

The Brexit deal locks the UK into continued Strasbourg Human Rights court membership

*The EU-UK Trade and Cooperation Agreement contains a number of provisions 'locking-in' the UK's continued commitment to the European Convention on Human Rights (ECHR). As with many other areas, far from closing arguments about the ECHR and human rights after Brexit, the deal shifts them further down the road, writes **Frederick Cowell** (Birkbeck College).*

The ECHR is not an EU institution; the ECHR was created by the Council of Europe in 1950, the EU's founding text was the 1957 Treaty of Rome. The Council of Europe has 47 members to the EU's 27 members and countries such as Norway, Switzerland and Iceland are party to the ECHR, but have distinct relationships with the EU. Hence, every law student's eye-roll when the ECHR and the EU are treated as one and the same. Yet, opposition to the ECHR and the EU in the UK overlap; claims that the ECHR weakens parliamentary sovereignty, were also made in the 2011 debate over the prisoner's voters ruling from the European Court of Human Rights. As public hostility to immigration increased in the late 2000s a common refrain from focus groups was that asylum seekers and foreign nationals were using human rights to 'play the system'. The commitment to repeal the Human Rights Act (HRA) which brings the ECHR into UK law was first made by the Conservatives in 2006 and was framed part of a wider constitutional reform project which later included a commitment to a referendum on the Lisbon Treaty.

Although the demands of the coalition government in the 2010-2015 Parliament ruled much of this out when in 2014 the Conservatives published their proposals for replacing the HRA it was framed in language about sovereignty, with references about protecting 'our laws', that in 2016 would become a feature of the Brexit campaign. The proposal that the UK would treat the judgments of the European Court of Human Rights as advisory would, as one analysis suggested, be incompatible with the UK's obligations under the ECHR pointing towards the UK withdrawing from the ECHR. As the final page of the 2014 proposals made clear the UK's 'relationship with the EU will be renegotiated in the next Parliament' and EU obligations which conflicted with the UK's new human rights framework would be 'renegotiated'.

The Brexit process and Britain's ECHR membership

Yet, when the 2016 referendum came the UK's relationship with the European Court of Human Rights did not really feature in the debate. After spending much of 2016 delaying the publication of proposals to repeal the HRA the government quietly shelved these plans in December. At the 2017 General Election, the Conservative manifesto said that the party if in government would not 'repeal or replace the Human Rights Act while the process of Brexit is underway' but left open the prospect of implementing a change to the UK's relationship with the European Court of Human Rights after Brexit.

The Political Declaration accompanying the 2018 Withdrawal Agreement committed the UK to remaining within the ECHR as a basis of future cooperation. The European Parliament passed two resolutions on the Brexit negotiations making it clear that for security cooperation and as a reflection of EU values the UK needed remain a party to the ECHR. None, of these developments necessarily precluded changes to the HRA. But what the Conservatives had envisaged in 2014 was something which would have gravitated towards ECHR withdrawal, or at least a fundamental reworking of the legal powers of the ECtHR. The Brexit process appeared to have locked-in the status quo surrounding the UK's relationship with the ECHR, so much so that the Conservatives 2019 Manifesto did not even mention the ECHR.



The EU-UK Agreement and Human Rights

The EU-UK Trade Agreement commits the parties in general terms to respecting human rights as a shared value under the section entitled Basis for Cooperation and respecting 'international human rights treaties to which they are parties' (Article COMPROV.4). Chapter 3 entitled 'Law Enforcement' is much more specific committing the UK and EU to respect the ECHR and to 'giving effect to the rights and freedoms in that Convention domestically' (Article LAW.GEN.3). Even though the government announced a review of the HRA in December, notionally this provision precludes a more ambitious reworking of the Act envisaged in the 2014 Conservative Proposals. This is further strengthened by the provision stating that if the UK withdraws from the ECHR cooperation on Law Enforcement and security ceases, regardless of whether the rest of the treaty is still in force (Article LAW.OTHER.136).

Other notable places referencing human rights protection in the agreement include the section on services and investment, requiring parties to deny benefits to states denying human rights protection (Article SERVIN.1.3) and in the section on Europol, where data sharing to 'hand down or execute a death penalty or any form of cruel or inhuman treatment' is prohibited (Article LAW.EUROPOL.52). A European Commission brochure on the agreement goes further than the published text saying that the agreement commits parties 'to continue to protect and give domestic effect to fundamental rights, such as those set out in the European Convention on Human Rights.'

Does the Agreement lock-in the UK's ECHR membership?

Post-Brexit the agreement certainly makes it harder for the UK to fully withdraw from the ECHR. But as the hardline Brexit grouping of MPs the European Research Group make clear in their statement supporting the agreement, the independent nature of the security provisions means that it is possible – in theory – for the UK to withdraw from the ECHR and hence automatically withdraw from Chapter 3 whilst continuing a very limited trading relationship with the EU under other parts of the agreement. The Treaty of the European Union requires new member states to be ECHR members and although unclear whether this applies to existing member states, ECHR membership is an important component of EU values.

There are, however, a lot of things that the UK could do to limit rights that don't involve ECHR withdrawal. For example, the government could pass a law significantly limiting the way in which European Court of Human Rights caselaw is applied in UK courts, or as is the case with the Overseas Operations Bill, limit the applicability of ECHR right in certain situations. Russia passed a law in 2015 significantly limiting the domestic applicability of the European Court of Human Rights decisions and fights between Hungary and Poland and the European Commission over the rule of law and rights protection show that its possible for extensive non-compliance on human rights standards to be built into the Convention system. As Professor Steve Peers notes the significant omission from the agreement text is that beyond Chapter 3 provisions there is a lack of clarity on what will happen if the UK falls short of its commitments to protect rights. Whilst it is clear how withdrawal from the ECHR would terminate the agreement, it is much less clear how broader non-compliance with the ECHR, or the European Court of Human Rights would be dealt with.

By the same token, it is possible for supporters of Brexit to argue that the agreement locks the UK into continued ECHR membership when the main thrust of the entire Brexit process was about reclaiming sovereignty from European institutions. Public views on the ECHR are mixed, support for human rights in the abstract is often very strong but specific cases from the European Court of Human Rights can often encourage a hostility to the institution which when mapped onto existing political divides on Brexit could well lead to the sense the agreement does not go far enough.

This article gives the views of the author, and not the position of LSE Brexit, nor of the London School of Economics.