In the name of parliamentary sovereignty: how the conflict between the UK government and the courts over prisoner voting rights was really about executive power

In UK political disputes over European Court of Human Rights judgments, such as the high-profile objections to rulings on prisoner voting, much political capital is made out of the claim that the European Court is impinging on UK parliamentary sovereignty. However, **Helen Hardman** *argues that the objections have instead been based on concern that court rulings would limit the decision-making powers of the government, rather than the independence and sovereignty of parliament. Archival and interview data demonstrate that the strategic purpose of the stand-off against the European Court was directed at weakening the European Convention system because it empowers UK domestic courts to effectively challenge government policy.*

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Archival evidence attests that there has been a concern in UK government circles since the 1970s that once the European Convention on Human Rights (ECHR) was incorporated into UK law it would empower the domestic courts at the expense of government. Yet neither Conservative nor Labour governments have wished to convey this message to the general public and have instead ambiguously referred to the threat the domestic application of the ECHR would pose to 'Parliament' or to 'parliamentary sovereignty'.

Once the ECHR was incorporated into UK law through the Human Rights Act (HRA) in 1998, the ambiguous notion of 'Parliament' in the UK Constitution underpinned the mechanism of 'judicial deference to Parliament', which evolved to provide UK courts the option to dismiss a case on the basis of a decision made by the executive, legislature or an act of Parliament. The ambiguity as to which subject the court is deferring has served as fertile ground for misunderstandings and false narratives.

This is particularly true in the long drawn-out prisoner voting debate, where the European Court of Human Rights first ruled in 2004 that the UK's blanket prohibition on prisoners being able to vote contravened their rights under the ECHR. Here UK political actors successfully invoked 'parliamentary sovereignty' to generate the narrative that the European Court of Human Rights was usurping the powers of 'Parliament' (as legislature) when in fact the European Court was challenging the dangerous precedent set by the UK Divisional Court's deference to the *executive* in the original case of *Pearson, Martinez and Hirst* of 2001. The UK legal community had already identified the Divisional Court judgment to be faulty and that deference to Parliament in this instance had been inappropriate, as evident in academic papers by Lardy (2001, 2002), Edwards (2002) and Foster (2001) published before the European Court issued their original judgment in *Hirst No. 2* in 2004. Some of these authors had identified that the UK court's deference to 'Parliament' had mostly comprised deference to the government decision taken in 2000 not to enfranchise prisoners when amending election laws in the Representation of the People's Act. The European Court's judgment in *Hirst No. 2* in 2004 and 2005 largely echoed their arguments, and questioned when the Parliament had in modern times had the opportunity to debate the issue. Thus apparently, the general message of the European Court's judgment was to convey the UK government's excessive dominance over Parliament in deciding rights-based issues.

So, to exonerate the government from the implicit criticism in the European Court's judgment that Parliament had not been sufficiently involved in decision-making on the issue, the UK government needed to demonstrate Parliament's wholehearted agreement with the blanket ban on voting for prisoners. This was achieved through a parliamentary backbench debate in February 2011, followed by a 'free vote' on the motion from which all members of the coalition government and Labour opposition frontbench were to abstain from voting. Thus ostensibly the debate and the vote on the motion were to be free from executive influence in an initiative that was Parliament-led, as the government emphasised to the Council of Europe's Committee of Ministers.

The backbench debate on 10 February 2011 comprised a shameful display of hostility towards both prisoners and the European Court of Human Rights which resulted in overwhelming support for the bipartisan motion, tabled by David Davis, Jack Straw and Dominic Raab (among others) to flout the European Court's judgments. Yet from interview data and desk research, there is clear evidence to demonstrate how the debate and its outcome were manufactured by the government. Evidently backbenchers were primed in advance to support the motion. The debate was scheduled by the government to coincide with the criminal trials of MPs over expenses fraud, in the wake of the 2009 expenses scandal. The story of prisoner voting rights and the expenses scandal became linked and the revelation of fresh claims against MPs in the media a few weeks before the 2011 debate may have made some MPs more vulnerable to pressure to vote in favour of the motion.

Parliament's intransigence on this issue was then conveyed to the Committee of Ministers at the Council of Europe, in successive communiqués between 2011 and 2017, as the reason why the UK government was unable to enfranchise prisoners. A parliamentary select committee tasked with examining the issue in 2013, which had been largely against prisoner voting at the outset of the inquiry, surprisingly concluded on the basis of expert evidence that those serving sentences of less than a year should be enfranchised. Yet the government did not act on this, nor did they communicate the positive nature of the outcome to the Committee of Ministers. Instead, subsequent communiqués cited continued parliamentary intransigence, evidenced by two bills tabled by the backbench MP Christopher Chope in 2014 and 2015 which proposed restating the blanket ban on prisoner voting. The communiqués failed to convey the negligible support in Parliament for these two bills and instead suggested that the government was doing its best to dissuade Parliament from supporting them. Additionally missing from these accounts was the broad support at the parliamentary consultations of 2006 and 2013 to enfranchise prisoners serving sentences for serious crimes. And yet the ultimate solution that the government proffered to the Committee of Ministers and which was accepted in December 2017, only gives the right to vote to those prisoners released on temporary licence (which numbers about 100 of a prison population of 92,500). Although improving prison conditions is likely to be a higher priority for prisoners than securing voting rights, this is disappointing and indicates the government's disregard for the ECHR mechanism.

If the backbench debate was manufactured by the government as the evidence in this research suggests, then this was a cynical abuse of Parliament's sovereignty in a way which political scientists might characterise the decision-making processes of authoritarian regimes. The strong and prominent anti-European content of the narrative and the general tendency among the public and even some in Parliament to conflate the institutions and courts of the Council of Europe with those of the European Union may have served to artificially promote a Eurosceptic agenda that does not reflect the will of Parliament. And to what extent this false narrative has informed the UK public's stance on Europe, as well as prisoners' rights and human rights more broadly, deserves much greater attention.

This article gives the views of the author, not the position of Democratic Audit.

It draws on the author's article 'In the name of parliamentary sovereignty: conflict between the UK Government and the courts over judicial deference in the case of prisoner voting rights', published in *British Politics*.

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