



UCL INSIGHTS: RESEARCH BRIEFING

Human Rights after Brexit: Workshop report

A key initiative in the Conservative Party's 2015 manifesto was to repeal the Human Rights Act 1998. Part of the rationale for these plans was that it would help to 'break the formal link between the UK and Strasbourg', and allow UK courts to adjudicate human rights claims under a British Bill of Rights without reference to Strasbourg case law.¹ Following the political fallout from Brexit, whether or not these plans would go ahead was initially unclear. However, the new Secretary of State for Justice has since clarified that Government remains committed to this part of their manifesto.²

On 25 July 2016, a workshop was held at UCL to discuss these plans, and their implications in light of the UK's new political environment post-Brexit. This briefing summarises the key points of discussion, which were:

- the potential impact of Brexit on human rights in the UK
- the role of section 2 of the HRA and the effect its repeal might have on relations between the UK and the European Court of Human Rights

- the HRA and its relationship with Parliamentary sovereignty and judicial power
- the British Bill of Rights as an opportunity for losing and/or gaining rights.

Overview of panel discussions

Panel I – The Big Picture: Brexit, the ECHR and Devolution

This discussion focused on: how human rights in Britain may be affected by Brexit; the future of the UK's position as a signatory to the European Convention on Human Rights (ECHR); and issues of human rights and devolution.

The EU referendum was described as being part of a recent trend in the UK towards retrenchment of international law, a point initially raised by Angela Patrick (JUSTICE). This trend was described as stemming from an increasing distrust in international law, which has had implications not only for public perceptions of the EU but also in relation to the European Court of Human Rights.

Prof Conor Gearty (LSE), agreeing with a position taken by Dr Virginia Mantouvalou (UCL) in a recent UK Constitutional Law Blog post, argued that in the course of the UK actually extricating itself from the EU, it may be at risk of violating the ECHR rights of EU citizens currently living in the UK.³

Prof Sionaidh Douglas-Scott (QMUL) highlighted that whatever changes may be made in relation to the HRA and the ECHR, a severe loss of rights will be seen as a result of leaving the EU.⁴ This is because while a significant proportion of those rights overlap with the rights contained in the ECHR, there are rights uniquely protected by the EU, under the EU Charter of Fundamental Rights, which Brexit will cause the British people to lose.

Prof Rick Rawlings (UCL) argued that devolution and human rights was an issue that had not so far gained much attention in the policy debate surrounding human rights in Britain. One aspect which seemed to have been particularly absent in the debate, according to Prof Rawlings, was that in relation to implementing the Government's plans for the HRA, as well as to carry out Brexit, there should be some form of consent from the

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devolved nations. Prof Rawlings sought to emphasise that the HRA has been one of the key pieces of legislation underpinning devolution and the maturation of the devolved nations.

Prof Rawlings also raised the point that different areas of the UK have established different human rights cultures (for example Wales has introduced legal measures to provide additional protections to children's rights, which exist alongside the rights contained in the ECHR). With the devolved nations so bound up with UK human rights law as it currently exists (in terms of both their history and devolved legislation), many in the panel session agreed that any plans for altering UK human rights law should not be formed without their extensive consultation.

It was argued by Prof Graham Gee (University of Sheffield) that **there was a case for reform of the HRA, and that Brexit may have strengthened it**. The case for reform was argued to be that the HRA wrongly privileges judicial policy choices and weakens both robust parliamentary deliberation and sound judicial culture. Brexit may be said to have strengthened this case as it is likely to result in energy and resources currently devoted to EU litigation being directed to ECHR/HRA litigation, which could well lead to an even more active and wayward domestic judiciary. Prof Gee added that Brexit is also likely to result in any reform of the HRA being more meaningful; as any changes made could not be undercut by an expansive approach to the EU Charter for Fundamental Rights.

Anthony Speaight QC (4 Pump Court), in a later session, argued that **Brexit may help to make the UK's relationship with the ECHR even more secure**: as it will be the UK's most significant link with Europe – and may therefore be more fiercely protected.

Panel II – Breaking 'the Formal Link' with Strasbourg

This discussion focused on the role of section 2 of the HRA, which requires British judges to 'take into account' Strasbourg jurisprudence, and the effect that repealing this section might have for the relationship between the UK and Strasbourg.

Prof Jeff King (UCL) and Prof Colm O'Connell (UCL) presented preliminary findings from research they had recently carried out, with research assistance from Daniella Lock (UCL) and Stefan Theil (University of Cambridge), on this very issue. The research sought to explore the influence, if any, of domestic consideration of the ECHR by British courts, on Strasbourg decision-making in cases brought against the UK. The key preliminary findings were:

- there may be a link between the quality of domestic reasoning and the outcome in the case in Strasbourg
- where Convention principles are applied by the domestic courts, it is likely that Strasbourg may be less willing to rejudge the case (this seemed to be the case particularly in relation to proportionality assessments under article 8 or article 10 of the ECHR)
- the UK's recent increase in success rates in Strasbourg seem to be in some way linked to the quality of its domestic reasoning on the ECHR.

While these findings are tentative, and further analysis is needed, they do support the idea that national court

reasoning – and in particular the higher courts – can have a significant effect on Strasbourg decision-making. The findings also indicated that this influence may be variable.

Piers Gardner (Monkton Chambers) and others, in response to the research presentation, were in agreement that an additional analysis of inadmissibility decisions made by Strasbourg would be important when assessing the extent to which national court reasoning on the ECHR may be influential in Strasbourg. It was also pointed out, by Dr Tom Hickman (UCL, Blackstone Chambers), that extra caution must be taken into account when examining success-rates in Strasbourg, as there are many factors that may serve to explain the number of cases won or lost by the UK outside of the influence by UK court decision-making, such as developments in Strasbourg jurisprudence around the time.

Prof Brice Dickson (QUB) suggested, and Merris Amos (QMUL) later agreed, that **repeal of section 2 of the HRA might not in reality make a difference to the way that British judges reasoned in human rights cases**. Prof Conor Gearty (LSE) also raised this point, which was expanded upon by Dr Aileen Kavanagh (Oxford), who argued that in the case of repeal of section 2, it was likely that judges would rely on the common law to bring about the same effect as section 2. However, it was conversely argued, by Prof Colm O'Connell (UCL), that if section 2 was repealed, it could well make a difference – as judges are likely to take this as **a cue from Parliament to move away from taking into account Strasbourg jurisprudence**, which they would feel constitutionally bound to follow.

Panel III – The British Bill of Rights, Parliamentary Sovereignty and Judicial Power

This discussion explored the role of section 3 and section 4 of the HRA. The former gives judges the power to interpret the UK legislation in way that complies with the ECHR 'as far as it is possible to do so', while the latter allows them to make declarations of incompatibility in relation to legislation if it is not possible to interpret the legislation in line with the ECHR.

Arguments in favour of the repeal of section 3:

- section 3 may be **problematic from the perspective of Parliamentary sovereignty**, as it essentially allows judges to depart from the will of Parliament. This was argued by Prof Christopher Forsyth (Cambridge) who argued that section 3 has effectively become a 'Henry VII clause' which allows judges to amend Acts of Parliament in the same way that Ministers can. He further stated that the repeal of section 3 would allow the supremacy of Parliament to be asserted once more
- the functioning of section 3 has effectively deprived section 4 of its meaning, as **judges appear primarily inclined to alter the meaning of the UK legislation rather than to issue a declaration of incompatibility**. This was also argued by Prof Christopher Forsyth.

Arguments against the repeal of section 3:

- section 3 does support Parliament's will insofar as it was brought about by an Act of Parliament. This was argued by both Prof Paul Craig and Prof Jeff King, who pointed out that the significant power section 3 endows

judges was specifically foreseen by Parliament and the Government in the HRA white paper

- it allows judges to solve certain problems of non-human rights compliance without further action needed to be taken by Parliament. Furthermore, if Parliament did not like the way that legislation was reinterpreted by the judiciary, it could always pass fresh legislation to correct this interpretation. This was argued by Prof Gavin Phillipson (Durham)
- it allows judges to fulfil one of their important functions in making legislation consistent, as was argued by Prof George Letsas (UCL)

On the topic of section 4, it was argued by Dr Jan Van Zyl Smit (Bingham Centre for the Rule of Law) that merely having a capacity to issue a declaration of incompatibility is inadequate when it comes to dealing with legislation that has failed to comply with the ECHR. He argued that the introduction of the capacity to strike down legislation would be an important step towards ensuring that sufficiently robust remedies exist to deal with non-compliance with rights obligations. Prof David Feldman (Cambridge) argued that another limitation of section 4 is that it is currently used in relation to legislation, but not in relation to the guidance issued to public authorities responsible for complying with or implementing that legislation. This means that judges are often unable to make a declaration of incompatibility with regards to Government policy that may play a significant role in determining the form in which much of UK law is implemented. It was argued that this is regrettable from the perspective of ensuring that the UK is rights-compliant.

Section 6 of the HRA creates a duty for all public authorities to carry out their conduct in a way that is compliant with the ECHR. Prof David Feldman argued, and this point was echoed by Prof Conor Gearty (LSE), that this section is often overlooked in discussions of rights-compliance in the UK, and that many of the concerns that arise regarding judicial power in relation to the use of section 3 or section 4 might be avoided if more emphasis was placed on section 6's role. **If more of a rights culture could be embedded in public authorities, there would be less need for litigation and therefore for judges to be making decisions on human rights.**

Panel IV – A British Bill of Rights as an Opportunity for Losing and/or Gaining Rights

This discussion explored whether a British Bill of Rights might prove to be an opportunity for losing and/or gaining rights.

Arguments that a British Bill of Rights could ultimately serve as an opportunity to gain rights included:

- it could serve as a charter for constitutionalism, which would not only bolster the protection of rights that we already have, but also extend the number of rights that are protected by British courts (for example by introducing the right to jury trial). This was argued by Anthony Speaight QC (4 Pump Court), who emphasised that the introduction of a British Bill of Rights could be an occasion for big thinking on issues related to the British Constitution, such as those related to the Union or those related to judicial protections of rights
- it could be seen as the best way to make sure that the UK remains a signatory to the ECHR, and therefore the

best way to protect the rights that UK citizens already have. It could also help to identify ways that the rights of the ECHR might fit better with 'local' British culture. This was argued by Sir Jeffrey Jowell (Blackstone Chambers), who also agreed with Anthony Speaight QC that the Bill could provide a good opportunity for pooling ideas on the British Constitution.

Arguments that a British Bill of Rights could ultimately result in an overall loss of rights included:

- the draft proposals, as well as commentary made by the Conservatives, published so far suggest that the Bill will be used to take away rights. This was argued by Rachel Logan (Amnesty International) who pointed out that the Conservatives' proposals have so far focused on the British Bill of Rights as a means of reducing the scope and/or applicability of the right to family and private life under article 8 of the ECHR, and exempting the army from human rights obligations
- rights could also be lost if section 6 of the HRA is altered, as was argued by Gracie Bradley (British Institute of Human Rights). If the British Bill of Rights requires compliance with the ECHR only by core public authorities, rather than hybrid public authorities (such as private care homes and immigration detention centres) which are currently required to comply with the ECHR, then this would severely limit the Government's obligations to protect rights. It would allow for rights to be taken away in many contexts involving the provision of crucial services.

Endnotes

- ¹ The Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)
- ² Jon Stone, 'Plans to replace Human Rights Act with British Bill of Rights will go ahead, Justice Secretary confirms', The Independent, 22 August 2016 (<http://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-theresa-may-justice-secretary-liz-truss-a7204256.html>)
- ³ For further reading on the implications of Brexit for ECHR rights, please see V. Mantouvalou, 'EU Citizens as Bargaining Chips' U.K. Const. L. Blog (14 July 2016) (<https://ukconstitutionallaw.org/>)
- ⁴ For a discussion on some of the rights derived from the EU, and their likely status after Brexit, please see: S. Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?', U.K. Const. L. Blog (16 May 2016) (<https://ukconstitutionallaw.org/>)

Background

The workshop was organised by Prof Jeff King, Prof Colm O'Cinneide and Daniella Lock, and attended by parliamentarians, human rights experts, and prominent practitioners and academics of human rights law. The workshop was a UCL Laws event, organised in partnership with the Bingham Centre for the Rule of Law, the UCL Institute for Human Rights and the UK Constitutional Law Association. It was funded by a grant from UCL Public Policy, as well as an events grant provided by the UK Constitutional Law Association.

Workshop format

Introductory Remarks

Speakers: Prof Dame Hazel Genn; Prof Jeff King; Prof Colm O’Cinneide; Sebastian Payne; Dr Lawrence McNamara; Dr Virginia Mantouvalou; Prof Maurice Sunkin

Panel I – The Big Picture: Brexit, the ECHR and Devolution

Chair: Baroness Hamwee

Speakers: Prof Sionaidh Douglas-Scott; Prof Conor Gearty; Angela Patrick, Prof Graham Gee; Prof Paul Craig; Prof Rick Rawlings

Panel II – Breaking ‘the Formal Link’ with Strasbourg

Chair: Joshua Rozenberg

Speakers: Prof Jeff King and Prof Colm O’Cinneide; Sir Stephen Sedley; Prof Brice Dickson; Merris Amos

Panel III – The British Bill of Rights, Parliamentary Sovereignty and Judicial Power

Chair: Donna Davidson

Speakers: Prof Chris Forsyth; Prof Alison Young; Dr Aileen Kavanagh; Dr Jan Van Zyl Smit; Prof Gavin Phillipson

Panel IV – A British Bill of Rights as an Opportunity for Losing and/or Gaining Rights

Chair: Prof Aoife Nolan

Speakers: Anthony Speaight QC; Rachel Logan; Richard Clayton QC; Sir Jeffrey Jowell QC

Closing Remarks

Speakers: Prof Andrew Le Sueuer; Prof David Feldman

Attendees

Merris Amos (Queen Mary University of London)
Nicholas Bamforth (University of Oxford)
Dr Ed Bates (University of Leicester)
Dr Julinda Beqiraj (Bingham Centre for the Rule of Law)
Gracie Bradley (British Institute of Human Rights)
Richard Clayton QC (4 – 5 Gray’s Inn Square)
Prof Paul Craig (University of Oxford)
Donna Davidson (Joint Committee on Human Rights)
Prof Brice Dickson (Queen’s University Belfast)
Prof Sionaidh Douglas-Scott (Queen Mary University of London)
Prof David Feldman (University of Cambridge)
Prof Christopher Forsyth (University of Cambridge)
Prof Conor Gearty (London School of Economics)
Prof Graham Gee (University of Sheffield)
Stephen Grosz QC (Hon) (Bindmans LPP)
The Baroness Hamwee (Joint Committee on Human Rights)

Dr Tom Hickman (UCL)
Alex Horne (Joint Committee on Human Rights)
Dr Andrea Jarman (Bournemouth University)
Prof Sir Jeffrey Jowell KCMG QC (Blackstone Chambers)
Dr Aileen Kavanagh (University of Oxford)
Dr Jeff King (UCL)
Prof Andrew Le Sueur (University of Essex)
Swee Leng Harris (Bingham Centre for the Rule of Law)
Prof George Letsas (UCL)
Daniella Lock (UCL)
Rachel Logan (Amnesty International)
Dr Virginia Mantouvalou (UCL)
Dr Lawrence McNamara (Bingham Centre for the Rule of Law)
Lucy Moxham (Bingham Centre for the Rule of Law)
Prof Aoife Nolan (University of Nottingham)
Prof Colm O’Cinneide (UCL)
Prof Dawn Oliver (UCL)
Angela Patrick (JUSTICE)
Sebastian Payne (University of Kent)
Prof Gavin Phillipson (University of Durham)
Prof Richard Rawlings (UCL)
Joshua Rozenberg QC (hon)
The Rt Hon Sir Stephen Sedley (University of Oxford)
Dr Jan Van Zyl Smit (Bingham Centre for the Rule of Law)
Anthony Speaight QC (4 Pump Court)
Justine Stefanelli (Bingham Centre for the Rule of Law)
Prof Maurice Sunkin (University of Essex)
Stefan Theil (University of Cambridge)
Prof Stephen Tierney (University of Edinburgh)
Prof Alison Young (University of Oxford)

Ongoing research on relations between EU and UK courts

Prof King and Prof O’Cinneide’s research (see page 2) explores the influence, if any, of domestic consideration of the ECHR by British courts, on Strasbourg decision-making in cases brought against the UK. This was being assessed by empirical means, namely through semi-structured interviews, with both British and Strasbourg judges and British legal practitioners, as well as an in-depth case analysis of all Strasbourg judgments containing a finding of violation or non-violation from 2005 until the end of 2015. At the time of the workshop, seven interviews had been carried out with sitting or former Strasbourg judges and one interview had been carried out with a UK government counsel. A case analysis had been carried out in relation to all UK cases in Strasbourg containing a finding of non-violation from 2005–2015 and all UK cases in Strasbourg containing a finding of violation from 2010–2015.

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