REPORT ON THE POTENTIAL EFFECTS OF REPEAL OF THE HUMAN RIGHTS ACT 1998 BY THE BRITISH GOVERNMENT

AN INDEPENDENT STUDY

COMMISSIONED BY THE EUROPEAN UNITED LEFT / NORDIC GREEN LEFT (GUE/NGL) GROUP OF THE EUROPEAN PARLIAMENT

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1. EXECUTIVE SUMMARY

1.1. The current UK Government, in power since May 2015, has stated that it will "*scrap*" the Human Rights Act 1998 (**"HRA"**). This threat was contained in the Conservative Party Manifesto 2015, which also stated that the Conservatives would "*introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK.*"[1] Repeal of the HRA had at this point been on the Conservative agenda for some years, with the now Prime Minister, David Cameron, having spoken of this as early as 2006, and it having appeared in the 2010 Conservative Party Manifesto. Mr. Cameron in April 2015 made clear that his intention was to fast-track repeal, stating that he intended to abolish the HRA within his first 100 days in power.[2]

1.2. However by the time of the Queen's Speech on 27 May 2015, Mr. Cameron's 100 day plan had vanished, and instead the Queen set out only a watered-down indication that the Government would "*bring forward proposals for a British Bill of Rights*".[3] By that point, the press were reporting that a Bill would not be published imminently and instead a consultation would be launched. Government aides were quoted as saying that the plans were "*simply not ready*", leading the *Telegraph* to conclude that, "*the totemic Tory demand to axe Labour's Human Rights Act – as raw a hunk of red meat as most Right wingers could ever hope to be served – had been consigned to the deep freeze*". [4]

1.3. By September 2015, the Government was indicating that proposals would be brought forward "*in the Autumn*", although they "*refused to be drawn on the substance and detail*".[5] However no proposals have yet emerged at the time of writing (February 2016), nine months after the election, and no consultation has yet been launched. On 2 February 2016, the Minister responsible for implementing the HRA reforms, Lord Chancellor and Secretary of State for Justice Michael Gove MP, was asked by the Chairman of the House of Lords' EU Justice Sub-Committee when the consultation paper can be expected. Again refusing to give any details, Gove responded with the one-word answer: "*Soon*".[6] There is complete uncertainty as to

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[1] Conservative Party, *The Conservative Party Manifesto 2015*, available at https://www.conservatives.com/manifesto, [73].

[2] Tim Ross, "David Cameron: My plan for the Tories' first 100 days in power", *Telegraph*, (26 April 2015), available at http://www.telegraph.co.uk/news/general-election-2015/11563550/David-Cameron-My-plan-for-the-Tories-first-100-days-in-power.html.

[3] Cabinet Office and Her Majesty the Queen, *Queen's Speech 2015* (27 May 2015), available at https://www.gov.uk/government/speeches/queens-speech-2015.

[4] Tim Ross, "How the Human Rights Act escaped the Tory axe," *Telegraph* (30 May 2015), available at http://www.telegraph.co.uk/news/politics/queens-speech/11640590/How-the-Human-Rights-Act-escaped-the-Tory-axe.html.

[5] Parliamentary Debates, House of Commons, 8 September 2015, col 207 (Dominic Raab MP, Parliamentary Under-Secretary of State for Justice).

[6] Unrevised transcript of evidence taken before the EU Justice Subcommittee, Oral Evidence Session with the Rt Hon Michael Gove MP, Lord Chancellor and Secretary of State for Justice (2 February 2016),

what will now happen, and no indication of the timetable for any consultation, let alone the publication of any draft Bill or Bill.

1.4. The little which is known of the reasoning behind the 2015 Conservative Manifesto pledge to scrap the HRA is a matter of serious concern. The explanations given are confused, incoherent, legally flawed and often based upon inaccurate factual premises regarding what the HRA is or its use in particular cases. Similarly, the minimal amount of information which is publicly available regarding potential models for repeal of the HRA and its possible replacement indicates fundamental errors of approach.

1.5. The same Manifesto which pledged to scrap the HRA set out the Conservative Party's "*strong support for the political institutions established over the past two decades as a result of the various Agreements*" in and concerning the North of Ireland.[7] However, grave concerns have been expressed regarding the potential impact of the Government's pledge to repeal the HRA in the Irish context. The Chief Commissioner of the Irish Human Rights and Equality Commission, for example, has stated that repeal "*would have negative consequences for the uniformity of human rights standards across these islands*."[8] The Directors of Amnesty International in both the UK and Ireland have expressed *"deep concern"* over the Conservative Party's plans in a letter to Prime Minister Cameron and Irish Taoiseach Enda Kenny TD.[9] The signatories said that repeal could undercut "*public confidence in the new political and policing arrangements*" that stemmed from the Good Friday Agreement[10] (**"GFA"**) (the key international treaty at the heart of the Irish peace process) and which have been endorsed by referenda, and could even jeopardise the peace settlement.

1.6. Similarly, the Irish Government has expressed concern regarding both the UK Government's proposals to repeal the HRA and its attempts to renegotiate the UK's relationship with the European Union ("**EU"**). The Irish Minister for Foreign Affairs, Charlie Flanagan TD, has said that the protection of human rights was a key principle underpinning the GFA, and that, "*as a guarantor of the Good Friday Agreement, the Irish Government takes very seriously our responsibility to safeguard the Agreement… The fundamental role of human rights in guaranteeing*

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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.pdf.

[7] Conservative Party, *The Conservative Party Manifesto 2015*, available at https://www.conservatives.com/manifesto, [71].

[8] Emily Logan, Chief Commissioner, Irish Human Rights and Equality Commission, *Presentation to the Joint Committee on the Implementation of the Belfast / Good Friday Agreement* (25 June 2015), available at http://www.ihrec.ie/download/pdf/ihrec_briefing_joint_committee_implementation_gfa_25june2015.pdf, 3.

[9] See Amnesty International UK, "Repeal of 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.

[10] See *The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland,* Cm 3883 (10 April 1998), copy available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

peace and stability in Northern Ireland must be fully respected".[11] The Taoiseach has indicated that Northern Ireland would face *"serious difficulty"* if the UK were to vote to leave the EU, and he highlighted the links between the peace process and the UK and Irish Republic's joint membership of the EU.[12]

1.7. Against this backdrop, this independent Report examines the potential impact of the proposed repeal of the HRA by the current UK Government, with a particular focus upon the potential implications for the North of Ireland.[13] The key findings of the Report are as follows:

(i) Proposals for repeal and replacement of the HRA have been made by the Conservative Party and Government in numerous forms, though no clear model or timetable for consultation has been proposed.

(ii) The Conservatives' proposals are focused on replacing the HRA with a 'British Bill of Rights' that will limit human rights to 'serious' rather than 'trivial' cases and restrict the role and influence of the European Court of Human Rights (**"European Court"**) in UK law, including by treating judgments of the Court as advisory only. In doing so, the proposals perpetuate a degree of misinformation and muddying of legal principles.

(iii) It appears from the current proposals that the protections currently guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (**"Convention"**) would be limited, either in respect of the right itself or in respect of who it applies to. Claimants with cases deemed 'trivial' would not have access to Convention rights in domestic courts, with no clarity about how that should be determined in the individual case.

(iv) The proposals repeatedly link the HRA directly with the EU, conflating the two systems, in order to increase the appeal of the reforms to Eurosceptics. For example, the outline of the proposals in the Conservative Party Manifesto 2015 is confusingly placed under the heading "Real Change in Our Relationship with the European Union"[14]. As we explain in this Report, there are in fact nuanced and complex links between the proposals to repeal the HRA and a possible British withdrawal from the EU (colloquially, **"Brexit"**), and there are serious and inter-linked risks to the protection of fundamental rights arising from both proposals.

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[11] BBC, "Human Rights Act: Irish government 'will protect 1998 Agreement'", *BBC News* (14 May 2015), available at http://www.bbc.co.uk/news/uk-northern-ireland-32734062.

[12] Nicolas Watt, "Northern Ireland would face serious difficulty from Brexit, Kenny warns", *Guardian* (26 January 2016), available at http://www.theguardian.com/politics/2016/jan/25/northern-ireland-irish-republic-eu-referendum-enda-kenny?.

[13] Terms of the Invitation to Tender of the GUE/NGL Group of the European Parliament are at http://www.guengl.eu/uploads/news-documents/Tender_HRA_ECHR.pdf.

[14] Conservative Party, *The Conservative Party Manifesto 2015*, available at https://www.conservatives.com/manifesto, [72]-[73].

(v) The fact that there is no clear model, consultation structure or timetable for the repeal and replacement of the HRA means that it is not possible to assess with specificity or certainty the likely impact of the proposed reforms. The delay, uncertainty and lack of a clear model in themselves give rise to process concerns and diminishes confidence that consultation will be adequate.

(vi) Despite the fact that matters concerning human rights in the UK are inextricably intertwined with the devolution settlements, the UK Government has so far failed to engage meaningfully with the consequences of repeal and replacement of the HRA for the devolved administrations.

(vii) Protection of fundamental rights and freedom from discrimination are principles which are central to and underpin the GFA and the transition to peace. These principles are the lifeblood of the Agreement. They were a key part of the impetus for it being agreed and accepted, and their inclusion has been necessary for holding the State to account for their previous and ongoing failures. Any undermining of these key principles is a matter of grave concern in the context of the North of Ireland.

(viii) Whether the proposed reforms will breach the GFA is not capable of proper evaluation until a model is put forward. The GFA required the British Government to "*complete incorporation*" of the Convention and to provide remedies before the courts for breaches of the Convention in Northern Ireland law. A model that did not alter the substantive protections of the Convention may not technically breach the GFA, though might be queried whether repeal and replacement of the HRA complies with a 'good faith' reading of the UK's obligations under the GFA. If a British Bill of Rights took any steps to limit or curtail Convention rights in the UK, for example by restricting its application to 'serious cases' or by treating Strasbourg judgments as merely advisory, this would be likely to breach the Agreement. On the basis of the Conservative Party's current proposals, this would appear to be a significant risk.

(ix) Repeal of the HRA and its replacement with some more limited form of protection for human rights risks not only breaching the GFA in a technical sense, but infringing its spirit and leading to a loss of faith in the UK Government's commitment to the peace process, of which human rights were a core feature.

(x) Replacement of the HRA would be likely to affect the scope of the devolved powers of the Northern Irish, Scottish and Welsh legislatures and require their consent under the Sewel Convention. Even if the UK Government did repeal and replace the HRA, it would be within the power of the devolved

legislatures to introduce their own human rights statutes in respect of devolved matters, creating a patchwork approach to human rights in the UK.

(xi) Because the GFA constitutes part of an international treaty between the UK and Ireland, any possible breaches of the Agreement may constitute violations of international legal obligations and may have negative consequences for the uniformity and reciprocity of human rights protections. Further, in effecting the current proposals to treat judgments as merely advisory, the UK may breach its obligation to other State Parties to the Convention to abide by final judgments.

1.8. The Report concludes that there would be value in commissioning a further study on the specifics of any proposed model(s) once announced by the UK Government, to inform engagement with the consultation process.

2. INTRODUCTION

(a) Context of the Report

2.1. Repeal and replacement of the HRA has been on the Conservative agenda for some years. In June 2006, David Cameron, then Opposition Leader, made a speech to the Centre for Policy Studies [15] in which he committed a future Conservative government to repeal the HRA and replace it with a British Bill of Rights. The pledge to repeal and replace the HRA appeared in the 2010 Conservative Manifesto,[16] on which Conservative MPs campaigned at the 2010 general election. It was also an election pledge of the Conservative Party during the 2015 general election.[17] So far, however, the promise of reform has remained unfulfilled.

2.2. During the term of the Conservative-Liberal Democrat Coalition Government from 2010-2015, Prime Minister Cameron was hampered in progressing his pledge to repeal and replace the HRA by the opposition of his deputy, Nick Clegg MP. Instead, a Commission on a Bill of Rights was established "*to investigate the creation of a British Bill of Rights that incorporates and builds on all our*

[15] David Cameron, "Balancing freedom and security – A modern British Bill of Rights", *Speech to the Centre for Policy Studies*, (26 June 2006), available at http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution.

[16] Conservative Party, *The Conservative Manifesto 2010*, available at https://www.conservatives.com/~/media/files/activist%20centre/press%20and%20policy/manifestos/manifesto2010 [79].

[17] Conservative Party, *The Conservative Party Manifesto* (14 April 2015); Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws* (October 2014), available at https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf.

obligations under the European Convention on Human Rights".[18] The Commission failed to reach consensus, either on the need for a Bill of Rights or on an appropriate model.[19] The Commission did, however, conclude unanimously on two critical points: that future debate and reform must be acutely sensitive to issues concerning devolution and must involve the devolved administrations.[20]

2.3. Following the election in May 2015, having won a slim majority in the Commons, the Conservative Government pressed forward with its repeal agenda. However, for reasons that have not been made entirely clear to the British public, no draft Bill, nor consultation paper, nor timetable for the proposed reform has yet been released.

2.4. The potential repeal of the HRA by the British Government is a cause of concern for many in Britain and particularly, in this context, for administrations and citizens in Northern Ireland, Scotland and Wales. Human rights are a key component of the devolution settlements across the UK. The HRA is itself a reserved (non-devolved) matter, but human rights generally are not reserved and are partially devolved, with each of the devolved administrations having its own human rights commission. The devolved legislatures and executives are required to comply with Convention rights under their respective devolution statutes and cannot legislate inconsistently with them.[21] They can also take measures to give further effect to the UK's international human rights obligations, not confined to rights that arise under the Convention. Northern Ireland is additionally affected because the GFA, on which the Peace Process centred, contains specific requirements as to the incorporation of Convention rights into Northern Ireland law. The Northern Ireland Bill of Rights process is also rooted in the Convention.[22]

2.5. In addition to the lack of a clear model, the UK Government has so far failed to engage meaningfully with the consequences of repeal and replacement of the HRA for the devolved administrations,[23] as recommended by its own Commission in

[18] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012), Terms of Reference [5], available at http://webarchive.nationalarchives.gov.uk/20130128112038/http:/www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf.

[19] Ibid.

[20] Ibid, [73], [76].

[21] Northern Ireland Act 1998, ss 6(2)(c) and 24(1)(a); Scotland Act 1998, ss 29(2)(d) and 57(2); Government of Wales Act 2006, ss 81(1) and 94(6)(c); see further detailed discussion at **section 3(b)(ii)** below.

[22] See for a useful summary of these matters Colm O'Cinneide, "Human Rights, Devolution and the Constrained Authority of the Westminster Parliament", *UK Constitutional Law Blog* (4 March 2013), available at http://ukconstitutionallaw.org/2013/03/04/colm-ocinneide-human-rights-devolution-and-the-constrained-authority-of-the-westminster-parliament/.

[23] Michael Gove MP appeared to admit this point in his evidence before the House of Lords EU Justice Sub-Committee, where he stated: "*As to consent, we will consult on what we think is the best way of involving all the constituent parts of the United Kingdom in understanding the case for rights reform. However, I would not want to prejudge at this stage exactly how we might do so*": See unrevised transcript of evidence taken before the EU Justice Subcommittee, Oral Evidence Session with the Rt Hon Michael Gove MP, Lord Chancellor and Secretary of State for Justice (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.pdf.

2012. This Report is intended to provide a closer analysis of those issues, insofar as it is possible to do so given the vague terms of the proposed reforms.

(b) Scope of the Report

2.6. This Report is focused on the potential impact and effects of the current British Government's proposals for repeal and replacement of the HRA, rather than on proposals put forward previously or by other parties.

2.7. In discussing the potential impact of those proposals, the Report focuses on implications specific to Northern Ireland in accordance with the terms of the commissioned study. In particular, the following topics are discussed:

(i) the underpinning of the Good Friday (Belfast) Agreement (1998);

(ii) the institutions of government in the North of Ireland;

(iii) the devolved administrations of Scotland, Wales and the North of Ireland; and

(iv) the relationship of Britain with the European Court and the European Convention.

2.8. The Report is legal in focus but is intended to assist political groups, academics, the legal community and ordinary citizens in developing their understanding of the relationship behind the HRA, the GFA and the practical ramifications of the proposed repeal.

(c) Structure of the Report

2.9. The Report is structured as set out in the Table of Contents above. The substantive sections of the Report are as follows:

- **Part 3** outlines the relevant features of the human rights framework in the UK, with particular focus on the background to the HRA and the context of Northern Ireland, including the GFA and the debate on a Northern Ireland Bill of Rights.

- **Part 4** summarises the proposed reforms so far and critically analyses the delay in the process and lack of a clear model for reform.

- **Part 5** explores and evaluates the potential impact and effects of the proposed reforms on Northern Ireland, in respect of protection of rights more generally and under international law; and

- **Part 6** sets out key conclusions and recommendations.

3. THE HUMAN RIGHTS FRAMEWORK IN THE UK

(a) Brief overview of the European human rights system

(i) The European Convention on Human Rights

3.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms[24] is an international human rights treaty made up of Member States from the Council of Europe. The Council of Europe was established in 1949 and currently has 47 members. The Convention was adopted on 4 November 1950 and came into force on 3 September 1953. The rights guaranteed by the Convention are modelled on those contained in the United Nations Universal Declaration of Human Rights (1948).

3.2. States that have ratified the Convention have undertaken to secure to everyone within their jurisdiction the fundamental civil and political rights defined in the Convention.[25] These rights include: the right to life, the right to a fair trial, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion, and the protection of property.

3.3. The Convention also prohibits certain conduct and creates positive obligations on States Parties to investigate and punish those responsible for torture and inhuman or degrading treatment, and slavery and forced labour. A number of Convention rights and protocols also deal with arbitrary and unlawful detention and discrimination.[26]

3.4. The Convention is regarded by the Court as a 'living instrument' which evolves through its case law.[27] In this way, the Court has extended the protections and rights afforded to unforeseen situations. Notably, in certain circumstances States Parties may be held to account for human rights violations outside of the geographical territory of the state where they have effective control.[28] The Court has also guaranteed a number of socio-economic rights in order to "*safeguard the individual in a real and practical way*".[29]

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[24] (1950) ETS 5; 213 UNTS 222.
[25] Ibid, Art 1.
[26] See Art 5 on arbitrary and unlawful detention and Art 14 on non-discrimination. Protocol 12 to the Convention creates a free-standing provision on non-discrimination. The UK has not signed this Protocol.
[27] *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, [31]: "*The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions*."
[28] For example, *Al-Saadoon v United Kingdom* (2010) 51 EHRR 9. See Factsheet – Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights (July 2015), available at http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf
[29] *Airey v Ireland* (1979-80) 2 EHRR 305, [26].

3.5. A number of additional protocols have also been adopted. These protocols add rights to the Convention and are only binding on the States Parties that have signed and ratified them. To date, 14 additional protocols have been adopted, and two additional protocols have been proposed.

3.6. It is important to note that with the protection of the right to life and the prohibitions in Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 4 (prohibition of slavery) are absolute, other rights are 'limited' or 'qualified'. Limited rights include Article 5 (right to liberty and security of the person), Article 6 (fair trial rights), Article 12 (the right to marry and found a family) and a number of rights under the protocols (Protocol 1, Article 2 and Protocol 1, Article 3 for example). This means that rights can be restricted in an explicit and finite circumstances as set out in the article itself.

3.7. Qualified rights are those which recognise that there may be a balancing act, or that the exercise of these rights may conflict with the overall interests of society or the rights of others. The right to respect for private life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11) all provide that there may be limitation where these are "*in accordance with the law*", "*pursuing a legitimate aim*" and "*necessary in a democratic society*." The State Party must also demonstrate the proportionality of the measure limiting the right guaranteed in the Convention. The Court has developed extensive case law on these provisions.

3.8. In terms of the UK and Irish relationship with the Convention, the UK ratified the Convention in 1951, but as explained in greater detail below, did not incorporate the Convention into domestic law until 1998. In 1966 it did however accept the right of individual petition, meaning that individual litigations in Britain had the possibility of obtaining redress in Strasbourg where there was a violation of Convention rights and no adequate remedy was provided by domestic courts.

3.9. Ireland was one of the original countries to sign up to the Convention in 1950, but the Convention was not brought into domestic law until 2003, following the terms of the GFA (further discussed below). So far roughly 30 judgments before the European Court of Human Rights relate to Ireland and the first case ever decided by the Court, was an Irish case (*Lawless v Ireland* (1979-80) 1 EHRR 15, on 1 July 1961).

(ii) The European Court of Human Rights

3.10. The European Court of Human Rights is a regional human rights court set up in 1959. It rules on individual or State complaints alleging violations of the rights set out in the Convention. Since 1998 it sits as a full-time court in Strasbourg. In

almost fifty years the Court has delivered over 10,000 judgments. The Convention originally established three bodies to monitor human rights within the State Parties: the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers. The Commission originally worked as a screening mechanism, deciding which cases would advance to the Court (much like in the Inter-American System of Human Rights). However, in November 1998, the Commission ceased to exist and individuals now apply directly to the Court. The Court then decides whether a case is admissible. If it finds a violation or violations of Convention provisions, the decision is binding on the country concerned.

3.11. The Court now receives a huge number of cases from the States Parties. Nearly all of the cases are brought by individuals rather than States against other States. The case load of the Court has meant that there is a constant review of procedure and practice directions. In 2009 the Court adopted a priority policy[30] which takes into consideration the urgency and importance of the issue when deciding the order in which cases are to be dealt with. This policy, alongside the pilot judgment procedure, [31] which deals with "*systemic or structural issues*" arising from domestic legislation of a Member State, has helped to streamline the Court procedures in the context of the Court's massive case load. The Court works in the two official languages of English and French.

3.12. In terms of the Court's relationship with State Parties, the Court's judgments bind the State under international law under Article 46(1) of the Convention, which requires States "*to abide by the final judgment of the Court in any case to which they are parties*". It is also important to note that for an application to be held admissible by the Court, an individual must have exhausted national remedies. Article 35(1) of the Convention provides that the "*Court can only deal with the matter after all domestic remedies have been exhausted*." The Court has also developed a doctrine known as the margin of appreciation, leaving a certain amount of discretion to national governments. These measures regulate the interaction between States Parties and the Court. More recently, Protocol 15 has embedded the principle of 'subsidiarity' into the Convention. This principle underlines that it is the primary responsibility of the State to guarantee human rights and that the European Court is a subsidiary mechanism of protection.[32] The Protocol has yet to enter into force.

[30] Rule 41 – Order of dealing with cases, as amended by the Court on 29 June 2009, European Court of Human Rights, Rules of Court, (1 June 2015).
[31] Rule 61 – Pilot-Judgment Procedure, inserted by the Court on 21 February 2011, European Court of Human Rights, Rules of Court, (1 June 2015).
[32] Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights" (2015) 15(2) *Human Rights Law Review* 313.

(b) Giving effect to Convention rights in the UK

(i) Background and enactment of the HRA 1998

3.13. In many democracies, the rights of citizens are enshrined in a constitutional document known as a 'Bill of Rights'. Until the inception of the HRA, the UK had no similar constitutional document, despite the fact that the Magna Carta of 1215 had inspired many such documents elsewhere. Instead, rights were protected in the common law, statutes and a number of treaties to which the UK is a party.[33] With the enactment of the European Convention, support grew for its incorporation into national law. A number of Private Members' Bills made proposals and support for incorporation grew during the 1980s and 1990s amongst lawyers, judges and members of the public.

3.14. In 1965, the first Wilson Government decided to accept the individual petition and the jurisdiction of the European Court to rule on cases brought by individuals from the UK to Strasbourg.[34] Between this date and the enactment of the HRA, the UK was held to be in violation of the Convention for a range of different situations. These breaches included the inhuman treatment of suspect terrorists in Northern Ireland;[35] inadequate safeguards against telephone tapping by police forces;[36] criminalisation of homosexuality in Northern Ireland;[37] and the interference of free speech by maintaining injunctions restraining breaches of confidence.[38] The enactment of the HRA and the incorporation of the Convention into domestic law were thus seen as a means of stemming the tide of cases from the UK to the European Court.

3.15. In this context, after the 1997 General Election, the Labour Government made a commitment to introduce legislation incorporating the main provisions of the Convention into domestic law.[39] The HRA was introduced into Parliament in October 1997, with cross-party support. The provisions of the Act were drafted as a compromise between parliamentary supremacy and protection for human rights, with much attention going to the mechanics of the Act.[40] The measure came into

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[33] For more detailed information see Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, Vol I (2nd ed, 2009), Ch 1.
[34] See Lord Lester of Herne Hill QC, "Human Rights and the British Constitution", in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (5th ed, 2004).
[35] *Ireland v United Kingdom* (1979-80) 2 EHRR 25.
[36] *Malone v United Kingdom* (1985) 7 EHRR 14.
[37] *Dudgeon v United Kingdom* (1982) 4 EHRR 149.
[38] *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153.
[39] See for example the Queen's Speech and Jack Straw MP and Paul Boateng MP, *Bringing Rights Home: Labour's Plans to Incorporate the ECHR into UK Law*: *A Consultation Paper*, December 1996 (1997).
[40] Keith Ewing argued that *"... it is unquestionably the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688 when the Bill of Rights proclaimed loudly that proceedings in Parliament ought not to be questioned or impeached in any court or any other place*": K.D. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 *Modern Law Review* 79, [98]-[99].

force on 2 October 2000, comprising of 22 sections and four schedules. Helen Fenwick and Gavin Phillipson have reflected that: "*The Convention thus received into domestic law creates a transformation in constitutional terms in the sense that it provides positive rights in the place of negative liberties."*[41] Instead of so-called 'residual liberties', citizens now have positive rights to protection from violations of their fundamental rights by the acts or omissions of public bodies and authorities.

3.16. The HRA enables judges to give effect to Convention rights by interpreting domestic law "*so far as it is possible to do so*" in a way which is Convention-compatible. As the authors of *Blackstone's Guide to the Human Rights Act* explain:

> "*Since the Human Rights Act came into force it has altered the interpretation and use of the common law and all other legislation in cases involving human rights issues. The overriding objective is to weave the Convention into the existing legal system, so that all courts will consider Convention arguments, and rights which could have been obtained in Strasbourg can be secured in national courts, while minimizing disruption to the existing legal system.*"[42]

3.17. In this way, the Act has endowed citizens in England and Wales, Scotland and Northern Ireland with greater human rights protection.

(ii) <u>The context of devolution</u>

3.18. The enactment of the HRA must be understood in the context of wider reform, including devolution, and the move to guarantee human rights, while upholding the tradition of parliamentary sovereignty peculiar to the British constitutional order.[43] The HRA was enacted in the context of negotiation and debate over greater devolution of powers to Scotland, Wales and Northern Ireland. As Professor Conor Gearty has commented:

> "*The new Labour administration that was elected in 1997 tackled many constitutional and civil liberties issues in its first term, the reform of the House of Lords among them, but it did so via the traditional route of parliamentary enactment rather than through the establishment of a new constitution. Thus the Scotland, Northern Ireland, and Government of Wales Acts, arranging for devolved government in these parts of the United Kingdom, the Representation of the People Act 2000 and the Freedom of Information Act 2000 may indeed be seen as combining together to produce a basic UK constitution which is*

[41] Helen Fenwick and Gavin Phillipson, *Text, Cases, and Materials on Public Law and Human Rights*, (2003), [856].
[42] John Wadham, Helen Mountfield, Anna Edmundson, Caoilfhionn Gallagher, *Blackstone's Guide to the Human Rights Act 1998* (4th ed, 2007), [51].
[43] Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999).

more a 'written constitution' than it was before, and certainly more democratic."[44]

3.19. The Labour Manifesto of 1997 highlighted Scottish devolution as one of the urgent priorities for the government.[45] In marked difference to the referendum over the Scotland Act 1978, the 1998 White Paper and the proposal of a Scottish Parliament was put to the Scottish people and produced large majorities for a 'Yes' answer, paving the way for a devolution bill.[46] The Scotland Act 1998 established a Scottish Parliament, which is a subordinate legislature and has competence over matters which are not 'reserved' to Westminster.

3.20. The terms of the Scotland Act are too lengthy to be examined in detail, but it is important to note that both EU law and the Convention bind the Scottish Parliament. Section 29(2)(d) of the Act provides that Parliament cannot act incompatibly with the Convention. Section 57(2) of the Act provides that the Executive is bound not to act incompatibly with EU law and the Convention.[47]

3.21. The Government of Wales Act 1998 was also enacted following a vote of the Welsh people in support of Welsh devolution. Compared to the Scottish Parliament, the powers of the Welsh Assembly are greatly limited, with the primary difference being that it cannot pass primary legislation. Like the Scottish Parliament, EU law and the Convention bind the Assembly under ss 106 and 107 of the Act. The Assembly cannot pass subordinate or delegated legislation which is contrary to Convention rights.

3.22. It is in this overall context of increased devolution that Northern Ireland also received its greater powers through negotiation and enactment of the GFA, implemented in the UK by means of the Northern Ireland Act 1998. This Agreement was implemented as part of the peace process following many years of violence. Given the specificity of the terms of this Agreement, human rights protection in the Northern Irish context is explored in greater detail below in **section 3(c)** below.

(iii) Operation of the HRA 1998 in practice

3.23. There are a number of key provisions of the HRA that must be explained in order to understand the mechanics of human rights protection in the UK. There are many books and practitioner texts which explore in detail substantive legal developments

[44] Conor Gearty, *Principles of Human Rights Adjudication* (2005), [38].
[45] Labour Party, *New Labour: Because Britain Deserves Better* (1997), text only available at http://www.politicsresources.net/area/uk/man/lab97.htm.
[46] *Scotland's Parliament* (Cm 3658) (24 July 1997). The White Paper discusses the legislation paving the way for the referendums held in Scotland and Wales in 1997.
[47] For a greater exploration of the case law arising from these provisions see: Stephen Tierney, "Devolution issues and s.2(1) of the Human Rights Act 1998" (2000) 4 *European Human Rights Law Review* 380, 392.

which over the past 15 years since the Act came into force. This section instead aims to sketch out the framework of the Act in order to explain how it operates in practice. The HRA is described in its long title as an Act "*to give further effect*" to the rights and freedom guaranteed under the Convention. The way it does so is outlined below.

3.24. The HRA creates a statutory requirement that all legislation, primary or secondary, must be read and given effect in a way which is compatible with the Convention. Section 3(1) of the Act provides: "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.*" This means that the courts are under an obligation to interpret legislation, including previous enactments, in a Convention-compliant manner (s 3(2)(a)). This principle of construction applies to all litigation, meaning that it can affect the rights of private persons between themselves (also known as 'horizontal effect').

3.25. Since the HRA has come into force, the Courts have handed down guidance on the limits of the interpretative provision under s 3 of the HRA. In *Re S*,[48] Lord Nicholls stated in an oft-cited passage that "*a meaning which departs substantially from a fundamental feature of a Act of Parliament is likely to have crossed the boundary between interpretation and amendment*".[49] In many cases, judges will be able to interpret provisions in a Convention-compliant way, modernising the common law and clarifying, or at times altering legislative measures. However, in some cases the wording of certain provisions means that this is not possible.

3.26. If legislation cannot be read in a Convention-compatible manner, the higher courts can make a declaration of incompatibility (s 4). A declaration of incompatibility does not result in the invalidity of the measure. Instead, under s 10, a minister may make amendments to the offending legislation by means of the "fast track" procedure. This section may also be used where the European Court of Human Rights finds the UK in breach of its obligations under the Convention. It is important to note in both cases, amendments by the Minister are discretionary and that he or she is not obliged to amend the offending provision or legislation.

3.27. Another central provision of the HRA sets out the position of public authorities under the HRA. Section 6(1) states that: *"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."* This includes the courts. Public authorities must put procedures in place in order to ensure that they do not breach their duty under s 6. In practice, these provisions and the others in the HRA mean that the judiciary and courts have their own primary statutory duty to give effect to the Convention and are tasked with reading legislation passed before 1998 in a manner which is compliant with case law from the Strasbourg Court on

[48] *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291; [2002] UKHL 10.
[49] Ibid, [40].

Convention rights. In this way, the HRA plays a fundamental role in fostering accountability and a human rights culture in public authorities.

3.28. Section 7 of the Act created new, directly enforceable rights against the public bodies and against those carrying out functions of a public nature. Under the Act "victims" can challenge public authority decisions and use Convention arguments in litigation before court. Under s 8, the court can award relief or remedies, including damages for breaches of Convention rights if it considers it "just and appropriate" to do so. Principles from the Convention on damages and the amount to award under Article 41 of the Convention must be taken into account by the courts when awarding damages in this context (s 8(4)).

3.29. In terms of the practicalities of devolution, s 21 of the HRA sets out that legislation from the Northern Ireland Parliament or Assembly or from the Scottish Parliament is to be considered as subordinate legislation for the purposes of the Act. Under the Constitutional arrangement the UK Supreme Court remains the final Court to hear matters from Northern Ireland and Scotland on human rights violations.

3.30. Significantly, the UK Government passed the HRA 1998. The HRA was passed at Westminster in the same month as the Northern Ireland Act 1998 which implemented significant parts of the GFA. As with other devolved legislatures, the Northern Ireland Assembly is barred from making any law which breaches the HRA. This prohibition became operational in Northern Ireland on 2 December 1999. Under s 6(1) and (2)(b) of the Northern Ireland Act 1998 Assembly acts are subordinate legislation for the purposes of the HRA and so can be invalidated by any court or tribunal if found to be incompatible with Convention rights.

(iv) The relationship between the UK courts and the European Court

3.31. In the first significant case to reach the House of Lords before the full force of the Act came into effect, Lord Hope remarked that it was *"now plain that the incorporation of the European Convention of Human Rights into our domestic law will subject the entire legal system to a fundamental process of review, and where necessary, reform by the judiciary."*[50] There is little doubt that the HRA has had a significant impact on all areas of domestic law. However, the approach of the UK courts to human rights has also been described as "*cautious*",[51] with some members of the House of Lords adopting a "*no more, but certainly no less*" approach to Strasbourg cases.[52]

3.32. This principle, commonly referred to as the 'mirror principle', broadly means that where there is consistent and clear Strasbourg authority on the issue, then the

[50] *R v Director of Public Prosecutions; ex p Kebilene* [2000] 2 AC 326; [1999] UKHL 43, 374-375.
[51] John Wadham, Helen Mountfield, Anna Edmundson, Caoilfhionn Gallagher, *Blackstone's Guide to the Human Rights Act 1998,* (5th ed, 2009), vi.
[52] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323; [2004] UKHL 26, [20].

Court's should take this jurisprudence into account in order to avoid parties having to take their cases to Strasbourg. This, however, does not mean that the UK Court's are slavishly bound to follow Strasbourg. The UK Courts can go further than Strasbourg and provide greater protection for human rights [53] – Strasbourg's approach is a floor, not a ceiling for the UK courts. Further, Strasbourg takes into account the UK's margin of appreciation in matters which have been debated by Parliament and on which the national legislature is best placed to decide the matter.[54]

3.33. The relationship between the UK Courts and Strasbourg can therefore be described as an on-going dialogue with Strasbourg providing specialist and subsidiary human rights protection. National courts have the primary responsibility for interpreting Convention rights and the courts have recognized that national sensitivities might mean different interpretations in different contexts.

3.34. The case of *Re G*[55] is an illustrative example of the potential for a different approach by the European Court to an issue arising in the Republic of Ireland and in the United Kingdom, given the definition of marriage and family life in the Irish Constitution. This case concerned an unmarried heterosexual couple who wished to jointly adopt the woman's daughter. While England and Scotland allowed for unmarried couples to adopt, Northern Ireland had not taken such a step. In this case, the Supreme Court ultimately found Article 14 of the Adoption (Northern Ireland) Order 1987 contrary to Article 14 on the basis that it failed to take into sufficient consideration the best interests of the child. Baroness Hale has commented that that at least two of the judges in the Supreme Court were uncertain as to whether Strasbourg would find a violation and further, "*It seemed unlikely to me that Strasbourg would oblige the Irish to allow unmarried couples to adopt. But, we were in the United Kingdom.*"[56]

3.35. While in the majority of cases, a finding of a violation by the court in Strasbourg results in legislative amendments, there are situations in which Parliament, the Executive and the highest courts in the UK have instead continued to follow the British approach to the human right in question instead of following a Strasbourg decision. This is explained by Lord Philips as follows:

> "*The requirement to 'take into account' the Strasbourg jurisprudence will normally result in [the Supreme Court] applying principles that are clearly established by the Strasbourg Court. There will however be rare occasions where [the Supreme Court] has concerns as to whether a decision of the*

[53] *Rabone & Anor v Pennine Care NHS Trust* [2012] 2 AC 72; [2012] UKSC 2, [112]-[114] per Lord Brown.
[54] *Friend v United Kingdom; Countryside Alliance v United Kingdom* (2010) 50 EHRR SE6.
[55] *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173; [2008] UKHL 38.
[56] Baroness Hale, "Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?" (2012) 12(1) *Human Rights Law Review* 65, 75.

Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In those circumstances it is open to [the Supreme Court] to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the [Supreme Court] and the Strasbourg Court."[57]

3.36. The Grand Chamber have taken the detailed reasoning of the UK courts into account in subsequently finding no violations on appeal to the Grand Chamber illustrating the on-going dialogue between the UK and Strasbourg.[58] Although the relationship between the Strasbourg Court and the UK has been difficult at times, the HRA has played a fundamental role in regulating the balance and dialogue between the Courts. As Sir Nicolas Bratza, the former President of the European Court has observed, *"The Human Rights Act, and the manner of its implementation by judges of the United Kingdom, have set a shining example to other states of how Convention rights can be brought home.*"[59]

(c) The context of Northern Ireland

(i) <u>The Peace Process</u>

3.37. While **section 3(b)(ii)** above sets out how the HRA can be seen in the broader context of devolution, the backdrop and process of devolution in Northern Ireland is clearly distinct to the accounts of devolution in Scotland and Wales. The bi-lateral negotiating framework between the UK and Republic of Ireland, the presence of international actors to aid in brokering stalemates in the process, and the backdrop of murders, rioting and political violence are all factors which explain the context of Northern Irish devolution and the terms of the GFA. Professor Christine Bell, a leading academic on peace processes, has reflected that:

"*This process had more similarities to other peace processes involving round tables, for example South Africa on whose process it drew, than to constitutional change processes elsewhere in the United Kingdom. Its central focus was to find a way to transcend the irreconcilable constitutional and sovereign positions to Irish unity and Union with Britain that lay at the heart of a violent conflict.*"[60]

[57] *R v Horncastle & Others* [2010] 2 AC 373; [2009] UKSC 14, [11].
[58] See e.g. *Al Khawaja v United Kingdom* (2012) 54 EHRR 23.
[59] Nicolas Bratza, "The relationship between the UK Courts and Strasbourg" (2011) 5 *European Human Rights Law Review* 505, 506.
[60] Christine Bell, "Constitutional transitions: the peculiarities of the British constitution and the politics of comparison" (July 2014) *Public Law* 446, 458.

3.38. The history and politics of Northern Ireland is long, contested and complex. Enquiries into violence during the conflict are ongoing and the words used to describe the violence and the events remain contested between the two communities. It is outside the scope of this Report to provide a summary of all the key events, such as internment, Bloody Sunday, the hunger strikes, and bombings in the UK, which have resulted in a number of different legal responses. Further, the Report does not provide a summary of the different political and paramilitary actors. Instead, in this section, we provide a very brief summary of the legislative framework necessary to understanding the terms of the GFA.

3.39. By way of very brief historical background, the Northern Irish peace process was born out of a long history of a struggle by some for independence following the partition of the North from the Republic of Ireland. The Anglo-Irish Treaty signed in London in 1921 concluded the Irish War of Independence, creating the Irish Free State. The Republic of Ireland would later gain full independence from the UK with the enactment of the Irish Constitution in 1937. It is in this context that the Government of Ireland Act 1920 created Northern Ireland, which remained within the UK. Northern Ireland had its own parliament from 1921 until 1972 when this arrangement collapsed.

3.40. On 5 October 1968 an historic civil rights march took place in Derry. The thirty years between this event and the signing of the GFA on the 10 April 1998 marked a period of violent political conflict, colloquially and euphemistically referred to as "The Troubles." During this time over 3,000 people were killed and many more were injured. At issue in this territorial conflict was whether Northern Ireland would remain part of the UK or become part of the Republic of Ireland. The Provisional IRA, also known as the IRA, embarked on a strategy of violence with the objective of obtaining independence from the UK. This was later matched by loyalist paramilitary forces, which sought to remain with the UK.

3.41. The extent and escalation of the violence in the region meant that in 1972 the British Government suspended Stormont, the Northern Irish parliament, and direct rule was imposed from London via a Secretary of State who assumed executive authority. From this time onwards, there were a number of attempts to reach an agreement for devolution and power-sharing between the two communities in order to put an end to the conflict.

3.42. The Sunningdale Agreement in 1973 and the Anglo-Irish Agreement in 1985 were both precursors to establishing peace. However, the on-going violence meant that these agreements collapsed. In 1994 the IRA announced a ceasefire and peace talks began in 1996. Negotiations over the decommissioning of paramilitary groups and the ending of illegal paramilitary activity was a central component to the peace process and to the conclusion of the Agreement. The Mitchell Principles and the creation of an International Commission on Decommissioning brought an

international dimension to the negotiations and in 1997 it was agreed that *"the resolution of the decommissioning issue is an indispensable part of the process of negotiation."* [61] The Northern Ireland Decommissioning Act 1997 provided paramilitary groups with an amnesty for decommissioning their weapons during a certain timeframe.

3.43. As momentum grew for an agreement for peace, it became clear that certain issues had to be addressed for the peace process to be effective. First, the effective implementation of human rights became a key part of the process. As Lord Archer, the Shadow Secretary for Northern Ireland (1983-1987) and founder of Amnesty International has noted in this context: "*The quarrels, the bitterness and violence arose in the first place largely because many people believed – rightly or wrongly – that they were being treated unfairly in the practical details of daily life. The future of the whole process may hang on whether or not they believe that that is being redressed.*"[62] Secondly, the Northern Ireland (Sentences) Act and the establishment of the Sentence Review Commission meant that prisoners convicted for terrorist offences began to be released. Thirdly, a number of Commissions on policy and criminal justice were set out with policing remaining an ongoing issue until the acceptance of the Police Service of Northern Ireland by Sinn Fein in 2006. For the Police Service of Northern Ireland, the HRA became and continues to be a core underpinning document in ensuring compliance with human rights in policing.[63]

3.44. The talks from the peace process and the measures outlined above ultimately resulted in the GFA. The GFA is in fact a number of agreements, linked together and known officially as "The Agreement: Agreement reached in the multi-party negotiations" (April 10, 1998).[64] It is more commonly known or referred to as the Belfast or Good Friday Agreement. This Agreement remains the basis for governance in Northern Ireland and regulates three types of relationships or 'strands': relationships within Northern Ireland; relationships between Northern Ireland and the Republic of Ireland; and relationships between Britain and the Republic of Ireland.

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[61] Agreement between the Government of Ireland and the Government of the United Kingdom establishing the Independent International Commission on Decommissioning (26 August 1997), Treaty Series No. 54 (1997) Cm 3753.

[62] *Parliamentary Debates*, House of Lords, 5 October 1998, col 182 (Lord Archer of Sandwell).

[63] See e.g. Report of the Independent Commission on Policing For Northern Ireland, A New Beginning: Policing In Northern Ireland (September 1999) ("the Patten Report"), available at http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf; Police Service of Northern Ireland, "Human Rights", available at http://www.psni.police.uk/index/about-us/human_rights.htm.

[64] The GFA is published in various forms, including *The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland,* Cm 3883 (10 April 1998), copy available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

(ii) The Belfast (Good Friday) Agreement

3.45. The GFA emerged from a complex internationally mediated process, involving political actors and civil society. The Agreement was adopted by a referendum in both the North and South of Ireland on 22 May 1998). In Northern Ireland, there was approval of the Agreement among the nationalist population. However, amongst the unionist population there was significant opposition to the Agreement amongst some groups, with the Democratic Unionist Party (DUP) formally opposed to it. Despite this opposition, the Agreement was approved in the referendum by a majority.

3.46. The Agreement has legal implications for the UK and the Republic of Ireland, with the terms stipulating that laws affecting the status of Northern Ireland needed to be changed, repealed or amended. For domestic effect to take place in the UK, the Agreement was incorporated in statute through the Northern Ireland Act 1998 and the Northern Ireland Assembly Act 1998. The British Government also repealed section 75 of the Government of Ireland Act 1920. The Republic of Ireland amended its Constitution following a referendum by repealing Articles 2 and 3, in which the Republic of Ireland made a claim to the North.

3.47. The Agreement is an important constitutional settlement which also has broader legal repercussions. Lord Hoffman in the House of Lords described the Northern Ireland Act as *"a constitution for Northern Ireland, framed to create a continuing form of government against the background of history of the territory and the principles agreed in Belfast"*.[65] As well as its importance in terms of British constitutionalism, the Agreement is also significant in its provision for self-determination. As a bi-lateral Treaty, the Agreement has implications beyond British constitutionalism and must be understood in this broader context. The international aspect of this agreement is explored in more detail below.

3.48. Alongside the external effects, one of the main purposes of the Agreement was to enable a stable government to be formed within Northern Ireland. The Agreement enshrines a compromise between the two sides of the community with complex institutional arrangements reflecting the need for cross-community approval of legislation. For example, members of the Assembly register a designation of identity (nationalist, unionist or other) for the purposes of identifying whether there is sufficient cross-community support on an issue. Cross-community majority agreement is also necessary for the election of the First and Deputy First Minister and the formation of the Executive. This dual heading of the Executive has been described as a "*major constitutional innovation*" in UK constitutional practice.[66]

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[65] *Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL 32, [2002] NI 390 [25].
[66] Christopher McCrudden, "Northern Ireland, The Belfast Agreement and the British Constitution", in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (5th ed, 2004), 206.

(iii) The terms of the Good Friday Agreement

3.49. The most important provisions of the GFA are as follows:

- Northern Ireland is to remain part of UK unless and until a majority of its citizens by referendum decide otherwise (s 1).

- The Republic of Ireland agreed to amend its Constitution to abandon its territorial claim to Northern Ireland;

- The Assembly only has the power to pass legislation in issues which are "transferred" to Northern Ireland, subject to the Convention and EU law.[67]

- The Convention and any Bill of Rights for Northern Ireland supplementing it, are safeguards to ensure that all sections of the community can participate and work together peacefully (s 5(b)).

- UK Parliament retains the ability to legislate for Northern Ireland even in devolved manners (s 5(5) NIA);

- All parties must use best endeavours to secure decommissioning of weapons;

- Release of paramilitary prisoners was a key aspect of the GFA;

- The GFA also envisaged the establishment of a number of new institutions or arrangements including a North/South Ministerial Council, a British-Irish Council, and a British-Irish Intergovernmental Conference.

3.50. In addition to these key terms, the GFA explicitly mentions human rights and their importance in a number of places. There are equivalence provisions for the Republic of Ireland and the UK in which both governments undertake to strengthen the protection of human rights and for the UK to complete incorporation of the Convention into Northern Ireland law.

3.51. The centrality of human rights to the GFA is illustrated by a full standalone section entitled "Human Rights" which provides that:

> "*1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:*
>
> - *the right of free political thought;*

[67] Northern Ireland Act 1998, s 4(1) and s 6.

- *the right to freedom and expression of religion;*
- *the right to pursue democratically national and political aspirations;*
- *the right to seek constitutional change by peaceful and legitimate means;*
- *the right to freely choose one's place of residence;*
- *the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;*
- *the right to freedom from sectarian harassment; and*
- *the right of women to full and equal political participation.*"

3.52. Sections on reconciliation and victims of violence, economic, social and cultural issues, and policing and justice all highlight the need for social inclusion, equality and human rights. The GFA has been a starting point with implementation of the provisions set out in many post-agreement documents. Important and complex implementation procedures have regulated issues including decommissioning, police reform, criminal justice reform, 'demilitarisation', early release of prisoners, and controversial political issues such as parades and flags.

3.53. Undoubtedly, the protection of fundamental rights and freedom from discrimination are principles which are central to and underpin the GFA and the transition to peace. These principles are the lifeblood of the GFA. They were a key part of the impetus for it being agreed and accepted, and their inclusion has been necessary for holding the State to account for their previous and ongoing failures (for example in the inquest context).

3.54. The Northern Ireland Act 1998 implementing the GFA also contains important provisions for human rights, including the establishment of the Northern Ireland Human Rights Commission. The Commission is tasked with advising the British government on the scope for enacting a Bill of Rights in Northern Ireland, reflecting the particular circumstances of Northern Ireland.

(iv) <u>Status as an international agreement between Ireland and the UK</u>

3.55. The GFA is part of a bilateral treaty between the British Government and the Government of the Republic of Ireland, which is an international legal instrument registered with the United Nations.[68] The international treaty, generally known as the British-Irish Agreement, acknowledges that the GFA "*offers an opportunity for a new beginning in relationships with Northern Ireland, within the island of Ireland*

[68] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (1998) 2114 UNTS 473. The Good Friday Agreement is an Annex to the treaty and is referred to in its core provisions.

and between the peoples of these islands".[69] The two Governments agreed the following:

- To recognize the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland (Article 1(i));

- To recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland (Article 1(ii));

- To affirm that, if in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish (Article 1(4));

- To establish a North/South Ministerial Council; a British Irish Council, a British Irish Intergovernmental Conference and other bodies referred to in paragraph 9(ii) of the GFA (Article 2);

- British legislation shall be enacted for the purpose of implementing provision of Annex A to the section entitled 'Constitutional Issues' of the Multi Party Agreement (Article 4(a));

- The amendment to the Constitution of Ireland set out in Annex B to the section entitled 'Constitutional Issues' of the Multi Party Agreement shall have been approved by referendum (Article 4(b)).

3.56. Since the signing of the British-Irish Agreement, the two Governments have agreed a number of other agreements aimed at filling certain gaps identified in the GFA. These include a review of the Parades Commission, a commitment to address issues of police reform (Weston Park Agreement 2001), establishing a Victim's Commissioner, addressing employment and reintegration of ex-prisoners (St Andrews Agreement 2006), devolved policing and issues related to transition (Hillsborough Agreement 2010). These agreements alongside other measures 'dealing with the past' illustrate that the British-Irish Agreement was a starting part

[69] Ibid, Preamble, [2].

for transition, with public inquiries, investigations and memorial projects filling in some of the remaining gaps.

3.57. The recognition of self-determination in the British Irish Agreement has led to it being considered a groundbreaking model in international law. The GFA stipulates in its section entitled 'Constitutional Issues' that it is for the "*people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right to self-determination…*"[70] Further it states "*that if, in the future the people of the island of Ireland exercise their right to self-determination… to bring about a United Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish.*"[71] The Agreement further provides that the people in Northern Ireland have a right "*to identify themselves and be accepted as Irish or British, or both, as they may so choose*."[72]

3.58. The ability of the people of the North and South to freely exercise their choice as to the status of the North is seen as *"a radical reconfiguration of both the theory and practice of state formation. In short, democratic participation and the expressly articulated desire of a majority to change their national and territorial status trumps established borders."*[73] In this way, contained within the legal arrangement of the Agreement is a fluidity and recognition that the status of the North of Ireland may change in the future.

3.59. The obligations and responsibilities which arise from this Agreement are further discussed in Part 5.

(v) NI Bill of Rights

3.60. The GFA and the St Andrews Agreement set out a commitment that the Northern Irish Human Rights Commission would be asked:

> *…to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights (ECHR), to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the*

[70] *The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland,* Cm 3883 (10 April 1998), copy available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf, Constitutional Issues, 1(ii).
[71] Ibid, Constitutional Issues, 1(iv).
[72] Ibid, Constitutional Issues, 1(vi).
[73] Colm Campbell, Fionnuala Ni Aolain and Colin Harvey, "The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland" (2003) 66 *Modern Law Review* 317, 330.

identity and ethos of both communities and parity of esteem, and- taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland.[74]

3.61. On 10 December 2008, the Commission delivered its recommendations to the Secretary of State for Northern Ireland. These recommendations include that the provisions of the HRA should be included within a Bill of Rights for Northern Ireland. These provisions however would be interpreted in a broader manner, with a more generous reading given to concepts such as a 'public authority' and a 'victim' than under the HRA.

3.62. The Commission also recommended the inclusion of rights contained in the Convention which were not included in the HRA. The recommendations also draw on a number of international human rights treaties, ratified by the UK, and calls for the inclusion of the supplementary rights. In this way the Bill aims to be a best practice document on the incorporation of human rights standards and also takes into account the particular circumstance of Northern Ireland.

3.63. The rights in the Bill aim to address the legacy of the past and the special needs of victims and survivors of the conflict. This is reflected in the recommendations on Convention rights, such Article 2 of the Convention, with a specific focus on the investigation of deaths. The Bill also contains a number of recommendations supplementary to Convention rights, with specific sections on Freedom from Violence, Exploitation and Harassment, the right to identity and culture, language rights, rights of victims and to civil and administrative justice. It also includes a number of socio-economic rights such as the right to health, an adequate standard of living, right to accommodation, right to work, and social security rights. Further, it enshrines a number of "group" rights such as environmental rights, and children's rights.

3.64. The Bill also reflects the broader UN Women, Peace and Security agenda first set out in UN Security Council Resolution 1325 and states that the Bill "*values the role of women in public and political life and their involvement in advancing peace and security*". The recommendations in the Bill extend to sexual and reproductive rights with the Bill stating that "*women and girls have the right to access gender-sensitive and appropriate healthcare services and information.*"

3.65. A fundamental part of the Commission's role and mandate was to formulate and advise on equality provisions in Northern Ireland taking into account the identity and ethos of both communities. As the Commission has noted discrimination and inequality has been a source of conflict in Northern Ireland and the Bill of Rights aims to combat discrimination and address this need for equality and mutual respect between the two communities and also for individuals who fall outside of these communities. In this context, the Bill addresses the ongoing discrimination against

[74] The commitment is also reflected in the Northern Ireland Act 1998.

lesbian and gay men and the lack of marriage equality in Northern Ireland. In its section on Article 12 and the right to marriage the Commission explained that:

> "*The Commission has made these recommendations because homosexuality was not decriminalized in Northern Ireland until 1982, 15 years after similar legislation in England and Wales. Significant opposition to the rights of gay and lesbian people and civil partnership remains in Northern Ireland. In these particular circumstances, it is necessary that the right to civil partnership and to termination of both it and marriage be given addition protection. In contributing, with other rights, to a fully inclusive and equal society, this additional protection will help promote respect and equality*."[75]

3.66. In this way, the Bill aims to protect, respect and fulfill the human rights of minority groups which may not be able to use political and legislative means in their pursuit of equality.

3.67. Following the delivery of the advice in 2008, the Northern Ireland Office carried out a public consultation. Since then, there has been *"very little progress"* towards the adoption of the instrument.[76] The adoption of a Northern Ireland Bill of Rights is currently stalled pending the outcome of the current consultation of a Bill of Rights in the UK. The future of the Bill of Rights for Northern Ireland currently remains uncertain. This uncertainty is of grave concern, given the centrality of human rights protection to the peace process, and the threatened repeal of the HRA. Regardless of the HRA's future, progress should be made on the Bill, although the appropriate way forward for the Bill will inevitably be closely linked to what is to happen with the HRA. Further human rights protections in the North addressing the specific history and circumstances would be a welcome development, building on the self-determination provisions of the GFA and ensuring that the North of Ireland is a best practice model for transitional justice.

(vi) <u>All Ireland Charter of Human Rights</u>

3.68. In addition to a specific Northern Ireland Bill of Rights, the GFA

> "*envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other matters, the possibility of establishing a charter, open to*

[75] Northern Ireland Human Rights Commission, *Summary: A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland* (July 2009) available at http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-summary-2009.pdf, 13.

[76] Northern Ireland Human Rights Commission, *Is that Right? Fact and Fiction on a Bill of Rights* (2012) available at http://www.nihrc.org/uploads/publications/Fact_and_Fiction_on_a_Bill_of_Rights-_Is_that_Right.pdf, 5.

signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland."

3.69. Brice Dickson, the former Chief Commissioner for the Northern Irish Human Rights Commission has explained that the terms of the GFA do not obligate the Joint Committee of the two Human Rights Commissions to develop a draft. However, the terms of the Agreement enshrines the underlying idea that there should be a common foundation or equivalence of fundamental rights North and South of the border. In 2003 a consultation was carried out resulting in the suggestion of a number of different models for the Charter of Rights for the island of Ireland.[77]

3.70. In June 2011 the Northern Ireland Human Rights Commission and the Irish Human Rights Commission delivered an advice of the joint committee on a Charter of Rights for the island of Ireland. The advice states that a Charter would not provide for any new human rights protections, however, it would allow political parties from each jurisdiction to demonstrate their continued commitment to human rights. The advice highlights a number of protocols to the Convention which have not been ratified by the UK and others which have not been ratified by the Republic of Ireland. The Joint Committee called on the Governments to finalise the content of the Charter based on their advice. As of writing the content of the Charter has not been finalised.

(vii) The role of the HRA 1998 and human rights generally

3.71. Since coming into effect, the Convention and the HRA have played a fundamental role in holding state actors to account and for providing justice to the families of victims. There has been extensive scholarly research into transitional justice and human rights in Northern Ireland.[78] There have also been a number of works which deal specifically with the relationship between Northern Ireland and the Convention.[79] Many of these articles and books analyse the issue of inquests and the State's Article 2 (right to life) obligations under the Convention to investigate deaths under the procedural limb of this right. The actions of the security forces in

[77] Brice Dickson, Chief Commissioner, Northern Ireland Human Rights Commission, "A Charter of Rights for the Island of Ireland", New Human Rights Legislation Conference, Dublin (18 October 2003), available at http://www.ihrec.ie/download/pdf/paper200310_actconf_brice_dickson.pdf.

[78] See e.g. Bibliography on Scholarly Research on Transitional Justice in Northern Ireland, available at http://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2014/10/Bibliography-on-scholarly-research-on-transitional-justice-in-Northern-Ireland.pdf.

[79] Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010); Kris Brown, "Rights and Victims, martyrs and memories: the European Court of Human Rights and political transition in Northern Ireland", in Michael Hamilton and Antoine Buyse (eds), *Transitional Jurisprudence and the ECHR* (2011); Gordon Anthony and Paul Mageean, "Habits of Mind and 'Truth-Telling': Article 2 ECHR in Post-Conflict Northern Ireland", in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Human Rights and Transition: Essays in Honour of Stephen Livingston* (2007); Marny Requa, "Keeping Up with Strasbourg: Article 2 Obligations and Northern Ireland's Pending Inquests" (2012) *Public Law* 610.

Northern Ireland and the failure to adequately and effectively investigate these actions has led to a number of cases coming before the court in Strasbourg.[80] The Committee of Ministers, which monitors compliance with European Court cases noted a number of issues arising from these cases including: the role of inquest procedure in securing a prosecution in respect of a criminal offence; the compellability of witnesses at inquests; legal aid for the representation of the victim's family; and the lack of independence of police investigators investigating an incident leading to defects in police investigations.[81]

3.72. These cases should be understood within the broader context of asserting and protecting human rights, post-conflict in Northern Ireland. As Fionnuala Ni Aolain explains, at the heart of human rights protections in Northern Ireland there is a paradox, given:

> "*...the uneasy relationship between the state's management of the conflict, its role as an actor in the conflict, and its attempts to 'solve' the conflict through legal and political means, makes analyzing the relationship between human rights protections and conflict resolution a complex proposition. Part of that complexity emanates from the fact that the state is both complicit in human rights violations, and responsible for creating the means to facilitate accountability for violations*."[82]

3.73. Despite this paradox in implementation, the terms of the GFA clearly illustrate the centrality of human rights to the peace process and to Northern Ireland. The Agreement provided the Assembly the power to appoint a special committee to report on whether legislative measures are in conformity with equality requirements. In this way, there is scrutiny at the political as well as the judicial level. The table annexed to this report also illustrates that the HRA has had an impact on domestic law in a variety of issues from property law, inquests, education, and insolvency. The HRA and the Convention have therefore had an impact beyond policing, equality and non-discrimination and criminal justice, which formed the main focus of the GFA.

3.74. According to Brice Dickson, between 2000 and 2005 the Northern Ireland Court Service calculated that of the 585 occasions on which the HRA was raised in

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[80] *Jordan v United Kingdom* (2003) 37 EHRR 2; *McKerr v United Kingdom* (2002) 34 EHRR 20; *Kelly and others v United Kingdom,* App No 30054/96 (Judgment), 4 May 2001; *Shanaghan v United Kingdom*, App No 37715/97 (Judgment), 4 May 2001; *McShane v United Kingdom* (2002) 35 EHRR 23; *Finucane v United Kingdom* (2003) 37 EHRR 29.

[81] See Council of Europe, Committee of Ministers, Interim Resolution, "Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases)" (6 June 2007) and Appendices, available at https://wcd.coe.int/ViewDoc.jsp?id=1146359&Site=CM.

[82] Fionnuala Ni Aolain, "Human Rights in Negotiating Peace Agreements: The Good Friday Agreement", International Council on Human Rights Policy, Working Paper (2005), available at http://www.ichrp.org/files/papers/57/128_-_Northern_Ireland_-_Human_Rights_in_Negotiating_Peace_Agreements_Ni_Aolain__Fionnuala__2005.pdf, 2.

Northern Ireland's courts, in only 20 cases had the validity of domestic legislation been challenged.[83] According to Dickson, during this time only one case was declared incompatible with Convention rights.[84] More recently in 2015, the Northern Ireland Human Rights Commission brought an application for judicial review on the law on the termination of pregnancy in Northern Ireland.[85] In this case the Commission sought a declaration of incompatibility as a 'victim' under s 72(2B) of the Northern Ireland Act 1998 which empowers it to take test cases in relation to human rights issues without having to fulfil the victim requirement in s 7 of the HRA. The Court held that the Commission had the power to bring test cases and to challenge Convention compatibility with legislation pre-dating 1998.

3.75. The judgment considers the position of the Convention in Northern Ireland, with Judge Horner reflecting that:

> "*[91] The Convention protects certain fundamental rights. The Court in Strasbourg made this clear to all those in Northern Ireland in 1982 when it ruled that the imposition of criminal sanctions on practising homosexuals infringed the Article 8 rights of Mr Dudgeon and others like him: see [1982] 4 EHRR 149. Despite this ruling Northern Ireland has not become a modern day Sodom and Gomorrah as some feared. Indeed the removal of these criminal sanctions allowed and allows practising homosexuals to grow up and live and work in Northern Ireland and to contribute to its society without fear of prosecution or discrimination.*
>
> *[92] When all the political parties signed up to the constitutional settlement which was enacted in the 1998 Act, they did so on the basis that one of the foundation stones of the new Northern Ireland was that its laws would be Convention compliant. This has had an effect on a number of different areas where there are strongly held religious and moral beliefs: eg adoption – see Re G (Adoption: Unmarried Couple) [2008] UKHL 38.*
>
> *[93] There can be no doubt that the Convention necessarily has had the effect of making Northern Ireland a more tolerant and liberal society, one that is more pluralistic and broadminded. Whether this is a good thing is not a matter for the Court. But it is one of the Convention's objectives. The Convention does not require anyone to give up his or her deeply held beliefs on certain moral or religious matters. It just means that in respect of certain rights protected by the Convention one section of the community, whether in the majority or not, is no longer able to deny to others whether by the*

[83] Brice Dickson, "The Impact of the Human Rights Act in Northern Ireland", in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (2012).
[84] *Re McR's Application* [2003] NI 1; [2002] NIQB 58.
[85] *The Northern Ireland Human Rights Commission's Application* [2015] NIQB 96.

imposition of criminal sanctions or otherwise, the ability to enjoy those protected Convention rights."

3.76. The judge found a violation of Article 8 for the failure to provide exceptions to the law prohibiting abortion in respect of fatal foetal abnormalities at any time and pregnancies due to a sexual crime up to the date when the foetus becomes capable of an existence independent of the mother. The Court intended to grant a declaration of incompatibility subject to further argument on a number of grounds including at [182]:

> "*The history of the Northern Ireland Assembly suggests that when there are contentious religious and moral issues that divide the political classes, there is little prospect of progress given the present constitutional settlement. This is not intended as a criticism, but rather to reflect what has happened in the past. The Guidance Document produced in response to the Court of Appeal judgment in Family Planning Association of Northern Ireland v Minister of Health and Social Services and Public Safety took some 8½ years to produce. The consultative document is intended to deal with the issues before this Court has not only taken an inordinately long time to be produced, but it has failed to deal with pregnancies which are a consequence of sexual crime. There is every reason to accept as true, the comments of the First Minister that any legislative proposals for the termination of pregnancy regardless of the category are doomed. The submissions on behalf of the Attorney General simply serve to underline this*."

3.77. Through the HRA, the courts in Northern Ireland play an important democratic and balancing role, taking into account the practical realities and effects of power-sharing in the other organs of government. Although declarations of incompatibility are infrequent, the table attached illustrates that Convention rights are routinely considered by the courts.

3.78. Further, the courts play an important role in holding state bodies to accounts and have reminded public authorities of the need to consider and comply with their Convention obligations. For example, the Courts have found violations of Article 8 in adoption cases on the basis that "*Not only was there an absence of any reference to their Article 8 rights, but there was a chilling absence of even lip service to such rights at a very senior level in this Trust*."[86] In that particular case, Gillen J went on to state:

> "*I find the breach of the rights in this case to be flagrant and the courts must make clear that such breaches of Article 8 of the European Convention on Human Rights will not be tolerated. Although I am assured that steps have*

[86] *In re W and M (Breach of Article 8 of the European Convention On Human Rights: Freeing for Adoption Order)* [2005] NIFam 2, [2].

been taken now to ensure that this Trust will afford compliance to Convention rights in the future, it is clear to me that employees at all levels in this Trust require training in the fundamental impact that the Convention has on the type of decision that was to be made in this instance. The public interest requires that all Trusts throughout Northern Ireland grasp this concept."[87]

3.79. Similarly, the Courts have found a violation of Article 8 in the prison context for sloping out arrangements at Magilligan Prison.[88] The Prison Services, Parades Commission, education sector, housing, health and social services have all had to demonstrate that they are acting compatibly with the HRA and their Convention obligations.

3.80. While the Northern Irish Courts carefully consider complaints about Convention rights, a number of cases from Northern Ireland have ended up in Strasbourg since the HRA came into force. In *Shannon v the United Kingdom*,[89] the European Court found a breach of Article 6 due to the requirement to attend an interview and give information to financial investigators exercising their powers under the Proceeds of Crime (Northern Ireland) Order 1996. Many cases, relate to the procedural obligations under Article 2 (the right to life) of the Convention. The cases before Strasbourg such as *Re McKerr*, *Re Jordan* and *Re McCaughey* mentioned above all raised questions about the ambit of inquests and permissible.[90] While the HRA has ensured that public authorities need to consider Convention rights there remain lacunas relating to the transitional elements specific to Northern Ireland, which reinforces the need for urgent consideration to be given to the long-stalled issue of a Bill of Rights for the North of Ireland.

4. PROPOSED REPEAL OF THE HRA 1998

4.1. This Part outlines the various recent proposals that have been made for repeal of the HRA. The focus of this Part is on the current Conservative Party platform, rather than on the Commission on a Bill of Rights held under the Coalition Government during 2011-2012 (referred to above at paragraph 2.2).[91]

4.2. Over the past decade, members of the now Government have repeatedly criticised the HRA, claiming that it is a terrorists' and criminals' charter which does not benefit ordinary people. Regrettably, many of these statements have been based upon misinformation and mischaracterizations of the HRA's content and effect. We

[87] Ibid, [23].
[88] *Martin v Northern Ireland Prison Service* [2006] NIQB 1; see also *In re Neale and others' applications for Judicial Review* [2005] NIQB 33.
[89] *Shannon v United Kingdom* (2006) 42 EHRR 31..
[90] *Jordan v United Kingdom* (2003) 37 EHRR 2; *McKerr v United Kingdom* (2002) 34 EHRR 20; *Kelly and others v United Kingdom,* App No 30054/96 (Judgment), 4 May 2001; *Shanaghan v United Kingdom*, App No 37715/97 (Judgment), 4 May 2001; *McCaughey and others v United Kingdom* (2014) 58 EHRR 13.
[91] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012).

summarise at **section 4(a)** below some of the most egregious examples of these incorrect statements, as they are an important part of the background to the Government's current policy aim of repealing the HRA and replacing it with a *"common sense"* British Bill of Rights. We then outline at **section 4(b)** below a series of proposals which have come to light since October 2014, with the announcement of Conservative Party policy on the HRA going into the May 2015 election. The proposals reveal a number of common themes, which are discussed in section 4(c), though the timeframe for their delivery has shifted multiple times. As noted in section 4(d), most striking is the lack of a draft Bill or clear model for a 'British Bill of Rights', over a year after the Conservative Party outlined its position. The process concerns arising from this delay are discussed in section 4(e).

(a) Misinformation regarding the HRA

4.3. A number of factual misconceptions have repeatedly been cited in support of the Government's proposals to repeal the HRA and introduce a new British Bill of Rights. Some human rights organisations (such as Liberty, RightsInfo[92] and the British Institute of Human Rights) dedicate resources to 'mythbusting' – tackling myths and misconceptions regarding the HRA, including how it works and who it protects.

4.4. A particularly pervasive misconception is that the HRA protects only criminals and terrorists and does nothing for ordinary, average citizens. In May 2015, for example, the *Sun* newspaper ran a front page comment:

> *'EUROPEAN COURT PUTS TERRORISTS AND MURDERERS FIRST. WHY IS CAMERON DITHERING OVER ENDING THIS FARCE?'*

Superimposed on photos of four convicted criminals (labeled variously: 'Killer'; 'Rapist'; 'Paedo rapist'; 'Terrorist') was the four-word headline: *'THEIR RIGHTS...OR YOURS?'*

4.5. This is a visceral and inaccurate message. As Sir Keir Starmer QC, writing last year, put it:

> *"The arguments against the Human Rights Act are coming. They will be false. No doubt Gove will peddle the usual myth that the HRA is nothing more than a villains' charter. But the evidence is against him on that. There has been no fundamental shift in defendants' rights under the HRA, mainly because legislation passed by the Margaret Thatcher government in 1984 set out clear rights for suspects that have been successfully embedded in our law for many years.*

[92] See Adam Wagner, "The 14 Worst Human Rights Myths", available at http://rightsinfo.org/infographics/the-14-worst-human-rights-myths/.

By stark contrast, the HRA has heralded a new approach to the protection of the most vulnerable in our society, including child victims of trafficking, women subject to domestic and sexual violence, those with disabilities and victims of crime. After many years of struggling to be heard, these individuals now have not only a voice, but a right to be protected. The Tory plans to repeal the HRA, together with the restricted access to our courts already brought about by the restriction on judicial review introduced by Gove's predecessor, Chris Grayling, will silence the vulnerable and leave great swaths of executive action unchecked and unaccountable."[93]

Campaign group Act for the Act put it this way:

"*Without the Human Rights Act, there would have been no second inquest into the 1989 Hillsborough disaster to finally uncover the truth about that dreadful day; no accountability for the family of murdered teenager Stephen Lawrence; and no justice for the victims of black cab rapist John Worboys, who were so badly let down."*[94]

4.6. Particular myths have continued to circulate regarding the use of the HRA, and regrettably they have often been either raised or repeated by members of the now Government. For example, in September 2011 the Home Secretary, Theresa May MP, told the Conservative Party Conference about the *"illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat*." RightsInfo have corrected this claim:

"Simply not true. He had a cat (named Maya) but the cat wasn't the reason he was allowed to stay in the UK. The man was allowed to stay because the Home Office failed to apply its own guidance dealing with unmarried partners of people settled in the UK."[95]

4.7. A further misconception relates to the extent to which the European Court in Strasbourg rules against the UK. Despite misleading reports and public statements, in fact, according to a report commissioned by the Equality and Human Rights Commission,

"Compared to a selected sample of Council of Europe states, the UK has among the lowest number of applications per year brought against it. The

[93] Keir Starmer, "The arguments against the Human Rights Act are coming. They will be false" *Guardian*, (13 May 2015) http://www.theguardian.com/commentisfree/2015/may/13/arguments-human-rights-act-michael-gove-repeal-myth-busting.

[94] See The Act for the Act Campaign, available at http://actfortheact.uk.

[95] Adam Wagner, "The 14 Worst Human Rights Myths", available at http://rightsinfo.org/infographics/the-14-worst-human-rights-myths/ and see also Adam Wagner, "Catgate: another myth used to trash human rights," *Guardian*, (4 October 2011), available at http://www.theguardian.com/law/2011/oct/04/theresa-may-wrong-cat-deportation

UK also has a lower percentage of these applications declared admissible and loses proportionately fewer of the cases brought against it."[96]

The authors of the report found that of nearly 12,000 applications brought against the UK between 1999 and 2010, the vast majority fell at the first hurdle and only 3% (390) applications were declared admissible.

4.8. These and other myths regarding the HRA are repeatedly cited in support of proposals for reform.

(b) The proposals so far

4.9. Proposals for repeal of the HRA have been made in the following documents:

(i) Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws* (October 2014);

(ii) *The Conservative Party Manifesto 2015*;

(iii) The Queen's Speech to Parliament 2015; and

(iv) Documents obtained by the *Sunday Times* from the Ministry of Justice.

4.10. The content of each of these sources is summarised in turn.

(i) Protecting Human Rights in the UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws *(October 2014)*

4.11. On 3 October 2014, the Conservative Party published an eight-page document[97] setting out its proposals for repeal of the HRA. The content of the document may briefly be summarised as follows:

4.12. The first section "*Human Rights in Context*", affirms the underlying importance of the Convention, stating that "*[t]he Convention is an entirely sensible statement of the principles which should underpin any modern democratic nation*" and recalling that "*the UK had a great influence on the drafting of the Convention, and was the first nation to ratify it*."[98]

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[96] See Equality and Human Rights Commission, *The UK and the European Court of Human Rights*, Research report 83 (2012), available at http://www.equalityhumanrights.com/sites/default/files/documents/research/83._european_court_of_human_rights.pdf.

[97] Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws* (October 2014), available at https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf.

[98] Ibid, 2.

4.13. The Conservatives make a commitment "*to reform the human rights laws in the UK, so they are credible, just and command public support*" and states "*we will shortly publish a draft British Bill of Rights and Responsibilities for consultation*".[99]

4.14. The next section, entitled "*The Case for Change*", cites "*significant developments which have undermined public confidence in the human rights framework in the UK*" and asserts "*[b]oth the recent practice of the [European Court of Human Rights] and the domestic legislation passed by Labour has damaged the credibility of human rights at home*."[100] Four key criticisms are noted:[101]

- **The European Court has developed 'mission creep':** The Conservatives refer to "*mounting concern at Strasbourg's attempts to overrule decisions of our democratically elected Parliament*", citing the dispute between the Court and the UK over prisoner voting rights, deportation cases and whole life sentences.

- **The HRA undermines the role of UK courts in deciding on human rights issues:** The requirement under s 2(1) of the HRA to take into account rulings of the European Court is characterised as "*meaning that problematic Strasbourg jurisprudence is often being applied in UK law*". Proportionality is also criticised.

- **The HRA undermines the sovereignty of parliament and democratic accountability:** Section 3(1) of the HRA is said to undermine Parliamentary sovereignty by requiring judges to interpret legislation so that it complies with Convention rights, "*most often following Strasbourg's interpretation*".

- **The HRA goes far beyond the UK's obligations under the Convention:** The Conservatives recall that the Convention does not require direct incorporation, nor does it require Strasbourg to be "*directly binding on domestic courts*".

4.15. The section entitled "*The Conservatives' Plan for Change*" outlines the proposed reforms in broad-brush terms. The reforms are aimed at diminishing the role of the European Court so that it is "*is no longer binding over the UK Supreme Court*" and "*is no longer able to order a change in UK law*".[102]

4.16. The proposals are said to be grounded in two facts: that the HRA introduced a "*requirement for UK courts to treat the Strasbourg Court as creating legal*

[99] Ibid, 2.
[100] Ibid, 3.
[101] Ibid, 3-4.
[102] Ibid, 5.

precedent for the UK" and that "*in all matters related to our international commitments, Parliament is sovereign*".[103]

4.17. The British Bill of Rights and Responsibilities will have several key objectives, including to:[104]

- **Repeal the HRA**.

- **Put "*the text of the original Human Rights Convention*" into primary legislation:** It is not clear whether this means the original text of the Convention as passed in 1950, or the amended text in force today. Moreover, the HRA does not contain Articles 1 and 13 of the Convention; it is not clear whether it is proposed to include these articles in a new Act.

- **"*Clarify*" Convention rights:** By setting out a "*clearer test*" for non-refoulement under Article 3 of the Convention other than 'real risk'; limiting (at least) Article 8 rights (at least) in deportation cases; more precisely defining terms including 'degrading treatment or punishment'.[105] This is said to be intended to "*ensure that they are applied in accordance with the original intentions for the Convention and the mainstream understanding of these rights*".

- **Break the formal link between British Courts and the European Court**: By no longer requiring UK courts to take into account rulings of the European Court.

- **End the ability of the European Court to "*force the UK to change the law*":** "*Every judgement that UK law is incompatible with the Convention will be treated as advisory*" only. Parliament will be required formally to consider each judgment, which is a new requirement not p resent in the HRA.

- **Prevent our laws from being effectively rewritten through 'interpretation':** Requiring courts to interpret legislation based upon its "*normal meaning*", not having to "*stretch*" its meaning to comply with Strasbourg case law.

- **Limit the use of human rights laws to "*the most serious cases*":** "*The use of the new law to will be limited to cases that involve criminal law and the liberty of an individual, the right to property and similar serious matters. There will*

[103] Ibid.
[104] Ibid, 5-6.
[105] The UN Human Rights Committee has found it unnecessary to define this term because "*the distinctions depend on the nature, purpose and severity of the treatment applied*": Human Rights Committee, *General Comment 20, Article 7*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI\GEN\1\Rev.1 at 30 (1994), [4].

be a threshold below which Convention rights will not be engaged, ensuring UK courts strike out trivial cases".

- **Limit the reach of human rights cases to the UK:** British Armed forces will not be subject to "*persistent human rights claims*".

- **Amend the Ministerial Code** to make clear the duty of Ministers to follow the will of Parliament.

4.18. Under the heading "*The International Implications for Our Plan*", the Conservatives recognise that "*it will remain open to individuals to take the UK to the Strasbourg Court claiming a breach of their Convention rights, and resultant judgments of the Court will be seen to be binding on the UK as a treaty obligation*".[106] The Conservatives "*would like the UK to remain a party to the Convention*" and "*hope, therefore, that the Council will recognise these changes to our Human Rights laws*".[107] If the Council of Europe refuses to recognise the UK's demand to be allowed to remain a signatory to the Convention while treating judgments of the European Court as merely advisory, the UK would withdraw from the Convention.

4.19. A section is then included entitled "*The EU Dimension*", noting that the EU may sign up to the Convention in its own right and that negotiations are ongoing as to the terms of this arrangement. The Conservatives are "*mindful that there may be legal implications for our approach once the EU accedes to the ECHR*" and will use the negotiations to "*ensure this is reflected in the rules that will govern the EU's interaction with the Court*" and to "*ensure that the UK's new human rights framework is respected*".[108]

4.20. Under the point about 'serious cases', there is a brief mention of devolved legislatures: "*We will work with the devolved administrations and legislatures as necessary to make sure there is an effective new settlement across the UK.*"[109] The document does not make any specific mention of Northern Ireland, the GFA, Scotland or Wales.

4.21. In the meantime, the *Protecting Rights in the UK* proposals have been publicly criticised, notably by Conservative MP and former Attorney-General Dominic Grieve QC,[110] Professor Conor Gearty[111] and Professor Philippe Sands QC[112] (part

[106] Ibid, 8.
[107] Ibid.
[108] Ibid.
[109] Ibid, 4.
[110] Dominic Grieve, "Human Rights Act: Why the Conservatives are wrong", *Prospect* (10 October 2014), available at http://www.prospectmagazine.co.uk/politics/human-rights-act-why-the-conservatives-are-wrong; Dominic Grieve, "Scrapping the Human Rights Act will hurt the UK", *Prospect* (20 August 2015), available at http://www.prospectmagazine.co.uk/features/scrapping-the-human-rights-act-will-hurt-the-uk.

of the Commission on a Bill of Rights), as well as by National Human Rights Institutions[113] and numerous rights groups.

(ii) The Conservative Party Manifesto 2015

4.22. The Conservative Party Manifesto[114] contains two mentions of the Conservative Party's plans regarding the HRA.

4.23. Under the heading "*Fighting crime and standing up for victims*", the Manifesto states:

> "***We will reform human rights law and our legal system***
> *We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour's human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.*"[115]

4.24. Under the heading "*Real change in our relationship with the European Union*", the Manifesto reads:

> "***We will scrap the Human Rights Act***
> *We will scrap Labour's Human Rights Act and introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights. It will protect basic rights, like the right to a fair trial, and the right to life, which are an essential part of a modern democratic society. But it will reverse the mission creep that has meant human rights law being used for more and*

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[111] Conor Gearty, "The Tories' proposal for a British bill of rights is incoherent, but they don't care", *Guardian* (3 October 2014), available at http://www.theguardian.com/commentisfree/2014/oct/03/tories-proposal-british-bill-of-rights-incoherent-human-rights-act-strasbourg

[112] Philippe Sands, "This British bill of rights could end the UK", *Guardian* (14 May 2015), available at http://www.theguardian.com/commentisfree/2015/may/14/british-bill-rights-could-end-uk; Philippe Sands, "The government is playing a dangerous game trying to scrap the Human Rights Act", *Guardian* (21 October 2015), available at http://www.theguardian.com/commentisfree/2015/oct/21/government-human-rights-act-legal-europe-uk .

[113] Irish Human Rights and Equality Commission and Northern Ireland Human Rights Commission, *Joint Statement of IHREC and NIHRC* (25 June 2015), available at http://www.nihrc.org/news/detail/joint-statement-of-irish-human-rights-and-equality-commission-and-northern. See also Emily Logan, Chief Commissioner, Irish Human Rights and Equality Commission, *Presentation to the Joint Committee on the Implementation of the Belfast / Good Friday Agreement* (25 June 2015), available at http://www.ihrec.ie/download/pdf/ihrec_briefing_joint_committee_implementation_gfa_25june2015.pdf.

[114] Conservative Party, *The Conservative Party Manifesto 2015*, available at https://www.conservatives.com/manifesto.

[115] Ibid, 60.

more purposes, and often with little regard for the rights of wider society. Among other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation."[116]

(iii) The Queen's Speech to Parliament 2015

4.25. The Queen's Speech, delivered on 27 May 2015, included one sentence on the issue: "*My government will bring forward proposals for a British Bill of Rights.*"[117] The Queen's Speech did not make any specific commitment to repeal of the HRA. No timetable for the enactment of legislation was specified.

4.26. The accompanying briefing[118] affirmed that repeal of the HRA was intended, but gave no further substantive detail as to the proposed model or timing, stating in broad terms:

"*The Government will bring forward proposals for a Bill of Rights to replace the Human Rights Act.*

This would reform and modernise our human rights legal framework and restore common sense to the application of human rights laws. It would also protect existing rights, which are an essential part of a modern, democratic society, and better protect against abuse of the system and misuse of human rights laws.."[119]

(iv) Documents obtained by The Sunday Times from the Ministry of Justice

4.27. On 8 November 2015, journalist Tim Shipman revealed[120] that government plans for repeal of the HRA had been leaked to *The Sunday Times*.

4.28. The plans described in *The Sunday Times* may be summarised as follows:

- Judges will be told they will not have to follow rulings of the European Court of Human Rights in Strasbourg automatically, but "*will be free to reference other sources of law such as common law and rulings from other Commonwealth countries when formulating judgments*."

[116] Ibid, 73.
[117] Cabinet Office and Her Majesty the Queen, *Queen's Speech 2015* (27 May 2015), available at https://www.gov.uk/government/speeches/queens-speech-2015.
[118] Press Office, Prime Minister's Office, *The Queen's Speech 2015: Background Briefs*, (27 May 2015) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf.
[119] Ibid, 75.
[120] Tim Shipman, "Human rights law to be axed", *Sunday Times*, (8 November 2015), 1, 8.

- The amount of compensation available for breaches of human rights will be reduced.

- Soldiers and journalists will be given greater protection from people using human rights law to sue for damages.

- Human rights laws would in future apply only in Britain, meaning they could not be used in respect of actions on the battlefields overseas.

- Only cases that fulfil "*a certain level of seriousness*" will go to court.

- The UK will remain a signatory to the Convention.

- Ministers are considering enshrining the notion of parliamentary sovereignty explicitly in law, so that when judgments were made in Strasbourg against the government it would be clear that MPs in Westminster should decide how to respond.

4.29. The *Sunday Times* was also made aware of a possible timeframe: "*The consultation document is expected to be published in the next four weeks. A three-month consultation will follow, with the draft bill of rights published next spring*."[121] Plainly, this timeframe has not been realised.

(c) Key objectives and common themes

4.30. A number of running themes emerge from the proposals outlined above. These are described and analysed below.

(i) *Notional support for the Convention vs. criticism of the European Court and the HRA*

4.31. Overall, the Conservatives continue to support the Convention itself, but criticise "*the subsequent approach*" of the European Court and what is consistently termed "*Labour's Human Rights Act*".[122] This epithet ignores the fact that while the Labour Government introduced the Human Rights Bill in 1997, it passed with cross-party support, as explained in paragraph 3.15 above.

4.32. Professor Christine Bell has addressed the issue of nomenclature in the context of Northern Ireland:

[121] Ibid, 8.
[122] Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws* (October 2014), available at https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf, 8.

> "*It should also be noted, that while the Human Rights Act is now described throughout Conservative documents as 'Labour's Human Rights Act', in fact there was an explicit 'bi-partisan' approach agreed across the two main parties to support the peace process and Agreement in Northern Ireland, which was and remains crucial to its success. That UK government support rooted in the bi-partisan commitment has up until now carried clearly through successive governments and changes in power. Repeal of the Human Rights Act in Northern Ireland would constitute a remarkable and unfortunate break with the bi-partisan approach*."[123]

4.33. The Conservatives' notional commitment to the text of the Convention is undermined by the limits they seek to put on existing rights, and particularly by the proposal that human rights laws will be limited to "*the most serious cases*" and will not be applied to "*trivial*" cases. The explanation of what constitutes a "*serious case*" (namely "*criminal law and the liberty of an individual, the right to property and similar serious matters*") is vague and unprincipled, and gives rise to a number of questions. How will 'serious cases' be determined? Is there such a thing as a 'serious' breach of human rights as opposed to a 'trivial' breach? Will the distinction turn in some part, as appears to be suggested, on the type of right invoked, with cases that involve rights to liberty and property being more likely to be regarded as 'serious'? Will a right to property always be regarded as more 'serious' than the right to family life or freedom of conscience, for example? Is the right to vote 'serious' or 'trivial', or does it depend on the identity of the claimant? It is simply not possible, in the absence of a clear model, to answer these questions.

4.34. What is clear is that an attempt to divide and categorise rights is likely to be unsustainable in the light of the accepted principle that "*[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis*".[124] Human rights are not susceptible to being ranked in a hierarchy, either of rights or of beneficiaries. The Conservatives' approach would also contradict the language of the Convention itself, which "*aims at securing the universal and effective recognition and observance*"[125] of the rights therein by requiring states to "*secure*" those rights "*to everyone within their jurisdiction*".[126]

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[123] Christine Bell, "Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland", *Scottish Constitutional Futures Forum* (13 May 2015), available at http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/5597/Christine-Bell-Human-Rights-Act-Repeal-and-Devolution-Quick-Points-and-Further-Resources-on-Scotland-and-Northern-Ireland.aspx.

[124] Vienna Declaration and Programme of Action, approved by consensus at the World Conference on Human Rights, UN Doc. A/CONF.157/23 (25 June 1993), [5], endorsed e.g. by General Assembly Resolution 48/121, 20 December 1993 and General Assembly Resolution 60/251, 15 March 2006.

[125] Convention, Preamble, [2].

[126] Convention, Art 1.

(ii) *Repeated references to the European Court 'overruling the Supreme Court' and 'undermining Parliamentary sovereignty'*

4.35. The proposals continually refer to the need to reassert or entrench Parliamentary sovereignty and to reduce the remit of the European Court to ensure that it is no longer 'binding' over the UK Supreme Court and cannot 'order a change' or 'create legal precedent' in UK law.

4.36. These statements are misleading. The HRA does not affect Parliamentary sovereignty and contains no power to strike down legislation. The European Court has never been either binding over the UK Supreme Court, or able to change UK law. As explained in Part 3, the Court's rulings bind the UK as a state in international law, but need only be taken into account[127] by UK courts and tribunals under the HRA. The European Court can only declare that the UK has violated the Convention. In some cases, such as the prisoner voting case, the Court has ruled that the UK should change the law within a certain timeframe,[128] but this in itself does not affect UK domestic law. MPs are free to disregard the ruling, as they have done in that case.

4.37. Indeed, the criticism that parliamentary sovereignty is undermined by the European Court makes no mention of the fact that the scope of Convention law in the UK in no way even approaches the threshold of EU law, which must be considered supreme when in conflict with domestic law, and in the event of such conflict, domestic law can be disapplied.[129] When the requirement under EU law was characterised as a *"dangerous"* invasion of parliamentary sovereignty, the House of Lords dismissed such criticism as a *"misconception",* finding no erosion of sovereignty.[130] While it is not the case that Convention law and EU law either inhere the same principles or impose the same obligations on the UK domestically, if the requirements under EU law, more stringent as they are, fail to erode parliamentary sovereignty, it cannot be the case that Convention law erodes it in any way.

4.38. The approach taken in the proposals fails to recognise the judicial dialogue between Strasbourg and the Supreme Court, or that the Supreme Court already considers itself free not to follow Strasbourg in appropriate cases. The suggestion that courts must be told that they are at liberty "*to apply other sources of law such as common law*" is unnecessary given the Supreme Court has already preferred a direct

[127] HRA, s 2(1).
[128] In *Greens and MT v United Kingdom* (2011) EHRR 21, the Grand Chamber ruled at [115] that the UK must introduce legislative proposals to amend s 3 of the Representation of the People Act 1983 (and if appropriate the European Parliamentary Elections Act 2002) within six months of the date on which the judgment became final. The UK government was given permission to intervene in the hearing of *Scoppola v Italy (No 3)* App No 126/05, Judgment, 22 May 2012 before the Grand Chamber. Compliance with the *Greens* judgment was extended to sixth months from the date of the judgment in *Scoppola*.
[129] *R v Transport Secretary ex parte Factortame Ltd and others (No. 2)* [1991] 1 AC 603 (HL) 659A.
[130] Ibid.

application of common law principles to the application of Convention rights in numerous recent cases.[131]

(iii) An aversion to 'interpretation'

4.39. The proposal to remove or reform the requirement in s 3(1) of the HRA to interpret statutes "*so far as it is possible*" in accordance with Convention rights may have the effect of prompting more declarations of incompatibility with the Convention, not fewer. The suggestion that Strasbourg 'interprets' UK domestic legislation and that UK courts "*most often follow*" that interpretation is, of course, incorrect. Only the UK courts interpret UK domestic legislation. To the extent that the Conservatives disagree with how s 2(1) has been interpreted,[132] their problem is with the Supreme Court, not the European Court.

(iv) Deliberate linking of the HRA to the EU

4.40. The proposals repeatedly link the HRA with the EU, either tangentially (referring to "*implications for our approach once the EU accedes to the ECHR*") or disingenuously (including scrapping the HRA as an example of "*Real change in our relationship with the European Union*"). This appears to be a perpetuation of wilful misunderstanding in order to increase the appeal of the reforms to Eurosceptics.

4.41. The HRA itself is not directly connected with the EU. The Convention and the Court are administered by the Council of Europe, not the EU. The wider ramifications of the EU's accession to the Convention, and of the UK's possible exit from the EU, are discussed in **section 5(d)** below.

(v) Treating European Court judgments as merely advisory

4.42. The Conservatives acknowledge that judgments of the European Court will remain binding in international law on the UK as a state while it remains a party to the Convention. Article 46(1) of the Convention places an obligation on the UK "*to abide by the final judgment of the Court in any case to which [it is] part[y]*". Regardless of the proposals adopted, the UK would not be relieved of its obligation to comply with judgments already handed down by the European Court, including on prisoner voting.

4.43. However, the proposals also envisage seeking approval from the Council of Europe for the UK to treat judgments of the European Court as merely advisory for the purposes of domestic law. It is not clear how this attitude sits with the UK's international obligation. Quite apart from potentially placing the UK in breach of its

[131] See discussion below at **section 5(d)(iii)**.
[132] See discussion of *R (Ullah) v Special Adjudicator* [2004] 2 AC 323; [2004] UKHL 26 and the 'mirror principle' above.

international obligations, this may diminish the credibility of the UK's position with other Member States and encourage other States, including those with less respectable human rights records than the UK, to act similarly.

(vi) No analysis of constitutional implications

4.44. The proposals contain no mention of the GFA or analysis of the constitutional implications or sensitivities of the Conservative plan in the context of Northern Ireland. This is both telling and concerning, given the protections afforded by the Convention and the rulings of the European Court are woven into the text of the GFA as explained at **section 3(c)** above.

(vii) No analysis of implications for the devolved administrations

4.45. The Convention rights underpin the devolution agreements with Scotland, Northern Ireland and Wales. One of the few issues on which the 2011-2012 Commission on a Bill of Rights agreed was that "*any future debate on a UK Bill of Rights must be acutely sensitive to issues of devolution ... and it must involve the devolved administrations*".[133]

4.46. The Commission went on:

> "*To come to pass successfully a UK Bill of Rights would have to respect the different political and legal traditions within all of the countries of the UK, and to command public confidence beyond party politics and ideology. It would also, as a technical matter, involve reconsideration of the scheme of the devolution Acts, which limit the powers of the devolved legislatures and governments expressly by reference to respect for 'Convention rights'*".[134]

4.47. Despite these clear unanimous recommendations by an otherwise divided panel, the existing proposals contain no substantive analysis of devolution issues, and the extent to which the devolved administrations have been consulted is not clear.

(d) Lack of a clear model and timeframe

4.48. The model that will be used by the Government to address its concerns and achieve its objectives remains unclear. No British Bill of Rights and Responsibilities has yet been published. The Government is no longer promising a draft Bill but a consultation. The timescale has shifted from the first 100 days to *"this autumn"* to *"November or December"* to *"in due course"*.

4.49. Various reasons have been advanced to explain the delay:

[133] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012), [73].
[134] Ibid, [76].

- Difficulties in drafting a coherent plan / Bill that is sufficiently different from the present system, that incorporates the proposals made, and that works legally;
- Lack of public support;
- Constitutional and / or devolution difficulties;
- So-called 'high politics'[135] – lack of support and criticism from backbenchers, Labour, the SNP and the judiciary.

4.50. On 4 November 2015, Harriet Harman MP wrote to Michael Gove MP[136] following the establishment of the Joint Committee on Human Rights, of which Harman is chair. She requested "*some indication of proposed timings*", noting that the usual 12-week consultation period would be "*a very short time in which to deal with what is likely to be a complicated and contentious issue*". She also pointed out that "*we have no indication as to whether the Government intends to publish a White Paper, draft clauses, or indeed a draft Bill for legislative scrutiny*". She requested that submissions be published and noted the importance of consulting with devolved administrations: "*[i]t would be helpful to understand what approach the Government is going to take to ensure that the views of the different parts of the United Kingdom are heard*". She requested confirmation that the Government has officially ruled out withdrawing from the Convention.

4.51. In a one-page response dated 22 November 2015,[137] Gove stated:

> "*We have been clear that the Bill of Rights will remain faithful to the basic principles which we signed up to in the [Convention] ... We are confident that we can make progress from within the [Convention] ... While we want to remain part of the [Convention], we would not stay in at any cost and our plans are aligned to that objective.*"

4.52. On consultation, Gove would commit only to "*consulting fully*" in adherence to "*consultation principles published by the Cabinet Office*". Devolution implications "*are being considered*" and the Government "*has and will continue to work with devolved administrations*". No timeframe was given; Gove responded only that "*our proposals will launch in due course*". Gove also gave evidence before the Select Committee on the Constitution on 2 December 2015, but his discussion,

[135] See e.g. Tim Ross, "How the Human Rights Act escaped the Tory axe", *Telegraph* (30 May 2015), available at http://www.telegraph.co.uk/news/politics/queens-speech/11640590/How-the-Human-Rights-Act-escaped-the-Tory-axe.html

[136] Letter from Rt Hon Harriet Harman MP to Rt Hon Michael Gove MP (4 November 2015), available at http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/JCHR_Letter_to_Michael_Gove_MP_041115.pdf.

[137] Letter from Rt Hon Michael Gove MP to Rt Hon Harriet Harman MP (22 November 2015), available at http://www.parliament.uk/documents/joint-committees/human-rights/Michael_Gove_Letter_Bill_of_Rights_271115.pdf.

although lengthy, did not include any more specifics as to timeframe or content of the proposals.[138]

(e) Related process concerns

4.53. The delay, uncertainty and lack of a clear model are in themselves matters of concern. For devolved administrations and National Human Rights Institutions, the lack of clarity and certainty present challenges in terms of how to shape any practical implementation measures and to plan policies and programs. The Government's refusal to specify timeframes also diminishes confidence that the consultation will be effective, genuine and give sufficient time for full engagement with a series of complex issues.

5. THE EFFECTS OF PROPOSED REPEAL

(a) The effect on the Good Friday Agreement and institutions of government in Northern Ireland

5.1. As explained in Part 3, the HRA gives effect to the European Convention in the North and underpins key principles of the GFA which outlines both the structure and the accountability mechanisms for the institutions of government. This includes an obligation on the British Government to "*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*".[139]

5.2. That obligation was fulfilled by the UK in 1998 upon the enactment of the HRA, which 'completed incorporation' of the Convention into the law of Northern Ireland and of the rest of the UK. Particularly in the absence of a Northern Irish Bill of Rights, the HRA has an ongoing crucial function in Northern Ireland in ensuring protection of rights in Northern Ireland.[140]

5.3. Until a concrete model is put forward, the question whether the proposed repeal of the HRA would breach the GFA cannot be addressed with certainty.

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[138] Revised transcript of evidence taken before the Select Committee on the Constitution, Oral Evidence Session with the Rt Hon Michael Gove MP, Lord Chancellor and Secretary of State for Justice (2 December 2015), available at http://www.parliament.uk/documents/lords-committees/constitution/AnnualOralEvidence2014-15/CC021215-LC.pdf.

[139] *The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland,* Cm 3883 (10 April 1998), copy available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf, Rights, Safeguards and Equality of Opportunity, 2.

[140] Kanstantsin Dzehtsiarou and Tobias Lock (eds), *The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights*, Policy paper (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487.

5.4. If the HRA were to be replaced and the Convention incorporated into Northern Ireland law by way of a British Bill of Rights, there may technically be no breach, provided that the legislation immediately replaced the HRA and that the rights in the British Bill reflected the minimum protections in the Convention. In that event, however, there would seemingly be no change in substance from the current human rights regime. It is difficult to see why the Conservatives would go to the effort of making such a change with no substantive effects.

5.5. It also might be queried whether repeal and replacement of the HRA, even with very similar provisions, complies with a 'good faith' reading of the UK's obligations under the GFA. That obligation was to 'complete incorporation' of the Convention. The obligation was met, and incorporation 'completed', in the year 2000 when the HRA came into force. Fulfilling the obligation by means of the HRA has met with the general acceptance and approval of all parties to the Agreement. Arguably to wind back the clock and 're-fulfill' the obligation with a different piece of legislation may be said to be a breach of both the letter and spirit of the Agreement.

5.6. If a British Bill of Rights took any steps to limit or curtail the rights in the Convention, this would be likely to breach the Agreement. On the basis of the current proposals, this would appear to be a significant risk on a number of fronts. In particular, we highlight the following four key flaws:

(i) A move to restrict the application of human rights standards to 'serious cases' would fall below the minimum standards in the Convention. The Agreement enshrines "*direct access to the courts, and remedies for breach of the Convention*". The current proposals would deprive those considered to have 'trivial' claims of a remedy before the domestic courts for breaches of their Convention rights. That would breach the Agreement.

(ii) Proposals to reduce the decisions of the European Court to advisory opinions would breach the requirement under Article 46(1) of the Convention "*to abide by the final judgment of the Court in any case to which [it is] part[y]*", and therefore would appear to undermine the obligation to incorporate the Convention into Northern Ireland law.

(iii) Further, the Agreement explicitly includes the ability of the courts to override Assembly legislation on the grounds of inconsistency as a remedy before the courts. If this were diminished in any way, for example by limiting the courts' ability to take into account Strasbourg jurisprudence, there may be an arguable breach of the Agreement.

(iv) Whilst currently vague, the proposals indicate that the Government wishes to distance the new Bill of Rights from the jurisprudence of the European Court

and to take more of an originalist approach, in accordance with what they see as the original intentions of the framers of the Convention[141]. While it remains unclear as to how they propose to achieve this, it is clear to us that any 'winding back' of Convention rights, stripping the Convention of the interpretation provided by the Court since it was originally drafted, would risk violating the spirit of the GFA. Article 32 of the Convention seises the European Court with *"all matters concerning the interpretation and application of the Convention"* (subject of course to the role of domestic courts in practice). The European Court has repeatedly made clear that the Convention is a *"living instrument":* the rights enshrined in the Convention have to be interpreted in the light of present day conditions, so as to be practical and effective. The Court has, accordingly, altered its views on certain matters due to scientific developments or changing moral standards – such as, for example, the question of whether relationships between same-sex couples fall within the scope of family life under Article 8.[142] Further, because the GFA was agreed in 1998, after the Court had already been exercising its interpretive mandate for almost 40 years, and it promised to incorporate the Convention into NI law, a contextual good-faith reading would suggest that the obligation was intended to mean the Convention with the benefit of existing and ongoing interpretation by the Court, in accordance with its terms.

5.7. The 'living instrument' doctrine is by no means unique to the Convention. It is a basic principle of constitutional interpretation in many jurisdictions worldwide. For example, in US and Canadian law the 'living tree' or *théorie de l'arbre vivant* doctrine of constitutional interpretation provides that constitutions – unlike ordinary statutes – are organic, and they must be read in a broad and progressive manner, so as to adapt to and reflect changes in society. As the Supreme Court of Canada has put it,

> *"The 'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."*[143]

5.8. Similarly, the Irish Constitution is interpreted in this way. Mr Justice Walsh in *McGee v Attorney General* stated that, *"no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."*[144] The Irish Constitution is thus not *"stuck in the permafrost of 1937"*[145]:

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[141] See e.g. 3-5 of *Protecting Human Rights in the UK*; Conservative Party Manifesto 2015, 73.
[142] Cf *Mata Estevez v Spain*, App No 56501/00 (Judgment), 10 May 2001, and *Schalk and Kopf v Austria* (2011) 53 EHRR 20..
[143] *Reference re Same-Sex Marriage* [2004] 3 SCR 698 (9 December 2004), at [22], [28].
[144] [1974] IR 284 at 319.

it is a living, breathing, evolving document. It guarantees fundamental rights of the citizen in Articles 40 to 44 of the Constitution. Article 40 provides that all citizens are to be held equal before the law and obliges the State to vindicate the personal rights of the citizen. The term 'personal rights', as interpreted by the Irish courts, has led to the recognition and vindication of many rights not expressly provided for in the text of the Constitution. These 'unenumerated rights' include the right to bodily integrity, the right to marry and the right to earn a living, among others.

5.9. The UK Government's proposals, however, reject this dynamic, evolving principle of constitutional interpretation so well-established in courts worldwide. Rather, they wish to return to the Convention's text and how they consider it was intended and interpreted in 1950, almost seven decades ago.

(b) The effect on the Irish Peace Process

5.10. As also explained in section 3(c) above, the peace process in Northern Ireland was delicate, complex and long-running. After a number of failed settlements and years of fragile negotiations, the peace achieved through the GFA was hard won. Human rights were a central part of that process; as Emily Logan, Chief Commissioner of the Irish Human Rights and Equality Commission, has said, "*human rights protections were a core feature, not an 'add on', of the Peace Process and the negotiations around the Agreement*".[146] The incorporation of human rights, both through the HRA and more generally, is woven into the settlement documents, which were signed following majority support by the people in referenda in Northern Ireland and the Republic of Ireland. As well as being legal agreements, it is their political and popular dimensions that have ensured the success of the settlement so far.

5.11. Repeal of the HRA and its replacement with some more limited form of protection for human rights risks not only breaching the GFA in a technical sense, but infringing its spirit and leading to a loss of faith in the UK Government's commitment, both by political parties and ordinary citizens. For example, new policing arrangements in Northern Ireland, introduced around the time of the GFA as part of the peace process, are reliant on adherence to the HRA and the Convention. Public trust in the new policing structures, built by putting human rights at the centre of policing, has been crucial to the success of the settlement.[147]

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[145] Hogan and White, *JM Kelly on the Irish Constitution* (2003), 24,25. See also *Zappone and another v Revenue Commissioners and others* [2006] IEHC 404.

[146] Emily Logan, Chief Commissioner, Irish Human Rights and Equality Commission, *Presentation to the Joint Committee on the Implementation of the Belfast / Good Friday Agreement* (25 June 2015), available at http://www.ihrec.ie/download/pdf/ihrec_briefing_joint_committee_implementation_gfa_25june2015.pdf.

[147] See e.g. Chief Constable's speech on Dignity and Rights: A Framework for the Future (4 December 2014), available at http://www.psni.police.uk/pr_chief_constable_s_speech_on_dignity_and_rights__a_framework_for_the_future_041214; see also Chair of the Northern Ireland Policing Board's Address to the New York Citizens

Concerns regarding the potentially *"enormous"* implications of repeal of the HRA for the administration of government, justice and policing in Northern Ireland have been raised by the Sinn Féin leader, Gerry Adams[148], for example, and SDLP councilor Alban Maginness MLA has said the planned repeal would spell *"chaos"* for Northern Ireland and *"have a deep-rooted impact on the devolution set-up."*[149]

5.12. Consternation at potential repeal and its effect on the peace process extends beyond the North to the Republic of Ireland. Charlie Flanagan, the Irish Minister for Foreign Affairs, told the Irish Seanad that the HRA "*is woven into the structures*" of the GFA and that "*[a] shared emphasis on human rights and all that this implies is part of what makes the peace process credible*".[150]

5.13. The Directors of Amnesty International in both the UK and Ireland have expressed *"deep concern"* over the Conservative Party's plans in a letter to Britain and Ireland's Prime Ministers.[151] The signatories said that repeal could undercut "*public confidence in the new political and policing arrangements*" that stemmed from the GFA endorsed by referenda, which in turn could jeopardise the peace settlement. Kate Allen, Director of Amnesty International UK, has warned, *"given the history of political discrimination and mistrust in policing in Northern Ireland, binding human rights obligations have been crucial in building and bolstering public confidence in these key structures post-Troubles. But public confidence can be eroded and undermined just as surely as it can be built."*[152] To similar effect, Colm O'Gorman, Executive Director of Amnesty International Ireland, called on the Taoiseach to make, *"strong and urgent representations to the UK Prime Minister to ensure that hard-won progress is Northern Ireland is not now put at risk."*[153] Again, it is not possible to predict any clear outcomes in the absence of disclosure of a model and a proper consultation process. In the meantime, it appears likely that the ongoing uncertainty and speculation is itself eroding public confidence in the UK Government's commitment to the peace process on both sides of the Irish border.

Crime Commission Breakfast Forum (20 March 2015), available at http://www.nipolicingboard.org.uk/board_chair_new_york_crime_commission_breakfast_forum.pdf. See also the comments of then ACPO leader Sir Hugh Orde, speaking at Liberty in 2011, "Undercover policing and public trust: Sir Hugh Orde speaks at Liberty", available at http://www.ifsecglobal.com/undercover-policing-and-public-trust-sir-hugh-orde-speaks-at-liberty/.

[148] "Human Rights Act: Irish government 'will protect 1998 agreement'", *BBC News* (14 May 2015), available at http://www.bbc.co.uk/news/uk-northern-ireland-32734062.

[149] Claire Cromie, "David Cameron's plans to scrap the Human Rights Act could undermine Northern Ireland peace, warns Amnesty," *Belfast Telegraph* (14 May 2015), available at http://www.belfasttelegraph.co.uk/news/northern-ireland/david-camerons-plans-to-scrap-the-human-rights-act-could-undermine-northern-ireland-peace-warns-amnesty-31222250.html.

[150] See Department of Foreign Affairs and Trade, "Seanad address on the effect of the repeal of the UK Human Rights Act on the Good Friday Agreement" (14 May 2015), available at https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2015/may/minister-flanagan-addresses-the-seanad-uk-hr-act/.

[151] 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.

[152] Ibid.

[153] Ibid.

(c) The effect on devolved administrations

5.14. As explained in **Part 2** and **section 3(b)(ii),** although the HRA itself is reserved, human rights are partially devolved in Scotland, Wales and Northern Ireland. A number of authors have noted[154] that the Sewel Convention may require the consent of the devolved legislatures at least if the HRA were to be altered or replaced.[155]

5.15. The Sewel Convention is set out in a Memorandum of Understanding between the UK government and the devolved administrations. It states:

> "*The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, 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 responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government*."[156]

5.16. As noted in Part 2 and **section 3(b)(ii)** above, the devolved administrations are required to comply with Convention rights by virtue of specific provisions set out in the devolution statutes. The devolved administrations can also give further effect to the UK's international human rights obligations when acting within the scope of their powers, including but not confined to those that arise under the Convention.[157] Any change to the current requirement that the Northern Irish, Scottish and Welsh legislatures must comply with Convention rights would affect the scope of their devolved powers, and would therefore appear to trigger the Sewel Convention. This would mean that the UK Parliament would normally seek consent of each of the devolved legislatures before enacting such legislation. While constitutional

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[154] See e.g. Kanstantsin Dzehtsiarou and Tobias Lock (eds), *The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights*, Policy paper (2015), 11-12; CRG Murray, Aoife O'Donoghue, Ben TC Warwick, *Policy Paper: The Place of Northern Ireland within UK Human Rights Reform* (August 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643464, 32-33; Colm O'Cinneide, "Human Rights, Devolution and the Constrained Authority of the Westminster Parliament", *UK Constitutional Law Blog* (4 March 2013), available at http://ukconstitutionallaw.org.

[155] See e.g. for discussion of whether pure repeal without replacement would trigger the Sewel Convention, M. Elliott, "HRA Watch: Reform, Repeal, Replace? Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights?", *UK Constitutional Law Blog* (16th May 2015), available at http://ukconstitutionallaw.org; c.f. JUSTICE, Devolution and Human Rights (*February 2010*), available at http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/Devoultion-and-Human-Rights.pdf, [76].

[156] Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013.

[157] Northern Ireland Act 1998, Sched 2, para 3(c); Scotland Act 1998, Sched 5, para 7(2); Government of Wales Act 2006, Sched 5.

conventions are not legally binding, it is likely that a refusal or failure to seek consent in those circumstances would be regarded as politically difficult and unpalatable.

5.17. The extent to which such consent would be required is again dependent on the precise contours of the model adopted. It seems that any requests for consent would face challenges given the strong support for human rights and the HRA in Northern Ireland and Scotland in particular. On 12 May 2015, the Scottish Social Justice Secretary, Alex Neil, told the Scottish Parliament that the Scottish Government would withhold any consent requested: "*The Scottish government's position is that implementation of the Conservative government's proposals would require legislative consent and that this parliament should make clear that such consent will not be given*."[158] On 24 September 2015, First Minister of Scotland Nicola Sturgeon stated that it was "*inconceivable*" that the Scottish Government would consent to plans to scrap the HRA, that any move to repeal the HRA would be a "*monumental mistake*", and that she would have "*no interest*" in a deal that protected rights in Scotland but weakened them elsewhere in the UK.[159]

5.18. A further possible impact related to devolution is that, even if the UK Government did repeal and replace the HRA, it would be within the power of the devolved legislatures to introduce their own human rights statutes in respect of devolved matters. While this may restore the effects of the HRA within the devolved administrations, it would create a patchwork approach to human rights protections throughout the UK. This would presumably be undesirable in terms of both principle and policy, and could affect the viability of the devolution settlements more generally.

(d) Issues relating to EU / 'Brexit'

5.19. As noted above, the Conservative Government have conflated the European Court with the EU system. This section examines specific issues relating to the European Union and a possible British withdrawal from the EU (colloquially, 'Brexit'). First, the section considers the consequences of EU accession to the Convention, in the context of the existing framework of EU law. Secondly, it considers the consequences of a possible 'Brexit' for Northern Ireland. As background, it is necessary to set out how human rights are currently protected under EU law in the UK.

[158] Libby Brookes, "Scotland 'will not consent' to Tory plans to scrap the Human Rights Act", *Guardian* (12 May 2015), available at http://www.theguardian.com/law/2015/may/12/scottish-government-human-rights-act-conservatives.
[159] BBC News, "Sturgeon warns against plans to scrap the Human Rights Act" (24 September 2015), available at http://www.bbc.co.uk/news/uk-scotland-scotland-politics-34331682.

(i) Human rights in EU law

5.20. This section provides a brief explanation of the current human rights framework in the EU. Depending on the circumstances and the legal measures involved, the UK is currently subject to two separate human rights mechanisms: the Convention, introduced and discussed extensively throughout this report, which is administered by the Council of Europe; and the Charter of Fundamental Rights (**"the Charter"**),[160] which is an instrument of the EU. EU law is given effect in the UK by the European Communities Act 1972. There has been considerable confusion in the UK about the differences between the two systems.[161] To this end, this section sets out some of the differences and interactions between the EU and Convention human rights protections.

5.21. The EU provides human rights protection in the form of a Charter.[162] On 1 December 2009, the Charter, mentioned above, came into force through Article 6 of the Treaty of Lisbon.[163] The provisions of the Charter are addressed to the institutions and the bodies of the EU and national authorities when implementing EU law.[164] Article 52(3) of the Charter states that, without prejudice to a more extensive protection, the meaning and scope of those rights shall be the same as those laid down by the Convention.[165] Many of the protections and rights contained in the Charter mirror those of the Convention. Despite the existence of the two different systems, it is important to note that Convention standards are general principles of EU law.

(ii) The effect of the Charter in the UK

5.22. The Charter is directly effective in the UK.[166] This means that the rights and protections contained in the document have supremacy over inconsistent national law or decisions of public authorities. While the courts in the UK can only make a

[160] Charter of Fundamental Human Rights of the European Union, 2000/C 364/01.
[161] House of Commons European Scrutiny Committee. *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion*, Forty-Third Report of Sessions 2013-2014, HC979 (26 March 2014).
[162] See Francesca Ferraro and Jesus Carmona, "Fundamental Rights in the European Union: the role of the Charter after the Lisbon Treaty" *European Parliamentary Research* (March 2015), available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf. .
[163] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007/C 306/01.
[164] Grainne de Burca, "The Drafting of the European Union Charter of Fundamental Rights" (2001) 26 *European Law Review* 1.
[165] Charter, Art 52(3): "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*" The 'Explanations' section of the Charter lists the areas where EU protection is extended.
[166] While there was confusion over whether Protocol 30 to the Charter afforded the UK and Poland an 'opt-out', the case law of the ECJ makes it clear that Protocol No 30 simply clarifies the scope of the Charter but does not exempt the UK from the obligations to comply with the Charter. Case C-411/10 and C-493/10, *R (NS) v Secretary of State for the Home Department*: "*article 1(1) of Protocol No 30 explains article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions*.": [4] Summary of the Judgment.

'declaration of incompatibility' under the HRA if a measure violates a Convention right, national courts can invalidate an Act of Parliament where it is inconsistent with the Charter, if it is within the scope of EU law.[167] The remedy of striking down or disapplying Acts of Parliament where they breach fundamental rights in the Charter is considered to be a chief advantage of the Charter over the Convention.[168]

5.23. Currently human rights challenges are brought against public authorities under the HRA. The availability of the HRA means that the Charter has been underutilised with little public awareness and confusion about its provisions. However, the bite of the Charter ensures that at least in under the scope of EU law, the Charter will continue to guarantee a minimum of fundamental rights protections even if the HRA is repealed.

(iii) Accession of the EU to the Convention

5.24. All of the Member States of the European Union ("**EU**") are currently also Member States of the European Convention. The EU requires new Member States to accede to the Convention as a part of the criteria to qualify for membership.[169]

5.25. In addition, the accession of the EU itself to the Convention is required pursuant to the Treaty of Lisbon, which inserted a new Article 6(2) into the Treaty on European Union. Article 6(2) of the Treaty enshrines the EU's commitment to accede to the Convention in order to ensure that there is coherence and consistency of human rights protection for EU citizens. This is especially important given that citizens and judicial authorities are currently confronted with different binding regimes to interpret and apply.[170] Article 6(2) reflects the importance of human rights across the two European systems and the desire for greater harmonisation of the protection of fundamental human rights.[171] Accession of the EU to the Convention should

[167] *Factortame (No 1)* [1990] 2 AC 85; [1989] UKHL 1; *Factortame (No 2)* [1991] 1 AC 603; [1990] UKHL 13.

[168] Kieron Beal QC and Dr Tom Hickman, "Beano no More: The EU Charter of Rights after Lisbon" (2011) 16(2), *Judicial Review* 113, 127 [57].

[169] The Criteria are commonly referred to as the Copenhagen Criteria. The Commission confirmed that States have to ratify the Convention to be eligible for membership in their opinion on Bulgaria's membership. See: Vaughne Miller "Is Adherence to the European Convention on Human Rights a condition of European Union membership?" (25 March 2014), SN/IA/6577, available at http://researchbriefings.files.parliament.uk/documents/SN06577/SN06577.pdf

[170] Jorg Polakiewicz, "EU law and the ECHR: Will EU accession to the European Convention on Human Rights Square the Circle?" Fundamental Rights in Europe: A Matter for Two Courts, Conference Paper, Oxford Brookes University (18 January 2013), available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Accession_documents/Oxford_18_January_2013_versionWeb.pdf. As Professor Polakiewicz notes however there is a so-called *Bosphorus* presumption that ECHR compliance can be presumed when a Member States implements EU law, unless it is demonstrated that protection of Convention rights were "manifestly deficient." He asks: "*Why should the ECJ be allowed to hide behind the* Bosphorus *veil when all the national constitutional and supreme courts are subject to the full control of the Strasbourg Court?" See also Bosphorus v Ireland* (2005) 42 EHRR 1.

[171] On the dialogue between the ECJ and the ECHR see e.g. Marta Cartabia, "Europe and Rights: Taking Dialogue Seriously", (2009), 5(1) *European Constitutional Law Review* 5; Guy Harpaz, "The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy" (2009) 46 *Common Market Law Review*, 105. Protocol 14 to the

ensure even greater harmonisation between the two systems and greater prominence of the Convention in the Union aquis.

5.26. The European Commission and Council of Europe are currently in the stages of negotiating an agreement for EU accession to the Convention.[172] While the precise conditions of the agreement are as yet unclear, the result of the accession of the EU is that the Convention will be binding upon the institutions of the EU.[173] The Convention and the Strasbourg Court would provide an external mechanism to monitor human rights compliance of the EU and its institutions.[174] In practical terms, accession of the EU to the Convention will close some of the 'justice gaps' which have emerged from actions of EU institutions including through the procedures of the CJEU.[175] The justice gaps identified by EU law specialists include the current inability of individuals to challenge preliminary reference decisions, with these claims being held to be inadmissible before the European Court of Human Rights leaving claimants with nowhere to go.[176] Individuals will be able to bring cases challenging measures and procedures of the EU, either alongside the implementing State or directly against the EU where these do not involve a Member State (for example challenging a preliminary reference of the CJEU or the rules of standing before the Court under Article 6(1) of the Convention).

5.27. Like other Member States, under Article 46(1) of the Convention, following a finding of a violation by the Strasbourg Court, the EU institutions would need to take action in order to bring regulations in line with Strasbourg decisions, with a measure of discretion as to how this is done. The on-going negotiations and the recent decision of the Court of Justice of the European Union (CJEU) on these matters[177] reflect the struggle for a compromise which ensures the principle of the autonomy of Union law while at the same time recognising the jurisdiction of a

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Convention, Art 17 declares that the Convention is to be amended to provide that "*The European Union may accede to this Convention*".

[172] The complex and mandatory accession procedure is set out in TFEU, Art 218(6)(ii). On 4 June 2010, the Council gave the Commission a mandate to start negotiations.

[173] Bruno de Witte argues that the Convention is already binding on the EU, see Bruno de Witte, "Human Rights" in Pano Koutrakos (ed), *Beyond the Established Orders: Policy Interconnections Between the EU and the Rest of the World* (2011).

[174] The Court would not be able to quash EU legislative acts or judgments. According to Professor Polakiewicz ("EU law and the ECHR: Will EU accession to the European Convention on Human Rights Square the Circle?" Fundamental Rights in Europe: A Matter for Two Courts, Conference Paper, Oxford Brookes University (18 January 2013), available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Accession_documents/Oxford_18_January_2013_versionWeb.pdf), *"Its jurisdiction would be limited to a certain number of cases raising issues involving the protection of fundamental and human rights, which constitute only a small percentage of the case"*: 7.

[175] See David Hart QC, "EU judges oppose accession of EU to ECHR" (22 December 2014), available at http://ukhumanrightsblog.com/2014/12/22/eu-judges-oppose-accession-of-eu-to-echr/

[176] *Cooperatieve Producentenorganisatie Van de Nederlandse Kokkelvisserij v Netherlands*, App No 13645/05, 20 January 2009 (a case concerning the EU Habitats Directive and cockle fishermen).

[177] See Opinion 2/13 [2014] of the Court of Justice of the European Union. See also the Draft Report of the Committee on Institutional Affairs of the European Parliament, *Institutional Aspects of the Accession to the EU to the European Convention on Human Rights*, 2009/2241 (INI).

'specialised court' providing external supervision over the EU's compliance with human rights protections.[178]

(iv) Consequences of EU accession to the Convention for the UK

5.28. As noted in **Part 4** above, the Conservatives' plan in *Protecting Rights in the UK* contains a section on the EU's accession to the Convention. The document states:

> "*We are mindful that there may be legal implications for our approach once the EU accedes to the ECHR. We will therefore ensure this is reflected in the rules that will govern the EU's interaction with the Court. The EU's application to join the Convention requires the unanimous agreement of all member states, which will allow us to ensure that the UK's new human rights framework is respected*."[179]

Again, it is wholly unclear what is meant by this or how it is intended that this would be effected.

5.29. Even if the HRA is repealed, a new Bill of Rights will operate alongside the EU Charter and the human rights guaranteed therein. Further, the accession of the EU to the Convention means that the UK may be brought before Strasbourg as a co-respondent where EU measures breach Convention standards of human rights. A repeal of the HRA could also entail a more prominent place for the Charter in UK human rights adjudication where the measure falls within the scope of EU law.

5.30. More broadly, it remains unclear whether it is permissible for EU member states to completely withdraw from the Convention. In any event, since 1992 the Maastricht Treaty has placed an obligation on the EU to respect fundamental rights "*as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of community law*".[180] Even if a State were to withdraw from the Convention, the EU has clarified the scope of these fundamental rights and provides directly effective human rights protections through the Charter. This means that national laws implementing Union law must be human rights-compliant to the standard of the Charter. As set out above, the CJEU takes Strasbourg case law into account when interpreting provisions of the Charter. Further given that the EU is to accede to the Convention, EU measures and procedures will be subject to the jurisdiction of Strasbourg. This means that Union law is not only presumed to be Convention compliant (as is currently the case) but that it must in fact be Convention compliant.

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[178] On the principle of autonomy see C-402/05 P and C-415/05 *P, Kadi & Al Barakaat Intl'l Found. v Council & Commission,* 3 CMLR 41 (2008), [316].
[179] Conservatives, *Protecting Human Rights in the UK, The Conservative Proposal's for Changing Britain's Human Rights Laws*, available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf, 8.
[180] TEU, Art 6(3).

EU citizens and those affected by EU laws and procedures will be able to take their cases to Strasbourg and have their cases heard before the Court.

5.31. While the above considers the parallel system of human rights protections in operation in the UK (and the Republic of Ireland), the proposed repeal of the HRA takes place in the context of a possible 'Brexit'. The section below addresses the proposed repeal of the HRA within the wider uncertainty surrounding the Conservative party agenda and proposals for withdrawal of the UK from the EU.

(v) Introducing 'Brexit'

5.32. On 10 November 2015, Prime Minister Cameron set out his four objectives for reforming the UK's membership of the EU, with the most substantive and significant reform proposal relating to access to welfare benefits for EU citizens in their host state.[181] This came after two years of speeches by the Prime Minister (since his Bloomberg Speech in 2013)[182] in which technical and institutional detail of the proposed reforms were absent. There remains uncertainty over whether the UK will even remain within the EU, with an In/Out referendum due to take place by the end of 2017.

(vi) Consequences of a possible 'Brexit' for the UK generally

5.33. The possibility of Brexit and what this means exactly raises a number of issues for human rights protections in the UK.

5.34. First, if the UK leaves the EU, UK citizens would not be able to rely on the binding Charter which contains many of the protections set out in the Convention. This means that in the event of repeal, UK citizens would be placed back in the situation pre-HRA with great legal uncertainty over the protections available. Significantly, it also raises real questions over areas of law that have developed through Convention claims and dialogue. The laws on inquests and the procedural rights in Article 2 are a prime example of the need for subsidiary protection, especially where State actors are involved in the violations of the right to life.

5.35. Secondly, the repeal of the HRA and the potential exit of the UK from the EU both display what Jo Murkens has termed "*no awareness of the law of unintended consequences*". In the context of a possible 'Brexit', he has warned:

> "*To be sure, [Cameron's] ideas of 'what is best for Britain' might not be shared across the EU. But are his ideas even shared across the countries*

[181] BBC, "David Cameron sets out EU reform goals" (11 November 2015), available at http://www.bbc.co.uk/news/uk-politics-34770875. See further Floris de Witte, "Cameron's EU reforms: political feasibility and legal implications", *Verfassungsblog on Constitutional Matters* (10 November 2015), available at http://verfassungsblog.de/en/camerons-eu-reforms-political-feasibility-and-legal-implications/#.VkS7LnbhAsM.

[182] Prime Minister David Cameron, "EU Speech at Bloomberg" (23 January 2013), available at https://www.gov.uk/government/speeches/eu-speech-at-bloomberg

making up the UK? The unity of the United Kingdom is not guaranteed as long as the Scottish Nationalists are waiting for a hard and fast reason to hold a second independence referendum. Scotland's First Minister Nicola Sturgeon anticipates that the UK withdrawing from the EU will give rise to 'unstoppable' public demand for Scottish independence. In trying to get a better deal on EU membership, Cameron may inadvertently take the UK out of the EU and Scotland out of the UK."[183]

5.36. In relation to the withdrawal from the Convention by a Member State, the European Commission, in a written response to Geoffrey Van Orden MEP on 26 January 2007, stated the following:

> "*Respect for fundamental rights as guaranteed by the European Convention on Human Rights is an explicit obligation for the Union under Article 6(2) of the Treaty on European Union, and the Court of Justice has held that the Convention is of especial importance for determining the fundamental rights that must be respected by the Member States as general principles of law when they act within the scope of Union law. The rights secured by the Convention are among the rights guaranteed by the Charter of Fundamental Rights of the European Union. In the negotiations for the accession of new Union members, respect for the Convention and the case-law of the European Court of Human Rights is treated as part of the Union* acquis.
>
> *Any Member State deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures could, in certain circumstances, raise concern as regards the effective protection of fundamental rights by its authorities. Such a situation, which the Commission hopes will remain purely hypothetical, would need to be examined under Articles 6 and 7 of the Treaty on European Union.*"[184]

(vii) Consequences of a possible 'Brexit' for Northern Ireland

5.37. There has been growing concern voiced by a number of political actors over the possible consequences of Brexit for Northern Ireland, including from the political leadership in the Republic of Ireland. The GFA recognises the special relationship between the UK and Ireland, as friendly neighbours and partners in the European Union. Speaking on the 9 November 2015, the Taoiseach, Mr Enda Kenny, stated that the Irish Government's strong view, backed up by independent economic research is that Brexit is not in Ireland's economic interest. Further, Mr Kenny highlighted that the EU is a cohesive and stabilising force for peace in Northern Ireland:

> "*The research also found that Northern Ireland could be the most adversely affected region of the UK in the event of a Brexit. This is extremely worrying on a number of levels. The EU has been an important, perhaps*

[183] J. Murkens, "David Cameron Is Not a Visionary, He Is an Illusionist", *UK Constitutional Law Blog* (17 November 2015), available at: http://ukconstitutionallaw.org/.
[184] Answer given by Mr Frattini on behalf of the Commission (26 January 2007), OJ C 293, 05/12/2007.

underestimated, enabler of peace in Northern Ireland. It was instrumental in facilitating constructive contact and building trust between our Governments to find a political settlement. All- island economic cooperation is so much easier between two members of the European Union. The EU provided almost €2.4 billion euro in funding over the period 2007 to 2013 to help Northern Ireland overcome the challenges of a peripheral region that has emerged from conflict. Common membership of the EU project is part of the glue holding that transition process together. We have come through a difficult few months politically in Northern Ireland. But I remain optimistic. I believe that Northern Ireland can leave the past behind and become a dynamic economy that will benefit not only the UK but the island of Ireland."[185]

5.38. On the 26 November 2015, Charlie Flanagan, the Minister for Foreign Affairs and Trade of the Republic of Ireland emphasised the importance of the common British and Irish membership of the EU for the Northern Ireland peace process. Mr Flanagan underlined the positive impact of the EU on the peace process but also on the economies and on north-south cooperation. He stated that "*continuing EU membership is, without question, in the interests of everyone on our islands*."[186] His speech then addressed some of the "*huge uncertainties*" surrounding Brexit including on the North-South border and on the Irish and Northern Irish economies.[187] In particular, he drew attention to the possible negative impact on tourism and trade.

5.39. Others have echoed these concerns, and also noted the particular difficulties which arise with the Northern Ireland/ Republic of Ireland border. For example, Cathal McCall has noted that a central element of the pro-Brexit campaign has been to seek to prevent the movement of unwanted *"outsiders"* to the UK, and to focus, *"on clear, hard borders, replete with all the attendant physical manifestations: customs posts, watchtowers, patrols and, if need be, razor wire fences and walls,"* but the difficulty is that the UK only shares one land border with another State, the Republic of Ireland and so *"it does not seem plausible that a post-Brexit Conservative*

[185] Address by An Taoiseach, Mr Enda Kenny TD to the Confederation of British Industry Annual Conference, Grosvenor House Hotel, London "Securing our global future in a changing world" (November 2015) available at http://www.taoiseach.gov.ie/eng/News/Taoiseach's_Speeches/Address_by_An_Taoiseach_Mr_Enda_Kenny_TD_to_the_Confederation_of_British_Industry_Annual_Conference_9_November_Grosvenor_House_Hotel_London_Securing_our_global_future_in_a_changing_world_.html#sthash.ak4PzdXP.dpuf.

[186] Remarks by the Minister for Foreign Affairs and Trade, Mr. Charlie Flanagan TD, "What Brexit Means for Northern Ireland", Seminar at Queen's University Belfast (26 November 2015), available at https://www.dfa.ie/news-and-media/speeches/speeches-archive/2015/november/what-brexit-means-for-northern-ireland/.

[187] See also David Phinnemore et al, "EU Debate NI: To Remain or Leave? Northern Ireland and the EU Referendum" available online http://eudebateni.org/wp-content/uploads/2015/11/To-Remain-or-Leave-Northern-Ireland-and-the-EU-Referendum.pdf. The potential impact on the border and freedom of movement of people and goods, the impact on tourism, and on criminal justice affairs are just some of the areas of concern raised by the Joint Committee on European Union Affairs of the Oireachtas in their report "UK/EU Future Relationship: Implications for Ireland" (June 2015), available at http://www.oireachtas.ie/parliament/media/committees/euaffairs/Agreed-Report-UK-EU-Future-Relations_Updated.pdf.

government could entertain the continuation of an open Irish border."[188] Others have noted the particular issues arising from the fact that many of those living in Northern Ireland carry Irish passports – should they continue to enjoy the benefits of EU membership, even if the UK has pulled out?[189]

5.40. The potential impact on the Northern Irish economy has been flagged elsewhere, with Professor Sionaidh Douglas-Scott noting that Northern Ireland stands to lose significant amounts of funding from the EU if the UK votes to leave. Further, the other devolved regions including Northern Ireland have expressed opposition to withdrawing from the EU. Noting that England makes up 82% of the population of the UK, Professor Douglas-Scott states that:

> "*the UK central government could be on a path of EU renegotiation and referendum without the support of any devolved administrations. It is difficult to see how the legitimacy of devolved government can be sustained if vitally important decisions on EU membership are taken without consensus between the UK government and the devolved administrations or indeed the UK Parliament and the devolved assemblies*."[190]

5.41. Professor Douglas-Scott concludes that "*an EU exit could wreck havoc with the devolution settlement, risking a constitutional crisis*".

(viii) Conclusion

5.42. In conclusion, even if the UK repeals the HRA, the Charter would still ensure a measure of fundamental rights protection for UK citizens. Further accession of the EU to the Convention would solidify and harmonise European human rights protections. Currently the Charter is a little known and under-utilised mechanism. However, it remains an important mechanism through which human rights and principles are protected at the EU level. Moreover, the rights protected in the Charter are interpreted with reference to the Convention and new member States of the EU are obliged to ratify the Convention. The Convention forms part of the Union *acquis* and as such, the UK will still be subject to the Convention in certain circumstances.

5.43. The concerns by the Irish Government set out above illustrate the negative impact that a Brexit or repeal of the HRA would have on relationships with EU partners and friendly neighbours. Further, withdrawing from the EU and repealing the HRA would leave a large lacuna in terms of human rights protections. The Convention and the Charter protect the rights of citizens across the Council of Europe and the

[188] Cathal McCall, "How Brexit could destabilise the Irish peace process," *Guardian* (3 November 2015), available at http://www.theguardian.com/commentisfree/2015/nov/03/brexit-irish-peace-process-british-eurosceptics-uk-borders

[189] See e.g. Mark Devenport, "Brexit: Concern over possible consequences for the Irish border," *BBC News* (24 June 2015), available at http://www.bbc.co.uk/news/uk-northern-ireland-politics-33255310.

[190] Sionaidh Douglas-Scott, "A UK exit from the EU: the end of the United Kingdom or a new constitutional dawn" (2015) *Cambridge Journal of International and Comparative Law* (forthcoming).

EU ensuring a floor rather than a ceiling of protection. The vote on a possible Brexit, together with the potential repeal of the HRA, is incredibly worrying for all citizens of the UK. As set out above, the impact of the repeal of the HRA and exit from the EU could be particularly disastrous for Northern Ireland. Beyond a negative impact on the economy, human rights has played a central role in ensuring peace and security in the North with the two institutions playing a vital role in facilitating and supporting change and transition.

(e) Broader implications

(i) Implications under international law

5.44. There are a number of potential ramifications of repeal and replacement of the HRA under international law. In particular:

(i) the UK may breach an international obligation to Ireland under the international Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland annexing the GFA; and

(ii) the UK may breach its obligations to other Member States of the European Convention by failing to treat judgments of the European Court as binding.

5.45. First, breaches of the GFA may have international consequences. As explained in **section 3(c)(iv)** above, the GFA is an Annex to an international treaty between the UK and the Republic of Ireland, registered with the UN.[191] The undertakings of the UK and Ireland in the Treaty, and in the Agreement which forms the substance of the commitments in the Treaty, entail obligations under international law.

5.46. The starting point for discussion of possible breach of a bilateral treaty[192] is Article 60(1) of the Vienna Convention on the Law of Treaties,[193] which provides that "*A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part*". A 'material breach' is defined in Article 60(3)(b) as including "*[t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty*".

5.47. As explained in Part 3 and outlined above, adequate protection of human rights through incorporation of the Convention in both jurisdictions was a core

[191] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (1998) 2114 UNTS 473.
[192] For an orthodox application of the relevant principles, albeit in a different context, see Rabinder Singh QC and Professor Christine Chinkin, *Joint Advice on the Mutual Defence Agreement and the Nuclear Non-Proliferation Treaty* (20 July 2004), available at http://www.acronym.org.uk/dd/dd78/78news02.htm.
[193] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

underpinning part of both the Peace Process and the GFA, and not a mere add-on or afterthought. The objects of the international treaty between the UK and Ireland as set out in its Preamble[194] include the Parties' "*commitment to ... the protection of civil, political, social, economic and cultural rights in their respective jurisdictions*". [195] The Republic of Ireland, as part of its implementation of Agreement and Treaty, undertook to change its Constitution removing historic claims to jurisdiction over Northern Ireland[196] and to incorporate the Convention into its law.[197] This formed part of a reciprocal agreement to match human rights provisions in the UK, to "*ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland*".[198]

5.48. There is a strong argument that incorporation of the Convention in Northern Ireland is "*a provision essential to the accomplishment of the object and purpose*" of the treaty. If the UK were to detract or resile from that commitment, including in the ways set out above, then it is strongly arguable that the UK would be in material breach of international law. A move by the UK to diminish or dilute its own human rights obligations under the Convention may be regarded by Ireland as a breach of the reciprocity provisions. The Chief Commissioner of the Irish Human Rights and Equality Commission has stated that repeal "*would have negative consequences for the uniformity of human rights standards across these islands*."[199]

5.49. Second, in effecting the proposed reforms the UK may breach its obligations to other State signatories to the Convention. As also noted above, the UK has an international obligation to all Member States of the Convention under Article 46(1) "*to abide by the final judgment of the Court in any case to which [it is] part[y]*". If the Government proceeds with its proposal to treat every judgment of the European Court as advisory only, it would be in breach of the treaty both in respect of any judgments which it actually did not abide by, and in the sense of breaching the general undertaking to regard judgments as binding.

5.50. The proposal to treat judgments as advisory would appear to lead to a two-way choice: either to continually breach international law, or to withdraw from the Convention. Withdrawal would be a drastic step which would require six months'

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[194] The Preamble of a treaty is part of the context of the treaty for the purposes of interpretation. The Vienna Convention on the Law of Treaties at Art 31(2) states that "*[T]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes*".

[195] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (1998) 2114 UNTS 473, Preamble.

[196] Ibid, Art 4.

[197] *The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland,* Cm 3883 (10 April 1998), copy available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf, Safeguards and Equality of Opportunity, 9.

[198] Ibid.

[199] Emily Logan, Chief Commissioner, Irish Human Rights and Equality Commission, *Presentation to the Joint Committee on the Implementation of the Belfast / Good Friday Agreement* (25 June 2015), available at http://www.ihrec.ie/download/pdf/ihrec_briefing_joint_committee_implementation_gfa_25june2015.pdf.

notice[200] and would cause constitutional problems, as outlined above. The UK would be the first and only democracy ever to withdraw from the Convention.[201]

5.51. The Conservatives' proposals suggest that there is a third way, that is, "*engag[ing] with the Council of Europe, and seek[ing] recognition that our approach is a legitimate way of applying the Convention*".[202] However, from a legal perspective, such an approach would be meaningless, and would do nothing to cure any breach. Under Article 26 of the Vienna Convention on the Law of Treaties, parties are obliged to comply with their treaty obligations in good faith.[203] It is a fundamental principle of international law that a State may not rely on the provisions of its internal law as justification for failure to comply with its international obligations.[204] Reservations to a treaty obligation (for example, to the obligation to abide by judgments of the European Court in Article 46(1) of the Convention) cannot be entered by agreement after a party has accepted the treaty. Reservations can only be entered at the time a party ratifies a treaty, as a qualification on consent. Once consent is given, it cannot be undermined by a later act. This is explicitly provided in respect of the Convention in Article 57.

5.52. A breach or breaches of international law in either or both of the situations described would give rise to international consequences. Article 1 of the International Law Commission's Articles on State Responsibility[205] provides that "*[a]n internationally wrongful act of a State [including breach of a treaty] entails the international responsibility of that State*". Article 30 provides that the State responsible for an internationally wrongful act is under an obligation *"(a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.*" Article 31 requires the responsible State to make full reparation for any material or moral damage caused by its wrongful act.

5.53. Article 60 of the Vienna Convention on the Law of Treaties further provides for the consequences in the event of material breach of a bilateral (Article 60(1)) or multilateral (Article 60(2)) treaty. Under those provisions, the other party or parties to the treaty are entitled to suspend the operation of the treaty or terminate it in the

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[200] Convention, Art 58(1).

[201] See Equality and Human Rights Commission, *The UK and the European Court of Human Rights*, Research report 83 (2012), available at http://www.equalityhumanrights.com/sites/default/files/documents/research/83._european_court_of_human_rights.pdf, vi.

[202] Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws* (October 2014), 8.

[203] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, Art 26.

[204] Ibid, Art 27; International Law Commission, Articles on State Responsibility, Art 32. The Articles were adopted by the Commission at its 53rd session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission*, 2001, vol II (Pt 2) and in the Annex to GA Res 56/83 (12 December 2001), corrected by A/56/49(Vol. I)/Corr.4.

[205] Ibid, Art 1.

event of a material violation. Ireland may consider taking such steps if the Conservative plans result in a material breach of the GFA and Treaty.

5.54. The proposed reforms therefore may open the UK to international liability, international action and at least political disapproval from Ireland and from the other Member States of the Convention, and / or require a withdrawal from the Convention altogether. Detailed analysis of the consequences of withdrawal is beyond the scope of this Report, but may require serious consideration once a model is put forward.

(ii) Implications for human rights protection in the UK

5.55. The Minister responsible for implementation of the Conservative proposals, Michael Gove MP, has given evidence to the Select Committee on the Constitution that the result of the proposals would be to strengthen rights in the UK.[206] However, it is not clear how any of the proposals are directed at this aim.

5.56. If the HRA were replaced with a British Bill of Rights under the current proposals, it appears clear that the protections given by the Convention would be limited, either in respect of the right itself (Article 3; Article 8) or in respect of who it applies to (undocumented migrants; persons convicted of serious crimes; serving prisoners). Convention rights overall would be limited to 'serious cases', with no clarity about how that should be determined in the individual case. Claimants with cases deemed 'trivial' would not have access to Convention rights in domestic courts. Human rights claims could not be pursued in respect of actions of members of the arms forces overseas. The claim of removing the jurisdiction of the courts over human rights claims in respect of actions of members of the arms forces overseas may very well be impossible to enact in any event, given that UK courts have, for centuries, exercised personal jurisdiction, at common law, over individuals whose actions occurred abroad.[207]

5.57. The Conservatives' strategy document *Protecting Human Rights in the UK* has been criticised for comparing the situation post-repeal of HRA to the Constitutional approach in Germany. This comparison has been described by a number of commentators, including Jo Murkens, an expert on German constitutional law and UK public law, as a "*howler*".[208] The UK does not have constitutional protection of

[206] Revised transcript of evidence taken before the Select Committee on the Constitution, Oral Evidence Session with the Rt Hon Michael Gove MP, Lord Chancellor and Secretary of State for Justice (2 December 2015), available at http://www.parliament.uk/documents/lords-committees/constitution/AnnualOralEvidence2014-15/CC021215-LC.pdf, 2.
[207] See e.g. *Mostyn v Fabrigas* 1 Cowp. 161 (1774).
[208] Philip Oltermann, "Tory bid to liken human rights plan to German legal system backfires", *Guardian* (3 October 2014), available at http://www.theguardian.com/law/2014/oct/03/tory-human-rights-convention-plan-german-legal-system-comparison-backfires.

human rights parallel to that of other Convention states such as Germany.[209] The Convention is a floor, rather than a ceiling, with many Member States providing a much higher level of protection than that currently provided by the Convention through their Constitutions, meaning that the Convention need not be incorporated into domestic law. In those States, the Convention becomes part of a 'constitutional bundle' used as a guide to interpret constitutional provisions. A cursory glance at important and landmark human rights decisions in the UK, including from Northern Ireland, illustrates that common law and Convention rights are separate claims, which are not dealt with in a Constitution like in many other States.

5.58. If the HRA were repealed, individuals would still be able to rely on common law remedies, as far as they exist, as well as the EU Charter of Fundamental Rights in cases in which the UK has acted within the scope of EU law. The right of individual petition to the European Court would remain once domestic remedies were exhausted, and may be a more frequent occurrence.

(iii) Implications for the relationship between the UK courts and the European Court

5.59. It seems (although no precise amendments or wording have been proposed) that if reforms were successfully passed they would entail the removal or modification of the requirement in s 2(1) of the HRA 'to take into account' the case law of the European Court and the requirement in s 3(1) to read legislation 'as far as possible' compatibly with Convention rights.

5.60. The Conservative proposals tend to ignore the fact that the obligation under s 2(1) 'to take into account' Strasbourg jurisprudence is not one that imposes an onerous restrictions or unusual obligation on domestic courts. It is unclear to what extent repeal of the HRA and in particular s 2(1) would in practice alter the UK Supreme Court's careful approach to decisions of the European Court, outlined in the case of *Ullah* and described at paragraph 3.32 above. There seems little doubt that, if the HRA were repealed and replaced with a British Bill of Rights based on the text of the Convention, the jurisprudence of the European Court would remain an important interpretive tool in the UK Supreme Court's reading of the same or very similar rights. The UK Supreme Court would remain, as it is now, free to depart from Strasbourg in appropriate cases.

5.61. Further, the proposals fail to have regard to the extent to which the courts have regarded human rights law as being intertwined with the common law; in the words of Lord Toulson, "*human rights law and public law has developed through our*

[209] On the constitutional arrangement in Germany, see Frank Hoffmeister, Member of the Legal Service of the European Commission, "Germany: Status of European Convention on Human Rights in domestic law", (2006) 4(4) *International Journal of Constitutional Law* 722.

common law over a long period of time"[210]. Section 3(1) of the HRA was regarded by Lord Hoffman in the seminal case of *R (Simms) v Secretary of State for the Home Department*[211] as an enactment of the common law principle of legality. In the event of repeal of the HRA, pursuant to this principle and consistent with pre-HRA authority, courts would still be bound to assume that, absent clear words, or "*if possible*",[212] Parliament should be regarded as having intended to comply with fundamental rights and domestic legislation should be construed so as to conform to international human rights norms. Lady Hale, speaking extra-curially at Warwick University in 2014, made the further point that repeal of the HRA would not alter the impact of decisions made under it.[213] She suggested that "*the common law would now embrace many of the rights ... established*" under the HRA.[214]

5.62. One potential outcome of repeal of the HRA may be to allow parties to take cases straight to the European Court in circumstances where there are no options for domestic recourse under the Convention, as was the case pre-1998. This would deny UK judges 'the first bite of the cherry' in interpreting the effect of Convention rights on the UK and its citizens, and to determine at a domestic level whether the UK is in breach. The principle of subsidiarity dictates that it is more appropriate that such decisions be considered at a domestic level rather than a European or international level, at least in the first instance. Allowing cases to go straight to Strasbourg without domestic interpretation would be unsatisfactory from the perspective of both UK judges and Strasbourg judges, who would not have the benefit of an assessment of the facts and of UK law without the case having progressed through numerous levels of the UK courts. This outcome would also contradict the Conservatives' stated aims. As Angela Patrick of JUSTICE has expressed it (in a slightly different context):

> "*There is a disconnect between saying that we, as a country, believe in subsidiarity and want to get the law on the European convention right first time with our judges taking the decisions and applying the sensitive balances, while at the same time making it more difficult at home for our judges to have the first bite of the cherry on such discretion and decision making*."[215]

5.63. The Conservatives' proposals have so far failed to engage with these issues and to justify why and how human rights protections should be repealed and recast in view of the approach of the UK courts in practice.

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[210] *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2014] 2 WLR 808; [2014] UKSC 20, [133].
[211] [2000] 2 AC 115; [1999] UKHL 33, 131-132.
[212] Eg *Matadeen v Pointu* [1999] 1 AC 98 [1998] UKPC 9, 114.
[213] Lady Hale, "What's the point of human rights?", *Warwick Law Lecture 2013* (28 November 2013), available at www.supremecourt.uk/docs/speech-131128.pdf.
[214] Ibid.
[215] Angela Patrick, Evidence to the Public Bills Committee on the Immigration Bill (31 October 2013), available at http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131031/am/131031s01.htm.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1. Little is known regarding the detail of the current UK Government's intended changes to the human rights landscape, but the limited information which is available gives rise to grave concerns. The factual and legal rationale for the proposal to scrap the HRA is flawed; and the indications to date regarding the proposed model do not indicate a coherence or rationality of approach.

6.2. Despite the lack of a clear model or timetable for consultation, on the available information it appears that the UK Government is determined to press ahead with human rights reform. The current proposals are to replace the HRA with a 'British Bill of Rights' that will limit human rights to 'serious' rather than 'trivial' cases and restrict the role and influence of the European Court in UK law, including by treating judgments of the Court as advisory and possibly removing requirements in the HRA for the courts 'to take into account' the case law of the European Court and to read legislation 'as far as possible' compatibly with Convention rights.

6.3. Such curtailment of basic rights and freedoms regarded as fundamental by all Member States of the Convention is a matter of grave concern for human rights protection across the UK. It is particularly concerning that the UK Government has so far failed to properly and publicly engage with the consequences of repeal and replacement of the HRA for the devolution settlements and devolved administrations, which are likely to be significant. Replacement of the HRA would be likely to require the consent of the devolved legislatures and it is clear that such consent would not be forthcoming, at least from Scotland. This may lead to the fragmentation of human rights regimes across the UK. It is unclear whether and to what extent the proposed reforms would affect existing common law rights protections in the UK.

6.4. In respect of the North of Ireland, it appears likely on the current proposals that reform of the HRA would breach the GFA or at least demonstrate an unwillingness on the part of the British Government to act compatibly in good faith with its obligations therein. This would not only jeopardise the peace process in Northern Ireland, but may entail violation of the UK's obligations to Ireland under international law. The UK may also be responsible for breaching Article 46(1) of the Convention by refusing to abide by final judgments of the European Court. A breach of the UK's international obligations would not be cured by seeking recognition from Member States that its approach is legitimate, as retrospective consent is not a remedy for a wrongful act under international law.

6.5. The fact that there is no clear model, consultation structure or timetable for the repeal and replacement of the HRA means that it is not possible to assess with

specificity or certainty the likely impact of the proposed reforms. Once a model and consultation timetable is forthcoming, it is likely that further analysis will be required. It is recommended that there would be value in commissioning a further study on the specifics of any proposed model(s) once announced by the UK Government. Such a study should tie in with consultation dates so that it can inform any submissions and future advocacy efforts if and when the Government proceeds with reform.

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7. TABLE OF CASES

This table provides a snapshot of some of the areas of law in which the Convention has come into play in Northern Ireland. It is an illustrative rather than exhaustive list. The cases selected show how Convention arguments have been used in the domestic courts at the Crown Court, High Court and Court of Appeal levels in different ways. In some circumstances, the Courts have found a breach of Convention rights. In other cases, the Courts have concluded that enforcing a certain order (such as a dispossession order) would result in a breach. A number of cases have also been included where no breach was found, due to their specificity to human rights adjudication and issues in the North. The table below illustrates the reach and breadth of the Convention in Northern Irish law. We have also included a number of cases which are specific to the context of the North of Ireland, and which relate to media reporting on paramilitaries, inquests and the 2013-2014 Flag Protests.

Case	Court	Area of law	Convention Article	Summary
R v A and others [2001] NICC 11 [link]	Crown Court	Abuse of process, child rights	Article 8 and Article 6(1)	It would be a common law abuse of process and violation of Article 6(1) to prosecute three youth offenders given the delay in the proceedings from their initial interview. The judge stayed the charges.
In re Dennis Donaldson, an application for bail [2002] NIQB 68 [link]	High Court	Bail	Article 5(4)	If the Crown relies on intelligence material in a bail application, this material must be disclosed to the defence (suitably redacted), in order to satisfy Article 5(4).
Re McR's Application for Judicial Review [2003] NI 1[link]	High Court	Sexual Offences	Article 8	The case concerned a man who was charged under S62 of the OAPA 1861 (attempted buggery). He argued that the existence of the offence of attempted buggery was in breach of Article 8 to the extent that it interfered with consensual sexual behaviour between individuals. Declaration of incompatibility. S 62 was later repealed.
In re McCaughey and another's application for Judicial Review [2004] NIQB 2 [link]	High Court	Inquest	Article 2	The duty to conduct an effective investigation under Article 2 necessitates that the police disclose to the coroner all material which the coroner feels relevant, including material without redactions.

In re C (Contact) [2004] NIFam 5 [link]	High Court	Family	Article 8	While Article 8 is engaged in cases applications for contact with grandchildren, such contact can be refused if it is in the child's best interests. Social workers reported concerns that the applicant had sexually abused his daughter, and, though he was never prosecuted for same, such concerns militate against allowing contact with his daughter's son (the applicant's grandson).
In re W and another (Freeing for Adoption Order) [2005] NIFam 2 [link]	High Court	Adoption	Article 8	A freeing order for adoption is a "draconian" measure and "must never be entertained lightly" by any public body. The decision-making process must ensure that the views and interests of parents are made known to, and taken into account, by a Trust.
In re Neale and Others' applications for Judicial Review [2005] NIQB 33 [link]	High Court	Prison visitation and home leave	Article 8	The retrospective extension of a new and more restrictive scheme in relation to prison visitation and home leave breached Article 8 and was unlawful in the circumstances.
Martin v Northern Ireland Prison Service [2006] NIQB 1 [link]	High Court	Prison conditions		Breach of Article 8 regarding the toileting and washing facilities at Magilligan prison.
The Official Receiver for Northern Ireland v Rooney and others [2008] NICh 22 [link]	High Court	Insolvency, repossession of homes	Article 6 and Article 8	The enforcement of dispossession orders against the wives' of bankrupt husbands, including for a home specifically adapted for a disabled child, would breach Article 8 and Article 6 of the Convention.
King v Sunday Newspapers Ltd. [2011] NICA 8 [link]	Court of Appeal	Reporting in the media on paramilitaries	Article 2, Article 3 and Article 8	The publication of identifying details was unjustified, and there would have been no unjustifiable infringement of the plaintiff's Article 8 rights had the partner's identifying details not been published, particularly as they also involved the identification of the plaintiff's child.
In re Brownlee's	High	Right to legal	Article 6	The lack of exceptional or unusual

application for Judicial Review [2013] NIQB 47 [link]	Court	representation in criminal matters		circumstances provisions in legal aid for engaging counsel in respect of access to justice violates Article 6, as counsel cannot then be engaged even where such engagement is deemed appropriate.
J19 and another v Facebook Ireland [2013] NIQB 113 [link]	High Court	Privacy, reporting on social media	Article 3 and Article 8	The publication of photographs taken without the knowledge of the applicants and their subsequent posting in sectarian contexts had *prima facie* engaged Article 3 and Article 8 rights of the applicants. However, both injunctions sought were dismissed in the particular circumstances.
In re Jordan's applications for Judicial Review [2014] NIQB 11 [link]	High Court	Parameters of the State duty to investigate suspicious deaths	Article 2	Following the jurisprudence of the Strasbourg Court, the investigative duty incumbent on the State under Article 2 is now freestanding, with the implication that it must be discharged in a manner compatible with Article 2.
In re DB's application for Judicial Review [2014] NICA 56 [link]	Court of Appeal	Public order, police handling of protests	Article 8 and Article 11	Policing of the flag protest appeal. Article 8 rights of the applicant not violated in the circumstances.
In re Finucane's application for Judicial Review [2015] NIQB 57 [link]	High Court	Parameters of the State duty to investigate suspicious deaths	Article 2	In the instant case, the Review conducted by Sir Desmond de Silva, though heavily redacted, contained sufficiently serious allegations which revived the Article 2 duty to investigate the death of the applicant's loved one.
The Northern Ireland Human Rights Commission's Application [2015] NIQB 96 [link]	High Court	Access to safe and legal abortion	Article 8	Northern Irish law restricting access to abortion is a disproportionate interference with women's article 8 rights.

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