

Submission to the Scottish Parliament European and External Relations Committee
Human Rights Inquiry

Glasgow Human Rights Network

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On 4 November 2015, the Glasgow Human Rights Network convened a workshop to consider the questions raised in the Human Rights Inquiry terms of reference. It was attended by academics, members of civil society and individuals from public authorities. This submission to the Inquiry draws on salient points which emerged from the discussion. Although the exact content of the Westminster government's proposals for replacing the Human Rights Act (HRA) with a British Bill of Rights are not known, and thus it is difficult to respond with any certainty, the starting point for the discussion of proposals for a British Bill of Rights was the paper produced by the Conservative Party in 2014 entitled *Protecting Human Rights in the UK*.¹

There was a general view that there is no need to replace the Human Rights Act, which incorporates key protections from the European Convention on Human Rights (ECHR) into UK law. Any such move would be seen as regressive since it would inevitably mean undermining some key human rights protections as well as undermining the development and maintenance of a human rights culture more generally. Indeed, there was a perception that the proposals already have had a chilling effect on positive discussions of human rights. Further, the idea that the ECHR would become an 'advisory body' is of particular concern.

Much of discussion amongst politicians and in the media about the HRA has focused on 'unpopular rights,' such as those of prisoners, terror suspects, and asylum seekers. Yet, these issues cover only a small part of what the HRA addresses. At the same time, these 'unpopular rights' are exactly the ones which need to be upheld. If rights are only protected if they are popular, this undermines the entire concept of universal human rights which are applicable to everybody everywhere – not just when they are seen as convenient or popular. Further, the talk of responsibilities is particularly worrying since it seems to indicate that individuals might lose their human rights if they are perceived to have acted irresponsibly, which also undermines the idea of fundamental human rights. While individuals may be punished in ways which are entirely consistent with human rights for breaking the law,

¹ Conservative Party, 'Protecting Human Rights in the UK,'
https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf.

individuals do not lose their rights to due process and other human rights as a result of breaking the law – or indeed being suspected of breaking the law.

One criticism of the ECHR and the European Court of Human Rights has been a sense of ‘mission creep.’ That is, the ECHR and Court have gone beyond their mandate and intrude on areas where it was not intended. Further, there are charges that the ECHR and the Court undermine the sovereignty of the UK. In response, the following points were made:

- Rather than the Court doing too much, it may actually do too little to protect vulnerable people, such as in the area of asylum law.² So the charges of ‘mission creep’ are unfounded. Making unpopular decisions is not the same as ‘mission creep.’
- There are proposals to limit recourse to human rights mechanisms to the ‘most serious cases.’ It is unclear what this means, since violations of human rights are in and of themselves serious. If the government wants to reserve for itself decisions on which violations are serious enough, rather than addressing ‘mission creep,’ this undermines the concept of human rights itself. A fundamental role of human rights norms and laws is to restrain governments and prevent them from violating human rights. Repeal of the HRA could undermine this key function of human rights.
- Under the HRA, UK courts must take into account case law and interpret legislation in a way which is compatible with the Convention ‘so far as it is possible to do so.’ When this is not possible, superior courts can make a declaration of incompatibility, thus maintaining UK sovereignty. Yet, prisoners’ voting rights is the only area where the UK has defied the Court. Thus, perceived incompatibility between the ECHR/Court and UK law and perceived fundamental UK interests is clearly not widespread.
- The reality of sovereignty and the locus of political authority is more nuanced than the current discourse. As a result of continuing global and regional economic and political and environmental integration, notions of absolute sovereignty are outdated – if indeed they ever accurately described the state of political authority. The fact that decision-making in the UK is shared between Westminster, devolved authorities such as the Scottish Parliament, and European Union bodies problematises the absolute sovereignty that is proposed in the Conservative Party document. There are concerns that the proposals on the HRA are related to broader proposals to withdraw from, or significantly renegotiate the relationship with, the European Union. Further, the development of the idea of universal human rights has been a foundation of the modernity upon which the modern British state is based. And human rights more generally have become constitutive of political legitimacy.³

² Marie-Bénédicte Dembour, ‘Why the European Court of Human Rights is no friend to migrants,’ *The Conversation* (21 May 2015). <https://theconversation.com/why-the-european-court-of-human-rights-is-no-friend-to-migrants-42129>. The Court has also recently upheld secret anti-terror hearings in the UK, <http://www.theguardian.com/uk-news/2015/oct/20/european-court-human-rights-rules-secret-hearings-legal>.

³ Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (Basingstoke: Macmillan, 1998).

To move away from recognised human rights could undermine the legitimacy of the British state itself.

The Westminster government has indicated that it would not withdraw from the ECHR itself, but wants to be able to ignore the Court whenever it wants to. But what the ECHR means is what the Court says it means, so there is a contradiction.

If the HRA is repealed and a British Bill of Rights is brought in, this new legislation would apply to the entire UK - Scotland would not be exempt. ECHR rights might still constrain the exercise of devolved powers, but protection of human rights in relation to reserved matters would be reduced. There would need to be some technical amendments to the Scotland Act 1998. Overall, there could be unequal enjoyment of rights across different parts of the UK.

If the HRA is repealed, there would be significant effects on the UK's international standing. Signing up to the ECHR is a requirement of European Union membership. Even if the UK did not formally withdraw from the ECHR, questions would still be raised about its adherence to the ECHR and thus its position *vis a vis* the EU. Further, as noted, recognition and protection of human rights has become a constitutive element of perceived state legitimacy. Any indication that the UK was retreating from human rights standards and obligations would alter international perceptions of the UK. More fundamentally, a major element of its international identity is related to human rights, and it draws on human rights in its exercise of soft power. The UK has played a fundamental role in developing and advancing human rights norms globally. It portrays itself internationally as a human rights protecting and supporting state and routinely advocates for human rights internationally and criticises other countries' human rights record. Indeed, every year the UK government produces a Human Rights and Democracy Report,⁴ which assesses the state of human rights around the world. The UK's efforts to advance human rights internationally could be affected by any perceived rollback of human rights in the UK, and be seen as hypocritical. Concern has already been raised by the UN High Commissioner for Human Rights, Prince Zeid Ra'ad Al Hussein, about plans to repeal the HRA, stating that 'This proposal may have a very significant impact on access to remedy for victims of human rights violations within the jurisdiction of the UK.'⁵ Prince Hussein went on to argue that:

If Britain – a key member of the human rights council, a founding member of the UN and a privileged, permanent member of the security council – is considering a move that will potentially weaken a vital regional institution upholding fundamental human rights guarantees, this would be profoundly regrettable; damaging for victims and human rights protection; and contrary to this country's commendable history of global and regional engagement.

⁴ <https://www.gov.uk/government/collections/human-rights-and-democracy-reports>

⁵ Owen Bowcott, 'Senior UN official warns against UK plans to scrap Human Rights Act,' *The Guardian* (12 October 2015), <http://www.theguardian.com/law/2015/oct/12/un-official-warns-against-uk-plans-scrap-human-rights-act>.

Moreover, many other states, where civil society is currently threatened, may gleefully follow suit. Surely this is a legacy no British government would wish to inspire.

There could thus be a significant negative impact on human rights internationally if the UK is perceived as rolling back human rights protections. Indeed, Russia, which has by far the most cases lodged against it in the Court could use the UK's actions to withdraw or further undermine the possibility of Russian citizens using the Court to hold it to account for human rights violations.

In sum, the following points should be reiterated:

- The debate to date in Westminster and the media has been very toxic, undermining the development and maintenance of a human rights culture in the UK. Indeed, it leads to a perception that some people do not deserve rights.
- The intent behind the government's proposal is perceived as regressive and indicates a different trajectory than in Scotland, which is seen as more supportive of human rights. The lack of discussion about economic and social rights in Westminster is also seen as in contradiction to understandings of human rights in Scotland.
- There is little sense that the Human Rights Act and the European human rights machinery (which the UK helped to found) are broken to such an extent, and in such fundamental opposition to UK interests, that the UK must now rewrite domestic law and distance itself the European human rights regime.⁶
- There are constitutional issues and the possibility that the UK could be left with unequal human rights protections in different devolved jurisdictions.
- The European Court of Human Rights has always been a last resort. Relatively few British cases are taken to the Court, and few cases go against the UK government.
- There is little evidence of 'mission creep.'
- Human Rights are not just about taking cases to court. Indeed, most human rights issues are addressed in other ways. The Human Rights Act is as much as anything about creating a culture of human rights. Repealing the HRA would undermine that culture.
- UK judges would continue to human rights concepts in their judgments.
- Repeal of the HRA could undermine the UK's international standing and its ability to advocate for human rights around the world. There could also be damage specifically to Scotland's reputation, since Scotland has made a great effort to give a different, more positive message about human rights (even though it was agreed that Scotland could still make improvements in the area of human rights).

⁶ Indeed, the UK has recently 'won' a couple of important cases in the ECHR. Joshua Rozenberg, 'ECHR cases won by UK government show flexibility of human rights system,' *The Guardian* (17 December 2014), <http://www.theguardian.com/law/2014/dec/17/britain-withdraw-human-rights-convention>