



The origins of ‘civil rights and religious liberties’ in the Belfast–Good Friday Agreement[†]

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ABSTRACT

This article traces the origins of the declaration of rights in the human rights and equality section of the 1998 Belfast–Good Friday Agreement, which secured a fragile peace in Northern Ireland. It sets out in detail for the first time the drafting history of the declaration, set against the complex negotiating history of the Agreement as a whole, describing the multiple actors involved in the evolution of the declaration and their motivations, including republican and loyalist paramilitary groups, feminists and civil rights organisations, Irish and British civil servants and political advisors, as well as the political parties. It thus provides a detailed account of the evolution of human rights thinking at a critical stage of the Northern Ireland peace process. The article argues that it is now more important than ever to understand this history. Although originally conceived as merely declaratory, this declaration has, since the European Union–United Kingdom (EU–UK) Withdrawal Agreement following Brexit, taken on a new lease of life due to the Ireland–Northern Ireland Protocol to the EU–UK Withdrawal Agreement, which accorded the declaration of rights a legal status in domestic and international law that it did not have previously. The article concludes with a reflection on the implications of the history recounted in this article for the future interpretation and application of the Protocol (now, the Windsor Framework), and for the study of the historiography of human rights more broadly, emphasising in particular the extent to which the declaration exemplifies a syncretic rather than an eclectic human rights instrument.

Keywords: Belfast–Good Friday Agreement; Northern Ireland peace process; human rights history; Windsor Framework; Ireland–Northern Ireland Protocol; Ulster Volunteer Force; Irish Republican Army; Combined Loyalist Military Command; Northern Ireland Women’s Coalition; Committee on the Administration of Justice; Downing Street Declaration.

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INTRODUCTION

There is a ringing affirmation of rights in the first paragraph of the human rights and equality chapter of the 1998 Belfast–Good Friday Agreement (B-GFA, the Agreement).¹ It reads:

The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.

This article seeks to identify the origins of this declaration of rights, why it was included in the 1998 Agreement, and why it is more important than ever to understand its history. The history of this declaration is but a fragment (albeit an important fragment) of the history of the development of human rights thinking in Northern Ireland, and an even smaller piece in the global history of human rights. But one of the critically important aspects of this emerging global history is its expansion beyond the history of international human rights and the rediscovery of national developments that taken together with the international dimensions present a more complete narrative, and one that challenges theories of the genealogy of human rights based on

[* *cont*] Martin O'Brien, Rory Montgomery, Gary Mason, Aaron Edwards, Brian Rowan, and Richard English. I am grateful to them all. None of them should be assumed to agree with or endorse what follows. I am particularly grateful to the members of the Quill Project at Pembroke College, Oxford (Ruth Murray and Annabel Harris) who are in the process of digitising materials relating to the negotiation of the B-GFA, for help in identifying relevant sources and helping generally to construct a timeline for the negotiations. Where sources are available on the Quill website, they are identified as follows: 'digitised by Quill at [link]'. Over the next few years, anyone doing serious work on the evolution of the B-GFA will find their work of vital importance.

1 An Agreement Reached at the Multi-Party Talks in Northern Ireland, Cm 3883 (1998), sometimes referred to as the Belfast Agreement or the Good Friday Agreement (B-GFA). The Agreement is digitised by Quill at: [Resource Item 16631](#). The human rights and equality chapter is entitled 'Rights, Safeguards and Equality of Opportunity'. The declaration is paragraph 1 of that chapter.

international and regional developments alone.² In a modest way, this article seeks to contribute to this historiography by providing a detailed account of the development of human rights thinking at a critical stage of the Northern Ireland peace process.

The article seeks to achieve these objectives in five steps. First, the declaration will be set in the context of the chapter on human rights and equality in the Agreement; we shall see that it was one among several other, better known, commitments. Second, we shall see that this declaration has, since the European Union–United Kingdom (EU–UK) Withdrawal Agreement following Brexit, taken on an important role in the Ireland–Northern Ireland Protocol (the Protocol) to that agreement relating to Northern Ireland,³ giving the declaration a legal status that it did not have previously. Having set the scene, we shall then begin our exploration of the historical origins of the declaration, beginning in the third part of the article with an overview of the complex negotiating history of the B-GFA as a necessary prelude to the next section (the fourth part), which sets out in detail the drafting history of the declaration itself. The article concludes with a brief reflection on the implications of the history recounted in this article for the future interpretation and application of the Protocol, and for the study of the global history of human rights.

THE HUMAN RIGHTS AND EQUALITY CHAPTER OF THE B-GFA

The human rights and equality chapter of the Agreement committed the Irish and United Kingdom (UK) Governments together with eight political parties in Northern Ireland to a diverse range of obligations: to protect certain rights in the future, in addition to this declaration of rights; to ensure that the European Convention on Human Rights (ECHR)⁴ would be incorporated into the domestic law of Northern Ireland, thereby providing domestic remedies for breaches of the ECHR;⁵ to implement agreed standards for new equality legislation, including a new public sector equality duty to replace the previous

2 Christopher McCrudden, 'Where did "human dignity" come from? Drafting the Preamble to the Irish Constitution' (2020) 60 *American Journal of Legal History* 485.

3 The Protocol agreed in 2019 was amended as part of the Windsor Framework agreement in 2023. An unofficial, consolidated version of the text of the amended Protocol is available: [The Protocol on Ireland/Northern Ireland as amended through the Windsor Framework \(2023\) – Consolidated Text](#).

4 Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

5 B-GFA, 'Rights, Safeguards and Equality of Opportunity, Human Rights', para 2.

Policy Appraisal and Fair Treatment (PAFT) guidelines;⁶ to commit to new protections for the Irish language and Ulster Scots; to acknowledge the rights of victims of the conflict; to provide for new human rights institutions, notably the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission (NIHRC);⁷ and to require that the NIHRC report on the scope for establishing a Northern Ireland-specific Bill of Rights additional to the ECHR.⁸ Other sections of the Agreement ensured that human rights would be embedded within a reformed police service, pending the review and proposals of an independent commission,⁹ and a review of the administration of justice was agreed.¹⁰

As well as acting as guarantor of the Agreement in general, the Irish Government agreed to commit to several human rights obligations: to ensure an equivalent level of human rights protection in Ireland to that in Northern Ireland; and to provide for a joint committee of the Northern Ireland and Irish Human Rights Commissions to consider issues of mutual interest, including a possible charter of human rights for the island of Ireland as a whole.¹¹

The text of the B-GFA did not itself directly create binding legal obligations in the domestic law of Northern Ireland or in Ireland; the legal obligations it gave rise to were confined to the sphere of international law, but no international legal methods of dispute settlement or enforcement were created. For the most part, the international legal obligations were therefore left legally unenforceable, perhaps trusting that these obligations would be operated in good faith by the two governments. For it to have been legally enforceable in UK domestic law, Parliament would have to incorporate it by way of legislation. Thus, the approach taken following the conclusion of the Agreement was for the bulk of the UK Government's commitments to be implemented by way of the Northern Ireland Act 1998 (NIA) (a statute of the UK Parliament), supplemented by more specific pieces of legislation such as the Fair Employment and Treatment (Northern Ireland) Order 1998. Other commitments were partly implemented in legislation applying to the entire UK, especially the Human Rights Act 1998 which incorporated the ECHR into domestic law. This meant

6 Ibid para 3. PAFT (set out in Circular 5/93) placed a positive obligation on public bodies to actively promote 'fair treatment' in policymaking, implementation and service-delivery. PAFT applied to a broad range of grounds: religion, politics, gender, disability, marital status, age, ethnicity and sexual orientation.

7 Ibid paras 5 and 6.

8 Ibid para. 4.

9 B-GFA, 'Policing and Justice', para 2.

10 Ibid para 5.

11 B-GFA, 'Rights, Safeguards and Equality of Opportunity, Human Rights', para 9.

that, in future, it would be these pieces of implementing legislation that would be the primary sources of legal rights and duties in UK law, and not the B-GFA itself. It also resulted in those elements of the Agreement that were not implemented through legislation remaining unenforceable. Following the Agreement, the declaration of rights that is the focus of this article was not incorporated into the NIA or any other domestic legislation.

HUMAN RIGHTS AND EQUALITY IN THE IRELAND–NORTHERN IRELAND PROTOCOL/ WINDSOR FRAMEWORK

European Union (EU) law provided an important, and gradually expanding, underpinning of some B-GFA human rights and equality commitments.¹² This underpinning was threatened by the UK's decision to leave the EU, and that led to the inclusion of article 2 in the Protocol.¹³ This provision is distinct from much of the rest of the Protocol because it imposes obligations of result rather than of conduct. The declared goal is to 'ensure that no diminution of rights, safeguards and equality of opportunity as set out' in that part of the B-GFA entitled 'Rights, Safeguards and Equality of Opportunity', will result from the UK's exit from the EU. While the *substance* of the rights in existence before withdrawal and underpinned by EU law must be retained in Northern Ireland, there is no obligation to retain *specific EU measures* themselves, but article 2 obliges the UK to achieve the functionally equivalent result: it has some discretion (within limits) over how to achieve that result.

Because of the explicit reference in the Protocol, the declaration of rights in paragraph 1 of the part of the human rights and equality chapter of the B-GFA (paragraph 1) now has a legal significance in both international law and domestic Northern Ireland law that it never had before. In the UK Government's Explainer Document on article 2, setting out the Government's understanding of the scope of rights protected under article 2,¹⁴ the bulk of the rights specified are those listed in this paragraph 1, supplemented by references to the 'rights of victims' and 'linguistic diversity' derived from later paragraphs of the

12 For example, the extensive set of EU anti-discrimination Directives, now listed in annex 1 of the Protocol.

13 Christopher McCrudden, 'Law and a crisis of trust: human rights and the negotiation of article 2 of the Ireland-Northern Ireland Protocol' (2023) 70 *Irish Jurist* 156.

14 UK Government, *Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity* (7 August 2020) para 9.

B-GFA's human rights and equality chapter.¹⁵ The relevant rights are also specified as including 'but may not be limited to' the listed rights in the paragraph 1 declaration. Although the reasons for this caveat are not made explicit in the Explainer Document, the first sentence of the first paragraph refers to respect for 'civil rights and religious liberties', which may significantly expand the scope of article 2 protections.

We have seen that before the Protocol, these provisions were largely aspirational rather than legally binding, even in international law. They had seldom been referred to in a legal context, let alone subjected to rigorous legal analysis, because the B-GFA was considered an unincorporated treaty in UK law.¹⁶ The inclusion of article 2 in the Protocol, and the way it has been given direct effect in UK law,¹⁷ has meant that the meaning and scope of the 'rights, safeguards and equality of opportunity' provisions in that part of the B-GFA, including the first paragraph quoted above, have been subject to considerably greater and more intense legal scrutiny than ever before, including in the Northern Ireland Court of Appeal.¹⁸ The aim of this article is not to trace this case law, not least because, at the time of writing (May 2024) so many of the relevant cases are currently still in litigation. Rather, this article attempts to look back at the origins of paragraph 1; it is an historical, rather than a legal, analysis.

Nevertheless, an historical analysis has potential legal relevance. The B-GFA is a multi-party agreement among political parties in Northern Ireland brokered by the Irish and UK Governments (the multi-party agreement), and an agreement between the two sovereign governments themselves (the British–Irish Agreement, BIA). For lawyers, the starting point for the interpretation of a provision in a legally binding international agreement is the Vienna Convention on the Law of Treaties (VCLT). Two technical issues arise in applying the VCLT to paragraph 1. The first is that, as Katie Johnson has pointed out, although the British–Irish Agreement 'was concluded after the Vienna Convention on the Law of Treaties entered into force generally and for the UK, Ireland only acceded to the VCLT on

15 Found respectively in B-GFA, 'Rights, Safeguards and Equality of Opportunity, Human Rights', para 12, and B-GFA, 'Rights, Safeguards and Equality of Opportunity, Economic, Social and Cultural Issues', para 3.

16 *Re Ni Chuinneagain* [2022] NICA 56, para 68.

17 Especially through the European Union (Withdrawal) Act 2018, s 7A.

18 *Re Chuinneagain's Application for Judicial Review* [2021] NIQB 79 (Scofield J); *In re SPUC Pro-Life Ltd* (Abortion) [2022] NIQB 9 (Colton J), [2023] NICA 35 (Keegan LCJ, Treacy LJ and Humphreys J); *Angesom* [2023] NIKB 102 (Colton J); *Dillon, et al* [2024] NIKB 11 (Colton J); *In re NIHRC and JR295* [2024] NIKB 35 (Illegal Migration Act 2023) (Humphreys J). Full disclosure: I represented the Equality Commission for Northern Ireland as intervenor in *SPUC* and *Dillon*.

7 August 2006. The BIA therefore does not fall within the scope of the VCLT.¹⁹ However, it is now accepted that the VCLT's provisions on interpretation codify the customary international law of treaties in that respect and therefore the VCLT's provisions are the appropriate touchstone for interpretation even where customary international law applies rather than the VCLT.²⁰ Second, what was concluded in April 1998 was a 'hybrid' agreement (adopting the terminology of Christine Bell),²¹ in the sense that there were two agreements, the multi-party agreement and the BIA, which specifically refers to the multi-party agreement. Thus far, the court that has considered the issue in detail has concluded that the VCLT's principles of treaty interpretation apply to the multi-party agreement and not only the BIA.²²

Article 31(1) of the VCLT sets out the general rule of interpretation of international agreements. It provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 32(2) sets out what 'the context' comprises, including:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Article 32(3) provides that 'together with the context', 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account.

Article 32 further provides that:

[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

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- 19 Katie Johnson, 'The Good Friday Agreement and International Treaty Law' *EJIL: Talk!* 10 April 2023.
 - 20 Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer-Verlag 2012) 523–525.
 - 21 Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) ch 9.
 - 22 In *Dillon, et al* [2024] NIKB 11, Colton J held that the VCLT applied to the B-GFA, at [533]. At the time of writing (May 2024), that issue was under appeal to the Northern Ireland Court of Appeal. Full disclosure: I represented the Equality Commission for Northern Ireland as intervenor. See further Steven R Ratner, 'International law rules on treaty interpretation' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press 2022) 80–91.

So, in addition to the textual analysis of paragraph 1, it is appropriate to ask: where did these specific rights in the B-GFA come from, and why are they there? In that context, history becomes a relevant source to aid legal interpretation. However, interpreting paragraph 1 through a history of its origins poses certain problems. Several of the local parties had significant links (directly or indirectly) to paramilitary groups who contributed to the policy positions taken by these parties. One consequence is that the secrecy in which parts of the negotiations were conducted still lingers, and that makes documenting how some provisions emerged a difficult and, sometimes, a fruitless task. Following the VCLT's requirements for treaty interpretation is therefore more difficult for this peace agreement than might be the case, for example, in the interpretation of a trade agreement.

Nevertheless, significant material is now in the public domain for a provisional analysis to be possible. Interest in the drafting history of the B-GFA has grown exponentially over the last ten years, with a plethora of publications, ranging from personal histories and autobiographies, extended interviews with the key actors, and (increasingly) examination of recently released key documents accessible in the National Archives at Kew, the Northern Ireland Public Record Office in Belfast, and the National Archives of Ireland in Dublin. In addition, the Library of Queen's University Belfast, in partnership with the Quill Project at the University of Oxford, has begun the process of archiving the personal papers of key actors, including David Trimble, Lord Alderdice²³ and Monica McWilliams.²⁴ The archives of the Committee on the Administration of Justice (CAJ), a civil rights organisation that influenced the latter stages of the negotiations, were made available, supplemented by several informal discussions with those who have relevant information about the process.

Combining the information available from these disparate sources has enabled me to trace the evolution of the list of rights addressed in this article, namely, those included in paragraph 1 of the human rights and equality chapter of the B-GFA. The remainder of this article is solely concerned with the evolution of this list. The other provisions of the human rights and equality chapter require a separate historical analysis, partly because they arise from quite different sources.²⁵

23 Digitised by Quill at [Resource Collections 297](#).

24 Digitised by Quill at [Resource Collections 295](#).

25 See Beatrix Campbell, *Agreement: The State, Conflict and Change in Northern Ireland* (Lawrence & Wishart 2008).

A BRIEF CHRONOLOGY OF THE NEGOTIATION OF THE B-GFA

In 1985, the Anglo-Irish (or Hillsborough) Agreement (AIA)²⁶ between the UK and Ireland significantly increased the input and advisory role of the Irish Government in Northern Ireland through an 'Intergovernmental Conference', made up of officials from the British and Irish Governments and headed by Ireland's Foreign Minister and the UK Secretary of State for Northern Ireland. The AIA confirmed that there would be no change in the constitutional position of Northern Ireland unless a majority of its electorate agreed to join Ireland, though it did not modify Ireland's rival constitutional claims to the whole island of Ireland.

In broad terms, two separate initiatives can be identified as having evolved between 1985 and 1992: an attempt to secure agreement on the establishment of a functioning and sustainable Northern Ireland Government through inter-party and inter-governmental negotiations (the talks process); and an attempt to secure an end to the use of violence for political ends (the peace process). The former had been unsuccessful, and the latter was mostly conducted in secret. Between 1986 and 1988 increasing attempts had been made to fuse the two initiatives, with the aim of bringing into the political dialogue the paramilitary groups (initially, the Irish Republican Army (IRA), an illegal paramilitary group committed to the use of force to achieve a united Ireland, and then subsequently the loyalist paramilitary groups, also illegal and seeking to prevent unification). The goal was 'to embrace all the constituencies with a role in the problem and therefore in its solution',²⁷ and to accomplish a comprehensive settlement. The two sovereign governments insisted, however, that ceasefires had to be declared by armed groups before the political parties with electoral mandates which were associated with these groups could be brought into negotiations.

From January 1988, the first public attempt at bringing the two initiatives together was underway. A brief public dialogue took place between the main nationalist party at that time, the Social Democratic and Labour Party (SDLP) and Sinn Féin (the party widely regarded as the political wing of the IRA), which broke off after a few months. Both were avowedly Irish nationalist in their aims and thus rivals for the nationalist vote. The significant difference between the two parties at that time was the close connection between Sinn Féin and support for political violence, in contrast with the SDLP, which rejected the use of

26 Digitised by Quill at [Resource Item 16629](#).

27 Graham Spencer (ed), *Inside Accounts*, volume 1 (Manchester University Press 2020) 132 (Seán Ó hUiginn).

violence. In 1988 a secret 'back-channel' was created in parallel between Fianna Fáil (with Fine Gael, one of the two principal political parties in Ireland, and the lead party in the Coalition Government at that time) and Sinn Féin, with two or three meetings held in Dundalk. In 1989, there were talks in Duisburg, West Germany, but that initiative was repudiated by political leaders, especially John Hume (leader of the SDLP). Later, the so-called Hume–Adams talks, named after Hume of the SDLP, and Gerry Adams, the leader of Sinn Féin, were initiated. The Hume–Adams talks were intended to explore whether there was an opportunity for broader peace negotiations, at a time when neither the Irish Government nor the UK Government were willing to be seen in public to be meeting the leadership of Sinn Féin, let alone negotiating with them.²⁸

Separately from the Hume–Adams initiative, attempts were underway by the UK Government to convene talks between the 'constitutional parties', namely, parties committed to exclusively peaceful and constitutional means and not connected to paramilitary activities. The talks process (though not called that at the time) began as a British initiative launched by Peter Brooke's Bangor speech in 1990, which envisaged dialogue between the two governments and the constitutional parties. Two of its key features were a comprehensive agenda and an inclusive cast list. Consistent with that was the hope on the British side (at least after Brooke's appointment as Secretary of State) that the process would eventually co-opt Sinn Féin if violence ended. (In this it must be contrasted with the earlier period culminating in the AIA 1985 which had at its heart the objective of marginalising Sinn Féin by demonstrating what constitutional nationalism could achieve.)

The Brooke initiative eventually materialised in the form of the Brooke–Mayhew talks, named after the UK Secretaries of State for Northern Ireland in office during the talks. Sinn Féin was still excluded from participating because of its connections to the IRA. So too, the loyalist political parties were excluded because of their connections to loyalist paramilitary groups. The Brooke–Mayhew talks, chaired in part by Sir Ninian Stephen, an Australian diplomat and lawyer, were conducted under the 'three strands' advocated by Hume. These would subsequently be retained in the negotiation of the B-GFA. Strand One addressed relationships between the parties within Northern Ireland; Strand Two considered relationships between Northern Ireland and Ireland (North–South); and Strand Three, considered relations

28 Martin McGuinness, one of the most senior leaders of Sinn Féin, led secret discussions about negotiations with MI6's Michael Oatley. See Niall Ó Dochartaigh, *Deniable Contact: Back Channel Negotiation in the Northern Ireland Conflict* (Oxford University Press 2021).

between the UK and Ireland (East–West). The talks began in April 1991 but were suspended in November 1992. By the end of 1992, the shift in the British position (from marginalisation to co-option) looked distinctly unsuccessful, but it remained the UK Government's aim.

A similar shift, independently arrived at, occurred in government circles in Dublin. Hume presented a first draft of a proposed declaration by the Irish Government with the aim of ending violence and securing a peace agreement, with the tacit agreement of Adams, to Charles Haughey, the Taoiseach (Prime Minister), in the autumn of 1991. The secret contacts between Irish political representatives and the republican movement (referred to as the back-channel) became critically important. The aim was to create a basis on which the IRA would declare a ceasefire, but the republican movement was not willing to do this without a direct, as opposed to just an indirect, channel of communication to the Taoiseach. These contacts were, therefore, key to the success of the whole initiative, creating trust through regular dialogue as well as helping to resolve issues of drafting as the process developed. The contacts were facilitated by individual go-betweens, in particular the Redemptorist priest, Fr Alec Reid, from the Clonard Monastery in Belfast.

From the autumn of 1991, the two governments were also meeting to consider how to nudge the peace process forward, with the aim of producing jointly agreed proposals that would lay the groundwork for a future agreement. A joint declaration by the two governments was first formally proposed to British Prime Minister John Major by Haughey on 4 December 1991.²⁹ The two most senior civil servants on each side (Dermot Nally, the Secretary to the Irish Government, and Sir Robin Butler, the British Cabinet Secretary) met at a subsequent meeting³⁰ on 16 December to discuss the initiative. Nally showed Butler the text of the draft, headed draft 2, later JD2, of the joint statement spoken about at the meeting of the Prime Minister and Taoiseach on 4 December.³¹ This text is almost identical to that attributed to Hume and dated to October 1991 by the distinguished journalists Eamonn Mallie and David McKittrick, in their path-breaking study of the evolution of the peace process.³² By February 1992, Butler had received another version from Hume directly, headed draft 3, which was in very similar terms.³³ That text is almost identical to that attributed to Sinn Féin and dated

29 National Archives of the UK (TNA), PREM 19/3823.

30 Digitised by Quill at [Resource Item 24101](#).

31 National Archives of the UK (TNA), PREM 19/3405.

32 Eamonn Mallie and David McKittrick, *The Fight for Peace: The Secret Story behind the Irish Peace Process* (Heinemann 1996) (Mallie and McKittrick) 371.

33 Briefing Note, from W R Fittall to Stephen Wall, dated 21 February 1992, National Archives of the UK (TNA), PREM 19/3823.

to February 1992 by Mallie and McKittrick.³⁴ These early texts would have committed the British either to withdrawal by a specified date or to become 'persuaders' for the unification of Ireland.

Prime Minister Major parked this initiative until after the UK General Election in April 1992, but did not shut the door on it. From Dublin's perspective, the primary discussions on what became the Joint Declaration for Peace (known colloquially as the Downing Street Declaration) took place from October 1992 up to June 1993 in the secret Irish back-channel meetings between representatives of the Taoiseach (in particular, Dr Martin Mansergh, who worked for Fianna Fáil and served three Fianna Fáil leaders (Haughey, Albert Reynolds and Bertie Ahern) as Director of Research, Policy and Special Advisor on Northern Ireland) and representatives of Sinn Féin (primarily, Martin McGuinness, who may or may not have been a member of the IRA's Provisional Army Council at that time, but in any event had their confidence). Officials were not aware that direct meetings were taking place, with meetings about every six weeks up to June 1993. Senior officials were aware of the drafting outcomes and the exchange of other written communications, deemed to have come directly from Fr Reid, but in many cases from the back-channel.

By early 1993 the Irish and British Governments were discussing two initiatives: a possible joint declaration and a framework document to be issued by the two governments, leading (it was hoped) to a renewed talks process with the Northern Ireland parties getting underway, and the cessation of violence.³⁵ Butler and Nally continued to meet intermittently. The process then stepped up a gear in June 1993 when a new version of the draft declaration (JD6)³⁶ was handed by the Taoiseach, Albert Reynolds, who had replaced Haughey as leader in February 1992, to the British Cabinet Secretary at Baldonnel Aerodrome, outside Dublin.

By that time, two, relatively separate, sets of discussions between Irish and British officials were established:³⁷ what might be called the Nally–Butler Group, which focused on the joint declaration, and the Liaison Group, which was given a formal mandate to produce a 'joint framework statement' with a 'substantial constitutional component' by

34 Mallie and McKittrick (n 32 above) 373: Digitised by Quill at [Resource Item 23544](#). This is referred to as JD3.

35 Described in detail from the British Government perspective in John Major, *John Major: The Autobiography* (Harper Collins 2000) 447–454.

36 Digitised by Quill at [Resource Item 22956](#).

37 Annabel Harris and Ruth Murray of the Quill Project, and Sir Quentin Thomas and David Cooke, formerly senior British officials, were immensely helpful in clarifying this aspect of the complex negotiations. The next four paragraphs are based on this information. I am most grateful.

the Intergovernmental Conference on 19 September 1993,³⁸ and was jointly chaired by Quentin Thomas and Seán Ó hUiginn, respectively senior British and Irish officials. To term the Nally–Butler Group a 'group' probably overstates the formality of the discussions and identifying it as separate from the Liaison Group underplays their partially overlapping membership during 1993. As both governments came to engage on the successive drafts of what became the Joint Declaration there was a series of *ad hoc* meetings of officials convened jointly by Butler and Nally. Some exploratory work on possible text was also carried forward by members of the Liaison Group, in particular Thomas and Ó hUiginn. Since Thomas and Ó hUiginn kept meeting in the Liaison Group, some work on the Joint Declaration was conducted in the margins of it, but it was decided that the full Liaison Group would not have sight of the Joint Declaration,³⁹ which continued to be negotiated in the Butler–Nally Group, between Thomas and Ó hUiginn informally, and then between Major and Reynolds at the Anglo-Irish Summit in Dublin Castle on 3 December 1993.

To some degree, it seems that there was a difference of emphasis between the two sides over priorities. British officials appear to have prioritised a framework document that might be of use in inter-party talks (resuming the Brooke–Mayhew initiative) rather than a Joint Declaration, whereas Irish officials appeared less enthusiastic about a framework document (they promised the Liaison Group a draft but apparently did not secure Ministerial approval to table it) and were prioritising the Joint Declaration.

Essentially, up until the publication of the Joint Declaration on 15 December 1993, the declaration and the framework document were worked up as parallel, and to some extent even partly competing, initiatives. From late November 1993, the British decided to go with the Joint Declaration approach, but with the two sides again offering distinctly different approaches. Two texts are available from November 1993 which show the different Irish and British positions at that time: the first text, JD14,⁴⁰ was the proposed text from the Irish side, and had been the subject of discussions with the British side; the second text was a proposed British version,⁴¹ which was conveyed to the Taoiseach by Butler, the then British Cabinet Secretary, on 26 November. The proposed British text came as something of a surprise to Dublin and was swiftly rejected by the Irish Government. Intense negotiation on the text of a Joint Declaration then took place in early December 1993,

38 Digitised by Quill at [Resource Item 23437](#).

39 Digitised by Quill at [Resource Item 23450](#).

40 As it was known in the British system. Digitised by Quill at [Resource Item 22925](#).

41 Digitised by Quill at [Resource Item 23065](#).

using the Irish text as the starting point, following the Dublin Castle Summit.

Thus far, the principal focus of this narrative has been on the attempts to bring republicans to a ceasefire. As ever, negotiators walked a tightrope. The opposition from unionist opinion to the AIA meant that gaining unionist support for these new initiatives would be difficult. Reassurance to Sinn Féin could not compromise the interests of others, including the unionists and the loyalists. But, just as there were different and competing parties on the broadly Irish nationalist side, so too were there different and competing political groupings on the broadly unionist side, which gained support predominantly from the Protestant population.

The principal unionist political party in the 1990s was the Ulster Unionist Party (UUP), led in the early 1990s by James Molyneaux and then by David Trimble. Its main rival was the Democratic Unionist Party (DUP), led by its founder the Reverend Ian Paisley. By the 1990s, neither of these parties explicitly supported any paramilitary groups, although leading members of both parties had flirted with paramilitarism at various times over the years. The DUP, for example, had been involved in establishing a paramilitary group (Ulster Resistance) as a reaction to the AIA. During 1993, there were attempts to ensure that Molyneaux in particular was engaged and informed. Robin Eames, the Church of Ireland Primate of All Ireland and Archbishop of Armagh, played an important role. Eames was in close touch with both Major and Molyneaux and was also in close contact with Reynolds. So, too, the British negotiators engaged with Molyneaux, illustrated by the fact that a draft of the Declaration, version JD14A,⁴² took into account amendments that were thought likely to make the text more acceptable to Molyneaux, who had been consulted on the draft.

In addition to the UUP and the DUP, there were two political parties that were explicitly connected with unionist (often termed 'loyalist') paramilitary groups: the Progressive Unionist Party (PUP) closely aligned to the illegal Ulster Volunteer Force (UVF),⁴³ and the Ulster Democratic Party (UDP), closely aligned to the Ulster Defence Association (UDA). Aaron Edwards has described the PUP as having sprung from the collapse of the Northern Ireland Labour Party (NILP)⁴⁴ and several of the founding members of the PUP had been members of the NILP, including Jim McDonald, who was later

42 Digitised by Quill at [Resource Item 22932](#).

43 For an analysis of the PUP's origins and ideology, see Aaron Edwards, 'The Progressive Unionist Party of Northern Ireland: a left-wing voice in an ethnically divided society' (2010) *British Journal of Politics and International Relations* 1.

44 See Aaron Edwards, *A History of the Northern Ireland Labour Party: Democratic Socialism and Sectarianism* (Manchester University Press 2009).

to become an important member of the UVF's 'Brigade Staff',⁴⁵ and David Overend, who, until the late 1980s, played a significant role in drafting PUP policy statements.⁴⁶ They remained committed to a 'left-leaning and working-class alternative to mainstream unionism'.⁴⁷ This outlook was broadly shared by several other prominent members of the PUP and the UVF, including Gusty Spence, Billy Mitchell and David Ervine.⁴⁸

The UDA did not share the broad left-leaning politics of that section of the UVF/PUP. Both the UVF and the UDA were at one, however, in claiming to be defenders of Northern Ireland's place in the UK and employing illegal violence in furthering that aim.⁴⁹ The two loyalist paramilitary groups came together with the Red Hand Commandos (RHC) in the early 1990s to form the Combined Loyalist Military Command (CLMC), and a parallel Combined Loyalist Political Alliance (CLPA) was established to advise the CLMC on political strategy.⁵⁰

If the political initiatives underway were to stop the violence, then these loyalist political parties and the allied paramilitary groups would also have to be brought into the process. We have seen that, at that time, the British Government was unwilling to be seen to engage with loyalist paramilitaries in political negotiations,⁵¹ and Reynolds 'moved to fill the vacuum'.⁵² Mansergh identified the Reverend Roy Magee, a Protestant Minister with close links to Loyalism as a possible

45 Brian Rowan, 'Funeral of top loyalist McDonald' *Belfast Telegraph* (Belfast 28 May 2009).

46 Edwards (n 44 above) 219.

47 Aaron Edwards, *UVF: Behind the Mask* (Merrion Press 2017) 148.

48 Ibid 146, quoting Billy Mitchell: 'I think there was a consensus among some of us, certainly amongst [David Ervine], Billy [Hutchinson], Eddie [Kinner] and Martin Snodden. ... We realised that we had suffered deprivation and poverty, the same as working-class Catholics.' So too, Gusty Spence's political outlook 'was closest to the NILP' (ibid 144).

49 The UVF had been proscribed since 1975. The UDA remained legal until August 1992.

50 See eg Roy Garland, *Gusty Spence* (Blackstaff Press 2001) 282; Billy Hutchinson, *My Life in Loyalism* (Merrion Press 2020) 184; Jim Cusack and Henry McDonald, *UVF: The Endgame* (Poolbeg Press 2017) 272–273.

51 Garland (n 50 above) 283. It should be noted, however, that at this time military, policing and intelligence branches of the UK state were complicit in illegal activities by Loyalist paramilitary groups and were closely co-operating with them in several murders.

52 Conor Lenihan, *Albert Reynolds: Risktaker for Peace* (Merrion Press 2021) 154. American politicians close to the Clinton Administration were also involved at the same time in engaging with these groups. See Penn Rhodeen, *Peacerunner: The True Story of How an Ex-Congressman Helped End the Centuries of War in Ireland* (BenBella Books 2016) 93–101.

interlocutor.⁵³ Mansergh met Magee who agreed to act as a contact between the loyalist paramilitaries and the Taoiseach.⁵⁴ Magee was to become one of the central actors in the evolution of the declaration of rights in paragraph 1 of the human rights and equality chapter of the B-GFA, as we shall see in the next part of this article.

The urgency of engaging with loyalists, the deterioration in the security situation in Northern Ireland, and the urgency for momentum in the negotiations generally, was confirmed when, in October 1993, 10 people were killed when a bomb being planted by the IRA exploded prematurely in Frizzell's fish and chip shop on the overwhelmingly Protestant Shankill Road in Belfast. These deaths represented the greatest loss of life in Northern Ireland in a single incident since 1987. There was a wave of retaliations, with loyalist paramilitaries immediately shooting two Catholic men, one of whom died later from his wounds, followed some days later by the killing by the Ulster Freedom Fighters (a *nom de guerre* of the UDA) of six Catholics and one Protestant in an attack on the Rising Sun bar in Greysteel.

It had become clear by the early autumn of 1993 that the draft declaration (on which Sinn Féin was not prepared to negotiate further) would have to be expanded on the Taoiseach's initiative. Broadly, there were two significant additions to the text that were intended to appeal to the unionist and loyalist communities: the inclusion of language in what became paragraphs 6 and 7 of the Joint Declaration, which was directed towards unionist opinion more broadly, and was drafted at the Taoiseach's request by Eames, and the language included in paragraph 5 as a result of the Mansergh–Magee back-channel which was directed specifically to loyalists (of which, more later).

After tense and sometimes acrimonious negotiations, the two Governments announced a Joint Declaration on Peace on 15 December 1993.⁵⁵ In this, Reynolds and Major set out their vision for securing peace. It was a carefully calculated vehicle for reciprocal assurance. The Declaration was intended, at least in part, as a signal to those committed to political violence, in particular, the IRA, that an alternative way forward was possible, whilst also seeking to reassure unionist opinion that the Union was safe. Four principal reassurances can be identified from the British side:

53 The Reverend Roy Magee had participated in William Craig's Vanguard Movement in 1974, generally classified as a paramilitary organisation in waiting. He was also admitted on occasion to meetings with the Combined Loyalist Military Command.

54 Spencer (n 27 above) 169.

55 Digitised by Quill at [Resource Item 22979](#).

- 1 the two governments would work together in partnership to find an agreed Ireland, as evidenced by the Joint Declaration itself;
- 2 the British had no selfish strategic or economic interest in Northern Ireland (the formulation deployed in earlier ministerial speeches);
- 3 the right of Irish self-determination was acknowledged; and
- 4 if violence were abandoned Sinn Féin could join any talks process.

The British side also received reassurances that it was hoped would be favourably received by unionists, in particular the more explicit recognition of the 'consent principle' by the Taoiseach in paragraph 5. This stated:

The Taoiseach, on behalf of the Irish Government, considers that the lessons of Irish history, and especially of Northern Ireland, show that stability and well-being will not be found under any political system which is refused allegiance or rejected on grounds of identity by a significant minority of those governed by it. For this reason, it would be wrong to attempt to impose a united Ireland, in the absence of the freely given consent of a majority of the people of Northern Ireland. He accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland ...

Sinn Féin was critical of the Downing Street Declaration, as the document was popularly known, and sought clarifications. The IRA appears to have considered sufficient progress to have been made for it to announce, in August 1994, 'a complete cessation of military activities'. This cessation was followed six weeks later with a similar ceasefire announcement by the main loyalist paramilitaries, the UVF, the UDA and the RHC, speaking jointly through the CLMC, with Spence announcing the ceasefire flanked by Ervine and McDonald, among others.⁵⁶ Negotiations continued between the UK and Irish Governments and, increasingly, with the full range of political actors in Northern Ireland. In November, the first meeting took place between delegations from the PUP, the UDP and Northern Ireland Office officials on behalf of the British Government. In December 1994, the first acknowledged meeting took place between a Sinn Féin delegation and Northern Ireland Office officials.

Negotiations between the two governments also continued but with a change of political leadership on the Irish side. In November 1994, Albert Reynolds, then Taoiseach, and his Fianna Fáil ministers were forced to resign ending the Coalition Government of Fianna Fáil and the Labour Party. In December of the same year, a new coalition was

56 Jim Cusack and Henry McDonald, UVF: *The Endgame* (Poolbeg 2008) 319.

formed of Fine Gael, the Labour Party and the Democratic Left. John Bruton, leader of Fine Gael, was elected Taoiseach. The changes did not appear to result in any significant difference in the progress of the negotiations, and in February 1995, the two governments announced the Framework Documents,⁵⁷ which gave further detail on what the two governments considered the way forward in peace negotiations, building 'heavily' on the Downing Street Declaration.⁵⁸

Following this, however, little progress in the negotiations was evident. Tensions on the street remained high. In July 1995, for example, the Royal Ulster Constabulary (RUC) blocked an Orange Order parade from returning from Drumcree Church to Portadown along the Garvaghy Road, a Catholic area. The decision sparked a stand-off between the RUC and the Orange Order. There were disturbances and blocked roads across Northern Ireland as protests were organised by loyalists in support of the Orange Order. A few days later, a compromise was reached which allowed the Drumcree parade to proceed down the Garvaghy Road in Portadown, but tensions remained high.⁵⁹

The inter-governmental negotiations drifted on, with an unstable British Government under Major increasingly unable to drive the process forward partly because of internal divisions within the Conservative Party and partly because of Major's reliance on UUP Members of Parliament for critical votes in the UK Parliament. Frustrated with the lack of momentum, the IRA exploded a substantial bomb at London's Docklands in February 1996, marking the end of its ceasefire, and leading to the UK Government and Irish Government breaking off formal links with Sinn Féin. Later that month, Major, still British Prime Minister, and John Bruton, now Taoiseach and heading a new Fine Gael–Labour–Democratic Left Coalition Government, announced a date for the start of all-party talks. As part of the process of negotiations, the Northern Ireland Forum for Political Dialogue was established. One of its primary purposes was to enable delegations to be formed which would take part in these talks, and to give these

57 Digitised by Quill at [Resource Item 16649](#).

58 David Donoghue, *One Good Day: My Journey to the Good Friday Agreement* (Gill Books 2022) 25. The terminology used to describe this initiative is confusing. 'Frameworks' (plural) is used to describe the two documents issued at that time: a joint statement by the two Governments (henceforth referred to as the Joint Framework Document), addressing Strands 2 and 3, and one put forward only by the UK Government addressing Strand One. See Government of Ireland and Government of the United Kingdom, *Frameworks for the Future* (Dublin 1995). See further, Brendan O'Leary, 'Afterword: what is framed in the framework documents?' (1995) 18(4) *Ethnic and Racial Studies* 862.

59 The issue recurred in July 1996 and July 1997, in each case leading to violence and protests by loyalists throughout Northern Ireland, leading in turn to instances of sectarian harassment and intimidation.

delegations a democratic mandate by being elected to the Forum. A novel electoral system was devised, with each of the top 10 parties by votes guaranteed at least two seats each, with the larger parties gaining three seats each. The purpose was to ensure that loyalists, who were not expected to do well, would be represented in the negotiations. These elections also saw the formation of a new political party (the Women's Coalition) to contest the elections. Sinn Féin increased its share of the vote, and the UDP, the PUP and the Women's Coalition each secured two seats, thus giving them a place at the table.⁶⁰ Following these elections, the talks duly began on 10 June 1996, but without Sinn Féin.

Once the inter-party talks began, the issues to be discussed were divided into three 'strands', reflecting the 'three-strand' approach adopted in the earlier Brooke-Mayhew talks, each with its own Committee. In addition, there was to be a Plenary, in accordance with the 'Ground Rules' published by the two governments on 16 April 1996,⁶¹ and a Business Committee, whose role was to address unresolved procedural issues.

In 1997, General Elections in both Ireland and the UK resulted in significant changes in both jurisdictions. In May, the Labour Party, led by Tony Blair, was elected to replace John Major's Conservative Party as the UK governing party, and in Ireland the Fine Gael–Labour Coalition Government was replaced in June with a Fianna Fáil–Progressive Democrats coalition, led by Bertie Ahern. The coincidence of both states having new governments contributed to a greater optimism that progress could be made in Northern Ireland. In July of that year, the IRA reinstated its ceasefire enabling Sinn Féin to take part in the inter-party and inter-governmental talks, chaired by former United States Senator George Mitchell, who had been nominated by the United States President, Bill Clinton. However, as one party joined the talks, others left: Sinn Féin entered the talks at Stormont in September 1997 but the DUP walked out in protest at their admission, as did the small UK UUP, led by Robert McCartney. The other main unionist party, Trimble's UUP, remained to negotiate. So did the loyalist political parties, the PUP and the UDP. Jim McDonald, David Ervine and Billy Mitchell, together with Billy Hutchinson, were members of the PUP's talks team.⁶²

60 For an assessment of the results of the election, see Geoffrey Evans and Brendan O'Leary, 'Intransigence and flexibility on the way to two forums: the Northern Ireland elections of 30 May 1996 and public opinion' (1997) 34(3–4) *Representation* 208; Geoffrey Evans and Brendan O'Leary, 'Frameworked futures: intransigence and flexibility in the Northern Ireland elections of May 30 1996' (1997) 12 *Irish Political Studies* 23.

61 Ground Rules for Substantive All-Party Negotiations, 16 April 1996.

62 Edwards (note 47 above) 258.

These negotiations continued during the rest of 1997 and into 1998, without apparent progress, amid continuing disputes over the connections between the loyalist parties and their associated paramilitary groups and between Sinn Féin and the IRA. Involvement in continuing violence led to the UDP and Sinn Féin's participation being suspended for periods, amid increasing political pressure for the 'decommissioning' of weapons. In January 1998, the multi-party talks resumed at Stormont. The British and Irish Governments issued their 'Propositions on Heads of Agreement'⁶³ document in an attempt to push the talks process on. Several parties at the talks welcomed the document but, critically, Sinn Féin rejected it later that month, and the UUP's Jeffrey Donaldson dramatically tore it up at a press conference in Lancaster House where the talks had briefly moved to. In order to nudge the talks forward to a conclusion one way or another, Senator Mitchell set a deadline of 9 April 1998 as the conclusion of the process, with or without an agreement.

By the beginning of April, Irish and British civil servants had begun, in the words of Mo Mowlam, the Secretary of State for Northern Ireland at the time, 'working like mad pulling bits together from old papers and putting new ideas' into a draft agreement.⁶⁴ On the evening of 6–7 April 1998, the two Governments produced a draft agreement (named 'the Mitchell draft' in an effort to distance the Governments from the draft to make it more palatable).⁶⁵ Intense further negotiations continued between then and 10 April 1998,⁶⁶ when a final Agreement between all the parties in the negotiations and the two Governments was reached. A month later, in referendums held simultaneously in Ireland and in Northern Ireland, the Agreement was supported by 71.1 per cent of the people of Northern Ireland, including a majority of unionist voters, and 94.4 per cent in Ireland.

63 Digitised by Quill at [Resource Item 17115](#).

64 Mo Mowlam, *Momentum: The Struggle for Peace, Politics and the People* (Hodder 2003) 208.

65 Donoghue (n 58 above) 143.

66 Senator Mitchell has provided an account of the negotiations: George Mitchell, *Making Peace: The Inside Story of the Making of the Good Friday Agreement* (Heinemann 1997). Tony Blair's Chief of Staff, Jonathan Powell's account of the negotiations is: Jonathan Powell, *Great Hatred, Little Room: Making Peace in Northern Ireland* (Vintage 2009). Monica McWilliams, one of the leaders of the Women's Coalition, published her account in Monica McWilliams, *Stand Up, Speak Out: My Life Working for Women's Rights, Peace and Equality in Northern Ireland and Beyond* (Blackstaff 2021).

EVOLUTION OF PARAGRAPH 1 OF THE B-GFA'S 'RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY'

Having set out a brief summary of the negotiating context, we turn now to consider specifically the evolution of the declaration of rights in paragraph 1 of the human rights and equality chapter of the B-GFA. At this point, a closer textual analysis of the paragraph is useful. Paragraph 1 has two operative parts. The first is general. The first sentence states: 'The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community.' The second operative part introduces a list of specified rights, followed by the list of rights themselves ('Against the background of the recent history of communal conflict, the parties affirm in particular: the right of free political thought ...' etc). The origin of the first sentence (the 'general' part) is significantly different from that of the second sentence (the 'specified rights' part). Significant parts of both these elements in paragraph 1 were first found in paragraph 5 of the Downing Street Declaration, agreed and published by the Irish and British Governments in December 1993. This part of the article is devoted to identifying the sources of these different elements.

Downing Street Declaration and the Joint Framework Document

From a political perspective, the importance of paragraph 5 of the Downing Street Declaration taken as a whole was that it formally recognised the exercise of self-determination by the people of Ireland as a whole (including deciding to create a united Ireland) but that it would also require the consent of a majority of the people of Northern Ireland, thus instantiating what has come to be termed the principle of 'consent'. Concurrent self-determination meant that the consent of the people of the (Republic of) Ireland was also required. For our purposes, however, what is striking about the drafting of paragraph 5 is that the Taoiseach also recognised, on behalf of the Irish Government, that any exercise of self-determination by the Irish people must also respect certain substantive values, in addition to respecting the principle of consent: the 'civil rights and religious liberties of everyone in the community' would be protected.

The general part: 'civil rights and religious liberties of everyone in the community'

The Downing Street Declaration, including paragraph 5, was the culmination of previous negotiating processes both public and private. As identified by Mallie and McKittrick, three drafts emerged out of the Hume–Adams dialogue between October 1991 and June 1992, each

of which significantly foreshadowed what became paragraph 5 of the Downing Street Declaration. The existence and content of these drafts have been confirmed by the opening up of the archives, as we have seen.

*'A Strategy for Peace and Justice in Ireland' (October 1991, 'by John Hume, Charles Haughey and Dublin officials')*⁶⁷

*'Draft of a declaration which Sinn Féin suggests should be made jointly by the British and Dublin governments' (February 1992 'sent to John Hume and the Irish government by the republican movement', February 1992)*⁶⁸

*'Draft of a declaration which Sinn Féin suggests should be made jointly by the British and Dublin Governments' (June 1992 'Sinn Féin draft')*⁶⁹

'The Taoiseach, on behalf of the Irish Government, accepts that the exercise of the democratic right of self-determination by the people of Ireland as a whole ... must, consistent with justice and equity, respect the democratic dignity and the civil rights of both communities, whether majority or minority.'

'The Taoiseach, on behalf of the Irish Government, accepts that the exercise of the democratic right of self-determination by the people of Ireland as a whole ... must, consistent with justice and equity, respect the democratic dignity and the civil rights of both communities.'

'The Taoiseach, on behalf of the Irish Government, ... accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole ... must, consistent with justice and equity, respect the democratic dignity and the civil rights of both communities.'

The function that paragraph 5 was to play was already evident in these early drafts. The approach suggested in the documents emerging from Hume–Adams was that there would be a series of paragraphs setting out several principles that the Taoiseach, on behalf of the Irish Government, would commit to and which he considered should be reflected in any future political and constitutional arrangements. We can see that an early draft of the phrase in the Declaration embodying the commitment of the Taoiseach to these principles is first found

67 Mallie and McKittrick (n 32 above) 371; digitised by Quill at [Resource Item 23543](#). This is referred to as JD2.

68 Mallie and McKittrick (n 32 above) 373. Digitised by Quill at [Resource Item 23544](#). This is referred to as JD3.

69 Mallie and McKittrick (n 32 above) 375.

in the October 1991 document 'A Strategy for Peace and Justice in Ireland' attributed by Mallie and McKittrick to 'John Hume, Charles Haughey and Dublin officials', and that it flows through each of the Hume–Adams documents and drafts from that time up to and including the June 1992 draft proposed by Sinn Féin, identified by Mallie and McKittrick.

We have seen, too, that the process of drafting a joint declaration by British and Irish officials was restarted in June 1993, a year and a half after it had first been proposed by Dublin to London.⁷⁰ From now on, I shall refer to the relevant documents using the British document number. Document JD6,⁷¹ apparently agreed between the Taoiseach and the IRA's Provisional Army Council,⁷² presumably after discussions in the back-channel, was handed to UK officials by Irish officials on 6 June 1993. For our purposes, the relevant text of paragraph 5 reads:

He [the Taoiseach] accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with the agreement and consent of the people of Northern Ireland and must, consistent with justice and equity, respect the democratic dignity and provide entrenched guarantees of the civil rights and religious liberties of both communities.

It will be seen that two significant changes in drafting occurred between June 1992 and June 1993: the inclusion of 'and religious liberties', and the stipulation that 'civil rights and religious liberties' would be protected by 'entrenched guarantees'.

Unfortunately, we do not have access to a copy of JD4, which is one of two documents that preceded JD6, and which had been passed to British officials in April 1992. However, a UK Government commentary on JD6 (which, as we have seen, contains a reference to 'religious liberties') says that the relevant paragraphs of JD6 'appear to follow JD.4 word for word'.⁷³ It is possible, therefore, that the first mention of 'religious liberties' might have been as far back as JD4, handed to the UK Government in May 1992. However, against that view is the identification by Mallie and McKittrick of a version of the declaration proposed by Sinn Féin, dated April 1992, which as we have seen does not contain a mention of 'religious liberties'. The fact that another version of the draft joint declaration, dated 29 March 1993,

70 Annabel Harris of the Quill Project was immensely helpful in clarifying this aspect of the complex negotiations. The next three paragraphs are based on this information. I am most grateful.

71 Digitised by Quill at [Resource Item 22956](#).

72 The Taoiseach was clear that JD6 had been signed off by the Provisional Army Council: digitised by Quill at [Resource Item 22957](#).

73 Digitised by Quill at [Resource Item 22959](#).

is in the Nally papers that it also does not contain any mention of this phrase is further evidence that it was not in JD4.⁷⁴ The first verified version of a draft containing 'religious liberties' is JD6, which is the version handed to Butler by Reynolds. JD6 will then have gone into the Nally–Butler Group for negotiation.

Document JD8, handed to Thomas by Ó hUiginn on 24 September 1993,⁷⁵ contains the language that ends up in the final version of the Joint Declaration:

He [the Taoiseach] accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with the agreement and consent of the people of Northern Ireland and must, consistent with justice and equity, respect the democratic dignity and the civil rights and religious liberties of both communities.

Importantly, the phrase 'provide entrenched guarantees' has disappeared. This revised version of paragraph 5 was retained in further Irish Government drafts of the Declaration that were being worked up by the Irish and British negotiators in early October 1993⁷⁶ and found their way into the three November 1993 texts referred to previously (JD14, the British alternative draft, and JD14A, the text that followed consultations with Molyneaux), and thence into the final Declaration. On 6 October 1993, a further phrase was added at a meeting of the Butler–Nally Group which discussed the latest version of the Joint Declaration (JD10) and amended it.⁷⁷ The amendment added the sentence at the end of paragraph 5 which provided that: 'These would be reflected in any future political and constitutional arrangements emerging from a new and more broadly based agreement.'

As to who drafted the critical phrases that found their way into the final Declaration, the documents made available thus far do not indicate. Ó hUiginn has described the texts coming out of Hume–Adams as resulting from 'rather a floating drafting exercise where many hands refined a text to arrive at a result that might reflect a generally acceptable compromise'.⁷⁸ That said, there is some external evidence that a likely draftsperson was Mansergh, who, as we have seen, was during this period the principal liaison person between successive leaders of Fianna Fáil (beginning with Charles Haughey, then Albert

74 Papers of Dermot Nally, UCD Archives, University College Dublin Library, Ireland, P254.

75 Digitised by Quill at [Resource Item 23027](#).

76 John Coakley and Jennifer Todd, *Negotiating a Settlement in Northern Ireland, 1969–2019* (Oxford University Press 2020) 258 (quoting Dermot Nally).

77 Papers of Dermot Nally, UCD Archives, University College Dublin Library, Ireland, P254.

78 Spencer (note 27 above) 127.

Reynolds and later Bertie Ahern) and the republican movement. His role in drafting has been acknowledged by several people involved in the discussions.⁷⁹ He himself acknowledged his involvement in the drafting of another part of paragraph 5, as we shall see. And he closely identified the importance of the commitment to the whole Declaration, suggesting in 2003 that the '*whole thrust of the declaration* was to work towards a new agreed Ireland, based on justice and equality and respect for the democratic dignity, civil rights and religious liberties of both communities'.⁸⁰ The important point, however, is that whoever was the draftsman, it reflected a consensus position at that time between the Irish Government and the republican movement, as represented by Sinn Féin. The understanding of the phrase 'civil rights' therefore was likely to have strongly reflected the understanding of that phrase that Northern Ireland 'civil rights' activists of the late 1960s would have recognised, namely the importance of equality rights involving voting, housing, employment and non-discrimination but, equally clearly, it went beyond that meaning. It is worth bearing in mind that the issue of the incorporation of the ECHR into the domestic law of the UK (and its application in Northern Ireland law) had been discussed for some 20 years and 'civil rights' would also have been seen in part in this context.

It is particularly hard to argue for a narrow interpretation of 'civil rights' when combined with the reference to 'religious liberties'. The expression 'religious liberties' may have been included to give the paragraph a more Protestant and unionist flavour. The Orange Order, for example, had been founded in 1795 to uphold the Williamite Settlement and the 1688 Glorious Revolution, including the protection of 'civil and religious liberty available under a British, Protestant, monarch as opposed to a dictatorial Roman Catholic Papacy'.⁸¹ One of the traditional objections of Unionism and organised Protestant opinion to a united Ireland was that their freedom to practise their religion would not be protected, and that any united Ireland would be dominated by Catholic teaching and dogma. For the Irish Government, therefore, sending a signal that this concern was recognised would have been considered useful in helping persuade Protestant opinion in Northern Ireland that a new Ireland contemplated by the Taoiseach in paragraph 5 would be protective of their rights in this respect.

79 Ibid at 128, 130.

80 Martin Mansergh, *The Legacy of History* (Mercier Press 2003) 103.

81 See eg Dominic Bryan, 'The right to march: parading a loyal Protestant identity in Northern Ireland' (1997) 4(3/4) *International Journal on Minority and Group Rights* 373, 380. Blair Worden, *God's Instruments: Political Conduct in the England of Oliver Cromwell* (Oxford University Press 2012) ch 8, shows how the term 'civil and religious liberty' pre-dates 1688 and had already become embedded under Oliver Cromwell and was already 'ubiquitous'.

Nor would the inclusion of 'religious liberties', together with 'civil rights' be seen in republican circles as weakening commitment to the latter. The terms used had clear echoes of the Proclamation of the Irish Republic on Easter Monday 1916, which included the commitment: 'The Republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens ...'. Its inclusion was likely to appeal not only to Protestants but also Northern Ireland Catholics, whose places of worship were not always free from harassment. It was also consistent with Sinn Féin statements at that time. Sinn Féin had, at least from 1987, acknowledged the importance of the protection of rights in a united Ireland. In 'A Scenario for Peace'⁸² first issued in May 1987, it stated that 'republicans have consistently asserted that the loyalist people, in common with all other citizens, must be given firm guarantees of their religious and civil liberties'.⁸³

The reference to specific rights: the second sentence

Paragraph 5 of the Downing Street Declaration goes well beyond this attempt at reassurance, if such it was. Following the text that reads 'and must, consistent with justice and equity, respect the democratic dignity and the civil rights and religious liberties of both communities ...' a significant addition to the text was introduced 'at a very late stage in the draft'.⁸⁴ The first time such an addition was on the cards was on 9 December 1993, when an insert was included in draft JD15B which includes in square brackets: 'These rights would include in particular [the "Magee list": to be provided on Monday]'. Following extensive back and forth between Butler and Nally on 13 December 1993, this list of rights is included in the revised text. The additional text reads, after 'communities':

... including: the right of free political thought; the right to freedom and expression of religion, the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to live wherever one chooses without hindrance; the right to equal opportunity in all social and economic activity, regardless of class, creed, sex or colour ...

Where did this list of specific rights come from? The reference to the 'Magee list' gives a clear indication. The following origins story is attested to in numerous accounts of those close to the discussions from the Irish side, and from published accounts by Reynolds himself. The list of rights derives substantially from a document which was

82 Digitised by Quill at [Resource Item 22375](#).

83 Sinn Féin, *A Scenario for Peace: A Discussion Paper* (Sinn Féin 1987) 4.

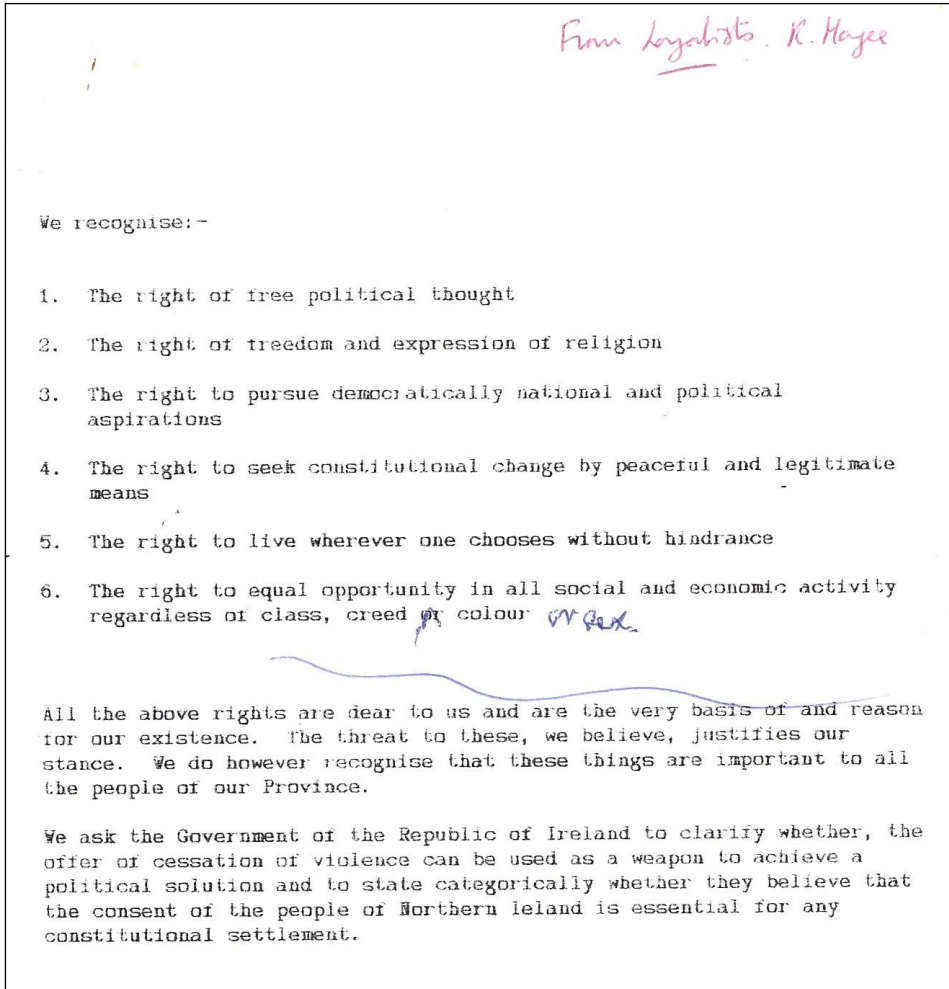
84 Coakley and Todd (n 76 above) 257 (quoting Dermot Nally). Dermot Nally's Papers now made clear that the language was introduced no earlier than 13 December 1993.

brought secretly by Magee from the CLMC in Belfast to Mansergh, probably in early October 1993.⁸⁵ Separately, the list had also been given by Gusty Spence, a leading member of the CLPA, and former leader of the UVF, and David Ervine, then leader of the PUP and formerly of the UVF, to Fergus Finlay, the political advisor to Dick Spring of the Irish Labour Party, then Ireland's Tánaiste (Deputy Prime Minister), at a meeting in Belfast.⁸⁶ Finlay described the list as 'a set of principles about discrimination, which formed the core of their own political philosophy, and which had been published as part of their party literature'.⁸⁷ We have seen that Magee was one of several back-channels being established between politicians in Ireland and paramilitaries to encourage political negotiations and the cessation of political violence.⁸⁸ The list was then inserted by Reynolds, into paragraph 5 of the Downing Street Declaration, as a way of demonstrating to loyalists that they would be listened to by the Irish Government, at a delicate stage of attempting to secure a ceasefire by these groups.

The account provided up to this point is largely based on published accounts. More recently, however, the actual document brought to Dublin by Magee has become available with the release of Nally's papers, which, given his role as the leading Irish civil service negotiator at the time, are of considerable importance. Several important details emerge from the Nally papers, and from the Magee document that the papers include. According to Mansergh, the only significant change made in the list of rights brought to Dublin by Magee and inserted

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- 85 In his autobiography, Reynolds quotes Magee's account: 'We had a meeting of the combined Loyalist leadership discussing the way that they would be happy with things if certain points were drawn up. I met Mr Reynolds the following day and he asked me, "What was the situation?" I explained about the meeting, which I had the right to do and the permission to do. "Could I see those points?" he said. I gave them to him, and those were the six points written into the Downing Street Declaration.' Reynolds adds: 'I included them unchanged in paragraph 5.' Albert Reynolds, *Albert Reynolds: My Autobiography* (Transworld Ireland 2010) 332.
- 86 Connal Parr suggests that, as 'part of an intriguing working-class dynamic', while the UVF leadership were 'more comfortable' meeting Spring because he was Labour Party leader, Spence and Ervine felt able also to meet Reynolds, 'Ending the siege? David Ervine and the struggle for progressive Loyalism' 33(2) *Irish Political Studies* 202, 210.
- 87 Fergus Finlay, *Snakes and Ladders* (New Island Books 1998) 200. Mansergh himself believes that the list was handed to him by Magee in early October, personal communication.
- 88 Donoghue (n 58 above) 24; Garland (n 50 above) 284. Another key intermediary between Loyalists and Dublin politicians was Chris Hudson, who acted as a conduit between the UVF and members of the Irish Labour Party. Hudson does not appear to have been involved with the Magee List. Hutchinson (n 50 above) 189; Finlay (n 87 above) 199.

in the Downing Street Declaration was the inclusion of 'sex' among the list of grounds of discrimination. Who made that change seems to be disputed, with both Mansergh and Finlay claiming involvement in introducing that amendment.⁸⁹ The handwritten addition of 'sex' in the draft set of rights provided by Magee to Mansergh and included in the Nally papers⁹⁰ appears to have been inserted by Mansergh or by Reynolds himself.⁹¹



89 Martin Mansergh, personal communication; Finlay (n 87 above) 200–201: 'I changed the phrase to "class, creed, sex or colour". It enabled me to claim credit, if nothing else, for putting sex into the Downing Street Declaration.'

90 Dermot Nally Papers, UCDA P254/85, digitised by Quill at [Resource Item 23495](#).

91 Martin Mansergh, personal communication.

Nally's papers also include a note to the Taoiseach of 13 December 1993 stating that the inclusion of the rights had been discussed with Sir Robin Butler that day. The various texts of the draft Downing Street Declaration, such as that of the 9 December 1993 quoted previously, also demonstrate how *both* Governments realised that the list derived from Magee on behalf of the loyalists. The annotated British draft⁹² of the final text Declaration confirms clearly that the UK Government realised that Magee was, indeed, the source of this list of rights (it is referred to as the 'Magee list'), and that its intended purpose at that time was to 'reassure unionists'.

To those unfamiliar with the history of Loyalism in Northern Ireland, the involvement of the CLMC in apparently proposing a list of rights to the Irish Government might seem strange. Beginning in the 1970s, however, an important strand of loyalist opinion had strongly supported the idea of a Bill of Rights.⁹³ We have seen that several founding members of the PUP had been members of the NILP, which had, from the 1960s, adopted a Bill of Rights as a key part of its political reform platform.⁹⁴ Loyalist political parties frequently referred to the need for a Northern Ireland Bill of Rights and included proposals for such a Bill in their manifestos.⁹⁵ Indeed, it was one of

92 Digitised by Quill at [Resource Item 23107](#).

93 Tony Novosel, *Northern Ireland's Lost Opportunity: The Frustrated Promise of Political Loyalism* (Pluto Press 2013), recounting the UVF's political agenda, which included supporting rights, during the 1970s. See also Anne Smith, Monica McWilliams and Priyamvada Yarnell, *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* (Transitional Justice Institute, University of Ulster 2014), ch 2, which sets out the positions of the political parties on a Northern Ireland Bill of Rights from the 1970s to the conclusion of the B-GFA.

94 Northern Ireland Office, *The Future of Northern Ireland: A Paper for Discussion* (HMSO 1972), annex 6 ('Views of the Northern Ireland Labour Party'). See further Aaron Edwards, *A History of the Northern Ireland Labour Party: Democratic Socialism and Sectarianism* (Manchester University Press 2009) 136.

95 As early as 1979, the Progressive Unionist Group (the forerunner of the PUP) published its Proposed Democratic Devolved Administration for Northern Ireland, which included a proposed Bill of Rights 'for all United Kingdom citizens', see Novosel (n 93 above) 189. In 1985, the PUP expanded on this idea, PUP, *Sharing Responsibility*, September 1985 [Irish Left Archive](#): 'Freedom from fear and violence, social deprivation in all areas, negations of basic human rights and many other issues have not received the public emotional attention that they so richly deserve. The result has been catastrophic. ... The constitution of Northern Ireland should embody a Bill of Rights along the lines of the European Convention on Human Rights which would include guarantees against discrimination.' This was 'created' by Hugh Smyth, Jim McDonald and David Overend: Novosel (n 93 above) 214. See the later iteration of this policy in PUP, War or Peace: Conflict or Conference: Policy Document of the Progressive Unionist Party (nd, 1986–1987?) 5–6; PUP, [Progressive View](#) (1996, No 3 February). Somewhat equivalent proposals were made by the UDA: UDA, A Bill of Rights (UDA 1986). This had been preceded by several publications by the New Ulster Political

the significant ways (apart from their espousal of political violence) in which those parties could be differentiated from the UUP and the DUP. This emphasis on human rights was seen by these parties as part of their self-understanding as working class, urban and committed to left-wing politics,⁹⁶ whilst remaining Protestant and unionist. Some of their grievances were strikingly similar to the grievances identified by working-class Catholics and republicans: for example, that the conditions under which loyalist prisoners were held amounted to violations of human rights.⁹⁷ In light of that history, then, it is not too surprising that a list of rights would be signed off by the CLMC.

Historical uncertainties not infrequently attract conspiracy theories, and the origins of the text we are concerned with is no exception. Was it possible that the list was conceived in Dublin and cunningly fed to the loyalists indirectly who then (unaware of its provenance) fed it back to Dublin?⁹⁸ Identifying conspiracy theories, even to rebut them, is hazardous, in that it risks giving them a credibility that they clearly lack. The hypothesis that the list had been drafted originally in Dublin, identified by a political commentator close to current loyalist thinking as in circulation among these groups,⁹⁹ seems extremely unlikely, and may say more about contemporary splits within Loyalism than anything else. Mansergh has indicated that he 'certainly never suggested [such a list]. Indeed, it came as a significant surprise. At no point was it suggested to me by Roy Magee, that the idea had been prompted by anyone in Dublin.'¹⁰⁰ No one else who was involved at the time and has subsequently written about it has suggested it, even

[*n* 95 cont] Research Group, which was an advisory body to the UDA. See New Ulster Political Research Group, *A Proposed Bill of Rights* (NURPG 1979); New Ulster Political Research Group, *Beyond the Religious Divide* (NURPG 1979); Ulster Political Research Group, *Common Sense: Northern Ireland – An Agreed Process* (Ulster Political Research Group 1987, 1993).

96 At that time, support for a Bill of Rights also emanated from Left Republicans hostile to Sinn Féin in the form of the Workers Party (see 'Bill of Rights essential for democracy', *The Northern People*, 28 May 1990, 3), and the Official IRA (with whom the UVF was in dialogue at the time).

97 *Combat*, October 1991; *Combat*, June 1992.

98 There is no evidence for this, it should be said. There are faint glimmers of similar language in the version of the Irish Draft Joint Working Paper which was leaked to the *Irish Press* and published in that newspaper on 19 November 1993. This refers to 'a number of principles which the two governments hold in common ... [including] recognition of and respect for the identities of the two communities in Northern Ireland, and the right of each to pursue its aspirations by peaceful and constitutional means ... and with the opportunity for both communities to participate fully in the structures and processes of government.' But it is likely that the Irish Government already had sight by that time of the 'Magee List'.

99 The source of this information has requested anonymity.

100 Mansergh, personal communication.

when they are otherwise willing to claim credit for events. Third-party non-governmental organisations or individuals are possible sources, but if they had written it, would they have subsequently hidden their light under a bushel? As Mansergh states:

The image of loyalists in Dublin at the time was such that it would have occurred to very few, or even anyone, inside or outside of government, that loyalists had the slightest interest in human rights or that they would be receptive to any suggestion from Dublin that they should put forward a list.

We can, I suggest, safely dismiss this theory, not least since there are much better alternatives available. Henry Sinnerton, the biographer of Ervine, provides the most detailed and (in the absence of other evidence) most plausible explanation for how the list evolved. In meetings between Spence and Ervine on the one side and Finlay on the other side, Sinnerton says ('in September and October 1993')¹⁰¹ that the loyalists 'put on the table the political documents on which the Combined Loyalist Political Alliance had been working'.¹⁰² He continues: 'Finlay suggested to Spence and Ervine that his political masters in Dublin would be very keen to see their ideas in print ... and the thinking of the loyalists eventually made its mark upon the two government's deliberations.'¹⁰³ Then, referring to the list of rights, Sinnerton adds that the list was 'written by the Combined Loyalist Political Alliance and approved by the Combined Loyalist Military Command on the Shankill Road'.¹⁰⁴

The Magee List appears remarkably similar to a list published in the UVF magazine, *Combat*, in November 1993.¹⁰⁵ Embedded in an article by 'Carson' (a *nom de plume*), and seemingly entirely unrelated to that article, is the following:

All human beings have the right to: Free political thought. To Freedom. To worship where and when they so desire. To political aspirations of their choice. To seek change constitutionally. To equal opportunity. There can be no price for peace. There is a price for war!

Some similar phrases also appear in a statement issued by the CLMC in early December 1993.¹⁰⁶ The editor of *Combat* magazine at the

101 Henry Sinnerton, *David Ervine: Uncharted Waters* (Brandon 2002) 150.

102 Ibid 150.

103 Ibid 150.

104 Ibid 151.

105 *Combat*, November 1993.

106 See, Gerry Moriarty, 'Loyalists seek solution that recognises two traditions' *Irish Times* (Dublin 11 December 1993): 'We defend the right of any one or group to seek constitutional change by democratic, legitimate and peaceful means.'

time,¹⁰⁷ who would presumably have an insight into who 'Carson' was, and why the list of rights was embedded in an article which otherwise had little connection with the list, is unfortunately dead.

Who actually drafted the Magee List is also still to be determined. Was it Ervine, a former member of the UVF but by this time the leader of the PUP and a committed advocate of a pluralist Northern Ireland? Was it Spence, the *eminence grise* of the UVF, and a member of the CLPA?¹⁰⁸ Or Billy Mitchell, also a former member of the UVF, recently released from prison in 1990, and later to produce highly articulate and theoretically sophisticated justifications of human rights from a loyalist perspective?¹⁰⁹ Was it Magee himself?¹¹⁰ Or was it drafted by advisors external to the CLMC and the CLPA? The most likely answer is that it was the result of a collective effort. Dawn Purvis, who was to become leader of the PUP, but at this time was not in a leadership position, has said that:

from [her] experience ... Billy Mitchell was the writer of many PUP papers including drafts that went to the CLMC from the CLPA. Writing papers was usually a joint effort beginning with a Billy Mitchell draft with input from David [Ervine], Gusty [Spence], Eddie Kinner and Jim McDonald.¹¹¹

107 Dawn Purvis, subsequently leader of the PUP, has said that 'Billy Mitchell and Jim McDonald were ... editors of *Combat* with input from the UVF "Brigade Staff"': personal communication. In November 1993, McDonald was more likely to have been the editor than Mitchell, who is said to have become disillusioned with the publication by that time: Aaron Edwards, personal communication.

108 Spence subsequently spoke eloquently about the need for a 'pluralist and equitable society': 'A comprehensive programme of inalienable principles manifesting themselves in freedom of speech, of opportunity, of worship, of political practice, of dignity and of absolute parity solidly encapsulated in a Bill of Rights agreed by all the Parties in Northern Ireland.' Speech to PUP Conference, 11 February 1995, excerpted in *Political Profile 3, Combat*, April 1995.

109 Mitchell has been described as 'the PUP's brain': Edwards (n 47 above) 230. See further, Billy Mitchell, 'Democratic socialism and progressive unionism' (1998) 9 *New Irelander*; *Political Profile 1, Combat*, April 1995; PUP, *Principles of Loyalism: An Internal Discussion Paper*, November 2002 (written by Mitchell).

110 In his obituary of Magee, *Irish Independent*, 15 February 2009, Reynolds wrote: 'At my request he wrote paragraph 5 of the Downing Street Declaration'. He is also quoted as saying: 'Paragraph 5 was what Roy Magee had written at meetings on the Shankill Road. I read it and I was happy to run with it.': John D Brewer, Gareth I Higgins and Francis Teeney, *Religion, Civil Society, and Peace in Northern Ireland* (Oxford University Press 2011) 116. See further: *Statement by Albert Reynolds, in response to the Combined Loyalist Military Command Ceasefire*, 13 October 1994; John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images* (Blackwell 1995), appendix B, 421–422; Seán Duignan, *One Spin on the Merry-Go-Round* (Blackwater Press 1995) 101, 126; Patrick Maume, 'Magee, Roy (Robert James)', *Dictionary of Irish Biography* (originally published, December 2014).

111 Dawn Purvis, personal communication.

Viewed objectively, the list appears to be a combination of general (even universal) principles and principles addressing specific local loyalist concerns. There are some familiar rights, traditional in any human rights document, such as freedom of religion, but several of them are far from ordinary. Even as regards the traditional rights, the way they are presented (the reference to 'religious liberties', for example), seems to owe more to Lockean conceptions of religious tolerance and the rights established by the Glorious Revolution of 1688 than it does to the Universal Declaration of Human Rights. Clearly this list of rights is not a cut and paste extract from that Declaration or any other human rights convention. The 'right to live wherever one chooses without hindrance' could very well have been included because there was a well-publicised claim in the border areas of Northern Ireland, reflected in the pages of *Combat*, that the IRA and militant republicans were allegedly engaged in 'ethnic cleansing'¹¹² of Protestants and unionists.¹¹³ So too, protections from sectarian discrimination would respond to fears by Protestants about the new fair employment legislation, seen as favouring Catholics.¹¹⁴ Nor was the list of grounds included in the right to equality of opportunity (class, creed, or colour) simply a reflection of other equivalent lists discussed at the time, including the PAFT guidelines.¹¹⁵ The original Magee List includes 'class' (not included in PAFT), no doubt reflecting the left-wing identity of prominent loyalist leaders at that time, but does not include politics, gender, disability, marital status, age, and sexual orientation, all of which, as we have seen, were included in PAFT.

Mallie and McKittrick, in their account, also introduced a degree of ambiguity into what motivated the list, recounting how the Taoiseach and the loyalists may have been at cross purposes in their understandings. They say:

The misunderstanding arose because Reynolds assumed the points were what loyalists wished to be reassured about. In fact, however, they were points which the loyalists were prepared to offer to Catholics and nationalists. Mr Magee later explained: 'I presented six points. He [Reynolds] assumed that what he was being told was what loyalists wanted written into a Bill of Rights. What they were saying was, "Here

112 'Senator', 'Like Hell They Will', *Combat*, June 1993. On the concept of 'ethnic cleansing' and expulsions in general, see Meghan Garrity, 'Introducing the government-sponsored mass expulsion dataset' (2022) 59(5) *Journal of Peace Research* 767.

113 See 'Cameron', 'US Watch-Dog for Human Rights Here', *Combat*, February 1991; 'Claen', 'Around the Province', *Combat*, April 1992; 'Carson', 'The Scorched Earth Policy of Republican Sectarianism', *Combat*, October 1992.

114 Editorial, 'The War of Words', *Combat*, June 1993; 'Vigilant', 'Discrimination in Employment', *Combat*, July 1994.

115 See n 6 above.

is what we would want to see written into a Bill of Rights to make sure nationalists would be comfortable." They were in fact conceding them, which is different.¹¹⁶

On this reading, while the Taoiseach included the list in paragraph 5 as an intended reassurance to loyalists, presumably in a putative united Ireland, the loyalists had intended the list as a reassurance to nationalists, presumably within a British Northern Ireland, resulting (as one participant subsequently observed) in mutual reassurance but based on a shared misunderstanding.¹¹⁷

The likelihood is that both intentions played a part in the construction of the list. Leading loyalists, indeed, had developed a political understanding that 'if we wanted the Union to remain safe, then we would have to appeal to ... middle-class Catholics'.¹¹⁸ Presenting a list of rights could be seen as part of that strategy. But equally, the list included rights that grew directly from the grievances of working-class Protestants. This latter interpretation seems to be clearly indicated by the message which accompanied the list of proposed rights that Magee sent to Dublin, which, as we have seen, has only recently become available. The author of the note (and we have seen that who that was is uncertain) wrote: 'All the above rights are dear to us and are the very basis of and reason for our existence. The threat to these, we believe, justifies our stance.' To this was added, however: 'We do, however, recognise that these things are important to all the people of our Province.'¹¹⁹

Whatever its provenance and motivation, the same Magee list is repeated word for word in the joint Irish–UK Framework Document published in February 1995, with the minor exception that 'gender' is substituted for 'sex' as a protected ground, and there is a minor redrafting of the 'right to choose one's residence'.¹²⁰ However, while the text of the Magee List remained substantially the same, the object and purpose of the list shifted significantly between its original conception in December 1993 and the joint Framework Document. As we have seen, its original manifestation in paragraph 5 of the Downing Street Declaration was in the context of commitments by the Taoiseach to the loyalists, as the former saw it at least. In the joint Framework Document, the list was placed in a paragraph in which *both*

116 Mallie and McKittrick (n 32 above) 224. Mansergh, Reynold's adviser on Northern Ireland at the time, recounts that he 'always understood the Magee list being primarily what Loyalists were prepared to concede, but it could be read in more than one way'. Martin Mansergh, private communication.

117 Senior UK civil servant, personal communication.

118 Hutchinson (n 50 above) 182.

119 Dermot Nally Papers, UCDA P254/85.

120 Joint Framework Document (n 58 above), February 1995, para 51.

Governments urged the parties in forthcoming talks to consider the list as the basis for a Charter of Rights for the island of Ireland to be agreed by elected representatives North and South, a concept that had been introduced by Irish negotiators into the mix during the negotiations on the joint Framework Document during 1994 and was broadly accepted by both sides by March of that year.

From Magee to Mitchell (1995 to 6 April 1998)

After 1995, however, the Magee List barely features directly in any of the available documents from the joint Framework Document until the so-called Mitchell Draft was circulated to the parties on 6 and 7 April 1998. The list had not been included, for example in the Joint Irish–UK Propositions on Heads of Agreement document circulated on 12 January 1998,¹²¹ or in the British Government's Rights and Safeguards Paper of February 1998.¹²² So too, the political parties seldom referenced the specific rights included in the Magee List in their various submissions,¹²³ with the notable exception of the Ulster Democratic Party, linked to the Ulster Defence Association, in its submissions during the talks process.¹²⁴ 'Civil rights and liberties' which the UDP identified as needing to be addressed, included, 'amongst others':

The freedom of expression

The freedom of assembly

The freedom of religious expression

The right to democratically pursue national and political aspirations

The right to seek constitutional change and legitimate means

The right to live wherever one chooses without hindrance

The right to equal opportunity in all social and economic activity, regardless of class, religion, gender or colour

121 Propositions on Heads of Agreement, 12 January 1998, CAJ Papers.

122 Rights and Safeguards: Paper by the British Government, February 1998, CAJ Papers.

123 Paddy O'Hanlon, of the SDLP, did, however, reference the text on rights in para 5 of the Downing Street Declaration in his confidential (and influential) submission to the Irish Government of December 1997. His paper did not consider the issue of human rights or equality as such, however; nor did it form part of the submissions to the talks process and was not generally known about until his posthumous autobiography. See Paddy O'Hanlon, *End of Term Report* (Paddy O'Hanlon Publishing Ltd 2011), app: 'The Document'. I am grateful to Brendan O'Leary for the reference.

124 UDP: Position Paper – Strand Three, MMW Papers, Box 17, Strand 3 and Cross-cutting: Party Submissions to Strand 3, October 1997–February 1998.

The right to full participation in democratic politics

The right to be protected by law

The right to liberty and security of person

The right to a fair trial

However, although the list of rights included in the Magee paper were seldom explicitly referenced by the parties, the role of rights played an important part in the evolving negotiations. In a Consultation Paper by the British and Irish Governments of 14 October 1997, the two governments reiterated that they would 'encourage democratic representatives from both jurisdictions in Ireland to adopt a Charter or Covenant, which might reflect and endorse agreed measures for the protection of the fundamental rights of everyone living on the island of Ireland', and requested the views of the parties on 'which rights might be specifically cited in any such Charter or Covenant'.¹²⁵

In its paper on 'Rights and Safeguards' of 7 November 1997,¹²⁶ the Irish Government returned to the issue of a Charter or Covenant, suggesting that the proposal in the joint Framework Document could be valuable, and repeating that it could 'also pledge a commitment to mutual respect and to the civil rights and religious liberties of both communities'.¹²⁷ Such a Charter or Covenant 'would represent a set of political commitments by the democratic representatives of the people of Ireland which would underpin the range of human rights and institutional safeguards legally enshrined in an agreement emerging from the present negotiations'.¹²⁸

The SDLP supported the suggestion of a Covenant or Charter but proposed that the 'extensive body of internationally agreed individual and communal rights provides the basis' for such a Covenant or Charter.¹²⁹ So, too, did Sinn Féin.¹³⁰ As explained by the SDLP in the discussion of rights on 2 March 1998:

the idea had arisen from the previous round of talks in response to Ian Paisley's comment that a Northern Ireland Bill of Rights was predicated on Northern Ireland remaining in the UK, and any change in this status

125 Strand Three – A New Agreement: A Consultation Paper by the British and Irish Governments, 14 October 1997, MMW Papers, Box 17, Strand 3 and Cross-Cutting.

126 Digitised by Quill at [Resource Item 17404](#).

127 Strand Two – Rights and Safeguards: Paper Presented by the Irish Government, 7 November 1997, CAJ Papers.

128 Ibid para 13.

129 SDLP Submission to Multi-Party Talks, October/November 1997, Rights and Safeguards, Strand 2: Agenda Item 5: digitised by Quill at [Resource Item 17416](#).

130 Rights and Safeguards: A Sinn Féin submission to Strands 1, 2 and 3, 8 February 1998, CAJ Papers.

would leave Protestants unprotected. The SDLP said it was possible that in the future Northern Ireland may opt by consent for reunification; therefore, it was important that they create rights that would apply equally for Unionists in such an eventuality as for nationalists at the present time.¹³¹

Explicit reference was made to the joint Framework Document provisions.

In its paper on 'Rights' to Strand One, the Women's Coalition also reiterated its support for such a Covenant and, in the context of spelling out its commitment, its representative 'read from paragraph 51 of the joint Framework Document [containing the Magee List] and said it believed it was important for the process to obtain some view of a declaration or covenant of rights'.¹³² There was, as yet, no set of principles on the table to be agreed, but 'it was clear that any which were drafted would have to be sufficient and dynamic to cover any attitudinal change [presumably a reference to unification] ... and that it was vitally important that such principles were developed on the basis that they would not provoke fears for anyone'.¹³³

When a (slightly) modified Magee List was included in the Mitchell Draft, therefore, it flowed from agreement between the two governments, rather than at the urgings of the political parties, but the discussions leading to its inclusion had strongly hinted that something like it could well play a role in any agreement. No one had expressed any opposition to the list and therefore retaining it as unmodified as possible was a way of heading off rejection by any party. Thus, the only significant change in the list between 1995 and 6 April 1998 was the addition of the 'right to freedom from sectarian harassment' in the Mitchell Draft. I understand from Martin Mansergh that he had advised the inclusion of this right during discussions between the two Governments in the second half of 1997, motivated by reported incidents of sectarian harassment in Northern Ireland at the time, not least the events surrounding the Garvaghy Road dispute.

So, although the Magee List remained substantially the same, its object and purpose shifted yet again between its original outing in December 1993 and its reappearance in April 1998. In its original manifestation in paragraph 5 of the Downing Street Declaration it was part of commitments by the Taoiseach to the loyalists. In the

131 Summary Record of Inaugural Cross-Strand Meeting – Monday, 2 March 1998 (14.15), MMW Papers, Box 17 Strand 3 and Cross-Cutting – Summary Record, 2 March 1998: digitised by Quill at [Resource Item 17470](#).

132 Summary Record of Inaugural Cross-Strand Meeting – Monday 2 March 1998 (14.15), MMW Papers, Box 17 Strand 3 and Cross-Cutting – Summary Record, 2 March 1998, para 27.

133 Summary Record, para 36.

joint Framework Document, it was placed in a paragraph in which both Governments urged the parties in forthcoming talks to consider the list as the basis for a Charter of Rights for the island. Now, in the Mitchell Draft, it was included as a commitment by all the parties to the Agreement, applicable in both jurisdictions immediately. The list was separated from being an explicit basis for a future Charter of Rights for the island, becoming instead a simple declaration of general principles which all parties to the Agreement recognised.

The idea of such a declaration had first been identified by the UK Government in an internal HMG Paper for Ministers on Human and Civil Rights (in April 1996) which assessed options ministers might consider in the forthcoming talks and included a discussion of a possible 'Declaration of Human Rights' which would 'be a presentational device involving little substantive change'.¹³⁴ There would be 'no statutory force to the Declaration, nor would it be in any way entrenched'. At that time, however, as reported to UK Ministers, the Irish Government

showed little enthusiasm for a declaration on these lines when it was proposed ... and we expect that it would probably be unattractive to the SDLP and Alliance. This is not an option which we should reject at this stage, if only because it might play a useful role in a settlement.

And so it became. The Magee List was separated from the idea of an all-island Charter or Covenant and became instead the centre piece of what was effectively the declaration envisaged by the UK Government.

Negotiating the final text of the B-GFA (6 April to 10 April 1998)

The basic Magee List remained intact, and, despite the apparent lack of previous consultation on the inclusion of the list as such with the parties, no component of what became paragraph 1 of the human rights and equality chapter of the Agreement was ever the source of any political showdown. That is not to say that the list passed without comment. The CAJ, the principal Northern Ireland human rights NGO, which was briefed unofficially on the content of the human rights and equality provisions of the Mitchell Draft during the morning of 7 April, suggested in a note to several of the political parties that the grounds on which equality of opportunity should be provided in paragraph 1 should be amended to include 'disability' and 'sexual orientation', both listed in the PAFT Guidelines.¹³⁵ Both the Women's Coalition and

¹³⁴ Ibid at para 9(a).

¹³⁵ Notes from Martin O'Brien to PUP, UDP, Sinn Féin, NIWC, including Some Notes [on the Mitchell Draft], 7 April 1998, CAJ Papers.

Sinn Féin proposed changes to the draft,¹³⁶ only some of which made it into the final agreement, but in the context of so much controversy over other sections of the agreement, the final version of paragraph 1 appears to have been accepted by all parties largely without demur. Both Sinn Féin and the Women's Coalition were primarily focused on other parts of the section on rights, safeguards and equality of opportunity, in particular the provisions on the public sector equality duty and the inclusion of language on victims.

Some amendments to the Magee List were made, however. One of the recurring fears of elements of civil society particularly involved with human rights issues had been that the negotiations would result in a backward-facing agreement, purely concerned with a 'two-communities' understanding of the conflict. In an internal CAJ paper, before the start of the negotiations, this fear was expressed as follows:

There is a need in particular to protect minority group rights in addition to the rights of the main traditions. Since the main thrust of the framework document is towards a political accommodation protecting the rights to the two main traditions in Ireland, there is a danger that the rights of other minorities (such as Travellers, ethnic minorities, lesbians and gays, and the disabled) will be overlooked. The ... Charter of Rights could play an important role in this regard.¹³⁷

In its paper on 'Rights' to the Strand One committee of the talks, in the run-up to the Mitchell Draft, the Women's Coalition had also stressed that, in its view, 'rights should not be seen as concessions to one side of the community or another, but rather as the benchmark and basis for the development of relationships characterised by equity, inclusion and respect for individual and community rights in Northern Ireland'.¹³⁸ It had urged that the talks should 'pay particular attention to the individual and collective rights of women; minority ethnic groups; people with disabilities, and other specific groupings within society that have experience of both direct and indirect discrimination'.¹³⁹

We have noted earlier the addition of 'sex' (later replaced by 'gender') to the original Magee List, but beyond that the list of protected grounds was narrow. Slowly but surely, however, the focus of attention shifted imperceptibly towards a somewhat more inclusive approach. Subtle

136 Mansergh has described Sinn Féin's involvement at this time: 'If you fast forward to the Good Friday Agreement, the night before it was concluded they came with a list of seventy-plus points that needed to be addressed ...': Spencer (n 27 above) 172–173.

137 Colm Campbell, Draft Initial Comments on Framework Document, March 1995, in CAJ Papers.

138 MMW Papers, Box 12, Strand 1 Papers Agenda Items 5 and 6, NIWC, Submission, para 2.1: digitised by Quill at [Resource Item 17305](#).

139 Summary Record, para 36.

changes (such as the shift from 'everyone living in Ireland' and the reference to 'both communities' in the joint Framework Document, to the use of the expression 'everyone in the community' in the B-GFA) hint how the human rights provisions in the Agreement were subtly providing an alternative, or at least supplementary, vision to the 'two communities' narrative of so much else in the Agreement.

In the context of this history, the other changes made in the final hours to paragraph 1 were significant.¹⁴⁰ Three sets of important changes were made. The first change to the Mitchell Draft was the addition of 'the right of women to full and equal political participation', at the request of the Women's Coalition. Monica McWilliams has described how the two governments agreed to insert it at the last minute, during the all-night negotiations on the night of 9/10 April.¹⁴¹ The second change was the addition of language on the victims of the 30-year-long conflict, some of which was framed in the language of rights. This too was proposed at the last minute by the Women's Coalition and included in the final draft, as Williams put it, 'by the skin of our teeth'.¹⁴² Third,

140 Digitised by Quill at [Resource Item 17140](#).

141 McWilliams (n 66 above) 208. A rather more colourful description of the process by which the provision was agreed to be included is by Kate Fearon, one of the other Women's Coalition negotiators, in *Women's Work: The Story of the Northern Ireland Women's Coalition* (Blackstaff Press 1999), chapter 4: 'The NIWC decided that it had not been in the process for two years for nothing to be acknowledged about women's rights, and thus proposed the addition of "the right of women to full and equal political participation" (wording arrived at only after revisiting the Beijing conference document and considering the wording of the Guatemalan peace agreement as found on the Internet). The offensive to have this inserted was mounted on a number of fronts. First, Sagar went to visit Mo Mowlam, who was being jealously guarded by her officials. Not to be put off, Sagar hung around the corridor. When Mowlam appeared, Pearl said she needed to speak to her urgently, so they shared a toilet cubicle while Pearl told her about the provision. Mo went back into her offices, and Sagar, after a quick Menthol Light in the toilet of the non-smoking building, went out into the corridor again. Here she met one of the officials, who told her she was not allowed to see the Secretary of State. She laughed. "Been there, done that, worn the T-shirt," she informed the stunned official. "You're too late."

Other officials were open to suggestion from the NIWC. They just needed a little persuading. For example, once Mowlam had deemed the issue of women's rights to be important enough to be pursued, one male official sat late into the night, looking slightly bewildered amongst ten women, trying to discover if rational arguments really existed for its inclusion. The rights laid down in the agreement, he observed, were specifically relevant to a situation of conflict – where did women fit in? "It's simple," Avila Kilmurray told him, quoting Derry civil rights activist Cathy Harkin. "We've been living in an armed patriarchy for the past thirty years!"

"Oh, right," came the sensible reply. And that was it. The NIWC addition was in. Once in, no one dared take it out.'

142 McWilliams (n 66 above) 208.

the list of protected grounds identified in the provision guaranteeing equality of opportunity was amended to include 'disability', and to substitute 'ethnicity' for 'race' (sexual orientation was not included as a protected ground). These amendments were proposed by the Women's Coalition,¹⁴³ at the urging of the CAJ,¹⁴⁴ which as we have seen was in contact with several of the political party representatives present in the negotiations, although it was not a party to the negotiations.

Following publication of the Agreement, the declaration of rights in paragraph 1 elicited opposed assessments, when it was addressed at all. On the one hand, the organisation British Irish Human Rights Watch was highly critical of what it saw as the failure of the drafters of the Agreement to do more to break the 'two communities' approach. Referring specifically to the list in paragraph 1, it considered that it was

clear that the list contained in the Agreement has been introduced in order to appease or reassure one faction or another Thus the list ... perpetuates the approach of regarding human rights as bargaining chips, rather than recognising that they are universal and apply to everyone. The sooner the notion that human rights are a series of claims that need to be balanced between communities is abandoned, the better.¹⁴⁵

The Women's Coalition took a different view, with Monica McWilliams viewing this part of the Agreement with pride because it was inclusive and broke out of the 'two communities' narrative of rights.¹⁴⁶ For the most part, however, paragraph 1 elicited little comment.

CONCLUSION ... AND A POSTSCRIPT

We have seen in this article that the list of rights in paragraph 1 of the human rights and equality chapter of the B-GFA resulted from the collective involvement of many parties between 1991 and 1998. At one time or another, representatives of Sinn Féin, the IRA and the SDLP, the Irish Government and the British Government, the Women's Coalition and the CAJ, all played a role in producing a list of rights that each could live with. The dialogue that was initiated with Sinn Féin and the IRA contributed to the commitment that future constitutional arrangements would safeguard 'civil rights'. We have also seen that progressive loyalism, in the shape of members of the CLMC, the PUP and the UDP, also played an important role in shaping the embryonic declaration of human rights, supplying the language that

143 Ibid 207.

144 CAJ Archives.

145 British Irish Human Rights Watch, *The Mitchell Agreement: An Assessment of the Human Rights Dimension* (April 1998), CAJ Papers.

146 McWilliams (n 66 above) 208.

formed the basis of paragraph 5 of the Downing Street Declaration. The loyalist and republican role in contributing to the human rights element of the B-GFA and the peace process should, I think, be more widely recognised, not least if the communities from which they came are to feel any attachment to it. The fact that what were seen as the two political extremes were so central to the narrative is a critically important part of the story. The language chosen, and the process from which it came, were both carefully constructed precisely so that they would appeal to the political extremes in Northern Ireland, those who considered themselves (whether loyalist or republican) to be marginal to the society in which they lived.

What will be seen by some, at first reading, as a rather odd miscellany of rights, incubated on the hard streets of Belfast, survived largely intact in the cauldron of drafting what became the B-GFA. But grafted into the original Downing Street Declaration formulation were the subsequent contributions of a highly diverse group of strange bedfellows, who probably did not fully appreciate the origins of what they were contributing to. The traditions from which those who contributed to the final product came included: republicanism, liberalism, Lockean religious toleration, socialism and feminism. Was the result an eclectic collection of disconnected rights or was there a merging of these originally discrete traditions into an integrated and cohesive understanding of human rights?

At this point, the narrative set out in this article can usefully draw on, and contribute to, the historiography of human rights. A common theme in the study of the intellectual history of human rights is the extent to which human rights has come to challenge, if not replace, other previous ideologies.¹⁴⁷ Though this 'replacement theory' is regarded with some scepticism,¹⁴⁸ it does have the virtue of emphasising similarities between the role of human rights and the role of other competing ideologies. For the purposes of this article, the argument that human rights has become a new global civic religion is particularly interesting because the global growth of human rights in the twentieth century echoes the global growth of the Christian religion in the nineteenth century. The concepts that were developed to analyse the latter seem particularly adaptable in analysing the former, in particular the extent to which, when multiple religions came into contact with each other, what resulted was a merging or assimilation of these discrete traditions, what became known as 'syncretism'. Does this explain what occurred between 1993 and 1998 in Northern Ireland? Do we see the emergence of a syncretic human rights understanding? In

147 Samuel Moyn, *The Last Utopia* (Harvard University Press 2012).

148 Christopher McCrudden, 'Human rights histories' (2015) 35 *Oxford Journal of Legal Studies* 179.

particular, is there a central element that links the disparate traditions together sufficiently to create an integrated, inclusive idea of human rights?

One of the phrases that we have not so far considered is the reference to 'democratic dignity' in paragraph 5 of the Downing Street Declaration. We have seen that paragraph 5 comprised two main parts: the first section dealing with issues of political self-determination and the principle of consent, and the second part on the importance of rights. 'Democratic dignity' neatly links the two parts of the paragraph, with 'democratic' referring to the first part, and 'dignity' referring to the second part. In this context, the language of 'democratic dignity' speaks in terms of 'respect'. Indeed, in important ways, the concept of dignity as respect is the central idea of the whole paragraph. This message, that those on the extreme and the marginalised were respected, was a powerful signal of inclusion and possibility.

Were it not for Brexit, however, the story of how paragraph 1 came to be would be little more than a footnote in the history of the B-GFA. After the successful conclusion of the negotiations in 1998, paragraph 1 was treated with scant regard. How things have changed! For, now, the Magee List forms a significant part of the architecture that article 2 of the Protocol establishes for the continuing role of EU human rights and equality standards in Northern Ireland. When paragraph 5 of the Downing Street Declaration was amended to include the promise that rights listed 'would be reflected in any future political and constitutional arrangements', few if any could have imagined that it would be in the political and constitutional arrangements flowing from Brexit that the list of rights was to take centre stage. Nor that what was once, rightly, viewed as a set of legally unenforceable principles, of little immediate practical value, would become a key element of an enforceable set of legal obligations, both in domestic law and in international law, after being incorporated into the enforceable, and justiciable, legal provisions of the Protocol. Determining the extent to which British negotiators realised the full import of what was being agreed in Protocol article 2, in particular the change in the status and enforceability of the various aspirational rights in the B-GFA, is beyond the scope of this article, but contemporaneous evidence indicates that this was understood,¹⁴⁹ and none of the initiatives taken since, whether in the Windsor Framework,¹⁵⁰ or in the agreement between the DUP and the UK Government that led to the restoration of the Northern

149 The negotiating history of art 2 of the Protocol is considered in depth in McCrudden (n 13 above).

150 HM Government, *Windsor Framework: A New Way Forward* (CP 806 2023).

Ireland Assembly and Executive,¹⁵¹ has sought to diminish the scope of article 2, and the new role of the Magee List in that context.

There are several ironies in this aspect of the story. First, at the time of the B-GFA, the UK Government could afford to be tolerant of the incorporation of the declaration of rights in paragraph 1 because it had succeeded in stripping it of any enforceability, really from the time of the Downing Street Declaration on. It is ironic that it is because of the effects of Brexit, a decision of the British people that (on one reading, at least) wanted to free itself of such obligations, that the B-GFA's declaration of rights is now enforceable through the Protocol. The role of the Magee List in this respect is significant, providing one of the key elements in determining which pre-Brexit rights underpinned by EU law should be protected after Brexit. Article 2 of the Protocol essentially stakes out a conservative position, seeking to preserve and maintain the *status quo* prior to Brexit, rather than push forward a progressive agenda. But its conservative orientation is, paradoxically, a radical move considering the hostility to rights seen to be coming via 'Europe' from significant factions of the Conservative Party and it could well lead to Northern Ireland law diverging from the rest of the UK, so far as the protection of rights is concerned.

There is another irony in the Brexit aspect of the story. Northern Ireland civil society was remarkably successful in achieving several advances in the protection of human rights and equality in the B-GFA, and these have been identified previously. But for much of the history recounted here, civil society's focus in the run-up to the B-GFA was not on the declaration of rights. Indeed, the development of the declaration of rights had been under its radar, although near the end of the process there was an attempt, partially successful, to reconcile that list with current human rights thinking, but only marginally. One of the characteristics of the Magee List was how far it was from the traditional list of rights that human rights organisations themselves would have produced. We have seen, too, that the declaration of rights was met with some scepticism by at least one prominent human rights organisation at the time, when it eventually emerged. The irony lies in the fact that the list, through its incorporation in Protocol article 2, has now a significant role in several of civil society's most important human rights campaigns in Northern Ireland post-Brexit.¹⁵² The stone that the builders rejected has become the cornerstone, perhaps?

151 HM Government, *Safeguarding the Union* (CP 1021, 2024).

152 In particular, the campaigns against the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, the Nationality and Borders Bill 2023, the Northern Ireland Protocol Bill 2022, the Bill of Rights Bill 2023, the Illegal Migration Act 2023 and the Safety of Rwanda (Asylum and Immigration) Act 2024.

The courts are likely to become heavily involved in these issues in the future. If so, the origins story told in this article may influence the interpretation of article 2. To say the least, it is an intriguing story and, in several ways, potentially quite important in the future application of article 2 of the Protocol. The complex story told here is, however, unlikely to be seen as easily supporting any very clear analysis of the 'object and purpose' of the provision, as the VCLT demands. Perhaps the most that this narrative can do is to challenge some interpretations that might be advanced. At least two potential errors about the drafting of the list of rights in paragraph 1 can be challenged: it simply is not the case that the list represents predominantly the preferences of nationalists and republicans, rather than unionists and loyalists. And it is not the case that the list of rights only looks back in time to address the 'factory of grievances' that occupied Northern Ireland before 1998. We have seen that there is also room for a narrative that sees the declaration of rights in paragraph 1 as addressing the concerns of republicans and loyalists, whilst at the same time supplementing the dominant 'two communities' approach in much of the rest of the B-GFA with a vision of the future based on the protection of human rights and the advancement of equality for 'everyone in the community'.