

SPICe Briefing

The European Convention on Human Rights in the United Kingdom

25 September 2015

15/59

Angus Evans and Iain Mclver

This briefing provides information on the European Convention on Human Rights and the role of the European Court of Human Rights in enforcing the Convention. It then explains how the Convention has been applied in the United Kingdom including by the Human Rights Act 1998. It also sets out the proposals by the UK Government to reform human rights laws in the UK and examines the possible implications of any reform. The briefing updates a [previous SPICe briefing](#) published in November 2014.



CONTENTS

EXECUTIVE SUMMARY	3
WHAT IS THE EUROPEAN CONVENTION ON HUMAN RIGHTS?	5
<i>Absolute, limited and qualified rights</i>	5
<i>Derogating from the Convention</i>	6
THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS	6
<i>The Status of Court judgments</i>	6
<i>The Committee of Ministers and non-compliance with Court judgements</i>	7
THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE UNITED KINGDOM	7
THE HUMAN RIGHTS ACT	8
CONSERVATIVE PARTY’S PROPOSALS FOR CHANGING BRITAIN’S HUMAN RIGHTS LAWS	9
UK GOVERNMENT’S PROPOSALS	10
POTENTIAL IMPLICATIONS OF THE PROPOSALS	11
<i>Do European Court of Human Rights judgments set precedents in the UK courts as a result of the Human Rights Act?</i>	11
<i>Can the United Kingdom ignore European Court of Human Rights judgments?</i>	11
<i>Repercussions of ignoring a European Court of Human Rights judgment</i>	12
<i>Withdrawal from the binding jurisdiction of the Court</i>	12
<i>Withdrawal from the Convention</i>	13
<i>Human rights in Scotland and the Scotland Act</i>	13
THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN UNION	15
SOURCES	17
RELATED BRIEFINGS	20

EXECUTIVE SUMMARY

- The European Convention on Human Rights was adopted in Rome on 4 November 1950 by members of the Council of Europe. The Convention sets out the rights that all people living in each of the Council of Europe's member states can expect to receive.
- Individuals can bring complaints of human rights violations to the European Court of Human Rights (the Court) in Strasbourg once all possibilities of appeal have been exhausted in the member state concerned.
- The United Kingdom helped to draft the Convention and was one of the first countries to ratify it in 1951. Human rights in the UK have therefore been governed by the Convention for over 60 years.
- The Human Rights Act 1998 (Human Rights Act) came into force in the United Kingdom in October 2000. It is composed of a series of sections that have the effect of codifying the protections in the Convention into UK law. As a result, the Convention rights are enforceable in UK courts. This means that individuals can file human rights cases in domestic courts, rather than having to go to the Court in Strasbourg to argue their case.
- On 2 October 2014, the Conservative Party published proposals for reforming human rights laws in the UK which would mean that the case law of the Court would not be binding on the UK Supreme Court and that a new parliamentary procedure would be introduced to allow consideration of adverse Court judgments.
- The Queen's Speech in May 2015 included a commitment to a British Bill of Rights which would replace the Human Rights Act, but did not include any details of the likely legislation. A consultation outlining more details is likely to be published in autumn 2015.
- If the United Kingdom Government decided to withdraw from the Court's binding jurisdiction an issue could arise as to whether it could also be required to withdraw from the European Convention on Human Rights.
- The general rules in the Human Rights Act also apply in Scotland. Therefore, Scottish public authorities and the Scottish Government also have to comply with the Convention rights (Human Rights Act, section 6). In addition, devolved legislation has to be interpreted as far as possible in a way which is compatible with Convention rights (Human Rights Act, section 3). The Scotland Act 1998 (the Scotland Act) also contains its own specific provisions on human rights which incorporate the Convention.
- Certain legal commentators have argued that the provisions in the Scotland Act could provide an obstacle to the UK Government's human rights goals (at least in relation to Scotland). The Scottish Government has also indicated that the repeal of the Human Rights Act or the introduction of a UK Bill of Rights would trigger the Sewel Convention – i.e. the convention that, although it has the power to do so, the UK Government will not normally legislate on devolved matters in Scotland without the consent of the Scottish Parliament. In such a case the Scottish Government has said that it would not give consent to such legislation.

- On 23 September 2015, the First Minister, Nicola Sturgeon also indicated that the Scottish Government has no interest in a “carve-out” which would, “leave rights intact ... in Scotland” but not in the rest of the UK and that the same point holds for any arrangement which protects human rights in Scotland on devolved issues, but not on reserved issues. The First Minister also indicated that there are no circumstances in which SNP Members of Parliament would view the issue as an English-only one and would opt to abstain.
- Arguments have been made that a decision to withdraw from the Convention could result in an obligation to leave the European Union. However, others have argued that this would not be necessary.

WHAT IS THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

The [European Convention on Human Rights](#) (The Convention) was adopted in Rome on 4 November 1950 by members of the [Council of Europe](#)¹. It came into force three years later. The Convention was influenced by the Universal Declaration of Human Rights which was proclaimed by the General Assembly of the United Nations in December 1948. According to the Council of Europe, the Convention:

“gives practical form to certain of the rights and freedoms embodied in the Universal Declaration of Human Rights and provides a list of guaranteed rights”.

The Convention sets out the rights that all people living in each of the Council of Europe’s member states can expect to receive. These rights are:

- Right to life
- Prohibition of torture or inhuman and degrading treatment or punishment
- Prohibition of slavery and forced labour
- Right to liberty and security
- Right to a fair trial
- No punishment without law
- Right to respect for family and private life
- Freedom of thought, conscience and religion
- Freedom of expression
- Freedom of assembly and association
- Right to marry
- Right to an effective remedy
- Prohibition of discrimination

Protocols to the Convention have added further rights such as: the protection of property; the right to education; the right to elections (all included in Protocol 1 signed in 1952) and the abolition of the death penalty (included in Protocol 6 signed in 1983).

Although the rights enshrined in 1950 have remained unchanged, their scope has developed largely due to the way in which the European Court of Human Rights has interpreted the Convention – its so-called case-law – and due to various additional protocols that have established new rights.

Absolute, limited and qualified rights

Not all rights in the Convention/Protocols have the same weight. There are three broad types:

- **Absolute rights** – certain rights such as the protection against torture (Article 3) are absolute and cannot be removed or limited by member states (although see below in relation to derogations)
- **Limited rights** – certain rights can be limited under specific and finite circumstances. For example, Article 5 (the right to liberty) allows for people to be imprisoned, provided there is a “lawful detention of a person after conviction by a competent court”

¹ The Council of Europe is the continent's leading human rights organisation. It includes 47 member states, 28 of which are also members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The Council of Europe is not linked to the European Union and should not be confused with the Council of the European Union (European Council), which is the institution which represents EU member state governments.

- **Qualified rights** – certain rights require a balance between the rights of the individual and other interests². These include the rights to: respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); peaceful enjoyment of property (Protocol 1, Article 1); and, to a degree, the right to education (Protocol 1, Article 2).

Therefore, depending on the right in question and the specific circumstances, a policy or decision which restricts a Convention right may or may not be incompatible with the Convention.

Derogating from the Convention

Article 15 of the Convention allows parties to the Convention to derogate from certain Convention rights in time of “war or other public emergency threatening the life of the nation.” There are three substantive conditions for permissible derogations:

- There must be a public emergency threatening the life of the nation;
- Any measures taken in response must be “strictly required by the exigencies of the situation”; and
- The measures taken in response must be in compliance with the state’s other obligations under international law.

The derogation must also follow a defined procedure.

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Section 2 of the Convention establishes the European Court of Human Rights (the Court). Based in Strasbourg, the Court oversees the implementation of the Convention in the member states. Individuals can bring complaints of human rights violations to the Court once all possibilities of appeal have been exhausted in the member state concerned.

The Status of Court judgments

Article 46 of the Convention addresses how the Court’s findings will be enforced. It states:

“ARTICLE 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.

² According to a Ministry of Justice guide, interference with qualified rights is only permissible if: (1) there is a clear legal basis for the interference; (2) the action seeks to achieve a legitimate aim set out in the Convention’s articles; and (3) the action is in response to a pressing social need and is proportionate (Ministry of Justice 2006)

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.”

The Committee of Ministers and non-compliance with Court judgements

The Committee of Ministers is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg (Council of Europe 2014a).

As indicated in Article 46 of the Convention, where the Court judges a member to be in breach of its responsibilities, the Committee of Ministers decides on what further action should be taken. This work is usually undertaken at four regular meetings every year. The Committee of Ministers' essential function is to ensure that member states comply with Court judgments. The Committee completes each case by adopting a final resolution. In some cases, interim resolutions may prove appropriate. Both kinds of resolutions are public.

Neither the Court nor the Committee of Ministers has the right to financially penalise a member for failing to comply with a judgment. The Court can, however, choose to award compensation to successful applicants, potentially in the form of damages (Article 41).

The issue of what happens if a member state refuses to comply with a Court judgment is a complex one as it involves both a political and a legal context. The House of Commons Parliamentary and Constitutional Reform Committee considered this issue in relation to how the Government could comply with the “Hirst 2”³ and related cases where the Court had held that the UK’s blanket ban on prisoner voting breached Protocol 1, Article 3 on the right to regular, free and fair elections (for details see the discussion below and House of Commons Political and Constitutional Reform Committee 2011).

THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE UNITED KINGDOM

The United Kingdom helped to draft the Convention and was one of the first countries to ratify it in 1951. Human rights in the UK have therefore been governed by the Convention for over 60 years.

Over the years, a number of additional Protocols to the Convention have been adopted. Only some of these confer new rights. The United Kingdom has ratified some but not all of these substantive Protocols. Examples of Protocols which the United Kingdom has not ratified include Protocols 4, 7, 9, 12 and 15. (Council of Europe 2014b)

The United Kingdom Government has allowed an individual right of application to the Court since 1966. Before applying to the Court, applicants are required to pursue any legal proceedings in this country that are capable of giving them redress for the violation of their Convention rights. Now that the Human Rights Act is in force, this will usually involve pursuing a claim under this Act. (Liberty 2014)

³ [Hirst v. the United Kingdom \(No. 2\) - 74025/01 \[2005\] ECHR 681](#)

THE HUMAN RIGHTS ACT

According to the UK Government's Ministry of Justice:

“for many years the Convention was not a full part of our own law, so using the Convention usually meant taking a case to the European Court of Human Rights (ECtHR) in Strasbourg. This was often time-consuming and expensive.” (Ministry of Justice 2014)

The [Human Rights Act 1998](#) (Human Rights Act) came into force in the United Kingdom in October 2000. It is composed of a series of sections that have the effect of codifying the protections in the Convention into UK law. As a result, Convention rights are enforceable in United Kingdom courts. This means that individuals can file human rights cases in domestic courts, rather than having to go to the Court in Strasbourg to argue their case.

According to the Ministry of Justice, the Human Rights Act works in three ways:

“First, it requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights. Where it is not possible to do so, a court may quash or disapply subordinate legislation (such as Regulations or Orders), but only Parliament can make changes to primary legislation (such as Acts of Parliament).

Second, it makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Act if as the result of a provision of primary legislation (such as another Act of Parliament) it could not have acted differently. In general, a person who wants to take the UK to the ECtHR must first bring their case before our domestic courts.

Third, UK courts and tribunals must take account of Convention rights in all cases that come before them. This means, for example, that they must develop the common law compatibly with the Convention rights, taking account of Strasbourg case law.” (Ministry of Justice 2014)

These three principles are contained in sections 3, 6 and 2 of the Human Rights Act respectively.

All public bodies (such as courts, police, local governments, hospitals, publicly funded schools etc.) and other bodies carrying out public functions have to comply with the Convention rights.

Rather than provide new rights, the Human Rights Act incorporated the rights provided by the Convention into UK domestic law. These rights had previously been part of international law, which was binding on the UK as a State. However, after the 1998 Act came into force, UK citizens could ask the UK courts to directly consider whether those rights had been breached in a court case. Speaking on the anniversary of Liberty's 75th birthday, Lord Bingham explained this principle as follows:

“Thus the 1998 Act did not – this is the third point – give us the rights and freedoms to which we had not been entitled to before. What the Act set out to do, and did, was enable us to enforce those rights and freedoms here in Britain, in our own courts, before our own judges, magistrates and juries. The Government's White Paper heralding this Human Rights Bill was entitled ‘Bringing Rights Home’, and this was an apt description of the Bill's objective. Before the Act, British courts were obliged to close their eyes to the Convention for a very technical but practically important reason: that although the Convention was binding on the UK in international law, it formed no part of our domestic law. So if you or I complained in our local court that a public authority had breached one or other of our Convention rights, the judge would very probably decline to investigate the complaint and

would in any event be unable to help, even if he or she thought we were probably right. The Convention was not part of the law to which the judge was paid to administer. So you or I, having litigated unsuccessfully (and perhaps expensively) here, would have to pack our bags and our papers and take our case to the European Court of Human Rights at Strasbourg – incurring further cost, much delay, and imposing on that court a burden of work which it is nowadays scarcely able to handle.” (Liberty 2009)

As a result of the Human Rights Act, Lord Bingham argues that, whereas before judges making decisions on the Convention were based in Strasbourg and were perhaps unfamiliar with British life, now, as a result of the Human Rights Act “it is British judges, with insight into the way things are done here, paying close attention of course to what the Strasbourg judges say the Convention means”. (Liberty 2014)

CONSERVATIVE PARTY’S PROPOSALS FOR CHANGING BRITAIN’S HUMAN RIGHTS LAWS

On 2 October 2014, the Conservative Party published proposals for reforming human rights laws in the UK which would mean that:

- The case law of the Court would not be binding on the UK Supreme Court
- A new parliamentary procedure would be introduced to allow consideration of adverse Court judgments (Conservatives 2014)

The Conservative Party argues that the proposals are necessary due to what they call “mission creep”. Its view is that this involves the Court applying the Convention rights in new areas not foreseen by the original framers of the Convention. Examples provided include the Court judgments on prisoner voting mentioned above and judgments of the Court which prevented the United Kingdom extraditing foreign criminals (for example Abu Qatada).⁴

The Conservative Party’s proposals also suggest that the Human Rights Act 1998 has undermined UK Courts in their deliberations upon human rights issues. This is as a result of Article 2 of the Human Rights Act which states that UK courts must take account of any, “judgment, decision, declaration or advisory opinion of the European Court of Human Rights” (Human Rights Act 1998). According to the proposals, this means that, “problematic Strasbourg jurisprudence is often being applied in the UK” which, due to the doctrine of ‘proportionality’, involves UK courts getting involved in what are essentially political decisions. The proposal states that the requirement in the Human Rights Act on UK Courts to take account of European Court judgments is not mirrored in a number of other European countries, including Germany.

In addition, the proposals argue that Section 3(1) of the 1998 Act undermines parliamentary sovereignty – in other words, the principle that the UK Parliament is the supreme legal authority which can create or end any law, and that the courts are subject to the will of parliament.

Section 3(1) requires the UK courts to give effect to legislation in a way which is compatible with Convention rights “so far as it is possible to do so”. The Conservatives state that “UK courts have gone to artificial lengths to change the meaning of legislation so that it complies with their interpretation of Convention rights ... even if this is inconsistent with Parliament’s intention when enacting the relevant legislation.”

The proposals’ key objectives would therefore be to:

- Repeal the Human Rights Act 1998 and replace it with a new Bill of Rights

⁴ [Othman \(Abu Qatada\) v UK 8139/09 \[2012\] ECHR 56](#)

- Put the text of the original Convention into primary legislation
- Clarify the Convention rights to ensure a better balance between rights and responsibilities
- Stop UK courts from having to take into account Court judgments from Strasbourg
- Make Court judgments only advisory (Parliament would have the final say as to whether a judgment should be followed)
- Limit the use of human rights laws to the most serious cases (e.g. criminal law, right to property and liberty of an individual)
- Limit the reach of human rights cases to the UK (so British Armed forces overseas are not covered)
- Amend the Ministerial Code to remove any ambiguity in the current rules about the duty of Ministers to follow the will of Parliament in the UK

UK GOVERNMENT'S PROPOSALS

The Conservative Party achieved an overall majority in the general election in 2015 and formed the UK Government.

The commitment to a British Bill of Rights to replace the Human Rights Act was included in the Queen's speech. The UK Government's intention is that:

“This would reform and modernise our human rights legal framework and restore common sense to the application of human rights laws. 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 misuses of human rights laws.” (UK Government 2015)

The Queen's Speech did not, however, include details of the legislation and it is currently not clear what its precise content will be and the extent to which it will follow the Conservative Party's proposals mentioned above.

Although there is a lack of clarity as to the details of the legislation, the Parliamentary Under-Secretary of State for Justice (Dominic Raab MP) did, however, recently indicate in the House of Commons that the UK Government intends to bring forward proposals for a British Bill of Rights in the autumn of 2015 which will be, “subject to full consultation.” (Hansard 2016).

While Dominic Raab would not be drawn on the precise scope of the legislation, he did outline that its aim will be, “to restore some balance to our human rights regime” and that, “we want to protect fundamental rights, but we do not want to see them distorted by judicial legislation or abused by serious and serial criminals” (Hansard 2016).

POTENTIAL IMPLICATIONS OF THE PROPOSALS

The next section of the briefing examines some implications of the above proposals.

Do European Court of Human Rights judgments set precedents in the UK courts as a result of the Human Rights Act?

Section 2 of the Human Rights Act requires UK courts to take into account judgments by the Court when deciding cases. There has been some debate about the meaning of this term. As indicated, the Conservative Party appears to suggest that UK courts are reading this term as meaning that they are required to follow Court judgments (in other words the argument is that UK judges consider Court judgments to be a form of precedent). Certain echoes of this argument can also be found in some academic work. For example, Professor Helen Fenwick of the University of Durham, in a broader analysis of section 2, notes, referring to case law, that:

“as is of course well known, the obligation to take the jurisprudence into account was rapidly transformed by the judiciary into an obligation akin to being bound by it if it was clear and constant” (Fenwick 2012)

However, others have argued that the actual impact of this section is more limited. For example, the UK Human Rights blog “One Crown Office Row” (2011b) examined whether the United Kingdom could in effect ignore Court judgments and argued that, as a result of the Human Rights Act, UK Courts, “only have to take Strasbourg decisions into account. This means they cannot ignore decisions, and sometimes – but not always – will probably have to follow them”.

This view suggests that UK courts already have some room for manoeuvre under the current regime.

Can the United Kingdom ignore European Court of Human Rights judgments?

If the Human Rights Act was repealed (including section 2) it would still leave the question of whether the UK could legally ignore a specific judgment of the Court which did not go in its favour. Giving evidence in February 2011 to the House of Commons Parliamentary and Constitutional Reform Committee (2011), the former Lord Chancellor, Lord MacKay of Clashfern said:

“... it is absolutely binding on us to obey the judgments of the European Court. Simply to say, 'Leave it till tomorrow', or, 'Leave it till the next year', or just say nothing about it, 'Let's ignore it', is not in accordance with the rule of law. I think to do that would be very wrong.

... if you set up a system that includes decisions by the courts, until you change that system you are bound by these judgments. Now, different judges take different points of view and they are all individuals and none of them are perfect ... but if you want to change the system then you have to do that in an orderly fashion.”

In other words, Lord MacKay’s view would appear to be that, as a treaty signatory, the UK would be bound to follow Court judgments. The Committee also concluded that, as a signatory to the Convention, to ignore judgments of the Court would be a breach of international law as a result of the United Kingdom’s treaty obligations.

This position also appears to be shared by the then Lord Chief Justice of England and Wales⁵, Lord Phillips of Worth Matravers, who stated, in evidence taken by the House of Lords and House of Commons Joint Committee on Human Rights in 2011, that refusing to be bound by a

⁵ The Lord Chief Justice is the head of the Judiciary in England and Wales and President of the Courts in England and Wales

judgment of the Court “would be a violation of the obligations of this country under international law.” (House of Commons and House of Lords Joint Human Rights Committee 2011) He, however, also noted that:

“It would have no direct legal impact at all domestically. Indeed, Parliament is supreme in this area; it does not have to have regard, as a matter of domestic law, to decisions of the Strasbourg court. If we rule that a particular piece of legislation is not compatible with the Convention, that is the message we convey; what is done with that message is entirely up to the Government.”

Although the UK would likely be expected to comply with a judgment from the European Court of Human Rights, it should be pointed out that the way in which compliance is achieved is left to the relevant UK institutions. For instance, in the prisoner voting cases, the Court left the possibility that the UK Parliament could choose to extend the franchise to certain categories of prisoner (but not all categories).

Repercussions of ignoring a European Court of Human Rights judgment

In the event the UK chooses not to abide by a Court judgment, the case would be passed to the Council of Europe’s Committee of Ministers. Article 46 of the Convention states that the Committee of Ministers should, “consider what measures should be taken”.

In an article for The Telegraph in May 2012, The former Justice Secretary, Jack Straw, and former shadow home secretary, David Davis, argued that Britain cannot be forced to comply with the Convention or to pay compensation; and that the European Court, “has no power to fine Britain for non-compliance with its judgments” and was unlikely to expel the UK from the Council of Europe. Their view is that, “the matter will simply remain on the long list of unenforced judgments reviewed by the Committee of Ministers. (The Telegraph 2012)

Based on this view, a UK decision not to comply with or to delay compliance with a Court judgment would involve elements of international political reputation/negotiation rather than being a purely legal issue. This view was analysed in more depth in the House of Commons (2011) Standard Note: “European Court of Human Rights rulings: are there options for governments?” (House of Commons Library 2011). The Standard Note explains, amongst other things that, although non-compliance with Court judgments could potentially lead to expulsion or suspension from the Council of Europe, no countries have ever been expelled on these grounds. Certain countries have, however, had their membership suspended for serious human rights violations.

Withdrawal from the binding jurisdiction of the Court

If the United Kingdom Government decided to withdraw from the Court’s binding jurisdiction an issue could arise as to whether it could also be required to withdraw from the European Convention on Human Rights. This issue was analysed in the Standard Note mentioned above.

In the Standard Note, Vaughne Miller outlined the views of Dr Michael Pinto-Duschinsky who, until he stepped down in 2012, was a member of the UK Government’s Bill of Rights Commission. Dr Pinto-Duschinsky argues that the UK’s 1994 signature of Protocol 11 of the ECHR (which set up a new permanent Court)⁶ means that the UK can no longer leave the jurisdiction of the European Court of Human Rights without also rejecting the Convention. He does, however, suggest two ways in which the UK Government could leave the jurisdiction of the Court but remain within the Convention:

⁶ The key change brought about by Protocol 11 was the creation of a single permanent Court of Human Rights to replace the existing European Commission on Human Rights which acted as a gatekeeper to the Court

“First, it could simply continue to incorporate the ECHR into UK law. This would signal a continuing adherence to the basic standards set forth in the convention without being a signatory to the convention by international treaty.

Second, it could negotiate with the Council of Europe to permit it to remain a signatory of the ECHR without accepting the jurisdiction of the Strasbourg court.” (Policy Exchange 2011)

Others have suggested that a withdrawal from the jurisdiction of the Court would, in effect, mean a withdrawal from the Convention and, by implication, a withdrawal from the Council of Europe. (One Crown Office Row 2011a)

Withdrawal from the Convention

The Conservative Party’s proposals did not involve withdrawing the United Kingdom from the Convention. They stated that a future Conservative Government would enshrine the original Convention text into primary legislation and would, “clarify the Convention rights to reflect a proper balance between rights and responsibilities”.

The proposals also argued that there would be a need to work with the Council of Europe during passage of the Bill of Rights to “seek recognition that our approach is a legitimate way of applying the Convention”. However, they also state that if agreement cannot be reached, then the UK would have no choice but to withdraw from the Convention.

It is not clear what the UK Government’s position is on this point. However, if the UK were to leave the Convention, it would present legal questions about continued membership of the Council of Europe and possibly also the European Union. Legal advice prepared for the then Deputy Prime Minister, Nick Clegg on the issue of compliance with Court judgments suggested that, if Britain left the Convention, it could risk the country's membership of the European Union.

“Both the Council of Europe and the EU require member states to adhere to their value [sic], including respect for human rights. Ultimately, whether to expel the UK from either would be a political decision, but the UK would clearly lay itself open to expulsion by withdrawing from the ECHR,” (University College London 2011)

For more details on the issue of membership of the European Union see below.

Human rights in Scotland and the Scotland Act

The general provisions in the Human Rights Act mentioned above also apply in Scotland. The result is that Scottish public authorities and the Scottish Government also have a duty to comply with Convention rights (Human Rights Act, section 6). In addition, devolved legislation also has to be interpreted as far as possible in a way which is compatible with Convention rights (Human Rights Act, section 3).

However, it is important to note that the [Scotland Act 1998](#) (the Scotland Act) also contains its own specific provisions on human rights which incorporate the Convention. In particular:

- Section 57(2), which states that, "a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law"
- Section 29(2), which provides that the provisions of an Act of the Scottish Parliament will be outside the legislative competence of the Scottish Parliament and hence unlawful if they are, “incompatible with any of the Convention rights or with EU law”

Certain legal commentators have argued that these provisions in the Scotland Act could provide an obstacle to the Conservative Party's human rights goals (at least in relation to Scotland).

For example, Professor Aileen McHarg, Professor of Public Law at the University of Strathclyde, has argued that if the UK Government wishes to remove the whole of the United Kingdom from the scope of the Convention, it would have to amend the terms of the Scotland Act (and also the legislation governing the other devolved nations). In this regard, she indicates that "things become constitutionally interesting" in Scotland due to the Sewel Convention. This is the convention that, although it has the power to do so, the UK Government will not normally legislate on devolved matters in Scotland without the consent of the Scottish Parliament (see House of Commons Library 2005). She notes in particular that:

"Amendment of the devolution statutes would trigger the requirement for the consent of the relevant legislature under the Sewel Convention, and there are good reasons to think that such consent would *not* be granted, at least by the Scottish Parliament and Northern Irish Assembly. At present, this consent requirement is only a matter of convention and so could be overridden by Westminster (although probably not without provoking a significant political backlash). However, one element of the "Vow" made to Scottish voters just before the independence referendum was a promise to entrench the Scottish Parliament's powers. That seems to mean that the Sewel Convention would be made legally binding." (McHarg 2014).

For similar views, which also emphasise the impact on Northern Ireland, see O'Conneide 2013. See also Jamieson 2015 which examines in more detail the technical impact of any repeal of the Human Rights Act on the Sewel Convention.

In addition, Professor McHarg also argues that the plans to enact a new UK-wide Bill of Rights could be problematic since:

- Like the Human Rights Act, it would presumably apply to both reserved and devolved matters and would also trigger the Sewel Convention.
- There would be difficulties in coming to a UK-wide agreement on the content of a Bill of Rights as many of the prime candidates for rights which could be included in a British Bill of Rights are actually pure English law concepts.⁷
- Politically, there is evidence of less public hostility towards the Convention rights in Scotland as compared to England.

She also makes the argument that, "although none of the devolved legislatures has the competence to modify or repeal the HRA, they can legislate to supplement it, or replace it were it to be repealed."

More recently arguments, have been made that the proposal to write the Sewel Convention into the Scotland Bill strengthens the view that the consent of the Scottish Parliament would be needed should the Scotland Act 1998 be amended (UK Human Rights Blog (2015), Campbell QC (2015))

The Conservatives' proposals did not deal with this general issue in any detail, although they note that, "we will work with the devolved administrations and legislatures as necessary to make sure there is an effective new settlement across the UK." The nature of any settlement, is however, currently not clear, and in its proposals to the Smith Commission considering further

⁷ For example, she indicates that the writ of habeas corpus (primarily used to determine whether a prisoner has been lawfully detained) has never been part of Scots law and that trial by jury does not have the same deep roots in Scotland as in England

powers for the Scottish Parliament, the Scottish Government indicated that its position would be to oppose any repeal of the Human Rights Act (Law Society Gazette 2014) (Scottish Government 2014). More recently, in a Scottish Parliament debate on the Human Rights Act on 8 September 2015, the Minister for Local Government and Community Empowerment (Marco Biagi) stated that:

“Under the Scotland Act 1998, the power to observe and implement international obligations, including obligations under the ECHR, falls firmly within the competence of this Parliament. Like the wider work of this Parliament, that power and those obligations are of immense importance. The Sewel convention exists to ensure that there is some constitutional underpinning of the rights of this Parliament and that its powers will not be changed without its permission ...” (Scottish Parliament 2015)

During a speech on 23 September, the First Minister, Nicola Sturgeon explained that the Scottish Government would block any repeal of the Human Rights Act and would, “oppose any weakening of human rights protections, not just in Scotland, but across the UK”. She also emphasised that the Scottish Government has no interest in a “carve-out” which would, “leave rights intact ... in Scotland but dilutes them in other parts of the country” explaining that the same point holds for any arrangement which protects human rights in Scotland on devolved issues, but not on reserved issues. She concluded that:

“To put it bluntly there are no circumstances in which my party’s MPs will choose to view this as an English-only issue and opt to abstain. Human rights are not English, Scottish, Welsh or Northern Irish rights. They are universal rights.” (BBC 2015)

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN UNION

The Convention and Council of Europe operate outside the European Union institutions. However, the European Union Treaties make reference both to human rights and specifically to the Convention.

Article 2 of the Treaty on European Union as amended by the Lisbon Treaty, states:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Article 6(3) of the Treaty on European Union states:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

Article 7 of the Treaty on European Union provides a mechanism for determining, “that there is a clear risk of a serious breach by a Member State” of the values set out in Article 2.

Given the content of Article 6(3) of the Treaty on European Union, the question arises whether a decision to withdraw from the Convention would result in an obligation to leave the European Union. Arguments have been made on both sides. These are outlined in more detail in the Standard Note mentioned above.

One group of arguments suggests that, if a Member State left the Convention it would still be able to observe the fundamental rights set out in the Convention as referred to in Article 6(3) of the Treaty on European Union. In other words, this argument stresses that the important thing is that a Member State respects the type of fundamental rights as guaranteed by the Convention rather than being a member of the Convention itself. This argument could potentially cover proposals which enshrine the original Convention text in primary legislation.

Another group of arguments suggests that ratifying the Convention is a requirement of being a member of the European Union. For example, Professor Francesca Klug from the London School of Economics Human Rights Centre suggested in evidence to the House of Commons Select Committee on Constitutional Affairs that the United Kingdom could not remain a member of the European Union if it left the Convention. She explained:

“Because it is a requirement now of the European Union that you ratify the Convention. You do not have to incorporate it into your laws, as we have done with the Human Rights Act, but you do have to ratify the European Convention on Human Rights to be a member of the EU.” (House of Commons 2014)

SOURCES

BBC (2015) *Sturgeon warns against plan to scrap Human Rights Act*. Available at: <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-34331682>

Campbell K. QC (2015). *The Draft Scotland Bill and limits in constitutional statutes*. Available at: <http://ukconstitutionallaw.org/2015/02/02/kenneth-campbell-qc-the-draft-scotland-bill-and-limits-in-constitutional-statutes/>

Conservatives (2014) *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws*. Available at: https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf

Council of Europe (2014a) *About the Committee of Ministers*. Available at: http://www.coe.int/T/CM/aboutCM_en.asp

Council of Europe (2014b) *List of the treaties coming from the subject-matter: Human Rights (Convention and Protocols only)*. Available at: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG>

Council of Europe (1953) *European Convention on Human Rights*. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf

Fenwick H. (2012) *What's Wrong With S.2 of the Human Rights Act?* Available at: <http://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/>

Hansard (2016). *House of Commons, Tuesday 8 September 2015*, column 205. Available at: <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150908/debtext/150908-0001.htm#15090844000011>

House of Commons and House of Lords Joint Human Rights Committee (2011) *Human Rights Judgments*. Available at: <http://www.parliament.uk/documents/joint-committees/human-rights/JCHR%2015%20November%20transcript.pdf>

House of Commons Library (2014) *Standard Note SN/IA/6577 "Is adherence to the European Convention on Human Rights a condition of European Union membership?"*. Available at <http://www.parliament.uk/business/publications/research/briefing-papers/SN06577/is-adherence-to-the-european-convention-on-human-rights-a-condition-of-european-union-membership>

House of Commons Library (2011). *Standard Note SN/IA/5941 "European Court of Human Rights rulings: are there options for governments?"*. Available at: <http://www.parliament.uk/business/publications/research/briefing-papers/SN05941/european-court-of-human-rights-rulings-are-there-options-for-governments>

House of Commons Library (2005). *Standard Note SN/PC/2084 "The Sewel Convention"*. Available at: <http://researchbriefings.files.parliament.uk/documents/SN02084/SN02084.pdf>

House of Commons Political and Constitutional Reform Committee (2011) *Voting by Convicted Prisoners Report: Summary of Evidence*. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/776/77602.htm>

Human Rights Act (1998). Available at: <http://www.legislation.gov.uk/ukpga/1998/42/contents>

Jamieson I. (2015). *The Repeal of the Human Rights Act and the Sewel Convention in Scotland*. Available at: <http://ukconstitutionallaw.org/2015/06/11/hra-watch-reform-repeal-replace-iain-jamieson-the-repeal-of-the-human-rights-act-and-the-sewel-convention-in-scotland/>

Law Society Gazette (2014). *Scotland's anger over UK abandoning Human Rights Act*. Available at: <http://www.lawgazette.co.uk/news/scotlands-anger-over-uk-abandoning-human-rights-act/5043831.fullarticle>

Liberty (2014) *International human rights*. Available at: <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/international-human-rights>

Liberty (2009) *Speech by Lord Bingham on Human Rights*. Available at: <https://www.liberty-human-rights.org.uk/sites/default/files/lord-bingham-speech-final.pdf>

McHarg E. (2014). *Will devolution scupper Conservative plans for a "British" Bill of Rights?* Available at: <http://ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights/>

Ministry of Justice (2014) *Human Rights*. Available at: <http://www.justice.gov.uk/human-rights>

Ministry of Justice (2006). *Making Sense of Human Rights 2006– A short introduction*. Available at: <http://www.justice.gov.uk/downloads/human-rights/human-rights-making-sense-human-rights.pdf>

O'Cinneide C. (2013). *Human Rights, Devolution and the Constrained Authority of the Westminster Parliament*. Available at: <http://ukconstitutionallaw.org/2013/03/04/colm-ocinneide-human-rights-devolution-and-the-constrained-authority-of-the-westminster-parliament/>

One Crown Office Row (2011a) *UK Human Rights Blog: It's time we packed our bags at Strasbourg, says report 9 February 2011*. Available at: <http://ukhumanrightsblog.com/2011/02/09/its-time-we-packed-our-bags-at-strasbourg-says-report/>

One Crown Office Row (2011b) *UK Human Rights Blog: Can Britain "ignore Europe on Human Rights"?* 23 October 2011. Available at: <http://ukhumanrightsblog.com/2011/10/23/can-britain-ignore-europe-on-human-rights/>

Policy Exchange (2011) *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK*. Available at <http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%202011.pdf>

Scotland Act (1998). Available at: <http://www.legislation.gov.uk/ukpga/1998/46/contents>

Scottish Government (2014). *More Powers for the Scottish Parliament*. Available at: <http://www.scotland.gov.uk/Publications/2014/10/2806>

Scottish Parliament (2015). Official Report Meeting of the Parliament Tuesday 8 September 2015, column 94. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10068&mode=pdf>

The Telegraph (2012). *We must defy Strasbourg on prisoner votes* 24 May 2012. Available at: <http://www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html>

UK Human Rights Blog (2015). *Scotland, Sewel, and the Human Rights Act*. Available at: <http://ukhumanrightsblog.com/2015/07/18/scotland-sewel-and-the-human-rights-act/>

United Kingdom Government (2015) *Queen's Speech 2015: background briefing notes*. Available at: <https://www.gov.uk/government/publications/queens-speech-2015-background-briefing-notes>

University College London (2011). *The Constitution Unit: At the heel of the hunt, the Tory hue and cry on human rights needs to die down 18 February 2011*. Available at: <http://constitution-unit.com/2011/02/18/at-the-heel-of-the-hunt-the-tory-hue-and-cry-on-human-rights-needs-to-die-down/>

RELATED BRIEFINGS

SB 14-80 [The European Convention on Human Rights in the United Kingdom](#) 651KB pdf

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Angus Evans on extension 85356 or email Angus.Evans@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at SPICe@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Published by the Scottish Parliament Information Centre (SPICe), The Scottish Parliament, Edinburgh, EH 99 1SP

www.scottish.parliament.uk