Taking the politics out of human rights in conflict resolution: Northern Ireland and beyond

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Introduction

Although supporters of human rights are sometimes reluctant to admit it, the very concept of human rights is a contested one. People reasonably differ as to what qualifies as a human right and as to why that is the case. Consensus on these issues is reached within different societies, or at the international level, only through processes of political deliberation and negotiation. In recent years all sorts of claims have been wrapped up in human rights language in an attempt to make them more acceptable to voters and to candidates who seek those votes when standing for political office. Within large-scale conflict situations, such as have occurred in Northern Ireland, South Africa, the Balkans and Turkey, it is particularly tempting for different political factions to exploit human rights language in order to boost their own political claims. The challenge for human rights academics and theorists is to try to prevent the concept of human rights from being unduly distorted as a result of inappropriate politicisation of the traditional vocabulary used in this context.

Of course, there are many theorists who already hold that the current orthodoxy regarding human rights – as represented by the nine 'core' human rights treaties adopted by the United Nations – is already politically biased. Marxists view those treaties as propping up capitalism, feminists as underpinning patriarchy, and environmentalists as prioritising the needs of humans over the sustainability of the planet. But even within the limits of the current orthodoxy there are substantial differences as exactly how certain human rights should be protected. China, for example, even though it now engages enthusiastically in international trade, still denies its residents the rights to free speech, unrestricted access to the internet or fair and free elections. Likewise, countries which designate themselves as Islamic have a very different position from that adopted in Western Europe as regards the rights of women and of people who are gay. Time and again national governments of all persuasions ratify human rights treaties only after depositing reservations or declarations qualifying their acceptance of some of the terms of those treaties.[1] Fourteen states have still not signed, let alone ratified, the earliest

global treaty on human rights – the UN Convention on the Elimination of All Forms of Racial Discrimination (1966).

In this short article I will suggest how human rights activism can thrive without at the same time being over-politicised.

Human rights as a political construct

Many people become supporters of human rights without giving much thought as to what sorts of claims deserve to be given that label. Those who were first attracted to the area, as I was, by the work of Amnesty International will know that that organisation was founded in 1961 in order to address the plight of 'prisoners of conscience', people who were deprived of their liberty simply because of what they believed in, whether their beliefs were religious, philosophical or political. It was only after four decades of campaigning that Amnesty International decided to expand its mandate to allow it to work on the protection of 'all of the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments'.[2]

Today, generally speaking, it is the United Nations which determines what is a human right. This is because the UN is the nearest thing we have to a world government and human rights, by definition, are rights which every human being should be entitled to regardless of what part of the world they live in. But groups of countries around the world, especially in Europe and the Americas, have chosen to develop their own regional approach to human rights, thereby leading to some divergence between their standards and the UN's standards.[3] They have added rights to those guaranteed at the UN level and created more effective mechanisms for ensuring that victims of abuses of human rights can have their rights vindicated in a regional Court of Human Rights, something which does not yet exist on the global stage, although a campaign to create a World Court has been prominent for at least 10 years.[4] In a sense, therefore, there is already a significant degree of relativity in what is meant to be a uniform and universal set of human rights protections.

These differences have arisen as a result of political manoeuvring. Even at the time when the Universal Declaration was agreed only 48 of the then 58 member-states of the UN approved it. Eight states abstained and two did not take part in the vote at all. Of the eight which abstained six were run by communist governments,[5] one was an Islamic state (Saudi Arabia) and one was a state which explicitly supported racial dominance (South Africa). Attempts to turn the non-binding Declaration into a binding treaty took 18 years and was eventually possible only because the UN agreed to convert it into not one treaty

but two – one on civil and political rights and another on economic, social and cultural rights. 'First World' countries were eager to ratify the former, while 'Second World' countries were keener to ratify the latter.[6]

Today the Cold War era may be over, but many other differences continue to exist between nations. In addition, the power of individuals has increased dramatically, especially when it is exercised collectively through social media. Hence there has been an exponential growth in lobbying around 'new' human rights claims. This is perhaps best illustrated by the way in which the claim that people who are gay have the human right to marry has gained phenomenal support. At the time of writing 25 nations allow gay couples to marry, even though the European Court of Human Rights has not yet held that there is a right to same-sex marriage under the ECHR and no UN treaty-monitoring body has asserted that there is such a right under UN standards.[7] 'Populism' – in the sense of pressure to meet the concerns of ordinary people – is thus another form of political manipulation and while it can often have negative consequences it can at times be beneficial as regards the protection of human rights.

Human rights and conflict resolution

Given the political nature of human rights it is to be expected that when serious political conflicts arise, either within or between states, the various sides to the conflict will be inclined to mould the concept of human rights so as to make it fit with their political ideology. The scope for doing so is enhanced by the fact that virtually every human right so far recognized at the international level is not considered to be an absolute right – only the rights not to be tortured, not to be subjected to slavery and the right to freedom of thought are rights which no state is ever permitted to violate whatever the alleged justification. Every other right *can* be qualified, the commonest grounds for qualification being the protection of morality, public order or national security, the maintenance of health or welfare and, the catch-all limitation, 'the protection of the rights and freedoms of others'.

If we consider some of the most intractable conflicts of recent decades we can see how the language of human rights has been invoked to support suggested solutions to them. This is to be expected – and applauded – in situations where the very reason for the conflict is the denial of human rights to categories of people living in the country in question. The South African conflict arose out of the abhorrent treatment of black people, who in several respects were treated as second class citizens in their own country, with limited or no rights to vote, no right to seek a remedy for discrimination and no right to

claim social and economic rights. In Northern Ireland, likewise, the conflict developed out of repressive measures taken by successive unionist governments which resulted in people from the 'nationalist' community, who were mainly Catholics and supporters of the re-unification of Ireland, being deprived of equality of rights with their Protestant neighbours. In Turkey a major conflict has been raging for decades over the so-called Kurdish question, a terrible euphemism for the widespread denial of rights to people who would prefer to celebrate a Kurdish identity rather than a Turkish one. In the conflicts which ensued in the 1990s after the fragmentation of the former Yugoslavia the common factor energising the combatants was the refusal of majority populations to accept the civil, political and cultural rights of minority populations in the same country.

The peace settlements in South Africa and Northern Ireland, epitomised by the former's Constitution of 1996 and the latter's Belfast (Good Friday) Agreement of 1998, were firmly founded on ensuring that in the future the human rights of everyone in those countries would be equally protected. The Dayton Agreement of 1995 helped to put an end to the terrible conflict in Bosnia-Herzegovina, one of bloodiest conflicts in the Balkans during the 1990s. It focused on restructuring the country into different entities but said little about human rights as such. Bosnia and Herzegovina formally ratified the UN's Covenant on Civil and Political Rights in 1993, just a year after declaring its independence, but it did not ratify the European Convention on Human Rights until 2002. The conflict in Turkey, alas, is far from resolved and even though some concessions have been made to Kurdish demands relating to broadcasting rights there are still severe restrictions on the use of the Kurdish language more generally. In addition, the right to free speech is more limited in Turkey that in any other European state.[8]

One of the difficulties facing individuals and groups who find themselves trapped in states where their very identity feels threatened is that the international human rights 'pantheon' does not yet include some of the rights which these individuals and groups are campaigning for. The corpus of human rights includes the right to free and fair elections, but it says nothing about how governments should be formed, whether those governments need to share power if they are governing deeply divided societies and what protections should be in place to ensure that majoritarian rule does not make members of minorities feel disrespected or, worse, disadvantaged. Even when the European Court of Human Rights condemns certain political agreements as undermining equality rights, the judgment can easily be ignored by the government in question.[9]

'Language rights' are a particularly under-developed sub-set of human rights, as speakers of Irish in Northern Ireland or of Kurdish in Turkey know to their costs. The problem in Northern Ireland is all the greater because there is no-one there who speaks

only Irish – all such speakers can speak English as well – while there are many immigrants whose need for help in making themselves understood is much greater than that of Irish speakers.

International human rights law is also inadequate in the context of conflict resolution in in two other important respects. Firstly, it says little about the rights of 'ex-combatants', people who were prepared to use force in furtherance of their political goals but who have now given up that philosophy and are attempting to contribute to the peace process in their society. To what extent should they still be held accountable for their earlier violent actions and should they be allowed equal access to all the rights which other people in the society enjoy if they are still not prepared to accept that their previous use of violence was wrong, especially if it resulted in other people suffering their own grievous human rights abuses? Article 17 of the European Convention provides that no group or person has the right 'to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein', so does that mean that states are violating the Convention if they turned a blind eye to such activities or acts? When, if at all, can a state grant an amnesty to politically-motivated offenders without at the same time denying the right of access to justice to those who are victims of those offenders?

Secondly, international human rights law is silent about a number of other issues that often need to be addressed in a post-conflict situation. Is there a duty on the state to ensure that illegally held weapons are somehow decommissioned? Should individuals who are in the middle of a long prison sentence for crimes they have committed have the right to early release from prison as an element of the peace-making process? What right inheres in ordinary residents of the country, people who took no side in the conflict and abhorred the abuses committed on all sides, to have active measures taken to promote reconciliation in the country and to ensure that the abuses which occurred will not be repeated and there will be no regression on steps taken to uphold human rights and equality? Maybe the next generation of rights will address these sorts of question but at the moment they remain purely political claims, not legal or human rights ones.

Human rights and dealing with the past

Ensuring that human rights are protected in the future is difficult enough, but deciding how human rights should be respected when dealing with the past is even more problematic. This is currently a major stumbling block in the peace process in Northern Ireland. That process took a major leap forward in 1998 when most of the political parties

in Northern Ireland reached what is called the Belfast or Good Friday Agreement. This provided for a power-sharing government, the early release of people serving prison sentences for conflict-related offences and the de-commissioning of weapons held by illegal paramilitary groups. Following the Agreement there was a reduction in the level of politically-motivated violence in Northern Ireland, but some 150 people have nevertheless been killed in such violence during the intervening 20 years. The Agreement postponed the reform of policing and of the criminal justice system more generally, but subsequent commissions ensured that those reforms were mostly in place by the end of 2001.[10]

What the Agreement was largely silent about was how the residue of the past should be dealt with. Apart from saying that anyone subsequently convicted of a conflict-related offence committed before the Belfast Agreement would have to serve a maximum of just two years in prison, even if the offence in question was murder, there was no amnesty in the sense that no promise was made to exempt individuals from being prosecuted for such crimes. There was only an amnesty in the sense that long prison sentences would not have to be served. The Agreement was strongly endorsed by referenda in both Northern Ireland and the Republic of Ireland, although many people held their nose while doing so because the thought of thugs and gangsters being allowed out of prison so soon after committing very serious offences was repugnant to them. It was the price that many people were prepared to pay in order to secure peace and reconciliation. They were not asked to vote on any mechanism for dealing with the past, such as a truth commission, a statute of limitations (allowing prosecutions to take place only up to a certain number of years after the offence was committed) or a pension for all victims, whether the bereaved or the living injured.

It was only in 2014, in the Stormont House Agreement,[11] that the political parties (including the largest unionist party, the Democratic Unionist Party (DUP), which had been opposed to the Belfast Agreement) reached consensus on how to deal more broadly with the past. Unfortunately, that Stormont House Agreement has not yet been implemented. There was no political momentum for it in the immediate aftermath of the negotiations and since January 2017 the biggest nationalist political party, Sinn Féin, has been unwilling to serve in a power-sharing government with the DUP unless the latter agrees to certain other reforms such a stand-alone Act protecting the rights of Irish speakers. By the end of August 2018 Northern Ireland was still without a government and there was no immediate prospect of one being formed.

Amongst the proposals contained in the Stormont House Agreement are the creation of a new Historical Investigations Unit to take responsibility for investigating all conflict-

related deaths not yet 'resolved' (which number more than 1,400). This would remove that responsibility from the Police Service of Northern Ireland, which has found it very difficult to police the present effectively while spending so much time and effort investigating crimes committed up to 50 years ago. The Agreement also provides for an Independent Commission on Information Retrieval, which would allow anyone who has information about a conflict-related death to make it available to families of victims without being worried that the information could be used against the informant in subsequent legal proceedings. Again, no amnesty is promised, so an informant could still be prosecuted if evidence implicating him or her were to come to light in other ways. The Stormont House Agreement also envisages an Oral History Archive, where the recollections of anyone who lived through the conflict could be recorded for posterity.

Whether these ideas will be realised, and whether they will work or not, are moot points. What I want to stress here is that on such a vital issue as how to deal with the past international human rights law does not have much to say. It does require effective investigations of killings and of incidents of ill-treatment, but as yet it does not require prosecutions or mandate particular punishments. It seems rather intolerant of laws prohibiting people from being prosecuted for serious offences, though much depends on the exact wording of that law.[12] There is, as yet, no generally recognized 'right to truth' and to the extent that it does exist there is little consensus as to how it can be enforced and what remedies should exist if it is violated. In 2006 the Office of the UN High Commissioner for Human Rights published a study which concluded that there was an inalienable and autonomous right to the truth about gross human rights violations and serious violations of human rights law; it found that the right is closely linked with other rights, that it has both an individual and a societal dimension and that it should be considered as non-derogable and not subject to limitations.[13] Unfortunately no definition is provided of what qualifies as a gross or serious human rights violation in this context. Would a single sectarian murder be enough?

Bills of Rights as sites of conflict

In many peace processes a suggestion is made that a Bill of Rights should be put in place to help reassure all people of the area that in future the rights of everyone will be guaranteed equally. There can be little doubt that the Bill of Rights contained in South Africa's Constitution of 1996 has been at the root of many positive developments in that nation in later years. We must remember, however, that much of the credit for those developments should go to South Africa's Constitutional Court rather than to the text of the Bill because in many cases it is the interpretation placed on the Bill that has ensured

the positive developments. The Constitution does not explicitly outlaw the death penalty, require the universal provision of anti-retroviral drugs for those who are HIV positive, or confer the right to marry on same-sex couples, but the Court has enthusiastically read all of those consequences into the text. On the other hand, the Court has arguably been less progressive when it comes to protecting the right to water,[14] and although it has sought to protect the right to housing its efforts in that regard have been thwarted by recalcitrant governments.[15]

In the same year as the Belfast Agreement Northern Ireland obtained a Bill of Rights of sorts – the Human Rights Act 1998. This allows all domestic courts in the UK to uphold most of the rights set out in the European Convention on Human Rights and its impact on UK law has been almost as fundamental as that of the Bill of Rights on South African law.[16] Commendably the Belfast Agreement envisaged (but did not promise) a Northern Ireland Bill of Rights that would supplement the rights protected in the Human Rights Act, provided they related to the particular circumstances of Northern Ireland. To date, unfortunately, the UK government (and unionist parties in Northern Ireland) have not been persuaded that such supplementary rights deserve to be enshrined in law, despite the best campaigning efforts of the Northern Ireland Human Rights Commission and many others during the past two decades. The issue has become a highly politicised one, as Omar Grech has ably pointed out in his excellent analysis of the role of human rights before, during and after the Northern Ireland conflict.[17]

As a result, attention has regrettably been diverted away from the particular rights that deserve to be protected in Northern Ireland and has focused instead on the nature of the legal mechanism that should be used to provide such protection. Things have got to the stage where the very phrase 'Bill of Rights' is provocative, associated as it is in some minds with overly-aggressive demands for a document that would eclipse not just South Africa's Bill of Rights but all other national Bills the world over. The chance has been missed to produce a relatively short and snappy supplement to the Human Rights Act, encapsulating Northern Ireland-specific rights such as the right to be free from sectarianism, the right of children (whether born into Protestant or Catholic families) to have an integrated education, the right of persons suspected of terrorist offences to have a trial by jury, the right of victims of the conflict to be provided with an account of what precisely happened to cause their victimhood, and the right of women and gays to the same standard of human rights protection as they enjoy both in the rest of the UK and in the Republic of Ireland.

To de-politicise the question of whether there should be a Bill of Rights for Northern Ireland the proposed content of any such Bill should be broken down into small chunks

and separate campaigns should be waged to get as many as possible of those chunks transposed into law. In addition, human rights activists should take advantage of what was allegedly agreed on a Bill of Rights in the inter-party talks which for other reasons failed in February 2018: a leaked document suggests that the two main parties were content for an ad hoc Assembly Committee to be established 'to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement'.[18] This is code for a narrower, more NI-specific, Bill of Rights than the Northern Ireland Human Rights Commission and others have been campaigning for, but such a Bill would be better than no Bill at all, especially as efforts can be made to enhance the Bill once it is in place.

The limits of human rights

Those of us who are supporters of ensuring that human rights should be protected by law can easily be deluded into thinking, first, that law is the only way in which human rights can be effectively protected and, second, that the best way of getting the law changed on any issue is to label it a human rights issue. We tend to forget that, while the concept of human rights is immensely powerful in our eyes, there are often other interests at play which mean that human rights cannot be prioritised quite as much as we might have hoped. Senior judges are often very aware of these competing calls on their attention, the more so if they are not sitting in a court which processes only human rights claims. Two decisions of South Africa's Constitutional Court illustrate this point quite markedly. In *Soobramoney v Minister of Health, KwaZulu-Natal* the Court made it clear that the constitutional right to have access to health care services did not mean that the clamant in that case who was in need of kidney dialysis was entitled to receive it: unfortunately there was not enough money available to provide it, given the competing needs of so many other patients.[19] And in *Azanian Peoples Organization v President of the Republic of South Africa* the Court rejected a claim that the family of the murdered black consciousness leader Steve Biko were entitled to have his killer tried in a court of law because, an amnesty having been granted to the killer by the Truth and Reconciliation Commission, the country's needs for reconciliation had to take a higher priority than the family's right to see justice done.[20]

In addition, many rights can legitimately be limited if it is reasonable to do so, and reasonable people can reasonably disagree over when such a denial is indeed reasonable. Article 6 of the ECHR confers on both civil litigants and criminal defendants the right to a fair and public hearing 'within a reasonable time'. Under Article 12 of the UN Convention Against Torture states have a duty to conduct a prompt and impartial

investigation 'wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction'. Article 7 of the UN Covenant on Economic, Social and Cultural Rights guarantees everyone 'reasonable limitation of working hours'. It would be wrong to assume that whatever a governing political party deems to be 'reasonable' in these contexts should be accepted as such, but so long as an independent court can be asked to check whether a limitation is reasonable there can be little to complain about as far as human rights are concerned. Judges can often use their skills to develop criteria of reasonableness which, grounded as they are in the rule of law, are subtly different from those adopted by the government.

Sadly, it has to be conceded as well that it is not politically feasible to insist that once a state has agreed to protect a human right at a certain level it cannot at some later time reduce that level of protection. National and economic disasters, not to mention wars and terrorism, can bring untold suffering in terms of lives and livelihoods. It is only to be expected, therefore, that UN, European and American human rights treaties all permit states to 'derogate' from their human rights obligations in times of grave emergencies.[21] One might wish it to be otherwise, but when really bad things happen in people's lives their first priority is not necessarily the full protection of all their human rights. An all-embracing principle of non-regression is just not feasible in human rights law.

Conclusion

David Kennedy provided a useful service when he pointed out in 2002 that sometimes the international human rights movement might, 'on balance, and acknowledging its enormous achievement, be more part of the problem in today's world than part of the solution'.[22] He rightly warned us that 'it is often tempting (for those within and without the movement) to set pragmatic concerns aside, to treat human rights as an object of devotion rather than calculation'.[23] Kennedy's article was a genuine attempt to inject a healthy dose of pragmatism into the veins of human rights activists, a treatment that is all the more essential whenever the protection of human rights is being considered in the context of conflict resolution. Likewise, if Bismarck was correct to proclaim that 'politics is the art of the possible, the attainable – the art of the next best', his adage should surely be extended to the drawing of lines around the protection of 'human rights', which is itself an aspect of politics. This is by no means a prompt to sacrifice human rights on the altar of compromise but rather an honest plea for an achievable approach to their effective realisation.

Notes

[1] E.g. when signing Protocol 1 to the ECHR the UK declared that it accepted the principle in Art 2 that it must respect the right of parents to ensure education and training for their children in conformity with their own religious and philosophical convictions, but 'only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'.

[2] Statute of Amnesty International, para 1. The change to the Statute was made at the organisation's International Council Meeting in 2001.

[3] Africa has a Charter on Human and People's Rights too, but it is still relatively under-developed.

[4] See Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7 *Human Rights LR* 251 and the draft Statute for such a court drafted by Nowak and Julia Kozma, available at https://www.eui.eu/Documents/DepartmentsCentres/AcademyofEuropeanLaw/CourseMaterialsHR/HR2009/Scheinin/ScheininClassReading2.pdf.

[5] Byelorussian SSR, Czechoslovakia, Poland, the Soviet Union, the Ukrainian SSR and Yugoslavia.

[6] See the history of ratifications of the Covenants on (1) Civil and Political Rights and (2) Economic, Social and Cultural Rights at https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx.

[7] But the Inter-American Court of Human Rights has said in an Advisory Opinion that states must extend the right to marry to same-sex couples: Opinion 24/17, judgment of 9 January 2018.

[8] See, eg, Y Akdeniz and K Altıparmak, *Turkey: Freedom of Expression in Jeopardy – Violations of the Rights of Authors, Publishers and Academics under the State of Emergency* (London, PEN, 2018), available online. In January 2018 Reporters Without Borders ranked Turkey 154th in their World Press Freedom Index.

[9] That has been the fate of the Grand Chamber's judgment in *Sejdić and Finzi v Bosnia and Herzegovina* App Nos 27996/06 and 34836/06, judgment of 22 December 2009. The judgment was heavily criticised in C McCrudden and B O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford UP, 2013).

[10] Policing reform was effected via the Police (Northern Ireland) Act 2000 and the Police (Northern Ireland Act 2003 while criminal justice reform was effected via the Justice (Northern Ireland) Act 2002 and the Justice (Northern Ireland) Act 2004.

[11] The Stormont House Agreement is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706293/Stormont_House_Agreement.pdf.

[12] In *Marguš v Croatia* (2016) 62 EHRR 17, judgment of 27 May 2014, the Grand Chamber of the European Court of Human Rights recognized the growing tendency in international law to reject the granting of amnesties in respect of grave breaches of human rights and in this case held that in prosecuting the applicant for war crimes against civilians Croatia was complying with Arts 2 and 3 of the ECHR and with the recommendations of various international bodies.

[13] UN Commission on Human Rights, *Study on the Right to Truth*, E/CN.4/2006/91, 8 February 2006.

[14] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

[15] *Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC).

[16] See P de Vos and W Freedman (eds), *South African Constitutional Law in Context* (2015), Chaps 9-16.

[17] O Grech, *Human Rights and the Northern Ireland Conflict* (Routledge, 2017), especially Chap 8.

[18] See the text of the leaked documents at http://eamonnmallie.com/2018/02/stormont-exclusive-draft-agreement-text-eamonn-mallie-brian-rowan/.

[19] 1998 (1) SA 765 (CC).

[20] 1996 (4) SA 672 (CC).

[21] See Art 4(1) of the UN Covenant on Civil and Political Rights, Art 15 of the ECHR and Art 27(1) of the American Convention on Human Rights.

[22] D Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 *Harv Hum Rts J* 101.

[23] Ibid, 102.