

Human Rights Act Repeal and Devolution: Points and Further Resources on Scotland and Northern Ireland

The proposed repeal of the Human Rights Act (HRA), and in particular its implications for devolution have attracted a lot of attention. The proposal for repeal [is set out in a Conservative Party proposal of October 2014](#), and mentioned in the [Conservative Party manifesto](#) on page 60. Not included in the Queen's speech, [these proposals appear to be somewhat on hold, reportedly due to a threatened back-bench rebellion](#).

A [report launched recently as a result of a legal expert seminar at the University of Edinburgh](#), on the legal implications of repeal of the HRA (see further below) provides the full chapter and verse on the issue. The concerns with the proposal had a significant devolution dimension, as set out below. What follows is an extended summary of these concerns with a list of more detailed and reasoned resources.

1. The Human Rights Act is Westminster legislation applying throughout the UK, if it is repealed in its entirety it will be repealed for the whole of the UK without more.
2. There are plans not just to repeal the Human Rights Act, but to replace it with a British Bill of Rights. It is unclear what this British Bill of Rights will look like and how it will be enforced; some of the devolution implications of repeal and replacement will only be apparent when there is more detail on the 'replacement' part of the proposal.
3. The Scotland Act 1998 gives powers to the Scottish Parliament, so long as they comply with the European Convention on Human Rights (ECHR) (among other things). The obligation to comply with the ECHR would not change with repeal of the Human Rights Act alone.
4. However, the Conservative Party proposals indicate not just an intention to repeal the Human Rights Act, but an intention to try to renegotiate the relationship between the UK and the Council of Europe by:

Seeking 'recognition that our approach is a legitimate way of applying the Convention'; and that 'In the event that we are unable to reach that agreement, the UK would be left with no alternative but to withdraw from the European Convention on Human Rights' ([pg 8](#)).

Withdrawal from the ECHR would affect the entire framework of devolution. At present all the devolved Acts require that legislation is compatible with the European Convention on Human Rights. While it would be technically possible to keep the ECHR as a framework for devolved government, even if the UK were not a member of the Council of Europe and were no longer bound by the ECHR, it would be very strange if a treaty that no longer bound the UK was the basis for the devolution settlement. Moreover, it could lead to chronic uncertainty: withdrawal from the ECHR and the ECtHRs supervision of rights, would be likely to make it unclear how 'compliance' with the ECHR was to be evaluated, and whether interpretations by the Strasbourg Courts were to be taken into account or not. For an example of how significant this could be in the devolved context, one merely needs to look at the differences

between the Scottish and Supreme Courts in significant rights cases, based in part on the way in which each differently 'read down' the ECtHR judgements as they apply the provisions of the Convention to criminal law practice in Scotland.

5. There are further devolved complications with repealing the Human Rights Act. Human rights are partially devolved in Scotland, where the devolved institutions have a power to promote rights. Therefore, any unilateral repeal of the Human Rights Act by Westminster would be likely to violate the Sewell Convention, whereby the Westminster government will 'not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'. Similar understandings apply through memoranda of understandings with each of the devolved legislatures in the UK. Some commentators have argued that the Sewell Convention is not affected ([see Elliot](#)). However, this is a fairly technical argument which depends on arguing that 'devolved matters' are not affected because it is the devolution legislation rather than the Human Rights Act which frames devolved competence. In my view, this view neglects that the Human Rights Act currently affects all devolved competences of Scottish Ministers, and public bodies, even in devolved areas. The argument also underestimates the extent to which human rights are devolved as well as reserved ([see Christopher Himsworth](#)). So, for example, the Act of the Scottish Parliament establishing the Scottish Human Rights Commission, which was an Act clearly within the Scottish Parliament's powers to pass, relies on the Human Rights Act.
6. Moreover, the proposal is not merely to repeal the Human Rights Act, but to replace it with a British Bill of Rights. The purpose of such a Bill of Rights would be very definitely to govern and restrain devolved powers and devolved executive action, and this even more clearly requires devolved consent under the Sewell Convention/ memoranda of understanding. Indeed, successive governments have opposed legislating on the Bill of Rights in Northern Ireland contemplated by the Agreement, because it did not have the support of the political parties in Northern Ireland, and cited the need for legislative consent to amend the Human Rights Act.
7. To further complicate matters, the Smith Commission proposals and draft clauses propose putting the Sewell Convention on a legislative footing, rather than merely relying on either a memorandum of understanding between the two governments, or the idea that there is a 'constitutional convention' that this is the case (<https://www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement>). So the issue raises the prospect of a very real clash between the Conservative Party's commitments to revise and reduce the role of the European Convention on Human Rights in UK Law, and its commitments to the Scottish electorate to implement 'the vow'. And, one could surmise, the real possibility of a clash between the Scottish and Westminster Parliament. This clash will not be helped by the fact that it is possible to have different interpretations as to the scope of the Sewell Convention (which was formulated politically rather than legally originally), and the question of what it means to legislate 'with regard to' devolved matters.

8. The repeal of the Human Rights Act raises even more problems in Northern Ireland, where a similar commitment not to legislate against the wishes of the NI Assembly (a complicated 'shared' Unionist and Nationalist Assembly) exists. As noted above, successive UK governments have viewed proposed amendment to the HRA to require a legislative consent motion, arguing that their hands are tied on human rights legislation if the devolved institutions do not agree. However, In Northern Ireland human rights are even further devolved than in Scotland, and the Human Rights Act is explicitly mentioned in the Northern Ireland Act 1998, meaning that it would have to be immediately amended if the Human Rights Act was repealed, with a number of consequential legal amendments in other devolved legislation.
9. In Northern Ireland, however, the commitment to the Human Rights Act mechanism was also put in detail into the Belfast or Good Friday Agreement which forms the constitutional DNA of the Northern Ireland Act 1998. The Agreement has also been found by courts to be in-effect, the 'constitutional underpinning' of the Northern Ireland Act.
10. 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.”

At the time it was negotiated the Labour proposals for the Human Rights Act were well developed and in train.

11. The UK government as part of the peace agreement also signed a [legally binding international treaty with the Republic of Ireland](#) government, where both committed to implement the Agreement commitments that required action on each government's part. The Republic of Ireland as part its implementation of Agreement and Treaty, changed its Constitution removing historic claims to jurisdiction over Northern Ireland, and incorporated the ECHR into its law, as part of the reciprocal agreement to 'match' human rights provisions in the UK (in part to assuage Unionist concerns).
12. Repealing the Human Rights Act unilaterally would put the UK in violation of the letter of the Good Friday Agreement, and its international treaty obligations to Ireland. This would have international reputational consequences and consequences for the reciprocity on which the Treaty depends. However, it would also be understood within Northern Ireland as a violation of both letter and spirit of the Belfast / Good Friday Agreement, and potentially a signal that the Government were no longer committed to the Agreement and that all its provisions were up for grabs. This Agreement also was subject to a referendum in both Northern Ireland and the Republic of Ireland with both parts having to consent for the Agreement to be implemented. The referendum enabled the Agreement to have widespread legitimacy, but more notably by taking place in both parts of the island of Ireland answered historic

Republican claims to be using violence to secure the 'right to self-determination' of the Irish people. It was also necessary to changing the Irish Constitution. So any unilateral move away from its commitments carries major democratic legitimacy and bad faith consequences, with deep and problematic historical resonances. In fact, the UK is normally very scrupulous about not unilaterally breaching its treaty commitments, it would therefore have to seek to withdraw from the Treaty (and by implication the Agreement), or get the Irish government to consent to the revision as in compliance with the treaty (both governments previously made an agreement that changes to Irish citizenship requirements that impacted on clauses negotiated in the Agreement did not breach the treaty). However, these changes are of a first order, and [the Irish government has expressed its 'dismay' at the proposals](#). It is perhaps worth noting here that the Irish government has also recently applied to the ECHR to reopen the famous Ireland v UK torture case – one of very few interstate cases in the entire system - in the light of papers suggesting that the UK failed to disclose material matters when the first case was taken, suggesting that it views UK compliance with the Convention as very important.

13. It should also be noted, that while the Human Rights Act is now described throughout Conservative documents as 'Labour's Human Rights Act', in fact there was an explicit 'bi-partisan' approach agreed across the two main parties to support the peace process and Agreement in Northern Ireland, which was and remains crucial to its success. That UK government support, rooted in the bi-partisan commitment, has up until now carried clearly through successive governments and changes in power. Repeal of the Human Rights Act in Northern Ireland would constitute a remarkable and unfortunate break with the bi-partisan approach.
14. There are other, more political, unfortunate consequences. Incorporation of the European Convention on Human Rights was a long-standing Unionist Party proposal, and one of the key human rights contributions that had cross-party support in Northern Ireland unlike many of the agreement's provisions which were agreed to in a complex set of 'trades' between parties. It has proved very difficult in Northern Ireland to get political consensus to modify the rights basis of the ECHR, even though the Agreement provided a mechanism to extend rights in Northern Ireland beyond it. So again, the proposal undercuts what is a fairly fragile area of 'common commitment to common values' between the parties, and may even undermine Unionism in holding to its affirmation of the ECHR. Northern Ireland needs consensus on 'difficult' issues such as human rights protections to be further built, rather than having the slivers of existing consensus fractured.
15. Recently, Theresa May's former special advisor wrote that [arguments of violation of the Belfast Agreement were ill-made](#). He suggested that the letter of the Belfast Agreement would be met, if the UK were to replace the Human Rights Act with their proposed British Bill of Rights because it would provide for the ECHR and for judicial enforcement. However, the proposal for replacement is in fact a proposal for a modified ECHR, divorced from the ECtHR's judgements – judgements which have been crucial to rights in Northern Ireland, notably the rights of those 'other' than the main religious groupings, notably gay, lesbian and transgender people, and women, who would have seen and be likely to see their equality rights, adoption

rights, reproductive rights removed by the Assembly without the ECHR. In fact, given that it took an ECHR case to legalise 'homosexuality' in Northern Ireland in 1981, repeal could herald a more radical backlash against gay rights that is already in train. The suggestion that the Agreement's letter will be observed is also rather undercut by the proposal that the UK withdraw from the European Convention. The letter of the agreement, even if it was satisfied, cannot be divorced from its underlying intention: such a proposal would not have found favour with the political parties negotiating the agreement then, and is unlikely to now. A commitment to incorporate 'The ECHR', is very different from a commitment to incorporate 'The ECHR but not as you or anyone else knows it'.

16. So to put it shortly, repeal of the Human Rights Act would require the consent of the devolved regions and the Republic of Ireland. Even if such consent was forthcoming, moving away from the Human Rights Act could be considered a breach of the Belfast or Good Friday Agreement by the 'people of the island of Ireland, North and South', who formally ratified the Agreement with its explicit commitment to the Human Rights Act mechanism, in a referendum, and could be similarly so seen by all those who voted for devolution in Scotland and Wales, who view rights as part of their common and devolved constitutional framework. Paradoxically, repeal of the Human Rights Act would also dismantle one of the increasingly few value-driven components of 'the union' that currently acts as its fast-eroding 'glue'.

Useful resources:

The report mentioned above, itself drawing from an expert seminar on the issue: [The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487

2010 (but still good and relevant) in depth report from JUSTICE, 'Devolution and Human Rights', at <http://justice.org.uk/devolution-human-rights/>

See also blogs / positions from:

Committee on the Administration of Justice. Tory Plan to Repeal Human Rights Act in NI would constitute flagrant breach of GFA, at <http://www.caj.org.uk/contents/1293>

Committee on the Administration of Justice. Fighting Repeal of the Human Rights Act, at <http://www.caj.org.uk/contents/1318>

Colm O'Conneide. Human Rights, Devolution and the Constrained Authority of the Westminster Parliament, at <http://ukconstitutionalaw.org/2013/03/04/colm-ocinneide-human-rights-devolution-and-the-constrained-authority-of-the-westminster-parliament/>

Aileen McHarg. Will Devolution Scupper Conservative Plans for a 'British' Bill of Rights?, at <http://ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights/>

Andrew Ticknell. Scotland and Human Rights Act Abolition, at <http://lallandspeatworrier.blogspot.co.uk/>

