

**NOT THE WAY FORWARD: Some
Comments On The Northern Ireland Human Rights
Commission's Consultation Document On A Bill Of
Rights For Northern Ireland**

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I. INTRODUCTION

The Northern Ireland Human Rights Consultation Paper on a Bill of Rights for Northern Ireland ("The Document") has, in some ways, already achieved a considerable amount. The publication of the Document (in September 2001) led, over the ensuing months, to an increasingly focused debate over this vexed issue. It has led, in particular, to growing participation by party politicians in discussing the way forward. Another effect of the Document, however, has been the significant degree of consensus that the Northern Ireland Human Rights Commission's Document is not the way forward.

This is not surprising. The Document is the product of a radically divided Northern Ireland Human Rights Commission (NIHRC). On many issues of central importance, the NIHRC has, as is clear from the text, simply agreed to differ at this stage of the discussion. Indeed, it seems likely that, had the NIHRC been required to reach a consensus on such issues by September, no such consensus would have been possible. An important consideration, therefore, in deciding how to react to the Document, is whether the NIHRC is likely to reach a consensus, within the next year, on what to recommend to the Secretary of State.

Since new members have joined the NIHRC's existing members, most of whom have been renewed, any prediction on this is of questionable value. We simply do not know what the new dynamics within the NIHRC are likely to be. In these sorts of bodies, personal relationships mean a lot. However, based on the somewhat fraught nature of the discussions within the NIHRC leading up to the publication of the September Document, it would be foolish to assume that a consensus will emerge, and it may be wise to assume that a consensus will *not* emerge.

It is important to stress that these basic disagreements are only in part because of issues internal to the NIHRC. In important respects the fundamental splits within the NIHRC on the Bill of Rights (disagreements which go well beyond the nationalist/unionist divide) reflect likely fissures outside the NIHRC in the larger political society of Northern Ireland. If this is correct, then the prospects for a Bill of Rights in the short to medium term are bleak indeed, since the British Government has made clear that, before legislating, they expect there to be a broad political consensus in Northern Ireland in favour of any set of proposals.

One (I stress *one*) of the reasons why the NIHRC appears to be so radically fractured is because its discussion on a future Northern Ireland Bill of Rights appears from the Document to have been woefully under-theorized in the post-Good Friday Agreement context. Before agreement on the detail of a

Bill of Rights is likely to be forthcoming, it is first necessary to find an accommodation on much deeper issues that lie behind these details. The NIHRC has failed to achieve this.

I want to make it clear at the outset the purpose of my paper. It is to assist the process of reaching a consensus by identifying the crucial issues that must be faced. I will not attempt to express my own views on these issues at this time because I think that would pre-empt the discussion that must be had on these questions. All of the issues identified below seem to me to raise genuine problems on which reasonable people can disagree. In order to move on, however, these reasonable disagreements need to be addressed and an accommodation found. I will begin with some areas of controversy that appear to be rather technical, before turning to what seem to me to be the deeper issues underlying these apparently technical questions.

II. SOME APPARENTLY TECHNICAL ISSUES OF CONTROVERSY INADEQUATELY ADDRESSED IN THE NIHRC DOCUMENT

(a) Relationship between the Bill of Rights and existing protections

The question of what a future Northern Ireland Bill of Rights should include, indeed the question of whether there should be an additional Bill of Rights at all, depends significantly on what we think of the existing legal and political protections, comprising the Human Rights Act 1998, the Northern Ireland Act 1998, and the other major statutory rights legislation. However, in important respects, we do not really know what to make of some of these existing protections because they are relatively young and substantially untested. The Human Rights Act has only been in effect for a very short period of time and no clear pattern of how the courts (particularly the Northern Ireland courts) will interpret the European Convention on Human Rights in the Northern Ireland context has yet emerged. Regarding the political protections for rights embedded in the Good Friday Agreement and the Northern Ireland Act, again it is very early days; in effect Northern Ireland has had stable government for only a matter of weeks. (I write in December 2001.) How these political protections will work over time (separately and together) is still very unclear, therefore. The NIHRC is in the position of considering options, and shaping the agenda for future debate, in a state of considerable uncertainty about the implications of the existing protections. Does this uncertainty matter? For some it does; for others it does not. The NIHRC Document is internally inconsistent on the question: sometimes it considers the adequacy of existing provisions; sometimes it does not, without any apparent logic.

This deficiency in analysis is apparent in the Document's failure to consider the relationship between its proposals and existing equality legislation, particularly the Fair Employment and Treatment Order 1998, and section 75 of the Northern Ireland Act 1998. With regard to the former, there is a recommendation to remove the exception for teachers in the legislation, without any apparent indication that this has been extensively considered in the past (not least by the NIHRC's predecessor body the Standing Advisory Commission on Human Rights) and been rejected. In its discussion of the extent to which it would be desirable to require Government to take

positive/affirmative action measures, as opposed to simply permitting such measures, there is an entirely inadequate discussion of the implication this would have for section 75 of the Northern Ireland Act 1998, which has been interpreted (including by the responsible Minister in the House of Commons) as requiring affirmative/positive action.

(b) Legal status of the rights in a Northern Ireland Bill of Rights

The legal status of the rights in a Bill of Rights is unexplored in any depth. One option, not fully considered in the paper, is that a Northern Ireland Bill of Rights might be drafted simply as a political declaration. This will also be an extremely important issue in the context of discussions concerning the proposed all-Ireland charter of rights. In part, one's reaction to this issue depends on what effect a purely "political" Bill of Rights is likely to have. For some, the potential political significance of the Bill of Rights is considerable even without formal legal effect, in that by setting out for the first time the list of rights that the community aspires to, it may increase the likelihood that further discussion of the meaning of these rights may take place and provide the opportunity to consider how political action can be used to develop these rights further. In part, therefore, our reactions to whether we think a purely political Bill of Rights is useful will depend on whether we think the Bill of Rights will, even without a legal status, have beneficial political effects. If not, then we are much more likely to want a firm legal basis for the Bill of Rights, not only because of the stronger expressive message this may convey, but also because we want the Bill of Rights to be directly instrumentally valuable in ways that a purely political Bill of Rights cannot accomplish. If it is to be accorded legal status, then we have to consider how, technically, this is to be accomplished. Here the issue arises as to whether the Bill of Rights should be regarded as equivalent to ordinary legislation, or be accorded a "constitutional" status of some form. If constitutional, then should this be a legal status, or a political status? The Document gives the reader little if any guidance on these difficult questions.

(c) Role of the courts

If the Bill of Rights is to be justiciable in any major respects, within which forums should adjudication take place? Several options are put forward by the NIHRC. The first is to rely on the existing Northern Ireland courts. A second option is to consider the possibility that there might be a new additional court dealing with human rights questions specifically. But to present these options without much more extensive consideration of the modalities of each option is unhelpful. Suggestions have, of course, been made by some that a new judicial institution could be established, with a much wider jurisdiction, to decide constitutionally-related cases more generally, for example cases about whether the Assembly or the Executive, or the British Government has overstepped the bounds of their attributed competences more generally. What is the NIHRC's view on this? Some have suggested that this might be a means of circumventing the climate of mistrust that seems to be clouding the courts in some sections of the community in such sensitive cases and might have a role to play in the fundamental rights field too. Does the NIHRC consider that this mistrust is justified or not? On the other hand, others have argued that the potential for

severe jurisdictional conflict between the two judicial institutions is ever present. Is there a way that the NIHRC considers that these conflicts can be minimized or eradicated?

If the ordinary courts are to be involved, then the NIHRC might have been expected to consider more specifically the approach that the courts should be encouraged or required to take in human rights interpretation. How should judges be selected for the Northern Ireland courts? Should there be greater democratic participation in the selection of judges for the Northern Ireland courts? These issues have, of course, been discussed in the context of the courts' role in interpreting law generally. The question the NIHRC needed to consider was whether a significantly increased role in interpreting human rights norms should lead to a reconsideration of the approaches taken to these issues in the past. The Document adverts to some of these issues, but none are explored in the degree of detail, or in the degree of sophistication necessary to convince or even to inform the public of the type of issues they need to consider in responding to the "options" presented.

(d) What does the Framework Convention on National Minorities require?

Considerable attention is paid in the Document to the Council of Europe Framework Convention on National Minorities, which both the United Kingdom and Ireland have signed and ratified. One of the features of the Convention is the absence of any definition of what constitutes a "national minority", although there has been extensive discussion of the question in international legal circles for some considerable time. The NIHRC Document, over the dissent of some members apparently, has interpreted the Convention protection of "minorities" as encompassing protection of communities of identity more generally, and views this protection as therefore equally applicable to majority identity communities as well as minority identity communities. Given the emphasis accorded to the Convention in the Document, this interpretation is of considerable importance. Yet it is also clearly controversial. Viewing majorities as having the extensive rights provided for in the Convention could well be extraordinarily destabilizing in certain contexts, if this leads to the conclusion that the minority rights are thereby correspondingly limited. The assumption of symmetry between majorities and minorities inherent in this interpretation is, to say the least, arguable. But no justification is given for this interpretation other than a cryptic reference to "advice", which remains unpublished.

(e) Where does the Bill of Rights fit in with human rights policy more broadly?

The Document is filled with recommendations that appear to be policy recommendations to government regarding human rights policy broadly conceived. Nowhere, however, is the issue of the relationship between a Bill of Rights and human rights policy consistently or comprehensively explored. Irrespective of whether the Bill of Rights is made justiciable, for example, the question arises as to how far non-judicial mechanisms of implementation should be adopted. How far should legislation be administratively or legislatively screened or audited for compliance with the Bill of Rights?

“Mainstreaming” is already accepted as a central strategy for achieving equality in Northern Ireland, however much in practice it leaves much to be desired. How far should similar proactive obligations be developed more broadly in the human rights context. Another relevant issue is whether there should be bodies outside the existing institutions given the task of monitoring the implementation of a Bill of Rights, and drawing attention to potential breaches. In this context, the powers of the Human Rights Commission itself become more than relevant. For some, it is of pressing concern that the Human Rights Commission be given adequate powers of enforcement, and this is regarded as relevant to the development of a Bill of Rights, but this interconnection is not adequately explored.

(f) Protection and enforcement of “solidarity” rights

How far should a Northern Ireland Bill of Rights bring political, civil, economic, social, and cultural rights together into one document? It is clear that some within the NIHRC were deeply uneasy about including many of what might be called “solidarity” rights in the Bill of Rights, and uneasy compromises to meet these concerns are evident in the texts of these provisions. There is extensive discussion in the literature about whether social rights are appropriately included in such bills of rights, whether this would be best done by setting out the detailed rights in a Bill of Rights itself, or by setting out a goal to be achieved and imposing positive responsibilities to enact specific legislation. In particular, there is discussion as to which rights should be regarded as having an immediate effect, and which should be subject to further detailed exposition (either at the national level or the regional or international level). Some rights, particularly social rights, are regarded by some as less susceptible to individual adjudication than civil rights. Social rights are sometimes seen as fundamental principles that must be put into effect by specific policies relevant to a particular country against the backdrop of its economic and social development, rather than as “rights”.

The NIHRC proposed a provision that, essentially, proceduralizes socio-economic rights to a very significant extent. Public bodies are “to allocate resources in a proportionate and non-discriminatory manner”. Legal remedies “shall protect the due process and equality rights of all citizens in respect of social and economic rights”. In attempting to respond to the debate over the status of legal enforcement of socio-economic rights, however, the NIHRC has blundered into another highly contentious issue. Should we think of socio-economic rights as delivering substantive justice, or procedural justice? To view them as largely encapsulating the latter is (to say the least) debateable, yet no debate on this is apparent in the Document.

III. SOME DEEPER ISSUES

These specific, often apparently rather technical, debates mask a deeper set of issues, in my view. What is the meaning of the Good Friday Agreement? What role do we envisage “rights” playing in the re-construction of Northern Ireland? Do we think of “rights” as essentially there to support free-market liberalism, or underpin the European social model in Northern Ireland? Do we think of “rights” primarily in the context of a notion of Northern Ireland citizenship and civic society, with “rights” playing a “constitutional” role in furthering political integration and constitutional stability? This part of the paper begins to explore some of these deeper questions, albeit briefly.

(a) The nature of the Northern Ireland conflict and “the particular circumstances of Northern Ireland”

The NIHRC was asked,

“to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, *to reflect the particular circumstances of Northern Ireland*, drawing as appropriate on international instruments and experience” (emphasis added).

The requirement “to reflect the particular circumstances of Northern Ireland” is clearly of considerable significance. What does it mean? The NIHRC’s approach is, to say the least, underdeveloped. At the core of the issue is the deeply significant question of what we think the Northern Ireland conflict is about. This has been a subject of very significant debate over many years. Little of that debate appears to have been drawn on by the NIHRC, for reasons that are entirely unclear. We cannot adequately consider what “the particular circumstances of Northern Ireland” properly involve without taking a view on this deeply controversial issue. As importantly, the NIHRC’s failure to convince on this issue leaves it open to the criticism that its proposals represent more in the nature of political opportunism than considered judgment as to what should be included in the Bill of Rights.

(b) Consociationalism and the Bill of Rights?

Although the Bill of Rights debate predated the Good Friday Agreement, the current discussions clearly emerge from the Agreement. The NIHRC, indeed, derives its origin and its legitimacy from the Agreement. But there is a fundamental disagreement as to what the implications of this are for the Bill of Rights debate. Should we see the debate about the role of the Bill of Rights as part of an essentially contested *constitutional* discussion? In part, the manifestation of this disagreement relates to the question of how far the Bill of Rights should be regarded as further underpinning aspects of the Agreement, or supplementing (whilst remaining consistent) with the Agreement, or rebalancing the Agreement (without undermining it).

How should the Bill of Rights co-exist with the Agreement? There are two linked sets of issues. First, how should we think of the consociationalism in the Agreement? Should we view the consociational aspects of the Agreement as a basic value, or (rather) as merely a mechanism for delivering certain other basic values (and nothing more than that). Are these characteristics of the Agreement the result of pragmatic politics (and brilliant as that) or espousing consociationalism as an ideal? Second, what function do we think a Bill of Rights should have? Is the Bill of Rights simply a constitutional text, or is it supposed to reflect fundamental values that transcend time and geography? What position one takes on these two sets of questions markedly affects one’s view of the appropriate relationship between the Agreement and the Bill of Rights. If we think the function of the Bill of Rights is primarily as a constitutional text, then one is, I think, more likely to view the function of a Bill of Rights in Northern Ireland as not only not to undermine this fragile pragmatic mechanism, but to incorporate it. If, however, we view the function of the Bill of Rights not as

constitutional in this sense but more as attempting to articulate and promote fundamental values, then our reaction to the relationship with the Agreement will tend to depend on how we view the consociationalism of the Agreement. Only if we regard consociationalism as a basic value, are we likely to view the function of the Bill of Rights as appropriately reflecting that value, and (indeed) incorporating it.

Part of the debate about whether consociationalism is a value or not relates to how much one thinks that these arrangements have a significant down-side. If we recognise these arrangements as imperfect (though necessary), then we are unlikely to think that they espouse a value that merits inclusion in a Bill of Rights, but rather as an imperfect mechanism that should be put in a Constitution but which may need to be modified or limited when (if?) it gets out of hand. Another aspect of the debate involves the question of how far the ethos of consociationalism should be seen as pervasive of the whole Agreement. We might think, for example, that although fundamental, consociationalism is not the only element in the Agreement. If pervasive, we are more likely to see the Bill of Rights as an appropriate place to further this ideal; if not, then we are more likely to question how far the Bill of Rights should be used as a mechanism for enforcing such consociationalism.

Viewing the future of the Bill of Rights within this discourse is complicated, in part because the argument that rights can have the effect of transcending the consociationalism of the Agreement (what I shall call an integrationist effect) is formulated in different ways. One formulation goes something like this: The Good Friday Agreement embodies a strong element of narrow group identity and the Northern Ireland Act encapsulates this in preserving the community divide in a central role in the development of the political institutions in Northern Ireland. The aim of some is to replace this with a broader identity. In this sense, the function of a Bill of Rights is partly constitutional, in that, like other modern national constitutions, it attempts to identify the basic values that Northern Ireland is committed to. Recognising a common set of rights in a document that all can commit to, at least in part, is seen as an important element in building a new political society, providing the possibility at least of common identification by all with the basic document, if not with the institutions. From this perspective it is important that the rights identified should not be too narrow in their focus or prove ineffective in practice. The narrower the range identified, or the less effective in practice, the less likely it is that individuals will identify with the bulk of rights on the list and hence the integrationist effect will be weakened. The more the rights specified appeal across the existing communities, and the more effective they are in practice, the more likely it will be that rights can be seen as things that bind the communities together rather than divide them, and those institutions seen to be most closely identified with those rights will indirectly attract greater legitimacy. Particularly where much of the rest of the constitutional structure in Northern Ireland is explicitly or implicitly community-based, a broad-based list of rights may thus enable a set of common values to be identified that transcends the communities, offering an alternative vision of the future. By setting out a common vision, a shared set of ideals in a Bill of Rights, we enable ownership of an important element of the Community to be shared across communities.

For others, however, assumptions about the integrationist effect of rights in the Northern Ireland context are exaggerated, unproven, or wrongheaded.

From one perspective, rights do not create a polity, do not create a common political identity, but rather are expressions of an identity that already exists. If such a polity does not already exist, then the Bill of Rights will not help to create it; if such a polity does exist already then a Bill of Rights is unnecessary to create it. To either support or oppose the Bill of Rights on the grounds that it can increase integration is to assume that the tail wags the dog rather than the other way round. Unless there is an already functioning common political identity, the attempt to inculcate rights will be unsuccessful and so, from that point of view, the debate about the role of the Charter is irrelevant to the debate about integration. Rights are not constitutive of political identity, in other words, but the other way round. It is even possible that a Bill of Rights may weaken integration under certain conditions.

As I have said above, this debate is a complicated and multi-faceted one, but one that is critical to the likelihood of a successful Bill of Rights emerging. The NIHRC should have considered these issues much more extensively, and given significantly more guidance on how the public should address them.

(c) Meaning of equality and its relationship to socio-economic rights, and identity

Central to much of the discussion in the Document is an underlying concern with equality, but at no stage is the concept of equality explored in other than a technically legal way. In particular, the relationship between equality, identity, and socio-economic rights is never adequately addressed.

Let's begin with the issue of identity. During the 1980s, some political theorists increasingly concentrated on the desirability of recognising diverse identities. One of the most important developments affecting discussions of equality in the last decade has arisen from this political theory. Theories of justice developed, based on the importance of the cultural, political and legal recognition of the choices of social groups, viewing the failure to accord due importance to such differing identities as a form of oppression and inequality. This reflected and, to some extent stimulated, what has been called "identity politics", encompassing attempts to secure the political recognition and accommodation (if not celebration) of ethnic, religious, sexual, and other diversity. Bills of Rights are tailor-made for such politics and one of the ways in which this politics has manifested itself legally is by seeking to expand the grounds on which discrimination is prohibited. This model of equality as recognition is partially incorporated in the Document, although not identified as such.

However, at least two further elements in the political-theory debate over the politics of recognition are becoming influential in the critique of equality theory. One set of debates concerns the justifiability and desirability of recognising social groups in this way. Does such categorisation facilitate or hold back the goal(s) that anti-discrimination law aims to achieve? Does it require such a simplified conception of the characteristics of the social group that it ends up reinforcing an essentialist view of the group, and thus the further stereotyping of the group that equality guarantees were meant to protect against? Does it reify the existence of such groups, encouraging exclusivity and polarisation between these groups? How far, in light of this

debate, should the NIHRC adopt such a notion of equality? The NIHRC nowhere considers these difficult questions.

Turning now to the relationship between socio-economic rights and equality, some argue that the incorporation of such rights within a Bill of Rights is a way of indirectly furthering an equality agenda, if that agenda is conceptualised as one which seeks to deliver greater economic redistribution between groups. Seen from this perspective, equality is not primarily about the protection of identity groups but about securing greater economic justice between groups distinguished by access to goods. This group justice rationale has been seen by some as underpinning the development and interpretation of Northern Ireland equality law, given the emphasis placed in the Fair Employment and Treatment Order 1998 on indirect discrimination and affirmative action, which depend to some extent on group classification, and arguably adopt a group-justice rationale more generally, to the extent that, for example, statistics on and the monitoring of group behaviour and status is seen as central to the operational effectiveness of this model.

The NIHRC at various points appears to adopt both conceptions of equality. However, there is no apparent recognition that in some circumstances these two conceptions of equality may conflict, hence (in part) the NIHRC 's confusion over the interpretation of the Framework Convention on National Minorities. Is the equality that the NIHRC is primarily concerned with one that stresses concern with more equal distribution of goods and opportunities to economically disadvantaged groups, or is it one based on the cultural and symbolic recognition of differing identities? Does a concern with recognition, in other words, displace a concern with economic redistribution in the NIHRC 's agenda? We are given no guidance on this issue.

(d) The Bill of Rights and the European social model?

There is another dimension to the debate about the future of the Bill of Rights, which also arises out of debates about the meaning of the Agreement, but goes beyond that. One of the most hotly contested issues in European political debate is the future of the "European social model". The debate about the relative balance that is appropriate between social protection and competitiveness, and the ability to sustain substantial social spending in the context of an increasingly globalized economic system, are issues that go to the heart of European political controversy (and indeed globalisation more broadly). The debate about the future of the Bill of Rights is, in part, bound up with this broader debate. On one reading, the Agreement appears to adopt the position that there is a strong connection between rights and the creation of a stable, prosperous Northern Ireland. So what should be the appropriate relationship between rights and competitiveness, and between rights and social policies generally in Northern Ireland?

The issue then becomes the extraordinarily difficult and contentious one of whether solidarity and equality rights are foundational of economic success, or a drag on it. In this unresolved debate, the Bill of Rights becomes a powerful symbol for both sides. On the one hand, some will see a Bill of Rights espousal of equality and solidarity rights as a move by those who oppose the development of a liberal, market driven model of economic growth and development. For others, the Bill of Rights inclusion of these rights symbolises the acceptance within a foundational document of Northern

Ireland of the view that such rights provide the basis for economic growth and development. Higher social protection, from this perspective, may trigger higher productivity. Without it Northern Ireland is on the road to becoming a low skill labour market unable to compete with the sweat-shops of the third-world, and unable to compete with the high skill economies. What position does the NIHRC take on these issues? They are clearly central to its consideration of the role of socio-economic rights but they do not feature in the NIHRC's Document.

(e) Rights as foundational to Northern Ireland political participation?

Seen from one perspective, the political vision of the Northern Ireland is an ambitious one. It is, essentially, one that places considerable importance on political participation. It offers an opportunity to everyone to engage, to participate in shaping the future of a new political community. It is a truism that one of the major problems with that ideal is that it places a severe burden on everyone to act as a participant in the unfolding political drama. That sounds wonderful in theory, but can it be put into operation? The burdens of participation can seem at times to be overwhelming. How can a single parent who is worried about where the next pair of children's shoes is coming from, or a pensioner suffering from a recurrent and debilitating health problem, or a community activist unable to read and understand the interminable bureaucratic jargon that pours forth from government, or someone who is fearful that she will lose her job if she expresses her unpopular sexual preferences, participate effectively in the political process. It is difficult, time consuming, draining, and potentially risky work – much better, it might seem, to leave it to our full-time political representatives! But given that our political representatives are engaging in distant institutions in far-off Stormont, Westminster and Brussels, an inability to participate effectively beyond this means that the vision of a society of fully participating individuals recedes into the far distance.

This is where the debate about rights, particularly solidarity and equality rights, may come in. On the one hand, those who see the evolution of Northern Ireland politics depending, not on mass popular participation, but on elite, representative politics, or who doubt the role of rights in encouraging political participation at all, remain sceptical of the utility of the Bill of Rights in this context. Some, indeed, see the relationship between the Bill of Rights and political discourse much more negatively. Some see it as containing a “wish list” that, if accepted as anything other than purely rhetorical would withdraw a considerable number of issues from political debate. Others would argue that it is inappropriate to allow courts to give definitive answers to controversial political questions: instead, it should be left to the Assembly to make such contentious decisions. Indeed, this problem has already surfaced within existing human rights jurisprudence under the Human Rights Act.

On the other hand, rights, enforceable rights, rights that are secured, are thought by some to be necessary, though not sufficient, to enable participation in the political process to take place on an equal, respectful basis, one where there is, if not a level playing field, one which is not substantially biased against any group of participants. Here we come, then,

to the relationship between politics and the Bill of Rights. For some proponents, the Bill of Rights helps to guarantee those rights that enable political participation to take place on a platform of security, equality, and dignity. These rights are not a “wish list” of everything that one would like to see politics deliver without having to engage in politics – the Bill of Rights cannot replace politics, it is not anti-political. Such a Bill of Rights, and the rights it contains, is one which meshes with, while at the same time transcending, the Realpolitik of Northern Ireland political dialogue.

In short, the NIHRC should have offered some perspective on the relationship between rights and democratic dialogue. Its failure to do so betrays either an unwillingness or an inability to grapple with the deeper issues.

(f) Rights viewed as intrinsically important, or instrumentally valuable?

So far, the deeper debates canvassed above link the value of the Bill of Rights, at least in part, to wider debates about the meaning of the Agreement, economic development and political discourse. There is, however, a debate over whether the attempt to place discourse about the Bill of Rights in the context of any of these other debates is appropriate. The question raised here is whether the rights contained in the Bill of Rights should be seen as justified on consequentialist or non-consequentialist grounds. For those who see human rights deontologically, the Bill of Rights is justified first and foremost because it promotes values that are intrinsically, not instrumentally, valuable. To the extent that this view is adopted, then the previous questions are at best side issues. However, a deontological approach to rights raises other significant questions about the content of the Bill of Rights, in particular whether the rights the Bill of Rights contains are of such fundamental value as to be justified on these grounds. For those viewing the Bill of Rights from such a perspective, the rights contained should have such importance in order to justify their inclusion. The inclusion of non-intrinsically justified “rights” risks undermining those other rights in the Bill of Rights that are clearly justified deontologically. Which position does the NIHRC advocate? No answer is forthcoming.

(g) Human rights law as autonomous?

Human rights law raises immensely controversial issues of interpretation. There is often profound disagreement about the appropriate reach of human rights protections. The emotional and political force that an allegation of a violation of human rights now has often adds significantly to the salience of this controversy. In most jurisdictions in which courts play an active role in the legal protection of human rights, there is a significant debate about the extent to which the judiciary is either legitimate or competent in carrying out such a role. In part, this debate focuses on whether the purported distinction between legal and political approaches to human rights is convincing. When a judge interprets a human rights provision in a Bill of Rights, for example, is the judge really interpreting law, or making a political judgment? This question goes not only to the issue of the independence of the judiciary, but to the larger question of the autonomy of human rights law itself, its separateness from political and economic forces in the society. If human

rights law is not “autonomous” (or relatively so), then the judge interpreting it might be said not to be acting as a judge in the traditional sense, but as a politician. If a politician, he or she has (in democratic societies) no greater ability or legitimacy in doing so than any other political actor, and arguably a good deal less. This goes to the debate over whether a Bill of Rights contributes to or competes with democratic discourse.

There is, however, an additional aspect to the debate over the autonomy of human rights law, and this relates to the autonomy of such law vis-à-vis other areas of legal interpretation. Do we view the ordinary courts as an appropriate body to adjudicate on the Bill of Rights? For those who consider human rights law as autonomous, the answer often tends to be “no”, or at least “not without significant changes to the ordinary courts”. From this perspective come arguments about the potential for special human rights courts, for example. On the other hand, those who do not regard human rights law as autonomous but simply as law, tend to have less fear of a significantly expanded human rights role for the ordinary courts. There is no consideration of this important issue by the NIHRC in the context of whether a special court or the ordinary courts are appropriate for the interpretation of the Bill of Rights. Yet without consideration of this issue, participants in the debate are left rudderless.

IV. A FUTURE FOR THE BILL OF RIGHTS?

The question of where to go with the Bill of Rights in the future is controversial because of disagreements on a considerable range of different issues. There is disagreement on how far existing provisions go. There is disagreement on the place that a future Bill of Rights should have in the future of Northern Ireland, and (indeed) what the future of Northern Ireland should be. There is disagreement over the role of the Bill of Rights in the development of the European social model. There is disagreement over the role that rights serve in democratic government. There is disagreement over the nature of human rights, and the autonomy of the law that seeks to protect them. It has been my argument in this paper that an informed understanding of the debate over the Bill of Rights requires an understanding of, and ultimately a degree of consensus on how each of these sets of disagreements should be resolved.

Documents of the kind that the NIHRC was mandated to produce need to be visionary, technically authoritative, politically astute, and comprehensive. The NIHRC’s Document is, unfortunately, none of these. In large measure, the chorus of criticism to which the Document has been subjected is justified. It is sloppy, rushed, internally inconsistent, technically unconvincing, and lacking any coherent vision. A fresh start is necessary. It seems unlikely at the time of writing, that the NIHRC will be able to achieve what is necessary. The NIHRC should recognise that fact and devise, in co-operation with all the relevant political actors, an alternative process for progressing the project.

What is the way forward? One alternative (which I do not advocate) is for the political process simply to leave serious discussion of the Bill of Rights to another day when it might be easier to achieve a consensus. This option, however, underestimates the extent to which the Bill of Rights is thought by some to be a foundation stone of the Good Friday Agreement. For it to fail

to materialise might be to contribute to destabilizing the Agreement. It is clear that significant numbers of people have been both sufficiently energized and empowered by the discussions to regard the collapse of the project with considerable unease. Another alternative (which I also do not advocate) is to reform the NIHRC's decision-making procedures, either formally or informally, to move away from a consensus-based approach towards majority decision-making. The effect of that, whilst ensuring a result in the short term, would be to lead to a result in the longer term that would be likely to fail the "external" consensus test that the British Government has indicated it would apply to any set of proposals coming from the NIHRC.

Is there another alternative? Without seeking to set out a detailed mechanism, it may be worth considering the type of approach adopted by the European Union in order to draft the European Union Charter of Fundamental Rights, proclaimed in Nice in December 2000. The body charged with drawing up the Charter, which took less than a year to draft, was made up of a broadly representative group of members, including 16 members of the European Parliament, 30 members of national Parliaments and 15 representatives of the Heads of State of member states. For a European Union body, the "Convention", as it became known, was exceptionally open and accessible, and encouraged extensive participation. Most importantly, perhaps, it enabled the type of political participation in the discussion that enabled a political consensus to grow over time.