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Mutual Respect? Interrogating Human Rights in a Fractured Union

Colin Harvey*

Introduction

The Law and Politics of Constitutional Obsession

The preferences and internal politics of the Conservative Party continue to shape the constitutional future of the UK. The arrival of a coalition (Conservative-Liberal Democrat) government in 2010, followed by Conservative governments in 2015 and (in diminished form) in 2017, presented a challenge to human rights protection in particular. The Conservative Party has steadily developed a mild obsession with the Human Rights Act 1998, and remains determined to repeal it (eventually).¹ Although current policies are framed by the new Brexit-inspired language of ‘Global Britain’² they often appear solidly anchored in forms of narrow nationalism (British and/or English). Accompanied as this is by versions of constitutional unionism³, it seems surprisingly neglectful of what it is that might hold the UK together (if that is the desired outcome).⁴

The UK is witnessing a sustained period of constitutional turbulence, as governmental instability combines with the looming prospect of Brexit, in its much debated and myriad versions.⁵ Reflections on the future of human rights must find a place within this picture of ‘constitutional unsettlement’.⁶ An assessment of rights in this context must then be located within an adequate conception of the UK’s contested constitutionalism; the context-transcending discourse of human rights thus plays out in a complex legal and political environment.⁷

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¹ Conservative Party Manifesto 2017, p 37: ‘We will not bring the European Union’s Charter of Fundamental Rights into UK law. We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament.’ <www.conservatives.com/manifesto> accessed 20 September 2017.

² *Ibid* pp 37-38.

³ It is too easy to neglect the fact that the continued existence of the ‘union state’ in its current form is contested at highest levels within the governance structures of the state.

⁴ Christopher McCrudden, ‘State architecture: subsidiarity, devolution, federalism and independence’ in Mark Elliott and David Feldman, *The Cambridge Companion to Public Law* (2015, Cambridge University Press) chapter 10.

⁵ See, for example, Colin Harvey, ‘Brexit, Borders and Human Rights’ <<http://qppl.qub.ac.uk/brexit-borders-human-rights/>> 8 June 2017, accessed 26 September 2017.

⁶ Neil Walker, ‘Our Constitutional Unsettlement’ [2014] *Public Law* 529. Colm O’Cinneide argues that there is a legitimacy crisis for human rights law and more work is needed to challenge this crisis effectively, Colm O’Cinneide, ‘Rights Under Pressure’ [2017] *European Human Rights Law Review* 43.

⁷ See McCrudden above n 4.

Human Rights in a Multi-National State

There are two senses of this framing narrative that are relevant for the purposes of this article. First, the UK is nationally divided; it is a multi-national state.⁸ The formal constitutional position (unitary state) meets the reality of diversity and pluralism, including but not limited to national and regional differences. This helps to explain why the language of ‘mutual respect’ is often so evident in the interactions between the devolved administrations and the Westminster Government.⁹ It also means that constitutional unionism should be seen as a partial political position within any examination of the UK’s constitution; the default mode of governance within the British constitution is not politically neutral when the existence of the union itself is contested to a constitutionally significant degree.¹⁰

Second, the discourse of human rights tends to promise a determined focus on ‘the person’, the notion that status should only matter when special or enhanced forms of protection are under consideration (for vulnerable groups, for example). The simple idea in human rights law that *everyone* (who is jurisdictionally present) should enjoy certain basic guarantees often proves more disruptive than might be expected (including to discussions that focus purely on citizens’ rights). What remains notable about many contentious debates in the UK is just how central *status* is to the treatment received, including national status. Rights may irritate governmental power but more often co-exist in legal and political worlds where legal, social, political, economic and cultural distinctions determine outcomes. This is particularly marked in discussions of migration in general, where the Arendtian-inspired critique of human rights still has a powerful resonance.¹¹ So, the point is that human rights discourse pays close attention to people first, and worries less about whether someone is a citizen (EU/British/Irish) or not. Understanding this is essential to grasping why the discourse continues to provoke controversy and is a source of frustration to those seeking national or other forms of closure.

The proposals on the future repeal of the Human Rights Act 1998¹², and the (currently abandoned) suggestion of possible withdrawal from the European Convention on Human

⁸ For an examination of these discussions in comparative context see, for example, Stephen Tierney, ‘Reframing Sovereignty: Sub-State National Societies and Contemporary Challenges to the Nation-State’ (2005) 54 *International and Comparative Law Quarterly* 161; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press, 2004).

⁹ See ‘Cameron wants “respect” agenda with devolved institutions’

<http://news.bbc.co.uk/1/hi/uk_politics/8683137.stm> 14 May 2010, accessed 26 September 2017.

¹⁰ Constitutional unionism exists on a continuum between those arguing for substantial constitutional reform (in defence of the union) and those who are largely content with the current arrangements. What unites this perspective is a strong desire to maintain the ‘union state’ (the UK) as it is currently composed.

¹¹ See Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (2012, Oxford University Press); Colin Harvey, ‘Is Humanity Enough? Refugees, asylum seekers and the rights regime’ in Satvinder Juss and Colin Harvey (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, 2013) ch 3. Note the suggestion that more use should be made of an equality framework in these contexts, Jason Pobjoy and Sarah Spencer, ‘Equality for All? The Relationship Between Immigration Status and the Allocation of Rights in the United Kingdom’ [2012] *European Human Rights Law Review* 160.

¹² The Conservative Party Manifesto 2017 above n 1 (following on from earlier manifesto commitments). The Queen’s Speech in 2015 <<https://publications.parliament.uk/pa/ld201516/ldhansrd/text/150527-0001.htm#15052714000178>> and 2016 <<https://hansard.parliament.uk/lords/2016-05-18/debates/E021E4C9-7D94-4A00-9A84-8BC81A8221A1/QueenSSpeech>> accessed 26 September 2017, included reference to proposals on a British Bill of Rights. See also Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Law* (Conservative Party, London 2014).

Rights¹³, can be located in these contexts, and have generated a remarkable level of comment and debate.¹⁴ This should not be surprising, given the potential constitutional implications for a ‘union state’ that is already under excessive strain.¹⁵ The fact that the intention is to replace the Act with a new Bill of Rights - sometimes referred to as a ‘British Bill of Rights’ - adds further interest.¹⁶ It is not always clear precisely what is being proposed, and practical suggestions thus far have attracted widespread criticism.¹⁷ The discussion is principally about the implications of repeal, the options for a new legal framework for human rights protection in the UK, and the prospects for the current relationship with the European Convention on Human Rights (especially the Strasbourg court). As with the debate on Brexit, the UK is often intended when the word ‘Britain’ is used in these constitutional conversations, and this tendency to neglect Northern Ireland (and the nuances of its constitutional politics) is not simply shorthand. It is reflective of a habit of mind that pays insufficient attention to impacts

¹³ The Conservative Party Manifesto 2017 above n 1; Theresa May, as part of her leadership bid within the Conservative Party, indicated that the suggestion of withdrawal from the Convention should not be pursued, Anna Dannreuther and Adam Wagner, ‘Where The Tory Leadership Candidates Stand On Human Rights’ <<http://rightsinfo.org/tory-leadership-candidates-stand-human-rights/>> accessed 20 September 2017; ‘Theresa May launches Tory leadership bid with pledge to unite country’ <www.theguardian.com/politics/2016/jun/30/theresa-may-launches-tory-leadership-bid-with-pledge-to-unite-country> accessed 20 September 2017.

¹⁴ See, for example, House of Lords, EU Committee, *The UK, the EU and a British Bill of Rights* (HL Paper 139, 2016); Konstantin Dzehtsiarou and Tobias Lock (eds) *The legal implications of a repeal of the Human Rights Act 1998 and withdrawal from the European Convention on Human Rights* <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2605487> accessed 20 September 2017; Christine Bell, ‘Human Rights Act Repeal and Devolution’ <<http://www.centreonconstitutionalchange.ac.uk/blog/human-rights-act-repeal-and-devolution-0>> accessed 20 September 2017; Mark Elliott, ‘Theresa May’s Case for Withdrawal from the ECHR: Politically astute, legally dubious, constitutionally naïve’ <<https://publiclawforeveryone.com/2016/04/26/theresa-mays-case-for-withdrawal-from-the-echr-politically-astute-legally-dubious-constitutionally-naive/>> accessed 20 September 2017; C.R.G. Murray, Aoife O’Donoghue, Ben T.C. Warwick, ‘The Place of Northern Ireland within UK Human Rights Reform’ <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643464> accessed 20 September 2017; ‘Sturgeon warns against plans to scrap Human Rights Act’ <www.bbc.co.uk/news/uk-scotland-scotland-politics-34331682> accessed 26 September 2017; ‘Welsh Government will do “everything it can” to block repeal of the Human Rights Act’ <www.walesonline.co.uk/news/wales-news/welsh-government-everything-can-block-9279496> accessed 26 September 2017; ‘Ireland dismayed by UK plan to repeal Human Rights Act’ <www.ft.com/content/e1ad7d2e-fa48-11e4-b432-00144feab7de> accessed 26 September 2017; ‘Victims campaigner warns of danger to peace if Human Rights Act repealed’ <www.belfasttelegraph.co.uk/news/northern-ireland/victims-campaigner-warns-of-danger-to-peace-if-human-rights-act-repealed-35216274.html> accessed 26 September 2017.

¹⁵ A position that must be viewed in the light of the divisive outcome of the referendum on membership of the EU, see Colin Harvey, ‘Complex Constitutionalism in a Pluralist UK’ <<https://ukconstitutionallaw.org/2016/07/02/colin-harvey-complex-constitutionalism-in-a-pluralist-uk/>> accessed 20 September 2017.

¹⁶ The final report of the Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Vols 1 and 2, December 2012) <<http://webarchive.nationalarchives.gov.uk/20130206021312/>> accessed 26 September 2017.

¹⁷ For example, Dominic Grieve, ‘Scrapping the Human Rights Act will Hurt the UK’ *Prospect* (September 2015 issue) <www.prospectmagazine.co.uk/features/scrapping-the-human-rights-act-will-hurt-the-uk> accessed 20 September 2017; KRW Law and Doughty Street Chambers, *Report on the Potential Effects of Repeal of the Human Rights Act 1998 by the British Government: An Independent Study Commissioned by the European United Left/Nordic Green (GUE/NGL) Group of the European Parliament*, 15 February 2016 <www.doughtystreet.co.uk/documents/uploaded-documents/HRA_NI_FINAL_15_02_16.pdf> accessed 20 September 2017; Colin Harvey, ‘Rights in a Fractured Union’ <<http://ukconstitutionallaw.org/2015/06/01/hra-watch-reform-repeal-replace-colin-harvey-rights-in-a-fractured-union/>> accessed 20 September 2017.

across these islands.¹⁸ The Human Rights Act 1998 is a UK-wide measure; any new Bill of Rights (along the lines suggested by the Westminster Government) will have UK-wide implications, it will influence future relationships between the UK and Ireland (given its significance in Northern Ireland), and other states are watching closely. This is in no sense a purely 'British' debate and it would be a backward step for future rights-based legislation if it is so narrowly drawn.

The nature of constitutionalism in the UK shapes the form and content of thinking on human rights, and arguably this is having a detrimental impact on what can be said and advanced. In assessing the debate about a Bill of Rights this article explores the thought that the resultant timidity risks colluding in a process of impoverishing the practical status of rights that are intended to have equal status (most evident in relation to social and economic rights). This is what makes events in Northern Ireland so intriguing; participants were able to engage in extended dialogue on the full range of guarantees relatively safe in the knowledge that this would not fall below the standards set in the European Convention. The aim therefore is to contextualise the arguments over a British Bill of Rights in the complex constitutional environment of the UK noted above; both in grasping how rights unfold in the UK as it currently is and in assessing how this determines the nature of proposals on the way forward (and their likely success). Part of the objective is to raise further questions arising from the situation in Northern Ireland and highlight potential consequences flowing from the existing proposals.

Three overall themes are explored in this article. First, consideration is given to constitutionalism and human rights in the UK at present. Second, the position of Northern Ireland is examined, and finally this article includes reflections on consequences, and why those engaged in these discussions need to reflect further on the concept and the implications of talking about a 'British Bill of Rights'. There are hard questions to answer for anyone currently proposing the adoption of a new UK-wide measure in the field of human rights. They have not been dealt with adequately at a governmental level and there is a consistent practice of deferral. While this might indicate that those arguing for retention have succeeded in neutralising these plans the threat of repeal remains. It thus has the potential to continue to be destabilising for Northern Ireland. One premise for much of the analysis that follows is the worry that the constitutional agenda advanced by the UK Government might cause significant damage to the fundamentals of a peace and political process painstakingly constructed over decades. There is, however, a wider dimension and tension over visions of what the UK constitution is and might be; human rights law is intrinsically ensnared in these conversations.

¹⁸ The decision of the DUP to reach a 'confidence and supply' agreement with the Conservative Party has, however, brought increased attention to Northern Ireland: 'Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party' 26 June 2017, <www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland> accessed 26 September 2017.

Constitutional Contestation and Human Rights in the UK

Diverse Constitutional Perspectives

The UK appears not to be the place it was; *appears* because the constitutional legal position contrasts with the UK's particular version of political constitutionalism. The idea of a unitary state, where parliament reigns supreme, co-exists with a fragmented UK where power *seems* to be more radically dispersed.¹⁹ Using the legal constitution to navigate all aspects of the operation of the political constitution increasing seems ill-advised. The picture is not monolithic and the constitution can look strikingly different viewed from Cardiff, Edinburgh or Belfast. This can seem to be a basic and even banal point, but it speaks to deeper matters of constitutionalism. How this is framed, and where one stands, will impact on what is seen. While respecting the normativity of law, and without collapsing into totalising forms of relativism, context and perspective determine what is experienced. Some versions of UK constitutionalism are simply limited and partial ways of viewing what should be a complex constitutional picture. The question hanging over constitutional law in the UK is whether the pragmatic and flexible British constitution can evolve or whether it is time for a major normative overhaul.²⁰

One logical conclusion from the present arrangements is that the devolved areas are empowered to take a different path, but even to note this is problematic from an explanatory standpoint. Is the experience of Northern Ireland adequately captured as a tale of devolution restored (recall that Northern Ireland had a long and unhappy history of devolved government and has experienced sustained periods of violent conflict)? The peace and political processes often seem more securely anchored within transitional constitutionalism, and thus linked to the extensive literature on transitional justice.²¹ The conflict, and the mechanisms intended to resolve it, clearly signal a distinctiveness that suggests that Northern Ireland already is supposed to enjoy a *special constitutional status* (with international legal elements). This is evident in, for example, the self-determination mechanisms in operation.²² Related but equally distinctive issues arise in Scotland, and it has already had an opportunity to vote to leave the UK (an option the majority decided not to take).²³ Scotland and Northern Ireland have significant populations that routinely express (through their electoral choices) unease about continued membership of the UK (views that are within government - when operational - in both jurisdictions). The union is therefore not contested at an abstract level of constitutional theory but from within the structures of governance in the UK (a majority in both Scotland and Northern Ireland also voted to remain in the EU).²⁴

¹⁹ See Walker above n 6.

²⁰ See, for example, Political and Constitutional Reform Committee, *A New Magna Carta?* House of Commons, 2014-15, HC 463, <www.publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/463/46302.htm> accessed 26 September 2017.

²¹ Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *Modern Law Review* 317.

²² Belfast/Good Friday Agreement 1998 'Constitutional Issues'; Northern Ireland Act 1998 s 1 and schedule 1 and Irish Constitution articles 2 and 3.

²³ The result of the September 2015 referendum was: 55.3% No and 44.7% Yes <www.bbc.co.uk/news/events/scotland-decides/results> accessed 20 September 2017.

²⁴ The result in Northern Ireland was 55.8% Remain and 44.2% Leave <www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 20 September 2017.

Why should any of this matter when thinking about human rights? The UK has a Human Rights Act that applies throughout the state, and it is stitched into the devolution and peace process settings.²⁵ The Act has already been labelled a Bill of Rights, precisely because of its UK-wide and constitutional qualities.²⁶ The most vocal current defenders of the Act often seem like the least likely political actors to advocate *any* union-wide legislative measure, but that is precisely what has happened.²⁷ The Act has succeeded in not being perceived as an imposition from Westminster, and it finds favour with political movements that already self-identify as rights-respecting but who also raise existential questions about the UK's composition in its current form.²⁸

Northern Ireland therefore provides only one example of a marked trend within the evolving UK. The UK is an increasingly diverse and pluralist constitutional entity where public power is dispersed widely and multi-level governance is a mundane reality.²⁹ This pluralism raises several themes that are worth underlining. First, and as indicated, there would seem to be more of a political appetite for the Human Rights Act in some parts of the UK than others.³⁰ The reasons for this differ, and the picture varies even within regions; in Northern Ireland the DUP remains a major critic of the Act.³¹ Second, while legal hierarchies keep interpretative divergence in check, this human rights legislation does unfold in diverse local settings.³² Third, and related, pluralism carries the strong implication that democratically expressed differences (within normative limits) should be respected.³³ The idea is that regions/nations might pursue

²⁵ For example, Northern Ireland Act 1998 s 6 and s 24.

²⁶ Francesca Klug, 'The Human Rights Act is a British Bill of Rights'

<www.theguardian.com/commentisfree/2012/dec/13/human-rights-act-british-bill-rights> 13 December 2012, accessed 20 September 2017.

²⁷ See, for example, the position of the SNP, 'Do the SNP oppose the abolition of the Human Rights Act' <www.snp.org/pb_do_the_snp_oppose_the_abolition_of_the_human_rights_act>. See also the interventions by Sinn Féin 'Human Rights Act: Gerry Adams criticises 'attack' on NI peace deal' <www.bbc.co.uk/news/av/uk-northern-ireland-32729074/human-rights-act-gerry-adams-criticises-attack-on-ni-peace-deal> accessed 20 September 2017.

²⁸ So, arguably the most vocal advocates for human rights in the UK (politically) are those keenest to leave the union.

²⁹ There is little that is new in this, see John Morison and Stephen Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (Sweet and Maxwell, 1995).

³⁰ See above n 27.

³¹ 'However, the DUP's Jeffrey Donaldson said his party had long been critical of the Human Rights Act and the way in which it has been interpreted by the European Court of Human Rights. "The Human Rights Act has been abused by criminals and terrorists who have used spurious challenges to avoid deportation," he said. "It has failed to adequately protect the rights of innocent victims. We want to see laws which assist victims secure justice rather than enabling perpetrators avoid justice." 'Human Rights Act: Tory pledge to scrap law "breaches NI peace deal" <www.bbc.co.uk/news/uk-northern-ireland-32705020> accessed 20 September 2017. See also Fiona de Londras, 'The DUP's Worrying Human Rights Record' Oxford Human Rights Hub, 13 June 2017, <<http://ohrh.law.ox.ac.uk/the-dups-worrying-human-rights-record/>> accessed 20 September 2017.

³² The litigation in Northern Ireland over issues such as abortion, equal marriage and adoption perhaps highlights these points. See, for example, *In the Matter of an application by Close (Grainne), Sickles (Shannon), Flanagan Kane (Christopher) and Flanagan Kane (Henry)* [2017] NIQB 79. There has been extensive work undertaken in Scotland on, for example, the Scottish National Action Plan for Human Rights <www.snaprights.info/>, accessed 26 September 2017; and the Scottish Parliament has an Equalities and Human Rights Committee, <www.parliament.scot/parliamentarybusiness/CurrentCommittees/Equalities-Committee.aspx>, accessed 26 September 2017. 'Convention rights' have been used successfully to challenge the Scottish Government's 'Named Person Scheme', *The Christian Institute and others v Lord Advocate* [2016] UKSC 51.

³³ Maria Baghramin and Attracta Ingram (eds) *Pluralism: the philosophy and politics of diversity* (Routledge, London and New York, 2000). For discussion of the specific questions raised in relation to *constitutional*

their own priorities; however, given the overarching dominance of the principle of parliamentary supremacy³⁴, the UK has a fairly weak legal form of such pluralism. Tensions can emerge, and a human rights *legal* logic will trigger interpretative constraints (not all forms of difference can and should necessarily be *legally* respected) and may even be incompatible with thicker versions of it.³⁵ It is not a novel dilemma and springs to life in a sharpened way for those cast in a decision-making or adjudicative role within the UK's constitution. A new codified constitution or Bill of Rights would not erase the dilemmas that it raises, although it might further enhance the judicial role in resolving constitutional disagreements.

Despite their prominence, the traditional and founding concepts of constitutional law, such as the legislative supremacy of the Westminster Parliament, often seem to have questionable practical relevance to the emerging political picture. The UK Government has a legally defined connection with a region (Northern Ireland), and the bond embraces international obligations and carries significant bi-national implications (British-Irish). In such an environment, respectful constitutional dialogue is required if relationships are not to deteriorate. This includes, for example, recognising and fully respecting constitutional conventions that apply in dealings with the devolved legislatures in the UK. Any debate about human rights (in Northern Ireland or elsewhere) must be located convincingly in an account of the new forms of constitutionalism that have therefore emerged.³⁶ Viewed in this way, for example, it seems plain that the convention that the Westminster Parliament will not normally legislate on devolved matters - broadly understood - without the consent of the devolved legislature will apply to any attempt to replace the Human Rights Act 1998 with a new Bill of Rights (and it seems likely that such consent would not be forthcoming).

Internationalising the practice of rights

There is a wider international environment too. The UK is a state party to an impressive number of international human rights instruments, and is a member of several intergovernmental organisations (the Council of Europe being one).³⁷ It has bound itself, as a matter of international law, to obligations on civil, political, economic, social and cultural rights (not forgetting the obligations arising from customary international law too).³⁸ Although it is

pluralism see Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; Neil Walker, 'Constitutional Pluralism Revisited' (2016) 23 *European Law Journal* 333.

³⁴ See Northern Ireland Act 1998 s 5(6): 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland.'

³⁵ A simple idea, central to the rule of law and human rights, is that the defence of rights and legality may mean defending minorities and the deeply unpopular. In the UK devolution schemes a unifying factor is that legislative competence is bounded by Convention rights, among other things.

³⁶ For an analysis of the place of human rights in the UK constitution see Colm O'Cinneide, *Human Rights and the UK Constitution* (2012, British Academy Policy Centre) <www.britac.ac.uk/policy/Human-rights.cfm> accessed 16 May 2016. See also Colm O'Cinneide, 'Human Rights and the UK Constitution' in Jeffrey Jowell, Dawn Oliver, and Colm O'Cinneide (eds), *The Changing Constitution* (8th ed Oxford University Press, 2015) ch 3.

³⁷ See, for example, the UN Treaty Collection 'Human Rights' section for further details:

<<https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en>> accessed 20 September 2017.

³⁸ For example, the UK's seventh periodic report to the Human Rights Committee was considered in July 2015 and the Committee then adopted its Concluding Observations (published August 2015), UN Human Rights Committee, *Concluding Observations, Seventh Periodic Report, UK*, CCPR/C/GBR/CO/7, 17 August 2015 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GBR/CO/7&Lang=En> accessed 26 September 2017. See also, UN Economic, Social and Cultural Rights Committee, Concluding

cautious about participating in individual complaints procedures at the UN level, it has done so.³⁹ This means that the UK regularly reports to UN treaty-monitoring bodies on matters of human rights compliance.⁴⁰ The UK is a member of the UN Human Rights Council and has been subject to the UPR process.⁴¹ These processes provide for a distinctive practice of rights mobilisation that travels beyond formal accounts of the dualist nature of the constitution. Valuable work is done in probing the UK's human rights record, but the outcomes remain underexplored in mainstream constitutional discussion (dualism has a pervasive impact). They also offer scope to assess the UK's performance, and for rights advocates they are a way to internationalise domestic rights issues. This is especially significant in the light of recent and ongoing developments in the UK, including but not limited to Brexit.

Although debate continues on its contemporary relevance, the UK therefore remains a dualist state for international law purposes; a place where constitutional dualism can have a distorting grip on the legal imagination.⁴² This means that effective access to rights at the domestic level depends on incorporation or 'giving further effect to' international standards, and as noted, this can influence the attention paid to international legal obligations and institutions. In practice, however, these international human rights norms *do* feature in a variety of ways that go beyond formal argumentation in courtrooms. They plainly inform the work of the Joint Committee on Human Rights.⁴³ There is evidence too of the judicial notice taken of such instruments as the UN Convention on the Rights of the Child⁴⁴ and the 1951 Convention relating to the Status of Refugees.⁴⁵ The European Convention on Human Rights gains such

Observations, Sixth Periodic Report, UK, E/C.12/GBR/CO/6, 16 July 2016

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f6&Lang=en> accessed 26 September 2017. On the Convention on the Rights of Persons with Disabilities (where the UK has accepted individual communications) see: *Kenneth McAlpine v UK*, CRPD Comm No 6/2011 (2012). For access to these and related materials see <www.ohchr.org/EN/Countries/ENACARegion/Pages/GBIndex.aspx> accessed 26 September 2017.

³⁹ The UK has signed up to the complaints mechanisms under the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, see Ratification Status for United Kingdom of Great Britain and Northern Ireland

<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=185>

⁴⁰ See above n 38.

⁴¹ See: <www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> accessed 20 September 2017; <www.ohchr.org/EN/HRBodies/UPR/Pages/GBIndex.aspx> accessed 20 September 2017.

⁴² But note Lord Kerr's attempt to think differently: 'If Lord Steyn is right, as I believe he is, to characterise the rationale for the dualist theory as a form of protection of the citizen from abuses by the executive, the justification for refusing to recognise the rights enshrined in an international convention relating to human rights and to which the UK has subscribed as directly enforceable in domestic law is not easy to find. Why should a convention which expresses the UK's commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law?' Lord Kerr in *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16, [255]. See also, Conor McCormick 'Debating Constitutional Dualism' 24 November 2015, <<https://ukconstitutionallaw.org/2015/11/24/conor-mccormick-debating-constitutional-dualism/>> accessed 26 September 2017.

⁴³ <www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/> accessed 26 September 2017.

⁴⁴ See above n 42.

⁴⁵ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; *RT (Zimbabwe) and Others v Secretary of State for the Home Department* [2012] UKSC 38. Also note: Asylum and Immigration Appeals Act 1993 s 2: 'Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.'

prominence precisely because the Human Rights Act 1998 gives ‘further effect’ to ‘Convention rights’ in domestic law (these rights have been escorted home and potentially carry forward international *and* domestic meanings). The legislation marked a radical break with the past, and was one part of an agenda of constitutional reconstruction particularly (but not exclusively) associated with the election of a Labour government in 1997. It is of fundamental significance but it is not the only measure of relevance. Reference is still made to the other international standards, especially when, for example, a state report is due to a UN treaty-monitoring body or there is a visit from a UN Special Rapporteur.⁴⁶ The Northern Ireland and the Scottish Human Rights Commissions make extensive use of the full range of international standards in their work and are actively involved in the international rights system.⁴⁷ There is nothing to prevent international human rights law from being cited and deployed in political (or even legal) arguments, and being adopted as advocacy tools. The problem is that it is only through domestic incorporation - in some form - that reasonably effective legal implementation and enforcement is a possibility. Even then the nature of the UK’s constitutional arrangements can still leave rights vulnerable. That is why the debate on repeal of the Human Rights Act 1998 is so intense. The relatively recent attempt to ‘bring human rights home’ is being called into question, often in terms that are legally and politically unpersuasive, and with much uncertainty on what will come next. The fact that successive Conservative governments have so far failed to achieve their objective indicates that there may be more of a sense of domestic ownership of Convention rights than is often claimed.

The Global and Local

This picture of international norms is supplemented by national institutional mechanisms. There are three ‘A status’⁴⁸ human rights institutions in the UK: the Equality and Human Rights Commission⁴⁹; the Northern Ireland Human Rights Commission⁵⁰; and the Scottish Human Rights Commission.⁵¹ There is a Joint Committee on Human Rights in the Westminster Parliament,⁵² an Equalities and Human Rights Committee in the Scottish Parliament⁵³, and legal protections can be found in the Human Rights Act 1998, the devolution statutes, common law, EU law (for now) and the statutory frameworks that govern specific areas of law and policy. There are also active civil society organisations and networks seeking to uphold human rights.⁵⁴

As indicated, however, there is one legal measure that has dominated the scene. The Human Rights Act has received much attention, and the literature on it is vast.⁵⁵ It is now firmly

⁴⁶ See, for example, Jessie Hohmann, ‘Provoking Debate: The UN Special Rapporteur and the Right to Housing in the UK’ Oxford Human Rights Hub, 27 September 2013, <<http://ohrh.law.ox.ac.uk/provoking-debate-the-un-special-rapporteur-and-the-right-to-housing-in-the-uk/>> accessed 20 September 2017.

⁴⁷ See Northern Ireland Act 1998 s 69 and Scottish Commission for Human Rights Act 2006 s 2.

⁴⁸ See <<http://nhri.ohchr.org/EN/AboutUs/ICC Accreditation/Pages/default.aspx>> accessed 20 September 2017.

⁴⁹ <www.equalityhumanrights.com/en> accessed 20 September 2017.

⁵⁰ <www.nihrc.org/> accessed 20 September 2017.

⁵¹ <www.scottishhumanrights.com/> accessed 20 September 2017.

⁵² <www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/> accessed 20 September 2017.

⁵³ See above n 32.

⁵⁴ In Northern Ireland, for example, see the work of the Human Rights Consortium <www.humanrightsconsortium.org/> accessed 26 September 2017.

⁵⁵ For example, Merris Amos, *Human Rights Law* (2nd ed, Hart Publishing, 2014); John Wadham and others, *Blackstone’s Guide to the Human Rights Act 1998* (7th ed, Oxford University Press, 2015).

embedded in the UK's legal systems. The level of interest perhaps indicates that something normatively different is happening.⁵⁶ The British constitution's pervasive narrative of continuity and incrementalism has a habit of clouding those times when 'constitutional moments' of profound significance have taken place.⁵⁷ The Act was devised as an ingenious device to marry rights protection with parliamentary supremacy; as if the principal goal of human rights should be the smooth evolution of British constitutional tradition. That has largely been how the Human Rights Act has performed; it has not provided radical rights-based reform. Successive governments have been able to advance restrictive and repressive policy agendas with only minor irritation.⁵⁸ There have been rights-based push backs against the worst aspects of government policy⁵⁹ but it has offered little sustained structural resistance to austerity, robust counter-terrorism policies and increasingly disturbing changes to immigration and asylum law.⁶⁰ Human rights advocates, in a desperate and understandable attempt to hold onto the legislation, regularly overstate the practical impact of the Act (or even attempt to understate its significance for tactical purposes). The Strasbourg Court is not immune to this mood, with its apparent willingness to defer to the UK's human rights scepticism.⁶¹ The difficulty with this at times timid approach to human rights is that it can give the most recalcitrant person in the room the most power. The risk is that it undercuts the more transformative ambitions of human rights, and can relativise them out of existence. Even though Conservative governments have, thus far, not been able to repeal the Act they have been reasonably effective in neutralising its standing through a determined and targeted campaign of hostility to it.

How the Human Rights Act is viewed has determined the approach to its fate. The Conservative Party has been and remains negative.⁶² It has built a platform around repeal and replacement of the Act, without much legislative success. The contours of the critique have shifted over time but some of the main elements persist.⁶³ The Act is alleged to lack ownership, and seems too much like a foreign import that gives European judges excessive power.⁶⁴ The suggestion is frequently repeated that it stands in the way of tackling crime and has prevented

⁵⁶ On this point see Christopher McCrudden, 'Northern Ireland, the Belfast Agreement, and the British Constitution' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (5th ed, Oxford University Press, 2000) ch 8.

⁵⁷ McCrudden *ibid.* On issues of constitutional identity see Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and Andrs Saj (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) ch 35.

⁵⁸ On this debate see K.D. Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] *Public Law* 668; K.D. Ewing, 'The Futility of the Human Rights Act' [2004] *Public Law* 829; Anthony Lester, 'The Utility of the Human Rights Act: A Reply to Ewing' [2005] *Public Law* 249.

⁵⁹ See, for example, *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 (involving a challenge to the government's 'deport first, appeal later' policy).

⁶⁰ This joins a wider international debate about the effectiveness of human rights law. See, for example, the argument advanced in Eric A Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014). See also Aoife Nolan, 'Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis?' [2015] *European Human Rights Law Review* 358.

⁶¹ Helen Fenwick, 'An appeasement approach in the European Court of Human Rights?' <<https://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/>> accessed 26 September 2017.

⁶² The Human Rights Act did have cross party support in 1998, and there are exceptions to this general statement, see, for example the position taken by Dominic Grieve, 'Can a Bill of Rights do better than the Human Rights Act?' [2016] *Public Law* 223.

⁶³ Conservative Party, *Protecting Human Rights in the UK* above n 12; Steven Greer and Rosie Slowe, 'The Conservatives' Proposals for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation' [2015] *European Human Rights Law Review* 370.

⁶⁴ Conservative Party *ibid.*

deportations.⁶⁵ The cosmopolitan and the generous aspects of the Act seem, in this understanding, to be among its greatest flaws.⁶⁶ A theme here, as elsewhere, is on domesticating rights; not a project of necessarily abandoning them. One of the intriguing elements of this strategy is that it is about *replacing* and not simply repealing human rights law; often in terms that indicate that this Act is not *local enough*. Although the legislation seems secure for now the general volatility of UK politics means that little can be taken for granted.

As indicated, it is arguable that the nature of the discussion of the Act forced those supportive of a more expansive human rights culture in the UK into a highly defensive mode. Many in the world of advocacy retreated into a sustained defence of the Human Rights Act. Those mobilising around rights risked being confined by the hegemonic discourse about the meaning of this legislation and its impact. Even though the limitations could be acknowledged, this frequently gave way to a tactical concern about saying this ‘out loud’. The Human Rights Act thus remains a significant but limited tool for the protection and promotion of human rights in the UK. That is one reason why it is worth pausing to reflect on what happened in Northern Ireland.

The Northern Ireland Context

Human Rights and the Peace Process

1998 was not only an eventful year for human rights protection across the UK.⁶⁷ It also represented a key moment in the peace process in Northern Ireland, with the adoption of a peace agreement and the subsequent advance of new devolution arrangements, among other things.⁶⁸ A credible assessment of the implications of removing the Human Rights Act 1998 to make way for a British Bill of Rights must display awareness and understanding of the peace and political processes that have delivered a significant level of democratic stability. Even now it remains a society emerging slowly from the trauma of violent conflict.⁶⁹ The conflict and the enormous efforts involved in bringing it to a conclusion are essential elements of any serious reflection on the human rights impact of discussions in the Westminster Parliament.

⁶⁵ David Cameron, speech to Centre for Policy Studies, 26 June 2006 ‘Balancing freedom and security – a modern British Bill of Rights’ <www.theguardian.com/politics/2006/jun/26/conservatives.constitution> accessed 26 September 2017: ‘The Human Rights Act has a similarly damaging impact on our ability to protect our society against terrorism. One of the most obvious ways in which our Government can help prevent terrorist outrages in Britain is to deport foreign nationals who threaten our security ... The difficulty is not caused by the Human Rights Act. But the Human Rights Act has made the problem worse. The key factor here is the European Court of Human Rights judgement in the *Chahal* case in 1996.’

⁶⁶ For a defence of the Act along these lines see Francesca Klug, *A Magna Carta for all Humanity: Homing in on Human Rights* (Routledge, 2015).

⁶⁷ The Human Rights Act received Royal Assent on 9 November 1998. The Belfast/Good Friday Agreement was signed on 10 April 1998, and the referenda on the island of Ireland were held on 22 May 1998. The Northern Ireland Act 1998 received Royal Assent on 19 November 1998.

⁶⁸ See the essays in the Special Issue of the *Fordham International Law Journal* Volume 22 April 1999, also see Colin Harvey (ed) *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart Publishing, 2001).

⁶⁹ For the ongoing challenges of dealing with the legacy of the conflict see Cheryl Lawther, ‘Criminal Justice, Truth Recovery and Dealing with the Past in Northern Ireland’ in Anne-Marie McAlinden and Clare Dwyer (eds) *Criminal Justice in Transition: The Northern Ireland Context* (Hart Publishing, 2015) ch 2.

There are two points in particular to draw out here. First, the scale of the political investment in delivering a measure of stability to Northern Ireland must be acknowledged, and second, it was understood during the long journey to peace that human rights would be central to any political agreement. This is evident in the landmark documents of the process.⁷⁰ It was therefore not surprising that the language of human rights was so prominent in the Belfast/Good Friday Agreement 1998.⁷¹ The legal and policy framework that has emerged since 1998 is intrinsically connected to the politics of the peace process, and a creative and imaginative attempt at conflict transformation that had human rights at its core. There was always a risk that the unique features of transitional constitutionalism would not align well with traditional British constitutional pragmatism.⁷² Aspects of this dilemma were conveniently masked by a Labour government that was itself committed to imaginative constitutional reconstruction. The test was always going to arise with the arrival of a Conservative government less attuned to the special constitutional status of Northern Ireland.

This is not to promote a misleading view; there are risks in suggesting a monolithic Northern Ireland perspective on human rights or the peace process. The peculiarities of the present arrangements are evident, for example, in the fact (always worth recalling) that, even though the fundamental principles agreed in 1998 shape the governing structures of Northern Ireland (even after the St Andrews Agreement 2006), the largest political party in the Northern Ireland Assembly (the DUP) remains doggedly opposed to the Belfast/Good Friday Agreement 1998.⁷³ It must therefore be acknowledged that the human rights debate in Northern Ireland continues to advance against a background of unionist scepticism about initiatives on human rights and equality.⁷⁴

The Belfast/Good Friday Agreement and Human Rights

The Agreement gave life (in the UK and Ireland) to the constitutional fundamentals of the new arrangements, and this is worth stressing and remembering.⁷⁵ These ‘fundamentals’ gained legal form in the UK through the Northern Ireland Act 1998 (as amended), and also through the Human Rights Act 1998, and are underpinned by an international agreement between the UK and Ireland.⁷⁶ It would, however, be a mistake to view this exclusively through the limited

⁷⁰ Colin Harvey and Stephen Livingstone, ‘Human Rights and the Northern Ireland Peace Process’ [1999] *European Human Rights Law Review* 162.

⁷¹ Paul Mageean and Martin O’Brien, ‘From the Margins to the Mainstream: Human Rights and the Good Friday Agreement’ (1999) 22 *Fordham International Law Journal* 1499.

⁷² See McCrudden above n 56.

⁷³ It is the St Andrews Agreement 2006 that is central to the DUP’s understanding of its approach to devolved government, see the comments on the Human Rights Act and the Agreement by Jeffrey Donaldson, ‘The Human Rights Act has Failed Victims’ <www.mydup.com/news/article/donaldson-human-rights-act-has-failed-victims> accessed 26 September 2017. The electoral position was confirmed in the Assembly elections in March 2017 when the DUP returned as the largest party but with reduced numbers (28 MLAs with Sinn Féin on 27) ‘DUP largest party in NI Assembly but Sinn Féin make large gains’ <www.bbc.co.uk/news/election-northern-ireland-2017-39147988> accessed 26 September 2017.

⁷⁴ For a perspective on this in relation to the work of the NIHRC see Peter Munce, ‘Unionism and the Northern Ireland Human Rights Commission 1999–2005: Hostility, Hubris and Hesitancy’ (2014) 29 *Irish Political Studies* 194.

⁷⁵ Colin Harvey, ‘Reconstructing the “Political Constitution” of Northern Ireland’, 2 August 2012, <<https://ukconstitutionallaw.org/2012/08/02/colin-harvey-reconstructing-the-political-constitution-of-northern-ireland/>> accessed 26 September 2017.

⁷⁶ Belfast (Good Friday) Agreement 1998, ‘Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland’ Article 2: ‘The two Governments affirm

lens of legalism. At stake in these conversations are some of the basics of the political constitutionalism that has shaped life around these islands for decades.

First, recall the idea expressed in the Declaration of Support that ‘the achievement’ of the ‘protection and vindication of the human rights of all’ was one part of the ‘fresh start’ that would ‘best honour’ those who had ‘died or been injured, and their families’.⁷⁷ This is underlined in the section on ‘Constitutional Issues’, where it is plain that whatever choice is made on the status of Northern Ireland the ‘sovereign government’ must act with ‘rigorous impartiality’ and ‘full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens’.⁷⁸

Second, the right of self-determination was recognised in a complex and carefully negotiated formulation that sensitively balanced competing objectives; supported by the right ‘of all the people of Northern Ireland’ to identify and be accepted as British or Irish or both.⁷⁹ These British-Irish elements are an attempt to manage bi-national division with a specific focus on citizenship; provisions that will be tested in the light of Brexit and the ongoing EU-UK negotiations.

Third, the European Convention on Human Rights (and ‘any Bill of Rights supplementing it’) was firmly embedded in the Agreement.⁸⁰ For example, in Strand One on ‘Democratic Institutions’ the intention was to give a special place to the European Convention, including on the proofing of legislation and key decisions.⁸¹ The British Government agreed to ‘incorporation’ of the Convention into Northern Ireland law ‘with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency’.⁸²

Fourth, a new Human Rights Commission in Northern Ireland would be established with lead responsibility for a new Bill of Rights process.⁸³ This Bill of Rights was envisaged as an instrument that would *supplement* the European Convention, and the (vague) mandate for the exercise captured the elements that would need to be considered. The rights would be additional to the Convention rather than an inferior replacement, draw on international instruments and experience and respect the particular circumstances of Northern Ireland. The starting point in Northern Ireland was always ‘Convention plus’, in a scenario where the reality of British-Irish ethno-national division endures.

their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement.’

⁷⁷ Declaration of Support para 2.

⁷⁸ Constitutional Issues para 1 (v). A provision that attracted attention in 2017 in light of the Conservative – DUP ‘deal’, see above n 18. Colin Harvey, ‘Northern Ireland and rigorous impartiality: untangling a constitutional mess’, 13 June 2017 <<http://qpol.qub.ac.uk/ni-rigorous-impartiality/>> accessed 26 September 2017.

⁷⁹ Constitutional Issues para 1 (vi).

⁸⁰ Democratic Institutions in Northern Ireland para 5(b).

⁸¹ Democratic Institutions in Northern Ireland paras 5(b), (c), 11, 26(a),

⁸² Rights, Safeguards and Equality of Opportunity, para 2.

⁸³ Rights, Safeguards and Equality of Opportunity, para 4.

Fifth, the Agreement had implications for the UK *and* Irish Governments, seen clearly in the British-Irish Agreement⁸⁴, but also evident in the express commitments undertaken by both. For example, the Irish Government agreed to establish a new Human Rights Commission as part of efforts to ‘further strengthen the protection of human rights’.⁸⁵ In the interests of guaranteeing ‘at least an equivalent level of protection’ it agreed to ‘strengthen and underpin the constitutional protection of human rights’ with an examination of the question of incorporation of the Convention.⁸⁶ The Agreement also provided the basis for a new Joint Committee of both Commissions on the island.⁸⁷

And finally, there are references to human rights in the sections of the Agreement dealing with Reconciliation and Victims of Violence (‘a right to remember’⁸⁸), and Policing and Justice. These anticipated just how central human rights would become to debates on policing and justice reform as well as proposals to deal with the legacy of the conflict.⁸⁹

There are significant Agreements that have followed - including the St Andrews Agreement 2006 and the Stormont House Agreement 2014 - but the Belfast/Good Friday Agreement 1998 (endorsed in referenda in both jurisdictions on the island of Ireland) provides the foundational framing context for understanding the centrality of human rights to the peace process. Its centrality to the EU-UK negotiations around Brexit has also heightened its significance. Many of the elements sketched above were operationalised, but it is notable that there is still no Bill of Rights in Northern Ireland supplementing the European Convention (or a Charter of Rights for the island of Ireland).⁹⁰ There is considerable merit in the argument that while the bi-national elements of the Agreement functioned to a reasonable degree (on a stop-start basis) the human rights and equality aspirations have never been satisfactorily brought to a resolution. That outcome thus places added pressure on the Human Rights Act and brings enhanced intensity to the discussions of its possible repeal.

The Human Rights Act and the European Convention on Human Rights in Northern Ireland

The Human Rights Act 1998 and the European Convention on Human Rights are so intertwined with the constitutional project of securing peace and stability in Northern Ireland that it is difficult to understand why they would ever be lightly set aside. Again, this is not to argue that political endorsement is universal, the DUP for example, is critical of the Act and, like the Conservative Party, has called for reform.⁹¹ It is, however, to suggest that tampering with these

⁸⁴ The Preamble to which states: ‘Reaffirming their commitment to the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions.’

⁸⁵ Rights, Safeguards and Equality of Opportunity, para 9.

⁸⁶ Rights, Safeguards and Equality of Opportunity para 9.

⁸⁷ Rights, Safeguards and Equality of Opportunity para 10.

⁸⁸ Reconciliation and Victims of Violence para 12.

⁸⁹ See Anne-Marie McAlinden and Clare Dwyer (eds) above n 69. John Doyle (ed) *Policing the Narrow Ground: Lessons from the transformation of policing in Northern Ireland* (RIA, 2010).

⁹⁰ Anne Smith, Monica McWilliams and Priyamvada Yarnell, ‘Does Every Cloud Have a Silver Lining? Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights’ (2016) 40 *Fordham International Law Journal* 79; 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; 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.

⁹¹ Jeffrey Donaldson above n 73. See also the contributions to the Northern Ireland Assembly debate on the repeal Human Rights Act, 1 June 2015,

measures, in the ways suggested, opens up questions about a fundamental pillar (human rights) of the current dispensation in Northern Ireland; given the nature of ongoing constitutional disagreements it will not promote a consensual dialogue about rights.

Active use was being made of the European Convention system in Northern Ireland for some time before the Human Rights Act 1998 was enacted.⁹² As with elsewhere in the UK, this usually involved taking the long road to the Strasbourg court. Northern Ireland was also at the centre of an inter-state complaint - *Ireland v UK*⁹³ - which is now being looked at again, following a request by the Irish Government.⁹⁴ The Northern Ireland case law from the European Court of Human Rights includes, for example, leading contributions on the meaning and application of article 2 (right to life) in the context of the use of lethal force and the requirement to conduct effective investigations.⁹⁵ This conflict-related case law from Strasbourg is of particular note, and has made a significant difference to attempts to deal, in a principled way, with the legacies of the past (to such an extent that 'article 2 compliance' is exhaustively referenced in public debate).⁹⁶ The European Court proved useful, for example, in challenging the treatment of vulnerable minorities in Northern Ireland, such as the LGBTQ community in *Dudgeon v UK*.⁹⁷ Convention rights are often cited in the various attempts to resolve contentious issues such as parades, and reference to them has been notable in relevant sections of, for example, the Stormont House Agreement 2014.⁹⁸

The Human Rights Act 1998 is firmly established in the new governance arrangements. The Act has been widely employed, and continues to inform an emergent culture of respect for human rights; as noted, Convention rights are woven into Northern Ireland's devolution scheme.⁹⁹ It is notable, for example, that the Northern Ireland Assembly has debated possible repeal of the legislation (on 1 June 2015) and voted (43 – 41) to reject this option, and thus underlined its 'vital importance'.¹⁰⁰ Although there is an ever present 'conflict context' to the discussions, Northern Ireland is often little different to other parts of the UK in the use of the Convention in the courts (including all the way to the UK's Supreme Court) and by public authorities.¹⁰¹ It is deployed regularly to question the actions of a wide range of public

<<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2015/06/01&docID=236056>> accessed 26 September 2017.

⁹² Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, 2010).

⁹³ *Ireland v UK* (1979-1980) 2 EHRR 25.

⁹⁴ 'Statement by Minister Flanagan on the "Hooded Men" Case' 2 December 2014 <www.dfa.ie/news-and-media/press-releases/press-release-archive/2014/december/hooded-men-case-northern-ireland/> accessed 26 September 2017.

⁹⁵ For example, *Jordan v UK* (2003) 37 EHRR 52; *McKerr v UK* (2002) 34 EHRR 20; *McCann v UK* (1996) 21 EHRR 97.

⁹⁶ See Gordon Anthony and Luke Moffett, 'Northern Ireland: Law, Politics and the "Problem of the Past"' (2014) 20 *European Public Law* 395.

⁹⁷ *Dudgeon v UK* (1982) 4 EHRR 149.

⁹⁸ <www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf> accessed 26 September 2017.

⁹⁹ See above n 25.

¹⁰⁰ 'That this Assembly recognises the vital importance that the Human Rights Act 1998 plays in the lives of citizens of the United Kingdom; further recognises the importance of this Act to the Good Friday Agreement and the devolution of policing and justice powers; and rejects any attempts by the Conservative Government to repeal the Human Rights Act 1998.' Private Members' Business, MLAs Stewart Dickson, Chris Lyttle and Anna Lo, see above n 91.

¹⁰¹ For example, *Re JR38's Application (Northern Ireland)* [2015] UKSC 42.

bodies.¹⁰² The Northern Ireland Human Rights Commission has, for example, used Convention rights in the courts to question abortion law and policy¹⁰³ as well as the approach to adoption.¹⁰⁴

Attempted institutional transformation was an essential component of the Northern Ireland peace process. This remains particularly evident in the discussions over policing reform. The Human Rights Act is key to this ongoing project, and Convention rights are referred to extensively in the PSNI Code of Ethics¹⁰⁵ and in the accountability work undertaken by the Policing Board.¹⁰⁶ Human rights remain a core ingredient in the reform agenda within the PSNI, and the justice sector in general in Northern Ireland.¹⁰⁷ The status of Convention rights within the governing arrangements in Northern Ireland mean that they are taken seriously (by the Executive and Assembly) within the legislative process.¹⁰⁸

Although the Human Rights Act 1998 and the European Convention on Human Rights have gained most attention in law, policy and practice, there is evidence that Northern Ireland has also gone beyond Convention rights.¹⁰⁹ For example, the Attorney General's Guidance to criminal justice agencies refers to a full range of international standards¹¹⁰, some Northern Ireland Assembly legislation references international measures¹¹¹, and the Human Rights Commission and NGOs regularly promote engagement with international human rights law and relevant institutions.¹¹² There is a dynamic and robust civil society sector in Northern Ireland that displays enormous resilience in its work for human rights in often difficult times.¹¹³ There is evidence in these efforts of profound respect for the Human Rights Act 1998, as well

¹⁰² Ronagh McQuigg, 'A "very limited" effect or a "seismic" impact? A study of the impact of the Human Rights Act 1998 on the Courts of Northern Ireland' [2010] *Public Law* 551; See Brice Dickson, 'The impact of the Human Rights Act in Northern Ireland' in John Morison, Kieran McEvoy and Gordon Anthony, *Judges, Transition and Human Rights* (Oxford University Press, 2007) ch 11.

¹⁰³ *Attorney General for Northern Ireland & The Department for Justice v The Northern Ireland Human Rights Commission* [2017] NICA 42; *Re NIHRC's Application* [2015] NIQB 102, [2015] NIQB 96.

¹⁰⁴ *Re NIHRC's Application* [2013] NICA 37. See also, *In re G* [2008] UKHL 38, [2009] 1 AC 173.

¹⁰⁵ See <www.nipolicingboard.org.uk/index/our-work/content-humanrights/content-psnicodeofethics.htm> accessed 26 September 2017.

¹⁰⁶ The Board is required to monitor PSNI performance on compliance with the Human Rights Act, Police (Northern Ireland) Act 2000 s 3(3)(b)(i); see generally <www.nipolicingboard.org.uk/index/our-work/content-humanrights.htm> accessed 26 September 2017.

¹⁰⁷ Colin Harvey, 'Bringing Humanity Home: A Transformational Human Rights Culture for Northern Ireland' in Anne-Marie McAlinden and Clare Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context* (Hart Publishing, 2015) ch 3.

¹⁰⁸ See Tim Moore, Michael Potter, Jane Campbell, 'Human Rights and Equality Proofing of Public Bills' Northern Ireland Assembly, Research and Information Service Briefing Paper, <www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/assembly_exec_review/2014.pdf> accessed 26 September 2017.

¹⁰⁹ This is the case historically, for example, in advocacy work. See CAJ, *Making Rights Count*, CAJ Pamphlet No. 17 (October 1990), arguing that a bill of rights should 'largely' be based on international human rights treaties ratified by the UK. See also the use made of international human rights standards in CAJ, *A Bill of Rights for Northern Ireland* (May 1993).

¹¹⁰ See <www.attorneygeneralni.gov.uk/human-rights-guidance> accessed 26 September 2017; Justice (Northern Ireland) Act 2004 s 8.

¹¹¹ Commissioner for Older People Act (Northern Ireland) 2011; Children's Services Co-operation Act (Northern Ireland) 2015.

¹¹² See, for just one example, the submissions from Northern Ireland to the UN Committee on Economic, Social and Cultural Rights for its consideration of the UK State report in June 2016, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1059&Lang=en> accessed 26 September 2017.

¹¹³ See reference to CAJ's work above n 109.

as generous references to applicable international law.¹¹⁴ An ambitious practice of human rights exists in Northern Ireland that has the Act at its core but which also goes further.

The Northern Ireland Bill of Rights Process

Another distinctive feature of Northern Ireland's human rights landscape (that demonstrates more extensive thinking on rights) is the Bill of Rights process. The current initiative can be traced directly to the Belfast/Good Friday Agreement 1998, although debates on a Bill of Rights have a long history.¹¹⁵ The Agreement included a mandate for a process that was launched in March 2000, and which led to the submission of advice (by the Northern Ireland Human Rights Commission) on 10 December 2008.¹¹⁶ Although this advice was rejected by the UK Government (recall that in 2008-2010 this was a Labour government) the ambition for enhanced human rights protection has not evaporated.¹¹⁷

The enterprise was conducted on the secure basis that any new Bill of Rights would flow from the particular circumstances of Northern Ireland, and would *supplement* the European Convention on Human Rights. It was plainly intended that the Convention rights might not be the last word for these purposes, and that it might be possible and desirable to build constructively on them. Even if the idea did not arise from extended reflection at the negotiations in 1997 and 1998, the thinking was prefigured in the decades of negotiation leading to the Agreement. It was widely understood and accepted that human rights would have to feature prominently if safeguards were to be in place and trust secured for any future governing arrangements. In this sense, the power-sharing (consociational) aspects were not enough on their own, more safeguards were necessary. This point can be overlooked; it is the combination of human rights guarantees with specific power-sharing components (and other things) that were supposed to combine to make the safeguards credible and thus the new arrangements stable and sustainable (in a meaningful way).

¹¹⁴ See, for example, CAJ, *Fighting the Repeal of the Human Rights Act*, 9 June 2015, <www.caj.org.uk/contents/1318> accessed 26 September 2017.

¹¹⁵ Omar Grech, *Human Rights and the Northern Ireland Conflict: Law, Politics and Conflict* (Routledge, 2017).

¹¹⁶ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, 10 December 2008). For the response of the Northern Ireland Office see, NIO, *A Bill of Rights for Northern Ireland: Next Steps* (NIO, November 2009) and NIHRC, *A Bill of Rights for Northern Ireland: Next Steps – Response to the Northern Ireland Office* (NIHRC, February 2010). The work of the Commission on this project was extensive, see e.g. NIHRC, *Progressing a Bill of Rights: An Update* (NIHRC, April 2004) and *Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission* (NIHRC, September 2001); *Summary of Submissions on a Bill of Rights* (NIHRC, July 2003). See also, 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). See Anne Smith, Monica McWilliams, and Priyamvada Yarnell, *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* (Transitional Justice Institute, 2014); Colin Harvey and Alex Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60 *Northern Ireland Legal Quarterly* 181; Colin Harvey, 'Revisiting a Bill of Rights for Northern Ireland'

<<http://ukconstitutionallaw.org/2015/07/10/hra-watch-reform-repeal-replace-colin-harvey-revisiting-a-bill-of-rights-for-northern-ireland/>> accessed 26 September 2017.

¹¹⁷ The Bill of Rights has been noted as an issue of contention during the talks that took place during 2017, see 'Adams denies DUP "lies" about SF commitment to powersharing' <www.irishtimes.com/news/politics/adams-denies-dup-lies-about-sf-commitment-to-powersharing-1.3232009> accessed 26 September 2017.

Although the process revealed disagreements of principle¹¹⁸, for example on maximalist and minimalist approaches, it proceeded on the basis that the European Convention (and then subsequently the Human Rights Act) would be a starting point for something demonstrably better. The debate was marked by delay, and as with the Commission on a Bill of Rights in Britain, unanimity was absent.¹¹⁹ In terms of political parties this largely divided along unionist/nationalist lines, with unionist parties tending to favour (if at all) a modest list of additional rights (or a new UK-wide measure), and nationalist parties supporting more expansive protections. Whatever views were expressed in public, it appears that the main political parties were not willing to make the Bill of Rights a non-negotiable element of the various political discussions. That includes those parties most vocally supportive of the idea in principle. There is, however, evidence that this issue re-entered the political debate in a more extensive way during 2017.¹²⁰

What were people agreeing and disagreeing about? The Northern Ireland Human Rights Commission, in its final advice of December 2008, opted for proposals that embraced an inclusive range of guarantees.¹²¹ Notably the Commission recommended justiciable social and economic rights, as well as a range of other supplementary guarantees. As indicated, this did not find favour with the Northern Ireland Office, and with some political parties, but it did gain significant levels of support.¹²² The Bill of Rights process remains stalled, with the UK Government unwilling to proceed without political consensus in Northern Ireland.¹²³ It seems regrettable that such a significant constitutional project appears to have lost momentum, in the sense that there is no clear way forward currently processed.¹²⁴ What the substantive proposals advanced by the Commission do highlight is that it is possible to have a Bill of Rights

¹¹⁸ On the issue of disagreement see the argument advanced in Jennifer Curtis, *Human Rights as War by Other Means: Peace Politics in Northern Ireland* (2014, University of Pennsylvania Press).

¹¹⁹ See NIHR Advice above n 116.

¹²⁰ Declan Kearney MLA, Sinn Féin: 'Rights and equality belong to everyone in our society. A Bill of Rights is essential to ensure no citizen or section of our society is ever again put to the back of the bus. It is crucial to completing the process of democratic transformation envisaged by the GFA. All of us have a stake in realising that ambition. With a fourth round of talks on re-establishing the political institutions planned, it is vital that all sections and sectors of society intensify our efforts to ensure a Bill of Rights is finally achieved.'
<www.sinnfein.ie/contents/45577> accessed 26 September 2017.

¹²¹ The author of this article was a Commissioner at the time. Two Commissioners, Jonathan Bell and Daphne Trimble, dissented from the final report.

¹²² Patrick Corrigan, 'The vast majority of people in Northern Ireland consider a Bill of Rights to be important' <<http://rightsni.org/2011/11/the-vast-majority-of-people-in-northern-ireland-consider-a-bill-of-rights-to-be-important/>> accessed 26 September 2017.

¹²³ Stormont House Agreement 2014 para 69: 'Noting that there is not at present consensus on a Bill of Rights, the parties commit to serving the people of Northern Ireland equally, and to act in accordance with the obligations on government to promote equality and respect and to prevent discrimination; to promote a culture of tolerance, mutual respect and mutual understanding at every level of society, including initiatives to facilitate and encourage shared and integrated education and housing, social inclusion, and in particular community development and the advancement of women in public life; and to promote the interests of the whole community towards the goals of reconciliation and economic renewal.' The Fresh Start Agreement 2015 offered no proposals for a way forward, <www.gov.uk/government/news/a-fresh-start-for-northern-ireland> accessed 27 September 2017.

¹²⁴ See Anne Smith and Monica McWilliams, 'Human Rights Protections in Northern Ireland: How to Make the Best Out of a Bad Situation' <<http://ohrh.law.ox.ac.uk/human-rights-protections-in-northern-ireland-how-to-make-the-best-out-of-a-bad-situation/>> accessed 26 September 2017.

conversation that is not bound up with fears about retrogression; a process that would include serious reflection on social and economic rights.¹²⁵

As should be apparent from the complex constitutional mechanisms in place to handle a divided society in a sensitive and respectful way, the suggestion of simply joining in a wider UK dialogue about a new Bill of Rights misses the point and is potentially problematic.¹²⁶ It must be assumed that such a proposal would risk exposing further divisions by neglecting the work already completed and ignoring the distinctiveness of the Northern Ireland post-conflict setting (especially its bi-national aspects). While unionist political parties might welcome the prospect of a UK-wide approach it is unlikely that nationalist/republican parties will. In order to avoid a stalemate over competing ‘national’ frameworks (UK-wide or all-Ireland), and to demonstrate a genuine level of mutual respect for the competing narratives that shape Northern Ireland, it makes considerable sense to return to specific measures tailored around Northern Ireland’s particular circumstances and its special constitutional status. That will ultimately mean a return, in some form, to the proposals from the Human Rights Commission in 2008.

Talking about a ‘British Bill of Rights’

A Continuing Story of Failure

In the introduction it was suggested that the Conservative Party has become obsessed with the Human Rights Act. This has not been as tortured as its relationship with the EU but in many ways it came to symbolise what many (but not all) in that political party regarded as the excessively cosmopolitan, European and inclusive agenda of earlier Labour governments. The UK Government’s proposals for repeal of the Human Rights Act, and replacement with a ‘British Bill of Rights’, have therefore provoked significant levels of critical attention. A widespread view is that it would be a mistake to press on, and that the plans can and should be reconsidered. Brexit has provided a reason for further delay, and the perilous position of the current Government raises questions about whether it will be able to proceed.

The story of this Bill of Rights process is well known and was essentially started by David Cameron in a now famous speech in 2006.¹²⁷ It has culminated (for now) in the work undertaken by the Bill of Rights Commission and its final report.¹²⁸ That Commission was a result of (Conservative-Liberal Democrat) political compromise during the period of the 2010-2015 coalition government¹²⁹, and those divisions are everywhere present in its report.¹³⁰ While

¹²⁵ Even this statement does need to be qualified, the first iteration of the Commission’s draft advice did advance proposals that were subject to considerable controversy, see Christopher McCrudden, ‘Not the way forward’ (2001) 52 *Northern Ireland Legal Quarterly* 372.

¹²⁶ It is instructive that the Northern Ireland Executive (unlike Scotland and Wales) did not nominate members to the Advisory Panel established by the Commission on a Bill of Rights. Is this a likely response to any new UK-wide process, and does it signal (along with the Assembly vote against repeal of the Human Rights Act) the potential result of any request for a legislative consent motion in the Northern Ireland Assembly?

¹²⁷ See above n 65.

¹²⁸ See Francesca Klug and Amy Williams, ‘The Choice before us? The report of the Commission on a Bill of Rights’ [2013] *Public Law* 459; Mark Elliott, ‘A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights’ [2013] *European Human Rights Law Review* 137.

¹²⁹ Richard Rawlings, ‘A Coalition Government in Westminster’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (8th ed Oxford University Press, 2015) ch 7.

¹³⁰ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* above n 16. The Commission was quite clear on its position in relation to Northern Ireland: ‘We are also acutely conscious of the sensitivities

the majority of members did favour advancing the Bill of Rights project, an influential minority did not.¹³¹ As with the Northern Ireland experience, this ended in disagreement but unlike the Northern Irish Commission's final report this one did not aid easy implementation. The final report reads at times like a collection of personal reflections. The recommendations have not been taken forward and it joins a list of other such failed initiatives.

The intriguing aspect of this exercise was the approach of many human rights advocates. It is plain that a strategic decision was taken to hold firmly to the status quo of the Human Rights Act, rather than gamble with any new process. What is equally evident is that context does determine the approach and mutual trust is required. The British Bill of Rights debate was ineptly handled (and seemed to flow directly from an attack on the concept of *human* rights). The whole concept remains under theorised, but there is also a basic lack of trust within these discussions. Many participants simply do not trust, based on the historical record, a Conservative administration with a constitutional project such as this.

This disquiet (with the ambitions of the Conservative Party) is not motivated by antipathy to the *idea* of a strong Bill of Rights. Arguably this has been a debate against a particular brand of British Bill of Rights in defence of the idea of *human* rights. For many in this conversation the Human Rights Act 1998 is already a 'Bill of Rights' or at minimum the foundation stone for another more expansive measure (particularly in Northern Ireland). There are strategic and tactical calculations in play but it would make little sense, from a Northern Ireland perspective, to view the Human Rights Act 1998 as the ceiling on the future of human rights. Why? Because (based on a good faith reading of the 1998 Agreement) the Act was so evidently intended as the starting point of a more extensive programme of human rights reform linked to a process of conflict transformation. The anxiety, now plain among many, flows from the background noted above, and not from any lack of imagination about enhancing human rights guarantees. Remember again that this is a constitutional conversation triggered from a position of scepticism about the implications of *human* rights, and this leads to the well-founded fear that essential guarantees will be removed and replaced by inferior substitutes.

The terms of this British debate, given the circumstances, are often viewed as intrinsically divisive and destabilising because they display alarming levels of disrespect for the fundamental principles of the peace process. Take the example of the use of 'British' or Britain in these discussions. This is unhelpful for anyone trying to speak credibly to an ethno-nationally divided society (such as Northern Ireland) where the right to identify as British or Irish or both is a constitutional fundamental.¹³² That is not in any way to suggest a denial of the significance of British identity in Northern Ireland, but it is to stress the need for constitutional acceptance of the power-sharing nature of the current arrangements, based as they are on recognition of the role of human rights in the circumstances of bi-national division

attached to discussion of a UK Bill of Rights in the context of Northern Ireland. In particular we recognise the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland. We do not wish to interfere in that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights process. It may, of course, be that by the time the outcome of the referendum in Scotland is known there may have been further progress towards a Bill of Rights for Northern Ireland under the terms of the Belfast/Good Friday Agreement.'

¹³¹ Ibid vol 1 pp 221-230 'In Defence of Rights' by Baroness Kennedy of the Shaws QC and Professor Philippe Sands QC.

¹³² A human rights discussion framed in this way would also be difficult in a Scottish context too.

in a climate of mutual respect.¹³³ Although proposed and advanced in often the most nationalistic terms¹³⁴, the Human Rights Act 1998 does at least retain a principled focus on *human beings*, and it has been widely accepted in the nations and the regions of the UK in those terms. That is a constitutional achievement of value and significance.

British-Irish governmental relations are worth noting in this tale of woe. It is generally accepted that effective intergovernmental co-operation was vital to securing peace in Northern Ireland. The Irish Government retains an established role in these discussions and its views must be taken into account. The UK and Irish Governments are co-guarantors of the Agreement, and this fact has more than mere symbolic significance. The perception that the current UK Government is continually questioning the fundamentals of the peace process does risk derailing the progress that has been made in securing better relationships across these islands, and it is apparent that the Irish Government has been monitoring developments closely.¹³⁵ It is notable that Ireland has taken a considerable interest not only in Brexit but in the British discussions over the Human Rights Act.¹³⁶ There is little to suggest that this level of concern will diminish, particularly as attention turns to possible regression on matters of rights and equality as a result of Brexit.

Uneasy Constitutional Moments

Taken together this combines to create an uneasy moment for anyone troubled about the constitutional future of the UK. The scale of current constitutional confrontation is notable and could ultimately fracture the ‘union state’ beyond repair.¹³⁷ Political preferences will dictate whether this is regarded as welcome or unwelcome, but it does seem to be a high price for what looks like a series of ill-judged constitutional interventions. Is it therefore time to stop talking about a ‘British Bill of Rights’ and, in line with scholarly and other assessments, embrace the more pluralist UK that is emerging? If this is the case should this lead to an acceptance that nations and regions may chart their own human rights future or benefit from higher levels of

¹³³ This is confirmed in the UK Government’s position paper on Brexit and Northern Ireland, HM Government, ‘Northern Ireland and Ireland Position Paper’ 16 August 2017 <www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper> accessed 26 September 2017.

¹³⁴ For comment on this see Colin Harvey, ‘Taking the Next Step? Achieving another Bill of Rights’ [2011] *European Human Rights Law Review* 24.

¹³⁵ Speech by Minister Flanagan to the Seanad on the effect of the repeal of the UK Human Rights Act on the Good Friday Agreement, 14 May 2015 <www.dfa.ie/news-and-media/speeches/speeches-archive/2015/may/minister-flanagan-addresses-the-seanad/> accessed 26 September 2017: ‘On the broad question of human rights and the Good Friday Agreement, the views of the Government are clear and unchanged. The protection of human rights in Northern Ireland law, predicated on the European Convention of Human Rights, is one of the key principles underpinning the Agreement. As a guarantor of the Good Friday Agreement, the Government takes very seriously its responsibility to safeguard its institutions and principles. Protecting the human rights aspects of the Good Friday Agreement is not only a shared responsibility between the two Governments in terms of the welfare of the people of Northern Ireland, but is also an obligation on them as parties to the international treaty, lodged with the UN, in which the Agreement was enshrined. The fundamental role of human rights in guaranteeing peace and stability in Northern Ireland cannot be taken for granted and must be fully respected.’

¹³⁶ ‘Post-Brexit repeal of Human Rights Act in North opposed by State’ <www.irishtimes.com/news/world/uk/post-brexit-repeal-of-human-rights-act-in-north-opposed-by-state-1.2717402> accessed 26 September 2017.

¹³⁷ House of Lords, Constitution Committee, *The Union and Devolution*, House of Lords, 2015-16, HL 149; Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom – Report of an Independent Commission* (British Institute of International and Comparative Law, 2015).

protection (the special constitutional status of Northern Ireland once again)? How would any UK-wide process operate given the current configuration of the UK? There may be parts of the UK where holding onto the Human Rights Act 1998 or letting go of it might be all that is desired but there is reason to believe that this is insufficient for Northern Ireland. All the talk of a British Bill of Rights or of a new UK-wide measure increasingly seems like an extended exercise in constitutional avoidance. There is little evidence, from recent experience, that there is the capacity or willingness to take the steps required to re-think human rights for this more pluralistic and complex constitutional environment.

Conclusion

The iterations of Conservative government since 2010 have been remarkably unsuccessful in bringing about at least one of their principal constitutional objectives: repeal of the Human Rights Act. It is an extended story of political promises not delivered. The hostility to the legislation has provoked a host of defensive reactions (even as the courts continue their steady absorption of Convention rights into the British constitutional tradition). One odd side-effect is that many exaggerate the impact of the Act, and thus seal off open discussion about its limitations and silences. In practice human rights law has not prevented a formidably repressive policy agenda, and the legal framework still undervalues the significance of, for example, social and economic rights. This is one tragic outcome of the elongated discussion of a British Bill of Rights; a debate that seems more interested in further restriction than in contemplating significant progress on rights implementation.

In Northern Ireland, with its distinctive rights culture, things have been different. The Bill of Rights process that flowed from the Belfast/Good Friday Agreement took the indivisibility and interdependence of all human rights seriously. The proposals from the Human Rights Commission speak to the notion, for example, that social and economic rights should not be relegated continually to second-class status. The document is an example of what a modern Bill of Rights might resemble. The constitutional arrangements in Northern Ireland are the result of many years of careful negotiation and compromise. It remains a region within the UK (the United Kingdom of Great Britain *and Northern Ireland*) with distinctive power-sharing structures that reflect relationships across these islands (perhaps still best captured in the three-stranded approach in the Belfast/Good Friday Agreement 1998). Human rights protections are central, and the European Convention is directly referred to in the Agreement; Convention rights (in the form of the Human Rights Act 1998 and the Northern Ireland Act 1998) influence law, policy and practice in essential ways. Use is still made of the Strasbourg court, and its jurisprudence shapes the debates on dealing with legacy issues, and will inform any new mechanisms established. Even though the expected Northern Irish Bill of Rights never arrived, the highly participative process helped to mould the shape of the dynamic regional human rights culture. Northern Ireland benefits from vibrant civil society networks that are attentive to the global framework of human rights norms and institutions.

This article highlights why the UK Government's proposals have generated high levels of concern in Northern Ireland and elsewhere. Questions must be raised about the wisdom of proceeding with these plans, and whether the constitutional damage is really worth it. Initiating a process to repeal the Human Rights Act will provoke further division in Northern Ireland, and the UK in general, at a time when relationships will need to be repaired. It is not the way

forward. However, the Northern Ireland experience also shows that it is possible to imagine a Bill of Right process that is both respectful of particular circumstances and ambitious for the future. Accepting that such a constitutional measure is desirable might be one small part of recognising a more pluralist UK.