

**ECONOMIC AND SOCIAL RIGHTS IN NORTHERN IRELAND:  
MODELS OF ENFORCEABILITY**

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## Foreword

The Human Rights Consortium is a broad alliance of over 160 civil society organisations from across all communities, sectors and areas of Northern Ireland who work together to help develop a human rights-based society. Since our foundation we have been raising awareness about and campaigning for a Bill of Rights as provided for in the Belfast/Good Friday Agreement.

As a place emerging from the devastation of the troubles that still seeks greater stabilization, cohesion and reconciliation as a society, many continue to see a formal set of legal protections in a Bill of Rights as a core part of the shaping of that new society.

Indeed the Belfast Agreement's own declaration of support says that we can best honour those who have died or been injured, and their families through 'a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.'

However, despite that commitment, finding a way to formulate and sculpt the protection and vindication of the rights of all has made slow progress in Northern Ireland. Consensus at a political level on many rights issues, including the progression of a Bill of Rights, has been impossible to achieve to date.

The Consortium has felt that part of the inability to reach consensus on progressing a Bill of Rights has been rooted in the binary nature of some of the debates to date on the content and enforcement of such a Bill. Historically, a key point of debate in dialogue on a Bill of Rights has been the inclusion of economic and social rights (ESR) and the way such rights might be enforced.

From our perspective the ongoing case for the inclusion of basic ESR protections within a Bill of Rights is clear given both our historic and present difficulties in protecting and advancing such rights as a society. Political opinions on this topic are clearly divided however and major points of contention have focussed historically on those ESR, and particularly, the manner of their enforcement. With clear concerns by some politicians about the overlap and interplay between the role of elected representatives, the Northern Ireland Executive/Ministers, and the judiciary.

Those concerns have resulted in perhaps only two dominant perspectives being heard on the enforcement options for a Bill of Rights. Those could be best described as declaratory principles on the one hand and full enforceability on the other. The declaratory principles model would essentially be a commitment of the Northern Ireland government and elected representatives to uphold ESR. But there would be no legal mechanism or enforcement options to pro-actively ensure compliance with that declaration by elected representatives. On the opposite extreme is the model of full enforceability whereby any right articulated in a

Bill of Rights is justiciable through the courts. This would likely include a variety of duties in line with international standards as regards ESR enforcement, such as duties to take appropriate measures, adopting the principles of progressive realisation and the concept of minimum core obligations.

Debates on the enforceability of ESR have largely stagnated at this point for several years and opportunities to engage in dialogue on alternative models or versions that seek to explore compromise have not featured enough in topical discussion.

So while the Consortium continues to see a fully enforceable model as offering the greatest potential regarding the protection of ESR in Northern Ireland, we recognise that wider debate on a broader range of ESR enforcement models may help play a positive role in enabling dialogue or potential compromise and consensus on this issue.

We have therefore commissioned a team of academics to explore through this report a variety of other enforcement opportunities that may exist for ESR. Their brief was to research and articulate other alternative models of enforcement of economic and social rights that existed between the spectrum from declaratory principles on one hand, to full enforceability on the other. We believe that the five models they have developed in this Consortium report represent a significant contribution to the debate on this important aspect of the Bill of Rights and we are grateful for their efforts and expertise in delivering this project. We hope that by developing this report we can contribute much needed food for thought into these discussions, help the exploration of how ESR can best be enforced in Northern Ireland and potentially assist in the development of consensus on this issue at all levels in Northern Ireland.

Northern Ireland needs the added security of strong social and economic rights protections within a Bill of Rights as much now as it ever has. To do so we need to develop a model of rights enforcement that fits within our governance frameworks, is workable by our elected representatives and represents a significant advancement in the protections on offer to the most vulnerable in our society. If we are to achieve this vision of a strong and inclusive Bill of Rights, Northern Ireland could potentially be a world leading destination as regards the protection of rights and a place to be proud of. We hope that this report can make a useful and timely contribution to a fresh start on achieving that vision.

Human Rights Consortium  
November 2020

## Executive Summary

*'Economic, social and cultural rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education.'*<sup>1</sup>

Economic, social and cultural rights are set out in the International Covenant on Economic, Social and Cultural Rights, the Council of Europe's Social Rights Charter, the EU's Charter of Fundamental Rights, and other equivalent legal provisions. In this Executive Summary, we present a brief outline of five models for enforcement in Northern Ireland of economic and social rights (ESR) that are considered in greater detail in the main report. We use the term 'model' to describe these, not in the sense that they are 'models of best practice', but simply to indicate that there are various methods already developed which differ from each other in significant ways. The focus of our Report is on the implementation of economic and social rights, given their importance in the historical context of human rights in Northern Ireland, where complaints regarding the failure of the state to deliver basic services and rights have a frequent source of conflict. We have largely excluded discussion of cultural rights, not because they are less important, but because they may give rise to somewhat different issues in their effective implementation.

We have been commissioned by the Human Rights Consortium to identify possible methods of enforcing ESR in Northern Ireland that span the middle of the spectrum between full enforceability on the one hand and declaratory principles on the other. The purpose of doing so, we understand, is to stimulate debate about how ESR could be better delivered, even if the approach of what we shall call 'full justiciability' (that is, the ability of courts to enforce ESR directly in the same way as other human rights under the European Convention on Human Rights (ECHR), such as the right to freedom of expression is enforced) is not adopted. As individuals, several of the authors have taken public positions on the desirability of such a move. As a group, however, we do not take a position on whether such full justiciability should be adopted; nor do we rule out further legislative or constitutional reform explicitly recognising socio-economic rights.

So, too, in a similar vein, we are conscious that the Northern Ireland Human Rights Commission (NIHRC) has provided its Advice to the Secretary of State for Northern Ireland on a Northern Ireland Bill of Rights. If adopted, the NIHRC's Bill of Rights, which contains socio-economic rights among others, would make it unlawful to act incompatibly with them. Several of the authors were involved in various ways in developing the NIHRC's approach. Again, as a group, we neither endorse nor reject these proposals. Nothing we are proposing stands in the way of the enactment of a strong and inclusive Bill of Rights for Northern Ireland. The models we discuss below do not replace such an approach; nor do they prevent such an approach. But they could be adopted even if such

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<sup>1</sup> Office of the High Commissioner for Human Rights, Fact Sheet #33, 2008.

approaches as expanding the Human Rights Act 1998 (HRA) to encompass ESR or adopting a Bill of Rights along the line of that proposed by the NIHRC were rejected within Northern Ireland.

Here are the five models we discuss in this Report:

*Model 1: pre-legislative scrutiny by the Northern Ireland Assembly and amending the Ministerial Code of Northern Ireland Ministers*

*Model 2: including socio-economic requirements in specific legislation*

*Model 3: Constitutionalizing ESR principles, where the Assembly has principal responsibility to implement*

*Model 4: Progressive implementation and restricted judicial review, such as on grounds of reasonableness*

*Model 5: Incorporating ESR in future free trade agreements applying to Northern Ireland*

Our development of these models has been an iterative process, involving discussion internally within the group. We do not rank these models in terms of their political feasibility or effectiveness, and the listing of the options from 1 to 5 does not indicate any such preference. Nor do we as a group or as individuals necessarily propose any of these as a preferred option, singly or together; but they seem to us among the leading candidates situated on the spectrum between full justiciability of 'subjective rights' (which we consider subsequently) and simply declaratory, tending towards the middle of that spectrum. These options were tested and scrutinized at later stages in the process including by those who participated in a peer-review event with interested stakeholders (see Acknowledgements for details). The Northern Ireland Assembly's Ad Hoc Committee on the Bill of Rights will also have the opportunity of considering these options and commenting on them, as part of its broader inquiry. With that caveat, we turn to sketch out the bare bones of each model.

There is already extensive, if patchy, implementation of various economic and social rights in Northern Ireland law, even if these protections are not labelled as such. In this context, we need to take into account both common law and statutory provisions regarding rights in the housing, social security, education, employment, human rights, and equality contexts. All of these go some way towards meeting some aspects of internationally-protected ESR, but taken together they still fall short of protecting all internationally-protected ESR to the degree required to satisfy international obligations,

as any of the recent reports on the state of ESR in Northern Ireland by the Committee on Economic, Social, and Cultural Rights makes clear.<sup>2</sup>

The existing protections do mean, however, that any new initiative is not starting from scratch, which has implications for how best to proceed. The models we discuss below should be regarded as additional to the construction of complementary mechanisms, in civil society particularly, to better enable existing rights that directly or indirectly protect ESR rights, to be implemented more effectively. In particular, it will be important to consider ways in which existing rights could be better mobilised to serve the goal of securing the effective protection of ESR. On the one hand, therefore, the aim of the Report is to enable ESR to be enhanced. On the other hand, there are also developments (the budgetary costs of dealing with the Covid-19 pandemic, the economic effects of the UK's exit from the EU, among others) that lead some to be concerned that it may be difficult even to sustain *existing* levels of ESR protection. The aim of the Report is also to identify, therefore, how existing ESR might best be protected.

*Model 1: pre-legislative scrutiny by the Northern Ireland Assembly and amending the Ministerial Code of Northern Ireland Ministers*

Model 1 is based on the proposition that placing responsibility for dealing with ESR on local politicians could be an effective way in which Ministers and civil servants would be regularly reminded of international legal obligations to implement socio-economic rights in Northern Ireland. One way of doing so would be to establish, probably through a change in the Standing Orders of the Assembly, an additional committee charged with regular pre-legislative scrutiny of Bills going through the Assembly for compliance with ESR. Anticipating that such scrutiny would occur should stimulate Ministers and civil servants to take such rights more seriously in the context of considering policy options. This ensures a certain degree of mainstreaming at the pre-legislative stage.

The approach developed in Model 1 could be taken somewhat further but stopping short of requiring legislative changes. This would require an amendment to the current Ministerial Code of Northern Ireland Ministers requiring Ministers to take ESR into account in exercising their Ministerial responsibilities. (At the moment, there is only a vague requirement on Ministers to uphold the 'rule of law', and the Attorney General produces human rights guidance, based on a range of international standards.) An amendment to the Ministerial Code could have the effect of further stimulating Ministers and civil servants serving those Ministers to build consideration of ESR into the fabric of decision-making in those areas in which powers have been devolved, as well as serving as a potentially important requirement on Ministers in carrying out negotiations with Westminster/Whitehall on policies relevant to Northern Ireland, where powers have not been devolved. This would also assist the Secretary of State who has the power to

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<sup>2</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016.

intervene if Ministers are in breach of international obligations (Northern Ireland Act 1998, section 26).

This model could be constructed in such a way as to be of particular relevance for the budgetary process. One of the issues that a Committee of the Assembly could consider would be building a role for the Committee into the budget process. Another variation would be to put a duty on the Department of Finance and Personnel to track spending against the realization of specific ESR, putting an emphasis on how ESR would be furthered within the lifetime of the relevant budgetary process. Another issue for consideration would be whether the Committee adopts an advisory role or a supervisory one. In this sense, the legal status of the Committee's decisions could be considered – i.e. whether the decisions would be persuasive (soft enforcement) or binding (strong enforcement) on the Assembly. Changing the Ministerial Code could also have significant implications for the budget process. The (UK) Treasury Green Book already refers specifically to the International Covenant on Economic, Social and Cultural Rights as something to be taken into account in devising and testing policy options. Much useful work has, of course, already been done in Northern Ireland on budgeting in a range of contexts, including gender budgeting, children's rights budget, and socio-economic rights budgeting.

*Model 2: including socio-economic requirements in specific legislation*

In Model 2, the approach taken would be to insert references to ESR in specific pieces of Assembly or Westminster legislation applying to Northern Ireland. One example could be section 75 of the Northern Ireland Act (NIA), which might be amended to include something like 'socio-economic status' as one of the grounds subject to the mainstreaming requirements of Schedule 10 of the Act. This would generate significant obligations, both substantive and procedural, on public bodies generally to engage in regular consultations with civil society on how policies and practices impact on those of lower socio-economic status. On the other hand, in the past there have been objections to opening up section 75 to legislative scrutiny, and concerns have been expressed as to the robustness of the (effectively non-justiciable) 'due regard' duty, and so we consider below whether the risks in amending section 75 outweigh any advantages. It should be noted that section 1 of the Equality Act 2010, which does not extend to Northern Ireland, has been devolved to Scotland and Wales (although the provision is not yet commenced in Wales). This means that Westminster has devolved the power to introduce a socio-economic equality duty to the Scottish Parliament and Welsh Assembly (since May 2020, the *Welsh Parliament*) respectively. With the process of devolving the power now complete in Scotland if used Scotland will be the first part of the UK to protect those from socio-economic deprivation based on a procedural due regard duty (the section was never commenced at a GB level). With Scotland and Wales now in a position to introduce a socio-economic equality duty this could set a precedent for amendment to section 75, which would require Westminster's approval. The opportunity could also

then be taken to reflect on the effectiveness of the enforcement provisions attached to section 75 and whether these could be strengthened and improved.

Another possible approach within this Model would be for the Assembly to be persuaded to see the benefits in further protecting specific aspects of ESR piecemeal in Assembly legislation. In creating the Northern Ireland Commissioner for Children and Young People (NICCY) and the Commissioner for Older People for Northern Ireland (COPNI), the desirability of having regard to international standards was written into the legislation. Building on this approach, a specific 'due regard' obligation with reference to ESR might be introduced in Assembly legislation addressing particular topics, for example in the education, employment, health, housing and disability fields, perhaps at the initiative of 'backbench' Members of the Northern Ireland Assembly (MLAs). There is also scope to consider whether the Assembly might adopt a form of holistic incorporation similar to the Welsh Assembly Measure that introduced a duty to have due regard to the United Nations (UN) Convention on the Rights of the Child. This kind of legislation is within the competence of the Assembly and could provide a 'self-regulatory' mechanism for ESR in observance of international obligations (Schedule 2 paragraph 3(c) NIA 1998). For example, the Assembly could introduce a duty to have due regard to ICESCR when legislating in devolved areas.

*Model 3: Constitutionalizing ESR principles, where the Assembly has principal responsibility to implement*

Constitutions often play the vital function of identifying what are the fundamental values that a country espouses and seeks to uphold. Sometimes these values are articulated as 'rights' that may be enforced by courts. There is, however, no reason of principle why some fundamental values identified in a constitution should not be separated off and made non-justiciable duties rather than justiciable rights. The Constitutions of Ireland (1937) and India (1950) both incorporate non-directly justiciable duties on the State (the so-called Directive Principles) to apply certain socio-economic principles when making laws.<sup>3</sup> There are degrees of ESR enforceability in these models and sometimes the judiciary can play a role in enforcement, short of making ESR rights fully justiciable in the same way as civil and political rights. In India, for example, the courts have subsequently extended ESR protection through a dynamic interpretation of civil and political rights drawing on the Directive Principles.

A variation on these approaches is to be found in the Constitution of Finland, in which several ESR are mentioned, but the responsibility is placed on the legislature to implement these rights, and litigation is based largely on the specific legislation enacted to implement the right, rather than the Constitution itself. For example, section 16 on educational rights provides in part: 'The public authorities shall, as provided in more detail by an Act,

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<sup>3</sup> Ireland has held a Constitutional Convention which has recommended changing the constitution to include justiciable ESR, see further below.

guarantee ...'. Section 17, on the right to one's language and culture, provides in part: 'The right of everyone to use his or her own language ... shall be guaranteed by an Act.' Section 18, on the right to work, provides in part: 'Everyone has the right, as provided by an Act, to earn his or her livelihood ...'. Section 19, on the right to social security, provides in part: 'Everyone shall be guaranteed by an Act the right to basic subsistence.' There is therefore a robust ESR constitutional framework but the legislature retains a strong degree of control over how ESR are interpreted and enforced. The court performs *ex post* judicial review in the context of the legislation introduced to fulfil ESR.

It should be noted, however, that in two respects the approach in Finland does not leave matters entirely in the hands of the legislature. First, whilst the Finnish example places a strong emphasis on the legislature as the state body responsible for implementing ESR, there are some constitutional ESR provisions which are treated as creating subjective justiciable minimum-core rights, such as Article 19(1), which protects the right to social assistance, in particular in connection with issues such as emergency health care based on the concept of dignity. Second, the Finnish constitutional model is supported by a Constitutional Committee that scrutinises legislation for ESR compatibility pre-enactment, so-called *ex ante* review. This approach can therefore be considered in the wider context of Model 2. This review is binding on Parliament. This can be compared to the weaker enforcement of pre-legislative scrutiny in the UK Parliament conducted by the Joint Committee on Human Rights where the decisions of the Committee are not binding on Parliament.

*Model 4: Progressive implementation and restricted judicial review, such as on grounds of reasonableness*

Courts in the United Kingdom currently interpret and apply human rights set out in the Human Rights Act using an approach that sets a high bar for those seeking to justify breaches of human rights. An approach could be adopted that required courts to set a much lower bar in the context of ESR. The Joint Committee on Human Rights of the United Kingdom House of Commons and House of Lords proposed a model of phased implementation short of the adoption of fully enforceable subjective rights by a rights' holder in court. The Joint Committee put forward for consideration an approach, which would initially only include a limited range of rights (health, education, housing, and an adequate standard of living). As applied to Northern Ireland, the Assembly and Executive would be under a duty to take reasonable legislative and other measures within its available resources, to achieve the progressive realization of these rights. The Assembly and Executive would be given the primary obligation to decide how best to achieve that agreed aim. So far, this looks similar to Model 3. There are, however, two ways in which this approach might move towards more legal enforceability.

The first approach would be to allow a five- to ten-year window in which no judicial enforcement of these rights would be permitted, but after which the rights would be fully

enforceable as subjective rights by aggrieved individuals, thus enabling the Assembly and Executive to get its house in order, but with an effective deadline for doing so. This is similar to the delayed remedy mechanism in Canada, which might prove a useful approach to adopt. The second approach would be to provide that individuals would not be able to enforce these rights for themselves (these are often referred to as 'subjective rights'), but would be able to review the reasonableness of the actions taken or not taken by the Assembly and Executive. These approaches might be combined, with a staged implementation, followed by judicial review only on reasonableness grounds.

There is also scope to consider within the second, third and fourth models, in particular, whether there are particular types of innovative remedies which the courts could adopt which help to build on the positive balance of responsibilities between the courts and the Assembly and Executive. For example, issuing an order that would have no suspensory effect on the continuation of a provision found not to be in compliance with ESR principles, allowing time for the Assembly to amend the provision to secure compatibility. Other judicial remedies might be considered, where the court declares an action unlawful and then defers the issue back to the Assembly or Executive and then plays a supervisory role in ensuring compliance with the judgment.

*Model 5: Continued application of EU-derived ESR through their incorporation in any future free trade agreement between the UK and the EU relating to Northern Ireland*

This fifth model has been developed specifically to address the circumstances that will apply following the United Kingdom's exit from the European Union. We considered how, in particular, the Northern Ireland Executive and Assembly might best address ESR issues that will arise in future trade and investment agreements that will apply in Northern Ireland, and are likely to significantly influence the ability of any Northern Ireland government to advance (indeed, even to maintain) ESR in the future. There are two core ideas, addressing two different aspects of the UK's exit from the EU: the loss of EU-based ESR protections; and the danger to ESR of the need to negotiate trade and investment agreements with non-EU states.

First, the EU, when negotiating a free trade or investment agreement with the United Kingdom (either generally or one relating to the Northern Ireland dimensions) would insist that the United Kingdom continue to implement a basic set of human rights requirements (including ESR) as a condition for that agreement being concluded. Second, in any trade or investment agreement with non-EU states, provisions could be included that would directly or indirectly protect the Northern Ireland Assembly's ability to legislate in the area of ESR, human rights, and social policy. Otherwise, there is a danger that future trade or investment agreements could undermine that ability.

## Chapter I: Context

In this section, we set out the key contextual issues that have and will continue to affect consideration of economic and social rights, in Northern Ireland in particular. They will also affect how the models we discuss subsequently in the Report are likely to be viewed immediately, and over time. They are listed in no particular order of importance.

### (a) East-West issues

There are three overlapping East-West issues. First, as with many issues concerning human rights and equality, there are concerns at Westminster and in Whitehall about the possible impact that incorporating ESR in Northern Ireland would, or might, have on legislative and policy developments in England and Wales, or in the United Kingdom as a whole. This ‘read-across’ effect will need to be addressed effectively if this issue is not to derail the adoption of any of the proposed models. In particular, powers to disallow legislation or executive action that would be directly or indirectly discriminatory against economic operators in the other nations of the UK, contrary to the effectiveness of the UK’s internal market, may impose constraints on the ability of Northern Ireland to adopt ESR, were they to be legislated in the form envisaged.<sup>1</sup> Second, an additional wild card is the proposed modification/repeal of the Human Rights Act 1998. The ESR enforcement models would be operating in a different legal and political context were the HRA to be significantly amended. The Conservative Party, in its 2019 General Election Manifesto, has committed to updating the Human Rights Act and administrative law ‘to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, *while ensuring that it is not abused to conduct politics by another means or to create needless delays.*’ The implications of this commitment are, as yet, unclear. Third, there is a separate question as to the approach that will be taken over time by the Scottish Government to ESR, in the context of the recent changes regarding the powers of the Scottish Parliament, including the transfer of competence on the socio-economic equality duty contained in section 1 of the Equality Act 2010 (Scotland Act 2016, ss 38, 72). More recently, a National Task Force has been established by the Scottish Government<sup>2</sup> tasked with implementing the recommendations of the First Minister’s Advisory Group on Human Rights Leadership.<sup>3</sup> These recommendations include a new statutory framework in Scotland incorporating economic and social rights into domestic law.

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<sup>1</sup> Department for Business, Energy and Industrial Strategy, *UK Internal Market*, CP 278, July 2020.

<sup>2</sup> <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/#:~:text=The%20National%20Taskforce%20for%20Human%20Rights%20is%20made%20up%20of,public%20sector%20and%20civil%20society.&text=The%20Taskforce%20will%20work%20to,ev ery%20member%20of%20Scottish%20Society>.

<sup>3</sup> <https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> )

(b) North-South issues

The issue of how ESR should be enforced has, in the past, been significantly influenced by the (lack) of priority accorded such rights in constitutional negotiations in Northern Ireland. Were the ESR issue to be seen as part of such negotiations, the Government of Ireland would be involved and this would affect the priority to be given to such issues in relation to other issues. On the one hand, there may be significant possibilities for delivering ESR, through cross-border initiatives, e.g. on health, food safety and transport, some of which could be promoted by the North-South bodies. On the other hand, there is a somewhat equivalent 'read-across' concern in Ireland (in UK terminology 'the Republic of Ireland') to that in Westminster/Whitehall, and an even greater concern that the requirement of 'equivalence' regarding human rights in the Belfast-Good Friday Agreement would put additional pressure on the Irish Government to introduce new (and expensive, or so it is thought) ESR in Ireland, at a time when government social spending is already under severe pressure. In February 2014, the Constitutional Convention in Ireland recommended that particular ESRs, such as the right to a home, be better protected in the Irish Constitution, including introducing some forms of justiciable ESR.<sup>4</sup> If the constitutional arrangements for ESR were to be revisited in Ireland, there is the potential for a future referendum on the issue on the basis of the Convention's recommendation, and this may affect debate on ESR in Northern Ireland. The debate about constitutionalising socio-economic rights in Ireland will also impact on how we assess feasibility issues concerning a Bill of Rights with socio-economic rights in Northern Ireland.

(c) Party political differences

The current formal position of several unionist parties (and particularly of the Democratic Unionist Party -- DUP) is largely hostile to previous models of enforceability of ESR in Northern Ireland. In part, this concern arises from ESR being perceived as part of a 'left' agenda, whereas the DUP is predominantly conservative; in part, their opposition is also due to the perception that human rights in general are part of a nationalist/republican agenda. It remains to be seen, of course, whether the DUP may reconsider their position, leading to the possibility that either or both of these concerns might be easier to alleviate in the near future than has proved to be the case in the past. It is not without significance that, in recent elections, many of the party manifestos across the political divides have included what would be commonly understood as 'social justice' concerns. And opinion polling indicates a degree of apparent consensus about the desirability of ESR among supporters of different political persuasions.<sup>5</sup>

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<sup>4</sup> The new Irish Government has committed in its Programme for Government to hold referendums on the rights of women (Art 41.2 of the Constitution) and on housing.

<sup>5</sup> Human Rights Consortium, Attitudes to Human Rights in Northern Ireland: Polling Data (July, 2017).

(d) Institutional and constitutional issues

A significant concern is the currently complicated legal issue of the powers of the Northern Ireland Assembly and Executive over areas of policy and expenditure in which issues of ESR most commonly arise, such as employment, housing, social security, refugee and asylum policy, and education. Whilst pretty much the whole of individual and collective employment law is devolved to the Assembly (except the topic of national insurance contributions), in several of the other areas, the Northern Ireland Assembly and Executive either shares responsibility with Westminster/Whitehall, or is subject to control by it. This raises the question as to how far it is possible or desirable for ESR enforcement models to attempt to address areas outside the direct and exclusive jurisdiction of the Assembly/Executive. The intensification of discussions about broader constitutional change both on the island of Ireland, and across these islands may alter the way in which the Bill of Rights debate is perceived.

More immediately, however, as we were completing this Report, the United Kingdom Internal Market Bill was introduced into the Westminster Parliament. Apart from the adverse impact of the Bill on the United Kingdom's reputation for upholding international law, if the Bill were passed in its current form, it would likely have significant impact on the current devolution of powers to Scotland, Wales and Northern Ireland. However that issue is finally resolved, the fact that it has arisen at all indicates that the current structure of devolution is not set in stone and that the distribution of powers may well change significantly in the future, with potentially significant effects on the ability of the Northern Ireland Assembly and Executive to act in policy areas that engage ESR.

Another issue that frequently arises has constitutional dimensions of a different nature. This is the issue of how far efforts to further protect and promote ESR weakens democratic controls and, in particular, undermines the role of politicians in handling economic and social issues through orthodox political channels. Whilst there is a real debate to be had about the extent to which some issues should be taken out of day-to-day political contestation, some of the concerns that may underlie that debate are misplaced. It is already the case that there is extensive statutory provision in Northern Ireland of ESR, with legislation dealing with social security, housing, education, and welfare, among others. This legislation is, of course, subject to judicial interpretation and enforcement. So, to regard ESR as some exotic set of rights that are alien to the Northern Ireland legal and political system, or to regard such rights as inherently unsuitable for judges to consider, is very wide of the mark. Nevertheless, to the extent that there are concerns that the role of the Assembly and the Executive could be weakened, it is worth considering whether Assembly- or Executive-driven ESR mechanisms can be devised that would strengthen their role in the ESR context.

(e) Bureaucratic and administrative concerns

The issue here is the extent to which, leaving aside party-political concerns, and political concerns arising from Great Britain or Ireland, ESR enforcement models need to take into

account, and meet, concerns from the permanent Civil Service, particularly over the increased administrative burden that they may think likely to arise with increased attention being given to ESR, and the budgetary implications, particularly for the Block Grant. Would the Treasury be prepared to fund more extensive provision of ESR and the higher social spending in Northern Ireland that may result if that was significantly different from the other parts of the United Kingdom? Apart from the devolution context, there is an additional significant budgetary consideration: how far would strengthening provision for ESR simply lead to robbing Peter to pay Paul; taking resources from housing, say, to increase social security spending? These are clearly significant issues, and raise broad questions of how to ensure that all areas of social policy are adequately funded, including whether a re-examination is necessary of who should bear the burden of funding a society that fully respects human rights, and at what level, issues that are beyond the scope of this Report.

(f) Judicial issues

For any model of ESR enforcement to be effective that relies on some element of judicial involvement (through judicial review, for example), it is necessary to take into account the likely reactions of Northern Ireland judges and (possibly) the reaction of the UK Supreme Court. Judicial review in Northern Ireland has already allowed courts to enhance the protection of ESR through application of the principle of non-discrimination.<sup>6</sup> However, the test that has been adopted by the Supreme Court (whether the contested measure is ‘manifestly without reasonable foundation’<sup>7</sup>) sets a high bar for claimants to overcome if they are to succeed.<sup>8</sup> The international and comparative evidence seems to confirm that if human rights, including socio-economic rights are not spelled out with precision in a sufficiently robust document, they will be ignored by politicians and may be subject to sceptical interpretation by judges. Rights also need to be used by victims of human rights violations, and the courts’ attention brought to these rights. Linked to the question of judicial recognition is the question of how, if at all, ESR rights might be mobilised, and the role of civil society in doing so, including the cost implications for this sector.

Whether, and to what extent, judicial involvement in such contexts is politically acceptable has changed over the past few years, at least in Britain. Partly because of the sensitivity of judicial scrutiny of various aspects of the exit of the United Kingdom from the EU, partly because of heightened political awareness of judicial review over administrative decision-making, and partly because of application of human rights in areas which had not been anticipated (such as the war in Iraq), there has been something of a

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<sup>6</sup> E.g. *Re Denise Brewster’s Application for JR* [2017] UKSC 8 (entitlement to a local government pension) and *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48 (entitlement to a widowed parent’s allowance).

<sup>7</sup> For example, *R. (on the application of DA) v Secretary of State for Work and Pensions* [2019] UKSC 21.

<sup>8</sup> Jed Meers, Problems with the “manifestly without reasonable foundation” test, (2020) 27(1) *Journal of Social Security Law* 12.

backlash among politicians against ‘activist’ judges. As a result of this backlash, a panel to review judicial review was recently appointed by the UK Government to consider ‘whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government.’<sup>9</sup> So, irrespective of what the Panel recommends as regards existing areas of judicial review, receptivity to judicial involvement in what are perceived to be novel areas has been severely reduced. What might have been politically relatively uncontroversial a few years’ ago, is now anything but. How this change would affect the role of courts in the context of ESR is uncertain, but is hardly likely to be positive.

(g) Expectations of NGO and other sectors

The UN Committee on Economic, Social and Cultural Rights recommends that ESR ought to be protected by states in the same way that civil and political rights are protected.<sup>10</sup> Civil and political rights enjoy protection under the UK-wide Human Rights Act 1998 and also at the devolved level in Northern Ireland under the Northern Ireland Act 1998. These statutory regimes embed civil and political rights (and some very basic economic and social rights, such as the right to education) found in the European Convention of Human Rights (ECHR) into the domestic legal system. They also form an important part of the Belfast-Good Friday Agreement as a minimum level of rights required in order to build a stable and peaceful society.<sup>11</sup> According to the UN Committee, economic and social rights, by extension, ought to be protected in the same manner – such as through an extension of the statutory regime embedding a treaty that focusses on ESR. This approach is one that is particularly strongly supported by sections of civil society in Northern Ireland.

There is a significant issue in relation to maintaining a balance between meeting (some of) the expectations of the (diverse) NGO sector (expectations that are shared by others beyond this sector) and ensuring that proposed models are seen by those responsible for adopting and implementing ESR as politically desirable and effective in practice. Sections of the NGO sector have traditionally been ambitious in terms of what can and should be delivered by ESR enforcement, and there has been a wide gulf between those expectations and what has, so far, proved politically feasible. Identifying this gap is not to imply either that the NGO sector should be less ambitious, or that others should be less cautious; nor is it to imply that the NGO sector is unconcerned with effectiveness and political desirability; it has carried out significant work on the ineffectiveness of the Government’s

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<sup>9</sup> Details available at: <https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review>.

<sup>10</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para.7

<sup>11</sup> The Belfast Agreement 1998 / The Good Friday Agreement 1998, annexed to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes), Belfast, 10 April 1998, Registration No. I.36776 UNTS 2114, Treaty series No.50 (2000) Cm 4705. Referred to as the ‘peace agreement’, para.5(2)(b)(c)

current approaches to delivering ESR. But if the gap in expectations is not narrowed, it is clear that nothing very much is likely to change.

(h) International reputation and inward investment

There is evidence that a significant element in decisions involving whether inward investment flows into the state involves the reputation of the state receiving the investment. One of the reputational considerations that concern investors involves the extent to which (some) socio-economic rights are protected; this is because investors want to be reassured that their reputations will not be tarnished by allegations concerning child labour, poverty wages, inadequate housing provision, or similar violations of ESR. One of the ways in which investors' concerns in this regard can be addressed is by the state that seeks and receives inward investment having a robust reputation for ensuring ESR. Apart from reputational issues, European states have resisted a 'race to the bottom', where states compete with each other on the basis of which can lower their social standards most. This is discussed further in the context of the fifth model.

(i) Northern Ireland Bill of Rights debate

As noted above, the context within which this Report is situated also involves the continuing debate over a Northern Ireland Bill of Rights dealing with the particular circumstances of Northern Ireland, and deriving from the Belfast-Good Friday Agreement and the Northern Ireland Human Rights Commission statutory consultation process.

The Agreement invited the newly established Northern Ireland Human Rights Commission to 'to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland.'<sup>12</sup> The NIHRC's final advice contained a comprehensive list of economic and social rights. The Northern Ireland Office rejected the proposed Bill of Rights and was opposed to the inclusion of ESR.<sup>13</sup> Furthermore, the Commission for a UK-wide Bill of Rights, established by a previous Conservative-Liberal Democrat Government largely rejected the inclusion of such rights in any future Bill of Rights for the UK but did argue that a UK Bill of Rights

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<sup>12</sup> As per paragraph four of the section entitled 'Rights, Safeguards and Equality of Opportunity' in the 1998 Agreement.

<sup>13</sup> The proposed Bill of Rights was presented by the Northern Ireland Human Rights to the Northern Ireland Office in 2008. The Northern Ireland Office rejected the proposed Bill on 30 November 2009 citing various reasons for the decision, including the perceived controversial inclusion of socio-economic rights, Northern Ireland Office Consultation Paper, 'A Bill of Rights for Northern Ireland, Next Steps', November 2009

process should not interfere with the distinct NI Bill of Rights process.<sup>14</sup> The NIHRC has argued that the failure properly to consider its recommendations to the Secretary of State in relation to a Bill of Rights undermines the peace process.<sup>15</sup>

The political impasse that had ensued with various government administrations at the macro level and the lack of consensus between political parties at the micro level, had brought the process to a standstill until the New Decade, New Approach Agreement in January 2020 provided for an Ad-Hoc Assembly Committee to be established to consider the creation of a Bill of Rights. The Belfast-Good Friday Agreement anticipates that a Northern Ireland Bill of Rights would be adopted in Westminster legislation, perhaps anticipating that there might not be political consensus in Northern Ireland. The current UK Government had to this point seemed unwilling, however, to advance a Northern Ireland Bill without local agreement. Whilst it might be seen to lack democratic legitimacy to enact legislation without a local political consensus, there has until this latest development arguably been a democratic failure at the macro level to facilitate consensus at the micro level. Given the commitments contained in the Agreement on the continued enhancement of human rights protection in Northern Ireland (beyond the ECHR) there is an arguable case that the avoidance of addressing the ESR human rights legal deficit undermines the transition to peace,<sup>16</sup> particularly in failing to address the 'relationship between social and economic grievances and the conflict'.<sup>17</sup> On the other hand, the lack of political consensus in fact undermines any further progression on the matter.

Introducing legislative provisions that protect ESR in Northern Ireland without corresponding measures being available in the rest of UK may contribute to a substantial gap in the protection of human rights across the state. Whilst this would be consistent with devolution, it arguably goes against the very principle of the universality of human rights.<sup>18</sup> Separate provisions for Northern Ireland have been seen by some, for example Lady Trimble, as potentially leading 'to rights tourists coming to Northern Ireland to avail of these proposed rights which are not necessarily going to be available to people in other parts of the UK, or even in other parts of Europe, because what is proposed goes so much beyond what is in the European Convention, and so much beyond what is in the

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<sup>14</sup> Commission on a Bill of Rights, *a UK Bill of Rights? The Choice Before Us*, Volume I (December 2012) para.8.28

<sup>15</sup> NIHRC, 'A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office', February 2010, 39.

<sup>16</sup> Fionnuala Ní Aoláin, 'The Good Friday Agreement, Role of Human Rights in Peace Agreements', International Council on Human Rights Policy, Review Meeting, Belfast March 7-8 2005, International Council on Human Rights Policy, para.45

<sup>17</sup> House of Commons, Northern Ireland Affairs Committee, *A Bill of Rights for Northern Ireland: an Interim statement*, Sixth Report of Session 2009-10, Report together with formal minutes, oral and written evidence, 15 March 2010, (NIAC Report), Evidence Briefing, Ms Ann Hope, Commissioner, EvI.

<sup>18</sup> Brice Dickson, House of Commons, Northern Ireland Affairs Committee, *A Bill of Rights for Northern Ireland: an Interim statement*, Sixth Report of Session 2009-10, Report together with formal minutes, oral and written evidence, 15 March 2010, (NIAC Report) <<http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmselect/cmniaf/236/236.pdf>> para.12.

Human Rights Act'.<sup>19</sup> Lady Trimble's concerns have been echoed by Stephen Pound MP, a member of the Northern Ireland Affairs Committee (2007-2010).<sup>20</sup>

On the other hand, this insistence on a UK-wide approach may appear to contradict the very language of the NIHRC's mandate, which expressly refers to the 'particular circumstances of Northern Ireland'. In addition, protections for human rights and equality, including socio-economic rights, are already implemented to different degrees across the UK – the Equality Act 2010, for example, does not apply in Northern Ireland. As discussed above, Northern Ireland sits in isolation from the rest of the UK in terms of equality provisions, and socio-economic rights are enforced to different degrees across the UK.

In fact, civil, political, economic, social and cultural rights are all given effect to in different ways and protected to varying degrees across the UK's four jurisdictions. For example, the devolved statutes embed the ECHR creating a quasi-constitutional application of civil and political rights in the devolved legal framework. The devolved legislatures are bound to comply with the ECHR and ECHR jurisprudence has extended civil and political rights protection to socio-economic rights in certain circumstances. This means there is a more robust framework at the devolved level than the national level (with less protection of rights for those living in England). The Equality Act 2010 extends some procedural protection to socio-economic rights and the Scotland Act 2016 devolved the socio-economic equality duty to the Scottish Parliament. The Equality Act 2010 does not extend to Northern Ireland where the equality duty is governed by the Northern Ireland Act 1998 – meaning there are different legal mechanisms in each of the devolved regions in relation to equality requirements – each of which protect socio-economic rights in different ways. Not only do protection mechanisms differ significantly, the devolved jurisdictions are on different trajectories in progressive protection mechanisms whilst the national level has been seen as increasingly regressive.

(j) Brexit

Since commencing this project, the United Kingdom has voted in a referendum to leave the European Union (although Northern Ireland voted by a majority to remain in the EU), and negotiations to achieve this have now resulted in a Withdrawal Agreement, together with an Ireland-Northern Ireland Protocol, Article 2 of which seeks to ensure that, following the transition period, there will be no diminution of rights and equality obligations enshrined in the Belfast-Good Friday Agreement, resulting from UK exit. In addition, negotiations are currently under way for a broader future relations agreement between the UK and the EU. At the time of writing, it is uncertain whether there will be such an agreement or what it will contain.

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<sup>19</sup> Lady Trimble, Oral Evidence, NIAC Report *ibid*, Ev.15

<sup>20</sup> Stephen Pound (MP), Oral Questioning, NIAC Report *ibid*, Ev.3

The UK parliament has decided to continue to apply many rights in UK domestic law that were previously protected by EU law (or, rather, some elements of them) even though the UK leaves the EU. This is provided for in the European Union (Withdrawal) Act 2018. However, the continuation of these rights will, as provided by that Act, be subject to subsequent Ministerial override, and the UK Government has provided in the Act that the EU Charter of Fundamental Rights is not retained in UK law. It is also worthy of note, that although the current administration may promise to retain EU legal standards, future administrations will be under no obligation to do so and equality and employment-related rights derived from EU law may be eroded over time.

We also need to take into account, in this context, the specific reference to the need for the Ad Hoc Assembly Committee agreed in *New Decade, New Approach* of 2020 to consider the impact of Brexit on rights protection. In order to identify the types of measures that may be considered necessary, as a result of the UK leaving the EU, it is useful to identify the different threats to existing levels of ESR as a result of exiting the EU. There are at least four.

The first difficulty for ESR protections from Brexit is that the existing EU-regulated single market system, one relatively sympathetic to ESR will need to be replaced with something different and, potentially, less sympathetic to these requirements. The UK's stated aims post Brexit include reaching extensive trade and investment agreements with states other than the EU, such as the United State. The question that will arise in this context is what conditions the other states with which the UK wishes to conclude an agreement require. The principal issue is often not the question of tariff barriers, but non-tariff barriers, which include potentially regulatory standards in the UK that the other state considers a barrier to entry. Examples would include regulatory standards such as restricting hormones in beef, but it could equally include some types of ESR standards.

A second problem associated with leaving the EU, would be how to ensure, if this is what is considered necessary, that the UK remains in step with the EU's post-Brexit ESR reforms and interpretation, assuming it remains a progressive force.

The third difficulty relates to the ECHR. A significant layer of ESR protection in the UK now derives from the Human Rights Act 1998 and the ECHR. Brexit will remove a significant political requirement for UK to continue as member of ECHR, and there is therefore a possible threat to Human Rights Act 1998 in future, and possible withdrawal of the UK from ECHR to be contemplated.

The fourth relates to the methods of protection and the remedy that EU law provided. More fundamentally, leaving the EU impacts on the remedies available for the enforcement of ESR, in particular the extent to which human rights obligations override conflicting Parliamentary legislation. In particular, because of the supremacy of EU law, national law was prevented from reducing ESR protection below EU standards. In this

respect, the remedies available under EU law for a breach of equality law, for example, could be much further reaching than the remedies now available under the Human Rights Act 1998, the Northern Ireland Act 1998, and the Equality Act 2010. For example, in the *Benkharbouche* case, Ms Benkharbouche and Ms Janah were employed by the Sudanese and Libyan Embassies in London. They were dismissed and brought claims against the Embassies for unfair dismissal, failure to pay the national minimum wage and breach of the Working Time Regulations 1998. Ms Jannah also claimed racial discrimination and harassment. The Embassies sought to claim immunity under the State Immunity Act 1961 – primary legislation which seeks to exclude foreign embassies from domestic rules regarding employment. The Court of Appeal in England found that, amongst other issues, there had been a breach of the Working Time Regulations and anti-discrimination law which fell within the scope of EU law.<sup>21</sup> The UK State Immunity Act 1961 was disapplied in order to grant the applicants an effective remedy. The Supreme Court upheld the Court of Appeal’s decision.<sup>22</sup>

This case, and the remedy granted, represents the most robust form of remedy that can be employed by a UK court when dealing with primary legislation that conflicts with EU law – including EU human rights and equality provisions. As explained in the *Miller* judgment, the process of exiting the European Union has meant that remedies such as this will be lost when the UK leaves,<sup>23</sup> and the Withdrawal Act 1998 recognises this. The one major exception to this relates to the rights protected by Article 2 of the Ireland-Northern Ireland Protocol. If the removal of supra-national guarantees, which are currently not subject to override by Parliamentary sovereignty on a day to day basis, is considered a problem, then the remedy is to attempt to substitute other supra-national guarantees which would also function as a barrier to Parliament or the local Assembly reducing ESR guarantees.

There is a further uncertainty which will affect the status of ESR protections. After Brexit, existing areas of EU competence will be repatriated to the UK, but there is still considerable uncertainty as to which of these competences will be allocated to Westminster/Whitehall, and which to the devolved governments across the UK. It is unclear, in particular, who will be responsible for many of the EU competences which engage socio-economic rights. It is also unclear to what extent such competences that are devolved will become the responsibility of the Northern Ireland Assembly or will fall within executive competence. In light of these various and varying factors, we develop a fifth model of enforcement that might be developed to protect ESR rights that were previously derived from EU law.

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<sup>21</sup> *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62. See also *Google Inc v. Vidal-Hall* [2015] EWCA Civ 311 for a similar remedy in the disapplication of primary UK law contrary to EU law. The UK law was also declared to be incompatible with the ECHR in *Benkharbouche*.

<sup>22</sup> Note that the Court of Appeal also employed Article 47 of the Charter and the right to an effective remedy.

<sup>23</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para.78

(k) Continuing political negotiations

The lack of consensus on a Northern Ireland Bill of Rights amongst the political parties mentioned above continues to dog the Bill of Rights process, but there are indications of some movement (to put the point as cautiously as possible). Between January 2017 and January 2020, no Northern Ireland Executive was in operation. During that period, there were periodic sets of negotiations between the parties on the restoration of a power-sharing government. These culminated in *New Decade, New Approach* ('NDNA').<sup>24</sup> This provides for the establishment of an *ad hoc* Northern Ireland Assembly Committee, the role of which is 'to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights (which are currently applicable) and "that reflect the particular circumstances of Northern Ireland"; as well as reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem.'<sup>25</sup>

Annex E of NDNA, provides that the Ad-Hoc Committee will be assisted in its work by a Panel of five experts appointed jointly by the First Minister and deputy First Minister.<sup>26</sup> The role of the Panel is 'initially [to] seek to advise the Ad-Hoc Committee on what constitutes our "particular circumstances" drawing upon, but not bound by, previous work on a Bill of Rights and [to] review and make recommendations on how the UK's withdrawal from the EU may impact on our "particular circumstances".'<sup>27</sup> How far this new process will move beyond the previous stalemate remains uncertain.<sup>28</sup> NDNA notes that: 'The establishment of cross party and cross community support will be critical to advancing a Bill of Rights.'<sup>29</sup>

(l) Covid-19

As we were nearing the completion of this Report, the Covid-19 global pandemic struck, with massive implications for work, health, welfare, freedom of movement, privacy, and social life. As of September 2020, it would seem that the limitations in how governments have managed the pandemic has focused renewed attention on issues such as the structure of work, the funding of the National Health Service, and economic and health inequalities between communities, among others. All of these issues are closely linked to the issue of ESR. It remains to be seen whether the medium to long term effect of the pandemic will be increased intensity of appeals for such rights to be better protected, and acceptance by government that such calls are justified.

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<sup>24</sup> *New Decade, New Approach* (January 2020).

<sup>25</sup> NDNA, para 28.

<sup>26</sup> NDNA, para 5.27.

<sup>27</sup> NDNA, para 5.28.

<sup>28</sup> See <https://ohrh.law.ox.ac.uk/advancing-a-bill-of-rights-for-northern-ireland/>.

<sup>29</sup> NDNA, para 5.29.

## Conclusion

In this chapter, we have sought to identify what appear to us to be the main contextual factors that our Report needs to take into account. In the remainder of this Report, we suggest five main models that we consider are worth considering, taking these contextual factors into account. We suggest that the models identified are responsive to these key contextual considerations. They are also, as was requested of us:

- innovative and creative;
- situated on the spectrum between full justiciability of subjective rights and simply declaratory, tending towards the middle of that spectrum;
- feasible within the institutional and constitutional features of Northern Ireland government and administration, as established by the Northern Ireland Act 1998, implementing the Belfast-Good Friday Agreement and subsequent agreements; and
- provide an opportunity to engage local politicians in further debate.

We reiterate, however, that we do not reject the earlier proposals made by the Northern Ireland Human Rights Commission (considered further below), nor do we reject any more extensive constitutional or legislative reforms; these are already in the public domain.<sup>30</sup> Our brief was to introduce into Northern Ireland public debate other approaches that fall short of these.

We have also made clear, at the beginning of this chapter, that the current rapid changes that are underway politically and economically make it difficult to assess the effect, let alone the utility, of several of the models described. Thus, for example, current uncertainties surrounding the outcome of the current future relations negotiations between the EU and the UK make the fifth model difficult to assess; the extent of political scepticism over the role of judicial review in certain sections of the popular press and political commentaries make the feasibility of the fourth model questionable. The first, second and third options will be affected by how far there are significant changes in the scope of devolved powers. In several respects, therefore, this is not an auspicious time in which to consider options. On the other hand, the Covid-19 pandemic has exacerbated already existing problems in accessing ESR, and the effect has been to make addressing ESR now even more timely. What we aim to provide in the following chapters, then, is a set of options that we hope will stimulate a much-needed debate in Northern Ireland about how ESR are to be addressed in the future, rather than an immediate blueprint.

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<sup>30</sup> See, in particular, Anne Smith and Colin Harvey, *Where Next for a Bill of Rights for Northern Ireland* (Ulster University/Queen's University Belfast, 2018)

## **Chapter 2: Relying on pre-legislative scrutiny and relevant codes of practice**

This chapter focuses on developing a model that seeks to enhance the enforcement of economic and social rights (ESR) in Northern Ireland by ensuring that careful attention is given to the international obligation to protect, respect and fulfil such rights at times when new legislation or policies are being planned and debated. It considers the feasibility of mechanisms designed to increase the regard which Ministers in the Northern Ireland Executive, other Members of the Northern Ireland Assembly and civil servants in Northern Ireland government departments must all pay to ESR whenever they are proposing or developing new laws and policies.

The mechanisms in question are (1) Assembly Committees, (2) Assembly Standing Orders and (3) Ministerial Codes. In each case the mechanisms could be employed without the need for any new legislation to reinforce them, but if such legislation were to be passed it would allow the mechanisms to be strengthened so that they would be more likely to operate effectively in upholding ESR. This section looks first at each of the three types of mechanisms before going on to examine how they could be made to work more effectively if legislation were enacted to that end. The section proceeds on the assumption that the NIA will continue, and that an Executive will continue to operate.

### **(1) Assembly Committees**

#### *Statutory and Standing Committees*

At present Members of the Assembly scrutinise proposed legislation and existing or proposed policies through various Committees. These are called Statutory Committees because their existence is mandated through legislation (section 29 of the Northern Ireland Act 1998). They have to advise and assist each Northern Ireland Minister 'in the formulation of policy with respect to matters within his [or her] responsibilities as a Minister'. They can also initiate legislation, although this happens very rarely. An example is the Assembly Members (Independent Financial Review and Standards) Act (NI) 2011, which provided for an independent panel to be set up to determine the salaries and allowances of MLAs and for an Assembly Commissioner for Standards to be created to ensure independent investigations of complaints against MLAs.

Statutory Committees must carry out the tasks listed in paragraph 9 of Strand One of the Belfast (Good Friday) Agreement, which are as follows:

- consider and advise on departmental budgets and Annual Plans in the context of the overall budget allocation
- approve relevant secondary legislation and take the Committee stage of relevant primary legislation

- call for persons and papers
- initiate enquiries and make reports
- consider and advise on matters brought to the Committee by its Minister.

As there are currently (during the 2017-2022 mandate) nine departments within the Northern Ireland Executive, there are nine statutory committees dealing with:

- Agriculture, Environment and Rural Affairs
- Communities
- Economy
- Education
- The Executive Office
- Finance
- Health
- Infrastructure
- Justice

Under the Assembly's Standing Orders, the Assembly must establish Committees not only to discharge duties in relation to departments but also to 'carry out any other functions deemed necessary'. There are currently (during the 2017-2022 mandate) seven of these so-called 'Standing' Committees. They are:

- Assembly and Executive Review
- Audit
- Business Committee
- Chairpersons' Liaison Group
- Procedures
- Public Accounts
- Standards and Privileges

Like the Statutory Committees, these Standing Committees have the power to send for persons and papers. Committees can also sit together, or the Assembly can decide to create a specific Joint Committee.<sup>1</sup>

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<sup>1</sup> Assembly Standing Order 64C. For information on Assembly Committees more generally, but bearing in mind that the number of Statutory Committees has fallen since 2013, see: [http://education.niassembly.gov.uk/sites/userfiles/files/MAY2013FinalCommittees\(2\).pdf](http://education.niassembly.gov.uk/sites/userfiles/files/MAY2013FinalCommittees(2).pdf).

## Special or Ad Hoc Committees

There is no Committee whose sole function is to consider proposed legislation, or existing or proposed policies, from an equality and/or human rights perspective.<sup>2</sup> Paragraph 11 of Strand One of the Belfast (Good Friday) Agreement provided that the Assembly could 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'. The procedure for setting up and operating such a special Committee (called an Ad Hoc Committee on Conformity with Equality Requirements) has since been provided for at some length in Assembly Standing Order 35.

In practice, the establishment of this kind of special Committee is relatively rare. In 2012-13, during the Assembly's consideration of the proposed Welfare Reform Bill, an Ad Hoc Committee was established 'in order to consider only and report only on whether the provisions of the Welfare Reform Bill are in conformity with the requirements for equality and observance of human rights'. The Committee debated the content of its report on 14 January 2013<sup>3</sup> and the report was published on 21 January 2013.<sup>4</sup> The Committee could not identify any specific breaches of equality or human rights in the Welfare Reform Bill. The report was debated in the Assembly on 29 January 2013,<sup>5</sup> where on a cross-community vote (53 v 38) it was not approved. Unionist MLAs were in favour of the report, as were the Alliance MLAs; but nationalist MLAs were against it, as was the Green MLA.<sup>6</sup> The report was discussed again the following day by the Committee for Social Development,<sup>7</sup> whose consideration of the Welfare Reform Bill had been put on hold pending the conclusion of the Ad Hoc Committee's work.

In addition to the special Committee provided for in the Belfast (Good Friday) Agreement, Assembly Standing Order 53(1) states that 'ad hoc committees shall be established from time to time to deal with any specific time-bounded terms of reference that the Assembly may set. The Assembly shall decide the membership of any such committee and

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<sup>2</sup> See, generally, Ray McCaffrey and Fiona O'Connell, *Standing Committees that examine conformity with human rights and equality issues in legislatures in the UK and Ireland*, NI Assembly, Research and Information Service Briefing Paper 001/14 (January 2014).

<sup>3</sup> See [http://www.niassembly.gov.uk/globalassets/documents/official-reports/ad-hoc/ad-hoc-2012-13/130114\\_agreementoncommitteeoposition.pdf](http://www.niassembly.gov.uk/globalassets/documents/official-reports/ad-hoc/ad-hoc-2012-13/130114_agreementoncommitteeoposition.pdf).

<sup>4</sup> For the Executive Summary see <http://www.niassembly.gov.uk/assembly-business/committees/2011-2016/ad-hoc-committee-on-conformity-with-equality-requirements-welfare-reform-bill/reports/report-on-whether-the-provisions-of-the-welfare-reform-bill-are-in-conformity-with-the-requirements-for-equality-and-observance-of-human-rights/> and for the full report and all written submissions see <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-welfare-reform-committee/report/nia921115.pdf>.

<sup>5</sup> See <http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2012-13/microsoft-word---29.01.13.pdf>.

<sup>6</sup> See <http://www.niassembly.gov.uk/assembly-business/minutes-of-proceedings/archive-minutes/session-2012-2013/tuesday-29-january-2013>.

<sup>7</sup> See <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2012-2013/january-2013/welfare-reform-bill-consideration-of-ad-hoc-committee-report>.

may direct its method of operation'. There are currently two Ad Hoc Committees sitting: the Ad Hoc Committee on the Covid-19 Response; and the Ad Hoc Committee on the Bill or Rights. It would be possible for the Assembly to create such a committee for the specific purpose of monitoring the compatibility of legislation and policy with ESR.

### *Analysis*

There are several arguments in favour of establishing a Committee to consider ESC in Northern Ireland, either as a stand-alone committee or as part of the mandate of a committee with a broader mandate. First, the Northern Ireland Human Rights Commission recommended in 2001 that the Assembly should have its own Standing Committee on Human Rights and Equality,<sup>8</sup> a recommendation repeated in the Commission's 2008 advice to the Secretary of State for Northern Ireland on a Bill of Rights for Northern Ireland.<sup>9</sup> Second, there is a precedent in the form of the Joint Committee on Human Rights at Westminster, which has had some marked success in establishing itself as a powerful and effective voice for human rights. Third, having a forum for the expression of alternative views on rights may be thought to be intrinsically helpful, by bringing these disputes within the devolved institutions, rather than outside these institutions. Notably a new Equality and Human Rights Committee was established in the Scottish Parliament. Although it is too early to determine the effectiveness of this Committee in this regard it will be of interest to Northern Ireland to note its progress.<sup>10</sup> Similarly, the Welsh Parliament's Equality, Local Government and Communities Committee includes both equality and human rights within its remit. Each of these Committees whilst routinely considering human rights does not explicitly include ESR within its remit.

On the other hand, the experience of setting up an Ad Hoc Committee on Equality was not a very harmonious or fruitful one. It served to bring out the deep divisions which exist within the Assembly, largely between the unionist and nationalist positions, around what constitutes a breach of equality or human rights standards. The chances of a new Standing Committee on Equality and Human Rights being able, at least at the moment, to adopt an agreed stance on whether proposed new legislation breaches international standards are therefore slim, the more so if the remit of the Committee is confined to ESR. This would be the case whether the Committee was a special Committee envisaged by the Agreement and regulated by Standing Order 35 or an ad hoc Committee set up under Standing Order 53(1).

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<sup>8</sup> *The Northern Ireland Assembly's Standing Orders and Human Rights Protection.*

<sup>9</sup> *A Bill of Rights for Northern Ireland*, p 170.

<sup>10</sup> Not least because the Committee plans to extend its remit further to include engagement with international human rights following the recommendations of a report into the role of the Parliament as a guarantor of human rights, Scottish Parliament Equality and Human Rights Committee, "Getting Rights Right: Human Rights and the Scottish Parliament", November 2018, available at <https://sp-bpr-en-prod-cdnp.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf>.

A further practical difficulty with creating any such Committee is that in 2016 the number of MLAs was reduced from 108 to 90. This makes it harder to populate committees with a critical mass of MLAs who have the time to take their Committee responsibilities sufficiently seriously. Currently each of the Standing and Statutory Committees is required to have 9 members,<sup>11</sup> including the chairperson and deputy chairperson. Given that Ministers do not sit on Committees, most non-ministerial MLAs sit on two Committees, and some on three.

There could be other difficulties in setting up an Assembly Committee with the specific function of scrutinising Bills to check that they comply with international standards on ESR. If the example set by the Ad Hoc Committee on Equality were to be followed, discussion of the Bills by other Standing Committees would often need to be suspended while the ESR Committee completed its scrutiny. Even if this suspension of activities could be avoided, how it could be ensured that discussions within the ESR Committee would not be repeated at the relevant Standing Committee charged with looking at the Bill, or vice-versa, would need to be considered. It is true that Assembly Standing Orders 64, 64A and 64B attempt to regulate such problems, but even getting agreement on how such regulation should be applied in practice might be difficult.

It also may not be wise to corral debate about ESR into one specific Committee rather than seek to mainstream consideration of ESR rights throughout all Standing Committees. Some might point to the work of the Joint Committee on Human Rights at Westminster as a good example of how a specific Committee can influence government departments on rights and equality issues, but the context within which that Committee functions is significantly different from that which obtains at Stormont: the 12 members of the JCHR represent a total of 650 MPs and approximately 800 peers, there are no cross-community voting requirements and the resources available to service the Committee are significantly greater than at Stormont, including a full-time advisor who is an acknowledged legal specialist in the field. Moreover, the Joint Committee traditionally has members who have already devoted many years of active work on human rights or equality issues and can be considered genuine experts. It has a broader remit, too, in that it can conduct inquiries into human rights issues. There is also a culture whereby government departments issue formal responses to reports of committees at Westminster, a practice which does not seem to be replicated on a systematic basis at Stormont.

An assessment of whether the establishment of a Committee would be helpful depends, substantially, on what function such a Committee is intended to serve. If the function is to provide an opportunity to discuss ESR on a continuing basis, without necessarily reaching agreement, then that is achievable. If the function of the Committee is expected to be reaching agreement on the meaning and effect of such rights in the domestic context in Northern Ireland, so as to provide an agreed standard by which proposed legislation is assessed, that is less likely.

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<sup>11</sup> Assembly Standing Orders 49(2)(a) and 52(2)(a).

Then again, if the function is to affect the drafting of legislation, there may be other methods of achieving this short of establishing a Committee. When civil servants in each government department are considering new legislation and policies they already follow detailed guidance to ensure that they comply with the Human Rights Act 1998. It would be a relatively small step to provide those civil servants with additional guidance on how to ensure compliance with international standards on ESR, even if such ESR have not been expressly incorporated into domestic law in the way that the ECHR incorporates Convention rights. Besides some of the Convention rights partially overlap with internationally-recognised ESR, such as the right to respect for one's home (Article 8) and the right to education (Article 2 of Protocol 1). Even if no changes at all were made to current arrangements for Assembly Committees and MLAs to consider ESR, making such guidance available to, or accessible by, civil servants might indirectly achieve that goal.

## (2) Assembly Standing Orders<sup>12</sup>

Whether or not a specific Committee is established within the Assembly to consider ESR, which would itself require, at the very least, an amendment to Assembly Standing Orders, it might be possible to advance a non-legislative approach to the safeguarding of ESR through imposing more responsibility directly on Ministers and thereby indirectly on civil servants to bear in mind ESR when they are devising and developing new laws and policies. Under section 9 of the Northern Ireland Act 1998, a Minister in charge of a Bill must, on or before its introduction in the Assembly, issue a statement to the effect that in his or her view the Bill is within the legislative competence of the Assembly,<sup>13</sup> and section 6 of the same Act makes it clear that to be within that legislative competence the Bill must not be incompatible with any of the Convention rights (defined by section 98 as meaning the same as in the Human Rights Act 1998). At Westminster, because it is a sovereign and not a subordinate Parliament, under section 19 of the Human Rights Act 1998 a Minister in charge of a Bill has the option of making a statement to the effect that he or she is unable to confirm the Bill's compatibility with Convention rights but that the government nevertheless wishes the House to proceed with it.

It would be possible for the Assembly to adopt a new Standing Order requiring a Minister in charge of a Bill to state whether in his or her view the Bill is or is not compatible with the duties to protect ESR which the United Kingdom has agreed to through the ratification of international treaties. This would at least focus the Minister's mind and those of his or her officials on the potential impact of the Bill on ESR. The Standing Order could go on to require the Minister to state why, in cases where he or she is not able to say that the Bill is compatible with ESR, the government department still wishes to proceed with it. Given the inherent uncertainty around what some ESR actually require of states, this procedure

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<sup>12</sup> The latest version of the Standing Orders, dated March 2020, is available here: <http://www.niassembly.gov.uk/globalassets/documents/standing-orders/so-31march2020-updates.pdf>.

<sup>13</sup> Assembly Standing Order 84 places a similar duty on the promoter of a Private Members Bill.

would at least bring to the fore the points on which disagreement exists. In turn, it would facilitate discussion of those points when the Bill is being debated in the Assembly, a point that could also be made regarding a possible Committee.

This is what occurred when, at Westminster, the government felt unable to issue a statement that the Communications Bill it was introducing in 2002 was compatible with Convention rights as far as the control of political advertising was concerned. When the Bill was debated in Parliament a lot of attention was paid to that very matter and, years later, when the ECHR-compatibility of sections 319 and 321 of the resulting Communications Act 2003 was considered by the Grand Chamber of the European Court of Human Rights, emphasis was placed by that Court on the thoroughness of the parliamentary debate at Westminster when it reached the conclusion that the United Kingdom had acted within its margin of appreciation in enacting those provisions.<sup>14</sup>

Assembly Standing Orders could also be amended to harmonise procedures concerning human rights issues and equality issues affecting proposed legislation. At present Standing Orders 34 and 35 differ significantly, with only the latter allowing for the creation of an Ad Hoc Committee of the Assembly. On the other hand, Order 35 does not allow for advice to be sought from the Equality Commission for Northern Ireland (ECNI) even though Order 34 is built around asking for advice from the Northern Ireland Human Rights Commission (NIHRC). To some extent this difference is explicable by the terms of paragraph 11 of Strand One of the Belfast (Good Friday) Agreement, as mentioned above, but it would be within the powers of the Assembly to alter the Standing Orders so as to direct the attention of the Ad Hoc Committee to ESR and require it to take into account the views expressed by both the ECNI and the NIHRC on the compatibility of the Bill in question with all the international standards on ESR to which the United Kingdom has agreed to abide.

Assembly Standing Order 41 requires that when Bills are introduced in the Assembly they must be accompanied by an explanatory and financial memorandum. It does not specify that the memorandum should set out why the Bill is compatible with Convention rights even though in practice most memoranda do say something about human rights. As pointed out in a briefing paper commissioned by the Assembly itself in 2014, the guidance on what should be included in explanatory memoranda at Westminster is more demanding on human rights compliance than what is usually expected in Northern Ireland,<sup>15</sup> so here too there is scope for amending the Assembly Standing Orders accordingly.

### (3) Ministerial Codes

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<sup>14</sup> *Animal Defenders International v UK*, 22 April 2013, paras 108 and 113-123. The Appellate Committee of the House of Lords had also given great weight to this factor when deciding (by 5 v 0) that the relevant section of the 2003 Act was compatible with Convention Rights: *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, e.g. [33], per Lord Bingham.

<sup>15</sup> Tim Moore, Michael Potter and Jane Campbell, *Human Rights and Equality Proofing of Public Bills*, NI Assembly, Research and Information Service Briefing Paper 20/14 (10 February 2014).

Ministers in Northern Ireland are also obliged to abide by three separate documents setting out particular standards. First, under sections 16, 18 and 19 of the Northern Ireland Act 1998 they must affirm the terms of a Pledge of Office, the most pertinent of which is probably paragraph (c), which requires Ministers ‘to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination’. Second, they must comply with a Ministerial Code of Conduct, paragraph (vi) of which requires them to ‘operate in a way conducive to promoting good community relations and equality of treatment’. Third, and this is reinforced by paragraph (iv) of the Ministerial Code of Conduct, Ministers must follow the seven principles of public life, first drawn up by the former senior judge, Lord Nolan, in 1995.

The first two of the three documents just mentioned were set out in Annex A to Strand One of the Belfast (Good Friday) Agreement and were reproduced in Schedule 4 to the Northern Ireland Act 1998. They now form part of a larger document called, confusingly, the Ministerial Code, which sets out additional matters relevant to the exercise of executive power in Northern Ireland.<sup>16</sup> The Code itself provides, in paragraph 4, that it cannot be amended unless and until the proposed amendment is approved by the Assembly with cross-community support. It could be amended, for example, to require Ministers, when they are exercising their functions, to pay due regard to the United Kingdom’s obligations to protect ESR. This would be comparable to, though less enforceable than, the duties imposed upon Ministers (and other public authorities) by section 75(1) of the Northern Ireland Act 1998, which focuses on the need to promote equality of opportunity between different sectional groups depending, for example, on their religious belief, racial background, gender or disability status. Depending on the strength of the wording of the amended Code it is possible that the High Court would be willing to consider an application for judicial review if there was evidence that a Minister had clearly not paid due regard to ESR when exercising his or her functions.

Ministers in Northern Ireland must also bear in mind that if they do take any action which fails to meet the United Kingdom’s international obligations – including those imposed by human rights treaties – they remain in danger of having their actions countermanded by the Secretary of State for Northern Ireland. Section 26(3) of the Northern Ireland Act 1998 expressly states that this power applies even where the action concerned consists of introducing a Bill in the Assembly or making subordinate legislation. The Secretary of State’s power is exercisable through the making of an order, which can have retrospective effect (section 26(5)), but the order is subject to annulment by a resolution of either House of Parliament (section 96(1)). The power has not to date been exercised, and there would doubtless be serious political ramifications if it ever were to be, but it is still a significant weapon in the national government’s armoury if it were faced with obvious and blatant violations of ESR by a Northern Ireland Minister.

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<sup>16</sup> The Ministerial Code can be accessed here: <https://www.northernireland.gov.uk/sites/default/files/publications/nigov/Northern%20Ireland%20Ministerial%20Code.pdf>. It was drawn up as a result of St Andrews Agreement in 2006 and is provided for by section 28A of the Northern Ireland Act, which was inserted into the 1998 Act by section 5 of the Northern Ireland (St Andrews Agreement) Act 2006.

Under this heading on Ministerial Codes we should also mention the idea that a Code could impose obligations on Ministers to consider ESR when they are taking decisions on what their spending will be in any financial year. Substantial work on how public spending can be monitored from a human rights point of view has already been undertaken by researchers based in Northern Ireland.<sup>17</sup>

It would be perfectly possible for the Ministerial Code to be amended so as to require Ministers to, at the very least, take into account international standards on ESR when drawing up and implementing budgets. One of those standards, of course, is the obligation on each state to ‘take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized [in the International Covenant on Economic, Social and Cultural Rights (the ICESCR)] by all appropriate means’.<sup>18</sup> To supplement such a reform, the Assembly’s Standing Orders for the Public Accounts Committee could be amended to require it to assess whether public money has been spent in ways which do not violate international standards on ESR. Of course, as evidenced by the experience of the Ad Hoc Committee on the Welfare Reform Bill, discussed above, there is considerable room for reasonable people to disagree on what would or would not amount to a violation of those standards. To give an obvious example, do the words ‘achieve progressively the full realisation of rights’ mean that there must be better protection of each economic and social right on a year-to-year basis, or can they mean that it is enough if, over the period of a reporting cycle of, say, five years, economic and social rights are better protected at the end of the period than they were at the start?

#### (4) Legislative options

The international standard in Article 2(1) of the ICESCR, when referring to ‘all appropriate means’, continues: ‘including particularly the adoption of legislative measures’. Each of the three mechanisms already discussed in this chapter – Assembly Committees, Assembly Standing Orders and Ministerial Codes – could be applied as they currently stand in ways which would enhance the enforcement of ESR in Northern Ireland by ensuring that greater pre-legislative attention is given to relevant international obligations. Thus, the Assembly itself could decide to set up a new Committee, it could also alter its own Standing Orders or the Ministerial Code, and the Pledge of Office and Standards of Public Life could each be interpreted in ways which would require Ministers to pay more heed to ESR.

It is obvious, however, that more entrenched protection could be accorded to ESR if legislation were passed to cement such changes and/or to confer upon the Assembly additional powers and duties in relation to ESR. The example set by section 75 of the Northern Ireland Act 1998 should be borne in mind in this context (see the discussion of Model 2 below).

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<sup>17</sup> See, for example, Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, 2013).

<sup>18</sup> Article 2(1) of the ICESCR.

It is also worth noting that the function of ‘observing and implementing international obligations’, including the ECHR and the Protocols thereto which the United Kingdom has ratified,<sup>19</sup> is specifically excluded from the definition of an ‘excepted matter’ under the Northern Ireland Act 1998.<sup>20</sup> The function is also not included in the category of ‘reserved matters’, all of which are, potentially, only temporarily withheld from the Northern Ireland Assembly.<sup>21</sup> It therefore has to be considered as a ‘transferred matter’.<sup>22</sup> This means that it is already within the competence of the Assembly to pass laws which observe or implement international obligations such as those in the United Nations’ ICESCR or the Council of Europe’s Social Charter (not to mention Title IV of the EU’s Charter of Fundamental Rights in relation to the implementation of EU law, for so long as that law continues to be applicable in Northern Ireland). This could occur even if other parts of the United Kingdom did not follow suit.

A comparable situation arises in Scotland.<sup>23</sup> That is why the Scottish Parliament was able to enact Part I of the Children and Young People (Scotland) Act 2014, which imposes duties on Scottish Ministers and other public authorities in relation to compliance with the UN Convention on the Rights of the Child and, more recently, to introduce the UNCRC Incorporation (Scotland) Bill 2020. Indeed in the Commissioner for Older People Act (NI) 2011 the Northern Ireland Assembly has already provided that in deciding how to exercise his or her functions the Commissioner must ‘have regard to the United Nations Principles for Older Persons adopted by the General Assembly of the United Nations on 16 December 1991’.<sup>24</sup> Consensus on including that provision seems to have been reached fairly easily amongst MLAs, but whether that would be the case if a broader duty to have regard to the ICESCR were to be imposed on all Ministers is very much a moot point.

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<sup>19</sup> This embraces a wider set of rights than the ‘Convention rights’ as defined in the Human Rights Act 1998.

<sup>20</sup> Sch 2, para 3(c).

<sup>21</sup> Northern Ireland Act 1998, Sch 3.

<sup>22</sup> Northern Ireland Act 1998, s 4(1).

<sup>23</sup> Scotland Act 1998, Sch 5, para 7.

<sup>24</sup> Section 2(3)(b).

### **Chapter 3: Including socio-economic requirements in specific legislation**

This chapter outlines a model for economic and social rights (ESR) enforcement in Northern Ireland available within the existing constitutional framework that focuses on socio-economic requirements in specific legislation. As we shall see, there is a variety of different approaches within this broad model, with different approaches having both strengths and weaknesses. These are broadly contextualised within the particular circumstances of Northern Ireland, including the political impasse in terms of a Bill of Rights for Northern Ireland and the impact of constitutional change such as that entailed by Brexit.

This chapter examines the potential for ESR enforcement by enhancing existing equality legislation in Northern Ireland. The chapter also considers the approach of introducing a legislative regime that draws upon international ESR treaties, exploring the option of a 'due regard' duty, as well as full incorporation. Finally, the chapter addresses the option of the Northern Ireland Assembly enacting specific legislation to provide for socio-economic rights to operate within its area of devolved competence.

#### **(1) Enhancing equality legislation in Northern Ireland**

Economic and social rights can often be indirectly protected as a result of the enforcement of non-discrimination measures, where equality legislation acts as a vehicle for the protection of economic and social rights. This pattern has been recognised in both the literature,<sup>1</sup> and can be evidenced in practice.<sup>2</sup> Here, we consider the scope of enhancing existing equality provisions in Northern Ireland. Whilst this model may offer increased protection for ESR it should be noted that the protection afforded to ESR under the rubric of equality provisions can be both piecemeal and incremental. Equality provisions are also often designed to offer procedural rather than substantive protection.

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<sup>1</sup> Nolan et al *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Human Rights Consortium March 2007) para.3.3.1. Nolan et al state 'The relationship between the right to equality and non-discrimination and social and economic rights is of central importance to the adjudication of social and economic rights. Violations of most social and economic rights are directly linked to systemic inequalities and may, in many cases, be challenged as such. Thus, in jurisdictions lacking explicit protections of social and economic rights, the right to equality can serve as a critical vehicle for disadvantaged groups seeking to enforce their social and economic rights.'

<sup>2</sup> Domestic examples: *Harjula v London Borough Council* *supra* *Harjula v London Borough Council* [2011] EWHC 151 (QB); *R (W) v Birmingham City Council*, [2011] EWHC 1147 Admin. International examples: *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R.; *Awat Tingi v Nicaragua* Inter-Am Ct HR, August 31 2001; *Shelter Corporation v. Ontario Human Rights Commission* (2001) 143 OAC 54; also *Klickovic Pasalic and Karanovic v Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Sprska*, CH/02/8923, CH/02/8924, CH/02/9364, 10 January 2003; *Khosa v Minister of Social Development*, 2004 (6) SA 505 (CC)

Equality law in Northern Ireland consists of a series of specific legislative measures and is underpinned by the equality provisions found in the Northern Ireland Act 1998.<sup>3</sup> In the rest of the UK, the bulk of equality provisions are consolidated in one piece of legislation – the Equality Act 2010 (which does not extend to Northern Ireland). The Northern Ireland equality regime operates, therefore, under a different legislative scheme from other parts of the UK and this has an impact on the enforcement of economic and social rights.

Here we raise three possible approaches to enhancing existing equality mechanisms in Northern Ireland, in order to better protect socio-economic rights:

- First, we consider extending equality law, drawing lessons from the broader GB experience. This analysis includes considering the consolidation of all the different legislative mechanisms under one Act.
- Second, we consider an enhanced form of remedy by making the public sector equality duty under section 75 of the Northern Ireland Act 1998 amenable to judicial review so that compliance can be tested in the courts.
- Third, we consider whether section 75 should be amended to include a ground for discrimination based on socio-economic disadvantage.

Whilst equality law is to a large extent devolved in Northern Ireland, any change to section 75 of the Northern Ireland Act 1998 would require legislation from Westminster.<sup>4</sup> We would emphasise that any changes to the Northern Ireland framework should build on and not replace the already established best practice that exists in Northern Ireland – including, for example, the obligation on public authorities to produce, publish and review equality schemes under Schedule 9 to the 1998 Act, and the duty to mitigate identified adverse effects.<sup>5</sup> Enhanced equality provisions, drawing on GB experience, should not come at the expense of existing Northern Ireland mechanisms.

#### *Harmonising, simplifying and strengthening existing equality law*

The Equality Commission for Northern Ireland has recommended that equality law in Northern Ireland should be harmonised, simplified and strengthened.<sup>6</sup> In 2014 the

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<sup>3</sup> Section 75 and Schedule 9 of the Northern Ireland Act provides for the statutory equality framework in Northern Ireland. See also - the Equality Pay Act (NI) (as amended) 1970, which provided equality in employment between men and women; Sex Discrimination (NI) Order (as amended) 1976; Fair Employment Act 1976, which provided equality in employment between those of different religious beliefs; Fair Employment (NI) Act 1989; Disability Act (UK wide) 1995; Race Relations (NI) Order 1997; Fair Employment and Treatment (NI) Order 1998; Police (NI) Act 2000; Equality (Disability etc) (NI) Order 2000; Employment Equality (Sexual Orientation) (NI) Regulations 2003; Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006; Sex Discrimination (amendment of legislation) Regulations 2008

<sup>4</sup> The subject matter of section 75 is reserved under para.42(b) of Schedule 3 NIA 1998.

<sup>5</sup> See section 75 and Schedule 9 NIA

<sup>6</sup> See the discussion paper on Gaps in equality law between Great Britain and Northern Ireland, Equality Commission for Northern Ireland, March 2014, available at

Commission issued a report identifying equality law gaps between Northern Ireland and Great Britain. The report identifies that Northern Ireland equality law contains ‘a number of unjustifiable exceptions which limit the scope of the equality legislation, as well as unnecessary barriers that limit individuals’ ability to exercise their rights under the legislation.’<sup>7</sup> The ECNI highlighted that the failure to keep pace with new and emerging forms of discrimination may leave individuals with limited or no protection against unlawful discrimination.<sup>8</sup> The range of gaps in equality law between NI and GB may impact on vulnerable and marginalised individuals who experience discrimination and who have less protection against unlawful discrimination, harassment and victimisation across a number of equality grounds.<sup>9</sup>

As discussed above, gaps in anti-discrimination law can impact on the enjoyment of socio-economic rights. For example, in the submission to the UN Committee on the Rights of Persons with Disabilities (February 2017) both the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland identified concerns for disabled people who have less protection in Northern Ireland than in the rest of the UK in terms of access to remedies against perceived and associative discrimination and indirect discrimination.<sup>10</sup> The Advisory Committee on the Framework Convention for the Protection of National Minorities has also highlighted that the political climate in NI has prevented progress on equality reform and that this has meant those from national minorities also fall between equality ‘gaps’.<sup>11</sup> The main areas identified for immediate reform by the ECNI include race equality legislation, disability legislation, and age discrimination legislation relating to the provision of goods and services.<sup>12</sup>

Recommendations have been made to follow the GB example and consolidate all legislative instruments in Northern Ireland into one overarching piece of legislation in order to provide greater clarity and strengthen existing protections (similar to the Equality Act

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<http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2014/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf>

<sup>7</sup> Gaps in equality law between Great Britain and Northern Ireland, Equality Commission for Northern Ireland, March 2014, available at <http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2014/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf>, p.5

<sup>8</sup> *ibid*

<sup>9</sup> Gaps in equality law between Great Britain and Northern Ireland, Equality Commission for Northern Ireland, March 2014, available at <http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2014/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf>, p.7

<sup>10</sup> Disability rights in Northern Ireland, Supplementary submission to inform the CRPD List of Issues on the UK, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, February 2017, available at <http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/CRPD-NI-supplementary-submissionLOI.pdf>

<sup>11</sup> Council of Europe: Secretariat of the Framework Convention for the Protection of National Minorities, *Fourth Opinion on the United Kingdom adopted on 25 May 2016*, 27 February 2017, ACFC/OP/IV(2016)005 para.27

<sup>12</sup> Gaps p.1

2010).<sup>13</sup> An immediate step towards mainstreaming socio-economic rights enforcement would therefore be to extend the scope of equality law to ensure that those living in Northern Ireland have access to the same rights and remedies as is available for individuals in GB – possibly through an Equality Act for Northern Ireland. The Northern Ireland Assembly has the devolved power to legislate to improve and strengthen equality provisions in devolved areas on a piecemeal basis. However, as noted above, any change to the Northern Ireland Act 1998 and the overarching equality framework would require Westminster legislation. As previously stated, whilst lessons may be learned from the broader GB experience, this should not be at the expense of existing mechanisms in the Northern Ireland framework.

Strengthening equality provisions in Northern Ireland has become all the more pertinent in the light of Brexit. In some circumstances, the domestic equality framework has actually gone beyond the EU framework meaning that domestic protection mechanisms are already more advanced than EU law provides. For example, in the Northern Ireland *Ashers* case,<sup>14</sup> concerning the refusal of a bakery to make a cake with a message supporting gay marriage iced on it, the court relied on the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 which protect against discrimination based on sexual orientation in the provision of services – a protection not yet secured in EU law.<sup>15</sup> However, much of the equality framework in both Northern Ireland and GB has been shaped by EU law or has come to fruition as a direct result of EU law. O’Cinneide has described EU law as ‘the engine that has hauled the development of UK anti-discrimination law along in its wake’. He has argued that, without its influence, ‘British legal standards would be much weaker than they currently are.’<sup>16</sup> This is most evident in the case law concerning non-discrimination on the grounds of age in the work place<sup>17</sup>, and in particular the use of Article 21 (equality and non-discrimination)

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<sup>13</sup> The 2012 Annual statement, Human Rights in Northern Ireland, Northern Ireland Human Rights Commission, [http://www.nihrc.org/documents/advice-to-government/2012/HRC\\_Annual\\_statement%202012.pdf](http://www.nihrc.org/documents/advice-to-government/2012/HRC_Annual_statement%202012.pdf) 11; the 2016 Annual statement, Human Rights in Northern Ireland, Northern Ireland Human Rights Commission, <http://www.nihrc.org/uploads/publications/StrictlyEmbargoeduntil00.01hrs8December2016.NIHRCAnnualStatement2016.pdf>, 8 December 2016, 17. See also the Advisory Committee to the Framework Convention for the Protection of National Minorities concluded: ‘Existing legislation in NI remains complex and piecemeal. Consolidated legislation, such as that adopted in Great-Britain, is needed to put an end to the significant discrepancies and inconsistencies that exist between the different jurisdictions.’ para.66, and ‘Additional steps should be taken to develop a comprehensive and human rights-based antidiscrimination and equality legislation for Northern Ireland’, p.2, FCNM, Third Opinion on the UK, adopted on 30 June 2011, ACFC/OP/III (2011) 006 [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_UK\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_UK_en.pdf)

<sup>14</sup> *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 (Supreme Court).

<sup>15</sup> The EU Directive 2004/113/EC goes as far as protecting against discrimination between sexes in the provision of goods and services but not on the basis of sexual orientation (or other characteristics). In the *Ashers* case the claim based on sexual orientation discrimination failed. Another example is that Northern Ireland’s law protects people against discrimination on the grounds of political opinion in a way that does not exist in other parts of the UK or under EU law.

<sup>16</sup> Colm O’Cinneide, Equality rights in a post-Brexit United Kingdom, 29 July 2016, JCHR Report Joint Committee on Human Rights, The human rights implications of Brexit, <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/695.pdf>

<sup>17</sup> For example the recognition of horizontal rights by the CJEU in *C-144/04 Mangold* (22 November 2005) and applied in *Case C-555/07 Küçükdeveci* (19 January 2010) imposing the requirement for

and Article 47 (the right to an effective remedy) of the European Union Charter of Fundamental Rights.<sup>18</sup> Even in the *Ashers* case, jurisprudence from the CJEU was used to interpret equality provisions that did not originate in domestic law.

As we noted above, there is an added layer of complexity, because of Brexit. We saw above that those parts of existing Northern Ireland equality law that derive from EU law will be protected under Article 2 of the Ireland-Northern Ireland Protocol. That aside, however, the issue of whether previous EU competences should be retained at Westminster or devolved to the regions poses a potential difficulty for the non-EU-derived equality law. It is unclear whether former EU competences regarding equality will be devolved or not. On the one hand, not to devolve such competences would significantly weaken the ability of the NI Assembly to legislate within the generally devolved area of equality. On the other hand, stalemate has sometimes resulted in the past when attempts have been made to introduce increased protection for equality derived from EU law.<sup>19</sup> For example, as the Northern Ireland Human Rights Consortium has previously highlighted, the Northern Ireland Assembly was competent to legislate to give effect to the EU Council Directive 2004/113/EC (prohibiting gender discrimination in the provision of services), as it fell within its devolved powers, but it failed to do so.<sup>20</sup> The Explanatory Notes for the Regulations which were eventually issued state that ‘because the First Minister did not agree to the inclusion of references to transgender or gender reassignment in the Northern Ireland Regulations ... the decision was taken to take forward UK-wide regulations at Westminster. It was considered ... the most effective way of securing UK-wide compliance with our European Community obligations.’<sup>21</sup> Brexit has significant implications for the future shape of equality law in both Northern Ireland and the rest of the UK.

### *Access to judicial review*

The type of remedies available to individuals in NI and GB also differ. For example, in GB, an individual may seek judicial review of a decision by a public authority if the public

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national courts to suspend national law which breaches the principle of age discrimination (noting the subsequent reluctance to extend in [C-282/10 Dominguez \(24 January 2012\)](#)).

<sup>18</sup> Article 21 of the EU Charter of Fundamental Rights prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. The EU Charter is enforceable when engaging with EU law the scope of which covers employment law.

<sup>19</sup> The Sexual Orientation Regulations were indeed passed in Westminster during a period of dissolution of the NI Assembly.

<sup>20</sup> Northern Ireland Human Rights Consortium, Evidence of the Human Rights Consortium to the Joint Committee on Human Rights Inquiry: What are the human rights implications of Brexit? October 2016, available at <http://www.humanrightsconsortium.org/wp-content/uploads/2016/10/HRC-Submission-to-JCHR-Inquiry-HR-Implications-of-Brexit-10.10.16.pdf>

<sup>21</sup> Explanatory Memorandum to the Sex Discrimination (Amendment of Legislation) Regulations SI 2008/963: [http://www.legislation.gov.uk/uksi/2008/963/pdfs/uksiem\\_20080963\\_en.pdf](http://www.legislation.gov.uk/uksi/2008/963/pdfs/uksiem_20080963_en.pdf)

sector equality duty under the Equality Act 2010 has not been met.<sup>22</sup> During periods of austerity, this has resulted in courts overturning budgetary decisions which did not give due regard to promotion of equality.<sup>23</sup> By way of example, in 2011 Birmingham City Council was forced to revisit a budgetary decision which cut services to vulnerable disabled clients within the local authority's jurisdiction.<sup>24</sup> The City Council had reduced vital services without properly considering the impact that this would have on disabled persons – a protected group under the Equality Act 2010. This amounted to a failure to comply with the duty to have due regard to the need to eliminate unlawful discrimination and advance equality of opportunity under the public sector equality duty.<sup>25</sup> As a result, the court quashed the decision.<sup>26</sup> This is an example of ESR enforcement through a judicial remedy under the rubric of equality legislation.<sup>27</sup>

In Northern Ireland, disputes around compliance with equivalent equality provisions are adjudicated upon by the Equality Commission and judicial review of budgetary decisions by public bodies is restricted.<sup>28</sup> This limits individual access to a judicial remedy for a breach of the public sector equality duty. The UN Committee on Economic, Social and Cultural Rights has welcomed the development of administrative remedies such as that offered by the Equality Commission to deal with potential violations of ESC rights. The Committee has also recognised, however, that, whilst administrative measures may suffice as an effective remedy (without the need to resort to a judicial remedy), this is not always the case -- particularly with reference to obligations concerning non-discrimination.<sup>29</sup>

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<sup>22</sup> Prior to 6 April 2011 the relevant equality duties were contained in the Race Relations Act 1976 s.71; Sex Discrimination Act 1975 s.76A(1); and the Disability Discrimination Act 1995 s.49A(1). Section 149 of the Equality Act 2010 is now in force. The public sector equality duty extends to all the protected characteristics namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. For a fuller discussion on the impact of the Equality Act 2010 see Sandra Fredman, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda' [2010] European Human Rights Law Review 290

<sup>23</sup> See the domestic case examples mentioned above: *Harjula v London Borough Council* *supra* *Harjula v London Borough Council* [2011] EWHC 151 (QB); *R(W) v Birmingham City Council*, [2011] EWHC 1147 Admin

<sup>24</sup> BBC, 'Birmingham City Council care funding cuts unlawful', 20 April 2011, available at <http://www.bbc.co.uk/news/uk-england-birmingham-13147675>; Helen Carter, 'Birmingham council's plan to cut care for disabled ruled unlawful' *The Guardian*, 19 May 2011, available at <http://www.guardian.co.uk/society/2011/may/19/birmingham-council-cut-disabled-care-unlawful> Tim Ross, 'High Court: Council must not axe care for elderly' *The Telegraph*, 19 May 2011, <http://www.telegraph.co.uk/news/politics/8524591/High-Court-Council-must-not-axe-care-for-elderly.html>; Nicholas Timmins, 'Curb on disabled care ruled unlawful' *The Financial Times*, 19 May 2011 available at <http://www.ft.com/cms/s/0/704f5a6a-8249-11e0-961e-00144feabdc0>

<sup>25</sup> Section 149 Equality Act 2010.

<sup>26</sup> *R(W) v Birmingham City Council*, [2011] EWHC 1147 Admin

<sup>27</sup> *R(W) v Birmingham City Council*, [2011] EWHC 1147 Admin

<sup>28</sup> See *Neill's Application* [2006] NICA 5 on the court's reluctance to make the s75 statutory equality duty amenable to judicial review. However, note at para.30 "We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe section 75 would lie."

<sup>29</sup> Paragraph 9 of General Comment 9 of the Committee provides that 'an ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.' UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24

The distinct equality framework in Northern Ireland does not always reflect, therefore, the same level of judicial protection available to individuals in the rest of the UK. Learning from the broader GB experience and facilitating judicial review of compliance with the public sector equality duty in Northern Ireland could be achieved through an amendment to the Northern Ireland Act 1998, which would require Westminster legislation, to clarify that compliance with section 75 is subject to judicial review (after other remedies have been exhausted), or the courts could decide to depart from the *Neill* decision.

#### *Extending section 75 to include socio-economic status among the protected grounds*

Another way of extending equality law in Northern Ireland to enhance the protection of socio-economic rights would be for Westminster legislation to amend section 75 to include 'socio-economic disadvantage' as a legally protected ground in that section. Currently, section 75 imposes a duty on public authorities to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.<sup>30</sup> The Equality Commission for Northern Ireland has noted that 'whilst socio-economic disadvantage is not a specified ground under the equality legislation, the barriers and inequalities experienced by equality groups can be exacerbated by poverty and social exclusion.'<sup>31</sup>

A comparative analysis of socio-economic status as a grounds of discrimination in the employment context has argued that including socio-economic status as a ground of discrimination can help address ESR violations that occur as a result of social origin/socio-economic disadvantage, where poverty, social exclusion and social deprivation operate as constraints on an individual's social mobility (sometimes across generations).<sup>32</sup> For example, in the Canadian Northwest Territories, the Human Rights Act 2002 defines socio-economic status as a 'social condition' with regard to 'the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance.'<sup>33</sup> Other examples of legislative provisions in Canada include related grounds of discrimination such as 'being in receipt of public assistance', or 'social income' in order to combat socio-economic disadvantage (Saskatchewan, Manitoba and Ontario). In addition, case law in New Zealand has developed so as to include discrimination

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<sup>30</sup> Section 75 (a)-(d) of the Northern Ireland Act

<sup>31</sup> Equality Commission for Northern Ireland, Recommendations: Programme for Government (PFG) and Budget (May 2016)

<sup>32</sup> Shane Kilcommins, Siobhán Mullally, Emma McClean, Maeve McDonagh, Darius Whelan, 'Extending the Scope of Employment Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination', Report Commissioned by the Department of Justice, Equality and Reform (Government of Ireland, 2004)

<sup>33</sup> Section 1 Human Rights Act 2002 Northwest Territories, Canada

on the grounds of employment status (albeit in a more restrictive approach than socio-economic status *per se*).<sup>34</sup>

McKeever and Ní Aoláin have documented the development of equality legislation within Northern Ireland and have encouraged a move beyond a programmatic protection of socio-economic rights to a more inclusive and substantive enforcement model coupled with judicial remedies.<sup>35</sup> They argue that ESR protection would be better facilitated in Northern Ireland by amending section 75 to include 'socio-economic status' as part of the procedural duty to have due regard to encouraging equality of opportunity.<sup>36</sup> As above, any change to section 75 is not within the devolved competence of the Northern Ireland Assembly: it requires legislation at Westminster.

The existing socio-economic duty in the Equality Act 2010 (which does not extend to Northern Ireland and has not yet been brought into force in England) imposes a public sector duty on public authorities regarding socio-economic inequalities. Section 1 of the Act provides that a public authority must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome that result from socio-economic disadvantage. The purpose of the provision was to reduce inequalities in education, health, housing, crime rates or other matters associated with socio-economic disadvantage.<sup>37</sup> Before the Act came into force there was a change in the UK Government. The Act had been developed by the Labour administration of Gordon Brown but when the Coalition Government came to power in 2010 the then Minister for Women and Equalities, Theresa May, refused to commence this particular provision.<sup>38</sup> However, the provision is still on the statute book and could be brought fully into effect at a later stage.

In 2016 the Scottish Parliament was granted devolved competence to bring into force in Scotland the section 1 public sector duty regarding socio-economic inequalities.<sup>39</sup> This power was exercised to introduce provisions targeted at reducing socio-economic inequalities,

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<sup>34</sup> Shane Kilcommins, Siobhán Mullally, Emma McClean, Maeve McDonagh, Darius Whelan, 'Extending the Scope of Employment Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination', Report Commissioned by the Department of Justice, Equality and Reform (Government of Ireland, 2004)

<sup>35</sup> Grainne McKeever and Fionnuala Ní Aoláin, 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland' [2004] 2 *European Human Rights Law Review* 158, 166

<sup>36</sup> McKeever and Ní Aoláin *ibid* 172

<sup>37</sup> Explanatory Notes to the Equality Act 2010, available at <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/1/1>, accessed 10 September 2013, para.23. The explanatory notes also offer example scenarios in how the application of this provision was envisaged: 'The Department of Health decides to improve the provision of primary care services. They find evidence that people suffering socio-economic disadvantage are less likely to access such services during working hours, due to their conditions of employment. The Department therefore advises that such services should be available at other times of the day.'

<sup>38</sup> Amelia Gentleman, *Theresa May scraps legal requirement to reduce inequality*, *The Guardian*, 17 November 2010, available at <http://www.guardian.co.uk/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality>

<sup>39</sup> Section 38 of the Scotland Act 2016

renamed the 'Fairer Scotland' duty, from April 2018.<sup>40</sup> The same power has now been devolved to Wales under section 45 of the Wales Act 2017. Although that power has not been exercised yet, Welsh ministers would have done so in 2020 had not Covid-19 intervened to delay its introduction. A similar approach could be introduced in Northern Ireland if Westminster were to devolve competence to the Northern Ireland Assembly in the equivalent manner as has occurred in Scotland and Wales.

(2) A duty to have due regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR)

The Northern Ireland Assembly<sup>41</sup>, the Scottish Parliament<sup>42</sup> and the Welsh Assembly (as it then was)<sup>43</sup> have each introduced statutory duties to have regard to particular international treaties in the devolved context. As alluded to in Chapter 2 (on model 1), it would be within the competence of the Northern Ireland Assembly to introduce legislation that requires Ministers and public bodies to have 'due regard' (echoing the language of section 75 NIA) to existing international ESR treaty obligations. This could provide a 'self-regulatory' mechanism for ESR in observance of international obligations.<sup>44</sup> For example, the Assembly could introduce a duty to have due regard to the UK's obligations under the ICESCR when legislating in devolved areas.

The duty to have due regard to international ESR obligations, does not in itself guarantee a justiciable right to the substantive realisation of any particular economic or social right. Rather, judicial review would be available to scrutinise whether the decision maker took the right into consideration during the decision-making process. It must also be noted that legislative protection of human rights in this form is not free from the threat of repeal or retrogressive measures. For example, the UK Parliament introduced the Child Poverty Act 2010, which promoted the progressive realisation of an adequate standard of living under Article 27 of the UN Convention on the Rights of the Child, but Parliament later repealed the duty under the Welfare Reform and Work Act 2016.<sup>45</sup>

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<sup>40</sup> The Equality Act 2010 (Commencement No 13) (Scotland) Order 2017, SSI 2017/403; see also The Equality Act 2010 (Authorities Subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018, SSI 2018/101.

<sup>41</sup> Section 2(3)(b) of the Commissioner for Older People Act (Northern Ireland) 2011 requires the Commissioner to have regard to the United Nations Principles for Older Persons when carry out his/her functions and section 6(3)(b) of the Commissioner for Children and Young People (Northern Ireland) Order 2003 the Commissioner must have regard to the UN Convention on the Rights of the Child in exercising his/her functions

<sup>42</sup> Children and Young People (Scotland) Act 2014 (2014 Act) requires specified public authorities, including all local authorities and health boards, to report every 3 years on the steps they have taken to secure better or further effect of the UNCRC

<sup>43</sup> Rights of Children and Young Persons (Wales) Measure 2011 imposes a duty on Welsh Ministers to have due regard to the UN Convention on the Rights of the Child (UNCRC) in performance of their functions

<sup>44</sup> Schedule 2 paragraph 3(c) NIA 1998 exempts observing and implementing international obligations from the 'international relations' exception.

<sup>45</sup> Section 7.

In other words, the duty to have ‘due regard’ can be complied with without actually complying with the relevant norms, so long as due consideration has been given to the right in question. This type of duty is a procedural as opposed to a substantive duty. Nonetheless, it may be an attractive starting point from which to begin mainstreaming ESR into the decision-making process in Northern Ireland. Certainly, a duty to consider ICESCR when forming budgetary decisions, for example, would help to bring ESR to the forefront of the decision-making process without necessarily undermining the allocation of resources, given the procedural nature of the duty.<sup>46</sup> Another example in this vein, where a ‘due regard’ duty might well be helpful is when the Programme for Government is being developed. While the duty to have due regard is, therefore, not as robust a mechanism as one that fully incorporated ESR as provided for in international law, and placed limits on future repeal,<sup>47</sup> it is not without its attractions.

According to a recent OECD study, gender budgeting is increasingly prevalent in government budget processes. Almost half of OECD countries (15 out of 34 members) have introduced, plan to introduce, or are actively considering the introduction of gender budgeting.<sup>48</sup> Among others, both Austria and Iceland have introduced legislation to support gender budgeting. Iceland’s Organic Budget Law (Public Finance Act 123/2015) has provided for gender budgeting since 2016. The Finance Minister, in consultation with the Minister responsible for gender equality, heads a group responsible for the formulation of a gender budgeting programme, and this is taken into account in the drafting of the budget bill, which must outline its effects on gender equality targets.<sup>49</sup> Since 2009, Austria has been provided for gender budgeting in the Federal Constitution,<sup>50</sup> and since 2013 gender budgeting must be implemented at the federal level.<sup>51</sup> The Scottish Government has produced an Equality Statement as part of the Scottish Budget process since 2009. Although the impact of such initiatives is still being assessed, at its best, gender budgeting helps to mainstream gender within government policies, to hold government to account for gender policy promises in the allocation of financial resources, to increase the transparency of the budget process, to encourage civil society participation, and to contribute to better targeting of policy measures. Two mechanisms are, according to Quinn, most commonly associated with gender budgeting: ‘(i) the inclusion of instructions on gender budgeting in the regular budget circular issued by the Ministry of Finance, and (ii) an annual gender budget statement, outlining how the budget

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<sup>46</sup> See further, for example, the outputs of the QUB Budget Analysis Project, especially Rory O’Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014). See also Deloitte and Social Change Initiative, *Shifting Gear: Accelerating Public Service Transformation: Opportunities for Northern Ireland* (2020).

<sup>47</sup> S. Peterson, ‘Constitutional Entrenchment in England and the UK’ U.K. Const. L. Blog (25th March 2014) (available at <https://ukconstitutionallaw.org/>).

<sup>48</sup> Downes, R., L. von Trapp and S. Nicol (2017), “Gender budgeting in OECD countries”, *OECD Journal on Budgeting*, vol. 16/3, <https://doi.org/10.1787/budget-16-5jfq80dq1zbn>.

<sup>49</sup> OECD, *Budgeting and Public Expenditures in OECD Countries 2019* (OECD, 2019).

<sup>50</sup> Article 13.

<sup>51</sup> <https://www.un.org/ruleoflaw/blog/portfolio-items/austria-gender-budgeting/>

has contributed to the attainment of gender equality outcomes, presented to parliament.<sup>52</sup> Similar mechanisms could be introduced to ‘mainstream’ ICESCR obligations in the budget process in Northern Ireland.

### (3) Incorporation of an international ESR treaty such as ICESCR

If the duty to have due regard is considered an insufficiently robust approach compared with one that fully incorporated ESR as provided for in international law, and placed limits on future repeal, then another legislative option would be to introduce a statutory regime which incorporates an international ESR treaty.<sup>53</sup> There are already examples at the domestic level which demonstrate the viability of this model. The most obvious in the UK context relates to the virtual incorporation into domestic UK law via the Human Rights Act 1998 of the, mostly, civil and political rights found in the European Convention of Human Rights.

As noted above, the UN Committee on Economic, Social and Cultural Rights has advised on the domestic implementation of ICESCR, and recommends that ESR ought to be protected by states in the same way that civil and political rights are protected domestically.<sup>54</sup> Based on an analysis of state practice, the Committee identified a variety of approaches that are legitimately used given the broad flexible approach required by the Covenant.<sup>55</sup> Some states have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of ICESCR.<sup>56</sup> Others have adopted or incorporated the Convention into domestic law, so that its terms are retained intact and given formal validity in the national legal order,<sup>57</sup> often by means of constitutional provisions.<sup>58</sup>

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<sup>52</sup> Sheila Quinn, Gender Budgeting in Europe: What can we learn from best practice, Administration, 65(3) (2017), 101, Available from: [https://www.researchgate.net/publication/319010112\\_Gender\\_budgeting\\_in\\_Europe\\_What\\_can\\_we\\_learn\\_from\\_best\\_practice](https://www.researchgate.net/publication/319010112_Gender_budgeting_in_Europe_What_can_we_learn_from_best_practice) [accessed Aug 03 2019]

<sup>53</sup> An example of a non-incorporated treaty dealing with ESC rights is the International Covenant on Economic Social and Cultural Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 993, 3. Other treaties which provide for ESR include but are not limited to the European Social Charter (Revised) 1996, Council of Europe, ETS 163; the UN Convention on the Rights of the Child 1989, UN General Assembly, resolution 44/25 of 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; the Convention on the Elimination of Discrimination Against Women 1979, UN General Assembly resolution 34/180 of 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; the Convention on the Elimination of Racial Discrimination 1965, United Nations General Assembly resolution 2106 (XX) of 21 December 1965 United Nations, Treaty Series, vol. 660, p. 195; and the Convention on the Rights of Persons with Disabilities 2006, United Nations General Assembly resolution A/RES/61/106 of 24 January 2007, 76th plenary meeting; issued in GAOR, 61st sess., Suppl. no. 49. "Annex: Convention on the Rights of Persons with Disabilities": p. 2-29

<sup>54</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para.7

<sup>55</sup> General Comment No.9, para.1

<sup>56</sup> General Comment No.9, para.6

<sup>57</sup> Ibid

<sup>58</sup> Ibid – see for example the constitutions of Argentina 1853 (reinst. 1983, rev. 1994), Angola (2010), Macedonia 1991 (rev. 2011), Bosnia-Herzegovina 1995 (rev. 2009), Cape Verde 1980 (rev. 1992), Croatia 1991 (rev.2001), Czech Republic 1993 (rev. 2002), Democratic Republic of the Congo 2005 (rev. 2011), East Timor 2002, Eritrea 1997, Ethiopia 1994, Iran 1979 (rev. 1989), Macedonia 1991 (rev. 2011), Montenegro 2007; Mozambique 2004 (rev. 2007); Nepal 2006 (rev. 2010); Nicaragua 1987 (rev. 2005); Portugal 1976 (rev. 2005); Rwanda 2003 (rev. 2010); Sao Tome and Principe 1975 (rev. 1990);

Without a written constitution, incorporation into domestic law in any part of the UK would require the introduction of an Act in the Westminster Parliament or in a devolved legislature.

It will be useful at this point to consider a recent Canadian variation.<sup>59</sup> The recently adopted [National Housing Strategy Act](#) in Canada provides a useful example of legislative recognition of an ESC right that provides for a different type of access to justice so as to engage with the obligation of progressive realization without relying on courts. The Act declares that it is the housing policy of the Government of Canada to ‘recognize that the right to adequate housing is *a fundamental human right affirmed in international law*’ and commits the government to ‘further the progressive realization of the right to adequate housing as recognized in the *International Covenant on Economic, Social and Cultural Rights*.’<sup>60</sup>

Affected communities are able to make submissions on systemic issues to an independent Federal Housing Advocate supported by the Canadian Human Rights Commission. Submissions are to be investigated, including through consultation with affected communities, with recommendations submitted to the Government. Alternatively, a ‘Housing Advocate’ may refer critical systemic issues to a Review Panel to hold hearings ‘in a manner that offers the public, particularly members of communities that are affected by the issue and groups that have expertise in human rights and housing, an opportunity to participate’. The Review Panel may then deliver its opinion on the issue and recommend any necessary remedial measures. The Government is required to respond in a timely manner to findings and recommendations from the Housing Advocate or the Review Panel and must develop and maintain a National Housing Strategy to ‘further’ the housing policy based on the realization of the right to housing, ‘taking into account key principles of a human rights-based approach to housing.’

#### (4) Enacting specific legislation on ESR in Northern Ireland

It might be thought that an obvious way in which to protect socio-economic rights in Northern Ireland would be through piecemeal legislation enacted by the Northern Ireland Assembly aimed at protecting specific economic or social rights. Indeed, the Assembly has already enacted such legislation, albeit in an uncoordinated manner. It has been able to do so because responsibility for a significant range of socio-economic issues has already been devolved to Northern Ireland institutions. These issues include health, education, housing and (uniquely in the United Kingdom devolution arrangements) employment.

By way of example:

- the Mesothelioma etc (NI) Act 2008 provides for compensation to be paid to people suffering from diffuse mesothelioma in Northern Ireland (or their dependent if the sufferer is deceased) regardless of their employment status;

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Slovakia 1992 (rev. 2001); Surinam 1987 (rev. 1992). Each of these constitutions seek to explicitly protect ‘economic, social and cultural rights’.

<sup>59</sup> We are grateful to Bruce Porter for his contribution to this part of the chapter.

<sup>60</sup> *National Housing Strategy Act*, SC 2019, c 29, s 313 (NHSA) (emphasis added).

- the Children’s Services Co-operation Act (NI) 2015 – which started life as a Private Members’ Bill – requires certain public authorities and other persons to co-operate in order to contribute to the well-being of children and young people;
- the Shared Education Act (NI) 2016 imposes a duty on the Department of Education ‘to encourage, facilitate and promote shared education’ for children from Protestant and Catholic backgrounds;
- the Addressing Bullying in Schools Act (NI) 2016 places a duty on boards of governors of schools to put in place measures against bullying;
- the Rural Needs Act (NI) 2016 requires public authorities such as the Northern Ireland Housing Executive to have due regard to rural needs when developing and delivering policies and services;
- under Northern Ireland’s employment law employees who lose their job have a possible claim for unfair dismissal after just one year of employment; this qualifying period was not increased to two years when that step was taken for England, Scotland and Wales in 2012.

Even in areas in which there are restrictions on devolved competence, opportunities have arisen for particular socio-economic rights to be protected by the NI Assembly. As regards the welfare benefits system, for example, the relevant Minister in Northern Ireland must consult with the Secretary of State for Northern Ireland to ensure that there are ‘single systems’ of social security, child support and pensions in both Northern Ireland and Great Britain.<sup>61</sup> But in 2015 this requirement did not prevent the Northern Ireland Assembly from being able to agree special ‘mitigation’ measures to lessen the effects of social security reform in Northern Ireland compared with the rest of the United Kingdom. Due to time constraints those measures were then legislated for by the UK Parliament through the Northern Ireland (Welfare Reform) Act 2015, the Welfare Reform (NI) Order 2015 and various sets of Regulations. The net effect is that, during the 4-year period 2016-2020, recipients of welfare benefits in Northern Ireland received an additional several million over and above the amount they would have received had the welfare reforms in Great Britain been adopted in Northern Ireland without any locally negotiated mitigation measures.

One option for the future, therefore, would be for Members of the Northern Ireland Assembly to agree further pieces of legislation which would enhance the protection of specific ESR in Northern Ireland, in ways that would ensure fuller compliance with international human rights law. The standards set out in relevant international instruments – whether ‘hard law’ or ‘soft law’ documents – could be reflected in such legislation. As noted earlier, the Assembly adopted this approach (to some extent at least) in the Commissioner for Older People Act (NI) 2011, where it required the Commissioner for Older People, when considering the interests of older persons and deciding how to exercise the Commissioner’s

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<sup>61</sup> Section 87, Northern Ireland Act 1998.

functions, to 'have regard to the United Nations Principles for Older Persons adopted by the General Assembly of the United Nations on 16 December 1991'.<sup>62</sup>

A self-evident advantage of this option, besides the fact that it has already been used by the Assembly, is that it allows progress to be made on ESR on an issue-by-issue basis rather than waiting for a 'big bang' solution. In addition, it achieves protection for ESR through the votes of democratically elected politicians rather than, as some would see it, the adventitious decisions of unelected and unrepresentative judges. Realising rights through agreed political action rather than through the courts might be thought to bestow greater legitimacy on those rights,<sup>63</sup> and they may establish a mechanism that avoids some of the disadvantages associated with judicial enforcement. In the Canadian housing context, rights holders have, in a sense, traded off the advantages of judicial enforcement for the advantages of enhanced participation, a commitment to structural transformation, and an ability to address systemic issues that Canadian courts have proven themselves resistant to engaging with. The legislation is a foray into what has been labelled 'democratic experimentalism' in the field of human rights, in which the traditional approach to adjudicative finality and enforceable rights is replaced by participatory processes for the interpretation and implementation of legal rights.<sup>64</sup> Rights-based participatory processes may be an important component, and potential benefit, of models that do not rely exclusively or primarily on courts. Furthermore, a piecemeal approach allows for a highly flexible approach to the protection of ESR, taking into account the prevailing social and economic circumstances and the resources available, an approach encouraged by the UN Committee on Economic, Social and Cultural Rights.<sup>65</sup>

This piecemeal approach has several weaknesses, however. The Assembly might overlook particular rights, or not go far enough in reflecting international standards when trying to protect the rights that it does address.<sup>66</sup> The approach taken may be seen to be in tension with the important human rights principle of the universality of rights. Further, it is often the most marginalised groups who need the most protection but may be left behind by political systems. Progress on enhancing the protection of ESR would continue to be partial and relatively unsystematised, and such specific legislation would be easily amended or repealed. The protection afforded to the rights in question might not be as 'entrenched' as the Convention rights protected by the Human Rights Act 1998. It is also relevant to add that, as this option already exists, elected representatives could have used it to protect ESR and done so only marginally. Therefore, this option is highly dependent on continuing political

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<sup>62</sup> Section 2(3).

<sup>63</sup> See generally Jeremy Waldron, *Law and Disagreement* (Oxford Clarendon Press, 1999) and his 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346. See also Conor Gearty, who discusses the danger of relying on courts for quick fixes in relation to ESR: Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart 2011).

<sup>64</sup> Sandra Liebenberg and Katharine Young, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?', in Helena Alviar Garcia, et al. (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015) Chapter 13.

<sup>65</sup> See General Comment 3 ('The nature of States parties obligations') of the UN Committee on Economic, Social and Cultural Rights (1990), especially para 11.

<sup>66</sup> This point is noted by Jeff King, who refers to legislative 'blind spots' and the marginalisation of minority groups in majority decision making; see his *Judging Social Rights* (Cambridge University Press, 2012), 165-169.

agreement in the Assembly on rights – something that we have suggested above is in very short supply in Northern Ireland.

These defects could be addressed, in part at least, if some of the measures suggested within other models set out in this report were to be adopted; the models, we repeat, are not mutually exclusive. For example, reliance on pre-legislative scrutiny and codes of practice, as proposed in model 1 (see Chapter 2), could help to guide Members of the Northern Ireland Assembly in the ‘rights’ direction. Similarly, the adoption of ‘Directive Principles’, as proposed in model 3 (see Chapter 4), could provide a suitable prompt and a justification for the tabling of legislation on specific ESR.

## **Chapter 4:**

### **Constitutionalising economic and social rights principles, where the Assembly has principal responsibility to implement**

In this chapter, we consider a model in which a constitutional document provides for non-directly justiciable economic and social rights principles which are addressed to the State in its policy and law-making. These are referred to as ‘directive principles’ and have been adopted in several jurisdictions internationally.<sup>1</sup> There are various degrees of economic and social rights enforceability that can accompany a directive principles approach; sometimes the judiciary can play a role in enforcement, short of making economic and social rights justiciable in the same way as civil and political rights. In what follows, this model and how it could potentially apply in the Northern Ireland context is outlined, before turning to consider comparative experience via case studies of Ireland, India and Finland. We consider the model’s strengths and weaknesses, including the extent to which the contextual factors considered above affect an assessment as to whether this is a viable model for ESR protection.

#### (1) What are directive principles?

Directive principles can be described as provisions in a constitutional document that are not directly binding or enforceable but that reflect important social norms and generate expectations to hold politicians and policymakers accountable for the positive obligations they contain.<sup>2</sup> Directive principles are designed to guide the legislature and executive in their exercise of power, who are expected to take steps to realise the directive principles. Due to their constitutional nature, directive principles can be taken into consideration by the judiciary in the course of their work, but they cannot be directly adjudicated on. On the latter aspect, Alan Gledhill elaborates that, ‘even though these principles are not directly enforceable in court, they are bound to affect the decisions of courts on constitutional questions, just as the provisions of the Magna Carta have affected the decisions of the English judges’.<sup>3</sup> Bertus de Villiers elaborates further that ‘these directive principles are the embodiment of a national spirit and consensus on social, economic and cultural issues which have to be addressed by the state. Although they do not provide a basis of legal action if programmes are not undertaken, various governments have used the directive principles to bring about far-reaching socio-economic reform’.<sup>4</sup>

It is very important to distinguish between enforceable legal provisions in constitutional documents, which are justiciable, and directive principles, which are not.

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<sup>1</sup> These include India, Ireland, Spain, Finland and Malta.

<sup>2</sup> Elizabeth Kaletski, Lanse Minkler, Nishith Prakash and Susan Randolph, ‘Does Constitutionalising Economic and Social Rights Promote Their Fulfilment?’ *Journal of Human Rights* (2016) 15(4): 435.

<sup>3</sup> Alan Gledhill, *The Republic of India: The Development of Its Laws and Constitution* (London: Stevens & Sons, 1964) 161-162.

<sup>4</sup> Bertus de Villiers, ‘Directive Principles of State Policy and Fundamental Rights: The Indian Experience’ *South African Journal on Human Rights* (1992) 2: 29. For a more recent assessment of the efficacy of the directive principles see A. Pillay, ‘Revisiting the Indian Experience of Economic and Social Rights Adjudication: the Need for a Principled Approach to Judicial Activism and Restraint, (2014) *The International and Comparative Law Quarterly*, 63(2), 385-408.

Constitutions can include both. Generally enforceable constitutional provisions will make explicitly clear that the provision or right in question is legally binding on the state or that citizens may avail of legal action if the provision is unfulfilled. In contrast, directive principles in constitutional provisions acknowledge a right but either explicitly exclude citizens legal recourse to enforce it or present the right as a desirable goal generally.<sup>5</sup> For example, Article 45 of the Irish Constitution states that ‘The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution’.

## (2) What would protection of economic and social rights via this model involve?

In order to protect economic and social rights via this model in Northern Ireland a constitutional document, such as a Bill of Rights, would need to be enacted which laid down economic and social rights as directive principles. The Northern Ireland Assembly and Executive would then hold principal responsibility to act in a way that promotes and realises the rights outlined as directive principles, and could be held to political, although not legal, account if they did not. The extent to which the *judiciary* could engage in enforcement of these directive principles would depend on the particular model that is adopted and the willingness of the judiciary to engage such principles in interpreting enforceable Bill of Rights provisions and other legislative enactments. Varying approaches that have been taken by the judiciary in directive principles provisions are outlined below in the comparative experiences section. There are a number of strengths and drawbacks involved in the protection of economic and social rights via directive principles in Northern Ireland. Before considering these, however, we review the available comparative experience of the operation of such a model.

## (3) The experience of directive principles: comparative case studies

### *Republic of Ireland*

The Irish Constitution is regarded as one of the first to contain directive principles, and has been used as a model for constitutional design in this area.<sup>6</sup> Articles 40 to 44 of the Irish Constitution outline a number of fundamental rights which are followed in Article 45 by directive principles relating to social welfare. As outlined above, Article 45 explicitly characterises these principles as non-justiciable. Interestingly, the right to education is part of the fundamental rights protected in Article 42, meaning that education rights are not part of the non-justiciable principles outlined in Article 45. Thus, it is not entirely accurate to say that fundamental rights pertain to civil and political rights in the Irish Constitution and directive principles to economic and social rights, but a distinction along these lines is generally apparent

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<sup>5</sup> See further Kaletski *et al* above n 2 at 440.

<sup>6</sup> The directive principles provision provided the basis for equivalent provisions in the Indian constitution. See Gerard Hogan, ‘Directive Principles, Social and Economic Rights and the Constitution’ *Irish Jurist* (2001) 36: 175; De Villiers above n 4 at 30.

from the Constitution's preparatory notes.<sup>7</sup> In addition, Gerard Hogan notes that 'this distinction has not worked quite as straightforwardly in practice as the drafters might have intended'.<sup>8</sup> This in part is due to the approach taken by the Irish courts to directive principles. The Irish courts have generally taken a strict approach to Article 45 and have accordingly been conservative in their engagement with directive principles. In doing so the Irish judiciary have demonstrated a marked deference to the separation of powers.

The use to which Article 45 is put is also influenced by the Irish courts approach to the justiciability of socio-economic rights in general. Although Hogan noted in 2001 that the Irish courts have 'refused to treat socio-economic rights as being entirely non-justiciable in nature',<sup>9</sup> the courts have nevertheless been cautious in enforcing them. The Irish courts did make it clear in the seminal case of *O'Reilly v. Limerick Corporation*,<sup>10</sup> a case involving Travellers asserting their living conditions breached constitutional rights, that fundamental socio-economic issues surrounding how the national wealth was distributed were a matter for the state. Some consider, however, that the Irish Supreme Court may be softening its approach to ESR. In *NHV v Minister for Justice and Equality* [2017] IESC 35, the Court ruled that indefinitely banning all asylum seekers from looking for work was a violation of the unenumerated constitutional right to seek employment. The Court continued to cast doubt on the justiciability of socio-economic rights but nevertheless ruled that section 9(4) of the Refugee Act 1966 went too far in prohibiting access to work.

In this context, it might be concluded that directive principles have had a minimal impact in the Irish jurisdiction.<sup>11</sup> Nevertheless, in a number of cases Irish courts have viewed directive principles as of supplementary assistance in interpreting other constitutional provisions. For example, the case of *Murtagh Properties Ltd. v. Cleary* utilised Article 45 as a guide to rights protected under Art 40 in relation to the right to earn a livelihood without discrimination on the basis of sex.<sup>12</sup> In 2008, Charleton J in the High Court said that Article 45 could be used by the State to defend itself against a challenge that a legislative provision was unconstitutional (so, it's a shield but not a sword).<sup>13</sup> In another High Court case in 2017, Humphreys J referred to Article 45 when making an order requiring a local authority to carry out remedial work regarding an illegal landfill operation. He suggested Article 45 could influence the courts in their choice of appropriate remedies and he said that '[v]igilant and effective protection of the environment is an implied constitutional obligation'.<sup>14</sup> But in the *NHV* case, the Court seemed to imply that the principles in Article 45 should not be used to help determine the unenumerated constitutional rights in Ireland. That was also Hogan J's view when the case was before the Court of Appeal.

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<sup>7</sup> *Ibid* at p 176-179.

<sup>8</sup> *Ibid* at 179.

<sup>9</sup> *Ibid* at p 175.

<sup>10</sup> [1989] ILRM 181.

<sup>11</sup> *Ibid* at 179.

<sup>12</sup> [1972] IR 330.

<sup>13</sup> *Prendergast v Higher Education Authority* [2001] 1 IR 490.

<sup>14</sup> *Brownfield Restoration Ireland Ltd v Wicklow County Council* [2017] IEHC 456.

Outside the courts, there is ongoing political and legal debate surrounding a better way to protect economic and social rights in the Irish context. While in 1996 the Irish Constitution Review Group recommended against stronger ESR protection in the Constitution, citing traditional reasons relating to the separation of powers, in 2014 an Irish Constitutional Convention voted in favour of adding justiciable economic and social rights to the Constitution. The Irish Human Rights and Equality Commission has indicated that it wants 'the totality of...human rights guaranteed in the Constitution'.<sup>15</sup>

### *India*

Following the outline of a list of fundamental rights in Part III, Part IV of the Indian Constitution lays down a number of directive principles of state policy pertaining to economic and social rights. In a similar manner to the Irish Constitution, Article 37 of the Indian Constitution states that 'the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.

What makes the Indian experience of directive principles unique, and indeed marks a notable contrast from the Irish context, is not so much any innovative approach to the outline of the directive principles themselves, but the way in which the Indian courts have interpreted and used them. This experience draws particular attention to the relationship between fundamental rights and directive principles. While the Constitution explicitly characterises fundamental rights as enforceable and directive principles as not, a question has arisen over the nature of the relationship between the two and various approaches have been taken by Indian courts over the years.

In the early years fundamental rights were perceived as sacrosanct, the Indian courts taking this approach in the cases of *Madras v Champakam Dorairajan*,<sup>16</sup> *M H Quareshi v State of Bihar*<sup>17</sup> and *Re Kerala Education Bill, 1957*.<sup>18</sup> In this line of case law the judiciary approached fundamental rights as primary, directive principles not holding the same constitutional standing, and it was not possible to consider a law or executive action as void for non-adherence to directive principles. While fundamental rights and directive principles were to be interpreted harmoniously where they conflict fundamental rights carry more weight.<sup>19</sup>

Following criticism of this early approach indicating that the judiciary failed to appreciate the Constitution and the needs of society, courts subsequently moved to attempt to interpret fundamental rights and directive principles in a complementary and

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<sup>15</sup> *Irish Times*, 22 February 2014.

<sup>16</sup> 1951 AIR SC 226.

<sup>17</sup> 1958 SC 731

<sup>18</sup> 1959 SCR 995.

<sup>19</sup> De Villiers above n 4 at 43.

supplementary manner.<sup>20</sup> The first key case in this approach was *Sajjan Singh v State of Rajasthan*<sup>21</sup> where the courts initiated the new approach that fundamental rights should be interpreted in light of directive principles. This moved away from a hierarchical relationship between fundamental rights and directive principles and utilised the latter as to interpret the former.

The Indian courts can be perceived to have adopted a third approach to directive principles which followed the case of *Maneka Gandhi v Union of India*<sup>22</sup> and characterises the current period. This approach sees the courts taking a more direct role in addressing socio-economic problems. De Villiers comments that this is based on two arguments, 'the first is that it was the intention of the framers of the constitution that the state should not only be aware of what was expected of it, but that it should have constitutional support for undertaking socio-economic projects. The second is that, due to the conservative approach of the courts through the years, the state has not succeeded in effectively fulfilling its obligations as formulated in the directive principles'.<sup>23</sup> In this approach the court does not only interpret law but utilises the Constitution in order to achieve social justice, being more attentive to the obligations on state which are contained in the directive principles.<sup>24</sup> In this view the court 'no longer considers the principles as less important than fundamental rights in order to accommodate the directive principles'.<sup>25</sup>

Thus, in the Indian experience directive principles have been approached in the Indian context as the constitutional framework within which fundamental rights should be understood.<sup>26</sup> While distinct from one another, there is considerable overlap between fundamental rights, and that which they seek to uphold, and directive principles.<sup>27</sup> The Indian courts have taken an increasingly activist approach to directive principles. This has involved interpreting the reference to 'making of laws' in Article 37 as providing enough scope to allow them to interpret laws in light of the directive principles.<sup>28</sup> While it is not possible for Indian courts to strike down legislation due to incompatibility with the directive principles, the principles can and have been used to uphold legislation where it otherwise would have been nullified, and the courts have permitted legislative restrictions on fundamental rights in order to uphold the aims of the directive principles.<sup>29</sup> The existence of directive principles in the Constitution has also allowed the courts to interpret fundamental rights in a more creative way than might otherwise have been adopted.<sup>30</sup>

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<sup>20</sup> Ibid at 43-44.

<sup>21</sup> AIR 1965 SC 845.

<sup>22</sup> 1978 1 SCC 248.

<sup>23</sup> De Villiers above n 4 at 45.

<sup>24</sup> Ibid at 46.

<sup>25</sup> S. P. Sathe, 'Constitutional Law' *Annual Survey of Indian Law* (1983) XIX: 219.

<sup>26</sup> De Villiers above n 4 at 31.

<sup>27</sup> De Villiers above n 4 at 31.

<sup>28</sup> Ibid at 37.

<sup>29</sup> Ibid at 33.

<sup>30</sup> Ibid at 33.

However, it is also important to note the limitation of directive principles in this context. While the Indian judiciary have taken a much more active and creative role in engagement and use of directive principles than the Irish judiciary, Bertus de Villiers notes that the directive principles have not been ‘a panacea for the intense socio-economic problems experienced by India’.<sup>31</sup> Financial constraints of government, a lack of political will and structural conditions within Indian society have limited the impact of the directive principles and realisation of economic and social rights. Therefore, the success of directive principles in the Indian experience in terms of achieving protection and realisation of economic and social rights still remains limited.

#### *Finland*

A third comparative experience that can be taken into account is that of Finland which has adopted a variation of the approaches taken in Ireland and India. Several economic and social rights are mentioned in the Constitution of Finland but the responsibility is placed on the legislature to implement these rights, and litigation is based largely on the specific legislation enacted to implement the right, rather than the Constitution itself. For example, section 16 on educational rights provides in part: ‘The public authorities shall, as provides in more detail by an Act, guarantee ...’. Section 17, on the right to one’s language and culture, provides in part: ‘The right of everyone to use his or her own language ... shall be guaranteed by an Act.’ Section 18, on the right to work, provides in part: ‘Everyone has the right, as provided by an Act, to earn his or her livelihood ...’. Section 19, on the right to social security, provides in part: ‘Everyone shall be guaranteed by an Act the right to basic subsistence.’ In this approach Finland has a robust constitutional framework protecting economic and social rights but the legislature retains a strong degree of control over how these rights are interpreted and enforced. In this approach, the courts perform *ex post* judicial review in the context of the legislation introduced to fulfil economic and social rights.

It should be noted, however, that in two respects the approach in Finland does not leave matters entirely in the hands of the legislature. First, whilst the Finnish example places a strong emphasis on the legislature as the state body responsible for implementing economic and social rights there are some constitutional economic and social rights provisions which are treated as creating subjective justiciable minimum-core rights, such as Article 19(1), which protects the right to social assistance, in particular in connection with issues such as emergency health care based on the concept of dignity. Second, the Finnish constitutional model is supported by a Constitutional Committee that scrutinises legislation for economic and social rights compatibility pre-enactment, so-called *ex ante* review. By convention, Parliament complies with this review, in contrast with the weaker force of pre-legislative scrutiny in the UK Parliament conducted by the Joint Committee on Human Rights where the decisions of the Committee are not considered binding on Parliament.

#### (4) Strengths of the directive principles model

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<sup>31</sup> *Ibid* at 38.

From the outset, there appear to be a number of contextual factors that make protection of economic and social rights via directive principles appear a potentially viable option in Northern Ireland. Firstly, this approach appears particularly common in countries whose constitutional tradition derives from English common law. Ireland, India, Ghana, Malta, Nigeria and Papua New Guinea are among the jurisdictions which have constitutionalised economic and social rights using directive principles. From this perspective, the model may be compatible with the underlying common law tradition in Northern Irish law.

Secondly, the incorporation of economic and social rights into constitutional documents as directive principles appear to have been used in transitional settings as a means of addressing past discriminations or injustices and committing the State to a future vision of society that moves on from the violations of the past. This has been the case in India and Nepal, for example.<sup>32</sup> Directive principles have been considered powerful in these contexts as representing ‘a code of conduct according to which the governance of the country should take place’, for example, ‘given the socio-economic needs of Indian society, the directive principles provide the framework for a “peaceful political revolution”’.<sup>33</sup> The model of directive principles, therefore, holds potential to gesture towards a new shared future and act as a means to balance the need to recognise and enhance ESR, and previous exclusions from social and economic power, in societies moving on from conflict with the concern that full justiciability of socio-economic rights is not possible for resource reasons or due to concerns regarding judicial interference with policy decisions and implementation of economic and social rights.

Thirdly, the directive principles model by its nature may be compatible with the Northern Ireland context as research indicates that it works more effectively in democratic societies with a strong civil society base capable of holding legislators and policymakers to account.<sup>34</sup> The directive principle model works via political as opposed to legal accountability; as such, a strong civil society base, including a strong human rights sector, is advisable in order to maximise the effect of directive principles. Although civil society appears under considerable strain at present, due to reductions in resources, Northern Ireland has traditionally had a very strong civil society base, including a strong cohort of human rights organisations capable of undertaking such political work.<sup>35</sup>

Indeed, there may be additional strategic reasons why human rights and civil society actors may pursue constitutionalising economic and social rights via something similar to directive principles as opposed to enforceable provisions. As Kaletski *et al* highlight, calls for directly enforceable economic and social rights often generates ‘enormous political opposition

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<sup>32</sup> See Elisabeth Wickeri, ‘No Justice, No Peace: Conflict, Socio-Economic Rights, and the New Constitution in Nepal’ *Drexel Law Review* (2010) 2(2): 427-490.

<sup>33</sup> De Villiers n 4 at 32.

<sup>34</sup> Kaletski *et al* above n 2 at 434.

<sup>35</sup> See, for example, Christopher Farrington, *Global Change, Civil Fergal Cochran and Seamus Dunn, People Power? The Role of the Voluntary and Community Sector in the Northern Ireland Conflict* (Cork: Cork University Press, 2002).

and battles from well-funded interests. The political energy necessitated could be better used on social mobilization and policy change through different avenues, including statutory law'.<sup>36</sup> While the approaches we have examined may be non-justiciable, they may achieve a similar effect in terms of providing a stable constitutional provision to hold politicians and policymakers to account.

Fourthly, following on from this, the non-justiciability of directive principles may not be perceived as such a significant drawback as it may look on first glance. Lack of judicial enforcement does not render directive principles irrelevant. Their value lies in the ability they possess to shape the context within which politics and law-making takes place and give constitutional significance to the value and importance of economic and social rights. As was stated in the Indian case of *Minerva Mills Ltd v Union of India*, 'merely because the directive principles are not enforceable in a court of law, it does not mean that they are of subordinate importance to any part of the Constitution or that they cannot create obligations or duties binding on the State... In fact, non-compliance with the directive principles would be unconstitutional'.<sup>37</sup> In addition, consideration of comparative experience, explored further below, suggests that courts can still invoke and utilise directive principles in their decisions. The Supreme Court of Ghana has asserted that it is mandated to apply the directive principles in interpreting law. The Supreme Court of India has taken an even more activist stance and engaged directive principles when interpreting fundamental constitutional rights. Thus, while directive principles cannot compel a particular form of government action, comparative experience, particularly that of the Indian courts, does suggest that they can be a powerful tool in interpreting legislative provision and executive action as well as enforceable constitutional rights.<sup>38</sup>

As a common law jurisdiction with a strong civil society base to hold the legislature and executive politically accountable for failure to take account of directive principles, there appears to be scope for the protection of economic and social rights by adopting this approach in Northern Ireland. In addition, the strong statement that the constitutionalisation of directive principles would make, as a state-led commitment to address the socio-economic exclusion of the past, appears to be appropriate to Northern Ireland as a society transitioning from conflict. Integrating economic and social protections into a constitutional document such as a Bill of Rights for Northern Ireland would be a compromise between those who view fully enforceable and justiciable economic and social rights provisions with trepidation, and those who view economic and social rights protections as unacceptably inadequate. There is also considerable scope to determine the role of the judiciary in enforcement which, as is evident

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<sup>36</sup> Kaletski *et al* above n 435. See also Varun Gauri, 'Social Rights and Economics: Claims to Health Care and Education in Developing Countries' *World Development* 21 (2004): 465-477 and Wiktor Ositynski, 'Needs Based Approach to Social and Economic right' in Shareen Hertel and Ianse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge: Cambridge University Press, 2007).

<sup>37</sup> 1980 AIR 1789, 1981 SCR (1) 206 at 219.

<sup>38</sup> D M Davis, 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' *South African Journal on Human Rights* 8(4): 485.

from comparative experience, can take a strong or weak form. Adoption of the Finnish model could also be viewed as a middle ground between weak- and strong-form judicial review.<sup>39</sup>

#### (5) Drawbacks of the directive principles model

From the above, there are a number of strengths to the directive principles model generally and, in particular, when considered in light of the Northern Ireland contextual factors considered earlier. However, it is important to note that the model also demonstrates significant drawbacks that have become evident in other jurisdictions and that appear repeatedly in legal academic scholarship considering this model. There is another basis point that needs to be considered in arriving at a conclusion as to whether or not Directive Principles are a good idea, which is that the answer to some extent very much depends on the exact wording of those Principles.

The first, and perhaps most significant, drawback of the model relates to the context of devolved powers in the United Kingdom. In several socio-economic areas, the Northern Ireland Assembly and Executive shares its powers with Westminster/Whitehall, or is subject to control by it. This raises the question of whether directive principles would be capable of application to areas outside the direct and exclusive jurisdiction of the Northern Ireland Assembly/Executive.

Secondly, and more generally, directive principles by their nature cannot ensure realisation or enforcement of economic and social rights. This model cannot provide a legal guarantee that economic and social rights will be taken seriously and integrated into legislative and executive action, relying on political will in placing primary responsibility to implement with the Northern Ireland Assembly. In the context of Northern Ireland, where a not insignificant number of elected representatives appear to oppose economic and social rights,<sup>40</sup> directive principles do not provide the teeth to compel action. In addition, several empirical studies have indicated that the constitutionalisation of economic and social rights as directive principles does not necessarily translate into tangible social change. For example, Edwards and Marin found in their study of 61 countries that constitutionalisation of the right to education did not lead to higher test scores, and the quality of education depended on a number of other socio-economic, structural and policy variables.<sup>41</sup> In a wider study that incorporated a wider range of economic and social rights issues, Kalestski *et al* concluded that ‘there is no evidence that constitutional provisions as directive principles are correlated with the Social and Economic Rights Fulfilment (SERF) Index, but there is a correlation between enforceable law and the overall SERF Index and the individual component on the right to

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<sup>39</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, 2008).

<sup>40</sup> See, for example, Robin Whitaker, ‘Debating Rights in the New Northern Ireland’ *Irish Political Studies* (2010) 25: 23-45.

<sup>41</sup> Sebastian Edwards and Alcaro Garcia Main, ‘Constitutional Rights and Education: An International Comparative Study’ Nber Working Paper No 20475 (2014). Available at <https://liberty-review.org/2014/09/20/constitutional-rights-and-education-an-international-comparative-study/> (accessed 8<sup>th</sup> May 2017).

education, health and food... In contrast to the beliefs of some human rights advocates that directive principles are a better approach, these results indicate that only enforceable law provisions are positively correlated with fulfilment of economic and social rights, at least as measurable by the SERF Index'.<sup>42</sup> Such research indicates that directive principles are not as effective as enforceable provisions in terms of securing realisation of economic and social rights.

Thirdly, an argument has also been made that constitutionalising economic and social rights as directive principles further adds to the perception that they are 'secondary' or 'lesser' human rights provisions, and so undermines the claimed indivisibility of human rights. Particularly in a state like the UK that currently has justiciable 'civil and political rights' (albeit that the scope of convention rights go beyond civil and political), any approach that does not adopt a similar approach for the enforcement of ESR is likely to be seen as confirming the latter's second-class status. In this respect, while the achievement of constitutionalising economic and social rights as directive principles may be perceived as significant and politically symbolic, it may work in practice to reinforce the secondary status of such rights provision. This is an argument that is made by Mureinik who argues that 'to make economic rights mere interpretive presumptions, is plainly to declare them worth less than the first-generation rights; the precise opposite of the effect sought, in most cases, by those who favour directive principles'.<sup>43</sup> For Mureinik, this drawback outweighs the advantages of directive principles as presumptions of statutory interpretation. Indeed, in discussions surrounding changes to the Constitution of Nepal, the International Commission of Jurists expressed the view that constitutionalising economic and social rights as directive principles does not reflect contemporary international human rights practice that asserts the equal weighting of civil and political rights and economic and social rights.<sup>44</sup>

A fourth reason why the directive principles approach has been treated with caution by some legal commentators relates to the role of the judiciary. This role can vary, as demonstrated in the differences between the Indian experience, where judges have taken an active role, and the Irish experience, where the judiciary have expressed caution and a marked deference to the legislature and executive. The role of the judiciary appears to be an important element in enforcement and use of directive principles, but it is one that is significantly unpredictable. As noted above, therefore, although principal responsibility for implementation of directive principles would lie with the Northern Ireland Assembly, the judiciary could play a role in enforcement. The Northern Irish judiciary may initially adopt a conservative interpretation of directive principles, but this could not be guaranteed now, or in the future.<sup>45</sup>

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<sup>42</sup> Kaletski *et al* above n 2 at p 449.

<sup>43</sup> Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' *South African Journal on Human Rights* (1992) 8: 468.

<sup>44</sup> International Commission of Jurists, 'Economic Social and Cultural Rights and the New Constitution of Nepal' (2009). Available at [http://www.icj.org/wp-content/uploads/2012/04/Nepal\\_Economic-Social-and-Cultural-Rights-and-The-New-Constitution\\_Thematic-Report\\_2009.pdf](http://www.icj.org/wp-content/uploads/2012/04/Nepal_Economic-Social-and-Cultural-Rights-and-The-New-Constitution_Thematic-Report_2009.pdf) (accessed 8 May 2017).

<sup>45</sup> Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Social and Economic Rights in National Law' *American University International Law Review* (2006) 22(1): 59.

For Wiles, it is hard to justify the use of deliberately non-justiciable directions about rights as enforceable in court, when their justiciable status is likely to be determined at the whim of the judiciary in place at any one time.<sup>46</sup>

There is also controversy among scholars as to whether an activist or a conservative judicial role would be preferable. A conservative judicial role would place a greater onus on civil society to hold the legislature and executive accountable for failing to act in a way that is informed by directive principles. Wiles concludes that 'it seems evidence that explicit legal enforceability is needed in order for social and economic rights to have legitimacy, credibility and consistency as human rights in the long term, as an operative part of the legal system'.<sup>47</sup> However, an activist judicial approach to directive principles is not necessarily desirable. Wiles argues that the approach of the Indian courts, while on one level commendable, has put into question the strict separation of powers, and eroded legal certainty.

In short, there are considerable drawbacks to the directive principle model which must be taken into account. Of primary importance is the obstacle posed by current rules on devolution, which mean that the Northern Ireland Assembly does not have exclusive power over economic and social rights issues. This makes the adoption of directive principles complex and would require consideration and navigation of the role of Westminster/Whitehall and their role in legislative activity. In addition, while there is considerable scope to shape the role of the judiciary in enforcement of directive principles, it is likely (but not certain) that judicial interpretation in Northern Ireland would follow the Irish as opposed to the Indian experience, with considerable deference being shown by the judiciary to the Northern Ireland Assembly. In the Irish context, as has been outlined, some recent thinking has moved away from the directive principles approach due to the lack of impact that it has had, in no small part due to the approach taken by the Irish courts, and recent empirical studies elsewhere have indicated that directive principles are limited in achieving tangible protection and realisation of economic and social rights leading Seervai to describe them as 'rhetorical language, hopes, ideals and goals rather than the actual reality of government'.<sup>48</sup> Nevertheless, the question, as with each of the models we have considered, is: compared to what? The directive principles approach may be less effective than some other methods, but more effective than doing nothing.

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> H. M. Seervai, *Constitutional Law of India* (1<sup>st</sup> edition Delhi: Tripathi, 1984) 759.

## **Chapter 5: Progressive implementation and restricted judicial review, such as on grounds of reasonableness**

Courts in the United Kingdom currently interpret and apply human rights set out in the Human Rights Act using an approach that sets a high bar for those seeking to justify breaches of human rights. An approach could be adopted that required courts to set a much lower bar in the context of ESR. The model examined here is one based on restricted judicial review, an approach that differs from the ‘full justiciability’ recommendation of the NIHRC, in its advice to the Secretary of State. The starting point for the discussion in this chapter is the proposal (which includes a draft Bill of Rights) from the Joint Committee on Human Rights of the House of Commons and House of Lords in their 2008 report on a ‘Bill of Rights for the UK’.<sup>1</sup> The model discussed in this chapter is a modified version of the South African approach to the protection of ESR and captures well the idea of a restricted form of judicial intervention.<sup>2</sup> In reaching its conclusions, the Committee rejected fully justiciable and legally enforceable ESR,<sup>3</sup> as well as the Directive principles of state policy option.<sup>4</sup>

### (I) What is the Model?

The rationale for the Joint Committee’s preferred, and more legally constrained formulation, was precisely to offer an ‘appropriately limited’ judicial role.<sup>5</sup> This was at a time when Westminster was showing tentative signs of being more open to the recognition of these rights (subject to the usual political concerns about judicial overreach) than it appears to be currently.<sup>6</sup> The Committee stated:

‘The broad scheme of these provisions is to impose a duty on the Government to achieve the progressive realisation of the relevant rights, by legislative or other measures, within available resources, and to report to Parliament on the progress made; and to provide that the rights are not enforceable by individuals, but rather that the courts have a very closely circumscribed role in reviewing the measures taken by the Government.’<sup>7</sup> (emphasis removed)

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<sup>1</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* (Twenty-ninth report, 2007-08) HL 165-I HC 150 I. Note that two members of the Committee (Lord Bowness and the Earl of Onslow) attempted (unsuccessfully) to leave out the relevant provisions of the report para 192 lns 25-49.

<sup>2</sup> Para 192.

<sup>3</sup> Paras 166-67.

<sup>4</sup> Paras 168-169.

<sup>5</sup> Para 192.

<sup>6</sup> Paras 158-164. See also, Government Memorandum in Response to the Joint Committee on Human Rights Twenty-ninth Report of Session 2007-2008, 18 December 2008. While underlining concerns about judicial intervention the Government indicated (p 15) that they should not be excluded from the consultation process and that ‘there may be ways of recognising rights which exist but which are not enunciated or expressed as rights in UK law.’

<sup>7</sup> Para 192.

The Committee was persuaded that ESR should be included<sup>8</sup> and the report identifies (as a first step) rights to health care, education, housing and an adequate standard of living, as appropriate rights to include in a Bill of Rights.<sup>9</sup> It is plain that while the Committee heard much to suggest that consensus might be hard to obtain, it remained determined to find a model that might prove politically acceptable.<sup>10</sup> The Committee argued that these were rights that people could genuinely relate to (the ownership question), and that their inclusion would help to counter common myths surrounding human rights (that they are only for ‘criminals or terrorists’).<sup>11</sup>

(2) How would these rights be realised?

There were five steps in the Committee’s proposal. First, there would be an obligation on the Government to secure the progressive realization of these rights (a requirement to take ‘reasonable legislative or other measures, within its available resources’).<sup>12</sup> Second, the Government would have to report on progress in securing these rights annually to Parliament.<sup>13</sup> Third, and subject to other rights listed in the proposal (such as equality), it would be a matter for Parliament to decide on those who were eligible for such rights on, for example, grounds of nationality and residence.<sup>14</sup> Fourth, these rights would not be enforceable directly by individuals but would be taken into account in the interpretation of legislation, and in determining the ‘reasonableness’ of measures taken to achieve progressive realisation.<sup>15</sup> Fifth, the Committee listed a range of considerations that the courts should have regard to when considering reasonableness (again, drawing heavily on South African approaches).<sup>16</sup> These included such considerations as whether the measures were discriminatory, but emphasising that the court could not investigate whether ‘public money could be better spent’.<sup>17</sup>

The model advanced by the Joint Committee thus attempted to provide for the recognition of some ESR by express inclusion in a Bill of Rights for the UK. Although confined

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<sup>8</sup> Para 191 ‘In our view the main objections to the inclusion of social and economic rights in a Bill of Rights are not, in the end, objections of principle, but matters which are capable of being addressed by careful drafting. Having given the matter further attention, as recommended by our predecessor Committee, we are persuaded that the case for including economic and social rights in a UK Bill of Rights is made out. ... We consider that rights to health, education and housing are part of this country’s defining commitments, and including them in a UK Bill of Rights is therefore appropriate, if it can be achieved in a way which overcomes the traditional objections to such inclusion.’ (emphasis removed)

<sup>9</sup> Para 192.

<sup>10</sup> Para 149 ‘At times, listening to the evidence of those who in principle support the idea, it sounded as though they were already resigned to there being no prospect of progress on this issue. However, we believe it is all the more important that we explore the scope for agreement on this question in light of the consistent evidence of opinion polls that including economic and social rights in a Bill of Rights is very popular with the public.’

<sup>11</sup> Para 197.

<sup>12</sup> Para 192.

<sup>13</sup> Para 192.

<sup>14</sup> Para 192.

<sup>15</sup> Para 192.

<sup>16</sup> Para 192.

<sup>17</sup> Para 192.

to Schedule 3 of the proposed Bill, the provisions should be read in the context of the overall scheme of the proposed new instrument. For example, it included interpretative provisions that would amplify the role of international law, set down a strong interpretative obligation with respect to the rights in the Bill of Rights, embraced the idea of impact assessments for any new legislative proposals, and built-in a five-year parliamentary review of the operation of the Bill.<sup>18</sup> Such a review could, for example, assess how successful or not the initial approach to ESR has been, and might prove especially useful as a means of determining how effective the mechanisms were in their early years.

Although the report was careful to refute the traditional sceptical arguments about the role of judges, it does address these points to the extent that it seeks to limit (but not displace) the judicial role.<sup>19</sup> So, the intention is to carefully confine the judicial role to 'reasonableness review', in terms that would be well understood within administrative law (albeit that reasonableness would be likely to have a distinctive meaning, going beyond the so-called *Wednesbury* reasonableness standard, in line with the reasonableness test adopted in South Africa, and the more expansive test adopted by the UN's ESCR Committee.<sup>20</sup>

This approach meets critics of ESR part of the way by soothing anxieties about the judiciary, but also addresses concerns about second-class rights by 'constitutionalising' them in a Bill of Rights for the UK. The work of giving life to these rights is then left primarily to the Government and to Parliament, with the courts having a review function (to ensure that they are not entirely neglected). This takes the debate directly into Parliament, for example, through the annual report to be submitted by the Government. It does leave the door ajar for judicial intervention, with the clear plan that this would be a 'light touch' framework that would evolve as judges began to grapple with the new constitutional measure.

A variation on this approach can be found in Canada, where the federal judiciary have developed an approach to constitutional remedies that attempts to further a strongly dialogic relationship between the courts and the legislature. Guided by this understanding, the courts have the discretion to issue declarations of invalidity of an unconstitutional statute, but suspend the remedy for a period of time to allow the legislature to decide what to do. These so-called suspended or delayed declarations of invalidity first came to public prominence in 1985 in the *Reference re Manitoba Language Rights* case,<sup>21</sup> in which the Supreme Court of Canada decided that most of the statutes enacted in Manitoba between 1890 and 1985 were invalid. The Court considered that there would be chaos if this declaration of invalidity came

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<sup>18</sup> Annex I.

<sup>19</sup> Para 193. 'In our view this goes a long way to meeting the concern that the inclusion of social and economic rights in a Bill of Rights amounts to handing over policy making and resource allocation to unaccountable judges.'

<sup>20</sup> See further, Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission 2018).

<sup>21</sup> *Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitutional Act, 1867*, [1985] 1 S.C.R. 721. The case may not be an entirely apt example of the kind of judicial review which the JCHR had in mind because the case was decided against the background of a *binding* constitutional and fully justiciable right to equality.

into effect immediately, and the Court instead declared the legislation temporarily valid to enable the legislature to have enough time to re-enact the laws in a proper manner. Over time, however, the threat of legal chaos justification for the use of these suspended declarations has been replaced by a much more extensive justification: that delaying the onset of invalidity is justified where it is useful to allow the legislature to consult and consider alternative arrangements to replace the invalid legislation.<sup>22</sup> Such remedies might be thought to be particularly suitable in the context of light-touch judicial review of socio-economic rights. It is worth noting that the UK Supreme Court does have, and has exercised, the power to issue suspensive orders. In *Salveson v Riddell* a provision in an Act of the Scottish Parliament was held to be outside the legislative competence of that Parliament. The Supreme Court made an order suspending the effect of its decision until the defect in the Act was corrected.<sup>23</sup>

### (3) What are the advantages and disadvantages?

In assessing the advantages and disadvantages of this Model, the litmus test must be the more effective practical realisation of ESR. The assumption is that these are rights that must be implemented in ways that result in tangible change for the poor, vulnerable and marginalised. They should be more than mere constitutional ornamentation. Will this model deliver for those who need these rights most? This must also be followed by an assessment of the prospects for any UK-wide Bill of Rights. It seems an unlikely prospect in the near future, however *the model* proposed by the Joint Committee still provides an example of a possible approach (and one that could, in theory, be mapped onto Northern Ireland practice).

The principal advantage is that ESR are clearly acknowledged as part of a *Bill of Rights* (and thus directly constitutionalised), with mechanisms (including judicial) to advance implementation and enforcement. It would be easy to skip over this as self-evident and banal, but in a climate of political hostility to human rights this would be an important achievement. There is little reason to believe that some of the anticipated negative political reaction against the incorporation of ESR has dissipated in the intervening period.

The proposal would give firm legal recognition to claims that many in the UK now regard as fundamental, on health care, education, and housing, and on the need for an adequate standard of living. It would allow for a period of testing that might allow further steps to be taken. It would also accord a role for each branch of government. In principle at least, the advantage is that this model has the potential to bring ESR into the heart of parliamentary democracy, with built-in devices to ensure that they continue to shape law, policy and practice. Although there is a risk that this will slip into ‘tick-box’ proceduralism or programmatic symbolism empty of rights-based substance, there is always the chance, if political and bureaucratic leadership (combined with civic engagement) asserts itself, that it

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<sup>22</sup> For useful discussions of the use of this remedy, see Mary Lister, *Delayed Declarations of Invalidity: Deferential Dialogue or Justice Deferred?* Paper prepared for the 2005 Canadian Political Science Association Conference (June 4, 2005); Anthony Niblett, *Delaying declarations of constitutional invalidity*, in Frank Fagan and Saul Levmore (eds), *The Timing of Lawmaking* (Edward Elgar, 2017), 299.

<sup>23</sup> [2013] UKSC 22.

may deliver substantive social justice outcomes. It might force all in the public sphere to abandon a 'charity'-infused mind-set in favour of the direct legal recognition in a constitutional document of rights-holders and duty-bearers, and thus challenge more vacuous notions of social justice and well-being.

There are, however, several potential disadvantages to this Model of delivering ESR. There is the risk (inherent in much of what is proposed in our report) that, in seeking to gain respectability and acceptance for tactical reasons, the model sacrifices core principles. Even though many of the objections to possible judicial 'mission creep' are frequently rejected in the literature, the model reflects a willingness to accommodate these concerns. There is a real risk of going too far in anticipating resistance and ending up reaffirming an impoverished vision of these particular rights. The image of ESR as second-class would be perpetuated, reflected in provisions that plainly state that they are non-enforceable by individuals against the Government or any public authority.<sup>24</sup> This matters because it can lead to a 'reasonableness review' that does little to achieve rights-based outcomes in practice, resulting in the neglect, and a general lack of enforcement, of these rights.

As is well known, although open to interpretative development, 'reasonableness' sets a high threshold for judicial engagement in this context. As Dennis Davis notes:

'[I]t is doubtful whether a court will conceive of reasonableness in any way other than as involving deference to the decisions of a democratically elected legislature and executive. Reasonableness is a standard judges understand within the context of administrative law in which deference to the competence and democratic pedigree of the executive authority or the legislature is well established.'<sup>25</sup>

It should not be assumed, of course, that establishing strict parameters within which judges are expected to operate is negative in itself. This may be either good or bad, depending on context. A judiciary that is essentially hostile to ESR, if given too much interpretative room, might adopt unhelpfully problematic interpretations and even undercut what might be a more progressive response by politicians, or *vice versa*.

In the absence of a sustained political and societal commitment to the realisation of ESR, it is possible that a reasonableness-based approach will not lead to the expected gains. This opens the question of whether the fault lies in the inadequacy of the legal tools or in forms of structural and individual resistance to these rights that no constitution could easily overcome. The inclusion of ESR in a Bill of Rights, coupled with this model, might, however, offer useful normative foothold that could be developed.

#### (4) What is the comparative experience?

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<sup>24</sup> Annex I.

<sup>25</sup> Dennis M. Davis, 'Socio-economic rights: Do they deliver the goods?' (2008) 8 *International Journal of Constitutional Law* 707.

This model explicitly draws on the South African experience, and examples are provided in the Committee report.<sup>26</sup> In advancing this approach, the Committee clearly felt it was adhering to a middle path represented by the South African jurisprudence,<sup>27</sup> in a way that would ease political concerns about judicial colonisation of socio-economic policy.

The literature on this comparative example is vast and assessment of the empirical evidence remains work in progress. The difficulty in drawing on this example is that the initial optimism around the South African Constitution,<sup>28</sup> and the work of the Constitutional Court in particular, faded somewhat when early expectations were not met. Part of the reason for this is that the Court was evidently grappling with the imperatives of ESR, while also acknowledging critiques of justiciability and the limits on its own role achieving in societal transformation under the new Constitution. As Aoife Nolan, for example, observes:

‘[I]ts emphasis upon the procedural rather than the substantive aspects of socio-economic rights obligations, together with the employment of a relatively weak standard of “reasonableness” review, and a consistent refusal to interpret such rights as giving rise to directly enforceable entitlements, has resulted in that jurisprudence being criticized for providing only limited benefits to the poor.’<sup>29</sup>

It may not have led to expected gains (a conclusion that is in itself open to continuing empirical verification) but it is an approach that is not devoid of merit, and it can be a useful tool.<sup>30</sup> The South African example shows that the approach adopted allows questions to be raised about the design, enactment and implementation of a relevant government programme, including whether appropriate resources have been set aside, whether it can lead to the realisation of the right, or whether the process is transparent.<sup>31</sup> There is also a significant

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<sup>26</sup> Paras 173-181.

<sup>27</sup> See, for example, *Ngomane and others v Govan Mbeki Municipality* [2016] ZACC 31; *Governing Body of the Juma Masjid Primary School and Others v Essay NNO and Others (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* [2011] ZACC 13; *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)* [2009] ZACC 28; *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC)

*Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC)

<sup>28</sup> In relation to ESR see, for example, ss 26-27 on housing, health care, food, water and social security where there is reference to reasonable legislative measures, progressive realisation and available resources.

<sup>29</sup> Aoife Nolan, *Children’s Socio-Economic Rights, Democracy and the Courts* (2011, Hart Publishing) 234-35 (footnote omitted) See also, Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010, Juta and Co Ltd) and for an analysis of ‘reasonableness review’ see ch 4, who sees both the strengths and weaknesses and makes the case for the adoption of the ‘minimum core approach’.

<sup>30</sup> Marius Pieterse, ‘Health, Social Movements, and Rights-based Litigation in South Africa’ (2008) 35 *Journal of Law and Society* 364. He does, however, note the structural problems that impede progress as well as problems arising from socio-economic rights adjudication itself.

<sup>31</sup> Liebenberg above n 152-53.

interplay with equality rights, for example, where a particular group is excluded from the programme.<sup>32</sup> It provides clear constitutional recognition of ESR, combined with a role for the judiciary in their ‘enforcement’. It is plain that these are rights to be taken seriously and the Constitutional Court, for example, has shown that it is willing to do so. However, it offers a degree of deference to the executive and legislature in addressing socio-economic rights that is not accorded to other rights, and this approach might well solidify the sense of unequal treatment between supposedly interdependent and indivisible rights.

In assessing this model, as in assessing each of the other models, we come back to the question of what the function of the model is perceived to be. In reaching conclusions about the South African judicial response, Sandra Liebenberg can be seen as arguing for a reconceived version of ‘reasonableness review’. ‘Reasonableness review,’ she observes, ‘... promotes dialogic engagement on the content and purposes of socio-economic rights which accords with the deliberative aspects of South Africa’s constitutional democracy.’<sup>33</sup> This form of review is clearly much more than *Wednesbury* unreasonableness. The weaknesses do, however, remain.

Turning now to the experience in Canada of the suspended declarations of invalidity, commentators have identified both potentially positive and negative effects.<sup>34</sup> On the one hand, delayed declarations of invalidity can be seen as useful in enabling a smooth transition from invalidity to constitutionality, particularly where the costs of an immediate transition with no lead-in period would be excessive. Government may genuinely need time to review complex alternatives, and delay may also enable those who have relied on the invalid legislation to rearrange their affairs in an appropriate manner. Such delays assume, and seek to further deepen, institutional dialogue between the courts and the legislature based on good faith consultation and collaboration between these institutions. On the other hand, the use of this remedy has been seen as being problematic: it temporarily extends invalid laws and creates tensions with the rule of law; the legislature may not, in the end, comply or may not act in good faith; constitutional norms may be under-enforced or ignored; and such remedies may (paradoxically) increase the likelihood of courts invalidating legislation by reducing the costs of striking legislation down.

(5) How does this fit with the project context?

The work of the Joint Committee on Human Rights was directed to the adoption of a Bill of Rights *for the UK*, with comparatively little thought devoted to devolution. This Report, on the other hand, explores the position in Northern Ireland in areas that are primarily (but not exclusively) devolved matters. The model under consideration in this chapter would, therefore, require legislation (even perhaps Assembly legislation) and it would appear to

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<sup>32</sup> Liebenberg 157-163

<sup>33</sup> Liebenberg 223 she goes on to stress that this can also be a weakness as it ‘can easily degenerate into a weak, normatively empty standard of review when its relationship to the transformative values and purposes of South Africa’s Constitution is not clearly developed.’

<sup>34</sup> These arguments are drawn from the articles by Liston and Niblett, above.

assume the adoption of a Bill of Rights, with 'reasonable review' (of ESR) as one part of that package. This would likely be within a Bill of Rights for Northern Ireland (rather than an overarching UK-wide version).

Whatever view is taken of the merits of the approach, thought would be needed on how this relates to the existing advice provided by the Northern Ireland Human Rights Commission on a Bill of Rights. That advice was directed to Westminster, and the Belfast/Good Friday Agreement is clear that it should be enacted in Westminster legislation. It is also plain from the Agreement that the new Bill of Rights should have a similar status as the 'Convention rights' have now in relation to the work of the Assembly and the Executive. The Commission did not opt for the type of model supported by the Joint Committee, so there is a risk that this will be viewed as undermining that approach and that it will open the door to the sort of unequal treatment between rights that the NIHRC wanted to avoid. The NIHRC's insistence on parity between rights seems particularly persuasive, if the deferential approaches to politicised anxieties about these rights have proven successful.

Many of the ideas outlined by the Joint Committee have potential merit in Northern Ireland. The notion that ESR should inform the work of the democratic institutions is commendable, and requiring the Executive to report annually to an Assembly where there is an 'official opposition' might encourage more extensive consideration of these rights. In a context where devolved government is still to be embedded, and the likelihood of conflict over questions of resource allocation and policy development, the Northern Ireland judiciary might feel more comfortable with a form of 'reasonableness review' that accords them only a 'light touch' role. Although the test is distinctive, they would also be familiar with the language of such an approach; as with judges throughout the UK, they already have experience of adjudicating on socio-economic matters, human rights and even disputes between Ministers in the Northern Ireland Executive. From other perspectives, this model might, however, be viewed as the continuation of a weak and ineffective framework for the enforcement of human rights, and evidence of the unequal treatment accorded socio-economic rights. What, exactly, would a light touch review achieve if judges are expected to be very deferential to executive policy-making?

## **Chapter 6: ESR Conditionality in Trade Agreements**

As we identified at the beginning of this Report, our brief was to identify possible methods of delivering ESR in Northern Ireland in order to stimulate debate about how ESR could be better delivered, even if the approach of full justiciability of the full range of internationally-required ESR is not adopted. In the main, the previous models discussed have involved actions being taken by one or more institutions in a restored devolved government. This fifth model has been developed specifically to address the circumstances that apply following 'Brexit' and also focuses on what the Assembly and the Executive may do, but in the case of this model, in co-operation with other actors.

This chapter proceeds, as have the previous chapters, on the assumption that devolved government will continue, and considers what role, if any, the devolved institutions might take on to further ESR in a post-Brexit Northern Ireland. We have taken into account, in this context, the specific reference to the need for the Ad hoc Assembly Committee agreed in the New Decade, New Agreement of 2020 to consider the impact of Brexit on rights protection, as well as the provisions already agreed in the Ireland-Northern Ireland Protocol relating to the protection of rights deriving from the Belfast-Good Friday Agreement (discussed earlier).

The core idea explored in this chapter is how the Northern Ireland Executive and Assembly could influence future trade negotiations in such a way as to protect existing levels of ESR from being down-graded as a result of exiting the EU. This involves two possible interventions by the devolved institutions: an intervention in the next few weeks and months in the negotiations between the EU and the UK on the future relations agreement, and an intervention in negotiations between the UK and other non-EU states, such as the United States, in particular in order to prevent ESR being undermined by future trade and investment agreements concluded by the UK Government.

### (I) ESR in negotiations between the UK and the EU

#### (i) The route not taken: ESR in the Ireland-Northern Ireland Protocol

There are two separable phases in the negotiations with the UK concerning 'Brexit'. The first set of negotiations concerned the exit arrangements. The first phase negotiations have been completed, and the Withdrawal Agreement has been agreed between the UK Government and the EU. The negotiation of the Withdrawal Agreement, and the Ireland-Northern Ireland Protocol initially led to a draft Agreement in which ESR were initially quite prominent. Readers will recollect that it was originally envisaged under the Protocol that the United Kingdom as a whole (i.e. including Northern Ireland) would, until a new Future Relationship Agreement was concluded, form a new single customs territory with the EU. This complex, and controversial arrangement – controversial both within the EU and in the

UK – was intended to address the problem of preventing a customs border on the island of Ireland, whilst at the same time preventing a customs border between Northern Ireland and the rest of the UK. Within the EU, one of the controversial aspects of the new arrangement was the potential for the UK to benefit from access to the EU markets, whilst at the same time lowering its regulatory standards, thus allowing the UK to reduce the price of goods. As a result, draft Article 6 of the Protocol provided that “With a view to ensuring the maintenance of the level playing field conditions required for the proper functioning of this paragraph, the provisions set out in Annex 4 to this Protocol shall apply.”<sup>1</sup> Part 3 of Annex 4 referred to labour and social standards in this context.

Article 4 of Annex 4 provided that a set of labour and social standards would apply throughout the UK, but it did not set out the relevant EU labour and social standards. Instead, as is the practice in many free trade agreements concluded with the EU, the approach taken was to require non-regression by the UK (and the EU) from labour and social standards that existed in the UK (and the EU) at the end of the transition period. The EU and the United Kingdom, it provided, ‘shall ensure that the level of protection provided for by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in the area of labour and social protection and as regards fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring.’ The ‘common standards applicable within the Union and the United Kingdom’ were effectively those established in EU law, and thus the effect of the provision was to require the UK to maintain the existing standards set by EU law. No diminution of these standards was permissible.

Article 6 of the Annex provided for the monitoring and enforcement of these labour and social standards. The UK ‘shall ensure effective enforcement of Article 4 and of its laws, regulations and practices reflecting those common standards in its whole territory.’ The UK shall further ‘maintain an effective system of labour inspections, ensure that administrative and judicial proceedings are available in order to permit effective action against violations of its laws, regulations and practices, and provide for effective remedies, ensuring that any sanctions are effective, proportionate and dissuasive and have a real and deterrent effect.’ Beyond maintaining existing common standards, the UK and the EU initially agreed, to ‘protect and promote social dialogue on labour matters among workers and employers, and their respective organisations, and governments.’ Particular emphasis was placed on ILO standards and the Council of Europe Social Charter.

The draft Protocol established a separate process for the domestic implementation, monitoring and enforcement of the labour and social rights under the level-playing field provisions of the Protocol. Article 6 of Annex 4 to the Protocol provided that ‘the United Kingdom shall ensure effective enforcement’ of the non-regression obligation, and of ‘its laws,

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<sup>1</sup> Article 6 also provided: “Where appropriate, the Joint Committee may modify Annex 4 in order to lay down higher standards for these level playing field conditions.”

regulations and practices reflecting those common standards'. The Article went further, however, in requiring that the UK 'shall maintain an effective system of labour inspections, ensure that administrative and judicial proceedings are available in order to permit effective action against violations of its laws, regulations and practices, and provide for effective remedies, ensuring that any sanctions are effective, proportionate and dissuasive and have a real and deterrent effect.'

The Protocol as finally agreed by the UK and the EU did not include these provisions, and therefore only Article 2 of the Protocol remains as a possible basis for protecting aspects of ESR in Northern Ireland affected adversely by Brexit. There is, therefore, a gap between what was anticipated in the draft Protocol and what is currently applicable regarding ESR in the ultimately agreed in the final Withdrawal Agreement.

(ii) EU 'future relations' negotiations with the UK

The second phase of negotiations is currently underway, and involves negotiating the future relationship between the EU and the UK, including trading relationships. The EU will be concerned to ensure that the UK should be prevented from 'unfairly' competing against EU Member States, by reducing existing ESR norms, and that the EU should not be required to do business with a neighbour State that does not adequately protect human rights. The ESR issue is tackled in these contexts, and therefore there is less likely to be a tailor-made provision dealing specifically with Northern Ireland, and more likelihood that any such measures would apply to the UK as a whole.

Title III of the EU's proposed draft agreement<sup>2</sup> sets the protection of ESR firmly in the economic context of preventing 'distortions of trade and unfair competitive advantages.' 'To that end,' it continues, 'the Parties are determined to maintain high standards in the areas of state aid, competition, state-owned enterprises, taxation, social and labour protection, environmental protection and the fight against climate change.' The Parties would 'agree to establish long-lasting and robust commitments that prevent distortions of trade and unfair competitive advantages and ensure that their mutual trade and investment contributes to sustainable development', affirming 'their commitment to continue improving their respective levels of protection with the goal of ensuring high levels of protection in the areas covered by this Title'.

As regards labour and social protection, the Parties would commit not to 'adopt or maintain any measure that weakens or reduces the level of labour and social protection provided by the Party's law and practices and by the enforcement thereof, below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period, and by their enforcement'. Labour and social protection

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<sup>2</sup> European Commission, Task Force for Relations with the United Kingdom, Draft text of the Agreement on the New Partnership with the United Kingdom Origin: 18 March 2020 UKTF (2020) 14.

covers: (i) fundamental rights at work, (ii) occupational health and safety standards, (iii) fair working conditions and employment standards, and (iv) information and consultation rights at company level, and (v) restructuring. In addition, each Party would commit to ‘seek to increase, through its relevant law and practices and through the enforcement thereof, the level of labour and social protection above [that] level of protection.’ Where both Parties have increased the level of labour and social protection above that level ‘neither Party shall weaken or reduce its level of labour or social protection below a level of protection which is at least equivalent to that of the other Party’s increased level of labour and social protection.’

For the purpose of enforcement, each Party would ‘set up or maintain a transparent and adequately resourced system for the effective domestic enforcement, in particular an effective system of labour inspections; establish administrative and judicial proceedings, which shall allow public authorities and individuals to bring timely actions against violations of the labour and social law; and provide for remedies, including interim measures, which shall ensure that sanctions are effective, proportionate and dissuasive and have a real and deterrent effect.’ In addition, these provisions would be subject to the dispute settlement mechanism that would apply to the bulk of the other obligations in the Agreement, thus bringing a degree of international supervision of the UK’s and the EU’s compliance with these obligations.

Herein lies the major difference between the UK’s apparent position on labour and social protections and the EU’s position. The UK would not subject these provisions to the ordinary dispute settlement mechanism, preferring instead simply to rely on ‘cooperation provisions between the parties, including dialogue and exchange of best practice.’<sup>3</sup>

Turning now to consider the wider, human rights, that are related to, but go beyond labour and social protections, Part 3 of the Commission’s draft provides for a ‘security partnership’ between the UK and the EU, Title I of which sets out provisions governing law enforcement and judicial co-operation in criminal matters. Continued cooperation under this Title is, however, provided to be ‘conditional upon the United Kingdom’s continued adherence to the European Convention on Human Rights and Protocols 1, 6 and 13 thereto, as well as upon the United Kingdom giving continued effect to these instruments under its domestic law.’ Therefore, the draft continues, ‘in the event that the United Kingdom abrogates the domestic law giving effect to [these instruments] ... or makes amendments [to them] to the effect of reducing the extent to which individuals can rely on them before domestic courts of the United Kingdom, this Title shall be suspended from the date such abrogation or amendment becomes effective.’ Suspension would itself be terminated, and co-operation begin again ‘on the date the United Kingdom domestic law giving effect to the said instruments again becomes effective.’

Although the UK, on the one hand, also considers that ‘[c]ooperation [in the area of security] will be underpinned by the importance attached by the UK and the EU to

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<sup>3</sup> HM Government, *The Future Relationship with the EU: The UK’s Approach to Negotiations*, February 2020, CP211, Para 75.

safeguarding human rights, the rule of law and high standards of data protection,' on the other hand, the agreement 'should not specify how the UK or the EU Member States should protect and enforce human rights and the rule of law within their own autonomous legal systems.'<sup>4</sup>

(iii) The role of the devolved institutions

At various point in the process of the 'future relations' negotiations, there will be the opportunity for the devolved institutions to make their views felt on whether proposed texts are, or are not, satisfactory from their perspectives. The advantages of securing broad language of the type that the EU has proposed is the extent to which it would further the protection of ESR in Northern Ireland, in particular if the adequacy of adherence to the commitments were subject to the international dispute settlement process. The major downside of this approach, of course, is that it is not only dependent on the EU being prepared to assess whether the obligations have been complied with and complaining if necessary, but more importantly, it is dependent on the UK agreeing to these obligations in the first place. At best, the devolved institutions have a walk-on part in the process, rather than being in control.

(2) Non-EU negotiations with the UK

The assumption on which we have proceeded so far in this chapter is that it is in the interests of the EU for the UK to continue to conform to the European Social Model, which is, broadly, sympathetic to ESR. On the other hand, the assumption must be that in trade negotiations with non-EU states, we should proceed on the assumption that it is in the interests of non-EU states to *reduce* ESR protections in the UK where such protections could constitute what the non-EU state could consider 'non-tariff barriers.' It would be important for any future Northern Ireland Executive/Assembly to be aware that, in contrast to the likely scenario in EU/UK negotiations, in which there could be an opportunity to *further* embed ESR in Northern Ireland, it is more likely that it would be necessary in negotiations with non-EU states that *existing* rights are not undermined.

In an important report, the Joint Parliamentary Committee on Human Rights has recommended that human rights should form a key component of any future trade deals with non-EU states after Britain's exit from the European Union. In its report, the Committee correctly reported that the EU currently includes clauses on human rights in its international trade deals with non-EU member states and the Committee recommended that the UK must use Brexit as an opportunity to set even higher standards. This recommendation was premised on the idea that the UK would be in the position of exporting human rights standards that it itself complied with, but the recommendation would equally well apply to the UK itself as a self-denying ordinance.

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<sup>4</sup> Para 31.

One way of tackling the problem of ESR being seen as non-tariff barriers which would need to be removed in trade negotiations with non-EU states, such as the United States, would be for the Northern Ireland Executive to agree to insist that the UK Government should not conclude any international trade or investment agreement that would require the reduction of any existing UK ESR requirements in Northern Ireland.

### (3) Scope of devolved powers

Much of what has been discussed in this chapter relates to institutions outside Northern Ireland, in particular the EU institutions and UK institutions. There are, however, several important roles that Northern Ireland institutions may wish to play in the context of the development of the various aspects of the negotiations discussed above. But do the Executive and Assembly have a role in recommending protections for ESR to the United Kingdom Government in future trade and investment agreements? At first sight, any role for the Assembly and the Executive in trade negotiations appears to be limited. In particular, international relations, including trade negotiations, is an excepted matter under the NIA 1998; it is clear that the legal authority to conduct such negotiations lies in Westminster/Whitehall.

However, clear commitments have been made that the devolved administrations are to have an advisory/consultative role in setting the UK's negotiating mandate for such negotiations. In its White Paper of February 2019,<sup>5</sup> the UK Government announced 'processes [that] will ensure that the priorities and expertise of the devolved administrations can shape and inform the development of the UK Government's international trade policy and negotiating positions.' A commitment is given that: 'Where a new FTA requires legislation in order to implement it, the UK Government will continue to respect the devolution settlements and work with the devolved administrations to secure legislative consent for UK-wide legislation where appropriate.' The Northern Ireland Assembly will thus have the opportunity to exercise some control over the future shape of ESR in Northern Ireland, in so far as this is affected by trade negotiations, through the operation of the Sewel Convention.<sup>6</sup> The White Paper continued: 'We recognise that the devolved legislatures also have a strong and legitimate interest in future trade agreements. It will be for each devolved legislature to determine how it will scrutinise their respective Governments as part of the ongoing process.'

In order to secure the passage of a Legislative Consent Motion, if such were requested and the Assembly was minded to consent, MLAs may wish to consider whether preconditions should be included as to how various aspects of the exit and trade negotiations with the EU and trade negotiations with non-EU states should be conducted, and these conditions could

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<sup>5</sup> Department for International Trade and President of the Board of Trade, Processes for making free trade agreements after the United Kingdom has left the European Union, CP 63, February 2019, pages 8-9.

<sup>6</sup> The UK Supreme Court held, in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, that the Sewel Convention is not legally binding on the UK Government. It is just a political constraint.

include specific requirements as to how ESR should be treated post-Brexit. In that context, several of the issues discussed in this chapter might be highly relevant.

### Conclusion

This chapter assumes that the commitments made by the UK Government, that the devolved administrations will be involved in devising future trade policy, were made and will be operated in good faith. The issue that this chapter considered is how the Assembly and Executive might exercise that advisory/consultative role specifically in the area of ESR. We considered this initially in the context of negotiations between the EU and the UK, and then more broadly in the context of negotiations between the UK and other non-EU states.

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