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## **Liberty Briefing Note on the Good Friday Agreement, Devolution, and the Human Rights Act**

1. In 1998, the devolution arrangements for Scotland, Wales, and Northern Ireland were instituted across the United Kingdom. They created a Parliament and two Assemblies separate from Westminster in which legislation on matters not reserved to central Government can be made. At the same time, the conflict in Northern Ireland was ended with the Good Friday Agreement (GFA) between the UK, Ireland, and the people of Northern Ireland. Human rights, and the Human Rights Act, form the foundation of both of these historic settlements.
2. As part of the same package of constitutional reforms which established devolution within the UK's political and legal life, the Human Rights Act helps define the power and authority of the devolved administrations and legislatures. It is likely impossible to alter, much less repeal, the Human Rights Act without implicating these arrangements. This is equally, if not more, true of the GFA, whose terms require the full incorporation of the European Convention on Human Rights, and nothing less.
3. To repeal the HRA and incorporate any lesser standard of human rights protection would amount to a serious breach of the GFA, with disturbing consequences for Northern Ireland. As to the devolution arrangements, UK Government must seek the consent of the devolved governments and legislatures before attempting to implement any of its plans to alter the UK's established system for human rights protection. Any other approach risks constitutional crisis. In any event, consent is very unlikely to be given.

### ***Consequences for the Good Friday Agreement***

4. The GFA is an international treaty to which the UK and Ireland are bound in international law.<sup>1</sup> Failing to meet its requirements would constitute a breach of international law.
5. Paragraph 5 of Section 3 requires “safeguards to ensure that all sections of the community can participate and work together successfully” through the GFA institutions, and that “all sections of the community are protected”. The protections of the ECHR are identified as necessary to achieve this. Paragraph 26 of Section 3 also sets out the competence of the new Assembly, and requires that its legislation will be “null and void” where contrary to the ECHR.
6. Most importantly, paragraph 2 of Section 6 provides as follows,

“The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”
7. The ECHR is an international human rights treaty with an autonomous legal meaning. It comes with a court charged with the authoritative interpretation of its Articles, the European Court of Human Rights in Strasbourg.
8. It is unquestionable that the parties to the GFA understood and accepted these basic facts of international law in signing the GFA. They therefore agreed to implement the ECHR as it exists in international law, as it has been interpreted by Strasbourg, and with the oversight mechanism that the court provides.
9. For the UK to incorporate any version of the ECHR with diminished or downgraded rights protection, contrary to the decisions of the Court and/or without its oversight, would constitute a failure to incorporate the ECHR as the GFA requires.
10. The Government has made clear that it plans to both repeal the HRA and replace it with a Bill of Rights with diminished protections.<sup>2</sup> To replace the HRA with such a document would constitute a breach of the GFA. As academics exploring the issue have stated:

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<sup>1</sup> It is otherwise known as the Belfast Agreement, of 10 April 1998, available here: <https://www.gov.uk/government/publications/the-belfast-agreement>.

<sup>2</sup> See, for example, the Conservative Party’s proposals for a ‘British Bill of Rights’, *Protecting Rights in the UK*, October 2014, available here: [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03\\_10\\_14\\_humanrights.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf).

“The Bilateral Treaty and its Annex evidently envisaged an “ECHR-plus” arrangement for Northern Ireland, whereby the obligations and justiciability of incorporated ECHR provisions would ultimately be supplemented by the work of the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland. If this is the case, any weakening of the degree of implementation of the ECHR (an “ECHR-minus” scenario for Northern Ireland) would appear to contravene the Treaty.”<sup>3</sup>

11. In addition, without HRA, there would be no “remedies”, as required by the GFA, for breach of the ECHR. In addition to striking down devolved legislation, the quashing of executive action, and the making of just satisfaction are remedies which the GFA requires domestic law to provide, being remedies required by the ECHR. Individuals must also have access to the European Court of Human Rights. Any attempt by the Government to alter these remedies available to those in Northern Ireland for violation of the ECHR rights would also constitute a breach of the GFA.

12. The other key party to the Agreement, the Irish Government, has made clear its opposition to any diminution of rights protections in Northern Ireland. It signed the GFA with the oversight of both the UK courts, interpreting the ECHR as a matter of domestic law via the HRA, and the European Court of Human Rights. It has made clear that it sees the UK’s proposals for a Bill of Rights “as a threat to the international agreement that underpins Northern Ireland’s fragile but enduring peace process”.<sup>4</sup> As it has further stated:

“On the broad question of human rights and the Good Friday Agreement, the views of the Government are clear and unchanged. The protection of human rights in Northern Ireland law, predicated on the European Convention of Human Rights, is one of the key principles underpinning the Agreement. As a guarantor of the Good Friday Agreement, the Government takes very seriously its responsibility to safeguard its institutions and principles”.<sup>5</sup>

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<sup>3</sup> Murray, C., O’Donoghue, A., and Warwick, B., ‘Policy paper: the place of Northern Ireland within UK human rights reform’, Working paper: Social Science Electronic Publishing, 2015, accessible here: <http://dro.dur.ac.uk/16730/1/16730.pdf?DDD19+fpdb24+dul4eg>, p. 21.

<sup>4</sup> *The Financial Times*, ‘Ireland dismayed by UK plan to repeal Human Rights Act’, 17 May 2015, accessible here: <http://www.ft.com/cms/s/0/e1ad7d2e-fa48-11e4-b432-00144feab7de.html#axzz3wU8UWpYz>

<sup>5</sup> Minister for Foreign Affairs and Trade, Charles Flanagan, ‘Seanad address on the effect of the repeal of the UK Human Rights Act on the Good Friday Agreement’, 14 May 2015, accessible here: <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2015/may/minister-flanagan-addresses-the-seanad-uk-hr-act/>.

13. And the HRA has remained central to the ongoing settlement in Northern Ireland for more than a decade. Each successive agreement makes absolutely clear the centrality of human rights to its governance:

“Later communiques by the UK and Irish Governments have built upon the GFA, including the Joint Declaration issued in 2003, which commended the progress made by the introduction of the Human Rights Act and discussed the extension of human rights protections beyond the ECHR. The St Andrews Agreement also reaffirms the importance of human rights protections. In an annex dedicated to outlining the commitments of the UK Government relating to ‘Human Rights, Equality, Victims and Other Issues’, the importance of the Human Rights Act to the peace settlement is manifested through a specific commitment to give the Northern Ireland Human Rights Commission additional powers. The (unagreed) final draft that resulted from the Haass talks in 2013 also placed significant emphasis on the ECHR as a touchstone of parading rights. Furthermore, the recent Stormont House Agreement indicates the continued centrality of the ECHR in the peace process. In the context of parades and the Historical Investigations Unit, regard for, and compliance with, the Convention are required. Elsewhere, the Stormont House Agreement affirms the need for mechanisms for dealing with the past are ‘human rights compliant’, and notes the role of the negotiating parties in promoting human rights values in lieu of an agreed Bill of Rights for Northern Ireland. It is clear that the treatment of human rights is not an addendum or extraneous to the peace process, but a thread that runs through it.”<sup>6</sup>

14. As a result, it is not unlikely that for the UK to renege on its human rights commitments would be viewed as a signal to those in both Northern Ireland and the Republic of Ireland that the UK was no longer committed to safeguarding these crucial elements of the GFA.

15. And the HRA is especially likely in light of its crucial role in areas highly pertinent to the history of the conflict in Northern Ireland, such as policing. As the Committee on the Administration of Justice pointed out in their letter to the Secretary of State for Northern Ireland, Theresa Villiers, following the UK’s 2015 General Election:

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<sup>6</sup> Murray, C., O’Donoghue, A., and Warwick, B., ‘Policy paper: the place of Northern Ireland within UK human rights reform’, pp. 24-25.

“One of the most important functions of the Northern Ireland Policing Board, as set out in s.3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998.”<sup>7</sup>

16. Similarly the PSNI’s Code of Ethics was devised with specific reference to the ECHR, as required by section 52 of the Policing (Northern Ireland) Act 1998:

“When carrying out these duties, police officers shall obey and uphold the law, protect human dignity and uphold the human rights and fundamental freedoms of all persons as enshrined in the Human Rights Act 1998, the European Convention on Human Rights and other relevant international human rights instruments.”<sup>8</sup>

17. The repeal of the HRA will have a real impact on policing in Northern Ireland. As the Chief Constable of the PSNI, George Hamilton, has stated, the repeal of the Act would be “hugely detrimental to both confidence in policing and confidence of the police to make difficult decisions especially where there are competing perspectives”.<sup>9</sup>

18. With the HRA so central to ongoing issues of justice and governance in Northern Ireland, for the UK Government to impose its will over the heads of those there would represent an extremely regressive step.

### ***The devolution settlements***

19. The Scotland Act 1998 provides the legal framework for Scottish devolution, as does the Northern Ireland Act 1998 for that in Northern Ireland, and the Government of Wales Acts of 1998 and 2006 for that in Wales.

20. Completing these devolution settlements is the Sewel Convention. As a constitutional convention, it provides that the UK Parliament ought not legislate with regard to devolved matters without the consent of the devolved legislatures. It was formalised in a Memorandum of Understanding between the UK Government and the devolved administrations in 2001 and most recently updated in 2013:

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Accessible

here:

[http://www.caj.org.uk/files/2015/05/11/CAJ\\_correspondence\\_to\\_SOS\\_re\\_HRA\\_May\\_20151.pdf](http://www.caj.org.uk/files/2015/05/11/CAJ_correspondence_to_SOS_re_HRA_May_20151.pdf)

<sup>8</sup> PSNI Code of Ethics 2008, accessible here: [http://www.nipolicingboard.org.uk/final\\_code\\_of\\_ethics-2.pdf](http://www.nipolicingboard.org.uk/final_code_of_ethics-2.pdf), p. 8.

<sup>9</sup> *The Irish Times*, ‘Very few to face justice for Troubles killings, says PSNI Chief’, 26 January 2016, accessible here: <http://www.irishtimes.com/news/crime-and-law/very-few-to-face-justice-for-troubles-killings-says-psni-chief-1.2511022>.

“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.”<sup>10</sup>

21. Where Westminster seeks to legislate “with regard to devolved matters”, it therefore ought to seek consent from the devolved legislatures. Legislation will relate to a “devolved matter” in two cases: (i) where it amounts to legislation that a devolved legislature could have enacted – the matter falling within its powers under the relevant devolution statute – or (ii) it affects the scope of the legal authority or powers of a devolved legislature or administration.
22. Repeal of the HRA has significant implications for the devolution settlements in Scotland, Wales, and Northern Ireland. It is likely that an attempt to repeal the Human Rights Act, without the consent of the devolved legislatures, would breach the Sewel Convention.

### ***Reserved and devolved matters***

23. In all the three separate devolution arrangements, the Human Rights Act is a matter reserved to the Westminster Government. However, human rights in general are not. This leaves human rights matters within the power and authority of the devolved governments and legislatures. They can, for example, currently legislate in respect of human rights issues, provided they do not contravene (or amend or alter) the Human Rights Act.
24. Most importantly, the Human Rights Act determines the powers of the devolved governments and legislatures. As with section 6 of the HRA in respect of the UK Government, the devolved administrations cannot act incompatibly with the rights

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<sup>10</sup>Paragraph 14, available here: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf). The Government has purported to place the Convention on a legislative footing by section 2 of the Scotland Act 2016, which amended the 1998 Scotland Act to include section 28(8). It reads, ‘it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’

contained in the HRA.<sup>11</sup> However, in addition, neither the Scottish Parliament, nor the Northern Ireland or Welsh Assemblies, can legislate contrary to those rights either.<sup>12</sup>

25. Any change to the Human Rights Act, therefore, affects the powers and responsibilities of all the devolved Governments. For Westminster to repeal the Human Rights Act would alter the legislative competence of the three devolved Governments by removing one of the matters on which it is precluded from legislating.
26. Indeed, the HRA and devolution statutes all emerged from the same process of constitutional reform, with the HRA's requirements interwoven with the fabric of devolution. The HRA defines the competence of not only the devolved administrations – something which section 6 of the HRA does in respect of the UK Government as a whole – but it defines the legislative powers of the devolution *legislatures*, which amounts to a constitutional innovation without precedent in the history of the UK. As a result, the devolution settlement is clearly premised on the relationship between the individual and the state as defined in the HRA. Any amendments to the HRA, and therefore to that relationship, cannot but alter the nature of the devolution settlements.
27. This is particularly important to the settlement in Northern Ireland. The ECHR was embedded into the Good Friday Agreement of 1998, setting limits on all parties exercise of power and framing the mandate for new institutions, such as Northern Ireland's police service.
28. Given the importance of these matters, any such changes are bound to require consent from the devolved governments through a Legislative Consent Motion.
29. In any event, even were the Government permitted to repeal the Human Rights Act without a Legislative Consent Motion, within the terms of the Convention, it would clearly not be permitted to introduce any new legislation on the matter, such as a 'British Bill of Rights', without such consent, as human rights in general constitute matters devolved to Scotland, Wales, and Northern Ireland.

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<sup>11</sup> Section 57(2) of the Scotland Act 1998, section 24(1)(a) of the Northern Ireland Act 1998, and section 81(1) of the Government of Wales Act 2006, each read with section 1 of and Schedule 1 to the Human Rights Act 1998 (which defines the term, 'Convention rights', as it appears in each devolution statute).

<sup>12</sup> See section 29(2)(d) of the Scotland Act 1998, section 6(2)(c) of the Northern Ireland Act 1998, and section 108(6)(c) of the Government of Wales Act 2006, each read with section 1 of and Schedule 1 to the Human Rights Act 1998 (which defines the term, 'Convention rights', as it appears in each devolution statute).

## ***Legislative Consent unlikely to be achieved***

30. Each of the devolved administrations has expressed its support for the Human Rights Act, stating their opposition to its repeal in extremely clear terms. In November 2014, the Scottish Parliament passed a motion, by 100-10, in favour of a motion which expressed “its confidence in, and support for, the Human Rights Act 1998 as a successful and effective implementation of the [ECHR] in domestic law”.<sup>13</sup> Scottish Conservative leader, Ruth Davidson MSP, confirmed in May 2016 that she believes consent of the Scottish Parliament would be required for any change to the HRA. She said:

“I take a slightly different view from Theresa May - I think we should recognise that the ECHR was in large part drafted by people from Britain, and its British values that are enshrined there. In terms of a Scottish context, the ECHR is written into the original Scotland Act, so it would be up to the Scottish Parliament to decide whether we changed the basis of that. There's nothing at a UK-wide level that would be able to change that without Holyrood's consent.”<sup>14</sup>

31. In June 2015, Northern Ireland's Assembly passed a motion to reject “any attempts” to repeal the HRA and to recognise its “vital importance”, not simply to those in the UK but to the devolution settlements and the Good Friday Agreement.<sup>15</sup> In November 2015, the Welsh Assembly similarly passed a motion with overwhelming support stating that the Assembly “oppose[s] any attempt to repeal the Human Rights Act 1998”.<sup>16</sup> The Welsh Government had previously pledged to do “everything it can” to block repeal of the HRA.<sup>17</sup>

32. It is highly unlikely that consent for the repeal or replacement of the HRA can be gained. As a result, the UK Government faces the choice of legislating contrary to the recognised constitutional division of powers across the Union or opting for a ‘patchwork’ approach whereby the HRA remains in place in Northern Ireland, Wales,

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<sup>13</sup> See the text of the motion, S4M-11484, available here: <http://www.theyworkforyou.com/sp/?id=2014-11-11.6.0>.

<sup>14</sup> Pink News, ‘Scottish Tory Leader opposes Theresa May's European Human Rights withdrawal plan’, 3 May 2016, available here: <http://www.pinknews.co.uk/2016/05/03/ruthdavidson/>.

<sup>15</sup> See the text of the motion of 15 May 2015, available here: <http://aims.niassembly.gov.uk/plenary/details.aspx?tbv=0&ptv=0&mcv=0&mtv=0&sp=0&spv=-1&per=1&it=0&pid=2&sid=p&pn=0&ba=1&doc=234772%20&fd=01/06/2015&td=01/06/2015>.

<sup>16</sup> See the text of the motion, NDM5856, available here: <http://www.senedd.assembly.wales/ieListDocuments.aspx?MId=3473>.

<sup>17</sup> *Wales Online*, ‘Welsh Government will do “everything it can” to block repeal of the Human Rights Act’, 18 May 2015, available here: <http://www.walesonline.co.uk/news/wales-news/welsh-government-everything-can-block-9279496>.

and Scotland, but is repealed in England and replaced perhaps by some kind of 'Bill of Rights for England'.

### ***An 'English Bill of Rights'?***

33. The UK Government may seek to repeal the HRA and impose a Bill of Rights which only applies to the UK Government acting in respect of reserved matters and also acting in respect of matters relating only to England. Alternatively, the Government might seek to amend the HRA to restrict its application to actions of the devolved governments alone.
34. However, even these proposals may engage the Sewel Convention. This is because to do so would remove HRA from the list of matters which are specifically reserved to the Westminster Government. To remove a matter on which the devolved Executives are prohibited from legislating, by repealing the HRA, has the effect of altering that Government's devolved powers. On the face of it, the Sewel Convention would therefore be engaged.
35. In any event, any 'English Bill of Rights' would face serious practical difficulties. The Government has made clear its intention to seriously restrict rights protections in any future Bill of Rights. Were they to do so only in respect of the actions of the UK Government, the Westminster Government would be held to lower human rights standards than the devolved administrations and would be giving itself wider leeway to abuse the human rights of those in England while offering greater protection to people in Northern Ireland, Wales and Scotland. People of the devolved administrations would, bizarrely, have fewer rights protections in relation to actions of the Westminster Government than against those of their own administrations while having greater human rights protections against the Westminster Government than their counterparts in Northern Ireland, Wales and Scotland.
36. The risk of forum shopping, along with satellite litigation over the application of one regime or another, is also clear. Litigants are likely to seek the benefit of greater protections obtaining in the devolved administrations by its retained Human Rights Act. It is unclear how Government departments – let alone ordinary people – will be able to determine which human rights obligations are owed to which people according to their location in the UK. The result will be serious uncertainty as to the law and its application, with citizens, businesses, and civil servants unable to take clear advice on the relevant rights protections in play.

## ***Constitutional Crisis***

37. In an uncodified constitution, in which actors often rely on convention rather than strict legal constraint, the line between politics and law may be unclear. At least one thing is plain. There is widespread support for our Human Rights Act in Scotland, Wales, and Northern Ireland.
38. No Scottish, Northern Irish, or Welsh political party of any persuasion called for the repeal of the HRA in their 2015 manifestos, and almost all stated their explicit support for it. Whatever the results of strict constitutional analysis, consent for the HRA's repeal and replacement remains an essential practical requirement.
39. Ultimately, were the Government to attempt to implement a 'British Bill of Rights' against the wishes of the devolved administrations, it would, at best, generate longstanding and potentially debilitating tension between them. At worst, it could provoke a constitutional crisis.
40. There is real and troubling historical precedent for such a situation. In 1982, the Canadian Prime Minister, Pierre Trudeau, enacted the Canadian Constitution across the entirety of the country against the wishes of the government of Quebec. Professor Vernon Bogdanor – Prime Minister David Cameron's former tutor – draws a direct parallel to the UK Government's current proposals:

“The issue remained as a running sore, poisoning relations between Canada and Quebec for many years. A British Bill of Rights, therefore, could prove a highly divisive issue both in Scotland and in Northern Ireland.”<sup>18</sup>

**Sam Hawke**

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<sup>18</sup> Bogdanor, V., 'The Crisis of the Constitution', 2<sup>nd</sup> ed., The Constitution Society and the UK Constitutional Law Association, December 2015, accessible here: <http://www.consoc.org.uk/2016/02/new-paper-by-professor-vernon-bogdanor-the-crisis-of-the-constitution-2nd-edition/>.