Disinformation or an Undemocratic Monster: Why the European Court of Human Rights is under attack in the United Kingdom?

The Policy Exchange declared with fanfare this week that there is nothing that stops the United Kingdom pulling out of the European Convention on Human Rights in a report (‘Bringing Rights Home: Making human rights compatible with parliamentary democracy’ by Michael Pinto-Duschinsky, Forward by Lord Hoffmann PC, edited by Blair Gibbs). In fact, it was very simple: the UK only has to give six months notice.

This piece of information may be a huge surprise to think tank researchers. But perhaps the Policy Exchange should have given even bigger news to its audience – that the United Kingdom is free to pull out from any of its international law treaty obligations whenever it wants. Given that the Policy Exchange singles out the most successful legal instrument in international law to date for criticism, a legal instrument that has made concrete advancements for human rights protection in the UK and elsewhere over the past sixty years, where is the real problem?

The Policy Exchange Report tells us that the European Convention of Human Rights is troublesome because it has a court – the European Court of Human Rights - to interpret it. This court, says the Policy Exchange, is undemocratic and incompetent and the cost of this to British politics far outweighs its benefits internationally.

This charge of being undemocratic and many of the other charges the Policy Exchange levies against the European Court of Human Rights rest largely on disinformation. The author suggests that we should take democracy seriously. I fully agree. Taking democracy seriously, however, comes with the obligation to seek accurate and balanced information on which to base our opinions.

There are three predominant areas of disinformation in this policy paper: the role of Parliament in creating international legal obligations, the status of the European Court of Human Rights and the consequences of its judgments, and the interpretive principles of the European Convention on Human Rights.
International treaties that bind the UK reflect the settled opinion of the British Parliament

The Policy Exchange misguides readers of its report in claiming that judges, domestic or international, bypass the will of Parliament if they honour the international obligations to which the state has signed up. This is wrong. The reality is that Parliament first has to ratify an international treaty for that treaty to bind the UK internationally. Parliament then also has to incorporate that treaty into domestic law for it to have legal consequences domestically. As the late Lord Bingham correctly explained, only a ratified treaty creates international legal obligations for the United Kingdom. Naturally, all organs of the state should strive to honour international treaty obligations, which receive the rubber stamp of Parliament. Put simply, if the UK’s government and courts do not respect a treaty ratified by Parliament they are violating international law and disrespecting the sovereign right of the UK Parliament as the only body with the power to ratify international treaties.

The incorporation of a treaty into domestic law makes an international treaty directly applicable in UK courts through the consent of Parliament. This is exactly what the Human Rights Act did for the European Convention on Human Rights. It, therefore, avoided the odd position of judges respecting domestic law, but violating international law that has been ratified by the Parliament. The pre-Human Rights Act struggle of homosexuals to be openly employed by the British Army is a clear example of this. The individuals had to go to the European Court of Human Rights in Strasbourg; the Strasbourg Court had to indicate that the UK was in breach of its obligations under international law. After this process Parliament did reconsider its opinion on discrimination against homosexuals (Smith and Grady v. United Kingdom) and changed the law.

It is, therefore, misleading to suggest that Parliament and democratic scrutiny do not play a role in how international legal obligations are created and how they are translated into domestic law. The Policy Exchange is clearly advocating that Parliament changes its own settled opinion on the European Court of Human Rights. To do this, there is no need to attack the European Court of Human Rights. It is Parliament and the democratic process through which Parliament decided to afford
the protection of international human rights law to British citizens and those under the effective jurisdiction of Britain that should be in the paper’s sights.

**The European Court of Human Rights is not a Supreme Court**

The Policy Exchange calls the European Court of Human Rights a ‘supreme court’. This is incorrect. The European Court of Human Rights is not a supreme court. It has no power to quash the judgments of domestic courts. It also has no power to invalidate legislation. As once described by an Irish politician, the European Court of Human Rights is a ‘floating supranational court’. Its central value is to signal to parliaments, governments and domestic judges what the human rights angle is on a concrete issue and whether a policy, legislation or judgment is in violation of human rights protections. For the majority of commentators (but not, seemingly, the Policy Exchange) it is merely a logical extension that an international treaty has an international interpretive body to tell us what that treaty means. Because the Convention is owned by 47 states, not one state alone, it makes sense that there is an international court to interpret the Convention and that that court is made up of judges from those 47 states.

The European Court of Human Rights has no powers to order anyone what to do. Its judgments indicate what went wrong in a particular case. They are, therefore, declaratory judgments. It is then up to the state to debate and discuss what to do and communicate this to the inter-governmental peer review mechanism, the Committee of Ministers, which essentially is a political body. The roles of parliaments, governments and domestic judiciaries are central in deciding how to respect a Strasbourg judgment. They not only have the primary responsibility, they also have discretion. The British Parliament, and also the government and judiciary for that matter, debate the legal and political consequences of a judgment and decide on a course of implementation based on these debates. It is misleading to portray the European Court of Human Rights as a body that removes power from Parliament.
The European Court of Human Rights case law is based on principles of effectiveness and subsidiarity both of which protect meaningful democratic participation for citizens

Finally, the paper attacks the interpretive principles of the European Court of Human Rights. It argues that the Strasbourg court stretches human rights beyond its core and micromanages policy that should be left to democratic processes. I cannot do justice to the case law of the European Court of Human Rights here. It comprises more than 10,000 judgments, through which the Court has developed sophisticated views about what falls under the scope of human rights law and what does not.

The key debate in Strasbourg has never been about core rights versus periphery rights. Rather, the Court rightly asks whether (democratic) political power is used in arbitrary, discriminatory ways that are hostile to minority opinions or disrespectful of the basic tenets of human dignity. The Strasbourg Court as a matter of principle aims to strike a balance between the effectiveness of human rights (so that they are not paper tigers) and the subsidiarity of Strasbourg to domestic political and legal decision-making processes. Both of these principles have the meaningful participation of citizens and denizens in the domestic political process at heart. The Court does not always get it right in each case, but it got it right in terms of principle.

The paper further disinforms the reader through its use of cases to present what it argues is at stake. Its discussion, for example, of the case of A. v. UK implies that the Strasbourg Court is telling British parents when and when not to smack their children.

The true details of this case show that the violation judgment concerns the ‘defence of reasonable chastisement’ as blocking the consideration of the amount of physical abuse received by a nine-year-old child in the domestic legal proceedings. The stepfather had repeatedly beaten a nine-year-old child with a garden cane, but was able to argue that the courts should not inquire into the severity of the beatings in a parent-son relationship. Contrary to what the Policy Exchange says, the Strasbourg Court did not comment on how British parents should treat their children. It merely stated that the rights of a nine-year-old child were not adequately protected in this single, concrete case given the severity of abuse the child received. It flagged the
danger of the potential abuse of the ‘defence of reasonable chastisement’ in any future similar cases. As Lord Hoffman says in his foreword, ‘the devil is in the detail’ with the Strasbourg Court cases.

It is perfectly healthy to criticise the judgments of the European Court of Human Rights. Indeed, it is perfectly healthy to criticise any court. There is a good deal of it - especially in the United Kingdom. It is, however, a separate thing to attack the European Court of Human Rights and the European Convention on Human Rights based on ill-conceived facts about the lack of its democratic legitimacy.

I have been studying the perceptions of the legitimacy of the European Court of Human Rights amongst politicians, judges and lawyers for the past three years. All those whom I have interviewed have shared with me their criticisms. None of them, however, thought that the European Court of Human Rights and its interpretations were imposed on the British state. They had their facts right. The European Court of Human Rights has the democratic endorsement of Parliament, the support of its citizens who bring cases before it, and the ear of its judges and politicians – the very people who strive every day to get the balance between human rights and the public interest right. To paint a picture of an undemocratic monster out of what is a delicate and balanced experiment of human rights supranationalism and democracy in Europe is an exercise in bad faith. This is not the basis for an informed debate about the reform of the European Court of Human Rights and what it means for Britain.

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