

# **An All-Island Charter of Rights**

**A means to harmonise and enhance human rights and  
equality provisions and protections throughout  
Ireland?**

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## **Abstract**

The Belfast/Good Friday Agreement has been widely acclaimed for its embedded and extensive human rights provisions. Eighteen years on, there are growing concerns at both the failure to fulfil all the human rights provisions of the Agreement and the emerging signs of regression on rights protection. A renewed debate on the full spectrum of human rights issues is therefore urgently required. All options and potential initiatives to arrest regression should now be considered. As a possible contribution to this debate, this study explores the potential of a Charter of Rights for the island of Ireland as a mechanism for the enhancement of human rights protection. The study focuses on key factors which are critical to the effectiveness of a Bill/Charter of Rights and which might influence the development and adoption of a Charter. The study involves a desk-based research. It considers a range of reports and commentary relevant to the rights protection discourse. The study examines the views and recommendations of the various contributors, and applies them to the consideration of a Charter. The study identifies a significant body of rights violations, north and south, common and major weaknesses of the rights protection framework at international, regional and domestic level, and a mixture of apathy and antipathy towards rights protection among political parties and government. The lack of legally enforceable mechanisms which guarantee the adoption of measures to remedy rights violations in an appropriate and timely manner needs to be addressed. Human rights must be disaggregated from the ‘constitutional status of Northern Ireland’ battleground. The study concludes that a Charter of Rights commonly adopted in both jurisdictions and which includes strong enforcement mechanisms has the potential to address these issues and to inject a new momentum and renewed optimism into rights protection island-wide.

## Abbreviations

CAJ	Committee on the Administration of Justice
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Committee on the Rights of the Child
DUP	Democratic Unionist Party
ESCR	Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GFA	Good Friday Agreement
HRA	Human Rights Act
ICCL	Irish Council for Civil Liberties
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHREC	Irish Human Rights and Equality Commission
IHRC	Irish Human Rights Commission
NGOs	Non-Governmental Organisations
NIHRC	Northern Ireland Human Rights Commission
NIO	Northern Ireland Office
SDLP	Social Democratic and Labour Party
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations

# Chapter 1: Introduction

## Introduction

The Good Friday Agreement<sup>1</sup> has been widely acclaimed as a model for conflict resolution,<sup>2</sup> not least because of its emphasis on human rights. Mary Robinson, former UN High Commissioner and former President of Ireland, in delivering the Sydney Peace Prize Lecture in 2002, claimed the Agreement had put human rights at the heart of peace.<sup>3</sup> Its embedded human rights provisions, according to Ní Aoláin, are a testament to the importance of human rights protections in both resolving conflict and building a sustainable peace.<sup>4</sup>

The Agreement, of course, was multifaceted and included, inter alia, provisions on constitutional compromise, power-sharing government, policing and justice reform and enhanced human rights and equality protection. It was endorsed by an overwhelming majority in simultaneous referenda in both Northern Ireland and the Republic of Ireland.<sup>5</sup> Nevertheless, its implementation has not been without problems. The political process in Northern Ireland has almost ran aground on a number of occasions since, and has required a series of supplementary political agreements<sup>6</sup> to rescue it from the rocks, the latest of which, A Fresh Start, was agreed as recently as November 2015.<sup>7</sup> The stuttering and protracted nature of its implementation notwithstanding, the GFA has clearly stood the test of time. Many of its provisions, including some significant commitments on human rights and equality<sup>8</sup>, have now been implemented and, while peace should never be taken for granted, the prospect of a return to major conflict appears remote.

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<sup>1</sup> Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998 [hereinafter 'the GFA' or 'the Agreement'].

<sup>2</sup> Democratic Progress Institute *The Good Friday Agreement – An Overview* (London 2013).

<sup>3</sup> Mary Robinson, *Human Rights at the Heart of Peace* (City of Sydney Peace Prize Lecture, The Centre for Peace and Conflict Studies University of Sydney 2002).

<sup>4</sup> Fionnuala Ní Aoláin, 'Human Rights in Negotiating Peace Agreements: The Good Friday Agreement' International Council on Human Rights Policy (2005) 1.

<sup>5</sup> Result of the referenda: 71.1% in favour in Northern Ireland, 94.39% in favour in the Republic of Ireland, available at <[http://www.bbc.co.uk/history/events/good\\_friday\\_agreement](http://www.bbc.co.uk/history/events/good_friday_agreement)> accessed 10/05/2016.

<sup>6</sup> Agreements since the GFA include: The Weston Park Agreement in 2002, the St Andrews Agreement in 2006, the Hillsborough Agreement in 2010, Stormont House Agreement in 2014, A Fresh Start in 2015.

<sup>7</sup> Northern Ireland Executive *A Fresh Start – The Stormont Agreement and Implementation Plan* Nov. 17, 2015 available at <<http://www.northernireland.gov.uk>>24/06/2016.

<sup>8</sup> For example, the incorporation of the ECHR into domestic law and the establishment of Human Commissions in both jurisdictions

However the Agreement promised more than an end to conflict. It generated hope that it would lead to a fairer, more inclusive and human rights-based society across the whole island<sup>9</sup> and it held out the promise of the protection and vindication of the human rights of all.<sup>10</sup> The full potential of the Agreement in this respect has not been realised and there are now signs of regression with respect to the progress that has thus far been made. The Agreement mooted the possibility of the adoption of an all-island Charter of Rights as an additional human rights instrument to give effect to its rights protection potential. Such a Charter has not yet been fully considered. This study therefore considers the potential of an all-island Charter of Rights as a means to enhance human rights protection island-wide. The first section of this introductory chapter maps out the background to the study. The following section outlines the study's aims and objectives. This is followed by a brief explanation of the rationale underpinning the study. The fourth section sets out the methodology. Section five addresses the underlying assumptions of the study with regard to any possible developments which might invalidate its value. The next section outlines the structure of the study and the final section contains concluding commentary.

## **1.1 Background**

The early optimism that the GFA might realise its potential with respect to the enhancement of human rights protection rested on a combination of its founding principles, thematic declarations and a number of its substantive provisions.

The underlying principles of the Agreement require the exercise of government on the basis

...of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities.<sup>11</sup>

They also include cross-jurisdictional institutional arrangements to develop consultation, co-operation and action on specified matters of mutual interest, north and south.<sup>12</sup> The text of the

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<sup>9</sup> Michael Farrell 'The Irish Government's Compliance With Its Commitments' in Mapping the Rollback? Human Rights Provision of the Belfast/Good Friday Agreement 15 years on (Committee on the Administration of Justice 2013) 25.

<sup>10</sup> GFA, Declaration of Support, para 2.

<sup>11</sup> GFA, Constitutional Issues, para 1(v).

<sup>12</sup> GFA, Strand 2, para 1.



Agreement is threaded with commitments of support for human rights protection, equality, non-discrimination, and mutual respect.<sup>13</sup> But, important as the rhetoric of the Agreement is, perhaps the primary grounds for the feel-good factor on the human rights front which accompanied its adoption lay in its inclusion of specific measures aimed at enhancing human rights protection<sup>14</sup> and promoting a substantive concept of equality with a focus on equality of outcomes.<sup>15</sup> However, despite the implementation of many of these, that early enthusiasm has long been dampened by the realisation that the governments are paying little more than lip service to some key provisions of the Agreement which have not come to fruition.<sup>16</sup> These include a Bill of Rights for Northern Ireland,<sup>17</sup> adequate measures in the Republic of Ireland to match, at minimal, the human rights protections pertaining in the north,<sup>18</sup> and an appropriate consideration of a Charter of Rights for the island of Ireland.<sup>19</sup> Together, they represent the principle elements of, what Farrell describes as, the ‘unfinished business’ of the GFA in the human rights area.<sup>20</sup>

The Bill of Rights for Northern Ireland has been parked in a political cul-de-sac since the publication in 2009 of the Northern Ireland Office’s (NIO) ‘Next Steps’ consultation paper.<sup>21</sup> The paper was widely criticised by human rights organisations and was interpreted as a rejection of many of the recommendations by the Northern Ireland Human Rights Commission (NIHRC) on how to progress the matter.<sup>22</sup>

In contrast to the intensive deliberations on the Bill of Rights, equivalence measures in the Republic of Ireland to match human rights protections in Northern Ireland and the prospect of a

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<sup>13</sup> GFA, Declaration of Support, para 3; GFA, Constitutional Issues, para 1(v); GFA, Strand 1, Annex A, Pledge of Office (c); GFA, Rights, Safeguards and Equality of Opportunity, para 1; GFA, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland.

<sup>14</sup> See, for example, Rights, Safeguards and Equality of Opportunity, paras 2 & 9.

<sup>15</sup> Katherine Zappone *Charting the Equality Agenda: A Coherent Framework for Equality Strategies in Ireland, North and South* (Dublin (Equality Authority and Equality Commission for Northern Ireland, 2001) available at <<http://www.equalityni.org/uploads/pdf/kzreport.pdf>> accessed 10/09/2016

<sup>16</sup> Farrell (n 9) 25.

<sup>17</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 4.

<sup>18</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 9.

<sup>19</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 10.

<sup>20</sup> Farrell (n 9) 26.

<sup>21</sup> Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009).

<sup>22</sup> See, for example, *Amnesty International, United Kingdom: Submission to UK Government on “A Bill of Rights for Northern Ireland – Next Steps”* (Amnesty International Publications 2010) available at <<https://www.amnesty.org.uk/resources/submission-bill-rights-northern-ireland#.V5T7fLgrLcs>> last accessed 24/07/2016.

Charter of Rights for the island have drawn only limited attention.<sup>23</sup> The minimalist approach by the Irish Government on equivalence has prompted accusations that they have failed to take their obligations on the matter seriously. According to Farrell, for example, it took five years of lobbying and campaigning by groups such as the Irish Council for Civil Liberties (ICCL) and the Law Society before the Irish Government eventually passed the ECHR Act 2003<sup>24</sup> to incorporate the European Convention on Human Rights<sup>25</sup> (ECHR) into domestic law.<sup>26</sup> Similarly, the delay in establishing the Irish Human Rights Commission (IHREC)<sup>27</sup> and its underfunding in the years thereafter further evidences a less than enthusiastic approach by the Irish Government to the fulfilment of its commitment on equivalence.<sup>28</sup>

The Charter of Rights has fallen victim to perhaps an even greater degree of neglect than equivalence measures. According to Egan and Murray, despite its transformative potential the Charter has provoked only minimal political engagement in both Northern Ireland and the Republic of Ireland.<sup>29</sup> O'Cinnéide echoes this sentiment, on the one hand extolling the Charter's potential as a vehicle to give effect to an all-island convergence and commonality of rights protection,<sup>30</sup> while, on the other hand, pointing out that it remains marooned in political apathy.<sup>31</sup> This lack of political focus, combined with its secondary status on the list of the GFA's human rights unfinished business, has effectively confined deliberations on the Charter to the work carried out by the Joint Committee of the NIHRC and the IHREC,<sup>32</sup> and a limited number of academic contributions. A fuller and wider consideration of the potential of an all-island Charter of Rights is clearly required.

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<sup>23</sup> Colm O'Cinnéide *Equivalence in Promoting Equality - The Implications of the Multi-party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (The Equality Authority: Dublin 2005) 31, 72.

<sup>24</sup> The ECHR Act 2003 [Hereinafter referred to as 'The ECHR Act'].

<sup>25</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) hereinafter 'ECHR'.

<sup>26</sup> Farrell (n 9) 22.

<sup>27</sup> In 2014 the Irish Human Rights Commission merged with the Equality Authority and is now known as the Irish Human Rights and Equality Commission. Throughout this study the Commission will be referred to as the IHREC.

<sup>28</sup> Farrell (n 9) 23.

<sup>29</sup> Suzanne Egan and Rachel Murray 'Casting a Cold Eye on the Origins and Development of an All-Island Charter of Rights', (2010) 34 *Fordham International Law Journal* 78, 80

<sup>30</sup> C. O'Cinnéide (n 23) 72.

<sup>31</sup> C. O'Cinnéide (n 23) 72..

<sup>32</sup> Hereinafter referred to as 'the Joint Committee'.

## **1.2 Aims and Objectives**

Against the background outlined in the previous section, the overall aim of this study is to explore the potential of a Charter of Rights, commonly applied in both Northern Ireland and the Republic of Ireland, as a mechanism to enhance human rights protection. The study therefore explores some key factors which are either critical to the effectiveness of such a Charter or which might influence its development and adoption.

### **Main Research Question**

Whilst the GFA is an important reference point in assessing British and Irish Government compliance with their obligations on human rights enhancement, international standards are the benchmark against which the quality and level of rights protection which has thus far been achieved should be gauged. The GFA itself invokes such an approach.<sup>33</sup> This study will therefore draw on the various international human rights instruments, such as the ECHR, the International Covenant on Civil and Political Rights (ICCPR)<sup>34</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>35</sup> (ICESCR), as the barometer against which the standard a Charter of Rights should be measured. Moreover, as a guide for both the direction and the generation of relevant outcomes of the study, a particular focus on the following research question will be maintained throughout: What are the key factors which are critical to the effectiveness of a Charter of Rights or might influence its development and adoption on an all-island basis?

## **1.3 The Rationale for the Study**

Concerns about the failure to realise the full promise of the Agreement on human rights protection clearly go beyond stasis. The report of the 2013 conference at Queens University, Belfast, which mapped the rollback on the human rights commitments of the GFA, gives important insights into the concerns of human rights organisations and activists about both the resilement of both governments from their commitments and the ongoing human rights

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<sup>33</sup> GFA, Rights, Safeguards and Equality of Opportunity, paras 4 & 9.

<sup>34</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>35</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR).

protection deficits on the island.<sup>36</sup> Moreover, the increased prospect of a repeal of the Human Rights Act 1998 (HRA) and its replacement with a British Bill of Rights,<sup>37</sup> and the potential resulting implications for the ECHR-related provisions of the Agreement<sup>38</sup> raises the spectre of a further lowering of the threshold of rights protection.<sup>39</sup> Similarly, the result of the recent referendum on UK membership of the European Union<sup>40</sup> (EU) has raised additional concerns relating to declining rights protections. As soon as the UK exit from the EU takes effect, it will no longer be bound by the provisions of the EU Charter of Fundamental Rights.<sup>41</sup> EU directives will also cease to apply and the benefits accruing to Northern Ireland from the current EU equality legislation, such as the Race Equality Directive 2000<sup>42</sup> and the Employment Equality Directive,<sup>43</sup> will be lost.<sup>44</sup> Compounding all of this, there appears to be a diminishing rather than an increasing focus on human rights issues by the governments and the political parties which negotiated the Agreement. Their failure to include even one specific reference to ‘human rights’ in the text of the Fresh Start agreement or to address the impasse over the Bill of Rights, beyond noting that there is not at present a consensus on it,<sup>45</sup> is tellingly indicative of where rights enhancement currently sits in the priority list of the political parties.

The protracted impasse over the Northern Ireland Bill of Rights might have stifled somewhat the appetite for renewed discussion or negotiation of further progress on equality and human rights, including the Charter. Or, perhaps an increasingly consolidated peace, bedded-in political institutions and a general normalisation of politics has encouraged the view among the

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<sup>36</sup> Committee on the Administration of Justice, ‘Mapping the Rollback? Human Rights Provisions of the Belfast/Good Friday Agreement 15 years on’ (2013).

<sup>37</sup> In August 2016 there was speculation that the plan to repeal the HRA may have been shelved – see <http://rightsinfo.org/plans-scrap-human-rights-act-may-scrapped/>. However, on 6/09/2016 the UK Secretary of State for Justice, Elizabeth Truss MP, speaking in the House of Commons, clarified that the government is proceeding with plans to repeal the HRA and replace it with a British Bill of Rights – see <<http://www.parliamentlive.tv/Event/Index/3184e13a-c51f-4940-836b-66c97226e358>> accessed 10/09/2016; see also the Conservative Party Manifesto (2015) 60.

<sup>38</sup> GFA, Rights, Safeguards and Equality of Opportunity, paras 2 & 4.

<sup>39</sup> Anne Smith, Monica McWilliams, Priyamvada Yarnell *Does every cloud have a silver lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights* (2016) forthcoming 40 Fordham International Law Journal, copy on file with author.

<sup>40</sup> 51.9% voted to leave the EU in the UK referendum held on 23/06/2016

<sup>41</sup> The EU Charter of Fundamental Rights was given legal footing by the Lisbon Treaty 2007 (Article 6 EU Treaty) and came into force in 2009. It is therefore legally binding on EU member states.

<sup>42</sup> Race Directive 2003/43/EC.

<sup>43</sup> Employment Framework Directive 2000/78/EC.

<sup>44</sup> Anne Smith and Monica McWilliams Human Rights in Northern Ireland: How to Make the Best Out of a Bad Situation (Oxford Human Rights Hub 2016) available at <<http://ohrh.law.ox.ac.uk/human-rights-protections-in-northern-ireland-how-to-make-the-best-out-of-a-bad-situation/>> accessed 20/08/2016.

<sup>45</sup> See Northern Ireland Executive *A Fresh Start – The Stormont Agreement and Implementation Plan* Section F para 69 available at <<http://www.northernireland.gov.uk>> last accessed 10/05/2016.

politicians that human rights protections are not as important in the building of sustainable peace as Ní Aoláin suggests.<sup>46</sup> Either way, unless it is challenged, the lack of political will to carry through on the substance of the Agreement commitments may well negate the inherent potential of some of its provisions to irreversibly advance the human rights project. The likely continued veto of legislation to give effect to equal marriage rights in Northern Ireland,<sup>47</sup> and the continuing restrictions on abortion rights in both jurisdictions are salutary markers of the attitude of the political parties to a human rights based approach to government. On a brighter note, the 2014 referendum vote in favour of equal marriage in the Republic of Ireland along with an Ipsos MORI opinion poll on the same issue in Northern Ireland suggests that public opinion may be in a more advanced place than the political establishment with regard to the timing and substance of human rights progression in both jurisdictions.<sup>48</sup>

Neither apathy nor antipathy among political parties towards human rights enhancement can be wished away. They can only be countered by increased analysis and a continuing informed debate. With the Bill of Rights in deadlock, the HRA under threat and the UK likely to leave the EU Charter of Fundamental Rights, a renewed debate on the full spectrum of human rights issues is required as a matter of urgency. An assessment of the factors which might influence the effectiveness of a Charter of Rights for the island or influence its development and adoption may well inform such a debate.

## 1.4 Methodology

This study will involve desk-based socio-legal research in the form of a literature review of primary and secondary sources. It will consider a number of reports, publications, academic and political commentary, and related literature relevant to existing human rights and equality protections in both Northern Ireland and the Republic of Ireland and the discourse on their enhancement, accessed via the Ulster University Library and internet search engines. It will include an examination of views and/or recommendations by a variety of contributors, including

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<sup>46</sup> Ní Aoláin (n 4) 1.

<sup>47</sup> See the DUP Manifesto for the 2016 Northern Ireland Assembly Election 'Our Plan for Northern Ireland' 20

<sup>48</sup> See <http://www.referendum.ie/results.php?ref=10> for the results of the referendum on the 34<sup>th</sup> Amendment of the Constitution (Marriage Equality) Bill 2015 which was held on 22<sup>nd</sup> May 2015, 62.07% voted in favour of the amendment to allow same-sex marriage whereas 77.93% voted against the amendment; See also outcome of an Ipsos MORI poll, carried out in July 2015, which showed that 68% of adults in Northern Ireland think that homosexual couples should be allowed to marry, available at <https://www.ipsos-mori.com/researchpublications/researcharchive/3668/Same-sex-marriage-in-Northern-Ireland.aspx>.

the IHREC, the NIHRC, the NIO, the Irish and British Governments, the Irish Council for Civil Liberties (ICCL), the Committee on the Administration of Justice (CAJ) and academics, relevant to a consideration of the case for an island-wide Charter of Rights as a means to achieve enhanced protections. The study will take due account of international standards as prescribed in the main human rights instruments and various concerns raised in the reports by relevant treaty monitoring bodies on both the UK's and the Republic of Ireland's compliance with their international obligations. It will identify deficits in human rights protections in each jurisdiction. In particular the study will consider some key factors which might determine the effectiveness of a Charter of Rights or influence its development and adoption.

## 1.5 Assumptions

This study assumes that there will be no significant developments in the immediate period ahead which will invalidate or render irrelevant the consideration of the need for a Charter of Rights. The Bill of Rights impasse is set to continue, evident by the lack of focus on the issue in the 2015 Fresh Start political negotiations and its absence from most of the political manifestos published in advance of the recent 2016 election to the Northern Ireland Assembly. Significantly, the Bill of Rights does not merit a single mention in the Northern Ireland Executive's draft programme for government which has recently been the subject of a public consultation.<sup>49</sup> Similarly, the introduction or application of new measures to ensure rights protection in the Republic of Ireland equivalent to that in Northern Ireland, are not included in the Irish Government's most recent programme for government.<sup>50</sup> Although the UK have signalled clearly they remain intent on repealing the HRA and replacing it with a British Bill of Rights,<sup>51</sup> there are no signs they will be in a position to give effect to either in the short term.<sup>52</sup> Similarly, as it is anticipated that it will be at least two years before the UK exit from the EU

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<sup>49</sup> Northern Ireland Executive *Draft Programme for Government Framework 2016-21* available at <<https://www.northernireland.gov.uk/sites/default/files/consultations/newnigov/draft-pfg-framework-2016-21.pdf>> accessed 24/07/2016.

<sup>50</sup> See *A Programme for Partnership Government* (May 2016) available at <[http://www.taoiseach.gov.ie/eng/Work Of The Department/Programme for Government/A Programme for a Partnership Government.pdf](http://www.taoiseach.gov.ie/eng/Work%20Of%20The%20Department/Programme%20for%20Government/A%20Programme%20for%20a%20Partnership%20Government.pdf)> accessed 24/06/2016.

<sup>51</sup> See n 37.

<sup>52</sup> The UK Government's 2016 policy and legislative programme addresses would suggest neither proposal has advanced from the previous year. See the Queen's Speech, May 17, 2016 at 48 available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524040/Queens\\_Speech\\_2016\\_background\\_notes\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queens_Speech_2016_background_notes_.pdf)> accessed 10/09/2016; see also the Queen's Speech, May 27, 2015 at 75 available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/430149/QS\\_lobby\\_pack\\_FINAL\\_NEW\\_2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf)> accessed 10/09/2016.

takes effect, any resultant implications for human rights protection in Northern Ireland will not impact in the immediate future.

## **1.6 Structure of the Study**

This study will consist of five chapters. This introductory chapter sets the general context for the study, including the rationale and importance of the study, Chapter 1 also highlights the methodology employed in the study and the focus question of the research. Chapter 2 will include a Literature Review, identifying some of the key concepts which shape the form, content and effectiveness of Bills/Charters of Rights and considering their importance with reference to various texts and contributions relevant to the development of the Charter concept. Chapter 3 briefly considers the effectiveness of the international human rights framework at international, regional and domestic level with particular reference to government compliance and enforcement. Chapter 4 evaluates some additional issues which might influence the development of a Charter and inform any renewed approach to its consideration, such as process and the Bill of Rights debate. Finally, Chapter 5 draws together the conclusions of the study.

## **1.7 Conclusion**

The possibility of a Charter of Rights for the island of Ireland, as provided for in the GFA, has thus far been subjected to only a very limited consideration involving a small number of groups and individuals. Consequently, there remains a significant deficit of understanding regarding its potential. By virtue of a wider consideration of some of the key factors which might impact on the development and effectiveness of an all-island Charter or in securing agreement on its adoption, this research study aims to narrow this gap in understanding. This opening chapter has mapped out the background to the study and outlined its structure. The next chapter will identify some of the key characteristics of a Charter of Rights which impact on its form, content and effectiveness. Each of these concepts will be considered with reference to both the broader human rights discourse and the limited available Charter-related literature.

## Chapter 2: Literature Review

### Introduction

Given the limited available literature on an all-island Charter of Rights, this chapter draws on some of the key characteristics of a Bill of Rights and considers their importance with reference to various texts and contributions relevant to the development of the Charter. There is no defined distinction between the terms ‘Charter of Rights’ and ‘Bill of Rights’. The terms therefore have been used interchangeably throughout this study. Where necessary, such as in specific reference to any existing or currently proposed documents, the currently applied term will be used. The first section of this chapter considers the definition of a Bill/Charter of Rights and the importance of a singular focus on rights enhancement. The second section addresses the content of a Charter. This is followed by a consideration of the related issues of entrenchment and enforcement. The fourth section looks at the issue of justiciability with particular reference to economic, social and cultural rights (ESCR). The final section contains some brief conclusions.

### 2.1 Defining a Bill/Charter of Rights

Bills of Rights are not homogenous entities and therefore have no precise or standard definition.<sup>53</sup> Nevertheless, they often have common underlying characteristics which formally bind governments to protect and uphold specified fundamental rights, and make provision for addressing violations.<sup>54</sup> The degree to which they may succeed in this respect is linked directly to their content and the mechanisms by which they can be enforced. Whilst a Bill of Rights may carry a moral imperative, its capacity for enforcement will likely rest on whether or not it has been formally entrenched and the powers of the courts with regard to its provisions.<sup>55</sup> One definition of a Bill of Rights describes it as ‘an instrument which sets out a broad set of fundamental human or civil rights and grants these an overarching status within the national order’.<sup>56</sup> Other definitions include a more specific mention of the binding nature of the Bill and

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<sup>53</sup> Ronagh McQuigg *Bills of Rights: A Comparative Perspective* (Intersentia 2014) 1.

<sup>54</sup> Anne Smith, Monica McWilliams, Priyamvada Yarnell *Advancing A Bill of Rights For Northern Ireland* (Transitional Justice Institute, Ulster University 2014) 10.

<sup>55</sup> The JUSTICE Constitution Committee *A British Bill of Rights - Informing the debate* (Justice 2007) 65.

<sup>56</sup> David Erdos *Delegating Rights Protection* (Oxford University Press 2010) 3.



a provision for redress if violations occur.<sup>57</sup> The JUSTICE<sup>58</sup> constitution Committee, for example, describing a Bill of Rights as a combination of law, symbolism and aspiration, defines it as

a formal commitment to the protection of those human rights which are considered, at [a given] moment in history, to be of particular importance. It is, in principle, binding upon the government and can be overridden, if at all, only with significant difficulty. Some form of redress is provided in the event that violations occur.<sup>59</sup>

Specific to a Charter of Rights for the island of Ireland, the GFA's focus is restricted to purpose, suggesting it should reflect and endorse measures for the protection of rights of everyone living in the island.<sup>60</sup>

The Joint Committee recommended a Charter as a means to bring about an equivalence of human rights protections in both jurisdictions.<sup>61</sup> The Committee offered little by way of justification for their recommendation. Their rationale appears to be based on no more than the identification of an existing commonality of rights between the two jurisdictions and a belief that a Charter would allow political parties, north and south, to demonstrate a continued commitment to human rights and underpin the peace process in Northern Ireland.<sup>62</sup> An inherent weakness of a Charter constructed to serve such a purpose would be that it would set the bar of rights protection for the island at the level it reaches within Northern Ireland. Given the many concerns about the existing shortcomings in rights protection in both jurisdictions, a Charter of Rights should reflect a meaningful commitment to progressive human rights rather than a concession to the lowest common denominator.<sup>63</sup>

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<sup>57</sup> JUSTICE Committee (n 55) 15.

<sup>58</sup> JUSTICE is the British section of the International Commission of Jurists.

<sup>59</sup> JUSTICE Committee (n 55) 15.

<sup>60</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 10.

<sup>61</sup> The Advice of the Joint Committee on a Charter of Rights (June 2011) 2 available at <<https://www.nihrc.org/documents/charter%20of%20rights/charter-of-rights-advice-june-2011-final.pdf>> accessed 24/07/2016.

<sup>62</sup> *ibid* 4

<sup>63</sup> Irish Council for Civil Liberties *Response to the Pre-consultation on a Charter of Rights for the island of Ireland to the Joint Committee of Representatives of the Irish Human Rights Commission and the Northern Ireland Human Rights Commission* (2004) 4.

Egan and Murray have criticized the lack of clarity around the purpose of a Charter provided by the Joint Committee.<sup>64</sup> They suggest a number of possible aims of a Charter including: to achieve equivalence; to enhance North-South cooperation; to pledge political parties to rights protection, and; to augment or harmonize upwards human rights protection in both jurisdictions.<sup>65</sup> O’Cinnéide also points to the Charter’s potential in effecting equivalence. Emphasizing the obligatory nature of the equivalence dimension however, he insists that equivalence should apply irrespective of whether or not a Charter is adopted.<sup>66</sup> Furthermore, he advises caution in linking ‘political agendas’ to either issue. Achieving equivalence, he asserts, is not linked to a North/South sharing of power.<sup>67</sup> Egan and Murray also draw attention to the ‘politically fraught difficulties’ for unionists associated with the all-Ireland character of the proposal.<sup>68</sup> Clearly, an all-island Charter does not present as a means to effect some measure of North/South joint authority for Northern Ireland. Secondary political aims, both overt and covert, can only complicate an already politically sensitive discussion. For the purposes of considering or developing a Charter, the focus should remain on human rights related issues.

JUSTICE, in describing the underlying purposes of a British Bill of Rights, provide a useful template that might assist in defining the purposes of a Charter of Rights for the island of Ireland premised on rights enhancement. A Charter of Rights might therefore aim: to enhance human rights protection; to promote public awareness of human rights; and, to provide a unifying set of values for society across the island.<sup>69</sup>

## 2.2 Content

Although over 160 States, including the UK and the Republic of Ireland, have ratified the ICESCR, and despite a clear endorsement by the UN General Assembly of its opposition to a hierarchy of rights,<sup>70</sup> most Bills of Rights are based on the core content of either the ECHR or the ICCPR.<sup>71</sup> Both documents predominately promote and protect civil and political rights.<sup>72</sup> Economic, social and cultural rights (ESCR) are viewed by many as having a lesser status and

<sup>64</sup> Suzanne Egan and Rachel Murray ‘A Charter of Rights for the Island of Ireland: An Unknown Quantity in the Good Friday/Belfast Agreement’ (2007) 56 *International and Comparative Law Quarterly* 797, 806.

<sup>65</sup> *ibid* 814.

<sup>66</sup> C. O’Cinnéide (n 23) 72.

<sup>67</sup> C. O’Cinnéide (n 23) 73.

<sup>68</sup> S. Egan and R. Murray (n 64) 834.

<sup>69</sup> JUSTICE Committee (n 55) 17.

<sup>70</sup> SEE the Vienna Declaration and Programme of Action 1993, UN Doc A/CONF 157/23 para 5 (12 July 1993) available at <[https://www.fidh.org/IMG/pdf/vienne\\_onu1993a.pdf](https://www.fidh.org/IMG/pdf/vienne_onu1993a.pdf)> accessed 10/09/2016.

<sup>71</sup> JUSTICE Committee (n 55) 22.

<sup>72</sup> Javaid Rehman, *International Human Rights Law, A Practical Approach* (Pearson Education 2003) 137.

continue to attract controversy.<sup>73</sup> The Committee on Economic, Social and Cultural Rights (CESCR) has criticised States for ignoring their obligations under the ICESCR and contrasted their muted response to economic, social and cultural rights violations with the expressions of outrage which accompany violations of civil and political rights.<sup>74</sup> The Committee has criticised both the Republic of Ireland and the UK for a variety of failings relating to their obligations under the ICESCR.<sup>75</sup> Both countries have ratified the ICESCR. They have also incorporated the ECHR into domestic law in their respective jurisdictions.

The GFA did not substantially address specific rights for inclusion in a Charter. It did however commit the parties to the Agreement to the ‘vindication of the human rights of all’.<sup>76</sup> In light of the past history of communal conflict in Northern Ireland, it also specified a short list of mainly civil and political rights.<sup>77</sup> The NIHRC went beyond this, including economic, social and cultural rights in their recommendations for a Bill of Rights,<sup>78</sup> along with a number of other rights which it considered would reflect the ‘particular circumstances of Northern Ireland’.<sup>79</sup> The Joint Committee recommends only a minimum set of rights for inclusion in a Charter, essentially a listing of what it considers as existing rights.<sup>80</sup> Ignoring the criticisms of the CESCR, it fails to specifically address ESCR for inclusion.<sup>81</sup> Perhaps, as Farrell suggests, the UK Government’s rejection of the NIHRC’s recommendations on a Bill of Rights for Northern Ireland, which included ESCR, left them no foundation on which to build.<sup>82</sup> But government obduracy with respect to human rights is scarcely surprising. The UK Government, for example, insists that advocates of a Bill of Rights should be ‘more realistic in their ambitions’ and recognise that cross-party support for socio-economic rights is not achievable.<sup>83</sup> The minimalist approach reflected therein should be met with a challenge rather than an acquiescence or a lowering of the bar of rights protection. It should be remembered that both the ECHR and the ICCPR were crafted many decades ago. Shaping a Bill/Charter of Rights in the present day, for

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<sup>73</sup> Liam Thornton ‘Socio-Economic Rights and Ireland’ in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional Limited 2015) 173.

<sup>74</sup> *ibid* 175.

<sup>75</sup> See Committee on Economic, Social and Cultural Rights ‘Concluding Observations on the sixth periodic report of the United Kingdom and Northern Ireland’, 14 July 2016, UN Doc E/C.12/GBR/CO/6; also, CESCR ‘Concluding Observations on the third periodic report of Ireland’, para. 6, 8 July 2015, UN Doc E/C.12/IRL/CO/3.

<sup>76</sup> GFA, Declaration of Support, para 2.

<sup>77</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 1.

<sup>78</sup> See NIHRC, A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland, (2008)

<sup>79</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 4.

<sup>80</sup> Joint Committee’s Advice (n 61) 3.

<sup>81</sup> *ibid* 2.

<sup>82</sup> CAJ *Mapping the Rollback?* (n 36) 23.

<sup>83</sup> See Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall Deb col 194WH 16 July 2013.

whatever purpose, has over half a century of developments in human rights protection at international level from which to draw.<sup>84</sup> Developing international standards certainly require the inclusion of ESCR.

The GFA envisaged the realisation of a higher level of rights protection than afforded by the ECHR provisions.<sup>85</sup> Its prescription that the Bill of Rights must reflect the particular circumstances of Northern Ireland, which includes a history of institutionalised discrimination against the nationalist minority,<sup>86</sup> and its emphasis on equality highlight the need for the inclusion of ESCR in any proposed Bill or Charter of Rights. Moreover, the former UN High Commissioner for Human Rights, Louise Arbour, reminding the British Government about the role institutionalised discrimination and inequality plays in the emergence of conflict, strongly advised them not to neglect economic, social and cultural rights in Northern Ireland in the transitional period to peace.<sup>87</sup> At a minimum, one would reasonably expect states to include, in any domestic Bill/Charter of Rights, all the rights specified in the various international rights treaties which they have ratified.

## **2.3 Entrenchment and Enforcement**

In the opening round of any discussion about a Bill of Rights the issue of definition will hardly cause a problem. Concepts such as entrenchment and enforcement on the other hand are likely to be immediately problematic. The more technical descriptions of the various forms they may take mask somewhat the political contention which surrounds them. The entrenchment of a Bill or Charter of Rights, for example, either constitutionally or legislatively, has been characterized as a transfer of power from elected representatives to unelected judges.<sup>88</sup> This is perceived by some as a diminution of parliamentary sovereignty,<sup>89</sup> whereas others regard it as a necessary safeguard against majoritarianism.<sup>90</sup> Waldron argues that shifting responsibility for the protection of rights into the courts both disables the representative institutions and disenfranchises the citizens in favour of the judiciary.<sup>91</sup> The democratic deficit argument

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<sup>84</sup> JUSTICE Committee (n 55) 22

<sup>85</sup> Michael Meehan 'Towards a Northern Ireland Bill of Rights' (2001) 23 *Liverpool Law Review* 33, 41-42

<sup>86</sup> See Cameron Report (1969, Summary of Conclusions, para 229. Available at <<http://cain.ulst.ac.uk/hmso/cameron2.htm#chap16>> accessed 20/08/2016.

<sup>87</sup> Louise Arbour 'Economic and Social Justice for Societies in Transition' (2007) 40 *New York University Journal of International Law and Politics* 1, 8-9.

<sup>88</sup> McQuigg (n 53) 3.

<sup>89</sup> JUSTICE Committee (n 55) 54.

<sup>90</sup> McQuigg (n 53) 2.

<sup>91</sup> Jeremy Waldron 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 28 & 45.

however is somewhat circular and, as Dworkin suggests, self-defeating.<sup>92</sup> The incorporation of a Bill of Rights into law, for example, would require parliamentary endorsement and may even involve a referendum.<sup>93</sup> In effect, any increased powers for the judiciary with respect to the Bill would have been decided by the people directly or by those they had chosen democratically to legislate on their behalf. Concerns about majoritarianism in the political system are writ large in the GFA. The provisions governing the Northern Ireland Assembly include safeguards ‘to protect the rights and interests of all sides of the community’.<sup>94</sup> They also include a role for the courts in the resolution of disputes about legislative competence.<sup>95</sup> While the design of the Assembly, which effectively ensures a cross-community coalition in the Northern Ireland Executive, and accompanying safeguards have pre-empted somewhat the majoritarian ‘problem’ within these political institutions, they cannot prevent it emerging outside Stormont, albeit in a slightly modified form. The British Government position that a Bill of Rights for Northern Ireland requires cross-party agreement effectively affords some of the major parties a veto over its creation.<sup>96</sup> This scenario poses a significant political conundrum; each of the dominant parties of government in Northern Ireland has the power to block the creation of a human rights instrument which might serve to hold it accountable.

Holding government and public authorities to account is a central tenet of the human rights discourse. It clearly makes little sense that responsibility for that should be left to government itself. The role of the judiciary in protecting rights is therefore likely to increase rather than diminish, not least because, as McQuigg suggests, their non-reliance on public votes to stay in office may even put them in a better place than politicians to address particularly contentious rights issues.<sup>97</sup> The continuing failure of politicians in Northern Ireland to deal conclusively with contentious rights-related issues, such as flags, parades, equal marriage and the right to abortion lends a particular weight to this argument. Their inability to agree, after over a decade of discussion, on the content of a Bill of Rights at the very least calls into question their ability to reach a consensus on human rights issues. Arguably, shifting the onus of interpretation and elaboration of rights away from the Northern Ireland Assembly to non-accountable judges might well have an empowering rather than a disabling effect on the Assembly. It might also facilitate a decrease in the mistrust manifest in the continual need to return to the negotiating table, and

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<sup>92</sup> *ibid* 46.

<sup>93</sup> *Ibid*.

<sup>94</sup> GFA, Strand 1, paras 1 & 2.

<sup>95</sup> GFA, Strand 1, para 28.

<sup>96</sup> See Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall Deb 16 July 2013, col 196WH.

<sup>97</sup> McQuigg (n 53) 3.

allow, in the process, the development of a more constructive collaborative government and a concentrated focus on the enhancement of public services. An obvious counter-argument to such an approach might rest on the degree to which past nationalist mistrust of the judiciary in Northern Ireland has abated. The independence and impartiality of the judiciary in Northern Ireland during the conflict has been called into question in the past by the nationalist community.<sup>98</sup>

Entrenchment, normally, renders a Bill/Charter of Rights subject to a ‘higher law’ than the ordinary legislation,<sup>99</sup> making it more difficult to set aside the rights contained therein and immunizing them against the whims of changing government policies and programmes.<sup>100</sup> But, none of the concepts involved are absolutes and compromises are available to meet concerns about democratic deficits or parliamentary sovereignty. Bills of Rights range from those constitutionally entrenched to those which are non-binding statements of rights.<sup>101</sup> Compromise positions include legislative Bills of Rights, such as the UK’s HRA, which do not grant the judiciary the power to strike down legislation, but instead place a duty on the courts to interpret legislation consistent with the rights in question.<sup>102</sup> In such instances the courts might have the power to draw attention to the human rights deficit contained in a legislative provision, but not override it. Without usurping the authority of the legislature, the courts can therefore draw attention to a problem and initiate a dialogue to resolve it.<sup>103</sup>

Whilst compromise and dialogue have an inherent appeal as necessary elements of dispute resolution, it should be noted that the effectiveness of a non-entrenched statutory Bill of Rights relies largely on the goodwill of the legislature. The HRA, for example, enables the High Court or the Court of Appeal to adjudge that a legislative provision is incompatible with an ECHR right, but it does not affect the ‘validity, continuing operation or enforcement’ of the relevant provision.<sup>104</sup> Nor indeed does it bind the government in any specific way,<sup>105</sup> as exemplified by

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<sup>98</sup> Smith, McWilliams, Yarnell (n 54) 12.

<sup>99</sup> JUSTICE Committee (n 55) 55.

<sup>100</sup> Smith, McWilliams, Yarnell (n 54) 10.

<sup>101</sup> McQuigg (n 53) 1-2.

<sup>102</sup> *ibid* 3.

<sup>103</sup> *ibid* 3-4.

<sup>104</sup> Human Rights Act 1998 s 4(2); It should be noted that the higher courts in Northern Ireland have the power in certain circumstances to set aside secondary legislation, see NI Act 1998 s 81.

<sup>105</sup> Human Rights Act 1998 s 4(6).

the continuing refusal of the UK government to remove the ban on prisoners voting in elections despite the Scottish Crown Court of Session Declaration of Incompatibility in *Smith v Scott*.<sup>106</sup>

The GFA did not address either entrenchment or enforcement with regard to the Charter. It did however indicate that a Bill of Rights for Northern Ireland would be enshrined in Westminster legislation.<sup>107</sup> The Joint Committee also did not address either issue in its 2010 Advice to the two Governments, choosing instead to leave that to the politicians.<sup>108</sup> In 2004 however, the Committee indicated, without elaboration, that a Charter should include strong enforcement mechanisms.<sup>109</sup> Oddly though, it stated that these ‘would not necessarily enable individuals to go to court to assert their own personal rights’.<sup>110</sup> Under the HRA an individual who has suffered a breach of his/her human rights can take legal action.<sup>111</sup> The individual can only take action against a public authority. Presumably therefore the Joint Committee envisaged an enforcement mechanism for a Charter less than this limited enforcement mechanism in the HRA. A mechanism that does not include recourse to the courts for individuals who have experienced a breach of their human rights can hardly be described as a strong enforcement mechanism.

Ultimately, the method and degree of enforcement will relate to the model chosen for the Charter. The Pre-Consultation Paper presents three possible models for consideration: Model A - a declaratory model, similar to the UDHR, which sets out the rights the people should have and how they might be guaranteed; Model B - a programmatic model, similar to the ICESCR, which sets out both basic principles and a programme for their implementation; and, Model C, a legally enforceable charter, like the ECHR, which sets out standards which courts in both parts of Ireland would have to adhere to when applying domestic law.<sup>112</sup>

The Pre-Consultation Paper details a number of potential advantages and disadvantages associated with each model. The listed benefits associated with the declaratory model include its potential inspirational effect and its value as a ‘first step’.<sup>113</sup> The limited feedback to the

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<sup>106</sup> [2007] CSIH 9. See also (2006) 42 EHRR 41 *Hirst v UK*.

<sup>107</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 4.

<sup>108</sup> Monica McWilliams ‘Charting the way forward on human rights’ *The Irish Times* 27/06/2011 available at <<http://www.irishtimes.com/opinion/charting-the-way-forward-on-human-rights-1.608347>> accessed 20/08/2016.

<sup>109</sup> Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights Commission *A Charter of Rights for the Island of Ireland: Pre-Consultation Paper* (May 2003) Para 44. [Hereinafter referred to as ‘the Pre-Consultation Paper’].

<sup>110</sup> *Ibid*.

<sup>111</sup> Human Rights Act 1998 s 7(1).

<sup>112</sup> Joint Committee Pre-Consultation Paper (n 109) para 13.

<sup>113</sup> Joint Committee Pre-Consultation Paper (n 109) Para 15.

consultation process almost unanimously rejected the declaratory model.<sup>114</sup> Moreover, history suggests that second steps in advancing human rights are notoriously hard to progress. The eighteen year time lag between the first step UDHR and the second step ICCPR and ICESCR illustrate this. Closer to the subject matter of this study, whilst the GFA represented, as a first step, an agreement to have a Bill of Rights, no second step with regard to its actual creation is currently being contemplated. Regarding inspiration, declining voting patterns in elections<sup>115</sup> suggest that the electorate, north and south, are unlikely to be inspired by vacuous declarations by politicians.

The programmatic model is mooted as potentially having a more persuasive effect on both court and government decisions.<sup>116</sup> Against that, it has been suggested it might afford too much discretion to political parties. The ICCL dismisses this model on the basis of the Republic of Ireland's failure to progressively implement the ICESCR which it has signed and ratified.<sup>117</sup> A programmatic model without an effective means of enforcement would render a programmatic Charter of no more use than the list of promises included in the election manifesto of any of the political parties.

The enforceable model, it is suggested, offers some guarantee at least that the rights included therein can be relied upon in the domestic courts.<sup>118</sup> On the down side, it is suggested that such a model would be difficult to achieve, given the need to secure agreement of parties in two jurisdictions. Furthermore, complications might arise if the Charter prescribes rights differently for the two jurisdictions. An added disadvantage is the possibility that differential enforcement issues in the two jurisdictions might arise due to the fact that the Republic of Ireland has a written constitution which has primacy over domestic legislation when it comes to rights protection.

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<sup>114</sup> Maurice Manning *Paper on a Charter of Rights for the Island of Ireland* available at <<http://www.ihrec.ie/publications/list/dr-maurice-manning-president-of-the-ihrcpaper-on-a/>> accessed 20/08/2016.

<sup>115</sup> The turnout in the 2016 Assembly election was lower than in any previous Assembly election; See House of Commons Library Briefing Paper Number CBP7575 'Northern Ireland Assembly Elections: 2016' 18 May 2016, 10 available at <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7575#fullreport>> accessed 10/09/2016.

<sup>116</sup> Joint Committee Pre-Consultation Paper (n 109) para 18.

<sup>117</sup> ICCL, Charter of Rights Response (2004), 10 available at <<http://www.iccl.ie/-iccl-charter-of-rights-response-2004-.html>> accessed 20/08/2016.

<sup>118</sup> Joint Committee Pre-Consultation Paper (n 109) para 21.



The ‘particular circumstances of Northern Ireland’<sup>119</sup> argument for additional rights to be included in a Northern Ireland Bill of Rights has had a divisive rather than constructive impact on the rights debate. In any case, equivalence of rights north and south has already been agreed<sup>120</sup> and it would be a backward step to now disagree it. The ICCL suggest the Charter might act as a regional instrument<sup>121</sup> and could be incorporated into domestic legislation in both jurisdictions. In effect, such an arrangement would present no more difficulties than the operation of the ECHR via the HRA in one jurisdiction and via the ECHR Act in the other.

The Joint Committee rightly describes the models as differing mainly in how they can be enforced.<sup>122</sup> They identify the programmatic model, as their preferred option and one that ‘...strikes the best balance between a purely declaratory approach and a detailed legalistic approach’, and which, if adopted, will make a significant difference to the lives of people in both jurisdictions.<sup>123</sup> Their belief in the effectiveness of their favoured option as a mechanism for rights enhancement appears to rest on no more than the hope that the political parties that endorsed it would adhere to its principles. The Committee refers to the ‘Charter of European Political Parties for a Non-Racist Society’<sup>124</sup> as assisting in providing a rationale for both the creation and implementation of a Charter of Rights for the island of Ireland.<sup>125</sup> The text of this Charter, a Northern Ireland version of which has recently been adopted by the Northern Ireland Council for Ethnic Minorities, offers no more than a commitment to abide by a set of principles of good practice in challenging prejudice and racism. As an initiative to highlight racism, such a Charter is to be welcomed. As a means to protect against and eliminate it however, it offers no more than fine sentiment. Modelling an all-island Charter, or indeed the approach taken in its development, on the process by which the anti-racist Charter was constructed would likely result in no more than an addition to the fine sentiment of the pledges of office and codes of conduct of those in government in either jurisdiction. Enhancement of human rights protection requires much more than that.

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<sup>119</sup> See GFA , Rights, Safeguards and Equality of Opportunity, para 4.

<sup>120</sup> GFA , Rights, Safeguards and Equality of Opportunity, para 9.

<sup>121</sup> Irish Council for Civil Liberties *Response to the Pre-Consultation on a Charter of Rights for the island of Ireland* (2004), 11 available at <<http://www.iccl.ie/-iccl-charter-of-rights-response-2004-.html>> accessed 20/08/2016.

<sup>122</sup> Joint Committee Pre-Consultation Paper (n 109) para 13.

<sup>123</sup> Joint Committee Pre-Consultation Paper (n 109) para 23.

<sup>124</sup> Charter of European Political Parties for a Non-Racist Society (1998) available at <[http://www.art1.nl/artikel/2017-Charter\\_of\\_European\\_Political\\_Parties\\_for\\_a\\_non-racist\\_society](http://www.art1.nl/artikel/2017-Charter_of_European_Political_Parties_for_a_non-racist_society)>accessed 20/08/2016.

<sup>125</sup> Joint Committee’s Advice (n 61) 8.

## 2.4 Justiciability and ESCR

Justiciability relates to whether or not an issue is capable of being decided by the courts. The justiciability of ESCR draws a particular amount of controversy. Their vagueness and cost implications are often cited as grounds for calling into question their justiciability.<sup>126</sup> The persistence and detail of this debate suggests that a large part of it is rooted in opposing political or ideological viewpoints rather than a grappling with how best to enhance human rights protections. The focus on issues such as parliamentary sovereignty or supremacy, or indeed problems with interpreting rights, can easily obscure an ideological opposition to ESCR. Beetham, for example, challenges the very concept of ESCR as rights, arguing that, at most, they represent a statement of aspirations and lack the specificity required to render them justiciable.<sup>127</sup> He cautions against confusing ‘the fundamental with the merely desirable’. Furthermore, and suggestive of an ideological basis for his argument, he points to the likely extension of compulsory taxation which would be required to give effect to their potential breadth and asserts that this would represent an interference with the right to freedom.<sup>128</sup>

Trispiotis refutes such arguments, insisting that downgrading ESCR to aspirations would leave their implementation vulnerable to the discretion of State officials and reliant on the political will of the government of the day.<sup>129</sup> This, he argues, is at odds with the *raison d’être* of human rights, which seeks to protect individuals from the various exigencies of government in any country.<sup>130</sup> Regarding potential prohibitive costs, he reminds us that civil and political rights also come with a cost. The right to life, for example, requires the State to effectively investigate killings, regulate the use of force by State agents and often entails the adoption of costly preventative measures. Bearing out Trispiotis’ argument, and pertinent to the rights discourse in both jurisdictions in Ireland, it is worth noting here that the Saville Inquiry into the British Army’s killing of civil rights marchers in Derry in January 1972 cost an estimated £200m<sup>131</sup> and the proposed framework<sup>132</sup> for dealing with serious human rights violations during the conflict in

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<sup>126</sup> Ilias Trispiotis ‘Socio-Economic Rights: Legally Enforceable or Just Aspirational?’ Opticon 1826, (University College London 2010) 1.

<sup>127</sup> David Beetham ‘What Future for Economic and Social Rights?’ (1995) 43 Political Studies, 41-60, 42.

<sup>128</sup> *ibid* 42.

<sup>129</sup> Trispiotis (n 126) 3.

<sup>130</sup> *ibid*.

<sup>131</sup> David Cameron, Statement to the House of Commons 15<sup>th</sup> June 2010 available at <<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0004.htm#10061522000002>> accessed 10/09/2016.

<sup>132</sup> See ‘The Stormont House Agreement’, 2014 available at < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.Pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.Pdf) > accessed 3/09/2016.

Northern Ireland may well exceed that figure. On the issue of imprecision, Trispiotis, again drawing a comparison with civil and political rights, argues that the once nebulous nature of the right to liberty and freedom found clarity through judicial jurisprudence.<sup>133</sup> The judicial difficulty associated with the imprecision of ESCR can only be addressed if there is an accumulation of the necessary level of adjudicative experience to negate it.<sup>134</sup> Otherwise, it self-perpetuates.

Difficulties around the justiciability of ESCR beyond imprecision cannot be ignored. Neier, while supportive of the concept of the protection of economic and social rights, insists that the distribution of resources is a matter for parliament, not the unelected judiciary.<sup>135</sup> Palmer identifies a post-Cold War tendency among right wing political theorists to assert that the protection of economic and social rights leads to economic stagnation.<sup>136</sup> The ideological dimension is also evident in the rights discourse in both jurisdictions. In the Republic of Ireland, for example, although the Constitutional Convention<sup>137</sup> endorsed the need for a change in the Irish Constitution to strengthen economic, social and cultural rights,<sup>138</sup> not all its members supported the position. Michael McDowell, a former Minister for Justice in the Irish Government, argued against such a change on the basis that it would diminish politics, insisting that economic, social and cultural national policy should be decided in the Irish parliament and that the courts should confine its attention to areas, of civil, political and constitutional rights.<sup>139</sup> A controversial claim by McDowell in 2004 that ‘a dynamic liberal economy like ours demands flexibility and inequality in some respects to function’<sup>140</sup> would suggest his opposition to the strengthening of rights protection in the Irish Constitution was more ideologically based than reflecting a concern about the integrity of politics. His view, nevertheless, that the economic, social and cultural issues should be addressed in parliament rather than the courts is shared by

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<sup>133</sup> Trispiotis (n 126) 2.

<sup>134</sup> Ibid.

<sup>135</sup> Thornton (n 73) 174.

<sup>136</sup> Ibid.

<sup>137</sup> The Convention on the Constitution was established in 2012 to consider and make recommendations on possible changes to the Irish Constitution. It has reported on a range of matters including provision for same-sex marriage, and Economic, Social and Cultural Rights. Its final reports were published on 31/03/2014 and are available at <<https://www.constitution.ie/NewsDetails.aspx?nid=29710615-acb8-e311-a7ce-005056a32ee4>>.

<sup>138</sup> The Irish Times ‘Convention votes to protect economic, social, cultural rights’ 22 February, 2014 available at <<http://www.irishtimes.com/news/politics/convention-votes-to-protect-economic-social-cultural-rights-1.1701832>> accessed 24/07/2016.

<sup>139</sup> The Irish Times, ‘Convention votes to protect economic, social, cultural rights’, 22 February, 2014 available at <<http://www.irishtimes.com/news/politics/convention-votes-to-protect-economic-social-cultural-rights-1.1701832>> accessed 24/07/2016.

<sup>140</sup> See The Irish Times, M King ‘Towards a more equal society’ 1/09/2011 available at <http://www.irishtimes.com/opinion/towards-a-more-equal-society-1.588034> accessed 20/08/2016.

others and goes to the core of concerns about the politicisation of the legal process. The British Government, for example, has similarly insisted that it is not the role of the courts to impinge on the ability of the legislature to make decisions about the allocation of public funds.<sup>141</sup> Nor, is such a view confined to politicians. The courts, for the most part, defer to parliament on the issue. The position of the Irish judiciary on where responsibility to deal with socio-economic rights rests, for example, was set out in *Ryan v Attorney General* when Kenny J stated:

when dealing with controversial social, economic and medical matters... the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens...<sup>142</sup>

Over 30 years later, in *T.D v. Minister for Education*, Keane J expressed:

gravest doubts as to whether the courts at any stage should assume the function of declaring what are today described as “socio-economic” rights to be unenumerated rights guaranteed by Article 40.<sup>143</sup>

In the UK, in *R v Cambridge Health Authority ex parte B*, Lord Bingham, referring to the ‘difficult and agonising judgments’ a health authority has to make relating to the allocation of a limited budget, stated ‘That is not a judgment which the court can make.’<sup>144</sup>

Trispiotis cites two effective constitutional means of rendering socio-economic rights justiciable: directly - instanced, for example, by the South African Bill of Rights which is part of the South African constitution, or; indirectly - exemplified by the directive principles contained in the Republic of Ireland’s constitution.<sup>145</sup> Relevant to these, he identifies two judicial approaches: the ‘reasonableness’ approach which links socio-economic rights to available resources, and the ‘minimum core’ approach which links some socio-economic rights to the minimum core of the right to life.<sup>146</sup> JUSTICE points out that, ‘reasonableness’ notwithstanding, courts will still be reluctant to interfere with the policy choices governing resource allocation.<sup>147</sup> They also draw attention to the possibility that the ‘minimum core’ approach might encourage governments to

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<sup>141</sup> NIO (n 21) para 4.4.

<sup>142</sup> *Ryan v Attorney General* [1965] IR 294, 312.

<sup>143</sup> *TD v Minister for Education* [2001] 4 IR 259, at 282.

<sup>144</sup> *R v Cambridge Health Authority ex parte B*; CA 10 Mar 1995.

<sup>145</sup> Trispiotis (n 126) 4.

<sup>146</sup> Trispiotis (n 126) 4.

<sup>147</sup> JUSTICE Committee (n 55) 43

meet only minimal standards even when resources are available for a fuller enjoyment of ESCR.<sup>148</sup>

Thornton advises against allowing theoretical debate to obscure the fact that the Republic of Ireland has ratified the ICESCR.<sup>149</sup> The same can be said about the UK. Both countries have also affirmed their commitment to the indivisibility of all human rights, civil, political, economic, social and cultural. While the ICESCR affords States flexibility to meet their obligations by virtue of the ‘progressive realization’ concept, the CESCR insists that States must adopt expeditious concrete steps to do so.<sup>150</sup> Whatever approach is adopted, addressing ESCR adequately will be dependent on available resources. The ICESCR obligates states to ‘mobilize the maximum available resources for the implementation of economic, social and cultural rights’.<sup>151</sup> The CESCR has criticized both the Republic of Ireland and the UK for failing to do so,<sup>152</sup> contrasting the minimal alteration in the respective tax regimes with the maximum cuts in public expenditure which has resulted in a disproportionate adverse impact of austerity measures on the enjoyment of ESCR by disadvantaged individuals and groups.<sup>153</sup> The maintenance of a low corporation tax rate in the Republic of Ireland, and the willingness of the Northern Ireland Executive to match it,<sup>154</sup> manifests the ideological impact on government decision making which has consequences for human rights protection. Perhaps the starkest and most instructive example of this presents in the recent announcement by the European Commission that, in a period which included the worst years of the economic downturn, the Republic of Ireland illegally facilitated tax benefits to Apple amounting to €13 billion.<sup>155</sup> The resulting controversy might well inform public awareness in a way that the CESCR reports cannot. The manifest injustice of the Apple controversy will certainly not be easily obscured by theoretical debate.

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<sup>148</sup> JUSTICE Committee (n 55) 43

<sup>149</sup> Thornton (n 73) 176

<sup>150</sup> CESCR, General Comment No 3 *The Nature of States Parties Obligations* (Art 2, para 1) UN Doc E/1991/23 (14 December 1990), para 9.

<sup>151</sup> Committee on Economic, Social and Cultural Rights ‘Concluding Observations on the sixth periodic report of the United Kingdom and Northern Ireland’, para 16, 14 July 2016, UN Doc E/C.12/GBR/CO/6.

<sup>152</sup> See Committee on Economic, Social and Cultural Rights ‘Concluding Observations on the sixth periodic report of the United Kingdom and Northern Ireland’, 14 July 2016, UN Doc E/C.12/GBR/CO/6 and CESCR ‘Concluding Observations on the third periodic report of Ireland’, 8 July 2015, UN Doc E/C.12/IRL/CO/3.

<sup>153</sup> CESCR ‘Concluding Observations on the third periodic report of Ireland’, para. 11(a), 8 July 2015, UN Doc E/C.12/IRL/CO/3.

<sup>154</sup> R. Martin, Belfast Telegraph, 21 March 2016 ‘Lower UK corporation tax rate will hit Northern Ireland hard, warns top accountant’, available at <<http://www.belfasttelegraph.co.uk/business/news/lower-uk-corporation-tax-rate-will-hit-northern-ireland-hard-warns-top-accountant-34557150.html>> accessed 28/08/2016.

<sup>155</sup> See European Commission, Press Release Database ‘State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion’ 30 August 2016 available at <[http://europa.eu/rapid/press-release\\_IP-16-2923\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2923_en.htm)> accessed 9/09/2016.

## 2.5 The Implications of Lineage

The lineage of the Charter concept, and indeed that of the Bill of Rights, merits some attention in shaping any renewed focus on rights issues. From one perspective, it reflects a persistence at government level with an approach to resolving the conflict which included an emphasis on developing human rights protections on an all-island basis. Alternatively, it evidences a bias inherent in the view that human rights issues required an almost singular focus on Northern Ireland.

The idea of addressing human rights issues on an all-island basis appears as far back as the Sunningdale Agreement in 1973 and recurs in subsequent attempts to reach a political agreement in the period between then and 1998. Sunningdale included proposals for a Council of Ireland which would, *inter alia*, consider ways to incorporate the principles of the ECHR into domestic legislation in each part of Ireland or ‘embracing the whole island’.<sup>156</sup> The idea reappears in the Anglo Irish Agreement in 1985,<sup>157</sup> which referred to the need for measures to accommodate the rights and identities of the two traditions in Northern Ireland and to protect human rights and prevent discrimination.<sup>158</sup> Of particular note, in the Anglo-Irish Agreement, was the assertion that human rights issues shall be mainly concerned with Northern Ireland.<sup>159</sup> A more focused attention to human rights issues across the island would have been more appropriate. A recognition of the reality of rights problems island-wide, might have lessened unionist discomfort with the focus on Northern Ireland and, perhaps, challenged the complacency of the Irish Government which, incidentally, continues into the present. Egan and Murray suggest that during the 1998 political negotiations, the Irish Government was confident that the human rights framework in the Republic of Ireland was at that point already superior to what pertained in the north of Ireland,<sup>160</sup> and that this has since led to a minimalist interpretation by them of their obligations relating to equivalence.<sup>161</sup> In any case, the genesis of the concept is most often traced to the Joint Framework Document 1995, most probably because the text of the Charter

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<sup>156</sup> The Sunningdale Agreement (9 Dec 1973) para 11, available at <http://cain.ulst.ac.uk/events/sunningdale/agreement.htm> accessed 10/09/2016.

<sup>157</sup> ICCL (n 63) 4.

<sup>158</sup> Anglo-Irish Agreement (15 Nov 1985) (Cmnd 9657, 1985) Article 5(a), available at: <<http://cain.ulst.ac.uk/events/aia/aiadoc.htm>> accessed 24/07/2016.

<sup>159</sup> Ibid Article 5(b).

<sup>160</sup> Egan and Murray (n 64) 812.

<sup>161</sup> S. Egan and R. Murray (n 64) 813.

provision in the GFA draws directly from the text of the Protection of Rights section of the Joint Framework Document 1995.<sup>162</sup>

Criticisms of past attempts to secure political agreement notwithstanding, the centrality of human rights protection to the early success of the Irish peace process is widely recognized. The rights agenda and its potential to deliver real change, along with the prospect of the creation of North/South structures, played a vital role in building republican confidence in the early negotiations<sup>163</sup> and encouraging an end to a conflict which had spanned three decades. Its importance in this respect continues to be highlighted. Similarly, the entrenchment of human rights values throughout the GFA has been marked out as one of its key distinguishing features and lauded many times.<sup>164</sup> As a result the GFA, the rights and commitments therein and the consequent obligations on the British and Irish Governments and the political parties remain the reference point for many of the contributions to the human rights discourse as it applies to the island of Ireland.<sup>165</sup>

A negative corollary of an implied inextricable link between human rights and the peace process has been the tendency to link backsliding on the rights agenda with a possibility that the peace in Northern Ireland might unravel. Amnesty International, for example, in a 2015 press release, warned that any moves to repeal the HRA could have serious implications for the Northern Ireland peace settlement.<sup>166</sup> While repeal of the HRA may well place the British Government in legal breach of the GFA,<sup>167</sup> cause difficulties in the political process, and have adverse consequences for human rights protections, there is no evidence that it would undermine the peace. The immediate effect of repeal may do no more than add to the list of unfulfilled GFA commitments.

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<sup>162</sup> A New Framework for Agreement, Ir.-U.K., Feb. 22, 1995, 34 I.L.M. 946 (1995), Para 51.

<sup>163</sup> Paul Mageean & Martin O'Brien 'From the Margins to the Mainstream: Human Rights and the Good Friday Agreement' (1999) 22 Fordham International Law Journal 1499, 1504.

<sup>164</sup> Ní Aoláin (n 4) 5.

<sup>165</sup> See for examples 'Mapping the Rollback? Human Rights Provision of the Belfast/Good Friday Agreement 15 years on' 2013 Committee on the Administration of Justice (2013).

<sup>166</sup> See Amnesty International Press Release 'Repeal of Human Rights Act could undermine peace in Northern Ireland' May 2015 available at <<https://www.amnesty.org.uk/press-releases/repeal-human-rights-act-could-undermine-peace-northern-ireland>> accessed 10/09/2016.

<sup>167</sup> See 'Report on the Potential Effects of the Repeal of the Human Rights Act 1998', KRW Law and Doughty Street Chambers, (Feb. 2016), available at <[http://www.doughtystreet.co.uk/documents/uploaded-documents/HRA\\_NI\\_FINAL\\_15\\_02\\_16.pdf](http://www.doughtystreet.co.uk/documents/uploaded-documents/HRA_NI_FINAL_15_02_16.pdf)> accessed 10/09/2016.

## **2.6 Conclusion**

This chapter highlights some key concepts which relate directly to the character of a Bill/Charter of Rights and which will need to be addressed in considering the adoption of any additional human rights instruments. The focus has been informed by the limited available literature on the specific issue of an all-island Charter of rights. The chapter demonstrates that the effectiveness of a human rights instrument relates directly to its content and capacity for enforcement. Its capacity for enforcement is defined by the form the instrument takes, including how it relates to the domestic legal framework. It is also dependent on a political commitment at government level that goes beyond rhetoric. Human rights violations demand immediate redress and a proactive approach at government level to effect this. This chapter has underlined that this level of commitment does not exist. In the absence of such a commitment, responsibility for the realisation of appropriate protections rests with the justice frameworks at both international and domestic level. The effectiveness of these frameworks is considered in the next chapter.



## Chapter 3: The Normative Framework

### Introduction

The international human rights framework is a complex patchwork of declarations, conventions and treaties aimed at incrementally raising the standard of human rights protections which nations are required to maintain. Giving expression to its governing principles, human rights are said to be universal, inalienable, interdependent and indivisible. The framework operates at three different levels: international, regional and domestic. Its efficacy can be measured by the degree to which it influences the translation of its governing principles into practice. The effectiveness of the framework is clearly an important factor in the consideration of the development or adoption of any additional rights instrument. This chapter therefore briefly considers the effectiveness of the framework at each of the three levels by reference to government compliance with their human rights obligations in both jurisdictions on the island. The first section of this chapter considers the international framework. This section focuses on the observations of treaty body monitoring committees with regard to compliance and with respect to both the UK and Irish Governments. The second section looks at compliance under the regional framework through the prism of one of the ECHR's enforcement mechanisms, the ECtHR. Section 3 examines the effectiveness of the domestic framework with particular regard to equality issues and the incorporation of the ECHR into domestic law. In each section the situation in the UK and the Republic of Ireland is considered separately.

It should be noted that an analysis and in-depth assessment of the international human rights framework is beyond both the scope and purpose of this study. The chapter has sought instead to provide an overview of the effectiveness of the framework as it applies at three different levels. This is of particular importance to the study.

### 3.1 The International Framework

The UDHR is widely regarded as the consensus of global opinion on fundamental rights as understood in modern day society.<sup>168</sup> It addresses the full range of civil, political, economic, social and cultural rights to be protected at both the domestic and international level,<sup>169</sup>

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<sup>168</sup> Rhona Smith *Textbook on International Human Rights* (2<sup>nd</sup> ed Oxford University Press 2005) 38.

<sup>169</sup> Suzanne Egan 'The UN Human Rights Treaty System' in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional Limited 2015) 56.

providing a basis for most of the international human rights instruments developed thereafter.<sup>170</sup> Although the UDHR, the ICCPR and the ICESCR, taken together, are often referred to as the International Bill of Rights,<sup>171</sup> the international human rights system includes a range of treaties which both elaborate substantive human rights obligations and establish mechanisms, including treaty bodies, to supervise their implementation.

Both the UK and the Republic of Ireland are required to report periodically to the various treaty bodies which have monitoring and supervisory responsibility for the implementation of the key international human rights treaties.<sup>172</sup> An examination of the observations of the monitoring committees relating to these reports reveals significant criticisms of both governments, some of which are highlighted below.<sup>173</sup>

### **3.1.1 The Observations of Treaty Bodies on the UK**

In 2013 the Committee on the Elimination of Discrimination against Women (CEDAW Committee) expressed concern that abortion remains illegal in Northern Ireland except in cases where pregnancy threatens the life of the mother.<sup>174</sup> Repeating a call it had made in 2005, it recommended the decriminalisation of abortion in Northern Ireland.<sup>175</sup> The continuing degree of political opposition, evident in the failure to heed previous calls by the CEDAW Committee to hold a public consultation on the issue, suggests that the issue will be revisited when the UK submits its next report in 2017. The CEDAW Committee has also called for the mandate of the Historical Institutional Abuse Inquiry<sup>176</sup> to be extended to include women who entered the Magdalene Laundries<sup>177</sup> at the age of eighteen.<sup>178</sup> Their exclusion, according to the Committee, perpetuates a climate of impunity and leaves many women without a remedy.<sup>179</sup> The terms of

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<sup>170</sup> Rhona Smith *Textbook on International Human Rights* (2<sup>nd</sup> ed Oxford University Press 2005) 40.

<sup>171</sup> Theo Van Boven '50Years of the UN Human Rights Covenants'(2016) 34(2) *Netherlands Quarterly of Human Rights* 108-112, 108.

<sup>172</sup> Each of the treaties has an associated committee to monitor and supervise its implementation.

<sup>173</sup> The criticisms of the UK relate to both Great Britain and Northern Ireland. For the purposes of this study, the main focus will be those criticisms which relate to or impact upon Northern Ireland.

<sup>174</sup> Committee on the Elimination of Discrimination against Women 'Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland', para 50, 30 July 2013, UN Doc CEDAW/C/GBR/CO/7.

<sup>175</sup> *ibid* para 51.

<sup>176</sup> The Inquiry was established in 2012 to investigate allegations of child abuse in residential institutions in Northern Ireland between 1922 and 1995.

<sup>177</sup> The Magdalene Laundries were institutions established to accommodate vulnerable women. It has been proven that many of the women residents of the Laundries were abused. In 2013 the Irish Taoiseach (Prime Minister) issued a formal state apology to the women.

<sup>178</sup> Committee on CEDAW (n 174) para 25(a).

<sup>179</sup> Committee on CEDAW (n 174) para 24.

reference of the Inquiry were not extended to cover those over eighteen. The Inquiry's programme of hearings closed on 8<sup>th</sup> July 2016 and it is currently preparing its draft report without any consideration of the Magdalene victims of abuse. The CEDAW Committee has also criticised the failure of the legislative framework in Northern Ireland to provide for protection from multiple discrimination or prohibit pay secrecy clauses.<sup>180</sup> Women in Northern Ireland do not have the same equality protections as women in England. The Sex Discrimination Order (NI) 1976, for example, does not bar unlawful discrimination by public authorities on the grounds of sex in carrying out their public functions.<sup>181</sup> In England however, discrimination of this nature is prohibited by the Equality Act 2010.<sup>182</sup>

The Committee on the Rights of the Child (CRC), has expressed concerns about the particularly high rate of child poverty in Northern Ireland,<sup>183</sup> the continuing segregation in schools by religion,<sup>184</sup> and the exclusion of children under 16 years of age from proposed legislation on age discrimination.<sup>185</sup> It has been estimated that approximately 106,000 children in Northern Ireland are living in low income households and experiencing child poverty.<sup>186</sup>

The Committee on Economic, Social and Cultural Rights (CESCR) has echoed the concerns about the level of child poverty in Northern Ireland and called for the development of a comprehensive child poverty strategy.<sup>187</sup> The CESCR has also criticised the non-application of the Equality Act 2010 to Northern Ireland,<sup>188</sup> the delay in the adoption of a Bill of Rights for Northern Ireland,<sup>189</sup> the lack of effective measures to promote the use of the Irish language,<sup>190</sup>

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<sup>180</sup> *ibid* para 18.

<sup>181</sup> Equality Commission, 'Shadow Report to the Committee on the Elimination of Discrimination against Women' (ECNI 2013) 7.

<sup>182</sup> Equality Commission, 'Shadow Report to the Committee on the Elimination of Discrimination against Women' (ECNI 2013) 7; See also Committee on the Elimination of Racial Discrimination 'Concluding Observations on the twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland', para 7, Advance Unedited Version, 26 August 2016, CERD/C/GBR/CO/21-23, available at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD\\_C\\_GBR\\_CO\\_21-23\\_24985\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf) accessed 10/09/2016.

<sup>183</sup> Committee on the Rights of the Child 'Concluding Observations on the fifth periodic report of the United Kingdom and Northern Ireland', para 70(a), 12 July 2016, UN Doc CRC/C/GBR/CO/5.

<sup>184</sup> *ibid* para 72 (e).

<sup>185</sup> *ibid* para 21 (a); See also 'Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services) July 2015' 23 available at [https://www.executiveoffice-ni.gov.uk/sites/default/files/consultations/ofmdfm\\_dev/age-gfs-consultation.pdf](https://www.executiveoffice-ni.gov.uk/sites/default/files/consultations/ofmdfm_dev/age-gfs-consultation.pdf) accessed 23/08/2016.

<sup>186</sup> See 'BENEATH THE SURFACE Child Poverty in Northern Ireland' (Child Poverty Alliance 2014) 27 available at [http://www.ci-ni.org.uk/DatabaseDocs/nav\\_4786494\\_beneaththesurface\\_web.pdf](http://www.ci-ni.org.uk/DatabaseDocs/nav_4786494_beneaththesurface_web.pdf)

<sup>187</sup> CESCR (n 151) paras 47 & 48.

<sup>188</sup> *ibid* para 22.

<sup>189</sup> CESCR (n 151) para 9.

<sup>190</sup> *ibid* para 67.

and the continuing restrictions on abortion.<sup>191</sup> The failure to introduce an Irish Language Act in Northern Ireland to protect the rights of Irish speakers, according to Conradh na Gaeilge, is due to a lack of political consensus.<sup>192</sup> The CESCR has also expressed concerns about the high rate of homelessness,<sup>193</sup> the barriers which Roma, Gypsies and Travellers face in accessing appropriate accommodation, and the persistent inequality in the access to housing in North Belfast affecting Catholic families.<sup>194</sup> During the years 2014/15 over 11,000 households in Northern Ireland were deemed to be homeless.<sup>195</sup> An all-Ireland Traveller health study covering the period 2007-2010 has reported that three quarters of Travellers experience discrimination in getting accommodation.<sup>196</sup> In North Belfast, the composition of the housing waiting list has been calculated as 76% Catholic and 22% Protestant.<sup>197</sup> The approach to tackling housing equality in the area, according to a local equality campaign group, has consistently been presented as requiring cross-community support, rather than mandated by law.<sup>198</sup> The Committee expressed concern about the disproportionate adverse effect on marginalized groups and individuals of austerity measures introduced in 2010 in response to the global economic crisis.<sup>199</sup> It also criticised the failure of the UK Government to carry out an appropriate impact assessment of the cumulative impact of these measures.<sup>200</sup>

The Committee on the ICCPR (CCPR) has also criticised the delay in the adoption of a Bill of Rights for Northern Ireland and called on the government to ensure that the Bill of Rights incorporates all the rights contained in the ICCPR.<sup>201</sup> It has also expressed concern that the British Government's plan to repeal the HRA and replace it with a new Bill of Rights for the UK will weaken domestically the protection of the rights enshrined in the ICCPR.<sup>202</sup> The Committee also called for the introduction of amending legislation to remove some of the restrictions on

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<sup>191</sup> *ibid* para 62.

<sup>192</sup> BBC News 'Irish language policy of Northern Ireland criticised' 16/01/2014 available at <<http://www.bbc.co.uk/news/uk-northern-ireland-25750658>> accessed 20/08/2016.

<sup>193</sup> CESCR (n 151) para 51.

<sup>194</sup> *ibid* para 49.

<sup>195</sup> See Housing Executive, Key issues, Homelessness available at <[http://www.nihe.gov.uk/homelessness\\_information](http://www.nihe.gov.uk/homelessness_information)>, accessed 20/08/2016.

<sup>196</sup> HSC Public Health Agency, Health Intelligence Briefing 'The All-Ireland Traveller Health Study' available at <[http://www.belfasttrust.hscni.net/images/Travellers\\_health\\_study.pdf](http://www.belfasttrust.hscni.net/images/Travellers_health_study.pdf)> accessed 20/08/2016.

<sup>197</sup> PPR 'Equality Can't Wait – The Right to Housing Campaign' (Participation and Practice of Rights 2013) 4.

<sup>198</sup> *ibid* 5.

<sup>199</sup> CESCR (n 151) para 8.

<sup>200</sup> *ibid* para 18.

<sup>201</sup> CCPR 'Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland', paras 5 & 17, August 2015, UN Doc CCPR/C/GBR/CO/7.

<sup>202</sup> CCPR (n 201) para 5.

abortion in Northern Ireland.<sup>203</sup> It has also noted the absence of an appropriate framework for dealing with serious human rights violations that had occurred during the conflict in Northern Ireland.<sup>204</sup>

The Committee on the Elimination of Racial Discrimination (CERD) has expressed concern about the sharp rise in instances of hate crime in Northern Ireland which occurred in the wake of the referendum on EU membership,<sup>205</sup> and called for the immediate adoption of comprehensive legislation in Northern Ireland to prohibit racial discrimination.<sup>206</sup> CERD has also raised concerns about the interplay between racism and sectarianism in Northern Ireland.<sup>207</sup>

### **3.1.2 The Observations of Treaty Bodies on the Republic of Ireland**

The Republic of Ireland also draws a range of criticisms from the monitoring bodies. The CRC, for example, has expressed alarm at increasing levels of child poverty there,<sup>208</sup> the inadequate state response to homelessness,<sup>209</sup> ongoing structural discrimination against Traveller and Roma children and their families and also against lesbian, gay, bisexual, transgender and intersex children.<sup>210</sup> The CRC has also called for the decriminalization of abortion in all circumstances and for a review of the Protection of Life during Pregnancy Act 2013<sup>211</sup> to ensure children have access to safe abortion services.<sup>212</sup> The CCPR has similarly called for a review of both the legislation on abortion and the relevant sections of the Irish Constitution to broaden the circumstances in which abortion is allowed, for example in cases of rape, incest or fatal foetal abnormality. Reflecting the commonality of child poverty across the island, Barnados has estimated that approximately 132,000 children in the Irish Republic were suffering child poverty

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<sup>203</sup> *ibid* para 17.

<sup>204</sup> *ibid* para 8.

<sup>205</sup> Committee on the Elimination of Racial Discrimination 'Concluding Observations on the twenty-first to twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland', paras 15, 26 August 2016, UN Doc CERD/C/GBR/CO/21-23.

<sup>206</sup> *ibid* para 8(c).

<sup>207</sup> *ibid* para 36.

<sup>208</sup> Committee on the Rights of the Child 'Concluding Observations on the combined third and fourth periodic reports of Ireland', para 59, 1 March 2016, UN Doc CRC/C/IRL/CO/3-4.

<sup>209</sup> *ibid* para 61.

<sup>210</sup> *ibid* para 27.

<sup>211</sup> The Protection of Life during Pregnancy Act 2013 was introduced in response to the ECtHR judgement in *A, B and C v Ireland*. The Act does not address all the restrictions on abortion.

<sup>212</sup> CRC IRL (n 208) Para 58(a).

in 2014,<sup>213</sup> and Focus Ireland has estimated there were 2,177 children in emergency homeless accommodation with their families in June 2016.<sup>214</sup>

The CESCR's criticisms of the Republic of Ireland in 2015 included the government's failure to incorporate the Covenant into domestic law<sup>215</sup> and its handling of the economic crisis which the country had experienced and which had resulted in the imposition of austerity measures.<sup>216</sup> The Committee found that the Irish Government's response to the financial crisis had been disproportionately focused on cuts to public expenditure in areas of housing, social security, health care and education, without any concomitant alteration in the tax regime.<sup>217</sup> Many of the austerity measures, according to the Committee had been adopted without an appropriate assessment of their impact on economic social and cultural rights.<sup>218</sup> The rate of youth unemployment, for example, rose from 9.9% to 33% during the period 2006-12, whereas the unemployment rate for the general population rose from 4.6% to 15%.<sup>219</sup> The IHREC has claimed that subsequent age-related reductions in social security payments for jobseekers aged 26 or under have resulted in differential treatment based on age, and impacted disproportionately on an already disadvantaged group.<sup>220</sup>

The Irish Government was also criticised for its failure to supply sufficient and appropriately disaggregated data to allow for a proper assessment on the actual and progressive realisation of these rights.<sup>221</sup> The Committee also noted the limitations of the State's equality legislation, which does not include the full range of grounds of discrimination prohibited by the Covenant,<sup>222</sup> the pervasive gender inequality including the widening gender pay gap, and the

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<sup>213</sup> Barnardos, 'Child Poverty' available at <http://www.barnardos.ie/what-we-do/campaign-and-lobby/child-poverty.html?gclid=Cj0KEQjw6O-9BRDjhYXH2bOb8Z4BEiQAWRduk0kVCNUUspAy5-hpzWDvN9jsrXduN5wZXAcMQDRztmgaAo1A8P8HAQ> accessed 20/08/2016.

<sup>214</sup> Focus Ireland, 'About Homelessness' available at <http://www.focusireland.ie/resource-hub/about-homelessness/>, accessed 12/08/2016.

<sup>215</sup> CESCR 'Concluding Observations on the third periodic report of Ireland', para 7, 8 July 2015, UN Doc E/C.12/IRL/CO/3.

<sup>216</sup> *ibid* para 11.

<sup>217</sup> *ibid* para 11(a).

<sup>218</sup> *ibid* para 11(b).

<sup>219</sup> Irish Human Rights and Equality Commission Report 'Ireland and the International Covenant on Economic, Social and Cultural Rights' (IHREC, 2015) 45.

<sup>220</sup> *ibid* 45-46.

<sup>221</sup> CESCR IRL(n 215) para 6.

<sup>222</sup> *ibid* para 12.

restrictive legislation on abortion.<sup>223</sup> The gender pay gap in the Republic of Ireland is estimated at 14.4%.<sup>224</sup> The gap in Northern Ireland is 12.3%.<sup>225</sup>

The CEDAW Committee will be monitoring the Republic of Ireland's compliance again in 2017. Specific issues and questions which the Committee has already raised with the Irish Government in advance of that include: whether or not there will be an independent inquiry to fully investigate the Magdalene Laundries; the measures envisaged to investigate allegations of abuse in the Mother and Baby Homes; the measures envisaged to prosecute those who carried out the symphysiotomy procedure on children without parental consent; progress in addressing the gender pay gap; and any envisaged legislative measures to broaden the allowable grounds for abortion.<sup>226</sup>

It should be noted that the reports of the treaty monitoring bodies which include the criticisms outlined above and in the previous section are littered with references to previous recommendations by the treaty bodies with which both governments have failed to comply.<sup>227</sup> The governments are thus cast as repeat offenders when it comes to non-compliance. It should also be noted that, whilst the criticisms of the various treaty bodies might have some degree of political importance, public awareness about the treaty bodies' criticisms or their recommendations is minimal. Furthermore, their observations carry no legal weight.<sup>228</sup> Their recommendations are not legally binding on the respondent State.<sup>229</sup> A Charter of Rights, commonly adopted, and perhaps popularly endorsed, in both jurisdictions on the island, which includes legally enforceable mechanisms presents as a much more effective instrument for human rights protection.

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<sup>223</sup> CESCR IRL (n 215) para 30.

<sup>224</sup> See latest available figures in 'Tackling the Gender Pay Gap in the European Union' (European Union 2014) available at < [http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/140319\\_gpg\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/140319_gpg_en.pdf) > accessed 22/08/2016. This figure relates to 2014.

<sup>225</sup> See 'Annual Survey of Hours and Earnings (ASHE) 2014 to 2015 - Median gross hourly earnings (excluding overtime) and gender pay gap for all employees and those in continuous employment, UK' available at <https://www.ons.gov.uk/search?q=gender+pay+gap> accessed 22/08/2016. This figure relates to 2015.

<sup>226</sup> Committee on CEDAW, 'List of issues and questions prior to the submission of the combined sixth and seventh periodic reports of Ireland', paras 5,7,20 & 21, 16 March 2016, CEDAW/C/IRL/QPR/6-7

<sup>227</sup> See for examples, CESCR 'Concluding Observations on the third periodic report of Ireland', paras 6, 8 July 2015, UN Doc E/C.12/IRL/CO/3, Paras 7,11,27; See also Committee on Economic, Social and Cultural Rights 'Concluding Observations on the sixth periodic report of the United Kingdom and Northern Ireland', 14 July 2016, UN Doc E/C.12/GBR/CO/6, Paras 6, 10, 19.

<sup>228</sup> Thornton (n 73) 186

<sup>229</sup> Egan (n 169) 69.



## 3.2 The ECHR in the European Regional Human Rights Framework

The ECHR came into force in 1953. One of five core human rights instruments of the Council of Europe,<sup>230</sup> it represents the centrepiece of the European regional human rights framework.<sup>231</sup> Whilst it is based on the same principles as the UDHR, its primary focus on civil and political rights<sup>232</sup> makes it the regional equivalent of the ICCPR.<sup>233</sup> The ECHR's principle enforcement mechanism is the European Court of Human Rights (ECtHR). The record of a state before the ECtHR has two aspects, firstly – the number of adverse judgements against a state, and secondly – the state's response to these.<sup>234</sup> The effectiveness of the regional system rests largely on compliance and enforcement issues. Given the focus of this study, the effectiveness of the ECtHR as it applies to the UK is considered with particular reference to cases involving the use of lethal force by the security forces in Northern Ireland and the related ongoing controversy over the failure to hold Article 2 compliant inquests. Two other cases, *Hirst*<sup>235</sup> and *Abu Qatada*,<sup>236</sup> are also discussed, highlighting both government capacity for non-compliance and a major weakness in the ECtHR's enforcement powers. The section relating to the ECtHR and Ireland focuses on cases which impact on family life, privacy and broader societal values and further demonstrates the capacity of government to frustrate the effectiveness of the ECtHR by delaying implementation of its judgements.

### 3.2.1 The ECtHR and the UK

Over the three year period 2012/13/14 the ECtHR delivered 22 adverse judgements against the UK.<sup>237</sup> The UK record on compliance with ECtHR judgements has been praised by the Westminster Joint Committee on human rights.<sup>238</sup> Human Rights activists in Northern Ireland might think differently. Of 20 outstanding cases involving non-compliance, 6 relate to killings

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<sup>230</sup> Marie-Luce Paris 'The European Convention on Human Rights: Implementation Mechanisms and Compliance' in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional Limited 2015) 90.

<sup>231</sup> *ibid* 87.

<sup>232</sup> *ibid* (207) 91.

<sup>233</sup> *ibid* (207) 89.

<sup>234</sup> *Ibid* (207) 99.

<sup>235</sup> *Hirst v. UK* (2005)

<sup>236</sup> *Abu Qatada v. UK* (2012),

<sup>237</sup> UNA-UK 'Human Rights in the UK – From international obligations to everyday protections' (UNA-UK 2015) 11; For the UK record before the ECtHR see also 'The 14 Worst Human Rights Myths' available at <<http://rightsinfo.org/infographics/the-14-worst-human-rights-myths/>> accessed 10/09/2016.

<sup>238</sup> Joint Committee on Human Rights, 'Human Rights Judgements' HL Paper 130 HC 1088 published March 2015.



carried out by security forces during the conflict in Northern Ireland.<sup>239</sup> Some of the relatives of the victims have been waiting over 40 years for an Article 2 compliant inquest.<sup>240</sup> Article 2 (Right to Life) of the ECHR has been interpreted by the ECtHR as requiring member states to carry out a proper investigation into suspicious deaths. Redaction of security force documents, inter alia, has prevented many of these investigations from being completed. Judge Kalaydjieva, in *McCaughey & Ors v UK* suggested the failure to carry out proper investigations raised the possibility ‘for at least some agents of the State to benefit from virtual impunity as a result of the passage of time’.<sup>241</sup>

There are currently 55 outstanding inquests relating to 95 conflict-related deaths in Northern Ireland. Such cases have a corrosive effect on confidence in the justice system, both domestically and internationally. Apart from perpetuating injustice, they provoke competing narratives about the past and frustrate reconciliation. Pablo de Greiff, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, has described some of the suggestions about dealing with the past as ‘the continuation of the struggle through other means’.<sup>242</sup> Following a recent visit to Northern Ireland, de Greiff called for a comprehensive strategy for dealing with the past which goes much wider than case-based investigations, examines the structural and systemic dimensions of rights violations and includes a credible means to adjudicate disclosure issues.<sup>243</sup> The failure to address human rights violations, he suggests, requires a combined political and legal approach.<sup>244</sup> Thus far, there is little evidence that agreement on the political half of such a bargain will be secured any time soon. A failure to reach political agreement on the release of additional resources to deal with legacy inquests, according to the Lord Chief Justice, Sir Declan Morgan, could mean it will take decades before all of the outstanding inquests are completed.<sup>245</sup>

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<sup>239</sup> See Council of Europe, Execution of Judgements of the ECHR, <[http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=>](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=>)> accessed 3/09/2016.

<sup>240</sup> See ‘Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland’ 18 November 2016, available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E>> accessed 10/09/2016.

<sup>241</sup> See Concurring Opinion of Judge Kalaydjieva, *McCaughey and Others v. The United Kingdom* (Application no. 43098/09) 2013.

<sup>242</sup> Special Rapporteur Observations (n 240).

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> See BBC News report, ‘Legacy inquests: Judge calls for ‘urgent action’, available at <<http://www.bbc.co.uk/news/uk-northern-ireland-37277655>> accessed 10/09/2016.

In *Hirst* the ECtHR held that the UK ban on convicted prisoners voting in elections breached Article 3 (Right to free elections) of Protocol No.1 to the ECHR. Eleven years on, in defiance of the ECtHR ruling, the UK continues to apply the ban. In *Abu Qatada* the ECtHR ruled that the deportation of Abu Qatada to Jordan to face a retrial on charges for which he had been convicted in absentia would breach Article 6 of the ECHR (Right to a fair trial) on account of the real risk of the use of evidence against him obtained by torture of third parties. Abu Qatada was eventually deported, following an agreement between the UK and Jordan that evidence obtained through torture would not be used against him.<sup>246</sup> Nevertheless, both cases highlight the capacity of states to defy judgements of the ECtHR when they are minded to do so and also expose a significant flaw in the operation of the ECtHR as an enforcement mechanism. For enforcement to have meaningful effect, a ECtHR judgement must be implemented. This would normally require the adoption of measures to remedy the violation in question. ECtHR judgements however, although binding on states under international law,<sup>247</sup> are only declaratory.<sup>248</sup> The ECtHR cannot intervene in domestic legal systems and is therefore reliant on the co-operation of states for the implementation of their judgments.<sup>249</sup>

### 3.2.2 The ECtHR and the Republic of Ireland

The ECtHR has delivered just over 20 adverse judgements involving the Irish Republic, resulting in some significant changes in its domestic substantive law on a broad spectrum of important societal issues including, private and family life, abortion and child protection.<sup>250</sup> Whilst the Republic's record with respect to ECtHR judgments is one of compliance, an inordinate delay, in some instances, between the judgment and its implementation has attracted criticism. Paris, for example, describes the Irish Republic as 'reluctantly compliant'.<sup>251</sup> The Irish Government's response to *Norris*<sup>252</sup> and *A, B and C*,<sup>253</sup> two cases almost thirty years apart, demonstrates an enduring reluctance by the state to address rights deficits relating to family life and privacy.<sup>254</sup> In *Norris v. Ireland* the ECtHR ruled in favour of David Norris who had alleged that Irish legislation prohibiting male homosexual activity infringed his right to respect for

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<sup>246</sup> See BBC news report, 'Abu Qatada deported from UK to stand trial in Jordan' available at <<http://www.bbc.co.uk/news/uk-23213740>> accessed 10/09/2016.

<sup>247</sup> See ECHR Art 46.

<sup>248</sup> Paris (230) 94

<sup>249</sup> *ibid* 95.

<sup>250</sup> *ibid* 99.

<sup>251</sup> *ibid* 100.

<sup>252</sup> *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1988).

<sup>253</sup> *A, B and C v Ireland* (2011) 53 EHRR 13, Application No 25579/05, judgement of 16 December 2010.

<sup>254</sup> Paris (207) 100.

private life in contravention of Article 8 of the ECHR. The offending legislation was not repealed until 1993.<sup>255</sup> In *A, B and C v Ireland*, three women, who had travelled to England to have an abortion, challenged the Irish Republic's restrictive abortion laws, claiming that the criminalisation of abortion under Irish law had endangered their health and well-being in contravention of Articles 2, 3, 8 and 14 of the ECHR.<sup>256</sup> The Court found that the Republic of Ireland had violated the Article 8 rights of Applicant C. It took the Irish Government a full three years to enact legislation to give effect to the Court ruling.<sup>257</sup> Paris suggests that ECtHR judgements can act as a trigger forcing a revaluation by public authorities of complex contentious societal issues in a fast changing society.<sup>258</sup> The reluctant compliance of the government in the aforementioned cases suggests otherwise. While *A, B and C* might now be closed at international level, abortion rights have not been fully addressed and public authorities continue to lag some distance behind a rapidly changing society.

The effectiveness of the ECtHR can best be judged by its ability to enforce its judgments. The ECtHR's judgments, unlike the recommendations of the treaty monitoring bodies, are legally binding. Nevertheless, they present as no more effective than the treaty body recommendations when faced with a non-compliant or reluctantly compliant state. Both the UK and the Republic of Ireland evidence a capacity to defy the ECtHR judgements either by non-compliance or delayed compliance. Legally binding and legally enforceable are two distinct concepts. The development and adoption of a legally enforceable Charter of Rights applicable in both jurisdictions presents as an opportunity to bridge the gap between them.

### 3.3 Domestic Rights Protection

For the purposes of this study, this section looks at the application of the legislation which gives effect to the incorporation of the ECHR into the domestic legal framework in both Northern Ireland the Republic of Ireland. The section looks at the use and effectiveness of the declaration of incompatibility provision available to the courts in each jurisdiction. As a gauge of the effectiveness of the framework the section considers a number of cases relating to family life, privacy and broader societal values and ESCR.

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<sup>255</sup> The Criminal Law (Sexual Offences) Act 1993 repealed the Offences against the Person Act 1861 and the Criminal Law Amendment Act 1885.

<sup>256</sup> Paris (230)) 100; Article 2 (Right to Life), Article 3 (Prohibition on Torture), Article 8 (Right to respect for private and family life), Article 14 (Prohibition on Discrimination).

<sup>257</sup> See The Protection of Life During Pregnancy Act 2013.

<sup>258</sup> Paris (230) 102.

### 3.3.1 Northern Ireland

The core elements of the UK human rights system include the HRA, the Equality Act 2010 and the various EU framework directives. The HRA extends to Northern Ireland and, along with specific provisions of the Northern Ireland Act 1998, gives effect to the British Government commitment in the GFA to incorporate the ECHR into Northern Irish law.<sup>259</sup> The ECHR therefore remains the primary reference point in Northern Ireland for defining human rights.<sup>260</sup>

Unlike the HRA, the Equality Act does not extend to Northern Ireland. The Act was introduced to simplify, harmonise and strengthen equality law in Great Britain.<sup>261</sup> A similar approach in Northern Ireland, involving a Single Equality Bill to streamline equality standards into a single piece of legislation was considered in the past but appears to have been abandoned.<sup>262</sup> Although equality protections in Northern Ireland are quite extensive, the failure to streamline equality law on a similar basis as the Equality Act has resulted in less comprehensive and enforceable rights on a range of equality grounds for individuals in this jurisdiction when compared to Great Britain.<sup>263</sup> Disability rights protection, for example, is now weaker in Northern Ireland due to the continuing application of the House of Lords judgment in *Malcolm*,<sup>264</sup> whereas, in Great Britain, the Equality Act redressed the adverse effect of the judgement.<sup>265</sup> The *Malcom* judgment restricts the ability of people with a disability to claim disability-related discrimination.<sup>266</sup> The application of *Malcolm* in Northern Ireland also represents a potential breach of the UN Convention on the Rights of Persons with Disabilities.<sup>267</sup> As outlined in an earlier section, the shortcomings of equality legislation in Northern Ireland has attracted criticisms from various treaty monitoring bodies. The Committee on CEDAW, for

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<sup>259</sup> GFA, Rights, Safeguards and Equality of Opportunity, Para 2.

<sup>260</sup> Michael Potter, 'Equality and Human Rights Legislation in Northern Ireland: A Review' (Research and Information Service, NI Assembly 2011) 20.

<sup>261</sup> Equality Commission for Northern Ireland 'Gaps in equality law between Great Britain and Northern Ireland' (2014) 2 available at < <http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2014/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf> > accessed 10/09/2016.

<sup>262</sup> Potter (n 260) 1.

<sup>263</sup> ECNI (n 261) 2.

<sup>264</sup> *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43.

<sup>265</sup> ECNI (n 261) 5.

<sup>266</sup> *ibid* 5; See also 'The Malcolm Case' available at < <https://www.equalityhumanrights.com/en/legal-casework/malcolm-case> > accessed 10/09/2016; In 2004, London Borough of Lewisham served notice on Courtney Malcolm, who suffered schizophrenia, to quit the flat he was renting from the council. Malcolm was subletting the flat and the council claimed this was a breach of the tenancy agreement. Malcolm claimed that, as he was subletting the flat on account of his disability, the notice to quit was discrimination under the Disability Discrimination Act. The House of Lords ruled against Malcolm and narrowed the comparator for disability-related discrimination.

<sup>267</sup> ECNI (n 261) 5.

example, has highlighted the lack of protection for women against multiple discrimination. The CERD has called for comprehensive legislation in Northern Ireland to prohibit racial discrimination.

The HRA gives domestic effect to the core provisions of the ECHR. It also enables individuals within the UK to seek remedy for rights violations from UK courts rather than having to take their case to the ECtHR at Strasbourg. As stated earlier, by virtue of the HRA enables the High Court or the Court of Appeal can determine that a legislative provision is incompatible with an ECHR right,<sup>268</sup> but it cannot set it aside.<sup>269</sup> Nor does it bind the government to do so.<sup>270</sup> In November 2015, for example, the NIHRC secured a High Court ruling that Northern Ireland's current abortion law is incompatible with the ECHR.<sup>271</sup> The judgement is not binding on the Northern Ireland Assembly to remedy the situation. The importance of the subject matter of the case apart, the High Court judgment includes a number of observations which are particularly pertinent to this study. In setting out the underlying reasons behind the Court's decision, Justice Horner stated, *inter alia*, that:

The history of the Northern Ireland Assembly suggests that when there are contentious religious and moral issues that divide the political classes, there is little prospect of progress given the present constitutional settlement.<sup>272</sup>

Pointedly, in his concluding remarks, rehearsing comments by Lord Neuberger in the case of *Nicklinson*, he quotes:

Quite apart from this, there is force in the point that difficult or unpopular decisions which need to be taken, are on some occasions more easily grasped by judges than by the legislature. Although judges are not directly accountable to the electorate, there are occasions when their relative freedom from pressures of the moment enables them to make a more detached view.<sup>273</sup>

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<sup>268</sup> Human Rights Act 1998 s 4(2); As noted earlier in the study, the higher courts in Northern Ireland have the power in certain circumstances to set aside secondary legislation, see NI Act 1998 s 81.

<sup>269</sup> See Human Rights Act s 4(6)(a).

<sup>270</sup> See Human Rights Act s 4(6)(b).

<sup>271</sup> The Northern Ireland Human Rights Commission's Application [2015] NIQB 96.

<sup>272</sup> The Northern Ireland Human Rights Commission's Application [2015] NIQB 96, Para 182 (v).

<sup>273</sup> The Northern Ireland Human Rights Commission's Application [2015] NIQB 96, Para 183.

The comments of Justice Horner and Lord Neuberger reflect the frustration of broader society at the apparent inability of local politicians to reach agreement on many contentious issues which have human rights implications, including many events which occurred during the 30 years of conflict, equal marriage, gay rights and abortion. They also point to a possible role for the courts in finding a way through the disputes on these issues. Although, it should be noted, the ability to take a detached view is not necessarily a catalyst for change. The outworking of a court ruling on a violation of human rights will be negated somewhat without the existence and exercise of appropriate enforcement and implementation powers. Moreover, the comments of Lord Bingham in *Cambridge Health Authority*, alluded to in the previous chapter, would indicate that the courts may not be as able or willing to take a detached view when addressing cases involving ESCR.

### 3.3.2 The Republic of Ireland

The governing component of the domestic human rights framework in the Irish Republic is its Constitution which was adopted in 1937 and which contains a list of enumerated fundamental rights.<sup>274</sup> Additionally the Irish Courts have interpreted Article 40.3<sup>275</sup> of the Constitution to identify a limited number of unenumerated constitutional rights including the right to bodily integrity, to earn a livelihood, to individual and marital privacy, to marry and have children.<sup>276</sup>

The Amnesty International report ‘She is not a Criminal, the Impact of Ireland’s Abortion Law’<sup>277</sup> highlights the continuing violations of a range of women’s and girls’ rights in the Irish Republic, including their right to life, health, privacy, non-discrimination and freedom from torture, arising from its restrictive abortion law.<sup>278</sup> The Irish Council for Civil Liberties (ICCL) describes the Irish Constitution as outdated and ‘seriously deficient’ with respect to its written catalogue of rights.<sup>279</sup> It criticises the language of the Constitution, instancing the wording of the articles on the family which reflect the view that a woman’s place is in the home.<sup>280</sup> It also

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<sup>274</sup> See Constitution of Ireland Articles 40-44.

<sup>275</sup> See Constitution of Ireland Article 40.3.

<sup>276</sup> Noelle Higgins ‘Realising Human Rights in Times of Recession: What Could Ireland Have Done Differently?’ (2015) 94 *Teise* 241, 242.

<sup>277</sup> Amnesty International, ‘She is not a criminal, The Impact of Ireland’s Abortion Law’ (2015) available at [http://www.amnesty.org.uk/sites/default/files/she\\_is\\_not\\_a\\_criminal\\_report](http://www.amnesty.org.uk/sites/default/files/she_is_not_a_criminal_report) accessed 24/07/2016.

<sup>278</sup> The Eighth Amendment to the Constitution of Ireland. places the right to life of a foetus on an equal footing with a woman’s.

<sup>279</sup> ICCL (n 63) 5.

<sup>280</sup> Article 41.2(1) “In particular the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved”. Article 41.2(2) “The State shall, therefore,

draws attention to the absence from the Constitution of specific provisions on minority rights, including a prohibition on racism.<sup>281</sup> Moreover, it calls for the Constitution to be amended to include a comprehensive code of enumerated human rights and, relevant to this particular study, it believes the establishment of an island-wide Charter of Rights would provide the basis for this.<sup>282</sup>

Although Article 45<sup>283</sup> of the Constitution leaves open the door to the courts to adjudicate on socio-economic rights, the Irish judiciary remains reluctant to do so and the position inferred in *TD v Minister for Education*, mentioned in the previous chapter, prevails only in a very exceptional case.<sup>284</sup> In *Sinnott v. Minister for Education*, for example, the Supreme Court stated, that

In a discrete case ...the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.<sup>285</sup>

A supplementary and subordinate source of protection is the ECHR Act 2003 which, in line with the Irish Government's GFA obligations, incorporated the ECHR into domestic law. Similar to the HRA in the UK domestic framework, the ECHR Act renders ECHR rights actionable before the Irish domestic courts.<sup>286</sup> It requires the domestic courts to interpret and apply laws in a manner consistent with the ECHR.<sup>287</sup> It also allows them to declare that legislative provisions that give rise to breaches of rights are incompatible with the ECHR. Similarities notwithstanding, the ECHR Act has been cast as reflecting a less ambitious purpose than that which underpinned the HRA.<sup>288</sup> Whereas the underlying purpose of the HRA relates to the need for the development of a UK Bill of Rights, the ECHR Act, as reflected in its title, evidences a need to comply with the equivalence requirement of the GFA rather than a commitment to add

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endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home".

<sup>281</sup> ICCL (n 63) 8.

<sup>282</sup> *ibid* 9.

<sup>283</sup> Article 45 sets out Directive Principles of Social Policy.

<sup>284</sup> Irish Human Rights and Equality Commission Report 'Ireland and the International Covenant on Economic, Social and Cultural Rights' (IHREC, 2015) 28.

<sup>285</sup> *Sinnott v. Minister for Education* [2001] 2 I.R. 545, p. 710.

<sup>286</sup> Paris (n 230) 88.

<sup>287</sup> Higgins (n 276) 246.

<sup>288</sup> Paris (n 230) 103.

value to rights protection.<sup>289</sup> The Act makes clear that any resulting additional provisions arising from its incorporation of the ECHR are subject to the provisions of the Irish Constitution, including the personal rights specified under Article 40.3.<sup>290</sup> This complicates somewhat the interpretation of the Act's provisions.<sup>291</sup> This subordinate relationship to the Irish Constitution, coupled with the ECHR concentration on civil and political rights limits recourse to the ECHR Act in defence of socio-economic rights.<sup>292</sup> Other criticisms of the Act include the omission of mechanisms to require certification that proposed bills are compliant with the ECHR<sup>293</sup> and to enable enhanced scrutiny of proposed legislation.<sup>294</sup> The Act's declaration of incompatibility provision has also attracted criticism. As declarations of incompatibility have no effect on the offending legislation, a more effective remedy is potentially available by relying on the Constitution rather than the ECHR Act in legal proceedings. Where legislation is found to be unconstitutional it may be invalidated.<sup>295</sup>

Indicative of the effectiveness of declarations with respect to rights protection, the declaration facility has only been availed of on a few occasions thus far. One particular case, *Foy v An t-Ard Chláraitheoir*, highlights the lack of legal weight it carries. In *Foy*, the High Court ruled the State was in breach of Article 8 of the ECHR in failing to recognize the reassigned gender of Dr. Lydia Foy. That ruling was in 2007, yet it was not until 2015 that the Oireachtas finally remedied the incompatibility ruling against the Civil Registration Act 2004.<sup>296</sup> While the inexcusable delay clearly manifests a lack of political will within government, it also, according to de Londras, demonstrates that 'a Declaration does not provide the kind of violent nudge towards rights compliance that a finding of unconstitutionality does'.<sup>297</sup> The inability of a court declaration that a provision is incompatible is not binding on the Oireachtas. Nor does it appear to have any particular persuasive value on the Oireachtas to effect a remedy promptly. Although both the UK and the Republic of Ireland are party to the ECHR, it is not perceived as home-grown. A Charter of Rights which has been crafted within the domestic sphere is likely to have a

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<sup>289</sup> *ibid* 102/103.

<sup>290</sup> See IHREC, European Convention on Human Rights Act 2003 at <http://www.ihrec.ie/legal/europeanconvent.html> > accessed 10/09/2016;

<sup>291</sup> See IHREC, European Convention on Human Rights Act 2003 at <http://www.ihrec.ie/legal/europeanconvent.html> > accessed 10/09/2016.

<sup>292</sup> Higgins (n 276) 247.

<sup>293</sup> This mechanism is provided for in s 19 of the HRA.

<sup>294</sup> Paris (n 230) 104.

<sup>295</sup> Paris (n 230) 105.

<sup>296</sup> See the Gender Recognition Act 2015.

<sup>297</sup> Fiona De Londras 'Declarations of Incompatibility Under the ECHR Act 2003: A Workable Transplant?' (2013) 35 Statute Law Review 50, 63.



more persuasive effect on government to comply with its provisions, particularly in the event that the courts deemed the government to be in breach.

As a means of enforcement of human rights and equality protection, the declaration of incompatibility facility in both the HRA and the ECHR Act has limited value. A Charter of Rights which included legally strong enforcement mechanisms would fundamentally change the attention government pays to court decisions that specific pieces of legislation are incompatible with human rights. The key to holding government accountable may lie in the creation of a mechanism that holds individual government Ministers accountable. It is worth noting that the GFA envisaged the exclusion of Ministers from office if they were deemed to have failed to discharge their duties as set out in the Pledge of Office. A Charter of Rights might therefore include a provision rendering compliance with the Charter as a duty of office of government Ministers.

### **3.4 Conclusion**

This chapter has highlighted many examples of non-compliance by both the UK and the Republic of Ireland with regard to their respective obligations arising from their ratification of a number of the core international treaties. It demonstrates a commonality of concerns relating to both jurisdictions, such as the lack of abortion rights, discrimination against minorities, the violations arising from austerity measures and, arguably, the ideological resistance to ESCR. The chapter's focus on the regional and domestic frameworks also evidences government non-compliance issues. The chapter corroborates to some degree the conclusions from the previous chapter relating to the relationship between effectiveness and enforcement measures. It also manifests the operation of a hierarchy of rights.

Without measures and mechanisms to ensure enforcement the effectiveness of any proposed human rights instrument and the framework within which it operates will be continue to be called into question. Enhancing the current framework, as it applies to the island of Ireland, will be influenced by a variety of factors. Some of these have been addressed in this and preceding chapters. Chapter 4 will address some political factors and process issues.

## Chapter 4: Additional Issues

### Introduction

A comprehensive consideration of the possibility of an all-island Charter must address many diverse factors which might impact on its purpose, content and form. Some of these have already been alluded to in the previous chapter and include the characteristics of a Charter and a number of legal issues that might impact on its effectiveness. The background and context to the study, outlined in both chapters 1 and 2 draw attention to a variety of political issues which might impact upon a consideration of a Charter, including the much changed political landscape on the island which might ensue from the UK exit from the EU and the apathy of politicians with regard to human rights. This chapter briefly addresses some additional issues which must be factored into an examination of the viability of a Charter and which will require a more in-depth focus. The first section addresses process issues, identifying major shortcomings in process adopted by the Joint Committee in its consideration of the concept, and, consequently, emphasizing the need for a ‘bottom up’ approach to maximize broader public input into the concept’s development. The second section highlights the need for a comprehensive analysis of the current gaps in rights protection including the weaknesses or shortcomings of the existing enforcement mechanisms as a precursor to a broader consideration of the concept. The third section briefly emphasizes the importance of drawing lessons from the Bill of Rights debate.

### 4.1 Process Issues

The process by which a Bill or Charter of Rights is drafted has an important role to play in both influencing its content and securing broad support for its adoption.<sup>298</sup> Popularising participation in the drafting process of a Bill or Charter instils a sense of public ownership of the final product, enhances its legitimacy and, potentially, encourages a less restrictive approach by the judiciary to its interpretation.<sup>299</sup> Additionally, maximising participation in the process can play a critical role in promoting awareness about human rights issues and establishing a human rights culture in wider society. According to Murray, survey results have demonstrated that the scale of public participation in the construction of a South African Bill of Rights succeeded in creating

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<sup>298</sup> Anne Smith ‘Bills of Rights as process: the Canadian experience’ (2007) 3 *International Journal of Law in Context* 343.

<sup>299</sup> *Ibid.*

a sense of public ownership in it.<sup>300</sup> In Canada, maximising public participation in the shaping of the Canadian Charter of Rights built a momentum behind the government's position at a critical time when it met with provincial resistance to its proposal for an entrenched Bill of Rights.<sup>301</sup> This 'bottom-up' approach which preceded the introduction of the Canadian Charter of Rights both raised awareness of the Charter and enhanced its legitimacy.<sup>302</sup> Moreover, commentators have noted the positive impact public participation in its definition had on the Canadian judiciary.<sup>303</sup>

A sense of public ownership of a draft Charter or Bill of Rights, however, is not always sufficient to secure the necessary political agreement to bring about its adoption. The NIHRC recommendations on a Bill of Rights for Northern Ireland do not command cross-party support, nor indeed are many of them acceptable to the British Government.<sup>304</sup> If, however, placing fundamental rights beyond government is necessary, particularly in societies emerging from conflict, as suggested by Smith, McWilliams and Yarnell,<sup>305</sup> then allowing politicians to determine the definition of rights in a Bill or Charter of Rights makes little sense.

The Joint Committee has already carried out a process which considered the creation of an all-island Charter of Rights. Compared to the Bill of Rights process, the approach on the Charter stands out as an example of how not to progress the concept. The NIHRC championed the Bill of Rights, organizing an extensive range of relevant workshops, conferences, information events and public and private meetings with individuals, political parties and various groups.<sup>306</sup> Of particular importance, the Commission was responsive to criticism.<sup>307</sup> The report carrying its final recommendations addressed both the content and effective enforcement and implementation of a Bill of Rights.<sup>308</sup> Underscoring their proactive, enthusiastic and robust approach, the NIHRC challenged in a public and forthright way the NIO's effective rejection of

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<sup>300</sup> Rachel Murray 'The Importance of a Bill of Rights in Northern Ireland as a process: Comparative Reflections from South Africa' (2001) 52 Northern Ireland Legal Quarterly 385, 405.

<sup>301</sup> Smith (n 298) 359.

<sup>302</sup> *ibid* 360.

<sup>303</sup> *ibid* 360.

<sup>304</sup> See Theresa Villiers, Secretary of State for Northern Ireland, Westminster Hall Deb col 194WH 16 July 2013.

<sup>305</sup> Smith, McWilliams, Yarnell (n 54) 10

<sup>306</sup> NIHRC, A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland, (2008) 10-13.

<sup>307</sup> See Colin Harvey and Alex Schwartz 'Designing A Bill of Rights for Northern Ireland' (2009) 60 Northern Ireland Legal Quarterly 181, 187-188; The first set of proposals published by the NIHRC drew a range of criticisms relating to their content, scope and effect, some of which were addressed positively In a second set of proposals, published three years later.

<sup>308</sup> NIHRC, Advice to the Secretary of State (n 306) 137.

their recommendations.<sup>309</sup> The Joint Committee, in contrast, adopted only a limited pre-consultation exercise and pursued only a comparatively small number of engagements on the issue. It failed to ignite any significant interest in their Pre-Consultation Paper which it issued on a limited basis in 2003. Only 121 bodies were asked to give their views and less than 30 substantive replies were received.<sup>310</sup> Only two political parties responded, the Alliance party and Sinn Féin.<sup>311</sup> Given the primacy of the Bill of Rights debate at the time the Pre-Consultation Paper was issued, the lack of response to it from the political parties then and since is more likely to reflect a disinterest in the concept than outright opposition to it. A renewed consideration of the concept, in light of the impasse on the Bill of Rights, might now attract a keener interest in the concept.

A comparison of the Pre-Consultation Paper with the Joint Committee's eventual 'Advice on a Charter of Rights',<sup>312</sup> which it published in 2011, also raises questions about its approach. The recommendations in the 2011 paper, involve little more than a listing of existing human rights protections common to both jurisdictions.<sup>313</sup> Proposing only a minimum framework of rights protection, it leaves the issue of whether or not the bar of human rights protection should be raised along with the model a Charter might take to the politicians.<sup>314</sup>

The absence from its Advice to the two governments of an explanation for its failure to conduct a wider consultation process is surprising, given the importance of consultation in validating the process. The NIHRC's criticism that the NIO's consultation paper on a Bill of Rights for Northern Ireland did not comply with the Sedley requirements on public consultation is of particular note here.<sup>315</sup> The Sedley requirements insist that a public consultation is carried out when proposals are still at a formative stage and that they are taken into account in finalizing proposals.<sup>316</sup> The Joint Committee, which includes members of the NIHRC, appear to have followed the same approach as the NIO. Whatever the causes of its shortcomings, the approach of the Joint Committee to its consideration of a Charter of Rights appears to have been flawed. Nevertheless, a review of its approach, including an examination of many issues raised in its

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<sup>309</sup> NIHRC, A Bill of Rights for Northern Ireland: Next Steps, Response to the Northern Ireland Office (2009).

<sup>310</sup> Manning (n 114).

<sup>311</sup> Ibid.

<sup>312</sup> Joint Committee's Advice (n 59) 4.

<sup>313</sup> Farrell (n 9) 24.

<sup>314</sup> See Monica McWilliams 'Charting the way forward on human Rights' The Irish Times, June 27, 2011, available at <<http://www.irishtimes.com/opinion/charting-the-way-forward-on-human-rights-1.608347>> accessed 24/07/2016.

<sup>315</sup> NIHRC, A Bill of Rights for Northern Ireland: Next Steps, Response to the Northern Ireland Office, 17.

<sup>316</sup> Ibid.

Pre-Consultation Paper will be relevant to any renewed consideration of the concept. Some of the issues raised in both the Pre-Consultation Paper and the responses to it have been validated or clarified by the thirteen years of impasse on a Bill of Rights and a diminishing focus on human rights by the political parties. The views of both the Joint Committee and the ICCL that a declaratory charter, for example, would make no practical difference nor inspirational impact<sup>317</sup> have, if anything, been reinforced by evidence of a growing public distrust of politicians. In a recent European survey 80% of those polled indicated they do not trust political parties and, specific to the Republic of Ireland, two thirds indicated they did not trust the Dáil.<sup>318</sup>

## 4.2 A Precursor to the Process

Whilst this study presupposes that a Charter of Rights will be premised on rights enhancement, of itself, this is insufficient reason to advance a proposition for a Charter. Combat Poverty have cautioned against merely adding another level of complexity to the plethora of existing mechanisms.<sup>319</sup> Given the multiplicity of human rights instruments already at the disposal of human rights advocates and governments, some assessment is required as to the need for a Charter. Egan and Murray have rightly criticized the Joint Committee for failing to carry out an evaluation of the existing gaps between national law and international law as a precursor to a fuller consideration of the viability of a Charter,<sup>320</sup> which might explain, to some degree at least, the minimal interest the issue has attracted. The required analysis must however go beyond the gaps in the law, it must address the application of the law, as well as its substantive content. This will include a consideration of the political and cultural ethos and dynamics which impact upon the application of the law, including political ideology. The analysis will highlight some important issues for further consideration, such as the impact of the failure of both Governments to incorporate many of the human rights treaties which they have signed and ratified into domestic law. By focusing on existing legal frameworks the analysis will clarify the relationship between effectiveness, content, implementation and enforcement, which, in turn, will inform the crafting of a Charter model fit for purpose.

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<sup>317</sup> Joint Committee Pre-Consultation Paper (n 109) paras 15 & 16.

<sup>318</sup> Irish Examiner, '80% have no trust in political parties', 12 March 2016, available at <http://www.irishexaminer.com/ireland/80-have-no-trust-in-political-parties-386987.html>>accessed 20/08/2016.

<sup>319</sup> Combat Poverty Agency, Submission to the Human Rights Commission on Joint Committee Pre-Consultation Document on an All-Ireland Charter of Rights, (2003) para 3, available at <[http://www.combatpoverty.ie/publications/submissions/2003\\_Sub\\_HumanRightsCommission.pdf](http://www.combatpoverty.ie/publications/submissions/2003_Sub_HumanRightsCommission.pdf)>accessed 24/07/2016.

<sup>320</sup> Egan and Murray (n 64) 815.

A different gauge of need might be based on the degree of government compliance with existing protections. The range of criticisms of both governments in this respect emanating from NGOs and various Treaty monitoring bodies clearly points to the need for new initiatives on human rights in both jurisdictions. The commonality of concerns relating to two jurisdictions in a relatively small geographic area argues for a consideration of an all-island Charter as one potential initiative.

Continuing rights deficits, including the unfinished business of the GFA, have been instanced in a variety of reports from both NGOs and monitoring bodies of the UN. The report on the CAJ's 'Mapping the Rollback' conference which contains an extensive list of government failings on human rights including unimplemented GFA provisions,<sup>321</sup> will be particularly informative in developing a framework for a comprehensive analysis. Examples instanced in the report range from the general – for example, the NIO rejection of the NIHRC proposals relating to a Bill of Rights and the failure by the Irish Government to implement measures to ensure equivalent protection in the Irish Republic – to the specific - for example, the ongoing denial of Irish language rights in Northern Ireland, the continued use of the Special Criminal Court in the Irish Republic and the lack of an equality duty there which is equivalent in strength to the Section 75 in operation in Northern Ireland.<sup>322</sup>

### **4.3 The Northern Ireland Bill of Rights Debate**

The debate on a Bill of Rights for Northern Ireland will be particularly informative in any consideration of a Charter of Rights. The Bill of Rights debate has lasted over a decade. Despite demonstrable widespread support for a broad ranging rights bill,<sup>323</sup> it ended in stalemate and has prompted suggestions that the rights agenda has become just another battleground for constitutional conflict.<sup>324</sup> Cautioning against such a reductionist analysis of the contributions to the debate, Whitaker highlights that there are many more than two sides to the debate<sup>325</sup> and that many of the issues raised, such as the arts, gay rights, discrimination against the disabled, do not map simply onto constitutional politics.<sup>326</sup> The need for a more forensic analysis of the contributions to the debate notwithstanding, the eventual outcome of the debate, with political

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<sup>321</sup> 'Mapping the Rollback? Human Rights Provision of the Belfast/Good Friday Agreement 15 years on' 2013 Committee on the Administration of Justice (2013).

<sup>322</sup> Farrell (n 9) 26.

<sup>323</sup> Robin Whitaker 'Debating Rights in the New Northern Ireland' (2010) 25 Irish Political Studies 23, 24

<sup>324</sup> *ibid* 25.

<sup>325</sup> *ibid* 32.

<sup>326</sup> *ibid* 34.

unionism in favour of a minimalist bill and nationalists arguing for an expansive one,<sup>327</sup> lends credibility to the argument that constitutional politics has played a significant role in the resulting disagreement. However, while even a brief examination of the final report of the Bill of Rights Forum<sup>328</sup> corroborates the view that party politics played a role in the rights debate, it also validates Whitaker's advice on the need to take a wider perspective on its outcome. The report tabulates the respective party positions on each of the proposals for inclusion in a Bill of Rights. Almost invariably, the UUP and the DUP positions converge on the one side, and the SF and SDLP positions converge on the opposite side.<sup>329</sup> Interestingly however, in most instances, the positions of the Alliance Party, NGOs and representatives of other sectors aligned considerably with the positions adopted by the nationalist parties.<sup>330</sup> It is also worth noting that independent surveys commissioned by the NIHRC evidenced a large majority support (87%) among respondents for a Northern Ireland Bill of Rights.<sup>331</sup>

While the origins of unionist suspicions about the rights agenda have been identified by many commentators,<sup>332</sup> a means to assuage them remains elusive and begs some creative thinking. Bell's view that the emergence of human rights as the centerpiece of the GFA was the result of a realization by opposing parties that individual rights protection could address mutual concerns of domination has not been borne out by subsequent events.<sup>333</sup> Similarly, Ní Aoláin's view that the rights agenda would cause a paradigm shift, opening up the rights domain to the unionist community and affording them guarantees of future rights protections in the event of any change in the constitutional status of Northern Ireland, has not been realised.<sup>334</sup> Nevertheless, both views identify a focal point for an innovative approach to the rights issue. It is worth noting that in post-apartheid South Africa, support for a Charter or Bill of fundamental rights was almost unanimous, with the white majority coming round to the view that such a document would provide them with protections, including property rights, in the new political dispensation

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<sup>327</sup> *ibid* 1.

<sup>328</sup> Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008).

<sup>329</sup> For examples, see Bill of Rights Forum Final Report: Recommendations relating to the Preamble, P21; Recommendations relating to Substantive Rights, P32-34; Right to Life, P37; Right to Liberty and Security of Person, P50; Right to Nationality and Identity, P70.

<sup>330</sup> *ibid*

<sup>331</sup> NIHRC, *Advice to the Secretary of State* (n 306) 8

<sup>332</sup> See, for example, Ní Aoláin (n 4) 3.

<sup>333</sup> Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press, 2000) 193.

<sup>334</sup> Ní Aoláin (n 4) 3.

there.<sup>335</sup> Finding a formula which guarantees the constitutional status of Northern Ireland for inclusion in a Bill or Charter of Right on the same terms as set out in the GFA might go some way to alleviating unionists concerns about the role of the rights agenda.

The GFA points towards the construction of a Bill of Rights which includes the rights set out in the ECHR and additional rights which ‘reflect the particular circumstances of Northern Ireland’.<sup>336</sup> If the intention in this instance was to broaden the potential scope of rights to be included in the Bill of Rights, it failed miserably. Chris Sidoti, the Chair of the Bill of Right Forum, noted in the Forum’s final report that no issue divided Forum member more than the understanding of what constituted ‘the particular circumstances of Northern Ireland’. The disagreement on the meaning of the term divided along unionist and nationalist lines, with unionists favouring a limited interpretation and nationalists opting for an expansive one.<sup>337</sup> With the benefit of hindsight the inclusion of the term in the GFA was probably a mistake. It politicised the debate rather than enhanced it.

#### **4.4 Conclusion**

This chapter draws attention to some additional issues which will impact on any renewed consideration of a Charter. The chapter highlights some significant flaws in the the process adopted by the Joint Committee in its consideration of a Charter. At best the process can only be described as a ‘box-ticking’ exercise. The concept merits as full a consideration as possible, with maximum input from the broader public in both jurisdictions. It should also be informed by a comprehensive analysis of existing gaps in rights protection, the strengths and weaknesses of the existing framework and any lessons which might emerge from a reflection on the Bill of Rights debate. Beyond the obvious benefit of such an analysis, it will also serve to highlight the many concerns about ongoing human rights violations in both jurisdictions, government complacency with regard to remedying these, and the less than casual interest in human rights which currently prevails among the political parties. A summary of the findings and conclusions of the study are set out in the final chapter.

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<sup>335</sup> Rachel Murray ‘The Importance of a Bill of Rights in Northern Ireland as a process: Comparative Reflections from South Africa’ (2001) 52 Northern Ireland Legal Quarterly 385, 399-400.

<sup>336</sup> GFA, Rights, Safeguards and Equality of Opportunity, para 4.

<sup>337</sup> Peter Munce ‘Unionists as ‘Court Sceptics’: Exploring Elite-Level Unionist Discourses about a Northern Ireland Bill of Rights’ (2013) 15 The British Journal of Politics and International Relations 647, 660.



## **Chapter 5: Conclusion**

### **Introduction**

This research study has considered a variety of factors which might influence the development and adoption of a Charter of Rights for the island of Ireland. The Charter has attracted little interest in the past in either academia or at rights activist level. Nor has it received any serious political attention. The immediate purpose of this study therefore was to narrow the gap in understanding about the Charter's potential as a means to enhance human rights protection on the island. Some of the main conclusions of the study are set out below.

### **5.1 Context – A Reminder**

The study is set against a background of increasing concerns about the level of rights protection in both jurisdictions on the island of Ireland. Many of these have been well rehearsed by various NGOs, human rights organisations and academics. More often than not, they are referenced against the GFA which continues to be extolled both domestically and abroad as a template for conflict resolution, not least because of its expansive embedded human rights related provisions. The Agreement undoubtedly played a key role in ending 30 years of conflict. In the early years of its implementation it also resulted in securing significant advances in rights protections on the island, exemplified by the establishment of human rights commissions in both jurisdictions and the incorporation of the ECHR into the domestic legal framework in both parts of the island. The Agreement was rightly credited with moving human rights from the margins to the mainstream.<sup>338</sup> However, the optimism of the early years of its implementation has long dissipated. The GFA's promise of the protection and vindication of the human rights of all remains elusive. The Bill of Rights for Northern Ireland is dual-locked in what appears to be an impenetrable impasse, blocked, at one end, by a lack of consensus among the parties in Northern Ireland on its content and, at the other, by a British Government commitment to repeal the HRA and introduce a British Bill of Rights. Adding to the anxiety, the UK is now on course to leave the EU, raising questions about resultant gaps arising from any disapplication of EU equality directives in Northern Ireland. Compounding all of this, human rights have clearly fallen off the political agenda, evidenced by the collapse of all of the GFA commitments in respect of rights, safeguards, and equality of opportunity into one catch-all generic paragraph in the

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<sup>338</sup> Mageean & O'Brien (n 163) 1503.

Stormont House Agreement.<sup>339</sup> But far from a cause for despondency, the context outlined above presents a new opportunity to push human rights back into the mainstream. The changing political landscape will herald intensive inter-government negotiations involving the British and Irish Governments, the Northern Ireland Assembly and the EU Commission. An early and wide-ranging debate on the breadth of related human rights issues on the island is therefore required as a matter of urgency. All possible options for rights enhancement should be considered, including a Charter of Rights for the island.

## 5.2 Findings

This study draws attention to many issues which will feature in the consideration of any emerging proposals for rights enhancement. Its brief focus on the international human rights framework, the factors that make a rights instrument effective, the Bill of Rights debate, the limited consideration of a Charter, historical approaches to incorporate rights protection into a political settlement, and other issues will be instructive in any ensuing debate.

The study highlights deficiencies in the international, regional and domestic rights frameworks, including weak enforcement powers and mechanisms. The ECHR enforcement body, the ECtHR, for example, has international enforcement credentials but no means to give effect to their judgements at domestic level, evidenced by the UK's continuing defiance of the Court's ruling with respect to convicted prisoners voting in elections. The domestic system is hampered by the failure of the respective governments to enshrine in law the appropriate level of rights protection, and the deference of the judiciary to parliament. The treaty bodies referred to in this study have only a monitoring role. Nevertheless, their reports have been particularly instructive, demonstrating a commonality of criticisms and concerns relating to both jurisdictions which include: the disproportionate effect of government-imposed austerity measures on the marginalised, the restriction on abortion rights, discrimination against minority groups and the resistance of government to the incorporation of treaties into domestic law. The hard evidence in the treaty body reports relating to the scale and persistence of rights violations in both parts of the island lends significant weight to the argument for new initiatives on human rights, including an all-island Charter, and represents a more authoritative claim for new initiatives than political rhetoric about outstanding GFA commitments.

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<sup>339</sup> Michelle Rouse 'In need of a fresh start: gender equality in post-GFA Northern Ireland' (2016) 67 NILQ 233, 240

The study focus on the core characteristics of a Bill/Charter of Rights, such as content, entrenchment and enforcement, and justiciability, emphasises their respective roles in determining its effectiveness. The study highlights the importance of ESCR in both the post-conflict context and in situations of economic downturn which have resulted in the adoption of austerity measures. The study favours their inclusion in a Charter of Rights.

The study's brief consideration of the Bill of Rights debate draws attention to problems of definition. Hindsight suggests, for example, that inclusion of the term 'particular circumstances of Northern Ireland' in the GFA Bill of Rights provision has had a negative effect on the debate. A non-geographic term such as 'the legacy of communal division including high levels of deprivation' might have served the Bill of Rights debate better. The Bill of Rights debate, confirms the view noted earlier in the study that rights issues have become another battleground for constitutional politics. It highlights also how the cross-party support requirement can operate as a veto. Given what presents as an unfailing capacity for disagreement among political parties in Northern Ireland, particularly on human rights issues, it argues for a different method of democratic endorsement. Tied closely to this is the issue of process. The study highlights weaknesses in the approach adopted by the Joint Committee in its consideration of the Charter proposition. Their failure to carry out a full public consultation on the issue was a significant failing, and might well explain the lack of public interest in the issue. Without public buy-in to the concept, the Charter's prospects are non-existent.

The study has highlighted an almost singular focus on rights issues in Northern Ireland in the pre-1998 political negotiations which casts rights as a nationalist demand, heightened unionist suspicions about the role of the rights agenda, and fed the complacency of the Irish Government with regard to major human rights concerns within its own jurisdiction. The singular focus approach has also impacted adversely in the post-GFA era. Whilst the logic that both equivalence issues and the Charter could not be fully addressed until the Bill of Rights was in place might have had a degree of merit in the early years of implementation, it is now evident this approach has caused both issues to be perceived as secondary and to be overlooked. While the inter-relatedness of rights instruments is clearly important, all options for rights enhancement should be fully considered in their own right.

The routine eulogising of the link between the GFA human rights provisions and the resolution of the conflict has generated a negative corollary which compounds suspicion that the rights issues is being used for political leverage purposes. The false logic, sometimes deployed in

confronting possible regression on human rights, that backsliding on human rights might destabilise the peace process has no basis in fact and only serves to compound suspicions about the use of the rights issue for political leverage purposes. While unionists' mistrust of the rights agenda prevails, it should be noted that their concerns about north-south co-operation, including working on an all-island basis, are abating. For example, for many years, the DUP would not engage with the all-island architecture of the Agreement.<sup>340</sup> Now, as the majority party in the Executive coalition government, they routinely attend and take the lead at North South Ministerial Council Meetings.<sup>341</sup>

In 2004, Brice Dickson, the then Chairperson of the NIHRC, complained that the question of additional and effective powers for the NIHRC was being used as a bargaining chip in political negotiations and argued for human rights to be lifted above politics.<sup>342</sup> Whilst the Agreement remains a useful marker of progress on human rights issues, it is of no value as a pressure point on government for the introduction or adoption of further rights measures. The continual linkage of human rights with the peace process, for either positive or negative reasons, against a backdrop of complaint about unfinished GFA business, might in fact serve no purpose other than to reignite or compound unionist suspicions about the use of human rights and equality as a either a bargaining chip by the governments in political negotiations or a 'Trojan horse',<sup>343</sup> by nationalists to secure their aspiration for a united Ireland.

### **5.3 A Charter of Rights - A Basis for a Human Rights Agreement?**

The scale of human rights violations in both jurisdictions, the inadequate associated response of the governments and the inability of the human rights framework at international, regional or domestic level to progress appropriate remedial action highlight the need for a fundamental reappraisal of how human rights issues should be addressed island-wide. While the GFA retains its status as an exemplary model for conflict resolution at international level, its value as a reference point for such a reappraisal is now limited. The paradigm shift, opening up the rights domain to unionism, as predicted by Ní Aoláin, has clearly not materialised. Nevertheless, both

<sup>340</sup> Joanne McEvoy *Politics of Northern Ireland* (Edinburgh University Press 2008) 51.

<sup>341</sup> The North/South Ministerial Council was established under the terms of the GFA. It meets in plenary format twice a year and in various sectoral formats on a regular and frequent basis. Meetings are attended by Government Ministers from both jurisdictions.

<sup>342</sup> See Munce (n 338) 655.

<sup>343</sup> See transcript of comments by Gerry Adams, President of Sinn Féin "That's what we need to keep the focus on - that's the Trojan Horse of the entire republican strategy - is to reach out to people on the basis of equality" available at <[http://www.impartialreporter.com/news/13868875.Gerry\\_Adams\\_in\\_Enniskillen\\_\\_the\\_full\\_transcript\\_and\\_audio/](http://www.impartialreporter.com/news/13868875.Gerry_Adams_in_Enniskillen__the_full_transcript_and_audio/)> accessed 10/05/2016>accessed 30/08/2016.

her view along with Bell's present as a focal point for the development of an approach which might yet bring it to fruition. Inclusion of guarantees relating to the constitutional status of Northern Ireland in a Charter of Rights along similar lines to those in the GFA might serve to alleviate unionism's suspicions about human rights and liberate their engagement with the rights domain. The GFA was essentially a political agreement. What the current situation clearly demands is a human rights agreement, disaggregated from party politics and party political agendas, and binding on government and legally enforceable. A Charter of Rights might provide the basis for such an agreement.

# Bibliography

## International Law

Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998 [hereinafter 'GFA' or 'the Agreement'].

Anglo-Irish Agreement (15 Nov 1985) (Cmnd 9657, 1985) Article 5(a), available at: <<http://cain.ulst.ac.uk/events/aia/aiadoc.htm>> accessed 24/07/2016.

A New Framework for Agreement, Ir.-U.K., Feb. 22, 1995, 34 I.L.M. 946 (1995), Para 51

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR)

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

The Sunningdale Agreement (9 Dec 1973) Para 11, available at: <<http://cain.ulst.ac.uk/events/sunningdale/agreement.htm>>

The Sunningdale Agreement (9 Dec 1973)

UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23 Para 5

Committee on Civil and Political Rights 'Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland', August 2015, UN Doc CCPR/C/GBR/CO/7

Committee on Economic, Social and Cultural Rights 'Concluding Observations on the third periodic report of Ireland', 8 July 2015, UN Doc E/C.12/IRL/CO/3

Committee on Economic, Social and Cultural Rights 'Concluding Observations on the sixth periodic report of the United Kingdom and Northern Ireland', 14 July 2016, UN Doc E/C.12/GBR/CO/6

Committee on Economic, Social and Cultural Rights, General Comment No 3 *The Nature of States Parties Obligations* (Art 2, para 1) UN Doc E/1991/23 (14 December 1990)

Committee on the Elimination of Racial Discrimination 'Concluding Observations on the twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland', Advance Unedited Version, 26 August 2016, CERD/C/GBR/CO/21-23, available at <[http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD\\_C\\_GBR\\_CO\\_21-23\\_24985\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf)> accessed 10/09/2016.

Committee on the Elimination of Discrimination against Women 'Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland', 30 July 2013, UN Doc CEDAW/C/GBR/CO/7

Committee on the Elimination of Discrimination against Women, 'List of issues and questions prior to the submission of the combined sixth and seventh periodic reports of Ireland', 16 March 2016, CEDAW/C/IRL/QPR/6-7

Committee on the Elimination of Racial Discrimination 'Concluding Observations on the twenty-first to twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland', 26 August 2016, UN Doc CERD/C/GBR/CO/21-23

Committee on the Rights of the Child 'Concluding Observations on the combined third and fourth periodic reports of Ireland', 1 March 2016, UN Doc CRC/C/IRL/CO/3-4

Committee on the Rights of the Child 'Concluding Observations on the fifth periodic report of the United Kingdom and Northern Ireland', 12 July 2016, UN Doc CRC/C/GBR/CO/5

Council of Europe, Execution of Judgements of the ECHR,  
<[http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=>](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=>) accessed 3/09/2016

Joint Committee on Human Rights, 'Human Rights Judgements' HL Paper 130 HC 1088 published March 2015.

'Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland' 18 November 2016, available at  
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E>> accessed 10/09/2016

## Case Law

*A, B and C v Ireland* (2011) 53 EHRR 13, Application No 25579/05, judgement of 16 December 2010

*Abu Qatada v. UK* (2012)

*Foy v An t-Ard Chláraitheoir* (2007)

*Hirst v. Uk* (2005)

*Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43

*McCaughey and Others v. The United Kingdom* (Application no. 43098/09) 2013

*Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1988)

*R v Cambridge Health Authority ex parte B*; CA 10 Mar 1995

*Ryan v Attorney General* [1965] IR 294

*Sinnott v. Minister for Education* [2001] 2 I.R. 545

*TD v Minister for Education* [2001] 4 IR 259, at 282

The Northern Ireland Human Rights Commission's Application [2015] NIQB 96

## Legislation

Employment Framework Directive 2000/78/EC

Gender Recognition Act 2015

Human Rights Act 1998

The Constitution of Ireland (1937)  
The ECHR Act 2003  
The Equality Act 2010  
The Protection of Life During Pregnancy Act 2013  
Race Directive 2003/43/EC

## **Government Reports and Publications**

*A Programme for Partnership Government* (May 2016) available at  
<[http://www.taoiseach.gov.ie/eng/Work Of The Department/Programme for Government/A Programme for a Partnership Government.pdf](http://www.taoiseach.gov.ie/eng/Work%20Of%20The%20Department/Programme%20for%20Government/A%20Programme%20for%20a%20Partnership%20Government.pdf)>accessed 24/06/2016.

Cameron D, Statement to the House of Commons 15<sup>th</sup> June 2010 available at  
<<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0004.htm#10061522000002>>accessed 10/09/2016.

House of Commons Library Briefing Paper Number CBP7575 ‘Northern Ireland Assembly Elections: 2016’ 18 May 2016, 10 available at <  
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7575#fullreport>>  
accessed 10/09/2016.

Northern Ireland Executive *A Fresh Start – The Stormont Agreement and Implementation Plan* Nov. 17, 2015 available at <<http://www.northernireland.gov.uk>>24/06/2016.

Northern Ireland Office, Consultation Paper, *A Bill of Rights for Northern Ireland: Next Steps* (November 2009).

Northern Ireland Executive *Draft Programme for Government Framework 2016-21* available at  
<<https://www.northernireland.gov.uk/sites/default/files/consultations/newnigov/draft-pfg-framework-2016-21.pdf>> accessed 24/07/2016.

Potter M, ‘Equality and Human Rights Legislation in Northern Ireland: A Review’ (Research and Information Service, NI Assembly 2011) 20

Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services) July 2015, available at <[https://www.executiveoffice-ni.gov.uk/sites/default/files/consultations/ofmdfm\\_dev/age-gfs-consultation.pdf](https://www.executiveoffice-ni.gov.uk/sites/default/files/consultations/ofmdfm_dev/age-gfs-consultation.pdf)> accessed 23/08/2016

The Stormont House Agreement, 2014, available at < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.Pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.Pdf)> accessed 3/09/2016.

Truss E, MP, speaking in the House of Commons,  
<<http://www.parliamentlive.tv/Event/Index/3184e13a-c51f-4940-836b-66c97226e358>>accessed 10/09/2016; see also the Conservative Party Manifesto (2015) 60.

Villiers T, Secretary of State for Northern Ireland, Westminster Hall Deb col 194WH 16 July 2013.

Villiers T, Secretary of State for Northern Ireland, Westminster Hall Deb 16 July 2013, col 196WH.



## Books

- Bell C, *Peace Agreements and Human Rights* (Oxford University Press, 2000)
- Egan S, The UN Human Rights Treaty System, in Suzanne Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional Limited 2015)
- Erdoş D, *Delegating Rights Protection* (Oxford University Press 2010)
- McEvoy J, *Politics of Northern Ireland* (Edinburgh University Press 2008)
- McQuigg R, *Bills of Rights: A Comparative Perspective* (Intersentia 2014)
- Rehman J *International Human Rights Law A Practical Approach*, (Pearson Education 2003)
- Smith R, *Textbook on International Human Rights* (2<sup>nd</sup> edn, Oxford University Press 2005)

## Chapters in Edited Books

- Egan S, 'Ireland and the Human Rights Regime: A Contextual Overview' in Suzanne Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional Limited 2015) 2
- Paris ML, 'The European Convention on Human Rights: Implementation Mechanisms and Compliance' in Suzanne Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional Limited 2015) 90
- Thornton L, 'Socio-Economic Rights and Ireland' in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury Professional Limited 2015) 173.

## Articles

- Arbour L, 'Economic and Social Justice for Societies in Transition' (2007) 40 *New York University Journal of International Law and Politics* 1
- Meehan M, 'Towards a Northern Ireland Bill of Rights' (2001) 23 *Liverpool Law Review* 33
- Beetham D, 'What Future for Economic and Social Rights?' (1995) 43 *Political Studies*, 41
- Higgins N, 'Realising Human Rights in Times of Recession: What Could Ireland Have Done Differently?' (2015) 94 *Teise* 242
- Byrne R 'Changing Modalities: Implementing Human Rights Obligations in Ireland after the Good Friday Agreement' 70 *Nordic Journal of International Law* 1
- Egan S and Murray R, 'A Charter of Rights for the Island of Ireland: An Unknown Quantity in the Good Friday/Belfast Agreement', (2007) 56 *International and Comparative Law Quarterly* 797
- Egan S and Murray R, 'Casting a Cold Eye on the Origins and Development of an All-Island Charter of Rights', (2010) 34 *Fordham International Law Journal* 78
- Ní Aoláin F, 'Human Rights in Negotiating Peace Agreements: The Good Friday Agreement' *International Council on Human Rights Policy* (2005) 1
- Harvey C, and Schwartz A, 'Designing A Bill of Rights for Northern Ireland' (2009) 60 *Northern Ireland Legal Quarterly* 181
- Higgins N, 'Realising Human Rights in Times of Recession: What Could Ireland Have Done Differently?' (2015) 94 *Teise* 241

Smith A, McWilliams M, Yarnell P, *Does every cloud have a silver lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights* (2016) Forthcoming 40 Fordham International Law Journal, copy on file with author.

Waldron J 'A Rights-Based Critique of Constitutional Rights' (1993) 13 Oxford Journal of Legal Studies 18

Mageean P & O'Brien M, 'From the Margins to the Mainstream: Human Rights and the Good Friday Agreement' (1999) 22 Fordham International Law Journal 1499

Van Boven T, '50 Years of the UN Human Rights Covenants' (2016) 34(2) *Netherlands Quarterly of Human Rights* 108

De Londras F, 'Declarations of Incompatibility Under the ECHR Act 2003: A Workable Transplant?' (2013) 35 Statute Law Review 50

Smith A, 'Bills of Rights as process: the Canadian experience' (2007) 3 International Journal of Law in Context 343

Trispiotis I, 'Socio-Economic Rights: Legally Enforceable or Just Aspirational?' Opticon 1826, (University College London 2010)

Whitaker R, 'Debating Rights in the New Northern Ireland' (2010) 25 Irish Political Studies 23

Murray R, 'The Importance of a Bill of Rights in Northern Ireland as a process: Comparative Reflections from South Africa' (2001) 52 Northern Ireland Legal Quarterly 385

Munce P, 'Unionists as 'Court Sceptics': Exploring Elite-Level Unionist Discourses about a Northern Ireland Bill of Rights' (2013) 15 The British Journal of Politics and International Relations 647.

Rouse M, 'In need of a fresh start: gender equality in post-GFA Northern Ireland' (2016) 67 NILQ 233

Egan S and Murray R 'Casting a Cold Eye on the Origins and Development of an All-Island Charter of Rights', (2010) 34 Fordham International Law Journal 78

## Miscellaneous Reports

Amnesty International, 'She is not a criminal, The Impact of Ireland's Abortion Law' (2015) available at [http://www.amnesty.org.uk/sites/default/files/she\\_is\\_not\\_a\\_criminal\\_report](http://www.amnesty.org.uk/sites/default/files/she_is_not_a_criminal_report) accessed 24/07/2016

Amnesty International, United Kingdom: *Submission to UK Government on "A Bill of Rights for Northern Ireland – Next Steps"* (Amnesty International Publications 2010) available at <<https://www.amnesty.org.uk/resources/submission-bill-rights-northern-ireland#.V5T7fLgrLcs>> accessed 24/07/2016

Barnardos, 'Child Poverty' available at <http://www.barnardos.ie/what-we-do/campaign-and-lobby/child-poverty.html?gclid=Cj0KEQjw6O-9BRDjhYXH2bOb8Z4BEiQAWRduk0kVCNUUspAy5-lpzWDvN9jsrXduN5wZXAcMQDRztmgaAo1A8P8HAQ> accessed 20/08/2016

BENEATH THE SURFACE Child Poverty in Northern Ireland (Child Poverty Alliance 2014) available at <[http://www.ci-ni.org.uk/DatabaseDocs/nav\\_4786494\\_beneaththesurface\\_web.pdf](http://www.ci-ni.org.uk/DatabaseDocs/nav_4786494_beneaththesurface_web.pdf)> accessed 10/09/2016

Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (31 March 2008)

Cameron Report (1969, Summary of Conclusions, available at <http://cain.ulst.ac.uk/hmsoc/cameron2.htm#chap16>) accessed 20/08/2016.

Combat Poverty Agency, Submission to the Human Rights Commission on Joint Committee Pre-Consultation Document on an All-Ireland Charter of Rights, (2003), available at [http://www.combatpoverty.ie/publications/submissions/2003\\_Sub\\_HumanRightsCommission.pdf](http://www.combatpoverty.ie/publications/submissions/2003_Sub_HumanRightsCommission.pdf) accessed 24/07/2016.

Committee on the Administration of Justice, 'Mapping the Rollback? Human Rights Provisions of the Belfast/Good Friday Agreement 15 years on' (2013).

Democratic Progress Institute *The Good Friday Agreement – An Overview* (London 2013).

Equality Commission for Northern Ireland 'Gaps in equality law between Great Britain and Northern Ireland' (2014) 2 available at <

<http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2014/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf>> accessed 10/09/2016.

Equality Commission, 'Shadow Report to the Committee on the Elimination of Discrimination against Women' (ECNI 2013)

Smith A, McWilliams M, Yarnell P, *Advancing A Bill of Rights For Northern Ireland* (Transitional Justice Institute, Ulster University 2014)

Farrell M, 'The Irish Government's Compliance With Its Commitments' in Mapping the Rollback? Human Rights Provision of the Belfast/Good Friday Agreement 15 years on (Committee on the Administration of Justice 2013)

Focus Ireland, 'About Homelessness' available at <http://www.focusireland.ie/resource-hub/about-homelessness/>, accessed 12/08/2016.

HSC Public Health Agency, Health Intelligence Briefing 'The All-Ireland Traveller Health Study' available at <[http://www.belfasttrust.hscni.net/images/Travellers\\_health\\_study.pdf](http://www.belfasttrust.hscni.net/images/Travellers_health_study.pdf)> accessed 20/08/2016

Irish Council for Civil Liberties *Response to the Pre-Consultation on a Charter of Rights for the island of Ireland* (2004), available at <<http://www.iccl.ie/-iccl-charter-of-rights-response-2004-.html>> accessed 20/08/2016.

Irish Human Rights and Equality Commission Report 'Ireland and the International Covenant on Economic, Social and Cultural Rights' (IHREC, 2015) 45.

Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights Commission *A Charter of Rights for the Island of Ireland: Pre-Consultation Paper* (May 2003)

The JUSTICE Constitution Committee *A British Bill of Rights - Informing the debate* (Justice 2007) 65.

Mapping the Rollback? Human Rights Provision of the Belfast/Good Friday Agreement 15 years on (Committee on the Administration of Justice 2013)

NIHRC, *A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland*, (2008).

NIHRC, *A Bill of Rights for Northern Ireland: Next Steps*, Response to the Northern Ireland Office.

O'Cinnéide C, *Equivalence in Promoting Equality - The Implications of the Multi-party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (The Equality Authority: Dublin 2005)

PPR 'Equality Can't Wait – The Right to Housing Campaign' (Participation and Practice of Rights 2013)

*Report on the Potential Effects of the Repeal of the Human Rights Act 1998*, KRW Law and Doughty Street Chambers, (Feb. 2016), available at

<[http://www.doughtystreet.co.uk/documents/uploaded-documents/HRA\\_NI\\_FINAL\\_15\\_02\\_16.pdf](http://www.doughtystreet.co.uk/documents/uploaded-documents/HRA_NI_FINAL_15_02_16.pdf)> accessed 10/09/2016.

'Tackling the Gender Pay Gap in the European Union' (European Union 2014) available at <[http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/140319\\_gpg\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/140319_gpg_en.pdf)> accessed 22/08/2016.

The Advice of the Joint Committee on a Charter of Rights (June 2011) 2 available at <<https://www.nihrc.org/documents/charter%20of%20rights/charter-of-rights-advice-june-2011-final.pdf>> accessed 24/07/2016.

UNA-UK 'Human Rights in the UK – From international obligations to everyday protections' (UNA-UK 2015)

Zappone K, *Charting the Equality Agenda: A Coherent Framework for Equality Strategies in Ireland, North and South* (Dublin (Equality Authority and Equality Commission for Northern Ireland, 2001)

## **Newspaper articles, Press Releases and News Reports**

Amnesty International Press Release 'Repeal of Human Rights Act could undermine peace in Northern Ireland' May 2015 available at <<https://www.amnesty.org.uk/press-releases/repeal-human-rights-act-could-undermine-peace-northern-ireland>> accessed 10/09/2016.

BBC news report, 'Abu Qatada deported from UK to stand trial in Jordan' available at <<http://www.bbc.co.uk/news/uk-23213740>> accessed 10/09/2016.

BBC News 'Irish language policy of Northern Ireland criticised' 16/01/2014 available at <<http://www.bbc.co.uk/news/uk-northern-ireland-25750658>> accessed 20/08/2016.

BBC News report, 'Legacy inquests: Judge calls for 'urgent action'', available at <<http://www.bbc.co.uk/news/uk-northern-ireland-37277655>> accessed 10/09/2016.

Irish Examiner, '80% have no trust in political parties', 12 March 2016, available at <http://www.irishexaminer.com/ireland/80-have-no-trust-in-political-parties-386987.html>

Irish Examiner, '80% have no trust in political parties', 12 March 2016, available at <http://www.irishexaminer.com/ireland/80-have-no-trust-in-political-parties-386987.html>>accessed 20/08/2016.

Martin R, Belfast Telegraph, 21 March 2016 'Lower UK corporation tax rate will hit Northern Ireland hard, warns top accountant', available at <<http://www.belfasttelegraph.co.uk/business/news/lower-uk-corporation-tax-rate-will-hit-northern-ireland-hard-warns-top-accountant-34557150.html>> accessed 28/08/2016.

McWilliams M, 'Charting the way forward on human rights' The Irish Times 27/06/2011 available at <<http://www.irishtimes.com/opinion/charting-the-way-forward-on-human-rights-1.608347>> accessed 20/08/2016.

The Irish Times ‘Convention votes to protect economic, social, cultural rights’ 22 February, 2014 available at <<http://www.irishtimes.com/news/politics/convention-votes-to-protect-economic-social-cultural-rights-1.1701832>> accessed 24/07/2016.

The Irish Times, ‘Convention votes to protect economic, social, cultural rights’, 22 February, 2014 available at <<http://www.irishtimes.com/news/politics/convention-votes-to-protect-economic-social-cultural-rights-1.1701832>> accessed 24/07/2016.

The Irish Times, M King ‘Towards a more equal society’ 1/09/2011 available at <http://www.irishtimes.com/opinion/towards-a-more-equal-society-1.588034> accessed 20/08/2016.

The way forward on human Rights’, The Irish Times, June 27, 2011, available at <<http://www.irishtimes.com/opinion/charting-the-way-forward-on-human-rights-1.608347>> last accessed 24/07/2104

Transcript of comments by Gerry Adams, President of Sinn Féin available at <[http://www.impartialreporter.com/news/13868875.Gerry\\_Adams\\_in\\_Enniskillen\\_\\_the\\_full\\_transcript\\_and\\_audio/](http://www.impartialreporter.com/news/13868875.Gerry_Adams_in_Enniskillen__the_full_transcript_and_audio/)> accessed 10/05/2016>accessed 30/08/2016

European Commission, Press Release Database ‘State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion’ 30 August 2016 available at <[http://europa.eu/rapid/press-release\\_IP-16-2923\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2923_en.htm)>accessed 9/09/2016

## **Miscellaneous**

‘Annual Survey of Hours and Earnings (ASHE) 2014 to 2015 - Median gross hourly earnings (excluding overtime) and gender pay gap for all employees and those in continuous employment, UK’ available at <<https://www.ons.gov.uk/search?q=gender+pay+gap>> accessed 22/08/2016

August 2016 speculation that the plan to repeal the HRA may have been shelved –available at<<http://rightsinfo.org/plans-scrap-human-rights-act-may-scrapped/>> accessed 10/09/2016

Charter of European Political Parties for a Non-Racist Society (1998) available at <[http://www.art1.nl/artikel/2017-Charter\\_of\\_European\\_Political\\_Parties\\_for\\_a\\_non-racist\\_society](http://www.art1.nl/artikel/2017-Charter_of_European_Political_Parties_for_a_non-racist_society)>accessed 20/08/2016

Democratic Progress Institute, ‘The Good Friday Agreement – An Overview’ (London 2013)

Dickson B, ‘A Charter of Rights for the island of Ireland’ (2003) available at: [http://www.ihrec.ie/download/pdf/paper200310\\_actconf\\_brice\\_dickson.pdf](http://www.ihrec.ie/download/pdf/paper200310_actconf_brice_dickson.pdf), accessed 24/07/2016

DUP Manifesto for the 2016 Northern Ireland Assembly Election ‘Our Plan for Northern Ireland’ 20

Housing Executive, Key issues, Homelessness available at <[http://www.nihe.gov.uk/homelessness\\_information](http://www.nihe.gov.uk/homelessness_information)>, accessed 20/08/2016.

‘The 14 Worst Human Rights Myths’ available at <<http://rightsinfo.org/infographics/the-14-worst-human-rights-myths/>> accessed 10/09/2016

IHREC, European Convention on Human Rights Act 2003 at <<http://www.ihrec.ie/legal/europeanconvent.html>> accessed 10/09/2016

Ipsos MORI poll, July 2015 available at <<https://www.ipsos-mori.com/researchpublications/researcharchive/3668/Same-sex-marriage-in-Northern-Ireland.aspx>> accessed 10/09/2016.

Manning M, *Paper on a Charter of Rights for the Island of Ireland* available at <<http://www.ihrec.ie/publications/list/dr-maurice-manning-president-of-the-ihrcpaper-on-a/>> accessed 20/08/2016

Results of referendum on equal marriage, available at <<http://www.referendum.ie/results.php?ref=10>> accessed 10/09/2016

Result of the referenda on the Good Friday Agreement available at <[http://www.bbc.co.uk/history/events/good\\_friday\\_agreement](http://www.bbc.co.uk/history/events/good_friday_agreement)> accessed 10/05/2016.

Smith A and McWilliams M, Human Rights in Northern Ireland: How to Make the Best Out of a Bad Situation (Oxford Human Rights Hub 2016) available at <<http://ohrh.law.ox.ac.uk/human-rights-protections-in-northern-ireland-how-to-make-the-best-out-of-a-bad-situation/>> accessed 20/08/2016.

Speech by Mary Robinson, 'Human Rights at the Heart of Peace' City of Sydney Peace Prize Lecture 2002 (The Centre for Peace and Conflict Studies University of Sydney)

The Conservative Party Manifesto (2015) 60

'The Malcolm Case' available at <<https://www.equalityhumanrights.com/en/legal-casework/malcolm-case>> accessed 10/09/2016;

The Queen's Speech, May 17, 2016 at 48 available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524040/Queens\\_Speech\\_2016\\_background\\_notes\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queens_Speech_2016_background_notes_.pdf)> accessed 10/09/2016;

The Queen's Speech, May 27, 2015 at 75 available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/430149/QS\\_lob\\_by\\_pack\\_FINAL\\_NEW\\_2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lob_by_pack_FINAL_NEW_2.pdf)> accessed 10/09/2016.