

Taking the law into our own hands: the perils of a British Bill of Rights

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*Although leaving the EU would not automatically mean that Britain left the Council of Europe or the European Court of Human Rights, EU regulations would cease to be binding on the UK. In a recent speech at the LSE, **Mary Honeyball** set out the risks involved – and the hazards of abandoning European human rights legislation in favour of a British Bill of Rights.*



I should stress from the outset that my own belief is that talk of a British Bill of Rights is deeply flawed, for two reasons. First, because having a stand-alone document in a fluid constitution such as ours means that our human rights regime can very easily be changed via the will of Parliament, in the classic Diceyan concept of sovereignty, with no reference to external courts via which to ensure consistency in the application of the law. Second, any British Bill would have as basis many of the same rights already enumerated, the only difference being it would be left to our courts entirely to interpret the legislation.

While I see the appeal of this from a purely nationalistic standpoint, the external human rights jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights have proved very useful in standardising a form of human rights for citizens across Europe, and in policing the boundaries between our executive, legislature and judiciary. With our voting system, removing the UK from international human rights organisations and the EU removes an absolutely vital check on Parliament, as a government with a majority could simply do away with human rights legislation altogether.



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Sovereignty in the 21st century is a misnomer. While purely legally sound as a concept, are we meant to believe that we can get rid of our human rights jurisprudence and legislation without being an international pariah? Or even being subject to sanctions and reduced trade from other countries?

However, focussing specifically on a Brexit, we need to first of all make a distinction between the legal regimes which exist in Europe, which has affected all of our post-war human rights court rulings.

We are discussing the situation of human rights post-Brexit, but a Brexit would not mean leaving the Council of Europe, and thus abandoning the Court of Human Rights. The notion of moving to a British Bill of Rights, instead of the Human Rights Act based on the European Convention on Human Rights, would most likely require us to leave the Council of Europe. Incidentally, this means we could not be a member of the European Union anyway, as accession to the Convention is a requirement of EU membership.

EU jurisprudence from the 1970s onwards has been the other great source of human rights in the UK, in recognising general norms of human rights and making them binding, recognising the authority of the Convention, and indeed protecting the respective constitutional traditions of the Member States, right up until the adoption of the EU Charter of Fundamental Rights.

However, although the Court of Human Rights has a wider jurisdiction, its own jurisprudence states that it cannot strike down domestic law which is incompatible with the Convention. This is the biggest point of departure with the European Court of Justice, which may overrule national law to the contrary, but which some have argued leads to a workable comprehensive human rights regime.

The real worry is the effect of EU law no longer applying in the UK, and our rights and protections disappearing overnight.

This is particularly the case in reference to regulations, which are directly applicable and directly effective in the Member States as soon as they are law. Therefore, on exit, these should logically cease to be binding on us as they do not form part of a separate, British law.

While directives are by definition incorporated into national law by a national implementing measure, the problem here is that the European legislation can serve as an aid to the national judge in interpretation of the law – and additionally, where there is ambiguity (or indeed disagreement) between courts in the national order.

The logical conclusion therefore is that either we rescind the entire EU legislative framework which is relevant to the UK, or we have to ‘nationalise’ existing EU law, a process which could take a very long time, and risks being held hostage to the views of whichever party is in government as to the final content.

This brings me back to the question of sovereignty. The ‘Leave’ campaign in the EU referendum talks about bringing back sovereignty, making sure decisions are made purely at home, and yet at the same time participating fully in trade with the Single Market. They conveniently forget that increasingly, trade deals contain human rights requirements in them, in fact are required to at EU level, so we would have to essentially live by rules we actually had no say in, even leaving aside the regulations on imports to the Single Market.

From this point of view, and the millions of people who benefit every day in exercising their freedoms to join a trade union, practise a religion or none, give their opinion in public, question and criticise government and opposition, not suffer discrimination, and not be arrested arbitrarily, the case to remain stronger, and freer, in Europe is clear.

This post represents the views of the author and not those of the BrexitVote blog, nor the LSE.

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