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Human Rights Act Repeal and Devolution



There has already been discussion of the implications of repealing the Human Rights Act (and leaving the ECHR) on devolution. Prof Christine Bell highlights that the UK government will need the consent of the devolved legislatures to proceed.

The Conservative government's proposed repeal of the Human Rights Act (HRA) and possible withdrawal from the European Convention on Human Rights (ECHR) and Council of Europe, would have far-reaching implications for the UK's devolved administrations and relations with the Republic of Ireland. These run deep into the constitutional marrow of the nations involved; so deep that it is difficult to see how repeal of the Act could take place without their consent. The government's difficulties in relation to, especially, Scotland and Northern Ireland are significant but different and worth reviewing separately.

In Scotland, the ECHR – which the HRA establishes in UK law – is written into the legislation that created the devolved administration in the first place. The Scotland Act 1998 gives powers to the Scottish Parliament so long as it complies with the ECHR - among other things. Repealing the HRA would not, in and of itself, remove that obligation. While it would be technically possible to keep the ECHR as a framework for devolved government, even if the UK were not a member of the Council of Europe and were no longer bound by the treaty, it would be very strange to have it form a part of the constitutional basis of devolution. Moreover, it could lead to chronic uncertainty: withdrawal from the ECHR and the European Court of Human Rights' (ECtHR) supervision of rights, would be likely to make it unclear how 'compliance' with the ECHR was to be evaluated, and whether interpretations by the Strasbourg Courts were to be taken into account or not.

There are further devolved complications with repealing the Human Rights Act. Human rights are partially devolved in Scotland, where the devolved institutions have the power to protect them. The Scottish Parliament, for example, has set up a Scottish Human Rights Commission. A unilateral repeal of the HRA by Westminster would be likely to violate the Sewell Convention, whereby the Westminster government will 'not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'. Similar understandings apply through memoranda of understandings with each of the devolved legislatures in the UK.

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The repeal of the HRA also raises problems in Northern Ireland, where a similar commitment not to legislate against the wishes of the NI Assembly exists. Successive UK governments have considered proposed amendments to the HRA for Northern Ireland, to require a legislative consent motion, arguing that their hands are tied on human rights legislation if the devolved power-sharing government do not consent. In Northern Ireland, human rights are even further devolved than in Scotland, and the Human Rights Act is explicitly mentioned in the Northern Ireland Act 1998, meaning that it would have to be amended immediately if the Human Rights Act were repealed, with a number of consequential legal amendments in other devolved legislation.

Additionally, the commitment to the Human Rights Act mechanism was also put in detail into the Belfast or Good Friday Agreement which forms the constitutional DNA of the Northern Ireland Act 1998. The Agreement has also been found by courts to be, in effect, the 'constitutional underpinning' of the Northern Ireland Act.

The UK government as part of the peace agreement also signed a legally binding international treaty with the Republic of Ireland government, where both committed to implement the Agreement commitments that required action on each government's part. The Republic of Ireland, as part its implementation of the Agreement and Treaty, changed its Constitution removing the historic claims to jurisdiction over Northern Ireland, and incorporated the ECHR into its law, as part of the reciprocal agreement to 'match' human rights provisions in the UK (in part to assuage Unionist concerns). Any unilateral move away from these commitments carries major democratic legitimacy and bad faith consequences, with deep and problematic historical resonances. The Irish government has expressed its 'dismay' at the proposals. In fact normal UK practice would be to take treaty obligations extremely seriously and not to unilaterally breach them because they have become politically difficult.

So, to summarise, repeal of the Human Rights Act would require the consent of the devolved legislatures and the Republic of Ireland. Even if such consent was forthcoming, moving away from the Human Rights Act could be considered a breach of the Belfast or Good Friday Agreement by the 'people of the island of Ireland, North and South', who formally ratified the Agreement with its explicit commitment to the Human Rights Act mechanism, in a referendum, and could be similarly so seen by all those who voted for devolution in Scotland and Wales, who view rights as part of their common and devolved constitutional framework. Paradoxically, repeal of the Human Rights Act would also dismantle one of the increasingly few value-driven components of the Union that currently act as its fast-eroding glue.

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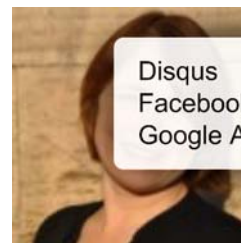
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