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THE POLITICS OF RIGHTS AND DELIBERATIVE DEMOCRACY: THE PROCESS OF DRAFTING A NORTHERN IRISH BILL OF RIGHTS

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Abstract: Nature of Bill of Rights exercise to be undertaken under terms of 1998 Belfast Agreement, need for public participation in drafting process, rights that should be protected and mechanisms for protection, including constitutional court.

***48** This article explores the issues raised by the development of a Bill of Rights in Northern Ireland, and considers the potential of the Bill of Rights to be a unifying force in a complex and diverse society, and to enhance participatory democracy in Northern Ireland. The drafting process for the Bill of Rights is notable for the stress that has been placed on public participation, an approach that is important in enhancing the legitimacy, and the sense of public ownership, of a Bill of Rights. The author considers the possible content of the Bill of Rights, and suggests that the Belfast Agreement does not mandate a narrow or restrictive approach to the catalogue of rights guaranteed. There is a need to ensure that the Bill of Rights is inclusive of all communities, and that, in particular, social and economic rights, and equality rights, are adequately protected. The article goes on to consider appropriate mechanisms of protection under the Bill of Rights, in particular the question of the establishment of a constitutional court for Northern Ireland.

Introduction

There is a general tendency to overstate the significance of the present, a trend which is evident in recent commentary on constitutional reform in the United Kingdom (U.K.). [FN1] While this is understandable, given the nature of the constitution and the times we live in, the reforms of the Labour government should be seen, as Ewing has argued, as part of the process of radical change which characterised the twentieth century. [FN2] The constitutional reform project of the Labour government, while clearly distinctive, must be placed within a tradition of political change and not entirely removed from it. The reason is not to encourage the depressing business of assimilation to orthodoxy, but to bring the rich history of political struggle which resulted in progressive social, economic and political reform back into the picture. [FN3] It is important

to ensure that the ***49** people who struggled to achieve these changes are not "air-brushed" out of history. The constitutional reform process has at times been such an elite-driven affair that one can neglect the popular struggles of the past.

Some constitutional lawyers in the U.K. are rather desperate to find in recent developments a constitutive moment which would herald a revolutionary break. Some of this is an attempt to renew what is now termed the "union state" at a time when its prospects do not look particularly good. In fact, the limited human rights project of the Labour government can be seen as an attempt to promote integration. Internal and external developments would certainly suggest that traditional approaches need to be reconsidered. [FN4] However, it may be that these concepts require reconstruction rather than abandonment. In Northern Ireland arguments for a radical break with the past have a particular resonance. It has seldom been entirely clear where Northern Ireland fits into the picture of "British constitutionalism". [FN5] As a territory which has traditionally suffered the flaws of the Westminster model in a direct way, it has the potential to be a site of constitutional reconstruction from which lessons might be learned. The Belfast Agreement can legitimately be viewed as a constitutive moment in the development of constitutionalism in Northern Ireland. [FN6] It is a constitutional settlement (when viewed in the context of changes in the U.K.) which demands a new vision. [FN7]

One aspect of the project of political and legal reconstruction is the Bill of Rights exercise. [FN8] The Northern Ireland Act 1998 places a duty on the Secretary of State for Northern Ireland to seek the advice of the Northern Ireland Human Rights Commission in relation to the relevant human rights provisions of the Agreement. [FN9] In other words, the Commission has been requested to embark upon an extensive Bill of Rights exercise. This may result (one can never tell how a British government will react to positive suggestions coming from Northern Ireland) in a legal instrument with expansive human rights guarantees, which will be effectively "entrenched" in political and legal life. The idea of a Bill of Rights exerts a powerful hold. At least in theory the adoption of a legal instrument with clearly stated human rights guarantees has a strong ***50** moral force. The attractiveness lies in the thought that even in a pluralist and divided society some texts might still remain "sacred" for everyone. One could be forgiven for linking this to theology, [FN10] but the process is a thoroughly secular one. Such an instrument can be viewed as the institutional expression of a secular ethics which might reflect the values of a particular community. [FN11] At the most idealistic level, a Bill of Rights might promote the idea of consensual constitutionalism and express the common values of a political community. One must be cautious here. The notion that there are such things as common values is open to question. Merely asserting their existence does not answer the complex questions which arise. Common values may be little more than the expression of elite preferences, with minimal popular participation. Unreflective references to common values can perpetuate the vague urge for unachievable and pre-modern forms of consensus in complex and pluralistic societies. [FN12] Deliberative democracy is easy to defend in theory, but rather harder to do in practice.

In addition, there are considerable challenges which spring from the need to respect diversity while at the same time promoting the integrative function that this instrument might fulfil. In Northern Ireland this tension is particularly marked. The call to respect difference co-exists with the desire to see a Bill of

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Rights as a force for societal integration. More cynically, a Bill of Rights may function as a mask which helps to disguise a poor record in the human rights field. States can gesture toward the Bill of Rights without making any effort to realise the rights in practice. The U.K. does not have a Bill of Rights, although the Human Rights Act 1998 does resemble a limited one. [FN13] The issue will be on the political agenda in the years ahead, primarily because of human rights developments in Northern Ireland. The aim of this article is to examine the debate surrounding the Bill of Rights exercise and highlight some of the issues that arise for Northern Ireland and the U.K. generally. A Bill of Rights adopted in Northern Ireland is likely to set a precedent and one can only speculate on the possible spill-over effect. One result might be to rekindle interest in the Labour Party about a "homegrown" Bill of Rights. [FN14] It may begin to seem odd, in the longer term, to have an expansive Bill of Rights in Northern Ireland and not in the U.K. as a whole. [FN15]

***51** The Background

The thought that a Bill of Rights might be the answer to some of Northern Ireland's problems is not new. [FN16] "Rights" and interests have historically been protected in Northern Ireland on a piecemeal and inconsistent basis. Thought naturally turned to a more comprehensive form of human rights protection. As with much of the thinking in the Agreement, the idea was around for some time. [FN17] In fact, a consensus existed among a broad range of participants that a Bill of Rights was a "good idea". [FN18] This evidence of consensus can be deceptive. While the general idea was accepted, precision has at times been lacking. Despite the consensus the Bill of Rights exercise has had to wait. It now follows the conclusion of a political settlement and is thus part of the ongoing ***52** process of constitutional renewal, rather than constitutive of the new legal order. This is important, because it explains why it has taken so long to become a politically feasible project, even when so much consensus was in existence. This does not mean that human rights were, or are, absent. [FN19] For devolution purposes the Human Rights Act 1998 constitutes a "Bill of Rights for Northern Ireland", for now at least. In the past the Committee on the Administration of Justice (CAJ) and others, for example, viewed the European Convention on Human Rights (ECHR) as the basis for a Bill of Rights for Northern Ireland. [FN20] The debate now, however, is focused on rights which supplement it.

Human Rights and the Agreement

Developments in Northern Ireland in the last few years have excited the interest of human rights scholars for understandable reasons. [FN21] The Belfast Agreement 1998 contains an impressive commitment to human rights protection. [FN22] The Declaration of Support gives expression to the importance of "the protection and vindication of the human rights of all". [FN23] References to rights can be found throughout the document. This commitment is reflected in political developments since then. The Northern Ireland Executive's draft Programme for Government, published in October 2000 states:

> "The protection of human rights and the promotion of equality are central to the Agreement. These policies are prerequisites for improving community relations and building community capacity, particularly in areas of greatest need." [FN24]

This demonstrates a continuing commitment to the human rights aspects of the

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Agreement.

The section on "Rights, Safeguards and Equality of Opportunity" provides:

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

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment;
- ***53** • the right of women to full and equal political participation." [FN25]

The debate on a Bill of Rights is framed by the Belfast Agreement and it is from this that it derives its legitimacy. [FN26] Before progressing to consider the relevant sections it is worth considering the nature of the Agreement. The Agreement contains many old ideas but its adoption heralds a new stage in the development of constitutionalism in the U.K. What I suggest is that the Agreement has a constitutive force and cannot be easily subsumed within traditional notions of constitutional law in the U.K. There are three limbs to this argument. First, it follows three decades of violent conflict and is effectively a negotiated peace settlement. This often makes the literature on transitional justice a more appropriate starting point when considering Northern Ireland. Second, it has implications for Ireland as a whole, north and south. The people of Ireland voted for it in overwhelming numbers, the people of Britain were not asked. While there are institutional mechanisms for British-Irish co-operation these were endorsed by the people of Ireland only. Scotland, Wales and England were "spoken for" by the British government. Those attracted to deliberative forms of democracy should attach importance to these facts. The third point, relating to the method of adoption, has already been mentioned. The Agreement was not simply adopted and then translated into domestic law. Referenda were held in Ireland, north and south, and this should be significant in the calculations of constitutional lawyers. It is possible to reject all this and adhere to the traditional tools of constitutional law. However, my suggestion is that those tasked with implementing the Agreement require a substantive vision of what its purpose is and why it is so significant. The legitimacy of the law created in the image of the Agreement is tied to the core values which it reflects. If one is searching for a constitutive moment then the Agreement presents a splendid example.

But which core values? There is currently much talk of values in the literature and one is entitled to be sceptical about the purpose of this "values-talk". Some of the communitarian language used by the Labour government, for example, is based upon simplistic, and sometimes pre-modern, views of the nature of complex and pluralistic societies. What this renewed interest in values reflects is an acknowledgement of the centrality of political morality to any discussion of law. It is long overdue recognition, within the mainstream of legal scholarship, of

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the political nature of legal discourse. The problem, once this is accepted, is that it is not always clear which values are being talked about. The Agreement is situated in a particular context. As noted, it followed three decades of conflict. Although there is reference in the text to a "fresh start" and a "new beginning" the Agreement could not become completely divorced from the society it came from. The Northern Ireland context is clear throughout. We are back to the issue of the nature of the Agreement. Brendan O'Leary has few doubts, he argues that it is a consociational agreement [FN27]:

> "In other words, it is a political arrangement which meets all four of the criteria laid down by that doyen of political science, the Dutchman Arend Lijphart: cross-***54** community executive power-sharing, proportionality rules applied throughout the relevant governmental and public sectors, community self-government or autonomy and equality in cultural life, and veto rights for minorities." [FN28]

O'Leary accepts that it is not only consociational and that it has important "external dimensions" [FN29]:

> "It is one made with national and not just ethnic or religious communities, and it is one endorsed by both leaders and the led." [FN30]

The attempt to address processes of exclusion makes considerable sense. One of the main communities in Northern Ireland (nationalist/republican) seeks to overcome a long history of discrimination. In this context, the settlement had to have strong consociational elements. There is, however, more to the Agreement than the expression of the political realities of Northern Ireland. A desire is expressed in the document for a more inclusive vision of the future. I suggest that there is also a strong element of deliberative democracy, with a stress on the right to participate. [FN31] The conception of deliberative democracy I am advancing presupposes human rights and equality guarantees and is anchored in a multicultural understanding of law and politics. While this element can be exaggerated, it is evidently there in, for example, the equality aspects of the Agreement. These are guarantees which have the potential to disrupt, in a healthy way, the stultifying impact of consociationalism. The deliberative element is evident even in some of the more fundamental legal provisions. For example, the constitutional status of Northern Ireland rests on the consent of its people. This can be presented as the imposition of an artificial device on an ethnically constructed entity. However, if we accept that all political communities are "imagined communities" then the consent principle takes on a different form. It offers a political community the opportunity to think differently about its own foundational status leaving open the argument that this is potentially a transitional arrangement. From a deliberative perspective it is hard to criticise an arrangement which leaves such a fundamental issue for resolution by the people of a territory. My argument is that the Agreement reflects a strong commitment to participation and thus the realisation of the rights and other political values which make effective engagement possible. If the Agreement has a nature (and this is open to some debate) then it is a mixture of consociational and deliberative democracy.

Now to the specific provisions of the Agreement which address the Bill of Rights exercise. As noted, the legitimacy of the exercise springs from the Agreement and it is quite prescriptive on this issue. Because of the significance of this section, it is worth citing in full:

> "The new Northern Ireland Human Rights Commission will be invited to con-

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sult 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 ***55** 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 on both the public and private sectors." [FN32]

There are at least eight elements to this and the intention here is to comment briefly on some of the issues raised by each one.

(a) to consult and to advise on the scope for defining

There has been some discussion of the precise meaning of this phrase, however it is relatively straightforward. The aim is clearly to encourage the Commission to engage in consultation and finalise a document which would then be forwarded to the Secretary of State.

(b) in Westminster legislation

As with the debate over the implementation of the Patten Report, the real struggles around the Bill of Rights are likely to take place at Westminster. Enshrining the instrument in Westminster legislation makes sense if the aim is to "entrench" it in the constitution of Northern Ireland. However, the lop-sided [FN33] nature of the Westminster model raises problems. In particular, because of the fundamental nature of the instrument it will have to apply not only to devolved matters but to any public authority which acts in Northern Ireland. Thought will have to be given to whether the balance struck in the Human Rights Act will be appropriate also for the Bill of Rights and how the Bill of Rights issue will be addressed within the legislative process at Westminster.

As noted, one innovative feature of the legal arrangements for Northern Ireland is to leave its constitutional status open to continuing contestation. Given this it is perhaps unwise to talk of a constitutional settlement. Linked to this is the idea of "double protection". Whatever the status of the North, the same rights will be protected. If a Bill of Rights is adopted in Westminster legislation then further human rights protection in the Republic of Ireland will potentially also be on the agenda. If the notion of double protection is taken seriously then this would in theory mean that consideration of this happened sooner rather than later. However, the current assumption would appear to be that the process will be confined to the North and thought given to all-Ireland protection later. This does not appear to accord with the logic of double protection. This raises intriguing questions about the real commitment of the Irish government to the ***56** principle. It has been slow to implement its human rights obligations under the Agreement.

(c) rights supplementary to those in the European Convention on Human Rights

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The ECHR has a pervasive presence in the new constitutional order of Europe. While it is of fundamental significance, one should not become too obsessive about it. It has weaknesses as well as strengths. The Agreement is quite clear that the rights included in the Bill of Rights should supplement the Convention. A major defect in the Convention is that it is confined to civil and political rights only. The inclusion of economic and social rights in a Northern Ireland Bill of Rights would be a useful supplement to it. The equality provision (Article 14) is known to be inadequate and could be supplemented with a much stronger provision. The Council of Europe has taken a step in this direction with the adoption of a new Protocol to the European Convention on Human Rights. This is discussed in more detail below.

(d) to reflect the particular circumstances of Northern Ireland

One could justify the inclusion of almost any right with reference to this phrase. What are the particular circumstances of Northern Ireland? Beyond banal observation, the answer to this question is inescapably tied to a substantive political position. In the past arguments about the particular circumstances of Northern Ireland have not always been used for progressive ends. [FN34] The argument about alleged Northern Irish exceptionalism should not be used to justify restrictive approaches.

The obvious fact is that Northern Ireland is a society emerging from three decades of violent conflict. To venture beyond this is to engage in debate about the "nature" of the conflict in Northern Ireland. Scholars have struggled for many years and still have not managed to generate a consensus on this. It is doubtful whether the Commission will be able to in the few short months that it has. Although there are circumstances which are unique to Northern Ireland, there is much that simply mirrors trends elsewhere. There is little that is unique about Northern Ireland and its problems are similar to those of many other societies in transition. The circumstances of Northern Ireland vary according to differing political perspectives. From a human rights perspective there are three which stand out. First, the past in Northern Ireland has been characterised by the abuse of human rights by state and non-state actors within the context of an internal conflict. This indicates that rights are not only abused by the state. As with any modern ***57** social democratic instrument, this document should have horizontal effect. Second, the "both communities" model has a habit of stifling the human rights debate and impoverishing political and legal discourse. In these circumstances there is a need to ensure that all voices are heard and listened to. [FN35] Finally, there is the issue of participation. The history of the North is characterised by a process of exclusion from decision-making at various levels. The nationalist/republican community was constructed as the "enemy within" and treated accordingly. In relation to the entire community direct rule was a form of disrespect for the value of participation. While informal public spheres emerged, Northern Irish society had a democratic vacuum at its heart. The third, vital human right is thus the right of everyone in Northern Ireland to participate in the process of democratic governance. Informal public spheres are not enough on their own to shoulder the burdens of democratic life. In the past calls for more local autonomy have not always come from progressive circles. Constructions of Northern Irish exceptionalism do not necessarily promote human rights based approaches. What the Agreement has demonstrated is that structuring rules can be devised which attempt to deal with the specific problems that can

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arise in local forms of governance (such as oppressive majoritarianism).

(e) drawing as appropriate on international instruments and experience

The Bill of Rights will need to be rooted in Northern Irish society if it is to work in practice. However, international experience can be helpful in considering the rights to be included. In particular, one might ask why Bills of Rights work in some political communities and not others. From this international experience we might learn what has a chance of working effectively in Northern Ireland. This requires an assessment of comparative experience of operating Bills of Rights in practice (not simply the rights that happen to be reflected in them). Making use of the international instruments also assists in the task of crafting an appropriate Bill of Rights and will undoubtedly play a part in Northern Ireland.

(f) these additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem

As noted, O'Leary argues that the settlement reflects a strong commitment to consociational democracy. [FN36] The Agreement and the legislative framework contain complex rules to ensure cross-community participation and consent. The Executive Committee of the Northern Ireland Assembly is an example of the sort of "grand coalition" encouraged by power-sharing or consociational arrangements. [FN37] The dominant political contest in Northern Ireland can be mapped onto the new institutional ***58** structures of governance. There are reasons to question this development, but given the circumstances of Northern Ireland it is difficult to see how any other resolution would have been possible. The result is that the Bill of Rights should "reflect" these principles. It does not have to be exclusively tied to them, but must give them due recognition. Given the institutional structures that already exist to ensure that "both communities" are respected and protected it is arguable that the Bill of Rights should be more inclusive in its scope. A Bill of Rights should ultimately disrupt cosy narratives that seek to deny heterogeneity.

(g) taken together with the ECHR--to constitute a Bill of Rights for Northern Ireland

The issue here is the form that the legislation should take. Should it be a distinct Bill of Rights Act or should it (in new legislation) be merged with the Human Rights Act in the form of supplementary legislation? Given that the aim is to supplement the European Convention it would make considerable sense to merge the rights into one instrument which would then form a Bill of Rights. This need not be called a Bill of Rights, but this would be the practical result. One point worth noting is that the Human Rights Act does not incorporate all aspects of the European Convention on Human Rights.

(h) among the issues for consideration ... 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 on both the public and private sectors

The Human Rights Commission has a broad range of matters to address during the

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Bill of Rights process. However, the Agreement includes reference to "issues for consideration". Note that the language does not require the Commission to include these issues in the Bill of Rights, they are matters for consideration. The second issue is more straightforward, in drafting terms, than the first. The inclusion of the public and private sectors should encourage the Commission to promote a strong equality provision in its Bill of Rights. The formulation of an obligation on government and public bodies "fully to respect, on the basis of equality of treatment, the identity and ethos of both communities" may prove problematic. While the notion of group rights has achieved recognition, concern remains that the rights of the individual should not be subsumed under communal rights and duties. [FN38] This section of the Agreement also presents drafting problems.

Rights, Process and Practice

If a Bill of Rights reflects values which a political community believes should be given a special status then the process of adoption is of vital significance. The process should ***59** be a broadly-based one which involves the input of all affected individuals and groups. To be meaningful, individuals must have a sense of shaping the final document, rather than simply being asked to endorse or reject a document agreed by others (as was the case with the Agreement). The South African example is a useful one. After the first round of constitution-making the process was opened up to the public for the purpose of drafting a "final" Constitution. [FN39] The Public Participation Programme was an attempt to ensure that people had a say. A wide-ranging process of consultation was also evident in the drafting and adoption of the Canadian Charter of Rights. [FN40] A major effort was mounted by individuals and groups in order to ensure that the process was as participatory as possible. [FN41] Not everyone agrees that all aspects of this were strongly deliberative. One criticism voiced of the Canadian process of adopting its Charter of Rights is that there was not enough public debate around the issue of equality. [FN42] This is not the general view of what took place and, as noted, the process has been cited as a useful example for others in terms of the breadth of the consultation process. [FN43] What this does is ensure that the instrument has popular backing. Courts, for example, are more likely to approach it appropriately if it is seen to derive its legitimacy from "the people". [FN44] In addition, there is likely to be less of a legitimacy problem if the instrument is seen to have the support of "we the people". [FN45] The lesson from elsewhere would appear to be that popular participation is essential to securing the legitimacy of the Bill of Rights. There are few societies where the expression "we the people" is unproblematic. The divided nature of the political community makes its use contentious. For the Irish community in Northern Ireland there are concerns about a Bill of Rights exercise which might have primarily integrationist dimensions.

This is a difficult and daunting task, but a Bill of Rights is of such potential significance that it must be underpinned by wide-ranging participation. But does this ***60** mean that once agreed the rights should be effectively removed from the deliberative process? This can cause human rights lawyers difficulties. One of the main problems relates to the fundamental importance of political participation. For those human rights lawyers who place particular weight on the right to participate, the idea of a once-and-for-all process which results in a definitive list of rights is troubling. The end result might be less protection of a full

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range of human rights, with further erosion of the deliberative component. Jeremy Waldron has made an important intervention in the debate about Bills of Rights. [FN46] He has challenged some common assumptions about the practical consequences of adhering to rights-based theories. He is deeply sceptical of the idea that judges should have the main say in revising and adapting basic rights. [FN47] The right to participate is, he argues, the right of all rights. His argument is persuasive and the result is, I suggest, that those who believe in rights-based approaches need not support one method only for their institutional expression. We believe in rights-based thinking because we think that autonomy matters. Yet the mistrust which is evident in some liberal theories of rights protection hardly displays an open commitment to respect for autonomy. If rights are the result of struggle, then people should have the right to participate in shaping their meaning. Ewing and Gearty have questioned human rights guarantees in similar terms. Their response to the Labour government's proposals for incorporation of the ECHR was critical, mainly due to their concern about the erosion of democracy. [FN48]

> "If we genuinely wish to protect human rights in a manner which is compatible with the principles of democratic government, there are ways by which this can be done through, for example, building constitutional review of human rights questions in the parliamentary process." [FN49]

The Human Rights Commission in Northern Ireland could be given a role in the pre-legislative process to work with the Assembly and the Westminster Parliament to see if new law is "Bill of Rights proof".

In Northern Ireland, the Human Rights Commission has attempted to make this a broadly participative process. In its first annual report it states:

> "The Commission wants the consultation to be a very deep and broad one, reaching people and groups who are not usually involved in responding to official consultations. We want all sections of the community to play a genuine part in shaping a Bill of Rights and to have a sense of ownership of its ultimate content." [FN50]

The process was launched on March 1, 2000 (the first anniversary of the establishment of the Commission) in both Derry and Belfast. Later in the year the Commission established nine working groups. [FN51] The working groups prepared expert advice for the ***61** Commission. The consultation process was not confined to the working groups, and efforts were made to encourage input from all sections of the community. [FN52] One aspect of this was an education programme on the issues involved in the exercise. [FN53] The overall objective, at the time of writing, was to draft a Bill of Rights which would then be sent out for consultation, with a final document being presented to the Secretary of State some time in 2002. [FN54]

Another issue related to the process is whether there should be a referendum (or some other form of popular endorsement) on the Bill of Rights. There are advantages and disadvantages in this approach. The main advantage is that this would give the Bill of Rights the sort of legitimacy which attaches already to the Agreement. This endorsement could take the form of another referendum or a cross-community vote on the Bill of Rights in the Assembly. The main disadvantage of this process is that it is rather crude. If people have had an opportunity to make a real impact on the document then an either/or vote is a questionable device. In addition, it can be argued that the Agreement already gives this process the legitimacy it requires.

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A final point relates to the drafting process at Westminster. If the process ever gets this far it may be worth considering a form of special standing committee, similar to the one adopted for the Immigration and Asylum Act 1999. The purpose would be to encourage extensive input into the legislative process. In Canada the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada sat from November 7, 1980 to February 9, 1981 to hear submissions on the new Constitution. This was an important part of securing the legitimacy of the Charter.

The suggestion is that the process of drafting a Bill of Rights is of fundamental significance. There are principled and pragmatic reasons for laying stress on a participative approach. The principled reason is that deliberation is always an essential aspect of reflective law and policy formation in a political community. This is even more so in the case of a Bill of Rights. If we have moved from classical liberal to social democratic models of human rights, then participation is central to the drafting process. The pragmatic consideration is that if one wants a Bill of Rights to have an impact then people need to have a sense of ownership of the final document. If the Bill of Rights is to assume the exalted status of the "sacred" text in a secular society then its shape (not simply the choice to accept or reject it) must be determined by a broadly-based process of popular participation. In Northern Ireland the Human Rights Commission is making a considerable effort to ensure that this is precisely what happens. A final point relates to the courts. If "the people" are seen to have spoken through this document there should be less judicial concern with taking a restrictive approach. The courts will assume the role of guardians of the rights selected by the community.

***62** Which Rights to Include?

The Agreement provides some guidance on this question. There is also a large body of national and international experience to draw upon when deciding which rights to include and their precise wording. The issue for Northern Ireland is conjoining the wishes of the population with the language of the Agreement. Comparative and international experience can assist the task.

Human rights can be viewed as those rights which we possess independently of the existence of political community. Historically, rights were said to pre-exist the state and inhere in individuals as human beings. The principal role of law in this conception is to protect these "natural rights". [FN55] Loughlin has charted the political movement to project this vision of social existence into national and international legal orders. [FN56] The notion that there are such things as natural rights is rightly derided today (proponents of rights discourse have had to "come down to earth") but it continues to have a powerful political force as rhetoric. Rather than challenge the natural rights argument the more interesting work is in seeing which particular views of human rights win in the social conversations around legal regulation. This will be instructive in the debates in Northern Ireland.

Which rights should be included in a Bill of Rights for Northern Ireland? [FN57] There has been some analysis of this issue already. The debate over which rights to include is fundamentally shaped by the language of the Agreement. Each substantive right will have to be accommodated within its terms. The instrument

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could thus be a narrow one which supplements the ECHR in a limited way, or a more broadly-based document which compares well with others. There are numerous examples of other instruments that might be drawn upon. The Bill of Rights contained in Chapter Two of the South African Constitution is a useful starting point. This includes economic and social rights as well as civil and political rights. [FN58] The Constitution makes clear that the Bill of Rights is intended to be a "cornerstone of democracy in South Africa". [FN59] One cannot neglect the particular circumstances of South Africa, however, it is a useful example of the rights that might be included in a modern Bill of Rights. The linkage of the Bill of Rights to democracy is of particular relevance in Northern Ireland where the new constitutional structures are so clearly based on the right to participate.

I suggest that the Agreement does not mandate a narrow and restrictive approach. There are two reasons which stand out. First, the Declaration of Support stresses that this is to be a "fresh start" and a "new beginning" based upon the protection and vindication of the human rights of all. A Bill of Rights which lacked imagination would hardly conform with this ambition. A fresh start would not be possible on the basis of ***63** a document which simply replicated a narrow view of political and legal life in Northern Ireland. Second, it might be argued that the particular circumstances of Northern Ireland demand an expansive view. In a context where the dominant societal narrative is of two, and only two, communities, then an ambitious Bill of Rights would permit an already more complicated picture to emerge fully in the public sphere. The Agreement is clear that the principles of mutual respect for the identity and ethos of both communities and parity of esteem must be reflected in this document. One can take a dim view of this and argue that it perpetuates the "both communities" narrative and thus should be strongly resisted. This is a mistake. A recognition of the past does not mean that a fresh start is impossible. Given the particular circumstances of Northern Ireland it would be surprising if the Bill of Rights did not contain reference to the ideas of mutual respect and parity of esteem. What should not be neglected, however, is that the instrument should reflect these principles. It does not need to be restricted exclusively to them.

By establishing working groups on particular issues the Human Rights Commission signalled, whether intentionally or not, the sorts of areas which might be included. [FN60] The ones that often attract attention are economic and social rights. The tendency to problematise these rights is open to question. While they raise complex issues, it is arguable that these are no more complicated than the ones which surround civil and political rights. Care must be taken not to permit an ideological argument against economic and social rights to infect the process of drafting these rights. Caution in this area is frequently based on dated assumptions about the nature and enforcement of modern human rights law. If human rights are indivisible then why should we contemplate different mechanisms of enforcement?

As noted, another area where the ECHR is weak is on equality. As is well known, Article 14 is a deficient equality guarantee. The Council of Europe has attempted to address this problem with the adoption of Protocol No. 12. [FN61] This new protocol does address some of the concerns expressed about Article 14. For example, it is a general non-discrimination provision and is thus not assigned a parasitic role. Even with this new Protocol the issue of an equality right should not be discounted. The Agreement refers specifically to equality, so

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it should form part of the text eventually adopted. There are different types of equality and reference to the identity and ethos of "both communities" is narrower in scope than rights not to be discriminated against in the public and private sectors. The issue will be which equality guarantee to adopt. There are several that might form the basis for a Northern Irish provision. [FN62] The equality provision in the South African Constitution is of particular interest. There is explicit recognition of the importance of legislative and other measures designed to "protect ***64** and advance persons, or categories of persons, disadvantaged by unfair discrimination ..." [FN63] Developments in E.U. equality law will also require careful attention. The equality clause will have to comply with E.U. law. [FN64] As the E.U. continues to deploy discourses of constitutionalism then its human rights and equality agenda will become more significant. This is already evident in the promulgation of the Charter of Fundamental Rights. [FN65]

Most human rights defined in law are not absolute. The practice is to list the protected rights and then include limitations. This can be achieved with listed limitations attached to each right. [FN66] Another approach is to include a general limitations clause. [FN67] As I suggest, whichever one is adopted, the judges must be encouraged to develop a fully articulated and value-based constitutional jurisprudence.

The substantive provisions of the Bill of Rights are a matter for continuing debate. We will see whether the Commission opts for an expansive Bill of Rights which includes social and economic rights. It is when the instrument is presented to the Secretary of State that the politics of the exercise will be in full view. Will the British government be prepared to opt for a precedent-setting instrument which contains a broad list of rights? Will the Irish government, which is committed under the terms of the Agreement to "at least an equivalent level of protection of human rights", [FN68] be willing to support it? And will the political parties in Northern Ireland be persuaded that such an instrument should be endorsed? None of these pragmatic political concerns should prevent the Commission from adopting a progressive approach.

Mechanisms of Protection and Amendment

This final section addresses issues which surround the mechanisms of protection and amendment. In formal legal terms entrenchment of a Bill of Rights in the U.K. is not possible. It is achievable within the devolution schemes because of the patriarchal nature of the constitutional system in the U.K. What I mean is that the Westminster Parliament can continue to legislate for Northern Ireland in areas which cannot be altered by the Assembly. This has been done in the past [FN69] and can be seen in the Northern Ireland Act 1998 also. The Northern Ireland Assembly has, for example, no power to act incompatibly with Convention rights. The Northern Ireland Act could be amended to limit the powers of the Assembly with reference to a Bill of Rights (Northern Ireland) Act. While entrenching a U.K.-wide Bill of Rights is problematic this is not the case in Northern Ireland. The debate over entrenchment can become tedious ***65** when there is a failure to conjoin legal practice with political realities. In practice certain measures are in fact "entrenched". To classify the present arrangements as flawed underplays the democratic component which is reflected in them.

There are also reasons of principle why a Bill of Rights should not be com-

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pletely removed from revision. [FN70] The appropriate way to "entrench" this instrument is through the creation of a political and legal culture where rights are respected. [FN71] Hunt has noted the problems involved in creating a culture that is conducive to the effective implementation of the Human Rights Act in the U.K. [FN72] He argues for a specific understanding of the phrase "human rights culture" linked to the approach defended by the Labour government. [FN73] In particular, he argues that the Human Rights Act reflects a commitment to a social democratic conception of rights protection rather than a classical liberal model. [FN74] Hunt is aware of the problem of assimilation and observes the tendency of orthodoxy to absorb novelty and thus frustrate the aims of progressive legislation. This indicates the importance of the political project of creating a rights culture. [FN75] On this Northern Ireland has the distinct advantage of having a Human Rights Commission which is prepared to take an assertive approach to encouraging the development of a human rights culture. In the context of Northern Ireland, where there are now established mechanisms beyond the courts, the model of the Human Rights Act might be appropriate. One alteration that may be required is to give the Commission a central role in the promotion of the instrument and in monitoring its implementation.

There is continuing disagreement over the meaning of rights and they are often drafted in terms which leave them open to controversy. [FN76] Disagreement is at the heart ***66** of the politics of rights discourse and thus continuing deliberation should be an important part of a culture of rights. [FN77] Continuing contestation need not be feared and in fact is essential to democratic life. [FN78] This moves away from reliance on the courts to a focus on the role of democratic institutions and the broader informal and formal public spheres.

In reality a Bill of Rights would become a permanent feature of law in Northern Ireland precisely because of the political problems that would surround any attempt to interfere radically with its content at Westminster. In a paper published in September 1997 the CAJ stated:

> "A Bill of Rights, to be fully effective, must have a more elevated status than other legislation in the sense that it must be a document which cannot later be easily repealed. As it is meant to be part of the bedrock of society, it must be protected from the whim of subsequent legislators or judges. This is not to say that its terms must be completely immutable ... but they must be immune from evasion or abolition. This is what we mean when we say that the Bill of Rights needs to be entrenched." [FN79]

There is a tension in this reasoning between a desire to be open to future developments while wishing to ensure that rights are protected against the "whim of subsequent legislators or judges". While one can object to the link suggested between (unelected) judges and (elected) legislators, the point is a reasonable one.

One of the main issues surrounding enforcement is whether a new constitutional court is required to ensure that the Bill of Rights is effective. There are well-established reasons for not creating a new institution. [FN80] The principal argument against is that it might lead to rights jurisprudence being marginalised within the legal system and therefore not seen as an essential element of the work of decision-makers at all levels. The suggestion is that respect for rights will be mainstreamed if as many decision-makers as possible have direct responsibility for enforcement. While the argument makes considerable sense, there are

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reasons to doubt its applicability in the Northern Irish context. There is a history of mistrust of the judiciary among a section of the population in Northern Ireland. [FN81] A new constitutional court, staffed with individuals ***67** with a sincere and well-established record on human rights protection, might send the correct signal that the real intention is a fresh start. The new court would have the onerous task of developing a constitutional jurisprudence with the force to earn the respect of all participants in the legal system and beyond. Given the problems that surround judicial activism, this new constitutional jurisprudence would have to be value-based and anchored in a strong commitment to deliberative democracy. In other words, a new constitutional court in Northern Ireland would have to take responsibility for defending a political morality of constitutional adjudication based upon the values which underpin post-Agreement life. [FN82] Constitutional jurisprudence in Northern Ireland should develop on the basis of expressly articulated value commitments. [FN83] There is nothing to prevent the ordinary courts from enforcing the Bill of Rights, it is just that a new constitutional court would provide the energy and dynamism needed to make rights count in practice. This is not to eulogise the judicial role; such a stance would conflict with the views expressed elsewhere in this article. The suggestion here is that a new institution might be one part of the jigsaw, with the ambition to promote the fundamental importance of the right to participate and encourage a dynamic public sphere. A Bill of Rights might help to "provoke participation". [FN84]

There is a more fundamental criticism of the idea of a constitutional court. It is the familiar critique of the judicial role and a fear of the judicialisation of politics. [FN85] The legitimacy debate arises whenever the judicial role becomes central to political life. It can be brushed aside in pragmatic terms, by for example arguing that judges are more likely to protect rights than other institutional political actors. The principled objection is harder to defeat. The mistake often made is to assume that those who question the judicial role are somehow "against human rights". This is obviously inaccurate. The fear of the judicialisation of politics springs from a profound belief in the fundamental nature of the right to participate. My view is that a constitutional court would be one part only of the ongoing project of making a human rights culture real. A Bill of Rights could, for example, be highly prescriptive on the role of this new court and the principles which should guide the interpretative process. The Human Rights Commission could also be given a more important role in the interpretative process. A new constitutional court should be encouraged to take an assertive approach on issues such ***68** as inclusive democratic procedures and in areas which facilitate and enhance the "deliberative form of political opinion- and will-formation". [FN86] It is also possible to construct a mechanism which would place any new judicial institution within a "robust legal public sphere". [FN87] In the context of political and legal change in Northern Ireland the court could only derive its interpretations from arguments anchored in the priorities of political democracy and the importance of encouraging public deliberation. [FN88] The self-understanding of the court would have to be based on the full recognition that in a political democracy contestation must continue, not simply over preferences, but also over values and the meaning of rights. Human rights thinking does not transcend politics. [FN89] It is intimately tied to the politics of local struggles and interventions. [FN90] Recognising this fact does not mean the we have to accept the idea that rights discourse is an indeterminate mess and of

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little relevance for progressive political struggle. [FN91] A Bill of Rights can give people a stake in constitutional politics, something that the people of Northern Ireland have sorely lacked in the past. [FN92]

Experience from elsewhere on the work of constitutional courts is mixed. Constitutional courts can disappoint as well as provide a rich vein of constitutional jurisprudence. [FN93] It all depends on how one sees the judicial role in this context. Those who believe that constitutional courts should act progressively and decisively to protect human rights are often disappointed by what happens in practice. The worst sin is deference, from this perspective. Others are less troubled by judicial deference and believe that it is an appropriate mode of engagement in a political democracy. Following an assessment of the work of the Canadian Supreme Court Beatty states:

> ***69** "The fact is, and whether it is legitimate or not, the constitution in Canada resides less in the words of the text than in the legal and political theory of the judge." [FN94]

In advising other states which wish to adopt a Bill of Rights, Beatty makes clear the fundamental significance of the method of appointment of the judges. [FN95] Also on the Canadian experience, Russell argues against the idea that the Charter simply transferred political power to the judges. [FN96] He notes the "judicial processing of social controversy". [FN97] In this process the courts opt for consensual outcomes which display an awareness of the particular political context. In other words, judges consistently engage in a process of constraining their own power. [FN98] Rather than use the language of transfer perhaps this might be understood as changing the terms of the political and social conversation. In Northern Ireland a constitutional court which took a robust approach to a Bill of Rights might confront the inertia of consociationalism in a direct way. The end result could be a lively debate in the public sphere about the governance of Northern Ireland and one that goes beyond the traditional narratives of political and legal life.

The issue of amendment has already been mentioned. A Bill of Rights should not be removed from processes of amendment. Each generation has the right to participate in shaping the terms of its own governance. To deny this right displays both arrogance and profound mistrust. This does not mean that it should be altered by normal processes of legislative change. Some special procedure is required. If the Bill of Rights exercise is not endorsed in a referendum then requiring one for any amendments may be inappropriate. Another option is to insist on a cross-community vote in the Northern Ireland Assembly. But if the idea is to "ring-fence" the instrument then should it be removed from any interference by the political process in Northern Ireland? This raises the issue of how any amendment might work given that the instrument will be adopted through Westminster legislation.

A Bill of Rights will not be effective unless people can access the rights contained within it. If the intention is to make rights both practical and effective then individuals must be able to use the instrument. There are two elements to this: the importance of inclusive standing rules; and adequate resources to enable legal action. The Northern Ireland Human Rights Commission could be permitted to take an active role in bringing cases under the Bill of Rights. One suggestion is that it could have the power ***70** to refer proposed legislation to the courts, or another institution within the Assembly, to assess whether it is

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compatible with the Bill of Rights. [FN99] The aim would be to enrich democratic life by building a strong human rights component into the legislative process.

Conclusion

The Bill of Rights exercise in Northern Ireland presents an exciting opportunity for people to have a say. It is this stress on participation which should inform not only the drafting of the instrument but legal and political life after it has been adopted. The instrument should operate to disrupt some of the cosy, and closed, narratives that operate in the Northern Irish public sphere. This is not to argue for a parochial approach to human rights law. In fact, human rights law is best viewed as part of the development of cosmopolitan forms of democracy. Human rights law and issues of democratic governance are no longer confined within national borders. [FN1] The content of the instrument may well be shaped by Bills of Rights from elsewhere, but openness to comparative experience need not stop there. The judges might be persuaded to join what has been termed "transnational judicial conversations on constitutional rights". [FN2]

It is easy to deride those who express a preference for deliberative forms of democracy. An insistence on the priority of democracy can be depicted crudely as a preference for "dangerous majoritarianism". People (including judges) often act unreflectively. Preference formation can take place in public spaces removed from effective deliberation. The result, as in the asylum debate in the U.K., is a debate which is based upon mythology, with little or no acknowledgement of the empirical reality of asylum seeking. This should not lead to the abandonment of deliberative forums as the most appropriate places to reach consensus on these issues.

Northern Ireland has shown how democracy can be crafted to tackle the problems of majoritarianism and the well-known deficiencies of the Westminster model, when applied inappropriately to local contexts. There are weaknesses in the scheme adopted in the Agreement and these may in fact facilitate its eventual collapse. What a Bill of Rights can do is enrich political democracy and encourage dialogue. The inertia which may result from consociational democracy [FN3] can be tackled with an inclusive human rights agenda. My argument is that a Bill of Rights has the potential to enhance democratic life by promoting the conditions which make a healthy participatory democracy possible. Human rights and political democracy need not be in constant conflict, even in Northern Ireland.

FN1. See Neil Walker, "Beyond the Unitary Conception of the United Kingdom?" [2000] Public Law 384, who describes the constitutional reform agenda as "unarguably" the most far-reaching of the twentieth century. See also John Morison, "The Case Against Constitutional Reform" (1998) 25 Journal of Law and Society 510.

FN2. K. D. Ewing, "The Politics of the British Constitution" [2000] Public Law 405.

FN3. See K. D. Ewing and Conor Gearty, The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945 (2000).

FN4. For a useful example see Walker, op. cit., n. 1. He notes (p. 398) that the unitary conception of the U.K. may be more accommodating of diversity than the federal model.

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FN5. The Westminster Parliament retains the legal authority to legislate for Northern Ireland, even in transferred matters, see Northern Ireland Act 1998 s.5(6).

FN6. See generally Colin Harvey, "The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland" in Colin Harvey (ed.), Human Rights, Equality and Democratic Renewal in Northern Ireland (2001, forthcoming); Colin Harvey, "Complex Conversations: Legality, Politics and Constitutionalism in Northern Ireland" (2000) 3 Contemporary Issues in Irish Law and Politics 70; Colin Harvey, "Governing After the Rights Revolution" (2000) 27 Journal of Law and Society 61; Colin Harvey, "Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context" (1999) 22 Fordham International Law Journal 1389.

FN7. See Brigid Hadfield, "The Belfast Agreement, Sovereignty and the State of the Union" [1998] Public Law 599, at p. 616: "Perhaps, however, in the light of the introduction of considerable constitutional changes within and throughout the United Kingdom, the time is now as ripe as it ever has been to reject the language of overall sovereignty and to forge a new constitutional language and thinking."

FN8. I am aware that repeated reference is made to the Human Rights Act 1998 as a Bill of Rights for the U.K. If it is to be described as a Bill of Rights then it is a rather limited one which did not follow from wide-ranging popular participation.

FN9. Section 69(7).

FN10. See Peter H. Russell, "Canada's Charter of Rights and Freedoms: A Political Report" [1988] Public Law 385: "Indeed, I sometimes have the impression that the Charter will turn our law schools into schools of divinity with the Charter as holy covenant, the justices of the Supreme Court of Canada as the prophets of The Word, with the law professors disputing which of them have got it right."

FN11. See Francesca Klug, Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights (2000).

FN12. Roger Cotterrell, Law's Community: Legal Theory in Sociological Perspective (1995) pp. 308-310.

FN13. For the argument that it should not be regarded as simply an ordinary statute see Anthony Lester, "The Art of the Possible--Interpreting Statutes and the Human Rights Act" [1998] E.H.R.L.R. 665.

FN14. See John Wadham, "Bringing Rights Half-way Home" [1997] E.H.R.L.R. 141.

FN15. There are of course sound reasons why Northern Ireland should be viewed as exceptional in this regard, but this will not prevent questions being raised on this matter. The tendency to label the Human Rights Act 1998 as a Bill of Rights adds to confusion in this area.

FN16. There was the suggestion of a charter of human rights in the White Paper published prior to the Northern Ireland Constitution Act 1973, but it was never realised, see Northern Ireland Constitutional Proposals (1973) Cmnd 5259 paras 90-105. See also Report of a Committee to consider, in the context of civil

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liberties and human rights, measures to deal with terrorism in Northern Ireland (1975) Cmnd 5847 (Gardiner Report) para. 21: "[C]onsideration should be given to the enactment of a Bill of Rights." Note Lord MacDermott's reservations (p. 57): "Just at the end of Chapter 1 a number of developments designed to improve social conditions are mentioned. Most of these rank as acceptable projects: but I do not think the same can be said without much further thought about the suggestion for a Bill of Rights which the Report makes at this point. This is a difficult legislative subject which does not always live up to its expectations. For my part, I would prefer not to see it raised or recommended by this Committee." It is recognised that human rights are not the answer to all the problems faced in Northern Ireland, see Brice Dickson, "New human rights protection in Northern Ireland" (1999) 24 European Law Review 3.

FN17. See Standing Advisory Commission on Human Rights (SACHR), The Protection of Human Rights by Law in Northern Ireland (1977, Cmnd 7009). SACHR was a consistent advocate of the incorporation of the ECHR into domestic law in the U.K. "The main conclusion which we have reached in answer to our first question is that the legal protection of human rights in Northern Ireland should be increased and that one of the ways in which this should be done is by the enactment of an enforceable Bill of Rights. We believe the most appropriate way of doing this would be to incorporate the European Convention into the domestic legal system of the United Kingdom." (para. 6.05). It later became much more open to the idea of a Northern Irish Bill of Rights. For the reasoning behind its decision to embark on this study see First Annual Report 1974-75 HC 632. One reason was that the Northern Ireland Constitution Act 1973 fell so far short of the "major charter for the protection of human rights" that was promised, (para. 69).

FN18. For early evidence see The Northern Ireland Constitutional Convention Report 1975 HC 1. The Convention was established under s.2(1) of the Northern Ireland Act 1974 "for the purpose of considering what provision for the government of Northern Ireland is likely to command the most widespread acceptance throughout the community there". On human rights the Convention concluded that there should be a Bill of Constitutional Rights to guarantee the stability and integrity of Northern Ireland and a Bill of Rights and Duties to protect the rights of the individual citizen, (para. 141). See also CAJ, Making Rights Count (October 1990) p. 29: "The notion of introducing a Bill of Rights into British or Northern Irish law attracts strong support amongst a wide range of people. It is clear from the views assembled in this chapter that there is almost unanimous support for the idea amongst every political party in Northern Ireland. In spite of this groundswell of opinion there has been little action on the part of our legislators." For a sceptical argument about the value of Bills of Rights in general see Mark Tushnet, "Living with a Bill of Rights" in Conor Gearty and Adam Tomkins (eds), Understanding Human Rights (1996) 3, at p. 4: "My general thesis, stated broadly, is that, if adopted today, an entrenched Bill of Rights enforced by a judiciary like that in the UK is likely to have a relatively conservative effect on political outcomes ... I do believe ... that in the modern era those bills of rights that are likely to be adopted and enforced by the judiciaries in place at the time the bills are adopted will have a particular conservative form."

FN19. See Brigid Hadfield, "The Northern Ireland Constitution Act 1973: Lessons for Minority Rights" in P. Cumper and S. Wheatley (eds), Minority Rights in the

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"New" Europe (1999) 129.

FN20. CAJ, op. cit., n. 18 p. 12. See SACHR, op. cit., n. 17.

FN21. See Scottish Human Rights Forum, A Human Rights Commission for Scotland--discussion paper (March 2000) where reference is made to the Northern Ireland Human Rights Commission.

FN22. Cm 3883. See generally Colin Harvey and Stephen Livingstone, "Human Rights and the Northern Ireland Peace Process" [1999] E.H.R.L.R. 162.

FN23. Para. 2.

FN24. Para. 2.2.1.

FN25. Para. 1.

FN26. Northern Ireland Act 1998 s.69(7).

FN27. Brendan O'Leary, "The Nature of the Agreement" (1999) 22 Fordham International Law Journal 1628 cf. Paul Bew, "The Belfast Agreement of 1998: from ethnic democracy to a multicultural consociational settlement" in Michael Cox, Adrian Guelke and Fiona Stephen (eds), A Farewell to arms? From 'long war' to long peace in Northern Ireland (2000) 40.

FN28. O'Leary, ibid., p. 1630.

FN29. ibid., p. 1631.

FN30. ibid.

FN31. This is an aspect of the structures of government of many divided communities, see Tom Hadden and Elizabeth Craig, Integration and Separation: Rights in divided societies (1999).

FN32. Rights, Safeguards and Equality of Opportunity, para. 4.

FN33. See Walker, op. cit., n. 1 p. 396.

FN34. This thinking is evident in the following from the 1950s, F. H. Newark, "The Law and the Constitution" in Thomas Wilson (ed.), Ulster Under Home Rule: A Study of the Political and Economic Problems of Northern Ireland (1955) 14, at p. 54: "The advent of a Socialist government at Westminster added an entirely fresh problem to complicate the inter-relations between Great Britain and Northern Ireland. Once the constitutional question is excised from discussion between Ulstermen it is usually found that their political make-up consists of a hard core of conservatism with a certain overlay of old-fashioned radicalism on such matters as religious liberty, independence of thought, and the like. Certainly the average Ulsterman is no socialist, and yet he now finds that the step-by-step policy has of necessity lured him into socialistic experiments of which he disapproves in principle and which he finds expensive in practice. Consequently it is not surprising that the question of union is now sometimes discussed from a new angle."

FN35. The broad equality agenda that has emerged may in fact be the model to fol-

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low, see Northern Ireland Act 1998 s.75.

FN36. Op. cit., n. 27.

FN37. See Arend Lijphart, "Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems" in Will Kymlicka (ed.), The Rights of Minority Cultures (1995) 275. The reference in this paper to "self" rather than pre-determination of belonging is significant in Northern Ireland. Members of the Legislative Assembly (MLA) have a choice to designate themselves as a Nationalist, Unionist or Other.

FN38. For an example of the clash between collective and individual rights in the South African context see Christian Education South Africa v. Minister of Education (2000) 9 B.H.R.C. 53 (SACC). An umbrella body of independent Christian schools argued, unsuccessfully, that the prohibition of corporal punishment violated their right to freedom of religion and cultural life.

FN39. Hugh Corder, "The Process of Negotiating and Drafting the South African Constitution" paper presented in Belfast, December 10, 1998.

FN40. Roland Penner, "The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?" [1996] Public Law 104.

FN41. Ibid., pp. 106-107, he notes the way that a "democratic crucible" was forged and the importance of the new social movements (women, aboriginals, the disabled, religious, ethnic and language minorities) in this process.

FN42. Peter H. Russell, "The Effect of the Charter of Rights in the Policy-Making Role of the Canadian Courts" in F.L. Morton (ed.), Law, Politics and the Judicial Process in Canada (1984) 291, at p. 299: "I would be much happier about section 15 if its adoption as part of the law of our constitution had followed a wide-spread public and parliamentary discussion about the principles and practice of equality. But that is not the case."

FN43. Op. cit., n. 40.

FN44. Andrew Arato, Civil Society, Constitution, and Legitimacy (2000) p. 250: "Today it is unthinkable that legitimate constitution making bypass extended public discussion. Such discussion socializes the main actors who can therefore advance and defend positions for which normatively convincing arguments can be devised." Penner, op. cit., n. 40 p. 107 notes that one lesson from Canada is that popular backing will encourage the judges not to be overly cautious.

FN45. Penner, ibid., pp. 108-109. There are those who remain opposed to what is viewed as the judicialisation of politics, see, for example, Michael Mandel, "Democracy and the New Constitutionalism in Israel" (1999) 33 Israel Law Review 259; Michael Mandel, "A Brief History of the New Constitutionalism, or 'How we Changed Everything so that Everything would Remain the Same"' (1998) 32 Israel Law Review 250. Cf. Dieter Grimm "Constitutional Adjudication and Democracy" (1999) 33 Israel Law Review 193.

FN46. Jeremy Waldron, Law and Disagreement (1999).

FN47. Ibid., p. 213.

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FN48. K. D. Ewing and C. A. Gearty, "Rocky Foundations for Labour's New Rights" [1997] E.H.R.L.R. 146.

FN49. Ibid., p. 150.

FN50. First Annual Report 1999-2000, HC 715.

FN51. Equality, education, language, culture and identity, victims, social and economic rights, children and young people, criminal justice and implementation.

FN52. The advertising campaign included the use of billboards with the message "Who needs human rights? All of us".

FN53. This included the production of a "Training for Facilitators" programme as well as the publication of a detailed training manual.

FN54. The original plan was to submit its draft advice to the Secretary of State in December 2000. This was revised to March 2001 and then 2002, see Northern Ireland Human Rights Commission Strategic Plan 2000-2002 (2000).

FN55. See Martin Loughlin, Swords and Scales: An Examination of the Relationship Between Law and Politics (2000) pp. 197-214.

FN56. Ibid.

FN57. For one example of a proposed Bill of Rights for Northern Ireland see CAJ, A Bill of Rights for Northern Ireland (1993).

FN58. Freedom of trade, occupation and profession (s.22); labour relations (s.23); environment (s.24); housing (s.26); health care, food, water and social security (s.27). For an argument about the neglect of social rights in Britain see K. D. Ewing "Social Rights and Human Rights: Britain and the Social Charter--The Conservative Legacy" [2000] E.H.R.L.R. 91.

FN59. Section 7(1).

FN60. Op. cit., n. 51.

FN61. The Protocol was opened for signature on November 4, 2000. Article 1 provides: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

FN62. See, for example, Canadian Charter of Rights and Freedoms s.15; South African Bill of Rights s.9.

FN63. Section 9(2). See Grete S. Vogt, "Non-discrimination in South Africa under the new Constitution" [2000] Public Law 187; Evadné Grant and Joan G. Small, "Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court" (2000) 51 Northern Ireland Legal Quarterly 174.

FN64. See, for example, Article 13 E.C. Treaty and Council Directive of June 29,

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implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] O.J. L180/22.

FN65. See Sandra Fredman, Christopher McCrudden and Mark Freedland, "An E.U. Charter of Fundamental Rights" [2000] Public Law 178; J.H.H. Weiler, "Does the European Union Truly Need a Charter of Rights?" (2000) 6 European Law Journal 95.

FN66. The approach taken in the ECHR.

FN67. This method can be found in the South African Bill of Rights, see s.36.

FN68. Rights, Safeguards and Equality of Opportunity, para. 9.

FN69. Government of Ireland Act 1920 and the Northern Ireland Constitutional Act 1973.

FN70. See K. D. Ewing, "Human Rights, Social Democracy and Constitutional Reform" in Gearty and Tomkins, op. cit., n. 18 p. 40.

FN71. Cf. The Northern Ireland Constitutional Convention Report, op. cit., n. 18 para. 137: "The Bill of Rights, in order to provide a meaningful safeguard and source of reassurance to minorities, must be entrenched so that the amending process is set apart from ordinary law-making. The required procedure should be stated in the legislation itself."

FN72. Murray Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession" (1999) 26 Journal of Law and Society 86.

FN73. Ibid., p. 89: "It is clear from the Act's own provisions, from its fundamental scheme and from the various government pronouncements surrounding its enactment, as well as from its place in the wider programme of constitutional reform, that it is designed to introduce a culture of rights that is more communitarian than libertarian in its basic orientation. In such a human rights culture, the individual citizen is more than the mere bearer of negative rights against the state, but is a participative individual, taking an active part in the political realm and accepting the responsibility to respect the rights of others in the community with whom he or she is interdependent."

FN74. Cf. Philip Pettit, Republicanism: A Theory of Freedom and Government (1997) p. 304: "The rights required will be richer than any that law alone could support and they will depend on the sort of informal implementation that is possible only in a vibrant civil society where people show a willingness to come to one another's assistance. That is why the republican tradition has always insisted on the importance of a supply of civic virtue for the stability of a free state."

FN75. For a useful insight into the practical problems presented see Jeremy Croft, Whitehall and the Human Rights Act 1998 (Constitution Unit, 2000). He notes (p. 80) that a long "bedding down" period is planned for the Human Right Act and that the government is going to wait before any consideration is given to a Bill of Rights for Britain.

FN76. Tom Campbell, "Human Rights: A Culture of Controversy" (1999) 26 Journal of Law and Society 6.

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FN77. Ibid.

FN78. See generally John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations (2000); Iris Marion Young, Inclusion and Democracy (2000).

FN79. CAJ, Making a Bill of Rights Stick: Options for Implementation in Northern Ireland (September 1997) p. 2. Later in the paper (p. 9) the following is stated: "It is unrealistic to expect a Bill of Rights to address all issues for all time, so the wish for permanent entrenchment must be balanced against the need to have some mechanism whereby later generations can change the Bill of Rights in appropriate circumstances."

FN80. See SACHR, op. cit., n. 17 para. 6.13, arguing that there is no need for a special court.

FN81. The past record is not a good one, see Brice Dickson, "The European Convention and the Northern Irish Courts" [1996] E.H.R.L.R. 496, at p. 510: "Looking at Northern Irish cases in the round, one can safely say that the views of the Northern Irish judiciary as to the applicability of the European Convention in Northern Irish law are restrictive." The Scottish courts took a similarly restrictive approach, although this appears to have altered following the entry into force of the Human Rights Act, see Gavin W. Anderson, "Using Human Rights Law in Scottish Courts" (2000) 23 European Law Review 3: "I conclude that, as things stand, the Human Rights Act has already effected a considerable shift of power in Scotland, from the elected branches of government to the judiciary." Cf. Michael J. Beloff and Helen Mountfield, "Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales" [1996] E.H.R.L.R. 467.

FN82. For an argument in support of the value-based approach in the South African context see Max du Plessis, "The legitimacy of judicial review in South Africa's new constitutional dispensation: insights from Canadian experience" (2000) 33 The Comparative and International Law Journal of South Africa 227.

FN83. See Sandra Fredman, "Allies or Subversives? The Judiciary and Democracy" (1998) 32 Israel Law Review 407.

FN84. See David Dyzenhaus, "The New Positivists" (1989) 39 University of Toronto Law Journal 361. p. 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."

FN85. See generally, C. Neal Tate and Torbjörn Vallinder (eds), The Global Expansion of Judicial Power (1995); Mandel, op. cit., n. 45.

FN86. Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996, trans. William Rehg) p. 280.

FN87. Ibid.

FN88. See James Bohman, Public Deliberation: Pluralism, Complexity and Democracy (1996) p. 27, he defines public deliberation as "a dialogical process of exchanging reasons for the purpose of resolving problematic situations that cannot be

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settled without interpersonal coordination and cooperation".

FN89. Cf. Dickson, op. cit., n. 16 p. 7. The point is well made by Loughlin, op. cit., n. 55 p. 203: "[R]ights discourse remains intrinsically a form of political discourse ... Rights are local, historically-rooted claims, not fixed universals."

FN90. Costas Douzinas, The End of Human Rights (2000) p. 144.

FN91. See Mark Tushnet, "An Essay on Rights" (1984) 62 Texas Law Review 1363. Cf. Didi Herman, "Beyond the Rights Debate" (1993) 2 Social & Legal Studies 25.

FN92. See Russell (1988), op. cit., n. 10 p. 399: "Adding a bill of rights to the Canadian constitution gave citizens a stake in the constitution that they did not have before."

FN93. See David Beatty, "The Canadian Charter of Rights: Lessons and Laments" in Gavin W. Anderson (ed.), Rights and Democracy: Essays in UK-Canadian Constitutionalism (1999) 3, at p. 21: "Summarising the evolution of Canadian constitutional law since the entrenchment of the Charter is a relatively straightforward affair. There really is no disagreement among those who study the judgments of the Court that, after an initial flurry of activity, increasingly over time and as new justices took their seats on the Bench, the Court adopted a highly deferential even submissive posture towards the other two branches of government." For a statistical analysis of the first one hundred cases see F.L. Morton, Peter H. Russell, and Michael J. Witley, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall Law Journal 1. In its first one hundred decisions it upheld thirty-five per cent of Charter claims.

FN94. Beatty, ibid., p. 24.

FN95. The issue of judicial appointments has attracted increased attention in Ireland and the U.K. recently, see Constitutional Review Group, The All-Party Oireachtas Committee on the Constitution (4th Progress Report), The Courts and the Judiciary (1999); Constitutional Review Group, Report of the Constitutional Review Group (May 1999) and Appendix 17; Criminal Justice Review Group, Review of the Criminal Justice System in Northern Ireland (2000) ch. 6; Collette Blair, Judicial Appointments (2000); An Independent Scruting of the Appointments Process of Judges and Queen's Counsel in England and Wales: A Report to the Lord Chancellor by Sir Leonard Peach (1999); Kate Malleson, The New Judiciary (1999).

FN96. Peter H. Russell, "Canadian Constraints on Judicialisation from Without" in Tate and Vallinder, op. cit., n. 85 p. 137.

FN97. Ibid., p. 146.

FN98. Ibid., p. 145: "Most of the members of the country's highest court are conscious of the political reasons for exercising this constraint." See also Colin Harvey, "Dissident Voices: Refugees, Human Rights and Asylum in Europe" (2000) 9 Social & Legal Studies 367.

FN99. CAJ, op. cit., n. 79 p. 12 where reference is made to the position in the Republic of Ireland where the President may refer a Bill to the Supreme Court.

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FN1. Susan Marks, The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology (2000).

FN2. Christopher McCrudden, "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" in Katherine O'Donovan and Gerry R. Rubin (eds), Human Rights and Legal History: Essays in Honour of Brian Simpson (2000) p. 29. See also Colin Harvey, "The Politics of Legality" (1999) 50 Northern Ireland Legal Quarterly 528.

FN3. See Rick Wilford, "Designing the Northern Ireland Assembly" (2000) 53 Parliamentary Affairs 577.

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