

European and External Relations Committee

Human Rights Inquiry

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1. What is your general view on the UK Government's proposal to introduce a British Bill of Rights to replace the Human Rights Act 1998? Do you think changes need to be made to the current human rights regime in the UK?

1.1 It is difficult to assess the impact of changes to the existing human rights legal structure(s) without information on the substance of the proposals. The Conservative Government have indicated that they plan to replace the Human Rights Act (HRA) with a British Bill of Rights but we do not know what this means in practice as yet. The UK is a member of the Council of Europe and the European Convention of Human Rights (ECHR) will continue to apply in the UK in so far as its membership of the Council of Europe requires compliance with the ECHR, regardless of whether or not the HRA is in force. The HRA provides mechanisms for domestic enforcement of the ECHR. This means that an individual can rely on the ECHR in a domestic court. If this form of remedy is removed (through repeal of the Act) then an individual could still seek a remedy in the European Court of Human Rights (ECtHR). Article 13 of the ECHR protects the right to an effective remedy in relation to Convention rights. If the domestic route to an effective and adequate remedy for breach of the ECHR is undermined then we might actually see an increase in admissible cases at the supranational level – meaning more jurisprudence is determined in Strasbourg than in the UK. In this sense, unless the HRA is replaced by a system which is as robust if not more, then human rights violations will more likely be determined outside of the UK.

1.2 In relation to Scotland, and the other devolved jurisdictions, the repeal of the HRA will not in itself remove application of the ECHR in the devolved context. The devolved constitutional statutes, including the Scotland Act 1998, renders the ECHR and EU law as binding in relation to devolved matters. This means the legislature, the executive and public bodies are required to comply with the ECHR at the devolved level regardless of whether or not the Human Rights Act is in force. Amending the devolved constitutional framework becomes problematic when there is a lack of consensus between the national and devolved administrations. The UK Parliament could repeal the operative sections of the Scotland Act that partially incorporate the ECHR, however, this might prove politically problematic if the Scottish Parliament refuse to issue a Legislative Consent Memorandum. Whilst the operation of parliamentary sovereignty at the UK level would allow the UK parliament to proceed with such legislative change there would be a risk of breaching a constitutional safeguard. This is disputed territory in legal terms. In my view, there would be a clear risk of acting unconstitutionally if the ECHR was to be removed from the devolved legal framework without the consent of the Scottish Parliament. This is because the LCM process is supposed to act as a constitutional safeguard in

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our unwritten UK constitution, but also because, like the other devolved frameworks, devolution was approved by way of direct democracy (by way of referendum) and to undermine the foundationalist nature of the ECHR as fundamental constitutional rights in Scotland is in itself unconstitutional unless approved by a second referendum. This becomes even more problematic in the context of Northern Ireland where the Northern Ireland Act 1998, the multi-party peace agreement and the British Irish international treaty of 1998 all commit the UK to enshrining the ECHR at the devolved level as a fundamental part of the post-conflict peace process.

1.3 In so far as the devolved jurisdictions are concerned it would therefore be incredibly problematic to restructure the way human rights are protected. It would be important to ensure legitimacy and credibility in the process of introducing such changes which directly impact on the relationship between citizen and state. For example, a constitutional safeguard that would ensure legitimate change could be achieved through a deliberative process such as a constitutional convention or another form of constitutional process that is deliberative, inclusive, fair, democratic and, as an additional safeguard, approved by the people by way of referendum.

1.4 As it stands, if compliance with the ECHR is 'removed' from the Scotland Act 1998 as part of the implementation of a British Bill of Rights it would be within the power of the Scottish Parliament to introduce secondary legislation that reaffirms the status of the ECHR in relation to devolved matters. For example, paragraph 7(2) of Schedule 5 of the Scotland Act 1998 exempts international obligations from the Foreign Affairs reservation which means complying with international human rights obligations is within the competence of the devolved administration in relation to devolved matters.

1.5 It is important to note that EU law continues to apply in the UK and in Scotland whilst the UK remains a member state of the European Union. This is critical to this discussion because the EU is in the process of acceding to the ECHR and also because the EU Charter of Fundamental Rights consolidates much of the same rights contained in the ECHR and other international treaties, including socio-economic rights. Whilst EU law applies domestically much of the same human rights as available under the ECHR will also be available under the EU framework in relation to matters of EU law.

2. What rights, if any, would a British Bill of Rights have to contain? How would a British Bill of Rights interact with Scotland's separate legal system?

2.1 It is not clear what rights a British Bill of Rights would contain. The international human rights framework goes much further than the rights contained in the ECHR and so it would be open to the UK to introduce a broader and more robust human rights framework than currently exists. Rhetoric surrounding the debate on repeal of the HRA focusses much more on reducing the influence of supranational jurisprudence from a domestic context and perhaps even a shift towards a less robust system with fewer legal rights. This in a sense is a lost opportunity as a British Bill of Rights which would extend human rights protection by offering more effective remedies and expanding the ECHR framework to socio-economic rights would put the UK in better standing in relation to international human rights law.

2.2 On this point, there is a clear divergence in emerging trends at the devolved and national level. Whilst the UK Government, and Conservative led UK parliament moves towards a British Bill of Rights with potentially fewer rights and 'lighter' remedies the rest of the UK, through the devolved administrations, is moving towards a discussion and implementation of more progressive human rights protection. For example, the Welsh Assembly has introduced the Rights of Children and Young Persons (Wales) Measure 2011, which streamlines the UN Convention of the Rights of the Child into devolved decision making through a duty to have due regard. In Scotland, the post Smith landscape has seen a move towards potential further devolution in relation to socio-economic rights, with a transfer of competence on socio-economic inequality (section 36 of the Scotland Bill 2015-16). In Northern Ireland the devolved indigenous Bill of Rights process demonstrated support for the incorporation of economic, social and cultural rights.

2.3 This means that we could be facing a situation where human rights and equality are protected to different degrees depending on where you live in the UK. This anomaly already exists in relation to the different degrees of protection under devolution and at a national level (HRA v devolved Acts v Equality Act 2010). The future landscape however could be even further polarised. In other words, people in Scotland, Northern Ireland and Wales could have access to legally enforceable human rights which are not available to those living in England.

3. Arguments have been made that the current system does not sufficiently respect the sovereignty of the UK Parliament. What are your views on this?

3.1 Arguments relating to sovereignty raise very interesting issues about how we understand our constitution and how we are governed. The UK Parliament and the UK constitution rely on the operation of the rule of law in a system of parliamentary sovereignty. Parliament, is supreme and all other agencies of the state, including the executive and the judiciary ought to respect the will of parliament. However, the nature of the constitution is changing and, by its very nature, it is supposed to be a flexible constitution. The constitution is not written down but exists in the form of various foundational statutes and through the operation of custom and conventions. For example, we have a number of 'constitutional statutes' which alter the degree to which parliamentary supremacy applies. The European Communities Act 1972 incorporates EU law, the Human Rights Act 1998 incorporates the ECHR, the devolved Acts create a secondary layer of constitutionalism where EU law and the ECHR are supreme. This flexible system allows the UK parliament to enact legislation which is 'self-regulatory'. In other words, the UK Parliament can regulate itself and self-impose human rights compliance mechanisms. The parliament can also repeal the Human Rights Act 1998 but until such time as it does, it has allowed the operation of the ECHR in the domestic context through the application of the rule of law.

3.2 This is an unusual system of constitutionalism. It is also a unique one. In terms of constitutional theory the operation of parliamentary sovereignty is based on process system of constitutionalism. Most other countries operate within a foundationalist system of constitutionalism. Whilst in the UK we rely on the rule of law operating through fair process – fair processes of law making and fair process of law application, in the foundationalist model we see fairness and democracy derived

through compliance with a foundation of specific rules which form a foundational framework. At the heart of a foundationalist model of constitutionalism there would normally be a set of what are deemed 'constitutional' rights. No such explicit and enumerated constitutional rights apply in the UK – the constitution does not adopt a foundationalist model. There is no written constitution with a list of specific rights. Citizens can derive rights from process led legislation, such as the Human Rights Act, or through the development of the common law but both these processes are at all times secondary to what parliament deems to be 'constitutional rights'. In this sense, parliamentary sovereignty, in its strictest sense, means that rights can be given to people, and that they can be taken away.

3.3 This is why these questions go to the heart of issues about how we understand our constitution and how we are governed. Any reform to the existing human rights framework changes the relationship between citizen and state. The Human Rights Act 1998 has provided a 'semi-constitutional' foundation despite its process origins. If we remove these rights we need to think about what system replaces it and whether or not parliamentary sovereignty, without any checks and balances on human rights, is necessarily a good thing in terms of how we are governed.

3.4 It is also important to note that the application of parliamentary sovereignty is safeguarded in the UK under the Human Rights Act 1998 as decisions of the judiciary in Strasbourg are not automatically binding or applicable at the domestic level. In the same vein, the decisions of the judiciary at the domestic level are not directly applicable if the UK judiciary deem legislation to be contrary to the ECHR through a declaration of incompatibility. In both these scenarios the implementation of a means of compliance is left to the UK parliament to introduce, meaning UK parliamentary sovereignty is at all times retained and respected. This can be compared to an ultra vires declaration under devolution which would render an incompatible piece of secondary legislation null and void immediately.

4. In addition, it has been suggested that the European Court of Human Rights has developed “mission creep” expanding the European Convention on Human Rights into areas which it should not cover. What views do you have on this argument?

4.1 There are various different interpretations of this concept of “mission creep”. In order to understand the different interpretations it is important to place the ECHR in its historical context. The treaty was developed alongside an international process and the ECHR reflects part of the wider international framework. The international human rights framework encompasses civil, political, economic, social and cultural rights. As the ECHR progressed through the drafting process, in which the UK and in particular Scots lawyers were heavily involved, the drafters decided to focus predominantly on civil and political rights. This decision was predicated by an acknowledgement at both the international and regional level that it would be difficult to ensure that signatory states were in a position to automatically comply with the full human rights framework at the time of implementation. This meant that the ECHR was drafted as a tool for immediate use that would provide a robust framework with legal remedies, but with only limited cover of some rights. At the same time, there was also recognition that a wider scope of rights would need to be fulfilled in both the near and long term future. The international human rights framework was based on the principle of indivisibility. This meant that civil and political rights were dependent

on the enjoyment of wider socio-economic and cultural rights and vice versa. When judges look at cases relating to issues such as the right private and family life it is understandable therefore that jurisprudence will 'creep' into areas such as the right to adequate housing. Whilst the ECHR explicitly protects the former it does not protect the latter. However, we can see how jurisprudence might start to expand to reflect the original concept of indivisible rights. Having said this, because the ECHR is a limited document the jurisprudence cannot go very far beyond its limited scope. We can see this in relation to many of the rights that the ECHR does not protect such as rights relating to education, employment, health and standard of living. The recent report from the Equality and Human Rights Commission, *Is Britain Fairer?*², highlights that these are the areas in which the UK is falling behind in terms of international best practice.

5. What do you think the practical impact of the proposals will be in individual cases, for example as regards immigration policy, criminal law, or decisions made by public authorities?

5.1 It is not possible to answer this without further information on the substance of the proposals.

6. What impact do you think any changes will have on Scotland more generally? Would the Scottish Parliament have to consent to any changes under the Sewel Convention? Could the UK Government act without the consent of the Scottish Parliament?

6.1 Please see para.1.2 above.

7. Do you think it would be possible to have different human rights regimes within the United Kingdom

7.1 Different human rights regimes already exist within the UK – please see paras 2.2-3 above. This is not an ideal situation, further diverging regimes could become even more problematic, particularly for those who are most impacted by reduced access to human rights. This would probably impact those living in England who are not protected by an indigenous devolved human rights regime which offers a more robust form of protection than a weakened national UK regime.

8. What impact do you think the UK Government's proposals will have on the UK and Scotland at an EU and international level, for example within the Council of Europe?

8.1 Again it is difficult to answer this without a clearer understanding of the substance of the proposals. If the human rights regime is weakened and a less robust Bill of Rights replaces an already limited ECHR regime at a domestic level then we will likely see an increase in human rights cases being determined in Brussels and Strasbourg. The irony here is that the purpose of the current proposals would appear to be trying to 'reclaim' UK sovereignty in relation to human rights matters. The scrutiny of UK human rights compliance will not be exempt from the

² Is Britain Fairer, 30 October 2015, http://www.equalityhumanrights.com/sites/default/files/uploads/IBF/Final-reports/revised/EHRC_IBF_MainReport_acc.pdf

ECHR or EU regional observance unless the UK decides to actively leave the Council of Europe or European Union respectively. If the Bill of Rights process was to introduce a more robust framework that expanded the protection of human rights and facilitated effective remedies then it is likely that less cases would be deemed admissible, or indeed be required to be pursued, at the ECtHR or CJEU. A Bill of Rights that created a robust constitutional framework for the protection human rights (ie a system that improves on the HRA framework) would set the UK up as an example of best practice at the international level. On the other hand, a system that undermines, reduces or reneges on international legal standards will undermine the credibility of the UK as a leader in relation to human rights and equality at both the European and international level.

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