

Prisoners' right to vote: the blurred line between the European Convention on Human Rights and the European Union

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Key points:

- Prisoners are currently denied the right to vote in all elections in the UK, including general elections, European Parliament elections and local elections. If MPs vote to reject the Government's suggested compromise to comply with the European Court of Human Rights' (ECHR) ruling on granting voting rights to prisoners, the UK will need to find an alternative way forward.
- One possible option that has been suggested is the UK's withdrawal from the ECHR, which would allow the Government to ignore the Court's rulings. Despite the popular misconception, the UK could potentially withdraw from the ECHR and remain a member of the European Union. However, withdrawing from the ECHR would still leave a huge number of human rights locked in at the EU level.
- This is because first, the EU is set to join the ECHR in its own right and as a separate entity (although the UK has a veto over this) and secondly, the EU has its own catalogue of justiciable rights – the so-called Charter of Fundamental Rights, enshrined in the Lisbon Treaty. The Charter allows citizens to contest rights set down in EU law at the European Court of Justice (ECJ) and, in future, possibly also the ECHR (when the EU accedes to it).
- This complicated arrangement will further blur the lines between the case law of the ECHR, EU courts and national courts, as argued by the Lord Chief Justice. It will also make it increasingly difficult for the UK to negotiate a carve out from European human rights legislation.
- The EU's so-called "Stockholm Programme", a five year programme for EU justice and home affairs legislation, will also grant EU citizens additional rights and the ECJ will ultimately be responsible for enforcing them.
- If the UK Government wants to avoid future conflicts between national law and European human rights law – and new law suits – now is the time to seek cast-iron opt-outs:
 - Firstly, from the ECHR;
 - And secondly, along the lines of the original Conservative Party manifesto, from the EU's Charter of Fundamental Rights to avoid having to apply new EU laws amended to fulfil ECJ or ECHR rulings on rights.
- To illustrate why this matters: Withdrawal from the ECHR would allow the UK to ignore ECHR rulings on prisoners votes when it comes to general elections. However, as voting rights in European Parliament and local elections are covered by EU law as well as national law, their application in the UK could in future be challenged at the ECHR or the ECJ.
- The EU treaties state that the EU-wide right to vote in European Parliament elections are subject to "the same conditions as nationals of that state". But it remains unclear how the various overlapping rights would be interpreted by the ECJ or the ECHR against the UK's "blanket ban" on prisoners' voting rights.

Background

Prisoners are currently denied the right to vote in all elections in the UK, including general elections, European Parliament elections and local elections. The European Court of Human Rights has ruled that the UK's "blanket ban" on prisoners is in violation of Article 3 of Protocol 1 of the European Convention on Human Rights.

The Government has said it will do the "minimum that is necessary" to comply with the Strasbourg court's ruling¹. However, MPs are likely to vote against a Government-backed compromise allowing some prisoners the right to vote in general elections and European Parliament elections².

MPs are being granted a 'free vote' and Foreign Secretary William Hague has admitted that if the Government were defeated there would be "a clash between parliament in this country and a convention on human rights that we signed 60 years ago, and of course we'll then have to decide what to do about that."³

A former Government lawyer Carl Gardner has warned that a new ruling by the European Court of Human Rights⁴ may mean that the Government's proposals to limit the right to vote to those sentenced to less than four years may be ruled impermissible by the Court. In the case *Scoppola v Italy* the Court found that a prisoner's rights were violated because Italian law barred him from voting on the basis of his sentence. The Court said, "It is essential that the decision concerning the deprivation of voting rights be made by a judge and be duly motivated."⁵ This would appear to prevent governments from setting automatic arbitrary thresholds at which to deprive voting rights.

Options to overcome the constant intervention of the Strasbourg court that have been suggested are a renegotiation of the European Convention of Human Rights' application to the UK, withdrawing from the Convention altogether, or at least the jurisdiction of the European Court of Human Rights. The question is what this would mean for the UK's membership of the European Union.

Despite often being confused in public debate, the European Convention on Human Rights and the Strasbourg European Court of Human Rights are separate from the EU. However, there is an increasing overlap that could complicate any UK decision to withdraw from the European Convention on Human Rights and if the UK wants to fully regain control over human rights legislation a wider opt out from EU level human rights legislation will be required.

Can the UK leave the ECHR and remain a member of the EU?

The growing links between the European Convention on Human Rights and the EU would make such a decision complicated but not impossible. All 27 member states of

¹ William Hague speaking on the *BBC's* Andrew Marr show, 6 February 2011.

² See Cabinet Office Ministerial Statement, *Hansard*, 20 Dec 2010: Column 150WS; <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101220/wmstext/101220m0001.htm#1012204000026>

³ Speaking on the *BBC's* Andrew Marr show, 6 February 2011.

⁴ He refers to the ECtHR's ruling in *Scoppola v Italy*; <http://www.documentcloud.org/documents/26285-affaire-scoppola-c-italie-n-3.html>; see *Head of Legal*, 'Prisoners' votes: another dodgy ruling from the European Court', 18 January 2011; <http://www.headoflegal.com/2011/01/18/prisoners-votes-another-awkward-ruling-from-the-european-court/>

⁵ *Scoppola v Italy*, paragraph 43; <http://www.documentcloud.org/documents/26285-affaire-scoppola-c-italie-n-3.html>

the EU are signatories of the European Convention on Human Rights and being a signatory of the Convention has become a pre-condition for new countries seeking to join the EU.

However, there is no formal requirement in the EU treaties binding on existing member states such as the UK to remain signatories to the European Convention on Human Rights. On behalf of the previous Labour Government, Lord Falconer of Thoroton, the Lord Chancellor, gave the opinion that “the way that the relevant treaties are drafted does not express [continued adherence to the European Convention of Human Rights treaty] as a condition [of continued UK membership of the European Union].”⁶

Article 2 of the Treaty on European Union states that the Union is founded on “...the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities...”⁷

Other EU member states have the power to suspend the UK Government’s EU voting rights if they unanimously “determine the existence of a serious and persistent breach” of these values⁸. But UK withdrawal from the Convention would not be a breach of these values in itself⁹.

Elsewhere the EU treaties state that:

*“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”*¹⁰

But this is not the same thing as requiring member states to be signed up to the Convention and neither of these EU Treaty clauses seem to be incompatible with UK withdrawal from the Convention and remaining a member of the EU.

Withdrawal from the Convention should therefore be considered as a credible option as part of the solution to repatriating human rights powers to the UK.

However, should the UK choose to withdraw from the European Convention on Human Rights this will be complicated by the EU’s accession to the Convention in its own right, a process which started in July 2010 after the Lisbon Treaty came into force.¹¹ The practical example of voting rights for prisoners is an illustration of how

⁶ Cited in *Policy Exchange*, ‘Bringing rights back home: making human rights compatible with parliamentary democracy in the UK’, 2011, p13;
http://www.policyexchange.org.uk/images/publications/pdfs/PX_Keeping_Human_Rights_at_Home_WEB_07_02_11.pdf

⁷ Article 2 TEU

⁸ Article 7 TEU

⁹ For a discussion see *Policy Exchange*, ‘Bringing rights back home: making human rights compatible with parliamentary democracy in the UK’, 2011, p13;
http://www.policyexchange.org.uk/images/publications/pdfs/PX_Keeping_Human_Rights_at_Home_WEB_07_02_11.pdf

¹⁰ Article 6(3) TEU

¹¹ *Council of Europe* press release, ‘European Commission and Council of Europe kick off joint talks on EU’s accession to the Convention on Human Rights’, 7 July 2010;
<https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=PR545%282010%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>

human rights legislation at the EU level might in the future conflict with UK withdrawal from the Convention.

Withdrawing from the Convention would certainly enable the UK to ignore the European Court's ruling on prisoners' rights to vote for general elections as they fall outside EU law and are purely a matter for the UK. But it is far from clear whether it would enable the UK to do so for local or European Parliament elections, as voting rights for these elections are covered by EU law as well as national law.

What would happen if the EU joins the ECHR?

The Lisbon Treaty states that the EU "shall accede" to the European Convention on Human Rights¹². After the EU's accession, the EU institutions and EU law would be subject to the Convention and individuals could challenge EU laws on the same basis that domestic laws are currently challenged at the European Court of Human Rights in Strasbourg. The UK currently has a veto over EU accession to the Convention as this must be decided by unanimity¹³.

EU accession to the Convention would therefore mean that, if the UK were to withdraw from the Convention, it would still be bound by the Convention in cases falling under EU law and jurisdiction. The huge number of areas now falling under the powers of the EU makes this a significant caveat and prisoners' voting rights is an example of how these issues could cause conflict in the future.

The EU Treaties establish "Citizenship of the Union", which comes with certain rights. These include:

"The right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State,"¹⁴

Because the right to vote in European Parliament elections is also enshrined in EU law, rather than simply in national law, its application could in future be challenged at the European Court of Human Rights or the European Court of Justice.

Although the EU treaties state that the right to vote is subject to "the same conditions as nationals of that state", there would still be the potential for conflict between the UK's "blanket ban" on prisoners' rights to vote and the European Court of Human Rights' ruling.

This could happen if, for example, once the EU becomes a signatory to the Convention, someone took the same case to the European Court of Human Rights and the Court ruled that the above EU law was illegal because it enabled member states to enforce a "blanket ban" on prisoners' voting rights.

Such a situation could see the European Court of Human Rights' ruling on this issue re-emerge through the backdoor of the EU.

¹² Article 6(2) TEU

¹³ Article 218(8) TFEU

¹⁴ Article 20(2)b TFEU

The wider point here is that should the EU modify any of its laws in order to comply with a ruling from the European Court of Human Rights, the UK would be obliged to apply the new EU law in Britain as a consequence of its EU membership.

The EU's Charter of Fundamental Rights

The issue is further complicated by the fact that, under the Lisbon Treaty, the EU's Charter of Fundamental Rights becomes an integral part of EU law and the Lisbon Treaty states that the Charter carries the "same legal value as the Treaties."¹⁵

The Charter, established in 2000, overlaps substantially with the European Convention on Human Rights in a number of areas. The Charter is not meant to apply to purely domestic laws but applies when national governments are implementing EU law.

The Charter is clear, that where it overlaps with the Convention, the rights are the same as those laid down in the Convention on Human Rights. The Charter states that:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."¹⁶

Giving the Charter the same legal effect as the EU treaties is hugely significant as, in the words of the Law Society, it will allow rights set down in the Charter "to be recognised or interpreted in new ways".¹⁷

The UK does not currently have an 'opt out' from the Charter but secured a protocol to the Lisbon Treaty that, according to then Europe Minister Jim Murphy, "clarifies the effect that the Charter will have in the UK".

The Lisbon Treaty Protocol on the Charter states that:

"The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."¹⁸

However, as the Law Society said in 2008, "Exactly how this Protocol will work in practice remains to be seen."¹⁹

In 2008, the House of Lords' EU Select Committee said that,

¹⁵ Article 6 TEU

¹⁶ Article 52(3), Charter of Fundamental Rights; http://www.europarl.europa.eu/charter/pdf/text_en.pdf

¹⁷ Law Society, 'A guide to the Treaty of Lisbon', January 2008, p17;

http://www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf

¹⁸ Protocol No.30 'On the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom'

¹⁹ Law Society, 'A guide to the Treaty of Lisbon', January 2008, p10;

http://www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf

“Ultimately, the interpretation of the Protocol is a matter for the courts and, in both the national and EU contexts, we do not think it is possible at this stage to predict precisely what courts would decide if faced with the task of interpreting the Protocol’s language.”²⁰

On the subject of voting rights, Chapter V of the EU’s Charter of Fundamental Rights repeats the rights set down in the EU treaties granting EU citizens the right to vote in European Parliament and municipal elections. The Charter states that:

“Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.”²¹

“Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.”²²

As we have argued in the section above, the European Court of Human Rights could rule that these rights illegally enable the UK’s “blanket ban” on prisoners’ voting rights, raising a potential conflict between UK and EU level rights.

The unpredictability of the future application of the EU’s Charter for Fundamental Rights is of huge concern because the Charter lays down rights in several areas including²³:

- **Article 8: The right to protection of personal data** – Data protection rules have a big impact on police investigations – with some arguing that they make it harder for the police. Under the Charter the Court is able to define rules on data protection. It would also have big implications for the ongoing series of cases on passenger data sharing with the US. In May 2006, in Joined Cases C-317/04 and C-318/04²⁴, the Court annulled the decision authorising the conclusion of the agreement between the US and the EU on the transfer of personal data.
- **Articles 7 and 9: The “Right to family life” and the “Right to marry and found a family”** – These rights could tip the balance in various cases relating to immigration and family reunification. In Case C-540/03, Parliament v Council [2006] the Court rejected an attempt by the European Parliament to overturn limits on family reunification, because, as it argued, existing pieces of EU legislation “do not establish any absolute right regarding family reunification. Nor should the application be examined in light of the Charter given that the Charter does not constitute a source of Community law.”²⁵ Now the Charter is legally binding could clearly mean that future cases of this kind could go the other way.
- **Article 21: No discrimination on grounds of nationality** – While the idea of no “discrimination” sounds uncontroversial, in legal terms the inability to make any

²⁰ House of Lords EU Committee, ‘The Treaty of Lisbon: an impact assessment’, March 2008, p106; <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf>

²¹ Article 39, Charter of Fundamental Rights

²² Article 40, Charter of Fundamental Rights

²³ See *Open Europe*, ‘A guide to the Constitutional Treaty’, second edition, February 2008, p48-50; <http://www.openeurope.org.uk/research/guide.pdf>

²⁴ See Cases C-317/04 and C-318/04; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0317:EN:HTML>

²⁵ See Case C-540/03; <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79939372C19030540&doc=T&ouvert=T&seance=ARRET>

decisions which affect nationals of non-EU member states differently to those of EU member states can have significant implications for social security and border policy. In an amendment to the European Convention – which later became the Lisbon Treaty – the UK Government said that such an article “would have very wide-ranging consequences if applied to all nationalities, as opposed to only those of the Union.”²⁶ However, it remains in the Charter.

The case law of the European Court of Justice

As we noted above the EU treaties state that:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”²⁷

As a result, the European Court of Justice has increasingly referred to the Convention in its case law when interpreting EU legislation. This has had the effect of incorporating much of the Convention into EU law in practice.

In a 2010 lecture, the Lord Chief of Justice Lord Judge warned of the increasing overlap between the EU’s European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg. He said that, “The [EU’s] European Court of Justice is beginning to acquire jurisdiction over matters that would normally be regarded as matters not for Luxembourg but for Strasbourg.”²⁸

The EU’s so-called “Stockholm Programme”, a five year programme for EU justice and home affairs legislation²⁹, will also grant EU citizens additional rights in criminal proceedings. Lord Judge said of the programme:

“The EU has recently signed up to what is called a ‘roadmap’ of five areas of criminal procedure which must be addressed within the next 5 years to protect and guarantee the rights of EU citizens. I thought that was the job of the Convention.”

This is significant because under the Lisbon Treaty, the European Court of Justice gained full jurisdiction over all criminal justice laws and will have the ultimate say over these new EU level rights.

Lord Judge made the wider observation that little thought had been given to the consequences of the European Court of Justice’s new role in criminal matters and the blurring of its relationship with the European Convention on Human Rights:

“There are problems around these matters, and indeed there has been much discussion among our political parties about the Convention. So I shall not enter further into turbulent political waters. It is, however safe to anticipate that unless there are some dramatic changes, new and additional training

²⁶ Amendment proposed by then Europe Minister Peter Hain MP. See http://european-convention.eu.int/docs/treaty/pdf/6/6_Art%20I%204%20Hain%20EN.pdf

²⁷ Article 6(3) TEU

²⁸ The Judicial Studies Board Lecture, Inner Temple, 17 March 2010; <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-jsb-lecture-2010.pdf>

²⁹ See *European Commission*, ‘Action Plan Implementing the Stockholm Programme’, 20 April 2010; http://ec.europa.eu/commission_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf

requirements will be required before too long, and that the development of the European Union, and the extended jurisdiction of the European court in criminal matter, will have a significant impact domestically. Twenty years down the line, where will we be?"³⁰

Unilateral withdrawal from the ECHR would not be a full repatriation of human rights legislation

The growing role of the EU in human rights legislation has blurred the lines between national legislation, the European Convention on Human Rights and EU legislation. As a result, the UK cannot fully repatriate human rights legislation simply by withdrawing from the European Convention on Human Rights.

The EU's accession to the European Convention on Human Rights could allow the European Court of Human Rights' rulings to impact on the UK through the back door. If the EU decided to amend any of its laws in order to fulfil judgements from the Court of Human Rights, the UK would be obliged to implement the new laws in Britain. This would hugely dilute a unilateral UK withdrawal from the Convention.

Should the UK take the option of withdrawing from the Convention it should also seek to negotiate a genuine opt out from the EU's Charter of Fundamental Rights and guarantees that any rulings from the European Court of Human Rights on EU legislation are not applicable to the UK.

The European Court of Justice's growing body of case law is a more complicated problem. It will continue to blur the lines between the Convention on Human Rights, the Charter of Fundamental Rights and EU law and this will impact on the rulings of national courts. A UK opt out from the Charter should have the aim of avoiding having to apply new EU laws amended to fulfil European Court of Justice or European Court of Human Rights rulings on rights.

³⁰ The Judicial Studies Board Lecture, Inner Temple, 17 March 2010;
<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-jsb-lecture-2010.pdf>