Did Brexit Save the HRA 1998?

Dr Brian Christopher Jones, Liverpool Hope University, UK
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Perhaps it is time to begin looking for silver linings, as opposed to fantastic judicial interventions. On this blog in March I wrote that a remain vote in the referendum could spell doom for the Human Rights Act 1998 (HRA), as a fractured post-referendum Conservative party may attempt to mend itself by scrapping the HRA for a British Bill of Rights. After all, the introduction of such a proposal has been in successive Tory manifestos, and has been prominently voiced by leading Conservative MPs. An April 2016 speech by Teresa May—then Home Secretary—suggested that regardless of the referendum result, the UK should exit the European Convention on Human Rights (ECHR). Given that the ECHR is the backbone of the HRA 1998, exiting the ECHR would inherently threaten the legitimacy of the HRA, making imminent repeal a certainty. Yet on 23 June 2016 a shocking leave vote prevailed, and now Brits anxiously wait to see when Article 50 will be triggered. Even though the dust has not come close to settling—and in fact, many things are just beginning—it is not too early to ask whether or not Brexit saved the UK’s de facto bill of rights.

Assertions to scrap the HRA may have made political sense in pre-referendum Britain. But in a post-referendum Britain it is becoming increasingly clear that a thrust for repealing the HRA or exiting the ECHR appears virtually non-existent.

One reason for this change is that, practically—and especially once Article 50 is triggered—most governmental efforts in the coming months and years will be occupied by the implications of Brexit. There simply will be no time for the difficult task of developing and passing another constitutional rights statute. Trade deals, new and revised legislation and other matters related to Brexit will take priority. Indeed, passing such a monumental bill would involve significant political capital, and right now—unless the government is willing to use the Parliament Acts 1911 and 1949, which seems an unlikely prospect—the government does not possess enough political capital to move on any type of HRA replacement. Additionally, the political capital that the new government does have is being spent elsewhere, such as on grammar schools and nuclear facilities, and not (at least at this point) on another major constitutional reform.

Another reason the HRA is protected for the immediate future is that Britons, including many MPs and Peers, are so stunned by the Brexit vote that other significant attempts at another lasting constitutional change would be unwelcome. Just two months after her April speech advocating to depart the ECHR, as part of her bid for Conservative leader, Teresa May dropped plans to scrap the HRA. Further, recent comments from new Justice Secretary Elizabeth Truss may be indicative of the government’s lack of initiative as regards any HRA replacement. Professor Mark Elliott has pointed out that Truss’s recent evidence to the House of Commons Justice Committee points to a lack of government movement on the issue. Elliott fittingly acknowledges that “still looking at the parameters” regarding a British Bill of Rights—as Truss stated—implies that “there are currently no parameters”, and that there is “a great deal of work to do before any proposals see the light of day”. Interestingly, Truss also declared that a British Bill of Rights may “better” protect
human rights, a line of argument that Conservatives rarely use in regard to replacing the HRA.

Thus, although Brexit remains a shock to the polity and raises multifaceted questions in terms of how it will impact the UK constitution and economy, the practical and political implications of the referendum vote may have—at least for the time being—saved the HRA 1998. But even though the human rights in HRA may be tentatively remain protected in post-Brexit Britain, significant questions remain regarding what will happen to a plethora of workers’ rights provided by EU law (e.g., paid holiday, maternity leave, and fair treatment at work). Preservation of these rights will require a sustained effort, perhaps through strengthening provisions of the Equality Act 2010 or by introducing legislation to incorporate EU labour rights into domestic law.

Brexit seems to have left many people hopeless as regards rights protection in the UK. It is time to start picking up the pieces.Acknowledging the protection of the HRA 1998 is one step in the right direction.