ABSTRACT. The political settlement resulting from the Belfast Agreement recognised the fundamental importance of the issue of rights to a stable peace in Northern Ireland. Indeed, the agreement provided for a Human Rights Commission, one of whose tasks is the drafting of a Bill of Rights that will reflect the political reality of the province. This paper argues that the proposed document will have to reflect an understanding of rights and their protection resulting from the particular history of Northern Ireland. This specific understanding of rights appeared first in the Anglo-Irish Agreement and has been gradually developed and consolidated in the political agreements since. The planned Northern Ireland Bill of Rights will have to reflect this rights thinking. The article also chronicles the recent work of the Northern Ireland Human Rights Commission in drafting the Bill of Rights to be presented to the Secretary of State for Northern Ireland in February 2002. The reciprocal, if belated, moves in the Republic to set up its own human rights commission will also be addressed as part of the process to draw up a Charter of Rights for the whole people of Ireland.

KEY WORDS: an understanding of rights, history of Northern Ireland, Northern Ireland, Northern Ireland Bill of Rights, Northern Ireland Human Rights Commission, rights

INTRODUCTION

The joyous relief that greeted the signing of the Belfast or ‘Good Friday’ Agreement of the 10th April 1998 was not ill founded. Finally, after a turbulent previous thirty years of community conflict and over 3,000 deaths with many more injured, the chance of an enduring peace based on an agreement involving all the major players in Northern Ireland politics became a tangible possibility. This political agreement was reinforced by the referenda on it put to the Irish people in the two separate jurisdictions on May 22 and approved by a large majority in both. The Agreement also highlighted in concrete form the gradual recognition of the importance of rights to the resolution of political conflict in Northern Ireland. Conflict and civil strife are both the symptom and cause of human rights

* Lecturer in Law, Liverpool John Moores’ University. The author would like to thank Adam Gearey and Peter Fitzpatrick.


2 71% voted in favour of the agreement in Northern Ireland with 94% doing so in the South.
abuses. This had not been recognised in the rampant discrimination against the catholic minority that tarnished the governance of the six counties of Ulster which formed the partitioned state of Northern Ireland as provided by the Government of Ireland Act 1920. Many commentators have noted the failure of a system of governance in Northern Ireland which had as its inspiration the Westminster model of parliamentary democracy based on majority rule, the principles of responsible government, and the Rule of Law.3

Among the provisions of the Agreement the Section entitled Rights, Safeguards and Equality of Opportunity provided for the setting up of human rights commissions in both jurisdictions and laid the foundations for the drawing up of a Bill of Rights for Northern Ireland. The possibility of drawing up a Charter of rights for the whole island of Ireland, building on these initiatives, was also envisaged. This article will seek to investigate the potential of these developments for the future promotion and protection of human rights in Northern Ireland. In particular, the Northern Ireland Human Rights Commission (NIHRC) has been charged with the task of advising the Secretary of State for Northern Ireland on the content of a Bill of Rights for the province which would reflect the needs of this politically troubled region, drawing inspiration where appropriate from international human rights instruments.4 The Commission launched its consultation process in March 2000 and has since consulted widely with civil society and the public in Northern Ireland on its views as to the content desired. The result of this process has been the production of a final consultation document in September 2001 which, according to the Commission’s introduction, “represents the fruits of those considerations and discussions.”5 This article will argue that a particular perception of the issue of rights which recognises and reflects the political and historical reality of the region has and will largely inform this debate.6 The article will also chronicle the development of this debate on the content of the


4 Paragraph 4 of the Rights section and the Northern Ireland Act 1998, s 69(7).


Bill of Rights by reference to the work undertaken so far on the drafting of rights provisions. Such developments must also however be considered in the light of developments in the South where the European Convention on Human Rights has finally been introduced into the Republic’s domestic law and a “sister” body established to supervise and promote the protection of human rights within the jurisdiction. First, an examination of the historical events particular to the region and its understanding of human rights issues will be undertaken.

Towards a New Conception of Rights

The Government of Ireland Act 1920 provided the legal framework for the partition of Ireland. Following the failure of the political powers to resolve the problem of partition to the satisfaction of the two very different traditions cohabiting on the island, the six counties of Northern Ireland were then governed until 1972 by a devolved assembly based at Stormont. The model of government was based on that of Westminster, where familiar constitutional traditions such as a majority government formed from an elected parliamentary assembly operated, with an important role for conventions and the idea of the Rule of Law. This form of resulting majority rule by Unionists in a divided society had serious social and economic implications for the Catholic or Nationalist minority, and the extensive forms of discrimination against them eventually led to the Civil Rights movement of the 1960’s. The subsequent violent reactions to the actions of this movement brought the State to the point of near civil anarchy and direct rule from Westminster was restored in 1972 by the Northern Ireland (Temporary Provisions) Act. This history demonstrated the failure of the idea of any devolved form of government for Northern Ireland following the Westminster model, and highlighted the importance of guaranteeing minority rights in a divided society. The question now was how to do this.

The period from 1972 is a depressingly familiar history of civil conflict where moves to improve the protection of the rights of the Catholic minority by legislation were taken against a backdrop of political violence

---

8 C. McCrudden, supra n. 3.
9 For example the Northern Ireland Constitution Act 1973 prohibited political and religious discrimination by public bodies, and the Fair Employment (Northern Ireland) Act 1976 extended this prohibition to employment in the public and private sectors with mechanisms established to monitor this.
which provoked a strong security response from the UK government in the form of the various Emergency Provisions and Prevention of Terrorism Acts. The variety of rights abuses from different quarters proved extremely diverse in such an environment. It is not surprising that support began to grow among political parties from both traditions for a greater commitment to human rights to be made in the province in the form of a Bill of Rights. The best focus for the thinking of the time is a 1977 report of the Standing Advisory Commission on Human Rights (SACHR), the predecessor to the NIHRC. It examined two main questions, first whether an enforceable Bill of Rights would improve the protection of rights in Northern Ireland, and second whether it should only apply to the Six Counties. The body came to the conclusion that the best option would be the incorporation of the ECHR into domestic law and applicable to the whole of the UK, and that then a particular charter of rights specific to Northern Ireland would be a fundamental part of any constitutional settlement reinstating devolved government for the province. Indeed, the views of the body seemed extremely prescient in light of the later political moves towards recognising the need to have a political settlement, with a commitment to rights protection at its core, which reflected and had the support of the two traditions in the North and their supporters beyond. It stated:

For a Bill of Rights to be fully effective the root causes of injury to human rights will first have to be attacked. In the Northern Ireland context this will require further social and economic as well as political measures. Moreover, there can be little doubt that a Bill of Rights will flourish best in a situation in which constitutional legitimacy is not an issue. Any Bill of Rights will be diminished in value unless it can operate within a framework of social, political and constitutional values which is sympathetic to it.

As civil strife continued and the failure of the political actors in Northern Ireland to agree on an acceptable form of devolved government rendered the temporary measure of direct rule a perennial reality, the wisdom of this view only seemed to be finally acknowledged by the two govern-

---


12 SAHCR 1977, Chap 6, para 13.

13 This ‘temporary’ arrangement endured in order to “buy time for constitutionalism” (McCrudden, supra n. 3, at 350) and allow for an internal settlement.
ments with the signing of the Anglo-Irish Agreement in 1985. This Treaty is important to the idea of rights protection in Northern Ireland in three respects. First, in its preamble and in articles two and four it recognised the importance and the reality of the ‘Irish dimension’ as a necessary component to any attempts to forge a political settlement in the North. The process of recognising a role for the Irish government permitted it to become a facilitator to working towards a settlement, and it would represent many of the minority aspirations in the political moves that followed. Second, Article 1 of the agreement anchored the political necessity and constitutional value of consent as a prerequisite for any change in the status of the six counties. These two aspects reflected a base for formally establishing a commitment to the protection of the rights of the two communities in the North. Third, the agreement introduced a rights discourse and sought to develop a rights culture by recognising that the resolution of rights issues was the key to a successful political settlement. The preamble of the agreement gives us a firm indication of this new understanding where at para. 5, inter alia, the two governments recognise that,

... a condition of genuine reconciliation and dialogue between unionists and nationalists is mutual recognition and acceptance of each other’s rights.

More importantly, Article 5(a) provided a framework for future work in the area:

The Conference shall concern itself with measures to recognise and accommodate the rights and identities of the two traditions in Northern Ireland, to protect human rights and to prevent discrimination.

These measures included considering a Bill of Rights for the province. As Harvey and Livingstone note, this language of communal rights was to mark a step away from simple anti-discrimination measures which in many ways did not address the problems of deep-rooted sectarianism and its effect on the society. In the political moves and agreements that

15 The Intergovernmental Conference was the vehicle for such co-operation.
followed (the 1993 Downing Street Declaration and the Framework Document of 1995\(^{18}\), a more prominent place was given to rights protection. In particular the right to self-determination (cleverly intertwined with the principle of consent),\(^{19}\) and communal rights and the right to equal treatment were reiterated and more clearly defined. Building on the reference at Paragraph 4 of the 1993 Declaration to the need to respect the rights and identities of the two traditions, the Framework Document now extended it to the whole of Ireland. Rights which commanded particular attention were those of free political thought, of freedom and expression of religion, and a right to equal opportunity in the economic and social sphere without discrimination on the grounds of class, creed, sex or colour.\(^{20}\) Political representatives north and south were called upon to draft and support a Charter to protect the rights of everyone living on the island. These initiatives produced the necessary environment and inspiration that eventually led to the negotiations that produced the Good Friday Agreement.\(^{21}\)

THE BELFAST AGREEMENT

This Agreement had at its heart the desire to formulate a new direction for the Northern Ireland polity in its concern to resolve differences in a divided society by consensus.

O’Leary acknowledges the consociational nature of the Agreement. He describes a consociation as,

\[\ldots\] an association of communities based on the recognition of the mutual equality of groups and individuals. Consociational, or complex cross-community power-sharing systems, when they work, help stabilise territories divided by national, ethnic or religious antagonisms. They do so by recognising differences, rather than by attempting to eliminate them through the imposition of one identity. ‘Equality, proportionality, difference and consensus’ is their motto.\(^{22}\)

---

\(^{18}\) Actually containing two documents titled A Framework for Accountable Government in Northern Ireland and A New Framework for Agreement.

\(^{19}\) Mallie and McKittrick note that such an intertwining was “\ldots in effect an ambitious attempt to construct a finely balanced double helix in which self-determination and consent where inseparable”. E. Mallie and D. McKittrick, The Fight For Peace: The Inside Story of the Irish Peace Process (London: Mandarin, 1997).


\(^{21}\) For an excellent overview of the changing face of constitutionalism in Northern Ireland reflecting these political evolutions see C. Harvey, “The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland”, in supra n. 10, pp. 9–51.

He points out that the practical elements of the Agreement are built on these four foundations: *equality* in the form of the Executive's formation and nature; *proportionality* as evident in the use of the d’Hondt procedure for Executive elections, and the single transferable vote (STV) mechanism for elections to both Stormont and Westminster; *difference* in the Agreement’s call to recognise cultural difference and promote parity of esteem for different traditions; and *consensus* promoted by way of the voting devices and especially by the recognition and commitment to a set of values encapsulated in a mechanism such as a Bill of Rights.23

Focusing on this last point, the Belfast Agreement contains specific provisions relating to human rights and their promotion. The right to self-determination is clearly made subject to the consent of the people of Northern Ireland, and this is now formally provided for in the domestic law of the two jurisdictions by respectively, the Northern Ireland Act 1998 (Section 1), and the amendments made to the Irish Constitution recognising this right.24 By Para. 1(iv) of the Agreement the devolved government is to exercise its jurisdiction with ‘rigorous impartiality’. In a specific section entitled *Rights, Safeguards and Equality of Opportunity*, several rights were added to the list mentioned in the Framework Documents (above). They were the right to democratically pursue 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 freedom from sectarian harassment, the right to full and equal political participation by women, and the right to equal treatment is also extended to those with disabilities. These rights are in many ways unique in character and reflect the positions taken in the negotiations by the various parties.25

The agreement also provided for a Northern Ireland Human Rights Commission (NIHRC) which was established by the Northern Ireland Act 1998 implementing the Agreement into UK law.26 The Commission came into operation on March 1st 1999 and is composed of 10 Commissioners – one full-time and nine part-time – appointed by the Secretary of State for Northern Ireland following a competitive selection process. According to s 68(3) of the Act the commissioners were to be ‘*as far as practicable representati...*” and are inde-

---
23 Supra n. 22 at 354.
24 These amendments to Articles 2 and 3 of the Irish Constitution were carried by the referendum in the Republic of May 22 1998.
26 Sections 68–70 and Schedule 7.
The functions of the Commission are to oversee the adequacy and effectiveness of law and practice relating to human rights in Northern Ireland; to advise the Northern Ireland Executive and Secretary of State of measures, legislative or otherwise, to be taken to protect these rights; to advise on the drawing up of a Northern Ireland Bill of Rights; to promote an understanding and awareness of the importance of human rights; to work towards the establishment of a Joint Committee of the two Irish rights commissions; and to make suggestions after two years on how to improve its own effectiveness to the Northern Ireland Secretary. On top of this the Commission has the power to assist individuals who seek help relating to proceedings involving human rights law or practice and to initiate proceedings itself on the same issues. It can also conduct investigations it considers necessary and publish its advice and findings. The body does though deviate in one important aspect from the so-called ‘Paris Principles’ which relate to the UN’s view of the status to be given to national institutions created to monitor rights protection independent of government. It lacks substantial powers of investigation and cannot force witnesses to give evidence or require the production of documents. The significance of this omission can be seen when compared with the powers

27 The Commission has encountered opposition from Unionist circles who have argued that none of its members have a “unionist” political background. Although equally divided between men and women and accurately reflecting the society’s religious breakdown, its perspective has been seen as too “liberal”.


29 However the Commission received a setback on the 8th December 2000 when the Lord Justice agreed with a decision of the Coroner in the Omagh bombing inquest not to allow the Commission to apply to intervene as an interested third party. The Lord Chief Justice agreed that the body did not have an express statutory power to do so. This clearly contravened with previous practice where courts both in the Northern Irish jurisdiction as well as the European one (ECHR) had allowed submissions from the NIHRC. The Chief Commissioner Brice Dickson described the decision as driving “a coach and horses through the Commission’s ability to promote human rights in the courts” (NIHRC Press Release 8/12/2000).

30 As well as establishing a Victims’ Rights Project which produced a report to complement the Working Group’s report on the subject (see below), the Commission also instigated reviews of the legislation affecting the aged, the mentally ill, and gay, lesbian and transsexual people.


32 However such powers have been granted to the Commission in the Republic. Commentators (including the NIHRC Chief Commissioner himself) have expressed their disfavour with this limitation, and a proposal to extend these powers of investigation has been one of the major features of the two year review report presented to the Secretary of
given to the Commission’s “sister” organisation recently established in the Republic, where it has been given these powers under Section 8 of the Human Rights Commission Act 2000. These discrepancies may well prove problematic in the future with the proposed creation of a Joint Committee of the two bodies under the auspices of the Good Friday Agreement.

There is one function of the Commission that is particularly relevant to this study, i.e. advising on the content of a Bill of Rights. The Belfast Agreement, as enacted in the Northern Ireland Act 1998, mandates the NIHRC to do the Trojan work for the Secretary of State by consulting widely to draw up a Bill of Rights containing ‘rights supplementary’ to the ECHR.33 These are,

to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience’ and must ‘reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

Following the formal request from Dr. Mo Mowlam, the Northern Ireland Secretary of the time, the NIHRC embarked on its consultation exercise with the Northern Ireland public and civil society on the content of a Bill of Rights in March 2000, and a final report is expected to be presented to the Secretary of State for the region in February 2002. The original timetable for submission of the final advice had been extended in response to the high degree of public interest shown in the consultation process along with a concern on the part of the Commission that the consultation process be as thorough as possible.

**A BILL OF RIGHTS FOR NORTHERN IRELAND**

What rights should be included? By being given the opportunity to go beyond the provisions of the ECHR rights as enacted by the Human Rights Act 1998,34 the potential also exists to formulate a Bill of Rights which can reflect a more modern vision of rights to be protected in Northern Ireland such as those contained in the Council of Europe’s Social Charter

---

33 Northern Ireland Act 98 s. 69(7) and its reference to Paragraph 4 of the relevant section of the Belfast Agreement.

34 Northern Ireland Act 1998 S. 6(2) provides that legislation passed by the Assembly which is not compatible with Convention rights as enacted by the Human Rights Act 1998 is invalid. This Act has been applicable to Northern Ireland law during the sporadic bursts of legislative activity when the devolved Assembly has been up and running.
or UN instruments such as the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Indeed the Belfast Agreement permits the NIHRC to draw “as appropriate on international instruments and experience” in executing this task. Indeed, since the Commission’s consultation process has begun there has been much debate concerning the meaning and scope of the mandate provided for in the Good Friday Agreement where these supplementary rights are “to reflect the particular circumstances of Northern Ireland.” Both restrictive and extensive readings are possible here but it is submitted that an expansive interpretation of this phrase would be preferable in promoting human rights practice in the future. In the context of the particular history of Northern Ireland and the discussion above, rights relating to social and economic opportunity, to political and religious identity, to policing and criminal justice, and those relating to the problems of the existence of serious civil conflict, such as the rights of victims and ex-prisoners, are considered to be particularly important. As noted above the Commission itself has advocated addressing the rights of the elderly, of children, and promoting a more extensive understanding of equality.

First and foremost, it is submitted, that the rights specifically mentioned in the rights provisions of the Downing Street Declaration and the Framework Documents – the right to self-determination, communal rights, the right to equal treatment, the right to free political thought, to that of freedom and expression of religion, and a right to equal opportunity in the economic and social sphere without discrimination on the grounds of class, creed, sex or colour and those of the Good Friday Agreement – the right to democratically pursue 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 freedom from sectarian harassment, the right to full and equal political participation by women, and the right to equal treatment for those with disabilities – should serve as the building blocks for any Bill of Rights for the region.

Concerning the Social Charter, there is an incentive to include some of its provisions in the Bill of Rights as the Charter itself was intended to complement the ECHR. Following its substantial revision in 1996 and the adoption of an amending and two additional protocols in the last ten years,

36 The NIHRC addresses these diverging views in its final consultation document Making a Bill of Rights for Northern Ireland and chooses to follow the more extensive interpretation (See pp. 12–14).
37 Paragraph 8a of its Strategic Plan 2000 to 2002 (NIHRC 2000).
the Charter’s supervisory machinery (including a new system of collective complaints) has been improved. Theories of the universal and indivisible nature of human rights have allowed modern rights thinking to acknowledge the equal importance of social and economic rights. The NIHRC Chief Commissioner Brice Dickson has identified the Social Charter as being “particularly worthy of close scrutiny” in the exercise of drafting a Bill of Rights.38

Indeed, it has been in the social and economic sphere that the consequences of years of religious and political discrimination have had the most adverse effects. The Belfast Agreement contains a specific section entitled Economic, Social and Cultural issues where a clear reference is made to the importance of economic growth, social inclusion and the advancement of women in public life.39 The same section at also proposes initiatives to alleviate the unemployment disparity between catholics and protestants.40 It is submitted that the provisions of the Charter such as rights of collective action, and to social security, health care and social inclusion for example, as well as the principles mentioned above in the Agreement, be included, or clearly referred to, in the Bill of Rights. However, the question of deciding whether these rights are simply political objectives and thus not justiciable before the courts will be a difficult task for the NIHRC and the Secretary of State.

Related to these issues, and of particular resonance in Northern Ireland, is the question of equality of treatment and of opportunity. The Northern Ireland Act 1998 provided for the creation of an Equality Commission amalgamating the four pre-existing bodies to fight against various forms of discrimination in the six counties.41 It has been given the role of overseeing the application of equality schemes, which all public authorities in Northern Ireland must draw up and submit to the Equality Commission for approval.42 These schemes must demonstrate how and to what time-scale public authorities intend to comply with the duties imposed by section 75 of the Northern Ireland Act 1998. One obvious issue of concern is the possible overlapping of functions and competences between this body and the NIHRC. Steps were made recognising this potential and seeking to eradicate it as a threat in a meeting between representatives

38 B. Dickson, supra n. 32, at 8.
39 Paragraph 1. Supra n. 35.
40 Paragraph 2. Supra n. 35.
41 The Fair Employment Commission, the Equal Opportunities Commission, the Disability Council and the Commission for Racial Equality.
42 As provided for by Paragraph 6 of the rights section of the Belfast Agreement, and by Northern Ireland Act 1998 section 75 and Schedule 9.
of the two bodies in October 2000. The two Commissioners agreed upon
a Memorandum of Understanding which sought to promote co-operation
and indicates how the bodies will deal with matters falling within the
remit of both bodies based on the sharing of information, the referral of
complaints inadmissible to one Commission to the other, and the operation
of a close working relationship between the two bodies.43

Section 75 also places an obligation on these public bodies to promote
equality of opportunity based on a policy of non-discrimination on the
grounds of religious and political opinion, race, age, sex or sexual orienta-
tion, disability, and between persons with dependants and those without.44
However, discrimination on these grounds is not made unlawful. The
exception to this is when these bodies discriminate on the grounds of
religious or political opinion. According to Section 76 victims will be able
to sue if such discrimination can be proved. McCrudden has recognised
these new provisions as representing,

... a major development in the efforts to create a more equal society in Northern Ireland. They constitute a shift from an anti-discrimination to a mainstreaming approach.45

A more specific issue which stems from the notion of equality of oppor-
tunity is that of fair employment. Following the limited effect of the
Northern Ireland equality legislation of the 1970s, pressure built for more
substantial fair employment provisions in the 1980s. The adoption in the
United States of the ‘MacBride Principles’ (a series of anti-discrimination
principles based on equal opportunity standards operating in the States)
as a policy which would guide companies, both public and private, in their
business relations in the North, in the absence of effective fair employment
policies in the province, had a profound effect.46 An influential report
produced by the NIHRC’s predecessor47 resulted in the Fair Employ-
ment (Northern Ireland) Act 1989 being passed by the UK Government.
Although introducing helpful notions such as indirect discrimination, it
fell short of the report’s recommendations. The new social and economic
provisions of the Belfast Agreement discussed above are contained in the
Fair Employment and Treatment (Northern Ireland) Order 1998. It is too

43 Memorandum of Understanding between the Northern Ireland Human Rights
44 However, the RUC (now renamed the Police Service of Northern Ireland) and the
Northern Ireland Police Authority do not have to comply with this section, a fact criticised
by various political parties.
45 C. McCrudden, supra n. 3, at 103.
46 C. McCrudden, supra n. 3, pp. 344–350.
47 SACHR Religious and Political Discrimination and Equality of Opportunity in
early yet to say how effective its provisions will be (the all too regular suspensions of the Stormont Assembly since December 1999 have not helped), but at least the Order went further in implementing the 1987 Report recommendations than the previous legislation.\footnote{See the Fourth Report of Select Committee on Northern Ireland Affairs 95/1999 for an analysis of the issues.} Powers to oversee the operation of the legislation have been given to the new Equality Commission. The Bill of Rights will have to include these ideas of equality of treatment and opportunity in its provisions, and the importance of these values is reinforced by their place in the Belfast Agreement. Indeed the establishment in 2000 of two independently chaired working groups to advise the NIHRC on equality, and economic and social rights indicates the importance assigned to developing such protections as a fundamental part of the content of the future Bill of Rights.

Under Paragraph 4 of the Belfast Agreement the NIHRC is given the task when considering the rights to be included in the Bill of formulating

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 of formulating clearly

rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

The Commission will have to pay close attention to issues discussed above in executing this task. However, a potential problem arises here. Such a task may result, as Livingstone notes, in a conflict between the individual (human rights) and the collective (community rights).\footnote{S. Livingstone, \textit{supra} n. 28. The issues of freedom of expression and assembly in the North are good examples of such conflict.} Although such conflict is not unheard of in human rights law, it will take considerable skill to reach a satisfactory compromise in a future Bill of Rights. Livingstone suggests that the debate may focus on general social and economic rights to alleviate this likely friction.

Communal or community rights are the most recent addition to the rights debate in Northern Ireland, and the fact that they form such an important part of the development of the peace process will mean that they will have to be included in a future Bill of Rights. Dickson suggests that the rights to be protected here are those of the \textit{political} identity of both unionists and nationalists.\footnote{B. Dickson, \textit{supra} n. 32, at 8.} This formal recognition of the existence of two distinct community identities is the defining feature of what Morison and Livingstone call the ‘\textit{communicative constitution}’ (i.e. the period from the
The crux of this issue is recognising in law and practice that the two communities have equal status, and by giving them equality or parity of esteem, that an environment of mutual respect can be engendered to solidify the peace process and align the polity of Northern Ireland on values of equality, respect and tolerance. It is an inclusive concept and legitimates the political reality of the involvement of the UK and Irish governments, with the co-operation of the Northern Ireland political actors, in Northern Irish affairs as interested parties. However, as Dickson notes, international rights instruments relating to minorities offer no concrete guidance on how to develop this concept and formulate rights relative to the Irish context. So far, it has only been the Irish language and schools that have been identified as worthy of support in the form of the provisions of the Education (Northern Ireland) Order 1998. Again, the Commission has identified this area as a source for consultation by commissioning reports from working groups on Culture and Identity, Language rights and Education.

An interesting development, and in some ways a paradox to the above idea, is the concept of consent of the people of Northern Ireland as forming an integral part of the right to self-determination. It can be seen as the counterpart to the political identity rights discussed above where the right to self-determination is required to be based on majority agreement between the two ‘communities’ of Northern Ireland. Bernard Crick notes:

What makes the question of consent in Northern Ireland so unusually complex is that, of course, there are two different concepts of ‘the constituency’ to which the consent pertains: all-Ireland or else Northern Ireland.

Despite this complexity, the consolidation of the consent principle in the Agreement can be seen as a further element to the value of mutual respect and parity of esteem, i.e. action by consensus. These values will need to be reflected in a Bill of Rights.

The questions of security and policing have always been the most obvious source of contention for rights abuses in the North. The Security
measures introduced by the British (and Irish) governments in response to political and paramilitary violence (or terrorism against democracy), coupled with policing and judicial arrangements to complement these measures have led to both international censure and condemnation. Nine cases have reached the Strasbourg Court for adjudication in relation to these measures while many more have been declared inadmissible.56 The Agreement was supposed to herald a new age free of the concerns and threats of the past. Responsibility with security and policing rests with the UK Government which promised ‘the normalisation of security arrangements and practices’ (Belfast Agreement, section on Security para 1).

With the reality of peace, surely it was time for the UK Government to dismantle its emergency law and withdraw its ECHR derogation?57 It has responded by introducing general UK-wide anti-terrorist legislation.58 The NIHRC made a series of recommendations to committees of the Westminster parliament during the passage of this legislation through the two Houses and argued for effective safeguards to be included. In relation to policing and justice matters, the Patten Commission and the Criminal Justice Review Group have published their reports and legislation was eventually passed after much political bargaining and stalemate creating the new Police Service of Northern Ireland. Although most of the arguments here are ‘political’, the NIHRC will have to ensure that rights countering the extensive police powers and anomalies of the justice system in Northern Ireland (like juryless courts) are included in the Bill of Rights.59 New bodies such as the Police Ombudsman and Criminal Cases Review Commission will also play an important role in improving a long-neglected rights culture in this area. An important recognition of the need to respond positively to this long abused and maligned criminal justice system is again the creation of a working group to advocate including provisions addressing this area in a draft Bill of Rights.

Those who have arguably suffered the most in the North are the victims of violence. Indeed, the NIHRC has established a Victims’ Rights Project to look at their rights and how they could be improved. A Victims Commiss-

57 There are arguments for the remaining paramilitary threats to be dealt with by ordinary legislation.
58 Terrorism Act 2000.
sion also exists, and although it has a broad understanding of the word ‘victim’, it has been accused by some as having a ‘hierarchy of victim-hood’, where those killed by, or with the collusion of security forces are seen to have less importance. The NIHRC will have to be sure to guarantee the equal protection of victims’ rights. Its concern for addressing such issues can be seen in its decision to establish one of its nine working groups to focus on victims’ rights.

On the other side of the spectrum, those who may have been convicted for playing a part in this violence will also claim to have particular rights upheld. A right to rehabilitation into society should exist, and for those who have been freed as part of the Belfast Agreement release programme, a right that they are not imprisoned again, in the absence of any new offence, if the political situation deteriorates. This may be too ‘political’ to be included in a Bill of Rights. Once again the NIHRC has sought to tackle this issue in the work of its Criminal Justice Group.

**The Commission’s Response and the Drafting of a Bill of Rights for Northern Ireland**

In its introduction to the consultation exercise, the Commission identified nine areas of rights where it felt extra consideration should be given beyond the protections provided for in the ECHR. It listed them as rights relating to equality, education, children, language, culture, victims, criminal justice, women, and social and economic rights. Much of the focus of the development of these rights stemmed from the principles of mutual respect for the identity of the two major communities in Northern Ireland, as well the desire to promote a parity of esteem between them which lie at the heart of the Belfast Agreement. It also advocated drafting as comprehensive a Bill of Rights as possible, initially seeming to generously interpret section 69 (7) of the 1998 Northern Ireland Act and its phrasing of rights “to reflect the particular circumstances of Northern Ireland . . .”

The Commission also identified two key issues it was seeking opinions on, namely the question of limitations to these rights supplementary to the ECHR and the issue of implementation of such rights. It expressed its belief that the final document when enacted in the form of Westminster legislation

---

60 Mageean and O’Brien, *supra* n. 25, at 1531.
could represent a set of values which all communities can support, and be an expression of
the kind of society we want to enjoy in Northern Ireland, with everyone entitled to rights
and respect.

The overall purpose of the consultation exercise was defined as allowing all sections of the community to play a genuine part in contributing to the Commission’s proposed Bill of Rights and to give ownership of its content.62

The period from March 2000 to September 2001 saw a series of initiatives being undertaken by the NIHRC to promote the exercise of drafting the Bill. The first year focused on teaching and informing as much of the public of Northern Ireland about the drafting of a Bill of Rights as possible. Initiatives undertaken with this purpose in mind included organising training sessions and workshops for potential activists and producing a training video and manual to facilitate this task, meeting political representatives,63 organising and attending conferences and seminars both locally and internationally in order to cultivate and learn from practices in other polities that have experienced conflict, and meeting and hearing the views of voluntary organizations and civil society in Northern Ireland.64

In direct relation to the issue of drafting the Bill of Rights, the Commission published a series of eleven pamphlets explaining its proposed programme of action, and each focusing in particular on the supplementary rights it had identified as worthy of extra consideration in its original introductory document on the subject. The pamphlets, as well as listing a list of issues for consideration for each identified right, also encouraged its readers to respond to its comments by way of a detailed response sheet.

Of significant importance from the point of view of the possible content of the Bill of Rights, the Commission charged eight independently chaired Working Groups with the task of advising it on the drafting of provisions relating to the areas of rights it had itself identified in its introductory document. It also commissioned a working group investigating the potential means available for implementing a future charter of rights. Working independently from the Commission these groups had produced their reports by January 2001. In what way do they recognise the particularity

62 Supra n. 61.
63 Most political parties in the North have done so but there have been those who have refused to meet the body.
of Northern Ireland in relation to the drafting of rights provisions to be contained in a Bill of Rights for the province?

The Economic and Social Rights Working Group produced a strongly worded affirmation of the importance of these rights generally and strongly advocated their relevance to the future Northern Irish society. In their introductory comments they stated:

We affirm the view that the inclusion of social and economic rights will ameliorate long standing social and economic exclusions which are unique to this jurisdiction they provide a concrete means to address the social and economic consequences of the conflict itself, they affirm recognition for the reality of the conflict based and perpetuated exclusions and deprivation in this society, and they focus on the need to remedy such rights violations within the legal process.65

As well as calling for substantive provisions protecting and promoting such rights, the Working Group called for them to be complemented by policy initiatives at both the public and private level. Following an interpretative clause preceding the rights selected setting out basic principles common to all such rights,66 the group recognised the following rights as meriting inclusion in the Bill in the light of the particular nature of the province’s history and reality: the right to health (reflecting low health standards in the North and the subsequent link to social disadvantage); a broad right to an adequate standard of living (including the right to food, to clothing, to social security and an obligation on the State to develop “social and civic care”); the right to adequate housing (acknowledging the former discriminatory practices, intimidation and actual shortage of suitable housing in the region); the right to work (considered as generally contributing to the economic and social life of society); and finally the right to a healthy and sustainable environment (recognising the effects of the conflict on environmental protection in general and its development at the local, devolved level in comparison to other parts of the UK and Ireland).

The Equality Working Group report67 accentuated the universalist nature of the concept of equality while recognising its central role in the conflict in Northern Ireland. It expressly indicated its desire to take its cue from the relevant wording of the Belfast Agreement and advocated the expression of equality as a common value to be drafted into the preamble of the Bill. It called for a general equality clause where all persons are equal before and under the law and have the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all right and freedoms.

66 For example a non-discrimination clause.
A clause permitting positive action to eradicate discrimination was also considered imperative and represented a positive duty to actively promote equality. It would also be able to address group inequalities as well as promoting a broader, less individually based conception of equality. The group also advocated a general non-discrimination clause to prohibit both direct and indirect discrimination on express and wider grounds than most other international protections. Of particular interest is the prohibition of discrimination on the grounds of possession of a criminal or political conviction, recognising the large number of former prisoners in Northern Ireland who might potentially face such problems, whatever their view of their imprisonment. Drawing on European Community sources, the group drafted provisions defining both direct and indirect discrimination as well as formulating a provision identifying particular harassment as a form of discrimination. Again following EC precedent the group’s draft provisions also allow for justifiable exceptions to such prohibitions.

In relation to language rights, the working group drew mainly on the relevant provisions in the 1996 Constitution of South Africa and the Council of Europe Charter for Regional or Minority Languages. Recognising a general right for citizens to use the language of their choice, the group then proposes a provision obliging the State to recognise such languages and consider them “part of the cultural wealth of the island of Ireland.” Two sets of languages are listed – indigenous and ethnic community. The former classification is taken to include Irish, Ulster-Scots, Cant/Gammon (the language of the Traveller community), and sign language. The latter is concerned with recognising the growing ethnic communities in Northern Ireland. As well as a general non-discrimination clause, the group advocate a non-assimilation clause to protect against unwanted State cultural coercion. The group then concentrates on the elaboration of the State’s duties in relation to policy, promotion, public services, the judiciary, the media and education. A notable feature of the group’s report is the clear refusal to focus simply on the “two” traditions co-existing in the North and to recognise the multi-cultural nature of the polity.

Another group exhibiting this multi-cultural awareness was the Culture and Identity Working Group. To overcome the danger of too great a focus on the “two” communities in the North the group suggested that rights-bearers in the Bill of Rights should be defined in individualistic terms, as any community is composed of persons belonging to it. This avoided the danger of defining the bearers of rights in communal, and

---

thus divisive, terms. A call was also made to clearly state the equality of all communities (rather than “minorities”) in relation to rights held. An interpretative section was also envisaged providing for a clear commitment to multi-culturalism. The group also called for the incorporation of the Council of Europe Framework Convention on the Rights of National Minorities within the Bill of Rights itself.

The individual’s right of access to an effective education – so defined to recognise the Northern Irish system “which is characterised by institutional pluralism and segregation” – is the primary focus of the Education Working Group. A general right not to be discriminated against in access to state education is then provided for to help cover the loophole of possible discrimination on religious grounds in relation to school admission policies. Other drafted rights guarantees put forward by the group reflecting Northern Irish conditions and realities include the freedom to provide education outside the state system (recognising the possibility of independent schools so long as certain principles like maintenance of standards and democracy are respected), the development of a curriculum promoting human rights and cultural diversity awareness, and a State obligation to promote respect for cultural diversity.

A slightly different focus is evident from the Children and Young People’s Working Group. As the group notes in its introduction, the Bill of Rights offers the opportunity for a comprehensive code of children’s rights to be set out in domestic law mainly inspired by the UN Convention on the Rights of the Child. There are however certain provisions that are directly related to the particular reality in Northern Ireland. First, the State is to promote “tolerance and respect for other traditions and cultures.” Second, the inclusion of bullying in the provision on protection from abuse is to reflect the fact that it is a particularly serious concern in the province. Third, the recommended provision on the trial of young people draws attention to the group’s concern about the low age of criminal responsibility in Northern Ireland.

Of much more apparent relevance to circumstances particular to the region is the Criminal Justice Working Group Report. As it states in its introduction, “the submission is informed primarily by reference to the particular circumstances of the human rights situation in Northern Ireland and international human rights standards.” Its examination of the right

---

71 The Fair Employment and Treatment (NI) Order 1998 does not apply to school admissions.
issues raised in this area was undertaken by examining four aspects: arrest and detention, trial rights, custody and release, and the rights of children and young people. In relation to the first, the group drew attention to the pattern in Northern Ireland of threats to solicitors and the ill treatment of suspects. It accordingly drafted an express right guaranteeing that detained suspects had the right to have their solicitor present during questioning. It also expressed a concern to “restore the integrity of the right to silence” by stipulating in a proposed clause that adverse inferences are not to be drawn from the exercise of this right. A further provision sets the norm of detention before release or being charged at twenty four hours to challenge the practice of the police making arrests to gather evidence. It also calls for specific conditions during detention to address imperfect practice in the past as well as a presumption in favour of bail for those charged with offences unless public safety is clearly shown to be at risk.

In relation to trial rights the group proposes a right for suspects to a maximum period of one hundred days between a charge being made and the beginning of a trial, the purpose being to deter “evidence arrests” and promote the quality of police investigations. It clearly calls for a right to trial by jury to be reintroduced in Northern Ireland as an emergency situation no longer exists to justify its absence. Recognising the unfortunate examples of evidence collecting, tampering and the lack of disclosure, the Working Group advocates closer supervision of these areas to be included in the Bill.

As for custody and release issues, the group highlights the poor state of detention practice in the North and calls for a clause demanding respect for “the inherent dignity of the human person.” A right to reintegration is proposed recognising the fact that one in three males under the age of thirty-five in Northern Ireland has a criminal record, whatever the nature of the crime committed. This would help alleviate the all too likely discrimination against such people across a wide range of areas. Promoting this also involves for the group the possibility of having convictions declared spent in certain cases, and for “politically motivated offences” having their record deleted from official records or documents subject to a public safety exception. Finally, the group suggests raising the age of criminal responsibility in the province from ten to fourteen.

The Victims’ rights group report has for many the clearest resonance and greatest pertinence to the moves to develop a new polity in Northern Ireland.

---

74 Supra n. 73 at 2.
75 Supra n. 3, pp. 3–7.
76 Supra n. 73, pp. 7–11.
77 Supra n. 73, pp. 11–14.
Ireland. It clearly links the notion of victims to the collapse or negation of the existence of the Rule of Law in the province. Clear provisions supporting such rights would it believes “assist in embedding the rule of law in our new society and thus help transcend the past conflict.”

It formulated its definition of a victim based recognising the reality of a malfunction in society, the notion of an empowered rather than weak victim, and resulting from an intentional or perhaps culpable harm. This view allows the group to focus on the nature of the act suffered rather than activity of the victim when classifying those who qualify. The group also calls for a series of rights of access to justice whose purpose would be to recognise the harm suffered. This would also extend to the right to participate in investigations and inquiries subject to the rights of others and the interests of justice.

The Commission also established an Implementation Working Group to report on the examine possibilities of enforcing the Bill of Rights provisions. It suggested three models. First, a new Bill of Rights “subsuming and completing the Human Rights Act 1998” and involving the setting up of a “Human Rights Court” with extensive jurisdiction and enforcement powers, with or without complementing “process rights” similar to the equality duties under section 75 of the Northern Ireland Act 1998. Second, a Bill of Rights to be adopted as legislation to exist alongside an amended Human Rights Act, with a separate Human Rights Court yet involving less extensive judicial and supervisory roles. Finally, the group proposed an un-amended Human Rights Act complemented by a separate “Supplementary Rights Act” relying on the ordinary courts for its enforcement.

How then has the Commission responded to this advice it expressly sought? The answer lies in the final consultation document produced by the institution in September 2001. Sensibly enough it has, in the main, heeded the advice of its working groups in relation to the areas of rights it requested them to research. The consultation document takes an explanatory form, setting out the Commission’s proposals with a clear elaboration of the thinking and sources behind them. Reflecting its consultative nature the document asks for responses from interested parties and individuals to a series of questions it raises in relation to the provisions it proposes. The 1st December 2001 has been set as the deadline for responses before the Commission is to prepare its final advice for the Northern Ireland Secretary in February 2002.

80 Making a Bill of Rights for Northern Ireland: A Consultation by the NIHRC.
The Commission adds to the Working Groups’ reports in some areas. It calls for the “essential principles” of the Belfast Agreement to be included in a section entitled “Democratic rights” enshrining the right to free elections, to “fair, full and effective” participation in the government of the province, and reducing the voting age to seventeen. The values of the Good Friday Agreement also inspire the main part of the preamble, where the most important paragraphs of the “Declaration of Support” at the beginning of the Agreement are reiterated directly, and those of the “Rights, Safeguards and Equality of Opportunity” section are also quoted.\(^8\)

The Commission also addresses the issue of women’s rights, recognising the disadvantages women face in Northern Ireland by drafting provisions relating to equality between men and women, the right to reproductive health care, the right to be free from violence, and the right to fair, full and effective participation in public life. The Commission sought views on whether there should be a free standing section or if the provisions could be linked with other rights sections. Finally it also addressed the question of amending the Bill of Rights, as well as the possible operation of a State of Emergency. In relation to the former it suggested three methods. First, that an amendment would require a cross-community vote in the Assembly. Second an amendment would require an amendment to an international treaty to be agreed by the UK and Irish governments. Third, the amendment would necessitate a referendum of the people of Northern Ireland. With regard to states of emergency, the Commission regards a derogation from the protection of rights to be justified only “in very particular situations”, and in clearly defined, priorly notified and time restricted circumstances.

CONCLUSION

To conclude then, the NIHRC has faced a difficult task in drafting a Northern Ireland Bill of Rights for the Northern Ireland Secretary. However, in doing so, the Commission has taken into account, as far has been practicable, and it is submitted to a laudable extent the rights claims that result from the particular political history of the province. It is proper that the consultation exercise it embarked upon has informed (and will continue to inform) the substance of its conclusions, and the Commission should ‘fight its corner’ to ensure that its views about the content of the Bill of Rights be shared by the Northern Ireland Secretary. Finally, the formulation of this Bill of Rights must also be seen in relation to a general

\(^8\) Supra n. 80, pp. 17–23.
commitment to follow the same path in the Republic. The establishment of a rights commission there to complement that in the North as a reciprocal obligation of the Irish State under the provisions of the Belfast Agreement has already been achieved. The Agreement also provides for a Joint Committee of these two commissions to be established to eventually produce a Charter of rights to which the political parties North and South will be encouraged to sign up to. Thus, we can see the first steps towards a ‘pan-Irish’ Bill of Rights whose purpose would appear to be founding the new political settlement on a series of values expressing a common respect for the rights of all people of the island.

School of Law and Applied Social Studies
Liverpool John Moores’ University
Liverpool L7 4DN
UK

83 Supra n. 1. Section 10 of the part of the Agreement relating to Rights.