

## **A Way Forward for a Consensus Approach on Human Rights in Northern Ireland**

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### **Introduction**

This presentation considers key reasons for the current lack of consensus on how best to protect human rights in Northern Ireland. It draws on academic study of Northern Ireland's experience over the 25 years since the Belfast (Good Friday) Agreement, as well as lessons learned from other jurisdictions. Examining a way forward, it considers whether the lack of consensus arises from a failure of imagination and flexibility; whether a programme of constructive engagement, with less suspicion and division, could better enable and improve the lives of people living in Northern Ireland; and whether such a programme could help to fulfil human rights obligations alluded to (or not) in the Belfast (Good Friday) Agreement.

### **Changes to Northern Ireland's human rights landscape since 1998**

A great deal has been achieved on the human rights front in Northern Ireland since the Belfast (Good Friday) Agreement was reached in April 1998, but it is important to realise that not all of those achievements are directly relatable to the troubles. Those that are include the establishment of the Northern Ireland Human Rights Commission and the Equality Commission;<sup>2</sup> the introduction of public sector equality duties under section 75 of the Northern Ireland Act; the ratification of the European Charter for Regional or Minority Languages; and various measures taken to address the suffering of the victims of the troubles, such as setting up the Commission for Victims and Survivors,<sup>3</sup> the Victims and Survivors Service<sup>4</sup> and the Troubles Permanent Disablement Payment Scheme.<sup>5</sup>

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<sup>2</sup> The NIHRC was given additional powers by the Justice and Security (NI) Act 2007, ss 14-20 and by the European Union (Withdrawal Agreement) Act 2020, Sch 3, para 7.

<sup>3</sup> Victims and Survivors (NI) Order 2006; Commission for Victims and Survivors (NI) Act 2008 (amending the 2006 Order).

<sup>4</sup> This government service extends not just to victims and survivors of the troubles but also to those affected by historical institutional abuse or by abuse in Mother and Baby Institutions, Magdalene Laundries and Workhouses.

<sup>5</sup> See the Victims' Payments Regulations, made under the Northern Ireland (Executive Formation, etc) Act 2019.

The human rights achievements which are *not* directly related to the troubles or to the 1998 Agreement are much more numerous than those which are. They can be divided into six different categories:

(1) Measures which were already in the pipeline when the Agreement was reached, such as wider protection against religious and political discrimination under the Fair Employment and Treatment (NI) Order 1998; the establishment of the Office of the Police Ombudsman for Northern Ireland under the Police (NI) Act 1998; the Public Interest Disclosure (NI) Order 1998 (protecting the rights of whistle-blowers at work); the Public Processions (NI) Act 1998 (regulating parades, following the North Report in 1997) and, most significantly of all, the Human Rights Act 1998. It is important to remember that the Human Rights Act 1998 would have applied in Northern Ireland even if there had not been the Belfast (Good Friday) Agreement: what the Agreement did was to entrench the Act more deeply into the legal system of Northern Ireland, because it would now be a breach of the Agreement, and of the British-Irish Treaty which accompanied it, if the Human Rights Act were to be amended or replaced in a way which meant that the ECHR was no longer incorporated into Northern Ireland law, 'with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency'.<sup>6</sup>

(2) Measures taken by the Assembly on topics that do not relate to the content of the Agreement and might have been taken regardless of who was governing Northern Ireland at the time. This is a very large category, embracing fields such as workers' rights,<sup>7</sup> welfare

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<sup>6</sup> See the 'Rights, Safeguards and Equality of Opportunity' section of the Agreement, para 3.

<sup>7</sup> Employment Act (NI) 2010 (e.g. additional compensation for financial loss); Employment Act (NI) 2011 (dispute resolution procedures, etc); Work and Families Act (NI) 2015 (shared parental leave and pay); Employment Act (NI) 2016 (zero hours workers, gender pay gap information, etc); Fair Employment (School Teachers) Act (NI) 2022 (removing the exemption for employment of teachers); Parental Bereavement (Leave and Pay) Act (NI) 2022.

rights,<sup>8</sup> family rights,<sup>9</sup> children's rights,<sup>10</sup> health rights,<sup>11</sup> education rights,<sup>12</sup> housing rights<sup>13</sup> and environmental rights.<sup>14</sup> Since the devolution of policing and justice in 2010 there have

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<sup>8</sup> Child Reform, Pensions and Social Security Act (NI) 2000 (e.g. child support payments); State Pension Credit Act (NI) 2002 (provision of state pension credits); Welfare Reform Act (NI) 2007 (e.g. employment support allowance); Pensions Act (NI) 2008 (further provision for state and occupational pensions); Debt Relief Act (NI) 2010 (debt relief orders); Welfare Reform Act (NI) 2010 (working-age benefits); Pensions Act (NI) 2012 (gender equality, automatic enrolment, etc); Pensions Act (NI) 2015 (state pension reforms); Welfare Supplementary Payments (Amendment) Act (NI) 2022 (extending time for claiming such payments); Social Security (Terminal Illness) Act (NI) 2022 (special rules if death expected within 12 months)..

<sup>9</sup> Family Law Act (NI) 2001 (parental responsibility by father or step-parent); Carers and Direct Payments Act (NI) 2002 (rights of, and services for, carers); Social Security Act (NI) 2002 (e.g. maternity payments); Domestic Abuse and Civil Proceedings Act (NI) 2021 (offence of domestic abuse); Domestic Abuse (Safe Leave) Act (NI) 2022 (time off work for abuse victims); Adoption and Children Act (NI) 2022 (updating the law).

<sup>10</sup> Children (Leaving Care) Act (NI) 2002 (duty on authorities to looked-after children); Children (Emergency Protection Order) Act (NI) 2007 (allowing an EPO to be discharged within 72 hours); Child Maintenance Act (NI) 2008 (child support); Autism Act (NI) 2011 (autism strategy); Safeguarding Board Act (NI) 2011 (creating Safeguarding Board for Northern Ireland); Inquiry into Historical Institutional Abuse Act (NI) 2013; Children's Services Co-operation Act (NI) 2015 (cooperation between children's authorities); Autism (Amendment) Act (NI) 2022 (amending the 2011 Act).

<sup>11</sup> Health and Personal Social Services Act (NI) 2001 (creation of the Northern Ireland Social Care Council); Mesothelioma, etc Act (NI) 2008 (compensation for mesothelioma); Health and Social Care (Reform) Act (NI) 2009 (creating the Patient and Client Council); Damages (Asbestos-related Conditions) Act (NI) 2011 (compensation for asbestosis); Tobacco Retailers Act (NI) 2014 (registration of tobacco retailers); Health (Miscellaneous Provisions) Act (NI) 2016 (sale of nicotine, levy on sugar, etc); Mental Capacity Act (NI) 2016 (determination of mental capacity); Hospital Parking Charges Act (NI) 2022 (ban on such charges); Organ and Tissue Donation (Deemed Consent) Act (NI) 2022 (introducing an opt-out system); Period Products (Free Provision) Act (NI) 2022..

<sup>12</sup> Addressing Bullying in Schools Act (NI) 2016; Shared Education Act (NI) 2016 (facilitation of shared schools); Special Educational Needs and Disability Act (NI) 2016 (SEN assessments, etc); School Age Act (NI) 2022 (ensuring all children have equal time in schools); Integrated Education Act (NI) 2022 (statutory duty to support).

<sup>13</sup> Defective Premises (Landlords' Liability) Act (NI) 2001; (landlord's duty of care to repair premises); Housing (Amendment) Act (NI) 2010 (on homelessness etc); Housing (Amendment) Act (NI) 2011 (registration of landlords, etc); Houses in Multiple Occupation Act (NI) 2016 (licensing requirements); Housing (Amendment) Act (NI) 2016 (identifying empty properties); Private Tenancies Act (NI) 2022 (greater rights for tenants).

<sup>14</sup> Single Use Carrier Bags Act (NI) 2011 (charges for such bags); Clean Neighbourhoods and Environment Act (NI) 2011 (gating orders, nuisance parking, litter, graffiti, dogs, noise, etc); Wildlife and Natural Environment Act (NI) 2011 (biodiversity; protection of wild animals and plants, etc); Waste and Contaminated Land (Amendment) Act 2011 (penalties for pollution, etc); Marine Act (NI) 2014 (marine protection); Carrier Bags Act (NI) 2014 (extension of 2011 Act); Rural Needs Act (NI) 2016 (public authorities' duties); Environmental Better Regulation

been several measures in those fields too.<sup>15</sup> Older people have benefited as well, through the appointment of a Commissioner for Older People,<sup>16</sup> and the law on defamation has been reformed in favour of greater freedom of speech.<sup>17</sup>

(3) Measures taken by the UK Parliament at a time when the Assembly was not fully operational, such as reforms to workers' rights,<sup>18</sup> welfare rights,<sup>19</sup> family rights,<sup>20</sup> children's

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Act (NI) 2016 (improvement of regulation); Water and Sewerage Services Act (NI) 2016 (water resources and drought plans, etc); Climate Change Act (NI) 2022 (emission targets).

<sup>15</sup> Justice Act (NI) 2011 (offender levy; vulnerable and intimidated witnesses, Policing and Community Safety Partnerships); Criminal Justice Act (NI) 2013 (human trafficking, retention of fingerprints, etc); Justice Act (NI) 2015 (Victims and Witness Charters, etc); Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 (protection of victims, etc); Justice Act (NI) 2016 (statutory Prison Ombudsman, etc); Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022 (crime of voyeurism, better protection for trafficking victims); Protection from Stalking Act (NI) 2022 (offence of stalking); Criminal Justice (Committal Reform) Act (NI) 2022.

<sup>16</sup> Commissioner for Older People Act (NI) 2011.

<sup>17</sup> Defamation Act (NI) 2022.

<sup>18</sup> Employment Relations (NI) Order 1999 (additional workers' rights); Employment (NI) Order 2002 (adoption and paternity leave and pay); Employment (NI) Order 2003 (tribunal reform and dispute resolution procedures); Employment Relations (NI) Order 2004 (e.g. rights of trade union members); Employment (Miscellaneous Provisions) (NI) Order 2005 (regulation of employment agencies and enforcement of Fair Employment Tribunal awards); Work and Families (NI) Order 2006 (maternity and paternity leave and pay).

<sup>19</sup> Welfare Reform and Pensions (NI) Order 1999 (new pension schemes and welfare benefits); Northern Ireland (Welfare Reform) Act 2015 (creating powers to change the rules on welfare benefits); Welfare Reform (NI) Order 2015 (mitigating austerity measures); Welfare Reform and Work (NI) Order 2016 (e.g. the benefit cap and further mitigation payments).

<sup>20</sup> Law Reform (Miscellaneous Provisions) (NI) Order 2005 (family homes, domestic violence and equal treatment of spouses); Law Reform (Miscellaneous Provisions) (NI) Order 2006 (physical punishment of children and broader marriage rights); Family Homes and Domestic Violence (NI) Order 1998 (occupation orders and non-molestation orders, etc); Gender Recognition Act 2004; Civil Partnership Act 2004 (allowing gay couples to enter into civil partnerships); Forced Marriage (Civil Protection) Act 2007.

rights,<sup>21</sup> health rights,<sup>22</sup> education rights,<sup>23</sup> housing rights,<sup>24</sup> environmental rights<sup>25</sup> and disability rights.<sup>26</sup> Latterly the UK Parliament has stepped in on much more controversial issues such as reforms made to marriage laws,<sup>27</sup> abortion laws,<sup>28</sup> language laws<sup>29</sup> and organ donation laws.<sup>30</sup> A Bill is currently before Parliament on dealing with the past in Northern Ireland.<sup>31</sup>

(4) Measures taken by the UK Parliament on a national basis because they relate to 'excepted matters' listed in the Northern Ireland Act 1998, such as elections,<sup>32</sup> national security<sup>33</sup> or terrorism.<sup>34</sup>

(5) Measures taken by the UK Parliament because the topic at issue was a 'reserved matter' under the Northern Ireland Act 1998 and so could not be legislated for by the Assembly, as

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<sup>21</sup> Commissioner for Children and Young People (NI) Order 2003; Protection of Children and Vulnerable Adults (NI) Order 2003; the Child Poverty Act 2010 (targets on child poverty, etc); Safeguarding Vulnerable Groups (NI) Order 2007; Historical Institutional Abuse Act 2019.

<sup>22</sup> Health and Personal Social Services (Quality, Improvement and Regulation) (NI) Order 2003 (creating the Regulation and Quality Improvement Authority); Smoking (NI) Order 2006 (smoke-free premises and sale of tobacco to children).

<sup>23</sup> Education and Libraries (NI) Order 2003 (e.g. welfare and protection of pupils and abolition of corporal punishment); Special Educational Needs and Disability (NI) Order 2005 (e.g. disability discrimination in education); Education (NI) Order 2006 (curriculum reform and suspension and expulsion of pupils).

<sup>24</sup> Housing (NI) Order 2003 (e.g. grants for owners and tenants); Private Tenancies (NI) Order 2006 (obligations of landlords and tenants).

<sup>25</sup> Environment (NI) Order 2002 (pollution prevention, air quality strategy, etc); Energy (NI) Order 2003 (new regulatory arrangements; enhancement of General Consumer Council's functions); Waste (Amendment) (NI) Order 2007 (altering the Waste and Contaminated Land (NI) Order 1997).

<sup>26</sup> Equality (Disability, etc) (NI) Order 2000; Disability Discrimination (NI) Order 2006 (e.g. duties of public authorities; railway transport).

<sup>27</sup> Northern Ireland (Executive Formation, etc) Act 2019, s 8.

<sup>28</sup> Ibid, s 9.

<sup>29</sup> Identity and Language (Northern Ireland) Act 2022.

<sup>30</sup> Northern Ireland (Executive Formation and Organ and Tissue Donation) Act 2023.

<sup>31</sup> Northern Ireland (Legacy and Reconciliation) Bill.

<sup>32</sup> Northern Ireland Act 1998, Sch 2, paras 2, 12 and 13. See, e.g., Political Parties, Elections and Referendums Act 2000; Electoral Fraud (NI) Act 2002.

<sup>33</sup> Ibid, para 17. See, e.g., Regulation of Investigatory Powers Act 2000

<sup>34</sup> Ibid. See, e.g. Terrorism Act 2000;

was the case for criminal justice issues before devolution of that topic in 2010<sup>35</sup> and is still the case today for parades,<sup>36</sup> the national minimum wage,<sup>37</sup> surrogacy arrangements,<sup>38</sup> human fertilisation and embryology,<sup>39</sup> consumer safety<sup>40</sup> and data protection.<sup>41</sup>

(6) Measures taken on a UK-wide basis, even though arguably not on excepted or reserved matters, such as the Freedom of Information Act 2000, some parts of the Protection of Freedoms Act 2012, the Consumer Rights Act 2015 and the British Sign Language Act 2022.

### **Lessons learned from the last 25 years**

The basic deduction one can draw from how human rights have been protected in Northern Ireland since the Belfast (Good Friday) Agreement is that protection of human rights does not necessarily relate to the Agreement or, putting that differently, to the principal community division we have in this society between unionists and nationalists. Indeed, in some respects one might look upon the Agreement as an obstacle to the protection of human rights because its provisions on cross-community voting have been applied even in contexts where the issue in question is not a troubles-related one but rather an economic or moral one. On some of those issues the UK Parliament has taken the initiative instead. For instance, at the time of the introduction of austerity measures by the Cameron government in the wake of the 2008 financial crisis, there were deep divisions amongst the political parties in Northern Ireland over welfare reform and later there were equally if not more significant divisions over the

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<sup>35</sup> Criminal Justice (NI) Order 1988 (altering presumption concerning the criminal liability of children 10 over); Criminal Justice (Children) (NI) Order 1998 (youth conferences, etc); Criminal Evidence (NI) Order 1999 (special directions for vulnerable or intimidated witnesses); Criminal Injuries Compensation (NI) Order 2002 (reforms to a former scheme); Criminal Justice (NI) Order 2003 (bail rights, time limits and sexual offences); Access to Justice (NI) Order 2003 (reforms to legal aid provision); Criminal Justice (NI) Order 2004 (e.g. live links and prosecution appeals); Criminal Justice (No 2) (NI) Order 2004 (protection against hate speech); Criminal Justice (Evidence) (NI) Order 2004 (e.g. bad character and hearsay evidence); Criminal Justice (NI) Order 2005 (e.g. anti-social behaviour orders and reforms to youth justice system); Police and Criminal Evidence (Amendment) (NI) Order 2007 (reforming police powers).

<sup>36</sup> Northern Ireland Act 1998, Sch, para 10.

<sup>37</sup> Ibid, para 21.

<sup>38</sup> Ibid, para 32.

<sup>39</sup> Ibid, para 33.

<sup>40</sup> Ibid, para 37.

<sup>41</sup> Ibid, para 40.

permissibility of same-sex marriage and the decriminalisation of abortion. In those sorts of fields, thankfully, political parties can sometimes change their minds or agree a compromise, as occurred in 2014 when the Stormont House Agreement settled differences over matters including welfare reforms, identity and culture, parades and ‘dealing with the past’.

Another way of characterising the position which has arisen over the last 25 years is to say that there is by no means always a lack of consensus between unionists and nationalists on human rights issues. On issues of social justice, especially in the fields of workers’ rights, welfare rights, family rights, children’s rights, health rights, education rights, housing rights and environmental rights, there is a great deal of unanimity, even if there is sometimes disagreement about how best to bring about change and at what pace. The idea that political parties cannot agree on socio-economic rights is fallacious. Deals can be struck if controversial issues are discussed in packages on the understanding that nothing is agreed until everything is agreed. Private Members’ Bills can also achieve a lot, as we saw in the plethora of such Bills that were quickly agreed in the first three months of 2022 prior to the dissolution of the Assembly for elections.<sup>42</sup>

It is only on some totemic issues that disagreement stymies progress. This is epitomised in the debate over whether there should be a Bill of Rights for Northern Ireland. The Belfast (Good Friday) Agreement requires the UK government to consider proposals for a Bill of Rights but to date no such proposals, whether those made in 2001 or in 2008, have met with the approval of the UK government or indeed the Northern Ireland government. The Assembly’s Ad Hoc Committee did good work in gathering views on the issues (even if its process largely replicated two very extensive previous consultations organised by the Human Rights Commission) but, somewhat predictably in my view, consensus could not be reached in its final report because the Bill of Rights as a mechanism was deemed by the DUP not to be an appropriate one, almost (it seems) regardless of its content.<sup>43</sup> This appears to be because such a Bill would lead to Northern Ireland having a different human rights regime from that in Great Britain.

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<sup>42</sup> In all, 31 statutes were agreed by the Assembly, or received Royal Assent, in the first six months of 2022, at least five of which were Private Members’ Bills.

<sup>43</sup> See the 2022 report at <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/>. I submitted my own written and oral evidence to the Committee: see under ‘Written briefings received by the Committee’.

I do not share that concern as I don't think such a situation would in any way make the United Kingdom less united, but I do have increasing scepticism that a grandiose Bill of Rights is feasible: unless a great deal of change is made to the way our society is administered, or unless a Bill of Rights is imposed upon Northern Ireland against the will of one of the two largest communities, a whole new set of rights cannot be properly guaranteed just by stating that they exist. Most of the rights set out in the Human Rights Commission's proposals could be better protected by topic-specific legislation. Bills of Rights, however cleverly worded, quickly become out of date and (like the Belfast (Good Friday) Agreement), difficult to change. Besides, in a country where the fundamental principle of the Constitution (like it or not) is parliamentary sovereignty, there is no way of 'entrenching' a Bill of Rights and making it unalterable in the future. We are seeing that now in the context of the Conservative party's wish to replace the Human Rights Act. It is fortunate that the Human Rights Act contains rights set out in a treaty which an international court interprets: in that way the extent of those 'Convention rights' has increased significantly since 1998. EU law also further protected various rights, especially in the fields of discrimination law and workers' rights. Some of those will continue to apply in Northern Ireland due to the Ireland / Northern Ireland Protocol to the EU-UK Withdrawal Agreement 2020 and to the concept of retained EU law, a lot of which, we now know, will be retained for longer than originally planned.<sup>44</sup>

The current UK government is, of course, keen to replace the Human Rights Act with the UK's own Bill of Rights, based on the ECHR but with additional protections and perhaps new enforcement mechanisms, just as there is a French Bill of Rights, an American Bill of Rights and a Canadian Charter of Rights (for example). But in those three countries the documents in question have been amended very little since they were agreed, in 1789, 1791 and 1982 respectively. In many European countries their constitutions contain a chapter setting out fundamental rights but these are almost always no more extensive than the ECHR, which they have all incorporated into their domestic law in any event. As in the UK, those countries have supplemented their constitutional rights provisions by enacting additional 'ordinary' legislation guaranteeing rights. Australia, meanwhile, having had a nationwide consultation on

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<sup>44</sup> Lisa O'Carroll, 'Bonfire of EU laws watered down to just 800 after meeting of Brexiter MPs', *The Guardian*, 28 April 2023. The original plan had been to ditch 4,000 laws by the end of 2023.



whether it should adopt a national Bill of Rights, decided not to do so but instead to continue utilising existing mechanisms to protect human rights.<sup>45</sup>

A common feature of national attempts to guarantee rights is that in areas outside traditional civil and political rights the method chosen to protect the rights is ordinary legislation. Hence, to the extent that economic, social and cultural rights are protected at all, it is almost always through national laws. And as the first section of this paper has demonstrated, that is the indeed the way in which socio-economic rights are protected throughout the UK. Human rights activists, myself included, might want such legislation to be developed still further, but the point is that the principle that ESC rights deserve to be protected by law has already long been accepted across all political parties both in Northern Ireland and in Great Britain (and also Ireland). It does not matter that they are not specifically designated as ‘human rights’ because what matters is the substance of the protection afforded, not the form in which it is afforded

### **Imagination and flexibility**

#### *Social justice and fairness v human rights?*

It seems to me that one way of defusing tensions that exist amongst political parties over ‘human rights’ issues, however that term is defined, is to re-frame the debate. It might be more productive, for example, to talk first and foremost about social justice than about human rights, especially in the socio-economic field. I believe that all parties in the Assembly are in favour of social justice, if by that we mean a society where there is more equality and where the poor, the sick and the vulnerable are given additional state support to help them deal with their problems.

Fortunately, although we are living through an age of anxiety and mental instability, we are more aware than ever of the need to offer help, financial or personal, to those who have vulnerabilities. Be it people with disabilities, carers, children who are bullied at school, looked-after children, young people leaving care, victims of institutional abuse, menstruating girls and women, people working in or visiting hospitals, anyone exposed to domestic violence, stressed workers, the terminally ill, the homeless, the addicted, the suicidal, victims of crime or asylum seekers, our society has woken up to the need to take special measures for their

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<sup>45</sup> But the state of Victoria and the Australian Capital Territory (Canberra) do have Bills of Rights, as does New Zealand (linked closely to the UN’s International Covenant on Civil and Political Rights).

protection. Parties may disagree over the degree of protection that should be provided but they accept the need for some protection. For all that the epithet ‘woke’ now tends to be pejorative, the truth remains that for far too long our society has been insufficiently unconscious of the special needs of a very wide variety of groups whose members have been suffering in relative silence. It is appropriate to assist such individuals not specifically because they have a legally enforceable human right to such assistance but because it is socially just that it be provided. If laws can be passed to give such assistance that is a huge win for the whole of society.

There is also scope for making greater use of the concept of ‘fairness’ in our law. Although it is a vague, open-textured term, it is already deployed in a wide variety of legal contexts. We are all familiar with phrases such as unfair trials, unfair competition, unfair contract terms, unfair dismissal and unfairness in the field of administrative law. It is rare to find the criteria of fairness spelled out in the legislation on any of those areas, leaving the ground to regulators and judges to decide what behaviour is or is not fair given all the relevant circumstances. But it has been done in the context of unfair contract terms<sup>46</sup> and could be done in many other contexts too. When I was at the Human Rights Commission in the early 2000s I once gave a talk to a group of community activists explaining the *raison d’être* of the Commission and I said that its role was basically to ensure that people were treated fairly in society. One or two of my fellow Commissioners took issue with me over that but I maintain that to the average member of the public fairness is an excellent one-word summary for the value that a human right represents, indeed that any legal right represents. I am not suggesting that the language of human rights should be abandoned, only that it be generalised and its justifications made more transparent.

### *Duties v rights?*

Looking back over the legislation enacted during the past 25 years, I was also struck by how much of it was basically aimed at providing safety and security to people.<sup>47</sup> Traditionally the first duty of the state has been said to be the protection of its borders. Notwithstanding

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<sup>46</sup> Unfair Contract Terms Act 1977, s 11 and Sch 2 (though the principal term used there is ‘reasonableness’)

<sup>47</sup> Several relevant measures have already been footnoted, but see too the Pesticides Act 1998, Food Standards Act 1999, Railway Safety Act (NI) 2002; Safety of Sports Grounds (NI) Order 2006; Sexual Offences (NI) Order 2008; Criminal Justice (NI) Order 2008 (sentencing and electronic monitoring, etc); Sunbeds Act (NI) 2011; Food Hygiene Rating Act (NI) 2016; Preservation of Documents (Historical Institutions) Act (NI) 2022; Abortion Services (Safe Access Zones) Act (NI) 2022.

exceptional phenomena such as thousands of people risking their lives to cross the English channel in small boats, or the decision of a dictator to invade another sovereign country, the norm in the world is that the state's first duty is actually to preserve the health and safety of its own citizens and of others who are living there. The Covid pandemic shocked us into realising that all of us can be exposed to a viral infection very quickly and that at times extreme measures need to be taken by governments to protect the whole population. The ECHR, regrettably, is weak in this regard. Although it does contain a right, in Article 5(1), to 'security of person' the European Court has never developed that phrase into a right to be, or even just to feel, safe.

In this sphere it is, I think, more appropriate to talk in terms of a state's duty to keep people safe, not of a person's right to be safe – not least because in an emergency such as a pandemic very difficult choices need to be made as to which people deserve greater protection than others, and only elected representatives, taking into account expert advice, should be making those choices. We see this in the ECHR itself, which in Article 10(2) talks of the exercise of the rights to freedom of expression and to receipt of information carrying with it duties and responsibilities. Many other human rights treaties, be they derived from the UN or the Council of Europe, contain provisions imposing duties on states.

If it appears to be contradictory to say that if there's a duty there does not necessarily need to be a corresponding right – despite law students being taught, thanks to a certain US theorist called Wesley Hohfeld, that a right and a duty are always two sides of the same coin – in the real world this is not in fact the case. This is because the law can enforce duties in many different ways: not every breach of a duty has to result in an individual having a justiciable right. Breaches of the duties can be both identified and remedied in a number of other ways, e.g. through inspecting, monitoring and investigating the behaviour of the duty-holder. For example, section 1(1) of the Climate Change Act (NI) 2022 provides that 'The Northern Ireland departments must ensure that the net Northern Ireland emissions account for the year 2050 is at least 100% lower than the baseline'. While this duty is backed up, to some extent, by the need for departments to set interim targets, publish sectoral plans and issue carbon budgets, nothing at all is said in the legislation about what should happen if the statutory duty is not fully complied with. The Act, in other words, is exhortatory in nature, not prescriptive. It is there to help focus the minds of government departments but compliance with it is basically left to the will of the Ministers and officials in those departments. Any blowback resulting from a failure in compliance is unlikely to negatively affect any individual Minister or official, except

perhaps reputationally. Yet the gain to society as a whole may still be very significant, especially in situations where the duty is complied with to a great extent, even if not fully.

### **Constructive engagement**

An important alternative to the justiciability of human rights (i.e. allowing them to be the subject of litigation) is the periodic monitoring approach, such as we find operating within various UN and Council of Europe bodies.<sup>48</sup> These inter-governmental institutions, of which the UK has been an active member since their foundation, assess a state's human rights record through consideration of state-generated reports, supplemented at times by a face-to-face dialogue or at other times by a visit to the state by a group of expert monitors. This approach is much less threatening to a state than, say, litigation in the European Court of Human Rights. It is also based on promises made by states – including the UK – to abide by standards set in various multi-lateral treaties, comparable to, but not enforceable in the same way as, the ECHR. Moreover, each state is held to the same standards and all assessments are conducted to the same intensity, regardless of the size of the country or its political and economic profile. There is no 'complaint' at issue, there are no lawyers' fees involved and the 'judgments' reached by the assessors are set out in diplomatic rather than legalistic language. The process is collaborative rather than adversarial. No 'remedy' or 'penalty' is awarded at the end of each monitoring round: the conclusions and recommendations reached are published (sometimes only after the state's government has given its consent to publication) and the monitoring body often expects a follow-up report mid-way through the next monitoring round so that it can assess what progress has been made in responding to the body's previous conclusions and recommendations.

At present all of this monitoring operates at the international level, quite remotely, even though numerous civil society organisations are usually involved in some capacity or other. Publicity levels are low. But the monitoring concept could painlessly and cheaply be developed in Northern Ireland in two ways. First, an office within the Executive, probably within the Executive Office, could be established to (a) closely examine the conclusions and recommendations of the international monitors, (b) decide how Northern Ireland Ministers and departments could work on implementing the recommendations which are not, in its opinion, misguided or superfluous and (c) report to the Assembly annually on the extent to which any

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<sup>48</sup> See Brice Dickson, *International Human Rights Monitoring Mechanisms: A Study of their Impact in the UK* (Edward Elgar Publishing, 2022).

alleged failure to meet the international standards has been addressed during the past 12 months. The UN and Council of Europe would like such a centralised office to be established in every state and there is nothing to prevent separate jurisdictions within states to set up a regional office. The Assembly has the competence to do so under the Northern Ireland Act 1998, since ‘observing and implementing international obligations’ is a transferred matter under the terms of the Northern Ireland Act 1998.<sup>49</sup>

The other step the Executive or Assembly could take is to set up an office which itself, whether or not it also performs the function which I’ve just described, monitors the performance of Northern Ireland departments in adhering to human rights standards to which the UK has subscribed. This pro-active monitoring would identify gaps in human rights protection within Northern Ireland (but not deal with individuals’ complaints) and would suggest what the Executive’s plan should be for plugging those gaps. The standards need not to be all of those set out in the multiple human rights treaties which the UK has ratified: they could be limited, for the sake of argument, to those listed in the ECHR and the European Social Charter, which together embrace a broad array of civil, political, economic, social and cultural rights. Gaps in ECHR protection should be relatively simple to identify, since all departments and other public bodies should already be familiar with what the ECHR requires. The standards required by the European Social Charter are less well known but the European Committee of Social Rights – which in my view is probably the most effective of all the international human rights monitoring mechanisms – already produces a report each year on how Northern Ireland, as part of the UK, is or is not in conformity with the Charter’s provisions.<sup>50</sup>

One of the benefits of setting up one or other of these two types of office would be that officials would be much more on top of what changes may be required to policy or law in order to fulfil the selected standards. Another benefit is that the process would require the office to engage constructively with civil society organisations so that it can receive suggestions for what changes should be made.

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<sup>49</sup> Sch 2, para 3(c).

<sup>50</sup> The Committee has divided the Charter’s provisions into four groups, each of which it monitors on a four-year cycle. The groups are (1) employment, training and equal opportunities, (2) health, social security and social protection, (3) labour rights and (4) children, families and migrants.

A lot of what is suggested in this section of the paper could, perhaps even should, be undertaken by the Northern Ireland Human Rights Commission, since the Paris Principles with which such national human rights institutions have to comply require them to, amongst other things, ‘submit to the Government, Parliament and any other competent body, on an advisory basis... opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights’. Of course, since 2013 the Commission has been helping to fulfil such a role by publishing its very comprehensive ‘Annual Statement on Human Rights’ around 10 December each year.<sup>51</sup> This is now structured more or less in keeping with the sequencing of rights in the ECHR and the European Social Chapter and uses a traffic-light system to indicate how good or bad the current situation on any issue is. It also makes copious references to the views of international human rights monitoring bodies. The document is comparable to the reports which are issued by South Africa’s Human Rights Commission under section 184 of the country’s Constitution: this allows the Commission, each year, to require relevant organs of state to provide it with information on measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.<sup>52</sup>

Needless to say, the Commission also submits its views and advice to government policy proposals on specific issues every few weeks or so, often in response to consultation papers. But it could usefully be given a more central role in keeping the Assembly aware of how Northern Ireland is, or is not, meeting the standards which the UK government has promised will be upheld throughout the country. In a recent piece I have written for the Northern Ireland Legal Quarterly I have surveyed the attention given to Northern Ireland (as well as to Scotland and Wales) by no fewer than 17 international monitoring bodies since the year 2000: the attention is often detailed and significant and it is increasingly clear that the monitoring bodies

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<sup>51</sup> See <https://nihrc.org/publications>, under ‘Annual Statements’.

<sup>52</sup> The latest such national report appears to be for 2019: *Report of the State of Human Rights in South Africa 2019*, available at <https://sahrc.org.za/home/21/files/SAHRC%20SoHR%20Report%202019.pdf>. On the Commission’s website there are other detailed reports about parts of the country or particular rights: see <https://sahrc.org.za/index.php/sahrc-publications/general-reports>.

are keen to address their recommendations not just to national governments but to devolved governments also.<sup>53</sup>

I believe that better outreach by government departments would reduce suspicion and division around the concept of human rights, especially if the engagement adopts the approaches referred to earlier in this paper, where the aims of social justice and fairness are highlighted and where non-litigious approaches to enforcement are prioritised. I am basing my belief partly on what I perceive to be two distinguishing features of the Scottish approach to the protection of human rights – the adoption of a National Action Plan for Human Rights and the creation of a National Taskforce for Human Rights Leadership. The Scottish Human Rights Commission is seeking to incorporate several international human rights treaties into domestic law (within the limits of its legislative competence<sup>54</sup>) through a new Human Rights Bill. Personally, I can see some problems with that strategy, although I do think there is merit in encouraging domestic legislators to make more references to aspects of those treaties so that they can wield more influence domestically. We already do that in Northern Ireland in our legislation governing the Commissioner for Children and Young People and the Commissioner for Older People.<sup>55</sup> Using powers conferred by section 8 of the Justice (NI) Act 2004, the Attorney General has so far issued 15 sets of ‘Human Rights Guidance’ for bodies operating within the criminal justice system of Northern Ireland.

## Conclusion

More does remain to be done in the field of human rights in Northern Ireland. Some of it could be assisted by provisions in the Belfast (Good Friday) Agreement, but most of it could be achieved regardless of the Agreement.

The principal areas in which further progress requires to be made include the following:

- enhanced anti-discrimination laws, and perhaps a more substantive *equality* law,

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<sup>53</sup> Brice Dickson, ‘Devolution and International Human Rights Monitoring Mechanisms’ (2023) 74 *NILQ* [forthcoming]

<sup>54</sup> Following the finding by the UK Supreme Court that a draft Bill aimed at incorporating the UN Convention on the Rights of the Child into Scottish law was in some respects outside of the Scottish Parliament’s competence: *Reference by the Attorney General and the Advocate General for Scotland, UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42.

<sup>55</sup> Commissioner for Children and Young People (NI) Order 2003, art 6(3)(b); Commissioner for Older People Act (NI) 2011, s 2(3).

- enhanced provision for economic, social and cultural rights – the ‘poor relation’ as regards human rights provisions in most parts of the world,
- enhanced protection of the right to be safe and secure (e.g. against terrorism, cyber-crime, privacy invasion, viruses and environmental harm).

There have been various types of obstacles inhibiting progress to date:

- a lack of political consensus, and sometimes a lack of political opportunity (e.g. when the Assembly is suspended),
- a lack of financial resources, partly because the block grant from Westminster is limited and the Northern Ireland Executive has restricted revenue-raising powers,
- a lack of political agreement over the extent to which these reforms should be defined in terms of ‘rights’ rather than, say, state duties or public service targets,
- a certain unrealism on the part of the general population and some human rights activists: ‘rights’ language is easy to use but rights are difficult to guarantee in practice, especially when they conflict with other rights or with other important societal interests.

To overcome familiar obstacles we need to display more imagination and flexibility. We need to agree goals first and then decide how to reach them. Talk of ‘entitlements’ may be better downplayed, in favour of ‘expectations’. We should perhaps talk more about social justice and less about human rights. A failure to meet expectations should not always lead to a personal remedy or ‘punishment’ of those responsible. The ways of measuring progress should be discussed and careful monitoring should ensue (there may be lessons from the fair employment laws here). Would a system of universal basic income help? Should we start to measure individuals’ carbon footprints?

A programme of constructive engagement should be put in place, helping to ensure that the public is involved in agreeing the way forward: citizens’ assemblies, community group discussions, civil society organisations’ contributions, etc. We should promote the ideas of caring for others, respectfulness and altruism.

The direction of travel should bear the Belfast (Good Friday) Agreement in mind but not be limited by it: the wording of the ‘rights’ section of the Agreement was rather hastily put together, without public consultation. We should not be hamstrung by it. The precariousness of life has been made apparent to all of us (the financial crash in 2008, the pandemic in 2020, the cost-of-living crisis and the risk of war in 2022-23): to improve our society, to keep





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ourselves safe and to live in greater harmony we need to prioritise social justice over every other goal. That should ensure that human rights are protected almost as a by-product.