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BRIEFING PAPER

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A British Bill of Rights?

Inside:

Contents

Summary

The Conservative Party went into the 2015 General Election with a manifesto commitment to "scrap the Human Rights Act and curtail the role of the European Court of Human Rights."

This note provides a brief introduction to the Human Rights Act 1998; the European Convention on Human Rights and the work of the European Court of Human Rights. It considers the impact of both the 1998 Act and the Convention on the sovereignty of the UK Parliament; examining the vexed question of prisoner voting; as well as wider moves to reform the Convention system during the 2010-15 Parliament. These included the establishment of a Commission on a Bill of Rights and the 'Brighton Declaration' which was agreed during the UK's Presidency of the Council of Europe in 2012.

The note ends by assessing the potential challenges to the repeal of the Human Rights Act, such as the impact on the devolution settlement and the consequences for the UK's continued membership of the European Convention on Human Rights and the Council of Europe. There has been strong opposition to any move to repeal the Human Rights Act and leave the Convention from the Scottish Government.

Moves to repeal the Human Rights Act have traditionally been resisted by the other major parties in the UK Parliament (the Labour Party, Liberal Democrats and the Scottish National Party all went into the General Election on a platform to retain the current human rights framework). By contrast, UKIP favoured repealing the Human Rights Act and withdrawing from the jurisdiction of the European Convention on Human Rights; and some members of the Democratic Unionist Party have spoken in favour of a United Kingdom Bill of Rights.

1. Background

1.1 Introduction to the European Convention on Human Rights

The European Convention on Human Rights ("the Convention") was drafted by the Council of Europe in Rome on 4 November 1950. Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms, it came into force on 3 September 1953. The adoption of the Convention by the Council of Europe was the first step in implementing the UN's *Universal Declaration of Human Rights* of 1948.

By ratifying the Convention, member states accept international legal obligations to guarantee certain civil and political rights to individuals within their jurisdiction. These rights are contained in a series of Articles of (and Protocols to) the Convention.

Very few of the Convention rights are expressed in absolute terms (although there is an absolute bar on torture and inhuman or degrading treatment and slavery under Articles 3 and 4 of the Convention respectively). The vast majority of rights are subject to exceptions and many judicial decisions in human rights cases are about the necessity and proportionality of the interference with individuals' fundamental rights.

1.2 The European Court of Human Rights

The European Court of Human Rights is an international court, based in Strasbourg. It was established in 1959 and it rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.

The Court was set up by the Council of Europe Member States themselves to ensure the observance of the obligations that they had undertaken. It seeks to ensure compliance with the Convention for 800 million Europeans in the 47 member States that have ratified the Convention.

The United Kingdom ratified the Convention in 1951. However, it was not until 1965 that the UK Government declared, by an option under then Article 25 of the Convention, that it would accept the jurisdiction of the European Court of Human Rights in relation to individual complaints. The case-law of the court was somewhat controversial from the start. Dr Ed Bates (a senior lecturer in human rights law) records that in the 1970s there was some discussion to withdraw the right of individual petition and from the jurisdiction of the Court. He noted that by 1974, there was talk that Britain would take these steps and fears were expressed that other major States parties could feel that they had little to lose by following the British precedent.[1] In the event,

[1] . Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press, 2010), p15

a number of members of the growing European Economic Community (a separate body from the Council of Europe) accepted the Convention and the jurisdiction of the Strasbourg Court.

The optional clause was debated in late 1980, amid charges that the Court was "interfering with the exercise of parliamentary sovereignty" and "limiting [the UK's] freedom of action", but in 1981 and subsequently it was accepted for five more years.

In 1994, during the negotiation of Protocol 11 to the Convention, the UK tried in vain to ensure that the right of individual petition would remain optional. The then Conservative Government thought the Court had too much power, and the possibility of non-renewal of individual petition would act as a check on its authority. However, there was little support for this view and Protocol 11 (making the right of individual petition compulsory) entered into force on 1 November 1998.[2] Following the acceptance of Protocol 11, a new permanent European Court of Human Rights was inaugurated in Strasbourg.

1.3 The Human Rights Act 1998

The *Human Rights Act 1998* was introduced by the Labour Government in order to "bring rights home" and initially enjoyed cross-party support during its passage through Parliament.[3] Essentially, it allows anyone in the UK to rely on rights contained in the Convention before the domestic courts.[4]

The Act came into force in the United Kingdom in October 2000. It is composed of a series of sections that give legal effect to the protections in the European Convention on Human Rights in UK law. All public bodies (such as courts, police, local governments, hospitals, publicly funded schools, and others) and other bodies carrying out public functions have to comply with the Convention rights.

The Human Rights Act has proved controversial; and while it is still supported by the Labour Party and the Liberal Democrats, the Conservative Party has long been committed to replacing it with alternative legislation. Prior to the 2010 General Election, the Conservative election manifesto promised to repeal the 1998 Act and introduce a UK Bill of Rights, in order to "protect our freedoms from state encroachment and encourage greater social responsibility." This promise was repeated in 2015.

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2 For a useful history of the Convention, see: Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press, 2010)

3 The Conservatives did not vote against the Bill on Second or Third Reading in the House of Lords (although that may have been due to the Salisbury Convention – see: footnote 30). At Second Reading in the House of Commons, there was a division on an amendment proposed by Sir Brian Mawhinney which expressed "deep concern the constitutional implications and deficiencies of the Human Rights Bill". See: HC Deb 16 February 1998 cc767-93

4 There are also some circumstances in which the Convention has extra-territorial effect. For example the Convention may apply to the actions of UK armed forces in a foreign State, outside the Council of Europe. See: e.g. Lord Dyson, *The Extraterritorial Application of the European Convention on Human Rights*, 30 January 2014

Concerns over both the *Human Rights Act*, and latterly the jurisdiction of the European Court of Human Rights itself, have a number of causes. The principal concerns of critics focus on two discrete issues: the impact of human rights laws on Parliamentary sovereignty; coupled with the fact that they believe that these laws have been abused by various litigants. These include foreign national prisoners who cannot be deported; the contentious issue of prisoner voting (discussed further below); and, various tensions when suspected terrorists rely on Convention rights.

Proponents of the human rights legislation often argue that the general public is not well informed about how human rights benefit them, since the press frequently highlight negative (and sometimes erroneous) stories.[5]

1.4 Parliamentary sovereignty and human rights

The classic summary of the constitutional principle of the sovereignty of Parliament was given by A. V. Dicey in 1885:

> The principle of Parliamentary sovereignty mean neither more nor less than this, namely that Parliament … has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

Parliamentary sovereignty is retained in the domestic sphere, since the *Human Rights Act 1998* does not grant the UK Courts the power to strike down primary legislation made by the Westminster Parliament. Instead the Act offers the carefully calibrated device of a "declaration of incompatibility" under section 4. Section 4(6) of the Act makes plain that such a declaration does not affect the validity, continuing operation or enforcement of the provision.

Section 3 of the Act also provides that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in such a way as to be compatible with the Convention rights. Yet the 1998 Act allows Parliament to pass laws that are incompatible with the Convention, subject to certain (largely political) constraints.[6]

However, the question then arises as to whether the UK Government is obliged, under international law, to address judgments of the European Court of Human Rights.

Article 46.1 of the European Convention on Human Rights provides:

> ARTICLE 46

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5 For some examples of some of these cases, see: e.g. Rights Info, *What Human Rights Do For Us* and *The 14 Worst Human Rights Myths* (last accessed 18 May 2015). See also: *The Guardian*, "The arguments against the Human Rights Act are coming. They will be false", 13 May 2015

6 See: e.g. Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2009); Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, Cambridge University Press, 2010) and Michael Gordon, *Parliamentary Sovereignty in the UK Constitution* (Hart, 2015)

> 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.

In the case of *Chester and McGeoch* [7] Lord Sumption gave what appeared to be a definitive summary of the UK's obligation under Article 46.1 of the Convention when he said that:

> It is an international obligation of the United Kingdom under article 46.1 of the Convention to abide by the decisions of the European Court of Human Rights in any case to which it is a party. This obligation is in terms absolute.

The issue was also recently considered by a Parliamentary Committee (the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill) which concluded that:

> Parliament remains sovereign, but that sovereignty resides in Parliament's power to withdraw from the Convention system; while we are part of that system we incur obligations that cannot be the subject of cherry picking.

However, in a speech delivered in December 2013, the former Lord Chief Justice, Lord Judge, distinguished between the international legal obligation under Article 46 and Parliament's ultimate sovereignty in our national constitutional arrangements, arguing:

> In our constitutional arrangements Parliament is sovereign. It can overrule, through the legislative process, any decision of our Supreme Court. In relation to the Strasbourg Court, and the Convention, is this principle negatived by our accession to the treaty obligation contained in Article 46? Do we, can we, accept the obligation … that when a UK case arises, our Parliament must take 'general measures in its domestic legal order to put an end' to the violations found by the European Court? Can that possibly be required if Parliament disagrees? For me the answer is, of course not.[8]

1.5 The vexed question of prisoner voting

This question has been highlighted by the debate on prisoner voting. In 2004, the Grand Chamber of the European Court of Human Rights determined, in *Hirst v United Kingdom (No. 2)*[9], that the UK Government had breached Article 3 to the First Protocol to the Convention by imposing a blanket ban on prisoners voting.

This finding has never been addressed substantively by the UK Government – although, as noted above, a Parliamentary Committee was established in 2013 to consider a variety of proposed responses. The Joint Committee on the Draft Voting Eligibility (Prisoners) Bill concluded, amongst other things, that:

> A refusal to implement the Court's judgment, which is binding under international law, would not only undermine the standing of the UK; it would also give succour to those states in the Council of Europe who have a poor record of protecting human

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7 *Chester and McGeoch v Secretary of State for Justice and another* [2013] UKSC 63
8 Lord Judge, *Constitutional Change: Unfinished Business*, 4 December 2013
9 *Hirst v United Kingdom (No. 2)* (2005) ECHR 681

> rights and who could regard the UK's action as setting a precedent for them to follow.

Accordingly, the Committee recommended that "the Government introduce a Bill at the start of the 2014-15 session, which should provide that all prisoners serving sentences of 12 months or less should be entitled to vote"; and moreover that "prisoners should be entitled to apply, up to 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released." The Government has not indicated whether it agrees with the Committee's recommendation; but no legislation was forthcoming in the 2010-15 Parliament. A report by the Joint Committee on Human Rights at the close of the 2010 Parliament recommended that a Bill should be introduced at the start of the 2015 Parliament to give effect to the Joint Committee's recommendation.[10]

1.6 The European Convention on Human Rights and the "living instrument" doctrine

A further issue that has been raised in relation to the Convention is the fact that the courts treat it as a "living instrument". According to some critics, the European Court of Human Rights has engaged in an unwarranted extension of the rights contained in the Convention under this living instrument doctrine. In a 1978 case, *Tyrer v United Kingdom*, the Strasbourg Court observed that:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.[11]

Hence, since the 1970s, the doctrine has been held by the Court to mean that the Convention should not be set in stone (and read in accordance with prevailing standards when its core provisions were accepted in the 1950s), but that it should keep pace with emerging common European standards. Dominic Raab, now a minister at the Ministry of Justice, previously argued that "[t]his is not just a question of treaty interpretation – it is judicial legislation, immune from democratic accountability."[12]

Proponents of the Convention note that the interpretation of the Convention as a living instrument has, in some cases, led to outcomes that have ultimately been welcomed by national parliaments, even if they were controversial at the time. An example of this is the rights of

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10 Joint Committee on Human Rights, *Human Rights Judgments*, Seventh Report Session 2014-15, HL 130/HC 1088

11 *Tyrer v UK* (1978) 2 EHRR 1, paragraph 31

12 *Daily Telegraph*, "What happens if we defy Europe? Nothing", 2 February 2011. See also, Dominic Raab, *The Assault on Liberty: What Went Wrong with Rights* (Fourth Estate, 2009), where he argued, *inter alia*, that: "This judicial coup represents a naked usurpation by a judicial body of the legislative power that properly belongs to elected law-makers. To put it in context, the legislative powers assumed by the Strasbourg Court are unique. There is no equivalent in the UK – where creative developments under the common law can always be reversed by Parliament

LGBT people.[13] A further interesting example is the case of *Young, James and Webster v United Kingdom*[14] where the European Court of Human Rights decided that "the article 11 right to freedom of association, definitely intended to protect the right to join a trade union, also protected the right not to join a trade union, a right which had been deliberately omitted from the Convention in 1950."[15]

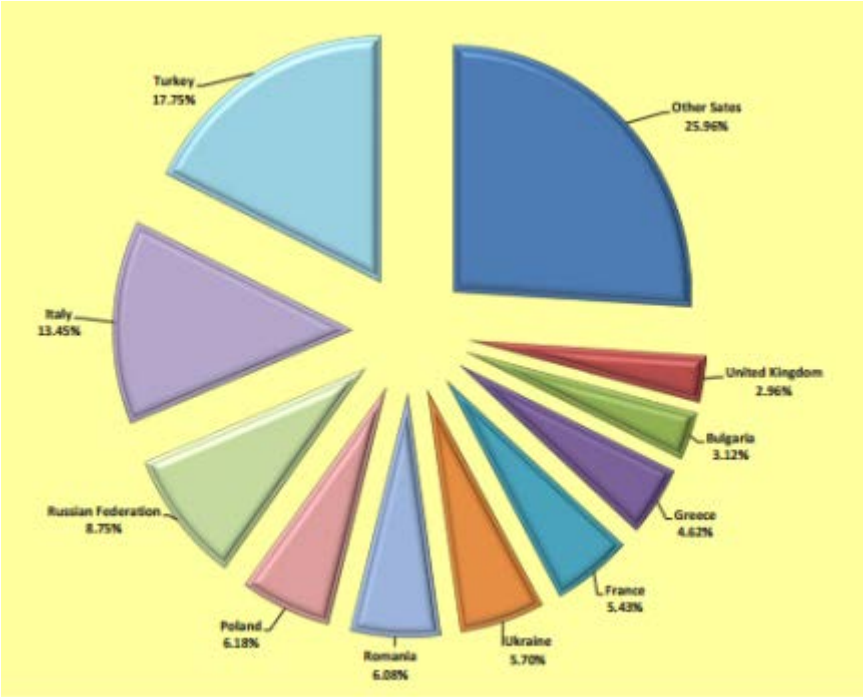
[13] See: e.g. *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (2000) 29 ECHR 548

[14] *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38

[15] See: Baroness Hale, *Beanstalk or living instrument? How tall can the European Convention on Human Rights grow?*, 16 June 2011

2. The UK at the European Court of Human Rights

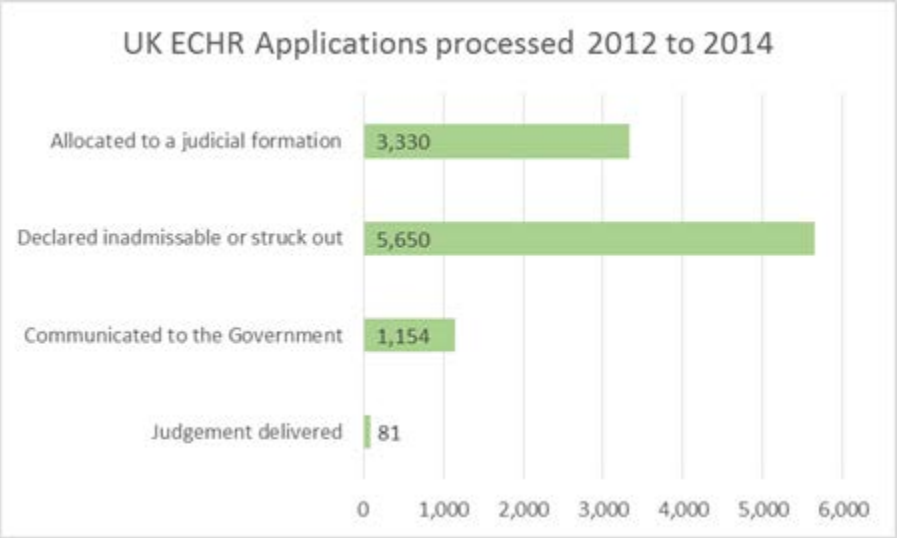
European Court of Human Rights judgments by Member state concerned, 1959-2013



Source: Overview 1959-2013 ECHR, February 2014.

Since the European Court of Human Rights was established in 1959, it has delivered around 17,000 judgments. Nearly half of these concerned five Member States (Turkey, Italy, the Russian Federation, Poland and Romania). As the chart above illustrates, from 1959 to 2013, (and in purely numerical terms) the UK was responsible for 2.96% of the total violations found by the Court (compared to Turkey which has been the worst offender, responsible for 17.75%).

Council of Europe figures also show that of the large number of applications to the European Court of Human Rights, only a tiny proportion result in a judgment against the UK. The charts below show the total number of UK applications, the number of applications declared admissible by the Court, the number declared inadmissible and the number of judgments for the years 2011 to 2013. (UK cases at the European Court of Human Rights is also the subject of Library Note 5611).



Source: ECHR Analysis of Statistics 2014

Applications to the European Court are allocated to a 'judicial formation', either as Single-Judge cases (likely to be declared inadmissible) or as cases to be considered by more than one Judge in Committee or a Chamber. Many of these are subsequently declared inadmissible or struck out. In the three years to 2014, 5,650 UK applications were declared inadmissible or struck out. Where an application is not considered inadmissible it is "communicated to the Government" and subsequently a judgment is delivered. The number of judgments is small relative to the number of applications. In the period 2012 to 2014, there were over 3,000 UK applications and 81 judgments. In 2014 the Court delivered 27 judgments on UK cases (concerning 1071 admissible applications), 5 of which found at least one violation of the European Convention.

3. The Coalition Government's approach to human rights

Following the 2010 election, the Conservatives were unable to persuade their coalition partners to introduce legislation to abolish the *Human Rights Act*. Instead, they agreed to establish a Commission on a Bill of Rights, which reported in December 2012. The Commission failed to reach a consensus and there were no significant developments towards a Bill of Rights in the 2010-15 Parliament following its report.[16]

The Government also sought to deal with some discrete concerns through domestic law (most notably through the *Immigration Act 2014*, which introduced new rules relating to foreign prisoners).

Finally, there were some relevant developments in the Convention system itself. During the UK's Presidency of the Council of Europe, these culminated in the Brighton Declaration, which built on earlier reforms. One particular concern at the Council of Europe was the increasing backlog of cases before the European Court of Human Rights. The Council of Europe acknowledged that this situation caused damage to the effectiveness and credibility of the Convention and its supervisory mechanism and represented a threat to the quality and the consistency of the case law and the authority of the Court.

Then Justice Secretary and Lord Chancellor, Ken Clarke, stated that the Brighton Declaration would bring a number of benefits, including:

- Amending the Convention to include the principles of subsidiarity and the margin of appreciation (this is about the appropriate role of the Strasbourg Court[17]);
- Amending the Convention to tighten the admissibility criteria – so that trivial cases could be thrown out and the Court could focus on more serious abuses;
- Reducing the time limit for claims from six months to four;
- Improving the selection process for judges;
- Setting out a roadmap for further reform.

Protocol 15, which seeks to implement Brighton reforms, was laid before Parliament on 28 October 2014. One issue that may be relevant to the question of Parliamentary sovereignty is the fact that Protocol 15

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16 For a more detailed discussion about the Coalition Government's approach to these issues, see: e.g. A. Horne and L. Maer, "From the Human Rights Act to a Bill of Rights?" in A. Horne, G. Drewry and D. Oliver, *Parliament and the Law* (Hart, 2013)

17 According to the Government (in its Explanatory Memorandum accompanying Protocol 15), subsidiarity is the principle that the national authorities (governments, parliaments and courts) have the primary responsibility for securing for everyone within their jurisdiction the Convention rights and freedoms, and for providing an effective remedy when those rights are violated. The margin of appreciation is the doctrine, underpinned by the principle of subsidiarity, according to which States enjoy a degree of latitude in deciding from a range of possible ways of giving effect to the Convention rights and freedoms, subject to the ultimate supervisory jurisdiction of the Strasbourg Court (see also: Alice Donald, *Who's afraid of Protocol 15? Not the Joint Committee on Human Rights*, UK Human Rights Blog, 4 December 2014). For a more detailed explanation of these terms see: House of Commons Library Note 6277, *The UK and Reform of the European Court of Human Rights*)

inserts references to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's preamble.[18]

Protocol 16 creates an optional system by which the highest national courts can seek advisory opinions from the European Court on the interpretation of the Convention.

The UK Government supports the former but does not currently intend to sign or ratify the latter. Instead, it proposes to observe "how the system operates in practice, having regard particularly to the effect on the workload of the Court, and to how the Court approaches the giving of opinions"[19] The Joint Committee on Human Rights has asked the Government to explain to Parliament its reasons for not currently wishing to sign or ratify Protocol 16.

3.1 The impact of reforms to the human rights framework

Recent reforms to the Court appear to have cut the significant backlog of cases. It was reported that on 1 July 2014, the Court had 84,515 pending applications – half as many as in 2011.[20]

In its report on Protocol 15 to the Convention, the Joint Committee on Human Rights considered the potential impact of the changes relating to the principle of subsidiarity and the margin of appreciation. It noted, amongst other things, that:

> We draw to Parliament's attention the fact that subsidiarity and the margin of appreciation, properly understood in the light of the Court's case-law, are not […] concerned with the primacy of national law over Convention law, or with demarcating national spheres of exclusive competence. The Convention system is subsidiary, not to the political will of the national authorities, but to the national system for safeguarding human rights. Where that national system is well developed, and has led to detailed and reasoned assessment of a law or policy by the national authorities in light of the Convention and the principles in the Court's case-law, the assessment of the national authorities is likely to be within the State's margin of appreciation (depending on the nature of the right).[21]

The reforms agreed at Brighton have clearly not satisfied some critics of the Convention system and have not dealt with all of their underlying concerns relating to Parliamentary sovereignty. And it is important to note that these have not only been raised by UK politicians. Questions have also been raised by senior UK judges, such as the former Law Lord, Lord Hoffmann (in his 2009 Judicial Studies Board Lecture, *The*

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18 See also: Joint Committee on Human Rights, *Protocol 15 to the European Convention on Human Rights*, Fourth Report of Session 2014–15, HL Paper 71/HC 837

19 Written Ministerial Statement, 28 October 2014

20 Alice Donald, *The remarkable shrinking backlog at the European Court of Human Rights*, UK Human Rights Blog, 1 October 2014

21 Joint Committee on Human Rights, *Protocol 15 to the European Convention on Human Rights*, Fourth Report of Session 2014–15, HL Paper 71/HC 837, para 3.11

Universality of Rights), and more recently, the former Lord Chief Justice, Lord Judge.

4. Moves towards a Bill of Rights

The idea of introducing a British Bill of Rights is not a new one. When he was Leader of the Opposition, in a speech in 2006, David Cameron proposed a modern British Bill of Rights. He argued that:

> … the time has now come for a new solution that protects liberties in this country that is home-grown and sensitive to Britain's legal inheritance that enables people to feel they have ownership of their rights and one which at the same time enables a British Home Secretary to strike a common-sense balance between civil liberties and the protection of public security.[22]

The July 2007 *Governance of Britain Green Paper*, published just days after Gordon Brown became Prime Minister, set out a wide range of proposals for constitutional reform under the headings of 'limiting the powers of the executive', 'making the executive more accountable' and 're-invigorating our democracy' before considering 'Britain's future: the citizen and the state'.[23] The Green Paper stated, amongst other things, that:

> A British Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations.[24]

In spite of these discussions there was no movement of any real significance on the issue in the 2005-10 Parliament. Discussion of the issue recommenced in the 2010 Parliament; through the deadlocked Commission for a Bill of Rights.[25] Given the disagreement on the issue between the coalition partners, many commentators saw the establishment of the Commission as a way of kicking the issue into the long grass.[26]

At the 2014 Conservative Party Conference, the Prime Minster, David Cameron recommitted the party to a manifesto pledge on a Bill of Rights. He said of the Convention that:

> When that charter [the ECHR] was written, in the aftermath of the Second World War, it set out the basic rights we should respect. But since then, interpretations of that charter have led to a whole lot of things that are frankly wrong. Rulings to stop us deporting suspected terrorists. The suggestion that you've got to apply the human rights convention even on the battle-fields of Helmand. And now – they want to give prisoners the vote. I'm sorry, I just don't agree. Our Parliament – the British Parliament – decided

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22 David Cameron, *Balancing freedom and security – A modern British Bill of Rights*, 26 June 2006

23 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007

24 For more information about discussions on a Bill of Rights which took place in the 2005-10 Parliament, see: e.g. House of Commons Library Note 4559, *Background to proposals for a British Bill of Rights and Duties*, 3 February 2009

25 For further details on this issues, see House of Lords Library Note, *Debate on 20 June: Report of the Commission on a Bill of Rights*, 17 June 2013

26 Mark Elliott, 'A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights', *University of Cambridge Faculty of Law Research Paper No 8/2013*, February 2013

> they shouldn't have that right. This is the country that wrote Magna Carta… the country that time and again has stood up for human rights whether liberating Europe from fascism or leading the charge today against sexual violence in war. Let me put this very clearly: We do not require instruction on this from judges in Strasbourg. So at long last, with a Conservative Government after the next election, this country will have a new British Bill of Rights to be passed in our Parliament rooted in our values … and as for Labour's Human Rights Act? We will scrap it, once and for all.

By contrast, prior to the General Election, then Shadow Justice Secretary, Sadiq Khan, announced that Labour remained committed to the Human Rights Act and at a fringe event at their party conference in 2014 said that he would be minded to introduce additional rights.

In an article in the Guardian, he argued that "walking away from the Convention and the European Court of Human Rights would be a betrayal of our history, and a betrayal of the British people's rights it protects."

Prior to the Prime Minister's speech, the former Attorney General, Dominic Grieve QC, also questioned whether attempts to limit the jurisdiction of the European Court of Human Rights might lead to the UK breaching its obligations under international law.

In October 2014, the Conservative Party published a document entitled *Protecting Human Rights in the UK*. In it, it set out its proposals for changing Britain's human rights laws.

It proposed, amongst other things, to repeal the Human Rights Act and replace it with a British Bill of Rights; ensure that rulings of the European Court of Human Rights were no longer binding on the UK Supreme Court (although it is worth noting that at present section 2 of the Human Rights Act only provides that the UK courts should "take into account" any ruling of the European Court of Human Rights). In addition, the European Court of Human Rights would "no longer [be] able to order a change in UK law" and would become "an advisory body only."

Many human rights lawyers and representatives of human rights NGOs (such as Liberty and JUSTICE) were very critical of these proposed reforms.[27] Dominic Grieve said the paper contained a "number of howlers" and that the proposed reforms were "unworkable" and would "damage the UK's international reputation."[28]

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[27] For example, see: A. Patrick, *Incoherent, incomplete and disrespectful: The Conservative plans for human rights*, UK Human Rights Blog, 3 October 2014 and Alison Young, *HRA Howlers: The Conservative Party and Reform of the Human Rights Act 1998*, UK Constitutional Law Blog, 7 October 2014

[28] *The Independent*, "Human Rights Act: Former Attorney General Dominic Grieve rubbishes 'unworkable' Tory plans to scrap ECHR", 3 October 2014; *The Guardian*, "Kenneth Clarke lambasts Conservatives' human rights plan", 3 October 2014

5. The Conservative Party manifesto commitment

The Conservative Party manifesto published in 2015 gave a clear commitment to repealing the Human Rights Act. It promised to "scrap the Human Rights Act and curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain."

In a more detailed section, the manifesto said:

> We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws. 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.

It went on to say:

> We will scrap Labour's Human Rights Act and introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights. It will protect basic rights, like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society. But it will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society. Among other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation.

This can be contrasted with the position of Labour, whose manifesto had promised that the party would "stand up for citizens' individual rights, protecting the Human Rights Act and reforming, rather than walking away from, the European Court of Human Rights." Going into the 2015 election, the Liberal Democrat manifesto had also promised that the "Human Rights Act will remain"; whilst the Scottish National Party manifesto said:

> Given the central place of human rights in Scotland's constitutional settlement, and their importance at the heart of our politics, we will oppose scrapping the Human Rights Act or withdrawal from the European Convention on Human Rights.

6. Developments since May 2015

In the Queen's Speech,[29] the Government said they would bring forward proposals (rather than legislation, as had been expected) to replace the Human Rights Act with a British Bill of Rights.

In the debate on the Queen's speech in the Commons, on 27 May 2015, the Prime Minister said:

> Be in no doubt: we will be introducing legislation and legislating on this issue because I want these decisions made by British judges in British courts, not in Strasbourg.[30]

During a Westminster Hall debate on 30 June, Human Rights Minister Dominic Raab said that there would be a full consultation in this Session, and that although withdrawal from the European Convention on Human Rights was not the Government's objective, no option was off the table.[31]

The consultation paper was originally expected to be published in the autumn of 2015, however there is still no set date for publication.

On 8 November the Sunday Times published details of what it claimed was a leaked draft of the Government's plans. The article suggested that the UK would remain a member of the ECHR, but that judges will be told that they do not have to follow rulings of the ECtHR. It also claimed that soldiers and journalists would be given "greater protection from people using human rights law to sue for damages", and that the new law would apply only in Britain, to prevent actions against the military in relation to overseas operations.[32]

Justice Secretary Michael Gove wrote to Harriet Harman as chair of the JCHR on 27 November 2015 explaining that the proposed Bill of Rights will 'remain faithful to the basic principles of the Convention' whilst 'preventing abuse of the system', 'restoring common sense' to UK human rights laws and 'making clear where the balance should lie between Strasbourg and British courts'.[33]

Giving evidence to the House of Lords Constitution Committee on 2 December 2015, Mr Gove provided the following updates:

> There has already been some discussion, obviously, about whether there should be any revision of the Human Rights Act at all. In the last Parliament, the coalition Government did some broad, consultative work. The conclusion of those tasked with reviewing the human rights landscape was that there was a case for reform. While there was a spectrum of opinions, it was nevertheless the case that that review formed, in some respects, the constitutional equivalent of a Green Paper. It set out the question, "Should we change?", and it concluded that, yes, there is a case for change. Now that we have a majority Conservative Government we are,

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[29] Queen's Speech 2015, 27 May 2015, gov.uk [accessed 22 January 2016]
[30] HC Deb 27 May 2015, c52
[31] HC Deb 30 June 2015, c 406WH
[32] Human Rights law to be axed, *Sunday Times*, 8 November 2015
[33] Letter from Rt Hon Michael Gove, Lord Chancellor and Secretary of State for Justice 271115

> within government, seeking to develop a set of proposals that will, outside government, command as much consensus as possible, because we agree with you that, when you are thinking of significant constitutional changes, no part of the United Kingdom should be allowed a disproportionate say or a veto, but it is absolutely vital that we consult as widely as possible. In that regard, we want to bring forward a consultation paper. At the moment, we have a consultation document that is being shared with colleagues within government so that they have an opportunity to refine it and contribute to its eventual formation. Once individual conversations with individual members of the Government, particularly the Home Secretary, the Foreign Secretary, the Defence Secretary and the Secretaries of State for territorial departments, have been concluded, we would take it through Cabinet Committee and Cabinet and then we would publish that consultation document. The consultation document will contain a series of open-ended questions, the aim being to secure the broadest possible consensus behind whatever change is considered desirable.

He further explained that the Prime Minister had asked him to consider whether the Bill should be used to create a "constitutional longstop" similar to the German Constitutional Court. This would enable a body, such as the Supreme Court, to say in certain circumstances that a ruling of the European Court of Justice was in conflict with the constitution.[34] This, and other difficult constitutional questions, were the reason for the delay in publishing the consultation paper, he explained.

Michael Gove gave evidence to the House of Lords EU Justice Sub-committee in February 2016, in which he suggested that section 2 of the Human Rights Act (which requires courts to take account of decisions of the ECtHR) might "put the balance rather too heavily in Strasbourg's court",[35] and therefore might need to be amended.

He also gave some indication of the aims of the substance of the proposals:

> One is when British troops operate abroad. There has been a widespread debate over months now, which has heightened particularly over the past few weeks, about whether the way in which room for troops to operate effectively in a conflict zone has been constrained overmuch by a variety of laws and treaties. One question—it is an open question—is whether reform of the Human Rights Act could clear up some of that concern in order to ensure that our soldiers stand on firm legal ground while of course still being subject to appropriate legal sanctions. That is one area. One thing that has been mooted, although we will have to wait for the consultation paper, is that there might be a derogation when British troops are engaged in conflict in the same way as France derogated from the ECHR to create a stage of emergency in the aftermath of the Bataclan atrocity.
>
> Separate to that are what I might call glosses that could be put on the rights that are capable of being balanced. Some of the rights are absolute. Others are of course balanced by the courts, and different courts in different countries might balance them in different ways.

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[34] House of Lords Constitution Committee, Evidence Session No. 1, 2 December 2015
[35] HL Select Committee on the European Union Justice Sub Committee, 2 February 2016, Evidence Session no 8

> To take another case in point, I think it is probably accepted that in Britain we place slightly more emphasis on freedom of expression and slightly less emphasis on privacy rights than in continental jurisdictions. We have seen that in some data protection cases, for example. It might be appropriate for us to firm up and make clearer the importance of freedom of expression. That might include everything from better protecting journalists' sources—there has been an interesting argument about the Miranda case—to helping to ensure that some of the erosions of freedom of speech, about which not just the media but others are worried, can be fought back. Again, we will put forward in the consultation some propositions and ideas about how we might better protect freedom of speech, and of course we will pay very close attention to the responses that come not just from the media but from across the piece.[36]

In April 2016, the Home Secretary made a speech calling for the UK to withdraw from the ECHR, arguing that it:

> [C]an bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights.[37]

An urgent question was subsequently tabled by Alastair Carmichael seeking clarification of Government policy, to which the Attorney General responded:

> [T]his Government were elected with a mandate to reform and modernise the UK human rights framework: the 2015 Conservative party manifesto said that a Conservative Government would scrap the Human Rights Act and introduce a British Bill of Rights. As with all elements of our manifesto, we intend to meet that commitment in the course of this Parliament. Members will be aware that we have set out our intention to consult on the future of the UK's human rights framework both in this country and abroad, and that consultation will be published in due course. We will fully consult on our proposals before introducing legislation; in doing so, we will welcome constructive contributions from all parts of the House.
>
> The intention of reform is to protect human rights, to prevent the abuse of human rights law and to restore some common sense to the system. The Prime Minister has been clear throughout that we "rule out absolutely nothing in getting that done".
>
> Our preference, though, is to seek to achieve reforms while remaining members of the European convention. Our reforms will focus on the expansionist approach to human rights by the Strasbourg court and under the Human Rights Act, but although we want to remain part of the ECHR, we will not stay in at any cost. We have been clear that if we cannot achieve a satisfactory settlement within the ECHR, we may have no option but to consider withdrawal.[38]

Responding to an adjournment debate on the ECHR on 9 May 2016, Dominic Raab said:

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[36] Ibid
[37] Home Secretary's speech on the UK, EU and our place in the world, 25 April 201, gov.uk
[38] HC Deb 26 April 2016 c1289-90

> Our commitment will not falter or fail, but we need to restore some credibility to human rights, which many people in this country increasingly view as dirty words—an industry or bandwagon for lawyers, rather than a tradition to take pride in. We can do that by restoring common sense to the system. We are confident that we can deliver our common-sense reforms within the bounds and parameters of the European convention.

We have already sought and listened to views from practitioners, non-governmental organisations, academics and politicians right across the entire United Kingdom. We know there has been consistently strong public support for these measures. We will consult fully on our forthcoming proposals before introducing legislation, and I know that my hon. Friend the Member for Christchurch will, as ever, bring to bear his considerable expertise and experience at the Parliamentary Assembly of the Council of Europe as we proceed with the Bill in the House.[39]

[39] HC Deb 9 May 2016 c516

7. Potential hurdles to the repeal of the Human Rights Act

7.1 Introduction

Supporters of the Human Rights Act (and those who are concerned about the consequences of curtailing the role of the European Court of Human Rights) have pointed to a number of potential hurdles that could hinder efforts to change the human rights framework.[40] These include the fact that measures may not find support in the House of Lords (although the measure was included in the Conservative Party manifesto, and therefore should benefit from the Salisbury Convention[41], the manifesto did not include much detail so it has been suggested that opponents may well seek to amend any measures in the Lords). Given that the Human Rights Act has now been in force for over 15 years, questions would also arise as to the effect of repeal on the historic case law and the common law more generally.[42] The majority of concerns have focused on the impact of repeal on the devolution settlement: an issue which is discussed in further detail below.

7.2 The devolution settlement

The Human Rights Act is a key part of the UK's constitution. But in addition to the Act itself[43], the European Convention on Human Rights was also incorporated into the devolution settlement, via the devolution statutes.[44]

The Welsh Assembly Research Service has observed that:

> This dual system of human rights protection means that while the UK Parliament is free to repeal the HRA, this would not by itself

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[40] See: e.g. Jack of Kent Blog, *The Seven Hurdles for Repeal of the Human Rights Act*, 15 May 2015

[41] The Salisbury Convention was considered by a Joint Committee in 2006. Its report provided a definition of the Convention: "In the House of Lords: A manifesto Bill is accorded a Second Reading; a manifesto Bill is not subject to 'wrecking amendments' which change the Government's manifesto intention as proposed in the Bill; and a manifesto Bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the Bill or any amendments the Lords may wish to propose." For more on this, see: e.g. Mark Elliot, *Replacing the Human Rights Act: The House of Lords, the Parliament Acts and the Salisbury Convention*, Public Law for Everyone Blog, 11 May 2015 and House of Commons Library, *The Parliament Acts*, Briefing papers SN675 (last accessed 18 May 2015)

[42] See: e.g. Mark Elliot, *Beyond the European Convention: Human Rights and the Common Law*, (2015) 68 Current Legal Problems

[43] Which is directly referenced in section 57(2) of the *Scotland Act 1998*; Section 24(1)(a) of the *Northern Ireland Act 1998*; and Section 81(1) of the *Government of Wales Act 2006*

[44] So, for example, under section 29(2)(d) of the *Scotland Act 1998* , Acts of the Scottish Parliament which are incompatible with Convention rights are "not law". Similarly, under section 57(2) of the Scotland Act, a member of the Scottish Government "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 …". There are similar (but not identical) provisions in the *Northern Ireland Act 1998* and the *Government of Wales Act 2006*. See: also Aileen McHarg, *Will devolution scupper Conservative plans for a "British" Bill of Rights?* UK Human Rights Blog, 2 October 2014;

> end the domestic incorporation of the ECHR in the devolved nations.
>
> While people in Scotland, Wales or Northern Ireland could no longer bring Convention-based actions against UK departments and other public bodies, nor argue for Convention-compatible interpretations of UK legislation, they would still be able to challenge primary or secondary legislation enacted by the devolved institutions or other acts of the devolved governments.
>
> If the UK Government wished to go further and withdraw from the ECHR altogether – as was suggested earlier this year by some Conservative politicians –this would require amendment of the devolution legislation as well. At this point, things become constitutionally interesting.[45]

The same note goes on to indicate that:

> In the case of the *Northern Ireland Act 1998*, the embedding of the Convention is reinforced by the Good Friday Agreement. Any attempt to remove references to the Convention could constitute a breach of an international treaty separate from the Convention itself.

Unless the Irish Government were to agree to a treaty change, the UK would remain obligated at the international level to "support, and where appropriate implement," the provisions of the Good Friday Agreement. These include, in paragraph 2 of sub-head Rights, Safeguards and Equality of Opportunity,

> 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.

It is also noteworthy that the Good Friday Agreement was approved in referendums in Ireland and Northern Ireland.[46]

After the Conservative Party conference in 2014, it was reported in the press that the proposed repeal of the Human Rights Act would not take effect in Scotland.[47] Subsequently, the Scottish Secretary was recorded as having said that:

> New legislation replaces existing legislation and therefore the new act will apply in Scotland.[48]

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45 Alys Thomas and Elisabeth Jones, *A "British Bill of Rights": implications for devolution*, In Brief (Blog of the National Assembly for Wales Research Service), 5 November 2014. For a more detailed discussion, see also: Christine Bell, *Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland*, Rights Northern Ireland Blog, 13 May 2015 and Mark Elliot, *Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights*, Public Law for Everyone Blog, 12 May 2015

46 The current legislative arrangements in Wales were also created as a result of their being approved in a referendum. They include reference to compatibility with Convention rights as a limit to competence.

47 *The Scotsman*, "Scotland exempt from Tories' Human Rights Act axe", 2 October 2014

48 *The Guardian*, "Scotland 'will not consent' to Tory plans to scrap Human Rights Act", 12 May 2015. See also: *The Times*, "SNP co-opts Tory rebels to save Human Rights Act", 13 May 2015

An article in the *Guardian* on 12 May 2015 suggested that the Scottish Government would resist any attempts to repeal the Human Rights Act.[49] The Scottish National Party issued a statement on 14 May 2015 that it would "fight attempts to scrap Human Rights Act."

Further issues could arise in respect of the Sewel Convention. This means that although the UK Parliament retains the authority to legislate on any issue, the UK Government proceeds in accordance with the convention that it will not normally invite Parliament to legislate with regard to devolved matters except with the agreement of the devolved legislature. Public lawyer, Dr Mark Elliot, has observed that:

> [T]he Sewel Convention is just that: a convention, not a law. (It has been proposed by the Smith Commission that the Convention should be recognised in statute, but […], it is not clear that this would fundamentally alter the status of the Convention — although it would give it added political gravitas.) The UK Government could therefore, without acting unlawfully, ignore the Sewel Convention. But however lawful that would be, it would be unconstitutional.[50]

A separate *Guardian* article reiterated the point made by the Welsh Assembly Research Service that repealing the Human Rights Act would be a breach of the Good Friday agreement. [51]

The situation in Northern Ireland is further complicated by the fact that the Northern Ireland Human Rights Commission (which was established in 1999 under the *Northern Ireland Act 1998*) was charged with giving advice to the Secretary of State for Northern Ireland about what should be in a Bill of Rights for Northern Ireland. It is notable that those who propose reform now usually refer to a 'British' rather than 'UK' Bill of Rights.

The Commission on a Bill of Rights had highlighted the potential for opposition from the devolved nations. It commented that it had been "surprised" by the "strong degree of opposition" that it had encountered to proposals to create a new Bill of Rights "particularly in Scotland but also in Wales and from some in Northern Ireland."[52] The Commission suggested that some critics thought a Bill of Rights was unnecessary, as there was no demand for it in their respective countries; whilst others argued that "this was no longer something which could be imposed by Westminster on the other countries of the UK."

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49 *The Guardian*, "Scotland 'will not consent' to Tory plans to scrap Human Rights Act", 12 May 2015

50 See: e.g. Mark Elliot, *Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights*, Public Law for Everyone Blog, 12 May 2015

51 *The Guardian*, "Scrapping Human Rights Act 'would breach Good Friday agreement", 12 May 2015. See also: *BBC Online*, "Human Rights Act: Gerry Adams criticises 'attack' on NI peace deal", 13 May 2015

52 The Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, December 2012, para 71

7.3 Continued membership of the European Convention on Human Rights and the Council of Europe

Questions have also been raised as to whether the UK could continue to be a member of the European Convention and the Council of Europe if the Government acted to make the European Court of Human Rights "an advisory body only", and established a special parliamentary procedure to consider whether to comply with European Court rulings.

Regarding the judgments of the Court as simply "advisory" would undermine the principle of human rights protection under the Convention, specifically Article 46.1 on the undertaking to "abide by the final judgment of the Court in any case to which they are parties".

The UK proposal directly contradicts Article 46 and acceptance of the UK position would require amendment of the Convention, to which all the other 46 Contracting Parties would have to agree. Failing that agreement, a unilateral decision not to abide by Court rulings would put the UK in breach of its international obligations.

The Government has not suggested withdrawing from the European Convention, but a decision not to respect European Court rulings would almost certainly lead to UK membership of the Convention and of the Council of Europe – for which accession to the Convention and the jurisdiction of its Court is now a condition - becoming untenable.

There are reputational factors to consider too. The UK was a founding member of the Council of Europe, played a significant role in drafting the Convention and has promoted human rights protection as essential to good governance. The former UK ECHR Judge, Sir Nicolas Bratza, thought that ignoring the European Court would hugely damage the UK's reputation.[53] He went on to say that such a move would set "a very bad example" and could potentially destroy the whole system of the European Convention. If the UK action encouraged other governments to adopt a similar approach, human rights protection under the Convention would become vulnerable to political stratagems and potential abuse by governments.[54]

7.4 The EU Charter of Rights

The impact of withdrawing from the Convention on Britain's continued membership of the European Union is far from clear.[55]

Moreover, in 2009, with the entry into force of the Treaty of Lisbon, the EU's own *Charter of Fundamental Rights* acquired equal legal status to

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53 Channel 4 News, 3 October 2014.

54 See: e.g. Joint Committee on Human Rights, *Human Rights Judgments*, Seventh Report Session 2014-15, HL 130/HC 1088, at para 3.23

55 Regarding EU membership, initially candidate states had to have a "firm intention" or a "declared willingness" to ratify the Convention. Under the *Copenhagen Criteria* for EU enlargement agreed in 1993, adherence to human rights principles is a condition of membership for aspiring members. However, it is not possible to say conclusively that continued membership of the EU requires the UK to remain a member of the Council of Europe or a signatory to the Convention

the EU Treaties themselves. The Charter includes European Convention rights and others with which EU Members States must act compatibly when acting within the scope of EU law.

The EU Charter refers to the European Convention as regards Charter rights which "correspond" to Convention rights (e.g. right to a private and family life and the prohibition on torture), and states that the relevant Charter rights have the same "meaning and scope" as their European Convention equivalents (Article 52 of Charter). The *Explanations* to the Charter Article 52 make clear that the case law of the European Court of Human Rights also applies in this context:

> The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union.

It would seem that a UK withdrawal or expulsion from the Convention, if membership were to become unsustainable, might leave UK courts in the position of not applying the Convention as part of UK law (as at present they are required to do under the *Human Rights Act*), but having nevertheless to apply it when implementing EU law.

In addition, Article 6 (2) of the *Treaty on European Union* (TEU) requires the EU to accede to the European Convention. The EU Court of Justice gave its Opinion on the validity of the draft agreement on the EU's accession to the Convention in December 2014, and found that the draft agreement was not compatible with EU law. Hence, for the time being at least, the UK will not have to deal with any further possible complications arising from EU accession.

7.5 Other international obligations

Finally, it is worth noting that irrespective of whether it repeals the Human Rights Act and/or remains a signatory to the European Convention on Human Rights, the United Kingdom is also bound by a number of other international legal obligations concerning human rights. These include the *International Covenant on Civil and Political Rights* and the *Convention relating to the Status of Refugees.* Some of these mirror and supplement Convention rights ratified by the UK. In some cases some of their provisions have been incorporated into UK domestic law (e.g. *United Nations Convention Against Torture*). Those that have been incorporated will continue to have legal effect.

8. Further Reading

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Stephen Dimelow and Alison Young, 'Common Sense' or Confusion: The Human Rights Act and the Conservative Party (The Constitution Society, May 2015)

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Joint Committee on Human Rights, A Bill of Rights for the UK?, Twenty–ninth Report of Session 2007–08, HL Paper 165-I/HC 150-I

BRIEFING PAPER
Number 7193, 19 May 2015