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

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JONATHAN COOPER, JUL 19 2017

Anybody else got this niggling feeling? Large numbers of those who voted to leave the EU did so as a result of decisions of the Council of Europe's European Court of Human Rights as opposed to the intricacies of the European Union and how it works. We're all familiar with the headlines decrying decisions of the Strasbourg Court. One of them even made the former Prime Minister, David Cameron, want to barf. The Europe that 37% of those registered to vote wanted to leave in June 2016 is more often associated with the European Convention on Human Rights and its Court than the political and economic reality emerging from Brussels or Luxembourg.

It was cheap politics and cheaper journalism that allowed European human rights law to become politicised. Which of those Strasbourg decisions that so enraged politicians and commentators would they now not support? Making the UK free of the criminalisation of homosexuality and permitting gay men and women to serve their country? Creating a fair and independent data protection regime? Ensuring police use of lethal force, even in the context of terrorism, is subject to scrutiny? That everyone in family court proceedings is entitled to a fair hearing? The guarantee of free speech, protest rights and the protection of journalists' sources? Or should it be lawful to return people to torture and trials based upon torture evidence? And should a right to vote really make a difference? Where is the harm to democracy: a blanket ban on prisoners' voting or acknowledging that sometimes even the vilest amongst us can have their say through the ballot box?

The reality is, decisions of the European Court of Human Rights have enhanced Britain's democratic institutions and improved the quality of everyday life for those within the jurisdiction, and by making the ECHR part of domestic law through the Human Rights Act (HRA), human rights protection has been delivered where it matters by decision makers and local courts, and not only at the international level. Prior to the HRA, the Strasbourg Court was, to all intents and purposes, the human rights court of first instance for the UK. And whilst we still need access to Strasbourg scrutiny, this was unsatisfactory on so many levels.

There is also the genius of the scheme of the HRA, which gives effect to the ECHR in domestic law. The HRA was introduced by New Labour, but credit for the Act's subtlety and brilliance should go to Sir Edward Caldwell, the civil servant who drafted it. The way in which Parliamentary sovereignty is preserved, whilst also imposing the highest level of human rights scrutiny based on the ECHR, is a breathtakingly delicate piece of craftsmanship, necessary to complete the tapestry of human rights protection in the UK. The simplest example making this point, is that the UK has violated all of the Convention rights, thus highlighting how Parliamentary sovereignty in and of itself, backed up by the common law and an independent judiciary, was insufficient to provide comprehensive human rights protection. The UK courts, like the Strasbourg one, have sensitively given effect to Convention rights domestically and have determinedly refused to stray into areas of policy outside of their remit. They have simply enforced the law.

Why and how, then, has the ECHR, and by extension the HRA, become a whipping boy for Eurosceptics? The fact that the HRA gives effect to a Convention with "European" in its title seems too simplistic. Blair, Straw and Blunkett should, of course, have done more to draw attention to the Act's merits. But the real fault lies with the right-wing media, for whom it made irresponsible, albeit sensational copy, and a certain type of politician who went on to lead the charge for Brexit. Those Brexiteers who have put ideology above evidence (and good governance) have sought

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all sorts of means to undermine the UK's adherence to the ECHR. But attacks on the Court's composition and attempts to dilute its effectiveness have left the ECHR undiminished. This is because Europe needs it, the UK needs it, and so does the wider global human rights community.

Similarly, in its relatively short existence – it still hasn't been in force for twenty years – the HRA has consistently faced the long shadow of repeal. Those same Brexiteers who seek to undermine the ECHR have attempted to discredit the HRA. This, in and of itself, has had implications for the rule of law and the credibility of some of the most important decisions made under the HRA/ECHR. However, Brexit ironically might be drawing a line under these attacks. Once again, the Conservative Party went into the 2017 Election with a prospective threat to review the UK's relationship with the ECHR. However, with the failure of the electorate to embrace that manifesto, is it now not time to end the charade of ECHR bashing? There was no mention of reviewing the status quo as it relates to human rights in the recent Queen's Speech. Labour's commitment is now firm and clear. The Lib Dems and the Greens have always been supportive. Large swathes of Conservatives also recognise the value of the ECHR and the HRA's scheme. Human rights are not and should not be considered political. We must build on that consensus and move forward on effective human rights protection within the UK based on the HRA with Strasbourg oversight if or when required.

The pressing issue in the context of Brexit for human rights protection is the Government's pledge not to include the EU Charter of Fundamental Rights as part of the package of European legal protections that will remain part of UK law post-Brexit. This does raise fundamental concerns. The EU Charter is a significantly more comprehensive document than the ECHR. It is also a human rights treaty written for the 21st century. For example, it is this treaty that gives the essential right to be forgotten in the age of the internet and social media. The Charter must be preserved within UK law post-Brexit, and, ironically, if there is a reason to review the UK's relationship with the ECHR domestically, it would be to replace ECHR rights which are given effect to through the HRA with those of the EU Charter. And that would make for a fundamentally comprehensive human rights regime.

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