

In Defense of the European Court of Human Rights

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Is the European Court of Human Rights wrong on the issue of prisoners' voting rights?

The power of courts to have the final say on matters of fundamental individual rights is a central feature of the constitutional order of many liberal democracies. The historical origins of how courts came to have this significant power vary from country to country. In some, as in the United States, the power of judicial review has been asserted by courts themselves as a necessary constitutional check on the political branches of government. In other countries, it was the political branch that decided to entrench this power in a written constitution, in the belief that a pre-commitment to judicial protection of rights is in the long run better for the people as a whole.

The end of the second world war has witnessed a parallel trend of states setting up supranational human rights courts, such as the European Court of Human Rights in Strasbourg or the Inter-American Court of Human Rights, under treaty-based agreements that are binding in international law. In Europe, all 47 state parties to the European Convention on Human Rights (ECHR) have explicitly and unreservedly undertaken to comply with the judgments of the Strasbourg court. Though initially the function of the Court was seen as a way to safeguard against totalitarian regimes, its role gradually developed to that of setting a pan-European floor of rights protection below which no state may fall.

The new role of the European Court was not the result of judicial activism by some unelected radicals: it was reaffirmed, time and again, in additional Protocols to the ECHR, signed and ratified by all state parties, the United Kingdom included. The judges who sit on the Court are elected by the Council of Europe's Parliamentary Assembly which is a democratic body made up of elected members of parliament from each state party. The Parliamentary Assembly elects out of a list of three candidates nominated by the government of each state party and has the right to reject the list based on a number of set criteria. Just like the supreme court of any advanced liberal democracy, the Court delivers judgments that are reasoned and coherent, based on a rich body of case law that it has developed over time. It interprets the text of the ECHR drawing on legal principles accepted by all state parties and striving to respect the legal, political and cultural particularities of each state. There is no objection to be made against the legitimacy of the Strasbourg Court that cannot equally be made against the UK Supreme Court.

Despite its clear legal basis, the power of courts to have the final say on matters of fundamental rights remains politically controversial in many countries. Critics are fond of pointing out that there is no bright line dividing issues of fundamental rights, which courts may legitimately uphold, and issues of public policy that should only be decided by the elected representatives of the people. The shutting down of a newspaper for criticizing the government for example is clearly a violation of human rights that courts ought to remedy; but are courts also to impose their own view of the right balance between say, press freedom and privacy, getting legislatures to rewrite libel laws? What should happen when the political branch believes, honestly and reasonably, that courts have overstepped the limits of their legal powers?

The recent controversy over prisoners' right to vote brings this question into sharp focus. In 2005, the Grand Chamber of the European Court of Human Rights

decided (in the case of *Hirst*) that the United Kingdom's general, indiscriminate and automatic ban on convicted prisoners' voting, as provided for in the Representation of the People Act 1983, amounts to a violation of the ECHR. Since then, and despite repeated resolutions of the Council of Europe's Committee of Ministers (the body that oversees the execution of the Court's judgments) calling for the amendment of UK electoral law, the United Kingdom has done nothing to comply. In November 2011, and while there were approximately 2,500 pending applications submitted by prisoners in the United Kingdom, the Strasbourg Court ordered the United Kingdom (in the case of *Greens and M.T.*) to amend its legislation within six months.

In February 2011, Members of Parliament backed a backbench cross-party motion supporting the blanket ban by a vote of 234 to 22. While it is still considering its response to the Court's six-month ultimatum, the government asked the European Court to refer the matter again to the Grand Chamber, in the hope that the UK Parliament's considered and vocal support of the blanket ban, will force the Strasbourg Court to cave in. Meanwhile, the country's populist and illiberal forces have seized the opportunity to engage in another round of bashing of European institutions, calling for the withdrawal from the jurisdiction of the European Court of Human Rights. The justice secretary, Kenneth Clarke, who is otherwise known for his pro-European stance, stated publicly that the relationship between the Strasbourg court and national authorities is in need of reform and that the government will work towards this direction.

Are the above reactions justified? Has the European Court gone too far? The simple answer is categorically and unequivocally 'no'. In finding the United Kingdom in breach of human rights, the Court followed a legal principle that it has developed systematically over decades and that is accepted by many constitutional courts in advanced liberal democracies: blanket restrictions on fundamental individual interests are by nature disproportionate. Such restrictions are bound to be over-inclusive, applying to people whose personal circumstances do not warrant the restriction. There is nothing politically controversial about this principle: every citizen in a liberal democracy, left and right of the political spectrum, has reason to accept it. No reasonable citizen for example would accept that being charged with a criminal offence should place his DNA on the police database forever, regardless of whether the charges were subsequently dropped or whether he was later acquitted.

Contrary to the misinformation spread around by the tabloid press, the Strasbourg court did not ask the United Kingdom to give each and every prisoner the right to vote. The Court did *not* rule that prisoners have a human right to vote; rather, it ruled that prisoners have a right not to be deprived of voting on an indiscriminate and automatic basis. All that the United Kingdom is required to do is to tailor the ban to the nature of the offence or the duration of the sentence and to give domestic courts the power to judge individual circumstances. There are many possible legislative schemes that meet this requirement while ensuring that people who have committed serious moral wrongs against society don't have a right to be represented in Parliament.

One might object, as many right-wing voters do, that disenfranchisement, just like deprivation of liberty, constitutes just punishment for everyone who has committed a criminal offence. But this objection fails to take into account the extensive use of criminal legislation by modern states, creating an unprecedented number of new imprisonment offences, as well as the legitimate fear that prosecution authorities use their powers in a discriminatory way, at the expense of people belonging to particular social, ethnic or racial groups. Many people who are

imprisoned needn't have committed a wrong worthy of disenfranchisement and many people who have committed criminal offences worthy of disenfranchisement needn't receive a prison sentence. Against this background, nobody has reason to accept the justifiability of the blanket ban. The Court's judgment is premised on a principle that no reasonable person would reject.

But let us assume, contrary to what is in fact the case, that the Court's judgment on prisoners' right to vote went too far. Would this entitle the UK to disregard it?

Despite its long commitment to parliamentary sovereignty as the foundational principle of its unwritten constitution, the United Kingdom has been at the forefront of creating supranational mechanisms for the protection of human rights in Europe. It accepted, together with other European states, that certain restrictions to state sovereignty - and indirectly to parliamentary sovereignty - is a legitimate price to pay in order to spread democracy, human rights and the rule of law across Europe. The result has been to create a supranational mechanism of human rights protection that has been a model of effectiveness. The jurisprudence of the Strasbourg Court, whatever its flaws, is a jewel of judicial wisdom and rights reasoning, having developed a largely coherent body of principles that serves as a European public order and that every democratic state in the world aspires to honor. The success of the Strasbourg Court and its contribution to peace and stability in Europe is far too important to be jeopardized for the sake of petty Euro-sceptic politics and short party-political gains.

The United Kingdom cannot withdraw from the jurisdiction of the European Court of Human Rights without denouncing the ECHR and withdrawing from the Council of Europe altogether. And it cannot do the latter without withdrawing from the European Union. To be sure, isolating itself from all the supranational institutions that have made possible the unprecedented period of peace and democracy in Europe the last 60 years, is within the sovereign rights of the UK. But just because one has a right to do something unwise and detrimental to one's interests, doesn't mean that one has reason to do it. The resulting political isolation, in a globalised and fragile world, would simply be foolishly detrimental to the interests of the British people.

Though its judgments are legally binding on state parties, the Strasbourg Court has no way of enforcing them. But the United Kingdom cannot pick and choose which judgments of the Court to comply with, without undermining the long and painful process of establishing a Europe of rights, democracy and the Rule of Law. It cannot do so without undermining its own ability to engage in legitimate criticism of other countries' human rights record. This is the case even when the Court gets it clearly wrong, let alone when, as in the case of the prisoners' right to vote, the Court gets it right. There are no two ways about it: the government must comply with the European Court's judgment because that is what legality, human rights and political wisdom dictate._

In 1998, the European human rights system was reformed to eliminate the European Commission of Human Rights, which previously decided the admissibility of complaints, oversaw friendly settlements, and referred some cases to the Court "in a manner similar to the current Inter-American System. Now, individual victims may submit their complaints directly to the European Court of Human Rights. The European Court, or "Strasbourg Court" as it is often called, serves a complementary role to that of the European Committee of Social Rights, which oversees European States' respect for social and economic rights. Jurisdiction. their human rights, as guaranteed by the European Convention on Human Rights (the "European Convention"),(2) have been violated. This ability to transcend national law, and to compel revision of such law to comport with rights guaranteed by the European Convention in a broad range of areas, most often within the exclusive purview of national and local courts, is of historic note. Generally, nation states have been the final arbiters of most issues affecting their citizenry and within their borders. Recent ECHR decisions address areas as far reaching as family law,(4) criminal defense,(5) children's rights,(6) employment, pensions,(7) freedom of expression,(8) and military policy.(9) Certain cases of special note are discussed below. Since 1959, the European Court of Human Rights (ECtHR) handles complaints regarding human rights violations. They then made sure that any violation of the demands specified in the European Convention of Human Rights (ECHR) could be brought before a court by creating a unique instrument: The European Court of Human Rights (ECtHR). The Court was established in 1959. It handles complaints regarding human rights violations, lodged by individuals or groups of individuals against a member state as well as complaints made by a member state against another member state. The Purpose of the Court. Human rights exist in part to protect those who are in a permanent minority or relatively powerless and who cannot therefore rely on the usual mechanisms that ensure responsiveness of politicians to the electorate. The case law of the Court lays repeated emphasis on pluralism, state accountability, and the substantive and procedural dimensions of democratic self-governance. Judgments on the rights to freedom of expression, freedom of assembly and association, and free elections may all be seen as enhancing the capacities of states to better protect and uphold democratic standards. Featured image credit: Courtroom European Court of Human Rights 05, by Adrian Grycuk. CC-BY-SA 3.0 Poland via Wikimedia Commons.