

Repealing the Human Rights Act: Implications for the Belfast Agreement

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To cite this article: Maria Helen Murphy (2015) Repealing the Human Rights Act: Implications for the Belfast Agreement, King's Law Journal, 26:3, 335-347, DOI: [10.1080/09615768.2015.1104948](https://doi.org/10.1080/09615768.2015.1104948)

To link to this article: <https://doi.org/10.1080/09615768.2015.1104948>



Published online: 09 Dec 2015.



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Analysis

REPEALING THE HUMAN RIGHTS ACT: IMPLICATIONS FOR THE BELFAST AGREEMENT

Introduction

With the recently elected Conservative Government holding a majority in Parliament, the Party has reiterated its manifesto pledge to ‘scrap the Human Rights Act and curtail the role of the European Court of Human Rights’.¹ While the possibility of a United Kingdom withdrawal from the European Convention on Human Rights (ECHR) has been mooted in the past,² recent pledges of the Conservative Party have focused on repealing the instrument that incorporated the Convention into domestic law, the Human Rights Act 1998 (HRA 1998). Instead of returning to the situation that existed prior to incorporation,³ the Conservative Party has plans to introduce a new ‘British Bill of

¹ Conservative Party Manifesto, ‘Strong Leadership, a Clear Economic Plan, a Brighter, More Secure Future’ (2015) 75 <www.conservatives.com/manifesto> accessed 10 August 2015. The repeal of the Human Rights Act 1998 (HRA 1998) has been a part of Conservative Party policy for some time. Indeed, in 2006, the Conservative Party’s general programme of constitutional reform indicated the Party’s intention to replace the HRA 1998 with a ‘Modern Bill of Rights’ for Britain. These plans were of course hindered by the outcome of the 2010 General Election, which placed the Conservative Party in coalition with the HRA 1998 supporters, the Liberal Democrats. David Cameron, ‘Balancing Freedom and Security—A Modern British Bill of Rights’ (Speech to the Centre for Policy Studies, London, 26 June 2006). Helen Fenwick, ‘The Human Rights Act or a British Bill of Rights: Creating a Down-grading Recalibration of Rights against the Counter-terror Backdrop?’ [2012] *Public Law* 468.

² The Conservatives’ proposals for changing Britain’s human rights laws, ‘Protecting Human Rights in the UK’ (3 October 2014) <www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf> accessed 10 August 2015.

³ Regardless of domestic incorporation, the ECHR is binding on State Parties under international law. Article 1 obliges State Parties to secure ‘to everyone within their jurisdiction the rights and freedoms’ of the Convention. In spite of this international obligation, without incorporation, the Convention is not a binding instrument as a matter of domestic law. Under the HRA 1998, it is unlawful for public authorities to act in a manner that is incompatible with ECHR rights and UK courts are obliged to interpret legislation in a manner that is compatible with Convention rights in so far as is possible. The HRA 1998 enables individuals to seek redress for breaches of their rights in domestic courts. It has been pointed out that the domestic rights as currently stated in the HRA 1998 are ‘mere duplicates’ of those contained in the ECHR. See HRA 1998, s 1; see Dominic Grieve, ‘Attorney General: European Convention on Human Rights: Current Challenges’ (*Gov.uk*, 24 October 2010) <www.gov.uk/government/speeches/european-convention-on-human-rights-current-challenges> accessed 10 August 2015; and see also Lord Slynn

Rights' (BBoR). The Conservative Party has yet to provide a detailed description of its reform plans, but the Party has expressed a desire to 'remain faithful to the basic principles of human rights' which the UK 'signed up to' in the 'original' ECHR.⁴ The Manifesto goes on to state that the Bill would protect basic rights 'like the right to a fair trial, and the right to life'.⁵ Although there may be some potential for a BBoR to improve on the existing protection of certain 'uniquely British' rights, it has been pointed out that such a document is more likely to reduce the protection of existing rights.⁶

The repeal of the HRA 1998 and the introduction of a BBoR might be more challenging, both politically and legally, than the Party had originally envisioned, particularly in light of the increasingly devolved structure of UK governance. Notably, current convention requires the Westminster Parliament to obtain consent from the devolved legislatures in order to legislate in certain devolved matters. While the Sewel Convention states that the UK Parliament retains legislative authority on devolved issues of competence, it asserts that the UK Parliament would not 'normally legislate with regard to devolved matters except with the agreement of the devolved legislature'.⁷

and the 'mirror principle' in *R (Alconbury Devs Ltd) v Sec'y of State for the Env't Transp & the Regions* [2001] UKHL 23, [2003] 2 AC 295 [26]. Accordingly, domestic rights protection under the HRA 1998 is strongly linked with the European layer of protection. See Sarah Lambrecht, 'Bringing Rights More Home: Can a Home-Grown UK Bill of Rights Lessen the Influence of the European Court of Human Rights?' (2014) 15(3) *German Law Journal* 407, 414. It must be acknowledged, however, that as long as the UK remains party to the Convention, connections would remain. Although the primary duty of State Parties is to comply with judgments in cases to which they are a party, and it is uncertain whether judgments of the ECtHR have effect *erga omnes*, the manner of interpretation and application by the ECtHR of the Convention rights is generally regarded as authoritative. K Zweigert and H Kötz, *An Introduction to Comparative Law* (Oxford University Press 1998); Costas Paraskeva, *The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights (with a Case Study on Cyprus and Turkey)* (Intersentia 2010) 9; Georg Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2004–05) 40 *Texas International Law Journal* 359, 374; Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7(4) *International Journal of Constitutional Law* 619, 637.

4 Conservative Party Manifesto, 'Strong Leadership, a Clear Economic Plan, a Brighter, More Secure Future' (2015) 73 <www.conservatives.com/manifesto> accessed 10 August 2015. The most recent policy document released by the Conservative Party on this issue was the Conservatives' proposals for changing Britain's human rights laws, 'Protecting Human Rights in the UK' (3 October 2014) <www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf> accessed 10 August 2015.

5 Conservative Party Manifesto, 'Strong Leadership, a Clear Economic Plan, a Brighter, More Secure Future' (2015) 73 <www.conservatives.com/manifesto> accessed 10 August 2015.

6 Kanstantsin Dzehtsiarou and Tobias Lock (eds), 'The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights' (12 May 2015) 12, 19–20 <<http://ssrn.com/abstract=2605487>> accessed 10 August 2015.

7 Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee (October 2013); Chris McCorkindale, 'Echo Chamber: The 2015 General Election at Holyrood—a Word on Sewel Posted' (*Scottish Constitutional Futures Forum*, 13 May 2015) <www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/5594/Chris-McCorkindale-Echo-Chamber-the-2015-General-Election-at-Holyrood-a-word-on-Sewel.aspx> accessed 10 August 2015.

Dzehtsiarou and Lock have noted that the legal implications of the Sewel Convention in the human rights context are 'somewhat unclear', with some commentators going so far as to argue that any repeal of the HRA 1998 will require the consent of the devolved legislatures.⁸ Even if a 'wholesale repeal' of the HRA 1998 is possible without the consent of the devolved legislatures, the introduction of a new BBoR as replacement legislation would most likely require consent.⁹

In spite of this uncertainty, it is clear that significant constitutional obstacles will need to be overcome if the Conservative Party is to be successful in its pursuit of repeal of the HRA 1998.¹⁰ From the Irish perspective, it is particularly important to consider the impact a repeal of the HRA 1998 would have on the Belfast Agreement.¹¹ While the output from the negotiations that led to the Belfast Agreement can be distinguished as two separate agreements—the Multi-Party Agreement and the British-Irish Agreement—each agreement is dependent on the other.¹² While the Multi-Party Agreement was reached between the UK and Irish Governments with the majority of the political parties of Northern Ireland, the British-Irish Agreement was reached between the UK and Irish Governments alone. In order to appreciate the significance of the proposed repeal, the political and legal context at the time of HRA 1998 enactment must be considered.¹³

⁸ Kanstantsin Dzehtsiarou and Tobias Lock (eds), 'The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights' (12 May 2015) 12 <<http://ssrn.com/abstract=2605487>> accessed 10 August 2015.

⁹ Kanstantsin Dzehtsiarou and Tobias Lock (eds), 'The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights' (12 May 2015) 12 <<http://ssrn.com/abstract=2605487>> accessed 10 August 2015.

¹⁰ David Allen Green, 'Why Repealing the Human Rights Act Is Not Going to Be Easy' *Financial Times* (London, 12 May 2015) <<http://blogs.ft.com/david-allen-green/2015/05/12/why-repealing-the-human-rights-act-is-not-going-to-be-easy/>> accessed 10 August 2015; Aileen McHarg, 'Will Devolution Scupper Conservative Plans for a "British" Bill of Rights?' (*UK Human Rights Blog*, 2 October 2014) <ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights/> accessed 10 August 2015.

¹¹ Otherwise known as the Good Friday Agreement. David O'Sullivan, 'The Good Friday Agreement: A New Constitutional Settlement for Northern Ireland' (2000) 22 *Dublin University Law Journal* 112. In addition to the issue of human rights being a partially devolved competency, the Northern Ireland Act 1998 includes explicit reference to the HRA 1998.

¹² The Multi-Party Agreement is linked to the British-Irish Agreement directly in Article 2 of the British-Irish Agreement. In addition, the Multi-Party Agreement is annexed to the British-Irish Agreement and vice versa. David Byrne, 'An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics' (1998) 22(4) *Fordham International Law Journal* 1206, 1207, 1211, 1212.

¹³ Of course, the full implementation of the Belfast Agreement has faced difficulties from the beginning, which has led to numerous suspensions of the devolved assembly. While there is no 'express provision for suspension of institutions' in the Belfast Agreement, Morgan has pointed out that that does not render a suspension unlawful. In 2006, the St Andrews Agreement broke the political stalemate by laying out changes to the power-sharing institutions and human rights. Police powers had remained a reserved power due to the decision to postpone consideration of this issue during the Belfast Agreement negotiations. Police powers were put back on the table in the St Andrews Agreement negotiations, where such devolution was recommended. The 'Hillsborough Agreement', approved by the Northern Ireland Assembly in 2010 agreed on the date for transferring police powers from London to Belfast. This agreement was praised as constituting a significant step towards full implementation of the Belfast Agreement. Austen Morgan, 'Legal Case Against Suspension Falls Flat' *Irish Times* (Dublin, 10 March 2000)

Background to Incorporation

Most of the members of the Council of Europe operate as monist systems, where international law is considered automatically applicable.¹⁴ Ireland and the UK are notable exceptions amongst the Council of Europe members.¹⁵ Both are dualist nations that require either legislative or constitutional incorporation of a treaty before it becomes part of domestic law.¹⁶ In line with this, following ratification of the ECHR, Ireland and the UK had international law obligations towards the other signatory states, but the same obligations did not exist domestically. In spite of the UK and Ireland ratifying the ECHR in 1951 and 1953 respectively, the countries did not incorporate the Convention into domestic law until the enactment of the UK HRA 1998 and Ireland's European Convention on Human Rights Act (ECHR Act) in 2003.

The dualist nature of both systems explains the lack of immediate domestic effect, but it does not explain the reason for the delayed incorporation. For example, Article 29.3 of the Irish Constitution acknowledges Ireland's acceptance of 'the generally recognised principles of international law as its rule of conduct in its relations with other States' and a clear process is provided for treaty incorporation in Article 29. Accordingly, there must have been other explanations for the decision made by successive Irish and UK Governments to ignore the issue of incorporation. A primary reason for the Irish delay was the contention that the rights of the Convention were adequately protected under the Irish Constitution and through the robust tradition of judicial review.¹⁷

4. Committee A (Sovereign Matters) British-Irish Parliamentary Assembly, 'Report on the Implementation of the Good Friday/Belfast and St Andrews Agreements' (March 2014) 4 <www.britishirish.org/assets/Uploads/2013-Files/Report-into-the-Implementation-of-the-Good-Friday-Belfast-and-St-Andrews-Agreements-FINAL.pdf> accessed 10 August 2015; Kristin Archick, 'Northern Ireland: The Peace Process' (Congressional Research Service Report, 11 March 2015) 2 <www.fas.org/sgp/crs/row/RS21333.pdf> accessed 10 August 2015.

- 14 For example in France the Constitution of 1958 states in Article 55 that treaties 'prevail' over national law.
- 15 Other states, for example Belgium, Norway and Sweden are 'formally dualist', but have adopted monist approaches to the ECHR. While Germany is a dualist state with a complete system of domestic rights protection, the Federal Constitutional Court requires enforcement of Convention rights against statutes, including statutes passed subsequently. Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 683, 684, 685.
- 16 Article 15.2.1 of the Irish Constitution vests 'the sole and exclusive power of making laws for the State' in the Oireachtas. In addition, Article 29.6 states, 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.
- 17 Ireland's Fundamental Rights Provisions contained in Articles 40 to 44 of the Constitution include protection of equality before the law, protection of personal rights and the defence of the 'life, person, good name and property rights of every citizen', protection of the 'right to life', protection of freedom of speech, freedom of assembly, freedom of association, protection of family and home life, protection of the right to education, protection of private property and freedom of worship. The largely civil and political rights protected by the express provisions of the Constitution are further supplemented by the concept of unenumerated rights, supported by language in Article 40.3, which the courts have held to protect rights under natural law. Such rights have included the right to 'bodily integrity' and 'marital privacy'. In spite of the overlap between the two systems of protection, there are clear instances where the Strasbourg Court has ruled differently under the ECHR than the Irish Supreme Court has under the Constitution. For

The reasons for the delayed incorporation of the Convention in domestic UK law were similar. Although the UK does not have a written constitution in the manner of the Irish Constitution—with its explicit protection of certain fundamental rights—the protection of civil liberties is considered engrained in the UK legal culture. Politicians frequently refer to Magna Carta and the fact that British civil servants played a central role in the design of the ECHR as evidence of this. In spite of this history, the 1990s saw popular demand for ‘bringing rights home’ grow and the Labour Party ran with the issue of incorporation as part of its 1997 New Labour election platform.¹⁸ Provision is made in the Convention to enable individuals to take their grievances to Strasbourg once they have exhausted domestic remedies; however, this is a time-consuming and costly process and would exclude many from the opportunity to pursue their rights. The average Strasbourg case lasts many years from beginning to conclusion; the risk of delayed justice becoming denied justice is high. With the prospect of a lengthy legal battle, when even victory might be followed by significant delay in any domestic changes, the individual petition procedure could be seen as a daunting and potentially fruitless exercise, that only the most dedicated (and adequately funded) could undertake. Some form of incorporation is therefore desirable in order to bring these rights closer to home and more accessible to the individual.

Incorporation and the Belfast Agreement

With the agreement of most of the political parties in Northern Ireland,¹⁹ the Belfast Agreement was signed by the Governments of Ireland and the UK on 10 April 1998. The Belfast Agreement was subsequently endorsed in referenda held in both the North and South of Ireland.²⁰ Under the Belfast Agreement, the jurisdictional and governmental relations between Ireland and the UK were accepted by both parties and provision was made for a power-sharing executive, a democratically elected

example, in *Norris v Ireland*, the ECtHR ruled that the continued existence of Victorian laws criminalising the practice of homosexuality was a violation of the ECHR; the Irish Supreme Court had previously held that the law was not unconstitutional. *Norris v Ireland* (1988) 13 EHRR 186; *Norris v Attorney General* [1984] IR 36. See Katherine Lesch Bodnick, ‘Bringing Ireland up to Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (2002) 26(2) *Fordham International Law Journal* 396; Suzanne Egan, ‘Implementing the ECHR in Ireland: Past, Present and Future’ in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014) 1, 11.

¹⁸ Labour Party Manifesto, ‘New Labour because Britain Deserves Better’ (1997) <www.politicsresources.net/area/uk/man/lab97.htm> accessed 10 August 2015.

¹⁹ With the notable exception of the Democratic Unionist Party, the Belfast Agreement received support from the Ulster Unionist Party, the Social Democratic and Labour Party, Sinn Féin, the Alliance Party, the Progressive Unionist Party, the Northern Ireland Women’s Coalition, the Ulster Democratic Party and Labour. Austen Morgan, *The Belfast Agreement: A Practical Legal Analysis* (The Belfast Press 2000) 6.

²⁰ While the Northern Irish referendum asked the electorate to express approval or disapproval of the full text of the Agreement, the Irish referendum only asked the electorate to vote on the necessary constitutional amendment. An 81.1% turnout in the Northern Irish referendum resulted in a 71.12% ‘yes’ vote and a 56.3% turnout in the Irish referendum resulted in a 94.39% ‘yes’ vote. Austen Morgan, *The Belfast Agreement: A Practical Legal Analysis* (The Belfast Press 2000) 6–7.

Assembly and a cross-community voting scheme.²¹ In addition, the Belfast Agreement provided for a commitment to human rights and equality, including provisions relating to the release of political prisoners, reform of the criminal justice system, the decommissioning of paramilitary weapons and the enumeration of human rights.

As previously stated, the Belfast Agreement is comprised of two separate, but linked, documents—the Multi-Party Agreement²² and the British-Irish Agreement.²³ While the British-Irish Agreement is a binding treaty, recognised under international law, the legal status of the Multi-Party Agreement is less clear. While the two documents are partially connected through cross-annexation, a crucial section of the British-Irish Agreement states that the ‘two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement’.²⁴ This imposes an international law obligation on the UK and Irish Governments to support and, where appropriate, implement the Multi-Party Agreement. While the existence of an obligation is clear, the concrete requirements imposed by this obligation demand closer examination. The decision to utilise the treaty-making power and to connect the two documents indicated the willingness of the States to be bound to the Belfast Agreement and enhanced the credibility of the commitments made.²⁵

The Multi-Party Agreement clearly states that the British Government ‘will complete incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the Convention’.²⁶ The Multi-Party Agreement is primarily a political agreement, but the decision to link it with the British-Irish Agreement enhances its legal status. While certain aspects of the Belfast Agreement have been described as ‘imprecise and aspirational’, the commitment agreed to by the UK Government to incorporate the Convention is specific and concrete.²⁷ As a result of the specificity of the commitment to incorporate, combined with the obligation to implement the provisions of the Multi-Party Agreement where appropriate, it seems clear that the UK was obliged under international law to incorporate the ECHR into Northern Irish domestic law.²⁸ If the UK reversed incorporation of the ECHR or removed direct access to the courts for Convention breaches in Northern Ireland, the UK would be in breach of its international obligations.

The legal obligation to incorporate the Convention into Northern Irish law did not necessarily require incorporation of the ECHR throughout the rest of the UK. While

21 This required changes to the Irish Constitution, including removal of the assertion of Article 2 that ‘the national territory consists of the whole island of Ireland, its islands and the territorial seas’. The provisions on power-sharing and cross-community voting were designed to ensure that neither Unionists nor Nationalists dominated the Assembly.

22 Signed by both Governments and supporting political parties.

23 Signed solely by the British and Irish Governments.

24 British-Irish Agreement 1998, Art 2.

25 Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization* 421, 422.

26 Multi-Party Agreement 1998, 6.2.

27 *O’Neill and Quinn v Governor of Castlereagh Prison* [2004] IESC 7.

28 Vienna Convention on the Law of Treaties 1969, Art 26.

the application of the HRA 1998 throughout the UK enjoyed cross-party support in 1998, in the current climate, repeal of the HRA 1998 in England alone could be deemed a sensible compromise solution. Not only would such an option avoid the thorny devolution questions, it would also prevent the UK from breaching its international obligations under the Belfast Agreement. It has been argued that there is nothing 'inherently undesirable' about asymmetry of rights within a State; however, repealing the HRA 1998 in England alone would create a two-tiered system of protection with the potential for significant inequality in the areas of health, education and criminal justice.²⁹ Such differences would not be particularly conducive to a 'united' United Kingdom.³⁰ Aileen McHarg points out that the creation of new 'constitutional differences between the constituent parts of the UK' would be 'counter-productive'.³¹ If Westminster identifies a solution to the devolution difficulties and replaces the HRA 1998 with a BBOR in England, Wales and Scotland alone, tensions could rise as the omission of Northern Ireland could aggravate those in the Northern Irish Unionist community who identify as British.³²

Setting aside consideration of regional repeal of the HRA 1998 for now, it could also be argued that a new BBOR—passed into law simultaneously with the repeal of the HRA 1998 and applicable across the UK—could potentially be considered an adequate incorporation of the ECHR for the purposes of the Belfast Agreement.³³ In order to comply

29 While some differences already exist between the human rights regimes, the current differences are 'relatively minor' and tend to concern 'machinery rather than substance'. Robert Hazell and Bob Morris, 'Will Plans for a British Bill of Rights Be Reduced to a Bill for England Only?' (*The Constitution Unit*, 15 May 2015) <constitution-unit.com/2015/05/15/will-plans-for-a-british-bill-of-rights-be-reduced-to-a-bill-for-england-only/> accessed 10 August 2015; Anthony Speaight, 'Devolution Options' in Members of the Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us Volume 1* (2012) 243, 256 <webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> accessed 10 August 2015.

30 Such differences could be particularly disruptive in the current environment, where uncertainty remains about Scotland's future within the Union. 'Nicola Sturgeon: Vote to Leave the EU Could Lead to Second Scottish Independence Referendum' *The Telegraph* (London, 21 April 2015) <www.telegraph.co.uk/news/politics/SNP/11551484/Nicola-Sturgeon-Vote-to-leave-the-EU-could-lead-to-second-Scottish-independence-referendum.html> accessed 10 August 2015.

31 Aileen McHarg, 'Will Devolution Scupper Conservative Plans for a "British" Bill of Rights?' (*UK Human Rights Blog*, 2 October 2014) <ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights/> accessed 10 August 2015.

32 Justice, 'Devolution and Human Rights' (February 2010) <2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/Devolution-and-Human-Rights-8-February-20101.pdf> accessed 10 August 2015.

33 While the Agreement made some provision to allow for the introduction of a Northern Ireland Bill of Rights, it is made equally clear that such an instrument would be 'supplementary' to the ECHR; see Multi-Party Agreement, 6.4. While the introduction of such a Bill has been stalled, it is an area that rests primarily within the competence of the Northern Ireland Assembly and is not relevant to this discussion. Committee A (Sovereign Matters) British-Irish Parliamentary Assembly, 'Report on the Implementation of the Good Friday/Belfast and St Andrews Agreements' (March 2014) 11 <www.britishterms.org/assets/Uploads/2013-Files/Report-into-the-Implementation-of-the-Good-Friday-Belfast-and-St-Andrews-Agreements-FINAL.pdf> accessed 10 August 2015; Thus far, provision made for the consideration of a charter 'reflecting and endorsing agreed measures for the protection of fundamental rights for everyone in the island of Ireland' has remained unused. Multi-Party Agreement, 6.10.

with the text of the Belfast Agreement, however, a new Bill of Rights would have to facilitate direct access to the courts and access to remedies for breaches of the Convention. In light of the recent rhetoric, and with consideration of previous Conservative proposals, it is highly questionable whether the reform as currently posited would adequately provide for this access.³⁴ Of particular concern is the suggestion that a BBoR would ‘clarify’ the ECHR in certain ways that would conflict with the European Court of Human Rights (ECtHR).³⁵ Another potentially problematic proposal is the imposition of a new threshold that only permits access to courts for ‘serious’ cases. While domestic courts already dismiss trivial cases, a new and undefined (and potentially value-laden) threshold of ‘seriousness’ could undermine the commitment of the UK to facilitate direct access to the courts and to remedies for breaches of the Convention.

It is important to point out that international law makes provision for the renegotiation of treaties. By definition, however, such renegotiation should not be a unilateral project.³⁶ Gerald Fitzmaurice has written that there is an assumption that treaties are of ‘indefinite duration, and only terminable ... by mutual agreement on the part of all the parties’.³⁷ While some treaties build in provisions that facilitate withdrawal or renegotiation, such provisions are not essential. In fact, the Vienna Convention contains 13 articles that make provision for termination, denunciation, or withdrawal in the absence of treaty-specific options providing for such actions.³⁸ Article 59 of the Vienna Convention is particularly relevant as it states that a treaty ‘shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter’.³⁹ As renegotiation is more challenging in multilateral agreements (due to the number of parties involved), the bilateral nature of the British-Irish Agreement should make the possibility

34 The Conservatives’ proposals for changing Britain’s human rights laws, ‘Protecting Human Rights in the UK’ (3 October 2014) <www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf> accessed 10 August 2015.

35 For example, the 2014 Conservative Party policy document suggests that the BBoR would reject the ‘real risk test’ endorsed by the ECtHR when assessing deportation decisions. This would enable deportation of individuals who face real risks of torture. While the document represents such a change as ‘clarifying’, it would conflict with the jurisprudence of the ECtHR. The Conservatives’ proposals for changing Britain’s human rights laws, ‘Protecting Human Rights in the UK’ (3 October 2014) 6 <www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf> accessed 10 August 2015.

36 This position is supported by the Vienna Convention on the Law of Treaties which provides that treaties that make no specific provision for withdrawal should only be terminated where ‘(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty’. Vienna Convention on the Law of Treaties 1969, Art 56.

37 Fitzmaurice accepted that numerous exceptions exist to this assumption. Other scholars disagree with this assumption in general, Gerald Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) 2 *Yearbook of the International Law Commission* 16, 22; Humphrey Waldock, ‘Second Report on the Law of Treaties’ (1963) 2 *Yearbook of the International Law Commission* 36; Laurence Helfer, ‘Terminating Treaties’ in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 634, 637.

38 Laurence Helfer, ‘Terminating Treaties’ in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 634.

39 Laurence Helfer, ‘Terminating Treaties’ in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 634, 636.

of successful renegotiation more achievable. Of course, this general reasoning is undermined in the context of the British-Irish Agreement, which is inherently connected to the Multi-Party Agreement. As any renegotiation of the Multi-Party Agreement would be dependent on the cooperation of a diverse array of actors with different interests, the Conservative ambitions face considerable obstacles.

In addition to these formal points, however, the importance placed on commonality of protection across the island raises even more issues. Interestingly, the Irish Government did not commit to incorporating the ECHR in the Belfast Agreement, but it did commit to considering the issue of incorporation in light of its commitment to 'bring forward measures to strengthen and underpin the constitutional protection of human rights'.⁴⁰ The Belfast Agreement was clearly ambiguous regarding the necessity of Irish incorporation, merely requiring the Irish Government to 'further examine' the option of incorporation. Notwithstanding the ambiguity of the Irish commitment on the issue of incorporation, and in spite of the contention that the Irish Constitution adequately protected human rights, the Belfast Agreement was clearly a spur to action for the introduction of the Irish ECHR Act 2003. The eventual enactment of the ECHR Act 2003 was clearly influenced by the agreement to bring forward measures that would 'ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland'.⁴¹ The value of the Belfast Agreement was not in its contractual nature, the value was the framework it created for cooperation between communities, and cooperation between the British and Irish Governments. The continued success of these relationships is contingent on a workable amount of trust and the decision of the Irish Government to adopt a system analogous to that adopted in the UK and Northern Ireland was in line with the emphasis on equivalence in the negotiations.⁴² If Ireland had decided not to incorporate the treaty, the work of the negotiators might have been undermined. Human rights have always been a central part of the debate in Northern Ireland. It is therefore not surprising that incorporation was seen as an attractive

⁴⁰ Multi-Party Agreement 1998, 6.9.

⁴¹ Multi-Party Agreement 1998, 6.9.

⁴² James Friedberg, 'Ambiguity, Sovereignty, and Identity in Ireland: Peace and Transition' (2005) 20 *Ohio State Journal on Dispute Resolution* 113, 113. While the ECHR Act 2003 derived significant inspiration from the HRA 1998, the Irish Act offers weaker protection. Crucially, the scope of remedies available under the ECHR Act 2003 is limited to damages. This compares unfavourably with the HRA 1998 which provides a much broader scope of remedies, including injunctive and declaratory remedies. A breadth of remedies better ensures effective relief for claimants. Additionally, unlike under the HRA 1998, there is no duty on the Irish Government to declare new legislation Convention compatible or otherwise. Colm O'Cinnéide, *Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (Equality Commission for Northern Ireland and Equality Authority 2005) 40; Donncha O'Connell, 'Watched Kettles Boil (Slowly): The Impact of the ECHR Act 2003' in Ursula Kilkelly (ed), *ECHR and Irish Law* (Jordans 2008) 1. For further discussion of the ECHR Act 2003, see generally, Ursula Kilkelly (ed), *ECHR and Irish Law* (Jordans 2008); Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Thomson Reuters 2010).

fulfilment of its commitment by the Irish Government. Gerard Hogan recognised the symbolic importance of this when he said:

Incorporation at this level is important, since, in the context of the impending cross-border bodies and the North-South ministerial Council, it is important to have a neutral yardstick of fundamental rights protection. Irrespective of the legal virtues of the Constitution as compared with the ECHR, the latter provides a politically neutral template for sensitive cross-border dealings which [the] former could never hope to attain.⁴³

The incorporation of the ECHR Act 2003 signalled to members of the Unionist community that Ireland would not rely on any self-proclaimed superior protection of the Irish Constitution. More importantly, the incorporation represented equality for the entire island, which has been identified as a clear goal of the Belfast Agreement. Accordingly, the enactment of the ECHR Act 2003, even if not legally required, was a political imperative in order to fulfil the goals of the Belfast Agreement. While achieving equivalence of human rights protection is a legal requirement for the Irish and not the UK Government, in light of the broader purpose of the Belfast Agreement there are clear policy reasons for the UK to also pursue equivalence of rights in the North and South.⁴⁴ As pointed out by O’Cinnéide, without a parallel culture of rights protection, there is a risk of deepened ‘suspicion and tensions between the different communities’.⁴⁵ Furthermore, the fact that the UK committed to ‘complete’ incorporation could also be interpreted to tie the UK to the incorporation process that was already underway. A decision to wholly depart from the Bill that was under consideration at the time the Belfast Agreement was signed might be perceived as bad faith on behalf of the UK Government.⁴⁶

Assessing the Proposed Repeal

O’Connell has argued that incorporation of the ECHR into Irish domestic law was largely of ‘symbolic importance’ and that Ireland’s incorporation should be viewed not solely as the fulfilment of a loose commitment under the Belfast Agreement but

⁴³ Gerard Hogan, ‘Incorporation of the ECHR: Some Issues of Methodology and Process’ in Ursula Kilkelly (ed), *ECHR and Irish Law* (Jordans 2004) 16.

⁴⁴ Under the agreement, equivalence is concerned with ‘ensuring the same *degree and extent of effective protection* [in Ireland as there is in Northern Ireland], even if different *forms* of protection are occasionally utilised to achieve this aim’. Colm O’Cinnéide, *Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (Equality Commission for Northern Ireland and Equality Authority 2005) 34, 36.

⁴⁵ Colm O’Cinnéide, *Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (Equality Commission for Northern Ireland and Equality Authority 2005) 36.

⁴⁶ In May 1997, the Labour Party released a White Paper setting out how the HRA 1998 would incorporate the ECHR and in October 1997, the Bill was introduced to the House of Lords. By the time the Belfast Agreement was signed in April 1998, the Bill was significantly progressed, receiving Royal Assent in November 1998. Home Department, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997).

rather as the beginning of a 'more fruitful "dialogue" between international human rights obligations and municipal law'.⁴⁷ It is important to consider what the Conservative Party's commitment to a BBoR in lieu of the HRA 1998 is intended to represent. The 2015 Conservative Party Manifesto states that the BBoR will 'break the formal link' between British courts and the ECtHR.⁴⁸ Such action suggests a desire on behalf of the Conservative Party to reassert its sovereignty in the face of what is portrayed as the increasing influence of 'foreign values' on the UK administration of justice. A key example of how the Conservative Party intends to do this is by reducing the influence of 'problematic Strasbourg jurisprudence' by reaffirming the sovereignty of the UK Parliament and removing the requirement that domestic judges should take the jurisprudence of the ECtHR into account.⁴⁹ The desire to reduce European influence on UK affairs is clearly echoed in calls to renegotiate Britain's relationship with the European Union and the desire for a referendum on whether Britain should exit the EU.

Accordingly, while the Conservative Party extols the merits of a BBoR, the current conception appears to reflect a very particular perception of what constitutes 'Britishness'. While a 'British Bill of Rights' might be considered more 'home grown' and could potentially lessen the anti-rights sentiment that has taken hold in much of the British press, it also has the potential to alienate.⁵⁰ While the semantic exclusion of the Irish branch of the Union could be addressed with a title change, both the Scottish and Welsh Governments are strongly opposed to a repeal of the HRA 1998.⁵¹ The position in Northern Ireland is more complex, and while the Democratic Unionist Party has never aligned itself with the Belfast Agreement, three other parties in the Northern Irish Government—Sinn Féin, the Social Democratic and Labour Party, and the Alliance Party—have criticised the Conservative Party plans for repeal.⁵²

47 Donncha O'Connell, 'The ECHR Act 2003: A Critical Perspective' in Ursula Kilkelly (ed), *ECHR and Irish Law* (Jordans 2004) 1.

48 Conservative Party Manifesto, 'Strong Leadership, a Clear Economic Plan, a Brighter, More Secure Future' (2015) 75 <www.conservatives.com/manifesto> accessed 10 August 2015.

49 The Conservatives' proposals for changing Britain's human rights laws, 'Protecting Human Rights in the UK' (3 October 2014) 4 <www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf> accessed 10 August 2015.

50 Kanstantsin Dzehtsiarou and Tobias Lock (eds), 'The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights' (12 May 2015) 18 <<http://ssrn.com/abstract=2605487>> accessed 10 August 2015.

51 The Scottish Government, 'Human Rights Act Must Stay' (3 October 2014) <news.scotland.gov.uk/News/Human-Rights-Act-must-stay-10d4.aspx>; David Allen Green, 'Why Repealing the Human Rights Act Is Not Going to Be Easy' *Financial Times* (London, 12 May 2015) <<http://blogs.ft.com/david-allen-green/2015/05/12/why-repealing-the-human-rights-act-is-not-going-to-be-easy/>> accessed 10 August 2015; Libby Brooks, 'Scotland "Will Not Consent" to Tory Plans to Scrap Human Rights Act' *The Guardian* (London, 12 May 2015) <www.theguardian.com/law/2015/may/12/scottish-government-human-rights-act-conservatives> accessed 10 August 2015; David Deans, 'Welsh Government Will Do "Everything It Can" to Block Repeal of the Human Rights Act' (*Wales Online*, 18 May 2015) <www.walesonline.co.uk/news/wales-news/welsh-government-everything-can-block-9279496> accessed 10 August 2015.

52 Jeffrey Donaldson has reiterated that 'the DUP has long argued that the United Kingdom should have a Bill of Rights which recognises and respects the diversity of the devolved arrangements across the country' and has stated that the DUP will, 'as a minimum', support reform of the HRA 1998 in order to 'remove the

Crucially, from the international law perspective, the Irish Government has expressed misgivings about the repeal proposals. The Irish Minister for Foreign Affairs, Charlie Flanagan, has stated that the Irish Government '[a]s a guarantor of the Good Friday Agreement takes the responsibility to safeguard the Belfast Agreement very seriously'.⁵³ He has indicated the necessity to work closely with the UK Government, including the Northern Ireland Secretary Theresa Villiers, in order to 'ensure that the protection of human rights remains at the heart of civic life and politics and ongoing societal change in Northern Ireland'.⁵⁴

In light of the foregoing, if the Conservative Party wishes to continue with its plans to repeal, it is imperative that the UK engages in negotiations with the Irish Government. As the existing Belfast Agreement emerged in the context of cross-party and community cooperation and was subsequently supported by popular votes, such a renegotiation would not be straightforward. The negotiations that led to the Belfast Agreement lasted almost two years.⁵⁵ In addition to the UK and Irish Governments, eight Northern Irish political parties participated and the negotiations were conducted according to detailed rules of procedure. According to a former Irish Attorney General and negotiator, David Byrne, the complexity was the 'inevitable result' of the need for the negotiations to be 'as inclusive as possible'.⁵⁶ Accordingly, any renegotiation of the Belfast Agreement would be a challenging process that would most likely require the involvement of the original negotiating parties. In addition, any attempt to modify the

'right to family life' defence against deportation upon conviction for a serious criminal offence'. Jeffrey Donaldson, 'Human Rights Act Has Failed Victims' (12 May 2015) <www.mydup.com/news/article/donaldson-human-rights-act-has-failed-victims> accessed 10 August 2015. While Sinn Féin, the SDLP and the Alliance Party are strongly against a repeal of the Act, the UUP is interested in exploring the option of replacing the Act with a British Bill of Rights. Gerry Adams, 'Tory Assault on Good Friday Agreement' (12 May 2015) <www.sinnfein.ie/contents/34880> accessed 10 August 2015; Alban Maginness, 'Human Rights Act Repeal Would Spell Chaos for Northern Ireland' (13 May 2015) <www.sdlp.ie/news/2015/maginness-human-rights-act-repeal-would-spell-chaos-for-northern-ireland/> accessed 10 August 2015; Claire Cromie, 'David Cameron's Plans to Scrap the Human Rights Act Could Undermine Northern Ireland Peace, Warns Amnesty' *Belfast Telegraph* (Belfast, 14 May 2015) <www.belfasttelegraph.co.uk/news/northern-ireland/david-camersons-plans-to-scrap-the-human-rights-act-could-undermine-northern-ireland-peace-warns-amnesty-31222250.html> accessed 10 August 2015; Amanda Ferguson, 'Mike Nesbitt to Focus on Mental Health in Meeting with Cameron' *Irish Times* (Dublin, 17 May 2015) <www.irishtimes.com/news/politics/mike-nesbitt-to-focus-on-mental-health-in-meeting-with-cameron-1.2215608> accessed 10 August 2015.

⁵³ Ruadhán Mac Cormaic, 'Government Concern about UK Plan to Scrap Human Rights Act' *Irish Times* (Dublin, 14 May 2015) <www.irishtimes.com/news/politics/government-concern-about-uk-plan-to-scrap-human-rights-act-1.2211556> accessed 10 August 2015.

⁵⁴ Ruadhán Mac Cormaic, 'Government Concern about UK Plan to Scrap Human Rights Act' *Irish Times* (Dublin, 14 May 2015) <www.irishtimes.com/news/politics/government-concern-about-uk-plan-to-scrap-human-rights-act-1.2211556> accessed 10 August 2015.

⁵⁵ These two years were, of course, in addition to several years of preparatory work. Jennifer Todd, 'Thresholds of State Change: Changing British State Institutions and Practices in Northern Ireland after Direct Rule' (2014) 62(3) *Political Studies* 522, 530–31.

⁵⁶ David Byrne, 'An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics' (1998) 22(4) *Fordham International Law Journal* 1206, 1207.

aspects of the Belfast Agreement that dealt with the Convention would most likely require reconsideration of the entire Belfast Agreement. In order to explain the holistic approach that was adopted in the negotiation process, David Byrne points out that

attempts to resolve one issue, or cluster of issues, without reference to others, or to start from an assumption that all that was required was tinkering with present arrangements, had been tried, and had failed, in the past.⁵⁷

Taken as a whole, the Belfast Agreement is a comprehensive political agreement, and its full implementation 'is essential to the integrity and balance of the whole'.⁵⁸ While there have been persistent difficulties in implementation, any unilateral tinkering with the original understanding has the potential to upset current cooperation and set the peace process back severely.

A possible solution that could reconcile the UK's obligations under the British-Irish Agreement with the Conservative Party's desire to repeal the HRA 1998 would be to retain the HRA 1998 in Northern Ireland while repealing it in the rest of the UK. While the issue of consent under the Sewel Convention would remain regarding implementation in Scotland and Wales, it would resolve the international law question. While maintaining the HRA 1998 in Northern Ireland would avoid a breach of international law, such a solution would add additional complexity and create undesirable differences in human rights protection across the UK.⁵⁹ Full appreciation of the implications of repealing the HRA 1998 is essential before any further plans are made.

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⁵⁷ David Byrne, 'An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics' (1998) 22(4) *Fordham International Law Journal* 1206, 1208.

⁵⁸ Committee A (Sovereign Matters) British-Irish Parliamentary Assembly, 'Report on the Implementation of the Good Friday/Belfast and St Andrews Agreements' (March 2014) 2 <www.britishirish.org/assets/Uploads/2013-Files/Report-into-the-Implementation-of-the-Good-Friday-Belfast-and-St-Andrews-Agreements-FINAL.pdf> accessed 10 August 2015.

⁵⁹ Kanstantsin Dzehtsiarou and Tobias Lock (eds), 'The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights' (12 May 2015) 14 <<http://ssrn.com/abstract=2605487>> accessed 10 August 2015; Philippe Sands, 'This British Bill of Rights Could End the UK' *The Guardian* (London, 14 May 2015) <www.theguardian.com/commentisfree/2015/may/14/british-bill-rights-could-end-uk> accessed 10 August 2015.