The new sovereigntism: what it means for human rights law in the UK

Brexit relates to a new sovereigntism that has alarming implications for the rule of law, argues ***Fiona de Londras (University of Birmingham)****. Although the European Convention on Human Rights is not an EU law – and therefore unaffected by leaving – there are striking parallels between pro-Brexit and anti-ECHR arguments. The prisoner voting saga is one area where Westminster has decided national sovereignty should trump European human rights law. The row over whether armed forces must always comply with the Convention is another.*

For many people, Brexit is about taking back 'control'; about determining for 'ourselves' what the law is, how it applies, how we spend our money, and how we develop our policies. The fact that many people both before the referendum and now struggle to identify with accuracy an area of law or policy in which the EU has 'taken' control (and not had competence ceded or shared through a Treaty change ratified by the UK) is irrelevant; what matters is the perception of a lack of national autonomy, and an associated corrosion of domestic democratic control.

Deep within at least parts of the arguments that circulate around Brexit is a form of new sovereigntism that is deeply worrying to the rule of law. The UK is hardly alone in this phenomenon; as far back as 2000 Peter Spiro wrote about the emergence of new sovereigntism in the United States; about a group of scholars and intellectuals who were not opposed to international law *per se*, but who thought that the US should be able to engage with it as and when it wanted to. In other words, these scholars promoted an a la carte approach to international law, underpinned by a "brand of anti-internationalism [that] runs deep in the American political tradition".

'The Emperor of the Gulls in his stolen gear': George III inspects Napoleon as he parades in a huge crown topped with a poisoned chalice. Attributed to C Williams, 1804. Image: Digital Bodleian via a CC-BY-NC-SA 3.0 licence

New sovereigntism will inevitably look a little different here in the United Kingdom, but its basic argument is the same: the UK is sovereign, and therefore can decide for itself what international law to follow and what to resist, as and when it best serves its purpose.

Current debates about the relationship with the European Court of Human Rights, and about the obligation to comply with the European Convention on Human Rights that it enforces, are exemplary of this. The ECHR is not an EU law, and Brexit will not mean anything for the UK's international legal obligations vis-à-vis the Convention, but the parallels in the basic strands of argument around both are striking.

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Ed Bates notes that when the UK signed up the ECHR it did so fully in the expectation that it would rarely if ever find itself in contravention thereof. In this, it was hardly alone; few states that signed up to this Convention anticipated either how it would develop over time, or that they would find themselves at the receiving end of critical judgments from the European Court of Human Rights. However, inevitably, over the decades of its operation the Convention has evolved; it has been developed into a significant international treaty, with substantial enforcement mechanisms, and with a Court that has the legal power to hand down binding judgments on states.

Since the enactment of the Human Rights Act 1998, the Convention's international legal character has been matched by its growing domestic legal importance. Courts in this country can now take into account the judgments of the ECtHR in interpreting UK law, and can even signify to Westminster that an Act of Parliament is incompatible with the Convention. The expectation then is that the law will be changed to secure compatibility, but of course the courts here cannot invalidate Acts of Parliament—to do so would be to jettison almost completely the parliamentary sovereignty on which much of UK constitutional law is built. Neither can the European Court of Human Rights really *force* the UK to comply with its judgments; it relies on political pressure from other states in the Council of Europe to secure such compliance, as well as on the sense within the respondent states themselves that such judgments should be implemented *even if they disagree with the outcome*.

That is at the heart of the rule of law: that law is law and must be complied with, and that one's position of power cannot exempt one from the application of the law. Applied in the broader context of the European Convention on Human Rights, this means that the Convention is law, that the judgments of the Strasbourg Court must be complied with, and that the fact that the UK has the power *not* to comply with them (by, for example, simply not changing its law to be compatible with the Convention) does not mean that it *may* resist those judgments. Increasingly, however, there are signs of a new sovereigntist resistance to those basic principles.

Take, for example, the prisoner voting saga. For over a decade now, judgments of the European Court of Human Rights requiring the UK to adjust its law so that there would be no *blanket ban* on prisoners voting (although some limitations would be permitted) have been resisted. The reason, simply put, is that Westminster has already decided that prisoners should not be allowed to vote, and that this decision has a kind of superior force to the decision of the Strasbourg Court. There are good *political* reasons why someone might agree with that. One might think that Westminster is democratic and the European Court of Human Rights is not, so that Westminster's decision should prevail, for example. But when translated into an argument about *law* that makes little sense: the United Kingdom is *legally obliged* to comply with international law, it is a party to the Convention, there is a judgment against it, that judgment is binding, and therefore the UK must comply whether it agrees with the outcome or not. That is what differentiates law from politics, after all; that is the essence of the rule of law.

I have previously characterised the refusal to execute these prisoner voting judgments (and similar refusals in other states) as a form of principled resistance; a political problem, that cannot be resolved using legal means. This should not be taken as under-estimating the scale of the problem that this points to. The political challenge here is severe for it is, at its core, a challenge to the basic idea that international law *is law* and the obligation to comply with it is real; that it cannot be disregarded on the basis of political disagreement. The new sovereigntist argument that suggests otherwise—that maintains that as long as the disagreement is underpinned by a political process at the national level such resistance is justifiable—is fundamentally an argument that rejects the nature of international law as law, and the rule of law as a principle that has application in the international sphere. Those are exactly the kinds of arguments that underpin 'take back control' tropes, which have potent popular and political impact.

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The next site of contestation between Westminster and the European Court of Human Rights is already being marked out. Increasingly there is a sense in the UK that the ECHR should not apply to British troops operating abroad: that it should not be possible to hold those forces to account for human rights abuses undertaken in overseas operations. The ECtHR has a clearly different view: if the military forces of an ECHR state are in effective control of a territory or a person they must comply with the Convention, even if they are acting overseas. For some, such as the Prime Minister, this leads to "activist left wing human rights lawyers harangue[ing] and harass[ing] the bravest of the brave". For others, it leads to accountability, not only for the actions of the armed forces but also for members of those armed forces who are entitled to the protection of the ECHR while acting abroad. The government's plan is to derogate from the Convention in all future armed conflicts, but ministers know as well as human rights lawyers do that derogations are only permitted in limited circumstances, and that any attempt at blanket future derogations in overseas operations may well fail and lead to judgments against the UK. One can already foresee how this would be presented as yet another example of the shifting of power properly held by Westminster (and Whitehall) to European institutions; how it would underpin the further argument that international law has exceeded its proper boundaries, that European courts are exceeding their proper roles, and that the UK can and should simply ignore such judgments or, ultimately, withdraw from the Convention and 'take back control'.

Brexit is a very different prospect to withdrawal from the European Convention on Human Rights, but the arguments that underpin and surround the relationship between the UK and both the EU and the ECHR are strikingly similar. They are arguments of control, of resistance to the authority of international law, and of the resistability of judicial determinations. These new sovereigntist arguments have a powerful political and popular pull, but a potentially dangerous reach into the rule of law.

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

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