The UK's Potential Withdrawal from the European Convention on Human Rights - Just a Flash in the Pan or a Real Threat?

Jannika Jahn

17.12.2014 doi: 10.17176/20181005-151949-0

The ruling Conservative party of Prime Minister *David Cameron* published a paper this year, called "Protecting Human Rights in the UK". The party suggests to replace the Human Rights Act 1998 (HRA), which incorporates the ECHR into UK law, with a "home-grown" bill of rights. The aim is to attribute the European Court of Human Rights (ECtHR) only an advisory role vis-à-vis the UK parliament and to weaken the quasi precedential effect of ECtHR case-law vis-à-vis the UK Supreme Court. In case this will not be accepted by the Council of Europe (CoE), the Conservatives propose withdrawing from the Convention. This is not the first time that the UK is flexing its muscles vis-à-vis the European Convention system.

Already in 1956 the UK openly considered quitting the European Convention on Human Rights (ECHR) over a case brought by Greece against the UK for its actions under emergency rule in Cyprus. After the ECtHR's decision in *McCann v UK* (1995) the UK threatened not to renew the optional declaration providing for the right to individual petition. Interestingly, the better reasons obviously spoke for remaining in the Convention system in the past, as the UK never acted upon its motions. Indeed, the Conservatives' suggestions underestimate the interdependence and interrelatedness of domestic and international human rights protection. Trying to go back to a *Diceyan* concept of absolute parliamentary supremacy is not in sync with modern constitutional thought in the UK. Besides domestic repercussions, these proposals might result in negative consequences at the international level. Finally, the common responsibility of all ECHR states to preserve a peaceful Europe should not be discarded on the basis of an anticipated short-term political gain.

Interdependence and Interrelatedness of Domestic, European and International Human Rights Protection

Contrary to the suggestions in the Conservatives' paper, the envisaged reform would in fact weaken, not strengthen the UK's autonomy concerning human rights protection, since the domestic and international human rights regimes have grown into a common interlinked system. By way of incorporation through the HRA, the ECHR has become part of domestic statutory law and through the judicial enforcement of ECHR rights, these rights now form part of UK common law. Hence, even if Parliament repealed the HRA, the substantive rights would continue to be part of the common law and it would be uncertain how the judiciary would deal with the repeal of such a "constitutional statute".

Also, irrespective of the ratification of the Convention the UK will be indirectly held to the ECHR standards. This is because Convention standards serve as a point of reference for the common best practices of international human rights protection (cf. the Human Rights Council's Special Rapporteur reports) and as a proof of a certain standard of human rights protection which is often stipulated as condition to enter regional or international treaty regimes (as e.g. the European Union (EU)).

Additionally, by forgoing the chance to make a distinctly British contribution to the common development of European human rights standards via the institutionalized dialogue of European judges, the UK would lose, not win autonomy concerning human rights protection. The current system gives the UK

enough leeway to materialize "its own" standards within the European system. How well this can be realized is largely dependent on how effective the UK Supreme Court enters into a dialogue with the ECtHR. The "mirror-principle" pronounced in *R (Ullah) v Special Adjudicator* allows for this dialogue, providing that generally ECtHR's judgments shall be followed unless there are strong reasons to dilute or weaken the effect of the Strasbourg case law (*Lord Bingham of Cornhill*). In fact, in 2009 the Court declined to follow a decision of the ECtHR Chamber in *R v Horncastle* which was directly addressed in *Al-Khawaja and Tahery v United Kingdom* and described as a sign of a constructive dialogue between the courts by UK judge *Bratza* in his concurring opinion. Indeed, section 2 HRA only requires UK courts to "take into account" ECtHR case-law, which allows the deviance in special cases. Here the Supreme Court can insist on particular aspects of the domestic culture and flesh out the UK's "constitutional red line" as it was done by the German Federal Constitutional Court in *Görgülü*.

So long as the UK decided to work with and not against the Convention system, the latter reacted quite flexibly. Both, the structural principle of subsidiarity and the interpretive principle of margin of appreciation were pushed by the UK in the reform of the 15th protocol to alleviate the perceived ECtHR's democratic deficit and to reflect that the Convention system is subsidiary to the safeguarding of human rights at the national level. This pursued the objective of strengthening national authorities in the system of European human rights protection, as they are, in principle, deemed to be better placed than an international court to evaluate local needs and conditions. Since then, both principles have been further refined and reinforced by the ECtHR in its ensuing jurisprudence, as pointed out by the Court's president and Judge *Spano*, allowing for the "centre of gravity" of the Convention system to become lower than before the Brighton conference. Thus, the Conservatives' broad brush reproach of the Court's "mission creep" appears distorting. The reference to the prisoners' disenfranchisement struggle in the UK's argumentation for withdrawal reveals an overreaction, apparently deriving from a misconception of the functioning of the Convention system. The UK parliament's refusal to comply with the ECtHR's case-law in *Greens and M.T.* and *Hirst (No. 2)* is not *per se* a reason to leave the Convention, but demonstrates the workings of a vivid complementary system of human rights protection. Only if conceived in a purely hierarchical manner, domestic deviance would be unthinkable. In a system, however, that depends on judicial dialogue and conceives of the Convention states as entities that are best suited to serve the people's needs at the local level, blind obedience cannot be desired. By contrast, constructive contestation can render even better results in the end. It seems, however, that the UK Supreme Court still has to find its role in this cooperative system. It silently deferred the matter of prisoners' disenfranchisement to parliament. Instead, by taking a judicial stance on the matter the UK Supreme Court would have helped to "embed" the highly contentious decisions into UK constitutional law which might have facilitated a more constructive ensuing political discussion.

Thus, if the UK uses the chances to shape the Convention system, it will succeed in rendering human rights protection in the UK more "home-grown". Instead, if the UK repeals the HRA or even withdraws from the ECHR, it will thereby forfeit its opportunity to make a distinctly British contribution, but will continue to be assessed by European and international human rights standards.

Domestic Repercussions of HRA Repeal or ECHR Withdrawal

Moreover, the repeal of the HRA might have considerable implications for the currently stable relationship between the UK judiciary and parliament. By the ratification of protocol 11 ECHR and the introduction of the HRA the UK decided to adhere to a concept of democracy that integrates the effective protection of human rights against the unlimited will of parliament. In R *(Jackson) v Attorney-General* the judges pointed out that if parliament were to attempt to remove the courts' powers of judicial review, the courts might refuse to recognize such legislation as valid. *Lord Hope* stated that the principle of parliamentary

sovereignty "is no longer, if it ever was, absolute". Prominent scholars have argued for the rule of law to be recognized as a constitutional doctrine of equal strength to parliamentary sovereignty. Hence, were the well-balanced arrangement between parliament and the UK Supreme Court under ss. 3(1) and 4 HRA repealed, it would not be unrealistic to see the UK Supreme Court proactively protecting the fundamental common law rights, also against parliament. Further, the Conservatives' proposals might have serious implications for the stable relations between England and the devolved countries, as they would have to consent to the UK's withdrawal from the Convention according to the Sewel Convention. The repeal of the HRA would most likely jeopardize the unity of the UK's human rights regime. The ECHR is incorporated directly into the devolution statutes and Scotland, Wales and Northern-Ireland will presumably want to continue to adhere to the Convention system, at least in the devolved areas of the law.

European and International Consequences of HRA Repeal or ECHR Withdrawal

Repercussion might also be faced at the international level. Obviously, the CoE could not accept that the UK would make the ECtHR an advisory body to the UK parliament as this would openly conflict with Art. 46 (1) ECHR. The same goes for the refusal of a binding nature of ECtHR decisions over UK Supreme Court decisions. The idea of withdrawing from the Convention to re-ratify it with the desired reservations would most likely be unacceptable, because this behavior would merely pursue the purpose of circumventing existing ECHR-obligations. Most probably thus, the UK would denounce the Convention (Art. 58 (1) ECHR) or it would be expelled from its CoE membership (Arts. 8, 3 CoE Statute) and would consequently cease to be a party to the ECHR (Art. 58 (3) ECHR). Eventually, this might also lead to the UK's suspension of certain EU membership rights (Art. 7 (3) TEU). For the accession to the EU the ratification of the ECHR functions as a practical indicator and condition (cf. Arts. 49, 2 TEU and the Copenhagen criteria). Yet, ECHR ratification is not stipulated as a legal requirement for EU accession or the continued EU membership. However, ECHR standards are defined as general principles of European Union law (Art. 6 (3) TEU) and the EU member states are bound to comply with the values set out in Art. 2 TEU, amongst them the respect for human rights (cf. also the interview with Koen Lenaerts). Once the EU will have acceded to the ECHR, as envisaged by Art. 6 (2) TEU, EU citizens will be able to have ECHR-abidance monitored by the ECtHR in areas of Union law application. Overall, the TEU seems to be built upon the assumption that EU member states are also parties to the Convention so that the member states can be trusted to live up to the standards of Art. 2 TEU when acting within the scope of Union law. Hence, one could conceive of ECHR ratification as an implicit *de jure* requirement for EU membership. If all of the Conservative suggestions were implemented – e.g. methodologically, dropping the proportionality test when balancing rights or, substantively, abandoning the extraterritorial application of human rights – the UK would fall below the Convention standards. Finally, this might result in the suspension of EU treaty rights under Arts. 7 (3), 2 TEU.

Moreover, the Conservatives' suggestions may have serious repercussions regarding the UK's international credibility and respectability. If the UK quits the Court's obligatory jurisdiction, the UK would be on a par with Belarus. Regarding the idea of a post ECtHR-judgment parliamentary control, the UK ranges on the same level as Russia and Ukraine. Furthermore, considering that the Convention system is the only effective European monitoring system of human rights protection, withdrawing from the Convention would imply the loss of this "high standard attestation". So whenever certain human rights standards serve as requirements to enter a treaty-regime, it might become harder for the UK to prove the sufficiency of its human rights protection.

Responsibility under the Convention System to Preserve Justice and Peace in Europe

Finally, it should not be forgotten that by signing the Convention the UK adopted the responsibility for cooperating with other European states to preserve a peaceful Europe. As the preamble states, a common understanding and observance of human rights would

furnish a complementary and thus a better foundation of justice and peace in Europe than the mere reliance on human rights' implementation within political democracies. Such a common understanding can only be achieved by institutional cooperation, such as through the judicial cooperation or that between the Committee of Ministers and the political institutions of the Convention states in the implementation process. Additionally, by furnishing an external and collective system of checks and balances, the Convention system helps to effectively enforce the common observance of human rights in Europe. More precisely, as an external monitor, the ECtHR serves to strengthen the domestic judiciary's independence from improper political pressures when enforcing human rights against the majority. Although a domino-effect is not presumable – also in the Inter-American system Venezuela's withdrawal did not have a bandwagon effect – it would be a bad sign if one of the founding countries quit the Convention.

Conclusion

The Conservatives' suggestions seem to form part of another sorry episode of envisaged short-term political gains thriving at the expense of the Convention system (which are mirrored with respect to the Conservatives' proposals to hold an in-out referendum on British EU membership). Most probably, however, the Conservatives' endeavor to repeal the HRA and to withdraw from the Convention as a measure of last resort will turn out to be a mere flash in the pan and no real threat to the Convention system. This is because these steps would entail considerable domestic as well as international repercussions. Moreover, the attempt to reinforce an unlimited parliamentary sovereignty and an unchallenged UK judiciary is largely anachronistic and unrealistic against the background of the UK's changing concept of democracy and in times of an interdependent and interlinked system of human rights protection that does not stop at national borders. Considering the groups of people that were protected by the ECtHR's girded case-law – prisoners and asylum seekers, who have no political lobby – the Convention system's importance for minority protection in Europe, as an external check on short-sighted domestic politics, is once again underscored. Still, the unfortunate misuse of the ECtHR as an external scapegoat for internal problems should be more actively addressed by a concerted communication strategy of the Convention states.

All contributions to this symposium are also published on Völkerrechtsblog.

ABOUT THE AUTHOR

Jannika Jahn

Jannika Jahn is a postdoctoral fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. She is an Associate Editor at Verfassungsblog covering public international and human rights law.

SUGGESTED CITATION

Jahn, Jannika: The UK's Potential Withdrawal from the European Convention on Human Rights – Just a Flash in the Pan or a Real Threat?, Verfassungsblog, 17.12.2014, doi: 10.17176/20181005-151949-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20181005-151949-0.