

# LEGISLATION, TRENDS AND CASES



## Legislation

# The role of Northern Ireland legislation in the protection of the Human Rights Act

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### Introduction

The Conservative Party manifesto of 2015 contained a statement that announced the party's intention to 'scrap the Human Rights Act', replacing it with a British Bill of Rights (BBoR).<sup>1</sup> Upon her appointment as Prime Minister, Theresa May confirmed this position in the wake of Brexit. This move is indicative of an alleged movement within the UK that aims to counteract external influence over British affairs – in this instance that of the European Court of Human Rights (ECtHR). While Westminster can repeal the Human Rights Act 1998 (HRA 1998), it would face significant constitutional issues pertaining to devolution in Northern Ireland. The HRA 1998, as the domestic application of the European Convention on Human Rights (ECHR), is an integral part of Northern Ireland's devolution structure. Its centrality to Northern Ireland's constitution challenges the ability of Parliament to freely repeal the HRA 1998.

### Parliamentary sovereignty

The Diceyan model of parliamentary sovereignty emphasises that no other institutions or bodies can interfere with the sovereignty of the UK Parliament. These institutions are understood to include both the courts and the devolved legislatures. However, while the courts have traditionally adhered to parliamentary sovereignty, devolution has posed a significant challenge to the doctrine as it is understood by Dicey.<sup>2</sup> In particular, the 'traditional' model does not seem to allow for the existence of constitutions within the devolved nations because 'full authority' is vested in the 'legally supreme' UK Parliament.<sup>3</sup>

Heuston and Calvert, writing in the 1960s, both determined that the 'traditional' view of sovereignty had not adapted to the changing landscape of the UK.<sup>4</sup> Calvert identified Dicey's construction as an 'English' view of sovereignty, and noted that 'the existence of a peculiarly Irish view is not to be discounted lightly'.<sup>5</sup> He directly implied that it would

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1 Conservative Party Manifesto (2015) 59.

2 Lord Neuberger, 'Who are the Masters Now?' (Second Lord Alexander of Weendon Lecture, 6 April 2011) <<http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weendon-lecture-110406.pdf>> 12.

3 Henry Calvert, *Constitutional Law in Northern Ireland* (Stevens & Sons 1968) 21.

4 Ibid. 30.

5 Ibid 16.

be incorrect to apply Dicey's view of parliamentary sovereignty as the constitutional make-up of an evolving UK.

These dissenters challenged the idea that the UK Parliament can act autonomously, without restriction or interference from outside bodies. Heuston observed that it would be unlikely for Westminster to legislate directly for the devolved states without the consent of the states themselves.<sup>6</sup> This has since become enshrined as a constitutional convention:<sup>7</sup> while not a substantive restriction, this more customary practice could be viewed as a form of restriction nonetheless. This idea then lends itself to the Ireland Act 1949, wherein s 1(2) stated that Northern Ireland would not cease to be a part of the UK without the consent of Northern Ireland's Parliament. In Calvert's words, severing ties with Northern Ireland can be done *legally*, but to do so would be *unconstitutional*.<sup>8</sup>

These dissenters not only challenge the 'traditional' notion of parliamentary sovereignty, but they also attest to the essential existence of a Northern Irish constitution within the UK. Though s 1(2) of the Ireland Act 1949 has been subsequently replaced by s 1 of the Northern Ireland Act 1988 (NIA 1988) and the procedure for changing the status of Northern Ireland has been altered, the notion of consent has remained constant. This construction is of great importance to the method by which Northern Ireland is governed, particularly in its recognition of a Northern Irish Parliament – now the Northern Ireland Assembly – as a constitutional body. The traditional views of parliamentary sovereignty espoused by Dicey were quickly becoming outdated by the time of Heuston and Calvert; as they no longer realistically, nor accurately, reflected the constitutional landscape of the UK. Westminster, through statutes like the Ireland Act 1949, treated Northern Ireland as a distinct polity, with its own exclusive constitution within the UK's constitutional framework. This emphasises that actions which seek to fundamentally change the construction of Northern Ireland's constitution would require the cooperation of the devolved legislature. That being said, the UK Supreme Court in the Brexit appeals has emphasised that this is a political measure which cannot be enforced in courts of law.<sup>9</sup>

### Devolution

Northern Ireland's devolution settlement poses a unique challenge in and of itself. The Belfast Agreement, as one of the essential documents of the peace settlement in Northern Ireland, deals directly with the incorporation of the ECHR into Northern Ireland's law.<sup>10</sup> This commitment reflects the idea that human rights were, and continue to be, central to the peace process in Northern Ireland. As such, the commitment to incorporation expressed in the document is considered one of the more 'specific and concrete' aspects of the Belfast Agreement.<sup>11</sup>

Just as human rights have been granted central importance in the Belfast Agreement, so too have they formed an integral part of the Northern Ireland Act 1998. The UK Parliament enacted the HRA 1998 in order to incorporate the ECHR into its own law

6 R F V Heuston, *Essays in Constitutional Law* 2nd edn (Stevens & Sons 1964) 28.

7 Memorandum of Understanding and Supplementary Agreements CM5240 (December 2001) 8.

8 Calvert (n 3) 32.

9 *R (on the Application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [141].

10 Aoife O'Donoghue and Ben Warwick, 'Constitutionally Questioned: UK Debates, International Law, and Northern Ireland' (2015) 66(1) *Northern Ireland Legal Quarterly* 93; The Belfast Agreement 1998, 20.

11 Maria Helen Murphy, 'Repealing the Human Rights Act: Implications for the Belfast Agreement' (2015) 26 *King's Law Journal* 3, 340.

and, more importantly yet, into Northern Ireland law.<sup>12</sup> This Act is expressly mentioned in s 7 of the NIA 1998, which entrenches the HRA 1998 in Northern Ireland's law.<sup>13</sup> This distinguishes Northern Ireland from the other devolved states because human rights are not devolved in the same way. If the HRA 1998 was repealed, the NIA 1998, along with numerous other parts of devolved legislation, would need to be immediately amended to accommodate the change.<sup>14</sup> While this practical problem does not necessarily challenge Westminster's ability to repeal, it does illustrate the centrality of human rights in the Northern Ireland context. The importance of human rights cannot be understated as they permeate the devolution settlement in Northern Ireland and thus demand consideration by the UK Parliament when it considers any changes to the HRA 1998.

If the HRA 1998 is repealed and immediately replaced by a BBoR, there is an argument that the latter would not fulfil the conditions of the Belfast Agreement.<sup>15</sup> Under the BBoR proposed in 2015, the rulings of the ECtHR would no longer be binding on either the UK Supreme Court or Parliament.<sup>16</sup> These proposals, if effected across the UK, would have the inevitable consequence of severely restricting access to the ECtHR. This would prove a direct infringement of the Belfast Agreement, which stipulates that the UK must facilitate 'direct access to the courts, and remedies for breaches of the Convention'.<sup>17</sup> Thus, the BBoR would have to be constructed in such a way that these requirements would still be accommodated. Murphy notes that formulated proposals do not appear to provide for the degree of access nor for the remedies as they were stated in the Belfast Agreement.<sup>18</sup> However, it is possible, and indeed necessary, that specific provision be made for the devolved nations in the future. If repeal were to occur having failed to adequately address the Agreement, it would serve not only to undermine the entire document, but the peace process by proxy. This could also be construed as a direct failing of democracy, due to the Agreement's endorsement by referendum of the Northern Irish populace.

The barriers to repeal posed by s 7 of the NIA 1998 and the BBoR are vastly pragmatic in nature. They are not necessarily issues that directly *prevent* the UK Parliament from repealing the HRA 1998. This lack of legal enforcement, particularly around s 7 of the NIA 1998, was confirmed by the UK Supreme Court in the Brexit appeals.<sup>19</sup> The result of which is the eventual removal of the European Communities Act 1972 from the NIA as the UK continues with its exit from the EU. However, both issues serve to indicate that unilateral action on the part of Westminster would create more problems than solutions. These issues also begin to allude to this ubiquitous concept of consent. Consent forms the essence of all the devolution settlements, the Sewel Convention in Scotland providing the more unequivocal example. This convention, which is enshrined by a Memorandum of Understanding (MoU) for all three devolved nations, effectively

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12 Human Rights Act 1998, 'Introduction'.

13 NIA 1998, s 7.

14 Christine Bell, 'Human Rights Act Repeal and Devolution' (Centre on Constitutional Change 17 June 2015) <[www.centreonconstitutionalchange.ac.uk/blog/human-rights-act-repeal-and-devolution-0](http://www.centreonconstitutionalchange.ac.uk/blog/human-rights-act-repeal-and-devolution-0)>.

15 Murphy (n 11) 341–2.

16 Conservative Party, 'Protecting Human Rights in the UK' (3 October 2014) <[www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](http://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)> 5.

17 Belfast Agreement 1998, 20.

18 Murphy (n 11) 342.

19 R (*on the Application of Miller and Another*) (n 9) [135].

states that the UK Parliament will not customarily legislate on devolved matters without the agreement of the devolved legislatures.<sup>20</sup> This concordat is not legally binding, but nevertheless creates an expectation for inter-institutional behaviour.<sup>21</sup>

Due to the non-binding nature of the MoU, the UK Parliament is still legally capable of unilateral interference. However, one commentator suggests that there is a dissonance between unadulterated parliamentary sovereignty and the political reality of the UK today.<sup>22</sup> To date, particularly in relation to the HRA 1998 in Northern Ireland, UK governments have respected the MoU, venturing further in their assertion that to make amendments would *require* legislative consent motions from the devolved governments.<sup>23</sup> It would seem, therefore, that the notion of consent as proposed in these concordats goes further than just simple appeasement; it is a crucial component of the entire apparatus of devolution. With this in mind, we must assume that the UK Parliament is likely to face immeasurable political backlash were the decision made to repeal the HRA 1998 without the consent of the Northern Ireland Assembly. There is also the distinct possibility of a legal challenge being made through an application for judicial review on the grounds of legitimate expectation.<sup>24</sup> However, the intervention of the courts may not be desirable due to the delicacy of the inter-governmental and inter-institutional relations.<sup>25</sup> There was the possibility of making a legal challenge through an application for judicial review on the grounds of legitimate expectation, however, the UK Supreme Court rejected such a challenge. This was because legitimate expectation cannot overcome Parliament's reserved ability to legislate for Northern Ireland.<sup>26</sup>

The UK Parliament possesses the capability to repeal the HRA 1998, but with substantive legal difficulties. However, the constitutional issues raised in relation to Northern Ireland promise to vastly complicate any attempt at repeal. The fundamentality of human rights, as embodied by the ECHR and the HRA 1998, cannot be emphasised enough in their importance to the peace process and the devolution settlement in Northern Ireland. To act without the consent of the devolved nation would not only undermine the cornerstone of the settlement, but would serve to undermine a democratically constructed devolution altogether. Repeal is challenged further yet by a significant shift in both the political landscape and parliamentary sovereignty; with this shift in parliamentary sovereignty constitutionally acknowledged in both the MoU and the Belfast Agreement. While the UK Parliament would certainly have a legal grounding in repealing the HRA 1998, it is the apparent circumvention of a democratically ratified Northern Irish constitution that causes the greatest obstacles. Northern Ireland's constitution thus, in this instance, appears the greatest threat to the UK Parliament's ability to repeal the HRA 1998; as, while Parliament possesses the legal standing necessary to repeal the Act, the Northern Irish constitution ensures that any attempt at repeal would likely be deemed *unconstitutional*.

20 Memorandum of Understanding and Supplementary Agreements CM 4444 (1999) 8.

21 Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Legal Studies, 361–2.

22 Ibid.

23 Bell (n 14).

24 Richard Rawlings, 'Concordats of the Constitution' (2000) 116 Law Quarterly Review, 283–4

25 Ibid.

26 R (*on the Application of Miller and Another*) (n 9) [135].