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Reassessing the European Convention on Human Rights in the Light of Brexit

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TOBIAS LOCK, JUL 10 2017

At first glance the fate of the European Convention on Human Rights (ECHR) has little to do with the UK's decision to leave the European Union (EU). After all, the ECHR is a treaty signed under the auspices of the Council of Europe, an organisation separate from the EU. All European countries except Belarus – forty-seven altogether – are signed up to it. They have thereby committed to respect the human rights standards it establishes and to accept the jurisdiction of the European Court of Human Rights (ECtHR). This means that the UK will continue to be bound by the ECHR after Brexit, which is also the basis of its own domestic human rights regime laid down by the Human Rights Act 1998; and the ECHR should be unaffected by it.

On closer inspection, however, things are not quite as straightforward. The ECHR system too is under attack. Some of the decisions handed down by the ECtHR have proven to be deeply unpopular with the governments of countries like Russia, Turkey, and the UK. Calls for a withdrawal from the ECHR have become a common feature of the political discussion in the UK; Russia has recently legislated to ensure the supremacy of its constitution over the ECHR designed to curb the influence of the ECtHR; and the Turkish president is considering reintroducing the death penalty, which would put the country at odds with one of the fundamentals of the Council of Europe system.

Animosities in the UK against the ECHR seem to be fuelled by the same Euroscepticism that has driven Brexit with stories of foreign judges thwarting the deportation of a radical hate preacher and holding the UK's troops accountable for human rights violations committed abroad. In addition, there is a tendency both on part of the media and on part of politicians to confuse the ECHR with the EU.

A withdrawal by the UK from the ECHR would have severe negative repercussions for the ECHR system as a whole. A withdrawal by a stable Western democracy taking pride in its observance of the rule of law and its active promotion of human rights worldwide would be unprecedented, the only previous case being Greece when ruled by a military junta in the 1960s. The discussion about the value (or its lack) of the ECHR is monitored with interest in Russia – e.g. by its constitutional court – and other countries on the fringes of the Council of Europe. A UK withdrawal from the ECHR would thus in all likelihood serve as a welcome excuse for other countries to follow suit. The Council of Europe's Commissioner for Human Rights warned expressly: 'Many are in fact eager to exploit any backsliding in Westminster's commitment to the Convention system to justify measures reducing their own citizens' and residents' ability to obtain justice through the Convention system.'

Brexit will make such a withdrawal easier for the UK. While in formal-legal terms under the ECHR withdrawal is simple – all that is required is six months' notice – EU membership presents an obstacle to it. After all, Article 2 TEU names respect for human rights and the rule of law as one of the founding principles of the EU, which every state applying to accede to the EU must respect. Compliance with these principles by accession states is monitored by the EU Commission, which places a great emphasis on ECHR conformity in its progress reports on each country. There is therefore a good argument to be made that present EU Member States must continue to adhere to these founding values which presupposes ECHR membership. Yet this consideration will no longer apply to the UK after Brexit, so that leaving the ECHR will have become easier.

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In addition, there is a danger that the ECHR could be used as a scapegoat if Brexit does not turn out to be hard enough to satisfy certain eurosceptics. Hence if Brexit does not quite deliver the promised freedom from the jurisdiction of the EU's Court of Justice or indeed if it has negative economic consequences, withdrawal from the ECHR might be a way for an embattled government to show resolve on 'Europe'.

But even if in the eyes of its advocates Brexit goes well, it is only a matter of time until the ECtHR hands down a judgment against the UK that will be controversial. The public will surely wonder why despite Brexit the UK is still bound to follow European judgments. With mounting pressure in this regard, withdrawal from the ECHR may be the easy way out for a government of any political colour.

Brexit therefore has not let the ECHR off the hook. While the Brexit process is ongoing, there is likely to be a break in the frequency and ferocity with which the ECHR system will find itself under attack from UK politicians. The Conservative party manifesto for the recent General Election stopped short of calling for withdrawal. But this was not a sign of greater acceptance for the ECHR in the UK, but merely evidence that with Brexit the government currently has much bigger fish to fry. This does not mean, however, that in the future there it will not regain its appetite for smaller fish like the ECHR.

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