

# **NORTHERN IRELAND LEGAL QUARTERLY**

## **Special Double Issue on the Proposed Bill of Rights for Northern Ireland**

Introduction

by: Professor Brice Dickson,  
Chief Commissioner,  
Northern Ireland Human Rights  
Commission

Articles by: Austen Morgan  
Stephen Livingstone  
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Paul Mageean  
Caoimhghin O'Murchadha & Lee Reynolds  
Brian S Gormally  
Elizabeth Craig & Laura Lundy  
Les Allamby  
Colin Harvey  
Christopher McCrudden  
Rachel Murray

Full table of contents inside

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CONTENTS

Editorial (*David Capper*)

Introduction ( <i>Brice Dickson</i> ) .....	229
What Bill of Rights? ( <i>Austen Morgan</i> ) .....	234
The Need for a Bill of Rights in Northern Ireland ( <i>Stephen Livingstone</i> ) .....	269
Children's Rights in the Bill of Rights: Meeting or Exceeding International Standards? ( <i>Ursula Kilkelly</i> ) .....	286
Equality Issues ( <i>Maggie Beirne</i> ) .....	296
Issues of Criminal Justice ( <i>Paul Mageean</i> ) .....	303
A Bill of Rights for Northern Ireland – Language Issues in Context ( <i>Caoimhghin O'Murchadha &amp; Lee Reynolds</i> ) .....	309
Victims and The Bill of Rights ( <i>Brian Stephen Gormally</i> ) .....	316
Education Rights in the Bill of Rights ( <i>Elizabeth Craig &amp; Laura Lundy</i> ) .....	325
Economic, Social and Cultural Rights ( <i>Les Allamby</i> ) .....	335
The Implementation of a Bill of Rights in Northern Ireland ( <i>Colin Harvey</i> ) .....	342
Not The Way Forward: Some Comments On The Northern Ireland Human Rights Commission's Consultation Document ( <i>Christopher McCrudden</i> ) .....	372
The Importance of a Bill of Rights in Northern Ireland as a Process: Comparative Reflections from South Africa ( <i>Rachel Murray</i> ) .....	385

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## EDITORIAL

This last issue of 2001 is a double issue devoted to the proposed Bill of Rights for Northern Ireland. It is a double issue because there is much more material than can be conveniently included within a single issue. It is timely because it coincides approximately with the end of the consultation period which followed the publication of the Human Rights Commission's consultation papers.

The *Quarterly* is trying to fulfil a twofold purpose. First, it is trying to be a general law journal of the highest quality. This involves the publication of high quality articles on any topic falling within the field of legal scholarship (broadly defined). Articles do not have to deal with specific Northern Ireland legal issues although an article which has no connection to Northern Ireland at all, even in the most general sense, is not likely to be suitable material for publication in these pages. Secondly, the *Quarterly* is trying to make a real contribution to debate about matters of importance to Northern Ireland. The editorial team recognises that most of our readers want this, without being exclusively devoted to this field. Hence we are producing this special issue, and there will be more to come. Planning is under way for two special single issues in 2002, devoted to *Access to Justice and Legal Aid Reform* and *Devolution*. We are also planning to feature a Northern Ireland Developments section in at least some of our forthcoming issues. This section is intended to feature shorter articles, comments and notes on topical legal developments of a more local flavour. But the commitment to wider and deeper legal scholarships remains undiminished.

We are delighted to welcome Sheena Grattan, Heather Conway, and Gordon Anthony to the editorial team. They join the existing editorial team consisting of David Capper, Rachel Murray and Sharon Turner, who have served since the departure of Professor Brigid Hadfield in May 2001. Rachel Murray has since left the staff of the School of Law at Queen's but remains a member of the editorial team in her current position on the staff of Birkbeck College London. Rachel has poured an enormous amount of energy into this special issue, which could never have happened without her.

We are especially delighted to welcome Professor Brice Dickson, Chief Commissioner of the Northern Ireland Human Rights Commission, as our Guest Editor for this special double issue. The papers published here are heavily based upon a one day conference held at Queen's on 8<sup>th</sup> December 2001 and organised jointly by the Queen's Human Rights Centre and SLS. Thanks are especially due to Rachel Murray for organising this conference. The order in which the papers are presented here follows the format of the conference. First, three papers appear providing an overview of the subject, a critical approach and a positive recommendation in the context of a written constitution. Secondly, a series of papers appear covering the main substantive areas where specific rights have been proposed or offered for further consideration. Lastly, there are three papers covering implementation and wider perspectives, both from Great Britain and internationally.

The views expressed in these pages are those of the authors alone and do not represent the position of SLS Legal Publications, the Queen's Human Rights

Centre, the School of Law, or Queen's University Belfast in any way. To the extent that there is any controversy or anything offensive to any person or body, that is not more than the inevitable consequence of robust adherence to freedom of expression.

A rich feast awaits you. Enjoy.

*David Capper*

## INTRODUCTION

### *Brice Dickson, Chief Commissioner, Northern Ireland Human Rights Commission*

I particularly welcome the occurrence of today's conference at Queen's University on the provisional proposals put forward by the Northern Ireland Human Rights Commission (NIHRC) for a Bill of Rights for Northern Ireland. The Centre for Human Rights at Queen's University is to be congratulated for taking the initiative in organising the event. I am also pleased that the proceedings of the conference will be published in the form of a special issue of the Northern Ireland Legal Quarterly, and thanks are due to the current editor of that journal, Mr David Capper, for agreeing to such a proposal.

In this short opening address I wish to explain where the NIHRC has got to in its process for formulating advice on a Bill of Rights and make some introductory remarks to help set the scene for the more detailed presentations to follow.

The NIHRC officially launched its project on a Bill of Rights for Northern Ireland on 1 March 2000, at joint events in Belfast and Derry / Londonderry. We immediately began meeting with individuals and groups to gather their views on what should be contained in the advice we would ultimately be submitting to the Secretary of State. We produced a training manual and video so that people could be prepared to act as facilitators at subsequent meetings and thereby cascade down an awareness of the Bill of Rights project throughout the community. To date some 600 individuals have been trained as facilitators. In the summer of 2000 we published 11 different pamphlets to flag up some of the key issues likely to arise in the discussion of a Bill of Rights. In the autumn of 2000 we established nine independent working groups to provide the NIHRC with specialised advice on particular kinds of rights. Their reports were published in January 2001.

After many meetings in the spring and summer of 2001, the NIHRC eventually published its consultation document called *Making a Bill of Rights for Northern Ireland* in early September 2001. The document represents the NIHRC's initial efforts at producing a set of proposals for people to comment on. We are expecting a large response to the document – people should find it easier to comment on actual proposals than on what they would like to see written on a blank page. In October 2001 the NIHRC published a child-friendly version of the consultation document and summary versions have been made available in English, Irish, Ulster-Scots and Cantonese.

Officially the deadline for submitting comments to the NIHRC on the consultation paper was 1 December 2001, with 31 January 2002 being the deadline for children and young people. We fully recognise, however, that a three-month consultation period has not been long enough to allow everyone who wants to submit views to do so, particularly those organisations which themselves have to consult with their members before submitting views. At present the Commissioners intend to finalise their views on all the points

made to them in the submissions by 31 May 2002 and to publish their final advice to the Secretary of State shortly thereafter. However that date may still shift, especially as four new Commissioners have just been appointed to the NIHRC.

As I see it, the twin purposes of today's event from the NIHRC's standpoint are to gather the views of a rather more specialised audience than would be usual in this context and to encourage thinking "outside the box". To change the metaphor, I hope we can all apply both a wide-angle lens and a magnifying lens when we are examining the NIHRC's provisional proposals. I know there will be adversely critical remarks, but I know as well that they will be made constructively and in a spirit of co-operation rather than confrontation. By way of introduction to the presentations and discussions I want to make just three basic points.

First, throughout this debate it is important to be aware of the NIHRC's functions as laid down by statute. Under section 69(7) of the Northern Ireland Act 1998:

"The Secretary of State shall request the Commission to provide advice of the kind referred to in paragraph 4 of the Human Rights section of the Belfast Agreement."

Paragraph 4 of the Belfast Agreement reads as follows:

The new Northern Ireland Human Rights Commission . . . will be invited 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. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

Shortly after the NIHRC's establishment in March 1999 the then Secretary of State, Dr Mo Mowlam, wrote to the NIHRC to ask for such advice to be provided. But she did not set a time limit by which the advice should be supplied. The NIHRC immediately began to plan how to go about consulting and advising as requested. It decided to consult as widely and as deeply as it could, in the way described above. The consultation paper is the interim product of that consultation. It contains not just discussion about what rights might be included in a Bill of Rights but also actual draft clauses.

Some of our critics, and the next speaker, Austen Morgan, falls into that category, would argue that the NIHRC, in producing an actual draft Bill of

Rights, has exceeded its mandate. They say, for example, that the NIHRC was required to advise only on “the scope for defining rights” and not on the rights themselves. The former phrase, they continue, suggests that the NIHRC should merely set out the different options for protecting rights additional to those already protected. Personally I do not accept that interpretation of our mandate, which in my view is certainly broad enough to justify what the NIHRC has come up with so far, but I would remind those critics that even if they are right in the way they interpret this particular part of the NIHRC’s mandate they cannot deny that the supposedly superfluous part of our advice can itself be perfectly easily legitimated as an exercise of the duty the NIHRC has under section 69(3)(b) of the Northern Ireland Act 1998, which reads:

“The Commission shall advise the Secretary of State. . . of legislative and other measures which ought to be taken to protect human rights. . . on such occasions as the Commission thinks appropriate.”

My second introductory point is that, when considering what advice to give the Secretary of State, it is essential that the NIHRC bear in mind the work already carried out on a Bill of Rights by other institutions both here and abroad. Back in 1977, for example, the Standing Advisory Commission on Human Rights issued a report, largely written by Anthony (now Lord) Lester, calling for a Bill of Rights based on the European Convention on Human Rights. The preference was for a Bill of Rights applicable throughout the United Kingdom, but the report added the following:

We believe that in the event of the return of devolved legislative and executive functions to a new government in Northern Ireland (either before or after the incorporation of the European Convention into domestic law), it would be desirable for the enabling legislation to include a clear and enforceable charter of rights for Northern Ireland...This charter of rights could be more comprehensive than the European Convention and should be framed in the light of whatever at the time seem to be the special needs of the people of Northern Ireland.<sup>1</sup>

The present NIHRC could also do well to look at other draft Bills of Rights already in existence in this part of the world, such as the one published by the Committee on the Administration of Justice in 1990. We should look too at Bills in place elsewhere in the world. In 1982, for example, Canada abandoned the doctrine of Parliamentary sovereignty and gave to its Supreme Court the power to interpret, and ultimately to declare invalid, all Canadian statutes in the light of the Canadian Charter of Rights and Freedoms. In 1996 the Republic of South Africa chose the same path, this time creating a special Constitutional Court to interpret and apply the Bill of Rights. When the United Kingdom handed Honk Kong back to China in 1997 it did so only after putting in place a Bill of Rights based on the United Nations’ International Covenant on Civil and Political Rights.

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<sup>1</sup> *The Protection of Human Rights by Law in Northern Ireland* (Cmnd 7009), at para 6.15.

Lest it be thought that a Bill of Rights for Northern Ireland is an idea attractive only to academics and so-called do-gooders, it is worth recording that all the political parties currently active in Northern Ireland have at some stage in the recent past declared themselves to be in favour of a Bill of Rights for Northern Ireland. The views of parties at Westminster are less well-known. When I spoke recently with the Conservative Party's Shadow Secretary of State for Northern Ireland, Mr Quentin Davies, he seemed reluctant to accept the notion that a Bill of Rights just for Northern Ireland would be sensible (despite the wording of the Belfast Agreement). The British Labour Party, which of course does not allow people who live in Northern Ireland to join the Party, is not currently in favour of a Bill of Rights for the whole of the United Kingdom and informal indications from the Secretary of State are that he still needs to be convinced that a comprehensive Bill is appropriate for Northern Ireland. The NIHRC argues that a Bill of Rights for Northern Ireland would be a good thing in itself, regardless of whether it is backed up by the Belfast Agreement, by party manifestos, by political expediency or by popular belief.

My third and last point is that it is worth remembering the context in which a Bill of Rights will be operating if it is enacted. Northern Ireland is a part of the United Kingdom but its people may eventually vote to join the Republic of Ireland. Moreover, Northern Ireland is a deeply divided society, one which has experienced serious violence for more than 30 years. There will be a continuing constitutional dispute here for the foreseeable future and there will also be a continuing risk of violence. We all know, regrettably, that supposedly politically motivated violence is still a part of our landscape. Questions arise, therefore, about which "constitutional" issues, if any, a Bill of Rights should deal with and about how a Bill of Rights should provide, if at all, for a future emergency situation caused by terrorism. A Bill of Rights, of course, is not itself a written Constitution, but merely part of one. It would not normally deal with sovereignty issues. In any event the Belfast Agreement and the Northern Ireland Act 1998 already deal with many constitutional and related issues. Likewise the criminal law, or special laws on decommissioning, may be deemed sufficient to cope with any increased threat arising from terrorism. But the NIHRC needs to re-consider these issues in depth and to take some clear decisions on them.

In a similar vein, "democratic" rights may deserve to be included in the Bill, but where should we draw the line in that regard? Is the preservation of a consociational (power-sharing) government something that should be protected by the Bill? Should the cross-community voting system in the Assembly be guaranteed, or something akin to it? In more general terms, what constraints should be imposed on politicians when they are deciding which policies to adopt in the realm of social and economic rights in Northern Ireland? Can a Bill of Rights legitimately impose constraints on the public expenditure decisions of politicians? Should a Bill of Rights seek in any sense to provide for the mediation of disputes when rights conflict and should it say more about duties and responsibilities as a counterweight to rights? Does it make sense for a Bill of Rights to confer rights but not at the same time to confer access to means of enforcing those rights?

These and many other questions remain to be resolved by the NIHRC in the coming months. Today's conference will, I feel sure, make a significant contribution to the Commissioners' deliberations.

Thank you all for attending and now let battle commence!

## WHAT BILL OF RIGHTS?

*Austen Morgan, Barrister<sup>1</sup> and Member of the Inn of Court of Northern Ireland*

### ABSTRACT

*The political campaign for a Bill of Rights for Northern Ireland, which had relevance in the 1980s and 1990s, is the discordant swansong of the local human rights community. This social force originated with the Campaign on the Administration of Justice in 1981. There are four substantive arguments against the United Kingdom government doing what the Northern Ireland Human Rights Commission (NIHRC), a still unrepresentative quango, demands: (1) the draft Bill of Rights of 4 September 2001, if enacted in Northern Ireland law, would shatter human rights protection in the United Kingdom; (2) the obligation in the Belfast Agreement was to request advice on the scope for particular supplementary rights, not give the Northern Ireland Human Rights Commission carte blanche to draft a comprehensive bill of rights; (3) even if this had been in the Belfast Agreement, it would be irresponsible to scatter a cornu copia of badly formulated rights into a communally divided society with little instinct for democratic accommodation; and (4) Northern Ireland's Bill of Rights is the Human Rights Act 1998, and a framework for the future by amendment at Westminster. Arguments (1), (2) and (4) are strictly legal; argument (3) is speculative, accepting for the moment the NIHRC's false view of its remit. Human rights entered the legal mainstream across the United Kingdom on 2 October 2000. Lawyers and the judiciary now have professional human rights responsibilities. There will be a need for legal certainty. In Northern Ireland, the Committee on the Administration of Justice/Northern Ireland Human Rights Commission will be eclipsed. They are not broadly based, but they continue to be funded privately and publicly. Elected representatives in Belfast, as well as London, now have a role to play. Hopefully, the human rights of all, after the gestures and self-indulgence of the early Belfast Agreement years, will begin to be vindicated.*

### INTRODUCTION

I am opposed to the current proposal of a Bill of Rights (BOR) for Northern Ireland (NI). This is not because I am against human rights, a motherhood issue. As a lawyer in London and Belfast, human rights are integral to the law I practise. I have been critical of the Northern Ireland Human Rights Commission (NIHRC) since its appointment on 1 March 1999.<sup>2</sup> This is

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<sup>1</sup> 3 Temple Gardens, Temple, London EC4Y 9AU. [info@austenmorgan.com](mailto:info@austenmorgan.com). I would like to thank Neil Faris and Jeffrey Dudgeon for commenting helpfully on earlier drafts.

<sup>2</sup> On 30 September 1999, the NIHRC issued a draft strategic plan for consultation. I responded to this, and the document of 13 November 1999 is available on my professional website: [www.austenmorgan.com](http://www.austenmorgan.com). I never expected it to have any effect. However, I was amused to find that all such responses were vetted, in

because it has failed to contribute to the reconciling pretension of the Belfast Agreement. The draft BOR of 4 September 2001 makes no contribution to the rule of law, and to a badly needed culture of legality. The NIHRC's 155-page consultation document, *Making a Bill of Rights for Northern Ireland (Making)* is a sloppy academic exercise.<sup>3</sup> If implemented in the name of a greatly misunderstood international law (which is most unlikely), the NIHRC's BOR would seriously disrupt the constitutional law of the United Kingdom (UK) (and, as I shall show, the Irish) state.

Professor David Kennedy of Harvard University has recently articulated the general phenomenon of which the NIHRC is a particular instance: "The human rights community degrades the legal profession by encouraging a combination of overall formal reliance on textual articulations which are anything but clear or binding and sloppy humanitarian argument. This combination degrades the legal skills of those involved, while encouraging them to believe that their projects are more legitimate precisely because they are presented in (sloppy) legal terms."<sup>4</sup>

In this article, I look at the legal meaning of a BOR, generally and in the case of NI. This section contains background information on the Committee on the Administration of Justice (CAJ), and its BOR of 1993. I then consider four substantive arguments against the NIHRC's BOR: (1) the draft Bill of Rights of 4 September 2001, if enacted in Northern Ireland law, would shatter human rights protection in the United Kingdom; (2) the obligation in the Belfast Agreement was to request advice on the scope for particular supplementary rights, not give the NIHRC *carte blanche* to draft a comprehensive bill of rights; (3) even if this had been in the Belfast Agreement, it would be irresponsible to scatter a *cornu copia* of badly formulated rights into a communally divided society with little instinct for democratic accommodation; and (4) Northern Ireland's Bill of Rights is the Human Rights Act (HRA) 1998, and a framework for the future by amendment at Westminster. I conclude by making some practical proposals for a genuine human rights culture for all in NI.

### The Legal Meaning of a Bill of Rights

There has been an important debate since the early 1990s about human rights. However, there is a clear distinction between the so-called incorporation of the European Convention on Human Rights (ECHR), and a full-blown constitutional bill of rights for the United Kingdom (which could be part of a written constitution).<sup>5</sup> The former is part of a continental project; the latter would be unique to the United Kingdom. The Human Rights Act 1998, which entered fully into force throughout the UK on 2 October 2000, is the only legal show in town. The new Labour government re-elected in

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accordance with an ideological interpretation of section 75 of the Northern Ireland Act (NIA) 1998: NIHRC minutes, 13 December 1999; 17 January 2000.

<sup>3</sup> Appendix 1 contains what I call the draft BOR or the NIHRC's BOR.

<sup>4</sup> "The International Human Rights Movement: part of the problem?" [2001] EHRLR 245 at 262.

<sup>5</sup> Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (London, 1999), pp xxviii-xxix & xxxii.

2001 is committed to its bedding down. This remains the position as regards NI, despite the particularity of the Belfast Agreement (of which more below).

### ***What are human rights?***

Human rights is a trendy and tribal slogan in NI. As a practising lawyer, I am adverse to declaratory gestures. The only things that should matter for lawyers are practical remedies for natural and legal persons, achieved through a profession with legal duties and ethical standards. Human rights that are not legal rights remain purely an aspiration; at best a value, at worst barely disguised domestic and/or international politicking.<sup>6</sup> If a right is not legal, enforceable and able to give rise to relief and remedies, it is something other – at best a suggested right.

The source of contemporary human rights is post-world-war-two multilateral agreements, associated principally with the United Nations and the Council of Europe. These instruments are greatly misunderstood in NI, where international law and human rights tend to be considered as identical: international human rights standards!<sup>7</sup>

Public international law (hereinafter “international law”) remains essentially the law of states, though it was once known as the law of nations.<sup>8</sup> However, international legal personality may be bestowed on international organizations. Arguably, individuals remain the objects of international law.<sup>9</sup> They are the beneficiaries of international humanitarian law. This has come to include human rights, which are governed by the law of treaties. Not all international documents (as the human rights community tends to suggest) have legal effect. They certainly do not become domestic law in dualist constitutions, such as the UK and the Republic of Ireland (“ROI”). Only some international agreements are, what are called, law-making treaties. So-called soft law is not, of course, binding – anywhere. International law remains largely customary, and based upon the practice of states.<sup>10</sup> International instruments bind states parties; they are essentially of evidential value, as regards the customs and overriding principles of international law<sup>11</sup>. There is also customary international human rights law, based upon state policy. This deals with a finite number of rights, though no state claims the right to practise genocide, slavery, torture, systematic racial (including religious?) discrimination etc.<sup>12</sup>

Geoffrey Robertson QC has expressed the distinction between the culture of the human rights community and international law thus: “Many overoptimistic international lawyers argue that everything in the Universal

<sup>6</sup> David Kennedy, “The Forgotten Politics of International Governance”, “The International Human Rights Movement: part of the problem?” and “The Politics of the Invisible College: international governance and the politics of expertise” [2001] EHRLR 117, 245 & 463.

<sup>7</sup> See the definition of international law in *Making*, p 94, which misconstrues article 39(1)(b)-(c) of the South African constitution.

<sup>8</sup> *Ibid* p 145.

<sup>9</sup> Though Hersch Lauterpacht thought otherwise.

<sup>10</sup> See the NIHRC’s misuse of this concept: *Making*, p 94.

<sup>11</sup> Ian Brownlie, *Principles of Public International Law*, 4<sup>th</sup> ed (Oxford 1990), p 4.

<sup>12</sup> American Law Institute, *Restatement of the Law Third*, vol. 2 (1987), para 702.

Declaration of Human Rights is by now part of international law, but this is the sort of wishful thinking that has made international human rights law such a fatuous exercise. If human rights are to have the force of law in the twenty-first century, we must abandon these norms of the imagination (which guarantee sophisticated rights to hundreds of millions of women and children who have no hope of possessing them) and concentrate on consolidating, and above all enforcing, the elemental rules which have already ripened into rules of international law.”<sup>13</sup>

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the associated Commission and Court in Strasbourg (now just the Court), has been of most practical use in Europe. Its principal drafter was a retired UK official, whose inspiration was the (originally English) common law. Much is made of the so-called positive rights of multilateral agreements, but the ECHR reflects the effectively negative freedoms of the common law.<sup>14</sup> What are now called (international) Convention rights in the HRA 1998<sup>15</sup> retain a complex relationship with judge-made law in the UK<sup>16</sup>.

There is a great deal of ill-informed talk about international human rights standards in NI. The proper comparator for the UK’s record regionally is the way other European states, bound by the ECHR, dealt – and still deal – with domestic and international terrorism. Have the solutions been proportionate to the problems? The issue then becomes: what are the human rights protected by multilateral agreements within international law, and how are they enforceable – if at all? The next question is: what is the domestic human rights law (now substituting for Strasbourg jurisdiction) within the three legal jurisdictions of the UK? Only then does the question arise on a particular right: what are the standards in international and domestic jurisprudence, and how should they be applied here to a particular case?

### ***Human rights: violations v abuses***

The modern concept of human rights was a response to the conduct of mainly the German state (and its allies) in the 1930s and 1940s. States were then assumed to be the main abusers of human rights, using the term “abusers” colloquially. This was a reasonable assumption in 1950. States, of course, are the only respondents at Strasbourg, where they may be found liable for what are called violations<sup>17</sup>. Equally reasonably, at the beginning of the twenty-first century, we now know that sub-state actors may also abuse human rights extensively. I refer principally to the phenomenon of terrorism in the last quarter of the twentieth century. Terrorism may be domestic; but it is increasingly international. Abuse is a term of art in the ECHR, but it remains to be developed in accord with the “living instrument” doctrine<sup>18</sup> of the Strasbourg court. After 11 September (a day infamous in

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<sup>13</sup> *Crimes against Humanity* (London 2000), pp 81-2.

<sup>14</sup> Peter Duffy QC & Paul Stanley, annotators of the HRA 1998, *Current Law Statutes*, vol 3, 1999, p 42.

<sup>15</sup> S 1(1).

<sup>16</sup> *Derbyshire County Council v Times Newspapers* [1993] AC 534, 551 per Lord Keith of Kinkel.

<sup>17</sup> ECHR, art 34.

<sup>18</sup> *Tyrer v UK* (1978) 2 EHRR, 1 at 10.

history), we now accept that such terrorists may be organized internationally, and may use one state as a platform for the equivalent of acts of war against another state.

The problem of terrorism has been experienced among Council of Europe member states most intensively in NI by the UK (which is not to underestimate the internal security threats experienced by France, Germany, Italy and especially Spain, in the 1970s and 1980s, and still continuing). There is now something called Irish terrorism in the UK.<sup>19</sup> Victims of terrorism had no recourse to Strasbourg, other than against a state party for inadequate protection. With the so-called incorporation of the ECHR in UK law, it may well be possible for such persons (or their relatives), by suing paramilitaries, to develop the indirect horizontal effect in the HRA 1998, to secure relief and remedies in NI courts.<sup>20</sup>

I alerted the NIHRC to this exciting possibility early in its existence.<sup>21</sup> The indirect horizontal effect is the principal significance regionally, of the shift on 2 October 2000 from Strasbourg and the ECHR to domestic courts and the HRA 1998. The NIHRC has continued to rail against state violations, and effectively ignore paramilitary and other abuses. And this in spite of *HLR v France*,<sup>22</sup> where Strasbourg held (though it rejected the application of a Columbian drug trafficker against deportation) that the source of the risk could be the threat of reprisals by drug traffickers, coupled with the fact that the Columbian State is allegedly incapable of protecting him from attacks by such persons.

### ***International refugee law***

An analogy may be drawn between refugee law and human rights law; both are aspects of international humanitarian law. The former derives in the main from the 1951 Geneva Convention and a 1967 Protocol. It is, therefore, law based upon a multilateral international agreement. This has not been incorporated in UK law, but it is referred to in statutes and other domestic instruments. Immigration law is a major aspect of the public law of, principally, England and Wales. Applicants for asylum may appeal to special courts, against decisions of the Secretary of State. Practitioners in the Independent Appellate Authority apply the law of asylum – a well-founded

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<sup>19</sup> This originated in the definition of terrorism as connected with the affairs of NI. Lord Lloyd of Berwick's *Inquiry into Legislation against Terrorism*, Cm 3420, October 1996, argued for a tripartite distinction: Irish, international and domestic. This was accepted by the government: *Legislation against Terrorism*, Cm 4178, December 1998. The Terrorism Act 2000 applies to Irish, international and domestic terrorism. It is not known if the Republic of Ireland objected to the term Irish terrorism after 1996. None of the terms is defined in the Terrorism Act 2000.

<sup>20</sup> HRA 1998, ss 6(3) & 7(1)(b); Murray Hunt, "The Horizontal Effect" of the Human Rights Act" [1998] PL 423; Thomas Raphael, "The Problem of Horizontal Effect" [2000] EHRLR 493; Ralf Brinktrine, "The Horizontal Effect of Human Rights in German Constitutional Law" [2001] EHRLR 421; Ivan Hare, "Vertically Challenged: private parties, privacy and the Human Rights Act", [2001] EHRLR 526.

<sup>21</sup> See note 1 above.

<sup>22</sup> (1997) 26 EHRR 29.

fear of persecution for, what is called, a Convention reason – using international and domestic jurisprudence.

In 1951, the assumption was that only states persecuted those who fled in fear. We now know differently. International refugee law, or UK immigration law to be more precise, now recognizes what it calls non-state agents.

In *Horvath v Secretary of State for the Home Department*,<sup>23</sup> the House of Lords held: given that the general purpose of the refugee convention was provision by the international community of surrogate protection, the test of whether ill-treatment amounted to persecution was dependent upon, not only the severity of the ill-treatment, but also upon there being a failure by the state to afford protection against the ill-treatment. The Appellate Committee did not blame “the state” for the putative persecution by non-state agents. However, it insisted that the authorities should be able to deal with the consequences: there is a *per curiam* that the standard is a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agents.

This case – contra the human rights community in NI (and their acolytes in Great Britain and the Republic of Ireland) – recognizes the victims of sub-state agents. The persecution flows in part from the latter. It is not exclusively a matter of inadequate protection by “the state”, as the supporters of the NIHRC continue to insist. This argument by analogy has been accepted by the Immigration Appeal Tribunal, in the starred decision, *Kacaj*, of 19 July 2001.

### ***The particularity of Northern Ireland***

The greatest abusers of human rights in NI in the 30 years of the troubles – contrary to the impression given by the NIHRC – were, not the police and the army, but republican and loyalist terrorists. According to the Costs of the Troubles Study at the University of Ulster, for the period 1969 to seemingly the end of February 1998, some 3,593 people were recorded as having been killed in political violence. The largest category is people killed by republican paramilitaries: 2,001 or 56 per cent. The second largest is killings perpetrated by loyalist paramilitaries: 983 deaths or 27 per cent. The security forces combined were responsible for 382 deaths or 11 per cent.<sup>24</sup> It is therefore the position that the vast majority of deaths – at least 83 per cent – are attributable to illegal paramilitary organizations; just over one in ten was the responsibility of what the human rights community calls “the state”. Not all of the latter would have been as a result of force that was no more than absolutely necessary.<sup>25</sup> Almost all (if not all) of the former will have amounted to the abuse of the right to life under article 2 of the ECHR.

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<sup>23</sup> [2000] 3 WLR 379.

<sup>24</sup> Marie-Therese Fay, Mike Morrissey & Marie Smyth, *Northern Ireland's Troubles* (London 1999), p 170. The human rights community is concerned principally with the latter category: Fionnuala Ní Aoláin, *The Politics of Force* (Belfast 2000).

<sup>25</sup> There is no Strasbourg case finding the UK liable for a substantive breach of art 2 in NI. *McCann v UK* (1996) 21 EHRR 97 concerned Gibraltar (a substantive breach by ten votes to nine). The *Jordan*, *McKerr*, *Kelly & Others*, and *Shanighan*

***A bill of rights?***

There is, of course, a bill of rights in the UK, of 1688-89. It is an important part of the uncodified constitution. And it is still litigated.

However, it was in November 1968 that Anthony Lester made his first call for the incorporation of the ECHR in domestic UK law, in his Fabian pamphlet, *Democracy and Individual Rights*. The term incorporation has stuck, and may be used colloquially. Strictly, incorporation refers to customary rules of international law having domestic effect. Transformation<sup>26</sup> would have been a better term for a multilateral agreement in international law. Recognition should also be given C. Desmond Greaves, in the context of the NI civil rights movement. He argued on behalf of the Connolly Association in London, that Westminster should legislate for the province.<sup>27</sup> This was part of a democratic solution, inspired by socialism but mainly by nationalism.

A regional bill of rights was suggested by the Ulster Unionist Party (UUP), the Alliance Party and the Northern Ireland Labour Party in October 1972. This was in the Northern Ireland Office (NIO) document, *The Future of Northern Ireland: a paper for discussion*. Nationalists did not join in these calls,<sup>28</sup> which were made shortly after the fall of Stormont. (There had, of course, been a provision against religious discrimination in section 5 of the Government of Ireland Act 1920.) The UK posed, by way of comment, the question of human rights abuses by terrorists.<sup>29</sup> A subsequent white paper<sup>30</sup> hinted at a (unenforceable) charter of human rights. In the Northern Ireland Constitution Act 1973, part III on the prevention of religious and political discrimination prohibited such acts by public authorities. A Standing Advisory Commission on Human Rights (SACHR) was also established. Though its remit was discrimination, it was SACHR which advised in 1977 – with the help of Anthony Lester – that there should be a bill of rights.<sup>31</sup> The proposal amounted to the incorporation of the ECHR. This was to be UK wide, though Robert Cooper (dissenting) favoured a NI bill rather than wait for Great Britain to catch up.

A UK bill of rights then, as advocated in the 1970s, meant the ECHR. This was the sense in which the NI political parties would refer subsequently to the proposal. And a bill of rights was not antipathetic to the majority community, from where unionism draws its support principally. The answer given invariably, when nationalists and others pressed catholic grievances, was: continued involvement in the UK, with a bill of rights as one of the benefits and a principal safeguard for minorities and individuals.

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decisions of 4 May 2001 relate only to a procedural breach (seven votes unanimously).

<sup>26</sup> Confer transposition of European Community/Union law.

<sup>27</sup> *The Irish Crisis* (London 1972), pp 197-88, 200, 204 & 217; Bob Purdie, *Politics in the Street* (Belfast 1990), p 112.

<sup>28</sup> For a later assessment, see chapter 4 of the CAJ's *Making Rights Count* (1990).

<sup>29</sup> Paras 27-32 & 64.

<sup>30</sup> *Northern Ireland Constitutional Proposals*, Cmnd 5259, March 1973, part IV.

<sup>31</sup> *The Protection of Human Rights by Law in Northern Ireland*, Cmnd 7009, November 1977.

However, the matter was to rest for over 20 years, following the publication of the SACHR report. The UK was opposed in the 1980s and 1990s to the incorporation of the ECHR. So also was the Republic of Ireland, which was content with its fundamental rights in Bunreacht na hÉireann (articles 40 to 44). In the concerted attempt from the late 1980s to settle the NI problem, London and Dublin jointly eschewed any commitment to ECHR incorporation.<sup>32</sup> It was suggested in 1995 that democratic representatives might adopt instead a (non binding) all-Ireland charter or covenant.<sup>33</sup> The UK idea of a non-binding charter of 1973 for NI became, 22 years later, the Irish idea of an all-Ireland charter.

The significance of the Belfast Agreement, from the point of view of human rights protection, was the way the UUP, drawing on new Labour's commitment to the ECHR (see below), forced the Irish state to agree to an equivalent level of protection of human rights with the UK.<sup>34</sup>

What Anthony Lester initiated in 1968 would take 30 years to be realized as the HRA 1998. A whole series of legal factors contributed to this process.<sup>35</sup> NI's contribution was the troubles. There were also adverse human rights decisions against the UK at Strasbourg. New Labour (but only in GB) – inspired by the Institute of Public Policy Research<sup>36</sup> and Liberty<sup>37</sup> – embraced the ECHR in 1993.<sup>38</sup> There followed the 1996 consultation paper, *Bringing Rights Home*,<sup>39</sup> which led – following the election of the Blair government – to the October 1997 white paper, *Rights Brought Home*.<sup>40</sup>

### ***The Committee on the Administration of Justice (CAJ)***

The above narrative is broadly complete. But it leaves out an important sub-current, the CAJ founded in Belfast in 1981. And it is not possible to understand the NIHRC individually and ideologically, without reference to

<sup>32</sup> *Downing Street Declaration*, Cmnd 2442, 15 December 1993; *Framework Documents*, Cmnd 2964, February 1995.

<sup>33</sup> In the 1995 *Framework Documents*. This was to be based apparently upon the six so-called rights included in the 1993 *Downing Street Declaration*. See further, Austen Morgan, *The Belfast Agreement: a practical legal analysis* (London 2000), pp 373-4 & 375-6.

<sup>34</sup> First paragraph 9 of the Rights, Safeguards and Equality of Opportunity section.

<sup>35</sup> I list them in Austen Morgan, *The Belfast Agreement: a practical legal analysis* (London 2000), pp 361-2.

<sup>36</sup> *A British Bill of Rights* (1990), included subsequently in *The Constitution of the UK* (1991). It was based upon the ECHR, with additions from the 1966 International Covenant on Civil and Political Rights. It was published again, as *A Written Constitution for the UK* (1993).

<sup>37</sup> National Council for Civil Liberties, *A People's Charter* (1991). This referred to "the UK Bill of Rights". It was also based upon the ECHR and the 1966 international civil and political rights covenant.

<sup>38</sup> The party conference that year agreed: one, incorporation of the ECHR; two, an all-party commission to consider and draft a homegrown bill of rights for the UK.

<sup>39</sup> 18 December, published in [1997] EHRLR 71. This was the only UK document to refer to a BOR for NI: "a distinct package of rights as part of a new agreed and balanced settlement for Northern Ireland." However, it was looking back to the 1977 SACHR report, and the human rights bill had not then even been drafted.

<sup>40</sup> Cm 3782. There is a reference to NI in para 2.23.

this controversial pressure group. Indeed, the precedent for the draft BOR of 2001 is the CAJ's bill of rights of 1993<sup>41</sup>.

The CAJ styles itself a non-governmental organization (NGO in the argot of diplomacy), but is not state wide. It would claim to take no position on the constitutional question, to be effectively neutral in NI. Neutrality here means: a refusal to accept NI's constitutional position in the UK (including especially the legitimate use of force); and an acceptance of a united Ireland as a viable alternative (diminishing its criticism of republican violence).<sup>42</sup> The CAJ did not anticipate, and has not followed, the "consent" principle of the Belfast Agreement, a constitutional provision that may be traced from 1922<sup>43</sup>. As for its opposition to violence, it has used "international law" to justify its non-criticism of the main human rights abusers.<sup>44</sup>

The CAJ can only be understood against a background of post-war social and political changes in the UK, and particularly the effects of the "class of '68" on culture and learning: the transcendence of liberalism by fundamentalist identity politics. These thrived in the NI troubles. In metropolitan Britain, in contrast, they were confronted by Margaret Thatcher, and transformed by new Labour. The Greater London Council under Ken Livingstone is a warning from history. In the 1980s and, especially after the fall of the Berlin wall in 1989, "human rights" was to become a provincial Manichean cause, in communion with Irish nationalism, and substantially replacing extra-parliamentary socialism. NI is noted for historical survivals, long after the passing of the conditions elsewhere which gave rise to them.

Steve McBride, one of the human rights pioneers, recalled of 1981: "when we set up the CAJ, there was a major recognition that what was needed was an independent, objective, organization which would take an honest, non-partisan stand on issues of human rights in the North." By 1995, as justice spokesman for the Alliance Party, this former chairman had to admit: "I must say that there are some aspects of the CAJ. . . which I would have to say I am frankly disappointed with. . . . Do they recognize that the greatest abuse of

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<sup>41</sup> *Bill of Rights for Northern Ireland*. See also, *The Blessings of Liberty* (1986) and *Making Rights Count* (1990), which contains an earlier draft of the BOR.

<sup>42</sup> A good analogy is James Connolly's so-called neutrality in 1914, a prelude to theoretical and practical pro-Germanism: Austen Morgan, *James Connolly* (Manchester 1988) pp 150-1.

<sup>43</sup> Austen Morgan, *The Belfast Agreement: a practical legal analysis* (London 2000), pp 134-49. The Belfast Agreement did not alter NI's position in the UK. The Republic Of Ireland, in contrast, ended its territorial claim. Aspirations remain legitimate, and further effect was given to unity by consent.

<sup>44</sup> "We have set ourselves up as a non-governmental organization to comment on how the State deals with non-State violence. . . You may not like it but it is our function. . . We are simply abstracting ourselves from the local situation and applying international law." (Michael Ritchie, Forum for Peace and Reconciliation, *Report of Proceedings: volume 12: Friday, 31 March 1995*, pp 44-5) See also, Brice Dickson, "The Protection of Human Rights: Lessons from Northern Ireland" [2000] EHRLR 213 at 222 (equating state violence with paramilitary violence in the context of the NIHRC's definition of victim).

human rights in Northern Ireland in the last twenty five years is that carried out by paramilitary groups. . .”<sup>45</sup>.

The answer to Steve McBride’s question is, of course, no. This is evident from the public session of the Irish government’s Forum for Peace and Reconciliation in Dublin Castle on 31 March 1995, when the CAJ (and its sister organization, the Irish Council for Civil Liberties [ICCL]) made a joint presentation to members<sup>46</sup>, comprising nationalist and other political leaders but no unionists. Elected politicians – including Dr John (now Lord) Alderdice of the Alliance Party (and now speaker of the NI Assembly), Mary Harney TD (leader of the Progressive Democrats and now tánaiste) and Michael McDowell TD (of the same party and now Irish attorney general) – criticized severely what was becoming a radical community in both parts of Ireland, using human rights to promote a political project with a considerable vanguard role for itself.

The *hauteur* of this self-appointed elite, and its disdain for what ordinary people believe to be human rights (whether drawing on religious consciousness or secular values), is remarkable.<sup>47</sup>

### ***The CAJ’s Bill of Rights for Northern Ireland (1993)***

Strangely, this was a bill only for Northern Ireland, at a time when civil liberties organizations in Great Britain were putting forward proposals for the UK as a whole. What explains the CAJ’s isolation? The answer is its relationship to nationalism, reflected in its purported constitutional neutrality. The preamble began: “However Northern Ireland is governed”. Why the doubt? The commentary read: “The CAJ intends this Bill of Rights to apply whatever the constitutional arrangements are in place at any particular time for governing the area known as Northern Ireland. The organisation takes no position on what the constitutional status of Northern

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<sup>45</sup> Forum for Peace and Reconciliation, *Report of Proceedings: volume 12: Friday, 31 March 1995*, pp 26-7.

<sup>46</sup> Angela Hegarty, Anne McKeown and Michael Ritchie represented the CAJ; Tom Cooney, Michael Farrell and Úna ní Raifeartaigh represented the ICCL.

<sup>47</sup> “Clearly we need to have another go at restating our position on the question of non-State violence. We have said that we are opposed to it. Clearly that is not adequate for many people. Unfortunately that may be a matter of the lack of a human rights environment that we have.” (Michael Ritchie, Forum for Peace and Reconciliation, *Report of Proceedings: volume 12: Friday, 31 March 1995*, p 44); see also, “Something we have noticed in our work already, even though the Human Rights Act is in its infancy, is that ordinary people, and others, are ignorant about human rights. Many people, including some politicians, are confused about how human rights apply, thinking that the rights protected by the Human Rights Act can regulate disputes between citizens, rather than between citizens and public authorities. Education is clearly needed to dispel this confusion, otherwise there is a danger that people will feel let down by the Act because of erroneous perceptions about its scope.” (Jane Winter, letter, 26 February 2001, to chairman Joint Committee on Human Rights, 2000-01, *Second Special Report: implementation of the Human Rights Act 1998*, HL Paper 66-I/HC 332-I, volume II, p 27) Both the CAJ and British Irish Rights Watch have been singled out for praise by Prof Brice Dickson of the NIHRC: ‘The Protection of Human Rights: lessons from Northern Ireland’, Paul Sieghart memorial lecture 2000, p 13.

Ireland should be.”<sup>48</sup> The identification of a BOR with a territory only is legally problematic, and compounded by an effective denial of UK sovereignty which is not legally balanced by an apparent disavowal of Irish sovereignty.

CAJ members drafted this BOR, mainly: Christine Bell, Brice Dickson, Donall Murphy, Martin O’Brien and Fionnuala Ní Aoláin. The first two were to become members of the NIHRC in 1999, Brice Dickson becoming the Chief Commissioner. The fourth is the CAJ’s director. And the fifth is a member of the Irish Human Rights Commission (Irish HRC), set up belatedly under the Belfast Agreement in the Republic of Ireland.

The CAJ’s BOR had 20 articles, and was at the time an important local contribution. The following points may be made.

One, it drew widely on human rights instruments and even constitutions. Two, there were no limitations in individual articles, but cross-references to a general limitation: (a) absolutely necessary, (b) prescribed by law and (c) manifestly justifiable in a free and democratic society. Three, it was concerned only with human rights violations. Four, it confused the distinction between international law and domestic law (apparently looking at “the [British] state” from within the Irish nation). Five, it included economic, social and cultural rights, and, separately, group rights (though these seemed to relate to class actions only). Six, and strangely, no reference was made to Westminster enactment: “The CAJ does not hold a collective view on precisely how the Bill of Rights should be made a part of the law of Northern Ireland.”<sup>49</sup> A proposal for amendment by two thirds of those voting in a referendum in NI, failed to appreciate that, under the doctrine of parliamentary sovereignty, referendums can only be consultative.<sup>50</sup>

### ***The NIHRC’s campaign***

The NIHRC focussed early upon the BOR project. As the end of their three year appointments approached (and before their reappointment), Professor Dickson and his fellow commissioners became more frantic to achieve the CAJ’s objective.<sup>51</sup> This campaign at public expense was marked by the following highlights:

- 1 March 2000: publication of the pamphlet, *A New Bill of Rights for Northern Ireland*,<sup>52</sup> at the launch of the NIHRC’s consultation;

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<sup>48</sup> This phrase, of course, reappears on p 19 of *Making*.

<sup>49</sup> There was, however, a reference to an ordinary Act of Parliament in the commentary on article 20.

<sup>50</sup> See, for example, para 2 of the Validation, Implementation and Review section of the Belfast Agreement.

<sup>51</sup> NIHRC minutes, 10 September 2001.

<sup>52</sup> This paraphrased the first paragraph 4 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement to read: “consulting and advising on the scope for defining rights additional to those in the European Convention on Human Rights”. It also claimed: “Under the Good Friday Agreement the [NIHRC] has been given the job of preparing a Bill of Rights for Northern Ireland.”

- September 2000: publication of 11 NIHRC pamphlets on aspects of a BOR<sup>53</sup>;
- 15 January 2001: publication of the conclusions of nine working groups on the same areas;<sup>54</sup>
- 4 September 2001: NIHRC submits its draft BOR to the UK government, and launches a short consultation (ending on 1 December 2001), to be followed presumably by a redrafted BOR;<sup>55</sup>
- collaboration with an ad-hoc Human Rights Consortium, in which the CAJ played a major role<sup>56</sup>, including the production of a joint *Belfast Telegraph* supplement, *Right here Write now: making a bill of rights for Northern Ireland*<sup>57</sup> and other advertising.

Professor Dickson, and the NIHRC, persisted in giving the false impression that every political party in NI supported the BOR.<sup>58</sup>

On 25 September 2001 (as was foreseeable), a motion in the NI Assembly originating with two liberal unionists, condemned the NIHRC.<sup>59</sup> When the nationalist Social Democratic & Labour Party (SDLP) organized a petition of concern, the motion secured a majority (48 to 39), but not a cross community, vote a week later.<sup>60</sup> It was subsequently inevitable that the NIHRC's BOR would not secure necessary political support.

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<sup>53</sup> One on women was announced for November 2000, but delayed to at least February 2001. The titles are: Introduction; Children & Young People; Criminal Justice; Culture & Identity; Education; Equality; Language; Social & Economic Rights; Victims; Women; Implementation.

<sup>54</sup> These were on: Children & Young People; Criminal Justice; Culture & Identity; Education; Equality; Language; Economic & Social Rights; Victims; and Implementation. There was nothing on Women. These (with the exception of Language, Equality and Implementation) made no reference to the Belfast Agreement provisions. The conclusions on Criminal Justice rewrote article 5 of the ECHR. That on Culture & Identity recommended the incorporation of the Framework Convention on the Protection of National Minorities, contrary to the intention of the contracting states.

<sup>55</sup> *Making*. The original intention had been to publish draft proposals in March 2001 and submit final recommendations in September 2001 (NIHRC, *The Bill of Rights: Introduction*, September 2000, p 8). The NIHRC envisaged *Making* as “draft advice” to be sent to the Secretary of State (Minutes, 14 May 2001). A NIHRC press release of 4 September 2001 referred to “preliminary advice to the Secretary of State”, and to “final advice for the Secretary of State early in 2002”. Professor Dickson referred to “provisional recommendations to the Secretary of State” on 4 September 2001, but also to consultation (supplied text).

<sup>56</sup> The first telephone number of the Consortium is the CAJ's; the second is Amnesty International in Belfast.

<sup>57</sup> This was distributed in November 2001.

<sup>58</sup> NIHRC press releases, 1 March 2000 & 17 October 2000. For a belated qualification of this claim, see *Making*, p 6; [www.utvinternet.com](http://www.utvinternet.com) for 4 September 2001; *Belfast Telegraph*, 4 September 2001. The former position is reasserted in the undated *Belfast Telegraph* supplement, p 2.

<sup>59</sup> Northern Ireland Assembly, *Official Report*, vol 12, no 6, 25 September 2001, pp 199-214.

<sup>60</sup> Northern Ireland Assembly, *Official Report*, vol 12, no 7, 1 October 2001, p 262.

***The NIHRC's BOR***

The consultation document *Making* is significant principally for its length. It contains as appendix 1 the 164 draft clauses in 24 pages. Presumably, this is the basis for a Westminster statute. (This is the text I discuss subsequently, referring to the commentary only when necessary.) Of the 164 clauses, only 37 have existing domestic legal effect, through the HRA 1998. Seventy seven per cent of the NIHRC's BOR is therefore new. It makes the CAJ's BOR of 1993 a modest proposal in comparison.

The structure of the BOR is: a preamble followed by 18 other numbered chapters, each containing several clauses.<sup>61</sup> The ECHR (including protocol articles which are now Convention rights under the HRA 1998) appears to be the basis of the document. However, the Convention rights are grouped in certain chapters.<sup>62</sup> This BOR is essentially the NIHRC's work. It is responsible for most of the chapters, and (as noted) the vast majority of the clauses. The chapters range far beyond civil and political rights, and even economic, social and cultural ones. Included are: electoral rights, identity and communities, women (though there are no actual rights in this chapter); victims; children; education; and language. Most of these are topics dealt with normally by representatives in legislatures, elected on the basis of political programmes. The NIHRC's BOR eclipses in scale those of: France (1789); the United States (1791); Germany (1949), various Caribbean states (1962-81), Canada (1982), New Zealand (1990), Hong Kong (1991), and South Africa (1996).<sup>63</sup> Each one of those bills of rights was created in a particular historical conjuncture. Not one is analogous to NI in 2001-02. They may be looked at for drafting purposes, but none is a precedent for a NI where the Belfast Agreement did not include provision for a NIHRC BOR (see further below).

The Belfast Agreement was the work of the political parties of NI in 1996-98, under the guidance of the two governments. The NIHRC, judging by appendix 5, seems not to understand what sort of legal instrument it is.<sup>64</sup> This would-be BOR is a document of almost equal stature. However, an unrepresentative human rights community<sup>65</sup>, which is the beneficiary of NIO patronage, has produced it. It was also facilitated by an extraordinary amount of public money. Having declined repeated NIHRC requests for more funds, the NIO relented and gave £357,200 to conduct a consultation exercise. This would appear to be one of the most expensive consultations in the history of the UK state. One looks forward to the NIHRC being held to account financially by London.

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<sup>61</sup> This suggests that the drafter does not understand the status of a preamble. Moreover, we are given here the preamble of an international agreement, not domestic legislation.

<sup>62</sup> For example, articles 2, 3 and 4 in chapter 6, articles 5, 6 and 7 in chapter 7, articles 8 and 12 in chapter 9, and articles 9, 10 and 11 in chapter 12 (where there is an attempt to play down freedom of peaceful assembly).

<sup>63</sup> Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (London 1999), pp 443-529.

<sup>64</sup> It is listed under "Domestic standards and references".

<sup>65</sup> See my submission of 13 November 1999: [www.austenmorgan.com](http://www.austenmorgan.com).

The preamble of the bill is framed: “The people of Northern Ireland. . . have requested the adoption of the following Bill of Rights.” What people? Is this the real people of NI, in their divided unity? Or is it the obedient people of revolutionary mythology? It certainly does not include people “of a certain kind” – those opposed to some or all of the BOR<sup>66</sup>. Popular demand is difficult to resist. And the NIHRC is clearly attempting to appeal over the heads of elected representatives. There was a fantasy in the NIHRC about popular pressure producing a cross-community vote of the Assembly.<sup>67</sup> Fortunately, as noted above, this has not, and will not, succeed. The BOR is a political initiative of stunning audacity, for a statutory body (or quango) of less than three years’ existence. The NIHRC was not set up to mobilize the people, and short circuit the NI Assembly, to press demands upon, not just the UK government, but also (as I shall show) the Irish government. Its functions were laid down in the Northern Ireland Act 1998 (“NIA 1998”), on the basis of the first paragraph 5 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement.

I am concerned with the overall context of the Belfast Agreement, and UK (and Irish) law. The sheer scale of the BOR has major constitutional, as well as, most obviously, political, significance.

#### FOUR ARGUMENTS AGAINST

There are four principal arguments against the NIHRC’s draft BOR. Points are, of course, interrelated, but my case is presented as four discrete legal submissions. If it is political to campaign for a BOR, one becomes involved in political debate by opposing the NIHRC’s grandiose plan. Argument (3) is an attempt to engage with any rational wing of the human rights community. It takes a constitutional stand in favour of elected politicians, and against a veritable fourth branch of government (as the NIHRC conducts itself)<sup>68</sup>, making policy decisions on behalf of the people.

#### **(1) The draft BOR of 4 September 2001, if enacted in NI law, would shatter human rights protection in the UK**

This argument is concerned with the human rights protection provided in the UK by the HRA 1998. I contend that the NIHRC’s BOR would separate NI from Great Britain in this respect. Further, and even more worryingly, it would undermine many rules of statutory, but mainly common, law. I do not envisage parliamentary counsel in London starting with the NIHRC’s BOR, and amending every necessary rule in order to have an extensive human rights regime uniquely in NI. Incredibly, there is no reference to the HRA 1998 in appendix 1 of *Making*. Nor is there any serious discussion of existing human rights law in the commentary.<sup>69</sup> There is very little acknowledgement of Westminster legislation, though Professor Kevin Boyle gave the game away on 4 September 2001, at the launch of the draft BOR, by

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<sup>66</sup> A phrase coined by Gerry Adams, but inspired by Brendan O’Leary (with reference to reverse discrimination in favour of Catholics including political vetting): *Irish Independent*, 2 November 1999; *Irish Times*, 14 June 2001.

<sup>67</sup> *Making*, p 18.

<sup>68</sup> See my article in the *Observer*, 19 August 2001.

<sup>69</sup> See pp 59, 87, 100, 102, 103, 138 & 144; it is not referred to on p 149.

referring to “entrench[ing] by law when the Westminster Parliament ultimately legislates Northern Ireland’s Bill of Rights.”<sup>70</sup>

The following points all arise from the draft BOR. They are not simply technical. They go to the heart of the NIHRC’s legal competence.

**(i) Northern Ireland: states and nations?**

There is complete legal continuity between the CAJ in 1993 and the NIHRC in 2001. Reference has been made above to the constitutional perspective of the first *Bill of Rights for Northern Ireland*. The CAJ was confused about states and nations. After the Belfast Agreement, there is less reason for the NIHRC reproducing the CAJ idea of a NI territory with its own BOR, effectively in movement between the UK and the Republic of Ireland.

The drafter of the NIHRC’s BOR treats NI as constitutionally autonomous (less a part of the UK and more a part of the Irish nation<sup>71</sup>). Thus, the strange analogy on page 107 of *Making* with the 1931 Statute of Westminster. This concerned relations between states, in the transition from empire to commonwealth. It has no application to NI’s position within the UK, a unitary state that has devolved power to its regions and nations.

The second aspect of this legal continuity is the view that NI, while – *sotto voce* – a part of the UK, has a destiny in an all-Ireland state. This reflects more a transition to a united Ireland view (characteristic of Sinn Féin), than a joint sovereignty, or authority, view, sometimes associated with the SDLP and the Irish government. Thus, on pages 18 to 19 of *Making*, there is an oblique reference to article 1 of the British-Irish Agreement, in particular paragraphs (v) and (vi).<sup>72</sup> The identities of Irish or British (acknowledged in the Belfast Agreement) do not justify what the NIHRC has done: namely, drafted a BOR for a NI which is, currently, in the UK, but could, just as reasonably, be a part of the Republic of Ireland. Many of the legal difficulties in the text stem from this old CAJ prejudice. It is also to misconstrue the Belfast Agreement, which is very clear about NI being a part of the UK. Virtually no attention has been paid to the second paragraph 4 of Strand Three: “There will be no derogation from the sovereignty of either Government (sic).” Further, article 1(i) of the British-Irish Agreement recognizes the legitimacy of the choice of a majority of the people of Northern Ireland with regard to its status.

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<sup>70</sup> Supplied text. The NIHRC referred bizarrely to “enact[ing] any necessary legislation as quickly as possible.” (Press statement, 4 September 2001.)

<sup>71</sup> Nation is treated uncritically as a legal category: *Making*, pp 144-5.

<sup>72</sup> The phrase “The Commission, of course, holds no views on what the future constitutional status of Northern Ireland should be.” repeats that in the CAJ’s 1993 BOR. Does the NIHRC have a view of the current constitutional position? Does it accept that the Belfast Agreement provides further for unity by consent? If so, the only possible future constitutional status is a united Ireland. The improbability of that corresponds neatly with the legal imperative of dealing with the constitutional present of NI, and not a hybrid or halfway house.

***(ii) The relationship between international law and domestic law***

This is confused in the draft BOR. While article 56 of the ECHR (territorial application) allowed London to extend the geographical scope of its international obligations, there is no concept in international law of intra-state differences (unless expressly or impliedly agreed?). However, the NIHRC envisages in domestic law: the HRA 1998 continuing to apply in GB; and, after the repeal of section 22(6), having the ECHR incorporated in NI law (in a different way from the rest of the UK). This could potentially fracture the UK's international obligations. To the argument that NI would have higher standards than Great Britain (the minimum), there is the reply that it would rapidly get out of synchronization and could fall below particular standards.<sup>73</sup> The NIHRC's BOR would also, obviously, separate NI from Great Britain. I discount the NIHRC wanting consciously to extend its BOR to Great Britain, having the HRA 1998 repealed in its entirety and the ECHR incorporated there on the same basis as in NI.

***(iii) Derogations and reservations***

The confusion between international law and domestic law is evident also in chapter 17, dealing with derogations. There is no specific reference to reservations (needless to say, denunciation – article 58 – is not recognized). Derogations and reservations are procedures in the law of treaties. These are provided for in, respectively, articles 15 and 57 of the ECHR. Because the HRA 1998 did not incorporate the ECHR strictly, the Convention rights remain in the multilateral agreement. It is therefore possible to derogate, and, in the case of new articles, make reservations (or denounce the ECHR with notice, and become a state party again with new reservations). This is under international rules on derogations and reservations. The HRA 1998, in sections 14 to 17, makes related domestic provisions. Once the ECHR is incorporated in NI law as the NIHRC envisages, it will not be possible to derogate (or, where relevant, make reservations). A domesticated instrument can only be amended under the rules of statutory amendment, partly provided for in the instrument.

The inclusion of article 15 of the ECHR (which is not a Convention right) in the draft BOR is nonsensical. Other ECHR articles incorporated peculiarly are: 14, 16 and 17, and articles 2 and 3 of the first protocol. These relate only to the international instrument. They have no effect, or meaning, in domestic law. Interestingly, there is a reservation attached to article 2 of the first protocol and dating from 1952. This is missing entirely from the draft BOR. Does the UK have a reservation in Great Britain but not in NI?

***(iv) The extent of the BOR?***

The NIHRC may believe it is providing only for NI (even if it is floating between the UK and the Republic of Ireland). However, clause 14(a)(1), dealing with social, economic and cultural rights, includes the following: "All public bodies through which any of the legislative, executive or judicial powers of the State are exercised in Northern Ireland. . . shall therefore take

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<sup>73</sup> Art 11 is one example.

legislative and/or other measures to develop and enforce programmatic responses to the social and economic rights set out below.”

This must include the UK Parliament (legislative), the central government (executive) and the most senior judiciary (judicial) – all of which are located in London, from where the unitary state is still governed despite devolution to Scotland, Wales and Northern Ireland. The NIHRC tries to avoid this issue by referring parenthetically to the NI Assembly and the executive, but these are specified as “in particular”. The BOR, certainly as regards social, economic and cultural rights, would have to apply in Great Britain (but only as regards NI?). Robin Cook, Tony Blair and Lord Irvine of Lairg would, therefore, have to have one set of policies for Great Britain, and another – governed by the BOR – for NI. I discount the NIHRC trying to influence central government economic and social policy in general, by circumscribing ‘Blairite’ economic liberalization with a legalistic affirmation of economic and social ideas from the third quarter of the twentieth century.

### ***(v) States of emergency?***

Chapter 17 is headed “Emergencies”, and clause 17(b) deals with “States of emergencies”. This is legal nonsense. There is no such concept in United Kingdom law. There is the Emergency Powers Act (Northern Ireland) 1926, and similar legislation in Great Britain. This was passed during the general strike. It refers to interference with the supply and distribution of food, water, fuel or light, or with the means of locomotion. It is, in any case, a reserved matter, under the NIA 1998.<sup>74</sup> This, however, is not what the NIHRC means by a state of emergency.

It is referring to the recent past of so-called emergency, or temporary, legislation. The permanent Terrorism Act 2000 has now replaced this (though section 2 and schedule 1 provide for temporary extension). The Northern Ireland Assembly does not have a devolved responsibility in this regard. And central government does not operate with a state of emergency concept. No state of emergency was declared after 11 September.

Most probably, the NIHRC is again confusing international and domestic law. Article 15 of the ECHR, which deals with derogations, specifies these as permissible in time of war or other public emergency. Public emergency is a concept of this multilateral agreement in international law. It does not necessarily require, or follow from, a declaration of a state of emergency in domestic law. Since 11 September, the United Kingdom state has sought to derogate from article 5(1) as a result of the Anti-terrorism, Crime and Security Bill being introduced in Parliament, with a section 19 statement by the Secretary of State about compatibility with Convention rights.<sup>75</sup>

It should not need stating, but it does, given the NIHRC’s equal treatment of the United Kingdom and the Republic of Ireland, that a NI administration,

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<sup>74</sup> Para 14 of sch 3.

<sup>75</sup> The Bill was published on 13 November 2001, with the Secretary of State’s statement of compatibility. Also, on that day, the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644 came into force. This referred to a proposed UK derogation.

already provided for in Bunreacht na hÉireann<sup>76</sup>, would never be allowed to exercise state of emergency powers. These are reserved for central government in the Irish constitution.<sup>77</sup> I discount, though the NIHRC may not, major amendments to Bunreacht na hÉireann.

***(vi) Entrenchment?***

This was an important issue in the early 1990s. It has been superseded in the main by the HRA 1998. This recognizes the continuing centrality of the doctrine of parliamentary sovereignty.<sup>78</sup> However, the NIHRC is still seeking to realize the CAJ's plan of 1993.

Clause 19(1) (there is no 19(2)!) effectively makes the Northern Ireland Assembly a house of Parliament, at least as regards a regional BOR. The origin of this idea lies in academic speculation about the so-called constitutional guarantee about NI's position within the United Kingdom.<sup>79</sup> It did not work in that context, and it does not work here. Parliament would never envisage such an arrangement. The Northern Ireland Assembly has been devolved, it has also been suspended, and it could be prorogued and/or abolished (as happened to the former NI Parliament). Human rights, in any case, is an excepted matter under the NIA 1998, and is a matter exclusively for Westminster.<sup>80</sup>

Again, it should not need stating, but it does, given the NIHRC's equal treatment of the United Kingdom and Republic of Ireland, that a Northern Ireland Assembly could not have such a role under Bunreacht na hÉireann. Human rights, as fundamental rights, are dealt with in articles 40 to 44. These are a matter initially for the Oireachtas, but ultimately for the people.<sup>81</sup> I discount, though the NIHRC may not, major amendments to Bunreacht na hÉireann.

***(vii) The NI Assembly***

The NIHRC, strangely, assumes a NI Assembly will be a permanent feature, and available for BOR amendments. If it is not there, then, under clause 19(1), there can be no amendments. The Northern Ireland Assembly was suspended indefinitely on 12 February 2000, and restored on 30 May 2000. The Northern Ireland Act 2000 was also used, to bring about two shorter suspensions in 2001. As noted above, the United Kingdom government retains powers over the fate of the Assembly. For no other reasons, it would not be possible to have entrenchment and amendment rooted in such a devolved institution.

***(viii) Implications for the Irish government***

The NIHRC's draft BOR has major implications for the Irish government. This is for two related reasons.

<sup>76</sup> Art 15.2.2.

<sup>77</sup> Art 28.3.3.

<sup>78</sup> This is recognized, *inter alia*, in para 33 of Strand One of the Belfast Agreement.

<sup>79</sup> Calvert, *Constitutional Law in Northern Ireland: a study of regional government* (London, 1968), pp 25-29.

<sup>80</sup> Paras 3(c) and 22(b) of sch 2.

<sup>81</sup> Arts 46 & 47.

First, under the first paragraph 9 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement, the Republic of Ireland is required to provide “an equivalent level of protection of human rights as will pertain in Northern Ireland.” Reference is made also to “measures to strengthen and underpin the constitutional protection of human rights.” So, if the NIHRC is to succeed with its BOR in NI, and the Republic of Ireland is to implement its few international obligations under the Belfast Agreement, the 164 draft clauses will have to be added to the fundamental rights in Bunreacht na hÉireann.

Second, the NIHRC refers to the need for a new international agreement. This is correct, but not in the way envisaged. The *Making* commentary refers to entrenchment of the BOR in a London/Dublin treaty.<sup>82</sup> This is not possible, given continuing UK sovereignty. The NIHRC is planning for permanent joint sovereignty, even given NI’s transfer from the United Kingdom to the Republic of Ireland! However, a new international agreement is necessary, to complete the constitutional provisions of the Belfast Agreement. Legal cession is not fully provided for in annexes A and B of the Constitutional Issues section.<sup>83</sup> There would, therefore, have to be a new United Kingdom/Irish international agreement to bring about a united Ireland. That only shows how far the NIHRC, with talk of a new bilateral treaty, is outside the Belfast Agreement.

The way to guarantee the BOR in a NI under Republic of Ireland sovereignty would be to have it incorporated now in Bunreacht na hÉireann. It would apply to the 26 counties. When the two parts of Ireland were reunited (a most unlikely eventuality), there would be the BOR in NI law (originally from Westminster), and the same instrument in the Irish constitution, courtesy of the people of the Republic of Ireland. The constitution would be amended to define Ireland as 32 counties. The original BOR from Westminster would, now through Bunreacht na hÉireann, continue to apply in NI.

The fact that the Republic of Ireland has to have the BOR at the same time as NI, and the NIHRC has spotted the need for a new London/Dublin agreement (but misunderstood its content), brings us to the same point. This point is simply one of political wishful thinking, with the aim of a united Ireland overshadowing the constitutional provisions of the Belfast Agreement, and the desire for a comprehensive BOR being illegitimately read into a document, which remains little understood.

The chances of the Republic of Ireland adopting the NIHRC’s BOR are nil. That means there is no guarantee that NI would be so covered if it were absorbed into the Republic of Ireland. That’s also why Dublin, which has interfered in the running of the NIHRC, is now promoting an unenforceable all-Ireland charter of rights as a practical alternative to the BOR in NI.<sup>84</sup>

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<sup>82</sup> Pp 19 & 107.

<sup>83</sup> Austen Morgan, *The Belfast Agreement: a practical legal analysis* (London 2000), pp 144-5.

<sup>84</sup> Under the first paragraph 10 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement.

The answer, of course, to human rights protection in both parts of Ireland is: the ECHR in United Kingdom law, and in the Irish constitution (as required by the Belfast Agreement); and the EU Charter of Fundamental Rights (which applies throughout Ireland, but is not yet – and may not – be incorporated in the European treaties).

**(2) The obligation in the Belfast Agreement was to request advice on the scope for particular supplementary rights, not give the Northern Ireland Human Rights Commission *carte blanche* to draft a comprehensive bill of rights**

Human rights are dealt with in the Belfast Agreement in the section headed Rights, Safeguards and Equality of Opportunity<sup>85</sup> (which is divided into a Human Rights subsection and one on Economic, Social and Cultural Issues<sup>86</sup>). But there are also important references to a BOR in Strand One, paragraphs 5(b)-(c), 11 and 26(a). Given that the Belfast Agreement is a bilateral international agreement, these paragraphs fall to be construed under articles 31 to 33 of the 1969 Vienna convention on the law of treaties (with article 2 of the British-Irish Agreement [“BIA”] being decisive). Article 31(1) reads: “A treaty shall be interpreted in good faith and 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.”

These are the references to a BOR in the Multi-Party Agreement (MPA) part of the Belfast Agreement (with [deletions] from and *additions* to the Mitchell Draft Paper of 6 April 1998 shown thus):

**STRAND ONE**

**Safeguards**

. . . 5. There will be safeguards . . . including: . . .

(b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it . . .

(c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland; . . .

**Operation of the Assembly**

11. The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights . . .

**Legislation**

[21.] 26. The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to:

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<sup>85</sup> Note the concept.

<sup>86</sup> Note the word “rights” has been avoided.

(a) the ECHR and any Bill of Rights for Northern Ireland supplementing it...

## **RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY...**

### **United Kingdom legislation**

2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR). . .

4. The new Northern Ireland Human Rights Commission (see paragraph 5 below) will be invited *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*. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; *and*
- a clear formulation of the new rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

### **New Institutions in Northern Ireland**

5. A new Northern Ireland Human Rights Commission, *with membership from Northern Ireland reflecting the community balance*, will be established by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so.

In Strand One, there are four references to a BOR, all in the context of the ECHR: paragraphs 5(b) and (c), 11 and 26(a). In two of those (paragraphs 5(b) and 26(a)), the BOR is described as supplementing the ECHR. The term “any” is also used of the BOR in three of those references. (Paragraph 11 – dealing with equality requirements – was added to the Mitchell Draft Paper, and nothing may be inferred from the absence of an “any” in the abbreviated “ECHR/Bill of Rights” phrase. It was a consequence of hasty drafting.)

The Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement deals with the possible BOR in the first paragraph 4 under the subheading, United Kingdom Legislation, in the context of the incorporation of the ECHR (the first paragraph 2). Its hypothetical nature is clear from the first paragraph 4: one, (presumably) the Secretary of State invites the NIHRC to consider a BOR; two, the NIHRC must first consult (a provision added to the Mitchell Draft Paper); three, the role of the NIHRC is to advise the Secretary of State (and therefore the United Kingdom government); and four, the advice is “on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights”. The key words are “scope” and “supplementary”, and the first is a condition precedent for the second.

Significantly, there is no reference to a BOR in the first paragraph 5, dealing with the continuing functions of the NIHRC.

The legal analysis proceeds through the following three, or, if necessary, four stages.

***(i) The duties of the NIHRC***

The law governing the functions of the NIHRC, a statutory body, is contained in section 69 of the NIA 1998. The relevant provision is section 69(3)(a): “The Commission shall advise the Secretary of State. . . as soon as reasonably practicable after receipt of a general or specific request for advice;”. Here, the issue is a specific request. Section 69(3)(b) – “on such other occasions as the Commission thinks appropriate” – has no relevance. The NIHRC only has the power of initiative under paragraph (b) in the absence of a Secretary of State request. Here, it never had the power of initiative under the NIA 1998, because of the Belfast Agreement.

***(ii) The obligations of the United Kingdom state***

These are contained in the extracts from the Belfast Agreement quoted above. This binds the United Kingdom state only, meaning, in domestic law, central government. The first paragraph 4 of the Rights, Safeguards and Equality of Opportunity section makes clear where, in domestic law terms, the duty lies: “The new Northern Ireland Human Rights Commission...will be invited to consult and to advise. . .”. In international law, the obligation is that of the state; in domestic law, the duty is upon the Secretary of State. The word “invite” is important.

The relevant paragraph of the Belfast Agreement has been incorporated by reference in the NIA 1998: “The Secretary of State shall request the Commission to provide advice of the kind referred to in paragraph 4 of the Human Rights [sub]section of the Belfast Agreement.” This makes clear that the initiative lies with the Secretary of State. It imposed a duty upon him (or her in this particular case).

***(iii) The Secretary of State’s letter of 24 March 1999***

Within a month of establishing the NIHRC, the Secretary of State wrote to the Chief Commissioner. The letter was not released at the time (there were six Northern Ireland Office press releases that day, including one on head lice!). However, it has been extracted recently through questions in Parliament.

The Secretary of State played a straight bat, referring to the Belfast Agreement (sic) and the NIA 1998. She stated that she was writing, as required under section 69(7), “to invite you to provide advice of the kind referred to in paragraph 4 of the relevant section of the Agreement”. She ended the letter: “The Act does not set a time limit for those proposals, and I am sure that you will want to consult widely. I look forward to receiving your advice in due course.” As far as the Secretary of State was concerned – and she was correct – the United Kingdom government discharged its obligations under the Belfast Agreement, as incorporated by the NIA 1998,<sup>87</sup> fully in this regard on 24 March 1999, upon the despatch of the letter to the Chief Commissioner.

If the Secretary of State had refused to seek such advice, then arguably the NIHRC could have reverted to its power of initiative under section 69(3)(b) of the NIA 1998. The NIHRC, however, could not have put itself in the Secretary of State’s place as regards the Belfast Agreement.

***(iv) Was the NIHRC confused in March 1999 as to the nature of the request?***

I don’t believe this for one moment. The BOR had been a CAJ project. Despite the HRA 1998, the slight reference in the Belfast Agreement was used by the CAJ-dominated NIHRC as the hook to launch its project: a NI rival to new Labour’s HRA 1998. And this despite the fact that the NI political parties had always understood, by a BOR, the incorporation of the ECHR – which had taken place with royal assent on 9 November 1998 (even though it would not come into force fully throughout the United Kingdom until 2 October 2000).

The Secretary of State had quoted from the first paragraph 4, from “to consult and to advise” to the phrase “to constitute of (sic) Bill of Rights for Northern Ireland”. If the NIHRC had been confused, it could have done one, two or three things:

- entered into correspondence with the Secretary of State, as to the meanings of “consult”, “advise”, “scope” and “supplementary”. This did not happen. However, there is an intriguing reference on page 14 of *Making* to the views of the United Kingdom government (this being a letter from No. 10 to the NIHRC);
- sought independent legal advice, ideally not from within the human rights community, but from independent specialist counsel in Belfast or London. I do not know if this was considered;
- arranged a friendly legal action, such as summary disposal on a point of law, or an application for judicial review, in the High Court in Belfast, which would have given the NIHRC legal immunity (if successful), and credibility, for the project it embarked upon, involving considerable public resources of time, persons and money.

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<sup>87</sup> The first paragraph of the letter is legally correct, even if “commitments” is not exact: “The Northern Ireland Act 1998 which established the Northern Ireland Human Rights Commission implements the commitments in the *Rights Safeguards and Equality of Opportunity* section of the Belfast Agreement.”

The NIHRC has already been down the *ultra vires* road. Section 69 of the NIA 1998 makes no reference to the power to intervene as a third party in legal actions<sup>88</sup>. The NIHRC, however, proceeded to do this.<sup>89</sup> The courts quickly restrained it. When it was refused permission to intervene in the Omagh inquest, the NIHRC applied for leave to apply for judicial review. It secured leave. Sir Robert Carswell LCJ, at first instance, held third-party intervention was *ultra vires* the NIA 1998. This was upheld in the Court of Appeal, Kerr J dissenting.<sup>90</sup> The NIHRC has secured leave to appeal to the House of Lords.

**(3) Even if this had been in the Belfast Agreement, it would be irresponsible to scatter a *cornu copia* of badly formulated rights into a communally divided society with little instinct for democracy**

There are two ideological views about rights in NI. The first is that of the human rights community. It believes that, if it had had its way, the troubles in NI would never have taken place.<sup>91</sup> Such counter-factual history is difficult to justify. This view may be characterized as self-serving. The second is that of the government of the United Kingdom, which gave further effect to the ECHR in domestic law through the HRA 1998. This is the view that rights are integrally related to responsibilities. It is, indeed, inherent in the structure of Convention rights: a right followed in many instances by a limitation; the individual benefits from living in a democracy, but also contributes to others in society.

Individual, or human, rights are essential to civilization. They are integral to the rule of law. But any society needs a thriving economy. And it can only determine public policy through a functioning democracy. That requires political representation, with a subordinate role for the self-interested elements of civil society.

NI is very far from this ideal. Three decades of political violence have taken their toll. Direct rule had the consequence of creating, what some consider, a quasi-colonial system of government based on the Northern Ireland Office. A huge dependency culture was created. Republican, and loyalist, terrorists were able to frustrate normal political activity. Politics was dominated by communal rivalry and this continues under devolution. Self-appointed social forces have substituted for elected politicians, with political correctness interlocking with (Catholic and Protestant) sectarian consciousness.

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<sup>88</sup> The powers are limited by ss 69(5)(a) & 70 (assistance to individuals) and s69(5)(b) (bringing proceedings in its own name).

<sup>89</sup> *Re Treacy's and another's Application for Judicial Review* [2000] NI 330; *In the Matter of an Application by Evelyn White for Judicial Review*, judgment of Carswell LCJ, 18 May 2000; *Re Adams's Application for Judicial Review* [2001] NI 1.

<sup>90</sup> *In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review*, Carswell LCJ, 8 December 2000; CA (NI), 6 April 2001.

<sup>91</sup> See the view of Professor Kevin Boyle, at the launch of the draft BOR, 4 September 2001 (supplied text).

The Belfast Agreement of 10 April 1998 is considered to be the only solution. This is certainly the view of the United Kingdom government, which retains the responsibility for NI. But it is also the view of the Irish government. It is relieved to have power without responsibility, and has helped mythologize what it calls the Good Friday Agreement. Part of this romanticization of politics includes a folksy – or, in David Kennedy’s words, sloppy – concept of human rights. Whatever the problem, there is a human rights solution. The result has been the massive overkill of *Making a Bill of Rights for Northern Ireland*, related to the interventionism of the NIHRC in a myriad of problems, to little constructive effect.

It is, therefore, necessary to get back to what the Belfast Agreement is, fully cognizant of the fact that pan-nationalism has culturally appropriated it, anti-agreement unionism essentially accepts this claim, and pro-agreement unionism has not asserted a pragmatic political interpretation compatible with the rule of law.

The Belfast Agreement comprises two texts: the MPA and the BIA. Their relationship is little appreciated (pro- and even anti-agreement commentators adopting a literal, almost biblical, approach to the text of what they call the Good Friday Agreement). Cm 3883 of April 1998 (presented to Parliament by the Secretary of State for Northern Ireland as the Belfast Agreement) has the BIA annexed to the MPA.<sup>92</sup> The relationship was altered in Cm 4292 of March 1999 and Cm 4905 of May 2000 (both presented by the foreign secretary), the MPA becoming annex 1 of the BIA in accord with the text of the latter.<sup>93</sup>

The Belfast Agreement, as a bilateral international agreement between the United Kingdom and Irish states, entered into force on 2 December 1999. The conditions precedent in article 4 of the BIA determined its effect immediately after 10 April 1998. Upon entry into force, the two states parties were bound by the BIA, and, under article 2, but only “where appropriate”, the MPA in annex 1.

There have been repeated references to the participants in the 1996-98 multi-party negotiations signing up to the Good Friday Agreement. This claim fails to distinguish the two contracting states and the NI political parties. It also neglects to appreciate that Sinn Féin did not even vote on 10 April 1998 for the MPA (and it never subsequently endorsed the Belfast Agreement).<sup>94</sup> The other political parties did vote for the MPA under the rules of the multi-party talks, which came to an end on Friday, 10 April 1998. So also did the United Kingdom and Irish governments (but to no legal effect). Tony Blair and Bertie Ahern, and, though it was unnecessary under the law of treaties and their respective constitutions, Mo Mowlam and David Andrews, signed the BIA at the end of the talks – without, I believe, the MPA being annexed to the *vellum* copies.

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<sup>92</sup> This was the text voted upon in NI on 22 May 1998 (see paragraph 2 of the Validation, Implementation and Review section).

<sup>93</sup> Respectively, the country series (before entry into force) and the treaty series (after entry into force).

<sup>94</sup> Austen Morgan, *The Belfast Agreement: a practical legal analysis* (London 2000), pp x-xii.

The Belfast Agreement binds the two states parties. This contains four types of text: one, international obligations, binding on one or both states parties; two, terms implied by international law, both general and particular; three, political text; and four, rhetoric. (The references to a BOR, as argued above, amounted to the Secretary of State requesting advice from the NIHRC, and thereby discharging the United Kingdom's international obligation.) An important implied term is the principle of legality in international law. An example of political text is the section on policing and justice, with "a new beginning" being nothing other than a literary flourish. The Belfast Agreement binds the NI parties politically (for what that is worth), more particularly by what I call its political face. But domestic NI law also binds them. This also includes a principle of legality. If it did not, there would be no constitution. On, for example, the dominant issue of decommissioning, the Belfast Agreement (governed by the law of treaties) did not alter the domestic law of NI, to the effect that the Irish Republican Army ("IRA") remains an illegal organization in possession of illegal arms. The international and domestic provisions for amnesty relate only to the handover and/or destruction of weaponry.<sup>95</sup> The Belfast Agreement does not provide that the IRA may hold on to its weapons, until such time as Sinn Féin achieves what it considers the full implementation of the Good Friday Agreement.

In *The Belfast Agreement: a practical legal analysis* (2000), I discussed in the preface a special issue of the *Fordham International Law Journal* (book 4 of volume 22, April 1999). I characterized the – mainly nationalist, republican or radical – academic contributors as espousing a political triptych instead of a legal analysis of the Belfast Agreement, involving: one, a constitutional weakening of NI's position within the United Kingdom; two, a major all-Ireland institutional advance; and especially three, the centrality of unspecified human rights. "Nationalist Ireland", I wrote, "is telling itself it has made a structural advance beyond the 1920-22 partition settlement."<sup>96</sup> This is not the place to rehearse such general issues, save to say that my practical legal analysis is countered with three alternative propositions: one, the constitutional sections are characterized predominantly by the end of the Irish territorial claim; two, the most important sections are those dealing with the institutions, most particularly the Strand One devolution settlement; and three, the HRA 1998, and article 13 of the European Community treaty, inserted by the 1997 Amsterdam treaty, were much more significant than the human rights community in NI.

Sinn Féin would have none of this, and it has managed to dominate adversely the implementation of the Belfast Agreement since 1998. It originated "the Irish peace process" in the late 1980s, meaning Brits out and a united Ireland. And it formulated the pan-nationalist strategy. The IRA's 1997 ceasefire, a restoration of the complete cessation of 1994 (which the republicans broke),

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<sup>95</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland establishing the Independent International Commission on Decommissioning (Cm 3753); Northern Ireland Arms Decommissioning Act 1997; the Republic of Ireland's Decommissioning Act 1997; plus secondary legislation, including decommissioning schemes and regulations.

<sup>96</sup> P xvii.

has been observed only as regards the police and the army.<sup>97</sup> Sinn Féin characterized the Belfast Agreement as transitional to a united Ireland, and then, by invocations such as “the agreement” and “Patten”, has managed to reconcile revolutionary absolutism and democratic participation – this being tolerated by an appeasing United Kingdom government, at the behest of the Irish government, and with constitutional parties playing supporting roles in the power-sharing administration.

It is this political uncertainty, which has allowed the NIHRC to thrive. It has not behaved properly as a public body (part of the state), making a constructive contribution to the problem of communal division. The NIHRC has conducted itself as a radical group, failing to work with other public authorities. It has engaged in posturing, of dubious human rights significance. The fact that some of the commissioners would deny this strongly only strengthens the criticism. Whatever internal differences may exist in the NIHRC, no sensible element had emerged by 4 September 2001, sufficiently to prevail over the radicals among the commissioners and their staff.

The NIHRC has majored in the BOR project. To some extent, the 1999 commission seemed determined to realize its goal before the end of its three-year period (its reappointment may lead to a revised strategy). However, the NIHRC’s lack of political realism suggests continuity with the CAJ days. Then, a BOR, despite moments of rationality<sup>98</sup>, was put forward as a Utopian panacea. Since 1999, the NIHRC has attempted populist mobilizations. Commissioners imply that everyone will gain more rights, through their BOR rather than the courts administering the HRA 1998. The corollary also applies: there has been an extraordinary attempt in *Making* to play down what Strasbourg considers a right fundamental to a democratic society, because the loyal orders, while they hesitantly invoke article 11 of the ECHR (peaceful assembly), have not looked (quite reasonably) to the NIHRC to resolve the issue of parading.<sup>99</sup>

This scenario was never envisaged by the NIO, which brought the NIHRC into being and keeps it alive. Such radical conduct is inconsistent with the Belfast Agreement. But this major latter attempt to settle NI has only increased communal division, with over-confident nationalists confronting alienated unionists. A still revolutionary Sinn Féin, in word but also in disciplined deeds, is a necessary condition for such human rights activity. The NIO has used “human rights” to lure republicans into the shallow water of democratic management, indulging the NIHRC because of United Kingdom state interests. The BOR will become a cause when Sinn Féin discovers the grievance of its non-appearance<sup>100</sup>, in the next series of

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<sup>97</sup> Andrew Rawnsley, *Servants of the People* (London 2001), p 123.

<sup>98</sup> Brice Dickson, “What practical difference would a Bill of Rights make in Northern Ireland?” June 1994 typescript.

<sup>99</sup> Clause 12 (heading); *Making*, pp 77-78; NIHRC minutes, 12 March 2001.

<sup>100</sup> Sinn Féin has said remarkably little about a BOR. It was not interestingly included in the two governments’ “take or leave it” document of 1 August 2001 which resulted from the Weston Park talks. For an indication of the likely response, see Michelle Gildernew: [www.utvinternet.com](http://www.utvinternet.com), 4 September 2001.

demands it will make, supposedly in return for further action on decommissioning.

The NIHRC described its proposals as “radical and wide-ranging”<sup>101</sup>. As a political project, the draft BOR is amazing. It represents a fusion of: a quasi-religious worldview, in which theology has been replaced by “international human rights standards” (a confusing phrase);<sup>102</sup> a central role has been created for a secular clerisy, with the NIHRC at the head of a charismatic movement; the outturn being a degree of state intervention in civil society reminiscent of twentieth-century communism, or aspects of post-world-war-two European social democracy.

In 2000, the House of Lords select committee on the European Union (“EU”), in a report on the (as yet non binding) EU Charter of Fundamental Rights, concluded of economic and social rights (which the NIHRC sees as a key aspect of its BOR): “No Member State or other common law country to the best of our knowledge has a charter of rights which goes beyond the basic civil and political rights, apart from some limited additions dealing with discrimination, rights to freedom of association and some “directive principles” to inform policy-making in the socio-economic field. . . . This suggests to us that economic and social rights that are not justiciable should be put in a different chapter of the Charter [if incorporated in the treaties] so that its status, as compared to the core civil and political rights, is made clear.”<sup>103</sup>

Among the maximalist demands of the NIHRC are:

- electoral rights<sup>104</sup>, including (unrepealable) proportional representation, the possibility that NI MPs might have to be included in a United Kingdom (or Irish) government, and voting and representing for children at 17 years (or conceivably younger) in NI<sup>105</sup>; these, of course, are political issues and not questions of right;
- identity and communities, the issue on which the NIHRC was asked to advise: the term “parity of esteem” has been rejected<sup>106</sup> (though unionism needs to be treated equally with nationalism); however, nationality has been turned into a question of fundamental law (for the United Kingdom and the Republic of Ireland), reverse political

<sup>101</sup> Supplied text, 4 September 2001.

<sup>102</sup> Thus the preamble refers to the EU’s Charter of Fundamental Rights. This, of course, has not (yet) been incorporated in the European treaties.

<sup>103</sup> House of Lords, 1999-2000, Select Committee on the European Union, 8<sup>th</sup> Report, *EU Charter of Fundamental Rights*, p 37. See also, Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (London 1999), pp 49-50. The Bangalore Principles (for common law jurisdictions) also exclude economic, social and cultural rights in the main: [2001] EHRLR 273 at 288.

<sup>104</sup> Part of the democratic rights chapter. This begins with a paragraph replete with major errors: *Making*, p 20.

<sup>105</sup> The criticism has been made that any such change in the voting age would have the sudden effect of boosting the nationalist vote. The point has also been made that the BOR might prevent a voting age lower than 17 years.

<sup>106</sup> It survives in an alternative. A moment of rationality descended when the NIHRC wrote: “It is hard to envisage how the Government could guarantee that the two communities feel respected by each other.” (*Making*, p 25)

discrimination (“representivity”) has been parenthetically trailed, the Framework Convention for the Protection of National Minorities has been incorporated in part (contrary to the advice of the Council of Europe<sup>107</sup>), travellers (new age and otherwise) have been recognized, and public authorities have been given the duty to “preserve” minority cultures;

- a quasi-communist equality agenda, based on equality of outcome, and reverse discrimination,<sup>108</sup> which subverts NI and European Community anti-discrimination law, and the equality of opportunity vision of the Belfast Agreement;
- a shell for women’s rights, which only cross-refers to four other chapters;
- dissolution of the institution of marriage, in favour of the rights and responsibilities of all “long-term domestic partnerships”;
- children’s rights (29 of the 164 clauses), with a child being defined as under 18 years, including raising the age of criminal responsibility to 12 years (and abolishing juvenile justice); there is a direct horizontal effect uniquely in this chapter; there is also, apparently, a “right to play”;
- education rights: while the BOR sends out separatist signals – “religious ethos”, “Irish-medium education” – in the commentary the NIHRC states it is opposed to the continuing exclusion of teachers from fair employment legislation; however, “genuine occupational requirement”, in the context of recent EC anti-discrimination law (which has not been absorbed properly), would amount to the status quo prevailing;
- language rights: again, the Charter for Regional or Minority Languages is unnecessarily incorporated, part IV providing for an adequate international reporting mechanism, involving a committee of experts within the Council of Europe;
- social, economic and environmental rights (20 of 164 clauses), including health care, adequate standard of living, housing, work, and healthy and sustainable environment; these are clearly intended to be legal rights, given the references to “legal remedies”, “judicial and administrative procedures”, “fair legal process”, and, in chapter 18 (enforcement), compensation and other court orders; and this despite the specific interpretative approach requiring public bodies to “take legislative and/or other measures to develop and enforce programmatic responses to the social and economic rights set out below.”;

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<sup>107</sup> Paragraph 11 of the explanatory report accompanying the Convention reads: “In view of the range of different situations and problems to be resolved, a choice was made for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue. These provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.”

<sup>108</sup> “full and effective equality. . . by reducing inequalities affecting groups disadvantaged on the grounds specified. . . or on socio-economic grounds”.

- there are no limitations in the individual chapters, but, in chapter 16, there is a general limitation clause similar to that in the CAJ's 1993 BOR;
- finally, on the right to life, the BOR is concerned only with violations of article 2. Nothing is offered by way of a horizontal effect (as in the children's chapter). Terrorists, however, have an additional 127 clauses. And "law enforcement official[s]" have further restrictions imposed upon them. As for article 5 (liberty and security), the three existing clauses are expanded to 17. Twelve new clauses are added to the existing three in article 6 (right to a fair trial).

Most of these issues (except for the last two) are the stuff of politics, for political parties with electoral programmes. Unfortunately, the NI Assembly has yet to mature. It remains attached to an inclusive, but Balkanized, system of government. Departments have become party fiefdoms; there is no opposition worth mentioning, and very little accountability. Involuntary coalitionism could only ever have been for a transitional period. However, there is little sign of a – centre against the sectarian extremes – voluntary coalition being constructed between the UUP and the SDLP.

This immaturity of politics is related to the naivety of the human rights community. Its strength is, in fact, the weakness of the democratic system. Neither the persons, nor the ideas, would have achieved such apparent stature anywhere else in the United Kingdom or mainland Europe.

#### **(4) Northern Ireland's Bill of Rights is the Human Rights Act 1998, and a framework for the future by amendment at Westminster**

The HRA 1998 is of major legal significance. It is, undoubtedly, here to stay. Part of its significance stems from directly justiciable human rights. But parliamentary counsel was commended in Parliament, for the way further effect had been given to a multilateral agreement in domestic United Kingdom law.

The HRA 1998 – following the New Zealand Bill of Rights Act of 1990 – does not, of course, strictly incorporate the ECHR; the rights remain in international law, subject to possible derogation and reservation. It is the remedies – not the rights – that have been brought home metaphorically. Domestic courts have now replaced Strasbourg to a considerable extent, though the European Court of Human Rights will still consider the United Kingdom's obligations under the ECHR. The HRA 1998 is largely an interpretative measure; the jurisprudence of Strasbourg is now infusing United Kingdom law, and, a point made much of in 1997, United Kingdom judges are able to help shape human rights legal culture in Europe. It has been described by Lord Lester of Herne Hill QC (as he now is) as "the most significant constitutional measure since the Bill of Rights of 1688-89 (apart from the European Communities Act in the areas where it reigns supreme)."<sup>109</sup>

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<sup>109</sup> *Counsel*, December 1999, pp 20-22.

Under the HRA 1998, in private-law litigation between parties, the court now has to take account of Convention rights.

This is because of section 6 (acts of public authorities). Subsection (1) states: “It is unlawful for a public authority to act in a way which is incompatible with a Convention right.” Subsection (3) defines a public authority as including a court or tribunal (or a person exercising functions of a public nature), but neither house of Parliament. Thus, a court, whether civil or criminal, is required by the HRA 1998, to act in a way that is compatible with a Convention right. (Section 2 requires the court, in interpreting the Convention right, to take into account *inter alia* the jurisprudence of the Strasbourg Court.)

Section 7(1)(b) states that a person may rely upon a Convention right in any legal proceedings. It is possible – given this express (albeit indirect) horizontal effect (mentioned above) – to proceed against a non-state human or legal person in private law, and have the court find a breach of a Convention right (this is possible in the United Kingdom; not in Strasbourg).<sup>110</sup>

Section 8(1) allows the court to grant such relief or remedy, or make such order, within its powers, as it considers just and appropriate.<sup>111</sup> “English law”, as Lord Wilberforce once said, “fastens not on principles but on remedies.”<sup>112</sup>

The current Lord Chief Justice, Lord Woolf, wrote in 1999 of the creation of human rights torts in both public and private law: “These torts will redefine the relationship between the individual and the State but will go beyond this by operating “horizontally” to influence the rights of individuals as well. The interests of minorities will be protected in a way which, up to now, has not been possible.”<sup>113</sup>

The HRA 1998, as an act of the Westminster Parliament, applied presumptively to the whole of the United Kingdom. For the avoidance of doubt, section 22(6) states that the act extends to NI. NI, therefore, was to have exactly the same legal regime as England & Wales and Scotland.

This was clear to the drafter of the Belfast Agreement, but the form of incorporation – remedies not rights – was not. The Human Rights Bill had been introduced in the House of Lords in October 1997, and debated there until February 1998. On 10 April 1998, the Bill was before the House of Commons.<sup>114</sup> However, no specific reference is made to the Bill in the Belfast Agreement. The first paragraph 2 of the Rights, Safeguards and Equality of Opportunity section refers to completing the incorporation of the ECHR (which was not strictly correct). So also does paragraph 4, where the BOR for NI is defined as the ECHR plus any supplementary rights accepted

<sup>110</sup> See also s 22(4).

<sup>111</sup> Query: if there is a private defendant, could damages be awarded against a (non-appearing) public authority?

<sup>112</sup> *Davy v Spelthorne BC* [1983] 3 All ER 278, 285.

<sup>113</sup> Lord Lester of Herne Hill QC & David Pannick QC, *Human Rights Law and Practice* (1999), p vii.

<sup>114</sup> It had had a second reading on 16 February 1998. The committee stage followed on 20 May 1998.

by the United Kingdom government. (Strand One refers similarly to the ECHR.)

The references to a BOR in the Belfast Agreement must therefore be interpreted legally in terms of the human rights regime that has prevailed throughout the United Kingdom since 2 October 2000. It cannot be used to justify a full incorporation of the ECHR, if only in NI.

Section 1(1) of the HRA 1998 defines what are called Convention rights, citing their source in the multilateral ECHR. These are also reproduced in schedule 1 of the HRA 1998. It therefore follows that the act may be amended to embrace further Convention rights simply by adding to section 1(1). Section 1(4)-(6) allows the Secretary of State to add by order an ECHR protocol that has been signed or ratified. Rights from other international instruments would require a new section 1(1)(A) by primary legislation, plus inclusion also in schedule 1. They would not be justiciable in Strasbourg, unlike the Convention rights. Amendment of the HRA 1998 is the most obvious way to improve the protection of human rights in United Kingdom law throughout the state. There is no technical obstacle to specific NI rights. They could also be added to the HRA 1998. And they would not be justiciable at Strasbourg.

It is another question whether there should be specific NI rights.

The NIHRC was set up to promote human rights. While section 69(10)(b) of the NIA 1998 allows for the advocacy of additional rights, other Commission functions require knowledge of human rights as existing legal entitlements.

## CONCLUSION

Each of the above four arguments stands on its own. Argument (3) (if a BOR had been in the Belfast Agreement) is the most speculative. It is premised on something that does not exist. However, it is the point where I have engaged the NIHRC most directly. The Commissioners, wanting a BOR for NI, simply joined in distorting the Belfast Agreement into a Good Friday Agreement, which says what some people want it to say. The other three arguments involve more legal and constitutional analysis.

Argument (1) (shattering United Kingdom human rights protection) goes to the heart of the matter: where NI is located constitutionally. The NIHRC's single-minded ignoring of Great Britain is related to its dependence upon Irish nationalism. (I have not addressed that issue directly, with comments on the totemic joint committee between the NIHRC and the Irish HRC in the first paragraph 10 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement. It suffices to mention, that the NIHRC's intuitive anti-state sentiment when it comes to the United Kingdom, is not carried over to the Republic of Ireland, despite the internationalist character of universal human rights.)

Arguments (2) and (4) (respectively, the actual obligation in the Belfast Agreement, and the HRA 1998 is NI's BOR), are symmetrical. The NIHRC was asked to do something. This it ignored. It then went on to do what it wanted. And, in the process, ignored the importance of new Labour's constitutional contribution in the form of human rights protection. In doing both, it revealed remarkable legal incompetence – its inability to interpret a bilateral international agreement, and a United Kingdom statute, which

resolves the relationship between international and domestic law as regards individual human rights.

What about the provisions of the first paragraph 4 of the Rights, Safeguards and Equality of Opportunity section? And what should be done about the NIHRC?

### ***An Assembly human rights committee***

I propose that the problem now be handed to the NI Assembly. There is a precedent: the joint human rights committee at Westminster. This was an alternative to a Human Rights Commission in GB. However, it may be followed in NI.

The joint Human Rights Committee was not established until the last session of the 1997 Parliament. It held its first meeting on 31 January 2001. Its chairman was (and remains) a Labour MP, Jean Corston. Among the 11 other members were: Desmond Browne MP (now a junior NIO minister); and Lord Lester of Herne Hill QC and Lord Goldsmith (now the Attorney General for England and Wales and also, for the moment, NI). The committee's terms of reference are: "to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)". It could, for example, enquire into the NIHRC. Before the end of the 1997 Parliament, it rushed out three reports.<sup>115</sup> This work has continued in the 2001 Parliament, commencing with an important report on the Anti-terrorism, Crime and Security Bill<sup>116</sup>.

A human rights committee, with appropriate powers, could be established at Stormont, under paragraph 10 of Strand One of the Belfast Agreement. Standing Order 49, made under the NIA 1998, provides for non-statutory committees, including standing committees. Such a committee could not take over all the functions of the NIHRC in section 69 of the NIA 1998. However, it could do a great deal to monitor human rights law and practice. It would have the virtue, given the rules governing the appointment of Assembly committees, of being politically representative.

### ***A new NIHRC?***

This is quite simply an imperative. An alternative would be the scrapping of the idea altogether, involving an amendment to the NIA 1998. The idea in the Belfast Agreement might encourage the Irish government to cause difficulties. However, Dublin is likely to grow disenchanted with the Irish HRC, and the human rights community in both parts of Ireland might find it less easy to maintain its newfound status.

The NIHRC has lacked public confidence since 1 March 1999. It must be doubted that it was recruited on the basis of merit. A minister defined representativeness, when the Northern Ireland Bill was going through

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<sup>115</sup> 2000-01, *First Special Report: Criminal Justice and Police Bill*, HL Paper 42/HC 296; *Second Special Report: Implementation of the Human Rights Act 1998*, HL Paper 66-I/HC 332-I; *Third Special Report: Scrutiny of Bills*, HL Paper 73/HC 448.

<sup>116</sup> 2001-02, *Second Report: Anti-terrorism, Crime and Security Bill*, HL Paper 37/HC 372, 14 November 2001.

Parliament, as “the broad Unionist community and the broad nationalist community”<sup>117</sup>. It was not defined in sociological terms: religion, gender, etc. However, that was what was done when the Secretary of State made the appointments.

Lawyers and others less enamoured of the NIHRC were looking forward to a brand new commission on 1 March 2002. Then, one member resigned. In the process of replacing her, three additional commissioners were selected after advertisement. But the remaining nine commissioners were reappointed, in a process lacking in transparency. Most likely, the issue of the NIHRC will lead to litigation: maybe actions based on political discrimination in NI; or, in London, and after complaint to the Office of the Commissioner for Public Appointments, an application for permission to apply for judicial review.

### ***A genuine human rights culture for all***

NI needed human rights protection in 1999. The HRA 1998 should have been its basis. A new legal epoch began on 2 October 2000, and NI should have been aligned with GB.

It will be commensurately more difficult to establish a culture of genuine human rights for all in NI in 2002 and beyond. However, the human rights priorities remain the following:

- action on article 2 (the right to life), as outlined above, namely the develop of the indirect horizontal effect in the HRA 1998. A leading case might well arise from the Real IRA bombing of Omagh on 15 August 1998;
- article 5 (liberty and security, not liberty or security), as a result of 11 September, where the Anti-terrorism, Crime and Security Act 2001 will extend to NI, as will other domestic and European measures;
- article 11 (freedom of peaceful assembly), an issue created by republicans in 1994, and not resolved by the United Kingdom’s public order approach, combined with a regulating Parades Commission, which has failed to embrace a genuine human rights approach. There is now another NIO review, and this may well lead to a new approach to the problem, capable of winning the assent of those who wish to exercise this particular human right;
- ECHR protocol no. 12 (the right not to be discriminated against): the United Kingdom is refusing to sign, let alone ratify, this measure, adopted in Rome on 4 November 2000. The most distressing human rights moment since the Belfast Agreement was the Patten report on policing proposal for 50/50 reverse discrimination. This necessitated the disapplication of NI’s anti-discrimination law as regards the police, and an opt out in a European directive (also allowing teachers in NI not to benefit from equality protection). The NIHRC (and the Equality Commission) were gung-ho for reverse discrimination in favour of “Roman Catholics” (but not other groups?). Both organizations will

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<sup>117</sup> *Hansard*, House of Commons, 6<sup>th</sup> series, vol. 317, cols 59-60, 27 July 1998.

have to choose between Patten and protocol no. 12. And, given allegations about lower-merit Catholics being recruited over higher-merit Protestants, this issue is likely to end up in the NI courts and the European Court of Justice and/or the European Court of Human Rights.

There is, then, a serious alternative human rights agenda. In seeking to engage it, the human rights community will, most likely, be an obstacle. Given the legal mainstreaming of human rights on 2 October 2000, it is unlikely to be an insuperable one.

## THE NEED FOR A BILL OF RIGHTS IN NORTHERN IRELAND

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### INTRODUCTION

Throughout the past thirty years of conflict in Northern Ireland widespread agreement on the need for a Bill of Rights as one element of any constitutional settlement was one of the few beacons of political consensus.<sup>1</sup> Significant disagreement on the objectives and content of that Bill of Rights could be glossed over while the prospect of any such settlement remained remote. In particular the issue of whether any such Bill of Rights should be limited to the incorporation of the European Convention on Human Rights (ECHR) into Northern Irish law or should go further (either to introduce other international human rights provisions or to craft specific human rights provisions for Northern Ireland) could effectively be postponed. With the advent of the Belfast Agreement, however, such issues must now be confronted. The Agreement recognizes that through the Human Rights Act 1998 (HRA) and the Northern Ireland Act 1998, the ECHR has effectively been incorporated into the law governing Northern Ireland.<sup>2</sup> However it also leaves open the possibility of going beyond the ECHR by providing that the Northern Ireland Human Rights Commission (NIHRC) should advise the Secretary of State as to the scope for defining rights supplementary to the ECHR “to reflect the particular circumstances of Northern Ireland”. Some think that with the ECHR now incorporated into United Kingdom law as a whole it is unnecessary and even constitutionally undesirable to go further.

This paper will argue against such a view and suggest that there is indeed a need for additional rights to be reflected in Northern Ireland law, particularly if the protection of human rights is recognized as an important element of the political settlement. However it also acknowledges that giving effective protection to such rights will face a number of difficulties, some deriving from the difficulties of reaching consensus on their formulation within Northern Ireland, others from the current constitutional structure of the United Kingdom. After discussing these difficulties and the extent to which they may be resolved, the paper moves on to consider what the form and content of any such Bill of Rights might be. Having argued that equality, social inclusion and respect for diversity must play an important role in any such Bill of Rights it will then go on to examine the proposals to date of the NIHRC in relation to these matters as reflected in *Making a Bill of Rights for*

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<sup>1</sup> See CAJ, *A Bill of Rights for Northern Ireland*.

<sup>2</sup> The Northern Ireland Act 1998 goes beyond the HRA in respect of Northern Ireland in two ways. Firstly s 6 provides that the Northern Ireland Assembly does not have competence to pass legislation inconsistent with Convention rights. Secondly s 24 provides that a minister or Northern Ireland Department has no power to “make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act” is inconsistent with Convention rights. These provisions mirror similar sections in the Scotland Act 1998.

*Northern Ireland (Making a Bill of Rights)*.<sup>3</sup> The paper argues that these proposals are flawed in a number of respects, which reflect a failure to think through the underlying values of a Bill of Rights, their relation to each other and the legal context within which a Bill of Rights would operate.

### **Beyond The ECHR**

The British Labour Party's conversion to the cause of incorporating the ECHR into United Kingdom law in the 1990s and its carrying out of a manifesto commitment to do so in 1998 are often presented as one aspect of the embracing of a radical new constitutional agenda. However some would argue that the decision to go for the ECHR as representing the content of a human rights law for the United Kingdom was an essentially conservative move which foreclosed broader discussion both of a more extensive set of rights and of a more effective way of securing them in the law.<sup>4</sup> Such critics would point out that the ECHR is now over 50 years old and was devised at the height of the cold war. Its exclusive emphasis on civil and political rights, which aimed to distinguish "democratic" western Europe from the communist and authoritarian east, is now significantly outdated in terms of international human rights law. In those intervening years the United Nations, in particular, has developed a whole new set of human rights standards relating to economic, social and cultural rights, the rights of women and children, the rights of minorities and of protection against discrimination. Most of these are found in treaties which have been signed by both the United Kingdom and Ireland. The present United Nations (UN) High Commissioner on Human Rights, Mary Robinson, has repeatedly stressed the "interdependence" of civil/political and economic/social/cultural rights and this is reflected in the most recent general UN statement on human rights, the Vienna Declaration and Programme of Action in 1993.<sup>5</sup> Even in the European context a more recent statement of fundamental rights, the Charter of Fundamental Rights of the European Union (2000), ranges far beyond the rights contained in the ECHR to include sections on solidarity rights and citizens' rights.

Not only is the ECHR outdated it can also be argued that it contains significant flaws. Nowhere is this clearer than in respect to its equality provision, Article 14.<sup>6</sup> While it offers a broad range of grounds on which discrimination is prohibited, Article 14 only applies to discrimination in respect of the enjoyment of other Convention rights. Since matters such as employment, the distribution of public funds or of public offices are not covered by the scope of other Convention rights, some of the most important areas of inequality in most modern societies are largely left untouched by the ECHR. In addition even where the Convention does bite, such as on

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<sup>3</sup> *Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission* (2001).

<sup>4</sup> See, for example K. Ewing, "Social Rights and Constitutional Law" [1999] *Public Law* 104.

<sup>5</sup> See Vienna Declaration and Programme for Action (1993) paragraph 5. "All Human Rights are universal, indivisible, interdependent and interrelated."

<sup>6</sup> See, for example J. Monaghan, "Limitations and Opportunities: A review of the Likely Domestic Impact of Article 14" [2001] *EHRLR* 167; S. Livingstone, "Article 14 and the Prevention of Discrimination" [1997] *EHRLR* 25.

discriminatory decisions relating to education or the family, the European Court of Human Rights has offered states a broad margin of appreciation in asserting justifications for different treatment.<sup>7</sup> Although the Council of Europe has sought to rectify this situation and replace Article 14 with a general equal protection clause through Protocol 12 to the Convention this is still some way off from coming into force, with the United Kingdom indicating thus far that it will be one of the states who will not ratify it.<sup>8</sup> Moreover it is unclear whether the European Court of Human Rights would adopt a more stringent approach to claims of the justification of discrimination even under a more extensive equality clause such as that provided for in Protocol 12. The ECHR's provisions on protection from torture or the right to a fair trial, though extensively developed by the jurisprudence of the Court of Human Rights, are also some way behind contemporary global standards, as reflected by provisions such as the Body of Principles on the Protection of All Persons in Detention (1990).

While the incorporation of the ECHR is a significant improvement in the level of formal human rights protection, one whose implications have yet to be fully explored in Northern Ireland, it is worth observing that if one were looking for an up to date model of an international human rights standard on which to base a national human rights law it is unlikely you would begin with the ECHR. Its adoption in the HRA is less a reflection of its contemporary quality than of its familiarity in the minds of senior politicians and judges, who have been forced to take account of it through the United Kingdom being frequently challenged before the European Court of Human Rights in Strasbourg. It is noticeable that while many countries who fashioned constitutions and Bills of Rights in central and eastern Europe in the late 1980s and early 1990s took account of the ECHR, few adopted it alone.

Moreover the ECHR remains in the end a set of international *minimum* standards. It is designed to provide a set of rights common to all who find themselves within the jurisdiction of European states and which therefore responds to a set of threats to respect for rights which are common to people throughout Europe. However this does not preclude a recognition that there may be *specific* problems in different parts of Europe which require a more specific response. To return to the example of central and eastern Europe it is clear that several of the human rights provisions adopted in their post-communist constitutions derive directly from an experience of the denial of political or religious rights in the past.<sup>9</sup> Such states have recognized a need to clearly establish these rights as fundamental to their constitutional order, both to mark a clear break with the past and to provide a framework for the future. This was even more pronounced in the drafting of a Bill of Rights for

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<sup>7</sup> See, for example *Petrovic v Austria*, Decision of the Court 23 March 1998. (State granted broad margin of appreciation in offering child care benefits only to mothers).

<sup>8</sup> See G. Moon, "Draft Discrimination Protocol to the ECHR: A Progress Report" [2000] *EHRLR* 49.

<sup>9</sup> Many for example enacted bans on former Communists occupying political office. Hungary enacted a ban on police officers standing for election as members of any political party, a ban reviewed and upheld by the European Court of Human Rights in *Rekvenyi v Hungary* [1999] *EHRLR* 114.

South Africa, whose interim constitution was explicitly described as a “bridge” between the apartheid past and a democratic future.<sup>10</sup> Those who drafted the South African Bill of Rights drew upon international human rights standards, indeed included a clause that in interpreting the Bill of Rights a court or tribunal *must* consider international law,<sup>11</sup> but also looked more explicitly at the denial of human rights in South Africa’s past and the likely needs of its future. Hence the inclusion of extensive clauses on language, labour relations, education and access to information as well as many of the civil and political rights familiar to constitutions around the world.<sup>12</sup> In many of the peace agreements which have sought to end conflicts in Europe, the Middle East and Latin America greater protections for human rights, often reflected in a new constitution or Bill of Rights, have been prominent.<sup>13</sup> These often draw heavily on international standards and indeed the willingness of a state to embrace such standards is often a crucial indication of its desire to fully rejoin the international community. However they are likely to be most fully effective when they also identify and respond to particular problems in the society in which they are located. Then they can perform the dual role of encouraging those who have experienced disadvantage in the past to believe that change will occur, while also reassuring those who were previously in a position of power that such change will not simply take the form of revenge and of similar oppression being inflicted on them.

Hence there are several reasons to believe that a Bill of Rights for Northern Ireland could and probably should go beyond the rights guaranteed in the ECHR. At the very least it is arguable that the ECHR might not provide the ideal set of human rights protections for Northern Ireland. Yet some, such as Austen Morgan in this collection, claim that it is not merely undesirable but also effectively impossible to look beyond the ECHR. This argument appears to have two strands, one political and one legal, though there is a significant amount of connection between them. Neither is ultimately convincing.

### ***The ECHR As Limit: Political Arguments***

The political argument essentially suggests that going beyond the ECHR will undermine the Union. Harking back to Diceyan concerns about the need to ensure equal enforcement of the law throughout the kingdom, it suggests that different levels of rights protection in different parts of the United Kingdom undermines the equality of its citizens. It also diminishes the identification of people with the Union as their orientation shifts to institutions shaped by a different set of legal imperatives in Northern Ireland as opposed to Scotland or England. If a Northern Ireland Bill of Rights were to guarantee a right to life for the unborn or require all schoolchildren to be educated in Irish, for example, it may result in a society so different from the rest of the United Kingdom as to undermine the claim that all British subjects enjoy a common set of rights and duties.

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<sup>10</sup> E. Murenik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31.

<sup>11</sup> Section 39(1)(b) of the Bill of Rights.

<sup>12</sup> See A. Sachs, *Advancing Human Rights in South Africa* (1992).

<sup>13</sup> See C. Bell, *Peace Agreements and Human Rights* (2000) Chapter 7.

For many both within and without Northern Ireland this concern will not be a problem. They see themselves as Irish citizens rather than British subjects and their political objective is not to maintain the Union but rather to move towards a situation where Northern Ireland no longer is a part of the United Kingdom. The Agreement clearly recognizes the legitimacy of such aspirations. However it also recognizes the legitimacy of unionist aspirations and the principle that no change should be made in Northern Ireland's constitutional status without the consent of the majority of its people. Overall the Agreement is shot through with the principle that dialogue and consent are the basis for its new institutions.<sup>14</sup> Failure to engage with unionist concerns as to the potential political consequences of a separate Bill of Rights for Northern Ireland is unlikely to lead to the consensus which is necessary for a legitimate and effective Bill of Rights.

Fortunately I would suggest that such concerns can be addressed. They have force only for a particular form of unionism, an integrationist perspective, which sees devolution itself as a danger to the Union. That, however, is currently very much a minority perspective among unionists throughout the United Kingdom. Instead devolution of power to Scotland, Wales and Northern Ireland has been embraced as the best way of preserving the Union, even if it will inevitably mean the development of different political institutions and cultural environments.<sup>15</sup> Constitutional theorists have argued that the United Kingdom should be seen less as a *unitary* state, bound together by strong national institutions and common laws, but rather as a *union* state, held together by the common agreement of its different peoples to share some common institutions and practices while differing on others.<sup>16</sup> There is still considerable scope for debate as to what political, legal or social practices will be necessary to maintain the unity of the United Kingdom, and whether they are capable of being reproduced in the future, but it is far from clear that maintaining an identical set of human rights protections in each of the different nations will be essential.

### ***The ECHR As Limit: Legal Arguments***

The legal argument suggests that it will be impossible to have a different set of human rights standards in one part of the United Kingdom from that which prevails in the rest of it and that the HRA is effectively "the only show in town". This argument starts from the premise that Parliament has provided, in section 6 of the HRA, that all public authorities in the United Kingdom must act in a way compatible with the Convention rights and that it cannot therefore countenance some institutions acting in conformity with a different set of standards. The right to family life, for example, must surely be given effect to in the same way throughout the United Kingdom so that the outcome of a custody proceeding should not depend on whether the parent bringing it lives in Derby or Dungannon. Introducing a specific Bill of Rights for Northern Ireland might lead to considerable confusion as public

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<sup>14</sup> See C. Harvey, "The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland" in C. Harvey (ed) *Human Rights, Equality and Democratic Renewal in Northern Ireland* (2001), Chap 2.

<sup>15</sup> See V. Bogdanor, *Devolution in the United Kingdom* (2001) pp 294-8.

<sup>16</sup> See N. Walker, "Beyond the Unitary Conception of the United Kingdom Constitution" [2000] *Public Law* 384.

authorities in Northern Ireland struggled to understand which human rights standards they are required to comply with and perhaps failed to ensure that someone's rights under the HRA are given effect to.

This argument has some force if the outcome of deliberations on a Bill of Rights were to produce a set of standards which failed to guarantee to people in Northern Ireland the rights protected by the ECHR. However, to return to a point made earlier, the ECHR is a set of *minimum* standards. It does not prevent states devising national law provisions which go *further* in protecting people from torture or unfair trials than the ECHR does. Nor does the Convention outlaw federalism and require that states have the same law throughout their entire jurisdiction.<sup>17</sup> Instead it simply requires that, whatever the internal constitutional arrangements of the state, all those within the jurisdiction of the member state are guaranteed the rights provided in the ECHR. Certainly one would expect that any Bill of Rights for Northern Ireland would take full account of the ECHR, and of other human rights treaties to which the United Kingdom is a party, but this does not preclude the drafting of a document which differs in some respects from it. Further support for the idea that different human rights provisions may exist in different parts of a state is provided by states which have a strong tradition of constitutional rights protection, such as the USA or Canada. In the former state constitutions have been promulgated in all states and include rights, such as a right to education, which go beyond those provided in the federal constitution. After decades of largely being ignored civil rights lawyers have increasingly turned to these state constitutions in the past decade in response to the limited and conservative reading of the Bill of Rights at the federal level.<sup>18</sup> In Canada, provinces such as Quebec devised a charter of rights in advance of the federal Canadian Charter and have continued to give effect to such provisions while acknowledging the supremacy of Charter rights where the two clash.<sup>19</sup>

However the legal arguments against moving beyond the ECHR do raise some problems for the framers of a Bill of Rights for Northern Ireland which they would be well advised to consider seriously. All derive, to a certain extent, from the uncertain legal status of the HRA and the partial nature of the United Kingdom's constitutional revolution in the late 1990s. If the United Kingdom had gone down the path of full blown constitutionalism, with a written constitution and an entrenched Bill of Rights, then the legal context within which a Bill of Rights for Northern Ireland would operate might have been much clearer. Instead the effort to preserve the principle of the sovereignty of Parliament has led to a fudge on both the status of the ECHR and the structure of devolution. Issues of the extent to which Convention rights are supreme over other legal provisions throughout the United Kingdom as well as the respective spheres of authority of the national

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<sup>17</sup> See, for example, *Handyside v United Kingdom* (1976) 1 EHRR 737 and *Otto Preminger v Austria* (1995) 19 EHRR 34, recognizing the existence of different laws impacting on freedom of expression in different parts of a state.

<sup>18</sup> See G. Tarr, *Understanding State Constitutions* (1998).

<sup>19</sup> Unless the provision in question is the object of the "notwithstanding" clause in section 33 of the Charter. See I. Molinaro, "The Charter and Quebec: Exploring the Limits of Constitutional Authority" in G. Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (1999) pp 139-66.

as opposed to regional governments have been postponed in order to preserve what may increasingly be a fiction, that the Westminster Parliament may intervene at any time in respect of any matter. Hence the Bill of Rights may be launched into uncertain legal territory.

Three issues in particular will require careful thought. The first is the relationship of the rights guaranteed by the Bill of Rights to those provided for by the ECHR. As has already been discussed the former may extend the protections given by the latter but may not, in international if not domestic law, limit them. However, without amendment to the HRA and the Northern Ireland Act, the obligation to act in conformity with ECHR standards would remain on public authorities in Northern Ireland, in addition to any obligation to comply with the Bill of Rights. The potential for confusion is clear and is exacerbated by the fact that, unlike the US or Canada, it is not clear that the ECHR standards enjoy the status of supreme law as opposed to being simply another set of statutory provisions, on the same level as those which may be contained in the Bill of Rights. Two choices would appear to exist. One is for the Bill of Rights to make no reference to the Convention rights but for it to be drafted in a way which aims to ensure that it does not lessen the standard of rights protection offered by the ECHR. Clearly some conflicts might arise. If the Bill of Rights were to include new provisions on the protection of minority or community rights there may be occasions when these clash with Convention based provisions on the right of individuals to freely associate or express themselves. It would then be left to the courts to adjudicate on whether an interpretation can be found which complies with both standards. If not it is likely that the ECHR standard would prevail given the UK's international commitments and the intention to draft Bill of Rights provisions which would be consistent with the ECHR. However it still might require some legal gymnastics for the courts to reach a position where they effectively uphold one statute as having pre-eminence over another. An alternative is to seek to resolve any potential conflicts in the Bill of Rights itself and to draft a Bill of Rights that would effectively replace the ECHR in Northern Ireland. Such a Bill of Rights might include a fair trial provision, for example, which would be based on the ECHR but could also include guarantees, such as a right to jury trial or to the exclusion of evidence gained in breach of the Bill of Rights, which go further than those provided in the Convention. This option would require amendment of the HRA and Northern Ireland Act to replace the obligation to comply with Convention rights in respect of Northern Ireland with an obligation to comply with the Northern Ireland Bill of Rights. Whether the rights contained in the Bill of Rights did comply with the ECHR could still ultimately be tested by application to Strasbourg but this option would not leave domestic courts with the challenge of deciding which standard should prevail. However it might raise problems with regard to the second issue to be discussed below.

This relates to the scope of the Bill of Rights. The Agreement refers to the need for additional rights in the Bill of Rights to "be defined in Westminster legislation". This suggests they may be given legal force by amendment to the Northern Ireland Act, to put the Bill of Rights guarantees on the same footing as Convention provisions are in sections 6 and 24 of that Act. However these provisions only bind the Northern Ireland Assembly, when passing legislation, and Northern Ireland departments, when carrying out their statutory functions. However many other institutions in Northern

Ireland, including the police, courts and United Kingdom government departments operating in Northern Ireland, are not covered by these provisions. They are however covered by the general obligation contained in section 6 of the HRA. This causes few difficulties where both statutes invoke the same human rights standards but becomes problematic where such standards differ. To limit the effect of any Northern Ireland Bill of Rights to Northern Ireland's devolved government would seem unsatisfactory given that some of the most significant human rights concerns in the recent history of Northern Ireland have related to the actions of bodies such as the police or security services, who would therefore be excluded from the scope of the Bill of Rights. Alternatively the Bill of Rights might be given the same effect as the current non-discrimination provision contained in section 76 of the Northern Ireland Act 1998. This prohibits discrimination on grounds of religion or political opinion by any "public authority carrying out functions relating to Northern Ireland". The section goes on to define these public authorities, which includes the police and any minister of the crown. However such an approach may not be welcome news for United Kingdom wide bodies, such as the Home Office or Inland Revenue, who might now find actions in Northern Ireland, based on the same statutes as operate in Britain, challenged as being inconsistent with the Bill of Rights even if they have been upheld under the HRA.<sup>20</sup> It might become even more problematic if the framers of a Northern Ireland Bill of Rights determined that its reach should extend beyond public bodies and even beyond the "horizontal effect" so far associated with the HRA,<sup>21</sup> to impose duties on private bodies or individuals. Once again the failure to think through concretely the consequences of devolution, to decide what is properly a matter of "federal" law throughout the United Kingdom (governed by a federal Bill of Rights) and what falls to regional authorities, may cause problems for ensuring effective human rights protection in Northern Ireland

The third issue relates to the enforcement of the Bill of Rights. Although there will no doubt be an expectation that those upon whom it imposes obligations will seek to comply with the Bill of Rights and although the NIHRC will have a very important role in commenting on legislative proposals and educating the wider public, it remains likely that the courts will have to play a significant part in enforcing this new legislation. However the issue is what courts and in particular what courts will have the final say on the interpretation of the Bill of Rights? As it is a statute that only operates in Northern Ireland there may be good reason for arguing that the Court of Appeal for Northern Ireland should be the final court for interpretation of the Bill of Rights. Some have even argued that, in light of the significance of the Bill of Rights and by analogy with the experience in

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<sup>20</sup> See, for example the immigration detention provisions recently upheld against an HRA based challenge in *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] 4 All ER 961. A NI Bill of Rights could contain a provision that strengthens the right to liberty for immigration detainees. Westminster might not permit such legislation to pass but this would merely compound the problem by resulting in the content of a Bill of Rights for Northern Ireland being dictated by UK wide concerns.

<sup>21</sup> See I. Hare, "Private Parties, Privacy and the Human Rights Act" [2001] *EHRLR* 526.

South Africa, that this should be the occasion for the creation of a new Constitutional Court for Northern Ireland. Leaving aside arguments as to the desirability and feasibility of this it may be wondered if this is possible. To take but one problem, if the Bill of Rights is to circumscribe the legislative competence of the Northern Ireland Assembly, then any claims that the Assembly had exceeded its competence by passing legislation inconsistent with the Bill of Rights would currently be defined as a “devolution question” and could ultimately be appealed to the Judicial Committee of the Privy Council.<sup>22</sup> It seems unlikely that Parliament could agree to issues of compliance with Convention rights being appealable to the Privy Council (to ensure consistent interpretation throughout the United Kingdom) but not issues of compliance with the Bill of Rights, especially if the Bill of Rights had subsumed the ECHR in respect of Northern Ireland. However people in Northern Ireland may subsequently become dissatisfied with the idea that what is essentially an English court will get to have the final say on the interpretation of a Bill of Rights specifically designed for Northern Ireland, especially if the Northern Irish courts have developed an interpretative approach which appears more in keeping with the objectives of the Bill.<sup>23</sup>

This possibility raises again the issue of how satisfactory it is that the Privy Council has effectively been “bolted on” to the devolution settlement to provide a final court of interpretation, one arguably now even supreme over the House of Lords. Several commentators have already observed that this may have been a missed opportunity to review the issue of what the United Kingdom’s “top court” should be, how it should be composed and what jurisdiction it should have.<sup>24</sup> Issues of interpreting a Bill of Rights from Northern Ireland may raise all these questions afresh and again much can be learned from the experience of US and Canadian courts in dealing with the differing provisions of state and federal constitutions.

In conclusion, in this section it is worth repeating the view that the passing of the HRA does not render impossible the idea of a separate and specific Bill of Rights for Northern Ireland. The way in which devolution has taken place and in which human rights standards have been incorporated into United Kingdom law does raise certain difficulties for the legal formulation of any such Bill of Rights but these are not insurmountable. Moreover there is good reason to say that the ECHR is not the ideal Bill of Rights for Northern Ireland in particular or even for the United Kingdom in general. Only inertia may prevent the drafting of something better.

## **Producing a Bill of Rights for Northern Ireland.**

### ***The Form of the Bill of Rights***

The Agreement simply indicates that the Bill of Rights shall be contained in “Westminster legislation”. This leaves it somewhat unclear what status it is

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<sup>22</sup> Sch 10 para 1(1)(a) Northern Ireland Act 1998.

<sup>23</sup> Worth noting that already the JCPC appears to be adopting a more restrictive approach to the interpretation of the HRA than that espoused by the Scottish courts. See A. O’Neill, “Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council” (2001) 64 *MLR* 603.

<sup>24</sup> For a discussion of the issues see N. Burrows, *Devolution* (2000) pp 174-9.

supposed to have and in particular whether it should assume a “constitutional” status and be supreme over Assembly legislation. However other sections of the Agreement clearly indicate that neither the Assembly nor the Executive should be able to act in contravention of the ECHR “and any Bill of Rights supplementing it”.<sup>25</sup> This would appear to suggest it would have a status at least equivalent to that of the ECHR in the current Northern Ireland Act 1998. Recognising that the Bill of Rights should have this “constitutional” character suggests that it should be drafted in a constitutional manner, more as statements of broad principle rather than the specific injunctions more familiar in statutes. This in turn should facilitate a broad reading of the Bill of Rights provisions by the courts, though it may well require the inclusion of an interpretation clause, similar to section 39 of the South African Bill of Rights, to encourage them to do so.

### ***The Content of the Bill of Rights***

The drafters of the Agreement did not make things easy for the Human Rights Commission. Rather than simply drafting a Bill of Rights, or alternatively leaving the NIHRC absolute discretion to do so, they indicated that this Bill of Rights was to comprise rights supplementary to the ECHR “to reflect the particular circumstances of Northern Ireland”. However, apart from indicating that these additional rights should “reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem” and providing two areas to consider (which will be discussed more fully below) the Commission was left with no further guidance in the Agreement. Nor have other accounts of the process by which the Agreement was reached shed much light on the issue. Hennessey, for example, appears to suggest that while Unionists wanted to include aspects of the European Framework Convention on National Minorities, Nationalists opposed this as defining them in terms of minorities rather than equal citizens.<sup>26</sup> The resulting clause appears to have been a compromise between these two views.

Each of the elements of the guidance that was offered raises some difficult questions of interpretation. Take “the particular circumstances of Northern Ireland”. One might ask in what way is Northern Ireland particular and particular with respect to what, England, Ireland or Europe for example? Some might locate this particularity in levels of social need or deprivation, others in conservative social mores. Even if one focuses on what might seem the most likely meaning of particularity, that which gave rise to the Agreement in the first place, the existence of a long standing violent conflict, this only raises a whole new set of questions. If the Bill of Rights is to respond adequately to the circumstances of the conflict then there will need to be some understanding of what these are and what their causes are. However, as John Whyte pointed out, there are myriad explanations of the Northern Ireland conflict.<sup>27</sup> Moving on from this there is the reference to the “two communities”. It might immediately be asked whether Northern Ireland can be reduced to only two communities. Would women in Northern

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<sup>25</sup> Strand One, para 5(1)(b).

<sup>26</sup> T. Hennessey, *The Northern Ireland Peace Process: Ending the Troubles?* (2000) pp 145-9.

<sup>27</sup> J. Whyte, *Interpreting Northern Ireland* (1990).

Ireland, for example, not suggest that this ignores gender as a primary reference of identity for many people. Where does it leave the Chinese or Traveller communities? Even if we focus on the two communities whose interests find reflection in the Agreement there is again a question of how they are identified, whether primarily in religious or political terms, which has significance for what aspects of their “identity and ethos” are to be given respect. Finally there are issues of what “parity of esteem” might mean and how it differs from notions of equality.

Such are the difficulties of constructing a clear meaning for the guidance given to the Commission in the Agreement it is tempting to ignore it and launch into a more general analysis of what sort of Bill of Rights might be most desirable for Northern Ireland, drawing upon contemporary international human rights standards. This indeed is arguably what the NIHRC has done, justifying the extent to which it steps outside the Agreement guidance by reference to its general power in section 69(3)(b) of the Northern Ireland Act 1998 to make recommendations for the better protection of human rights in Northern Ireland.<sup>28</sup> However there are good reasons for striving to identify a meaning within the terms of the Agreement, not least because this is what all signatories to the Agreement have committed themselves to and hence recommendations on a Bill of Rights which can be claimed to be in line with the Agreement’s guidance should stand a better chance of achieving the political consensus necessary to ensure that they come to legislative fruition.

One way of doing this is to consider more fully the place of human rights guarantees in the Agreement. If it is accepted that the primary aim of the Agreement is to secure a settlement which legitimises and accommodates both Unionist and Nationalist aspirations then it is worth noting that the parties accept that the redesign of political institutions alone can not achieve this. Undoubtedly the arrangements for the creation of the Assembly and the Executive, the new cross-border and east-west bodies are the most significant elements of this accommodation and were the most extensively argued over in the negotiations. However it seems also to have been accepted from the outset that these alone would not provide the basis for a settlement and that the Agreement would also have to include significant provisions about rights. This is an important departure in particular from previous British practice to approaching the resolution of the Northern Ireland conflict and perhaps has not received the attention it should have. While many have commented on the fact that, unlike the Sunningdale agreement of 1973, the Belfast Agreement of 1998 included all the parties to the conflict and made more extensive provisions on both north-south and east-west relationships, few have observed that it also contains a much more extensive set of provisions on rights. Whereas in 1973 it seemed enough to agree a power-sharing formula plus an all-Ireland dimension and then leave the Northern Irish parties to get on with things,<sup>29</sup> the settlement of 1998 contains a much more extensive engagement with the “micro” as well as the “macro” elements of

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<sup>28</sup> *Making a Bill of Rights* p 14.

<sup>29</sup> The only human rights commitment being to establish the Standing Advisory Commission for Human Rights.

constitutionalism.<sup>30</sup> This includes not only the human rights provisions but also those on policing, justice, victims and equality.

As to why this should be so I would suggest there are a number of reasons, but all are linked to a recognition that traditional British constitutionalism, whereby individual rights are secured through a mixture of constitutional convention and regular opportunities to change the party in power, is inappropriate for a deeply divided society such as Northern Ireland.<sup>31</sup> The most important role for rights provisions is that they reduce the risk that politics will become a zero sum game and hence encourage competing political groupings to participate in a political dialogue which involves risk and compromise on all sides. A common aversion of Unionists and Nationalists to many of the political structures proposed for Northern Ireland is a fear that a temporary advantage to the “other” side might translate into total defeat for their “own”. Knowledge that, whatever the complexion of the party in power, certain individual and collective rights are secure may encourage Nationalists to engage with a political system that may see a DUP First Minister or Unionists to accept the appointment of a Sinn Fein Justice Minister. Secondly the development of a rights agenda, and of changes in policing and criminal justice to advance that agenda, offers both the promise that concrete change in the lives of individuals will occur and that any such change will not take the form of simple revenge. The first is obviously crucial to Nationalists, who might fear that Unionists could block significant change through the weighted voting arrangements in the Assembly, the second to Unionists as they might fear a future Nationalist majority (perhaps in an all-Ireland context) could abuse power to discriminate against them. A third reason for a strong human rights component to the Agreement is a recognition that the settlement must be based on certain values to which all are committed. It is not enough simply to create a set of institutions and then let each contending party atavistically pursue their own ethnic or political interests. Instead a stable settlement requires that all accept certain principles and on the basis of a common acceptance of these principles seek to persuade others of the validity of their arguments. Rights provisions are the concrete expression of these principles. Indeed the inclusion of human rights provisions in the Agreement appears to acknowledge that the absence of respect for such principles played a significant role in contributing to the conflict.

If the rights contained in a Bill of Rights are to reflect back to the history of conflict in Northern Ireland the immediate question is whether the content of the ECHR is sufficient to achieve this. Already I have suggested that it may not be. One of the key themes of human rights in Northern Ireland is equality, given the central place that concerns about inequality have played in fuelling the conflict. However as I have noted above Article 14 of the ECHR is widely accepted to be one of its most flawed provisions and even the Council of Europe has now recognized the need for something else. Indeed paragraph 4 of the Agreement explicitly identifies equality as one

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<sup>30</sup> For a discussion of the distinction between “micro” and “macro” constitutionalism see J. Morison and S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (1995), Chap 4.

<sup>31</sup> See C. McCrudden, “Northern Ireland and the British Constitution” in Jowell and Oliver (eds) *The Changing Constitution* (3<sup>rd</sup> ed 1994).

area where the NIHR should consider the need for a provision going beyond the ECHR. A second area relates to the issue of accountability. Lack of effective accountability for human rights abuses, whether of state institutions or of armed opposition groups, has arisen as a regular theme in Northern Ireland and has led to a growth in regulatory and oversight bodies. The jurisprudence of the European Court, especially in relation to Articles 2 and 3, has increasingly stressed a need for independent and effective investigation of claims of human rights abuses plus the need for adequate civil and in some cases criminal sanctions against those engaged in them.<sup>32</sup> However the ECHR lacks substantive provisions on issues such as freedom of information or victims rights which might significantly enhance accountability for decisions and actions which might infringe individual rights.

The ECHR is also of course limited in that it focuses exclusively on individual rights. The Agreement suggests, as have commentators examining the issue,<sup>33</sup> that there is also a need for certain communal rights to be reflected in the Bill of Rights. Such rights are the “micro” corollary of the “macro” arrangements for establishing the government and passing legislation which work out the consociational principles at the heart of the Agreement.<sup>34</sup> Such communal rights provide further reassurance that the “identity and ethos” of the Unionist and Nationalist communities will be respected regardless of the working out of the legislative and executive arrangements. The obvious areas for such rights to focus on are issues of language, citizenship, flags, marches and education. The actual content of these rights will require delicate negotiation and will ultimately depend on what balance of rights is necessary to reassure each community of equal respect. In some cases it may simply involve giving “constitutional” form to the status quo, in others a significant change. It will also be important that however such rights are formulated they do not infringe individual rights protected by the ECHR. Thus an absolute ban on parades would not be consistent with Article 11 of the ECHR, nor would a requirement that all children attend denominational schools be reconcilable with Article 1 of Protocol 2. However within this framework one might well be able to come up with a requirement that the state fund Protestant, Catholic and integrated schools equally or that the union flag is flown at government buildings on certain days.

However the content of the Bill of Rights is not exhausted by the need to provide such communal guarantees. The Agreement itself, notably in paragraphs 1 and 3 of the Human Rights section, recognizes a need to look at human rights concerns beyond issues of the “two communities”. References in paragraph 1 to “the right to equal opportunity in all social and economic activity, regardless of. . . disability, gender and ethnicity” and to “the right of women to full and equal political participation”, plus the broad ranging equality commitment in paragraph 3, which became section 75 of the Northern Ireland Act 1998, shows an awareness of a broader human rights

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<sup>32</sup> See F. Ni Aolain, “The Evolving Jurisprudence of the European Convention Concerning the Right to Life” (2001) 19 *Netherlands HRQ* 21.

<sup>33</sup> See K. Boyle and T. Hadden, *Northern Ireland: The Choice* (1994) pp 182-3.

<sup>34</sup> For further discussion of the Agreement as a consociational arrangement see B. O’Leary, “The Nature of the Agreement” (1999) 22 *Fordham ILJ* 1628.

agenda. This may result from a recognition that the almost exclusive political focus on issues of national identity in Northern Ireland may have resulted in a marginalisation of other human rights concerns, something the political structures of the Agreement may only heighten. More broadly, as O'Leary observes, the consociational structure set out in the Agreement does not seek to exclude other forms of identity.<sup>35</sup> It accommodates the existence of two predominant forms of communal identity in Northern Ireland but does not freeze everyone into them permanently<sup>36</sup> and may therefore serve as a bridge to greater democratic pluralism in Northern Ireland.

Overall therefore while both recent history and the text of the Agreement suggest a need to tie any provisions additional to the ECHR in a Bill of Rights to issues arising from the Northern Ireland conflict this does not mean that any such Bill of Rights should be a very narrow and limited document. Just as those crafting a Bill of Rights for the new South Africa saw the need for an extensive set of rights provisions in order to provide reassurance both that change had occurred and that the future would be one of equal treatment for all, so the NIHRC is likely to find that "the particular circumstances of Northern Ireland" may require rather more than is offered in the ECHR.<sup>37</sup>

### **Issues of Equality and Identity in the Northern Ireland Human Rights Commission's Draft Bill**

As indicated above issues of communal identity and equality are likely to feature significantly in any Bill of Rights for Northern Ireland. Both meet the dual tests of relating specifically to Northern Ireland's circumstances and of being underdeveloped in the ECHR. *Making a Bill of Rights* does indeed include provisions relating to each. However neither is adequately formulated and in their present guise could actually undermine human rights protection in Northern Ireland.

To take the issue of Identity first the NIHRC indicates that it has taken its lead from the European Framework Convention on National Minorities but has substituted a reference to "communities" for that to "minorities". Undoubtedly this is influenced by the worthy desire to recognize that not everyone in Northern Ireland sees their identity as exclusively or even significantly in Unionist/Nationalist terms. However by transposing the Framework Convention obligations onto a "community" framework, *Making a Bill of Rights* places government under a duty to afford the same treatment to powerful majorities as to endangered minorities. For example while requiring government to "adopt effective and appropriate measures to

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<sup>35</sup> *Ibid.*, at p 1639.

<sup>36</sup> For example unlike Lebanon's 1943 National Pact, which provided for a Christian President and Muslim Prime Minister in perpetuity, the Agreement's weighted voting mechanisms allow for change between communal blocs and even potentially their replacement by other forms of political identity.

<sup>37</sup> For a study of the South African process see M. Chanock, "A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate", in P. Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) p 392; H. Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000).

promote. . . the conditions necessary for them[national, ethnic, religious or linguistic communities] to maintain and develop their culture”<sup>38</sup> might make sense in terms of the Chinese or Muslim community in Northern Ireland, who otherwise might face discrimination and/or assimilation, it seems rather less comprehensible in respect of powerful Protestant and Catholic communities. Such groups do not face the risk of assimilation into a mainstream for they indeed *are* that mainstream. Indeed there is a risk that taking measures to “maintain and develop the culture” of such groups could run into conflict with other human rights objectives, such as ensuring equal protection for gay men and lesbians. Although this provision is stated to be “without prejudice to existing legal requirements” that leaves a substantial loophole, especially for discussion as to whether “existing” refers to other legislation at the time the Bill of Rights comes into effect or at the time the issue is raised. Overall it may have been better for the NIHRC to have focused more directly on the communal rights of the Unionist and Nationalist communities (as occurs elsewhere in the draft) but also to have included a specific minority rights provision for those religious and ethnic minorities in Northern Ireland who otherwise might find themselves poorly served by the new constitutional arrangements.

In respect of equality paragraph 4 of the Agreement calls for “a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors”. There is certainly a need for such clarity as Northern Ireland now has a range of equality provisions including guarantees against discrimination by government in sections 6, 24 and 76 of the Northern Ireland Act 1998, the obligation on all public authorities to afford equality of opportunity in section 75 of the Northern Ireland Act 1998, a range of legislative anti-discrimination provisions, current European legislation on gender discrimination and impending European Directives against discrimination on a range of grounds.<sup>39</sup> There are clear gaps and inconsistencies in this coverage. Notably that discriminatory action by government is only limited to discrimination on the grounds of religion or political opinion and then only in respect of direct as opposed to indirect discrimination. One might have expected that the equality provision in *Making a Bill of Rights* would have referred to this history and also to the issue of how to relate any equality provisions in the Bill of Rights to the proposals for single equality legislation which were contained in the 1999 *Programme for Government*. However neither are referred to and the draft instead proceeds to discuss the equality provisions purely in the context of international and comparative standards. The draft clause is unsatisfactory in a number of ways.

Firstly it is anything but a clear statement as it contains both the Article 14 ECHR provision and the Commission’s own ideas for an equality clause. If the latter is not to subsume the former then courts will no doubt be forgiven for thinking that Article 14 still has some work to do. One approach they might take is to see Article 14 as still offering the appropriate standard (including its wide margin of appreciation justification standard) to claims of

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<sup>38</sup> *Making a Bill of Rights*, draft clause 3(b)(5)(a).

<sup>39</sup> See U. O’Hare, “Enhancing European Equality Rights: A New Regional Framework” (2001) 8 *Maastricht JIL* 133.

discrimination in respect of “Convention rights” leaving the rest of the equality clause to bite only on “non-Convention rights”. It is not clear this is what the NIHRC intends or that it would be desirable. Secondly the draft does not make clear the relationship between the justification tests contained in the equality clause and the general limitation clause it proposes in relation to all “non-Convention rights”. Although the definitions of direct and indirect discrimination follow UK legislative practice by allowing justification arguments as a defence to the latter but not the former, there remains the unanswered question of whether a defendant could still invoke the general limitation clause to defeat even direct discrimination claims. It is worthwhile noting that the Canadian and South African Bills of Rights (which also contain general limitation clauses) do not provide for a specific limitation clause in their equality provisions. Thirdly the clarity of the clause is hardly assisted by a specific commitment to promote equality between men and women “in all areas”. If this is not to make gender equality “first among equals” and to require positive action by the state in this area (elsewhere the draft leaves it open as to whether positive action should be permitted or required) then it is not clear how a court should read it. Again it is far from clear as to whether this is how the NIHRC intends that it should be read. Finally clarity is not helped by the inclusion of a specific clause against harassment or bullying. This appears more appropriate for a specific statute than a constitutional provision. Moreover the explanation the NIHRC gives for including this provision, that “many people argued that harassment and intimidation in the workplace on grounds of political opinion or gender should be outlawed” overlooks the fact that such discrimination has been unlawful for some time now.

Although the specific clause on affirmative action is valuable and appropriate for a Northern Ireland Bill of Rights overall the equality clause fails to achieve the clarity one might have expected of it. Both the clause itself and the text which introduces it lack any developed discussion on the objectives of the clause, such as where it stands on balance between preventing discrimination and promoting equality.<sup>40</sup> Such an explicit discussion might have helped a clearer development of this clause as setting out overall principles for the achievement of equality, which might then have been subsequently developed in more specific equality legislation.

### CONCLUSIONS

Overall it is to be hoped that this paper has demonstrated the need for a Bill of Rights in Northern Ireland and that it is both possible and desirable that it extend beyond the guarantees of the ECHR. While the Agreement and the conditions which gave rise to it will remain central to the content of that Bill of Rights this should not mean that it is a limited document. The NIHRC draft *Making a Bill of Rights* has already served a valuable purpose by focusing debate on what the content of such a Bill of Rights should be. However, as an analysis of the difficulties in even such key clauses as those on identity and equality reveals, there is still a considerable amount of work to be done.

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<sup>40</sup> For a discussion of the underlying vision of equality law see S. Freedman, “Equality: A New Generation” (2001) 30 *Industrial LJ* 145.



## **CHILDREN'S RIGHTS IN THE BILL OF RIGHTS: MEETING OR EXCEEDING INTERNATIONAL STANDARDS?**

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### **I. INTRODUCTION**

A Bill of Rights reflecting the particular circumstances of Northern Ireland was envisaged under the Belfast Agreement 1998 as a piece of the jigsaw that would form part of a lasting settlement.<sup>1</sup> In this context, it is vital that the Bill of Rights, which is designed to help create the foundation upon which the future of Northern Ireland can be built, set out the rights of children, to whom this future belongs. Including children's rights in the Bill of Rights is not a matter of choice, therefore, as any attempt to close the book on the injustices suffered during Northern Ireland's violent past must recognise that both directly and indirectly, it is children who have suffered the most by growing up knowing only a divided and conflict ridden society. These are the particular circumstances of Northern Ireland. More generally, however, children are recognised worldwide, as the largest voiceless minority; they are vulnerable to exploitation and abuse and they are incapable of influencing directly political and administrative decision making.<sup>2</sup> The need to recognise and protect their rights has been pursued at international level since 1924.<sup>3</sup> These objectives have become universal through the widespread ratification of the United Nations Convention on the Rights of the Child.<sup>4</sup>

The Human Rights Commission's support for these views is apparent from its preliminary proposals on a Bill of Rights for Northern Ireland, which contain a chapter dedicated to the rights of children, in addition to other relevant chapters on the family and education. This paper asks to what extent do the Commission's proposals on children's rights meet international standards, and goes on to consider what is required to exceed them.

### **II. THE SOURCE OF INTERNATIONAL STANDARDS**

In drafting a Bill of Rights for the particular circumstances of Northern Ireland, it is important to draw on international human rights instruments.<sup>5</sup>

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<sup>1</sup> Agreement Reached in the Multi-Party Negotiations, April 10 1998, at pp 16-17. See also s 69(7) Northern Ireland Act 1998, chap 47.

<sup>2</sup> Office of the First Minister and Deputy First Minister, *Protecting our Children's Rights: A Consultation Paper on a Commissioner for Children for Northern Ireland* (2001), p 9.

<sup>3</sup> Declaration on the Rights of the Child was adopted by the League of Nations in 1924.

<sup>4</sup> UN Doc A/44. The UN Convention on the Rights of the Child was adopted by the General Assembly on November 20th, 1989. It has been ratified by 191 states with the exception of the United States of America and Somalia.

<sup>5</sup> Indeed, this approach is expressly set out in the Agreement, see note 1, at p 17.

For this purpose, international law can be divided into those treaties which deal exclusively with children's rights and those which mainstream children's rights issues into general human rights treaties.

The most important treaty of the former kind is the internationally binding UN Convention on the Rights of the Child, 1989, which sets out comprehensively the rights to which children are entitled in all areas of their lives. In addition to its many detailed and varying provisions, it establishes a number of universal principles, such as Article 12 which enshrines the child's right to be heard and Article 3 which provides that the child's best interests shall be a primary consideration in all actions taken regarding children. The Convention's dedication to the rights of children and almost universal ratification have facilitated its use as a benchmark against which the implementation of children's rights can be measured.<sup>6</sup> Indeed, its standards have been used to inform the case law of the European Court of Human Rights<sup>7</sup> and have raised the profile of children's issues at national and international levels.<sup>8</sup> In light of the fact that some of its standards, which were set by consensus to achieve universality, are considered to be too low<sup>9</sup> it is significant that the provisions of the Children's Convention are informed by a number of more detailed standards dealing with children's rights in specific areas. Important examples include the UN Rules for the Protection of Juveniles Deprived of their Liberty<sup>10</sup>, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)<sup>11</sup> and various ILO conventions on child labour.<sup>12</sup> Moreover, the UN Committee on the Rights of the Child – the expert body which monitors implementation – has begun to make General Comments which provide further detail as to how the Convention is to be interpreted<sup>13</sup> and has organised Discussion Days on its application in certain areas, including children and the media, children with

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<sup>6</sup> See Geraghty, *Getting it Right? An evaluation of the UK Government's Implementation of the UN Convention on the Rights of the Child in Northern Ireland 1994-1999* (1999).

<sup>7</sup> See U. Kilkelly, "The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child", (2001) 23(2) *Human Rights Quarterly* 308.

<sup>8</sup> See further Fottrell (ed) *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (2000).

<sup>9</sup> In recognition of this fact, the Convention's standards have been raised by Optional Protocol on two occasions. The Optional Protocol on the involvement of children in armed conflicts was adopted by the General Assembly Resolution A/RES/54/263 of 25 May 2000 (it enters into force on 13 February 2002) and the Optional Protocol on the sale of children, child prostitution and child pornography was adopted by General Assembly Resolution A/RES/54/263 of 25 May 2000 (it enters into force on 18 January 2002).

<sup>10</sup> These Rules were adopted by General Assembly Resolution 45/113 of 14 December 1990.

<sup>11</sup> The Beijing Rules were adopted by the General Assembly Resolution 40/33 of 29 November 1985.

<sup>12</sup> See, for example, ILO 138 Convention concerning the Minimum Age for Admission to Employment, 1973 and ILO 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which came into force on 19 November 2000.

<sup>13</sup> See General Comment No 1 *The Aims of Education*, CRC/GC/2001/1, CRC 17 April 2001.

disabilities, youth justice and the role of the family.<sup>14</sup> Furthermore, the Committee's observations and recommendations on the efforts which individual states like the UK have undertaken to implement children's rights provide a unique analysis of the extent to which the Convention has been implemented at national level.<sup>15</sup>

In addition to this wealth of material, children's rights can be found in other general instruments of the United Nations and the Council of Europe. For example, both the International Covenant on Civil and Political Rights, 1966<sup>16</sup> and the International Covenant on Economic, Social and Cultural Rights, 1966<sup>17</sup> contain separate provisions on the rights of children, as well as references in other provisions to the child's right to special protection. The Council of Europe's Social Charter contains a provision dedicated to the right of children and young persons to protection<sup>18</sup> and the case law of the Commission and Court of Human Rights has provided positive but sporadic evidence of the protection that the European Convention on Human Rights offers children.<sup>19</sup> There also exists a whole range of decisions, declarations and advisory opinions on children's rights by bodies like the UN Economic and Social Council,<sup>20</sup> and the Parliamentary Assembly and the Committee of Ministers of the Council of Europe.<sup>21</sup> UK specific recommendations made by treaty monitoring bodies like the Human Rights Committee<sup>22</sup> and the Council of Europe Committee for the Prevention of Torture<sup>23</sup> provide a

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<sup>14</sup> For full details of all of the Committee's discussion days see CRC/C/DOD/1 19 September 2001.

<sup>15</sup> See Consideration of reports submitted by states parties under Article 44 of the Convention: United Kingdom of Great Britain and Northern Ireland. 15/02/95 CRC/C/15/Add.34 (Concluding Observations).

<sup>16</sup> ICCPR adopted by the General Assembly on 16 December 1966, 999 UNTS 171. The ICCPR has a separate provision concerning the rights of children (Article 24) and the family (Article 23) as well as a references to children's rights in other provisions, such as Article 10 on detention and Article 14 on criminal justice.

<sup>17</sup> ICESCR adopted by the General Assembly on 16 December 1966. Article 10 is concerned with the family and the rights of children and Article 13 deals with the right to education.

<sup>18</sup> Article 7, ETS No 38. The Charter was signed on 18 October 1961 and was revised in 1996.

<sup>19</sup> See U. Kilkelly, *The Child and the European Convention on Human Rights* (1999).

<sup>20</sup> See, for example, the resolutions of the Commission on Human Rights of ECOSOC on human rights in the administration of juvenile justice in 1996 (E/CN.4/RES/1996/32), 1998 (E/CN.4/RES/1998/39) and 2000 (E/CN.4/RES/2000/39).

<sup>21</sup> See, for example, Recommendation 2001 (16) of the Committee of Ministers on the protection of children from sexual exploitation, adopted on 31 October 2001. For details of other recommendations and decisions passed by the Council of Europe see Council of Europe *The Rights of the Child: A European Perspective* (1996).

<sup>22</sup> Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 05/11/2001. CCPR/CO/73/UK, CCPR/CO/73/UKOT.

<sup>23</sup> Report to the Government of the United Kingdom on the visit to Northern Ireland carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 29 Nov to 8 Dec 1999

further useful indicator of the extent to which the UK is implementing its treaty obligations in Northern Ireland with respect to treaties such as the International Covenant on Civil and Political Rights and the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>24</sup> Taken together these documents highlight the level of rights protection which the UK is obliged to put in place. They also provide evidence of the extent to which children's rights are protected in domestic law, policy and practice in Northern Ireland, and accordingly assist in the identification of gaps in the protection of children's rights, which the Bill of Rights might attempt to fill.

### III. CHILDREN'S RIGHTS IN THE PROPOSED BILL OF RIGHTS

There follows an evaluation of the extent to which the provisions of the proposed Bill of Rights reflect these international standards. First, however, it is necessary to consider the approach taken by the Human Rights Commission in providing for children's rights in its proposals.

#### (a) The approach: specific versus general provision

International law provides examples of the two main approaches open to the Commission in providing for children's rights in the Bill of Rights for Northern Ireland. The first option is to mainstream the children's rights standards, or to incorporate them completely into the general human rights provisions. An admittedly poor example of this is the European Convention on Human Rights, which limits its references to children to general provisions on the right to liberty and fair trial in Articles 5 and 6, and thus contains no dedicated children's rights provision. While this approach may serve to reinforce the application of all rights to children, it offers limited potential for the recognition of those rights which are exclusive to children. The second option – and the one chosen by the Commission in the Bill of Rights – is to have a dedicated children's rights provision, which sets out all the rights enjoyed exclusively by children. The international equivalent here is the Convention on the Rights of the Child, which contains only those standards relevant to children. The disadvantage with this approach is that it threatens to isolate the children's rights standards in a way which may undermine the applicability to children of all the rights recognised. It appears, therefore, that a combination of these approaches would maximise the potential of the Bill of Rights to improve the situation for children in Northern Ireland. Accordingly, the mainstreaming of children's rights would thus take place where appropriate, and a dedicated children's rights provision would deal with the remaining rights, which are exclusive to children. The objective of such an approach would be to include children's rights in the

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(CPT/Inf/(2001) 6) and Government Response to the CPT Report, CPT/Inf (2001) 7. Both can be found at [www.cpt.coe.int](http://www.cpt.coe.int)

<sup>24</sup> See also the *Concluding Observations of the Committee on the Elimination of Racial Discrimination*: United Kingdom of Great Britain and Northern Ireland 23/04/97 CERD/C/304/Add.20, the *Concluding observations of the Committee on Economic, Social and Cultural Rights*: United Kingdom of Great Britain and Northern Ireland. 21/12/94. E/C.12/1994/19 and *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*: United Kingdom of Great Britain and Northern Ireland, 01/07/99

Bill of Rights in a coherent way, which both recognises the importance of child-specific rights while reinforcing the application of all other, general rights to children.

**(b) The content**

Chapter 10 of the Commission's Consultation document contains the provision dedicated exclusively to children's rights in the proposed Bill of Rights,<sup>25</sup> which mirrors to a large extent the proposals of the Working Group on Children's Rights.<sup>26</sup>

Article 10 contains 11 sections dealing with the following areas of children's rights:

1. general provisions
2. participation rights
3. the family
4. protection rights
5. *children in conflict with the law*
6. children with disabilities
7. right to play
8. *health care*
9. *education*
10. *children's economic rights*
11. rights awareness

The italics identify those provisions, which could reasonably be incorporated into the main provisions dealing with the areas of criminal justice, health care, education, and social, economic and environmental rights respectively. This process would see the reassignment of about half of these sections to their more natural homes and a considerable strengthening of the general provisions would take place as a result. Furthermore, the rights of children with disabilities could be integrated into a new mainstream provision on this issue, curiously absent from the Commission's preliminary proposals.

The dedicated section on the family in Chapter 9 of the Commission's Consultation Document sits strangely apart from the children's rights provision, although the intention is clearly to incorporate Article 8 European Convention on Human Rights into the Bill of Rights. It makes little sense, however, to separate Article 8 from the family section in Chapter 10, particularly given that emphasis on the child in care dominates both the latter and the case law of the European Court of Human Rights, to which the

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<sup>25</sup> Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission* (2001), pp 62-71.

<sup>26</sup> The report of the working Group can be found on the Human Rights Commission's website at [www.nihrc.org](http://www.nihrc.org).

reference to Article 8 relates.<sup>27</sup> Consolidation of these provisions would be more coherent and effective, and in this context, consideration might also be given to reflecting the principles of Article 8 case law either generally, or with specific reference to the right of relevant parties to participate in the decision making process concerning the family; the principle of the right of the child to be returned to his/her family once state care is no longer necessary and the right of family members to mutual contact, for example.

In any event, this appropriate mainstreaming of children's rights would leave the dedicated children's rights provision to deal only with those substantive rights exclusive to children. Its content would thus include: general provisions; participation rights; the right to protection; the right to play and rights awareness. It is submitted that the provisions on the right to protection, play and the right to information about rights adequately reflect international standards. The remaining part of this paper will thus address the issues of guiding principles and general provisions.

### **(c) General provisions**

#### ***Scope of Protection***

The proposed Article 10(a) has three clauses, the first of which defines a child as everyone under 18 years. This reflects the highest standard in international law.

#### ***Best Interests***

The second clause reads as follows:

In all actions concerning children, whether undertaken by public or private institutions, individuals or bodies, courts of law, administrative or legislative authorities, the best interests of the child shall be the paramount consideration *and the following rights shall be interpreted as subject to that requirement.* (emphasis mine)

This clause is almost identical to Article 3 of the Convention on the Rights of the Child, with one important limitation. Although it sets out the higher domestic standard of requiring the child's best interests to be "the paramount" rather than "a primary" consideration<sup>28</sup> in all actions concerning children, the clause limits the application of the principle by adding the phrase italicised. The apparent effect of this is not to require the principle to guide action in areas which do not affect rights in Article 10. Yet, the important thing about Article 3 of the Convention on the Rights of the Child, despite its lower standard, is that it is widely applicable to state action in all areas concerning children and it is thus not limited, in a similar manner, to the exercise of Convention rights – although even if it were, the comprehensive nature of the Children's Convention would mean that this would not seriously undermine the principle. To ensure compatibility with the Article 3 principle, this latter clause should be removed from the proposed Article 10 section a, sub-section 2.

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<sup>27</sup> See Kilkelly, see note 19, pp 263-294.

<sup>28</sup> This test is set out in Article 3 Children (Northern Ireland) Order 1995.

**Implementation provision**

The third paragraph in section (a) provides that

Public bodies shall carry out their functions in relation to children in accordance with the provisions of the UN Convention on the Rights of the Child and shall in addition take all *reasonable* steps to ensure for all children *the following rights*. (emphasis mine)

There are a number of difficulties with this provision. First, it places two distinct obligations on public authorities with regard to the Children's Convention and the Bill of Rights respectively. The obligations – to carry out functions and take steps to guarantee rights to children – do not apply to both sources of children's rights and thus the obligation to implement children's rights does not apply to the Convention on the Rights of the Child, and vice versa. This approach is divisive and confusing at best, and insofar as it does not compel implementation of the Convention on the Rights of the Child is a wasted opportunity to reaffirm the importance of this Convention at national level. The current situation thus falls short of international standards, although they would be exceeded by extending both obligations to act compatibly with and to implement the provisions of the Convention on the Rights of the Child *and* the Bill of Rights.

A second difficulty with the obligation contained in this provision, however, is the fact that it requires authorities only to take steps that are "reasonable" to guarantee the rights in Chapter 10 to children. The equivalent provision in the Convention on the Rights of the Child (Article 4) requires states to do what is "appropriate" to implement children's rights and it permits states to use the defence of resources only with regard to economic, social and cultural rights. Moreover, the Committee on the Rights of the Child has encouraged the use of the best interests principle to determine decisions regarding the allocation of resources.<sup>29</sup> The recommendations of the Working Group had included neither the limitation of "reasonableness", nor resources. Meeting the international standard here, therefore, would require replacing the reference to what is "reasonable" with the word "appropriate". Greater ambitions to exceed the international standard would be fulfilled by removing the limitation altogether. The question of resources, which arguably lies behind the "reasonableness" requirement, should be dealt with in a general Bill of Rights provision on limitations, although extreme caution should be exercised about legitimising an approach according to which rights are protected when, and to the extent to which, resources permit.

**(d) Guiding principles**

According to the Committee on the Rights of the Child, three principles must guide the implementation of children's rights in all areas – non-discrimination; best interests of the child and the child's right to be heard. Only one of these is included in the Commission's proposals on interpretive clauses in the section (a) of Article 10, however, and it is, consequently, the weakest part of the children's rights provision.

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<sup>29</sup> See Committee on the Rights of the Child, see note 15, at para 24.

***Non-Discrimination: a principle with specific importance for children***

While the principle of non-discrimination is enshrined elsewhere in the Bill of Rights, where the prohibited grounds include “age”, nothing in the Bill of Rights reinforces the right of all children to equal treatment and the right to enjoy their rights without discrimination. Thus, laws, policies and procedures which have a detrimental and discriminatory effect on certain groups of children including children with disabilities, Traveller children, children from low income or unmarried families are unaddressed here. In order to reflect the standard set by Article 2 of the Convention on the Rights of the Child and the concerns of the Committee on the Rights of the Child in this area,<sup>30</sup> it is necessary to include a child-specific principle of non-discrimination in Chapter 10.

***Child's right to be heard: a guiding principle***

The absence from the interpretive provision of Article 10 of the fundamental principle of the child's right to be heard does not meet the international standard set by the Convention or the Committee on the Rights of the Child.<sup>31</sup> While this right is set out in the main part of the children's rights provision (paragraph b) its elevation to interpretive status is necessary to acknowledge its fundamental character and to reinforce the applicability of the right to all areas of the child's life, including education, care, justice and health.

***Child's right to special protection: significant omission***

The most fundamental omission from this section, however, despite the recommendation by the Working Group, is a general affirmation of the child's right to special protection, care and assistance. This is set out in Article 3 paragraph 2 Convention on the Rights of the Child and is one of the most reiterated principles in other non-child specific human rights documents such as the International Covenant on Civil and Political Rights (Articles 23 and 24) and the International Covenant on Economic Social and Cultural Rights (Article 10). It is a minimum and necessary standard which addresses the special vulnerability of children and their corresponding right to care and protection.

The Working Group Report linked the child's right to special protection to the child's entitlement to enjoy all the rights set out in the Bill of Rights, a clause which is also absent from the Commission's proposals. This provision is important, however, because it recognises that the principle of non-discrimination in the enjoyment of rights (set out in Chapter 4) is not enough to ensure that children are guaranteed those rights as well as adults.

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<sup>30</sup> Failure to implement this principle was of specific concern to the Committee on the Rights of the Child when it considered the First National Report of the UK in 1995; see note 15, at paras 11 and 12.

<sup>31</sup> See note 15, at paras 11 and 14.

### **(e) Other children's rights provisions**

It should not be presumed from this necessarily selective analysis of the children's rights provisions in the Bill of Rights, that those provisions not considered here adequately meet international requirements. In particular, provision for the rights of children in the criminal justice, education and health care systems could be strengthened further by relying on international standards in these areas. With regard to the children in conflict with the law, for example, a valuable approach might be to include a general reference to UN standards along the following lines:

The State shall secure to all children in conflict with the law the rights set out in international law. In particular, it undertakes to implement the minimum standards enshrined in the United Nations Guidelines for the Prevention of Juvenile Delinquency, Standard Minimum Rules for the Administration of Juvenile Justice and Rules for the Protection of Juveniles deprived of their Liberty.

This approach might be used to expand in an effective manner the scope of protection offered by the Bill of Rights, while keeping the size of the document to a workable minimum.

## **IV: CONCLUSIONS**

The fact that the children's rights provisions currently occupy the longest section of the Commission's consultation document acknowledges clearly their importance in this entire process. Moreover, the on-going consultation process may result in additional children's rights being included, such as the right to life, survival and development; the right to freedom of expression and the rights of children in care. The Commission's task in striking an appropriate balance between incorporating the many important international standards and the valid proposals of those engaged in the consultation process, and producing an effective, well-worded document aimed to fulfil the objective of furthering the protection of the rights of everyone in Northern Ireland is extremely difficult. In this regard, however, the following advice may be useful:

A Bill of Rights, which achieved full implementation and the effective guarantee to all children in all areas of their lives of the principles of non-discrimination, best interests and respect for the views of the child would make an enormous contribution to the lives of children in Northern Ireland. It would stand out as a leading example of its kind worldwide. Moreover, the success of a Bill of Rights must also be determined according to the support which it enjoys among children and young people and their sense of ownership of the final document. To this end, the Commission is encouraged to continue to facilitate the participation of children in the drafting process<sup>32</sup> and to work towards a Bill of Rights, which represents respect for children's rights both in word and in spirit.

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<sup>32</sup> The Commission's publication in November 2001 of its child-friendly version of the consultation document is a vital part of this process.



## EQUALITY ISSUES

### *Maggie Beirne, Chair of the Equality Working Group*

The Equality Working Group (Working Group) established by the Northern Ireland Human Rights Commission (NIHRC) was a model of consensual working practices. The group was quite mixed in terms of gender, religious and political opinion, age, and professional occupations, but there was extensive agreement, both as to the problems of inequality in Northern Ireland currently, and the measures that a Bill of Rights should include to counter these inequalities. People were also fortunate enough to be able to draw upon an extensive body of international and regional good practice, so that the group did not have to develop its own thinking entirely from scratch. There was a strong sense that, though the ways that questions of discrimination, disadvantage, and inequalities are experienced are unique to each society, there are also many universal factors, which can be usefully drawn upon.

However, before addressing the NIHRC's draft Bill of Rights, and making comparisons between its proposals and the proposals received from the Working Group established to advise the NIHRC in its work, it would be worth exploring, albeit briefly, why the Working Group made the specific proposals it did.

At its first meeting, the members of the group explored the problem of inequality in Northern Ireland. Leaving aside temporarily the fact that the Belfast Agreement explicitly argued that equality be included in the Bill of Rights, did members of the group feel that it was important to include equality provisions in Northern Ireland's Bill of Rights? The answer was an unequivocal 'yes'. Members of the group spoke from their own experience of people in Northern Ireland who suffer deprivation and inequality, whether because of their class, their gender, their political or religious beliefs, their disability, their sexual orientation, their status as ex-prisoners, and /or their status as victims of violence. It was clear that inequalities continue to scar society, and that a Bill of Rights could be of some use in responding to issues of discrimination and disadvantage.

A second question addressed by the Working Group related to the fact that the Belfast Agreement asked the NIHRC to consult on the scope of a Bill of Rights which, while drawing on international standards, would "reflect the particular circumstances of Northern Ireland". Did this formulation mean that one should just discuss equality and inequality in terms of the political conflict?

Disability, for example, is a factor that can create conditions of inequality and attract discrimination, but it is by no means peculiar to Northern Ireland, nor is it directly allied to the political conflict. The group discussed if the NIHRC should explicitly include or exclude issues such as disability from its purview. Everyone in the Working Group was very clear in concluding that disability should be addressed in any Bill of Rights for Northern Ireland.

On the one hand, the situation of people with disabilities in Northern Ireland is quantitatively different to that in Britain. In Northern Ireland, one in six

people have a disability; this very high proportion is due in part to the conflict itself and, in part, the very close link between disability and poverty. Northern Ireland has a long legacy of greater poverty levels when compared to Britain. On the other hand, the situation of people with disabilities in Northern Ireland is also qualitatively different. As one member of the Working Group pointed out – disability has never been taken seriously on any political agenda, as issues of nationalism and unionism have always “trumped” all other concerns. The conflict, and responses to it, has meant that long-term inequalities relating to disability have never received the attention they deserve.

Somewhat similar arguments were made in relation to gender, youth, carers, gays and lesbians, and so on. In most instances, people can point to quite different experiences as between Northern Ireland and Britain, and they could all provide evidence of issues that have received insufficient attention or resourcing because of the emergency demands imposed by the political conflict. While it is vital that the eventual Bill of Rights addresses issues that everyone would agree are particular to the conflict in Northern Ireland – religious and political discrimination, the treatment of ex-prisoners, the rights of victims etc. – there was an equally strong feeling that any Bill of Rights for Northern Ireland must address *all* the people of Northern Ireland. Everyone in Northern Ireland has been affected by the conflict, and a Bill of Rights which is intended to address a vision of an inclusive future must therefore address all these different needs in all their diversity. No-one argued for a “Bill of Rights for some people in Northern Ireland”!

A third concern for the Working Group was to draw on the latest good practice at regional and international level. The Belfast Agreement had mandated the NIHRC to draw “as appropriate on international instruments and experience”. Moreover, the United Kingdom is required to comply with its international human rights commitments, and cannot therefore authorise domestic provisions that would somehow undermine those international undertakings. Fortunately there is a wealth of international experience to be drawn upon in the field of equality. A short background note was prepared to accompany the Working Group’s final report highlighting the main texts that had been drawn upon in our debates. These included:

The Universal Declaration of Human Rights

The International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights

The UN Declaration on the Elimination of all Forms of Racial Discrimination (and subsequent Convention), the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, the Declaration on the Rights of Disabled Persons, and the UN Principles for Older Persons

The European Convention on Human Rights (and protocol 12)

The Framework Convention for the Protection of National Minorities

The African Charter on Human and Peoples’ Rights

The Constitutions of the US, South Africa and the Republic of Ireland, and the Canadian Charter of Rights and Freedoms

And, most recent of all, the European Union's Charter of Fundamental Rights.

Perhaps most useful of all, given its very recent origin, was a major UK wide study on anti-discrimination law that had just been completed by Professor Bob Hepple and others. This study had immediate relevance to a discussion about the protection of equality rights in Northern Ireland, since it consisted of a detailed comparison between current anti-discrimination laws, both in Britain and Northern Ireland, and drew out best practice across the various regimes. Definitions of discrimination (direct and indirect), harassment, victimisation, etc. were all developed as part of the Hepple study, and reflected the latest best practice at the European level. Accordingly, this work provided a very important baseline from which the Working Group was able to develop its own thinking.

So much for the background to the work of the group: what did it actually advise the NIHR, and to what extent did the NIHR accept that advice?

Firstly, the group recommended that there be a Preamble to the Bill of Rights which would be more aspirational in tone; it should "seek to enunciate some common values that people in Northern Ireland could share". Hopefully, this Preamble could then provide some guiding principles for judges to use when interpreting detailed clauses in the text. The NIHR received similar suggestions from other Working Groups, and presumably from individual submissions, and proposed a detailed Preamble that responds to the thrust of the Equality Working Group's suggestion.

Secondly, the Working Group proposed that there be a general equality clause. The text proposed drew on international texts such as the International Covenant on Civil and Political Rights, and more recent formulations – to be found in the Canadian and South African constitutions. The NIHR made one textual amendment by proposing in their draft clause that "equality includes full and equal access to . . ." as well as the enjoyment of rights. The Working Group had not explicitly referred to "access" and, coming as an addition to the text, this would presumably be considered by the Working Group as a very positive amendment.

Thirdly, the Working Group proposed a general non-discrimination clause that would, in particular, give substance to the preceding general equality clause. Both direct and indirect discrimination were to be outlawed, and these terms were clearly defined to that end. Debate around this clause engaged the Working Group for some time, as there were a number of issues that had to be resolved.

The Working Group had initially to determine the best definitions of direct and indirect discrimination, and the studies alluded to earlier were of particular importance in this regard. The Working Group discussed the issue of institutionalised discrimination, but found it difficult to determine whether explicit reference should be made to this problem in the text. Definitions have been explored in the wake of the MacPherson Inquiry into the Stephen Lawrence murder, but the Working Group understood that these definitions are far from 'fixed' and have little grounding as yet in international law. As far as members of the Working Group understood the current thinking about

institutionalised discrimination, this could be said to occur where there had been a “collective failure” on the part of an institution to recognise that its “processes, attitudes and behaviour amount to discrimination through unwitting prejudice, ignorance, thoughtlessness or (racist/sexist/sectarian....) stereotyping”. While there was no clear agreement to include reference to this in the final text, there was agreement that “only a combination of positive action (to compensate for past disadvantage), anti-discriminatory legislation, and anti-harassment policies could begin to tackle this much more complex form of unwitting prejudice.” Accordingly, the other recommendations (about including indirect discrimination, positive action measures, defining harassment etc.) would all go some way towards addressing institutionalised discrimination, whether or not it was explicitly alluded to in the Bill of Rights.

The other major debate for the group was the naming of grounds on which discrimination was to be outlawed. The Working Group spent some considerable time on this, looking to see what references were made in other texts (national and international), and to examine what were the particular needs for Northern Ireland. As part of the final report to the NIHRC, the Working Group appended a detailed explanation as to why it had included certain named grounds, and omitted others, and what interpretation it was proposing for the categories included. To sum up its position, the Working Group decided that the eventual list should:

“a) include at least some of the groups likely to benefit from protection; (b) relate directly to equality issues of particular relevance to Northern Ireland; and (c) not make pretensions to be entirely comprehensive”.

To this end, it argued that indirect and direct discrimination should be outlawed on grounds of race or ethnic origin, colour, sex, marital or family status, language, religion or belief, political or other opinion, possession of a criminal or political conviction, national or social origin, birth, disability, age, sexual orientation or other status. The Working Group commented that it had not referred to “status as a victim” as a possible ground purely because this was something that the Victims’ Working Group were presumably discussing in detail and would want to comment upon.

The NIHRC added “nationality”, “residence”, and “parentage”, and they replaced the word “sex” with the word “gender”. Presumably it was felt that these were all sufficiently important to be made explicit rather than included within concepts already listed, or indeed to be covered by the “any other status” provision. The Working Group – if it were re-convened – would probably have little difficulty with these changes. While trying to keep the list as short as possible, it was intended that each inclusion in the list be interpreted broadly, so the addition of some additional categories for the purpose of clarity is unlikely to be very problematic to any of the Working Group members.

However, one omission from the initial list would presumably have been strongly resisted by the Working Group. The NIHRC has proposed the protection of prisoners with “a criminal conviction” from discrimination but has made no specific reference to the many prisoners who consider themselves to have been political prisoners rather than criminals. The Working Group had considered international experience on this issue and

had found some useful references in the Canadian provincial statutes (Yukon and Quebec). Trying to address concerns in this domain, whilst respecting the sensibilities on all sides, the Working Group argued that “possession of a criminal or political conviction” be included as one of the non-discrimination grounds. The decision of the NIHRC to omit this reference clearly indicates their unwillingness to engage with the oft-cited concerns of people who were in prison for conflict-related reasons, and the kinds of discrimination they allege. While in principle anyone could claim the attention of the courts since “any other status” is included as one of the grounds, the very fact that the NIHRC explicitly disregarded the Working Group’s advice in this area might be seized on later by others to insist that people who consider themselves political prisoners are not intended to benefit from these provisions.

Fourthly, the Working Group had proposed definitions of “direct discrimination”, “indirect discrimination”, and “harassment”, which should also be understood as a form of discrimination. All of these were accepted without amendment by the NIHRC and, if eventually accepted, will give Northern Ireland some very good equality standards. The Working Group wanted to move away from the idea of having to find a specific comparator to prove discrimination. It also wanted to avoid definitions which required that there be a specific intention to discriminate. The NIHRC also accepted without amendment the Working Group’s clause defining exceptions to the non-discrimination clauses. Both the Working Group, and the NIHRC, drew on the most recent European standards to develop standards around a “genuine and determining requirement, provided that the objective is legitimate and the requirement is proportionate”.

So, by and large, the NIHRC took on board the extensive research done by the Working Group into international and regional best practice, and made the Working Group’s proposals their own. There are five important areas of divergence.

Firstly, the draft text from the NIHRC takes its opening clause for the equality chapter from the European Convention on Human Rights. This approach was presumably dictated by a general determination where possible to integrate clauses from the European Convention on Human Rights alongside additional clauses specific to Northern Ireland. The Working Group had no opportunity to comment on this issue, but the whole thrust of its work was to develop a series of clauses that built upon the European Convention on Human Rights and updated these provisions with later developments at the Council of Europe and at the European Union levels. The addition of this clause therefore adds nothing and, in the opinion of the author, may merely serve to confuse matters.

Secondly, the Working Group raised a whole series of questions that were of relevance beyond the equality remit and suggested that the Implementation Group or the NIHRC address them on the basis of input from a variety of Groups. So, for example, the Working Group proposed that the text express rights in terms of “All persons”, rather than “everyone” or “every individual”, or “citizens”. This preferred option was drawn from the International Covenant on Civil and Political Rights and was thought to better recognise that equality is a right that needs to be exercised both at the individual level and by individuals as members of groups. The NIHRC does not appear to

have engaged with this debate explicitly and its own text does not explain why the equality clauses use the term “everyone”. Given that the NIHRC’s text is inconsistent in its use of language in this area (and uses a variety of terms throughout its draft with no obvious explanation), it is not clear if this change to the Working Group language was deliberate, or due to poor editing.

Thirdly, the NIHRC decided to add a specific clause about equality between men and women, which had not been in the original draft proposed by the Working Group. If asked, it is not clear what perspective the Working Group would have taken on this addition. It would be fair, however, to say that a frequently raised concern for the group was the importance of being inclusive and not separating out particular constituencies for attention on the grounds that this might appear to exclude other groups.

The fourth point of divergence was the fact that whereas the Working Group had included in its proposals a very narrow exceptions clause, this was omitted by the NIHRC and incorporated into a more general (and somewhat weaker) exceptions clause. The Working Group had argued that indirect discrimination could only be justified objectively if there were “a necessary aim, and the means of achieving that aim (were) appropriate and proportionate”. The exceptions clause on offer from the NIHRC talks of “legitimate” objectives and “proportionate” requirements, and is therefore somewhat looser.

The fifth and most major concern relates to positive action. The Working Group placed the positive action clause immediately after the general equality provision because the group wanted to denote its importance in ensuring full and effective equality. In the full report to the NIHRC, it was noted that:

“To underpin the right to equality, and in recognition of the current legal situation which already obliges the public sector to promote equality of opportunity, the WG felt that NI’s Bill of Rights must include a positive duty to actively promote equality”.

We felt that the importance of this provision lay in its ability to address group inequalities and go beyond anti-discrimination measures which are, by and large, geared at redressing unfair treatment at the individual level. Using a gender lens, the Working Group asked itself whether individual women taking cases of equal pay to the courts would ever successfully challenge the persistent link between gender and poverty, the structural impediments to women entering the labour market, the under-valuation of women’s work, the responsibility that falls to women for child-bearing and nurturing, and their consequent exclusion from many economic and social benefits? The conclusion was that a broader conception of equality was needed and that positive action measures and a more mainstreaming approach were a necessary precursor to ensuing equality.

The NIHRC was unconvinced by the arguments of the Working Group and asked contributors to comment on whether positive action should be required or merely permitted. This was a disappointing stance. As the NIHRC itself indicates, “EU law couches positive action as both a requirement and a possibility”(p 33) and refers to the Treaty of Amsterdam which requires

states to enact positive measures for combating discrimination. The Working Group made no recommendations about the nature of positive action required – that is clearly a matter that can be left to the legislators, since the action may vary over time, and will certainly need to respond to different equality concerns. The Working Group did, however, feel that it was incumbent on the state to pro-actively introduce positive action measures in response to inequality, and that the Bill of Rights should state this clearly. Indeed, the Working Group believed that if the Bill of Rights merely made positive action an option, it would not be in compliance with the government's international commitments, nor indeed with some of the proposals in the Belfast Agreement. As a matter of principle, positive action needs to be made obligatory; its operationalisation, however, will and should be left to specific government action.

One of the objections apparently raised with the NIHRC was that positive action was seen as a 'political' issue and should not be dealt with by way of legal provisions. This objection sits uncomfortably with the explanation the NIHRC gives regarding the purpose of a Bill of Rights. At the outset of their draft text (page 6), the NIHRC explains that:

“The purpose of a Bill of Rights is to establish and guarantee the relationship between the state and its citizens. That means setting some limits to the powers of the government and of public bodies to control the lives of ordinary people...But a more modern bill of rights should also set some more positive requirements for the government, such as ensuring equality for all under the law. . . .That is the focus of the increasing number of international human rights documents which now set the standard for national bills of rights. . . .”

The Working Group would doubtless share this understanding of what constitutes a Bill of Rights and it was on that understanding that they argued for strong positive action measures. It is to be hoped that the NIHRC will bear this advice in mind when finalising their own proposals to the Secretary of State.

## ISSUES OF CRIMINAL JUSTICE

### *Paul Mageean, Rapporteur for the Working Group on Criminal Justice*

I acted as rapporteur for the working group on criminal justice (hereinafter “the working group”). The working group included barristers, solicitors, a police officer, an ex-prison governor, ex-prisoners, representatives from ex-prisoner groups, representatives from NIACRO and probation, the youth justice sector and other practitioners from the criminal justice sector.

Generally the working group reached its conclusions by consensus. There was dissent on some issues and this was reflected in the text.

While the working group drew on the views and expertise of those contained within it, the submission was informed primarily by reference to the particular circumstances of the human rights situation in Northern Ireland and international human rights standards.

The report of the working group contained four sections dealing with pre-trial rights, trial rights, custody and release, and the rights of children and young people in the criminal justice system.

We were of course cognisant of the international standards which are now part of our domestic law, those contained in the European Convention on Human Rights, and particularly Articles 5 and 6 of the Convention. While we largely incorporated Article 6 into our draft, we did not attempt to incorporate Article 5. We felt that Article 5 was not sufficiently precise in terms of its protection for arrest and detention rights and, given the way in which these rights have on occasion been abused in Northern Ireland, we felt it appropriate to draft what we considered to be stronger protections than those afforded by Article 5.

The bulk of the recommendations we eventually made to the Commission were taken on board in the draft Bill of Rights, but there were nevertheless some significant additions and omissions.

One of the areas of divergence centred on the fact that the Commission included Article 5 of the Convention in their draft in its entirety but then also added most of the specific recommendations of the working group as well. Interestingly the Commission chose also to insert a clause in their draft text which sought to ensure that no-one would be detained solely on the ground that he/she was a member of one of the categories in Article 5(1)(e) of the Convention (which allows for the detention of persons “for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants”).

Our submission to the Commission began with a section on arrest and detention rights. It included a right to be “secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.” This provision was reflected with minor amendments in the draft Bill of Rights.

We also set out a series of rights which are engaged whenever someone is arrested. Most of these were also replicated largely in the final text adopted by the Commission. The first of these proposals was the right to consult with a solicitor of the suspect's choice. The working group indicated that this right should extend to having that solicitor present during questioning given the history in Northern Ireland of allegations of ill-treatment of those detained under the emergency laws, and also widespread complaints of abuse and threats against solicitors being issued to unaccompanied suspects by police officers. The Commission appears to have shared this concern and indeed it has added to the equivalent provision in the Bill of Rights by stating that a suspect also has the right to have the interview subject to video and audio recording. However, the issue as to whether a suspect has a right to a solicitor of his/her choice is made subject to one of the questions which pepper the draft Bill of Rights, indicating that the Commission could not reach consensus on this issue.

The working group, with two members dissenting, also included a provision designed to restore the right to silence to the position before the introduction of the Criminal Evidence (NI) Order 1988. This impacted on the situation during interview with the police and also during trial given that under the 1988 Order inferences can be drawn if the suspect remains silent during either questioning or at trial. The Commission accepted these recommendations but unusually in terms of fair trial provisions, made them subject to a limitations clause. Indeed the Commission indicate that the current legislative inroads on the integrity of the right to silence may be considered legitimate under the draft Bill of Rights as they may be "reasonable and justifiable in an open and democratic society."

Working group provisions guaranteeing suspects under arrest the right to inform a relative/friend where they are being detained, and to communicate with and be visited by a range of individuals were both accepted by the Commission and articulated in their draft text.

The Commission also appears largely to accept the recommendation by the working group that suspects should be released or charged within 24 hours of the time of arrest. This reflected the fact that the vast majority of suspects are indeed released or charged within this timescale and also concern that, certainly in the emergency law context, the police used arrests not as a means of gathering evidence with a view to charging someone, but as a means of gathering intelligence. However, the Commission provision reads "[E]veryone who is detained has the right to be charged or to be released within 24 hours unless a court orders an extension to the detention for exceptional reasons." The wording of the Commission's clause is unclear as to what the maximum limit of detention is whereas the working group explicitly made the limit 24 hours. Presumably this confusion will be remedied in the final text.

Provisions suggested by the working group relating to the rights to have a competent interpreter present during questioning and to be informed of one's rights in a language and manner one understands were also included in the draft Bill of Rights.

The working group, conscious of the allegations made in Northern Ireland in relation to ill-treatment of detainees, included a provision outlawing cruel,

inhuman or degrading treatment but also accompanied by an explanatory note drawn from the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. This note explained that the term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses. The Commission obviously included protection against ill-treatment in its draft but only by way of the inclusion of Article 3 of the European Convention of Human Rights.

The penultimate pre-trial recommendation made by the working group attempted to ensure that those detained for questioning had the right to certain adequate conditions of detention in terms of access to food, exercise, reading material etc. Once again this relatively uncontroversial recommendation was accepted by the Commission with the addition of ensuring that those detained had access to “spiritual counselling”. The omission of this consideration may speak to the religious commitment of those on the working group.

The practitioners on the working group were concerned that in the past bail applications by those charged with serious politically motivated offences were often marked by the Crown making unsubstantiated allegations that individuals were active members of paramilitary groups. Such comments by the Crown were generally accepted by the judiciary as reasons to refuse the granting of bail to the applicant. The working group therefore included a provision to the effect that bail should be granted unless the release of the applicant would “constitute a real risk to public safety.” This provision was also informed by consideration of the relevant European Convention jurisprudence.<sup>1</sup> The Commission also appears to have been influenced by similar concerns in relation to the manner in which bail applications have operated to the disadvantage of the applicant in Northern Ireland. Yet the relevant provision states that suspects should be released on bail unless the “prosecution can produce admissible evidence to show that there are relevant and sufficient reasons to justify continued detention.” While clearly designed to deal with the same difficulty identified by the working group it is hard to see how this provision will work in practice. How can a bail court judge what is admissible evidence without a much fuller hearing than that which would normally occur at this stage? In addition, surely the primary consideration in relation to decisions whether to release on bail should relate to public safety rather than guilt or innocence of the accused.

Both the working group and the Commission incorporated Article 6 of the Convention into their respective drafts and both also included a number of additional rights. The working group, conscious of the extensive delays there had often been in bringing individuals to trial in Northern Ireland, argued that all trials had to take place within 100 days of the suspect being charged with the offence unless it was extended because the accused agreed or where the interests of justice so required. The Commission accepted the thrust of this recommendation but introduced the qualification that for the time limits to be engaged, the accused had to be in custody. In those circumstances, the time limit for indictable offences would be 110 days, and 40 days for summary offences. While the working group, as a result of the

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<sup>1</sup> *Wemhoff v FRG* A 7 (1968).

inclusion of these time limits, omitted the sub-clause from Article 6 of the Convention relating to trials being held within a reasonable time, the Commission did not.

The working group also included protection for the double jeopardy rule in its submission and included a right of appeal in relation to both conviction and sentence. The Commission essentially mirrored the latter of these recommendations but made the former subject to another of the questions which are found in the draft Bill of Rights.

Similarly subject to question, is the working group proposal to reinstate the right to trial by jury for indictable offences.

The Commission accepted without qualification the suggestion from the working group that “[E]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded.”

Surprisingly the Commission did not include in their draft any provision to reflect the concern expressed by the working group about disclosure of material by the prosecuting authorities and the police. We had suggested a provision obliging the disclosure of used and unused material. However, the Commission have not included any such provision in their Bill of Rights.

The working group also attempted, in the section of the report dealing with fair trial rights, to address concerns arising in relation to the issues of witnesses’ rights, victims’ rights and the behaviour of judges and other court officials. All of these were essentially included in the draft Bill of Rights although the provisions in relation to victims’ rights were re-drafted and covered by a directive provision in the Victims Chapter which obliges the state to introduce legislation to give effect to certain enumerated rights including the bulk of those identified by the working group.

There were three provisions which the Commission included which were not covered in the report by the working group.

The first was the inclusion of Article 7 of the European Convention which prohibits the retrospective application of criminal law. The second was an important provision, mirroring one from the South African Constitution, guaranteeing fair trial in administrative proceedings. The third was equally positive, particularly in light of the experience in Northern Ireland regarding official intimidation and harassment of defence lawyers. It is taken from the UN Basic Principles on the Role of Lawyers and the Basic Principles on the Independence of the Judiciary and places an obligation on government to ensure that lawyers can perform their professional functions without intimidation or interference.

The section of the working group’s report dealing with custody and release was also largely incorporated into the draft of the Bill of Rights. The first provisions in the section are directive in nature, stating that custodial sentences:

“ . . . shall only be used as a measure of last resort. The police, prosecuting authorities and judiciary shall consider alternatives to prosecution and custodial sentences at all stages of the criminal justice process.”

The latter sentence is not included in the draft Bill of Rights but the former is, as is the second provision from the working group in this section obliging criminal justice agencies to “develop and encourage the use of alternatives to prosecution and the use of custodial sentences.”

Provisions suggested by the working group guaranteeing prisoners, in most circumstances, the rights contained in the Bill of Rights and ensuring they are treated humanely were incorporated into the draft text.

The working group also recommended that the Bill of Rights should include a right to reintegration for prisoners. The Commission accepted the need for such a provision but again drafted their equivalent clause in order to place an obligation on the state to “ensure that favourable conditions are created for the reintegration of ex-prisoners into society.” Obviously an integral aspect of this reintegration should be a bar on discriminating against former prisoners on the grounds of their criminal record. The working group therefore recommended that the general provision relating to discrimination in the Bill of Rights should include those convicted of, or charged with a criminal offence. The Commission accepted this recommendation and the general anti-discrimination clause includes a bar on discrimination against those in “possession of a criminal record.”

The one area in this section where there is significant divergence between the recommendations of the working group and what the Commission proposed in its draft text is in relation to a clause proposed by the working group relating to those convicted of politically motivated offences. The working group felt that, given the particular difficulties faced by former politically motivated prisoners, such prisoners should be able to get their criminal records expunged subject only to measures necessary for the protection of the safety of the public. The Commission did not include any such provision in its final draft.

The final section of the report of the working group dealt with the rights of children and young people in the criminal justice system. There was also a Children’s Working Group so that overlap to a certain extent was inevitable. All of the provisions suggested by the working group were dealt with in the chapter of the draft Bill of Rights dealing with the rights of children.

There was extensive discussion within the group as to whether the age of criminal responsibility should be raised from 10. The unanimous view was that it should be raised and, while consensus was not reached about the appropriate age, almost all members of the group considered that it should be at least 14. The Commission has raised the age from 10 to 12 and has also exhorted the government to keep it under review.

The working group’s recommendations in relation to the definition of a child and ensuring that the best interests of the child are the paramount consideration in every matter concerning the child were included in the draft Bill of Rights. This was also the case with the provision guaranteeing a child being questioned by the police the right to have an appropriate adult present, in addition to the right to legal advice.

Equally, the rights relating to how children are treated once arrested and if charged, and in custody were largely replicated in the draft text as was the

provision drafted by the working group to deal with the judgment in *T & V v United Kingdom*<sup>2</sup> relating to fair trial rights for children.

The only apparent area of disagreement between the Commission and the working group in this section was in relation to a proposal by the working group to effectively incorporate the UN Convention on the Rights of the Child into domestic law. The Commission considered this option but decided against it, instead including a provision which obliges public bodies to “carry out their functions in relation to children in accordance with the provisions of the UN’s Convention on the Rights of the Child.”

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<sup>2</sup> Application numbers 24724/94 and 24888/94, 4<sup>th</sup> December 1998.

## **A BILL OF RIGHTS FOR NORTHERN IRELAND – LANGUAGE ISSUES IN CONTEXT**

*Caoimhghin Ó Murchadha, An Gaeláras, Derry and Lee Reynolds,  
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### **INTRODUCTION**

This paper will compare the Northern Ireland Human Rights Commission’s (NIHRC) recommendations contained in the language section of “Making a Bill of Rights for Northern Ireland” with the report<sup>1</sup> produced by the Language Rights Working Group (LRWG) and Cultural Identity Working Group (CIWG).

It will explain about the operation of the LRWG and the broad approach that was taken by the authors<sup>2</sup> of the report. Section one by Lee Reynolds will look at the NIHRC cultural and language recommendations and compare them with international standards and the LRWG’s work. Section two by Caoimhghin O’Murchadha will look at the context of the NIHRC’s work.

#### **(a) The Language Working Group**

The manner of appointment to the LRWG was different from the other working groups. The NIHRC approached a number of organisations asking them to nominate members. The different language communities had different levels of representation – four for Irish, two for Ulster-Scots, two for Chinese, one each for the Indians, Muslims, Travellers, blind and deaf. Patrick Yu of NICEM (Northern Ireland Council for Ethnic Minorities) was appointed as chair and Paddy Kelly as the Commissioner with responsibility for the group. To inform its deliberations the LRWG ran a one-day conference and each member was invited to make a submission.

There were a number of issues that hampered the work of the LRWG. First, there was confusion about the status of group members. The NIHRC view was that they were individuals with skills there to provide independent advice. LRWG members viewed themselves as representatives of the organisations that had been asked to nominate them. This was never resolved. Second, there were persistent problems with the thoroughness of the minutes provided by the NIHRC. Third, Patrick Yu had much to offer the debate and work of the committee but this interfered with his role as chair. Fourth, just as the issues of identity, language and culture are contentious in our society so were many of the debates in the LRWG.

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<sup>1</sup> The Language Rights Working Group and Cultural Identity Working Group reports can be downloaded from [www.nihrc.org](http://www.nihrc.org) in the Bill of Rights section, subsection working group reports.

<sup>2</sup> Caoimhghin O’Murchadha and Lee Reynolds

### **(b) The Approach to the Working Group Report**

The responsibility of drawing all the work into a final report was given to two LRWG members. The authors adopted a three-fold approach to the drafting of the report. First, that it would follow best international practice. Second, that it would treat the different language communities in an equal manner. Third, that the report should be viewed realistically by the various language communities. A Bill of Rights was not going to be a panacea for language communities. The work and commitment to maintain and develop the language communities would have to continue whatever a Bill of Rights did or did not say.

This approach obviously worked as the working group adopted the final report with one dissension (largely because the proposals did not go far enough). A consensus the NIHRC has chosen to ignore.

## **I. NIHRC CULTURAL AND LANGUAGE RECOMMENDATIONS**

### **(a) What the Cultural Identity Working Group Recommended**

The Cultural Identity Working Group had the task of squaring the circle between parity of esteem for the two communities and equality for all. The cultural working group, influenced by the advice of OSCE, recommended:

- Equality for all communities
- The adoption of the provisions of the *Framework Convention for National Minorities*
- The use of the term community instead of minority

These have been included in the recommendations of the NIHRC. They believe the parity of esteem issue is addressed by including it in the preamble and that “. . . the entire range of rights recommended for the Bill of Rights as providing a basis for parity of esteem among all communities in Northern Ireland”. However, there seems to be a lack of consensus on the parity of esteem issue in the Commission and it does offer the option of a direct clause.

### **(b) Parity Of Esteem**

The problem with debating the issue of parity of esteem is that it very quickly descends into a Unionist v Nationalist argument. Most Unionists consider “parity of esteem” as nationalist terminology. They claim it is either meaningless rhetoric or impossible to define. Nationalists place strong emphasis upon the “parity of esteem” terminology and argue that definition is possible. They say Unionists just do not like the consequences that must flow from Unionism’s acceptance of the term in the Agreement. Unionists counter that the acceptance by Nationalists of Northern Ireland’s constitutional status overrides any implications of parity of esteem. And so on and so on.

### **(c) Cultural Communities?**

However there is one recommendation that is missing which has significant implications for the Ulster-Scots community and this concerns the issue of

culture. There are four categories of communities protected in the cultural section – national, ethnic, religious and linguistic. The CIWG recommended that cultural be included in the categories of communities. NIHRC has not included it. This omission results in limited protection for the Ulster-Scots community.

The Government does not recognise Ulster-Scots as a national community; the Equality Commission does not accept Ulster-Scots as an ethnic group; the Ulster-Scots community is not religiously homogenous and the linguistic section of the Ulster-Scots community is smaller than the cultural community.

#### **(d) Dangerous Flaws?**

In terms of provision for all communities the draft bill has three weaknesses. First, a community, especially a minority one, needs access to the education system, the cultural institutions and the media in order to survive and hopefully thrive in the modern world. Moreover, the international standards acknowledge this need. In an attempt for international standards to avoid “ghettoisation” of a community/minority, additional provisions for mutual respect, understanding and co-operation are made. In clause 5(c) of the NIHRC draft access to the above is strictly placed in a cultural diversity context. This raises the question whether a community will only get access if all other communities are directly involved too?

Secondly, although the UN’s Convention on the Rights of the Child and the European Charter for Regional and Minority Languages make clear references to the need for a child to be educated in his/her own language or culture, there is nothing or little proposed in the Children’s rights section or the Educational rights section of the draft bill. Thirdly, there is no clear protection against assimilation as provided in the Framework Convention on National Minorities.

In conclusion, it must be stated that most of the recommendations of the identity working group have been adopted by the NIHRC in its draft, however that which has been omitted has the potential to be of serious consequence.

#### **(e) What the Language Group Recommended**

The Language Working Group report defined what languages were to be included with flexibility around the languages of minority ethnic communities. It set out the duties of the state to provide for positive policies and provision in the public sector and media access. These duties were strong but were couched with up to five qualifiers that the state could take into account: usage, need, demand, practicality and the situation of each language. In the area of judicial rights it recommended the right to use the language within the judicial system and also agreed that documents in languages other than English would be admissible within the judicial system and be invocable.

The education rights allowed for the establishment of independent schools, the state provision of educational materials at all stages of education, cultural education, educational opportunities for non-speakers, support for valuable research and assistance in the learning of English. Furthermore, a member of

a linguistic community could communicate with public bodies in their own language. Under media rights it recommended that a linguistic community could establish their own media institutions, they could receive media from abroad and that public broadcasters had to take their views into account (all within the normal regulatory framework).

### **(f) The NIHRC Recommendations**

There is a substantial difference in what the working group outlined and what the NIHRC recommended. The first clause of the NIHRC recommendations grants the right to use a language for private purposes and extends recognition beyond language speakers to dialect speakers. The second is the right to translation services to access essential services. The third is the right to assistance to learn English. The fourth calls for legislation for Ulster-Scots and Irish based on Charter recognition. The fifth provides six basic rights – development of the language, use with public bodies, use and recognition of names, the public display of signs, local street and place names and to learn it – with the qualifier of sufficient demand. No definition of sufficient demand is given other than it includes availability of resources.

These proposals are very conservative. What is worse is that they do not meet basic international standards. Also, despite the recognition in the cultural rights section of equality for all, a strong distinction is drawn in the language section between the indigenous and non-indigenous languages and potentially between Irish and Ulster-Scots.

Minority language speakers have the right to speak their language in public and not solely in private. A minority language community is entitled to certain basic rights. It is entitled to further rights on the basis of qualifiers such as demand. This approach is best reflected in the European Charter. However, the NIHRC makes a substantial element of the rights subject to the qualifier of demand. What has demand got to do with recognition for someone's name in their own language? Also the NIHRC does not define what sufficient demand means other than the fact that it includes availability of resources. Thus, government saying it has no money will stop real progress and judges will be dragged into adjudicating resource allocation issues.

### **(g) Ulster-Scots Concerns**

The Ulster-Scots community has a number of deep concerns. This is a carefully crafted document however there is not one solitary reference to Ulster Scots as a language. This is viewed by Ulster-Scots as a clear and premeditated slight on Ulster-Scots. The inclusion of dialect speakers, never heard before, leads many to believe that there is a reference to Ulster-Scots. The minority ethnic groups certainly never raised it in the working group. Secondly, Ulster-Scots are much more wary of the idea of legislation. Legislation will take a long time; it will turn the issue into a political football; it will institutionalise inequality between Ulster-Scots and Irish. Ulster-Scots has Part 2 recognition under the European Charter for Regional and Minority Languages. Irish has Part 3 recognition under the Charter. Legislation as suggested by the NIHRC would institutionalise this differential. Thirdly, in the education section only the Irish language

medium sector is recognised. There is no scope in the NIHRC’s proposals for an Ulster-Scots medium sector or minority ethnic language sectors to develop.

## II. THE CONTEXT OF THE NIHRC’S WORK

As a nominee from An Gaeláras, Doire, to the Northern Ireland Human Rights Commission’s working group on language I welcomed my appointment as giving me an opportunity to make an input at another level into a process that directly affects the work that myself and my colleagues are engaged in daily – that of establishing rights and creating an environment where such rights are protected and wherein the many projects that we are engaged in can flourish.

As a representative from an Irish language organisation I understood fully what it meant to have few or no rights, and how opposition to the assertion of rights could lead to conflict and contention. Coming from a constituency that had survived a distinctly hostile cultural climate our perception of the work of the Northern Ireland Human Rights Commission was that it marked the emergence of official recognition of the need for a process that would establish a template for a society that was based upon genuine principles of equality and a healthy respect for cultural diversity.

Attendance at the working group was a part of that process, and the brief that I took from my organisation was not that of “fighting our corner” but of striving to create a cultural context that would be of benefit to all. There is a saying in Irish “Ceart dom, ceart duit” – “I have rights, you have rights” – and that was the spirit and mindset that informed my approach to the working group. Of course Irish speakers have a “shopping list”, as do other groups and organisations, but we never felt that the NIHRC was likely to publish a report that would enable us to pack up our tents and retire and working group duties were undertaken in the full knowledge that whatever the NIHRC produced the lobbying and development would have to continue.

We had hopes of course, and still have them. The NIHRC is itself a child of the Good Friday Agreement, a part of the peace process that we all have a stake in, whether we are supporters of the Good Friday Agreement or not. Notwithstanding our positions with regard to that agreement, if we are genuine about establishing a polity that cherishes all its citizens equally then it follows that the challenge of creating a healthy society following years of bitter conflict requires a very careful assessment of the seeds of that conflict and their removal.

Viewed thus, language issues are not some trivial addition to more weighty affairs but are inextricably linked to the conflict and its resolution. Questions of identity, of the right to fully embrace all aspects of one’s culture and to be afforded equality under the law are crucial ones. In addition to respecting and underpinning the rights to express and develop certain cultural manifestations of British, Irish or Ulster Scots identity, the reality that there are others who have linguistic and cultural needs and rights, including some more recent arrivals to these shores, is one that also has to be recognised and addressed. And as the work of the working group progressed and its members looked beyond ethnic labels it was recognised that there were others too, who, by reason of illness or disability, had special communication

needs that often effectively led to their exclusion from the existing rights and opportunities that most people enjoyed.

As meeting followed meeting, as “shopping lists” gave way to a deeper respect and understanding of the needs and aspirations of others, the group moved closer to a consensus about the way forward. We had a sense that here was an opportunity to shape a society that truly respected all its citizens. We looked at issues and solutions in other jurisdictions; we looked at European and international standards; we pored over the language clauses in the Good Friday Agreement. We had, and I believe eventually took, a chance to emulate anything that these documents offered in terms of concrete and enforceable rights, a chance to craft a genuinely inclusive document that would reflect a multicultural society at ease with itself. If all the various nominees on the working group are viewed as representative of the pieces of the mosaic that make up our society there existed an opportunity to ensure that no one was excluded from the final picture that emerged of the group’s view of a fairer world.

It was put to us that following our draft report the NIHRC would draw up a consultation document and that later the Secretary of State would have the final say in what went into the Bill of Rights. I remember feeling a frisson of annoyance that any one individual could put a pen through the hard won consensus of representatives of the many, representatives who had considerable expertise and who had sought to put individual politics aside in the search for common ground and mutual respect. Ours was not an extremist draft, it was inclusive, it was reasonable and it had earned the support of almost every member of the working group.

I recalled the words of the Irish author Breandán Ó hEithir, who, writing in *The Irish Times* of 7<sup>th</sup> April 1977 on the problems of writing in Irish had this to say,

“. . . The language movement I hope to deal with at length in a future article in this paper so, for the moment, the following brief comment will suffice. The movement, such as it is, is not led by fanatics or hard headed thinkers, as is fondly imagined by some. The vast majority of them are gullible poor hoors who sit on committees which draft plans which are never implemented by the shifty-eyed civil servants who castrate them on the instructions of their political masters.”

That was another time, another place and, for legal purposes, another State. We’ve all seen too many episodes of “Yes Minister” to imagine that such sharp practice could be applied to the constituent parts of a delicate peace process – haven’t we?

Perhaps not, was my first reaction upon viewing the NIHRC consultation document. I felt cheated, almost abused, and was left with a strong feeling that my time and that of my colleagues on the working group had been wasted. Gone were the brave new world, the fresh start, and the respectful template. In its place was an anodyne document, vague in its language and frequently no more than a restatement of existing rights. References back to the Good Friday Agreement were, I believe, a failure of nerve, as that document too had its fair share of vagueness. Elements contained in the Good Friday Agreement were tinkered with, rights affecting the disabled

were dropped, and the consensus of the working group seemed to have been overturned by a lack of consensus among the Commissioners.

The NIHRC consultation document, gutted of the carefully considered detail contained in our draft, represents a lost opportunity to depoliticise language issues and leaves progress hostage to dispute and litigation. This may be a lawyer's dream but for a society attempting to emerge from conflict the document has more of a nightmarish tinge.

The management of change requires courage, not caution and the NIHRC has many nettles to grasp. The consultation document is not the final word – it is but a part of a process, and in it the NIHRC has seriously mishandled the language question. Perhaps the deadlines set for the document's publication were unhelpful, perhaps the Commission should have met the working group subsequent to the production of the group's draft and discussed it more fully. Whatever the case, one does not abandon one's friends because they make mistakes; one encourages them to learn and to improve on them. The next part of the process should be a reengagement between the NIHRC and the working group and a return to our hard won consensus – we deserve nothing less.

## VICTIMS AND THE BILL OF RIGHTS

*Brian S Gormally, Justice Associates*

### INTRODUCTION

The idea that victims have rights – real legally enforceable ones that flow from the status of victim – has been growing in recent years. From an often forgotten object of pity there is a progress towards seeing a victim as a leader in reasserting the importance and social necessity of safeguarding citizens' rights. There is an increasing tendency in international instruments and commentaries to formulate important propositions in terms of victims' rights as well as states' obligations.<sup>1</sup> As well as the development of law around victims' rights, there is an increasing tendency by their support organisations to express their needs in the form of rights. One of the most comprehensive formulations can be found in the three Statements of Victims' Rights published by the European Forum for Victim Services.<sup>2</sup> These cover social rights, rights in the process of criminal justice and rights to standards of service.

As the Northern Ireland Human Rights Commission (NIHRC) carries out its consultation on a Bill of Rights, the question naturally arises as to whether and how victims' rights might be included in it. For the purposes of this paper we assume that there should be some kind of reference to victims' rights. What follows is designed to highlight some of the difficult issues that decision raises.

### **Should the Bill of Rights make a distinction between victims in general and victims of the conflict?**

The NIHRC's draft Bill of Rights makes a distinction between the rights of "victims of the conflict" and the "rights of victims for the future." It argues that:

"It is not practicable to deal with the issues which arise from many years of conflict and the need to set standards for the future in an identical manner."

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<sup>1</sup> For example: UN General Assembly "*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*," GA Resolution 40/34, 1985. UN Human Rights Commission. "*Basic Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*," UN Doc. E/CN.4/2000/62. Final Report of the Special Rapporteur, Mr. Cherif Bassiouni, "*The Right to Restitution, Compensation and Rehabilitation for Victims of gross violations of Human Rights and Fundamental freedoms*," E/CN.4/2000/62

<sup>2</sup> Available from the European Forum for Victim Services, Cranmer House, 39 Brixton Road, London SW9 6DZ. Tel: 020 7735 9166.

It says:

“The demand that the continuing hurt and suffering arising from the past conflict should be addressed in a positive way cannot be ignored.”

It proposes two clauses to deal with the past, one demanding of government that it ensure that the loss and suffering of victims of the conflict “are appropriately and independently established,” and the other saying that such victims have the right “to the highest possible level of social care” and should be “protected from any unfair or discriminatory treatment.” It goes on to say that “a more precisely defined and detailed formulation of rights is required for future victims.” The question of definition is one that we shall return to.

The NIHRC thus wishes the Bill of Rights to bring some level of closure to victims of the past and to set more precise guidelines for the treatment of victims in the future. Beyond the question of definition, there seems to be nothing in the legal framework to either support or prevent this distinction between past and future victims.

### **Victims Of The Conflict – The Victims’ Views**

Almost everything about the last thirty years of violence is contested: who or what caused it, what we should call it, who was involved, who was to blame, who won or lost, when it started, even whether it has ended – all these are hotly debated issues. Nor do we have consensus on the “peace process” and its product, the Belfast Agreement. Even though 70 per cent of the people voted for the Agreement, its meanings and consequences are contested amongst those who support it as well as amongst its opponents.

No surprise then that there is no consensus amongst victims’ groups on who should be regarded as a victim of the conflict.

To simplify the arguments – there are two ends of the spectrum. At one end, people insist that some victims were “innocent,” either uninvolved in any violence or properly joining the security forces in the “fight against terrorism.” It is an insult to link them with killed, wounded or imprisoned terrorists and their families. At the other end are those who denounce the supposed “hierarchy of victims” operated by statutory agencies with the “innocents” as above at the top and those connected with paramilitary organisations at the bottom. Many of these people insist that their side was fighting a just war. No-one should underestimate the bitterness of division between these two poles of opinion.

Such is the divisiveness and complexity of this area of definition that we might think of dividing it into three possible types: political, social and legal. A political definition could look at the respective status of victim and perpetrator in a conflict and might see only “one side” as victims, or develop a “hierarchy” of victimhood, or argue that all those surviving conflict are victims. A social definition would define victims by the nature of harm they suffered rather than by who inflicted it or in what circumstances. A legal definition, however, must be clear and definite enough to stand up in the courts and, in this exercise, cover exactly those whose rights we wish to particularly protect.

### **Victims Of The Conflict – A Legal Definition?**

If there is to be special provision for victims of the conflict in the Bill of Rights, we assume it will be necessary to come up with a definition of what that means. Yet the NIHRC draft does not give such a definition. As far as we can see, this can mean only one of two things. The first is that it is unnecessary to define the category, as it is not intended that substantive, legally enforceable rights will attach to it. We will come to the second later.

The two clauses in the NIHRC's draft are rather general and declaratory. It may be argued that they are stating positions of general principle rather than granting substantive rights. This may be entirely appropriate as a gesture to past victims designed to give them recognition in one of the foundation legal documents of the new Northern Ireland. In which case, the lack of any definition allows different categories of presumed victim to self-define as such and take comfort from it. It would also be possible to generate a broad definition that included all those harmed by acts or circumstances arising from the conflict. To do that would be to reject explicitly the hierarchy of victims position and adopt a clear conflict resolution position.

It might be argued that this is the right stance for the Bill of Rights, rejecting any discrimination or distinction amongst those damaged by the troubles. This would therefore be a kind of anti-discrimination clause designed to ensure that all categories of victim had equal access to appropriate services rather than endowing them with justiciable rights. However, we have noted the disputes about the definition of victim amongst victims themselves. These are as much about differing political interpretations of the conflict as anything else; there can be no common definition of victims of the conflict when there is no common definition of the conflict itself. It is clear that leaving the definition "open" or explicitly adopting a broad definition will deeply offend at least those who argue for a distinction between "innocent" victims and others. It is difficult to see how this option can help bring closure to all victims.

Is it possible to define victims of the conflict more closely? Unfortunately, there does not seem to be anything in the legal context that helps us in this matter. The only distinction that seems at all relevant is that between victims of "crime and the abuse of power" and victims of "violations of international human rights and humanitarian law."

It is difficult to see how this distinction helps in terms of the definition of victims of the conflict in Northern Ireland. The reality that we have to contend with is that our peace process, and our consequent treatment of prisoners, for example, has been framed in the political terms of conflict resolution, yet there is no legal definition or recognition of the conflict. In legal terms the conflict of the past thirty years has merely been a series of crimes, mainly committed by unlawful civilians but occasionally also by individual members of the security forces. We shall briefly consider the alternative legal framework, that of "non-international armed conflict," below.

This makes problematic the second possibility as regards the NIHRC's draft Bill – that its general definition of victim should cover victims of the conflict simply when the harm done was actually connected to the conflict. The major problem is that a standard element in definitions of victims tends to be

that the harm done must be criminal. We need to consider the implications if that definition was applied to the conflict in Northern Ireland. Let us take a scenario of an open gun battle between uniformed members of the security forces and a paramilitary unit in easily identifiable combat gear. Those killed or wounded and their families on the security force side would all count as victims, killed by “criminal” gunfire. None of those similarly killed or wounded on the other side would count as victims as they would have been killed by “legal” gunfire.

Let us briefly consider the alternative legal framework suggested by Protocol II of the Geneva Convention.<sup>3</sup> It is designed for the “protection of victims” of internal armed conflicts that have some of the characteristics of war, just as the overall Geneva Convention is about the protection of victims and the proper treatment of combatants in international war. Protocol II applies to armed conflicts:

“which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” (Art 1(1))

The British Government, which only ratified the Protocol in 1998 and entered a number of reservations, has always denied that the Northern Ireland conflict came within this definition and many lawyers would agree with that. It is interesting, however, to look at the possible effect of applying its framework to the debate on definition of victims of the conflict.

The Protocol does not attempt a formal definition but is concerned to protect different groups of people in different circumstances. So, it makes fairly detailed statements about the treatment of prisoners – and is firm about their release as soon as the conflict is over. It also condemns deliberate attacks on the civilian population as well as individual civilians. However, in the section on “Fundamental Guarantees” it extends general protection to: “all persons who do not take a direct part or who have ceased to take part in hostilities. . .”

The implication is that those who *do* take part in the conflict – and no distinction is made between State and non-state forces – are not protected by law against the effects of the conflict. In this legal context then, unless they suffer some harm that is otherwise against the standards of human rights or humanitarian law, combatants cannot be defined as victims in any way that attracts particular legal rights. In the scenario outlined above there would be legal victims on neither side – we understand that it is no breach of the norms of humanitarian law to engage in open warfare with other combatants.

It seems, then, that glaring difficulties will occur whatever legal definition is applied to victims of the conflict if it has within it the concept of unlawfulness or even culpability of the harm done. So, for example, the

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<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

family of a paramilitary killed by his own bomb could never legally be victims. Or, again, the family of a security force member driven to take his own life by the stress of his role or dying in an accident while on active duty could not be legal victims. Yet many people would see these people as victims of the conflict in a more general, social sense.

Another difficulty in defining victims of the conflict is in assuming the conflict is in the past. In fact, politically motivated violence continues and new victims are created almost daily. For the best of political reasons it might have been right to have a “cut-off date” for offences in the context of qualifying for early release from prison – but should there be a cut-off date for victims?

These dilemmas would not be solved by an option the NIHRC suggests is possible, that is to extend the provisions relating to victims of the conflict to all victims. For that would again have the effect of transferring back the general, legal definition of victims to those of the conflict, with all the difficulties listed above.

The task of devising a legal definition of victims of the conflict that attracts real, enforceable rights and at the same time includes all those who “feel” themselves to be victims appears impossible. It would also be highly divisive to reflect back a legal definition made for the future – which assumes a widely recognised and legitimate rule of law – to the past when the rule of law and the legitimacy of the state were bitterly contested.

We do not see the point of including in a Bill of Rights vague declarations around a “social” definition of victims of the conflict. This would tend to reduce respect for, and perhaps even the legal force of the rest of the Bill. Furthermore, such a definition cannot help but take a particular perspective on the character of the conflict and so will be a point of argument and division amongst victims.

These conclusions obviously put a question mark over the whole enterprise of including “victims of the conflict” in the Bill of Rights.

### **Definition Of Future Victims**

The term “future victims” is used by the NIHRC in its draft. It is not clear whether that means that victims’ rights will only be enforceable if the harm is committed after the passing of the Bill or whether the term is only used to distinguish from victims of the conflict. The NIHRC might wish to be explicit about this matter.

There appears to be a fair degree of consensus amongst lawyers and other writers that the basic formulation in the United Nation’s (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, is as broad and inclusive as possible. It is the definition that the NIHRC bases its own version on and is adopted by the Criminal Justice Review. The main substantive issue in different formulations is the description of the kind of culpability that might be involved.

All talk of “acts or omissions,” but they may be:

“in breach of criminal laws,” – The Commission’s draft;

“in violation of criminal laws. . . including those laws proscribing criminal abuse of power,” – UN Declaration of Basic Principles of Justice;

“in violation of international human rights or humanitarian law norms,” – Human Rights Commission (UN).

The Victims’ Rights Working Group Report argued against the restriction of the definition to victims of crimes. It said:

“If. . . we restrict the cause of victimisation to criminal acts, we are left with a number of problems. First, and particularly in a period of violent political conflict, the criminal law may be distorted and/or may not be accorded legitimacy by all citizens. Second, whether or not an act is actually defined as criminal depends upon the vagaries of detection, prosecution and conviction. Third, what the UN Declaration calls “abuses of power” may not amount to criminal acts. Fourth, civil wrongs or torts may cause great harm but are not, by definition, criminal. Fifth, acts which may cause great harm, and may be perceived as injustices by the subject of them, may be held to be legal – justifiable homicide, for example.”

The above is persuasive, except for the last point. In a legal definition, it would be a problem to include acts that were not legally wrong. It might be theoretically possible to argue that acts such as justifiable homicide involved a direct human intention to hurt, in contrast to an accident, and so should be included. The fact, however, that such acts are, by definition, lawful and proper, risks weakening the whole concept of victimhood. This is even more important if one takes the view, as the Working Party Report did, that victims are persons whose citizens’ rights have been breached. A proper, lawful act carried out against a person, even if it results in death, cannot breach their rights as a citizen.

Another, important point made in the Working Party Report is worth quoting:

“We do take the opportunity to point out, however, that, in some circumstances, the status of victim may also remain to be proved. It should be understood that our definition of “victim” also includes “alleged victim,” or a person who claims to be a victim. Just as all alleged offenders must have their rights protected in the investigation and trial of their alleged crimes, even though many will be guilty, so all alleged victims must have their rights protected, even though some will turn out not to have been victimised.”

So, in the trial of someone for murder, where the defence is justifiable homicide, the family of the deceased should have all the rights accruing to victims at that stage, even though the result of the trial might be that they are not counted as victims in the future. In general this might seem self-evident but one can imagine hotly contested cases where the above principle needs to be made crystal clear.

There is a good deal of consensus in international law and the literature about the general definition of victims. The only significant point at issue seems to be whether the definition should be restricted to victims of crimes – the NIHRC asks this question in its consultative Draft Bill. All the international formulations refer to acts which are crimes of one sort or another. It does seem strange to exclude torts from a definition – intentional or careless harm that amounts to a civil wrong. It is likely that many acts of harm to the environment might fall within this category or would amount to breaches of administrative or regulatory law.

We would have thought that the term “unlawful,” applied to intentional acts or omissions causing harm would properly cover the range of circumstances in which people could be said, in a legal sense, to be victimised.

### **The Right To Truth**

We understand the right to truth as “the right to know,” that is, the right to know the truth about violations. In the particular sense this is an integral part of the right of access to justice and deals with matters such as a proper inquest procedure, transparency in the operation of criminal investigations, the willingness of the State to disclose all relevant information and to investigate itself and so on. There is, however, a particular context that produces a particular set of issues in societies attempting to move from conflict to peace. In a broad sense it can be described as the desire to know the truth about the conflict. This obviously refers to victims’ desire to know what happened to themselves or their loved ones – who did what to whom – in specific instances. It is also a more general desire for openness about the conflict – for those who were involved to admit their actions and take responsibility for them.

It is in this context that the concept of truth commissions or other mechanisms to establish truth and accountability comes to the fore. There is a strong current running through international legal texts and commentaries that the establishment of truth and accountability about past conflict is important to prevent repetitions of human rights abuses and to strengthen the rule of law. There is also a growing amount of literature arising out of debate on the subject in Northern Ireland.

The current Draft Bill of the NIHRC demands legislation and other measure:

“to ensure that the loss and suffering of all victims of that conflict and the responsibility of State and non-State participants are appropriately and independently established and/or acknowledged.”

This is a tall order and would presumably involve not only a truth commission but also commissions of enquiry into unsolved killings, woundings and bombings as well as allegations of misdeeds by the State. This is not the place to debate fully whether such a process should take place. It is appropriate, however, to discuss whether the Bill of Rights should contain an injunction on the State to carry it through.

As we have noted, there is a strong feeling amongst international human rights lawyers that, especially, transgressions of human rights and humanitarian legal norms should not go unpunished. It is felt that openness

and truth is the least we need in order to prevent repetitions. Joinet<sup>4</sup> argues that the right to truth extends from the particular to the general:

“(It) is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember”, which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved. These then are the main objectives of the right.”

In reading this passage it is clear, however, that the main concern is the tendency of States to cover up past human rights abuses. Some would argue that the British State was engaged in widespread abuses in Northern Ireland during the conflict; more would argue that however few or many, any potential human rights abuses by the State should be investigated, even if individuals are not prosecuted at this point. Others would point out, however, that there were also wholesale abuses of human rights by paramilitary organisations during the conflict and no-one was brought to account for many of their actions. Like so many others, this is a matter where the divisions underlying the conflict are also the cause for dispute over how it can be put in the past. The NIHRC’s formulation in calling for an equal establishment of responsibility does not solve this dispute in principle or practice.

There are at least three reasons why it is arguable that investigations into possible State abuses are of a higher priority than those of non-State entities. The first is that any breach of the law or human rights by the organs of the State, which are themselves tasked with upholding the law and protecting citizens, is a much more devastating blow to the rule of law and people’s sense of security and legitimacy than criminal acts by non-State actors, however horrendous. Second, given that the criminal justice system is the main method of protecting citizens’ rights, if elements of it breach those rights, it is unlikely that its institutions will themselves be capable of adequately investigating and righting the wrongs. Special arrangements will probably therefore be necessary for the State whereas the criminal justice system should be capable of adequately investigating and punishing non-state crimes. Third, the State endures while non-State entities pass away. In Northern Ireland, in spite of many reforms, there is a continuity of personnel and perhaps culture in the institutions of the State. In contrast, the peace process holds out the hope that paramilitary organisations will disarm, demobilise and either disappear or become purely peaceful cultural or political organisations.

In practice, we now have a number of continuing enquiries into disputed actions of the State or allegations of collusion with criminal elements, the biggest being the Saville enquiry. There are demands for some more, but not

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<sup>4</sup> Final Report Prepared by Louis Joinet, *Question of the Impunity of Perpetrators of Human Rights Violations, (Civil and Political)* E/CN.4/Sub.2/1997/20 (para. 17).

an inexhaustible list. On the other hand, while many non-State perpetrators were punished during the conflict there are also many incidents that involved breaches of human rights by non-State elements that remain unresolved. As the NIHRC itself says: “the difficulties of ensuring that all those who have suffered hurt or injury during many years of communal conflict are granted equal rights of investigation, compensation and restitution are quite daunting.”

Yet the NIHRC’s draft appears to put a legally enforceable obligation on the State to ensure that responsibility in all these cases is “appropriately and independently established.” It is arguable that this might well, in practice, be impossible.

That is not, in any sense, to argue against a voluntary process that would give victims the opportunity to tell their stories and the possible perpetrators the opportunity to make acknowledgement or to take responsibility. The point is whether such a process can or should be given the force of law by inclusion in a Bill of Rights.

The arguments that the hurt, bitterness and divisions of the past must be lanced by some sort of truth-telling process are easy to accept. They appeal to much that we know about human nature and draw on experience from other conflicts. It is much harder, unfortunately, to come up with a clear and acceptable mechanism to carry out the process. This paper does not have to wrestle with that problem, however. Our only issue is whether there should be a reference to this kind of process in the Bill of Rights. It is our view, and, we understand, that of the Commission, that rights or obligations on government incorporated in the Bill of Rights are meant to be legally enforceable in the courts. Any formulation, therefore, must be clear about what right it is granting and to whom.

We believe, at this present time, that the lack of clarity and consensus around a possible truth process and the impossibility of developing an acceptable legal definition of victims of the conflict, mean that neither of those criteria can be fulfilled. There should not, therefore, be a reference to a truth-telling or similar process in the Bill of Rights.

## EDUCATION RIGHTS IN THE BILL OF RIGHTS

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### INTRODUCTION

The fact that the Northern Ireland Human Rights Commission (NIHRC) prioritised education rights from the outset of its Bill of Rights consultation should come as no surprise to anyone with any knowledge of the Northern Ireland education system. The Northern Irish school system is unusual from a number of perspectives. Most significant of these is the fact that it is almost completely religiously segregated with Catholic pupils attending voluntary schools run by the Catholic church and Protestant children for the most part attending non-denominational state schools.<sup>1</sup> The fact that schools are divided by religion in such a visible way has allowed them to be used as a focal point for public protest and controversy.<sup>2</sup> Added to this, there has been a growing demand for alternative provision by parents who want their children to be educated in mixed religious (integrated) schools or through the medium of the Irish language. And finally, at secondary level there is a controversial system of academic selection at the age of eleven which recent research has shown contributes further to Northern Ireland's complex social and economic problems.<sup>3</sup> In effect, schools provide a venue in which the jurisdiction's religious, political and social divisions find a public outlet and therefore a setting in which claims that human rights are being infringed arise frequently. Although the European Convention on Human Rights contains an explicit right to education,<sup>4</sup> it has been subject to a highly restrictive interpretation by the European Court of Human Rights,<sup>5</sup> with the result that it fails for the most part to address the complex problems generated by Northern Ireland's school system.<sup>6</sup> The objective of this article is to examine critically the proposals by the NIHRC to supplement the ECHR and in particular to assess the extent to which the recommendations

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<sup>1</sup> For further details of this and an explanation of how it came about, see L. Lundy, *Education Law, Policy and Practice in Northern Ireland*, (2000, SLS) pp 4-7.

<sup>2</sup> In recent years this has included the walk-outs by pupils at various state schools in response to the appointment of Sinn Fein's Martin McGuinness as Minister for Education alongside the protests outside Catholic schools by parents opposed to the RUC having been invited to speak to pupils about drugs. Most recently, attention has focused on the loyalist protests at the Catholic Holy Cross primary school.

<sup>3</sup> A.M. Gallagher and A. Smith, *The Effects of the Selective System of Secondary Education in Northern Ireland – Main Report* (2000 DE).

<sup>4</sup> Article 2 of the First Protocol – “no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions.”

<sup>5</sup> See in particular, *The Belgian Linguistic Case* (1968) 1 EHRR 252, where the European Court of Human Rights considered that the right was one of access to whatever schools the State had in its discretion decided to provide.

<sup>6</sup> See for example, *X v United Kingdom* (1978) 14 DR 179, where a complaint about the funding arrangements for integrated schools was considered inadmissible.

reflect both the particular circumstances of Northern Ireland's education system and relevant international human rights covenants.

### The Right To An Effective Education

The NIHRC has proposed that "everyone has the right to an effective education."<sup>7</sup> What constitutes an effective education for each child is to be determined in accordance with 'the best interests' principle, which is elaborated upon in the chapter on children's rights.<sup>8</sup> This proposal appears to require that the educational needs of those who are particularly vulnerable, including children with special educational needs, those who are pregnant, in care or in the juvenile justice system, are properly ascertained and addressed. It recognises that an effective education should be directed towards "the full development of the person, including his or her talents, mental and physical abilities and sense of dignity" and should enable "all persons to participate effectively in the life of the community."<sup>9</sup> These aims are similar to some of those included in a number of human rights instruments, in particular Article 29(1) of the United Nations Convention on the Rights of the Child (UNCRC)<sup>10</sup> and Article 13(1) of the International Covenant on Economic, Social and Cultural Rights.<sup>11</sup> The reference to the "development of the person" is "intended to cover the many aspects important to human growth, such as intellectual, spiritual, physical, emotional, moral, creative and aesthetic development,"<sup>12</sup> an interpretation which reflects wide-spread dissatisfaction with the academic focus of the current curriculum<sup>13</sup> and the system of academic selection at the age of 11.<sup>14</sup> The second aim is an extended version of the traditional idea that education should prepare children for "the opportunities, responsibilities and experiences of *adult life*,"<sup>15</sup> (emphasis added) an acknowledgement of the fact that children should be prepared for effective participation in the life of the community

<sup>7</sup> Proposal 11(a)(2).

<sup>8</sup> NIHRC (2001) p 74. See Proposal 10(a)(2) "In all actions concerning children, whether undertaken by public or private institutions, individuals or bodies, courts of law, administrative or legislative authorities, the best interests of the child shall be the paramount consideration". Cf. Article 3(1) *UN Convention on the Rights of the Child* – "In all actions concerning children. . . the best interests of the child shall be a primary consideration."

<sup>9</sup> Proposal 11(a)(2).

<sup>10</sup> Article 29(1)(a) – "the development of the child's personality, talents and mental and physical abilities to their fullest potential." Article 29(1)(d) – "the preparation of the child for responsible life in a free society."

<sup>11</sup> Article 13(1) – "education shall be directed to the full development of the human personality and the sense of its dignity. . . (and) shall enable all persons to participate effectively in a free society. . ."

<sup>12</sup> NIHRC (2001) p 74.

<sup>13</sup> The Northern Ireland Council for the Curriculum, Examinations and Assessment (NICCEA) is currently consulting on proposals for a new Northern Ireland Curriculum. For further information, see NICCEA website at [www.ccea.org.uk](http://www.ccea.org.uk), last visited 31 October 2001.

<sup>14</sup> The *Burns* Report has recommended the abolition of the current system of selection. (Para 9.7, 'Education for the 21<sup>st</sup> Century: Post Primary Review Body' (Bangor, Department of Education, 2001).

<sup>15</sup> See Article 4 Education Reform (Northern Ireland) Order 1989.

throughout their lives.<sup>16</sup> The right is limited by the phrase “to the greatest extent possible.” This appears to be in recognition of the fact that the delivery of an effective education for each individual will depend both on his or her receptiveness and on the availability of resources to meet his or her needs with no particular outcome being guaranteed for any individual.

### Rights of Parents

The NIHRC has proposed that the State “shall, to the greatest extent possible, ensure the right of parents to have education and teaching for their children in conformity with their religious, philosophical and pedagogical convictions, subject to the competence of the child to decide for him or herself in accordance with his or her age and maturity.”<sup>17</sup> This proposal has obvious similarities with the second sentence of Article 2 of the First Protocol of the ECHR.<sup>18</sup> The key difference is an additional reference to ‘pedagogical convictions’, included as a result of the limited interpretation of the term ‘religious and philosophical convictions’ adopted by the European Court of Human Rights.<sup>19</sup> The term “pedagogical”, defined in the Glossary as “beliefs about how a person should be taught or receive education,” also appears in the European Union Charter of Fundamental Rights<sup>20</sup> and could be interpreted to include convictions concerning the education of children with special educational needs, language and integrated education. However, the NIHRC has chosen to highlight the fact that the term was included to provide a right to integrated education,<sup>21</sup> thereby raising doubts about whether it is also intended to cover these other convictions. The NIHRC has stated that the State should ensure parents’ rights “to the greatest extent possible.” It is unclear whether it is the NIHRC’s intention to override the effects of the UK’s reservation to the second sentence of Article 2 of the First Protocol of the ECHR, which would be highly controversial politically, or whether it is implicit that the rights of parents will be ensured “only so far as it is compatible with the provision of efficient education and training, and the avoidance of unreasonable public expenditure.”

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<sup>16</sup> In a similar vein the NICCEA has proposed that education should aim “to enable young people to achieve their potential and to make informed and responsible choices and decisions throughout their lives.” (Para 1.2, ‘Northern Ireland Curriculum Review. Phase I Consultation. Proposals for Changes to Northern Ireland Curriculum Framework April-June 2000’ (Belfast, NICCEA, 2000)).

<sup>17</sup> Proposal 11(a)(3).

<sup>18</sup> “In the exercise of any functions which it assumes in relation to education and to teaching the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

<sup>19</sup> NIHRC (2001) p 75. Parental views concerning the use of corporal punishment in school were considered to be philosophical convictions in the case of *Campbell & Cosans v UK* (1982) 4 EHRR 293, para 37. However, there has otherwise been a notable lack of cases brought successfully under the second sentence of Article 2. See, for example, *The Belgian Linguistic Case supra* n 5.

<sup>20</sup> Article 14(3) – “The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.”

<sup>21</sup> NIHRC (2001) p 75.

The qualifying reference in the first sentence, which indicates that parents' rights are subject to the right of the child to decide for him or herself could also be controversial. Proposals in the children's rights chapter recognise the right of the child to participate effectively in matters concerning his or her education (Proposal 10(i)(4)) and to be given an opportunity to express his or her views and to have them given due weight (Proposal 10(b)(1)) but the wording used here seems to imply that once the child has reached a certain age and maturity, he or she could make unilateral decisions about his or her education, a state of affairs which could itself be considered a violation of the right of parents under the second sentence of Article 2 of the First Protocol of the ECHR. The Committee on the Rights of the Child, in response to the United Kingdom's initial report under the UNCRC, expressed concern that children were not systematically invited to express their opinions on matters such as sex and religious education as required under Article 12 of the Convention<sup>22</sup> but the NIHRC's proposal would go further, by enabling some children to unilaterally apply for exemption from religious education and collective worship against parental wishes.

The second sentence of the proposal provides that the State shall "respect the right of parents to choose for their children education in schools with a particular religious ethos, education in integrated schools and education in Irish-medium schools."<sup>23</sup> The intention here is to extend the remit of the second sentence of Article 2 of the First Protocol to include a right of choice in the three designated areas. This goes beyond the established jurisprudence of the Strasbourg organs, which is that Article 2 does not require the State to provide or subsidise education of any particular type or level.<sup>24</sup> It is interesting that the limitation on parental rights in the first sentence of the proposal (i.e. "to the greatest extent possible") has not been expressly included in the second sentence, raising an issue as to whether the right of choice is intended to be absolute. On the other hand it could be argued that the obligation on the State in the second sentence is simply to 'respect' the right of parents to choose and not to 'ensure' that the child will be admitted to the school of their choice.

### Language Rights

The fact that Irish is the only language specifically mentioned in the chapter on education rights is difficult to understand in view of the fact that the NIHRC has elsewhere identified the need to guarantee the rights of *all* ethnic communities.<sup>25</sup> Indeed the NIHRC, drawing on the Framework Convention for the Protection of National Minorities, has recommended in the chapter on language rights that legislation be introduced to ensure for members of all linguistic communities, where there is sufficient demand, the right to learn

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<sup>22</sup> Para 14, 'Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland' UN Doc. CRC/C/15/Add.34 (1995) Article 12 UNCRC: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

<sup>23</sup> Proposal 11(a)(3).

<sup>24</sup> *The Belgian Linguistic Case* (1968) 1 EHRR 252.

<sup>25</sup> See Chapter 3.

their language and to be educated in and through it.<sup>26</sup> The aim of this proposal is to protect those belonging to the Chinese, Urdu and Traveller communities and to encourage the use of criteria to determine when sufficiency of demand exists.<sup>27</sup> However, it would perhaps make more sense if convictions concerning the language of education or the provision of opportunities for learning a minority language within English-medium schools were recognised as pedagogical convictions in the chapter on education rights. Alternatively, the NIHRC could expressly recognise the right to education in and/or through a minority language, subject to sufficiency of demand, as opposed to making legislative recommendations. This would also provide protection for speakers of Ulster Scots, recognised as a minority language under Part II of the European Charter for Regional or Minority Languages.<sup>28</sup>

### School Funding

The NIHRC has recommended that the State should provide financial support to schools “on an equitable and transparent basis, subject to reasonable requirements, including minimum numbers of pupils in any area and without prejudice to the need to address inequalities.”<sup>29</sup> This goes beyond anything in the ECHR or even the Framework Convention on National Minorities.<sup>30</sup> Its inclusion is justified by the fact that allegations about discrimination in funding have dogged the education system for years. In the past, concerns have been expressed about both the level of funding for existing schools as well as the criteria used to decide when to fund new schools. These have manifested themselves in litigation,<sup>31</sup> research reports

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<sup>26</sup> Proposal 13(5)(f). Cf. Art 14(2) *Framework Convention for the Protection of National Minorities* – “In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught in the minority language or for receiving instruction in this language.”

<sup>27</sup> NIHRC (2001) p 83.

<sup>28</sup> Under Article 7(1)(f) & (g) of the Charter, the UK has undertaken to base its policies, legislation and practice on certain objectives and principles, including the provision of appropriate forms and means for the teaching and study of Ulster-Scots and the provision of facilities enabling non-speakers to learn it. Cf. the fact that the UK has undertaken to promote the Irish language in Northern Ireland by making available either primary and/or secondary education, a substantial part of primary and/or secondary education or to provide for the teaching of Irish as an integral part of the curriculum at least to those pupils who or whose families so request and “whose number is considered sufficient” under Part III of the same Charter (Article 8(1)(b)(iv) & (c)(iv)).

<sup>29</sup> Chapter 11, 4.

<sup>30</sup> Article 2 of the First Protocol in conjunction with Article 14 ECHR only requires that, if the State does subsidise education of a particular type or level, it should not do so in a discriminatory way. See *Belgian Linguistics Case* (1968) 1 EHRR 252.

<sup>31</sup> See *In re Daly's Application* (unreported, October 5 1990) in which the Catholic Bishops claimed unsuccessfully that the funding formula for grant-maintained integrated schools discriminated against Catholics.

by the Standing Advisory Commission on Human Rights,<sup>32</sup> and ultimately legislative change which enables voluntary schools (the majority of which are Catholic) to opt for 100% funding of capital costs.<sup>33</sup> Further changes are underway. In particular, there are ongoing reviews of both the system of financial allocation for recurrent expenditure<sup>34</sup> and the viability criteria for establishing new Irish medium and integrated schools.<sup>35</sup> For these reasons, an overriding requirement for funding to be “equitable and transparent” should be welcomed by most in the education sector. The reception which the rest of the proposal is likely to receive is less certain, particularly the reservation that the obligation should be “without prejudice to the need to redress past inequalities”. This proactive approach to tackling inequalities is already established in the school funding system by virtue of the various New Targeting Social Need initiatives. It might also facilitate the implementation of the recommendation of the *Burns* Report that extra funding should be deployed to improve the standard of accommodation in some schools because this has a bearing “on their status and the esteem of pupils”.<sup>36</sup> However, any suggestion that the clause would enable preferential funding to be given to specific sectors such as integrated and Irish medium schools, might well be interpreted as a means of disadvantaging the traditional controlled and voluntary sectors and subject to controversy.

### Access to Education

The NIHRC has recommended that “no child shall be denied access to school” on any of the grounds which it proposes to include in its general anti-discrimination clause.<sup>37</sup> This would extend the heads of discrimination to matters such as family status and sexual orientation which are not expressly covered by the ECHR or the UNESCO Convention on the Elimination of Discrimination in Education. Most significant in the context of education, however, would be the fact that it would include protection against both direct and indirect discrimination, since the latter is not otherwise covered explicitly by Article 14 of the ECHR.<sup>38</sup> The prohibition of indirect discrimination on the grounds of religion in a system which is almost completely religiously segregated could well have far reaching effects on a number of issues which impinge on access to education such as admissions policies, school closures and funding. The NIHRC has indicated that there would need to be exceptions for schools with a particular religious ethos to

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<sup>32</sup> See R. Cormack, A. Gallagher and R. Osborne, ‘Religious Affiliation and Educational Attainment in Northern Ireland: the Financing of Schools in Northern Ireland’ Annex E in the *Sixteenth Report of the Standing Advisory Commission on Human Rights (1990-91)* (London, HMSO 1991).

<sup>33</sup> Education (NI) Order 1993, art 28. Prior to this, the maximum assistance a voluntary school could receive for capital costs was 85%.

<sup>34</sup> *Common Funding Formula for Grant-aided Schools – a consultation* (DE, 2001).

<sup>35</sup> *Review of Viability Criteria for Irish Medium and Integrated Schools* (DE, 2000).

<sup>36</sup> *Op cit* n 14, p 29.

<sup>37</sup> Chapter 4, 4.

<sup>38</sup> Nevertheless rules which are neutral on their face but impact adversely on a particular group may be susceptible to challenge under Article 14. See S. Livingstone, (1997) ‘Article 14 and the Prevention of Discrimination in the European Convention on Human Rights’ 1 *EHRLR* 25-34, at 30.

use criteria “within the mission of the school”.<sup>39</sup> In the past denominational schools in Northern Ireland have not used religious-based criteria – there was little need for them as few Protestant children applied to Catholic schools and vice versa. Whether church-owned schools will refrain from using them in the future is uncertain. The *Burns* Report has recommended that school admissions be determined by a centralised list of criteria which focus on matters such as parental choice, siblings and home to school distance.<sup>40</sup> These are likely to be seen to be unduly restrictive by schools (and parents) and this may result in calls for ethos-related criteria to be permitted. While faith schools may feel they have no choice but to go down this line, few people involved in education would see this as a positive way forward, particularly if it results in the type of admissions policies which are prevalent in church schools in England.<sup>41</sup>

One of the specific questions which has been put out for consultation is whether the Bill of Rights should require “the state to ensure that admission criteria for educational establishments ensure access to effective education.”<sup>42</sup> Any such proposal cannot be traced directly to any particular international human rights obligation. It arises out of the widespread concern about the fairness of the 11 plus<sup>43</sup> and current admissions policies employed in Northern Ireland’s schools.<sup>44</sup> However, genuine as these concerns are, it is difficult to see how the proposed clause might address them. The construction of the proposed right is awkward – admissions criteria cannot in themselves ensure access to an effective education for all. The best they can do is to ensure that when choices are made, they can be reasonably justified. Moreover, other recommendations in relation to a right to an effective education and a right not to be discriminated against in access to education would seem to have this covered. If everyone is assured an effective education and there are no unjustifiable barriers hindering their admission to individual educational establishments, it is difficult to see what additional protection someone might get from the proposal. In its explanation, the NIHRC has said that the proposal is intended to ensure that selection criteria “should be subjected to external review on the grounds of their impact on the delivery of effective education for all.”<sup>45</sup> This might have been better expressed as a direct proposal. There is no doubt that there is a strong argument for introducing a system of monitoring the impact of school admissions policies.<sup>46</sup> Although this is going to occur to some extent as a result of the statutory equality duty in section 75 of the Northern Ireland Act

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<sup>39</sup> They have also accepted the need for exceptions for single sex schools. This is the position in domestic sex discrimination legislation. See Sex Discrimination (NI) Order 1976, art 27.

<sup>40</sup> *Education for the 21<sup>st</sup> Century, Report of the Post-Primary Review Body*, (October 2001, DE).

<sup>41</sup> In England and Wales schools use criteria designed to measure the extent of religious commitment such as the number of church attendances, participation in church activities, the parish council etc.

<sup>42</sup> Question 29.

<sup>43</sup> *Op cit* n 3.

<sup>44</sup> See L. Lundy, *Access to Secondary Schools in Northern Ireland* (NIHRC 2001).

<sup>45</sup> Chapter 11(b) 2.

<sup>46</sup> See L. Lundy, *Access to Secondary Schools in Northern Ireland* (NIHRC 2001), pp 40-41.

1998, there is a case for broadening the remit of the review to include an examination of the other issues which affect access to education.

### Human Rights Education

The NIHRC's recommendation that "education in all its forms shall be directed to the promotion of human rights, equality, dignity of the person, respect for diversity and tolerance"<sup>47</sup> meets the requirements of several international instruments which identify the strengthening of respect for human rights as one of a number of educational aims.<sup>48</sup> It might therefore have been more appropriate if the reference to human rights education was inserted alongside the identification of educational goals in Proposal 11(a)(2). The NIHRC's recognition that this proposal will require the inclusion of specific provisions on education about national and international human rights standards in the Northern Ireland Curriculum<sup>49</sup> also reflects the current position of the UN Committee on the Rights of the Child.<sup>50</sup> However, what is not mentioned is that the promotion of human rights within schools may also require a change of educational ethos in Northern Ireland. The need for such an ethos was recognised by the UN Committee on the Rights of the Child when it recommended in its response to the UK's initial report that teaching methods in the UK be inspired by and reflect the spirit and philosophy of the UNCRC.<sup>51</sup> More recently the Committee on the Rights of the Child has recommended that values and policies conducive to human rights be promoted within schools on issues such as bullying and discipline and has also advocated "the participation of children in school life, the creation of school communities and student councils, peer education and peer counselling, and the involvement of children in school disciplinary proceedings...as part of the process of learning and *experiencing the realization of rights*" (emphasis added).<sup>52</sup>

### The Employment of Teachers

As Northern Ireland's domestic legislation currently stands, the employment of teachers is not subject to the stringent requirements of the Fair Employment and Treatment (NI) Order 1998 in respect of religious and political discrimination.<sup>53</sup> The NIHRC has not made a specific proposal regarding this exemption. However, it does question whether it should be

<sup>47</sup> Proposal 11(c).

<sup>48</sup> E.g. Article 26(2) UDHR & Article 13(1) ICESCR which recognise that education should be directed to the strengthening of respect for human rights and fundamental freedoms and should promote understanding, tolerance and friendship.

<sup>49</sup> NIHRC (2001) p 76.

<sup>50</sup> According to the Committee, human rights education should provide information on the content of human rights treaties. (Para 15, 'Convention on the Rights of the Child General Comment 1, The Aims of Education' (2000) UN Doc. CRC/GC/2001/1).

<sup>51</sup> Para 32, 'Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland' (1995) UN Doc CRC/C/15/Add.34.

<sup>52</sup> Paras 8 & 19, 'Convention on the Rights of the Child General Comment 1, The Aims of Education' (2000) UN Doc. CRC/GC/2001/1.

<sup>53</sup> S 71. The Equality Commission is required to keep the exemption under review.

removed and offers a provisional recommendation that it should be restricted to situations where there is a “genuine occupational qualification.” The issue has been part of a recent consultation on the proposed Single Equality Bill for Northern Ireland.<sup>54</sup> Moreover, it has already been addressed by the European Union’s Framework Directive on Equal Treatment in Employment and Occupation which prohibits discrimination in schools on the basis of religion or belief other than where it is a genuine occupational requirement.<sup>55</sup> The Framework Directive includes a specific exemption for Northern Ireland in relation to the recruitment (note – not promotion) of teachers “in order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities.”<sup>56</sup> Any change to the exemption would be controversial, as it is essentially an endorsement of the Catholic Church’s desire to employ Catholic teachers in its schools. In reality, the issue is likely to be determined by the outcome of the consultation on the Single Equality Bill rather than the Bill of Rights. Nonetheless, the NIHRC’s tentative proposal is one possible outcome from that process.<sup>57</sup> If the exemption for the recruitment of teachers were to be confined to situations where religion or belief is a genuine occupational requirement, the impact within the education system may be more symbolic than real as Protestant teachers are unlikely to seek employment in droves in Catholic schools. However, at that stage the discussion will undoubtedly have been transformed into a debate about what actually constitutes a genuine occupational qualification.

### **Children’s Rights In Education.**

The NIHRC has to be commended for producing such a detailed document on so many complex and controversial issues in a relatively short time. However, given the scale of the task, it is inevitable that the proposals at times do not read as a cohesive whole. One example of this is the fact that not all of the education rights are in the education chapter.<sup>58</sup> There are several quite significant education rights in the chapter on children’s rights. For instance, it is proposed that a child should be guaranteed effective participation in matters affecting his or her education, which is a strengthened version of Article 12 of the UNCRC. The reasons why the education rights have been dispersed in this way are not entirely clear.<sup>59</sup> However, what is more problematic is that the rights in Chapter 10 (children’s rights) have at times a quite different character to the rights in

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<sup>54</sup> *Promoting Equality of Opportunity: A Single Equality Bill for Northern Ireland* (OFMDFM, 2001).

<sup>55</sup> Council Directive 2000/78/EC.

<sup>56</sup> *Ibid* art 15.

<sup>57</sup> The other potential outcome is the retention of the *status quo* so far as recruitment is concerned.

<sup>58</sup> It is understandable that language rights in education appear in the language chapter. A cross-reference might, however, have been helpful.

<sup>59</sup> The NIHRC says that the rights in chapter 10 are those of particular importance to children. However, it is difficult to separate rights in this way, especially given that the main rights to an effective education and non-discrimination in access are in Chapter 11.

chapter 11 (education). For example, Chapter 10 includes the following proposal:

“School exclusions shall be imposed only as a last resort. Every child excluded from school has the right to be informed promptly of the grounds for exclusion, to receive all documentation relating to the school’s decision to exclude and to have the right to participate in an independent appeal procedure, together with his or her parents, guardians or other independent representative.”<sup>60</sup>

While a change in the domestic legislation to this effect would be welcomed by all who are interested in children’s rights, it looks out of place in a human rights charter which purports to produce rights:

“drafted in general terms, setting out basic principles for public bodies in performing their duties but also allowing a good deal of flexibility in the way in which these principles are implemented. . .”<sup>61</sup>

The same basic outcome might have been achieved through robust enforcement of the right not to be denied education, read together with the child’s right to participate in decision-making. However, perhaps the most striking difference is the fact that, while the children’s rights proposed go well beyond anything which might be considered to reflect “the particular circumstances of Northern Ireland”, in the education chapter, attention seems to have been confined to dealing with the aspects of the system which have previously proved contentious.

### CONCLUSION

The NIHRC has acknowledged that its proposals will not provide answers to all Northern Ireland’s human rights dilemmas – the Holy Cross protests being the obvious example in the area of education. However the proposals do contain some significant extensions to the ECHR which would enable fundamental human rights principles to be deployed in the education system when change is being considered and in the resolution of the disputes which will inevitably arise. Much is to be welcomed but most might have been predicted. In some ways, the opportunity for fundamental change could be lost by the focus on some of the obvious areas of contention within the system.<sup>62</sup> It may be that certain interests (such as the Irish medium and integrated sectors and the children’s rights lobby) were actively engaged with the Bill of Rights process from the beginning and therefore were well placed to influence the initial consultation. It is to be hoped that other education interests will now enter the debate and what will emerge ultimately is a broadly-based document which will provide the NIHRC’s stated aspiration of providing “a rallying point for all sections of the community.”

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<sup>60</sup> Chapter 11(i) 3.

<sup>61</sup> Summary, Introduction.

<sup>62</sup> See discussion on Proposal 11(a)(3).

## ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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### INTRODUCTION

Delivering a report to the Human Rights Commission on what economic and social rights should be in a Bill of Rights was a microcosm of the much wider process now taking place prior to the Commission publishing its own advice to the Secretary of State.

The twenty two members of the working group came from diverse occupational interests including employers' organisations, the trade union movement, academic life, health and social services management, the voluntary sector, and community based health, economic development and environmental groups. The final report represented a document that no individual would have drafted if left to his or her own devices, but one that everyone was able to sign off in agreement.

The starting point in making the case for economic and social rights is the relevant text on a Bill of Rights contained in the Belfast Agreement:

“The new Northern Ireland Human Rights Commission will be invited 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. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:-

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland;
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors”.

In effect, there are four key components that must be addressed in bringing forward economic and social rights in any Bill of Rights. These are rights that must:-

- be supplementary to those already contained in the European Convention on Human Rights (ECHR);
- reflect the particular circumstances of Northern Ireland;
- draw on international instruments and experience as appropriate;
- recognise the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

Whether these elements are interpreted narrowly or more broadly will determine, in significant measure, the scope and value of any Bill of Rights eventually enacted. The working group's clear position was to take a broad approach in offering its advice.

### **Interpreting The Mandate**

The European Convention on Human Rights protects fundamental rights and freedoms including the right to a fair trial, the right to life, freedom of expression, thought, conscience and religion, and the right to family and private life. In practice, the Convention concentrates mainly on protecting civil and political rights. Nonetheless, creative attempts have been made to enforce economic and social rights within the confines of the Convention. For example, the Law Centre in Belfast currently has cases lodged with the European Court of Human Rights arguing that the failure to provide widowers with social security benefits equivalent to those paid to widows is contrary to the right to family life (Article 8), freedom from discrimination (Article 14) and the right to personal property (Article 1, Protocol 1). Economic and social rights (for example, the right to housing, health, an adequate standard of living, and the right to work) are contained in other international human rights instruments which are not enforceable by individual legal action.

The defining feature of the Convention, namely individual legal enforcement in court, has been strengthened by the introduction of the Human Rights Act. Paradoxically, this has increased the gap between the scope for enhancement of civil and political rights and their economic and social counterparts.

The United Kingdom government has ratified a number of international and European human rights instruments including the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of Discrimination against Women (1979), the Convention on Elimination of all forms of Racial Discrimination (1966), the Convention on the Rights of the Child (1989), and the European Social Charter of the Council of Europe (1961). These human rights instruments require the UK government to justify periodically to UN and other human rights committees that it is meeting its international obligations. This process effectively amounts to an elaborate dance with the government highlighting all the policy provision that meets its obligations whilst pressure groups point out all the gaps in provision plus malign policy and legislation which run contrary to such obligations. A report by the relevant monitoring committee is then produced which is often critical of the UK government in specific areas. This process is useful in highlighting deficiencies in policy and strengthening accountability yet falls a long way short of having real bite. Moreover, the process does little to stimulate an effective debate within local communities. A Bill of Rights offers an opportunity to place particular emphasis on economic and social rights which are not contained in the Convention.

A major issue for consideration is what are the particular circumstances of Northern Ireland which need to be addressed within a Bill of Rights? Economic and social problems are not specific to Northern Ireland. Whilst the extent of poverty, unemployment, ill-health and disability is on average greater than elsewhere in the United Kingdom, there are pockets of

deprivation in some areas which match those faced in Northern Ireland. This, however, misses the point.

Economic and social conditions cannot, any more than political circumstances, be divorced from the civil conflict. Take just one example, the prevalence of ill-health and disability. Comparative health statistics within the United Kingdom or across Europe generally place Northern Ireland at the wrong end of any league table. Life expectancy rates, death rates from cancer, coronary heart disease, the proportion of the population suffering long term illness, the prevalence of teenage pregnancies all point to a society where health standards are low. In Northern Ireland, the proportion of people with a disability is 20 per cent higher than in Britain. Unravelling all the reasons for the differences in health is difficult, though it is clear that the prevailing economic and social conditions and civil conflict have played a role. Moreover, the violence of over 30 years has shaped economic and social conditions as well as the response to tackling such problems. As a result, economic and social rights fall legitimately within the Bill of Rights.

In the context of the Belfast Agreement, a Bill of Rights is designed to strengthen the transition towards peace and to recognise parity of esteem between the two main communities. The Research Evaluation Services Northern Ireland Omnibus Survey conducted in July 1999 for the Human Rights Commission demonstrated over 80 per cent support in both main communities for the inclusion of rights covering health, housing and employment in a Bill of Rights. Written responses prior to the publication of the Commission's own consultation document confirmed a high level of support for economic and social rights being part of a Bill of Rights. Therefore, economic and social rights have a unifying potential and are a building block towards a more prosperous and peaceful society.

### **The Working Group's Approach**

How should economic and social rights be developed within a Bill of Rights? The working group's starting point was the development of a clear set of principles, in effect, a statement of intent framed in an interpretative clause. The clause would act as a frame of reference for all economic and social rights. A number of key principles could then be encompassed. First, that poverty and social exclusion represent a fundamental denial of human dignity. Secondly, that legal remedies by themselves are not sufficient to guarantee such dignity. A more systematic, government led approach is required recognising the need for interdepartmental co-operation, partnership with civic and political organisations, and a transparent and accountable approach to legislative and policy development.<sup>1</sup> Thirdly, that economic and social rights should be guaranteed beyond effective legal redress by the development of a programmatic response which charges government as well as courts with responsibilities for tackling violations of economic and social rights.<sup>2</sup> This brings an additional dimension whereby government and public

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<sup>1</sup> Such a clause would entail explicit reference to the importance of consultation, access to information, and public education and the necessity of public participation in decision-making processes.

<sup>2</sup> This statement would be tied to an acknowledgement that resources still need to be allocated in a proportionate manner.

authorities are charged with pro-actively developing strategies to enhance the development of economic and social rights.

These principles would then be underpinned with an equality statement protecting rights equally without discrimination on the basis of religious belief, political opinion, age, race, ethnicity, gender, disability or sexual orientation.

The interpretative clause read as follows:-

- “(1) the provision of economic and social rights is subject to the general principle that poverty and social exclusion represent a fundamental denial of human dignity;
- (2) legal remedies alone cannot assure the dignity of the human person. The conditions which alleviate social exclusion and deprivation include, but are not limited to, consultation and communication with the public, education and effective access to information, advancing inter-agency responsibility for the enforcement of economic and social rights, facilitating public participation in decision making processes and acknowledging the inter-dependency of rights;
- (3) without prejudice to effective judicial and administrative remedies and the need to allocate resources in a proportionate manner, government is encouraged to develop programmatic responses to the underlying causes of social and economic rights violations;
- (4) all the rights outlined below shall be protected equally and without discrimination on the basis of religious belief, political belief, race, ethnicity, gender, sexual orientation, disability, or age”.

The interpretative clause was designed to bring a collective as well as individual dimension to developing economic and social rights. With the current United Kingdom government emphasising individual and personal responsibility at least as much as individual rights when formulating policy, the collective response assumes greater importance. Whilst responsibilities sit legitimately alongside rights, much of the existing debate uses the language of responsibilities as a means to stifle rights. Moreover, individual rights rely on the confidence and awareness of an individual to exercise his or her rights. Whilst some commentators have suggested that people in Northern Ireland are litigious, the overall picture is more complex.

The marked reluctance to challenge the level of domiciliary, respite and other forms of social care or express dissatisfaction with health care treatment suggests that some entitlements are not seen in terms of rights. With social security, where a culture of rights has developed, the low take up of means-tested benefits is evidence that lack of awareness, complexity and stigmatisation all act as powerful barriers to establishing entitlements. Moreover, studies of use of the National Health Service suggest that well educated, middle and higher income groups make most effective use of health care services.

It is clear, therefore, that some individuals and social groups are more adept at exercising rights than others. Those already marginalised and socially

excluded will benefit less from an exclusively individual rights based approach.

It is important to emphasise that the argument for a programmatic dimension to economic and social rights is to augment and not to replace judicial legal enforcement.

The rights recommended for inclusion in the Bill of Rights were a right to health, to an adequate standard of living, to housing, to work and to a healthy and sustainable environment. The framing of these rights all drew on existing international human rights instruments, particularly the United Nations Covenant of Economic Social and Cultural Rights (1966), the European Union Charter of Fundamental Rights (2000), the Economic Social Charter (1996)<sup>3</sup>, as well as the South African Bill of Rights (1996). One departure from international norms was the creation of a right to social and civic care, in effect, a recognition of state support for provision of social services and community care (for example, respite and domiciliary care, nursing and residential care). This builds on the internationally recognised principle of social assistance which has traditionally covered financial support only. Within the working group, there was a strong demand for a Bill of Rights to address the concerns of carers and those in need of care.

Finally, the working group tackled, head on, a number of common objections to making economic and social rights judicially enforceable. First, it has been argued that economic and social rights are vague, imprecise and difficult to draft in legislation. This does not effectively stand up to scrutiny as international human rights legislation has been able to come up with specific definitions and the question of what is an adequate standard of living is no more open to interpretation than what makes a fair trial. Second, economic and social rights have been argued as being less susceptible to legal enforcement. In practice, courts already have long experience of deciding questions of whether public bodies are meeting their statutory obligations (for example, whether health and social services trusts are meeting their duties to provide services to people with disabilities, or whether education and library boards are meeting statutory obligations to people with special learning needs). Moreover, the European Court of Justice in enforcing rights under the Treaty of Rome, particularly on freedom of movement and co-ordination of social security and the right to social and tax advantages, has long experience of judicially addressing what are effectively economic and social rights. Here though is where we move closer to the nub of the debate. Economic and social rights come with a price tag attached. A right to civic care including social services support or to health care entails substantial public expenditure. At the same time a cost is also attached to guaranteeing a fair trial which necessarily entails funding the judiciary and legal administration as well as paying lawyers through a legal aid scheme. These costs are, rightly, seen as essential in preserving a fundamental right. The principle applies equally to economic and social rights. A further cogent argument is made that placing economic and social rights in the hands of courts distorts democracy inasmuch as judges are left to take policy decisions. Putting aside the question of selection procedures and representativeness of the judiciary which is an overdue matter for legal

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<sup>3</sup> As revised.

reform, experience suggests that judges have long performed this balancing act when dealing with judicial review applications. There is a strong resistance, in some quarters, to legally enforceable economic and social rights on the grounds that this dilutes the powers of policy makers and legislators. Enforceable economic and social rights do not cede powers to micro-manage social and economic policy and provision to judicial authority. Instead, they subject policies and practice to scrutiny to ensure that basic standards are met and proportionate responses to needs and demands are applied.

### **The Approach Of The Human Rights Commission**

An initial reading of the chapter on economic and social rights suggests that much of the working group's report has been adopted. Closer scrutiny however, reveals that a significantly different approach has been taken by the Commission.

To begin positively, the Commission recognised that the protection of economic, social, civil and political rights are interdependent. The rights to be protected are those identified by the working group and the wording of the rights (with one or two exceptions) does not significantly differ from those recommended. The idea of a right to civic and social care has also been accepted.

Where the Commission's consultation document parts company with the working group's approach is on enforcement. In its discussion on enforcement the Commission noted:-

“The working groups on social and economic rights and on implementation, and a number of submissions, drew the Commission's attention to the need to develop innovative approaches to the delivery of social and economic rights in addition to enforcement by judicial decisions.

These would treat different types of rights differently, some being justiciable and directly enforceable by judges and some being enforceable in a programmatic way according to prescribed processes. The working group on social and economic rights was unanimous in its conclusions regarding the inclusion and implementation of social and economic rights in the Bill of Rights. As regards enforcement, the group said:-

Legal remedies are necessary but not sufficient to assure the dignity of the human person. The conditions which alleviate social exclusion and deprivation include but are not limited to: consultation and communication with the public, education and effective access to information, advancing inter-agency responsibility for the enforcement of economic and social rights, facilitating public participation in decision making processes and acknowledging the inter-dependency of rights”.

The working group was clear about its approach, namely, that legally enforceable social and economic rights should be augmented by a programmatic response that embeds the rights in policy and practice. The programmatic approach supplements legally enforceable rights. This is in

recognition that making legal rights meaningful is not confined to legal remedies, but extends to how legislation, policy and practice are developed and implemented. Moreover, this approach, combined with clearly worded legal rights, is designed to foster an approach which ensures a Bill of Rights is readily understandable and has resonance with everyday concerns across the two main communities. There should be no ambiguity, however, economic and social rights are about building on the foundation of judicially enforceable legal rights.

The Commission's approach appears to limit legal enforcement to protection of due process and equality rights. In expanding on what this means, the Commission notes:-

“The courts would not be able to take direct decisions on how to allocate resources (beyond perhaps specifying certain minimum standards which must always be met) but, would be able to supervise the proper implementation of the rights in question by applying concepts such as proportionality, reasonableness, equality and human dignity”.

There is a major inconsistency in that the failure to provide a legal remedy to review substantive decisions (except on grounds of procedural flaws or discrimination) undermines the desire to ensure the proper implementation of the rights. In effect, the provision of inadequate financial assistance to meet economic and social rights cannot be challenged where such assistance is at least targeted fairly and without discrimination. Equally, sustained cutbacks in provision will not be open to challenge where implemented in a fair and non-discriminatory manner. As a result, economic and social rights will have made a limited move forward.

The Commission has a difficult task and the dilution of the working group's approach may reflect pragmatic considerations about ultimately persuading the Secretary of State and the Westminster parliament to include any economic and social rights within a Bill of Rights. It is wise not to underestimate the powerful forces opposed to a Bill of Rights, never mind one that is expansive in form. Nonetheless, the current proposals from the Commission represent a squandered opportunity.

## THE IMPLEMENTATION OF A BILL OF RIGHTS IN NORTHERN IRELAND

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### I. INTRODUCTION

The language of rights is a prominent feature of public debate in the United Kingdom (UK) and the Republic of Ireland. Legal change in both states in recent times has included human rights protection. This pattern marks a shift in intensity rather than a complete break. Both were already parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).<sup>1</sup> The Convention has dominated discussion of reform, in the UK rather more than the Republic of Ireland. The result is that the Convention figures heavily in legal and political life. This reliance on human rights standards reflects international and European trends also. Human rights norms and institutions are now part of the international and European mainstream.

Few states, communities or individuals will reject human rights outright. Most now accept that rights are a "good thing". This fact, while impressive, does not advance the debate very far. The disagreements of significance now largely involve the contested meaning of human rights norms, issues of compliance and the most effective enforcement mechanisms. With the growing number of standards, implementation in particular has become a central concern of the human rights movement.

Northern Ireland is not a sovereign, independent state. It is, at present, a region of the UK.<sup>2</sup> Although it has a distinct legal system, law and politics are shaped by broader UK processes. In Northern Ireland, human rights have moved from the margins to the mainstream.<sup>3</sup> The Belfast Agreement 1998 contained extensive reference to human rights protection.<sup>4</sup> The Agreement, and the Northern Ireland Act 1998, have provided the framework and foundation for much of the human rights debate in Northern Ireland in the last three years. The current Bill of Rights process owes its existence and legitimacy to the Agreement. The aim of this article is to examine issues of implementation which arise from the Bill of Rights debate in Northern Ireland. It is essential that the Northern Ireland process is located within the

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<sup>1</sup> ETS (1950) 5; UKTS (1950) 70.

<sup>2</sup> The people of Northern Ireland may, at some future date, vote in a poll to leave the UK and form part of a united Ireland, Northern Ireland Act 1998 s 1 and Sch 1.

<sup>3</sup> O'Brien and Mageean, "From the Margins to the Mainstream: Human Rights and the Good Friday Agreement" (1999) 22 *Fordham International Law Journal* 1499.

<sup>4</sup> Harvey and Livingstone, "Human Rights and the Northern Ireland Peace Process" [1999] *EHRLR* 162.

broader arguments around implementation.<sup>5</sup> A range of mechanisms are in place at present. The Bill of Rights will supplement these. One objective in this article is to suggest that multiple enforcement mechanisms will be vital for the success of a Bill of Rights. It is a banal point, but a Bill of Rights for Northern Ireland will require suitably rigorous enforcement mechanisms. This article explores implementation with reference to current practice, some comparative examples and proposals being debated in Northern Ireland. The objective is not to provide definitive guidance or advice on the way forward. The intention is to raise questions for further discussion and analysis.

## II. HUMAN RIGHTS PROTECTION IN CONTEXT

### (a) Constitutional change and human rights

The debate on human rights protection in Northern Ireland is occurring within a wider discussion about constitutional change in the UK and the European Union (EU).<sup>6</sup> Devolution, for example, raises intriguing questions about the future of human rights protection.<sup>7</sup> The constitutional reform programme of the Labour government lacks an overarching guiding principle. It is piecemeal and pragmatic. There is no political consensus in the UK about the government driven process of constitutional change.<sup>8</sup> This may give the judiciary an important role in developing constitutional principles,<sup>9</sup> but it not apparent that this should be their role (or that it is one they are keen to have). The Bill of Rights process in Northern Ireland thus takes place within the context of unease about the coherence of constitutional reform in the UK. The decision to convene an EU Constitutional Convention to consider the constitutional architecture of that particular Union may prompt some reflection about the state of the UK's constitution. If the EU adopts a "written constitution" then a similar process of constitutional codification may be on the agenda in the UK. For example, the existing constitutional arrangements act as an impediment to some of the expressed

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<sup>5</sup> "We need something more prosaic: 'implementation, implementation, implementation'. The rigour of a legal regime can help to underpin the values of ethical globalisation. The next phase must be less aspirational, less theoretical and abstract, and more about keeping solemn promises made." Mary Robinson, UN High Commissioner for Human Rights, "Globalisation has to take human rights into account" *The Irish Times* 22 January 2002.

<sup>6</sup> For interesting thoughts on comparisons between the UK and US see O'Connor, "Altered States: Federalism and Devolution at the 'Real' Turn of the Millennium" (2001) 60 *Cambridge Law Journal* 493, at 502: "Federalism represents a true division of power, whereas devolution is simply a delegation. While each of our countries is a Union, there are two spheres of sovereignty in America, but a single realm in the United Kingdom."

<sup>7</sup> In March 2001, the Scottish Justice Minister, Jim Wallace, launched the consultation document *Protecting our Rights: A Human Rights Commission for Scotland?* (2001). See also *Analysis: Protecting our Rights: A Human Rights Commission for Scotland* (2001) for an examination of the 70 responses received. The majority supported the idea of a Scottish Human Rights Commission (77%). The Northern Ireland Human Rights Commission made a submission to this process.

<sup>8</sup> Lord Lester of Herne Hill, "Developing Constitutional Principles of Public Law" [2001] *PL* 684.

<sup>9</sup> *Ibid.*

goals of the present government. A complicated constitutional picture has emerged in the UK. It is this background which makes the drafting of a Bill of Rights for Northern Ireland such a complex task.

### **(b) Human Rights, the Belfast Agreement and the Northern Ireland Act 1998**

The Belfast Agreement includes reference to human rights.<sup>10</sup> The language of the document suggested that human rights protection would assume a central place in the future governance of Northern Ireland. The Declaration of Support provided:

“The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.”<sup>11</sup>

In Strand One, the ECHR, any Bill of Rights and the Human Rights Commission are included in a list of safeguards “to ensure that all sections of the community can participate and work together successfully in the operation of these institutions”.<sup>12</sup> The stress is on safeguards which will guarantee participation. In other respects, the Northern Ireland Assembly is straightforwardly constrained with reference, for example, to the Human Rights Act 1998.<sup>13</sup> A provision of an Act of the Assembly is not law if it is incompatible with the relevant provisions of the ECHR.<sup>14</sup> Mechanisms are in place within the Assembly to scrutinise whether proposed legislation is within its legislative competence. For example, the Presiding Officer ensures that the provisions of proposed legislation are scrutinised prior to their introduction to the Assembly.<sup>15</sup> The Northern Ireland Human Rights Commission also has a role in offering advice on the compatibility of a Bill with human rights.<sup>16</sup> The reference to human rights in the relevant provisions of the Northern Ireland Act 1998 is not confined to the ECHR. This allows the Commission to draw upon a range of human rights standards in providing advice to the Assembly.

The relevant Minister is required to state that a new Bill is within the legislative competence of the Assembly.<sup>17</sup> The Attorney General for Northern Ireland has the power to refer the issue of competence to the Judicial Committee of the Privy Council for decision.<sup>18</sup> A positive decision on legislative competence from the Judicial Committee applies to the

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<sup>10</sup> *Agreement Reached in the Multi-Party Negotiations* (1998, Cm 3883).

<sup>11</sup> “Declaration of Support” para 2.

<sup>12</sup> Strand One “Democratic Institutions in Northern Ireland” para 5.

<sup>13</sup> Strand One “Democratic Institutions in Northern Ireland” para 26(a); Northern Ireland Act 1998 s 6(2)(c) and s 7 (1)(b).

<sup>14</sup> Northern Ireland Act 1998 s 6(2)(c).

<sup>15</sup> Northern Ireland Act 1998 s 10.

<sup>16</sup> Northern Ireland Act 1998 s 69(4).

<sup>17</sup> Northern Ireland Act 1998 s 9.

<sup>18</sup> Northern Ireland Act 1998 s 11.

provision if it is enacted as part of an Act of the Assembly.<sup>19</sup> The Assembly Committees also have a significant role in the legislative process. There is, however, as yet no human rights committee.<sup>20</sup>

The current scheme permits pre-legislative scrutiny with reference to human rights standards, in addition to court-based mechanisms. Democratic mechanisms are therefore in place to assist in mainstreaming human rights. Reference to human rights can be found in the Executive Committee's *Programme for Government 2002-2004*.<sup>21</sup> Initiatives such as New Targeting Social Need are also aimed at securing socio-economic rights, although not explicitly addressed in this language.<sup>22</sup>

Reference to the Bill of Rights is included in the section on "Rights, Safeguards and Equality of Opportunity". On human rights, the parties to the Agreement affirmed the importance of the following rights: 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. Reference is made, not merely to principles, but also to new institutions. The Northern Ireland Human Rights Commission, formally established under the Northern Ireland Act 1998, is first mentioned in the Agreement.<sup>23</sup> The creation of the Commission (although not entirely novel in the Northern Ireland context) is recognition of the importance of supplementing traditional forms of human rights protection. This is reinforced when one considers another result of the Belfast Agreement; the creation of the Irish Human Rights Commission.<sup>24</sup>

The Bill of Rights for Northern Ireland is mentioned under the heading "United Kingdom Legislation". The relevant section merits full citation:

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<sup>19</sup> Northern Ireland Act 1998 s 11(4).

<sup>20</sup> See Northern Ireland Human Rights Commission, *The Northern Ireland Assembly's Standing Orders and Human Rights Protection* (2001). See also Belfast Agreement, Strand One "Democratic Institutions in Northern Ireland" para 11: "The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights." There is a Human Rights Unit within the Office of the First Minister and Deputy First Minister. Its aim is: "The promotion of a culture of rights and responsibilities within the Northern Ireland departments and the public authorities for which they are responsible."

<sup>21</sup> Northern Ireland Executive, *Programme for Government 2002-2004*, endorsed by the Northern Ireland Assembly 10 December 2001, p 15: "The core principles and values of equality and human rights are fundamental to our work. We are committed to promoting equality and human rights through strong legislation and effective public policies and strategies, recognising best practice. In this way we seek to assist greater inclusion."

<sup>22</sup> *Ibid* at 10-11.

<sup>23</sup> "Rights, Safeguards and Equality of Opportunity" para 5; Northern Ireland Act 1998 ss 69-72 and Schedule 7. See generally Livingstone, "The Northern Ireland Human Rights Commission" (1999) 22 *Fordham International Law Journal* 1465.

<sup>24</sup> "Rights, Safeguards and Equality of Opportunity" para 9.

“The new Northern Ireland Human Rights Commission. . . will be invited 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. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.”

The Belfast Agreement provides a new context for considering the protection of human rights in Northern Ireland. Brice Dickson, the Chief Commissioner of the Northern Ireland Human Rights Commission, argues that it is time to flood Northern Ireland with human rights and equality thinking as a way to ensure peace and stability.<sup>25</sup> There is an ongoing debate about the role of the Commission. The Northern Irish Commission has made a number of proposals to improve its overall effectiveness.<sup>26</sup> These proposals address some of the problems it has faced.

### **(c) The Human Rights Act 1998**

Political developments in Britain have had (and for straightforward legal reasons continue to have) an important impact on Northern Ireland. As noted above, Northern Ireland remains part of a unitary state. If a majority of the population decide to vote to leave the UK then they will be joining another unitary state (the Republic of Ireland). The variety of attempts to challenge constitutional orthodoxy have not altered the attachment of the Westminster Parliament to traditional conceptions of sovereignty.

The general election of May 1997 brought a government to power in Britain committed to legislating for human rights.<sup>27</sup> One result was the enactment of

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<sup>25</sup> Dickson, “The protection of human rights- lessons from Northern Ireland” [2000] *EHRLR* 213.

<sup>26</sup> Northern Ireland Human Rights Commission, *Report to the Secretary of State Required by Section 69(2) of the Northern Ireland Act 1998* (2001).

<sup>27</sup> Lord Irvine of Lairg, “Constitutional Reform and a Bill of Rights” [1997] *EHRLR* 483; Jack Straw (the then Secretary of State for the Home Department) *HC Debs* vol 307 col 769 (16 February 1998): “This is the first major Bill on human rights for more than 300 years. It will strengthen representative and democratic government. It does so by enabling citizens to challenge more easily actions of the state if they fail to match the standards set by the European Convention. The Bill will thus create a new and better relationship between the Government and the

the Human Rights Act 1998.<sup>28</sup> The Act is applicable throughout the UK, and extensive preparations were made for its entry into force.<sup>29</sup> The legislation has been described, unfortunately<sup>30</sup> (in my view) on numerous occasions, as a Bill of Rights,<sup>31</sup> and less problematically as having special constitutional significance.<sup>32</sup> The legislation, which gives further effect<sup>33</sup> in the UK to selected Convention rights, has limits.<sup>34</sup> It is too early to assess the precise impact of the new legislation.<sup>35</sup> As one would expect, it has been raised in

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people.” Straw and Boateng, “Bringing Rights Home: Labour’s plans to incorporate the European Convention in UK law” [1997] *EHRLR* 71.

<sup>28</sup> Jowell and Cooper (eds), *Understanding Human Rights Principles* (2001).

<sup>29</sup> Croft, “Whitehall and the Human Rights Act 1998” [2001] *EHRLR* 392.

<sup>30</sup> Although “incorporation” of the ECHR has long been described as one way to achieve a Bill of Rights for the UK there are flaws in this approach. While the rights are subject to dynamic interpretation by the European Court of Human Rights, and new Protocols can be adopted, the ECHR has its limitations. There are good reasons to support the notion of “home grown” Bills of Rights which reflect the particular circumstances of specific legal jurisdictions.

<sup>31</sup> Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (2000) at 20: “But the Human Rights Act is more than just the incorporation of a regional human rights treaty into UK law, which on the face of it could be a relatively minor, technical development. The people of these islands have finally got a bill of rights.”

<sup>32</sup> Lord Irvine of Lairg, “The Development of Human Rights in Britain under an Incorporated Convention on Human Rights” [1998] *PL* 221; Clayton and Tomlinson, *The Law of Human Rights* (2000) at 66; D. Feldman, “The Human Rights Act 1998 and Constitutional Principles” (1999) 19 *Legal Studies* 165.

<sup>33</sup> See the comments of Lord Lester of Herne Hill HL Debs vol 584 cols 1257–1260 (19 January 1998) and the response of Lord Irvine of Lairg HL Debs vol 584 col 1261 (19 January 1998).

<sup>34</sup> McGoldrick, “The United Kingdom’s Human Rights Act 1998 in Theory and Practice”, (2001) 50 *ICLQ* 901, at 908: “There was no attempt in the Human Rights Act to add any new substantive rights and there was no adaptation of the ECHR to the UK system. Thus, there is no general right to equality, no inclusion of social rights or economic rights, no express minority rights, and no specific gender based rights.”

<sup>35</sup> One impact is the significant increase in the use of comparative jurisprudence, see McGoldrick *ibid* at 919. See Klug and Starmer, “Incorporation through the ‘front door’: the first year of the Human Rights Act” [2001] *PL* 654, at 664: “[T]here is clear evidence that the Human Rights Act has begun to influence judicial decision-making in a broad range of cases.” Note also Wadham, “The Human Rights Act: One year on” [2001] *EHRLR* 620, at 638-639: “Perhaps those who lobbied for the Human Rights Act were a little naïve because despite these more optimistic signs from the courts Liberty does not think that overall the judiciary have followed the principles in the Convention as well as they should. . . . As a result of this analysis Liberty is creating a new ‘Human Rights Litigation Unit’ to assist applicants to take their cases to the Strasbourg Court.” See Gearty, “Tort Law and the Human Rights Act” in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) at 243-259: “[The Human Rights Act] will be buffeted on the waves of litigation, thrown back and forth between various litigants, sometimes doing good, sometimes doing bad, occasionally being washed up on useless analytical islands where it will be stuck for years on end until a rescue by some tidal wave of fresh thinking, only to be buffeted endlessly in some new direction. The only thing of which we can be sure is that in ten years’ time human rights law will be unrecognisable to us today.”

several cases in Northern Ireland.<sup>36</sup> Some disappointment has been expressed from the perspective of trends in English law.<sup>37</sup> This may reflect two things. First, the high levels of expectation which were created, and secondly, the lack of popular backing as a result of an inadequate consultative process. As noted above, there also continues to be uncertainty about the evolving constitutional context. The Human Rights Act was not part of a comprehensive constitutional reform project.

There was much debate about the best model for protecting human rights. The enforcement mechanism is of interest for the purpose of this article. A starting point is that the Act does not give further effect to the ECHR in its entirety.<sup>38</sup> Technically, the Convention has not been incorporated into national law; it has been given further effect. In addition, the enactment of this legislation does not prevent an individual from taking a case to the European Court of Human Rights. The Act contains an interpretative obligation or “rule of construction”.<sup>39</sup> The courts are under an obligation to interpret primary and subordinate legislation “so far as it is possible to do so” compatibly with Convention rights.<sup>40</sup> As a direct consequence of the continuing importance of the principle of parliamentary supremacy to the Labour government,<sup>41</sup> a mechanism was created to permit designated courts to rule on the issue of compatibility without having the power to strike down a provision of primary legislation.<sup>42</sup> The legislation empowers in Northern Ireland the High Court and the Court of Appeal to make a declaration of

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<sup>36</sup> See *eg*, *Re McCaffery* [2001] NI 378 (QBD); *Re A* [2001] NI 442 (CA); *Re Newton (a minor)* [2001] NI 115 (QBD); *Re Adams* [2001] NI 1 (CA); *R v Magee* [2001] NI 217 (CA); *Re Belfast Telegraph Newspapers Limited* [2001] NI 178 (CA); *Re Tweed* [2001] NI 165 (CA); *Reavey and others v Century Newspapers Limited and another* [2001] NI 187 (QBD); *R v Clinton* [2001] NI 207 (CA); *Re Guidera's Estate* [2001] NI 71 (ChD).

<sup>37</sup> Wadham, see note 35.

<sup>38</sup> Human Rights Act 1998 s 1.

<sup>39</sup> *Rights Brought Home: The Human Rights Bill* (1997, Cm 3782) para 2.8.

<sup>40</sup> Human Rights Act 1998 s 3(1). Lord Irvine of Lairg HL Debs vol 582 col 1230 (3 November 1997): “Clause 3 provides that legislation, whenever enacted, must as far as possible be read and given effect in a way which is compatible with the Convention rights. This will ensure that, if it is possible to interpret a statute in two ways—one compatible with the Convention and one not—the courts will always choose the interpretation which is compatible. In practice, this will prove a strong form of incorporation.” See *R v Offen and others* [2001] 2 All ER 154; *Poplar Housing and Regeneration Community Association Limited v Donoghue* [2001] EWCA Civ 595; *R v A* [2001] 2 WLR 1546; 3 All ER 1.

<sup>41</sup> A constitutional principle which the Labour government was keen to support, Lord Irvine of Lairg HL Debs vol 583 col 522 (18 November 1997): “We submit that this scheme is consistent with the sovereignty of Parliament as traditionally understood.” See also Jack Straw HC Debs vol 307 col 772 (16 February 1998).

<sup>42</sup> *Rights Brought Home: The Human Rights Bill* para 2.13: “The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate.”

incompatibility in relation to a provision of primary legislation and in prescribed cases subordinate legislation also.<sup>43</sup> In addition, only the higher courts can declare subordinate legislation to be invalid. The Human Rights Act 1998 makes it unlawful for any public authority to act in a way which is incompatible with Convention rights.<sup>44</sup> For this purpose “public authority” includes a court or tribunal.<sup>45</sup> The legislation attempts to strike a balance within the context of the UK’s constitutional system.<sup>46</sup> It does not “entrench Convention rights”.<sup>47</sup> The term “dialogue” has been rejected by members of the senior judiciary as a way of capturing the new relationship between the different branches of government.<sup>48</sup> The Human Rights Act does not give the courts the last word on human rights issues, a position which matches the Labour government’s commitment to parliamentary democracy.

The Bill of Rights for Northern Ireland will supplement the ECHR. One question for the Commission is whether to follow the enforcement mechanism in the Human Rights Act 1998.

#### **(d) The Joint Committee on Human Rights**

If human rights are to be adequately protected then more work is required on legislative processes. Those politicians who criticise unelected judges must demonstrate that democratic processes can accord sufficient respect for human rights standards. Reference has been made to the mechanisms within the Northern Ireland Assembly. There has also been relevant reform within the Westminster Parliament. In its White Paper, *Rights Brought Home: The Human Rights Bill*, the government stated its belief in “a new Parliamentary Committee with functions relating to human rights”.<sup>49</sup> A Joint Committee on Human Rights has been established. It has the following terms of reference:

“To consider:

- (a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);
- (b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and
- (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to

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<sup>43</sup> Human Rights Act 1998 s 4(5)(e). Acts of the Northern Ireland Assembly are defined as subordinate legislation.

<sup>44</sup> Human Rights Act 1998 s 6.

<sup>45</sup> Human Rights Act 1998 s 6(3)(a).

<sup>46</sup> Lord Hoffmann, “Human Rights and the House of Lords” (1999) 62 *MLR* 159, at 161: “I do not relish the role of a Platonic guardian and I am pleased to live in a society that does not thrust it upon me.”

<sup>47</sup> McGoldrick, see note 34, p 907: “Obviously then it makes no legal sense to suggest that the Convention rights are ‘entrenched.’”

<sup>48</sup> Joint Committee on Human Rights – Minutes of Evidence 26 March 2001, HC 332-iii (2000-2001). See the answers of Lord Bingham of Cornhill and Lord Phillips of Worth Matravers. Note, however, the comments of Lord Woolf of Barnes.

<sup>49</sup> See note 39 para 3.6.

them on any of the grounds specified in Standing Order 73 (Joint Committee on Statutory Instruments).”

The Committee is a select committee of both Houses of Parliament. It has the power to require the submission of written evidence and documents, and to examine witnesses. It has the power to make reports to both Houses of Parliament. It is a useful example of a parliamentary mechanism for enhancing consideration of human rights matters. It is still in the early stages of its work. Thus far the Committee has issued several significant reports dealing with legislative proposals.<sup>50</sup> It is also consulting on the idea of a UK Human Rights Commission.

### **(e) The Republic of Ireland and all-Ireland human rights protection**

The Belfast Agreement does not simply address Northern Ireland. It has also resulted in legal change in the Republic of Ireland. The constitutional legal systems of the UK and the Republic of Ireland differ in significant respects. The Republic of Ireland has a written constitution and an established tradition of constitutional rights protection. In the Republic of Ireland, the Supreme Court can strike down legislation which is contrary to the Constitution. In addition, a Bill (with some exceptions and limitations) passed by both Houses of the Oireachtas may be referred by the President to the Supreme Court “for a decision on the question as to whether such Bill or any specified provision or provisions of such Bills is or are repugnant to this Constitution or to any provision thereof”.<sup>51</sup> The Constitution also contains provision for a joint petition from the members of Seanad Éireann and Dáil Éireann to the President that the will of the people should be ascertained on a Bill which deals with a matter of particular national importance.<sup>52</sup>

The Agreement provided:

“The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward will ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.”<sup>53</sup>

In addition, the Irish government committed itself to the creation of a Human Rights Commission with a mandate and remit equivalent to the Northern

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<sup>50</sup> See *eg.* Joint Committee on Human Rights Reports on the Anti-Terrorism, Crime and Security Bill, 2<sup>nd</sup> Report HC 372 (2001-2002) and 5<sup>th</sup> Report (2001-2002).

<sup>51</sup> Art. 26.1.

<sup>52</sup> Art. 27.

<sup>53</sup> “Rights, Safeguards and Equality of Opportunity” para 9.

Irish Commission. The Agreement provided for a Joint Committee of both Commissions “as a forum for consideration of human rights issues in the island of Ireland.”<sup>54</sup> The Committee was formally established in November 2001. The Irish government has therefore also committed itself to enhanced human rights protection. It has taken a number of steps to implement these agreed measures. The Irish Human Rights Commission was formally established in 2001 after some difficulties over the process of appointments.<sup>55</sup> The legislation to incorporate the ECHR into Irish law has, at time of writing, not been formally enacted.<sup>56</sup> When it is in force it will function as a “template for fundamental rights protection in both jurisdictions”.<sup>57</sup> The Irish government appears to have adopted a minimalist approach to incorporation.<sup>58</sup>

### **(f) International and European contexts**

The individual does not have to rely solely on national mechanisms for protecting human rights. A range of other processes exist at the regional and international levels. At these levels different enforcement mechanisms are in place. Detailed legal rules exist to control access. The focus of the international and regional mechanisms is to encourage more effective national human rights protection.

The EU is perhaps of most relevance: not because of its human rights work, but due to the supremacy of EU law. Measures adopted in EU law are of particular significance because of their legal status in the national law of member states. Membership of the EU has transformed the scholarly debate in the UK, particularly with regards to traditional ideas of sovereignty. The UK and the Republic of Ireland are both members of the EU. As the EU becomes a “constitutional entity” so reference to human rights and equality will also increase. This is evident with the adoption of the EU Charter of Fundamental Rights, as well as the equality measures which have been enacted. The suggestion that the EU might craft a formal constitution may have an impact on the human rights debate in the UK.

The Council of Europe is the more obvious focus for human rights lawyers. The European Court of Human Rights is perhaps the best known regional enforcement mechanism. A large number of cases arising from events in Northern Ireland have been processed through the Convention institutions.<sup>59</sup>

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<sup>54</sup> “Rights, Safeguards and Equality of Opportunity” para 10.

<sup>55</sup> Human Rights Commission Act 2000; Human Rights Commission (Amendment) Act 2001.

<sup>56</sup> European Convention on Human Rights Bill 2001. For comment see Murphy, “The Incorporation of the European Convention on Human Rights into Irish Domestic Law”, [2001] *EHRLR* 640; O’Connell, “The Irish Constitution and the E.C.H.R.: Belts and Braces or Blinkers?” (2000) *Irish Human Rights Review* 90.

<sup>57</sup> Murphy *ibid* at 642.

<sup>58</sup> Murphy *ibid* at 642.

<sup>59</sup> See *eg*, *McCann v UK* (1995) 21 EHRR 97; *Brogan v UK* (1988) 11 EHRR 117; *Brannigan and McBride v UK* (1993) 17 EHRR 539; *Jordan v UK* judgment of 4 May 2001; *McKerr v UK* judgment of 4 May 2001; *Shanaghan v UK* judgment of 4 May 2001; *Kelly and others v UK* judgment of 4 May 2001.

The right of individual petition is arguably a major reason for its success. Recent cases demonstrate that this mechanism remains important.<sup>60</sup>

The right of petition is reflected in other international mechanisms. In addition, the state reporting mechanism within the UN is relevant,<sup>61</sup> as is the work of Special Rapporteurs.<sup>62</sup> There are a variety of other international legal and political mechanisms to assist the protection of human rights. This includes the work of non-governmental organisations (NGOs). The adoption of a Bill of Rights will not alter the ability of the individual to make use of international and regional mechanisms.

### III. PROPOSALS FROM NORTHERN IRELAND

#### (a) Consulting on a Bill of Rights

The debate around a Bill of Rights for Northern Ireland precedes the Belfast Agreement.<sup>63</sup> Extensive consideration of the subject has already taken place in Northern Ireland.<sup>64</sup> Earlier research demonstrated wide-ranging political support for a Bill of Rights.<sup>65</sup> The Belfast Agreement supplies a different context and the document provides the starting point for the current process. Following a request from the Secretary of State, the Northern Ireland Human Rights Commission commenced the Bill of Rights process on 1 March 2000.<sup>66</sup> The process was prioritised by the Commission.<sup>67</sup> It consistently

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<sup>60</sup> *Ibid.*

<sup>61</sup> See Lansdown, "The Reporting Process Under the Convention on the Rights of the Child" in Alston and Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) at 113-128; Clapham, "UN Human Rights Reporting Procedures: An NGO Perspective" in the same edited volume at 175-198.

<sup>62</sup> For example, see, Report of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers E/CN.4/2001/65 (1 February 2001) paras 213-229.

<sup>63</sup> For references to past discussion of a Bill of Rights see Harvey, "The Politics of Rights and Deliberative Democracy: Drafting a Northern Irish Bill of Rights" [2001] *EHRLR* 48. The work of the Standing Advisory Commission on Human Rights (SACHR) is of particular interest. See generally Boyle and Hadden, *Northern Ireland: The Choice* (1994) at 181: "The obvious conclusion is that a Bill of Rights for Northern Ireland will have to be specially drafted to meet the particular concerns of all sections of the community. . . The best approach may be to incorporate the terms of the European Convention into a new Northern Ireland Constitution with appropriate additional provisions to satisfy all groups that by agreeing to the compromises necessary for shared government they will not be risking their fundamental interests or aspirations. If the European Convention were incorporated into the law of the United Kingdom and the Republic of Ireland, as argued below, a Northern Ireland Bill of Rights need only contain the additional provisions."

<sup>64</sup> See Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland* (2001) at 6: "There is a long history of demands for a Bill of Rights for Northern Ireland and prior to the current peace process there was consensus among the main political parties that a Bill of Rights for Northern Ireland would be a good thing."

<sup>65</sup> Committee on the Administration of Justice, *Making Rights Count* (1990).

<sup>66</sup> Northern Ireland Act 1998 s 69(7). The process was launched with events in Derry and Belfast on 1 March 2000.

<sup>67</sup> Northern Ireland Human Rights Commission, *Annual Report 2001* (2001) at 20.

stressed the importance of participation.<sup>68</sup> The consultation process included: training sessions with potential trainers; the production of training videos and trainers' manuals; the publication of explanatory pamphlets; the establishment of nine advisory working groups; and meetings with political parties and interest groups.<sup>69</sup> The Commission received over 200 written submissions to its initial consultation exercise.<sup>70</sup> Beyond the Commission an Ad Hoc Human Rights Consortium was established. The Consortium brought together a group of NGOs with the aim of complementing the work of the Human Rights Commission in the promotion of a broad debate. The specific aim of the Consortium was to concentrate on process rather than substance. In other words, the Consortium was not arguing for any particular content but trying to encourage participation.

As noted, the Commission established a number of independent advisory working groups. One of these groups was asked to deal with implementation issues. The Implementation Working Group published its report in January 2001. The Report of this Group is of particular relevance here. In the absence of knowledge of the rights to be included, the Report of the Group concentrated on providing options, rather than specific recommendations. The result was a Report which listed possible approaches, rather than one which advanced one or more specific proposals. The Report thus provides a useful range of implementation options. The Report cited two background trends at the international, regional and national levels of particular significance: the development of overarching rights frameworks; and increased justiciability of socio-economic rights.<sup>71</sup> The Report then listed a range of questions, which are answered with several options. It raised the following questions:

“ [Implementation Issues]

- How legislatively could a Bill of Rights ‘supplement’ the rights already guaranteed by the ECHR?
- How could rights be enforced (and what body/bodies should do it)?
- How should rights be interpreted by the courts and/or other public bodies or state actors?
- How could a broad range of rights be made justiciable, in particular, how could socio-economic rights be made justiciable?
- Should rights cover devolved or also non-devolved issues?
- How should limitations on rights be dealt with?
- How could a Bill of Rights be made into a permanent feature of the legal system of Northern Ireland?
- To whom should a Bill of Rights apply?

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid* at 6-7.

<sup>70</sup> Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland* (2001) p 9.

<sup>71</sup> *Ibid*, para 2.1.

- Who can avail of the Bill of Rights ('standing')?
- What remedies should be available to those whose rights are violated?"

This is not the place to describe all the proposed options. A few do merit scrutiny here. The Working Group listed three possible models for the form the new protections might take. First, the Human Rights Act 1998 could be repealed and replaced by a Bill of Rights which would take its place.<sup>72</sup> The Bill of Rights would be drafted as a single document and include the ECHR and the supplementary rights. Secondly, the enactment of two new pieces of legislation: an amended Human Rights Act 1998, and an additional list of supplementary rights.<sup>73</sup> Finally, a single statute with supplementary rights with no amendment of the Human Rights Act 1998.<sup>74</sup> On enforcement, the Working Group listed two possible options. Option one (enforcement by a special Human Rights Court) could apply to either the first or second legislative suggestions. Option two would apply to the final legislative proposal. Although the Human Rights Act 1998 would remain unamended, a new Human Rights Court could be established to address the supplementary rights. In addition, the idea of special assessors was mentioned. On the applicability of the ECHR and supplementary rights, the Working Group was agreed that ideally they should apply to devolved and non-devolved issues.

The working groups formed one part only of the broader consultation process. A number of written submissions contained suggestions on implementation. The Committee on the Administration of Justice (CAJ) argued for a new court to enforce the Bill of Rights,<sup>75</sup> as did Amnesty International,<sup>76</sup> and the Social Democratic and Labour Party (SDLP).<sup>77</sup>

Following the initial consultation exercise the Commission published, in September 2001, *Making a Bill of Rights for Northern Ireland*.<sup>78</sup> The document contained a range of preliminary views, and in it the Commission presented a large number of questions. On implementation it was evident that much remained to be decided.

In this document the Commission recognised that a Bill of Rights could not do everything:

“It should be remembered, of course, that a Bill of Rights cannot cure all ills. It merely provides a set of minimum standards. The effective protection of rights requires additional rights-based legislation and enforcement mechanisms. Furthermore, the protection of rights often involves a

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<sup>72</sup> *Ibid*, paras 4.2-4.5.

<sup>73</sup> *Ibid*, paras 4.6-4.8.

<sup>74</sup> *Ibid*, paras 4.9-4.10.

<sup>75</sup> Committee on the Administration of Justice, *Preliminary Submission to the Human Rights Commission on a Bill of Rights for Northern Ireland* (2001).

<sup>76</sup> Amnesty International, *Northern Ireland: An Inclusive Bill of Rights for All* (2001).

<sup>77</sup> Social Democratic and Labour Party, *A Bill of Rights for All of Us: Delivering the Good Friday Agreement* (2001).

<sup>78</sup> See note 70.

balancing exercise: as well as claiming our own rights we owe a responsibility to allow other people to claim theirs.”<sup>79</sup>

The Commission concluded that the Human Rights Act 1998 mechanism was also appropriate for the Bill of Rights.<sup>80</sup> If adopted, this would mean that the same procedures of enforcement would apply. An Act of the Westminster Parliament could still not be struck down. As the Commission noted, no further appeal to the European Court of Human Rights would be available in relation to the supplementary rights.<sup>81</sup> On possible objections to the Judicial Committee of the Privy Council, the Commission suggested some flexibility in the selection of judicial panels.<sup>82</sup> Several submissions suggested the establishment of a new court. The Commission was undecided on the issue, and preferred to set out the advantages and disadvantages. Further views were sought. Given the importance of the issue, this section of the document merits citation in full:

**“Advantages**

- It could provide for a judicial rights-based culture so as to increase the chances that human rights would be central to the thinking of all judges in all courts.
- It could represent a fresh start to the interpretation and enforcement of the full range of human rights in Northern Ireland and could thus help to bolster general confidence in all sections of the community in the rule of law and remove any doubts some people may have about the attitude of Northern Irish judges when dealing with human rights matters.
- It would facilitate the development of innovative approaches to enforcement, especially as far as social and economic rights are concerned, which judges trained in the traditional system might find difficult.

**Disadvantages**

- In some cases it would be difficult to separate human rights issues, which would be the exclusive jurisdiction of the new court, from other issues and there might not be enough work for full-time judges dedicated only to human rights cases.
- It is not clear what the relationship of the judges of the new court would be to those in the ordinary courts and there might be difficulty in establishing the legitimacy of the new system. It could lessen the chances of making human rights central to the thinking of all judges in all courts.
- There would be political and constitutional difficulties in preventing decisions of the new court being subject to

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<sup>79</sup> *Ibid* at 6.

<sup>80</sup> *Ibid* at 100.

<sup>81</sup> *Ibid* at 100.

<sup>82</sup> *Ibid* at 100.

appeal to the House of Lords and/or the Privy Council and if appeals were permitted some of the alleged advantages of the system would be jeopardised.”<sup>83</sup>

The Commission also noted another option. In partnership, and as a long-term goal, the Privy Council might become a constitutional court for the UK.<sup>84</sup> Beyond the Commission’s proposal, there is some discussion at present of the idea of a UK constitutional court.<sup>85</sup> Whichever option was favoured, the Commission argued for the adoption of new procedures for judicial appointments involving a new Judicial Services Commission.<sup>86</sup> In addition, the Commission supported the idea of advanced review of proposed legislation, referring to the situation in the Republic of Ireland and France.<sup>87</sup> The Commission also noted the current procedure for the referral of proposed legislation from the Northern Ireland Assembly.<sup>88</sup>

The Commission included a proposed clause on effective remedies.<sup>89</sup> The clause would permit courts, including lower courts, to develop innovative remedies, particularly in relation to the enforcement of socio-economic rights.<sup>90</sup> The Commission recognised some potential objections, notably that this would give lower courts an overly broad discretion, and that the contrast with the Human Rights Act 1998 could not be justified.<sup>91</sup> The issue of referral of cases to a higher court was proposed by the Commission, with the suggestion that a duty should be imposed on magistrates’ courts and county courts to refer a case to the High Court “if the decision they propose to take in the case is in their view based on legislation which is incompatible with the Bill of Rights”.<sup>92</sup>

Who should have standing to bring a case to court under the Bill of Rights? The Commission’s preliminary view was that those with a legitimate interest should be able to bring proceedings under the Bill of Rights.<sup>93</sup>

### **(b) The politics of human rights**

The Northern Ireland Assembly debated the work of the Commission on 25 September 2001. Esmond Birnie of the Ulster Unionist Party (UUP) moved the following motion:

“That this Assembly believes, in the context of the development of a Bill of Rights, that the Northern Ireland Human Rights Commission has failed to discharge its remit, as given to it by the Belfast Agreement 1998, in its various

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<sup>83</sup> *Ibid* at 101.

<sup>84</sup> *Ibid* at 101-102.

<sup>85</sup> Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts* (2001); Le Sueur, *What is the Future of the Judicial Committee of the Privy Council?* (2001).

<sup>86</sup> See note 70 p 101.

<sup>87</sup> See note 70 p 104.

<sup>88</sup> See Northern Ireland Act 1998 s 11.

<sup>89</sup> See note 70 p 102.

<sup>90</sup> *Ibid*, p 103.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid*.

<sup>93</sup> See note 70, pp 103-104.

contributions to the debate on developing human rights in Northern Ireland.”<sup>94</sup>

Birnie, while acknowledging that human rights were a good thing, argued that the Commission had failed to discharge its remit. He addressed the matter of the “particular circumstances of Northern Ireland” in some detail.<sup>95</sup> His position on this issue can be summarised as follows: the Commission should have addressed the constitutional question instead of declaring its neutrality on the issue; the particular circumstances of Northern Ireland should include deaths resulting from terrorism and therefore include non-state violations; and finally, that socio-economic deprivation was not particular to Northern Ireland and not suitable for judicial enforcement.<sup>96</sup> Birnie was also concerned about “massive social engineering to reconstruct the totality of Northern Ireland”, the raised expectations on socio-economic matters and the danger to the new Assembly of a maximalist human rights culture.<sup>97</sup> An amendment to the motion was put down by Alex Attwood and Patricia Lewsley (SDLP).<sup>98</sup> Attwood argued in support of the Commission and suggested that its powers and resources might be enhanced. Mary Nelis of Sinn Fein and Eileen Bell of the Alliance Party opposed the motion and supported the amendment.<sup>99</sup> The debate in the Assembly broadly reflects the views of the political parties on both the Commission and the Bill of Rights process. There was little explicit reference to enforcement of a Bill of Rights. However, Birnie raised some hard questions about the Bill of Rights process. His concern about a maximalist human rights culture reflects an unease among some politicians (not simply in Northern Ireland) about the impact of expansive human rights protections on the democratic process. This is not the last word that the Assembly will have on the matter.

### (c) Rights and Responsibilities

Responses to the document varied. The CAJ, in a highly critical response, suggested that the document was “very confused” and generally lacked “strategy and cohesion”.<sup>100</sup> It also criticised the use of the term “rights and responsibilities”.<sup>101</sup>

The advice from the Commission to the Secretary of State (whenever it is eventually finalised) will come at a time when there is a distrust of rights-talk among some politicians at Westminster. There is a perception that rights-talk encourages excessive individualism.<sup>102</sup> The stress now, within the Labour Party in particular, is on rights and responsibilities. As Klug notes:

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<sup>94</sup> Northern Ireland Assembly, *Official Report* (2001-2002) 25 September 2001.

<sup>95</sup> He also stated: “Note that the agreement said ‘advise and consult’. It did not say ‘campaign and dictate.’”

<sup>96</sup> See note 94.

<sup>97</sup> *Ibid.*

<sup>98</sup> Delete all after “Commission” and insert: “has been hindered in discharging its remit due to limits on its powers and resources but congratulates the Commission on its substantial contributions to the debate on and in developing human rights in Northern Ireland.”

<sup>99</sup> See note 94.

<sup>100</sup> CAJ, *Submission to the Northern Ireland Human Rights Commission* (2001).

<sup>101</sup> *Ibid.*

<sup>102</sup> Giddens, *Where Now for New Labour?* (2002) at 51.

“Within this overall communitarian perspective Blair gives special emphasis to the idea of duties. ‘No rights without responsibilities’ has become a mantra of New Labour as closely identified with Tony Blair’s ‘third-way politics’ as social inclusion, or modernized public services.”<sup>103</sup>

Anthony Giddens talks of the construction of a “new social contract” based on the theorem “no rights without responsibilities”.<sup>104</sup> This is viewed now as a key feature of citizenship. But it is difficult to construct all rights in terms of social goods, as Giddens appears to. In addition, what about rights attaching to physical presence on a territory rather than citizenship? Can they easily be constructed as part of a new social contract involving responsibilities too? Is it not better to argue that a person possesses a right (even if she is adjudged to have acted irresponsibly), but there are justifiable limitations to most right? Klug correctly identifies the schizophrenic qualities of the Labour government, with its support for human rights at the international level, but profound distrust of rights-talk in domestic politics.<sup>105</sup> The suspicion is that the stress on responsibilities will re-surface when the advice of the Commission is submitted to the Secretary of State.

#### **IV. THE BILL OF RIGHTS PROCESS IN COMPARATIVE PERSPECTIVE**

There is extensive comparative experience from which to draw in any debate about a Bill of Rights for Northern Ireland.<sup>106</sup> Although Northern Ireland is not a sovereign state, this comparative experience is of some use when reflecting on the Bill of Rights process. It is important to remember, however, that each national context differs. For example, the US experience of a Bill of Rights is markedly different from that of Canada or New Zealand. Using the US model to criticise judicial activism has its limitations. The most important enactments since 1945 contemplate the limitation of rights, and do not necessarily give the final word to an unelected judiciary.<sup>107</sup> In addition, few, if any, advocates of human rights argue that the courtroom should be the exclusive forum for human rights enforcement.

Comparative practice can be used in arguments either for or against the enactment of constitutional rights. In other words, the nature of comparative experience is often disputed. If one takes the example of Canada, there is continuing disagreement about the impact of the Charter of Rights and Freedoms. In addition, there is a politics of comparison. Individuals and groups tend to use examples which enhance or support their pre-existing

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<sup>103</sup> See note 31 p 59.

<sup>104</sup> Giddens, *The Third Way and its Critics* (2000) 52.

<sup>105</sup> Klug, see note 31 p 51.

<sup>106</sup> For analysis of current issues in comparative law see Symposium, “New Directions in Comparative Law”, (1998) 46 *American Journal of Comparative Law* 597-756. On the use made by judges of comparative human rights material see McCrudden, “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights”, (2000) 20 *Oxford Journal of Legal Studies* 499.

<sup>107</sup> Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001) at 289.

political positions. Therefore, comparative experience can illustrate ways of doing things which may, or may not, prove useful in crafting local responses. The primary focus should be on constructing human rights protections which work in the particular circumstances of the local jurisdiction, and which reflect the concerns and priorities of the political community. Finally, having a Bill of Rights is no guarantee that rights will be adequately protected.<sup>108</sup>

### (a) Canada

In 1982, the Canadian Constitution was amended to include the Charter of Rights and Freedoms. The Charter was the product of active participation at all levels.<sup>109</sup> A Special Joint Committee of the Senate and the House of Commons received over 1,200 briefs expressing views.<sup>110</sup> There were numerous political considerations in the adoption of the Charter. In addition to dissatisfaction with parliamentary politics in Canada, the Charter also had centralising aims at a time when regionalism was on the rise.<sup>111</sup> At the time, dissent was largely confined to aboriginal groups and political elites in Quebec.<sup>112</sup> Since its adoption the group of dissenters has expanded.

This was not the first piece of human rights law in Canada. The Bill of Rights 1960 was in force for some time, but was widely regarded as a weak instrument.<sup>113</sup> The experience with the 1960 Bill of Rights demonstrates that merely having a Bill of Rights (just like simply having a Human Rights Commission) means little unless it has a practical impact on human rights protection.

The Constitution Act 1982 provides that the Constitution of Canada is the supreme law and that any law inconsistent with it is of no force or effect.<sup>114</sup> The Charter has generated an impassioned debate in Canada. There is continuing argument about the impact it has had on Canadian society, and the power of judicial review. The Charter was widely debated in the UK following the decision of the Labour government to legislate for human rights.<sup>115</sup> The Charter permits anyone whose “rights or freedoms, as guaranteed by this Charter, have been infringed or denied” to apply to a court “to obtain such remedy as the court considers appropriate and just in the circumstances”.<sup>116</sup> The Charter applies to the Parliament and government of Canada, and to the legislature and government of each province.<sup>117</sup> The rights and freedoms are subject “only to such reasonable limits prescribed by

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<sup>108</sup> Amnesty International, *Amnesty International Report 2001* (2001).

<sup>109</sup> Black-Branch, “Entrenching Human Rights Legislation under Constitutional Law: The Canadian Charter of Rights and Freedoms” [1998] *EHRLR* 312.

<sup>110</sup> *Ibid* at 322.

<sup>111</sup> Fudge, “The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts” in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 335, at 336.

<sup>112</sup> *Ibid*.

<sup>113</sup> See note 109 p 317.

<sup>114</sup> Constitution Act 1982 s 52(1).

<sup>115</sup> *Rights Brought Home: The Human Rights Bill* para 1.13 and para 2.11.

<sup>116</sup> S 24(1).

<sup>117</sup> S 32.

law as can be demonstrably justified in a free and democratic society”.<sup>118</sup> There is, however, an important exception. The Charter provides:

“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”<sup>119</sup>

A declaration under this section ceases to have effect five years after it comes into force.<sup>120</sup> An earlier date may be specified in the declaration.<sup>121</sup> The Charter is enforced by the courts and ultimately by the Supreme Court of Canada.

David Beatty is critical of the Supreme Court, arguing that the judges appointed to it have not done a good job of protecting basic human rights.<sup>122</sup> One of the problems, for Beatty, is the way that judges are appointed.

“It puts justice and the values on which the Charter is based at risk when the commitment of those nominated to the Court is ambiguous and clouded in doubt. Indeed, Canada’s experience strongly suggests that, in the absence of rigorous questioning of candidates’ views about the theory and practice of constitutional law before their appointment, such a risk is almost certain to materialise. . . . For countries considering whether to incorporate a written Bill of Rights into their constitutions, I have no doubt that the single most important lesson to be learned from Canada’s experience is that the extent to which human rights are protected in a society depends, more than anything else, on the way judges are appointed to its courts.”<sup>123</sup>

This highlights the importance of the process of appointment, and the commitment of individuals to human rights protection. Anne Bayefsky echoes this:

“The demands of theory notwithstanding, the Canadian Supreme Court’s general retrenchment on Charter review in recent years seems to have had more to do with changes in the Court’s membership and particular judicial personalities than principle.”<sup>124</sup>

On this view, the Supreme Court has not gone far enough.<sup>125</sup> This increased focus on the judiciary is noted by other commentators.<sup>126</sup> Writing from the

<sup>118</sup> S 1.

<sup>119</sup> S 33(1).

<sup>120</sup> S 33(3).

<sup>121</sup> *Ibid.*

<sup>122</sup> Beatty, “The Canadian Charter of Rights: Lessons and Laments” (1997) 60 *MLR* 481.

<sup>123</sup> *Ibid* at 497-498.

<sup>124</sup> Bayefsky, “Mechanisms for Entrenchment and Protection of a Bill of Rights: The Canadian Experience” [1997] *EHRLR* 496, at 498.

<sup>125</sup> Contrast this with Ison, “The Constitutional Bill of Rights – The Canadian Experience” (1997) 60 *MLR* 499. He argues that no one really knows the overall

perspective of a feminist advocate, Mary Eberts concludes that for women the experience of the first years of the Charter has been generally positive.<sup>127</sup> She is careful, however, to express some caution. She notes, for example, that Charter equality litigation is risky as well as costly.<sup>128</sup> Risky in the sense that, “the consequences of a decision denying equality under an entrenched Constitution may be severe and long-term”.<sup>129</sup> Roland Penner, in an examination of the arguments of “left-critics”, argues that the “experience with the Charter has both generally and specifically advanced the cause of human rights in Canada”.<sup>130</sup> He has no illusions about the role of a Bill of Rights.

“It is my considered view that though a bill of rights cannot be, instrumentally, a *sword* in the vanguard of transformative politics as urged by some, it can be a *shield* capable of defending the disempowered, the disadvantaged, the marginalised and the discriminated-against in society in certain, albeit limited, respects. . .”<sup>131</sup>

A Bill of Rights will protect the marginalised. But it will also shield corporations<sup>132</sup> and powerful groups in society. Somewhat cynically Ison states:

“About the only groups in society that have clearly benefited from the Charter are constitutional and criminal lawyers, drug traffickers and transnational corporations.”<sup>133</sup>

Others have observed the potential of the Charter to provoke participation.<sup>134</sup> Judy Fudge notes a growing dissatisfaction in Canada with the Charter and its impact on political practices and constitutional arrangements.<sup>135</sup> Perhaps

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impact of the Charter, due mainly to the lack of empirical research. He does conclude, however, that the Charter has had a negative impact on human rights proceedings.

<sup>126</sup> Sharpe, “The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective” in Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 431-453.

<sup>127</sup> Eberts, “The Canadian Charter of Rights and Freedoms: A Feminist Perspective” in Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 241-282.

<sup>128</sup> *Ibid* at 278-279. On the interpretation of s 15(1) of the Charter see *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

<sup>129</sup> See note 127 p 278. For a positive interpretation of developments on equality see Mahoney, “Charter Equality: Has it Delivered?” in Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (1999) 95-122.

<sup>130</sup> Penner, “The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?” [1996] *PL* 104, at 112.

<sup>131</sup> *Ibid* at 113.

<sup>132</sup> *R.J. R-MacDonald Inc v Canada (A-G)* (SCC, 21 September 1995).

<sup>133</sup> See note 125 p 511.

<sup>134</sup> Dyzenhaus, “The New Positivists” (1989) 39 *University of Toronto Law Journal* 361, at 378 “[A] charter that promises not only freedom and justice for all but also equality provides a forum in which consciousness can be raised. Lawyers can aim to raise consciousness and provoke participation by focusing public attention on the way in which society fails to live up to its formally enacted promise.”

<sup>135</sup> Fudge, see note 111.

as a result of this, and other criticism, the Canadian Supreme Court has talked more of partnership with government in recent years.<sup>136</sup>

Human rights protection in Canada is not confined to the Charter or the Supreme Court. Canada also has a Human Rights Commission.<sup>137</sup> This Commission has the power to refer cases to the Canadian Human Rights Tribunal. The Charter is located in a context where legislative protection of human rights also exists. In addition, the Supreme Court is not the only body charged with human rights implementation and enforcement.

### **(b) The Republic of Ireland**

Reference has already been made in this article to the Republic of Ireland. It has a written constitution.<sup>138</sup> This constitution contains express recognition of rights.<sup>139</sup> The all-Ireland dimensions of the Belfast Agreement give this context a rather different significance from the others considered here. Views differ about the effectiveness of the constitutional protection of rights in the Republic. Weaknesses have been identified.<sup>140</sup> The ruling of the Irish Supreme Court in *Sinnott v Minister for Education*<sup>141</sup> illustrates the distinction sometimes drawn between rights which derive from the constitution and legislative protection.

As noted, the Belfast Agreement has had an impact on the human rights debate in the Republic of Ireland. There is now an Irish Human Rights Commission and the ECHR is being incorporated into domestic law. Prior to this there was a significant process of constitutional reflection embodied in the work of the Constitution Review Group<sup>142</sup> and carried on by the All-Party Oireachtas Committee on the Constitution.<sup>143</sup>

### **(c) New Zealand**

New Zealand was cited as an appropriate example for the UK to follow. There are instructive lessons in the decision of the Labour government to adopt this approach. Not everyone agreed that this was appropriate. Unlike Canada, Australia and South Africa, New Zealand does not have a written constitution. Parliamentary supremacy is at the heart the system. This might explain why the UK government was, in particular, attracted to this model of

<sup>136</sup> *Ibid* at 338.

<sup>137</sup> See Canadian Human Rights Act 1977 Part II.

<sup>138</sup> For the historical background to the 1937 Constitution see Lee, *Ireland 1912-1985: Politics and Society* (1989) at 201-211.

<sup>139</sup> Arts. 40-44, these are not, however, the only human rights protections in the Constitution. See generally Casey, *Constitutional Law in Ireland* (3<sup>rd</sup> ed 2000) chs 12-19.

<sup>140</sup> Twomey, "Freedom of Expression – Talking about the Troubles" in Murphy and Twomey (eds), *Ireland's Evolving Constitution 1937-1997: Collected Essays* (1998) 199-218.

<sup>141</sup> [2001] IESC 39, judgment of 12 July 2001.

<sup>142</sup> Constitution Review Group, *Report of the Constitution Review Group* (1996). The All-Party Oireachtas Committee on the Constitution was established in 1996.

<sup>143</sup> For example, see, *First Progress Report* (1997) and *Fourth Progress Report: The Courts and the Judiciary* (1999).

human rights protection.<sup>144</sup> The New Zealand Bill of Rights Act 1990 grew from the 1985 document *A Bill of Rights for New Zealand: A White Paper*.<sup>145</sup> There was a negative public reaction to the idea of a Bill of Rights as supreme law, particularly to the notion of unelected judges deciding major issues of public policy.<sup>146</sup> There was no groundswell of public support for the proposals. Suspicion existed (similar to that which exists in the British Labour Party) within the New Zealand Labour Party about the judicial branch.<sup>147</sup> Political support, even for the weakened proposals, was based on the particular circumstances of New Zealand.<sup>148</sup> As a result, the New Zealand Bill of Rights Bill was introduced to Parliament in October 1989. A provision was inserted (section 4) to assert and preserve parliamentary sovereignty.<sup>149</sup> The Act contains an interpretative obligation:

“Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”<sup>150</sup>

No new judicial body was created. The New Zealand example was described as a bad one for the UK to follow.<sup>151</sup> Nevertheless, Michael Taggart argues that the Act has significantly altered legal culture and discourse in New Zealand.<sup>152</sup> The problems the Act presented the judiciary with are also worth noting.<sup>153</sup> These difficulties did not, however, prevent some judges from

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<sup>144</sup> It may be instructive for those engaged in the Northern Irish Bill of Rights process to note this attachment to New Zealand practice. In other words, when faced with a choice over which model to follow the Labour government opted for the “minimalism” of the New Zealand example.

<sup>145</sup> See Joseph, “The New Zealand Bill of Rights Experience” in Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 283-317.

<sup>146</sup> Allan, “The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand” in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 375-390.

<sup>147</sup> Taggart, “Tugging on Superman’s Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990” [1988] *PL* 266, at 267.

<sup>148</sup> The period of government led by Sir Robert Muldoon persuaded many of the need for a Bill of Rights, Taggart *ibid*. Note the comment of Joseph, see note 145 p 283, on the proposed Bill: “It was a partisan measure promoted with the support of the (then) National Opposition, or of most Government members, and with little public interest.” Joseph notes, however, that in practice the Act has worked well.

<sup>149</sup> See *Final Report of the Justice and Law Reform Select Committee on a White Paper for a Bill of Rights for New Zealand* (Appendices to the Journal of the House of Representatives I.8C, 1988); Butler, “The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain” (1997) 17 *OJLS* 323, at 324.

<sup>150</sup> Bill of Rights Act 1990 s 6. See Butler, “Interface between the Human Rights Act 1998 and other enactments: pointers from New Zealand” [2001] *EHRLR* 249.

<sup>151</sup> Emmerson, “This Year’s Model-The Options for Incorporation”, [1997] *EHRLR* 313. Cf Lord Irvine of Lairg, “Activism and Restraint: Human Rights and the Interpretative Process” [1999] *EHRLR* 350.

<sup>152</sup> Taggart, see note 147 p 287. Cf Lord Cooke of Thorndon HL Debs 583 cols 533-534 (18 November 1997).

<sup>153</sup> Joseph, see note 145 p 317.

trying to “upgrade” the legislation.<sup>154</sup> The experience of New Zealand suggests that even a relatively weak instrument, with little popular support, can still make a contribution to human rights protection.<sup>155</sup>

#### (d) South Africa

Developments in South Africa provide a useful example of an expansive Bill of Rights, adopted within the context of a broader constitutional settlement. The constitutional settlement was marked by an intensive process of participation. The Constitution of South Africa 1996 is the supreme law of the Republic.<sup>156</sup> This extensive process (springing from human rights abuses on a different scale to those in the UK) stands in marked contrast to the timid constitutional reform project of the Labour government.<sup>157</sup> The Bill of Rights is one part of the new constitutional order in South Africa. As Arthur Chaskalson states:

“The new constitutional order was given legitimacy, which in view of its origin it might not otherwise have had, when the interim Constitution was replaced by a new Constitution adopted by an elected Constitutional Assembly consisting of the two houses of Parliament sitting together. The Constitution thus adopted is based on respect for human rights and democracy. It spells out the values on which the new constitutional order has been established. They include human dignity, the achievement of equality and the advancement of human rights and freedoms.”<sup>158</sup>

The Bill of Rights is contained in Chapter 2 of the Constitution of the Republic of South African 1996. The purpose of the Bill of Rights is stated concisely:

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”<sup>159</sup>

The state must “respect, protect, promote and fulfil the rights contained in the Bill of Rights”.<sup>160</sup> If any law or conduct is inconsistent with the Bill of

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<sup>154</sup> Allan, see note 146 p 379 and p 390. He suggests that one lesson from New Zealand is that we can expect judges to upgrade and retool their statutory model.

<sup>155</sup> The Bill of Rights Act 1990 is not the only relevant matter. New Zealand also has a national Human Rights Commission.

<sup>156</sup> S 2.

<sup>157</sup> Jagwanth, “The South African Experience of Judicial Rights Discourse: A Critical Appraisal” in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 297-314.

<sup>158</sup> Chaskalson “Judging Human Rights in South Africa” [1998] *EHRLR* 181, at 182.

<sup>159</sup> S 7(1).

<sup>160</sup> S 7(2). *Christian Education South Africa v Minister of Education* (SACC 18 August 2000), *per* Sachs J: “It should be noted that these rights to be violence-free are additional to and not substitutes for the right not to be punished in a cruel, inhuman or degrading way. Under section 7(2) the state is obliged to ‘respect, protect, promote and fulfil’ these rights. It must accordingly take appropriate steps to reduce violence in public and private life. Coupled with its special duty

Rights the courts are required to declare it invalid to the extent of such inconsistency.<sup>161</sup> On a constitutional matter the courts may “make any order that is just and equitable”.<sup>162</sup>

There is a general limitations clause.<sup>163</sup> The Bill of Rights applies to all law in South Africa and binds the legislature, the executive, the judiciary and all organs of the state.<sup>164</sup> It also binds a natural or a juristic person “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.<sup>165</sup> The Bill of Rights contains standing rules which include anyone acting in the public interest, and an association acting in the interests of its members.<sup>166</sup> It also includes interpretative guidance to courts and tribunals.<sup>167</sup> They are required to: promote “the values that underlie an open and democratic society based on human dignity, equality and freedom”,<sup>168</sup> and consider international law.<sup>169</sup> They may consider foreign law.<sup>170</sup> In addition:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”<sup>171</sup>

Debate about the justiciability of socio-economic rights has been settled in South Africa.<sup>172</sup> Provision is made for socio-economic rights.<sup>173</sup> The Bill of Rights contains a right to housing, health care, food, water and social security.<sup>174</sup> The state is under an obligation to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.<sup>175</sup>

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towards children, this obligation represents a powerful requirement on the state to act.”

<sup>161</sup> S 172(1)(a).

<sup>162</sup> S 172(1)(b).

<sup>163</sup> S 36.

<sup>164</sup> S 8(1).

<sup>165</sup> S 8(2)-(4).

<sup>166</sup> S 38.

<sup>167</sup> S 39(1).

<sup>168</sup> S 39(1)(a).

<sup>169</sup> S 39(1)(b).

<sup>170</sup> S 39(1)(c).

<sup>171</sup> S 39(2).

<sup>172</sup> *In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253: “It is true that the inclusion of socio-economic rights may result in the court making orders which have implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech or the right to a fair trial, the order it makes will often have such implications. . . In our view it cannot be said that by including socio-economic rights within a Bill of Rights, a task is conferred upon the courts so different from that ordinarily conferred upon them that it results in a breach of the separation of powers. . . We are of the view that these rights are to some extent justiciable.”

<sup>173</sup> Ss 26-27.

<sup>174</sup> *Ibid.*

<sup>175</sup> S 26(2) and s 27(2). *The Government of the Republic of South Africa v Grootboom and others*, (SACC 4 October 2000) per Yacoob J para 24: “The right

Unlike Canada, a new Constitutional Court was created.<sup>176</sup> It was established in 1994 under the interim Constitution.<sup>177</sup> The Court has 11 members and is the highest court in South Africa with respect to constitutional matters.<sup>178</sup> Its decisions bind all other courts.<sup>179</sup>

“The Constitutional Court

- a. is the highest court in all constitutional matters;
- b. may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
- c. makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.”<sup>180</sup>

The Court makes the final decision on whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.<sup>181</sup> In order to address concerns about judicial appointments a Judicial Services Commission was established.<sup>182</sup> Saras Jagwanth argues that the Constitutional Court has contributed “sporadic achievements” to social transformation in South Africa.<sup>183</sup> She points to the central role of the democratic process in fleshing out the rights protected in the Constitution.<sup>184</sup> In other words, the importance of progressive legislation to the transformation of South Africa. A number of Commissions were also created: Human Rights Commission;<sup>185</sup> Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;<sup>186</sup> and a Commission for Gender Equality.<sup>187</sup> These are included under the heading of “state institutions supporting constitutional democracy” as three of the six such bodies.<sup>188</sup>

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of access to adequate housing cannot be seen in isolation. There is a close relationship between it and other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations under them.”

<sup>176</sup> See Chaskalson, see note 158 p 190: “One of the paradoxes of the new constitutional order is that courts, which were previously used to enforce apartheid and the repression associated with it, have now been given a central role in giving substance to the new democratic order.”

<sup>177</sup> See Spitz with Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000) at ch 11.

<sup>178</sup> S 167.

<sup>179</sup> See s 165(1): “The judicial authority of the Republic is vested in the courts.”

<sup>180</sup> S 167(3).

<sup>181</sup> S 167(5).

<sup>182</sup> S 178.

<sup>183</sup> Jagwanth, see note 157 p 314.

<sup>184</sup> *Ibid.*

<sup>185</sup> S 184.

<sup>186</sup> Ss 185-186.

<sup>187</sup> Ss 187.

<sup>188</sup> Ch 9.

## V. DELIVERING A NORTHERN IRISH BILL OF RIGHTS

### (a) Addressing the Belfast Agreement

The final section of this article contains some general thoughts on the Bill of Rights process. The advice has not as yet been submitted to the Secretary of State. Given the fundamental significance of a Bill of Rights it is wise to make sure that sufficient thought is given to it.

As stated earlier, Northern Ireland is not a sovereign state. While devolution has promoted local democracy, and generated a debate about federalism, this is still within the context of a unitary state. This constitutional background shapes both the use of comparative material and proposals advanced for a Bill of Rights.

The Bill of Rights process operates under a specific legal mandate. This mandate is contained in the Belfast Agreement. It is from the Agreement that the process gains its legitimacy. While it is accurate to argue that the Commission possesses a general remit to advance proposals for human rights protection, it will be difficult to make this case to the Secretary of State. The Commission must fulfil the Agreement's mandate if it is to gain acceptance for its proposals in Northern Ireland. The relevant passage of the Agreement is ambiguous in parts, but there are concrete references to matters which should be included. These matters may require the Commission to be innovative. For example, in areas where the Agreement goes beyond international standards.

There are understandable reasons why consensus, stability and agreement are stressed as essential in Northern Ireland. When the legacy of political violence remains alive the stress is correctly placed on consensus and stability. A Bill of Rights will in the longer term assist this process. However, it is essential that this does not undermine the role of disagreement in a democracy. A Bill of Rights will generate impassioned argument and continuing disagreement. This is what democratic politics is about. It is therefore unwise to leave the impression that a Bill of Rights will only promote harmony in Northern Ireland. Disagreement and dissent will be another product.

### (b) The process of making a Bill of Rights

The Commission has stressed the participative nature of the Bill of Rights process. It has attempted, within the constraints of its resources and powers, to encourage a wide-ranging debate. Beyond the Commission other initiatives have been launched by human rights groups. The process of securing consensus around a set of coherent proposals is central to effective enforcement. Judges, politicians and administrators are more likely to accord sufficient weight to this legal instrument if it is seen to have widespread popular backing across all communities in Northern Ireland. There is disagreement about how effective the Commission's work has been. Questions can legitimately be raised about the merit of entrusting the Bill of Rights process to a newly established Human Rights Commission. The Commission is in its early stages of development. The decision to grant the Commission (at such an early stage) the exclusive right to advance advice on a Bill of Rights to the Secretary of State may come to be regarded as a

flawed approach. If process is essential to effective enforcement then questions can fairly be raised about what has taken place in Northern Ireland. The process would appear not to have generated the level of engagement or consensus one would expect. The danger at this stage is that the Commission may be unable to deliver coherent proposals for a Bill of Rights which have widespread support in Northern Ireland.

### **(c) The Interdependence of all human rights**

All human rights (civil, political, economic, social and cultural) are interdependent. Socio-economic rights are recognised as justiciable rights, although the obligation on the state tends to be couched in the language of progressive realisation. In this context, there is nothing in international law to prevent the inclusion of a broad range of human rights. Innovative enforcement mechanisms may need to be crafted for socio-economic rights, but this is not a reason for their exclusion. The debate in Northern Ireland has turned on minimalist or maximalist interpretations of the Belfast Agreement. Focusing on the “particular circumstances of Northern Ireland” some argue for a Bill of Rights which concentrates on accommodating the communal rights of the two main communities. Thus a Bill of Rights, in this interpretation, would contain reference to parity of esteem, the protection of national aspirations and the cross-community partnership arrangements found in the Belfast Agreement. Others argue for a more generous interpretation of the Agreement’s mandate which could assist in building bridges between communities in Northern Ireland. On this interpretation, an expansive Bill of Rights is merited.

The Commission has committed itself to proposing the best possible Bill of Rights for Northern Ireland. The problem is that severe disagreement exists both inside and outside of the Commission. This is not motivated by bad faith. Rather there are genuinely divergent views on the nature and scope of this process and the substantive issues addressed.

What legal form should the Bill of Rights take? Proposals to repeal the Human Rights Act and replace it with a Bill of Rights (Northern Ireland) Act seem, at first sight, to be highly problematic. However, this approach has much to recommend it. A single, unified legal document would have the advantage of clarity and could assist the task of mainstreaming the rights it contains. Those who are committed to mainstreaming human rights should be able to see merit in this approach.

### **(d) A multiplicity of enforcement mechanisms**

Few human rights advocates argue that the courtroom is the only forum for protecting rights. There is general recognition that rights must be mainstreamed in the process of governance. This could not be achieved if everything was left exclusively in the hands of the judiciary. To suggest that human rights lawyers wish simply to enhance the power of unelected judges is a serious mistake. A Bill of Rights for Northern Ireland will have to reflect a commitment to mainstreaming rights. This will only be achieved by building human rights principles into processes of public administration.

There will be disagreement after the enactment of a Bill of Rights and some individuals and groups will not approve of the political and legal culture

which will emerge. Disagreement, rather than consensus, is a normal part of life in liberal democracies.<sup>189</sup> In fact, constitutional systems (inspired by republican thinking in particular) generally acknowledge conflict.<sup>190</sup> This is not conflict in the sense of political violence, but conflict as a continuing conversation. This is precisely what a functioning democratic polity should set in motion. For republicans, the point is to accept this disagreement and set up a constitutional system which forces engagement.<sup>191</sup> It is from this engagement that agreement on a particular issue might be attained. A Bill of Rights for Northern Ireland will have to form an important part of this continuing dialogue on good governance. It is a mistake (although a common one) in this context to regard human rights and political democracy as necessarily in conflict. Human rights are in fact, as the South African Constitution acknowledges, central to constitutional democracy.

The challenge for the Human Rights Commission is to generate sufficient consensus around its proposals. The Bill of Rights must be viewed as an instrument crafted to meet local, Northern Irish concerns, rather than as an unpopular imposition.

### **(e) A new Human Rights Court for Northern Ireland?**

The debate in legal scholarship over the role of the judiciary in a democracy shows no sign of abating. If a Bill of Rights for Northern Ireland is enacted this debate will go on, and even intensify. Experience from elsewhere suggests that disagreement will continue. Some will argue against the enhanced role of unelected judges, others will argue that the judges have not gone far enough in particular cases. In the political sphere, some politicians will become frustrated with what they see as an obstacle to their plans. When criminal justice is transferred to the Northern Ireland Assembly, then, as in other states, some may even begin to view the Bill of Rights as a “rogue’s charter”. There may even be a backlash against the Bill of Rights from those individuals and groups critical of the new human rights culture. Social conservatives and communitarians frequently voice concerns about rights-talk. Academics will write books and articles about the role of the judges under the Bill of Rights. Some will be constructively critical of the courts, others will lament the dominance of unelected judges. All these disagreements and arguments will be reasonable, and most will be in good faith. Political disagreement will not vanish once a Bill of Rights is enacted.

One issue of central importance is whether a new judicial body is required. Whatever the answer to this question, it is generally accepted that judicial appointment procedures need to be reformed. Continuing education and training is also recognised as important. In my view, proposals for a new Human Rights Court should form part of the final advice of the Human Rights Commission. This Court will fit into the new picture of human rights protection in Northern Ireland, and assist in the process of shaping good governance. It could, for example, view its role as one of partnership with

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<sup>189</sup> Waldron, *Law and Disagreement* (1999).

<sup>190</sup> Bellamy, “Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act” Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 15-39.

<sup>191</sup> *Ibid.*

the existing democratic institutions. The advantages outweigh the disadvantages. The new Court could assist the process of mainstreaming human rights, rather than act as an impediment to this process. In a context where distrust of the judiciary is a fact, a new Court could begin to dispel concerns. It would give a fresh impetus to human rights protection in Northern Ireland, and facilitate the effective enforcement of the Bill of Rights. The new body could craft creative approaches to the enforcement of rights. Much of this will depend, as comparative experience suggests, on processes of appointment and the commitment of the new Human Rights Court to the effective protection of human rights. In addition, to function properly there will have to be standing rules which permit effective access.

As suggested earlier, simply having a Bill of Rights, a Human Rights Commission or even a Human Rights Court is not a reliable guide to how human rights are in practice protected. The creation of a human rights culture will depend on multiple enforcement mechanisms aimed at mainstreaming human rights protection in the governance of Northern Ireland.

## **VI. CONCLUSION**

Consulting and advising on a Bill of Rights is complex and difficult. The Northern Ireland Human Rights Commission was given a daunting challenge at a time when it was still trying to establish itself. It has made a genuine effort to encourage a debate. It is now reasonable to question the wisdom of entrusting a Bill of Rights process exclusively to a Human Rights Commission which is in its early stages of development. This decision was taken in the negotiations around the Belfast Agreement, and was one way to deal with disagreement on the issue. A similar strategy was adopted for policing and criminal justice. A process like this is aimed at making substantive progress without negating the genuine political disagreements which exist. Leaving the process to a newly formed Commission may have been astute in the context of political negotiations, but was rather unfair on this new body. It is clear that the Commission has been presented with a formidable task.

This article does little more than raise questions about the implementation of a Bill of Rights. The suggestion is that several enforcement mechanisms are required if the common aim is to mainstream the Bill of Rights. These should include building respect for rights into the educational system at all levels, making rights count within the democratic process, and mainstreaming rights in public administration. A Bill of Rights will provide general guarantees. These protections can be enhanced and developed by specific legislation. The key is to ensure that effective co-ordination takes place to assist in the common goal of creating a human rights culture in Northern Ireland. A multiplicity of mechanisms and strategies will be essential to the achievement of this aim.



**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 Right 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.

## THE IMPORTANCE OF A BILL OF RIGHTS IN NORTHERN IRELAND AS A PROCESS: COMPARATIVE REFLECTIONS FROM SOUTH AFRICA

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### I. INTRODUCTION

Discussion of a Bill of Rights often concentrates on its content and the document as a final product rather than the process of its adoption. The manner in which it was created, the method by which provisions were written and the compromises accepted, as well as the involvement of the society that it is intended to serve are important considerations in an analysis of the success of a Bill of Rights and may go some way to ensuring respect and implementation for the final product is achieved.

South Africa is perhaps one of the most famous examples of a jurisdiction which has recently undergone a transition and adopted a constitution including a Bill of Rights which is respected throughout the world. As Northern Ireland is now going through a similar process, this paper aims to compare this situation with the process of adopting a constitution and Bill of Rights in South Africa. This is not to argue that what applied in South Africa can automatically apply in Northern Ireland,<sup>1</sup> but “comparison between the two cases thrives”.<sup>2</sup> Indeed prominent individuals involved in the peace process have been South African and there have been many works which have made such associations.<sup>3</sup>

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<sup>1</sup> C McCrudden, “A Northern Ireland Bill of Rights: Some Issues for Discussion”, unpublished, on file with the author, 8.

<sup>2</sup> On the utility of comparisons, see Guelke who notes differences between South Africa and Northern Ireland, A Guelke, *Inaugural Lecture*, Queens University Belfast, 2001, p 2.

<sup>3</sup> Guelke also notes comparisons made by Republicans with South Africa and colonisation, stating that “the question that arose was how was Republican violence to be legitimised in such circumstances? This is where analogies with other conflicts came in. Two received most attention in Republican propaganda: South Africa and the Middle East, pairing the IRA with the ANC and the PLO respectively”, Guelke, *ibid*, p 9. See, for example: T Mitchell, *Native versus Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa* (2000); M Suzman, *Ethnic Nationalism and State Power: The Rise of Irish Nationalism, Afrikaner Nationalism and Zionism* (1999); C Knox and P Quirk (eds), *Peace Building in Northern Ireland, Israel and South Africa* (2000).

In April 1998 the British and Irish governments signed the Belfast Agreement,<sup>4</sup> and later the British government enacted in national law the Northern Ireland Act 1998. The Agreement called for the establishment of a Northern Ireland Human Rights Commission and in its section on “Rights, Safeguards and Equality of Opportunity”<sup>5</sup> required it 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. These additional rights to reflect the principle of mutual respect for the identity and ethos of both communities and parity of esteem and – taken together with the European Convention on Human Rights – to constitute a Bill of Rights for Northern Ireland”.<sup>6</sup>

In this regard the Commission was required to consider “the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.”<sup>7</sup> The Commission is to submit its advice to the Secretary of State for Northern Ireland.<sup>8</sup>

South Africa underwent a process of drafting first an Interim Constitution of 1993 which contained 34 constitutional principles from which the final constitution could not deviate.<sup>9</sup> This Interim Constitution was drafted by unelected politicians through the CODESA process,<sup>10</sup> a procedure “widely criticised for being undemocratic, restricted to a narrow elite and lacking transparency”<sup>11</sup> and for being contrary to the views of some of the

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<sup>4</sup> The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland, Command Paper, Cm 3883.

<sup>5</sup> *Ibid*, Strand 6.

<sup>6</sup> *Ibid*, Strand 6, paragraph 4.

<sup>7</sup> *Ibid*.

<sup>8</sup> Northern Ireland Act, s 69(7).

<sup>9</sup> H Corder, “Towards a South African Constitution” (1994) 57 *MLR* 491, at 515, notes that these principles were a “striking demonstration of the power of those negotiating parties. . . which distrust the democratic credentials of a future government affected by the majority”. These were essential in any analysis of the final constitution.

<sup>10</sup> Convention for a Democratic South Africa. This began in late 1991 with meetings between government and the ANC, and continued with the Multi Party Negotiating Process in March 1993, although some parties refused to participate. Technical Committees, of which there was one on fundamental rights, were established composed of non-party experts which helped to solve contentious issues, S Gloppen, *South Africa: The Battle Over the Constitution* (1997), Chapter 9.

<sup>11</sup> *Ibid*, 256.

population.<sup>12</sup> The Final Constitution was drafted after the multiparty elections in 1994<sup>13</sup> and adopted finally in 1996.<sup>14</sup>

## II. THE DRAFTING PROCESS

In March 2000 the Northern Ireland Human Rights Commission launched a consultation process on the Bill of Rights<sup>15</sup> which, it is submitted, has taken place in two stages. Firstly, a general consultation was undertaken until early 2001 and secondly, the Commission published in September 2001 a draft Bill of Rights for public consultation. Consideration and comment was called for until 1 December 2001. The Commission was then to produce its advice to the Secretary of State by February 2002.<sup>16</sup>

By the end of 2000 the Commission had undertaken a number of activities to encourage wide participation on examining the content, status and implementation of a Bill of Rights. These included<sup>17</sup> producing pamphlets on specific issues such as criminal justice, education, equality, culture and identity, language, social and economic rights, victims and implementation; developing a web-site on the Bill of Rights; and running a series of programmes to train trainers in human rights. It organised a billboard campaign “Who Needs Human Rights? All of Us”, in some locations in Northern Ireland at over 40 advertising sights; gave talks to local groups and held a conference.<sup>18</sup> The Commission also encouraged individuals to run their own working group or event.

To evaluate the success of this consultation, comparisons with the similar stage of the process in South Africa are useful. Whilst it is acknowledged that the Interim Constitution played an essential role in shaping the Final Constitution,<sup>19</sup> it is the public consultation process which took place on the

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<sup>12</sup> Such as right wing groups, H Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (1998) p 172. See also Corder *op cit* at note 9, 515.

<sup>13</sup> Amendments to the constitution before elections brought the Inkatha Freedom Party (IFP) and others into the election process.

<sup>14</sup> The Constitution had to be certified by the Constitutional Court to ensure that it satisfied the 34 constitutional principles. It was initially rejected. See *Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), CCT23/96, 6 September 1996; *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996*, CCT 37/96 (4 December 1996). The Court invited submissions from persons on whether there was violation with the principles. Hearings were held in which all political parties except the ANC participated. Gloppen, *op cit* note 10, 212 argues that this gave the impression that the constitution was partisan.

<sup>15</sup> See plans set out in Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland* (2000) p 4.

<sup>16</sup> There is some possibility now that the consultation process may be extended.

<sup>17</sup> This list is not intended to be exhaustive.

<sup>18</sup> The conference from which this paper is taken, *op cit* note \*.

<sup>19</sup> Gloppen *op cit* note 10, 3. The Constitutional Court did not certify it, rejecting it in relation to the Bill of Rights for failing to entrench rights sufficiently, a lack of procedures for constitutional change, that the state of emergency provision went too far, derogable conditions were not justified and it did not recognise the employer’s right to collective bargaining. The IFP joined the amendment process whereby the Constitutional Assembly discussed only those aspects raised. The

Final Constitution which, it is argued, helped to instill a sense of ownership in the final document. As with the process in Northern Ireland, in South Africa general consultation was undertaken first before comments were asked on specific drafts. This process took place in South Africa under the auspices of the Constitutional Assembly, a body of elected MPs.<sup>20</sup> The first stage of the Constitutional Assembly's consultation process was perceived to have been extensive<sup>21</sup> and involved, among other things: poster campaigns; programmes and broadcasting on the television and radio; dissemination of leaflets to homes directly and other areas such as taxi ranks; and the holding of workshops with key players, political bodies, organisations, schools, and the general public. There were also outreach programmes with local communities. A total of 1,000 workshops and meetings were held and they were estimated to have reached nearly 100,000 people.<sup>22</sup> Public hearings were also held with key persons on specific issues including the judiciary, land rights, children's rights, women and socio-economic rights.<sup>23</sup> There were also a series of petitions on specific questions, such as what should be the official language; should the death penalty be available; should South Africa be a secular state; should abortion be permitted; whether sexual orientation should be expressly included within a non-discrimination clause; whether animal rights should be protected in the Constitution; and whether there should be a right to own firearms.<sup>24</sup> Nearly two million signatures on these petitions were received.<sup>25</sup> Submissions were also invited from individuals and organisations and nearly 13,500 were received: 10 per cent from organisations, some from political parties, but most from individuals.<sup>26</sup> There was a newsletter, "Constitutional Talk", which contained issues on the Constitution, drafts, invited submissions and which was distributed freely.<sup>27</sup> An internet site was established with key documents, drafts and public statements on the process and a phone line was set up to hear people's views.

A South African organisation, Community Agency for Social Enquiry (CASE), undertook a survey for the Constitutional Assembly to assess the extent of the participation and it found that the media campaign had reached 65 per cent of the population in three months.<sup>28</sup> Despite some scepticism about the success of a constitution and whether in fact people were clear on what a constitution meant, the process was extensive and reached many

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document was sent back to the Constitutional Court and adopted in December 1996, *op cit* note 14.

<sup>20</sup> The Constitutional Assembly of 490 members was elected by proportional representation. The ANC had most seats, but just short of enough to adopt the Constitution on its own. There was a central body of a 46 member multi-party Constitutional Committee, a Management Committee of 12 and six Theme Committees.

<sup>21</sup> Ebrahim *op cit* note 12, 242 notes that this was done through liaising with the community, media and advertising.

<sup>22</sup> Gloppen *op cit* note 10, 258.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, 257.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, 258.

<sup>27</sup> *Ibid.*

<sup>28</sup> Ebrahim *op cit* note 12, 243.

people.<sup>29</sup> The action taken during the first stage in Northern Ireland pales in comparison. The same degree of awareness and inclusivity cannot be said to have been achieved by the Northern Ireland Human Rights Commission after the first stage of its process.

At its second stage of consultation, the Northern Ireland Human Rights Commission produced a Draft Bill of Rights for consultation in September until December 2001 during which time it said it would undertake “widespread public consultation on the Commission’s draft proposals”.<sup>30</sup> The Commission again held numerous public meetings in each district council area, as well as events on specific issues such as women’s rights, disability and sexual orientation. There were television advertisements, billboards on bus shelters and supplements produced in local newspapers. It is not clear, however, the extent to which the public awareness and knowledge of the Bill of Rights had increased, but there were more submissions received by the Commission during this period than during the first stage of consultation. Children and youth appear to have been well consulted and many have praised the work carried out by the Commission to explain the Bill of Rights to young persons. It would still appear, however, that there were misconceptions about the role of a Bill of Rights and the power it gave to the courts. Local human rights organisations, schools and other individuals have also developed their own ways of highlighting the process, although sometimes through their own initiative rather than being prompted by the Commission.<sup>31</sup> It is still possible that the Secretary of State after receiving the Commission’s proposals will undertake a further consultation process (as happened with Patten Report, Criminal Justice Review and others for two months) before putting drafting legislation before Parliament (probably Autumn 2002, early 2003).<sup>32</sup>

This second stage of consultation in South Africa was important for public participation. There a Refined Working Draft was distributed in October 1995 which gave options for provisions, explanations and was a working draft of the constitution. Over 4.5m copies of this document were distributed around the country.<sup>33</sup> A closing date was set for submissions from the public to be the end of February 1996 (four months later). A Media Campaign supported the distribution and invited further submissions on the specific draft. Other materials on the constitution were also distributed to help focus

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<sup>29</sup> Sarkin notes in relation to the process in South Africa, “while the statistics show a high response level to the invitation to participate, the extent to which public comment impacted on the final text remains unclear. The CASE enquiry revealed that 41 per cent of respondents believed that their submissions would be treated seriously, with people living in rural areas having the most faith and white people having the least”. He also notes “the fact that the text was finalized by consensus reflects a remarkable achievement and much of the credit must go to a willingness, particularly on the part of the majority part, to accommodate the concerns of others and allay minority fears”, J Sarkin, “The Drafting of South Africa’s Final Constitution from a Human Rights Perspective”, (1999) 47 *American Journal of Comparative Law*, 67, at 71 and 86.

<sup>30</sup> See <[http://www.nihrc.org/files/BoR\\_15.htm](http://www.nihrc.org/files/BoR_15.htm)>

<sup>31</sup> See, for example, initiatives by the Committee for the Administration of Justice (CAJ), <<http://www.caj.org.uk>>.

<sup>32</sup> See <<http://www.caj.org.uk>>.

<sup>33</sup> Ebrahim *op cit* note 12, 194.

submissions. The success of this second campaign has been noted with the receipt of nearly 1,500 submissions and nearly 250,000 petitions.<sup>34</sup> Although there was some scepticism about the extent to which these submissions were actually taken on board in the final text, surveys again noted that whereas the majority of the population, 76 per cent, heard of the process through the media, some 12 per cent had obtained the information by word of mouth, suggesting that it had indeed generated public debate.<sup>35</sup>

In South Africa it was questioned whether it “was the content of the submissions of interest to the constitution-makers or only the fact that the submissions were made?”<sup>36</sup> It was found that there were difficulties in dealing with the amount of material obtained, how to treat the various submissions and whether they were to be seen as representative. It has been pointed out, for example, that it is necessary to measure access to information for one section of the community rather than the other in order to see the representativeness of the submissions. It was difficult to consider whether the fact that a disproportionate number of the submissions came from the well-educated middle class rendered the final document less representative.<sup>37</sup> In South Africa many organisations were asked to make submissions, but it is questioned whether these submissions “from organisations, particularly from central stakeholder, organisations with links to political parties, and organisations with specialised knowledge of the matters under consideration, appear to have fed into the process in a meaningful way. . . . However, the problem of representivity – which organised interests that are allowed to influence the negotiations-remains”.<sup>38</sup> Of those submissions from the public, it was noted that some were not focused and were very broad.

It has been said of the process in South Africa that it was “impossible to establish the precise extent to which the submissions from the public influenced the negotiation process and the constitution itself. There are too many interacting factors, too many possible patterns of influence and only tentative conclusions can be drawn”.<sup>39</sup> Having said this, however, at the second stage in South Africa, when comments were called on specific drafts, the submissions were seen to be more focused and less in number. These submissions were copied to the Committees, summarised and presented as end notes to the Draft Constitution sections: “This more manageable form

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<sup>34</sup> *Ibid.* During this time some behind the scenes negotiations were made among parties where agreement had been difficult to reach otherwise. Murray argues that although initially the process was open, it was essential that politicians chose to have bilateral meetings among themselves, on issues such as language rights and property, given the deeply divided nature of the society, C Murray, “A Constitutional Beginning: Making South Africa's Final Constitution”, (2001) *University of Arkansas at Little Rock Law Journal*, 11. See also C Murray, “Negotiating beyond Deadlock: From the Constitutional Assembly to the Court” in P Andrews and S Ellmann (eds), *The Post-Apartheid Constitutions: Perspectives on the New South Africa's Basic Law*, (2001).

<sup>35</sup> Ebrahim *op cit* note 12, 358.

<sup>36</sup> Gloppen *op cit* note 10, 259 questions whether people were being fooled into believing that their participation was worthwhile.

<sup>37</sup> *Ibid.*

<sup>38</sup> Gloppen *op cit* note 10, 260.

<sup>39</sup> *Ibid.*

greatly increased the accessibility of the submissions and their probability of being taken into consideration".<sup>40</sup> Thus, although "there are few signs indicating that the material content of the submissions from the public were utilised or systematically and seriously considered by the drafters at [the initial] stage. On the other hand, a certain influence cannot be ruled out".<sup>41</sup>

After the second stage of consultation on the specific draft document from the Commission in Northern Ireland there were criticisms that the Human Rights Commission has failed to generate this wide public involvement. A similar time period in which to undertake consultation in Northern Ireland, in total around one and half to two years,<sup>42</sup> cannot justify the apparently limited impact it has had, particularly when one compares its population of around 1.5 million with South Africa's 40 million at that time.

### III. THE APPROPRIATENESS OF USING HUMAN RIGHTS AS A TOOL OF POLITICAL CHANGE

The purpose of a Bill of Rights will vary depending upon the political, social and cultural context of the particular society.<sup>43</sup> One aim of a Bill of Rights should be to check "the political power of the majority",<sup>44</sup> whoever they may be, now and in the future.<sup>45</sup> Such a document should therefore be for the protection of all persons, not just those who are or who consider themselves oppressed or discriminated against in the present situation, but those who may be so in the future.<sup>46</sup> In addition, by ensuring as wide a participation and, therefore, as many views, as possible there is an increased likelihood that there will be a better Bill of Rights.<sup>47</sup>

Some have questioned the role of law, and human rights law, in dealing with political change, one of the arguments being that it may instead seek to

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<sup>40</sup> Gloppen *op cit* note 10, 261.

<sup>41</sup> *Ibid.*

<sup>42</sup> The deadline for producing the South African Constitution was two years from the first session of Parliament, namely 10 May 1996.

<sup>43</sup> For example, it has been argued that the political purposes of the Canadian Charter of Rights and Freedoms were to ensure national unity and to "guarantee" human rights, P.H Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms", (1983) 61 *Canadian Bar Review*, 30.

<sup>44</sup> A Cockrell, "The South African Bill of Rights and the 'Duck/Rabbit'", (1997) 60 *MLR* 513, at 529.

<sup>45</sup> *Ibid.* See also, for example, W.J Brennan, "Why have a Bill of Rights?", (1989) 9 *OJLS* 427.

<sup>46</sup> Cockrell, *op cit* note 44, 529. Cockrell also notes the quotation from Judges Chaskalson P and Didcott J in *S v Makwanyane and Another*, 1995 (3) SA 391 (CC), para 88 at 431C-E, that "the very reason for establishing the new legal order. . . was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process", and further, "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts".

<sup>47</sup> A Sachs, "Towards the Constitutional Reconstruction of South Africa", (1986) 2 *Lesotho Law Journal* 12; see Gloppen *op cit* note 10, 257.

entrench the *status quo*.<sup>48</sup> For example, in relation to South Africa, it was said that rights language was used by the ruling white minority to advance protection of their property interests thus making it difficult for land issues to be resolved properly.<sup>49</sup> Human rights, and a Bill of Rights, can be, as Mutua argues, “a double-edged sword: it can be used both as a weapon and as a shield”<sup>50</sup> and, therefore, in relation to South Africa it was argued “the protection of these interests through the new constitutional order in effect binds the ANC and robs it of any ability to carry out major reforms”.<sup>51</sup> I would not, however, take such a despondent view, if a Bill of Rights is seen as part of the process to a more just society, rather than the end result in itself. Indeed, whilst other action will also be necessary,<sup>52</sup> such as changes to institutional structures,<sup>53</sup> human rights themselves cannot hold all the answers.<sup>54</sup>

Inevitably a Bill of Rights will be a compromise,<sup>55</sup> as Christine Bell has stated, human rights are “both forward – and backward – looking”.<sup>56</sup> There

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<sup>48</sup> R Hirschl, “The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities”, (2000) 36 *Stanford Journal of International Law* 73, at 75.

<sup>49</sup> “While rights discourse had the power to galvanize the oppressed and garner the sympathy of some segments of the middle and upper classes during the struggle against official apartheid, the Mandela government’s near total dependence on rights discourse as the tool for the transformation of the legacy of apartheid is a mistake. First the double-edged nature of rights language has already become evident in South Africa. The new constitutional rights framework has frozen the hierarchies of apartheid by preserving the social and economic status quo”, M wa Mutua, “Hope and Despair for a new South Africa: The Limits of Rights Discourse”, (1997) 10 *Harvard Human Rights Journal*, 63, at 68 and 83.

<sup>50</sup> *Ibid*, p 112.

<sup>51</sup> *Ibid*, p 112.

<sup>52</sup> “. . . rights discourse does not and probably cannot provide us with the criteria for deciding between conflicting claims of right. In order to resolve rights conflicts, it is necessary to step outside the discourse. One must appeal to more concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers; and one must develop and elaborate conceptions of and intuitions about human freedom and self-determination by reference to which one seeks to assess rights claims and resolve rights conflicts”, K Klare, “Legal Theory and Democratic Reconstruction: Reflections on 1989”, (1991) 25 *University of British Columbia Law Review*, 69, at 101.

<sup>53</sup> As Gilbert Marcus argues, in relation to the Constitutional Court in South Africa, “the creation of a special court was considered imperative. Apartheid had resulted in distortions in all institutions of public life”, G Marcus, “A Bill of Rights for Northern Ireland: Lessons From South Africa”, July 2000, p 3 (on file with author). J Sarkin, “The Development of a Human Rights Culture in South Africa”, (1998) 20 *HRQ*, 628. Sarkin, *op cit* note 29, 86.

<sup>54</sup> As McEvoy has noted, for example, in relation to Northern Ireland, “with regard to the issue of disputed marches, while it may be conceptually useful to remind both marchers and residents groups that one element of their dispute is a clash of rights, the human rights framework can make no pretence to have all the answers in such a dispute”, K McEvoy, “Human Rights, Humanitarian Interventions and Paramilitary Activities in Northern Ireland”, in C Harvey, *Human Rights, Equality and Democratic Renewal in Northern Ireland* (2001) p 215, at 246-247.

<sup>55</sup> Corder *op cit* note 9, 514, notes that the South African Constitution’s provisions on rights were “reached after much dispute and vacillation between the major

will be at least two extreme positions pulling in opposite directions: “law and constitutions in such times draw their sense of justice from past human rights abuses, and notions of the rule of law and constitutional interpretation are shaped by the attempt to construct a different future”.<sup>57</sup> Human rights law, therefore, plays “a role in mediating between past and future”.<sup>58</sup> In addition, it is also likely that any agreement reached among the people and Commission in Northern Ireland may be watered down further once it is submitted to the British government, as was only too clear from the Patten proposals and their subsequent translation into the Police (Northern Ireland) Act 2000.<sup>59</sup>

Although the validity of a Bill of Rights as part of a state/community building process has been questioned,<sup>60</sup> it is clear that violations of human rights contribute to and exacerbate a conflict and thus part of the solution will require respect for human rights.<sup>61</sup> In this way human rights can be part of a move towards a more democratic process<sup>62</sup> and “international law and law in general can provide a powerful tool to individuals and communities struggling to create viable and accountable political, economic, social and cultural institutions”.<sup>63</sup>

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parties”, and have been criticised “on the basis of particular needs or programmes of such groups were not accommodated unreservedly”.

<sup>56</sup> C Bell, *Peace Agreements and Human Rights* (2000) p 303.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> See P Hillyard and M Tomlinson, “Patterns of Policing and Policing Patten”, (2000) 27(3) *Journal of Law and Society*, 394-415; Committee for the Administration of Justice (CAJ) “CAJ Dismayed by Patten Legislation”, 16 May 2000, <<http://www.caj.org.uk/press/20000516.html>>.

<sup>60</sup> See J Morison, “Democracy, Governance and Governmentality: The Role of the Voluntary Sector in the Democratic Renewal of Northern Ireland”, in C Harvey, *Human Rights, Equality and Democratic Renewal in Northern Ireland* (2001) p 249. See also, G H Fox and B R Roth, *Democratic Governance and International Law* (2000); C Harvey, “Democracy in Transition: Mainstreaming Human Rights and Equality in Northern Ireland”, (1999) 4 *Journal of Civil Liberties*, 307; C Palley, “Constitutional Devices in Multiracial and Multireligious Societies”, (1968) 19 *NILQ*, 377.

<sup>61</sup> As Brice Dickson states, “a failure on the part of the authorities to address human rights concerns made reaching a political settlement between the parties which did not support violence all the more difficult”, B Dickson, “The Protection of Human Rights: Lessons from Northern Ireland”, [2000] *EHRLR* 213, at 213; McEvoy *op cit* note 54, 215. See also, Bell *op cit* note 56.

<sup>62</sup> Morison notes the potential of a Bill of Rights to “deliver democratic process” and that advocates use human rights as a way of ensuring democracy, “widening political space” and to “hear voices outside traditional politics”, Morison *op cit* note 60, 269-271.

<sup>63</sup> R.C Slye, “International Law, Human Rights Beneficiaries and South Africa: Some Thoughts on the Utility of International Human Rights Law”, (2001) 2 *Chicago Journal of International Law*, 59, at 77. As Bell noted in relation to Northern Ireland, “the human rights dimension signals a fundamental change in the nature of the state. It is to be a state which recognizes both nationalist and unionist aspirations and identities as equally legitimate. In South Africa human rights protections are central to what is in essence a transfer of power. Human rights provide a new legitimacy to a new regime, but also aim to establish the new

There is a role, therefore, that a Bill of Rights can play in uniting a disparate and divided society and in this sense the manner in which it is adopted is important, “the symbolic importance of such instruments and their potential to foster a striving for common goals and aspirations depends greatly on the degree to which the drafting process has been inclusive and legitimate. Inclusivity can inspire a sense of national ownership; a non-inclusive process can be a source of tension and further division”.<sup>64</sup>

In this regard, the involvement of not only the key political players such as politicians and public organisations, but also the public as a whole in this project, is essential to the democratic and peace building process. The process of drafting itself can promote understanding between persons, namely create an awareness and perhaps appreciation of the “other” dialogue and can actually stimulate discussion and the development of a civil society.<sup>65</sup> In addition, ensuring that all persons are involved in deciding the content of a Bill of Rights increases the likelihood that there will be a sense of ownership of the resulting document.<sup>66</sup> It is submitted that the drafting process should be seen as part of the peace process as a whole, as part of the gradual transformation to reconciliation and a just society.<sup>67</sup> Enabling and encouraging all persons to be involved may actually help to ensure that the end product is actually respected and upheld.<sup>68</sup>

There are a number of issues, however, that go to the heart of the success of the process in Northern Ireland.

#### **IV. ROLE OF POLITICAL REPRESENTATIVES IN THE PROCESS**

##### **(a) Role of the Commission**

Unlike Northern Ireland, where the Human Rights Commission was mandated with the task of advising on the Bill of Rights, the process of drafting the constitution and its Bill of Rights in South Africa took place within a political process, under the CODESA process and then the Constitutional Assembly where parties (although the IFP did withdraw) were represented. There were some complaints that the Constitutional Assembly, despite being politically representative, asked for information but was not really prepared to engage in debate and it has been argued that “internally it seems that few organisations in civil society made serious attempts to draw

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regime as multiracial or pluralist, and capable of protecting rights regardless of ethnicity, rather than a mirror image of its predecessor”, Bell *op cit* note 56, 294.

<sup>64</sup> Sarkin, *op cit* note 29, at 86.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, see also Gloppen *op cit* note 10, 64.

<sup>68</sup> Gloppen *op cit* note 10, 65: “participation in the creation [of a constitution] works to kindle an obligation towards it”. The paper produced by the Victims’ Rights Working Group also notes that a “Bill of Rights can be seen as one of the fundamental ways of establishing a new legitimacy for the rule of law. It is a building block of a new society that is designed to transcend and resolve the conflict of the past”, Northern Ireland Human Rights Commission, *Bill of Rights. Victims’ Rights Working Group Report, January 2001*, 1.

their members into meetings or discussions about the writing process”.<sup>69</sup> However, those who may have been sceptical of how the process would benefit them<sup>70</sup> at least felt they had representatives involved in it from the start who had considerable leverage in the negotiations, enabling them, for example, to negotiate over contentious issues such as the protection of private property and protection of some language (Afrikaans) schools.<sup>71</sup> This has not been the case for Northern Ireland where even the Northern Ireland Assembly has had little role to play. Instead, the development of the Bill of Rights by a non-elected body, outside of the political structure with all of the preconceptions about its membership, served only to continue the perception that human rights are a republican/nationalist agenda.

In addition, the process in Northern Ireland has also been criticised for being the domain of NGOs and the human rights community which, again, are neither representative nor, it is argued, objective. Such arguments, about the role of non-elected individuals promoting such constitutional change, are not new<sup>72</sup> and some have argued “NGOs, acting individually and in networks, often wield influence on decision-making “behind closed doors” and without pluralistic participation”.<sup>73</sup>

The Human Rights Commission was mandated by the Belfast Agreement to “consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention. . . , to reflect the particular circumstances of Northern Ireland”. What “consult and advise” meant was not entirely clear and some have queried whether the Commission has overstepped its mark by going as far as it did and drafting an actual document. I believe, however, it is commendable that the Commission interpreted this in a broad sense to try to obtain as many views as possible. However, beyond this issue its mandate is not entirely clear. Is it merely to collect and facilitate the views of the people of Northern Ireland for presentation to the Secretary of State? Is it, in addition, to set some minimum standard of human rights for the jurisdiction beyond which, even if

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<sup>69</sup> Gloppen *op cit* note 10, 262.

<sup>70</sup> *Constitutional Assembly Annual Report 1996*, 71 and 75, noted that comparatively less proportion of the white section of the population said they had learnt something from the process, <[http://www.polity.org.za/govdocs/constitution/ca/ANREPORT/Ca95\\_96.pdf](http://www.polity.org.za/govdocs/constitution/ca/ANREPORT/Ca95_96.pdf)>; see also Ebrahim *op cit* note 11, 245.

<sup>71</sup> M.A Burnham, “Constitution Making in South Africa”, Boston Review, University of Illinois Press, <<http://bostonreview.mit.edu/BR22.6/burnham.html>>.

<sup>72</sup> “The rise of civil society presents a paradox to human rights advocates. On the one hand, civil society can promote human rights norms and raise the concerns of unheard voices. . . . On the other hand, transnational civil society may undermine this norm of democratic governance since voluntary associations are wholly unaccountable to any sovereign and, thus, may act in a manner contrary to democratic principles”, J Mertus, “From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society”, (1999) 14 *American University International Law Review*, 1335, at 1340.

<sup>73</sup> *Ibid*, 1372-1373. See also C Tracy, “The Growing Role of Non-Governmental Organizations”, (1995) 89 *American Society of International Law Proceedings*, 413; T Van Boven, “The Role of Non-Governmental Organizations in International Human Rights Standard Setting: A Prerequisite for Democracy”, (1990) 20 *California West Journal of International Law*, 207.

public opinion is contrary to it, any Bill of Rights must not fall. Its non-political status and human rights expertise would support this latter view. This should be one of the advantages of having the Bill of Rights drafted by those who are not politicians. This is indeed the approach the Commission seems to have (rightly I would argue) adopted, as it has stated in its consultation document:

“the purpose of this consultation paper is to draw on the many submissions the Commission has already received and to set out the Commission’s initial views on what rights a Bill of Rights should include and how they could be enforced. On some issues the Commission has reached preliminary conclusions. On others it has not yet made up its mind and has therefore set out what it sees as the main options. But it wants to have your views on all the issues involved before it makes its final recommendations to the Government”.<sup>74</sup>

In addition, the Commission has argued that its obligations under section 69(3) of the Northern Ireland Act permit it to take this wider view. Similarly, there have already been examples of where the Commission has supported human rights principles even in areas which do not obtain the support of many of the population in Northern Ireland, for example, by funding research into treatment of individuals on the basis of their sexual orientation in Northern Ireland despite criticisms,<sup>75</sup> and involving representatives of the gay, lesbian and trans minorities in the Working Groups in Northern Ireland whose views were reflected in the resulting papers.<sup>76</sup> Similarly, when petitioned on whether the Constitution should expressly include sexual orientation in the anti-discrimination clause, 17,000 South Africans out of a million voted against its inclusion.<sup>77</sup> Despite this, it was eventually protected within section 9 of the Constitution and there have now been cases before the Constitutional Court upholding non-discrimination on this ground.<sup>78</sup> The decision to include such protection in the South African constitution, which appears to go directly against the wishes of a significant number of persons, suggests that the will of the

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<sup>74</sup> Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland. A Consultation by the Northern Ireland Human Rights Commission* (2001) p 7.

<sup>75</sup> For example, M Coleman, “Protest Against Gays”, *Belfast Telegraph*, 11 June 1999; L Deeny, “Gays Vow to Defy Bigots”, *Belfast Telegraph*, 21 February 2001; “Gays have Bullied the Entire Nation”, *Belfast Telegraph*, 15 February 2000.

<sup>76</sup> The general non-discrimination clause in the Equality Working Group’s paper mentions sexual orientation explicitly as one of the grounds on which there should be no discrimination, Northern Ireland Human Rights Commission, *Bill of Rights. Equality Working Group Report, January 2001*, para 4, noting on p 3 that the issue of equality “goes beyond the nationalist/unionist political divisions. . .”. The Report draws upon the South African Constitution provisions on discrimination, amongst others. See also, Northern Ireland Human Rights Commission, *Bill of Rights. Culture and Identity Working Group Report, January 2001*.

<sup>77</sup> Gløppen *op cit* note 10, 257.

<sup>78</sup> See for example, *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and others*, CCT11/98, 9 October 1998. See also more widely, *Hoffman v South African Airways*, CCT17/00, 28 September 2000.

people need not always be the determining factor in deciding the content of the Bill of Rights.

### **(b) Role of the Working Groups**

That the Commission's mandate is not clear was also reflected in the position of the Working Groups. The Commission in Northern Ireland appointed Working Groups to consider a number of specific issues, namely victims' rights, culture and identity, children and young people, language rights, equality, social and economic rights, education rights and implementation issues. The Working Groups were required to produce advice to the Commission by the end of February 2001, which it would consider along with submissions received from other organisations, individuals and the wider public. In South Africa the Constitutional Assembly appointed six Theme Committees from among its 490 members, one of which had the task of drafting the provisions on fundamental rights.<sup>79</sup> These Theme Committees were composed of 30 persons nominated by political parties in proportion to their representation, with several chairpersons to ensure they were not dominated by one party. Their main role was to ensure the inclusive nature of the process by hearing submissions from all key persons.<sup>80</sup> Some of the Committees were given a technical committee of experts to advise them. Submissions from the public and others were fed back into the Theme Committees to include in their discussions and drafts.

Because the Theme Committees were set up under the elected body of the Constitutional Assembly, they were therefore politically representative. This avoided some of the difficulties associated with the Working Groups in Northern Ireland which, although appointed for their expertise, have been criticised for not being sufficiently representative, not only politically but also of all sectors and communities in Northern Ireland. The result is that some argued this initial process in Northern Ireland was not impartial.

What also did not seem to be clear in Northern Ireland was the exact mandate of the Working Groups. They were eager to make it clear at the start of their remit that it would not be their role to initialise public debate. While this task then clearly fell to the Human Rights Commission itself, this left some uncertainty as to what exactly the Working Groups should be producing, namely, whether the aim was to produce explicit drafts of a Bill of Rights, or merely a collection of ideas. The former would presume some legal drafting, which, it appeared, some of the groups did not perceive themselves having the relevant expertise to do. The latter would suggest that some public consultation by the groups was required. This did not take place. Whilst it might appear to have been easier to leave this task to the Working Groups, this was not really feasible given their limited budgets (£2000 per group) and the fact that all members of the group were undertaking this task on a part time voluntary basis.

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<sup>79</sup> There were Theme Committees on: the democratic state, structure of government, relationship between levels of government, fundamental rights, judiciary and legal systems, and specialised structures of government.

<sup>80</sup> Ebrahim *op cit* note 12, 182.

If the role of the Working Groups was merely that of experts to assist in drafting the Bill of Rights then this raises the question as to why, although some of the reports of the Groups were incorporated into the draft consultation document, for two of the groups: identity and community and language rights, the draft document of the Commission bears little relationship to the proposals offered by those Groups. Some have therefore questioned the purpose of asking these Groups to propose suggestions, where many took great pains to reach a difficult compromise, when their suggestions would be treated as any other. Whilst this might have been an important process for the individuals involved, the wider purpose is less clear.

### **(c) The perceived nationalist/republican bias**

The Commission has also faced further difficulties in Northern Ireland as a result of the perception that human rights is a nationalist/republican agenda. This may not only be the result of the political ideology of the right and left but McEvoy<sup>81</sup> has also suggested that human rights law through the European Convention on Human Rights was used by the nationalist/republican movement as part of a campaign to internationalise their struggle, and thus, “human rights challenges offered the opportunity to embarrass British governments and to expose state abuses”.<sup>82</sup> Mageean and O’Brien note that although there was a shift in attention paid to human rights issues during the drafting of the Good Friday Agreement and that little attention was paid by nationalists to human rights in the process, “the experience of the nationalist community within the state of Northern Ireland was forcefully articulated in the language of rights as early as the beginning of the current conflict. Indeed, many would say that the violence of the state’s reaction to that expression of discontent led to the re-birth of military republicanism and the subsequent violence”.<sup>83</sup>

As a result human rights are themselves not associated with an objective approach which will guarantee protection to all parties but as a tool of a particular political belief. It was inevitable therefore, that the Northern Ireland Human Rights Commission was going to be perceived as a body which would pursue a nationalist/republican agenda and which would be

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<sup>81</sup> K McEvoy, “Law, Struggle and Political Transformation in Northern Ireland”, (2000) 27(4) *Journal of Law and Society*, 542-571, at 557.

<sup>82</sup> McEvoy also notes the perceived link between Republican violence and use of human rights, “the inability or unwillingness of the Stormont regime to respond to the demands of the civil rights movement contributed directly to the development of more confrontational strategies. . . . once Republican violence began in earnest, the primacy of armed struggle meant that. . . those advocating a rights-based analysis of the conflict were liable to be treated with suspicion as ‘partitionist’”, *ibid*, 568-569.

<sup>83</sup> P Mageean and M O’Brien, “From the Margins to the Mainstream: Human Rights and the Good Friday Agreement”, (1999) 22 *Fordham International Law Journal*, 1499, at 1503. They also note that the Irish government saw rights as central to the conflict, 1504.

composed of sympathisers to that cause and a Bill of Rights as a republican document.<sup>84</sup>

Despite attempts to ensure that the membership of the Commission was representative of at least these two communities of Northern Ireland, these concerns still continue and the resulting feeling of alienation from the process by the unionist community has forced the Commission to consider alternative ways of including them and others traditionally opposed to the notion of human rights.<sup>85</sup>

In contrast, in South Africa “the need for a bill or charter of fundamental rights in a new constitution in South Africa was a point of almost unanimous agreement”.<sup>86</sup> Thus, although “the relationship between the newly democratic government in South Africa and international human rights law is, however, a complex one”,<sup>87</sup> the Bill of Rights had the support of the white minority as it was seen as a way of protecting their property rights. Therefore, there seems to have been several reasons why this was the case including that the adoption of such was inevitable and could not be avoided and therefore, they started to see the benefits that a Bill of Rights could bring to them and that “without some guarantee of protection for the rights of

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<sup>84</sup> Mageean and O’Brien state that “it is very likely that unionists within the talks process were left in little doubt that the extensive protections afforded to rights in the Agreement were there primarily to reassure nationalists who had suffered under both unionist and direct rule from London that the diluted but extant union that would emerge from the talks would be a safer place for them”. However, although some unionists accepted human rights as important, this was “not mirrored in mainstream unionism. Contemplating serious change to the police, judiciary and criminal justice system would have constituted firm evidence that flaws existed within those institutions and that they had in some ways contributed to the conflict. . . . To effect real change to the police was to accept the validity of the ‘enemy’s’ perception of the police, and therefore to betray those who had stoutly defended the state through a quarter of a century of the worst political violence experienced in any Western sense since World War II. In one sense, it could be argued that mainstream unionism could only lose in the talks, and the question was really how much would be lost”, Mageean and O’Brien, *ibid*, 1509 and 1510.

<sup>85</sup> See below, in relation to individual duties.

<sup>86</sup> R Spitz and M Chaskalson, *The Politics of Transition. A Hidden History of South Africa’s Negotiated Settlement* (2000) p 252. Spitz and Chaskalson note “the debate about fundamental human rights took place in the context of ideological and political power interests. Within the ideological context, three conceptual tensions stand out: between liberationism and libertarianism; progressivism and traditionalism, and feminism and patriarchy”, p 253. As they note, liberationism referred to individual liberty and state intervention being restricted and libertarianism “is associated with the tradition of “freedom fighting” in South Africa, and has come to emphasise equality and the need to bring about equality through political power”. The Technical Committee expected that there would be “strident claims from those formerly excluded from power” and “those still clinging to office will attempt to preserve as much privilege and control over the process as they can”. Yet, “the notion of a political power struggle is crucial to a basic understanding of the conflict surrounding the inclusion or formulation of certain fundamental rights”.

<sup>87</sup> Slye *op cit* note 63, at 61.

minorities, the previous ruling white minority government would not have relinquished power to an inevitably black-controlled majority government".<sup>88</sup>

## V. CONTENT OF A BILL OF RIGHTS

The issue of what rights to include illustrates some of the difficulties of the process of drafting the Bill of Rights and have a part to play in the sense of ownership of the final document.

### General issues

There was an attempt to use plain language rather than legal language in the Bill of Rights and Constitution as a whole in South Africa to ensure its accessibility to all persons.<sup>89</sup> Despite concern from some legal quarters that this would render the document weak and open to legal challenge, the final document is considered to be a successful compromise. This experience would be useful in Northern Ireland where there have been criticisms that the draft Bill of Rights it is not accessible to the wider public. There were concerns, both, that some of the Working Groups were too legal in their approach, that the information is very much a paper exercise and was difficult to understand and, on the other hand, there were also fears from those within the Groups that they did not have the necessary legal expertise to draft such material. It would be useful if the Commission took on board expert assistance in drafting its final submissions to the Secretary of State in this respect.

### Economic, Social and Cultural Rights

There has been considerable discussion as to whether to include economic, social and cultural rights as well as civil and political rights in a Northern Ireland Bill of Rights. In addition to the number of well argued reasons as to why economic, social and cultural rights should not be treated differently from civil and political rights, it has also been noted that the process of involvement of all sectors of the community necessitates that there should be both.<sup>90</sup> Thus, "the narrower the range identified, the less likely it is that individuals will identify with the bulk of rights on the list. In particular, the more the rights specified are seen to appeal across the communities, the more

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<sup>88</sup> R J Goldstone, "The South African Bill of Rights", (1997) 32 *Texas International Law Journal*, 451, 452. Thus, "the former South African government, recognising that it was inevitable that minority rule would sooner or later have to give in to the demands for democratic government, flirted with the idea of protecting group rights. The government in this way hoped to maintain some of the privileges enjoyed for so many decades by whites", 455.

<sup>89</sup> The Constitutional Assembly decided that the constitution should be drafted in plain language and a plain language expert was involved in the process, see Murray *op cit* note 34, 12.

<sup>90</sup> McCrudden *op cit* note 1, at 7 argues "modern constitutions now mostly contain an attempt to identify the basic values that a country is committed to ... recognising a common set of rights in a document that all can commit to, at least in part, is thus an important element in building a new society, providing the possibility of common identification by all with the basic document. For this reason it is important that the rights identified should not be too narrow in their focus".

likely it will be that rights can be seen as something that binds the communities together rather than divides them”.<sup>91</sup>

Similar arguments were raised in South Africa, indeed, the majority of members of the Technical Committee drafting the Interim Constitution and Bill of Rights “seem to have considered a full Bill of Rights fairer than one which accorded with the wishes of only one political party”. In addition, just as there has been disagreement here over what constitutes “circumstances particular to Northern Ireland”, so in South Africa at the stages of drafting the Interim Constitution it was not clear what was meant by “transition”, as the Technical Committee was required to draw up a set of rights in the Interim Constitution which would be essential to fair elections.<sup>92</sup> Thus:

“the conflict between “minimalists” and “maximalists” over the interim Bill of Rights became a microcosm of the negotiating process. . . At first the Technical Committee took the view that third-generation rights were not related to the transition, and therefore irrelevant to an interim Bill of Rights. In no time, however, the list of “essential” human rights had multiplied, and the minimalists were forced to review their position”.<sup>93</sup>

The Technical Committee would appear to have had some political pressure from the government to take a maximalist approach “this was their opportunity to draft the founding document of a human rights culture in South Africa and they took it”.<sup>94</sup> Thus:

“in many ways, and particularly in view of the explicitly political context in which discussions occurred, it made greater political sense to satisfy the largest possible number of parties by including rights on which they insisted, rather than alienate them from the negotiating process and undermine the principle of inclusiveness. Thus circumstances forced the ANC’s

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<sup>91</sup> McCrudden, *op cit* note 1, at 7-8. Further, “a broad based list of rights can enable a set of common values to be committed that transcends consocialism, and offers an alternative vision of the future”.

<sup>92</sup> Spitz and Chaskalson, *op cit* note 86, at 259-260; Cockrell, *op cit* note 44, at 526. Corder *op cit* note 9, at 512 notes that similarly in South Africa there were also different views on the content of a Bill of Rights in the drafting of the 1996 Final Constitution. Some wished for a complete inclusion of all rights including economic, social and cultural and peoples’ rights. Others, including the ANC wanted a democratically elected assembly to be free to draft whatever bill of rights it wanted, and wanted civil and political rights, in particular, free and fair elections. Corder notes, 513 “both the inclusion of certain rights, the exclusion of others and the precise formulations adopted were the direct product of political negotiations and agreement, with the government and the ANC being driving forces”. He then adds that once people had got used to the idea of an interim constitution and national unity government “there was little difference of opinion over the inclusion and formulation of the commonly accepted civil and political rights”.

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

<sup>94</sup> *Ibid.*, at 262.

ideological commitment to maximalism to prevail over its political expedient minimalism".<sup>95</sup>

As a result the South African Bill of Rights does contain rights to adequate housing, health care, food, water and social security, education, language and culture. Although in the Interim Constitution these rights were given a limited place, they are extended upon in the Final Constitution. One of the other arguments against including such rights which was raised in South Africa and has been raised in Northern Ireland has been shown to be flawed, namely that they could not be challenged before courts.<sup>96</sup> The argument was rejected by the South African Constitutional Court in its certification and given a recent case in the Constitutional Court concerning housing rights<sup>97</sup> there are clear precedents for the contention that inclusion of such rights in a Northern Ireland Bill of Rights would be realistic and enforceable.

The inclusion of such rights in the draft consultation Bill of Rights by the Northern Ireland Human Rights Commission is to be welcomed and the Commission has recognised that it is clear that such issues cut across community divides and therefore can have a uniting purpose and their inclusion could help to generate a sense of ownership in the resulting document. These rights should therefore be embraced for these purposes.

### **(c) Obligations of non-state actors?**

The Northern Ireland Human Rights Commission has considered using the notion of duties of the individual as a way of appealing to more right-wing ideology and sections of the community traditionally opposed to human rights.<sup>98</sup> About 90% of those who have died during the conflict in NI were as a result of killings by paramilitaries<sup>99</sup> and it has been argued therefore that the Bill of Rights should impose obligations not just on the state but also on non-state actors. As Brice Dickson has recognised, "this is the context against which the reaction of the state authorities has to be assessed. The context may not excuse the reaction but it does help to explain it".<sup>100</sup> The attempt to include this horizontal approach has been met with concern by human rights organisations for several reasons, particularly that the manner in which this is being promoted is to limit rights rather than enhance their protection.<sup>101</sup>

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<sup>95</sup> Spitz and Chaskalson, *op cit* note 86, at 262.

<sup>96</sup> The Constitutional Court in its certification of the constitution noted that objections related to the fact that they weren't universally recognised. In response to this the Court held that the final constitution was not limited to the rights raised in the interim one, it could go wider and it could supplement rights with those which are not universally recognisable, see *Certification of the Constitution*, *op cit* note 14.

<sup>97</sup> *Government of RSA and others v Grootboom and others*, Constitutional Court, CCT 11/00, 4 October 2000.

<sup>98</sup> See also McCrudden *op cit* note 1, at 9.

<sup>99</sup> A Simpson, *Murder Madness: True Crimes of the Troubles* (1999).

<sup>100</sup> Dickson *op cit* note 61, at 216.

<sup>101</sup> "Talk of the need for a Bill of Rights and Responsibilities is misleading at best and dangerous at worst. It is misleading in that it suggests a rights culture is a culture of licence, where people are free to hurt and abuse others... Who would seek to invoke responsibility provisions? The only obvious contender is the state

Comparisons with the South African experience would indicate that this was also a much debated issue<sup>102</sup> in the drafting of the Interim Constitution.<sup>103</sup> The issue was complex, “the underlying fear or hope, depending on which political viewpoint and constituency a party represented, being that without horizontality, corporations and companies would be able to “privatise” discrimination by keeping it beyond the reach of the state”.<sup>104</sup> Parties fluctuated over the horizontality issue in the Interim Constitution. Issues of concern against horizontality included the need to protect the privileges of the white and rich and stopping interference in the private sphere; fears that there would be a huge number of cases before courts, that employment practices would not be disturbed for whites, that discrimination in the private sphere could be prevented in other ways, and that horizontality would give too much discretion to the courts. Those arguments for horizontality included that it would prevent economic interests evading Bill of Rights requirements, would prevent discrimination in the private field and the “privatisation of apartheid”. In the end horizontality was not included in the Interim Constitution, although it did find its way into the Final Constitution. As Spitz and Chaskalson note:

“ultimately, the fact that the Bill of Rights was to be of short term duration probably swung the outcome in favour of verticality: the practical arguments for legal certainty during the transition outweighed the desirability of exploring academic possibilities surrounding horizontal application. This would also help explain why horizontal application was chosen for the Bill of Rights in the final Constitution, where immediate practical concerns appeared to matter less than the long-term potential for the inculcation of a rights culture”.<sup>105</sup>

In addition, in South Africa, as here, this issue reflected “a tension within international law between the legitimacy of the means used in an armed conflict (*jus in bello*) and the legitimacy of the ends for which an armed conflict is undertaken (*jus ad bellum*). Some in South Africa collapsed these two areas of international law and argued that the legitimacy of the fight against apartheid made every act committed in furtherance of that goal

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itself”, Committee on the Administration of Justice (CAJ), *CAJ’s Preliminary Submission to the Northern Ireland Human Rights Commission on A Bill of Rights for Northern Ireland March 2001* (CAJ, Belfast, 2001), p 2. As McEvoy argues, those lobbying groups who used the human rights framework in relation to paramilitary violence did not actually use human rights standards and did not look at state abuses, but networked with anti-terrorist groups and were funded by the government. He argues that the work of human rights organisations which focused on state abuses had an impact on paramilitary groups and explains why human rights bodies in Northern Ireland chose to focus on state abuses only. McEvoy *op cit* note 54, at 231-232. He also notes that the way of holding paramilitaries to account would be to apply humanitarian law and organisations such as CAJ were reticent to do so as this would make distinctions between who were legitimate and illegitimate targets, that it would cause arbitrary distinctions between loyalist and republican violence.

<sup>102</sup> Slye *op cit* note 63, at 71.

<sup>103</sup> *Du Plessis and Others v De Klerk and Another*, 1996 (3) SALR 850 P10 (CC).

<sup>104</sup> Spitz and Chaskalson *op cit* note 86, at 268; Marcus *op cit* note 53, at 5.

<sup>105</sup> Spitz and Chaskalson *op cit* note 86, at 279.

legitimate”.<sup>106</sup> It was noted, therefore, that “if the Truth and Reconciliation Commission (TRC) adopted this position, one direct effect would have been that victims of violent acts committed by the anti-apartheid movement would not have been considered victims of a gross violation of human rights under the TRC legislation and thus would not be eligible for reparations. The TRC eventually adopted the traditional international law position, noting that while apartheid was a crime against humanity and the fight against it was just, certain acts of the anti-apartheid movement qualified as gross violations of human rights”.<sup>107</sup>

Indeed, the Constitutional Court in their certification of the Final Constitution rejected objections based on several grounds including the argument that the principle was not universally acceptable. The Implementation Issues Working Group in Northern Ireland considered this issue and took the South African experience on board.<sup>108</sup>

The consultation document of the Human Rights Commission has some recognition of this issue in its preamble, for example, which states “realising that each individual in Northern Ireland, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Bill of Rights”. This appears to be a sensible approach which follows international standards and does not adopt the perspective of limiting rights which was initially feared.

## VI. EVALUATION OF THE DRAFTING PROCESS

As to whether the process created better understanding between peoples, both in South Africa and in Northern Ireland there was difficulty in obtaining the support of all members of the population.<sup>109</sup> It was recognised in South Africa, however, that over particularly contentious issues, discussion was apparent: “Certain issues of great emotional value, such as the flag and the national anthem, were the subjects of huge numbers of submissions and much public debate”,<sup>110</sup> even if it was difficult to see whether the process did lead to an understanding of the “other”.<sup>111</sup> What was clear in South Africa was that “acknowledgement of the value of public debate and of democratic processes as the legitimate approach to conflicts over the rules of politics, appear, however, to be widespread. This is indicated by surveys as well as by the marginalisation of the parties who chose to boycott parliamentary bodies”.<sup>112</sup> What was apparent in South Africa and in Northern Ireland was

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<sup>106</sup> Slye *op cit* note 63, at 71.

<sup>107</sup> *Ibid.*, 71-72.

<sup>108</sup> Northern Ireland Human Rights Commission, *Bill of Rights. Implementation Issues Working Group Report. January 2001*, para 11.

<sup>109</sup> The IFP boycotted the negotiations in the Constitutional Assembly in March 1995 (after a disagreement on international mediation). Gloppen *op cit* note 10, at 208 notes that “the obvious problem with regard to the IFP boycott is, of course, the negative impact on the legitimacy of the constitution”. The second stage of the constitution was finalised with the ANC and National Party as the main parties.

<sup>110</sup> Gloppen *op cit* note 10, at 263.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.* IFP withdrew from the constitutional negotiations, although it did win seats in the election. Christina Murray argues that this undermined the Constitutional

the enthusiasm and energy about the process, among the wider community.<sup>113</sup> This led to debate and discussion.

Survey results in South Africa indicated that “the public participation efforts succeeded in creating a sense of ownership in the product”.<sup>114</sup> There was clearly increased knowledge of the constitution and there was strong support for being involved in the process. In general it seemed that individuals believed that the organisers genuinely wanted them to participate and that their submission would be treated seriously,<sup>115</sup> while the style in which the draft document on the Bill of Rights was presented, with questions and options, suggests that it was indeed a document open for public consultation and not a *fait à compli*.

It would appear that the process in Northern Ireland has not received the attention that it should have done. The perceived bias of the Commission, the detachment from political structures and the lack of funding, have rendered conditions difficult for the Commission. The result has been that it is not clear that many outside the human rights community in Northern Ireland are either aware of the process of drafting a Bill of Rights or that they consider they should and could have some part to play in it. Many would support the contention that there is enthusiasm on the part of the Commission to make this consultation process effective for all sections of society but some political parties, drawn along traditional divides, lack the desire to support the process.

## VII. CONCLUSION

The Human Rights Commission is required to submit proposals to the Secretary of State for Northern Ireland and that such proposals will be enacted in Westminster legislation.<sup>116</sup> Thus, it could be argued even if the drafting process has achieved in instilling a sense of ownership and participation of the people of Northern Ireland, the final decision is taken out of the hands of its own Assembly and placed in those of the British Government. In this respect, a referendum on the Bill of Rights might help to engage political debate and ownership.

The issues regarding implementation of a Bill of Rights have not been covered in this paper and are dealt with extensively elsewhere.<sup>117</sup> One issue which, however, is central to the process and sense of ownership is whether there will be one document: “A Bill of Rights for Northern Ireland”. There have been alternatives suggested, however, that do not go as far. Firstly, it has been proposed that, on the same basis as the Human Rights Act, other relevant international human rights treaties should be enacted into national law through separate pieces of legislation, either for Great Britain and Northern Ireland or just for Northern Ireland. Particular treaties which have

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Assembly’s dreams that a constitution would include all South Africans from the start, Murray *op cit* note 34, at 6.

<sup>113</sup> *Ibid.*

<sup>114</sup> Gloppen *op cit* note 10, at 264.

<sup>115</sup> More scepticism came from white South Africans who had less faith in the constitution than the black majority, Gloppen *op cit* note 10, at 265.

<sup>116</sup> See above.

<sup>117</sup> See Colin Harvey, in this issue above. . .

been suggested in this regard include the Council of Europe Framework Convention on the Rights of National Minorities, the United Nations Convention on the Rights of the Child and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. A second alternative suggests consolidating existing legislation on, for example, issues to do with employment rights or discrimination, into single Acts. A third, even weaker, suggestion proposes passing amended pieces of legislation relating to particular Acts, for example, the Race Relations Acts, again, either for Great Britain and Northern Ireland or just for Northern Ireland.

These approaches, however, miss a valuable opportunity. Having one document, a “Bill of Rights for Northern Ireland” can ensure that the Belfast Agreement and the process of consultation, as indicated above, can be used to work towards a culture of peace and understanding. Drafting one document, with the contribution of all persons, can help to instil a sense of ownership of the resulting contents, and ensure a dialogue between others, that ad hoc amendments of legislation or ad hoc incorporation of treaties cannot.

A single Bill of Rights provides a valuable opportunity not only to deal with the situation specific to the past, but also to create a culture for the future in which the rights of all are realised and protected. In this respect, there have been concerns raised by some that the debate on a Bill of Rights is going beyond the situation which is perceived to be specific to Northern Ireland and taking in wider issues. It is submitted that there should not be a narrow interpretation of what this situation is, by considering for example, only issues of religion, but it is necessary to look wider at the society as a whole.<sup>118</sup> While the rights, for example, of ethnic minorities, gays, lesbians and trans people, persons with disabilities, those who are deaf and even women may not be traditionally associated with the conflict in Northern Ireland, this does not mean that they are not relevant to the situation in Northern Ireland. They should be considered in this process. Considering the amendment of ad hoc pieces of legislation or incorporation of specific treaties does not take a holistic view. This is where a Bill of Rights, one document with a recognition of the past and a vision for a future is essential.

A Bill of Rights is not just useful in its final form, but in the process by which it is created. This process should be seen as part of the transition to a more just society rather than as an end in itself. An opportunity for all the people in Northern Ireland to participate in drafting a document where they can see a clear final single product is essential.

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<sup>118</sup> McCrudden *op cit* note 1, at 8 argues that it “might be misguided to focus a Northern Ireland Bill of Rights only on those rights that address specifically Northern Ireland concerns in a narrow way”, such as language, discrimination minority rights, criminal justice, as this “reinforces the idea that human rights are narrowly concerned to further the interests of one community, or are narrowly concerned as part of a strategy of dispute resolution between those communities”. He notes the success of s 75 of the Northern Ireland Act in uniting groups across communities as something that should be encouraged.