

UCL POLICY BRIEFING – DECEMBER 2013

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A partnership between the UCL European Institute, UCL Public Policy, the UCL Institute for Human Rights and the UCL Centre for Law and Governance in Europe.

KEY FINDINGS

- the debate over the ECHR is often sensationalised;
- the concerns relating to the ECHR are more about improving it, rather than leaving it;
- there is a tension in UK constitutional law between sovereignty and human rights.

Human Rights and British Values:

The Role of the European Convention on Human Rights in the UK Today

SUMMARY

This brief discusses the potential of Britain leaving the European Convention on Human Rights (ECHR) and considers important aspects of the debate regarding the ECHR's benefits and drawbacks. It highlights in particular:

- the reasons for accepting the jurisdiction of the ECHR as an independent arbiter;
- the role of the UK in the development of the ECHR;
- the concerns regarding a transfer of sovereignty;
- the issues arising from the interpretation of the ECHR by the European Court of Human Rights;
- the problem of delays in the functioning of the ECHR system

Introduction

The European Convention on Human Rights (ECHR) was signed in 1950 by the then 12 member states of the Council of Europe, including the UK, and entered into force three years later. It now has 47 signatory states, with over 820 million citizens.

Recently, the ECHR and the judgments of its permanent court, the European Court of Human Rights (ECtHR), have attracted considerable – mostly negative – press in the UK. The Conservative party's 2010 manifesto, whilst not challenging the ECHR itself, was unsympathetic towards the Human Rights Act 1998 (HRA), which implements the Convention and places a duty on UK courts to apply it. On 18 March 2011 the Government announced to Parliament the establishment of a Commission on a Bill of Rights, which was asked to assess the benefits of a potential repeal of the HRA and its replacement with a UK Bill of Rights, as well as to advise the Government on its position in the Council of Europe. While the Commission did not reach consensus on the creation of such a Bill in its report, contentious issues such as prisoners' voting rights and the deportation of migrants convicted of criminal offences have continued to make headlines, leading to bold statements by the Prime Minister in September 2013 to the effect that Britain may end up leaving the ECHR.

“The concept of human rights is embedded in British DNA.”

Lord MacNally

Key issues

Why should the UK stay in the ECHR today, why do human rights matter and what do they signify?

The Convention was drafted when the spirit of ‘45 (i.e. a determination that there should be an international order preventing any recurrence of the horrors of WW2), was at its peak. This feeling stayed alive for a number of years but started to wane as younger generations become increasingly disconnected from this experience. While it is important not to lose sight of its drafting context, the Convention remains as relevant as ever in the UK today.

The importance of international human rights standards

Keeping the UK present on international platforms advances human rights both at home and abroad. By remaining subject to international scrutiny, the UK is challenged with regard to its human rights record, which urges it to keep human rights standards high and to strive to raise them even further, both within the UK and in its international operations. Additionally, keeping countries, such as the UK, committed to the protection of human rights within institutions for the protection of human rights internationally, can have a positive impact on nations which are now building a human rights order. Indeed, the UK’s compliance with international standards has been shown to influence the laws of other common law countries.

The role of the UK in the development of the ECHR

Often, discussions regarding the UK and the ECHR suggest that the Convention is something foreign to UK law. However, the UK has been instrumental in the drafting and development of the Convention. The ECHR was drafted largely under the supervision of Sir David Maxwell Fyfe; the UK was the first country to ratify the Convention in 1951; and Lord McNair, a British legal scholar, became the first President of the ECtHR in 1959. Still, British involvement in the Convention has not merely been a matter of historic coincidence. ECHR rights and freedoms are rooted as deeply in UK law as the Magna Carta and have been resolutely protected by courts in this country well before the entry into force of the Convention. The Convention and, in turn, the Human Rights Act 1998, codify values that have long imbued the British common law and enshrine “quintessentially British” ideals.

The continuing value of human rights

The concept of human rights has developed in great measure since the Convention was drafted. At the same time however, the application of human rights continues to raise important concerns (such as tensions between human rights and national security, or the application of human rights in a globalized context). So why do human rights still matter and what do they signify?

- Human rights are vital for political stability. In turn, political stability is vital for the functioning of market economies.
- The ECtHR’s interpretation of the Convention as a ‘living instrument’ ensures that its provisions develop in light of a modern context.
- There is a recognition that the concept of the rule of law is infused with ideas of human rights. An aspiration to comply with the rule of law goes hand-in-hand with human rights standards.
- Human rights are an important tool for peaceful coexistence in human communities.

The ECHR and the question of UK sovereignty

One of the most fundamental criticisms of the ECHR in the UK context today relates to the question of sovereignty: the Convention, and particularly the Court’s judgments, are often seen as unduly interfering with UK sovereignty and, more specifically, with the freedom of Parliament to take decisions regarding human rights standards in respect of sensitive political issues.

Does the ECHR undermine UK sovereignty?

It can be argued that any transfer of sovereignty to an international institution is unacceptable, because it necessarily interferes with the very concept of democratic representation, which is still effected at the national level, through the electoral process. The concept of Parliamentary sovereignty is perhaps the most fundamental principle of the UK constitutional order.

Parliamentary sovereignty means that UK courts do not have the power to strike down legislation duly enacted by Parliament, even if that legislation violates human rights (at most, they are entitled to make a non-binding declaration of incompatibility under section 4 of the Human Rights Act 1998). The fact that the ECtHR is able to rule that legislation duly enacted by Parliament violates human rights and therefore requires the UK to remedy that situation through its duty to execute judgments under Article 46 ECHR, is inconsistent with this principle. It restricts the Parliament’s freedom to legislate as it pleases while the UK remains a signatory to the Convention.

Conversely, it has been argued that Parliamentary sovereignty is not affected by Britain’s presence in the Convention system, to the extent that the UK Parliament remains in a position to withdraw from the Convention, in case it fundamentally disagrees with its interpretation.

Should UK sovereignty be restricted to protect human rights?

It may be necessary to restrict Parliamentary sovereignty in respect of human rights issues. While some national variations in the application of human rights can be accommodated, the very purpose of an international human rights order is to ensure that such variations are not in fact deviations from an internationally accepted set of human rights. It can be argued that discussing sovereignty in absolute terms when it comes to human rights is prejudicial to the concept of human rights. Parliaments voted by electoral majorities are not necessarily well placed to set human rights standards. Restricting the choices Parliament can make is therefore inherent in the creation of a binding set of human rights. Signing up to an international human rights convention therefore

must involve a transfer of sovereignty. That is the only way in which that system of human rights can produce any results.

The 'sovereignty' critique is extremely complex and the different stances regarding the proper reading of UK sovereignty in respect of the ECHR are hard to reconcile, which made it impossible to achieve consensus in the Bill of Rights Commission.

The problems with the interpretation and functioning of the ECHR

Many of the objections to the Convention system do not relate to the content of its provisions as such but, rather, to its application by the ECtHR and to the functioning of the system. In addition to the sovereignty critique, most of the concerns raised at the seminar related to the delays inherent in the individual petitions system and arguments regarding overreach. These concerns may encourage people to "think the unthinkable", as Mr Wheeler put it, i.e. that the UK should withdraw from the ECHR. Two important problems therefore need to be addressed:

The ECtHR's interpretation of the Convention

The reach of the judgments of the ECtHR regarding sensitive issues, such as prisoners' voting rights, deportations, life term imprisonment, and battlefield human rights, is a matter of contention.

- It is often felt that the Court's judgments in these fields have been excessively interventionist. While many of the judgments can be justified on their facts, it is disputable whether they always set a good record. Another critique is that the Court has failed to take account of the margin of appreciation doctrine by accommodating legitimate differences of opinion between the Member States in respect of the sensitive issues at stake (it is noteworthy that this issue will be discussed in further detail in March 2013, in a 'Britain and Europe' seminar delivered by the ECtHR's President, D. Spielmann). Furthermore, while Art 46 ECHR requires Member States to comply with the Court's judgments, the proliferation of judgments on these issues may lead to a de facto lack of enforcement on the part of Member States.

- On the other hand, it could be argued that independent oversight is needed precisely in these sensitive areas, in order to ensure a thorough application of human rights standards. Whether a court is going too far or not far enough is a subjective matter. It is also a matter that can be largely shaped by media sensationalism and the tone in which particular judgments are presented. Some of the questions of overreach could thus be better addressed by informed debate within Parliament.

**"The Convention's wording – if interpreted in a normal way – everyone would be happy with."
Stuart Wheeler**

The functioning of the Court and the delays inherent in the ECHR system

A series of concerns regarding the day-to-day functioning of the Court have been voiced, the most important being the excessive delays inherent in the ECHR system.

- The Court's 2011 statistics reveal that, in that year alone there were 64,500 new applications to the Court, adding to a backlog of 160,200 cases.
- In 2012 there were 65,150 new applications and a backlog 128,100 cases.
- While it is difficult to produce an accurate average of the length of proceedings before the Court, it is clear that proceedings before the ECtHR can take a very long time. In many cases, the time that elapses between allocation to a judicial formation and judgment can be as long as 4-5 years and the duration of the proceedings since the time of application can exceed 6 years.

One argument put forward was that the Court's current processing time is unacceptable from the applicants' perspective and that it should therefore be reduced to two years. The UK should enter into serious negotiations with its Council of Europe counterparts to achieve this. Altering the system of individual petitions, which result in an excessive number of inadmissible applications and are therefore conducive to inefficiency, would be helpful in this regard.

However, an alternative argument was that the problems with the ECHR's functioning should not be overplayed and that they should be dealt with carefully. The Court's judgments set an example for 47 states in Europe. While it is important to strive to reduce processing times, setting a two-year deadline seems unrealistic and should not be advanced at the potential cost of the judgments' quality. In particular, the removal of the system of individual petitions by which the ECtHR is ordinarily seized would be problematic. While the ECtHR's workload remains significant and alternatives should be openly discussed, there are clear benefits to the system of individual petitions. The Court's accessibility is perhaps the most important one. If we were to remove the petition system, could we still ensure that vulnerable groups (such as prisoners, minorities, children, victims of trafficking), i.e. those who do not usually benefit from legal aid and/or are either afraid or unable to reach out to the authorities, will still be able to address the State before the ECtHR?

Further research illustrates that the Court's substantial backlog is currently being reduced. In 2009 the Court introduced a new priority policy, through which it classifies applications into seven different categories, depending on their urgency and their degree of admissibility. This system has proved successful: as shown in the statistics from 2011 and 2012 above, despite the increase in applications in 2012, there was an overall decrease of 16% in the Court's backlog within that year.

"The language of human rights is a language that teaches us how to talk to each other with respect. It is not only a language we use to ensure respect in a faraway place somewhere in the world. It is very much about how we live with each other here, at home."

Baroness Kennedy

Conclusions

- On the whole, the symposium made clear that the UK is in the right place with the Human Rights Act and within the ECHR system. There seemed to be no fundamental objections to human rights as such, or to the UK's presence in the ECHR system in general, despite the far-reaching statements presented in the media.
- However, there are specific objections regarding the way the ECtHR is applying the Convention, as well as the delays embedded in the ECHR system. There needs to be a process of debate to improve this system – but that does not necessarily mean its repeal.
- At the same time though, aspects of this debate and, particularly, the sovereignty concerns, illustrate a lack of direction regarding Britain's constitutional principles. Most notably, it is debatable whether it is Parliament's ability to legislate across the board or the ability to challenge potential human rights violations before an independent arbiter, which is most valued in Britain's constitution.

BACKGROUND

In the academic year 2013-14, the UCL Faculty of Laws, the UCL European Institute, the UCL Institute for Human Rights and the UCL Centre for Law and Governance in Europe jointly hosted a project on 'Britain & Europe'. Through a series of public debates with experts from academia, the judiciary and policy-makers, and an accompanying resource collection, it sought to shed light on the contentious relationship between the United Kingdom on the one hand, and the European Union and the Council of Europe on the other. The project addressed key issues currently affecting this relationship, with a special focus on their legal dimension.

The second seminar of the Series was held at the UCL Faculty of Laws on 31 October 2013 on the occasion of the republication of Hersch Lauterpacht's *An International Bill of the Rights of Man* and concerned the future of the UK in the Council of Europe, as well as the potential of creating a UK Bill of Rights. The seminar took the form of a symposium chaired by Professor Philippe Sands (UCL / Matrix Chambers) and consisted of presentations by Baroness Helena Kennedy of the Shaws QC (Labour Member, House of Lords), Lord Tom

MacNally (Minister of State at the Ministry of Justice, and Deputy Leader of the House of Lords), Mr Anthony Speaight QC (Monckton Chambers) and Mr Stuart Wheeler (Treasurer, UKiP). This policy brief is based on their contributions as well as background research.

