

Policy Briefing:
**The possible implications of repealing the Human
Rights Act 1998**

January 2016



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Introduction

In October 2014, the Conservative Party published a strategy paper titled ‘Protecting Human Rights in the UK’. In this document, Chris Grayling in his role as Secretary of State for Justice laid out Conservative proposals for reforming the UK’s human rights laws and specifically the repeal of the Human Rights Act 1998 (HRA) – which was introduced by a Labour government to formally align the European Convention on Human rights (ECHR) with UK law.¹ The proposal to scrap the HRA was reaffirmed in the Conservative Party Manifesto 2015, prior to the election victory in May of the same year that provided the Conservative Party with a clear majority in the House of Commons and a mandate to pursue this interest. David Cameron reiterated this intention once more in a Chatham House speech in November 2015, while outlining his EU reform agenda. This report will elucidate the possible implications of such a course of action, revealing the legal and administrative dilemmas that repealing the HRA may cause. Particular attention will be paid to potential impacts on Northern Ireland and cross-border interaction – both directly and indirectly – within the context of the conditions of the 1998 Belfast/Good Friday Agreement.

Context

The Human Rights Act 1998 was introduced to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights. As well as making it unlawful for any political or public body to act in a way that is not in agreement with the Convention, the HRA also had implications for the way in which legal procedure was carried out. With regards to the Convention itself, nothing was altered and the incorporation of the ECHR into UK law was a formality. Prior to the Act, UK citizens were able to petition the European Court of Human Rights (ECtHR) – which upholds the Convention – when they felt that a ruling in the UK courts was in breach of the ECHR. The HRA allowed for the same practice, but for Convention rights and standards to be upheld by UK courts. This removed the requirement to go to Strasbourg for an individual to lodge an appeal, enabling UK courts to make the same judgements as per the ECHR. The UK was a founding signatory of the European Convention on Human Rights in 1951, although the Convention had never formally been incorporated into UK law before the HRA. The ECHR provides a minimum standard of human rights for the citizens of its signatory states to uphold to act as a safeguard against atrocities and human rights abuses. The Convention has 47 signatory states (all of which are also members of the Council of Europe) and is upheld by the European Court of Human Rights and the Council of Europe.

The dissatisfaction of the Conservative Party with the HRA stems primarily from two areas of human rights law: the binding nature of the Convention and the rulings of its courts, and secondly, Section 2 of the HRA which stipulates that UK courts must “take into account” the rulings of the ECtHR.² The former of these stems from the interpretation of Article 8 of the ECHR – the “right to respect for

¹ Grayling, C. (2014), ‘Protecting Human Rights in the UK’, p.6

² *Human Rights Act 1998*, Section 2.1.(a)

private and family life.”³ The UK Government has often been dissatisfied with the inability to deport foreign criminals after they have served their sentence due to the protection they are granted under this article of the Convention. By replacing the HRA, the Conservatives would seek to narrow the interpretation of this article, and prevent a defence based upon it and other ‘spurious’ human rights grounds.⁴ In their 2015 manifesto, the Conservatives pledged to “curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain.”⁵

The second disgruntlement of the Conservative party concerns Section 2 of the Human Rights Act. In the 2014 Grayling strategy paper, the Conservative Party pledged to “break the formal link between British courts and the European Court of Human Rights” and in so doing enable the UK Supreme Court to have the final interpretation of conventional rights.⁶ Ultimately, the Conservatives wish to be able to treat ECtHR rulings as advisory rather than binding, which Section 2 of the HRA (and the very nature of the Convention) prevents. A new ‘British Bill of Rights and Responsibilities’ in place of the HRA would require the Government to “seek recognition” from the Council of Europe that these proposals do not contravene the ECHR.⁷ In the case that this ‘recognition’ is not provided by the Council, the 2014 strategy paper warns of a complete withdrawal from the ECHR by the UK. This warning is problematic in a multitude of ways, posing dilemmas both domestically and internationally.

Regional and domestic implications

The repercussions of ECHR denunciation will be felt not least in Northern Ireland, where human rights safeguards are a prominent feature of the Belfast/Good Friday Agreement 1998. The HRA and the ECHR are sewn into the fabric of Northern Ireland Law and the devolved constitution (particularly that of the Assembly), laid out in the Northern Ireland Act 1998. The ECHR is prominent in the Belfast/Good Friday Agreement to the extent that it is declared that no public bodies in Northern Ireland (such as the Assembly) can infringe upon it.⁸ One of the fundamental aspects of the constitutional agreement is its emphasis on “equality requirements”, which is frequently expanded upon to clearly cite the ECHR.⁹ The declaration of human rights (and the ECHR specifically), as a safeguard for the protection of ‘the community’, demonstrates the extent to which the ECHR is fundamental to the agreement itself.¹⁰ Were the British government to repeal the HRA, then its replacement - the British Bill of Rights and Responsibilities - would need to be aligned with the ECHR to avoid a clear breach of the Belfast/Good Friday Agreement. From a strictly legal perspective, it is a breach of the ECHR, rather than the HRA, that would transgress the Belfast/Good Friday Agreement. However, repealing the HRA would require amendments to the devolution agreements in the UK due to its explicit inclusion in those agreements. Indeed, the UK government has failed to rule a complete withdrawal from the ECHR if they cannot achieve the reforms they want within the current framework. Prime Minister David Cameron has stated that he will rule out “absolutely nothing” if he

³ *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*, Article 8

⁴ Conservative Party (2015), *The Conservative Party Manifesto 2015*, p.73

⁵ *Ibid*, p.58

⁶ Grayling, C. (2014), ‘Protecting Human Rights in the UK’, p.6

⁷ *Ibid*, p.8

⁸ *The Agreement 1998*, Section 3.5(b)

⁹ *ibid*, Section 3.11

¹⁰ “The community” refers to the community of Northern Ireland as a whole. This terminology is extracted from the Agreement.

is unable to attain his preferred changes to the Convention at the European Court of Human Rights.¹¹

Repealing the ECHR would arguably directly contravene the Belfast/Good Friday Agreement. If this were deemed to be the case, the UK would leave Northern Ireland in a very precarious and unstable position by undermining a formal treaty with the Irish Government. In the Agreement, the governments of Ireland and the UK agreed that:

“The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention...”¹²

Furthermore, the Agreement included several safeguards including:

“the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe...”¹³

The passing of the Human Rights Act was the manifestation of this pledge, and as such the rights laid out in the ECHR would have to be upheld by any replacement bill. Considering the accomplishment that the Belfast/Good Friday Agreement was, a breach of this treaty may be a huge risk to take, especially considering recent difficulties experienced at Stormont which have demonstrated the potential for political instability in Northern Ireland. More nuanced consequences could also be encountered further afield, affecting the entire island of Ireland. As Rosemary Byrne states, the incorporation of the ECHR in the wake of the Agreement demonstrated a “commitment to acknowledge the importance of international rather than domestic standards for the protection of rights.”¹⁴ The equivalent legislation in Ireland – the ECHR Act – was incorporated into Irish law in 2003. Withdrawal from the ECHR would require amendment of the Agreement itself, presenting further opportunities for alterations, negotiations, or disagreements.

However, given the fact that a unilateral repeal of the Human Rights Act and/or withdrawal from the ECHR would affect the devolved legislatures of Northern Ireland, Scotland, and Wales, the UK government may well need approval from their respective devolved institutions in order to pass legislation on it. As is the case in Northern Ireland, devolution agreements with Scotland and Wales also include provisions concerning the European Convention on Human Rights. The Sewel Convention (otherwise known as the Legislative Consent Motion) is typically passed by a devolved legislature in order to allow Westminster to legislate on a devolved issue. However, the legal implications of this convention with regard to the HRA are not definitive and legal opinions differ. The Human Rights Act is a reserved matter itself, but human rights as such are not; both the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission have the power to promote and protect human rights. This is particularly significant as the Scottish Human Rights Commission was established by an Act of Scottish Parliament, demonstrating their ability to legislate

¹¹ Andrew Mitchell MP asked for clarification on the Conservatives position on ECHR membership (HC Deb 3 June 2015, c.583)

¹² *The Agreement 1998*, Section 6.2

¹³ *ibid*, Section 3.5(b)

¹⁴ Byrne, R. (2001), ‘Changing Modalities: Implementing Human Rights Obligations in Ireland after the Good Friday Agreement’ in *Nordic Journal of International Law*, no.70, p.21

in this area. In a November 2015 evidence session at the House of Lords EU Justice Sub-Committee, Marco Biagi MSP declared that it was the interpretation of the SNP that no devolution issues had been raised with the 2006 primary legislation that created the Scottish Human Rights Commission and as such human rights was not to be regarded as a reserved issue.¹⁵ In addition, the Northern Ireland Human Rights Commission was created as part of the Belfast/Good Friday Agreement with a mandate to attempt to construct a Northern Ireland Bill of Rights, subject to cross-community support.

Whilst it is uncertain whether the repeal of the HRA would need devolved approval as per the Sewel Convention, there is a stronger case to be made for required consent of the replacement bill. The case could be made that a new unilateral human rights bill would indeed impact upon devolved matters such as 'Law and Order' in Scotland and 'Justice and Policing' in Northern Ireland, among potentially many others. Yet, the Sewel Convention is, legally speaking, just that: a convention. Should Westminster wish to neglect this convention, it could arguably bypass the ratification of devolved legislatures and force a bill through. While the legal implications of this course of action are dubious at best, the political consequences felt in Scotland particularly, as well as Northern Ireland and Wales, would be extensive.

Moreover, the Scottish Parliament – and the Scottish National Party in particular – has expressed its complete opposition to the repeal of the HRA. Marco Biagi MSP has claimed that if the motion to repeal the HRA came to Scottish Parliament, then the SNP would invite the parliament to vote to reject this. Following the Scottish referendum in 2014, the UK Government launched the Smith Commission, to make recommendations of the further devolution that the 'Better Together' campaign promised. One recommendation is the formalisation of the Sewel Convention, bringing it into statute and thereby making the Sewel Convention a legal requirement. However, given that the Sewel Convention states that the UK Parliament will not "normally" legislate on devolved matters without the consent of Scottish Parliament, the Devolution (Further Powers) Committee has warned that this would only bring the convention into statute as a convention, with no substantive implications in practice.¹⁶ Indeed, the Sewel Convention also applies to Northern Ireland (as demonstrated with the Welfare Reform Bill in November 2015) and Wales, but at this stage it is not clear whether a legal formalisation would apply only to Scotland.

Given the political fallout that would occur should the UK Government force through human rights reform, a separate human rights bill could well be prepared for Scotland and Northern Ireland. A proposed 'Bill of Rights for Northern Ireland' is one area of the implementation of the Belfast/Good Friday Agreement that has yet to be concluded. The Northern Ireland Human Rights Commission was established as part of the Agreement, although little progress has been made in this area to date. As of the time of writing, the Commission's proposals have not come close to reaching a consensus between the parties of the Northern Ireland Assembly and, given recent political developments, an agreement on that front seems some way off. Further complications arise when one considers that Acts of Parliament such as the Northern Ireland Act and the Scotland Act presuppose membership of the European Convention of Human Rights.¹⁷ A complete withdrawal from the ECHR would therefore

¹⁵ EU Justice Sub-Committee (2015), *Potential Impact on EU Law of Repealing the Human Rights Act*, 17 November 2015

¹⁶ *The Sewel Convention*, 2005

¹⁷ *Scotland Act 1998*, Section 57.2 and *Northern Ireland Act 1998*, Section 24.1(a)

create many legal obstacles with regard to devolution and each of these agreements (as well as the Belfast/Good Friday Agreement) would need to be amended. Even if the government were to make a proposal in which the HRA would continue to apply in Northern Ireland and Scotland but not in England and Wales, recently appointed shadow Lord Chancellor, Lord Falconer, has warned that this would act as a “further wedge” between the nations.¹⁸ Moreover, an arrangement in which the Governments of Ireland and the UK have different conceptions of fundamental human rights would certainly not be conducive to cross-border co-operation on the island of Ireland. Common ground as a platform for cooperation could potentially be lost in institutions such as the North/South Ministerial Council and the North/South Language Body. In this sense, human rights as a policy area has a multitude of implications on other policy areas which could otherwise promote beneficial cross-border co-operation such as employment and mobility, education, and justice, to name but a few.

International Implications

The Council of Europe/ECHR

As previously stated, a withdrawal from the ECHR would break international law due to treaty obligations. This is not the only international implication however, as human rights reform could also have an effect on the UK’s status and standing in other European institutions. As far as withdrawal from the ECHR is concerned, this is largely uncharted waters. The only previous example of a signatory leaving the convention was when the military junta of Greece denounced the ECHR and the Council of Europe in 1967. Indeed, there is an existing procedure for the denunciation of the ECHR in the Convention itself, provided that the party has been a signatory for at least five years and it allows for six months’ notice before withdrawal.¹⁹ However, the Convention is less definitive about the relationship between itself and the Council of Europe. The ECHR was drafted by a then newly-formed Council of Europe in 1951, with British representatives being among the founders of both. To date, every member of the Council of Europe has also acceded to the ECHR.

Should the UK government denounce the ECHR, it will place itself in a precarious position. The UK’s place in the Council of Europe may be in jeopardy, although there is no definite legal direction. The Convention states that one of the methods by which the Council of Europe’s aims will be achieved is by the pursuit and maintenance of “Human Rights and Fundamental Freedoms.”²⁰ The Convention itself therefore makes several references not only to the Council itself, but also the Council’s aims that would be realised in the ECHR. It would appear that accession to the ECHR requires membership of the Council of Europe. The reverse relationship is not so clear, however, as the ECHR was conceived subsequently to the Council. However, Article 3 of the Statute of the Council of Europe does state that:

“Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms...”²¹

¹⁸ Lord Falconer responds to the Queen’s Speech (HL Deb 1 July 2015, cc.167-171)

¹⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*, Article 58

²⁰ *Ibid*, Preface, p.5

²¹ *Statute of the Council of Europe 1949*, Chapter II, Article 3

Whilst this does not cite the Convention by name, it should also be pointed out that the Convention is formally referred to as the “European Convention for the Protection of Human Rights and Fundamental Freedoms”, suggesting that the Convention is the manifestation of these principles. As the Council of Europe is the governing body of the ECHR, it may be ruled that any breach of the ECHR (such as denunciation) would be a breach of Article 3 of the Statute of the Council of Europe, especially if human rights are deemed to have been curtailed rather than expanded in the replacement British Bill of Rights.

The European Union

If the UK was neither a member of the Council of Europe nor an advocate of the ECHR, it would doubtlessly risk further alienation within the EU. Despite these bodies being entirely separate from the EU institutions, they nevertheless share common values. Article 6.3 of the Lisbon Treaty states that:

“Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] shall constitute general principles of the Union’s law.”²²

Thus, even if the bodies are separate from one another, the EU has incorporated the ECHR into its guiding principles of legislation. The ECHR has become the partial legal realisation of some of the principles of the EU, as laid out in Article 2 of the Treaty: “human dignity, freedom, democracy, equality, the rule of law and respect for human rights.”²³ A UK departure from these principles could therefore call its status as a member state into question. The Lisbon Treaty granted the EU legal status as a political entity, paving the way for EU accession to the ECHR. This could pose an additional problem for the UK if it were to denounce the ECHR. Having had an initial proposal rejected by the Court of Justice of the European Union, the EU is currently in the process of reformulating a proposal to accede to the ECHR. Should this accession go ahead as the Lisbon Treaty stipulates, the UK could find itself in a position where it is also a party to the Convention by proxy through EU law.

As raised by Dr Tobias Lock in a November 2015 evidence session at the House of Lords EU Justice Sub-Committee, a complete withdrawal from the ECHR could alienate the UK from the rest of Europe on a more practical level. A decrease in human rights standards may impede upon the concept of mutual recognition with regard to the European Arrest Warrant in EU law. Some cases may even arise in which fellow EU member states could refuse to cooperate with the UK on the grounds of asymmetric human rights standards. “That would certainly be detrimental to the UK’s membership of the EU”, Dr Lock concluded, “it could even make in untenable.”²⁴

Possible courses of action

Since gaining a majority in the House of Commons in May 2015 with a mandate to repeal the HRA, there (at the time of writing) has been no draft publication of a British Bill of Rights. However, the rhetoric of HRA repeal has regularly reappeared, most recently during Prime Minister David

²² *The Treaty of Lisbon 2007*, Article 6.3

²³ *ibid*, Article 2

²⁴ EU Justice Sub-Committee, *Potential Impact on EU Law of Repealing the Human Rights Act*, 20 October 2015

Cameron's speech concerning EU reform in November 2015.²⁵ Once the prospective British Bill of Rights has been drafted, consultations will begin with the Council of Europe and the ECtHR to determine whether or not the Bill would be seen as a legitimate way of interpreting the ECHR. At such a point, there will be several options available to the Government.

If the British Bill of Rights is not recognised by the Council of Europe, one option would be to withdraw from the ECHR entirely, as has been warned most notably in the Chris Grayling strategy paper of 2014. The consequences of this may well be severe and have been presented at length here. Denouncing the ECHR may be interpreted as breaking international law by breaching an international treaty – the Belfast/Good Friday Agreement – between the governments of the UK and Ireland, and being submitted to the UN. Devolution agreements with Wales, Northern Ireland and Scotland would also need to be amended, as well as dealing with the political fallout that bypassing the Sewel Convention would undoubtedly produce.

To avoid discontent spreading throughout the nations of the UK, the government may opt to introduce asymmetrical human rights standards, leaving the Human Rights Act or the European Convention in place in Northern Ireland and Scotland, whilst reforming human rights in England and Wales. This option would appear to be fraught with difficulty, due to the disparity in rights it would produce throughout the United Kingdom and between the UK and its neighbours, notably the Irish state. With reference to Scotland, there may also be a degree of confusion in terms of the institutions set up by the respective national and devolved legislatures and the disparity between human rights standards in each jurisdiction. Marco Biagi MSP cited this as one area of particular potential ambiguity.²⁶ For example, if the Scottish Human Rights Commission were to interact with bodies that deal with reserved matters (acting according to a new British Bill of Rights), then there would be considerable uncertainty with regard to which standard of human rights would be upheld.

It would seem that the UK Government will look to negotiate an alteration to the ECHR and the ECtHR's relationship to UK courts. Whilst convincing the Council of Europe to allow the UK to treat ECtHR judgements as 'advisory' rather than binding would be close to impossible, an alteration to the Convention or its additional protocols regarding interpretation may be theoretically achievable. Should the Conservatives be able to achieve this concession, then a withdrawal from the ECHR would not be strictly necessary in order to make the desired domestic reforms. However, one could legitimately ask why the Council of Europe would be willing to alter the Convention to suit the interests of the UK Government. To this end, the Grayling Strategy Paper cites the accession of the EU to the ECHR as a way to "ensure that the UK's new human rights framework is respected."²⁷ EU accession to the ECHR requires the unanimous consent of all member states, therefore presenting the UK Government with the opportunity to negotiate on both fronts. Opportunities for Convention amendment may also present themselves in the EU's negotiations with the Council of Europe over their relationship to the ECtHR. However, as previously stated, an agreement to allow the UK to treat ECtHR rulings as 'advisory' would significantly undermine the Court as well as the Council of Europe and agreement to this would seem unlikely. The UK Government may well therefore have to

²⁵ Cameron, David (2015), *The Future of Britain's Relationship with the European Union*, Chatham House, 10 November 2015

²⁶ EU Justice Sub-Committee, *Potential Impact on EU Law of Repealing the Human Rights Act*, 17 November 2015

²⁷ Grayling, C. (2014), *Protecting Human Rights in the UK*, p.8

concede defeat on this issue if it is not fully prepared to deal with the numerous legal and political repercussions that would follow withdrawal from the ECHR.

Difficulties and Ambiguities

However, there are significant issues that the UK government must address in order to proceed in any direction. One ambiguity is encountered within the policy itself. The Conservatives wish for the new Bill of Rights to “end the ability of the European Court of Human Rights to force the UK to change the law.”²⁸ However, in a legal sense this is not strictly accurate. If the UK Parliament attempts to pass a law that the ECtHR deems to be in breach of the Convention, then it will rule it so. It then falls upon the UK Government to amend the proposed law and seek approval, if it wishes to continue to attempt to pass the legislation. The ECtHR does not ‘force’ the UK to change the law per sé; it merely judges whether a proposed law is in breach of the ECHR. Parliamentary sovereignty therefore remains intact, as the ultimate power to enforce law lies with Parliament.

However, more practical obstacles may also hamper the course of action that the government takes on the issue. Whilst the Conservatives have a mandate to repeal the HRA and replace it with a British Bill of Rights, withdrawal from the ECHR would be significantly more difficult. The Conservative’s majority in the House of Commons is not matched by one in the House of Lords, which could prove to be an obstacle to passing the legislation through both Houses. However, the Salisbury Convention states that the House of Lords will not oppose a piece of legislation that was mentioned in a successfully elected manifesto. With regards to human rights reform, the Conservative Party Manifesto 2015 was significantly more diluted than the Grayling Strategy Paper published six months prior. In fact, the Conservative manifesto only pledges to repeal the Human Rights Act, and makes no reference to a possible ECHR withdrawal. The House of Lords would therefore be unable to block a scrapping of the HRA, but could intervene if there was an attempt to abandon the ECHR. For this reason, the discrepancy between the Grayling strategy paper and the manifesto is one that is worth noting. The manifesto pledges the party’s support of “basic principles of human rights [...] signed up to in the original Convention on Human Rights”, demonstrating a preference to continue as a party to the Convention, albeit one which is more narrowly focused and suited to their interests.²⁹

Conclusion

An ideal Conservative scenario would see them replace the HRA with a British Bill of Rights that is aligned to a modified (and more suitable) ECHR. If this was to be achieved, then the Belfast/Good Friday agreement would not be legally breached. If this cannot be obtained however, the UK Government must consider whether to concede defeat and accept a compromise, or risk political instability and legal uncertainty spreading through many regions of the nation notably in Scotland and on the island of Ireland.

On November 10 2015, David Cameron pledged to “reform [the UK’s] relationship with the ECHR by scrapping Labour’s HRA and introducing a new British Bill of Rights”, noting that consultation will be undertaken on how to make this “big constitutional change.”³⁰ Who would be consulted, however,

²⁸ Ibid, p.6

²⁹ Conservative Party (2015), *The Conservative Party Manifesto 2015*, p.73

³⁰ Cameron, David (2015), *The Future of Britain’s Relationship with the European Union*, Chatham House, 10 November 2015

was not disclosed. Whether negotiations are broad and inclusive – featuring the UK’s devolved legislatures – or exclusively limited to bilateral talks between the UK Government and the Council of Europe, there will doubtlessly be many obstacles to overcome. Should the new British Bill of Rights not be in alignment with the ECHR, the Belfast/Good Friday Agreement would be directly breached. Despite these being largely uncharted waters, there would also be a very real risk to the UK’s status in the Council of Europe and, moreover, the European Union. An EU exit would seriously threaten parity in rights and resources on the island of Ireland particularly, and, combined with a breach of the Belfast/Good Friday Agreement, would leave the political landscape in Northern Ireland and the surrounding border counties in a precarious position. Westminster’s relationship with Edinburgh would also be placed under further strain. Despite this uncertainty, one point does remain clear: withdrawal from the ECHR would produce a significant amount of political fallout at both domestic and international levels. Whether the potential reward is worthy of the significant risk, however, is for the UK Government to decide.

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