

ARTICLE

DESIGNING BILLS OF RIGHTS IN CONTESTED CONTEXTS: REFLECTIONS ON THE NORTHERN IRELAND EXPERIENCE

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ABSTRACT

This Article addresses a specific question around bills of rights: How are these instruments drafted? Drawing upon the findings of research projects funded by the Joseph Rowntree Charitable Trust (the “JRCT”), the Article examines the Northern Ireland experience, a place where the process is ongoing. In particular, the Article explores conceptual and practical matters involved in drafting bills of rights in post-conflict societies. The Article suggests that Northern Ireland merits consideration when one reflects on models for the facilitation of public participation in constitutional projects. What happened to the course of the debate on a bill of rights in Northern Ireland also raises hard questions about how to design an effective process in the context of ethno-national division. This Article contributes to discussions on human rights reform in deeply divided societies by examining the Northern Ireland experience.

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I. INTRODUCTION

The adoption of bills of rights is ubiquitous and has been described as a “booming industry”.¹ The process of designing bills of rights in contexts of ethno-national conflict is, however, poorly understood. Using Northern Ireland as a case study (where the process is ongoing) this Article asks the question: What are the conceptual and practical difficulties involved in drafting bills of rights in post-conflict societies? Our aim is to facilitate a better understanding of the choices faced by drafters.

The Article argues that although Northern Ireland does not have a bill of rights at the time of the Article’s publication, the process is a useful example that merits further study, as a model for the facilitation of public participation in the drafting of bills of rights and constitutions elsewhere. This begs the obvious question: If the process is worthy of consideration, why did it fail to produce a bill of rights?

We argue that this stagnation is indicative of the challenges of designing a bill of rights in contexts of deep ethno-national conflict, where the language of human rights is woven into inter-communal contestation. In Northern Ireland the major political conflict remains between unionists/loyalists, who wish to retain the Union with Britain, and nationalists/republicans, who seek a

1. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 220 (2004).

United Ireland. This is still embedded across public and private life in a region that often functions through forms of communal coding. Words that may have particular meanings in legal texts, and that flow from international instruments, will be heard and understood differently depending on context.

The Northern Ireland process demonstrates what is already well-known: that in deeply divided societies “law is not always viewed as politically neutral and objective”.² The notions of “neutrality and impartiality” are themselves contested in such contexts. The use of legal instruments and arguments takes place in situations where constitutional perspectives will often determine what is seen and heard. This has, for example, shaped mainstream unionist parties’ approaches (predominantly the Ulster Unionist Party (“UUP”) and the Democratic Unionist Party (“DUP”)) to the bill of rights.³ One commentator has noted that unionist ideas about what a bill of rights should encompass are deeply informed by perceptions of the legitimacy of the state and its institutions.⁴ As this Article will suggest, the Northern Ireland bill of rights process is a manifestation of a distinctive political context, and arguments around human rights reform became a further site of constitutional contestation.

The Article builds on the work of both Authors over many years.⁵ It offers evidence to support the view that in the wake of Brexit there is a need for enhanced consideration of human rights reform. Although the focus is on Northern Ireland, the debate is taking place against the backdrop of wider reflections

2. Louise Mallinder, *Metaconflict and International Human Rights Law in Dealing with Northern Ireland's Past*, 8 CAMBRIDGE INT'L L.J. 5, 11 (2019).

3. ANNE SMITH ET AL., POLITICAL CAPACITY BUILDING: ADVANCING A BILL OF RIGHTS FOR NORTHERN IRELAND ch. 2 (2014), https://www.ulster.ac.uk/__data/assets/pdf_file/0005/58271/Advancing_a_BOR_NI.pdf [<https://perma.cc/QB5R-TSEW>].

4. See, e.g., Catherine Turner, *Political Representations of Law in Northern Ireland*, 3 PUB. L. 451 (2010).

5. SMITH ET AL., *supra* note 3; Anne Smith & Colin Harvey, *Where Next for A Bill of Rights for Northern Ireland?* (2018), https://www.ulster.ac.uk/__data/assets/pdf_file/0005/341987/Full-Report.pdf [<https://perma.cc/NCV6-6KAU>]; Colin Harvey, *Northern Ireland and a Bill of Rights for the United Kingdom* (2016), <https://www.thebritishacademy.ac.uk/sites/default/files/NI%20BOR%20178.pdf> [<https://perma.cc/6KBB-6VL3>]. Although this Article draws upon the fieldwork conducted for the research projects noted above, the views here are those of Harvey and Smith alone.

on constitutional reform in the UK,⁶ as well as intensified conversations about the future of the island of Ireland. Furthermore, the Northern Ireland experience is a cautionary tale for any divided/post-conflict society faced with similar challenges. How do you create common ground for such a constitutional enterprise in a society where there is still deep ethno-national contestation?

This Article is underpinned by two main themes. First, the Article argues that designing and drafting bills of rights in the context of ethno-national division must be conducted and understood against the local background political context in which it is immersed. Second, the Article analyzes the roles of political support and leadership. This theme has created difficulties for post-conflict societies such as Northern Ireland, when some of the key political protagonists have a “differential affinity to rights”, and where the “sovereign government” is often unwilling to advance rights-based reform.⁷ To that end, and although it is not the complete picture, bills of rights potentially become a site where political antagonisms are simply rehearsed, thus creating further alienation. This raises contextual questions in Northern Ireland where it is possible—both legally and politically—for robust interventions from the “sovereign government” and Westminster Parliament.

This Article proceeds as follows. In Part I we note what a bill of rights can do. Part II defines what we mean by “divided/post-conflict societies.” As a comprehensive account of the term “divided/post-conflict society” is beyond the scope of this Article, we do not offer a detailed analysis of the prodigious bodies of work on this term.⁸ Instead we draw upon key works by political

6. Vernon Bogdanor, *Brexit Could Prove to Be Britain's Constitutional Moment*, LONDON SCH. ECON. & POL. SCI. BLOG (Feb. 27, 2019), <https://blogs.lse.ac.uk/brexit/2019/02/27/brexit-could-prove-to-be-britains-constitutional-moment/> [https://perma.cc/BAV7-75BU].

7. Robin Whitaker, *Debating Rights in the New Northern Ireland*, 25 IRISH POL. STUD. 23, 27 (2010).

8. See, e.g., ADRIAN GUELKE, *POLITICS IN DEEPLY DIVIDED SOCIETIES* (2012); AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977); Donald L. Horowitz, *The Challenge of Ethnic Conflict: Democracy in Divided Societies*, 4 J. DEMOCRACY 18 (1993); DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* (1991); Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR*

scientists and from within the transitional justice literature to frame our argument.⁹ Part III examines the divergent approaches to human rights by the main political parties. Part IV addresses the specific provisions in the Belfast/Good Friday Agreement (the “Agreement”). Part V focuses on the Northern Ireland bill of rights process. Parts VI, VII, and VIII then explore the Northern Ireland Human Rights Commission’s (the “Commission”) advice and the responses to it. We conclude by setting out tentative recommendations on possible ways forward.

II. WHAT CAN A BILL OF RIGHTS DO?

While this Article examines the role of bills of rights, this does not imply that other attempts to combat discrimination and inequality are of less value. There is always a risk of overstating the significance of such constitutional documents. What a bill of rights can do is provide an overarching point of reference that becomes a normative framework for further legal and political developments. It can support good governance by creating a rights-informed structure of accountability; a bill of rights can therefore be part of a wider project of shaping effective governance and holding government to account.¹⁰ So they can assist in ensuring that “legislation, policy and practice does not deny fundamental rights . . . [Bills of rights] limit the actions of politicians in order to strengthen democracy rather than undermining it.”¹¹ They also inform how power is exercised and policies are designed. A bill of rights that only lives in courtrooms is not a constitutional document worth having.

ACCOMMODATION? 3 (Sujit Choudhry ed., 2008); Ian Lustick, *Stability in Deeply Divided Societies: Consociationalism Versus Control*, 31 *WORLD POL.* 325 (1979).

9. See, e.g., RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000); Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 *J. L. & SOC’Y* 265 (2008); Colm Campbell et al., *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, 66 *MODERN L. REV.* 317 (2003).

10. Kader Asmal sees this role as government “being kept on its toes”. See Kader Asmal, *Designing a Bill of Rights for a Diverse Society*, Speech to Chatham House, London (Sept. 26, 2007) (transcript on file with author).

11. N. IR. HUMAN RIGHTS COMM’N, *IS THAT RIGHT? FACT AND FICTION ON A BILL OF RIGHTS* 9, 13 (2012), https://www.nihrc.org/uploads/publications/Fact_and_Fiction_on_a_Bill_of_Rights-_Is_that_Right.pdf [<https://perma.cc/25JG-JX4G>].

Bills of rights therefore are put in place to uphold rights and facilitate political accountability and good governance. They are a useful mechanism to assure people that whoever is the Minister, irrespective of their particular personal views, everyone's rights must be respected and protected. However, we acknowledge that for some, bills of rights are controversial, especially for those from the "democratic positivism"¹² school of thought, and "court sceptics"¹³ such as Waldron,¹⁴ Allan¹⁵ and Dahl.¹⁶ These scholars share an antipathy to strong judicial review, and are concerned with courts having the final say on the meaning of rights. Hiebert, who coined the term "court sceptic", describes the position as attaching to someone who accepts "the legitimacy of individual rights but doubt[s] the prudence of giving courts final responsibility for interpreting and resolving political disagreements involving rights, for a range of reasons such as democratic concerns or institutional competence".¹⁷ It is beyond the scope of this Article to address the arguments based on democracy and institutional competency, but there continues to be extensive debate.¹⁸ For the purposes of this Article we draw upon the "court sceptic" narrative to help explain mainstream

12. Murray Hunt, *Reshaping Constitutionalism*, in *JUDGES, TRANSITION AND HUMAN RIGHTS CULTURES* 467, 468 (John Morison et al. eds., 2007).

13. Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 *MODERN L. REV.* 7, 10 (2006).

14. Waldron's relevant writings include: Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 *OXFORD J. LEGAL STUD.* 18 (1993); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 *YALE L.J.* 1346 (2006); Jeremy Waldron, *Taking Group Rights Carefully*, in *LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW* (Grant Huscroft & Paul Rishworth eds. 2002); JEREMY WALDRON, *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS CENTURY* (2016).

15. See, e.g., James Allan, *The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand*, in *SCEPTICAL ESSAYS ON HUMAN RIGHTS* 375 (Tom Campbell, Keith Ewing, & Adam Tomkins eds., 2001).

16. See generally ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

17. Hiebert, *supra* note 13.

18. See, e.g., PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (Philip Alston ed., 1999); see also Mary L. Volcansek, *Judicialization of Politics or Politicization of the Courts in New Democracies?*, in *JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATION* 66 (Christine Landfried ed., 2019); See Waldron writings cited *supra* note 14.

unionism's approach to human rights, and in particular responses to the bill of rights.¹⁹

III. DIVIDED/POST-CONFLICT SOCIETIES

All societies are, to different degrees, divided and pluralist—that is obvious, but it does not get us very far. “Deeply divided societies”, as defined by political scientists such as Guelke,²⁰ Lijphart,²¹ Horowitz,²² and Choudhry,²³ exhibit particular traits that complicate political processes, and this may lead to stasis, crisis, or conflict. First, they exhibit what political scientists have called “antagonistic segmentation”—there is a political fragmentation into camps which share little overlapping membership—consequently there is a breakdown in relations between groups.²⁴ “Antagonistic segmentation”, according to political scientists, is generated by “ascriptive ties” that are based on “terminal identities with high political salience, sustained over a substantial period and a wide variety of issues. As a minimum condition, boundaries between rival groups must be sharp enough so that membership is clear and, with few exceptions, unchangeable”.²⁵ The phrase “terminal identities”²⁶ means that identities are often assumed to be “closed” and fixed. It is not how identity actually is, but how it is assumed to be. “Ascriptive ties” means that people are placed in a group or segment because of qualities beyond their control—identities are assumed or acquired at birth, such as race, language or ethnicity.²⁷ A high political value is attached to these differences or “markers”²⁸ and they become “politically salient”²⁹ and thus division acquires overriding importance.

19. In this context, *see, e.g.*, Peter Munce, *Unionists as ‘Court Sceptics’: Exploring Elite Level Unionist Discourses about a Northern Ireland Bill of Rights*, 15 BRITISH J. POL. & INT’L REL. 647 (2013).

20. *See generally* GUELKE, *supra* note 8.

21. *See generally* LIJPHART, *supra* note 8.

22. *See generally* HOROWITZ, *supra* note 8.

23. *See generally* CHOUDHRY, *supra* note 8.

24. Lustick, *supra* note 8, at 325.

25. *Id.*

26. *See id.* at 326.

27. *Id.*

28. Choudhry, *supra* note 8, at 5.

29. *Id.*

The significance of sustained division is also discussed by Lustick.³⁰ He comments that in such societies the fault line is viewed as so central that its impact and influence extends widely.³¹ This makes it difficult, if not impossible, to reach agreement on politically contentious issues, such as a bill of rights. Notwithstanding this difficulty, the process of debating and negotiating a bill of rights can be of intrinsic value, particularly in any attempt to create a sense of shared values amongst different ethno-cultural groups. In other words, it is a process where people may strive to create a polity where equal status is a reality. Choudhry terms this “civic citizenship”.³² However, as noted earlier, it may also serve simply to highlight established political disagreements, and there is much in the Northern Ireland experience that supports this interpretation. There is often a strong element of predictability about the eventual outcome. Furthermore, as the next Part explores, for deeply divided societies that are in “transition”,³³ some sections of the community even find the concept of “transition” difficult and “inapplicable”.³⁴ In such contexts, people can inhabit distinctive linguistic frameworks and see the same subject in radically different ways.

IV. NORTHERN IRELAND AS A POST- CONFLICT/TRANSITIONAL SOCIETY AND APPROACHES TO HUMAN RIGHTS

Mallinder argues that “Unionist self-identification with the State means that actions that are perceived as anti the British State are also perceived as anti-Unionist”.³⁵ Therefore any measure, such as a bill of rights that would be used to challenge the state and to hold the state accountable, risks being viewed with

30. *See generally* Lustick, *supra* note 8.

31. *See generally id.*

32. Choudhry has credited this phrase to Ernest Renan. *See* Choudhry, *supra* note 8, at 6.

33. The term “transition” encompasses a diversity of social and political processes and has different axes. For an excellent discussion on this, *see generally* Fionnuala Ní Aoláin and Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 *HUM. RTS. Q.* 172 (2005); Ruti Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69 (2003).

34. Mallinder, *supra* note 2, at 13.

35. *Id.* at 17.

suspicion. This also maps onto forms of skepticism about judicial activism. As bills of rights impose limitations and constraints on the exercise of legislative and executive power, and give judges a more expansive role, they have been viewed with “caution”³⁶ by mainstream unionism, as some believe that the “the judiciary should not be permitted to assume the role of the legislative branch of government”.³⁷ The preservation of the stability of the existing constitutional arrangements will often take precedence over anything perceived as disruptive. While mainstream unionism is itself not a monolith, and has shifted positions over time, Turner argues that for the main unionist parties “any attempt to pre-empt the outcome of—or indeed to foreclose—a democratic process is inherently anti-democratic and is to be resisted, as such political questions should be left to a democratic and accountable Assembly”.³⁸

Unionist understandings of human rights must also be viewed in relation to specific concerns about judicial interventions (both before the United Kingdom courts and the European Court of Human Rights) on the legacy of the conflict, the use of lethal force by the state, and collusion in particular.³⁹ As “Unionists generally view the State as a benign, and even deified, entity . . . calls to investigate State abuses or to adopt measures to curb them in the future are antithetical to their interests”.⁴⁰ According to a DUP spokesperson, “people in Northern Ireland react to the concept of rights in a particular way . . . and that is because ‘rights’ by their very nature are often used against the state and using it this way in Northern Ireland was relatively polarizing.”⁴¹

The current leader of the largest unionist party, the DUP, Arlene Foster states that “human rights is like a foreign language

36. Democratic Unionist Party, *A Bill of Rights for Northern Ireland?*, 9-10 (2003) (on file with author).

37. *Id.*

38. Turner, *supra* note 4, at 455.

39. See generally *McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 553 (2001); *Jordan v. United Kingdom*, 37 Eur. Ct. H.R. 2 (2003); *Finucane v. United Kingdom* 37 Eur. Ct. H.R. 29 (2003); *Kelly v. United Kingdom*, Eur. Ct. H.R. (2001); *Shanaghan v. United Kingdom*, Eur. Ct. H.R. (Apr. 4, 2000); *In re Finucane (NI)* [2019] UKSC 7, (2019).

40. Mallinder, *supra* note 2, at 17.

41. Interview by Jonathan Bell, former MLA, with Emma Little-Pengelly, Special Adviser to the First Minister, DUP (May 21, 2013) (on file with author).

to most [referring to Unionists]”.⁴² This alienation towards rights discourse is also shared by the other mainstream Unionist party, the UUP: “if you look at how rights play out, unionists probably feel that it has not been advantageous to their community”.⁴³ This does not “[equate] to an absolute rejection of human rights among Unionists”.⁴⁴ There is a need to be “wary of falling prey to the positing of a rigid dichotomy between unionist and nationalist political cultures . . . as it is not as monolithic as it is often portrayed”.⁴⁵ For example, over the years there have been moments when unionists/loyalists have taken a more generous view of human rights discourse in general, and on matters of specific communal concern.⁴⁶ For example, historical policy documents from the two main unionist parties constructed a bill of rights as an essential tool to protect their interests. In 1972 the UUP advocated a justiciable bill of rights; under the heading “Safeguards and Protection for Minorities” they stated that its enforcement “would be by the normal judicial remedies of injunction, mandamus and declaratory judgment . . . rely[ing] on the existing Supreme Court of Northern Ireland”.⁴⁷ The party proposed “the introduction of a precise and comprehensive Bill of Rights” and argued that although “they considerably restrict the powers of Government . . . the restriction of over wide legislative and executive action in these matters is an important safeguard”.⁴⁸ Likewise, the DUP, while their preference was for a

42. See Arlene Foster, *Protestants Need Rights Explained to Them*, 411 FORTNIGHT, at 13 (Feb. 2003); See generally Mick Fealty et al., *A Long Peace?: The Future of Unionism in Northern Ireland* (Sluggar O’Toole, 2003); Omar Grech, *Human Rights and the Northern Ireland Conflict: Law, Politics and Conflict 1921–2014* (Routledge, Abingdon/New York, 2017); Munce, *supra* note 19.

43. SMITH ET AL., *supra* note 3, at 41 (quoting a June 7, 2013 interview with Mike Nesbitt, MLA, UUP).

44. Mallinder, *supra* note 2, at 18.

45. COLIN HARVEY & ALEX SCHWARTZ, *Judicial Empowerment in Divided Societies: The Northern Ireland Bill of Rights Process in Comparative Perspective*, in RIGHTS IN DIVIDED SOCIETIES 138 (2012).

46. See, e.g., Committee on the Administration of Justice, *A Bill of Rights for Northern Ireland: Through the years – the views of the political parties* (2003), <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15130917/No.-46-A-Bill-of-Rights-for-Northern-Ireland-Through-the-years-the-views-of-the-political-parties-July-2003.pdf> [<https://perma.cc/39VH-C2FG>].

47. See UUP, *Towards the Future: A Unionist Blueprint*, in THE FUTURE OF NORTHERN IRELAND: A PAPER FOR DISCUSSION, Annex 4 (1972).

48. *Id.*

UK-wide bill of rights, stated that they “would be prepared to accept a proposal for a Northern Ireland bill of rights which would incorporate a range of statutory safeguards against abuse of power”.⁴⁹ Arlene Foster has also commented on the need for unionists to reclaim the rights agenda.⁵⁰ Furthermore, loyalist-aligned parties, such as the Progressive Unionist Party (“PUP”) have supported the concept of a bill of rights, as they consider it to be a necessary component of peace in Northern Ireland:

A Bill of Rights for all United Kingdom citizens should be drawn and ratified by the Westminster Parliament, guaranteed by the European Court of Human Rights and the United Nations Commission for Human Rights.⁵¹

As noted earlier, this discussion illustrates that there is no such thing as one unionist vision of human rights; views have oscillated over the years. In contrast, nationalists/republicans have generally been more comfortable with the language of human rights, as historically the demand for enhanced protection has been associated with the nationalist parties, and to a lesser extent the Irish Government.⁵² Nationalists/republicans view the state as party to the conflict, and the discourse of human rights played a prominent role in constructions of the rule of law that seek to hold the state to account for its “actions or inaction”.⁵³ Human rights discourse also had the advantage of “internationalizing” discussion of the conflict. As noted above, while unionist politicians have at times been uncomfortable, and are “reticent to use the language and framework of human

49. DUP, *Ulster the Future Assured Proposals by the Ulster Democratic Unionist Party Northern Ireland Assembly Group for Progress Toward Full Devolution in Northern Ireland*, 12 (1984), <https://cain.ulster.ac.uk/events/assembly1982/docs/dup200984.htm> [<https://perma.cc/J9RF-AYSV>].

50. See Mark Devenport, *Unionism must reclaim rights agenda says Arlene Foster*, BBC NEWS (May 21, 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-politics-44198803> [<https://perma.cc/G96B-NA9H>].

51. See COMM. ON THE ADMIN. OF JUSTICE, A BILL OF RIGHTS FOR NORTHERN IRELAND: THROUGH THE YEARS – THE VIEWS OF THE POLITICAL PARTIES 10 (July 2003).

52. See Fionnuala Ní Aoláin, *Human Rights in Negotiating Peace Agreements: The Good Friday Agreement 2* (The Intn’l Council on Hum. Rts. Pol’y, Working Paper, 2005).

53. See Jane Winter, *Abuses and Activism: The Role of Human Rights in the Northern Ireland Conflict and Peace Process*, 1 EUR. HUM. RTS. L. REV. 1, 8 (2013).

rights”,⁵⁴ it is often the opposite for nationalists/republicans. As Cahill-Ripley argues, “not surprisingly, historically with their involvement in the civil rights movement, the reframing of civil rights as human rights is a natural and easy transition for them to make”.⁵⁵ Smithey suggests that the nomenclature of human rights was therefore considered to be “inappropriate under the totalizing and polarizing logic of ethnopolitical division. Once it was associated with nationalism, it was tainted”.⁵⁶ A former PUP representative summed this up as: “rights are seen as a Catholic thing, it’s not a Protestant thing”.⁵⁷ The Alliance Party commented as follows:

the Bill of Rights . . . has become toxic because nationalists have embraced it and unionists as a result are repelled by it . . . it’s not necessarily a logical extension of unionism to be against a Bill of Rights. So it’s hard to judge whether it’s . . . a position that they’ve taken because someone else is for it, then they’re against it, and that happens a lot in Northern Ireland.⁵⁸

What is particularly puzzling is the politicized perception of the use of “inclusive” language: these are intended to be human rights for “everyone”. But in an intriguing way the unionist critique also aligns with relativist criticisms of human rights discourse that view it as “liberal cover” for forms of politics, substituting “nationalist” for “liberal”. In Northern Ireland it also speaks to how political opponents are viewed, and the rival constructions of identity; a form of permanent “culture war” pervades society, underpinned by deep mistrust. The risk is that the value to be derived for all communities, through active engagement with rights discourse, is lost.

54. Amanda Cahill-Ripley, *Exploring The Local: Vernacularizing Economic and Social Rights for Peacebuilding within the Protestant/Unionist Borderland Community in Northern Ireland*, 23(8) INT’L J. HUM. RTS., 1248, 1251 (2019).

55. *Id.*

56. LEE A. SMITHEY, UNIONISTS, LOYALISTS, AND CONFLICT TRANSFORMATION IN NORTHERN IRELAND 142 (2011).

57. SMITH ET AL., *supra* note 3, at 44 (quoting a Sept. 11, 2013 interview with Billy Hutchinson, PUP).

58. Interview with Naomi Long, then MP, Alliance Party (Oct. 2, 2013) (on file with authors).

V. BACKGROUND AND ORIGINS OF THE NORTHERN IRELAND BILL OF RIGHTS PROCESS

A bill of rights has been on the political agenda from the 1960s onwards. From 1964 to 1968 there were four attempts by Sheelagh Murnaghan to introduce a bill of rights for Northern Ireland.⁵⁹ However, each effort failed to garner sufficient support amongst the Unionist parties, who were then dominant in the Stormont Parliament.⁶⁰ Some argue that had a bill of rights been enacted earlier in the 1960s as proposed by Murnaghan, it could have possibly prevented the outbreak of the conflict:⁶¹

Had we [Northern Ireland] had a [Bill of Rights] in the 1960s whenever people like Sheelagh Murnaghan were advocating a Bill of Rights, we might have avoided some of the issues that exploded into the civil rights campaign and in particular socio-economic rights...one of the principle problems...was the allocation and distribution of housing and if we'd had them—[socio-economic rights] we might not have had that problem or we could have managed that problem differently...I say the same in relation to jobs. If we had a human rights charter in relation to the area of job discrimination and equal opportunity, we could have perhaps avoided some of those problems because job discrimination was another aggravating factor that gave rise to the civil rights campaign and the Troubles ultimately.⁶²

The debate around a bill of rights took place consistently at key moments over the following decades. In the period from 1972–1998, there were times when proposals were routinely discussed. In 1972 the Northern Ireland Parliament⁶³ was

59. Constance Rynder, *Sheelagh Murnaghan and the Ulster Liberal Party*, 71 J. LIBERAL HIST. 1, 15-16 (2011).

60. Colin Harvey & Alex Schwartz, *Designing a Bill of Rights for Northern Ireland*, 60 N. IR. L.Q., 181 (2009); *see id.*

61. MAURICE HAYES, *MINORITY VERDICT: EXPERIENCES OF A CATHOLIC PUBLIC SERVANT* 81 (1995).

62. SMITH ET AL., *supra* note 3, at 3 (quoting a May 1, 2013 interview with Alban Maginness, MLA SDLP).

63. The division of Ireland in 1921 resulted from an initial attempt to give “home rule” to the whole of Ireland (the 32 counties). The Irish Free State (consisting of 26 counties) came into existence in 1922 whilst the 6 counties of Ulster became “Northern Ireland” and remained under UK sovereignty with its own Parliament established the same year. This political move was opposed by Protestants in Ireland, who became the minority in the new Irish jurisdiction, as well as by a substantial Catholic minority within

dissolved after 50 years⁶⁴ and replaced by direct rule from Westminster.⁶⁵ The UK Government embarked on a series of consultations with the political parties in Northern Ireland to find an acceptable system of government. Each consultation proposed various forms of self-rule, alongside a bill of rights that could contribute to a stable system of government.⁶⁶

This constitutional debate continued into the mid-1980s, culminating in the signing of the Anglo-Irish Agreement, which provided the Irish Government with a consultative role in the administration of Northern Ireland for the first time.⁶⁷ The two main unionist parties opposed the intergovernmental agreement, and they subsequently refused to engage in government consultations. The 1990s marked another round of internal debates within the parties relating to a bill of rights for Northern Ireland, within the context of devolution.⁶⁸ Following the ceasefires, the British and Irish governments also commenced multi-party negotiations with the political parties.⁶⁹ This resulted in the Agreement of April 1998, which, among other things, contained agreed power-sharing arrangements for a new Northern Ireland Legislative Assembly.⁷⁰ This Assembly would act, along with the other institutions in Northern Ireland, in accordance with the “European Convention on Human Rights

Northern Ireland whose identity was linked to the emerging Irish state. Thus, the polarization of the two communities was built from the inception of the state along religious and political lines. Religious affiliation thus came to define political identity and was the means by which the state characterized citizenship and loyalty. These incompatible objectives were broadly, on the one hand, the desire of the Catholic community for the political integration of Northern Ireland with the Irish Free State (1922-1948)/Irish Republic (1948 onwards) and, on the other, the wish of their Protestant counterparts for the territory and governance of the jurisdiction to remain the responsibility of the United Kingdom.

64. See UUP, *The Future of Northern Ireland: A Paper for Discussion*, ¶12 (1972), <http://cain.ulst.ac.uk/hms0/nio1972.htm#part2> [<https://perma.cc/FQU3SPUX>]. “The most striking feature of the executive government of Northern Ireland throughout this period of more than half a century was its virtually complete concentration in the hands of a single political party, the Ulster Unionist Party.” *Id.*

65. See Northern Ireland (Temporary Provisions) Act (Northern Ireland) c. 22 1972 (1972).

66. SMITH ET AL., *supra* note 3, ch. 2.

67. See Agreement between the Government of Ireland and the Government of the United Kingdom art. 2, 1985.

68. SMITH ET AL., *supra* note 3, ch. 2.

69. *Id.*

70. It should be noted that the DUP did not support the Agreement.

(ECHR) and any Bill of Rights”.⁷¹ The Agreement therefore provided a new “constitutional moment”⁷² for the introduction of a bill of rights. For some commentators,⁷³ a bill of rights was essential:

[W]hat system of human rights provision does this liberal consociation require? The answer most obviously is: a Bill of Rights and a legal system that is consistent with it. That in turn implies that each of the four elements of the consociational system must be appropriately protected where necessary.⁷⁴

The arguments on the merits of consociationalism will continue.⁷⁵ But the debate about how to respect power-sharing and protect rights has had serious implications for the bill of rights process.

71. See Agreement Between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, ITS No. 1/2008 (Ir.) [hereinafter *The Agreement*]. This proposal is repeated four times in Strand One. Agreement reached in the multi-party negotiations, Cm 3883 (1998) 37 *ILM* 751, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf [<https://perma.cc/JA3F-J35S>] [hereinafter Agreement of April 1998].

72. This term is borrowed from Nolutshungu, who identified two essential elements within a constitutional idea: that of a constitutional moment and that of a constitutional function. The constitutional moment is the transition or the new beginning, which is more concerned with reaching a deal between the parties and the need to secure accommodation of all the parties’ interests rather than focusing on the constitutional function, the construction of a well-functioning constitutional structure. See Anne Smith & Eithne MacLaughlin, *Delivering Equality: Equality Mainstreaming and Constitutionalism of Socio-economic Rights*, 61 N. IR. LEGAL Q. 93, 94 (citing S.C. Nolutshungu, *The Constitutional Question in South Africa*, in STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY (Issa G. Shivji ed., 1991)).

73. See, e.g., Brendan O’Leary, *The Nature of the Agreement*, 22 FORDHAM INT’L L.J. 1628 (1999).

74. Brendan O’Leary, *The Protection of Human Rights under the Belfast Agreement*, 72(3) POL. Q. 353, 354 (2001). The term “consociation” or “consociationalism” was formulated by Lijphart to describe arrangements used in “deeply divided societies” involving institutionalized power-sharing arrangements between segments of society joined together by common citizenship but divided by language, religion, ethnicity or other factors. See Lijphart, *supra* note 8. The four elements O’Leary refers to reflect Lijphart’s four criteria which constitute a consociational structure: segmental autonomy, a grand coalition of governing elites, proportional representation and mutual vetoes.

75. Critics of consociationalism include: ASPECTS OF THE AGREEMENT (Rick Wilford ed., 2001); PAUL DIXON, NORTHERN IRELAND: THE POLITICS OF WAR AND PEACE (2002); Rupert Taylor, *Consociation or Social Transformation?*, in NORTHERN IRELAND AND THE DIVIDED WORLD: POST-AGREEMENT IN NORTHERN IRELAND IN COMPARATIVE PERSPECTIVES (J. McGarry ed., 2001).

VI. *THE AGREEMENT AND THE BILL OF RIGHTS*

In contrast to other jurisdictions that have adopted a bill of rights as part of what Bell calls a “constitutional design process”,⁷⁶ the Agreement established a new and independent Commission to advise the UK Government, with the assumption that the proposals would then be enacted as Westminster legislation.⁷⁷ The role was given to the new Commission, and this emphasis on “Westminster legislation” remains significant, as the chances of securing cross-party agreement in Northern Ireland were then, and still are, slim. The Agreement’s terms of reference provided that such a bill was to consist of rights supplementary to the ECHR and reflect the “particular circumstances of Northern Ireland”, among other things.⁷⁸ Reference to the “particular circumstances of Northern Ireland” has featured heavily in the discussions, and continues to be a source of disagreement. What is *particular to* Northern Ireland, and what should this phrase be taken to mean? Even if it is accepted that the conflict is a major aspect of this, what are the precise consequences for the bill of rights? Does this lead to a narrow understanding of human rights protections or does it embrace a full range of guarantees? The responses to these questions have historically been informed by the relevant background understanding of human rights, and the approach taken to the conflict.⁷⁹ Nationalist and unionist responses reflect “wider political contestations”,⁸⁰ with consequences for the adoption of any Northern Ireland bill of rights.

Before examining these responses, it is worth underlining that although the phrase “particular circumstances of Northern Ireland” tends to dominate the conversation, it is one part only of the mandate. Of equal significance is the reference to “drawing as appropriate on international instruments and experience” and “rights supplementary to those in the European Convention on Human Rights”.⁸¹ These phrases suggest two points. First, a global perspective should also infuse the discussions, and it is plain (in

76. Christine Bell, *Introduction: Bargaining on Constitutions-Political Settlements and Constitutional State-Building*, 6 *GLOBAL CONST.* 13, 14 (2017).

77. See Agreement of April 1998, *supra* note 71, § 6 para. 4.

78. *Id.* paras. 4, 16-17.

79. For a discussion on these points, see Turner, *supra* note 4.

80. Mallinder, *supra* note 2, at 11.

81. Agreement of April 1998, *supra* note 71, § 6 para. 4.

the extensive levels of justification offered for the inclusion of each additional right supplementary to the ECHR) that the Commission attempted to do precisely that.⁸² Second, a Northern Ireland bill of rights would build on the rights protection provided by the “incorporated” ECHR rights under the Human Rights Act 1998 (“HRA”)⁸³ and the Northern Ireland Act 1998.⁸⁴ In other words, a bill would be HRA plus; the intention being to supplement the Act rather than repeal and replace it. The ECHR provides a minimum standard, a bill of rights ought to provide a higher level of rights protection and address potential gaps. For example, on children’s rights, the rights of minorities, socio-economic guarantees and communal rights. In a divided society such as Northern Ireland, the effective protection of communal rights in areas such as citizenship, culture, and identity is, for example, pivotal.⁸⁵

The idea that a bill of rights is the answer is not a universal view, either within the political sector or within academia.⁸⁶ As stated earlier, we are not suggesting that the only way to protect rights is through a bill of rights; it is not. However, in the context of Northern Ireland it is an idea with profound normative merit, and the Agreement created a fair and reasonable expectation among participants in the peace process that one would be delivered.

In taking forward this project the Commission employed an inclusive process and facilitated public participation. This was an attempt at a “bottom-up method of direct democracy” with the

82. N. IR. HUMAN RIGHTS COMM’N, A BILL OF RIGHTS FOR NORTHERN IRELAND: ADVICE TO THE SECRETARY OF STATE FOR NORTHERN IRELAND app. 1 (Dec. 10, 2008), <http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf> [<https://perma.cc/3BX46Q4Z>].

83. This Act effectively made the ECHR part of UK domestic law. See Agreement of April 1998, *supra* note 71, § 6 para. 4.

84. This Act is the legislative enactment of the 1998 Agreement. Northern Ireland Act 1998, C. 47 §§ 68-69 (UK), <https://www.legislation.gov.uk/ukpga/1998/47/contents> [<https://perma.cc/VL24-98XV>].

85. Stephen Livingstone, *The Need for a Bill of Rights in Northern Ireland*, 52 N. IR. LEGAL Q. 269, 281 (2001).

86. For example, Brice Dickson argues that while there is a need for human rights reform in Northern Ireland, the rights deficit can be addressed in other ways, and concludes that “a Bill of Rights is no longer the most efficient or effective way of achieving” human rights reform. Brice Dickson, *The Stephen Livingstone Lecture: The problems with human rights*, 70 N. IR. LEGAL Q. 467, 476 (2019).

public asked in different fora to comment on draft consultations.⁸⁷ Such an approach is in line with what some view as a basic requirement for such a constitutional exercise. For example, Ginsberg and others state as bills of rights are generally the supreme law of the land, the processes require “the greatest possible level of legitimation in democratic theory”.⁸⁸ Others have asserted that public participation can help “provide the citizenry with a sense of ownership and authorship, a sense that ‘We the people’ includes me”.⁸⁹ In this context, bills of rights can be looked upon as citizen empowerment documents.⁹⁰ However, in divided societies there is the added complication that it is often not “We the People” but “We the Peoples”.⁹¹ In Northern Ireland, while there has been a broad mass of cross-community support for a bill of rights,⁹² as Schwartz and Harvey note, “it may be some time before the ‘Peoples’ of Northern Ireland can come together to speak with a single sovereign voice”.⁹³

Notwithstanding that difficulty, Northern Ireland remains useful as an example of the impact of engagement on the Commission’s advice. As we have already stated, from the

87. For a detailed discussion of the process, see Anne Smith & Leo Green, *The Processes of the ‘unfinished businesses’ of the Good Friday/ Belfast Agreement: An all-island Charter of Rights and the Northern Ireland Bill of Rights*, 11 (2) *IRISH YEARBOOK INT’L L.* 23 (2016-2017). See also N. Ir. Human Rights Comm’n, *Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission*, CAIN ULSTER U. (Sept. 2001), <https://cain.ulster.ac.uk/issues/law/bor/borconsult.htm> [<https://perma.cc/R3GH-X5AG>].

88. Tom Ginsberg et al., *Does the Process of Constitution-Making Matter?*, 5 *ANN. REV. L. & SOC. SCI.* 201, 206 (2009).

89. Hanna Lerner, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* 18 (Cambridge Univ. Press 2013). The words “we the people” are drawn upon Ackerman’s writing on the subject. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *VA. L. REV.* 771 (1997); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (Harvard Univ. Press 1991).

90. For a critical view, see Brian Christopher Jones, *Constitutions and bills of rights: invigorating or placating democracy?*, 38 *LEGAL STUD.* 339, 358-59 (2018) (arguing that rather than enhancing citizens’ power, Bills of Rights can reduce citizens’ influence as power is transferred to either the judiciary or the elected representatives).

91. Stephen Tierney, *We the Peoples: Balancing Constituent Power and Constitutionalism on Plurinational States*, in *THE PARADOX OF CONSTITUTIONALISM* 229 (Neil Walker & Martin Loughlin eds., 2007).

92. *Attitudes to Human Rights in Northern Ireland: Polling Data*, HUM. RTS. CONSORTIUM (July 2017), <http://www.humanrightsconsortium.org/wp-content/uploads/2017/07/Attitudes-to-Human-Rights-in-Northern-Ireland-Polling-Data-1.pdf> [<https://perma.cc/S4SF-KBSJ>].

93. Harvey & Schwartz, *supra* note 60, at 148.

beginning (March 2000) the Commission embarked on an open and participative process, and received over 650 formal submissions from individuals and agencies.⁹⁴ As part of the process a Bill of Rights Forum (which included representation from all the main political parties in Northern Ireland and various sections of civic society) was created in 2006.⁹⁵ Although it did not achieve agreement on a single set of proposals,⁹⁶ the Commission welcomed the Forum's findings, and agreed to pay "rigorous attention to the proposals contained in the Forum Report, with each of its proposals considered in detail".⁹⁷ On receipt of the Forum's advice, the Commission publicly stated its intention to submit its advice on a bill of rights to the Secretary of State for Northern Ireland within a defined time frame.⁹⁸ Having met its self-imposed deadline, the Commission's advice was published on December 10, 2008.⁹⁹

VII. DELIVERING AT LAST: THE COMMISSION'S ADVICE

The Commission did not set out a draft bill of rights, but rather the advice took the form of a comprehensive report with detailed recommendations on what rights should be included, and the rationale for the inclusion of each specific right. The Commission adopted guidelines which explained each recommendation and explained, in considerable detail, how it had approached the task.¹⁰⁰ The scale and extent of the advice hints at the level of contestation around the process, and the length that the Commission went to be open and rigorous. The attempt to work within a specific methodological framework is notable, as one of the first and obvious problems for the drafters

94. N. IR. HUMAN RIGHTS COMM'N, *supra* note 82.

95. The origins of the Bill of Rights Forum flow from the Joint Declaration by the British and Irish Governments, Ir.-Eng., April 2003, Annex 3, ¶3. However, the Bill of Rights was formally established following the St. Andrews Agreement 2006.

96. *See generally* BILL OF RIGHTS FORUM, FINAL REPORT: RECOMMENDATIONS TO THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION ON A BILL OF RIGHTS FOR NORTHERN IRELAND (Mar. 31, 2009). The key areas of disagreement were what constituted the 'particular circumstances' of Northern Ireland; cultural and identity rights; and social and economic rights. *Id.* at 70, 73, 86, 102.

97. N. IR. HUMAN RIGHTS COMM'N, *supra* note 82, at 13.

98. *Id.* at 13.

99. *Id.* at 1.

100. *Id.* app. 1.

of bills of rights in deeply divided societies is deciding what rights should be enacted, and how the selection will be justified. Other questions include: should a bill of rights contain a universal package of rights for any society that “goes beyond the confines of the conflict?”¹⁰¹ Or should it be an “indigenous” bill of rights reflecting the particular needs of a deeply divided society? Should it be fully justiciable, entrenching a wide range of rights, including socio-economic rights? Issues of enforcement, derogation and implementation also need to be addressed, as does the question of scope—should such a bill have horizontal as well as vertical application?

Responding to the Agreement’s reference to the realization of a higher level of rights protection than afforded by the ECHR provisions,¹⁰² the advice includes economic, social and cultural rights, along with a number of other rights, which it considered would reflect the “particular circumstances of Northern Ireland”.¹⁰³ The Commission took the position that all the recommendations should be capable of judicial enforcement.¹⁰⁴ It also adopted several recommendations that acknowledged the need for effective dialogue between the different “branches of government”, including annual reporting to the Northern Ireland Assembly and the Westminster Parliament on progress, as well as the establishment of a Human Rights Committee in the Assembly and a five-year independent review.¹⁰⁵ The Commission

101. Grech, *supra* note 42, at 252. For example, the suggestion that the original intention was for incorporation of the ECHR with some “add-ons” connected to the particular circumstances of Northern Ireland. See MIKE CHINYOY, *ARE YOU WITH ME?: KEVIN BOYLE AND THE RISE OF THE HUMAN RIGHTS MOVEMENT* 301 (The Lilliput Press, 2020).

102. Michael Meehan, *Towards a Northern Ireland Bill of Rights*, 23 *LIVERPOOL L. REV.* 33, 41-42 (2001).

103. Agreement of April 1998, *supra* note 71, § 6 para. 4. The recommendations include: the right to life; right to liberty and security, right to a fair trial and no punishment without trial; right to marriage or civil partnership; right to equality and prohibition of discrimination; democratic rights; education rights; freedom of movement; freedom from violence, exploitation and harassment; right to identity and culture; language rights; rights of victims; right to civil and administrative justice; right to health; right to an adequate standard of living; right to accommodation; right to work; environmental rights; social security rights; children’s rights. *Id.*

104. N. IR. HUMAN RIGHTS COMM’N, *supra* note 82, at 59.

105. *Id.*

recommended that the bill would apply to both the Assembly and the Executive and have vertical as well as horizontal application.¹⁰⁶

The Commission's blended approach has merit, in that a bill of rights should contain what might be termed "universal standards" as well as those provisions that are needed if it is to be anchored in the particular circumstances of society.¹⁰⁷ As Harvey argues "[a] bill of rights that is not properly grounded will have an insecure future and risks irrelevance. There is a balance to be struck, in navigating abstract universalism and cultural relativism".¹⁰⁸ At the same time we are cognizant that achieving this balance can be challenging, especially where there is a lack of agreement, both about what rights are considered so fundamental that they should be in a bill of rights, and the differing visions of human rights between the main political protagonists. The political responses to the Commission's advice epitomize this difficulty.

VIII. CONTESTATION REVISITED: RESPONSES TO THE COMMISSION'S ADVICE

In its response to the advice, the Northern Ireland Office ("NIO") in 2009 adopted a minimalist approach,¹⁰⁹ arguing that most of the rights proposed by the Commission were already adequately protected by existing legislation, policy, or practice,¹¹⁰ or were not specific to Northern Ireland. In addition, the NIO sought to append these rights to a "national" discussion on a possible UK bill of rights.¹¹¹ The insensitivity of the response was not surprising, and ignores this apt advice:

106. *Id.* at 148-70.

107. It should be noted here that one of the Authors (Harvey) was a commissioner at the time.

108. Colin Harvey & David Russell, *A new beginning for human rights protection in Northern Ireland?*, 6 EUR. HUM. RTS. L. REV. 748, 753 (2009).

109. The NIO's response supported the inclusion of only two out of the seventy-eight recommendations put forward by Commission. These are the right to vote/be elected and the right to identify and be accepted as British or Irish or both. *See* N. Ir. Office, *A Bill of Rights for Northern Ireland: Next Steps*, 1, 42 (Nov. 2009).

110. *Id.* at 72.

111. These rights include right to marriage or civil partnership, education rights, freedom of movement, right to civil and administrative justice, right to health, right to an adequate standard of living, right to work, environmental rights and social security rights. *Id.* at 17.

Northern Ireland is not Lincolnshire or Somerset. It is a distinct and unique political entity, recognised as such by an international treaty registered with the United Nations: the Belfast Agreement of 1998.¹¹²

In line with the peace agreement, the Northern Ireland bill of rights is, and should continue to be, a separate process, independent of and unfettered by the UK debate about a “British” bill of rights.¹¹³ The UK Commission on a Bill of Rights¹¹⁴ reached the same conclusion:

We [the Commission] recognise the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland. We do not wish to interfere in that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights process.¹¹⁵

The NIO’s critical response chimed with that of the main unionist parties, most notably the UUP and the DUP.¹¹⁶ They argued that the Commission should have adopted a narrower interpretation of its mandate and suggested that it went beyond its designated role.¹¹⁷ This stance is illustrative of the minimalist and “court

112. Fintan O’Toole, *Belfast agreement is a threat to the new English nationalism*, IRISH TIMES (July 5, 2016), <http://www.irishtimes.com/opinion/fintan-o-toole-belfast-agreement-is-a-threat-to-the-new-english-nationalism-1.2710209> [https://perma.cc/A9WW-AJTV].

113. For further information, see Harvey, *supra* note 5.

114. The UK Bill of Rights Commission was established in March 2011 by the coalition government in response to the Conservative Party’s wish to dilute the Human Rights Act and the Liberal Democrat’s wish to maintain it. The Commission failed to reach an agreement on whether or not the UK should have its own bill of rights. Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, COMMISSION ON A BILL OF RIGHTS, Vol. 1 (Dec. 2012), <https://webarchive.nationalarchives.gov.uk/20130206065653/https://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> [https://perma.cc/QN2M-ZTNS].

115. *Id.* ¶12.4.

116. Democratic Unionist Party, *A Bill of Rights for Northern Ireland: Next Steps – Response by Democratic Unionist Party* (Mar. 2010); Ulster Unionist Party, *Ulster Unionist Party consultation response – The Bill of Rights for Northern Ireland, Next Steps* (Mar. 2010) (on file with authors).

117. Colin Harvey, *Where now for the Northern Ireland Bill of Rights Process?*, UK CONST. L. ASS’N (July 28, 2011), <http://ukconstitutionallaw.org/2011/07/28/colin-harvey-where-now-for-the-northern-ireland-bill-of-rights-process/> [https://perma.cc/VX5K-C78W]. Two out of the ten commissioners dissented from the final advice; they were Mr. Jonathan Bell and Lady Daphne Trimble.

sceptic” narrative discussed earlier, as well as a view of what was originally intended:

The agreement mandated the commission to engage in a modest task, not one of industrial proportions. The commission was merely invited to consult and advise on the scope for supplementary rights, nothing more. It was not mandated to devise a new bill of rights or to change our socio-economic context through the creation of numerous new rights; it was merely mandated to examine the scope for rights supplementary to the European Convention on Human Rights. Quite how we got from that very modest, realistic task to a 189-page document from the Northern Ireland Human Rights Commission that proposes to hand over significant sections of public policy to the courts—taking them from democratically elected representatives—is something of a mystery.¹¹⁸

In contrast, the PUP argued that the NIO’s “document presented for consultation does not reflect the feedback, demands and needs of the process managed by the NIHRC and with the other parties it urged for the NIO to re-consider its proposals”.¹¹⁹ The party further reiterated its support for a strong bill of rights that would include social and economic rights.¹²⁰ Their stance was also supported by nationalist/republican parties, the Alliance Party and NGOs, community groups, trade unions and other civil society organizations (some of these organizations were reflecting views from within Protestant/unionist communities)¹²¹ who favored the Commission’s interpretation of its mandate, and agreed that it was intended to be inclusive.¹²² They endorsed the Commission’s generous approach.¹²³

118. *Mr. Kennedy, Before Northern Ireland Assembly, Private Members’ Business: Northern Ireland Human Rights Commission* (Nov. 3, 2009), <http://archive.niassembly.gov.uk/record/reports2009/091103.pdf> [https://perma.cc/72X3-2E3J].

119. Letter from the Progressive Unionist Party to Shaun Woodward Secretary of State for Northern Ireland, Mar. 9, 2010 (on file with the authors).

120. *Id.*

121. Harvey & Schwartz, *supra* note 45, at 138.

122. N. Ir. Human Rights Comm’n, *Summary of Submissions on a Bill of Rights 19* (July 2003) (on file with authors).

123. For a detailed discussion about the response to both the Commission’s advice and the NIO, see SMITH ET AL., *supra* note 3, ch. 3.

These two schools of thought (the restrictive versus the purposive) illustrate that the process, since inception, has been marked by a lack of political consensus framed by differing views of the original intentions of the drafters and the role of any bill of rights. While there is cross-community support for a Northern Ireland bill of rights (as evidenced by several opinion polls)¹²⁴ the lack of “elite political”¹²⁵ backing remains the key obstacle to progress. As Harvey and Schwartz state, “Northern Ireland would already have a bill of rights (in some form or another) if only its political elites *really* wanted one”.¹²⁶ That remains a basic fact of the process, allied to the reality that successive UK governments have used the absence of cross-party agreement as a basis for refusing to legislate at Westminster.¹²⁷

The findings of our research project suggest that there is also a third school of thought: some NGOs think that the Commission’s advice did not go far enough, and could be strengthened.¹²⁸ In this context, it is worth noting that the Commission’s 2008 advice was itself a *compromise document*; it did not include everything that, for example, civil society organizations wanted. This point is neglected in the public discussion, with a tendency to prioritize the voices of those who favor narrower options. This imbalance created space for the Commission’s advice to be cast in clichéd terms, and thus gave excessive room for the input of those who simply sought to avoid engagement on content.

The established “two-communities” construction of the debate therefore clouded and obscured the views of those who argued that the advice never went far enough. In practice the hegemonic (conservative) narratives that tend to dominate public life in Northern Ireland ensured that the Commission’s

124. N. IR. HUMAN RIGHTS COMM’N, *supra* note 82, at 8.

125. Harvey & Schwartz, *supra* note 45 at 130.

126. *Id.*

127. SMITH ET AL., *supra* note 3, at 45.

128. These organizations included: The Family Planning Association, the Children’s Law Centre; Anti-Poverty Network, Disability Forum and the Committee on the Administration of Justice. As part of the project, we translated the Commission’s advice into a draft legislative model bill of rights. See Smith & Harvey *supra* note 5, at 3. During the project the Authors also held stakeholder events in Belfast (June 28, 2017, and Dec. 14, 2017) and in Derry (Nov. 29, 2017) asking for responses to the draft model bill of rights.

advice could be written off as unrealistic. It joins a long list of contributions to public debate in Northern Ireland that are much commented on but little read.

Respondents to our project helped to clarify the areas where further thought might be needed. These include: marriage equality; women's rights and reproductive rights; language rights; equality and, in particular, the rights of disabled people. In addition, more specific recommendations emerged on the rights of children and young people; the rights of refugees (in particular, refugee and unaccompanied asylum-seeking children); and the ongoing systemic neglect of socio-economic rights.¹²⁹ Advances in some of these areas, most notably marriage equality and reproductive rights, continue to be made alongside the conversation on a bill of rights.¹³⁰ Campaigns on marriage equality and reproductive rights had notable successes (via the Westminster Parliament) in 2019.¹³¹ However, these advances do not necessarily eradicate the need for inclusion in a bill of rights. As noted earlier, a bill of rights can supplement and complement existing legislation, and provide a useful overarching normative framework.¹³²

While much of the Commission's advice reflects its designated mandate, it was submitted 12 years ago. As such, it could be usefully augmented to reflect the changing "particular circumstances of Northern Ireland". Brexit, in particular, dominated the responses to our project, and was highlighted as a major threat to the Agreement.¹³³ It has fueled widespread

129. *Id.*

130. See The Northern Ireland Executive Formation Act 2019 ch. 8-9. Other examples where Northern Ireland has benefited from legislation passed at Westminster include the Gender Recognition Act 2004, the Human Fertilisation and Embryology Act 2008, and the Data Protection Act 2018. Restoration of devolution was formally established in January 2020 on the basis of the New Decade, New Approach agreement. See New Decade, New Approach, Ir.-U.K, Jan. 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf [<https://perma.cc/4J57-6WKR>].

131. *Law Liberalising Abortion and Same-Sex Marriage In NI Passes Final Stage*, IRISH TIMES (July 22, 2019), <https://www.irishtimes.com/news/ireland/irish-news/law-liberalising-abortion-and-same-sex-marriage-in-ni-passes-final-stage-1.3964062> [<https://perma.cc/R7EP-72NU>].

132. Asmal, *supra* note 10.

133. Oral feedback from the stakeholder events in Belfast (June 28, 2017 and Dec. 14, 2017); Derry (Nov. 29, 2017) (on file with the authors).

anxiety about the future, and the impact on existing guarantees.¹³⁴ The loss of the EU Charter of Fundamental Rights was much commented on,¹³⁵ and has also been questioned by, among others, the UN Special Rapporteur on extreme poverty and human rights.¹³⁶ There will be question marks over the extent and the delivery of a wide range of rights. Most notably equality rights and employment rights, such as on unfair dismissal and safe working conditions. There are also concerns about the implications for socio-economic rights, such as access to health care, social and housing assistance, as well as protections relating to personal data and the right to an effective judicial remedy.¹³⁷

Citizenship rights and national identity were also highlighted as areas that will be affected by Brexit.¹³⁸ The Agreement, for example, recognizes the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British (or both), a right that “would not be affected by any future change in the status of Northern Ireland”.¹³⁹ Furthermore, when the Agreement was signed, there was a background assumption that the UK and Ireland would remain Member States of the EU. Indeed, one of the purposes of the Agreement was declared to be that both governments wished: “To develop still further the unique relationship between their peoples and the close co-

134. For example, see the work and outputs of the BrexitLawNI project. BREXITLAWNI, <https://www.brexitlawni.org> [<https://perma.cc/C77D-EEX2>] (last visited Dec. 2, 2020).

135. Oral feedback from the stakeholder events in Belfast (June 28, 2017 and Dec. 14, 2017); Derry (Nov. 29, 2017) (on file with the authors); *See also* European Union (Withdrawal) Act 2018, sch. 5(4) (Eng.).

136. *See* U.N. Special Rapporteur on Extreme Poverty and Human Rights, *Statement on Visit to the United Kingdom* (Nov. 16, 2018), https://www.ohchr.org/Documents/Issues/Poverty/EOM_GB_16Nov2018.pdf [<https://perma.cc/72DV-PYMZ>] (“If the European Charter of Fundamental Rights becomes no longer applicable in the UK, the level of human rights protections enjoyed by the population will be significantly diminished. The UK should not roll back EU-derived human rights protections on workplace regulation and inequality”).

137. For an excellent discussion of the impact of the EU Charter in the UK, see Menelaos Markakis, *Brexit and the EU Charter of Fundamental Rights*, *PUB. LAW: THE CONSTITUTION & ADMIN. LAW OF THE COMMONWEALTH*, 82, 82 (2019).

138. Oral feedback from the stakeholder events in Belfast (June 28, 2017 and Dec. 14, 2017); Derry (Nov. 29, 2017) (on file with the authors).

139. *The Agreement*, *supra* note 71, art. 1 (vi).

operation between their countries as friendly neighbours and as partners in the European Union”.¹⁴⁰

Brexit means that one of the “partners” is a “third country”, and although a special arrangement is in place (Protocol on Ireland/Northern Ireland),¹⁴¹ this will bring a major change in status for Northern Ireland. The question therefore arises how this will impact, for example, the future protection of citizenship provisions outlined in the Agreement, and commitments to human rights and equality. In this context, in order to uphold and respect the Agreement, it was a firmly expressed view throughout our project that the bill of rights should now be revisited¹⁴² as a potential solution to the rights and equality challenges presented by Brexit.¹⁴³ Indeed, the basic purpose of a bill of rights is precisely to *safeguard* the Agreement. In particular, and in relation to Brexit, the following rights/issues were highlighted by participants in our project: citizenship equality¹⁴⁴;

140. Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, Ir.-U.K., Dec. 2, 1999, Irish Treaty Series 2000 N 18, <https://www.dfa.ie/media/dfa/alldfawebsitemedia/treatyseries/uploads/documents/treaties/docs/200018.pdf> [<https://perma.cc/9VRVJ6TV>].

141. Council Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Committee, Jan. 31, 2020, 2020 O.J. L 29, Protocol on Ireland/Northern Ireland, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12020W/TXT#d1e32-102-1> [<https://perma.cc/EA2D-F3D>].

142. Smith & Harvey, *supra* note 5.

143. Several organizations noted that the bill of rights may now take “centre stage” in the context of Brexit. These included: UNISON, the Committee on the Administration of Justice, and Amnesty International. Oral feedback from the stakeholder events in Belfast (June 28, 2017 and Dec. 14, 2017); (on file with the authors)

144. The question of citizenship was raised in the recent DeSouza case. Emma DeSouza, an Irish citizen, born in Northern Ireland, applied to the Home Office for a residence card for her US-born husband. This was rejected by the Home Office, as UK nationality law held that people born in Northern Ireland remained British under the law, even if they identify as Irish, unless they expressly renounced their British citizenship. Ms. DeSouza argued that she never considered herself as British and there was no need to renounce it, having always identified as Irish. Using Article 1 (vi) of the Agreement (this entitles people born in Northern Ireland to identify as British or Irish or both) Ms. DeSouza challenged the UK’s immigration rules, arguing that they conflicted with the Agreement’s identity and citizenship provisions. Appealing against the decision of the First-tier Tribunal which found in favour of Ms. DeSouza, the Secretary of State for Northern Ireland won his appeal in the Upper Tribunal (Immigration and Asylum Chamber). *See Secretary of State for the Home Department v. DeSouza* [2019] UKUT 355. Following a change to the immigration rules,

freedom of movement; equivalence of rights on the island of Ireland; EU citizenship rights; and voting rights.¹⁴⁵

So how could a bill of rights address these matters? Regarding citizenship equality and EU citizenship rights, Brexit will create two classes of citizenship. Those persons holding only British citizenship, and who do not otherwise benefit from EU law guarantees, will no longer be able to exercise EU-treaty rights such as freedom of movement in the EU to work, study, and reside, with the associated right to be free of discrimination on the grounds of nationality. Irish citizens will continue to be EU citizens with the right to move freely to and within the EU and live and work there without discrimination, British citizens will not. This poses a dilemma for the good faith implementation of the Agreement. To force people to choose one citizenship or another in order to access different rights is arguably contrary to Article 1 (vi) of the Agreement (the national identity provision), as discussed above.¹⁴⁶ It is notable in this context that the Commission's advice states:

The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, *with no detriment or differential treatment of any kind*. This right would not be affected by any future change in the status of Northern Ireland.¹⁴⁷

A leading human rights NGO, responding to our project, recommended that the NIHRC's advice could be augmented as below:

The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. *It shall be the duty of the UK Government, through legislation and agreement as possible, to*

Ms. DeSouza withdrew an application to appeal to the Court of Appeal of Northern Ireland. For a useful analysis of the questions of citizenship and identity, see Comm. on the Admin. of Justice, *Initial thoughts on rights and the New Decade, New Approach (NDNA) agreement (S485) Briefing Note* (Jan. 2020), at 5-6, <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2020/02/04151315/Initial-thoughts-on-NDNA.pdf> [<https://perma.cc/Y6WR-MDJW>].

145. Smith & Harvey, *supra* note 5.

146. Agreement of April 1998, *supra* note 71.

147. N. IR. HUMAN RIGHTS COMM'N, *supra* note 82, at 41 (emphasis added).

ensure full and effective equality of the rights accruing to the two forms of citizenship. This right would not be affected by any future change in the status of Northern Ireland.¹⁴⁸

The same organization recommended that a provision should be drafted “to ensure that all EU citizens have the right to enter and leave Northern Ireland without let or hindrance, the right to reside indefinitely and work in Northern Ireland and any other rights currently enjoyed by EU citizens under EU Treaties on the territory of the UK as may be practically possible”.¹⁴⁹

Although the Protocol on Ireland/Northern Ireland¹⁵⁰ (which is enacted in domestic law via the European Union (Withdrawal Agreement) Act 2020) guarantees what McCrudden calls the “general clause”¹⁵¹ of “no diminution of rights” set out in the relevant sections of the Agreement, and a “more specific anti-discrimination clause”,¹⁵² the Annex only includes what McCrudden describes as “anti-discrimination Directives”.¹⁵³ While this is to be welcomed, as Murray and others argue, “it is a long way short of comprehensive and dynamic non diminution of the broad range of EU rights protections suggested by the Joint Report”.¹⁵⁴ Furthermore, as McCrudden points out, there are a

148. Comm. on the Admin. of Justice, *Draft Submission on the Bill of Rights to the “Conversation” Project* (Sept. 2017) (on file with the authors).

149. *Id.*

150. Council Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Committee, Jan. 31, 2020, 2020 O.J. L 29; Protocol on Ireland/Northern Ireland, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12020W/TXT#d1e32-102-1> [<https://perma.cc/65T4-ASHS>].

151. Christopher McCrudden, *Brexit, rights and the Northern Ireland Protocol to the Withdrawal Agreement*, BRIT. ACAD. & ROYAL IRISH ACAD 16 (2018), <https://www.thebritishacademy.ac.uk/documents/298/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement.pdf> [<https://perma.cc/SVD5-KK38>].

152. *Id.*

153. *Id.* at 23.

154. Sylvia de Mars et al., *Continuing EU Citizenship “Rights, Opportunities and Benefits” in Northern Ireland after Brexit*, N. IR. HUMAN RIGHTS COMM’N & IRISH EQUALITY & HUMAN RIGHTS COMM’N 42 (Mar. 2020), https://www.nihrc.org/uploads/publications/Rights_Opportunities.pdf [<https://perma.cc/7PYE-LCBB>]. In December 2017, the UK and the EU published a joint report on the progress of phase one of the Brexit negotiations. See, e.g., *Joint report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union* (Dec. 8, 2017),

series of other important EU Directives that are not included, such as the Part-time Work Directive, the Maternity and Parental Leave Directive and the Pregnancy Directive.¹⁵⁵ Thus a bill of rights, as Murray and others argue, remains the “best means”¹⁵⁶ of addressing these gaps.

The possible impact of Brexit also features prominently in the latest agreement to restore power-sharing government.¹⁵⁷ There are two notable points about the wording. First, it represents an advance on the previous position. Before this, the process had stalled to the extent that the Stormont House Agreement simply noted that consensus was absent, with vague aspirations about the values that would continue to inform political developments.¹⁵⁸ However, under the heading *Rights, language and identity* there is reference to an ad hoc Assembly Committee.¹⁵⁹ This Committee has been established and, for the first time in over a decade, there is a formal process for taking forward this work.¹⁶⁰ Second, the wording generally reflects the language used in a leaked draft Agreement between Sinn Féin and the DUP in February 2018,¹⁶¹ which aimed, albeit unsuccessfully, to achieve a return to government.¹⁶² Similar to the language of the 2018 leaked document, the 2020 deal states

https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf
<https://perma.cc/4H7T-5XHF>.

155. McCrudden, *supra* note 151, at 24.

156. See de Mars et al., *supra* note 154, at 45.

157. New Decade, New Approach, *supra* note 130.

158. N. Ir. Office, *The Stormont House Agreement*, GOV.UK, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf [<https://perma.cc/8VBT-FXG9>] (last visited Apr. 5, 2020) (the Stormont House Agreement was reached with Northern Ireland’s political leaders and the British and Irish governments in December 2014 to deal with a range of issues including the legacy of the conflict. The bill of rights was mentioned in paragraph 69).

159. New Decade, New Approach, *supra* note 130, at 16.

160. See N. Ir. Assembly, *Ad Hoc Committee on a Bill of Rights, Minutes of Proceedings 2019-2020*, <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/> [<https://perma.cc/8S5T-F2DH>] (last visited July 16, 2020).

161. *Full Draft Agreement Text*, EAMONNMALLIE (Feb. 20, 2018), <http://eamonnmallie.com/2018/02/full-draft-agreement-text/> [<https://perma.cc/8JXU-NPJV>].

162. See Anne Smith & Colin Harvey, *The Return of the Bill of Rights?*, RIGHTSNI (Mar. 29, 2018), <http://rightsni.org/2018/03/the-return-of-the-bill-of-rights/> [<https://perma.cc/2JNL-LX6N>].

that the Committee is to “consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement”, and the references (from the Agreement) to supplementing the ECHR and the particular circumstances of Northern Ireland are singled out.¹⁶³

The language of international instruments and experience is missing, and this may or may not be a telling absence. This Committee will be assisted by an expert Panel of five persons appointed jointly by the First Minister and deputy First Minister.¹⁶⁴ If there was any doubt about how central the “particular circumstances” phrase is, it is dispelled here. The *first* job of the Panel is to advise the Committee on “what constitutes ‘our particular circumstances’”.¹⁶⁵ In this it is to “draw upon, but not be bound by, previous work on a Bill of Rights”.¹⁶⁶ There is reference to the “UK’s withdrawal from the EU”¹⁶⁷ and the need for recommendations on how this will impact “particular circumstances”.¹⁶⁸ This would, presumably, now be taken to refer to the implications of Brexit for the bill of rights. Importantly and perhaps “most concerning”¹⁶⁹ given the context is that the section ends by highlighting that “cross party and cross community support”¹⁷⁰ are vital for any progress. This was not included in the 2018 draft document nor in the Agreement itself.

There are several points to note about the current state of this process. First, there is now a clear role for an ad hoc Committee of the Northern Ireland Assembly in assessing the position and charting a way forward. This inserts a new step in the bill of rights process, one that is not envisaged in the Agreement. It is clear in the Agreement that the next stage (after the Commission’s advice) was to be *Westminster legislation*.

Second, it is not apparent from the text what the precise role of the Committee will be and how the relationship with the expert panel will be managed. For example, will this Committee simply

163. New Decade, New Approach, *supra* note 130, at 16.

164. Full ‘Draft Agreement Text’, *supra* note 161 (in the draft leaked document from 2018, it was a panel of four).

165. New Decade, New Approach, *supra* note 130, Annex E.

166. *Id.*

167. *Id.*

168. *Id.*

169. Committee on the Administration of Justice, *Initial Thoughts*, *supra* note 144.

170. New Decade, New Approach, *supra* note 130, Annex E.

be providing an update or will it be making concrete recommendations for ways forward? If it does produce a report, what might happen next? Does this introduce into the bill of rights debate the prospect of Assembly legislation or will this then be taken forward at Westminster?

Third, the role of the advisory expert Panel is intriguing. This is to be an “expert” body of five persons appointed jointly by two executive ministers (First and deputy First Ministers), but offering advice to a committee of the legislature.¹⁷¹ What happens, for example, if members of the panel disagree? What will be done if established divisions simply re-emerge in this Committee, and it is just another venue in which to play out familiar conflicts, further dividing an already divided society? In short, could the Committee be yet another manifestation of “more of the same”?¹⁷² Questions will also arise over the process of appointments and what the remit will be.¹⁷³ For example, will the Panel have an outreach and engagement role or will it be confined to providing technical and other forms of legal advice?

Fourth, there is an overriding reference to the “stated intention” of the 1998 Agreement. One of the challenges for this Committee, and for the Panel, is the absence of consensus on precisely what this means. Again, there is a real risk that this process will simply confirm what is already well known about the process. The Panel advice to the Committee may help, but the existing disagreements over a bill of rights will remain (in terms of Committee membership).

Fifth, the provision allows the Committee and Panel to examine and draw upon all the work done thus far.¹⁷⁴ There is much to consider. The difficulty is that this might be read as undermining the advice submitted by the Commission, and neglects the fact that formally this stage of the process has in fact been completed. This must, however, be read alongside the

171. *Id.*

172. Whitaker, *supra* note 7, at 37.

173. The Human Rights Consortium in Northern Ireland wrote to the Executive Office requesting details on the appointment process of the Panel of Experts. Potential candidates were directly approached and were identified not by open trawl, but by suggestions from the Departmental Solicitor’s Office and the Human Rights Commission. Correspondence with the Human Rights Consortium (June 2020) (on file with authors).

174. New Decade, New Approach, *supra* note 130, at 37.

reference to the primacy of the intention of the 1998 Agreement. It would be difficult for the Panel or Committee to ignore the Commission's advice given this specific focus.

Sixth, subjecting progress on a bill of rights to "cross party and cross community support" departs from the Agreement. While the UK Government has previously insisted that "it would be virtually impossible to adopt a Bill of Rights for Northern Ireland without extensive cross-party support,"¹⁷⁵ the Irish Government has never publicly adopted such a position.

Furthermore, it is surprising that the parties agreed to endorse this approach, as in September 2011 the then Secretary of State for Northern Ireland issued a letter to each of the political parties suggesting the possibility of the Assembly being empowered to take forward this work.¹⁷⁶ At that time the parties did not express any interest in pursuing this, and as far as we can ascertain, none of the parties responded to the NIO correspondence.¹⁷⁷ Some parties did, however, signal their concern at this proposal (to devolve the discussions) noting that parties consistently exercise a veto in the Northern Ireland Assembly.¹⁷⁸ The level of political disagreement is evident in all the Assembly debates on a bill of rights thus far.¹⁷⁹ As the Alliance Party noted, "our system of government provides vetoes for the largest parties on either side of the divide and it's always easier to veto change than to veto no change."¹⁸⁰

Respondents also noted this absence of consensus amongst the two main parties in government. For example, the former leader of the Alliance Party argued "unless the largest party was in favour it could still be blocked The decisions are those that are worked out by the DUP and Sinn Féin at Executive level . . .

175. Theresa Villiers, former Secretary of State for Northern Ireland, 566 Parl Deb HC (2013) col. 197WH (UK).

176. Letter from Owen Paterson, former Sec'y of State for Northern Ireland (2010-2012) to the leaders of the Northern Ireland Political Parties, received by the Northern Ireland Assembly (Sept. 22, 2011) (on file with authors).

177. SMITH ET AL., *supra* note 3, at 7.

178. *Id.* at 46.

179. N. IR. ASSEMBLY, *OFFICIAL REPORT* (2001-2002) N. IR. HUMAN RIGHTS COMM'N (Sept. 25, 2001); N. IR. ASSEMBLY, *OFFICIAL REPORT* (2009-2010) MEMBERS' BUSINESS ON THE NIHRC (Nov. 3, 2009).

180. Interview with David Ford, former MLA, Alliance Party (Nov. 25, 2013) (on file with authors).

and worked out by the First Minister's team and the deputy First Minister's team in Stormont Castle."¹⁸¹ The Green Party also believed, "there's the politically sensitive stuff . . . things go into OFMdfM and they don't come out."¹⁸² As the former leader of the Alliance Party stated:

there are lots of things which are devolved which are in deadlock at the moment, including things which are critical . . . I'm really not sure if [devolving it] has any real chance of making a difference.¹⁸³

Ivan Lewis MP, the then Shadow Spokesperson on Northern Ireland for the Labour Party, noted that although devolution requires that the Executive take the lead:

there has been no progress historically, in the peace process at very difficult stages without the active engagement of the two governments very much working together as one. And I think that that is absolutely crucial.¹⁸⁴

Given this context, there is a real danger that this current process could result in parties merely "updating [their] positions and being back in the same place".¹⁸⁵

Finally, the text shows awareness of the possible impact of Brexit, and this is to be welcomed. This is a new ingredient that must now inform the way forward. Any proposals for a bill of rights will need to be shaped fully by the implications of the UK's withdrawal from the EU.¹⁸⁶ The bill of rights debate takes on new dimensions in this post-Brexit world, where there may be novel opportunities for distinctive constitutional conversations to emerge.

181. *Id.*

182. Interview with Steven Agnew, former MLA, Green Party (May 2, 2013) (on file with authors).

183. Interview with David Ford, former MLA, Alliance Party (Nov. 25, 2013) (on file with authors).

184. Ivan Lewis, Shadow Sec'y of State for Northern Ireland, speaking on "The View" BBC, in London, U.K. (May 8, 2014).

185. Interview with Vincent Parker, former Special Adviser to deputy First Minister, Sinn Féin (June 7, 2013) (on file with authors).

186. For further information, see BREXITLAWNI, *supra* note 134.

IX. WHERE NOW FOR THE BILL OF RIGHTS?

This Article has shown just how difficult drafting and progressing a bill of rights can be for divided/post-conflict societies. As discussed earlier, those who favor a narrow approach in Northern Ireland tend to be from mainstream political unionism, bringing its own challenges and implications for advancing the discussions any further in the context of mutual communal vetoes. Nationalists/republicans on the other hand have traditionally supported an extensive range of rights protections, including civil and political rights as well as socio-economic rights. The concern from this perspective is likely to be with any bill of rights that is minimalist or threatens to undercut existing guarantees.

What might challenge this current stalemate? It is possible that the constitutional dynamics on the island of Ireland, and across the islands, may shift views. Indeed, during our project we noted increasing discussion about reconfigured arrangements on the island of Ireland. For example, might a point be reached where unionism/loyalism views a bill of rights as a necessary insurance policy in the face of future constitutional change? Bills of rights are political as well as legal documents—they get adopted because it is in someone’s political or other interest to adopt them or because groups struggle and demand rights protection. However, our research has shown that at present “elite political”¹⁸⁷ leadership in Northern Ireland is lacking, and there is insufficient demand for this constitutional step to be taken.¹⁸⁸

The Article has also shown that the task of developing a bill of rights in Northern Ireland was headed by a “national human rights institution”, the Human Rights Commission. Experience elsewhere indicates that countries that have adopted a bill of rights, such as South Africa, Zimbabwe and Canada, have done so within an explicitly political context, and they are often drafted by politicians as part of the constitution-making process.¹⁸⁹

187. Harvey & Schwartz, *supra* note 45, at 148.

188. SMITH ET AL., *supra* note 3, at 50.

189. Anne Smith, *Bills of Rights as Process: The Canadian Experience*, 3:4 INT’L J.L. CONTEXT 343 (2008); Anne Smith, *Constitutionalising Equality: The South African Experience*, 9:4 INT’L J. DISCRIMINATION & L. 201 (2008).

During the negotiations leading to the Agreement the political parties agreed on a proposal for a bill of rights, but did not spend time deliberating on its contents.¹⁹⁰ While there have been many suggestions about what was intended, this is not clear from the text of the Agreement itself. Rather the priority issues for both governments and the Northern Ireland political parties at the time were the constitutional relationships between Britain, Ireland, and Northern Ireland, alongside the arrangements for a new power-sharing Executive and Legislative Assembly. The discussions on human rights received less time during the negotiations, and the sections on the bill of rights were drafted in the later stages in what has been described as “a somewhat haphazard way”.¹⁹¹ The remit of the Commission under the Agreement is a prime example of the “haphazard way” the rights sections were included in the peace agreement. The fact that the Agreement left what is a major constitutional task to a Commission (to give advice only) and did not provide a pathway after the submission of the advice, remains problematic. There are valuable lessons here for those negotiating such agreements in the future. It would, in particular, have been helpful if the drafters could have mapped out a legislative way forward. For those supportive of such human rights initiatives there may also be lessons in seizing the opportunities available at times when constitutional moments open up. There is clear evidence from the Northern Ireland experience that such moments can pass, and that anticipated gains in terms of rights and equality can simply fail to materialize.

At the time of writing, and as noted, a way forward has been established, with the setting up of a new ad hoc Assembly Committee.¹⁹² The lack of cross-party political consensus remains a major obstacle to progress, and will present a formidable challenge to the Committee. It was apparent throughout the drafting process however, that unionist/nationalist divisions do not always neatly map on to the views of individuals and

190. Anne Smith, *The Drafting Process of a Bill of Rights for Northern Ireland*, PUB. L. 526 (2004).

191. Stephen Livingstone, *Human Rights in Northern Ireland: In from the Margins?*, in *TOWARDS A CULTURE OF HUMAN RIGHTS IN IRELAND* 57 (Ivana Bacik & Stephen Livingstone eds., Cork Univ. Press 2001).

192. New Decade, New Approach, *supra* note 130, Annex E.

communities. While it is to be welcomed that the bill of rights is back on the political agenda, questions will remain about how the work will be structured, how participation will be ensured and, perhaps of most significance, how an acceptable outcome will be delivered. One possible way suggested to get support from the unionist political community is to put “the message out there that human rights apply to all of us.”¹⁹³ A former unionist political representative took the view that there needed to be more public awareness amongst the unionist community about its aims: “the Bill of Rights and human rights isn’t threatening to anyone; they are something for everyone.”¹⁹⁴ A PUP spokesperson suggested that, “we need to be arguing for a Bill of Rights—it’s about keeping all that political stuff out of it.”¹⁹⁵ A DUP spokesperson suggested that it might help to progress the discussions, “if we talk about something like ‘principles’, ‘guiding principles’ . . . ‘values’ then it could be quite different.”¹⁹⁶ Sinn Féin acknowledged the difficulties over the language used to date: “language within Unionist politics is very important—‘objective need’, ‘equality’/‘inequalities’—all those words are seen from a DUP point of view as Nationalist/Republican language.”¹⁹⁷ There was some openness to the suggestion that there may be more support for a bill of rights if it was to be called something else, a Charter or a Covenant. The view expressed was that “it doesn’t matter what it’s called or where the rights are located as long as they’re there.”¹⁹⁸

Another way to assist the process and “put the message out there that human rights apply to all of us” is to consider “international instruments and experience”, as outlined in the Agreement.¹⁹⁹ International instruments can be influential in expediting compromises when there is a specific controversial issue at stake. Arguably international law can help dispel concerns by highlighting what is deemed to work internationally. In this

193. Interview with John McCallister, former MLA, NI21 (Oct. 2, 2013) (on file with authors).

194. *Id.*

195. Interview with Billy Hutchinson, PUP (Sept. 11, 2013) (on file with authors).

196. Interview by Jonathan Bell, former MLA, with Emma Little-Pengelly, Special Adviser to the First Minister, DUP (May 21, 2013) (on file with author).

197. Interview with Vincent Parker, former Special Adviser to the deputy First Minister, Sinn Féin (June 7, 2013).

198. *Id.*

199. See Agreement of April 1998, *supra* note 71.

way, it can enable people to focus on a standard that exists and has evolved outside of the particular circumstances of Northern Ireland, and therefore offers some distance between the frenetic and impassioned local argumentation and what might be necessary to meet agreed international standards. Indeed, the use of international standards has been described as a:

distinguishing feature of rights development in the contemporary era . . . the contemporary situation reminds us that no process of developing a Charter or a Bill of Rights can take place in a void and be reflective merely of the specific context in which this is taking place.²⁰⁰

That said, international law should be regarded as a “tool” but not the “master”,²⁰¹ helping politicians to come to a solution that best reflects the particular exigencies of their society. A contextually insensitive approach is unlikely to work in Northern Ireland. While using alternative language and international standards may help, progress will only be made if there is effective engagement and a will to deliver an outcome. In this context, it is imperative for both governments, as co-guarantors of the Agreement, to assist the process.

X. CONCLUSION

We share the view, heard often in our discussions, that people should be ambitious for human rights and equality in Northern Ireland, and that the time is right to reopen this constitutional conversation. A firm position emerged from many participants in our project that it remains a society that still needs a bill of rights. The process has its basis in the Agreement, and resulted in the submission of advice by the Human Rights Commission in 2008.²⁰² The UK Government refused to take the next constitutional step and was unwilling to legislate based on

200. John E. Fossum, *Charters and Constitution-making: Comparing the Canadian Charter of Rights and Freedoms and the European Charter of Fundamental Rights* (ARENA Working Papers WP 02/08, 2002), https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2002/wp02_8.htm [<https://perma.cc/WZG2-KEXG>].

201. Shannon Smithey, *A Tool Not a Master: The Use of Foreign Law in Canada and South Africa*, 34 *COMPAR. POL. STUD.* 1188 (2001) (this phrase is from the title of an article).

202. See, e.g., N. IR. HUMAN RIGHTS COMM’N, *supra* note 82.

that advice.²⁰³ It has continually pointed to the absence of “consensus”, by which it means the objections of the unionist political parties in Northern Ireland.²⁰⁴ Some momentum has been restored through the establishment of an ad hoc Committee in the Northern Ireland Assembly. Whether this Committee simply provides another re-run of familiar political disputes remains to be seen. More than twenty years later, the enactment of a bill of rights for Northern Ireland does not appear imminent. In this Article we argue that there are lessons from this experience for those embarking on such a major constitutional enterprise in any post-conflict setting.

203. N. Ir. Office, *supra* note 158.

204. SMITH ET AL., *supra* note 3, at 42.

