

Fighting the Repeal of the Human Rights Act

Introduction

This paper seeks to analyse the impact on rights protection and society in general in Northern Ireland of the repeal of the Human Rights Act (HRA). It argues that repeal, on the terms proposed by the Conservative Party, would be a regression in rights protection and is unlikely to provide an opportunity for the enhancement of human rights standards. The paper suggests that “incorporation” of the European Convention on Human Rights (ECHR) involves the jurisprudence as well as the text of the Convention and that repeal of the HRA would breach the Belfast Good Friday Agreement. It is also argued that repeal of the HRA would breach the “Sewell Convention,” which governs the relationship between the UK Government and devolved institutions, and is likely to provoke a constitutional crisis in terms of the governance of the Union. Following on from this analysis, the paper identifies the arenas in which the repeal of the HRA can be fought.

Background

In October 2014, the Conservative Party published proposals in a document entitled “Protecting Human Rights in the UK: the Conservatives’ Proposals for Changing Britain’s Human Rights Laws” which proposed repealing the Human Rights Act (HRA) and replacing it with a British Bill of Rights. Although that document was widely criticised, the following commitment was included in the Conservatives’ Election Manifesto:

“The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.”

Some sources expected that legislation to implement this pledge would be introduced quickly. However, the Queen’s Speech contained reference only to “proposals” on a Bill of Rights and the Background Briefing paper to the Speech included the following explanation:

“The Government will bring forward proposals for a Bill of Rights to replace the Human Rights Act.

“This would reform and modernise our human rights legal framework and restore common sense to the application of human rights laws, which has been undermined by the damaging effects of Labour’s Human Rights Act. It would also protect existing

rights, which are an essential part of a modern, democratic society, and better protect against abuse of the system and misuse of human rights laws.”

It may be that the complexity of the proposals and the extent of opposition to the proposal to scrap the HRA, expressed between the election and the Queen’s Speech, prompted the Government to delay the introduction of legislation. As well as widespread opposition from individual politicians and human rights NGOs, the Scottish and Welsh administrations have condemned the move and the Irish Government has expressed concern.¹ However, Downing Street has stressed that the commitment remains and it would be a mistake to think it has been downgraded.

It now appears that there will be a consultation begun by the Justice Secretary in the autumn but that legislation might be delayed until after the referendum on membership of the European Union. There is also speculation in the media that withdrawal from the ECHR itself is still on the agenda if Strasbourg “refuses to accept” the Government proposals.²

Threat or Opportunity?

There are those who see the possible advent of a British Bill of Rights as an opportunity rather than a threat, both in terms of increasing the protection of rights in general and in opening up a space where a Bill of Rights for Northern Ireland, albeit limited, might be negotiated.³ At one level, whether this is so is a matter of political opinion. At another, however, it seems perfectly legitimate for a non-party political NGO to analyse the context of a political proposal and the terms in which it is being brought forward in order to assess the likelihood of it proving either a threat or an opportunity in terms of the protection of human rights.

In so doing, the first point to note is that “breaking the link” between the European Court and the British (i.e. UK) courts in itself would diminish rights protection. Below, we argue that the jurisprudence surrounding the Convention, not just its text, must be brought into domestic legal effect to amount to proper “incorporation.” However, the cutting off of UK courts from being able to “take account of” as well as contribute to European jurisprudence removes one route of effective protection of human rights. International oversight is, in itself, a way of controlling the unfettered power of the national state, particularly where

¹ See for example *Scrapping Human Rights Act 'would breach Good Friday agreement'* The Guardian 12 May 2015; and *Government concern about UK plan to scrap Human Rights Act* Irish Times 14 May 2015;

² *David Cameron Prepared to Break with Europe on Human Rights* The Guardian 2 June 2015

³ See, for example: <http://rightsni.org/2015/05/turning-a-challenge-into-an-opportunity-human-rights-ininnorthern-northern-ireland/>

parliamentary sovereignty is absolute; breaking the link between domestic courts and the European Court in itself reduces the effectiveness of that oversight.

Without going into detailed textual analysis, it is also possible to see clear threats to a proper system of human rights protections in the way the proposals have been argued. Against the universality of human rights is posed the concept of “British” values and principles, seen to be different and inherently superior to “foreign” or “European” impositions. Against the basic principle that human rights accrue to every person by simple virtue of their humanity, the proposals suggest that “foreign nationals” be treated differently and that rights are dependent on the proper exercise of “responsibilities.” Against the principle that everyone – even those declared enemies – are deserving of human rights protection is set the proposal that the ECHR should not bind the actions of British military forces overseas. In this context, the idea that proposals deriving from the present UK Government offer an opportunity to extend human rights protections flies in the face of both the facts and any sensible political analysis.

As regards a Bill of Rights for Northern Ireland, it is hard to see how knocking down one of the pillars of the Belfast/Good Friday Agreement brings an opportunity to erect one that has never been built. It is also hard to see anything in the present or foreseeable political configuration in Northern Ireland that would give one hope that the opportunity to contribute to debate on the content of a “British Bill of Rights” (or even a UK Bill of Rights) will forge the political consensus held to be necessary for a bespoke Northern Ireland element.

This is not to say that human rights activists do not have an obligation to fight for the best protection for human rights possible in any circumstances, including if the HRA is repealed and a new British Act is proposed. It is, however, to say that the first step in any human rights campaign is to prevent regression if possible which, in current circumstances, means opposing repeal of the HRA by all legitimate means.

Importance of HRA to Northern Ireland

The incorporation of the ECHR was a basic ingredient of the human rights protections in the Belfast Good Friday Agreement. It was regarded as so important that the Agreement also committed the Irish Government to incorporate the ECHR under the “equivalence” provisions. In our view, unless its provisions are simultaneously re-introduced for this jurisdiction, repealing the Human Rights Act insofar as it has effect in Northern Ireland would constitute a flagrant breach of the Belfast/Good Friday Agreement.

The Agreement, in addition to being overwhelmingly approved by referendum, in Ireland North and South, was also incorporated as a treaty between the UK and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705). Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement which correspond to its competency. Paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement states:

“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, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”

This commitment was given legislative effect through the HRA 1998 although it was also a 1997 Manifesto pledge of the Labour Party and had already begun its parliamentary process at the time of the Agreement. The Secretary of State has publicly refuted our claim that repeal of the HRA would breach the Agreement. There has been no direct evidence given for this refutation and, worryingly, in Theresa Villiers’ response to our correspondence on the matter, she only committed to “our strong support for the political institutions established over the past two decades as a result of the Agreement and its successors,” rather than to the integrity of the Agreement itself. However, it can be assumed that the intention to list the provisions of the ECHR in any new Bill of Rights, would, in the UK Government’s view, fulfil the pledge to “incorporate” the ECHR.

It is our view that “incorporation” cannot just mean repeating the text of the ECHR (or most of it) in a UK statute. It also involves “bringing in” the institutions of the Convention and the jurisprudence developed by the Court and other Convention bodies. This view of incorporation is completely recognised by the HRA. Section 1 of the HRA lists Convention rights as those in (most of) the ECHR. Section 2 “Interpretation of Convention Rights” says, in effect, that the convention rights must be interpreted “taking account” of ECtHR jurisprudence and the positions of other CoE institutions:

“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.” (Sec 2(1))

It is this Section that requires UK courts to “take account” of European Court decisions (not follow them as binding precedent as Conservative caricature alleges) and it is that link that the Government is explicitly committed to breaking. To repeal the HRA, without replacing it with legislation that would reference both the text and jurisprudence of the ECHR and provide for UK courts to be able to take account of, and contribute to, that jurisprudence would without doubt breach the Agreement and its supporting Treaty.

Unfortunately, legal opinion has told us that there is no dispute resolution mechanism in the Anglo-Irish treaty and there does not seem to be any legal means – certainly not through litigation – that would prevent this double breach. It would, of course, breach faith with the people of Northern Ireland (and indirectly with the people of the Republic of Ireland) and also with the Irish Government. We will work for a strong political response to this proposed outrage.

The Agreement also commits to safeguards to ensure the Northern Ireland Assembly or public authorities cannot infringe the ECHR. Removing this safeguard takes away a significant pillar of the human rights architecture both of the Agreement and Northern Ireland society. It threatens the whole basis of trust in the new institutions that has been painstakingly built up since 1998.

In relation to other key provisions of the peace settlement the HRA 1998 is, for example, also vital to the framework for the human rights compliance of policing in Northern Ireland. One of the key functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998. The PSNI Code of Ethics, provided for under s52 of the same Act is also designed around the framework of the ECHR as provided for by the HRA 1998. Again, the full impact of this legislation involves both the letter of the Convention and its jurisprudence.

Would the Repeal of the HRA Breach the Sewell Convention?

The Sewell Convention states:

“The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government”. (December 2001, Cm 5240, paragraph 13)

“Agreement” in the case of a piece of legislation is through a “legislative consent motion” to be passed through the Assembly. Devolution Guidance Notice 8: Post-Devolution Legislation Affecting Northern Ireland interprets the above convention and the Memorandum of Understanding between the UK Government and the devolved administrations for officials who may be considering bringing forward legislation. Paragraphs 4 and 5 contain the following text:

- “ III. contains provisions applying to Northern Ireland and which deal with transferred matters (but not reserved or excepted matters), or which alter the legislative competence of the Northern Ireland Assembly or the executive functions of Northern Ireland Ministers or departments.
5. Only Bills with provisions in category III are subject to the convention on seeking the agreement of the Northern Ireland Assembly.”

It is clear that the repeal of the HRA, unless it is replaced by near-identical provision, will alter both “the legislative competence of the Northern Ireland Assembly” and “the executive functions of Northern Ireland Ministers or departments.”

The Northern Ireland Act 1998 states that a provision of any legislation by the NI Assembly is outside of its legislative competence if:

“(c) it is incompatible with any of the Convention rights;” (Sec 6(2)(c))

These are defined as follows:

“the Convention rights’ has the same meaning as in the Human Rights Act 1998”
(Sec 98 (1))

As we have already argued, the HRA defines “Convention rights” through both Sections 1 and 2 to include both the text and the jurisprudence of the Convention. **Any** change in these provisions alters the legislative competence of the Assembly and so requires a legislative consent motion.

Section 24 (1) of the Northern Ireland Act provides:

“A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—

(a) is incompatible with any of the Convention rights;”

Similarly, any change in the Convention rights as defined in the HRA alters the executive functions of Northern Ireland Ministers or departments.

As far as Northern Ireland is concerned, therefore, repeal of the HRA, unless it is replaced by near-identical provision, will require a legislative consent motion. Given the current public positions of the various parties, such a motion is unlikely to be approved for presentation by the Executive and, even if it were to be introduced into the Assembly, would almost certainly be met with a Petition of Concern and thereby fail to achieve the necessary agreement.

Threat to the Union?

Northern Ireland is a divided society and, while the likely failure of a legislative consent motion would contribute to the constitutional crisis that the scrapping of the HRA would inevitably bring, the region will not speak with one voice on the issue. In contrast, Scotland and perhaps Wales will. Both devolved governments have made clear their opposition to the proposals and the assumption must be that legislative consent motions will not be passed.

In these circumstances, the UK Government has perhaps three options. First, withdraw the proposals, second, repeal the HRA only in respect of reserved and excepted matters and third, use parliamentary sovereignty to override the devolved administrations and legislatures. The second option might lead to a patchwork of human rights regimes across the UK and further divisions across the Union while the third would definitely create a constitutional crisis. When combined with the unknowns surrounding the EU “in-out” referendum, these proposals, supported by the avowedly unionist Conservative Party and, as far as we can see, by unionist parties in Northern Ireland, pose a real threat to the United Kingdom as presently constituted.

Fighting the Repeal of the HRA – How?

The argument of this paper can be summarised as follows. In spite of a possible partial retreat or delay in the implementation of the manifesto commitment, the current UK Government is committed to repeal of the HRA and its replacement by a British Bill of Rights of unknown content. The source and context of the proposals mean that they are a threat to human rights protection and it is extremely unlikely that any increase in protection will be possible in course of the process of implementation. The proposals would breach the Belfast/Good Friday Agreement and the international treaty which backs it up. Repealing

the HRA would also undermine basic elements of the rights-based governance of Northern Ireland, especially with regard to the vital area of policing. The proposals would engage the Sewell Convention, requiring legislative consent motions in the devolved legislatures which, for varying reasons, are unlikely to be forthcoming. If the UK Government nonetheless presses on with their proposals, there will be a constitutional crisis which will threaten the United Kingdom as we know it.

Following the logic of this analysis, CAJ will help fight the repeal of the HRA in the following ways:

- If a consultation is published, make a robust contribution to the debate and encourage others across the UK and Ireland to do likewise
- Work with colleagues and allies across the UK with a view to defeating the proposals in the UK Parliament
- Work with colleagues in the Republic and directly to press the Irish Government and political parties to make clear their opposition to the proposals
- Work with colleagues in Northern Ireland to make the arguments against the proposals, covering all the issues raised in this paper, with a view to denying a legislative consent motion if a bill comes forward
- Continue to press for a “HRA+” Northern Ireland Bill of Rights
- In general, maintain the importance of direct links between the UK jurisdictions and the regimes of international covenants ratified by the UK and work for incorporation where appropriate (e.g. the Convention on the Rights of the Child)

Brian Gormally June 2015