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## Does Every Cloud Have a Silver Lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights

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## Abstract

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**KEYWORDS:** Brexit, Human Rights Act, British Bill of Rights, Northern Ireland Bill of Rights, Belfast/Good Friday Agreement

## ARTICLE

### DOES EVERY CLOUD HAVE A SILVER LINING?: BREXIT, REPEAL OF THE HUMAN RIGHTS ACT AND THE NORTHERN IRELAND BILL OF RIGHTS

*Anne Smith, Monica McWilliams and Priyamvada Yarnell\**

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*Following the Brexit referendum in the United Kingdom and the Conservative's plans to replace the Human Rights Act with a British Bill of Rights, this article argues that this is an opportunity to re-open the debate on how best to address the current political stalemate on a Northern Ireland Bill of Rights, an unfulfilled element of the Belfast/Good Friday Agreement. We argue that at a time when there is so much uncertainty about the protection and safeguarding of rights with a real risk of lesser rights for fewer people in the United Kingdom, more than ever is the need to provide an alternative to progress the Northern Ireland Bill of Rights. This article provides that alternative. The article is supported in its conclusions by a series of semi-structured interviews with a range of key players involved in the Northern Ireland process and point to the pressing need for an alternative approach to a Bill of Rights for Northern Ireland.*

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*"If somebody has proposals . . . let us hear them. If they have a better alternative, let us hear it. Let us start . . . by trying to get a resolution to the problems that have dogged our society."*<sup>1</sup>

### INTRODUCTION

Against the backdrop of the Conservative government's plan to replace the Human Rights Act 1998 with a British (UK) Bill of Rights and now Brexit, this article aims to provide "a better alternative" to the political stalemate on a Northern Ireland Bill of Rights that has "dogged our society."<sup>2</sup> The article focuses on ways forward for a Northern Ireland Bill of Rights, and critically reflects on what Brexit and the government's proposals mean for such a Bill. Instead of viewing these concerning and potentially far-reaching developments with despair, this is an opportunity to re-invigorate the discussion about progressing the Northern Ireland Bill of Rights.

The UK government's decision to leave the European Union following the narrow referendum outcome (48% voted to remain against 52% who voted to leave) alongside its plans to replace the Human Rights Act with a British Bill of Rights has raised serious concerns in terms of human rights compliance with international standards.<sup>3</sup> It is pertinent to note at the outset that the European

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1. Peter Robinson, former First Minister, Address at Northern Ireland Assembly, Private Members' Business (July 16, 2013), <http://www.niassembly.gov.uk/assembly-business/official-report/reports-12-13/16-july-2013/> (last visited Apr. 6, 2016).

2. *Id.*

3. THE CONSERVATIVE PARTY, PROTECTING HUMAN RIGHTS IN THE UK: CHANGING BRITAIN'S HUMAN RIGHTS LAW (Oct. 2014), [https://www.conservatives.com/~media/files/downloadable%20files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20files/human_rights.pdf); HM Government, *The Process of Withdrawing from*

Convention on Human Rights (“ECHR”) is a regional legal instrument established by the Council of Europe and enforced by the European Court of Human Rights in Strasbourg. This distinguishes it from EU law, which is enforced by the European Court of Justice in Luxembourg. However, the two instruments are interlinked. The case has also been made that withdrawal from the ECHR would jeopardize a State’s EU membership<sup>4</sup> since ratification of the ECHR is a condition for entry. Despite the extensive scholarly media commentary on (a) the implications of Brexit; (b) the repeal of the Human Rights Act; and (c) the possible withdrawal from the ECHR,<sup>5</sup> there has been much less commentary on the implications of all three for the Belfast/Good Friday Agreement’s proposal for a Bill of Rights for Northern Ireland. This article addresses this gap by drawing upon the empirical findings of a research project aimed at progressing the Northern Ireland Bill of Rights.<sup>6</sup> This empirical data resulted from conducting twenty-one semi-structured interviews with the main political parties in the Northern Ireland Assembly, representatives of the UK and Irish governments, civil society, and key stakeholders involved in the Northern Ireland Bill of Rights and archival research

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*the European Union* (Feb. 2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/503908/54538\\_EU\\_Series\\_No2\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf).

4. See Vaughne Miller, *Is Adherence to the European Convention on Human Rights a Condition of European Union Membership?*, House of Commons Library, Standard Note, SN/IA/6577 (Mar. 25, 2014).

5. There has been a plethora of blogs on Brexit and a series of reports by the London School of Economics European Institute. See *LSE Commission on the Future of Britain in Europe*, LONDON SCH. ECON. EUR. INST. (Aug. 9, 2016), <http://www.lse.ac.uk/europeanInstitute/LSE-Commission/LSE-Commission-on-the-Future-of-Britain-in-Europe.aspx> (last visited Aug. 9, 2016); see also Brian Gormally, *Fighting the Repeal of the Human Rights Act*, COMM. ADMIN. JUSTICE (Jun. 2015), [http://www.caj.org.uk/files/2015/11/11/Fighting\\_the\\_Repeal\\_of\\_the\\_Human\\_Rights\\_Act\(1\)2.pdf](http://www.caj.org.uk/files/2015/11/11/Fighting_the_Repeal_of_the_Human_Rights_Act(1)2.pdf); Colin R.G Murray, Aoife O’Donoghue & Ben T.C. Warwick, *Policy Paper: The lace of Northern Ireland within UK Human Rights Reform*, (Aug. 2015), <http://ssrn.com/abstract=2643464>; Ed Bates, Christine Bell, Colm O’Cinneide, Fiona de Londras, Kanstantsin Dzehtsiarou, Sir David Edward, Alan Greene, Paul Johnson & Tobias Lock, *The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights* (May 12, 2015), <http://ssrn.com/abstract=2605487>; Caoilfhionn Gallagher, Gavin Booth, Katie O’Byrne, Anurag Deb & Keina Yoshida, *Report on the Potential Effects of the Repeal of the Human Rights Act 1998*, KRW L. & DOUGHTY ST. CHAMBERS, (Feb. 2016), [http://www.doughtystreet.co.uk/documents/uploaded-documents/HRA\\_NI\\_FINAL\\_15\\_02\\_16.pdf](http://www.doughtystreet.co.uk/documents/uploaded-documents/HRA_NI_FINAL_15_02_16.pdf).

6. See Anne Smith, Monica McWilliams & Priyamvada Yarnell, *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland*, TRANSITIONAL JUST. INST. (2014), [https://www.ulster.ac.uk/\\_data/assets/pdf\\_file/0005/58271/Advancing\\_a\\_BOR\\_NI.pdf](https://www.ulster.ac.uk/_data/assets/pdf_file/0005/58271/Advancing_a_BOR_NI.pdf).

on the issue. Based on the empirical data, this article puts forward proposals on how best to progress the Northern Ireland Bill of Rights set against the current UK government's proposals to replace the Human Rights Act with a British Bill of Rights, as well as Brexit. In doing so, this article makes a significant and original contribution on several levels: it provides material arguing for the advancement of a Northern Ireland Bill of Rights and offers a way forward by identifying the issues needing to be addressed by the British and Irish governments. It also proposes a policy framework that could lead to greater coherence in the British and Irish governments' approach to a Bill of Rights for Northern Ireland.<sup>7</sup> Finally, the article has broader resonance for scholarly literature and work on "doing human rights" in "ethno-nationally"<sup>8</sup> divided societies and may be of wider theoretical interest for explaining the intricate relationship between the protection of human rights reform in the United Kingdom and the devolution settlements.

The article is structured as follows: we begin by briefly explaining the particular Northern Ireland context as it shows the importance of the rights discourse in "deeply divided societies."<sup>9</sup> We then set out the various political agreements as well as a range of government declarations and consultations on a Northern Ireland Bill of Rights committing the UK government to bring forward legislation on a Bill of Rights for Northern Ireland. In particular, we focus on the 1998 Belfast/Good Friday Agreement,<sup>10</sup> the 2003 Joint Declaration at

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7. Note that other academics have also set out options for the way forward in Northern Ireland. See Brice Dickson & Colin Harvey, *A Discussion Paper: Enhancing the protection of human rights and equality in Northern Ireland: Options for the Way Forward* (July 2013) (on file with authors). One of the solutions is to legislate for a Bill of Rights for Northern Ireland. The other two proposals are: to "do nothing" and "work with what you have got" for now; and the other calls for a new Human Rights and Equality Bill for Northern Ireland enacted by the Northern Ireland Executive.

8. Colin Harvey, *Designing a Bill of Rights for Northern Ireland*, 60(2) N.I.L.Q 181 (2009).

9. AREND LIPJHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 5 (1980) at 5.

10. Agreement reached in the multi-party negotiations, Cm 3883 (1998) 37 *ILM* 751, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136652/agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf) [hereinafter Belfast/Good Friday Agreement]. The Agreement resulted from the talks in Northern Ireland in 1998, which produced a blueprint for how future relationships within and between the Republic of Ireland, Northern Ireland, and the United Kingdom should be developed.

Hillsborough,<sup>11</sup> and the 2006 St Andrews Agreement,<sup>12</sup> as these explicitly set out the UK government's intentions. This section outlines that, despite these declarations, and despite being in receipt of the Northern Ireland Human Rights Commission's ("NIHRC") advice since 2008,<sup>13</sup> the current UK government has failed to implement this part of the 1998 peace agreement. Although the process began to stagnate under the Labour government in 2009, it was increasingly undermined by the Conservative/Liberal Coalition government in 2010. This was manifested most prominently in the establishment of a Commission in March 2011 to explore the possibility of a UK Bill of Rights and incorporating Northern Ireland into this process. The findings of the UK Commission's report are examined in this section. We then draw upon our empirical findings by analyzing the responses of the political parties, and examining the role of the UK government in addressing the question of "what now" for a Bill of Rights for Northern Ireland.

The second half of the article discusses the disjointed approach by the two governments (despite being co-guarantors of the 1998 Agreement) in addressing the issue of a Bill of Rights for Northern Ireland. The UK government's proposals to replace the Human Rights Act of 1998 with a UK Bill of Rights and Brexit are discussed, as is the issue of whether the consent of the devolved regions is required for the introduction of a UK Bill of Rights and Brexit. Given that some preliminary views for repealing the Human Rights Act were set out in "Changing Britain: Human Rights in the UK" in 2014,<sup>14</sup> this document is used as a basis for our "what if" scenarios to help investigate the implications of the government's proposals for Northern Ireland. The final section makes a series of recommendations for the way forward for a Northern Ireland Bill of Rights.

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11. Joint Declaration by the British and Irish Governments, Gr. Brit.-Ir. Annex 3, ¶ 2, Apr. 2003, [http://uir.ulster.ac.uk/31714/1/Final\\_Draft\\_NILQ.pdf](http://uir.ulster.ac.uk/31714/1/Final_Draft_NILQ.pdf).

12. Agreement at St Andrews 2006, Gr. Brit.-Ir., Annex B, Dec. 2006 (stating in part that "We will establish a forum on a Bill of Rights and convene its inaugural meeting in December 2006").

13. *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, N. IR. HUM. RTS. COMM'N (Dec. 10, 2008), <http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>.

14. See THE CONSERVATIVE PARTY, *supra* note 2.

*I. PARTICULAR CONTEXT OF NORTHERN IRELAND*

Northern Ireland's political and legal history was dominated by half a century of one-party rule that allowed Unionists to exercise "hegemonic control in Northern Ireland,"<sup>15</sup> to the detriment of the Nationalist/Catholic minority. During the period from 1922 to 1972, the minority suffered discrimination and inequality on grounds of religion and political belief at the hands of the majority in areas of public and private employment, housing, education and welfare, policing, and emergency law.<sup>16</sup> However, the Northern Ireland conflict<sup>17</sup> is not based on religion, but "rather one where religion acts principally as the marker for two distinct ethno national identities."<sup>18</sup> As McEvoy puts it, the conflict is about "two groups with allegiances to two different national communities, Britain and Ireland, which themselves have had a long history of conflict."<sup>19</sup> Broadly speaking, one community (the Protestants) would identify themselves as British, preferring to stay within the United Kingdom, and are referred to as "Unionists"; the other community (the Catholics) generally identify themselves as Irish and are referred to as "Nationalists" or "Republicans."<sup>20</sup>

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15. BRENDAN O'LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM, UNDERSTANDING NORTHERN IRELAND* 110 (1990).

16. See Martin Melaugh, *Disturbances in Northern Ireland Report of the Cameron Commission Appointed by the Governor of Northern Ireland*, HER MAJESTY'S STATIONARY OFF. (1969), available at <http://cain.ulst.ac.uk/hmso/cameron.htm>; DAVID J. SMITH & GERARG CHAMBER, *INEQUALITY IN NORTHERN IRELAND* (1991); John Whyte, *How Much Discrimination Was There Under the Unionist Regime, 1921-68?*, in *CONTEMPORARY IRISH STUDIES* (Tom Gallagher & James O'Connell eds., 1983). See also MICHAEL FARRELL, *THE ORANGE STATE* (2D ED. 1980); KEVIN BOYLE, TOM HADDEN & PADDY HILLYARD, *LAW AND STATE: THE CASE OF NORTHERN IRELAND* (1975).

17. The Northern Ireland conflict is sometimes referred to as "The Troubles." See, e.g., Jane Winter, *Abuses and Activism: The Role of Human Rights in the Northern Ireland Conflict and Peace Process*, 1 EUR. HUM. RTS. L. REV. 1, 1-8 (2013).

18. PAUL NOLAN, *NORTHERN IRELAND PEACE MONITORING REPORT NUMBER ONE, COMMUNITY REL. COUNCIL* 19 (Feb. 2012), [http://cain.ulst.ac.uk/events/peace/docs/nipmr\\_2012-02.pdf](http://cain.ulst.ac.uk/events/peace/docs/nipmr_2012-02.pdf) (last visited Apr. 29, 2016).

19. JOANNE MCEVOY, *THE POLITICS OF NORTHERN IRELAND* 8 (2008).

20. *The Good Friday Agreement – An Overview*, DEMOCRATIC PROGRESS INST. (June 2013) <http://www.democraticprogress.org/wp-content/uploads/2013/07/The-Good-Friday-Agreement-An-Overview.pdf> (last visited Apr. 29 2016). This report acknowledges, as do the authors of this article, that there are exceptions to this generalization. See *Turkey: Comparative Study Visit to the Republic of Ireland Conflict*, DEMOCRATIC PROGRESS INST. 55-65 (2012), <http://www.democraticprogress.org/wp-content/uploads/2012/10/DPI-Ireland-Comparative-Study-Visit-2012.pdf>.



As is now well-documented, Northern Ireland also has a history of political violence by Loyalist and Republican paramilitaries.<sup>21</sup> This resulted in decades of sectarian violence with a "complex combination of a violent State reaction."<sup>22</sup> During these decades of civil and sectarian unrest, the discourse of human rights played a prominent role with particular emphasis on the rule of law and ensuring the government and state authorities were held accountable for their "actions or inaction."<sup>23</sup> This involved several, albeit unsuccessful, attempts to introduce a Bill of Rights for Northern Ireland.<sup>24</sup> Some commentators believe that if earlier proposals on a Bill of Rights had been passed by Northern Ireland's Parliament, much of the later conflict could have been avoided.<sup>25</sup> Arguably, "avoided" may be an overstatement, but had there been some form of accountability mechanism (such as a Bill of Rights) ensuring good governance and protecting everyone's rights, the issue of discriminatory practices would not have risen in the way they did.

In ethno-nationally divided societies such as Northern Ireland, Bills of Rights play an important role. As is now generally recognized, they "demarcate the power and discretion of the State";<sup>26</sup> when it comes to making decisions relating to fundamental rights, it is incumbent on elected politicians to do so in an equitable and fair manner. If they fail to make decisions fairly, a Bill of Rights can help

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21. For a brief chronological overview, see Martin Melaugh, *Violence – Loyalist and Republican Paramilitary Groups*, CAIN WEB SERVICE (last visited Apr. 29, 2016), <http://cain.ulst.ac.uk/issues/violence/paramilitary.htm>.

22. Kieran McEvoy & John Morison, *Constitutional and Institutional Dimensions Beyond the "Constitutional Moment": Law, Transition and Peacemaking in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 961, 970-95 (2003).

23. Winter, *supra* note 17, at 7.

24. Space constraints preclude a discussion on this issue. For a useful analysis, see Smith, et. al., *supra* note 6, at Chapter 2.

25. MAURICE HAYES, *MINORITY VERDICT: EXPERIENCE OF A CATHOLIC PUBLIC SERVANT* 81 (1995).

26. DAVID ERDOS, *DELEGATING RIGHTS PROTECTION* 3 (2010). Michele Lamb also highlights the importance of the language of human rights in ethno-nationalist divided societies in "providing the processual fairness needed to establish a dialogue that can lead towards greater understanding between the two communities [Protestants and Catholics]." Michele Lamb, *Ethno-nationalist Conflict, Participation and Human Rights-based Solidarity in Northern Ireland*, 17 *INT'L J. HUM. RTS.* 723, 729 (2013).

the most vulnerable to hold their government to account.<sup>27</sup> Placing fundamental values and rights beyond government is particularly important for post-conflict societies where parliamentary politics leading to discriminatory practices has failed. In divided societies like Northern Ireland where the governance of institutions created "divisions and provoked resentment and alienation,"<sup>28</sup> a Bill of Rights is viewed as central to institutional reform.<sup>29</sup> The break with the past, embodied in transitions from violent conflict and one-party rule, provides an opportunity to address issues not only of the rule of law and good governance but other structural issues such as violations and abuses against particular communities. It is in such a context that a Bill of Rights for Northern Ireland is most needed. Technical solutions will not be sufficient to address these challenges without a foundational document setting out the principles and standards that will command the allegiance of the people of Northern Ireland. A Bill of Rights can therefore provide a constitutional point of reference that becomes a legal framework for the politicians to act within. That is what was envisaged in the Belfast/Good Friday Agreement of 1998.<sup>30</sup>

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27. Asmal saw this role as government "being kept on its toes." See Kader Asmal, Address to Chatham House, London: Designing a Bill of Rights for a Diverse Society (Sept. 26, 2007) (on file with authors).

28. Brice Dickson, *The Protection of Human Rights - Lessons from Northern Ireland*, 3 EUR. HUM. RTS. L. REV. 213, 214 (2000). Dickson draws upon Northern Ireland's experience of majoritarianism from 1921-1972, arguing that "it is the failure properly to protect human rights in Northern Ireland that made the troubles of the past 30 years worse or so worse than they might have been." See also Aileen Kavanagh, *The Role of a Bill of Rights in Reconstructing Northern Ireland*, 26 HUM. RTS. Q. 964, 956 (2004). Additionally, see Mageean and O'Brien's article where they quote from O'Brien's unpublished LLM thesis, which highlights that in an analysis of speeches of the Irish government to the General Assembly of the UN, every speech from 1969 until 1977, and from 1987 until 1991, the denial of rights was mentioned as a contributing factor to the conflict. Paul Mageean & Martin O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1499, 1504 (1999).

29. Monica McWilliams, *Human Rights Underpins Devolution*, THE GUARDIAN (Apr. 27, 2010), <https://www.theguardian.com/commentisfree/libertycentral/2010/apr/27/human-rights-act-northern-ireland>.

30. See Belfast/Good Friday Agreement, *supra* note 10. Following the ceasefires in the mid-1990s multi-party peace talks began involving the British and Irish governments and the Northern Ireland political parties. This resulted in the Belfast/Good Friday Agreement, which agreed on power-sharing arrangements for a new Northern Ireland Legislative Assembly. These power-sharing arrangements reflect the ethno-national division in Northern Ireland and have been described as having a "consociational" structure, involving institutionalized power sharing arrangements between segments of society joined together by common citizenship but divided by language, religion, ethnicity or other factors. See Brendan O'Leary, *The Nature of*

II. THE RECENT HISTORY OF A BILL OF RIGHTS FOR  
NORTHERN IRELAND: NEGOTIATED AGREEMENTS AND  
DECLARATIONS

Under the Belfast/Good Friday Agreement<sup>31</sup> and the Northern Ireland Act, s.69 (7) 1998 ("NIA"), the NIHRC was tasked with consulting and advising the British government on which rights should be included in a proposed Bill of Rights for Northern Ireland. The Belfast/Good Friday Agreement is an international peace agreement between two sovereign States (Ireland and Britain) that was signed and supported by the majority of Northern Ireland political parties involved in the conflict.<sup>32</sup> In addition, the Agreement was overwhelmingly supported by a referendum in both Northern Ireland and in the Republic of Ireland.<sup>33</sup> As a bilateral agreement, both the British and Irish government are its co-guarantors and, as an international agreement, they are required to fulfill the obligations it sets out through actions arising from it.<sup>34</sup> These actions include the 2003 Joint Declaration at Hillsborough, which reiterated the UK government's commitment to bringing forward legislation on a Bill of Rights for Northern Ireland at Westminster.<sup>35</sup> This was followed by the St Andrews Agreement of 2006 establishing the Bill of Rights Forum made up of political parties and representatives from civil society. Following its deliberations, the Forum presented its report to the NIHRC<sup>36</sup> and later that same year (December 10, 2008), the NIHRC submitted its advice on a Bill of Rights for Northern Ireland

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*the Agreement*, 22 FORDHAM INT'L L.J. 1628, 1628-1667 (1999). The term "consociationalism" was formulated by Lipjhart. See Lipjhart, *supra* note 9.

31. Belfast/Good Friday Agreement, *supra* note 10, at § 6 references the creation of the NIHRC and a Bill of Rights.

32. The parties include Ulster Unionist Party ("UUP"), the Ulster Democratic Party ("UDP"), the Progressive Unionist Party ("PUP"), the Northern Ireland Women's Coalition, the Alliance Party, Sinn Féin, and the Social Democratic and Labour Party ("SDLP"). The Democratic Unionist Party ("DUP") did not sign up to the Agreement. See *The Good Friday Agreement – An Overview*, *supra* note 20, at 34.

33. *Id.* 71.2% of people in Northern Ireland and 94.39% in the Republic supported the Agreement.

34. Vienna Convention on the Law of Treaties art. 31(3), *opened for signature* May 23, 1969.

35. Joint Declaration by the British and Irish Governments, Gr. Brit.-Ir., April 2003, Annex 3, ¶ 2.

36. *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*, BILL OF RIGHTS F. (Mar. 31, 2008), available at [http://cain.ulst.ac.uk/issues/law/bor/borf310308\\_report.pdf](http://cain.ulst.ac.uk/issues/law/bor/borf310308_report.pdf).

to the British government.<sup>37</sup> The Commission put forward its recommendations for new substantive rights in addition to others relating to enforcement and implementation. The recommendations comprise a range of rights including economic, social, and cultural rights as well as civil and political rights, incorporating the ECHR and other international standards that reflect the particular circumstances of Northern Ireland.<sup>38</sup> In 2009, the Northern Ireland Office ("NIO") responded to this advice by publishing its consultation document.<sup>39</sup> The NIO selected certain sections of the NIHRC's advice for consultation and forwarded the view that further discussion on the NIHRC's advice could take place through a newly established UK Commission on a possible UK-wide Bill of Rights. This Commission was established by the Coalition government in 2011 and published its report in December 2012.<sup>40</sup> While the Commission could not reach

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37. See *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, *supra* note 13.

38. The recommendations include: the right to life, right to liberty and security, right to a fair trial and no punishment without trial; right to marriage or civil partnership; right to equality and prohibition of discrimination; democratic rights; education rights; freedom of movement; freedom from violence, exploitation and harassment; right to identity and culture; language rights; rights of victims; right to civil and administrative justice; right to health; right to an adequate standard of living; right to accommodation; right to work; environmental rights; social security rights; and children's rights. Not all commissioners agreed with these recommendations. Two commissioners (from unionist backgrounds) dissented: Lady Daphne Trimble and Jonathan Bell dissented on the grounds that the inclusion of socio-economic rights are not particular to Northern Ireland but "are by and large common societal problems right across the UK." Lady Trimble, House of Commons, Minutes of Evidence Taken before the Northern Ireland Affairs Committee A Bill of Rights for Northern Ireland (July 1, 2009), [www.publications.parliament.uk/pa/cm200809/cmselect/cmniaf/uc360-ii/uc36002.htm](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmniaf/uc360-ii/uc36002.htm). Political parties are also divided on this issue. On the one hand, political unionists argue that the NIHRC exceeded its remit by including rights that do not reflect "the particular circumstances of Northern Ireland" – a phrase that "do[es] not open the door to economic, social and cultural rights." Miss McIlveen, Northern Ireland Assembly, Private Members' Business on the NIHRC (Nov. 3, 2009), [http://archive.niassembly.gov.uk/record/hansard\\_session2009.htm](http://archive.niassembly.gov.uk/record/hansard_session2009.htm) (last visited May 2, 2016). On the other hand, the SDLP, Sinn Féin and Alliance Party, alongside NGOs, community groups, trade unions, and other civil society organisations, argue that socio-economic rights must be included, as they do reflect the "particular circumstances of Northern Ireland." Smith et. al, *supra* note 6, at 32-33.

39. A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS, N. IR. OFF. (Nov. 2009), [http://www.nio.gov.uk/consultation\\_paper\\_\\_a\\_bill\\_of\\_rights\\_for\\_northern\\_ireland\\_\\_next\\_steps.pdf](http://www.nio.gov.uk/consultation_paper__a_bill_of_rights_for_northern_ireland__next_steps.pdf)

40. COMMISSION ON A BILL OF RIGHTS, A UK BILL OF RIGHTS? THE CHOICE BEFORE US vol. 1 (Dec. 2012)

consensus on the need for a UK Bill of Rights,<sup>41</sup> it did agree that it should reject the government's proposal that a separate chapter in any future Bill could deal with the rights specific to Northern Ireland. In addition, the Commission specified that any UK Bill should not interfere with an independent process in Northern Ireland as it was a stand-alone issue, established under the peace agreement almost fifteen years prior.<sup>42</sup>

The UK government had already concluded something similar. In its consultation document in 2009 the government argued that, given Northern Ireland's history of division and conflict, there was a need for a separate Bill of Rights.<sup>43</sup> Despite acknowledging the substantial differences amongst the Northern Ireland parties over its contents, it did not dispute the need for Northern Ireland to have its own Bill of Rights. It was not surprising then that this view was further supported by the findings of the UK Commission on a Bill of Rights as set out below.<sup>44</sup>

We [the Commission] recognise the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland. We do not wish to interfere in that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights process.<sup>45</sup>

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41. Two out of eight commissioners (Baroness Helena Kennedy QC and Professor Philippe Sands QC) dissented from the majority findings. *See generally* Mark Elliott, *A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights*, 2 EUR. HUM. RTS. L. REV. 137 (2013). For an excellent analysis of this report, *see* Francesca Klug & Amy Williams, *The Choice Before Us? The Report of the Commission on a Bill of Rights*, PUB. L. 459 (July 2013).

42. COMMISSION ON A BILL OF RIGHTS, *supra* note 40 at 175, ¶ 12.4. This is in stark contrast to the other findings in the report, a report that has been criticized as having "limit[ing], inchoate proposals." Elliot, *supra* note 41. *See also* Klug & Williams, *supra* note 41.

43. A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS, *supra* note 39, at 7.

44. *See also* dissenting opinions presented by Baroness Helena Kennedy QC and Professor Philip Sands: "It is impossible to speak of principle when the true purport is not being addressed explicitly and would include, for some at least, a reduction of rights. We consider that the moment is not ripe to start moving towards a UK Bill of Rights until the parameters of such proposals are clearly set out. We note in this regard that our colleagues in the majority have, in our view, failed to identify or declare any shortcomings in the Human Rights Act." COMMISSION ON A BILL OF RIGHTS, *supra* note 40, at 222.

45. COMMISSION ON A BILL OF RIGHTS, *supra* note 40, at 175, ¶ 12.4.

What is surprising is that despite such strong views from the Democratic Unionist Party ("DUP") who argue that a separate Bill of Rights for Northern Ireland would "distance Northern Ireland from the rest of the UK"<sup>46</sup> and that a UK Bill of Rights would "recognise and respect the diversity of the devolved arrangements across the country,"<sup>47</sup> neither the DUP (the largest party on the Unionist side in Northern Ireland) or the Ulster Unionist Party ("UUP") responded to the UK government's invite to make a formal submission to the UK Commission on a Bill of Rights on this issue.

The two main unionist parties' stance is therefore at odds with the UK Bill of Rights Commission's findings. Indeed one of the members of the UK Bill of Rights Commission specifically focused on Northern Ireland and endorsed different rights for the devolved regions in the UK.<sup>48</sup> Speaight QC argued that there has been explicit and formal recognition of the desirability of a distinct Northern Ireland Bill of Rights<sup>49</sup> and cautioned that if there was to be a UK Bill of Rights, devolved legislatures should be able to legislate for specific rights within their jurisdictions.<sup>50</sup> He continued:

Consideration of future rights protection in the UK should take account of the reality that Northern Ireland [ . . . ] will have [its] own laws on rights and that these laws will not always match either each other or the laws at national level.<sup>51</sup>

The Joint Committee on Human Rights also discussed the idea of rights being "asymmetrical" at national and sub-national levels.<sup>52</sup> The UK government has also recognized that there is "no incompatibility"<sup>53</sup> with a Northern Ireland Bill of Rights and a

46. DEMOCRATIC UNIONIST PARTY, A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS – RESPONSE BY DEMOCRATIC UNIONIST PARTY 1 (Mar. 30, 2010).

47. Jeffrey Donaldson, *Human Rights Act Has Failed Victims*, DEMOCRATIC UNIONIST PARTY (May 12, 2015), <http://www.mydup.com/news/article/donaldson-human-rights-act-has-failed-victims>.

48. Anthony Speaight QC, *Mechanisms of a UK Bill of Rights*, in COMMISSION ON A BILL OF RIGHTS, A UK BILL OF RIGHTS? THE CHOICE BEFORE US vol. 1 (Dec. 2012) at 243.

49. *Id.* See also COMMISSION ON A BILL OF RIGHTS, *supra* note 40.

50. Speaight, *supra* note 48, at 247.

51. *Id.* at 247-48.

52. JOINT COMMITTEE ON HUMAN RIGHTS, A BILL OF RIGHTS FOR THE UK? TWENTY-NINTH REPORT OF THE 2007 – 2008 SESSION ¶ 110, *cited in* Anthony Speaight QC, *supra* note 48, at 244-245.

53. A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS, *supra* note 38.

possible UK Bill of Rights.<sup>54</sup> It continues to state that if a Northern Ireland Bill of Rights was introduced, any developments in the wider UK context should not "undermine"<sup>55</sup> the rights provided in a Northern Ireland Bill of Rights, and committed to bringing forward legislation for a separate Northern Ireland Bill of Rights.<sup>56</sup> This "commitment" was reiterated in the House of Lord's debate that also restated the UK Bill of Rights Commission's finding that the Northern Ireland Bill of Rights is and should remain a separate process from the UK Bill of Rights.<sup>57</sup>

The current government's attempt to introduce a British Bill of Rights that will limit human rights to "serious" rather than "trivial"<sup>58</sup> cases could also be seen to contravene "the importance and significance of the Belfast Agreement in determining our way forward on human rights legislation."<sup>59</sup> Despite this position, the former Secretary of State for Northern Ireland has caused some confusion when she referred to the "Rights, Safeguards and Equality of Opportunity" section of the Agreement as having a "degree of ambiguity"<sup>60</sup>:

Although the text does not go as far as stating that there would definitely be a Bill of Rights, the [A]greement certainly contemplated that a Bill of Rights was potentially an important part of the settlement.<sup>61</sup>

The former Secretary of State's argument that the "Rights, Safeguards and Equality of Opportunity" section of the Agreement had a "degree of ambiguity" was rebuffed by a number of stakeholders in Northern Ireland, including the former Chief Commissioner of the NIHRC, who is also a former member of the UN Human Rights Committee:

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54. See MINISTRY OF JUSTICE, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK LONDON, REPORT, (Mar. 2009) CM 7577.

55. A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS, *supra* note 38.

56. *Id.*

57. 24 Parl Deb HL (6th ser.) (2011) col. 677 (UK).

58. THE CONSERVATIVE PARTY, *supra* note 3.

59. Theresa Villiers, former Secretary of State for Northern Ireland, Oral evidence to the Northern Ireland Affairs Committee on Responsibilities of the Secretary of State for Northern Ireland, (Jul. 15, 2015) HC 322.

60. Theresa Villiers, former Secretary of State for Northern Ireland, Westminster Hall (July 16, 2013) in 16 Parl Deb WH (6th ser.) (2013) col. 194 (UK).

61. *See id.*

. . . the language [of the Agreement] is such that you would be a very strange interpreter of the text not to recognise that there's a responsibility [on]... the United Kingdom government, which is the sovereign (government) to work towards the consideration of the adoption of the Bill of Rights.<sup>62</sup>

The centrality of the Bill of Rights to the peace process is also supported by the fact that the "Rights, Safeguards and Equality of Opportunity" section is only one among the many references to a Northern Ireland Bill of Rights in the Belfast/Good Friday Agreement.<sup>63</sup> Indeed, one politician states, "at the heart of the Good Friday Agreement is a rights-based approach."<sup>64</sup> Northern Ireland's Bill of Rights was therefore "not a last minute bolt-on in the agreement"; it was recognized by many parties as being "core to the agreement"<sup>65</sup> and has been central to the UK government's plans in

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62. Interview with Professor Michael O'Flaherty, former Chief Comm'r of the NIHRC, in Belfast (Sept. 11, 2013).

63. Belfast/Good Friday Agreement, *supra* note 10, Strand One, *Democratic Institutions in Northern Ireland, Safeguards*, at 5 ("There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including: . . . (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission; (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland"); Belfast/Good Friday Agreement, Apr. 10 1998, *Operation of the Assembly*, at 11 ("The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights"); *Legislation*, at 26 ("The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to: (a) the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void.").

64. Alex Attwood MLA, 105(2) NIA Deb vol. 105, no. 2, p. 41 (June 1, 2015), *available at* <http://www.theyworkforyou.com/ni/?id=2015-06-01.6.1#g6.79> (last visited Mar. 10, 2016). Former UN High Commissioner for Human Rights, Mary Robinson, described the Agreement as "conspicuous by the centrality it gives to equality and human rights concerns." Mary Robinson, Speech at the Stormont Hotel: Equality and Human Rights - Their Role in Peace Building (Dec. 2, 1998), *quoted in* Mageean & O'Brien, *supra* note 28, at 1499.

65. Stephen Farry, MLA, NIA Deb vol. 105, no. 2 (June 1, 2015), <http://www.theyworkforyou.com/ni/?id=2015-06-01.6.1#g6.79> (last visited Mar. 10, 2016). Talking about the protection of human rights generally in the Agreement, Ní Aoláin makes a similar argument: human rights protections were not simply parachuted into the Agreement, but have consistently been offered as a partial means to unlock the conflict pattern itself. *See* Fionnuala Ní Aoláin, *Human Rights in Negotiating Peace Agreements*, INT'L COUNCIL HUM. RTS. POL'Y 1 (2005).



any determination on their "way forward on human rights legislation."<sup>66</sup>

Despite recognition that the responsibility lies with the UK government to pass legislation on Northern Ireland's Bill of Rights, language used by the former Secretary of State is contrary on this point:

Looking ahead, if there were agreement on additional rights for Northern Ireland, the Government would examine how best to take things forward. We remain open to the suggestion that work on this, including legislation, could be taken forward by the Assembly.<sup>67</sup>

However, when a letter had been sent previously in September of 2011 to each of the political parties in Northern Ireland proposing the Assembly be empowered to take forward work in this area,<sup>68</sup> none of the parties expressed an interest in doing so. When asked to check this correspondence during interviews with all the main political parties, it became apparent that no one had responded to the NIO's request. A number of parties expressed their concern at the proposal to devolve the discussions, noting that parties consistently exercise an effective veto in the Northern Ireland Assembly on issues perceived by either side to be contentious, preventing issues such as this from being taken forward.<sup>69</sup> As the Alliance Party noted, "our system of government

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66. For further information on "the notable for its extended references to human rights" in the Good Friday/Belfast Agreement, see Colin Harvey, *Bringing Humanity Home: A Transformational Human Rights Culture for Northern Ireland?*, in CRIMINAL JUSTICE IN TRANSITION: THE NORTHERN IRELAND CONTEXT 49-50 (Clare Dwyer & Anne-Marie McAlinden eds., 2015) [hereinafter *Bringing Humanity Home*].

67. Theresa Villiers, former Secretary of State for Northern Ireland, Westminster Hall (July 16, 2013) in 16 Parl Deb WH (6th ser.) (2013) col. 194 (UK).

68. Letter from Owen Patterson, Secretary of State for Northern Ireland (2010 – 2012), to the leaders of the Northern Ireland Political Parties, received by the Northern Ireland Assembly, (Sept. 22, 2011) (on file with authors).

69. See NORTHERN IRELAND ASSEMBLY REPORT, OFFICIAL REPORT (2001-02), (2001), <http://archive.niassembly.gov.uk/record/reports/010925d.htm> (last visited Apr. 12, 2016). For example, the petition of concern was used to block the introduction of the Welfare Reform Bill in May 2015. See *Welfare Reform: SDLP 'Cannot Accommodate' Welfare Proposals*, BBC NEWS (May 22, 2015), <http://www.bbc.com/news/uk-northern-ireland-32853348>. A petition of concern has been described by the Northern Ireland Assembly as: "a notice signed by at least 30 members and presented to the Speaker signifying concern about any forthcoming matter on which the Assembly is due to vote. The effects of a petition of concern are (a) that the vote on the matter may not be held until at least the day after the petition has been presented and (b) the vote will be on a cross-community basis, rather than simple majority." PLENARY TERMS,

provides vetoes for the largest parties on either side of the divide and it's always easier to veto change than to veto no change."<sup>70</sup>

Respondents also focused on the absence of consensus amongst the two main parties in government on having this issue devolved to the Northern Ireland Assembly. Similar to the leader of the Alliance Party who argues "unless the largest party was in favour it could still be blocked . . . decisions are those that are worked out by the DUP and Sinn Féin at Executive level,"<sup>71</sup> the Green Party also believes "there is the politically sensitive stuff . . . that goes into the Office for First Minister and Deputy First Minister (OFMdfM) and doesn't

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NORTHERN IRELAND ASSEMBLY (2016), <http://aims.niassembly.gov.uk/plenary/terms.aspx> (last visited Mar. 10 2016). This was tabled in respect of a motion questioning whether the NIHRC had gone beyond its remit under the Belfast/Good Friday Agreement regarding the development of a Bill of Rights in the context of the development of a Bill of Rights. On October 1, 2001, the following amendment was put forward: "[the NIHRC] has been hindered in discharging its remit due to limits on its powers and resources but congratulates the Commission on its substantial contributions to the debate on and in developing human rights in Northern Ireland." The Assembly was divided with the Nationalist parties voting yes (48) and the Unionist parties voting no (39). *See* PETITION OF CONCERN: NORTHERN IRELAND HUMAN RIGHTS COMMISSION, NORTHERN IRELAND ASSEMBLY (2016), <http://archive.niassembly.gov.uk/record/reports/011001e.htm#8> (last visited Apr. 12 2016). On April 8, 2008, a motion was put forward and supported by the majority that showed concern at the lack of cross-community support for Bill of Rights Forum report. *See* PRIVATE MEMBERS' BUSINESS: BILL OF RIGHTS AND NORTHERN IRELAND HUMAN RIGHTS COMMISSION, NORTHERN IRELAND ASSEMBLY (Apr. 8, 2008), <http://archive.niassembly.gov.uk/record/reports2007/080408.htm#4> (last visited Apr. 12, 2016). *See also* NORTHERN IRELAND ASSEMBLY REPORT, OFFICIAL REPORT (2009-10): MEMBERS' BUSINESS ON THE NIHRC, NORTHERN IRELAND ASSEMBLY (Nov. 3, 2009). Another petition of concern was tabled on November 2, 2009 on the following motion proposed by the Unionist party: "That this Assembly considers the Northern Ireland Human Rights Commission's advice to the Secretary of State 'A Bill of Rights for Northern Ireland' incompatible with the provisions of the Belfast Agreement; notes with concern that the proposals would undermine the democratic role and authority of this Assembly and the Parliament of the United Kingdom; and urges the Secretary of State not to implement the report's recommendations." The following amendment was then proposed to the motion: "notes the Northern Ireland Human Rights Commission's advice to the Secretary of State, 'A Bill of Rights for Northern Ireland,' and calls on the Secretary of State to publish the consultation document as soon as possible." The Assembly was divided as 46 voted yes; 39 voted no. *See* PRIVATE MEMBERS' BUSINESS: NORTHERN IRELAND HUMAN RIGHTS COMMISSION, NORTHERN IRELAND ASSEMBLY (Nov. 3, 2009) <http://archive.niassembly.gov.uk/record/reports2009/091103.htm#a5> (last visited Apr. 12, 2016).

70. Interview with David Ford, MLA, Alliance Party, in Belfast (Nov. 25, 2013) (on file with authors). There is also a basic point: the Bill of Rights should bind the Assembly. This can be done by Westminster legislation but it is very difficult to see how this can be done neatly by Assembly legislation. Thanks to Rory O'Connell for bringing this point to the authors' attention.

71. *Id.*

come out."<sup>72</sup> An example of this prevarication is the disagreement over the introduction of a Single Equality Bill despite the introduction of the Equality Act of 2010 for Great Britain, which has meant that Northern Ireland is "out of step with the rest of the UK in terms of equality protections."<sup>73</sup>

Labour MP Ivan Lewis, a former Shadow Spokesperson on Northern Ireland, noted that although devolution requires that the Executive take the lead:

. . . there has been no progress historically, in the peace process at very difficult stages without the active engagement of the two governments very much working together as one.<sup>74</sup>

This view holds much merit, since it is unlikely that the proposals from the Belfast/Good Friday Agreement on policing and criminal justice reform would have been taken forward by the devolved Assembly. Given the lack of political consensus on these reforms, it is incumbent for the UK government to take the legislation through Westminster.<sup>75</sup>

For the UK government to argue that a process should be established at the devolved level to resolve party political differences over the Bill of Rights for Northern Ireland is extremely problematic. This is exemplified by the process established by the First and Deputy First Ministers in July 2013 to resolve issues of cultural expression, including parades and protests, flags, symbols and emblems, and the legacy of the past.<sup>76</sup> An all-party group was established and independently facilitated by US diplomat Richard Haass and Megan

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72. Interview with Steven Agnew, MLA, Green Party, in Belfast (May 2, 2013) (on file with authors).

73. Motion put forward by the Alliance Party on a call for a fresh consultation on a Single Equality Bill for Northern Ireland, *Official Report* 16 March 2015, available at <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2015/03/16&docID=228045> (last visited May 2, 2016).

74. Interview with Ivan Lewis, former Shadow Secretary of State for Northern Ireland, speaking on 'The View' BBC, in London, U.K. (May 8, 2014), quoted in Smith, McWilliams & Yarnell, *supra* note 6, at 45.

75. Westminster passed The Police (Northern Ireland) Act 2000. (Gr. Brit.).

76. The formal negotiations are formally known as *The Panel of Parties in the Northern Ireland Executive on Parades and Protests; Flags, Symbols, Emblems and Related Matters; and the Past, Terms of Reference* (2013), available at <http://panelofpartiesnie.com/terms/> (last visited Nov. 8, 2016).

O'Sullivan.<sup>77</sup> The Haass-O'Sullivan negotiations took place between the political parties from July to December of 2013 with stakeholders from civil society participating in parallel discussions. The Bill of Rights was not in the terms of reference for the Haass-O'Sullivan talks, but they were asked to consider related matters that opened the space for other issues to be discussed. The NIHRC and a number of groups involved in the Bill of Rights process met with the facilitators while others submitted papers. They took the view that a human rights-based framework was needed to help resolve the problematic issues of cultural expression.<sup>78</sup> Some non-governmental organizations ("NGOs") argued that the Haass-O'Sullivan process was not, however, the appropriate place for discussions on the substantive issue of a Bill of Rights, fearing a "watering down" of the international standards as politicians bargained over human rights.<sup>79</sup> Sinn Féin referenced the issue of the delay on progressing the proposal in the peace agreement in its submission: "[t]he British Government has still not introduced a Bill of rights. This void has contributed in no small measure to the malaise we are currently in, surrounding these issues."<sup>80</sup> The Alliance Party MP stated that although the issue of the Bill of Rights was important, introducing it in "the context of trying to resolve one of those issues (parades) would overburden the process."<sup>81</sup>

The Haass-O'Sullivan talks concluded without agreement on December 31, 2013. The final report made a number of recommendations, such as the establishment of a Commission on Identity and Culture to consider, amongst other issues, a Bill of

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77. The appointment of M. O'Sullivan and R. Haass by the five parties of the Executive is stated in the Panel's Mission Statement, available at <http://panelofpartiesnie.com/mission/> (last visited Nov. 8, 2016).

78. *Together: Building a United Community Strategy and the Multi-Party Group on Flags, Parades and Dealing with the Past*, COMM. ADMIN. JUSTICE (Aug. 2013) (detailing the briefing from the Committee on the Administration of Justice.)

79. Interview with Nicole Brown, Practice and Participation of Rights, in Belfast (Jan. 24, 2014).

80. *Submission on Flags, Symbols and Emblems*, SINN FÉIN (Oct. 15, 2013).

81. Interview with Naomi Long, MP, Alliance Party, in Belfast (Oct. 2, 2013). While noting the need for a dedicated discussion on human rights, the same individual argued that these discussions might enable the Unionist community to deliver on the need for a wider framework in which these rights would be placed: "If they were all in the same pool of issues would it give people flexibility to do some trade around that politically, to be able to deliver on them?"

Rights for Northern Ireland.<sup>82</sup> Both Sinn Féin<sup>83</sup> and the Alliance Party voiced concerns that placing the Bill of Rights into such a Commission would mean that there would be far less focus on it since the process was designed to find a resolution to flags and parades.<sup>84</sup> The Irish government did not dismiss its inclusion, believing that it could be a way to revive the debate but should not preclude other routes to progress.<sup>85</sup> The UK government diverged from the more usual joint approach with the Irish government,<sup>86</sup> with the former Secretary of State adopting the view that the talks provided the basis for continuing discussions between the parties.<sup>87</sup> The failure of the Haass-O'Sullivan process reflected at that time a larger failing of the Northern Irish political parties to independently resolve contentious issues without the active engagement of the two governments working together as one.

It remains the case that the British government has failed in their commitment to bring forward in "Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland"<sup>88</sup> which is affirmed in the findings of our report where several politicians and stakeholders emphasized that the UK government bear the key responsibility:

It is the duty of [the UK] Government as a co-guarantor of the [A]greement and as a signatory to it to engage proactively with all stakeholders, including political parties, to seek consensus on this [Bill of Rights] and other outstanding issues. There is a

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82. Proposed Agreement Dec. 13, 2013: An Agreement Among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past 17. The Commission would consist of fifteen members, eight elected representatives to be appointed by the five leaders of the Executive parties and the other seven members to be outside government.

83. Gerry Adams TD, Sinn Féin, speaking at *Ard Chomhairle* TV Press Conference, (Jan. 11, 2014), available at <http://www.sinnfein.ie/contents/28417> (last visited May 2, 2016).

84. Interview with Naomi Long, MP, Alliance Party, in Belfast (Feb. 13, 2014).

85. Interview, off-the-record (Feb. 19, 2014).

86. Eamon Gilmore, Former Tánaiste, speaking in the Dáil (Jan. 15, 2014), available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014011500005?opendocument> (last visited Apr. 12, 2016).

87. Theresa Villiers, former Secretary of State for Northern Ireland, Westminster Hall (July 16, 2013) in 16 Parl Deb WH (6th ser.) (2013) col. 197 (UK)

88. See *Rights, Safeguards and Equality of Opportunity*, in *The Belfast/Good Friday Agreement*, *supra* note 10, at ¶ 4, 16-17.

particular responsibility around leadership on such issues when they are reserved matters.<sup>89</sup>

The responsibility sits with the UK government. [ . . . ] [W]hat is crucially missing is an indication from the British government that their intention is to legislate for something worthy of the name of a Northern Ireland Bill of Rights.<sup>90</sup>

This idea of putting pressure on the UK government as a "guarantor" was reiterated by various respondents: "[t]here is a co-guarantor duty on the Irish government to keep pressure on them [British government] as well."<sup>91</sup> One political representative went further to state that in "our view the Irish government has failed in its responsibilities to press the British."<sup>92</sup> Commenting on both the British and Irish governments' role, the Progressive Unionist representative stated:

It's both the British and Irish [governments] that have allowed the Northern Irish parties to decide what the Good Friday Agreement looks like; and that's been the difficulty. Rather than saying, 'no, no, no, this needs to be discussed, (as) this was said in the Good Friday Agreement' they're so happy that the thing [Bill of Rights] has run for so long. . . . sometimes it is difficult to ascertain the difference between the British and Irish governments now, they seem to have a joint voice on this.<sup>93</sup>

Some interviewees also believed that the Irish government "has not been particularly engaged" on the Bill of Rights issue, arguing that it could be playing a more "vigorous" role<sup>94</sup>:

The Irish government could be saying more forthrightly that this is an issue that is still here. It is not going to disappear, it's a commitment under the Good Friday Agreement and it needs to be addressed and that the Irish government is willing to assist in that process. [ . . . ] Its job is as a guarantor and it can't do very much on its own but it can put significant pressure on the British

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89. Naomi Long, MP, Alliance Party, at the Westminster Hall (July 16, 2013) *in* 16 Parl Deb WH (6th ser.) (2013) col. 191 (UK).

90. Interview with Patrick Corrigan, Amnesty UK, in Belfast (Nov. 6, 2013).

91. Interview with Kevin Hanratty, Human Rights Consortium, in Belfast (Oct. 31, 2013).

92. Interview with Vincent Parker, Special Adviser to the Deputy First Minister, Sinn Féin, in Belfast (June 7, 2013).

93. Interview with Billy Hutchinson, PUP, in Belfast (Sept. 11, 2013).

94. Interview with Naomi Long, MP, Alliance Party, in Belfast (Oct. 2, 2013).

government and it can also put some pressure on the parties locally.<sup>95</sup>

The Irish government rejects this view, recognizing that they are "co-guarantors of the peace agreement"<sup>96</sup> and have an obligation to work towards the implementation of a Bill of Rights for Northern Ireland. As the former Taoiseach, Brian Cowen, stated:

Regarding the Bill of Rights for Northern Ireland, I reiterate the commitment of the Government to ensure the full and effective implementation of all aspect of the Good Friday Agreement and the St Andrews Agreement. In that context, we attach importance to a specific Bill of Rights for Northern Ireland as envisaged in the Good Friday Agreement. The Government has consistently communicated that position in contacts with the current British Administration and with the Conservative Party Front Bench.<sup>97</sup>

The former Tánaiste, Eamon Gilmore, raised the Northern Ireland Bill of Rights in several speeches referring to the need to fulfill all parts of the Belfast/Good Friday Agreement:

We need to realise in full the potential of the Agreement and all its parts including a bill of rights. We cannot be selectively blind to those parts we find difficult. When we pick and choose the balance and integrity of the whole is picked apart.<sup>98</sup>

We need to reflect honestly on where there have been gaps left or intentions and commitments left unfulfilled... This is why commitments such as the Bill of Rights ... are not optional extras. They are fundamental. We neglect it at our cost.<sup>99</sup>

Interviewees recognized that the Irish government is in a different position than the UK government since the legislative process for any

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95. Interview with Alban Maginness, MLA, SDLP, in Belfast (May 1, 2013).

96. Interview, off-the-record (Feb. 19, 2014).

97. See *Ceisteanna: Questions, Northern Ireland Issues*, 692(3) DÁIL ÉIREANN DEBATE 562 (Oct. 21, 2009), available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2009102100004?opendocument> (last visited May 1, 2016). Fianna Fáil was in government in 2009. In 2009, the British Labour party was in government. In 2011, the Irish government became a coalition between Fine Gael and the Labour Party.

98. Eamon Gilmore, Former Tánaiste, Address to the SDLP Conference (Nov. 9, 2013), <https://www.dfa.ie/news-and-media/tags/browsebyyear/2013/4/>. The former Tánaiste also raised the Bill of Rights in his speech to the Alliance Party's Annual Conference in April 2012.

99. Eamon Gilmore, Former Tánaiste, Address to the British-Irish Association (Sept. 7, 2013), <https://www.dfa.ie/news-and-media/tags/browsebyyear/2013/4/>.

Bill of Rights for Northern Ireland will be in the Westminster Parliament. An official from the Irish government noted that they could be “more facilitative, give encouragement to look deeper at the issues.”<sup>100</sup> As some politicians noted, “if the Irish government go [*sic*] too far it will create Unionist antagonism”<sup>101</sup> and “would get up the backs of the DUP.”<sup>102</sup> This is exactly what happened when the Irish Prime Minister, Enda Kenny, commented in January 2016 that there would be “serious difficulties”<sup>103</sup> for Northern Ireland if the United Kingdom left the European Union following the Brexit referendum in June 2016. Reacting to this comment, the DUP leader and the First Minister for Northern Ireland, Arlene Foster, stated, “[i]t is for the people of the UK to decide what’s the best way forward and, as you know, we don’t take too kindly to people telling us what to do.”<sup>104</sup> However, as noted below, the Irish government needed to articulate its serious concerns on the implications of Northern Ireland being encouraged to withdraw from the European Union.

For several years, the lack of either government taking a lead on a Bill of Rights for Northern Ireland has led to a stalemate. In attempting to tackle this stalemate, the Alliance Party obtained a formal debate on a Northern Ireland Bill of Rights at Westminster Hall in 2013. The Alliance Party MP reminded the Secretary of State that “it is the duty of Government as a co-guarantor of the agreement, and as a signatory to it, to engage proactively with all stakeholders, including political parties, to seek consensus on this and other outstanding issues.”<sup>105</sup> In responding to the Westminster debate, the Secretary of State noted that “the Government would like to see this issue resolved . . . but we cannot simply conjure consensus into existence.”<sup>106</sup>

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100. Interview, off-the-record (Feb. 19, 2014).

101. Interview with Alban Maginness, MLA, SDLP, in Belfast (May 1, 2013).

102. Interview with Anna Lo, MLA, Alliance Party, in Belfast (May 2, 2013).

103. *Brexit Would Create Serious Difficulties for NI Says Enda Kenny*, BBC NEWS (Jan. 25, 2016), <http://www.bbc.com/news/uk-northern-ireland-35395135>.

104. *Brexit: Arlene Foster Says Enda Kenny Has Right to Express Opinion*, BBC News (Jan. 26, 2016), <http://www.bbc.co.uk/news/uk-northern-ireland-35407313> (last visited Apr. 12, 2016).

105. July 16, 2013, Parl Deb HC (2013) col. 190 WH (UK), <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130716/halltext/130716h0001.htm#13071670000077> (Naomi Long, MP).

106. Theresa Villiers, former Secretary of State for Northern Ireland, Westminster Hall (July 16, 2013) in 16 Parl Deb WH (6th ser.) (2013) col. 197 (UK).



The findings of our report show that when asked to respond to this, those parties in favor of a Bill of Rights expressed their dissatisfaction, arguing that unless pressure is applied from Westminster and parties are “incentivized,”<sup>107</sup> then a process will not get started:

At the moment the government are taking what they claim is a neutral position. But, by taking a neutral position, they are effectively not progressing and therefore are on the side of no movement.<sup>108</sup>

The parties, in favor of progressing a Bill of Rights for Northern Ireland, also noted that the proposals in the Good Friday/Belfast Agreement had been endorsed by a Northern Ireland referendum and the outcome in favor of the peace agreement (including the proposal for a Bill of Rights) still stands. The parties believed that they were being left to be persuaders with the UK government having adopted a position that “those who are in favour of a Bill of Rights . . . should focus their efforts on persuading those in Northern Ireland who remain skeptical [*sic*] on building such a consensus.”<sup>109</sup> However, these parties argue that it should not be their responsibility to persuade others of the need for a Bill of Rights for Northern Ireland, as this responsibility lies with the government.<sup>110</sup> This concern was further highlighted in 2014 in a Westminster debate on a Northern Ireland Bill, where the SDLP took the opportunity to criticize the government’s current position of inaction on the Northern Ireland Bill of Rights. Margaret Ritchie MP noted:

There are rights that are peculiar to Northern Ireland, which has a particular political situation that needs to be recognised. I regret the fact that the Government did not see fit to introduce a Bill of Rights that could have run concurrently with this Bill through both Houses. I ask the Minister to reflect on that . . . to talk to his

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107. Interview with David Ford, MLA, Alliance Party of N. Ir., in Belfast (Nov. 25, 2013).

108. Interview with Naomi Long, MP, Alliance Party, of N. Ir., in Belfast (Oct. 2, 2013).

109. Letter from Mike Penning, former Minister of State for Northern Ireland to the authors (May 24, 2013), in response to a letter from the authors to Theresa Villiers, former Secretary of State for Northern Ireland (Mar. 26, 2013) (on file with authors).

110. This was the position stated by all interviewees from parties in favor of the Northern Ireland Bill of Rights. Interviews with the Alliance Party (Nov. 25, 2013; Sinn Féin, June 7, 2013; and the SDLP, May 1, 2013).

colleagues in government, and to ensure that such legislation is introduced.<sup>111</sup>

However, the then-Minister of State for Northern Ireland did not appear to be familiar with the proposal for a Northern Ireland Bill of Rights as demonstrated by his response:

We have the Human Rights Act 1998 in place, and if all parties in Northern Ireland wish to propose some special legislation at the Westminster Parliament, we would of course consider it, but I see no need for such a thing, and I have never heard anybody suggest there was a need before.<sup>112</sup>

This explicit acknowledgement shows a fundamental lack of understanding within the Conservative government about a Northern Ireland Bill of Rights. Had the former Minister of State for Northern Ireland read the Belfast/Good Friday Agreement, “he would understand that it contains an entire page and chapter dedicated to human rights . . . and] that the agreement contains a specific obligation about a Bill of Rights in Northern Ireland.”<sup>113</sup>

Several other political representatives have also expressed their concern at the UK government’s “rollback.”<sup>114</sup> Another former political spokesperson went so far as to state that “we’re in a worse position than we were when we started.”<sup>115</sup> The spokesperson continued to state that as far as the British government is concerned:

. . . we have held the consultations, we have held the community forums, we have held the intense political discussions. We’re now at the position where there was only one decision to make and that was whether to implement it [the NIHRC’s advice] or

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111. Mar. 12, 2014, Parl Deb HC (2014) col. 370 (UK) (Margaret Ritchie, MP, SDLP).

112. Mar. 12, 2014, Parl Deb HC (2014) col. 376 (UK) Andrew Robathan, former Minister of State for Northern Ireland (October 2013 – July 2014).

113. Mar. 12, 2014, Parl Deb HC (2014) col 376 (UK) (Lady Sylvia Hermon, MP, Independent MP for North Down). In response to the former NIO Minister’s admission in this debate that he had not read the Agreement since 1998, the MP for North Down also added, “It would be wise, after 16 years for the Minister, before coming back to speak on an important piece of Northern Ireland legislation, to read the Good Friday agreement, the Belfast Agreement, in detail.”

114. Interview with Alban Maginness, MLA, Socialist Democratic and Labour Party, in Belfast (May 1, 2013).

115. Interview with Vincent Parker, Special Adviser to deputy First Minister, Sinn Féin, in Belfast (June 7, 2013).

not to implement it - and that is even implementing it in a slightly different format than what's been proposed.<sup>116</sup>

The leader of the UUP acknowledged that “the main political parties together haven't sat down and engaged on it”<sup>117</sup> and admitted that:

Would we vote in favour tomorrow for a Northern Ireland Bill of Rights? The answer would be no, because we don't see the argument and the need. But if you come to me and say – have you thought of this and this, and you can persuade us then we would come around to it.<sup>118</sup>

The leader of the UUP added, “I think that there would be merit in looking at a Bill of Rights because it's a commitment that's sat in the Belfast Agreement and fifteen years on, clearly no one has really seriously engaged.”<sup>119</sup> Likewise, the DUP spokesperson also noted, “we are open to any discussions that are going on and any proposals that are being brought forward.”<sup>120</sup> Sinn Féin believed that what was needed was a little bit of “hard-talk . . . the government (needs to) have a plan or a structure because otherwise . . . we are back in the same place. We'd just be updating positions.”<sup>121</sup> Sinn Féin added a proviso that “we have to find something different”<sup>122</sup> but what the “something different” might look like was not elaborated on. The leader of the Alliance Party also believed that an alternative approach was needed and opined that “a facilitation process, speaking to the parties and then putting forward proposals is the only real prospect we have.”<sup>123</sup> The Alliance Party MP took the view that “getting parties around the table is a starting point . . . but that process needs to be very focused and time-limited.”<sup>124</sup> The Sinn Féin party leader also noted the need for greater focus: “issues such as a Bill of Rights . . .

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116. *Id.*

117. Interview with Mike Nesbitt, MLA, UUP, in Belfast (June 7, 2013).

118. *Id.*

119. *Id.*

120. Jonathan Bell, Junior Minister. Interview with Jonathan Bell, MLA, Democratic Unionist Party, and Emma Little, DUP, MLA, Democratic Unionist Party, in Belfast (May 21, 2013).

121. Interview with Vincent Parker, Special Adviser to Deputy First Minister, Sinn Féin, in Belfast (June 7, 2013).

122. *Id.*

123. Interview with David Ford, MLA, Alliance Party, of N. Ir. in Belfast (Nov. 25, 2013).

124. Interview with Naomi Long, MP, Alliance Party, of N. Ir., in Belfast (Oct. 2, 2013).

are not going away”<sup>125</sup> and remain to be resolved in the near future. The findings of our report therefore show that all parties are willing to engage in this issue and seek “something different.” Even the failure of the recent political talks/agreements such as the Haass-O’Sullivan talks (July-December 2013),<sup>126</sup> the Stormont House Agreement (December 2014),<sup>127</sup> and the Fresh Start Agreement (November 2015)<sup>128</sup> highlights the pressing need to provide an alternative approach.

### III. ALTERNATIVE TO THE PRESENT STALEMATE

As the co-guarantors of the Belfast/Good Friday Agreement, we argue that the British and Irish governments need to establish a coherent approach to a Bill of Rights for Northern Ireland by developing a joint policy framework. The framework should clarify how the governments see their respective roles in implementing their obligations under the Belfast/Good Friday and St Andrews Agreements and agree how best to take forward the work on a Bill of Rights for Northern Ireland. The importance of moving forward on a Bill of Rights is particularly important in divided societies emerging from decades of violent political conflict. As noted earlier, Bills of Rights “are traditional and well used constitutional mechanisms”<sup>129</sup> in “conflicted/transitional” societies<sup>130</sup> as they act as a bridge in helping countries transition from conflict to move forward from “a

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125. Gerry Adams, TD, Presidential Address to Sinn Féin at *ArdFheis* 2014, (Feb. 8, 2014), <http://www.sinnfein.ie/ga/contents/28950> (last visited May 2, 2016).

126. The Haass-O’Sullivan final report made a number of recommendations, one of which was that a Commission on Identity and Culture be set up to consider amongst other issues a Bill of Rights for Northern Ireland. See THE HAASS-O’SULLIVAN FINAL REPORT, (July-Dec., 2013) (on file with authors).

127. THE STORMONT HOUSE AGREEMENT (Dec. 2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf) (last visited May 2, 2016), at ¶ 69. The Bill of rights appears under the “Outstanding Commitment” section.

128. A FRESH START: THE STORMONT AGREEMENT AND IMPLEMENTATION PLAN (Nov. 17, 2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/479116/A\\_Fresh\\_Start\\_-\\_The\\_Stormont\\_Agreement\\_and\\_Implementation\\_Plan\\_-\\_Final\\_Version\\_20\\_Nov\\_2015\\_for\\_PDF.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf). The Bill of Rights is mentioned only in passing towards the end of the Agreement in Section F in paragraph 69. This paragraph repeats the relevant paragraphs of the Stormont House Agreement but, in contrast with other issues where next steps are identified, no such steps are set out to deal with the Bill of Rights issue.

129. Harvey, *supra* note 66, at 56-57.

130. Christine Bell, Colin Campbell & Fionnuala Ní Aoláin et. al., *Justice Discourses in Transition* 13:3 SOC. & LEGAL STUD. 305, 310 (2004).

contentious past as well as being a point of reference for future generations.”<sup>131</sup> While their effectiveness “is highly context dependent,”<sup>132</sup> Bills of Rights have been “convenient device[s]”<sup>133</sup> for countries coming out of conflict.

The two governments need to adopt a consistent approach to the implementation of the Good Friday/Belfast Agreement. While the Irish government regards a separate Bill of Rights for Northern Ireland as an integral part of the Belfast/Good Friday Agreement,<sup>134</sup> the British government believes that a UK Bill of Rights could serve all devolved regions, including Northern Ireland.<sup>135</sup> Clarification is therefore necessary to reconcile the current differences in both governments’ approach to this issue.

#### *IV. THE "WHAT IF" SCENARIOS*

The UK government’s plan for the replacement of the Human Rights Act with a British Bill of Rights remains unclear as the proposals have yet to be published. While we know the results of the Brexit referendum,<sup>136</sup> there are several variables post-Brexit, such as the fundamental issue about the future protection of EU-related rights

131. Northern Ireland Human Rights Comm’r, *supra* note 13, at 3.

132. Harvey, *supra* note 66, at 56-57.

133. *Id.*

134. “A Bill of Rights for Northern Ireland remains a significant piece of unfinished work in this area. The Irish Government, as co-guarantor of the Agreement, will continue to work to ensure that this and all other outstanding provisions from the Agreement are fully and effectively implemented.” Eamon Gilmore, Former Tánaiste, Address to the Irish Human Rights Commission, Dublin (June 28, 2011), *available at* <https://www.dfa.ie/news-and-media/speeches/speeches-archive/2011/june/irish-human-rights-commission/>. In 2013, the Bill of Rights was raised in the Irish parliament on at least twelve occasions. Of those, eight were specifically requesting the Tánaiste update the Dáil on what work he had undertaken, usually relating to his communication with the Northern Ireland Secretary of State, specifically, regarding the Bill of Rights; on the other four incidences, it was discussed as one of the outstanding elements of the Peace Agreement. *See Dáil Éireann 2013, HOUSES OF THE OIREACTHAS* (2016), <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/dataset?readform&chamber=dail&year=2013> (last visited May 2, 2016).

135. Brian Gormally, *supra* note 5.

136. The United Kingdom voted to leave the European Union by 52% to 48% on the June 23, 2016. England and Wales voted to leave (53.4% and 52.5% respectively), Scotland and Northern Ireland voted to remain (55.8% and 62.0% respectively). *See EU Referendum Results*, BBC News (June 23, 2016), [http://www.bbc.co.uk/news/politics/eu\\_referendum/results](http://www.bbc.co.uk/news/politics/eu_referendum/results).

in Northern Ireland, to be considered.<sup>137</sup> What will happen now with the EU Charter of Fundamental Rights?<sup>138</sup> This Charter is stronger than the ECHR as it includes a broader range of rights (notably economic, social, and cultural rights in addition to civil and political rights), as well as freedom of movement for EU citizens within the European Union and data protection.

However, it is important to acknowledge that the Charter does have several limitations, such as its scope being restricted to EU laws.<sup>139</sup> Further, the Charter and its enforcement body, the European Court of Justice, make a distinction between "rights" and "principles."<sup>140</sup> This means that although a "right" exists in language, it does not mean that it will be directly enforceable. Most of the socio-economic rights are "principles."<sup>141</sup> The most notable example is the Court of Justice's interpretation of Article 27 of the Charter in the *AMS* case, where the Court concluded that Article 27 was not a right.<sup>142</sup> This case highlights that while on its face the Charter recognizes the indivisibility of rights, socio-economic rights are not accorded equal weight with civil and political rights.<sup>143</sup> Another

137. Brexit raises a myriad of legal, political, economic, and constitutional issues. It is beyond the scope of this article to address these issues. For information on some of these issues, see *LSE Commission on the Future of Britain in Europe*, LONDON SCH. ECON. (June 7, 2016) <http://www.lse.ac.uk/europeanInstitute/LSE-Commission/LSE-Commission-on-the-Future-of-Britain-in-Europe.aspx> (last visited July 27, 2016). See also House of Commons Library, Briefing Paper, *Brexit: What happens next?* Number 07632, June 30, 2016; House of Commons Library Briefing Paper, *Brexit: Some legal and constitutional issues and alternatives to EU membership*, Number 07214, July 28, 2016.

138. See Charter of Fundamental Rights of the European Union art. 51, 2012 O.J. C 326/391. The Charter of Fundamental Rights was given legal footing by the Lisbon treaty 2007 (Article 6 EU Treaty) and is therefore legally binding.

139. Article 51 of the EU Charter states that it applies to the EU Member States "only when they are implementing Union law." Charter of Fundamental Rights of the European Union art. 51, 2012 O.J. C 326/391.

140. For a comprehensive discussion about the limits, see Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8(3) EUR. CONST. L. REV. 375 (2012).

141. Socio-economic rights are grouped under the "Solidarity" chapter (Title IV) of the Charter. For a list of the solidarity rights, see *EU Charter of Fundamental Rights: Title IV: Solidarity*, EU AGENCY FOR FUNDAMENTAL RTS. (2016), <http://fra.europa.eu/en/charterspedia/title/iv-solidarity> (last visited July 27, 2016).

142. *AMS*, Case C-176/12 (Jan. 15, 2014), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0176>.

143. For an excellent discussion about the role and nature of the EU Charter post-Brexit, see *The Implications of Brexit for Fundamental Rights Protection in the UK*, LONDON SCH. ECON. EUR. INST. (Feb. 25, 2016), <http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-6---The-implications-of-Brexit-for-fundamental-rights-protection-in-the-UK.pdf>.

important question concerns whether Northern Ireland and the United Kingdom will be bereft of specific legislation if they no longer have to implement EU directives. Northern Ireland has benefitted in particular from a range of EU equality legislation (such as the Race Equality Directive and the Employment Equality Directive). As one human rights lawyer puts it, "Brexit and a possible decoupling of domestic law from the underlying Directives that have given rise to these rights would cause these to probably fluctuate."<sup>144</sup>

Repealing the Human Rights Act also raises a series of fundamental questions, such as whether replacing the Human Rights Act with a UK Bill of Rights would be a "grievous breach of the Good Friday Agreement."<sup>145</sup> If the UK government did this, what could or would the Irish government do? Does it mean that Northern Ireland would not have its own specific Bill of Rights? Or does it present an opportunity for a Northern Ireland Bill of Rights? Does the British government require the consent of the devolved assemblies, including the Northern Ireland Assembly, to proceed with both its proposals to repeal the Human Rights Act and Brexit? In an attempt to respond to the questions above, we provide a series of "what if" scenarios. Before doing so, some background information on the government's plans on repealing the Human Rights Act is provided.

#### *V. CONSERVATIVE'S PROPOSALS TO REPEAL THE HUMAN RIGHTS ACT*

Over the past six years, the Conservative party has repeated its intention to "scrap the Human Rights Act altogether."<sup>146</sup> Its plans

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144. *Id.* at 7. Brexit also raises the question about "acquired rights" in EU law. "Acquired rights" are rights already conferred by the EU such as workers' rights and non-discrimination rights. Once these rights have been recognized, they cannot be revoked even if a member state withdraws from the EU. Space precludes a detailed discussion about these acquired rights and Brexit. For an excellent discussion, see Sionaidh Douglas-Scott, *What Happens to 'Acquired Rights' in the Event of a Brexit?*, UK CONST. L. BLOG (May 16, 2016), <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brex-it/> (last visited July 27, 2016).

145. *Human Rights Act: Gerry Adams Criticises 'Attack' on NI Peace Deal*, BBC NEWS, (May 13, 2015), <http://www.bbc.co.uk/news/uk-northern-ireland-32721851> (last visited May 2, 2016).

146. See Theresa May, Speech at the Conservative Party Conference (Oct. 2012), <http://www.politics.co.uk/comment-analysis/2012/10/09/theresa-may-speech-in-full>. More in detail, dating back to as early as 2006, David Cameron (as Opposition Leader at that time) talked about replacing the Human Rights Act with a "Bill of Rights defining Britain's core

were elaborated in the 2014 publication of a strategy paper, "Protecting Human Rights in the UK."<sup>147</sup> This document sets out the Conservative's plans to introduce "a new British Bill of Rights and Responsibilities"<sup>148</sup> with nine "key objectives."<sup>149</sup> As these objectives have been examined elsewhere, we focus here on the points relevant to our discussion.<sup>150</sup> Generally, the Conservative's proposals are to "repeal Labour's Human Rights Act."<sup>151</sup> To this end, the Conservatives propose to introduce a "British Bill of Rights and Responsibilities" that will limit the scope of human rights laws to "the most serious cases" and restrict the reach of the cases to the UK. The proposals also refer to rendering Strasbourg judgments as "advisory" and "break[ing] the formal link between British courts and the European Court of Human Rights,"<sup>152</sup> with the British courts no longer being required to take into account Strasbourg rulings.<sup>153</sup> If the Council of Europe does not agree with these proposals, the Conservatives' only alternative for the United Kingdom is to withdrawal from the ECHR.<sup>154</sup>

As the UK government does not intend to add new rights in the proposed British Bill of Rights,<sup>155</sup> the key issue is how any rights should be adjudicated. In other words, it is more to do with breaking

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values." H el ene Mulholland, *Cameron 'Muddled' on Human Rights*, THE GUARDIAN (June 26, 2006), <http://www.theguardian.com/politics/2006/jun/26/immigrationpolicy.constitution> (last visited Apr. 29, 2016). This pledge was repeated in the Conservative's 2010 manifesto, *Invitation to Join the Government of Britain: The Conservative Manifesto* 79 (2010), <https://www.conservatives.com/~media/files/activist%20centre/press%20and%20policy/manifestos/manifesto2010>. At the Conservative's annual conference in 2014, the then Home Secretary announced that they would repeal the Human Rights Act and replace it with a British Bill of Rights.

147. See Theresa May, Speech at the Conservative Party Conference (Oct. 2012), <http://www.politics.co.uk/comment-analysis/2012/10/09/theresa-may-speech-in-full>.

148. THE CONSERVATIVE PARTY, *supra* note 3, at 5.

149. *Id.*

150. Steven Greer & Rosie Slowe, *The Conservatives' Proposals for a British Bill of Rights: Mired in Muddle Misconception and Misrepresentation?* 4 EUR. HUM. RTS. L. REV. 372 (2015). Steven Greer and Rosie Slowe provide an excellent analysis of the Conservative's policy document.

151. THE CONSERVATIVE PARTY, *supra* note 3.

152. *Id.* at 5.

153. *Id.* at 6.

154. *Id.* at 5.

155. "There is nothing wrong with that original document [referring to the ECHR] . . . We will not introduce new basic rights." *Id.* In November 2015, the former Justice Secretary stated that "Our Bill of Rights will be based on the Convention rights."



the formal link between British courts and the European Court of Human Rights. This point is explicitly made in the Conservative's 2015 manifesto:

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.<sup>156</sup>

However, in the Queen's speech in May 2016, there is a reference only to "proposals,"<sup>157</sup> and not a Bill for a British Bill of Rights.<sup>158</sup> There has therefore been a hiatus in bringing forward such a Bill and, despite several appearances of the then-Parliamentary Under-Secretary for Justice and the then-Minister of Justice before various select committees in 2015 and 2016 and ministerial statements on this issue,<sup>159</sup> the public has been left "baffled and a bit in the dark."<sup>160</sup>

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156. CONSERVATIVE PARTY, *STRONG LEADERSHIP: A CLEAR ECONOMIC PLAN. A BRIGHTER, MORE SECURE FUTURE: THE CONSERVATIVE PARTY MANIFESTO* (Apr. 2015), <https://www.conservatives.com/manifesto> [hereinafter CONSERVATIVE PARTY MANIFESTO].

157. THE QUEEN'S SPEECH BEFORE HER MAJESTY'S MOST GRACIOUS SPEECH TO BOTH HOUSES OF PARLIAMENT ON 18 MAY 2016 48 (May 18, 2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524040/Queen\\_s\\_Speech\\_2016\\_background\\_notes\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf) (last visited June 7, 2016) [hereinafter THE QUEEN'S SPEECH 2016].

158. The Queen's Speech repeats last year's speech. See THE QUEEN'S SPEECH BEFORE HER MAJESTY'S MOST GRACIOUS SPEECH TO BOTH HOUSES OF PARLIAMENT ON 27 MAY 2015 8 (May 18, 2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/430149/QS\\_lobby\\_pack\\_FINAL\\_NEW\\_2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf) (last visited Mar. 3, 2016) [hereinafter THE QUEEN'S SPEECH 2015].

159. In response to a question in the House of Commons about the consultation on proposals for a British Bill of Rights, Dominic Raab (former Parliamentary Under-Secretary, Ministry of Justice) replied that proposals would be introduced in Autumn 2015 and would be "subject to full consultation." See Sept. 2015 Parl Deb HC (2015) col. 2058 (UK) (Dominic Raab). In response to a letter from the Chair of the Joint Committee on Human Rights (Harriet Harman), asking about proposed timings, see Joint Committee on Human Rights, Letter to the Justice Secretary about the Bill of Rights (Nov. 4, 2015), <https://www.equalityhumanrights.com/en/file/17111/download?token=bi-FE9rU> (last visited Mar. 3, 2016). Michael Gove (the former Minister of Justice and former Attorney General) was non-committal, stating only that the government consultation would be a "thorough, transparent and productive exercise with a wide stakeholder group." See Justice Secretary's Response to Joint Committee on Human Rights' letter about the Bill of Rights (Nov. 27, 2015), [http://www.parliament.uk/documents/joint-committees/human-rights/Michael\\_Gove\\_Letter\\_Bill\\_of\\_Rights\\_271115.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Michael_Gove_Letter_Bill_of_Rights_271115.pdf) (last visited Mar. 3, 2016). In December 2015, according to the former Attorney General, a consultation document was "being shared" with government colleagues. It would then go to the relevant committees and then a consultation would begin sometime in the "new year." See House of Lords, The Select Committee on the Constitution, Oral Evidence Session with the Right Honourable Michael Gove MP, Lord Chancellor and Secretary of State for Justice, Evidence

One of the main reasons for the delay of such a Bill is the complicated issue of devolution and, as far as Northern Ireland is concerned, the impact of the government's proposals for the Good Friday/Belfast Agreement. As discussed earlier, the Agreement is replete with references to human rights, not least the requirement on the British government to "complete incorporation"<sup>161</sup> into Northern

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Session No. 1 Heard in Public, Questions 1 – 12 (Dec. 2, 2015), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chancellor/oral/28327.pdf> (last visited Mar. 3, 2016). When questioned again about this in an appearance before the House of Lords EU Justice Sub-committee in February 2016, the former Attorney General's initial response was that the consultation paper would be announced "soon," but after further probing from the Committee, he stated that he was "at the mercy of the Prime Minister," and while not committing to a date, remained "confident" that "there will not be too long to wait." See House of Lords, Revised Transcript of Evidence Taken Before The Select Committee on the European Union, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing the Human Rights Act, Evidence Session No. 8, Heard in Public, Questions 79 – 90 (Feb. 2, 2016). Witnesses: Rt Hon Mr Michael Gove MP and Mr Dominic Raab MP, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.html> (last visited May 2, 2016). The Final report was published in May 2016, House of Lords, European Union Committee, The UK, the EU and a British Bill of Rights 12th Report of Session 2015-2016 (May 2016), <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/139/139.pdf> (last visited June 7, 2016). On April 26, 2016, Dominic Raab's vague response provides no further light on this issue as he talked about proposals being published "in due course." See Oral Answers To Questions on a British Bill of Rights, 26 April 2016, Parl Deb HC (2016) col. 608, <https://hansard.parliament.uk/commons/2016-04-26/debates/16042636000018/BritishBillOfRights> (last visited Nov. 8, 2016). On May 17, 2016, Michael Gove sent a letter in reply from the Chair of the Joint Committee on Human Rights on the Bill of Rights giving very little away by merely stating that his ministerial team would be happy to discuss the government's proposals further without indicating when that will take place. See Former Justice Secretary's Response to Joint Committee on Human Right's Letter about the Bill of Rights (May 17, 2016) [http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/160517\\_Letter\\_MG\\_to\\_Chair\\_BoR.PDF](http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/160517_Letter_MG_to_Chair_BoR.PDF) (last visited June 8, 2016).

160. Baroness Kennedy of The Shaws (Chairman), The Select Committee on the European Union Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act, Evidence Session No. 8, Heard in Public 2 February 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.html> (last visited Nov. 8 2016). There was speculation that the previous government's plan to replace the Human Rights Act had been shelved, however the Justice Secretary, Liz Truss MP, stated in the House of Commons on September 6, 2016 that the government will proceed with plans to replace the Human Rights with a British Bill of Rights. See <http://www.parliamentlive.tv/Event/Index/3184e13a-c51f-4940-836b-66c97226e358> (last visited Sept. 6, 2016).

161. Good Friday/Belfast Agreement, *supra* note 10, at Annex 1, ¶ 2 (covering "Rights, Safeguards and Equality of Opportunity.").

Irish law of the ECHR, and to provide "direct access"<sup>162</sup> to courts and remedies for any alleged breaches of the ECHR. The ECHR also applies to the Northern Ireland Assembly since its legislation cannot breach the rights contained in the ECHR "and any Bill of Rights for Northern Ireland supplementing it."<sup>163</sup> Such legislative proposals would be rendered "null and void" should they not be in alignment with the Convention rights.<sup>164</sup> The incorporation of the ECHR into domestic legislation was given effect on October 2, 2000 with the 1998 Human Rights Act and the Northern Ireland Act of 1998 giving statutory footing to these commitments.<sup>165</sup> This raises two questions. First, would replacing the Human Rights Act with a British or a "UK Bill of Rights"<sup>166</sup> be a breach of these commitments? Second, is the consent of the Northern Ireland legislative Assembly required both in terms of repealing the Human Rights Act and also for Brexit? These questions will be dealt with respectively.

Under "what if" scenario one, where a UK Bill of Rights does not affect the existing protections under the ECHR, there would be no legal or technical breach. What about scenario two, where a UK Bill of Rights makes changes to the Convention rights within the meaning of the Human Rights Act, resulting in an "ECHR-minus"<sup>167</sup> Bill of Rights? Arguably under this scenario, there is a "significant risk"<sup>168</sup> of breaching the Good Friday/Belfast Agreement. Such a Bill will arguably be "an emaciated version of human rights . . . [and will not] further the human-rights-based purposes of the Good Friday/[Belfast] Agreement."<sup>169</sup> The likelihood of this scenario where a UK Bill of

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162. *Id.*

163. *Id.*, at Strand I, ¶ 26.

164. *Id.*

165. The Human Rights Act gives "direct effect" to most of the ECHR rights in domestic law. Under Northern Ireland Act 1998, §§ 6(1), 6(2)(c), and 7(1) (this Act was passed "to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland . . ."), the Assembly does not have legislative competence for the Human Rights Act and ECHR rights.

166. Evidence of Gove and Raab to the House of Lords, Revised transcript of evidence taken before The Select Committee on the European Union, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing the Human Rights Act, 2016, Evidence Session No. 8 [hereinafter The House of Lords, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act].

167. Murray et al., *supra* note 5, at 21.

168. Gallagher et al., *supra* note 5, at 5.

169. Aoife O'Donoghue & Ben Warwick, *Constitutionally Questioned: UK Debates, International Law and Northern Ireland*, 66:1 N.I.L.Q 93, 100 (2015).

Rights makes changes to the ECHR is very real, given the admission by the former Attorney General before a Select Committee on the European Union in February 2016 that "there will be some changes"<sup>170</sup> to the Human Rights Act. In particular, one of these changes refers to Section 2 of the Human Rights Act, which requires UK courts to take into account Strasbourg jurisprudence when interpreting ECHR rights.<sup>171</sup> The former Attorney General believes there is an imbalance between the European Court of Human Rights and UK courts, with the latter favoring the former.<sup>172</sup> For some commentators, it is this imbalance and the government's desire to "break the formal link"<sup>173</sup> between British courts and the European Court of Human Rights that is at the "core"<sup>174</sup> of the government's plans. Repetitive references to the UK courts having the ultimate say in the interpretation of ECHR rights and the emphasis placed on parliamentary sovereignty by the Conservatives in both written publications and oral evidence before the various parliamentary committees sustains this view. For example, when giving evidence before the Select Committee on the Constitution, Michael Gove referred to parliamentary sovereignty on several occasions.<sup>175</sup> For

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170. House of Lords, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act, *supra* note 166.

171. House of Lords, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act, *supra* note 166. The Chairman stated that "It is pedestrian to state that there is no legal obligation for the UK courts to follow Strasbourg rulings since this is 'almost written as an accepted tenet.'"

172. See The House of Lords, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act, *supra* note 166. Mr. Gove states that "Section 2 of the Act in particular might put the balance rather too heavily in Strasbourg's court rather than in our own when it comes to the interpretation of those rights."

173. THE CONSERVATIVE PARTY, *supra* note 3, at 6.

174. Grainne Mellon, *British Plans to Repeal Human Rights Act Misguided and Unnecessary*, IRISH TIMES (Nov. 10, 2015), <http://www.irishtimes.com/opinion/british-plans-to-repeal-human-rights-act-misguided-and-unnecessary-1.2424110> (last visited Mar. 4, 2016).

175. "I am attached to the principle of parliamentary sovereignty. . . . Parliamentary sovereignty is the essence of our democracy." House of Lords, The Select Committee on the Constitution, Oral Evidence Session with the Right Honourable Michael Gove MP, former Lord C. Chancellor and Secretary of State for Justice, Dec. 2, 2015. Then, on February 2, 2016, Mr. Gove stated, "we need to ensure that we uphold parliamentary sovereignty." In the Conservative's proposals in 2014, there are several references to the UK courts having the "final say" and parliamentary sovereignty: "The UK Courts, not Strasbourg, will have the final say in interpreting Convention Rights, as clarified by Parliament . . . It [referring to a British Bill of Rights] will ensure that Parliament is the ultimate source of legal authority, and that the Supreme Court is indeed supreme in the interpretation of the law . . . In all matters related to our international commitments, Parliament is sovereign . . . The European Court of Human

those who adopt a broad interpretation of "incorporation" to go beyond "incorporating" the text of the ECHR and to include Strasbourg rulings, it follows that any forthcoming Bill of Rights that prevents UK courts from "taking into account" Strasbourg jurisprudence and "the positions of other Council of Europe institutions"<sup>176</sup> could result in lowering rights protection. This may result in a breach of the Belfast/Good Friday Agreement, as it is "remov[ing] one route of effective protection . . . [of] international oversight."<sup>177</sup> Such oversight is essential in states where parliamentary sovereignty is sacrosanct (such as the United Kingdom) as it is a way of "controlling [States'] unfettered power."<sup>178</sup>

Another way of limiting the effectiveness of this "international oversight" is by reducing the European Court of Human Rights to an advisory body.<sup>179</sup> Other real possibilities include limiting the UK Bill of Rights to "the most serious cases";<sup>180</sup> preventing "terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation";<sup>181</sup> and limiting the reach of a UK Bill of Rights to the UK so that British troops abroad can "operate effectively in a conflict zone" without

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Rights is no longer binding over the UK Supreme Court . . . Labour's Human Rights Act undermines the sovereignty of Parliament, and democratic accountability to the public." THE CONSERVATIVE PARTY, *supra* note 3, at 4-6. Further, in February 2016, the former Prime Minister supported the idea of a Sovereignty Act. Such an Act never materialized and was not included in the Queen's Speech in 2016. See Mark Elliot, *Why a Sovereignty Act Makes No Legal Sense*, PUB. L. FOR EVERYONE BLOG (May 27, 2015), <https://publiclawforeveryone.com/2015/05/27/why-a-sovereignty-act-makes-no-legal-sense-a-short-response-to-daniel-hannan-mep/> (last visited June 7, 2016); see also Charles Moore, *The Red Herring that was the Sovereignty Bill*, TELEGRAPH (Mar. 7, 2016), <http://www.telegraph.co.uk/news/newsttopics/eureferendum/12185548/The-red-herring-that-was-the-Sovereignty-Bill.html> (last visited Mar. 25, 2016). The most recent reference to the sovereignty of Parliament is in the Queen's speech in May 2016, where reference is made that "her ministers will uphold the sovereignty of Parliament." THE QUEEN'S SPEECH 2016, *supra* note 157. For a detailed analysis on this point about sovereignty and the British Bill of Rights, see Mark Elliot, *The 2016 Queen's Speech and the Constitution*, PUB. L. FOR EVERYONE BLOG (May 18, 2016), <https://publiclawforeveryone.com/2016/05/18/the-2016-queens-speech-and-the-constitution/>.

176. Human Rights Act (1998) § 2 (Eng.).

177. Gormally, *supra* note 4; see also Murray et al., *supra* note 5; Gallagher et al., *supra* note 5.

177. Gormally, *supra* note 5.

178. *Id.*

179. THE CONSERVATIVE PARTY, *supra* note 3.

180. *Id.*

181. CONSERVATIVE PARTY MANIFESTO, *supra* note 156, at 147.

being "constrained . . . by a variety of laws and treaties."<sup>182</sup> This raises issues of compatibility with not only the ECHR, but also international human rights and humanitarian law that the United Kingdom signed and/or are *jus cogens*.

Further, to render the European Court of Human Rights an advisory body directly conflicts with Article 46(1) of the ECHR, which requires Member States to "undertake to abide by the judgment of the court in any case to which they are a parties."<sup>183</sup> Nor, given its lack of clarity, would limiting cases to "the most serious cases" be compatible with the ECHR. The government's plans are therefore trying to reconcile the irreconcilable: instead of building upon the protections of the Human Rights Act, the British government is in the "unusual and unedifying position"<sup>184</sup> of proposing to repeal and weaken existing human rights protection. Such a Bill would therefore not only be "tamper[ing] with existing human rights protection"<sup>185</sup> but risk undermining the role the ECHR plays in Northern Ireland under the Good Friday/Belfast Agreement. The findings of the recent House of Lords EU Justice subcommittee on a British Bill of Rights concludes that the ECHR and the Human Rights Act plays a "vital role" in the implementation of the Good Friday/Belfast Agreement.<sup>186</sup>

The centrality of the Good Friday/Belfast Agreement has also been recognized by the Council of Europe Commissioner for Human Rights. The Commissioner recognizes that the ECHR's role has a "particular resonance" in Northern Ireland . . . where the ECHR is part of the Good Friday Agreement, and where the Human Rights Act underpins key policing institutions."<sup>187</sup> The Irish government has also expressed similar sentiments:

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182. The House of Lords, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act, *supra* note 166.

<sup>183</sup> The European Convention on Human Rights, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

184. Mellon, *supra* note 174.

185. June 15, 2015, Parl Deb HC (6<sup>th</sup> ser.) (2015) col. 108, (UK) (Clause 2, the Sewel Convention).

186. The House of Lords European Union Committee, The UK, the EU and a British Bill of Rights, 2015-16, HL 139, at 48, <http://www.publications.parliament.uk/pa/ld/201516/ldselect/ldcom/139/139.pdf> (last visited June 6, 2016).

187. Nils Muižnieks, Comm'r for Human Rights, *UK: Forthcoming Reforms to Human Rights Law Must Not Weaken Protection*, COUNCIL EUR. (Jan. 22, 2016), <http://www.coe.int/en/web/commissioner/-/uk-forthcoming-reforms-to-human-rights-law-must-not->

[T]he Good Friday/Belfast Agreement is clear that the European Convention on Human Rights must be incorporated into law in Northern Ireland..... In addition, a strong human rights framework, including external supervision by the European Court of Human Rights, has been an essential part of the peace process and anything that undermines this, or is perceived to undermine this, could have serious consequences for the operation of the Good Friday/Belfast Agreement.<sup>188</sup>

More recently, the Irish government "expressed a very strong view"<sup>189</sup> about the British government's plans to repeal the Human Rights Act. The opposition from the Irish government is welcomed, and if the British government continues with its proposals and produces a scenario type two Bill of Rights (referred to earlier), the Irish government will have to do more than send strongly worded letters and issue ministerial statements expressing its strong opposition. It will have to hold the British government accountable for failing to fulfill its commitment from the 1998 peace agreement to initiate a process to progress a Northern Ireland Bill of Rights. This argument emanates from the Agreement's dual status: it is both a multi-party agreement amongst the main political parties<sup>190</sup> and a bi-lateral treaty between the British and Irish governments.<sup>191</sup> Article 2 of the bilateral agreement requires the UK government to implement provisions of

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weaken-protection (last visited Apr. 6, 2016). Nils Muižnieks visited the United Kingdom on January 22, 2016. Following this visit, he published this speech.

188. Letter from Frances Fitzgerald, Minister for Justice and Equality, to Michael Gove MP, the then Lord Chancellor (Feb. 3, 2015), <http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/RepealofHRAeffectonEULaw/Minister-Frances-Fitzgerald-toSofSJus.pdf>.

189. Pat Leahy, *Post-Brexit Repeal of the Human Rights Act Opposed by State*, IRISH TIMES (July 11, 2016), <http://www.irishtimes.com/news/world/uk/post-brexit-repeal-of-human-rights-act-in-north-opposed-by-state-1.2717402> (last visited Aug. 9, 2016).

190. See generally Christine Bell, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA (2008) (providing further information on the duality of the Good Friday/Belfast Agreement). With the exception of the DUP who formally opposed and is not a signatory of the Agreement.

191. Compare Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (Apr. 10, 1998), 2114 U.N.T.S. 473, with Northern Ireland Peace Agreement (The Good Friday Agreement) (Oct. 4, 1998), Gr. Brit.-N. Ir., [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136652/agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf) (last visited Mar. 11, 2016). The Good Friday Agreement is an Annex to the treaty and is referred to in its core provisions. The Agreement was incorporated as a treaty between the United Kingdom and Ireland and lodged with the United Nations. See 4705 U.N.T.S. 50.

the Good Friday/Belfast Agreement.<sup>192</sup> Under the provisions of the Good Friday/Belfast Agreement, the NIHRC was mandated to advise on "rights supplementary to the ECHR,"<sup>193</sup> and on December 10, 2008, the NIHRC submitted this advice to the British government.<sup>194</sup> The NIHRC interpreted its mandate for advice on a Bill of Rights for Northern Ireland to be "ECHR-plus," given the clauses in the agreement of which it had been asked to take account.<sup>195</sup> These clauses "invited"<sup>196</sup> the Commission "to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, [and] to reflect the particular circumstances of Northern Ireland."<sup>197</sup> As the Chief Commissioner of the NIHRC notes in his evidence to the Irish Parliament in 2015, this provision is an "implicit recognition of those rights and their enforcement in practice."<sup>198</sup> As Murray et. al. argue in their 2015 report, it is this section of the Agreement that provides a *prima facie* case that the "baseline of the relationship between the law of Northern Ireland and the ECHR should be maintained."<sup>199</sup>

The peace accord from 1998 has therefore "the agreement of both governments in terms of an international Agreement, [which] cannot be ignored; it has to be accepted."<sup>200</sup> It is an agreement between the Executive's political parties (given that the subsequent St Andrews Agreement included the DUP) and the British and Irish governments, so all of these stakeholders are required to fulfill their

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192. See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Gr. Brit.-N. Ir., art. 2 (Apr. 10, 1998), 2114 U.N.T.S. 473 Article 2.

193. Belfast/Good Friday Agreement, *supra* note 10, § 6 (covering "Rights, Safeguards and Equality of Opportunity.").

194. *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, *supra* note 13.

195. Murray et al., *supra* note 5, at 21.

196. Northern Ireland Peace Agreement (The Good Friday Agreement), Gr. Brit.-N. Ir., Section 6, paragraph 4, Safeguards and Equality of Opportunity, Oct. 4, 1998.

197. *Id.*

198. Les Allamby, Chief Comm'r, *Northern Ireland Human Rights Commission Briefing on the Proposal to Repeal the United Kingdom Human Rights Act 1998 and its Potential Effect on the Good Friday Agreement*, N. IR. HUM. RTS. COMM'N (June 3, 2015), [http://www.ihrc.ie/download/pdf/nihrc\\_oireachtas\\_briefing\\_good\\_friday\\_agreement\\_25\\_june\\_2015.pdf](http://www.ihrc.ie/download/pdf/nihrc_oireachtas_briefing_good_friday_agreement_25_june_2015.pdf) at 3 (last visited Mar. 7, 2016).

199. Murray et al., *supra* note 5, at 42.

200. Interview with Alban Maginness, MLA, SDLP, in Belfast (May 1, 2013).



obligations as set out in this accord.<sup>201</sup> Further under Article 31 of the Vienna Convention on the Law of Treaties, to which the United Kingdom is a party, the United Kingdom has the obligation to fulfill its promises in good faith and in accordance with its subsequent actions.<sup>202</sup> Under this article, it is arguable that the UK government has not fulfilled its promises to legislate. As part of its guarantee, in the Joint Declaration of 2003, the UK government would have been expected to set out its own legislative proposals with the receipt of the NIHRC's advice to the Secretary of State in 2008. However, in the terms of the Vienna Convention, no "subsequent actions" have followed its 2009 consultation on the NIHRC advice<sup>203</sup> and a continuing stalemate has been accentuated by the UK government's proposals on the repeal of the Human Rights Act.

As a bilateral interstate agreement, the United Kingdom arguably owes obligations to the Republic of Ireland.<sup>204</sup> In that context, one possibility is international litigation at the International Court of Justice ("ICJ").<sup>205</sup> Both the United Kingdom and the Irish have recognized the compulsory jurisdiction of the ICJ. It is technically possible, therefore, for the Irish government to bring a case against the UK government for breaching the Good Friday/Belfast Agreement. However, there is an important caveat—a caveat imposed by the Irish government itself, as it does not recognize

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201. *See id.* "We will establish a forum on a Bill of Rights and convene its inaugural meeting in December 2006." *See also* Agreement at St Andrews, Gr. Brit.-N. Ir. (Oct. 13, 2006), 'Human Rights, Equality, Victims and Other Issues' Annex B, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136651/st\\_andrews\\_agreement-2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf) (last visited May 2, 2016).

202. Vienna Convention on the Law of Treaties art. 31:1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). *See also* Agreement at St Andrews, *supra* note 201, at art. 31:2 ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . ."), at art. 31:3 ("There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.").

203. For reports supporting this conclusion, *see, e.g.*, Murray et al., *supra* note 5, at 23; Gallagher et al., *supra* note 5, at 63-66.

204. *See generally* Murray et al, *supra* note 5, at 23. This report argues that as international treaties owe duties to individuals as well as to states, the United Kingdom is in violation of its commitments to the people of Northern Ireland.

205. Due to space constraint, this article focuses primarily on litigation as one possible mechanism. For other options, *see* Gallagher et al., *supra* note 5, at 63-66; Murray et al., *supra* note 5, at 27-58.

compulsory jurisdiction if there are issues relating to Northern Ireland.<sup>206</sup>

Another possibility is to lodge an interstate case using the special procedure of Article 33 of the ECHR (brought by one member of the Council of Europe against another) if the government proceeds with its plans of repealing the Human Rights Act.<sup>207</sup> Any Contracting Party under the ECHR would be effectively fulfilling its obligations under Article 46 (1) of the ECHR. If the United Kingdom were to proceed with its plans to not comply with decisions of the European Court of Human Rights, viewing them as advisory only, this would be a violation of international law with the United Kingdom arguably breaching its obligations to other Contracting Parties.<sup>208</sup> While such a decision would not be "taken lightly,"<sup>209</sup> it is open to the Irish government to consider taking such action if an "ECHR-minus"<sup>210</sup> Bill of Rights prevails.<sup>211</sup> In that context, the political stalemate on the Northern Ireland Bill of Rights could potentially be shifted.

The second question raised earlier is whether the consent of the devolved regions is required for the introduction of both a UK Bill of Rights and Brexit under the Sewel Convention.<sup>212</sup> The Sewel

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206. This idea is borrowed from Professor Chris McCrudden's presentation on "The Constitutional Significance of the Human Rights Act in Northern Ireland" at a conference on "The Impact of the Human Rights Act in Northern Ireland," Belfast (Jan. 26, 2016), on file with the author. See also Chris McCrudden & Gordon Anthony, *Potential Impact of Repealing the Human Rights Act on EU Law*, Oral Evidence to the EU Justice Subcommittee (Jan. 26, 2016); *EU Justice Sub-Committee*, PARLIAMENT LIVE (Jan. 26, 2016), <http://parliament.live.tv/Event/Index/1392eebe-aa68-4ad5-83b2-3aa2eca7440e>.

207. European Convention on Human Rights art. 33 (Nov. 4, 1950). Article 33 states "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party." See also Murray et al., *supra* note 5, at 56-57 (providing further discussion on this option).

208. Gallagher et al., *supra* note 5, at 63-64.

209. *Irish Government to Reopen the Case of the Hooded Men*, IRISH IN BRITAIN, <http://www.irishinbritain.org/news-and-events/124/irish-government-to-reopen-the-case-of-the-hooded-men> (last visited Mar. 16, 2016).

210. Murray et al., *supra* note 5, at 21.

211. *Id.* Murray, O'Donoghue, and Warwick highlight the fact that the Irish Government has re-opened a previous inter-state case (*Ireland v. United Kingdom* 2 Eur. H. R. Rep. EHRR 25 (1978)) shows its commitment to maintaining human rights standards.

212. This Convention is named after Lord Sewel, who stated during the debate on the Scottish Bill 1998 that "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament." See 592 Parl Deb HL (1998) col. 768-80021. Thereafter, this was referred to as the Sewel Convention.

Convention recognizes that the Westminster Parliament has the ultimate authority to pass legislation on all matters, irrespective of whether they are devolved/transferred or reserved/excepted. However, the Westminster Parliament will not legislate on devolved/transferred matters in the absence of an "agreement/legislative consent motion" of the devolved legislature.<sup>213</sup> The applicability of this Convention, as far as repealing the Human Rights Act is concerned, hinges on whether it is a devolved or a reserved matter. The UK government's position is unclear on this: "it is neither reserved nor devolved."<sup>214</sup> To quote Lord Blair of Boughton, "[i]t is like saying that you feel a little bit pregnant; it is just not possible. It is either reserved or devolved."<sup>215</sup> To shed some clarity on this issue, the authors put forward two schools of thought.<sup>216</sup> Under a narrow reading of the Sewel Convention, as the Human Rights Act is not a devolved/transferred matter,<sup>217</sup> any repeal of the Human Rights Act arguably would not violate the Sewel Convention, as it would not be

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213. The Sewel Convention is embodied in the September 2012 Memorandum of Understanding ("MoU") between the UK Government and the devolved administrations in Scotland, Wales, and Northern Ireland. In the explanatory section, it states: "This paper, superseding Command Paper Cm 5240 published in December 2001, comprises a series of agreements between the UK Government and the devolved administrations in Scotland, Wales and Northern Ireland setting out the principles which underlie relations between them. It is not intended that these agreements should be legally binding." DEVOLUTION MEMORANDUM OF UNDERSTANDING AND SUPPLEMENTARY AGREEMENTS BETWEEN THE UNITED KINGDOM GOVERNMENT, THE SCOTTISH MINISTERS, THE WELSH MINISTERS, AND THE NORTHERN IRELAND EXECUTIVE COMMITTEE PRESENTED TO PARLIAMENT BY COMMAND OF HER MAJESTY AND PRESENTED TO THE SCOTTISH PARLIAMENT AND THE NORTHERN IRELAND ASSEMBLY AND LAID BEFORE THE NATIONAL ASSEMBLY FOR WALES 3 (October 2013), [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) (last visited Mar. 9, 2016). The MoU describes the Sewel Convention in similar language: "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." *Id.* at 8.

214. Michael Gove, House of Lords, Revised Transcript of Evidence Taken Before The Select Committee on the European Union, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing the Human Rights Act, Evidence Session no. 8, Questions 79-90 (Feb. 2, 2016).

215. Lord Blair of Boughton, House of Lords, The Select Committee on the European Union Justice Sub-Committee Inquiry on Potential Impact on EU Law of Repealing the Human Rights Act, Evidence Session No. 8, Questions 79 – 90 (Feb. 2, 2016).

216. This idea is borrowed from Chris McCrudden. *See supra* note 206 and accompanying text.

217. Northern Ireland Act 1998, c. 47, § 7 (1) (b).

legislating upon a Northern Ireland/devolved issue. However, under a broader reading of the Convention, any repeal of the Human Rights Act would trigger the Convention, as the UK parliament would be legislating "with regard to devolved matters . . . which affects the scope of the legal authority of a devolved legislature or a devolved administration."<sup>218</sup> This is due to the explicit wording of the Northern Ireland Act, as it expressly requires the Northern Ireland Assembly and Executive to observe and implement "obligations under the Human Rights Convention,"<sup>219</sup> and the devolved institutions are expressly prohibited from diminishing the ECHR rights and protections.<sup>220</sup>

If the UK Bill of Rights was to reduce the existing protections provided under the ECHR (as in scenario two above), the Sewel Convention would apply.<sup>221</sup> Would such a consent motion be forthcoming? This is hard to predict given the narrow vote in a recent debate in the Northern Ireland Assembly on the repeal of the Human Rights Act.<sup>222</sup> The Assembly Members narrowly voted against

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218. Alan Trench, *Legislative Consent and the Sewel Convention*, DEVOLUTION MATTERS (June 2016), <https://devolutionmatters.wordpress.com/the-sewel-convention/>. For a lively discussion on the differing views on this issue, see Iain Jamieson, *The Repeal of the Human Rights Act and the Sewel Convention in Scotland*, SCOTTISH CONST. FUTURES F. (June 12, 2015), <http://www.scottishconstitutional-futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/5741/Iain-Jamieson-The-Repeal-of-the-Human-Rights-Act-and-the-Sewel-Convention-in-Scotland.aspx>; see also Mark Elliot, *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?*, U.K. CONST. L. ASS'N (May 16, 2015), <https://ukconstitutionallaw.org/2015/05/16/hra-watch-reform-repeal-replace-mark-elliott-could-the-devolved-nations-block-repeal-of-the-human-rights-act-and-the-enactment-of-a-new-bill-of-rights/>.

219. Northern Ireland Act 1998, c. 47, sch. 2, ¶ 3.

220. Northern Ireland Act 1998, c. 47, § 24(1)(a). The same applies to Scotland and Wales under the Scotland Act 1998, § 29(2)(d), § 57(2) and the Government of Wales Act 2006, c. 32, § 81(1).

221. Bates et al., *supra* note 5, at 10-14; Gallagher et al., *supra* note 5, at 6, 53; Gormally, *supra* note 5; Murray et al., *supra* note 5, at 13-15; Colm O'Conneide, *Human Rights, Devolution and the Constrained Authority of the Westminster Parliament*, U.K. CONST. L. BLOG (Mar. 4, 2013), <http://ukconstitutionallaw.org>.

222. 105 NIA Deb (2015) col. 2 1, <http://www.theyworkforyou.com/ni/?id=2015-06-01.6.1#g6.79>. House of Lords EU Justice subcommittee on the Potential Impact of Repealing the Human Rights Act on EU Law to the Parliamentary EU Justice Sub-Committee, PARLIAMENT LIVE (Jan. 26, 2016), <http://parliamentlive.tv/Event/Index/1392eebe-aa68-4ad5-83b2-3aa2eca7440e> (last visited Mar. 24 2016). In oral evidence by Professors McCrudden and Anthony, they note that such consent would not be forthcoming. See McCrudden & Anthony, *supra* note 206. This reflects the final conclusions of the House of Lords EU Justice

repealing the Human Rights Act, with the two main Unionist parties voting in favor.<sup>223</sup> It is possible that the UK government could ignore the Convention, as it is not legally enforceable,<sup>224</sup> but it could be entering into "unchartered constitutional territory."<sup>225</sup> As a leading constitutional lawyer states, "the justiciability of the Convention will ultimately be decided by the UK Supreme Court."<sup>226</sup> Until this matter is agreed,<sup>227</sup> several commentators agree that if the UK government

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subcommittee's report. See The House of Lords European Union Committee, *The UK, the EU and a British Bill of Rights*, 12<sup>th</sup> Report of Session 2015-2016, May 9, 2016 ("The evidence demonstrates that the Northern Ireland Assembly [is] unlikely to give consent to a Bill of Rights which repealed the Human Rights Act."). House of Lords EU Justice Subcommittee, *The UK, The EU, and a British Bill of Rights*, 2015-16, HL 139, <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf> at 52 (last visited June 6, 2016).

223. Gormally, *supra* note 5. Even if such a motion were to be introduced, this would "almost certainly be met with a Petition of Concern and thereby fail to achieve the necessary agreement."

224. This is clearly stated in the MoU between the UK government and the devolved regions: "It is not intended that these agreements should be legally binding." DEVOLUTION MEMORANDUM OF UNDERSTANDING AND SUPPLEMENTARY AGREEMENTS BETWEEN THE UNITED KINGDOM GOVERNMENT, THE SCOTTISH MINISTERS, THE WELSH MINISTERS, AND THE NORTHERN IRELAND EXECUTIVE COMMITTEE PRESENTED TO PARLIAMENT BY COMMAND OF HER MAJESTY AND PRESENTED TO THE SCOTTISH PARLIAMENT AND THE NORTHERN IRELAND ASSEMBLY AND LAID BEFORE THE NATIONAL ASSEMBLY FOR WALES 3 (Oct. 2013), [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). However, it is important to note that the Sewel Convention is both a Convention and a statute in Scotland. This followed a recommendation by the Smith Commission. See THE SMITH COMMISSION, REPORT OF THE SMITH COMMISSION FOR FURTHER DEVOLUTION OF POWERS TO THE SCOTTISH PARLIAMENT 13 (Nov. 27, 2014) [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28\\_11\\_14\\_smithcommission.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28_11_14_smithcommission.pdf). This issue was also debated in the Scottish Parliament. See *The Sewel Convention, Scotland Bill*, Clause 2 June 2015, Parl Deb HC (2015) c10815 (2015). The Scotland Act 2016 received royal assent on March 23, 2016. See also Scotland Act 2016, § 2, for a specific reference to the Sewel Convention.

225. The House of Lords European Union Committee, *The UK, the EU and a British Bill of Rights*, 12<sup>th</sup> Report of Session 2015-2016 42 (May 9, 2016), <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf>.

226. See *id.*; Michael Zander, *Will It Ever Come to Pass?* NEW L. J. 11, 12 (2015). The issue of justiciability was also discussed in the House of Lord's Select Committee on the Constitution. House of Lords, Revised transcript of evidence taken before The Select Committee on the European Union, Justice Sub-Committee Inquiry on the Potential Impact on EU Law of Repealing the Human Rights Act, Evidence Session No. 8, *supra* note 159, at Questions 79-90. During this debate, Mr. Gove acknowledged that an "attempt" could be made by someone to bring a case before the courts, but he hoped that the courts would agree with the Government's intention and admitted that this would be a matter for the courts to decide.

227. Chris McCrudden uses what is referred to as the *Partition Reference* case in Canada, *Re Amendment of the Constitution of Canada* (1981) 1 S.C.R. 753, as an example

were to impose what has been labeled "a major legislative imposition"<sup>228</sup> without the consent of the devolved administrations, this unilateral action could be viewed as not only "unconstitutional,"<sup>229</sup> but such legislation would be "more difficult to achieve politically."<sup>230</sup> As the government itself has admitted:

... the devolution settlements not only acknowledge, but support the idea that a blanket, "one-size-fits-all" approach is not always appropriate for the diverse histories, needs, and priorities across the UK. There have been and remain different levels of demand, in different contexts, for devolution in England, Scotland, Wales and Northern Ireland. Devolution is asymmetric in nature precisely to reflect and support the variations of all these factors.<sup>231</sup>

To proceed with what has been described as an "unpalatable"<sup>232</sup> course of action would undermine and be "at variance with the devolution settlement[s],"<sup>233</sup> and potentially risking undermining the relationship between the constituent parts of the United Kingdom.<sup>234</sup> The Joint Committee on Human Rights also recognizes the importance of giving the devolved institutions a "full opportunity to contribute" on this issue.<sup>235</sup> Likewise, the Council of Europe

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where the justiciability of a convention was considered by the Supreme Court of Canada. *See* McCrudden, *supra* note 206; *see also* House of Lords' European Union Committee '12th Report of Session 2015–16' HL Paper 139, May 9, 2016; Peter C. Oliver *Constitutional Conventions in the Canadian Courts*, UK CONST. L. ASS'N (Nov. 4, 2011), <https://ukconstitutionallaw.org/2011/11/04/peter-c-oliver-constitutional-conventions-in-the-canadian-courts/>.

228. Murray et al. *supra* note 5.

229. *Id.*

230. Bates et al., *supra* note 5, at 12.

231. Government Response to the House of Commons Political and Constitutional Reform Committee Fourth Report of Session 2012-13: Do We Need a Constitutional Convention for the UK (2013), Cm. 8749, at 7.

232. Gallagher et al, *supra* note 5, at 54.

233. Murray et al., *supra* note 5, at 15.

234. *Id.*

235. Letter from the Chair of the Joint Comm'n. on Human Rights to Mitchell McLaughlin, former Speaker of the N. Ir. Assembly (Jan. 27, 2015), [http://www.parliament.uk/documents/joint-committees/human-rights/BoR\\_purdah\\_letter\\_\(NI\).pdf](http://www.parliament.uk/documents/joint-committees/human-rights/BoR_purdah_letter_(NI).pdf) (last visited Apr. 6, 2016). The Speaker of the Northern Ireland Assembly replied to this letter on February 29, 2016 stating that he is "glad" the Committee is seeking to ensure the devolved regions play an important role in this debate and highlighted the division within the Northern Ireland Assembly on repealing the Human Rights Act citing the assembly debate on June 1, 2015. Letter from Mitchel McLaughlin to Rt Hon Harriet Harman MP/Chair of the Joint Comm'n-

Commissioner for Human Rights has encouraged more consultation with the devolved regions.<sup>236</sup> In contrast, the former Lord Chancellor was reluctant to "pronounce definitively"<sup>237</sup> on this matter as he wanted to wait and see "what is in any given Bill in order to be absolutely certain as to whether a legislative consent Motion might be required in any of the devolved legislatures."<sup>238</sup> Arguably, this means that the government's position as to whether a legislative consent motion is necessary is "an open question."<sup>239</sup>

The British government's position on whether consent from the Northern Ireland Assembly (and the other devolved assemblies) is needed to leave the European Union following Brexit is also an open question. As far as the British government is concerned, although they will be consulting and working with the Northern Ireland Executive and the Scottish government, "ultimately it is parliament's decision whether we [the government] repeal the 1972 European Communities Act or whether we don't."<sup>240</sup> While we do not disagree with one of the most fundamental doctrines underpinning UK constitutional law as EU law is entrenched in the devolution settlement,<sup>241</sup> the House of Lords report on the process of withdrawing from the European Union states it "has no reason"<sup>242</sup> to believe that legislative consent is not needed from all of the devolved assemblies. Would such consent be forthcoming? One source has estimated that about one-third of the

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on Human Rights (Feb. 29, 2016), [http://www.parliament.uk/documents/joint-committees/human-rights/Letter\\_from\\_Mitchel\\_Mclaughlin\\_290216.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Mitchel_Mclaughlin_290216.pdf) (last visited Apr. 6, 2016).

236. The Council of Europe's Commissioner for Human Rights, Nils Muižnieks, visited the United Kingdom on January 22, 2016. Following this visit, he published a speech. *See* Muižnieks *supra* note 187.

237. House of Lords, Revised transcript of evidence taken before The Select Committee on the Constitution, Oral Evidence with the Rt. Hon. Michael Gove MP, former Lord Chancellor and Secretary of State for Justice, Evidence Session No. 1, Questions 1-12 (Dec. 2, 2015).

238. *Id.*

239. *Id.*

240. *EU referendum: Theresa Villiers Says Parliament is Sovereign*, BBC NEWS (June 26, 2016), <http://www.bbc.co.uk/news/uk-northern-ireland-36633939>. The European Communities Act is the piece of legislation that allowed the United Kingdom to join the then European Economic Community.

241. Northern Ireland Act 1998 § 6(2)(d).

242. HM GOVERNMENT, THE PROCESS OF WITHDRAWING FROM THE EUROPEAN UNION (Feb. 2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504216/The\\_process\\_for\\_withdrawing\\_from\\_the\\_EU\\_print\\_ready.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504216/The_process_for_withdrawing_from_the_EU_print_ready.pdf) (last visited Aug. 8, 2016).

Assembly's members support Brexit (DUP, TUV, and some from the UUP, although the leader of the UUP voted to remain, and possibly People Before Profit).<sup>243</sup> The other parties (Sinn Féin, Alliance, SDLP, and the Green Party) are pro-Remain.<sup>244</sup> Indeed, all of the pro-Remain parties are part of a current legal challenge arguing that if the prime minister, Theresa May, fails to address legal obligations relating to Northern Ireland and to the peace process before the legal mechanism to withdraw from the European Union is triggered,<sup>245</sup> the political parties alongside human rights activists will launch a legal case.<sup>246</sup> One of the issues raised by the legal team representing the cross-community of coalition of politicians and human rights activists is the need for a legislative consent motion to be carried out by the Assembly.

If such legislative consent is not forthcoming, could the British government proceed with Brexit even though the democratic will of the Northern Ireland electorate voted to remain within the European Union? As stated earlier, under the doctrine of parliamentary constitutionally, the UK parliament has the authority to do so. As one Northern Ireland politician states:

. . . ultimately there [is] nothing the regional parliaments could do  
 . . . We would have the opportunity to make decisions over  
 specific EU rules and laws that actually apply in Northern Ireland  
 . . . However, parliament remains with primacy, it can take back

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243. Jonathan Tonge, *Brexit: Leaving May Need Consent of Scotland, Wales and Northern Ireland*, IRISH TIMES (June 27, 2016), <http://www.irishtimes.com/news/world/uk/brexit-leaving-may-need-consent-of-scotland-wales-and-northern-ireland-1.2700810>.

244. Sinn Féin, Alliance, SDLP and the Green Party all campaigned for a remain vote. *See DUP Confirms It Will Campaign for Brexit in Leave/Remain Referendum*, BELFAST TELEGRAPH (Feb. 20, 2016), <http://www.belfasttelegraph.co.uk/news/northern-ireland/dup-confirms-it-will-campaign-for-brexit-in-leaveremain-referendum-34470806.html>.

245. Article 50 of the Treaty on European Union to the European Council allows a member state to withdraw from the European Union. This allows for a two-year negotiation period between the United Kingdom and the rest of the EU member states. *See HOUSE OF COMMONS LIBRARY, LEAVING THE EU, 9-14* (July 1, 2013), <http://researchbriefings.files.parliament.uk/documents/RP13-42/RP13-42.pdf>.

246. Steven McCaffery, *Brexit Set to Face Legal Challenge in Northern Ireland*, DETAIL (July 25, 2016), <http://www.thedetail.tv/articles/brexit-set-to-face-legal-challenge-in-northern-ireland>. There are also other legal cases pending in London. *See Mishcon de Reya, Article 50 Process on Brexit Faces Legal Challenges to Ensure Parliamentary Involvement*, MISHCON DE REYA LLP (July 3, 2016), [http://www.mishcon.com/news/firm\\_news/article\\_50\\_process\\_on\\_brexit\\_faces\\_legal\\_challenge\\_to\\_ensure\\_parliamentary\\_involvement\\_07\\_2016](http://www.mishcon.com/news/firm_news/article_50_process_on_brexit_faces_legal_challenge_to_ensure_parliamentary_involvement_07_2016).



power from Holyrood, it can take back power from the assembly, so let's not kid ourselves.<sup>247</sup>

On a constitutional level, the authors agree with this statement. However, as EU law is part of the devolution settlement, such an approach would be politically hazardous, as it would greatly undermine the Good Friday/Belfast Agreement. One of the key provisions of the Agreement is the right of citizenship that entitles anyone born in Northern Ireland to have dual citizenship (meaning Irish or British or both). As Fintan O'Toole, the Irish Times journalist asks, "[w]hat does that mean in the new dispensation? Can someone be both an EU citizen and not an EU citizen?"<sup>248</sup> While Westminster can constitutionally assert its right to withdraw Northern Ireland and Scotland from the European Union, it ignores "the reality that Westminster is no longer politically capable of enforcing that right."<sup>249</sup>

While a legislative consent motion for Brexit and for repealing the Human Rights Act remains an open question, this is in stark contrast to the British government's position on a Northern Ireland Bill of Rights, where legislative consent amongst the Northern Ireland political parties is demanded before the same government will introduce legislation at Westminster:

... a legislative consent motion must be passed by the Assembly in circumstances where the government brings forward any legislation at Westminster such as a Bill of Rights which will have a significant impact on devolved policy. ... The British government is happy to move, but there is no point in moving until we have achieved some sort of consensus which is very much lacking at the moment.<sup>250</sup>

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247. *EU referendum: Theresa Villiers Says Parliament is Sovereign*, *supra* note 240.

248. Fintan O'Toole, *The English Have Placed a Bomb Under the Irish Peace Process*, THE GUARDIAN (June 24, 2016), <https://www.theguardian.com/commentisfree/2016/jun/24/northern-irish-peace-sacrificed-english-nationalism>.

249. Jo Murkens, *Westminster Must Choose Between Leaving the EU and Retaining the UK*, DEMOCRATIC AUDIT UK (July 6, 2016), <http://www.democraticaudit.com/?p=23214>.

250. Owen Paterson, Secretary of State for Northern Ireland, *quoted in* Mark Hennessy, *Stormont Agreement Needed for Rights Bill*, IRISH TIMES (Nov. 23, 2010); *see also* Theresa Villiers, former Secretary of State for Northern Ireland, Westminster Hall (2013) in 16 Parl Deb WH (6th ser.) (2013) col. 197 (UK); Letter from Owen Patterson, Secretary of State for Northern Ireland (2010–12) to the leaders of the Northern Ireland Political Parties, received by the Northern Ireland Assembly (Sept. 22, 2011) (on file with the authors).

However, a precedent exists: in 2007, the British government intervened at the regional level because the Northern Ireland Assembly was unable to reach consensus on the transposition of the EU Gender Directive on Goods and Services (2004/113/EC). This Directive implements the principle of equal treatment between men and women in the access to and supply of goods and services. Due to lack of cross-party agreement on the issue of transgender in the regulations,<sup>251</sup> when consent was not forthcoming, the British government took forward the legislation for Northern Ireland.<sup>252</sup>

Under section 26 of the Northern Ireland Act of 1998, the UK government has the power to direct action (including legislation) to be taken by a Northern Ireland Minister in order to fulfill international obligations.<sup>253</sup> However, these powers have not been exercised in relation to the Northern Ireland Bill of Rights. Instead, the government has invented a requirement of cross-party consensus<sup>254</sup> to implement the international obligation of the Northern Ireland Bill of Rights. As the British government is well aware, there is no such consensus and, as such, the political stalemate continues. The next section addresses how this political stalemate could potentially be shifted.

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251. The then First Minister opposed introducing legislation on the basis that he was “not agreeable” due to “the explicit inclusion of reference to transgender or gender reassignment in the regulations.” As the Committee on the Administration of Justice (“CAJ”) points out, “whilst gender reassignment is a different matter to sexual orientation, a DUP colleague on the Committee, Stephen Moutray, stated their concern was that ‘Bible-believing Christians would be put in a position where they could have to take part in ceremonies at gay weddings, or if they were a guesthouse owner, they would have to give a double room to two gay men.’” *CAJ’s Submission to the Department of Culture, Arts, and Leisure Consultation on Tograi Faoi Choinne Bille Gaeilgre (Proposals for an Irish Language Bill)*, COMM. ADMIN. JUSTICE (May 2015), [http://www.caj.org.uk/files/2015/05/08/S443\\_CAJs\\_submission\\_to\\_DCAL\\_consultation\\_on\\_Irish\\_Language\\_Bill\\_May\\_2015.pdf](http://www.caj.org.uk/files/2015/05/08/S443_CAJs_submission_to_DCAL_consultation_on_Irish_Language_Bill_May_2015.pdf).

252. The authors are grateful to Daniel Holder, Deputy Director of the CAJ, for bringing this example to our attention.

253. Northern Ireland Act 1998 § 26(2) (“If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken.”).

254. See *supra* note 69 and accompanying text.

*VI. THE WAY FORWARD*

We conclude that an agreed framework between the governments would provide an opportunity to ascertain the extent of agreement and/or disagreement on the proposals put forward by the NIHRC and the main political parties. In establishing a process for discussions between the parties, as part of this framework, the parties should be asked to address the question as to what they understand to be the role of a Bill of Rights. Answers to such questions should be used as the basis for banking agreement and building consensus. The parties should be encouraged to design a set of agreed principles from which they can agree on the rights appropriate to the particular circumstances of Northern Ireland using the NIHRC's advice (and any further advice) as a tool to assist with their decision making.

What might work best could be a combination of elements: a framework that clearly identifies the objective and how it will be achieved; commitment from the British and Irish governments to assist the process; and a variety of useful tools designed to help political parties carry out their discussions effectively. In addition, a high-level third party champion could help facilitate the discourse. Dialogue is important to gauge what the parties wish to achieve in terms of outcomes. Some consideration should be given to identify not only a respected third party for the process but also to identify a location where dedicated discussions can take place away from the glare of publicity and media speculation.

In this regard, the model involved in taking forward police reform following the Belfast/Good Friday Agreement could be used as an exemplar given that a series of roundtable events took place in and out of Northern Ireland providing neutral and safe spaces for parties to discuss a range of options. It is critical that in any future process, the political parties benefit from the experience of independent human rights experts and those with expertise in scoping out or drafting Bills of Rights. The process has to also respect the United Kingdom's obligations under international law.<sup>255</sup> This need was evidenced in our empirical findings where there were a number

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255. See Anne Smith, *The Drafting Process of a Bill of Rights for Northern Ireland*, PUB. L. 526 (2004); Anne Smith, *Bills of Rights as Process: The Canadian Experience*, 3:4 INT'L J. OF L. IN CONTEXT 343 (2008); Anne Smith, *Constitutionalising Equality: The South African Experience*, 9:4 INT'L J. DISCRIMINATION & L. 201 (2008).

of misunderstandings amongst some political parties on what a Bill of Rights can and cannot deliver.

The authors have already embarked on a series of roundtable discussions on a Bill of Rights; the first was in Belfast on December 14, 2015. The British and Irish governments were represented, as were the main political parties and representatives from the NIHRC and civil society.<sup>256</sup> The feedback was positive and the importance of holding such an event was highlighted where the parties could be provided with the space to work out their differences and ascertain a level of common ground.

### CONCLUSION

It is clear that the local political actors will not take the lead on the outstanding issue of a Northern Ireland Bill of Rights because the requisite political will is lacking and there is insufficient technical and legal capacity to do so.<sup>257</sup> It is also evident that the UK government's plan to replace the Human Rights Act with a British Bill of Rights, alongside the decision to leave the European Union, has created an extra layer of complexity in the steps needed to progress a Northern Ireland Bill of Rights. In light of these recent political developments, a "double argument" exists<sup>258</sup> for Northern Ireland to have its own Bill of Rights incorporating the ECHR and the EU-related rights. Indeed, as human rights are devolved, the Northern Ireland Assembly (or any of the devolved legislatures) could replace the Human Rights Act with another Act with the same level of rights protection as exists under the ECHR and the European Union. However, two important points must be made. First, the wording of the Good Friday/Belfast Agreement specifically stipulates that the rights in a Bill of Rights are to be "supplementary to those in the European Convention on Human

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256. There were representatives from the Alliance Party, SDLP, Sinn Féin, UUP, and the DUP. The Green Party sent their apologies, the TUV, PUP, and NI21 did not respond to the invite.

257. Participants at the roundtable event in Belfast highlighted the important role of politics and political will and leadership progressing a Bill of Rights for Northern Ireland. See Feedback From the Roundtable Event on *Where Next for a Bill of Rights for Northern Ireland?*, Belfast (Dec. 15, 2015) (on file with authors).

258. Alban Maginness, Roundtable Discussion on *Where Next for a Bill of Rights for Northern Ireland?*, Belfast (Dec. 14, 2015) (on file with authors).

Rights."<sup>259</sup> The Human Rights Act was to be a "place-holder measure"<sup>260</sup> until Northern Ireland had its own Bill of Rights. Second, a cautionary note is needed in relation to passing legislation perceived to be contentious, since the use of the petition of concern can act as a veto and block further progress in the Northern Ireland Assembly.

The UK government pledges its "strong support for the political institutions established over the past two decades as a result of the various Agreements" in the same manifesto in which it set out the repeal of the Human Rights Act and the referendum on the European Union.<sup>261</sup> As Fintan O'Toole notes, "Northern Ireland is not Lincolnshire or Somerset. It is a distinct and unique political entity, recognised as such by an international treaty registered with the United Nations: the Belfast Agreement of 1998."<sup>262</sup> In line with this peace accord, the Northern Ireland Bill of Rights is, and should continue to be seen as, a separate process, independent of and unfettered by the UK debate about a British Bill of Rights. As noted earlier, this was one of the findings of the UK Bill of Rights Commission's report, and this argument has been endorsed at the international level, with several UN bodies calling on the British government to "expedite the enactment"<sup>263</sup> of a Northern Ireland Bill of Rights "without delay."<sup>264</sup> This article argues that the time has arrived for the UK government to uphold its international legal obligations or be brought to task for not doing so. Since the current situation has raised a range of issues in relation to a Bill of Rights for Northern Ireland, that is where the silver lining may yet be found.

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259. The Belfast/Good Friday Agreement, *supra* note 10, at ¶ 4, 16-17 (covering "Rights, Safeguards and Equality of Opportunity").

260. Murray et al. *supra* note 5.

261. CONSERVATIVE PARTY MANIFESTO, *supra* note 156.

262. Fintan O'Toole, *Belfast Agreement is a Threat to the New English Nationalism*, IRISH TIMES (July 5, 2016), <http://www.irishtimes.com/opinion/fintan-o-toole-belfast-agreement-is-a-threat-to-the-new-english-nationalism-1.2710209>.

263. UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the UK*, ¶ 10, U.N. Doc. E/C.12/GBR/CO/6 (June 24, 2016); UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on the UK*, ¶¶ 9-10, U.N. Doc CERD/C/GBR/CO/21-23 (Aug. 26, 2016).

264. UN Committee on the Rights of the Child, *Concluding Observations on the UK*, ¶ 7, U.N. Doc. E/C.CRC/C/GBR/CO/5 (June 3 2016).

