BINGHAM CENTRE FOR THE RULE OF LAW

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APPG on the Rule of Law

Meeting Report:
The HRA and ECHR in the Devolved Nations

5 July 2016, 17:00-19:00

Committee Room 20, House of Commons

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Format

17:00 – 17:20	AGM – Rt Hon Dominic Grieve QC MP Chair
17:20 – 17:25	Introduction for substantive meeting – Ms Joanna Cherry QC MP Chair
17:25 – 17:50	5 x expert speakers
17:50 – 18:15	Questions and comment – MPs and Peers
18:15 – 18:30	Questions and comment – open to the floor

Note: the minutes for the 2016 AGM are recorded in a separate document.

Attendance

Chair: Joanna Cherry QC MP

MPs and Peers: Rt Hon Dominic Grieve QC MP; Mark Durkan MP; Stuart McDonald MP; Margaret Ferrier MP; Angela Crawley MP; Margaret Ritchie MP; Jesse Norman MP; Lord Judd; Lord Purvis; Lord Lisvane

Others in attendance included: Gabrielle Parke (Office of Baroness Buscombe); Clare Duffy (Office of Lord Lester QC); Katherine O'Byrne (Doughty Street Chambers); Bella Sankey (Liberty); Andrew Warnock QC (Society of Conservative Lawyers); Professor Lorna McGregor (Director of the Human Rights Centre, University of Essex); Nicole Piche (All-Party Parliamentary Human Rights Group); Professor Michael Keating (Director, ESRC Centre on Constitutional Change); Lucy Wake (Amnesty International); Disha Gulati (Allen & Overy); Shalina Daved (Allen & Overy); Theo Huckle QC (Doughty Street Chambers); Professor John McEldowney (University of Warwick) Daniella Lock (UCL); Swee Leng Harris (Bingham Centre); Dr Jan van Zyl Smit (Bingham Centre); Dr Lawrence McNamara (Bingham Centre); Toby Shevlane (Bingham Centre)

Meeting Aim

To provide MPs and Peers with an opportunity to discuss rule of law considerations relevant to the Human Rights Act (HRA) and European Convention on Human Rights (ECHR) in the devolved nations of Northern Ireland, Scotland and Wales. This discussion will encompass:

- The role that the HRA and ECHR play in law-making in the devolved nations and in the Belfast/Good Friday Agreement; and
- The constitutional convention known as the Sewel Convention that may require the consent of the devolved legislatures.

Background

Former Lord Chancellor the Rt Hon Michael Gove MP has expressed the UK Government's wish that a proposed 'British Bill of Rights' would have UK-wide application.[1] The background briefing notes for the 2016 Queen's Speech state in relation to devolution that: 'Revising the Human Rights Act

[1] Revised transcript of evidence taken before The Select Committee on the European Union Justice Sub-Committee, Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act, Evidence Session No. 8 (2 February 2016) available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.html

can only be done by the UK Parliament, but we will consult fully before bringing forward proposals.'[2]

However, the House of Lords EU Justice Sub-Committee's recent report concluded:

> If, for no other reason, the possible constitutional disruption involving the devolved administrations should weigh against proceeding with this reform.[3]

The Sub-Committee's report emphasised two key issues: the possible need for the devolved legislatures to consent to a British Bill of Rights, and the role that the HRA and ECHR play in relation to the Belfast/Good Friday Agreement.

The ECHR and Law-Making by the Devolved Legislatures

The devolution statutes rely on the set of rights contained in the ECHR, particularly in limiting the legislative competence of the devolved legislatures. All three devolution statutes state that a provision enacted by the devolved legislature is 'not law' if it is incompatible with 'the Convention rights'.[4] This is independent of the HRA (although the 'Convention rights' are defined by reference to the HRA).[5] The Supreme Court is the final court of appeal for issues of legislative competence.[6]

Legislative Consent by the Devolved Legislatures

Under UK constitutional law, there is no strict legal requirement that the UK Parliament or Government obtain consent from the devolved legislatures. Professor Mark Elliott explains that the legal position is that:

> the UK Parliament is sovereign; that devolution did nothing, as a matter of law, to detract from that sovereignty; and that the UK Parliament therefore remains legally free to make whatever laws it wishes, both for the UK as a whole and for any of its constituent parts.[7]

The need for legislative consent by the devolved legislatures is based upon a *constitutional convention*: the Sewel Convention. The wording of the Sewel Convention is enshrined in a Memorandum of Understanding between the UK Government and devolved administrations. After affirming the legal position, the Memorandum reads:

> However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with

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[2] Queen's Speech 2016: background briefing notes, (18 May 2016), p. 48, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf

[3] House of Lords European Union Committee: The UK, the EU and a British Bill of Rights, 12th Report of Session 2015-16, p. 48, available at: http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf

[4] Section 29(2)(d) Scotland Act 1998; section 6(2)(c) Northern Ireland Act 1998; section 108(6)(c) Government of Wales Act 2006

[5] See, for example, section 98 Northern Ireland Act 1998: '"the Convention rights" has the same meaning as in the Human Rights Act 1998'. See also section 126 Scotland Act 1998 and section 158(1) Government of Wales Act 2006.

[6] See: para 12, Part II, schedule 6 Scotland Act 1998; para 11, Part 2, schedule 9 Government of Wales Act 2006; para 10, Part II, schedule 10 Northern Ireland Act 1998.

[7] Professor Mark Elliott, 'Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights?' Public Law for Everyone (12 May 2015) available at: https://publiclawforeveryone.com/2015/05/12/could-the-devolved-nations-block-repeal-of-the-human-rights-act-and-the-enactment-of-a-new-bill-of-rights/

> regard to devolved matters except with the agreement of the devolved legislature.[8]

A key question, therefore, is whether human rights legislation constitutes a devolved matter for Scotland, Northern Ireland, and Wales. Under current legislation for Wales, only specified legislative power is devolved to the Welsh Assembly, and human rights is not included in the list of devolved powers.[9] The reverse is true for Scotland and Northern Ireland: legislative responsibility is reserved to Westminster only for specified matters, and human rights is not listed as a reserved power.[10] Further, the Wales Bill – in its current form[11] – will move Wales to the same 'reserved powers' model, and without human rights legislation being reserved to Westminster.

While this points towards the conclusion that human rights is a devolved matter for Scotland and Northern Ireland (with Wales set to follow suit), the result is complicated by the inclusion in all of the devolution statutes of a provision prohibiting the devolved legislatures from modifying the HRA.[12]

Mr Gove has expressed the view that:

> [Human rights legislation] is neither reserved nor devolved. Any reform or change to the Human Rights Act is a matter for the Westminster Parliament, but the application of human rights is a matter for Scots courts and, indeed, for the Scottish Government.[13]

Some academic commentators draw the distinction differently. For example, Professor Elliott classifies the HRA itself as a non-devolved matter because the devolution statutes expressly prohibit the devolved legislatures from modifying the HRA. On the other hand, he argues:

> …the same is not true of *human rights*. It would, for instance, be open to the Scottish Parliament to enact its own Bill of Rights. This means that the UK Parliament's enacting a British Bill of Rights would trigger the Sewel Convention, because insofar as the British Bill of Rights would apply to Scotland, the UK Parliament would be

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[8] Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive (2001) available at: http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf

[9] These are listed in Schedule 7 to the Government of Wales Act 2006

[10] Reserved matters are listed in the Scotland Act 1998 in Schedule 5. Excepted and reserved matters are listed in the Northern Ireland Act 1998 under Schedule 2 and 3 respectively.

[11] Wales Bill 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527845/Wales_Bill.pdf
Also see the Wales Bill Explanatory Notes. Paragraph 3 states that the new 'reserved powers' model will enable 'the Assembly to legislate on any subject except those specifically reserved to the UK Parliament.'

[12] Sch 4, para 1(2)(f) Scotland Act 1998, section 7 Northern Ireland Act 1998, Sch 7, Part II para 2(1) Government of Wales Act 2006

[13] Revised transcript of evidence taken before The Select Committee on the European Union Justice Sub-Committee: Inquiry on The Potential Impact on EU Law of Repealing Human Rights Act, Witnesses: Rt Hon Mr Michael Gove MP and Mr Dominic Raab MP, (2 February 2016), Q 88 at page 15, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.pdf

> doing something (i.e. legislating in respect of human rights in Scotland) that the Scottish Parliament is competent to do.[14]

The governments of Scotland, Northern Ireland, and Wales agree that a British Bill of Rights would require consent under the Sewel Convention.[15] The EU Justice Sub-Committee concluded that 'the Scottish Parliament and Northern Ireland Assembly are unlikely to give consent',[16] based on evidence from those administrations. Further, there is evidence that in opposing the repeal of the HRA and introduction of a British Bill of Rights the devolved legislatures would be reflecting the majority view of those living in the devolved nations.[17]

In Scotland, the political ramifications following a breach of the Sewel Convention would be exacerbated by the recent entrenchment of the Sewel Convention in the Scotland Act. This was inserted by the UK Parliament in 2016, partly to honour promises made by English political leaders to the Scottish public in the context of the Scottish independence referendum.[18] Breaking such promises could strengthen claims for Scottish independence, now that Scotland's first minister, Nicola Sturgeon, has foreshadowed the possibility of a second Scottish independence referendum.[19]

The Belfast/Good Friday Agreement

Section 6 of the Belfast/Good Friday Agreement, which was reached only months before the HRA received royal assent, states:

> The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.[20]

Therefore, to the extent that any proposed British Bill of Rights distances domestic law from the jurisprudence of the European Court of Human Rights, the UK Government risks breaching its international law obligations to the Republic of Ireland. Fitzgerald TD, the Republic of Ireland Minister for Justice and Equality, wrote to Mr Gove in February 2016 stating that:

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[14] Elliott 'Could the devolved nations block repeal of the Human Rights Act and the enactment of a new Bill of Rights?' (12 May 2015)
[15] House of Lords European Union Committee: The UK, the EU and a British Bill of Rights, 12th Report of Session 2015-16, p. 42, 46
[16] House of Lords European Union Committee, 12th Report of Session 2015–16: *The UK, the EU and a British Bill of Rights*, HL Paper 139 (9 May, 2016), at [182], available at http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf .
[17] Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us', Volume 1 (December 2012), p. 18-19, available at: http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf
[18] In particular, promises to make the Scottish Parliament more 'permanent'; See 'The Vow', *The Daily Record* (15 September 2014), available at: http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992#cABWKV8Utdd81vhy.97
[19] 'Brexit: Nicola Sturgeon says second Scottish independence vote 'highly likely'' *BBC News* (24 June 2016), available at: http://www.bbc.co.uk/news/uk-scotland-scotland-politics-36621030
[20] Section 6, the Belfast Agreement (1998), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

> a strong human rights framework, including external supervision by the European Court of Human Rights, has been an essential part of the peace process and anything that undermines this, or is perceived to undermine this, could have serious consequences for the operation of the Good Friday/Belfast Agreement.[21]

Professor Christopher McCrudden has emphasised the unique relationship that Northern Ireland has with the HRA and the ECHR.[22] Leading academics have observed that 'the ECHR has an important practical function in attempting to deal with the legacy issues from the troubles and in particular state involvement in deaths.'[23] Over the years, numerous human rights violations have been uncovered during this process of litigation (both domestically and via Strasbourg),[24] including the ECtHR's landmark decision in 1978 that the UK's treatment of 14 IRA members amounted to inhumane and degrading treatment,[25] and the ECtHR's decisions in 2001 that insisted upon higher standards for state investigations of deaths.[26]

For this reason, it has been suggested that the current human rights mechanism for accountability in Northern Ireland is vital for rebuilding public trust in state institutions. Kate Allen, Director of Amnesty International UK, has argued that given the history of public mistrust in policing, 'binding human rights obligations have been crucial in building and bolstering public confidence in these key structures post-Troubles.'[27]

Further, Professor Christine Bell has made the point that the HRA has been one of the few points of political consensus between the Unionists and Nationalists.[28] To the extent that the HRA has a role in resolving legacy

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[21] Letter from Frances Fitzgerald TD to the Rt Hon Michael Gove MP (3 February 2015), available at: http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/RepealofHRAeffectonEULaw/Minister-Frances-Fitzgerald-toSofSJus.pdf

[22] Revised transcript of evidence taken before The Select Committee on the European Union Justice Sub-Committee, Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act, Evidence Session No. 7 (26 January 2016) available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28283.html

[23] Dzehtsiarou, Lock, Johnson, de Londras, Greene, and Bates 'The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights' (12 May 2015), p. 13, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487

[24] Re domestic cases, Jane Winter of SOAS points to a series of judicial reviews that eventually led to a right for lawyers to be present during police interrogation of their clients. She concludes: 'Almost overnight, ill-treatment in custody and abuse of lawyers became largely a thing of the past.' (2013) European Human Rights Law Review, 1, 1-8. The relevant cases are: R v Harper [1990] 4 N.I.J.B. 75; Re McNearney (1991) HC; Re Duffy (1991) HC; Re McKenna and McKenna (1991) CA

[25] The Republic of Ireland v. UK ECHR 18 Jan 1978

[26] The conjoined cases of Hugh Jordan v. United Kingdom (24746/94) (2003) 37 E.H.R.R. 2;, Kelly and Others v. United Kingdom (30054/96) [2001] Inquest L.R. 125, McKerr v. United Kingdom (28883/95) (2002) 34 E.H.R.R. 20, and Shanaghan v. United Kingdom (37715/97) [2001] Inquest L.R. 149

[27] See Amnesty International UK 'Repeal of the Human Rights Act could undermine peace in Northern Ireland' (14 May 2015) available at: https://www.amnesty.org.uk/press-releases/repeal-human-rights-act-could-undermine-peace-northern-ireland

[28] Bell 'Human Rights Act Repeal and Devolution: Points and Further Resources on Scotland and Northern Ireland' available at: http://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/Bell_Human%20Rights%20%20Devolution.pdf

issues from The Troubles, such consensus is rare. A political crisis in 2015 was brought to an end by an agreement between the two groups, but they could not agree on how to deal with the legacy issues.[29] Moreover, even the finer detail of the HRA could be fundamental to its cross-party support; Professor Bell has pointed out that even where the Belfast/Good Friday Agreement provided for a route for the Northern Ireland Assembly to extend human rights protections, the two groups have been unable to reach agreement on how this should be achieved.

The peace process in Northern Ireland is especially delicate after the recent EU referendum, which could lead to border controls being reintroduced between Northern Ireland and the Republic of Ireland.[30]

Possible solution: a 'sunrise' clause?

One possibility, as put forward by Jonathan Fisher QC, would be to introduce the British Bill of Rights with a 'sunrise' clause: a provision that states that the new legislation will not come into effect in Scotland, Wales and Northern Ireland without the consent of the devolved assembly in question.[31] Without such consent, the HRA would continue to apply. However, this could run counter to the government's aim of a UK-wide Bill of Rights.

To ensure the meeting expressly addresses these issues in a rule of law framework, speakers are asked to direct their attention to key rule of law issues that arise. These include:

- Legal certainty and consistency/legitimate expectations — Would it be inconsistent with this principle for the UK Government to not follow the Sewel Convention in relation to the HRA, or to pass legislation that was not consistent with the Belfast/Good Friday Agreement and the devolution statutes?
- Protection of fundamental rights — the devolution statutes currently require that all legislation passed by the devolved legislatures must be consistent with the ECHR. Would similar protection of fundamental rights be guaranteed under a new British Bill of Rights regime? Might protection of human rights particularly related to the rule of law (such as administrative justice) be strengthened under a new Bill of Rights?
- Equal application of the law — is this principle undermined if the 'British Bill of Rights' only applies in England, but the HRA continues to apply in the devolved nations?
- International rule of law — might a British Bill of Rights that repealed the HRA be in breach of the UK's obligation under the Belfast/Good Friday Agreement?

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[29] See Stormont agreement: Deal reached to save Northern Ireland power share after Troubles legacy crisis (17 November 2015) International Business Times

[30] See Emer O'Toole, 'Ireland faces partition again. Preserving the peace is crucial.' *The Guardian* (26 June 2016), available at: https://www.theguardian.com/commentisfree/2016/jun/26/northern-ireland-republic-peace-brexit-border

[31] Jonathan Fisher QC, 'The British Bill of Rights – Protecting freedom under the law' *Politeia* (7 December 2015) available at http://politeia.co.uk/sites/default/files/files/The%20British%20Bill%20of%20Rights%20-%20Protecting%20Freedom%20Under%20the%20Law(1).pdf

The Bingham Rule of Law Principles

The rule of law questions identified above are based on the eight rule of law principles that were identified by Lord Bingham, which can be summarised as:

1. The law must be accessible and so far as possible, intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair; and
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

Speakers' Summaries

Some of these summaries were provided by the speakers and others are based on notes taken at the meeting, but should not be considered verbatim quotations.

Professor Sir David Edward KCMG QC PC FRSE

The Commission on a Bill of Rights

I was a member of the Commission on a Bill of Rights. The Commission's Terms of Reference were stated to be: to "investigate the creation of a UK Bill of Rights that *incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law*, and protects and extends our liberties"

The majority (including myself) reported in favour of a UK Bill of Rights while recognising the potential complications as regards the devolved entities. I would certainly not have recommended the creation of a British Bill of Rights in substitution for compliance with the ECHR, still less withdrawal from the Convention.

My reason for supporting the creation of a Bill of Rights is that I am essentially an old-fashioned libertarian with a Madisonian distrust of power, however well-intentioned its exercise.

I have watched with dismay the creeping invasion of the rights of the individual by the organs of the State (including Parliament) and the flouting of time-honoured guarantees of due process and administrative propriety. I am disgusted by the casual indifference to elementary human dignity shown by some of those who are clothed with a brief authority and those who seek to excuse or justify what they have done.

Individual rights and dignity cannot be adequately protected by the general and unspecific terms of the ECHR, enacted by the Human Rights Act. We need more, not less.

The ECHR and Scotland Act 1998 (as amended by the Scotland Act 2016)

The relevant provisions of the Scotland Act are set out in annex I.

The crucial points are that, as matters stand, the legislative competence of the Scottish Parliament and the executive competence of the Scottish Government are constrained by the obligation not to act incompatibly with EU law and Convention rights.

According to Explanatory Note 9 published with the Scotland Act 2016, that Act required the legislative consent of the Scottish Parliament "*on the basis that it contains provisions applying to Scotland which alter the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers*". (That is the 'Sewel Convention' now given statutory authority by Section 28(8) of the 1998 Act as amended.)

On the same basis, legislation to remove the obligations of the Scottish Parliament and Government to comply with the Convention would require the legislative consent of the Scottish Parliament. I do not believe that such consent would be given by that Parliament.

Consequently, Westminster would have to decide either to ignore the Sewel Convention and legislate without seeking consent, or proceed to legislate in spite of a refusal of consent. Given the legislative supremacy of Westminster, enacted in Section 28(7) of the Scotland Act, that is theoretically possible.

The Sovereignty of Westminster

Those who assert the doctrine of the legislative sovereignty of Westminster tend to forget that Dicey, who asserted (or invented?) the doctrine, also said that "the actual exercise of authority by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations" – in brief, the willingness of the subjects to obey and the acceptability of the legislation in the circumstances of the time. So, he said, Parliament could, but would not, legislate to tax the colonies, abolish the Scottish law courts, or repeal the Roman Catholic Emancipation Acts.

One has to ask whether, consistently with a desire to maintain the unity of the United Kingdom and the new terms of the Scotland Act, Westminster could act unilaterally to remove the obligation of the Scottish Parliament and Government to comply with the ECHR.

If we are not already in a state of constitutional crisis, that would assuredly provoke it.

Professor Graham Gee

Professor Gee's paper is attached as annex II to this document, which sets out his thoughts in detail. The following summary is based on notes taken at the meeting on his presentation.

Professor Gee observed that if the last fortnight has shown anything, it is that the UK constitution is increasingly complex, multi-layered and divergent, which makes the devolution dimensions to UK-wide human rights reform especially difficult, politically if not legally. In light of the positions of others on the panel, Professor Gee would assume the role of advocating for UK-wide human rights reform in order to promote discussion. Professor Gee explained that he comes to the topic as a Scot trained in the law of England and Wales, with an understanding of the constitution shaped by the best traditions of Westminster and Whitehall. At the same time, he is acutely aware that these traditions are differently appraised in different parts of the UK. He noted in particular the profound concern in Belfast about the insufficient attention that Westminster pays to the implications for the political process in Northern Ireland when considering UK-wide constitutional questions.

Motivation for reform – Professor Gee observed that those who agree about the rule of law can and do disagree on human rights reform. Many want reform in order to enhance rights protection by addressing problems with the HRA that are said to undermine the rule of law, legal certainty, and parliamentary democracy. For reformers, the starting premise is that the HRA is a piece of positive law and capable of being improved. Others may argue it has acquired a special status in some parts of the UK that cannot be tampered with, but there is a high threshold to clear if you want to argue that position.

Method for reform – the UK Government seems to intend to replace one statutory bill of rights with another. To some, this looks like HRA 2.0., although that would be a disappointment for some reformers. Some defenders of the status quo argue that HRA reform would breach the Good Friday Agreement, but the Agreement only requires that the UK Government ensure the complete incorporation of the ECHR into Northern Ireland law So long as any new Bill of Rights includes the Convention Rights, there ought to be no breach of Good Friday Agreement. As to the argument that such reform would not be in good faith with the Agreement if any such new Bill of Rights did not contain equivalent provisions to ss 2, 3 and 4 of the HRA, Professor Gee argued that what matters—in strict legal terms—is the substance of ECHR incorporation, not the text itself.

Mandate for reform – the basic domestic legal position is clear: the UK Parliament is free to adopt whatever laws it chooses, but that domestic legal position has been complicated by the Sewell Convention. Strictly speaking, the Sewel Convention (as now replicated in s 28(8) of the Scotland Act) only provides that the UK Government will "not normally legislate" without procuring the consent of the relevant devolved legislature. Given that the Government can be said to want to enhance rights protection via a statue that contains all of the same Convention rights, and given the government's mandate for HRA reform, then a question arises as to whether this might constitute an exceptional situation that warrants Westminster proceeding without the consent of the devolved legislatures. This is a question that has not been adequately aired.

Jonathan Fisher QC

The following summary is based on notes taken at the meeting on Mr Fisher QC's presentation.

Mr Fisher QC began by observing that whenever the topic of human rights is combined with devolution, you are in treacherous waters.

Mr Fisher set out two guiding principles that inform his approach, noting that there is a tension—hopefully not irreconcilable—between these principles. On the one hand, there is a strong case for a UK BoR in accordance with the Conservative Party's manifesto prior to the last general election. In 1066 language, a BoR would be a 'good thing' to enable the British people to take control of and strengthen rights protection, and there is a lot of strengthening needed (e.g. habeus corpus).

The second principle is that, irrespective of the legal niceties concerning sovereignty, as a matter of common sense and political reality, and political morality, we should be sensitive to the views and feelings in Edinburgh, Belfast, and Cardiff. Mr Fisher observed that he learnt a lot whilst sitting on the Bill of Rights Commission about what was going on in these places. It was quite clear that there was less, if any, enthusiasm for a Westminster enacted Bill of Rights, and we have to be sensitive of that in London.

At the end of the day, Mr Fisher wants to see the continuation of the UK as a whole and does not want to see it fractured, which has led him to try and work out a way forward.

Mr Fisher emphasised that he does not support leaving the ECHR. There has been a clear trend on the part of the ECrtHR to be more sensitive to the margin of appreciation and to shy away from the judicial creativity in which it had previously engaged. Since the Brighton Declaration, the UK's position in relation to the ECrtHR has been much improved, and the UK should therefore remain in the ECHR.

Coming back to the two guiding principles, Mr Fisher had arrived at the idea of a sunrise clause in order to square the circle and address the difficulties that arise for human rights reform and devolution. A sunrise clause would mean that the Bill would not come into effect in the devolved nations without their consent, and they could perhaps amend it as they saw best. It is not perfect; but it is perhaps the most elegant solution in the circumstances.

Ultimately, Mr Fisher took the view that the law will not solve this problem; rather, we need common sense to solve the problem.

Professor Christopher McCrudden

Professor McCrudden's written material is attached as annex III to this document, which sets out his thoughts in detail. These are his introductory remarks at the meeting:

I debated with myself over the last week whether I should just bail out of this meeting. After all, the momentous consequences that these issues have

for Northern Ireland have been largely ignored in the recent Referendum debates, and subsequently.

I eventually decided that I should try, yet again, as so many others have in the recent past, to stress the potentially tragic consequences we now face. But I do this without any confidence that my warnings tonight will have any more effect now than I and others have had in the last two years. I am speaking, of course, in a purely personal capacity. The British political debates over withdrawal from the EU, repeal of the Human Rights Act, and denouncing the ECHR, have simply not taken the consequences for Northern Ireland of any of these becoming a reality fully into account

We are not here to talk primarily about Brexit, but it would be negligent of me not to stress that one of the assumptions of the Belfast/Good Friday Agreement, on which peace in Northern Ireland depends, is common membership within the EU of Ireland and the United Kingdom, and with that of the gradual irrelevance of the Border in Northern Irish life, and the growing irrelevance of citizenship. Brexit will not lead to the immediate collapse of the Agreement (although it will require its amendment) but it does weaken the ideological foundations on which the Agreement is built.

Turning now to the issue of the ECHR, the position is even more concerning. This is because, unlike membership in the EU, adherence to the ECHR is required by the Belfast-Good Friday Agreement, and is built into the institutions established by the Agreement.

We shall have the opportunity to discuss the details and the intricacies. I wish only at this point to make two fundamental points about the relationship between the Agreement and human rights. The first is that unlike in England and Wales, and unlike even in Scotland, human rights is an essential part of the constitutional settlement. The Agreement simply would not have come about without the human rights and equality guarantees that the Agreement contains. Part of that package was incorporation of the ECHR, north and south of the border.

Were the UK to withdraw from the ECHR, I cannot see how the Agreement could survive. If the Agreement collapses, the Executive and the Assembly collapses, we return to Direct Rule, and God knows what else.

But the issue goes beyond membership in the ECHR, it also includes the Human Rights Act. There is, quite simply, no appetite in Northern Ireland to repeal the HRA and replace it with a British Bill of Rights.

And now we come to the critical constitutional point. Also fundamental to the Agreement is the idea of consent of the governed in Northern Ireland. Consent is built into Northern Ireland remaining part of the U.K., consent is fundamental to the structure of power sharing. Indeed, consent for the Agreement itself was secured in Northern Ireland by a massive vote in favour in a Referendum.

Consent is also basic to the relationship between the Northern Ireland Assembly and the Westminster Parliament. Technically, this is encapsulated in the need for a legislative consent motion in the Assembly for changes affecting the scope and operation of devolved powers.

There are few things that are clearer in Northern Ireland politics than the fact that there will not be a legislative consent motion passed by the Assembly consenting to the repeal of the Human Rights Act, if that is necessary, or to the enactment of a British Bill of Rights that falls short of complete incorporation of all the obligations of the ECHR, or to Brexit for that matter.

So what? Well, what happens next is unclear. It seems probable that, ultimately, the U.K. Parliament has the legal power to collapse the Agreement. That is its choice. Some in these Houses of Parliament would welcome this. All I can do is to echo Pearse: The fools, the fools ... If Parliament does collapse the Agreement, then it must bear responsibility for what ensues. If Irish history teaches us anything, it is that Britain has consistently underestimated how fragile peace is in Ireland. And the first casualty will be human rights and the Rule of Law.

Sir Paul Silk

I will speak principally about Wales and human rights in the context of the European Convention on Human Rights, and with the assumption that the current Wales Bill is enacted.

That Bill gives legislative effect to many of the recommendations of the Commission on Devolution in Wales. It makes devolution more symmetric, most obviously by moving Wales from a conferred powers model of devolution to a reserved powers model, but also by enlarging the areas of devolved competence and by making the National Assembly a legislature in the model of the Scottish Parliament.

Under the Bill, an Act of the Assembly is outside competence if incompatible with Convention rights; the Human Rights Act 1998 is unamendable by the Assembly; and the Secretary of State has intervention powers if any action by Welsh Ministers or an Assembly Bill is incompatible with international obligations. Obligations under the ECHR are specifically not reserved to the UK. Some classic human rights areas are reserved, and some are not. For example, equal opportunities are reserved to the UK. Language, social care, education and elections are not reserved.

As in the Scotland Act 2016, the Wales Bill contains a declaratory statement that Parliament will not normally legislate on devolved matters without the consent of the Assembly. The First Minister has said that repealing the Human Rights Act would require legislative consent, though official Welsh Government briefing is more cautious. There is a contrast here with the Welsh Government's intention with regard to legislation to leave the EU. Recognising that Wales voted for Brexit, the First Minister said on June 26th that it would only worsen the constitutional crisis to ignore the people's decision. But it is difficult to see how the amendment of the devolution legislation to repeal the Human Rights Act could be effected without the Assembly expressing a majority opinion against such amendment.

Three other points. First, Welsh legislation to date has enthusiastically endorsed international standards. Even if the Human Rights Act is repealed and the devolution legislation amended in consequence, Assembly legislation might still explicitly oblige Welsh public bodies to comply with

Convention rights within areas of devolved Welsh competence. Secondly, so long as a single England and Wales jurisdiction remains, there could be particular difficulties for Wales if a new Bill of Rights applied only in England. Finally, the rule of law is better protected in Wales, Scotland and Northern Ireland precisely because the Supreme Court has a power to strike down legislation that is incompatible with Convention rights, a power that does not apply to incompatible Westminster legislation affecting England, including that affecting England alone.

Key Points from the Discussion

There were questions and some discussion during and following the expert speakers' presentations. The following paraphrases and summarises this discussion based on notes taken at the meeting, but should not be considered verbatim quotations.

International Impact

There was a lot of discussion that focussed on the international impacts of changes to UK human rights law and policy.

One Lord reflected on the introduction of the Universal Declaration of Human Rights in his youth. Human Rights have grown in importance, not just for legal reasons, but also as a cornerstone for peace and stability. It seemed previously that we had all been working to the furtherance of the ideals set out in the Declaration, and it has been important that there was a convention that was above us, which contained ideals we were aspiring to achieve. It is sickening that Britain is trying to turn this into a subjective game. If the UK can make 'contextual' arguments on human rights, then so too can other countries, and this is internationally irresponsible on the part of the UK. It is important to consider the significance of any changes in UK policy on the international community

There was agreement by many that if the UK were to exit from the ECHR, this would undermine the ECHR and hence human rights internationally. Human rights reform would not necessarily send a message internationally that the UK was walking away from or weakening rights. However, the ECHR would be weakened if the UK were to exit, and this would be particularly acute in relation to emerging countries who look to us for leadership on human rights. The UK's not upholding the ECHR would have a catastrophic effect on opinion in other countries.

A few points were raised in response, although with the underlying position of support for the UK's belonging to the ECHR. First, that human rights protection in the UK does not necessarily depend on ECHR membership. There are domestic law protections that stand independent of the ECHR. Second, there is an as yet unproved empirical question concerning the international effect of UK actions – it may be that UK actions on human rights could weaken them internationally, or it may not, and these assessments may differ depending on whether the focus is on the short-term, the medium-term or the long-term. Finally, an important question that has gone largely unaddressed is whether a good faith concern desire to remedy a problem in the domestic constitutional reactions should be trumped by the assumed international consequences of any such reform.

It was observed that the ECHR is part of a larger pattern of resistance to human rights decisions by international institutions. Examples of this resistance can be seen in Bosnia and Russia. These countries have now set themselves explicitly against international protections and institutions, and there is a weakening of protection at the international level because of this resistance.

On the other hand, it was suggested that the debate on the HRA serves multiple purposes. One purpose is the possible implementation of a Bill of Rights (BoR). Another, however, is as a signal to ECtHR judges. The discussion of a BoR has contributed to closer attention being paid by the ECtHR to the margin of appreciation and has likewise had a positive influence on some domestic judges.

It was separately observed that the discussion was based on a false dichotomy of national and international impacts. Rather it was suggested that damage to human rights at the national level means damage at international level.

Constitutional Crisis

The human rights and devolution questions were discussed in light of broader constitutional issues currently facing the UK following the referendum. These issues were characterised as a crisis by some.

It was observed that recent events show how international and domestic law have become interwoven, more so than perhaps had been appreciated previously. There may not be a constitutional crisis as such. But, it has become apparent that the UK constitution that has been described as flexible and evolutionary is not in fact so. The UK constitution is something that has been constructed over a long period of time through a series of reforms, which has resulted in a number of pinch points in the constitutional system that are creating the system's current problems.

An MP argued that the current crisis is not necessarily terminal, but as can be seen in Parliament at the moment, the UK's mechanisms of governance have almost collapsed. By autumn, things may be running again, but at the moment things are closer to collapse than ever before. The analysis of pinch points was endorsed: things have built up over time, and now all of a sudden all the cumulative pressure is coming home to roost. One area of tension is the disconnect between the views of those inside Westminster and view amongst the general public.

The UK Parliament and Devolved Legislatures

There was concern amongst a number of people about the quality of legislation being made by Westminster. In particular, the use of quasi-legislation in Westminster was criticised, as being associated with high concentration and centralisation of power in the executive, which undermines the sovereignty of Parliament.

There were a range of views on the devolved legislatures. For Wales, it was suggested that there are some practices that are worse than in Westminster, especially in relation to the use of Henry VIII clauses. However, the relatively high use of Henry VIII clauses could be due to a lack of resources. On the other hand, there was the suggestion that the use of committee

work in the devolved legislature of Scotland was better, although limited by resources. The Northern Ireland form of government does not provide a model of good governance in terms of transparency or democracy, but it constitutes the least worst form of government under the circumstances, and it works.

The role of the UK Parliament was identified as a question that underlies the larger debate. In the context of the Brexit debate, the question has arisen of what is it we expect Parliament to do in contrast with the Executive and actions by royal prerogative. Parliamentary sovereignty is being undermined not only by quasi legislation, but also by the possible use of royal prerogative to effect Brexit by triggering Art 50. Who should trigger Art 50? It was argued that Brexit is a question for Parliament, not the Executive.

Similarly it was argued that the UK is in a Constitutional crisis, of which the ECHR is only part. All of the constitutional issues have same origin: an increasing dissatisfaction with constraints on what is seen to be Parliamentary sovereignty, which lies at the root of many arguments on the ECHR. Moreover, the referendum on Brexit may have done more to undermine Parliamentary sovereignty than anything before it.

Public opinion and debate

There was a call for open and respectful debate on questions of human rights, devolution, Parliamentary sovereignty and the constitution. Even if we might consider arguments such as the idea that the EU is a threat to parliamentary sovereignty to be based on a lack of understanding, nevertheless those views are there, regardless of whether they have been instigated by the media. What can be done to address these views?

Further, it was observed that there is a risk, which is in danger of reoccurring (having recently manifested differently in a different context), that those who think the answer is obvious will ignore the mood that is out in the general public. Politicians cannot spend 30/40 years criticising Europe or human rights and then be surprised when people vote in accordance with that view. Accordingly, those who support human rights and internationalism need to engage with those who seek to put forward the intellectual arguments for the 'other' side. There is a strong view held amongst the public that the UK should come out of compliance with ECHR and adopt a British model, and what people want is for the floor of human rights standards to be dropped. This is a view that needs to be acknowledged and engaged with.

Devolution and a Sunrise Clause

There was some support for the idea of a sunrise clause from the perspective of the devolved nations. However, there was also a question on how it would operate in practice if there were to be different human rights regimes in the different nations of the UK. Assuming that whatever BoR was passed, it had a duty for devolved legislatures to act in compliance with the rights without a power for courts to strike down legislation, where would that leave legal certainty?

There was concern over this potential uncertainty. By way of example, what would happen if an individual who lived in Wales received treatment in a

hospital in England – where do their human rights reside? A discussion may be needed on whether a patchwork of rights across the UK is desirable.

One view was that a sunrise clause would create a lawyers' paradise. If there were four different jurisdictions, you would likely have forum shopping. If there was a peak institution such as the Supreme Court that would have the role of moderating then forum shopping may be avoid, but if not then there will be forum shopping.

Another view was that there are already different legal regimes in different areas in the UK, and the situation produced by a sunrise clause would be no different.

A separate question was raised concerning the nature of a 'mandate' in the context of elections and devolution. The present UK government has a mandate for HRA reform from those who voted for the Conservative Party, not those who voted for other parties such as the SNP. The opposing position put forward was that, as part of the UK, Scotland needs to go with rest of the country in these matters.

Northern Ireland

Many at the meeting acknowledged the particular issues faced in Northern Ireland in relation to human rights. It was explained that calls for changes to human rights/ECHR are dangerous and cut to the core of unique situation in Northern Ireland, where there are two different sources of legitimacy and people know that their rights are backed up by the ECtHR. People do not realise they would not be knocking through a stone wall by undertaking human rights reform; rather, it is a supporting wall for the peace settlement in Northern Ireland that is being damaged. The issue is not limited to human rights, but it is also the principle of consent. There were two consent proceedings (referendums) that put the GFA in place, and people consented because of the rights protection included. So, if you undermine human rights protections, then you undermine the whole settlement.

We need to understand what the ECHR does for all parts of the UK. Based on the past performance of those arguing for certain positions, it is clear that dropping out of the ECHR would mean reducing human rights protections. Agreement on all of the provisions in the GFA would not have been achieved the without the ECHR rights. Greater rights protection is possible in theory, but the Northern Irish BoR process that sought to establish further rights protections has been frustrated. Ironically, the reason why the Secretary of State has said that she will not enact a Northern Irish BoR is the lack of consent, and that principle of consent should likewise be applied in this context.

The problems or concerns with human rights seem to come from England, where there is a view that rights are being imposed from somewhere else onto England. The dilemma for some in Northern Ireland is: do we try to persuade the English debate on human rights onto a different course? Or do we try to prevent the contagion effect on Northern Ireland? One perspective was that the English debate on human rights has been lost, and that English debate must not be allowed to have a contagion effect in

Northern Ireland and undermine support for human rights there. Regardless of concern about the debate in England, it must not be allowed to undermine the peace settlement in Northern Ireland. Accordingly, separate human rights regimes may be necessary. Another perspective was that those who support human rights should not give up on England, and that there is cause for optimism such as the Modern Slavery Act and its positive influence internationally.

Strengthening rights

There was much discussion of whether human rights reform in the UK was motivated by, or would achieve, the strengthening of human rights protections. When the matter is debated in Westminster, many arguing for rights reform will not be doing so to strengthen human rights protections.

Some took the view that human rights reform is an opportunity to strengthen rights in the UK. A BoR could include additional rights, such as administrative and procedural rights that have a UK character, as well as additional mechanisms for rights protection. It was noted that the majority of the other countries in Europe have got a constitution that includes a BoR and they are also members of the ECHR and they do not have the same consternation that the UK has over such a position. For example, Germany's constitutional human rights protections build on and are not inconsistent with its ECHR membership. ECHR rights constitute the base level, and then the German constitution has additional rights protections. Similarly, Norway had a commission on human rights and then established a BoR. Thus, it need not be a significant problem to build on the Convention.

A number of people were sceptical about the Government's motivations for rights reform, did not think the motivation was to enhance rights protection, and did not expect that human rights reform under this government would produce enhanced rights protections. Some argued that this Government does not have a good track record on enhancing rights. Further, it was argued that there are other ways to enhance and strengthen human rights without repealing or amending the HRA, specifically, passing additional legislation. If the motivation is to enhance protection for rule of law or administrative processes, then passing legislation to do so would be effective and there is no need to repeal the HRA. Passing legislation was the traditional mechanism for achieving such aims in the UK.

By contrast, some urged caution in ascribing motives to those advocating for human rights reform. It was acknowledged that politicians have a wide range of motives for advocating reform.

Expert Speakers' Biographies

Professor Sir David Edward KCMG QC PC FRSE

Sir David Edward is a Scottish advocate, arbitrator, and former judge of the Court of Justice of the European Communities. He is also Professor Emeritus at the School of Law, University of Edinburgh. From 2008 to 2009, Sir David served on the Commission on Scottish Devolution (the 'Calman Commission'). In 2012, he was a member of the Commission on a Bill of Rights.

Professor Graham Gee

Professor of Public Law at the University of Sheffield. Professor Gee's research is focused on the changing nature and character of the UK constitution, including changes to the governance, leadership and selection of the judiciary in England and Wales. He edits the *Judicial Power Project* website under the auspices of Policy Exchange. Before pursuing an academic career, Professor Gee qualified as a solicitor at Freshfields Bruckhaus Deringer in London. Earlier this year he sat on the selection committee that recommended to the Lord Chancellor candidates for the UK seat on the European Court of Human Rights.

Jonathan Fisher QC

Jonathan Fisher QC is a practising barrister at Devereux Chambers in the Temple. He is also a Visiting Professor in Practice in the Law Department of the London School of Economics. He was chairman of research of the Society of Conservative Lawyers between 2006 and 2010, and a Commissioner on the Bill of Rights Commission between 2011 and 2012. His publications include Rescuing Human Rights (2012) and 'The British Bill of Rights - Protecting Freedom Under the Law', which was published by Politeia in December 2015.

Professor Christopher McCrudden

Christopher McCrudden received his legal education in Belfast (LL.B.), Yale University (LL.M.), and Oxford (D.Phil.). He is currently Professor of Human Rights and Equality Law at Queen's University Belfast and a Fellow of the British Academy. He was formerly Professor of Human Rights Law at the University of Oxford and is now a Visiting Professor at Oxford. Christopher has published widely in the areas of public law and regulation, equality and discrimination, human rights, EC law, and international economic law. In 2016, he gave evidence to the EU Justice Sub-Committee on the proposed British Bill of Rights.

Sir Paul Silk

Sir Paul Silk was Chair of the Commission on Devolution in Wales from 2011 to 2014. Paul is a former Clerk to the National Assembly for Wales, serving from March 2001 until December 2006. From 1975 to 2001 he was a clerk in the House of Commons, and again worked in the House from 2007 to 2011. He is an honorary Professor at the Wales Governance Centre at Cardiff University and President of the Study of Parliament Group. In 2015 he gave evidence on devolution to the Lords' Constitution Committee.

ANNEX I – the Scotland Act 1998, amended by the Scotland Act 2016.

Section 28 (Acts of the Scottish Parliament)

(1) Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.

(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

Section 29 (Legislative competence)

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
(2) A provision is outside that competence so far as any of the following paragraphs apply— …
(d) it is incompatible with any of the Convention rights or with EU law,

Section 57 (EU law and Convention rights)

(2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law.

Section 63A (Permanence of the Scottish Parliament and Scottish Government)

(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.
(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

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ANNEX II

—The HRA and ECHR in the Devolved Nations—

General Principles of Human Rights Reform

1. Reasonable people can and do disagree about whether the Human Rights Act ("HRA") should be repealed and a British Bill of Rights ("BBOR") introduced in its place. Some of the claims made in recent months by both defenders and critics of the HRA have been overwrought, with some of the former far too quick to dismiss the case for reform (as well as, very regrettably, traducing the motives of those arguing for reform). **It bears repeating: people sharing a bona fide commitment to constitutional government and the rule of law can and will disagree about the legal arrangements that are likely to secure the effective protection of human rights.** The debate must be open, inclusive and respectful, including respecting the different views that are likely to be held with varying strength in different parts of the UK.

2. **Those arguing for human rights reform do so not to *reduce* rights protection, but to *enhance* it,** by addressing problems associated with the particular model of protection envisaged by the HRA, including:

   - the ECtHR has, by its own admission, gone well beyond the commitments agreed by the signatories to the ECHR, developing a case law that is often excessive, poorly-reasoned and undermining of the rule of law.

   - the HRA undermines the rule of law in important ways, and not least by way of the uncertainty of the requirement in section 3 to interpret so far as possible legislation consistently with 'Convention rights'.

   - the HRA makes ECtHR case law much more significant in domestic law and increases the political pressure on the Government and Parliament to conform to its rulings.

   - the strictures of the HRA, and the related reception of ECtHR case law, pose a rising challenge to parliamentary self-government; and

   - the HRA contributes to a changing judicial culture in far-reaching ways, as many judges have noted, some with approval and others with regret.

   Addressing these problems will strengthen the rule of law and parliamentary democracy.

3. **For supporters of reform, the most challenging objections relate to the role of the HRA and the ECHR in the devolution arrangements in Scotland and Northern Ireland.** There are complex legal, political and constitutional questions, including about: Westminster's relationship with the devolved legislatures; the distinctive role of the ECHR within the Good Friday Agreement ("GFA") and the peace process more generally; and the potential to inflame debates about the future of Northern Ireland and Scotland within the Union. Many of these questions are fraught in any event, but plainly even more so following the EU referendum. Even supporters of reform might find themselves wondering whether now is a prudent time to embark on reform that risks inflaming nationalist sentiment in Scotland and Northern Ireland. **It should not be forgotten, however, that, on the basis of our current constitutional arrangements, the UK Government has a mandate to repeal the HRA and introduce a new BBOR**.

4. Debate over the last year has focused on whether devolved legislatures can in effect block reform. This framing is unfortunate for two reasons. First, **the duty of constitutional respect is one that both the UK Parliament and devolved legislatures must show towards each other. Second, a BBOR could (and arguably should) be about empowering of all the various legislatures in the UK on questions of rights in general, not just the UK Parliament** (e.g. by creating more scope for and ensuring more weight is attached to legislative deliberation on the meaning and content of rights).

5. Much will turn on the precise details of the Government's proposal. For these purposes, I assume (a) the repeal of the HRA, (b) the introduction of a BBOR which replicates all of the Convention Rights, possibly in some instances with greater specification of the considerations that courts should take into account when assessing the proportionality of alleged infringements; and (c) changes to some or all of sections 2, 3 and 4.

The Basic Legal Position

6. The basic domestic legal position is clear. The UK Parliament is sovereign and is legally free to enact whatever human rights reform it wishes for the UK as a whole or any of its parts, notwithstanding the devolution statutes and GFA. It also matters that the HRA is a reserved statute, with the devolved legislatures not empowered to amend or repeal it.

The Good Friday Agreement

7. There is also an important international law dimension in Northern Ireland. The GFA binds the UK in international law. It requires the UK to ensure the "complete incorporation into Northern Ireland law of the ECHR, with direct access to the courts, and remedies for breach of the Convention, including power for courts to overrule Assembly legislation on grounds of inconsistency". **Assuming the Convention Rights are replicated in a BBOR, there should be no breach of the GFA.**

8. Some defenders of the status quo might argue that repeal of the HRA and the introduction of a BBOR that does not contain equivalent provisions to ss 2, 3 and 4 does not represent a "good faith" reading of the UK's obligations under the GFA. They will argue that "complete incorporation into Northern Ireland law of the ECHR" implies more than repeating the text of the ECHR, but also presupposes, for example, an important role for the ECtHR's case law. This is not an especially strong argument. The text of the GFA does not explicitly require the HRA's continued existence. It is arguable that the HRA was only intended to have a temporary, placeholder role within the GFA pending the introduction of a Bill of Rights for Northern Ireland. **The key point is that the GFA does not make specific reference to the HRA; it references incorporation of the ECHR into Northern Ireland law. Hence, it is the substance of the ECHR's incorporation that matters, not the legislative form (i.e. whether via the HRA or a BBOR).**

The Sewel Convention

9. The view held by many lawyers is that repeal of the HRA and the introduction of a BBOR would engage the Sewel Convention. Reasons include:

    - Repeal of the HRA is likely to mean that several provisions of the Scotland Act 1998 are spent or repealed, and would have the effect of increasing the competence of the Scottish Parliament.

- Introduction of BBOR may touch upon areas of devolved competence and may have the effect of revising the competence of the devolved legislatures.

- Any attempt in a BBOR to introduce qualifications on the meaning and the breadth of convention rights will automatically and correspondingly reduce or expand competence of the devolved institutions.

- It can be argued that human rights, or at the very least the "observation and implementation" of the ECHR, have been devolved to the Scottish Parliament and the Northern Ireland Assembly.

10. Some of the claims made for the triggering of the Convention seem overstated (e.g. a BBOR could include consequential amendments necessary by virtue of the references in the devolution legislation to convention rights and/or HRA; a BBOR could also include a provision stipulating that nothing in the BBOR expands or contracts the competence of devolved institutions, except that their disability from amending or repealing the HRA now applies to the BBOR).

11. It is clear, however, that the weight of legal opinion is that the Convention will be triggered. As a non-legal rule, the Convention is not legally enforceable, but still carries considerable political weight. The current political complexions of the Scottish Parliament and the Northern Ireland Assembly is likely to render it difficult to obtain legislative consent for either HRA repeal or introduction of a BBOR. On this view, then, a UK Government that repealed the HRA and introduced a new BBOR without obtaining legislative consent could be criticized for acting unconstitutionally. There are subtleties, however, that this neglects.

12. **An important question that has gone largely unaddressed is when is it appropriate for the UK Parliament to legislate in the face of consent being withheld?** Lord Sewel's initial formulation noted that, if the Convention is engaged, the UK Government will "not normally legislate" save with the consent of the devolved legislature. **It would be problematic if the practical effect of interweaving the HRA in the devolution statutes, when combined with the Sewel Convention, was to make the HRA impossible to reform. This matters all the more when a national political party has won a general election on a manifesto commitment to repeal and replace the HRA.** It may be, in other words, that this is an exceptional situation where the UK Government should feel able to disregard any withholding of legislative consent.

13. This is especially so given that the effect of s29 and Sch 4 of the Scotland Act (and equivalent provisions in the Northern Ireland Act) is to position the HRA outside of devolved competence (i.e. the devolved institutions cannot therefore amend or repeal the HRA). Changes to devolved matters or the competence of the devolved institutions that are incidental on changes to a reserved statute such as the HRA are arguably less objectionable in terms of the Convention. Any such changes would seem less constitutionally problematic than a direct decision by the UK Parliament deliberately to change the scope of devolved matters.

<u>An England-only Bill of Rights?</u>

14. One option might be for a new BBOR to apply only in England and Wales. It is already the case that the legal regimes in England and Wales, Scotland and Northern Ireland confer different rights and responsibilities upon citizens. This would recognise that there is a particular "ownership issue" with the HRA in England. But it undercuts the Government's aim of introducing a new human rights regime for the whole of the UK.

15. Another option might be to jettison the introduction of a BBOR and instead to amend the HRA to address the problems listed at point 2 above. Even the most stalwart supporter of the HRA should be able to concede that it is a piece of legislation that can be improved.

Graham Gee
Professor of Public Law
University of Sheffield

APPG on the Rule of Law meeting
House of Commons, 5 July 2016

The HRA and ECHR in the Devolved Nations

Professor Gordon Anthony (also of Queen's University School of Law) and I were asked to present Evidence to the Select Committee on the European Union, Justice Sub-Committee, Inquiry on the Potential Impact on EU Law of Repealing the Human Rights Act earlier this year. Having reviewed it in light of the results of the recent Referendum, I see no reason not to reiterate the points I made in our Evidence, revised to correct one factual error.

We also submitted Evidence to the House of Commons, Northern Ireland Affairs Committee on the relationship between the United Kingdom exiting the European Union and its effect on the protection of human rights in Northern Ireland. Again, I see no reason to resile from the points I made in this Evidence, which I also attach.

Christopher McCrudden FBA

Professor of Human Rights and Equality Law, Queen's University Belfast; William W Cook Global Professor of Law, University of Michigan Law School; Barrister, Blackstone Chambers, London

1 July 2016

Memorandum to the Select Committee on the European Union, Justice Sub-Committee, Inquiry on the Potential Impact on EU Law of Repealing the Human Rights Act (Revised 1 July 2016)

A. *Protection of human rights in Northern Ireland, in general*

1. The legal arrangements for the protection of human rights in Northern Ireland, as in the rest of the United Kingdom, are multi-layered in form and include Common Law, ordinary statute (enacted by the UK Parliament and by local legislatures), and what might be considered 'constitutional' enactments, including in particular the Human Rights Act 1998 and the Northern Ireland Act 1998.

2. In the Northern Ireland constitutional context, 'human rights' is neither an excepted nor a reserved matter (with certain exceptions we shall mention subsequently). Neither Schedule 2 of the Northern Ireland Act 1998 (on what constitutes an excepted matter) nor Schedule 3 (on what constitutes a reserved matter, mention 'human rights', save where mention is made of the European Convention on Human Rights ('ECHR').[1] The principle of the Northern Ireland Act is clearly set out in section 4(2), that a "'transferred matter" means any matter which is not an excepted or reserved matter.' As a result, , it might be said that the Northern Ireland Assembly has power to legislate in respect of 'human rights' as a 'transferred', i.e. a devolved, issue.

3. This interpretation is supported section 69 of the Northern Ireland Act 1998 and related provisions in the Assembly's Standing Orders, which require that the Northern Ireland Human Rights Commission should be consulted on whether Assembly legislation complies with 'human rights'. In addition, although Schedule 2 of the Northern Ireland Act (on excepted matters) includes (in para 3(c)) 'international relations' as one of the excepted matters, this is stated *not* to include 'observing and implementing international obligations, obligations under the Human Rights Convention[2] and obligations under [EU] law'. Observing and implementing these obligations are therefore also devolved responsibilities.

4. Although 'human rights' are devolved, and the Assembly is empowered (and obliged[3]) to act to observe and implement the ECHR, the Assembly and Northern Ireland Ministers are disabled from amending the Human Rights Act 1998. This is because section 7(1) of the Northern Ireland Act 1998 provides that the Human Rights Act constitutes an entrenched provision, meaning that it cannot 'be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department.'

5. Whilst this Memorandum considers the 'constitutional' enactments in more detail, it is noteworthy that 'ordinary' statutes have played a significant role in establishing human rights protections, perhaps particularly in the area of equality and non-discrimination, including such legislation as the Fair Employment and Treatment Order 1998, which differs from the Equality Act 2010 that applies in the rest of the UK. In addition, sections 75 and 76 of the Northern

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[1] Northern Ireland Act 1998, Schedule 2, paragraph 2.

[2] In this paragraph "the Human Rights Convention" means the following as they have effect for the time being in relation to the United Kingdom— (a) the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950; and (b) any Protocols to that Convention which have been ratified by the United Kingdom.'

[3] Northern Ireland Act, section 6 and Human Rights Act, section 6.

Ireland Act 1998, together with Schedule 9,[4] provide for additional equality obligations on public authorities that differ from those in the rest of the UK.

6. In addition to these arrangements, there is one further provision in the Northern Ireland Act 1998 that is of relevance to considering the protection of human rights. The Northern Ireland Act (as amended by legislation to give effect to the St Andrews Agreement[5]) provides, in section 28A, that there shall be a Ministerial Code and that Ministers shall act in accordance with that Code. The Northern Ireland courts have held these provisions to be legally binding.[6] The Ministerial Code includes a requirement on Ministers to 'uphold the rule of law'. It is unclear whether the 'rule of law' includes the 'rule of international law', but arguably it does, and therefore there is an obligation on Ministers in the Executive to uphold international human rights obligations.

7. It would also appear that, where a Minister states that he or she has taken international law into account when making a decision, his or her decision can subsequently be challenged as contrary to the international standard in question.[7] Subsequent case law has, however, made clear that a challenge of this kind will fail where the international standard in question permits of more than one interpretation.[8] We would also note that such cases fasten upon a *power* to consider unincorporated international law, rather than an enforceable *duty* to do so. Constitutional dualism in this way retains influence even if it is no longer quite as dominant as it once was..[9]

B. The protection of human rights under the ECHR and EU Law in Northern Ireland

8. The Human Rights Act 1998 applies to Northern Ireland, but in several other critical respects, the protection of human rights in Northern Ireland under the ECHR and EU Charter is different from that in Scotland and Wales.

9. Before turning to those differences, we would note that there are many similarities between Northern Ireland and Scotland and Wales. Under each of the devolution schemes, legislative measures and executive acts must conform to the ECHR and EU law, and remedies may be granted where they fail to do so.[10] While the genesis of the Northern Ireland Act 1998 is different in that it lies in the Belfast-Good Friday Agreement 1998, much of the modelling for the protection of rights under the wider devolution settlement is similar. In this sense, Northern Ireland has much to learn from Scotland and Wales and the "rights-centred" devolution case law that has arisen in those settings.[11]

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[4] On the legal effects of which, see Re Neill's Application [2006] NI 278, and JR1's Application [2011] NIQB 5.
[5] Northern Ireland (St Andrews Agreement) Acts of 2006 and 2007.
[6] Re Solinas' Application [2009] NIQB 43.
[7] Re McCallion's Application [2007] NIQB 76.
[8] Re McCallion's Application [2009] NIQB 45 & [2009] NICA 55.
[9] Re T's Application [2000] NI 516. For the limits of dualism in the human rights context see Lord Kerr's comments in R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16
[10] See Northern Ireland Act 1998, ss 6, 24, 81, 83; Scotland Act 1998, ss 29, 57, 101, 102; Government of Wales Act 2006, ss 80, 81, 108, 153, 154.
[11] E.g., Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3.

10. The protection of human rights in Northern Ireland under the ECHR differs from that of Wales and Scotland in three other critical respects: the first is functional; the second is procedural; and the third is in terms of its status in international law.

11. As regards the functional differences, it is important to note that the ECHR has played a critical role in the most recent Troubles in Northern Ireland, from the early days in the late 1960s when it was used as a method of challenging religious and political discrimination, following the descent into violence when it was used as a way of limiting actions by the security forces, and following the Good Friday-Belfast Agreement ('the Agreement') in 1998 when it has proven an important mechanism in the context of dealing with the past.[12]

12. The procedural differences concern the operation of the ECHR in Northern Ireland, where aspects of the Human Rights Act 1998 are modified. Section 13(4) of the Northern Ireland Act 1998 provides that Standing Orders of the Northern Ireland Assembly 'shall include provision— (a) requiring the Presiding Officer to send a copy of each Bill, as soon as reasonably practicable after introduction, to the Northern Ireland Human Rights Commission; and (b) enabling the Assembly to ask the Commission, where the Assembly thinks fit, to advise whether a Bill is compatible with human rights (including the Convention rights). Section 71, in addition, provides that the Northern Ireland Human Rights Commission has standing to litigate ECHR issues in the domestic courts, without itself having to satisfy the 'victim' test under section 7 of the Human Rights Act 1998/Article 34 of the ECHR. It is this procedural difference that recently enabled the Commission successfully to challenge Northern Ireland's abortion laws as contrary to Article 8 ECHR.[13]

13. The international law difference concerns the status of the ECHR as a part of the Belfast-Good Friday Agreement, where the protection of rights has dimensions that are internal and external to Northern Ireland (and, by extension, the UK). The important point here is that the Belfast-Good Friday Agreement not only constitutes a peace agreement between the contending communities in Northern Ireland, it also comprises an international agreement between the Republic of Ireland and the United Kingdom.

14. The Agreement provides, in Strand One (which details new institutional arrangements in Northern Ireland):

> 'There will be safeguards … including: … (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission; [and] (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland'[14]

15. In Section 6 of the Agreement (dealing with 'Rights, Safeguards, and Equality of Opportunity'):

> 'The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts,

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[12] The definitive study is Brice Dickson, The European Convention on Human Rights and the Conflict in Northern Ireland (OUP, 2012).

[13] Re Northern Ireland Human Rights Commission's Application [2015] NIQB 96 & 102.

[14] Strand One, at paragraph 5.

and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.'[15]

16. The human rights provisions included in the devolution arrangements in Northern Ireland are, therefore, unlike those in the rest of the United Kingdom, underpinned by an international agreement between the Republic of Ireland and the United Kingdom. How far the obligations protect the different provisions of the whole of the existing Human Rights Act 1998 is a matter of debate, but it would appear to require, at least, that if Westminster did repeal the HRA it could continue to meet the UK's obligations under the Belfast-Good Friday Agreement only by providing, at the very least, that Convention rights would continue to be justiciable in Northern Ireland courts.

C. Role of the EU Charter of Fundamental Rights in Northern Ireland

17. The approach taken to implementing the ECHR, through the Human Rights Act 1998 and the Northern Ireland Act 1998, means that all Westminster legislation and decisions taken by UK Ministers, as well as all Northern Ireland Assembly legislation and decisions taken by Northern Ireland Ministers and other public authorities, are subject to human rights scrutiny.

18. On the other hand, the application of the EU Charter in Northern Ireland means that, as in the rest of the EU, the Charter applies to public authorities only when they are implementing EU law. While it is not entirely clear how 'implementing' is to be understood, it would appear that domestic courts and the Court of Justice of the European Union are reading the term broadly.[16] This would suggest that the Charter's reach is an expansive one, albeit that, in UK law, it is not as far-reaching as the Human Rights Act 1998.

19. The Northern Irish courts are already faced with arguments using the EU Charter in the human rights context. McCloskey J, of the Northern Ireland High Court has referred to the Charter as 'a dynamic, revolutionary and directly effective measure of EU law'.[17]

20. The Northern Ireland courts have been faced with a steady stream of arguments drawn from the Charter. There are several recent examples.[18] Most recently, in a case in which the Northern Ireland Department of Health's life-time ban on males who have sex with other males from donating blood was struck down, counsel for the applicant relied on the EU Charter's non-discrimination provisions.[19] This case is currently before the Northern Ireland Court of Appeal.

21. In another case, a mother sought to prevent the registration in Northern Ireland of an order of a Polish court which had awarded parental powers to her husband, the father of their two

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[15] Rights, Safeguards, and Equality of Opportunity, at paragraph 2

[16] Eg, Rugby Football Union v Viagogo Ltd [2012 UKSC 55 and Case C-617/10, Aklagaren v Fransson [2013] 2 CMLR 46.

[17] See AB & Ors v Facebook Ireland Ltd [2013] NIQB 14, at [14].

[18] See also Re ALJ et al's Application [2013] NIQB 88.

[19] *Re JR65's Application for Judicial Review* [2013] NIQB 101,

children.[20] At the time that the order was made the mother and the children resided in Northern Ireland and the father resided in Poland. The father sought to enforce the order of the Polish court so that the children would come to live with him in Poland. The mother argued that the children do not wish to return to Poland and that their views should be taken into consideration on matters which concern them in accordance with their age and maturity, referring to Article 24(1) of the Charter. This argument was accepted by Stephens J.

22. In our view, there would be likely to be increased reliance on the EU Charter in Northern Ireland courts were the Human Rights Act were to be repealed, at least in those areas in which it could be plausibly argued that there was an element of implementation of EU law involved, and that this issue would, in itself, lead to increased references to the Court of Justice of the European Union. We would note, parenthetically, that there is a very significant overlap between the Charter and the Convention and that any rulings of the Court of Justice of the European Union may well give the Convention a continuing, if indirect, role in UK law.

23. To what extent could the EU Charter substitute for the repeal of the Human Rights Act? Although the Northern Ireland courts have been willing to take a flexible approach to the operation and scope of the Charter, the fact that Charter applies to such bodies only when they are implementing EU law means that the EU Charter may have a limited impact on Northern Ireland-specific matters. The point is notably true of many of the areas in which human rights issues have arisen during the Troubles and during the transition – the investigation of controversial deaths under Article 2 ECHR would be one obvious example.

24. We cannot say, therefore, that the EU Charter would (or could) provide an adequate functional substitute for the repeal of the Human Rights Act, given the limitations on its applicability. To the extent that, as we believe, the availability of human rights remedies provided in the Human Rights Act has eased that transition, repeal of the HRA could, therefore, have a destabilizing effect on the Peace Process, broadly conceived, and that the EU Charter would be unlikely to be able to fill that vacuum.

D. Operation of the Sewel Convention, the Legislative Consent Motion, and the Petition of Concern procedure

25. Would the Northern Ireland Assembly need to consent to repeal the Human Rights Act under the Sewel Convention? This is a difficult question for several reasons. The first reason is that the Convention might be thought to have a broader as well as a narrower ambit.

26. The broader understanding is that all matters that significantly impact on devolved matters in Northern Ireland are subject to the Convention, such that if the UK Parliament wishes to legislate in these areas, the agreement of the Assembly should be obtained. This broader reading is based, in part, on the Memorandum of Understanding between the devolved administrations of 2001. This states, at paragraph 13:

> '… the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be

[20] *Re Jakub and Dawid (Brussels II revised: recognition and enforcement of foreign order)* [2009] NIFam 23,

> responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.'[21]

This would suggest, for example, that a broad range of matters over which Westminster and Stormont share responsibilities, such as 'human rights' are subject to the Convention, as well as Westminster legislation that significantly affects the operation of devolved powers.

27. The narrower interpretation of the Convention is that such agreement need only be obtained where it is intended directly to legislate in areas 'specifically' devolved to Northern Ireland Ministers and the Assembly. This narrower reading is based on the UK Government's Devolution Guidance Note 10 which provides that: 'Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult the [Northern Irish] Executive on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes.' Provisions which are 'specifically for devolved purposes' would include legislation directly altering the powers of the Assembly and of Northern Ireland Ministers.

28. In order to consider the potentially different effect of these two (somewhat different) understandings of the Convention, it is worth distinguishing between repealing the Human Rights Act 1998, and enacting an alternative domestic Bill of Rights that falls short of the ECHR and the ECtHR's jurisprudence. It seems clear to us that whether a broad or a narrow interpretation of the Sewel Convention is adopted, enacting a new domestic Bill of Rights that applied to the Northern Ireland Assembly and to Northern Ireland Ministers, would involve amending the existing Northern Ireland Act's allocation of powers to Ministers and the Assembly and would therefore require Assembly approval. We would suggest that this is certainly true as a matter of politics if not also a matter of law. We would also note that this directly involves the UK Parliament acting in the area of 'human rights', which we have seen to be a devolved matter.

29. There is, however, greater uncertainty regarding the repeal of the HRA only. If the broader reading of the Sewel Convention is adopted, then repeal of the HRA as it applies to Northern Ireland, would seem to require Assembly approval. While the position is not clear, the following points suggest a need for approval: the HRA touches on areas that indirectly affect devolved areas, since currently the HRA is regularly used in the Northern Ireland courts to challenge the actions of Northern Ireland Ministers operating under devolved powers; and the HRA is specifically included in the definition of 'human rights', which is a devolved matter.

30. If the narrower reading is adopted, however, then the repeal of the HRA would seem not to trigger the Sewel Convention, for two reasons. First, it could be said that Sewel would not be engaged because that repeal would not entail the UK Parliament legislating 'with regard to' areas that are specifically devolved. This is because section 7(1) of the Northern Ireland Act 1998 provides that the Human Rights Act constitutes an entrenched provision, meaning that it cannot 'be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department.' Since, therefore, the Assembly and Northern Ireland Ministers are disabled from legislating to modify the HRA, the Sewel Convention does not arise if Westminster elects to do so. Some support for this argument is

[21] Devolution: Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, December 2001 CM 5240.

derived from previous practice: when the UK Parliament amended the HRA in 2008,[22] it did so for Northern Ireland as well,[23] and we understand that no legislative consent motion was sought from the Assembly at that time.

31. Secondly, the Convention may not apply under the narrower understanding of the Sewek Convention because, it could be argued, the relevant references in the Northern Ireland Act to the limits on the powers of the Assembly and of Ministers refer to 'Convention rights', not the HRA. On this reading, repeal of the HRA would not directly affect the operation of 'Convention rights' under the Northern Ireland Act, which would remain in operation and therefore repeal would not engage the Sewel Convention.

32. However, a peculiarity in the drafting of the various devolution Acts, including the Northern Ireland Act 1998, means that this second argument in the previous paragraph may not be correct. Section 98 of the Northern Ireland Act provides that the term 'Convention rights' (which as has been seen above is the term used in that Act regarding the competence of the Assembly and Northern Ireland Ministers), is to be interpreted as having 'the same meaning as in the Human Rights Act 1998'. This seems to link 'Convention rights' in the Northern Ireland Act 1998 directly to the HRA in a way which might be interpreted as meaning that, in the absence of the HRA, 'Convention rights' in the Northern Ireland Act 1998 would have no internal definition and would thereby be inoperable. This would mean that the requirement on Ministers and the Assembly to conform to 'Convention rights' would fall away once the HRA was repealed, and that repeal would therefore have modified the powers of Ministers and the Assembly in a manner that would have required Assembly approval as *per* Sewel.

33. A separate question arises, however, even assuming that the UK Government considered that the Sewel Convention operated. Even if the Northern Ireland Assembly were asked to consent to repeal of the HRA and/or the enactment of a domestic Bill of Rights, would the Assembly be able to consent, in the sense of being able to muster sufficient votes to pass the legislative consent motion?

34. The answer is likely to be 'no', at least as things stand politically. This is because any significant issue before the Assembly may be made the subject of a Petition of Concern, triggered by a group of Members of the Assembly. The effect of such a Petition of Concern is that both the major parties (Sinn Fein and the Democratic Unionist Party) have effective vetoes over any issue before the Assembly, because a super-majority is required where such a Petition has been triggered. It seems highly unlikely that either Sinn Fein or the Social Democratic and Labour Party (to say nothing of the other political parties represented in the Assembly) would be willing to vote in favour of a legislative consent motion of this type, and highly likely that they would (separately or together) initiate a Petition of Concern.

35. We turn now to consider whether the Northern Ireland Assembly would have competence to legislate for any gaps in human rights protection caused by repealing the Human Rights Act, and not covered by a Bill of Rights or the EU Charter.

36. For the reasons stated previously, we consider that the Northern Ireland Assembly would have power to legislate for some of the gaps in the protection of international and ECHR human rights provisions that would remain post repeal of HRA. In particular, as we point out

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[22] Health and Social Care Act 2008, section 145.

[23] Health and Social Care Act 2008, section 169(2)(e).

in paragraph 3 above, the Assembly is free to implement the UK's international obligations within its sphere of competence. This means that if the HRA were to be repealed contrary to the Assembly's wishes, it could itself pass an Act to replace it.

37. There are two major possible limits to the power of the Assembly in this regard. The first is whether the Assembly could enact a HRA-alternative which would apply to the Assembly and the Executive, effectively reproducing the current terms of section 6 and section 24 of the Northern Ireland Act.

38. A second issue arises regarding the scope of public authorities affected. A significant gap that could exist is the issue of what constitutes a 'public authority' for the purposes of human rights protections. At the moment, as we have seen, all public authorities operating in Northern Ireland are included within the human rights coverage of the Human Rights Act, the Northern Ireland Act, or both. If, following repeal of the HRA, UK-based public authorities operating in Northern Ireland in subject areas that were reserved or excepted (such as the Ministry of Defence) were not covered by any UK Parliament generated human rights obligations, or were subject to reduced human rights obligations, then the Northern Ireland Assembly would *only* be able to fill this gap if the consent of the Secretary of State for Northern Ireland was obtained. Some years ago the Assembly brought some UK public authorities under the umbrella of the equality duties deriving from section 75 of the Northern Ireland Act,[24] with the consent of the Secretary of State, so there is an existing precedent for such a move..

39. There is another significant difficulty, however, which is more practical and political than legal and constitutional. At the moment, there is some dispute in Northern Ireland about the role and relevance of human rights standards, with the DUP appearing to be less inclined towards enforceable human rights standards than Sinn Fein appears to be. This controversy has contributed to the impossibility, so far at least, of obtaining sufficient agreement between the parties on a Northern Ireland Bill of Rights that would have gone beyond the HRA in terms of rights and remedies. Given this, it would seem likely that there would be very real difficulties, following any repeal of the HRA, in securing any agreement between the parties as to what would replace the HRA in Northern Ireland.

40. Given the significant legal and political issues that would arise from repealing the HRA and providing for a Bill of Rights, there is a strong likelihood that litigation would result, and in the remaining paragraphs we consider various possible routes that might be used, beginning with domestic litigation and then moving on to consider possible European and international litigation.

E. Possibility of domestic litigation

41. Would it be possible to challenge UK Parliamentary legislation that repealed the Human Rights Act? Certainly, if such legislation were to be enacted under the Parliament Acts, there may be the possibility of challenging the legislation as unconstitutional on the ground that it contravened the 'rule of law'. This is the territory of the *Jackson* case[25] in which a number of the Law Lords indicated, *obiter*, that the House of Lords (now the Supreme Court) could

[24] See the Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001.
[25] Jackson v Attorney General [2005] UKHL 56.

constrain Parliament at some point in the future.[26] However, we would accept that it is highly unlikely that any such challenge would succeed, given that it would be seen as a major root-and-branch challenge to Parliamentary sovereignty.

42. Would it be possible to challenge a Northern Ireland Minister's decision to bring forward a legislative consent motion in the Northern Ireland Assembly? Were a Northern Ireland Minister to attempt to bring forward a legislative consent motion to the Northern Ireland Assembly, there is the possibility of challenging that decision under the Ministerial Code (see above), on the grounds that it involves asking the Assembly to consent to a breach of the 'rule of law' (because it would breach the Agreement between Ireland and the United Kingdom), and under section 75 of the Northern Ireland Act 1998, on the ground that, in reducing the opportunity to contest discrimination, it involves a breach of the Ministerial obligation not to have 'due regard to the need to promote equality of opportunity.' Using the Ministerial Code in this way would open up the meaning of the 'rule of law' in this context and, as we have seen, there is uncertainty as to whether the 'rule of law' includes the rule of international law. Whether the challenge under section 75 would succeed is, perhaps, doubtful given the approach taken to the meaning of 'due regard' in the Northern Ireland courts.[27]

43. Would it be possible to challenge non-compliance with the Sewel Convention? We have suggested above that it is more probable than not that, given the unlikelihood that the Northern Ireland Assembly would pass a legislative consent motion, the United Kingdom Government would need to act in breach of the Sewel Convention, if it wanted to repeal the Human Rights Act, in so far as it applied to Northern Ireland. The received wisdom is that breaches of the Sewel Convention can only be challenged politically, not legally, because they concern breaches of a Constitutional Convention, which UK courts have, historically, been unwilling to remedy. However, it can be argued that there may be legal avenues now available for such a challenge, particularly on the basis that non-compliance with such a clear Convention is a breach of a legitimate expectation. This is very much unchartered territory, however, and the result of a judicial review on this basis is also unpredictable.

F. International law ramifications of repeal of the Human Rights Act protection in Northern Ireland

44. What are the implications under ECHR? We suggest the starting point here would be whether the UK legislated to replace HRA with a clearly deficient instrument, i.e. one that, on its face, would provide for inadequate coverage or remedies in domestic law for breaches of the ECHR. Article 13 of the ECHR obliges Member States to the Convention to provide effective remedies in domestic law. In the event that there were no such remedies in place, there would be the potential for either an Inter-State application (by the Republic of Ireland, for example) or an individual petition (by a 'victim') by which the UK's failure to provide an effective remedy could be challenged in Strasbourg.

45. What are the implications under EU law? The situation under EU law is more complicated. There is the possibility, were the repeal of the HRA to give rise to difficulties in implementing EU law, for a case to be referred to the CJEU. Apart from this, however, the question is whether the repeal of the HRA and its replacement with something clearly inadequate gives rise to issues under Article 6 and 7 of the Treaty on European Union, under which a procedure may be initiated alleging that a Member State's actions are such as to call into

[26] See also, e.g., *Re Moohan* [2014] UKSC 67, para 35, Lord Hodge.
[27] Re Neill's Application [2006] NI 278; JR1's Application [2011] NIQB 5.

serious question the Member State's commitment to human rights and the rule of law. While we might expect the UK government to argue that UK law was simply returning to a position that had previously been deemed suitable for membership, the EU has since developed and given human rights a much more central role in its constitutional architecture. A return to the UK's past may therefore be inconsistent with EU law's current and future expectations.

46. What are the implications under public international law more broadly? This, too, is a complex matter, and we have been unable to identify any general forum under which the argument could be made that the United Kingdom would be in breach of its international agreement with the Republic of Ireland. Ireland would have the right, in theory, to regard the UK's breach of the Agreement as constituting a fundamental breach of the Agreement, giving Ireland the right to withdraw from its obligations under the Agreement, and this possibility could act as a further stimulus to get diplomatic negotiations going.

47. Even should it wish to, Ireland does not appear to have the right to seek to mobilize the International Court of Justice. The Agreement was formally registered at the United Nations, and that registered Agreements may be recognized by the Court in disputes between the parties to the Agreement. However, although both the United Kingdom and Ireland have agreed to the compulsory jurisdiction of the Court, in so far as the other State has agreed to the compulsory jurisdiction also, Ireland has specified that the compulsory jurisdiction of the Court does not apply in relation to disputes between the UK and Ireland regarding Northern Ireland. That would appear to exclude the ICJ's jurisdiction, unless the UK and Ireland were to agree to give the Court jurisdiction in relation to this particular matter.

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19 January 2016 (revised 1 July 2016)

[28] We are grateful to our colleague, Professor Brice Dickson, for helpful comments on an earlier draft.

Written Evidence submitted by Professor Gordon Anthony and Professor Christopher McCrudden for the Northern Ireland Affairs Committee's inquiry into Northern Ireland and the EU Referendum (EUN0003)

1. INTRODUCTION

1.1 This evidence is presented in response to the House of Commons Northern Ireland Affairs Committee's call for such evidence on 18 January 2016. We are both Professors of Law in the School of Law at Queen's University, Belfast, and members of the Northern Ireland Bar. Professor Anthony is Professor of Public Law, whilst Professor McCrudden is Professor of Human Rights and Equality Law. We do not, of course, represent the University or the School of Law in making these submissions.

1.2 Professor Anthony is a member of the Conseil' d'Orientation de la Chaire Mutations de l'Action Publique et du Droit Public, Sciences Po. He is also a member of the European Group of Public Law, Athens, Greece, where is Director of the Academy of European Public Law. He has held grants from the Economic and Social Research Council, the Arts and Humanities Research Council, the British Academy, and the European Commission.

1.3 Professor McCrudden is William W Cook Global Professor of Law at the University of Michigan Law School, a senior member of the European Network of Experts in Gender Equality and Non-Discrimination. He has held grants from the British Academy, the European Commission, the Leverhulme Trust, and the Nuffield Foundation, among others. He is a Fellow of the British Academy.

1.4 Our submission considers five main points about "Brexit" and its potential implications for Northern Ireland. Our first point is to question the assumption that Brexit would repatriate political "sovereignty" to the United Kingdom to the extent that some supporters of Brexit appear to envisage. Indeed, in some respects, Brexit may lead to the diminution of political sovereignty because the United Kingdom would no longer be present when key decisions by others are taken. This issue is considered further at paragraphs 9 to 12 below.

1.5 Our second point is to question the assumption that, even if Brexit were to result in increased political sovereignty at the national level (which we doubt), it would also result in the ability to exercise increased competence at the devolved level. We suggest that the current structure of Northern Ireland's governmental arrangements makes this unlikely. While this issue was not listed among the Committee's (non-exhaustive) terms of reference, we think that it is implicit in those terms and of very real constitutional significance. This issue is considered further at paragraphs 13 to 17 below.

1.6 Our third point concerns the implications for the North-South Ministerial Council and its related implementation bodies, where we suggest that aspects of inter-

governmental relations may well become more complicated as a result of Brexit. We suggest that this may be true not just in terms of the loss of EU funding but also in terms of how North/South policy preferences might be aligned in areas that presently fall within the EU's competence. This issue is considered at paragraphs 18 to 22 below.

1.7 Our fourth and fifth points concern the impact that Brexit might have on the still-fragile Northern Ireland Peace Process, and the UK's related international commitments under the Belfast-Good Friday Agreement. In relation to the Peace Process, we consider, in particular, the implications that Brexit may have for the protection of fundamental rights, particularly if Brexit becomes tied to the repeal, or far-reaching amendment, of the Human Rights Act 1998. Although there is no necessary "cause and effect" between Brexit and the status of the Human Rights Act 1998, the two are often linked together in debates about Europe, and we consider that a vote to leave the EU may well make it easier for the current UK government to replace the Human Rights Act 1998. In our view, such a development (or such developments) would have clear implications for the Peace Process insofar as that process has benefited from having fundamental rights as key parts not just of the Belfast Agreement but also of the UK's contemporary constitution. (See paragraphs 23-37).

1.8 Our point about international law is that repeal of the Human Rights Act 1998 might place the UK government in breach of its commitments under the Belfast Agreement, notably to "complete incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency".[1] These issues are considered at paragraphs 38 to 39 below.

2. BREXIT AND "SOVEREIGNTY" AS A CONTESTABLE ASSUMPTION

2.1 The sovereignty-related arguments that have been made in support of Brexit are, of course, well known and need not be rehearsed in detail here. They include arguments such as: (i) the EU institutions are remote and undemocratic; (ii) EU law can prevail over laws enacted by the Westminster Parliament and devolved legislatures; (iii) the EU is unduly regulatory and stifles economic growth; and (iv) many EU policies are misconceived and are now being shown to be failing. By voting to leave the EU, it is thus contended that each of these problems can be inverted and made to work to the advantage of UK, which will become responsible, once more, for designing and implementing its own policy preferences.

2.2 The assumption that Brexit will repatriate "sovereignty" to the UK is highly contestable, however, based on well-established academic arguments about the limited nature of sovereignty in contemporary society. Whilst legal sovereignty may increase, political sovereignty may not. The difficulty that a significant quantity of the relevant academic literature identifies with sovereignty-related arguments is that they overlook the reality of social, cultural and economic linkages between nation-states, sub-state units (such as devolved territories),

international organisations (such as the UN), and supranational organisations (viz the EU).[2]

2.3 The point that is frequently made is that there is an unavoidable overlap between the rules and processes of such units of governance and that it is next-to impossible to create sovereign spaces that are free from the external influence of such units. An often-cited example is the interplay of rules between the UN and the EU in the famous *Kadi* ruling of the Court of Justice of the European Union (CJEU), where UN anti-terror resolutions were subjected to *de facto* judicial control within the EU.[3] Whilst the Court of Justice of the European did not formally review the UN's resolutions, it applied its own internal rules in such a way as to have substantial indirect impact upon the UN rules. More recently, the UK Supreme Court has also recognised the complexities that can be generated by overlapping of anti-terrorism rules.[4]

2.4 Any suggestion that Brexit would in some way recreate the political sovereignty of previous eras simply be reinstituting legal sovereignty needs to be subjected to close and careful scrutiny. In other words, if the UK were to retreat from the EU, but in circumstances whereby EU rules and processes could still have significant indirect influence within the UK, Westminster may be in a notional position of enjoying increased legal sovereignty and legal competence but working within a political reality that would still link some, if not many, of their decisions to the externally defined rules of the EU and other organisations, over which it would have reduced influence.

3. INCREASED COMPETENCE AND THE NORTHERN IRELAND INSTITUTIONS

3.1 Turning to the second issue of how the Northern Ireland institutions might function in the event of Brexit, let us assume (which we query) that Brexit would lead to significantly increased freedom in the making and implementation of policy initiatives, including at the devolved level. It is a common-place that policy formation in Northern Ireland has often been shaped by the use of theconsociational blocking mechanisms that are contained in the Northern Ireland Act 1998. The most prominent of these is the "petition of concern", which is underpinned by section 42 of the Northern Ireland Act 1998.

3.2 According to that section, 30 MLAs may petition the Assembly with their concerns about a measure that is to be voted on by the Assembly, with the result that the measure can be passed only with "cross-community support". "Cross-community support" is in turn linked to designation rules that require members to register themselves as "Unionist", "Nationalist" or "Other" when they are elected to the Assembly, and it essentially means that an impugned measure will be carried only where it attracts the support of a majority of both Nationalist and Unionist members.[5]

3.3 While existing statistics on the mechanism do not suggest that it has been used to frustrate a majority of the Assembly's wider legislative programme, there is clear evidence that it has been used to block discrete initiatives that have been said to affect the interests of one of Northern Ireland's main ethno-national groups, as well as some measures that have escaped ethno-national

association. Reform of planning law is one such example of the latter type of measure; amendment of the law on abortion is another.

3.4 The impact that the petition of concern may have on policy formation has since featured in the inter-party negotiations that led to the Stormont House Agreement of December 2014 and to the Fresh Start document of November 2015.[6] It appears, for the moment, that the parties propose to adopt a Protocol that would govern when the petition could be used.

3.5 The effect of the Petition of Concern (even thus limited) on post-Brexit exercise of devolved powers is uncertain but it seems at least probable that the use of the Petition would be likely to limit the extent to which Northern Ireland institutions would maximise the potential of any increased competence following Brexit. It would, of course, be possible to amend the rules more radically than is now envisaged by the parties, but it is to be remembered that the purpose of the Petition of Concern is to protect the interests of Northern Ireland's two main ethno-national designations. Northern Ireland would therefore face something of a dilemma following Brexit: to choose between narrowing the terms of the petition of concern to so as maximise any increased freedom following Brexit , or allowing measures to be blocked because of Northern Ireland's divided and difficult past. This issue is relevant also to the third issue, to which we now turn.

4. NORTH-SOUTH INTER-GOVERNMENTAL RELATIONS

4.1 Our point here concerns the effect of Brexit on North/South inter-governmental relations between Northern Ireland and Ireland. Institutionally, these presently centre on the North-South Ministerial Council (NSMC) and the work of six "implementation bodies" in areas of "mutual interest". These are: Waterways Ireland; the Food Safety Promotion Board; the Trade and Business Development Body; the Special European Union Programmes Body; the Language Body; and the Foyle, Carlingford and Irish Lights Commission.

4.2 While the NSMC does not have executive power, it has a prominent political role that is most evident when the First Minister and Deputy First Minister, and the Taoiseach, convene "plenary" meetings. Otherwise, the great majority of the meetings are "sectoral" and held by Ministers and Junior Ministers who consider the work of the implementation bodies and who discuss, though do not decide, policy in areas that include agriculture, education, the environment, and tourism.[7] Where the agenda for a meeting contains an item that is "significant or controversial", it may also be attended by the First Minister and Deputy First Minister even if the item in question does not fall within the responsibility of their office.[8]

4.3 We suggest that there is a very clear potential for Brexit to complicate the work of the NSMC and the implementation bodies. For instance, one area in which it may complicate relations is co-operation on matters such as agriculture and the environment. This is because the Republic of Ireland would remain tied to EU policies and Northern Ireland would not.

4.4 While the extent of any differences between the two jurisdictions would depend upon the final shape and form of Brexit – the UK is presently also a signatory to

the Aarhus Convention that underlies parts of EU environmental law – the dynamics of co-operation might be expected to change, precisely because there would no longer be any mutual bind to EU law.

4.5 Indeed, those changed dynamics may become all the more remarkable if it were to be perceived that post-Brexit co-operation within the framework of the NSMC was being used to foster policies that aligned Northern Ireland more closely to Irish interests, rather than those in the rest of the United Kingdom. This is essentially a political point about the reservations that Unionists may haveabout increased co-operation on an all-Ireland basis, where recourse could again be had to the blocking mechanisms in the Northern Ireland Act 1998 discussed above.

5. FUNDAMENTAL RIGHTS AND THE PEACE PROCESS

5.1 Our fourth point concerns the role that fundamental rights have played in Northern Ireland's transition from its difficult and violent past. As things stand, there would appear to be two possibilities associated with Brexit, namely (a) "Brexit only", and (b) "Brexit + repeal of the Human Rights Act 1998". We will address each of those possibilities in turn.

(a) "Brexit only"

5.2 The implications of "Brexit only" would plainly not be as far-reaching as that of "Brexit + repeal", but they would nevertheless be significant. For example, one consequence would be that the Charter of Fundamental Rights of the European Union would no longer be enforceable in the Northern Ireland Courts as it currently is. While that Charter does not have as broad a reach as the Human Rights Act – it applies only when public bodies are implementing EU law, whereas the Human Rights Act covers all public authority decisions – it has still played an important role in cases in the Northern Ireland courts. Cases in which it has featured have included a challenge to a lifetime ban on the donation of blood by men who have sex with men[9] and a family law dispute in which the mother of children lived in Northern Ireland and the father in Poland.[10] It has also featured in case law in the field of privacy and data protection.[11]

5.3 Another way in which "Brexit only" may affect fundamental rights is in the context of equality law. Equality law in Northern Ireland does, of course, have a number of different characteristics from the rest of the United Kingdom, particularly section 75 of the Northern Ireland Act 1998. However, section 75 is only one part of the broader architecture of equality law, which includes a range of EU Treaty Articles and Directives that have been implemented in domestic law.[12]

5.4 Were the UK to leave the EU, those EU provisions would lose their direct enforceability in the Northern Ireland courts, which would then be required to develop new approaches in discrimination cases. While their task in so doing might be eased were the relevant domestic provisions that give effect to EU Directives to be kept in force and given a domestic reading, there would inevitably be an element of artificiality in such an approach. For instance, would it be realistic for the courts to divorce their legal reasoning from the body of EU

law that drove their case law up until the moment of Brexit, or should they still have regard for the rulings of the Court of Justice of the European Union? And if they were to adopt the latter course of action, should this include post-Brexit rulings on the Directives that first gave rise to the domestic legislation that would remain in force? There is scope here for considerable confusion in the case law and for that confusion to be understood as an outworking of the above-noted point about the questionable assumption of post-Brexit, increased sovereignty.

(b) "Brexit + repeal of the Human Rights Act 1998"

5.5 The implications of "Brexit + repeal" are much more far-reaching, as such a development would effectively seek to break any meaningful link between UK domestic law and the wider European human rights regime, whether that developed in the EU or under the ECHR.

5.6 In terms of the implications that this might have for the peace process, we would not wish to suggest that "Brexit + repeal" would threaten its very foundations, as the democratic process in Northern Ireland is now more robust than it has been at any time in Northern Ireland's history. However, nor would we wish to downplay the significance of "Brexit + repeal" on that process.Fundamental rights have become central to the workings of the Northern Ireland constitution, and "Brexit + repeal" would inevitably unsettle existing practices. This is a matter on which we have previously given evidence to the House of Lords' EU Justice Sub-Committee, where we noted the following points (among others):

a. Human rights can be regarded as a devolved matter, and any decision to repeal the Human Rights Act 1998 should be taken only in a manner that is consistent with that constitutional understanding.
b. The Belfast Agreement is in the form of an international treaty between the UK Government and the Government of the Republic of Ireland, and any decision to repeal the Human Rights Act 1998 should be cognisant of that reality.
c. On a broad reading of the Sewel Convention, the Northern Ireland Assembly would need to pass a legislative consent motion before the Human Rights Act 1998 could be repealed. We believe that it is unlikely that such a motion could be carried as a petition of concern could be used to block it.
d. Repeal of the Human Rights Act, in breach of Sewel, might give rise to litigation centred upon the doctrine of legitimate expectation.
e. The Northern Ireland Assembly could legislate to introduce something akin to the Human Rights Act 1998, but this would be neither a problem free process nor a panacea: (a) a petition of concern could be used to block any such proposed legislation; (b) such legislation, if enacted, could not apply to the Assembly itself or to the Executive Committee; (c) such legislation, if enacted, could apply only to public authorities in Northern Ireland and would not apply to UK public authorities such as the Ministry of Defence.

5.7 Clearly, the above points are somewhat speculative, but that concerning the Ministry of Defence is, perhaps, of most relevance to the Committee's query about the peace process. As the Committee will appreciate, the issue of Northern Ireland's past has become increasingly controversial in recent years, and human rights law, most notably the right to life under Article 2 ECHR, has featured

prominently in cases involving the Ministry of Defence. Were the Human Rights Act 1998 to be repealed and the Ministry of Defence to remain outside the competence of any legislation that might be enacted by the Northern Ireland Assembly, this would mean that important arguments could not be advanced about State responsibility during the Northern Ireland conflict incurred by the Ministry of Defence. We suggest that, while this may not destabilise the peace process, it may leave many people disaffected by an inability to rely upon rights that have, until now, been central to the transition in Northern Ireland.

6. FUNDAMENTAL RIGHTS AND INTERNATIONAL LAW

6.1 Finally, as we also suggested to our evidence to the House of Lords, we believe that "Brexit + repeal" would represent an arguable breach of the UK government's commitments under the Belfast-Good Friday Agreement. For instance, according to paragraph 5 of Strand One of that Agreement, the United Kingdom committed itself to introduce safeguards "including: … (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission; [and] (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland".

6.2 Moreover, paragraph 2 of Part 6 of the Belfast Agreement, quoted above, requires the UK government to establish remedies centred on the provisions of the ECHR. Given that the Human Rights Act was intended to provide just such a regime, we cannot see how its repeal would further the UK government's commitments under the Belfast Agreement unless something substantially the same was put in its place.

16 February 2016

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[1] Para 2 of Part 6 of the Agreement.

[2] See generally R Rawlings, P Leyland, and A Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, 2013).

[3] Joined Cases C-402/05 & C-415/05, *Kadi v Council of the European Union* [2008] 3 CMLR 41.

[4] *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

[5] Northern Ireland Act 1998, s 4(5)-5(A); and Order 3(7) of the Standing Orders of the Assembly. S 4(5) defines "cross-community support" as (a) the support of a majority of members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or (b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting".

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf; and http://www.northernireland.gov.uk/a-fresh-start-stormont-agreement.pdf.

[7] Belfast Agreement, Part 4.

[8]
Northern Ireland Act 1998, s 52(A)(8), as read with s 20(3)-(4).

[9] *Re JR65's Application for Judicial Review* [2013] NIQB 101

[10]
Re Jakub and Dawid (Brussels II revised: recognition and enforcement of foreign order) [2009] NIFam 23.

[11]
See *AB & Ors v Facebook Ireland Ltd* [2013] NIQB 14.

[12]
E.g., the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, SR 2003/497, as read with Directive 2000/78/EC.