

The Protection of Human Rights under the Belfast Agreement

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THE full details of the Belfast Agreement are still being explored, interpreted and re-interpreted.¹ With others, I believe that the Agreement, its legislative enactment in the (UK) Northern Ireland (1998) Act and its protection in the British–Irish Agreement (1999) created consociational institutions within Northern Ireland and confederal institutions across these islands, and that it also sketched a model of ‘double protection’ of rights throughout Ireland compatible with a change in the sovereign stateholder in Northern Ireland.² It is not disputed by anyone that better human rights protection was a central promise of the Agreement. Here I argue for some essential features of human rights protection under the Belfast Agreement. My focus is on the governmental, political, national and ethnic dimensions of rights protection, and my argument does not seek to juridify politics or absolutise rights in any naïve fashion.³

Let me make it plain that what I suggest below claims to identify what minimally needs to be done and legally institutionalised to protect the *political*

core of the Agreement. My argument should not, however, be interpreted as simply arguing for a minimal form of new rights protection—though it is logically compatible with such a view. With one caveat my argument is fully compatible with the ambitions of those who want Northern Ireland to have its own, novel, extensive and comprehensive Bill of Rights,⁴ one that elaborates many more forms of rights protection than are addressed here. It is, for instance, essential that the types of emergency regime that permitted abuses be rendered illegal under any new form of human rights protection. The fact that I do not focus, for example, on the rights of women, children and the disabled, on criminal proceedings or on economic rights, to name but some topics, does not mean that I regard these rights as in any sense less important—though I am much less competent to discuss them. The caveat is this: I do not think that any new Bill of Rights, however progressive, should permit the judicial striking down of any feature of the Agreement; any changes should occur *within* the established institutions and terms of the Agreement.

This article adapts and revises a lecture given to the SDLP's Conference on Human Rights in Belfast on 28 January 2001 and subsequently submitted to the Northern Ireland Human Rights Commission. It has benefited from criticism from Martin O'Brien of the Committee on the Administration of Justice, Law Professors Tom Hadden, Colin Harvey, Nicola Lacey and Christopher McCrudden, and Professor John McGarry. Comments from my LSE colleague Dr Julia Black were very helpful. Shelley Deane and Simone Lewis were assiduous with research assistance. All named can be held responsible for improvements. Only Professor McGarry shares full responsibility for the views expressed.

Consociation

Internally the Belfast Agreement created a consociation. A consociation, especially a liberal consociation, is an association of communities based on recognition of the mutual equality of groups *and* individuals. Consociational, or complex cross-community power-sharing systems, when they work, help stabilise territories

divided by national, ethnic or religious antagonisms. They do so by recognising differences, rather than by attempting to eliminate them through the imposition of one identity. 'Equality, proportionality, difference and consensus' is their motto.

The Belfast Agreement envisaged all four essential features of a regional consociation.⁵ First, Northern Ireland has a *cross-community power-sharing executive*. This is built around two institutions: the dual premiership, elected by an absolute majority of members and a concurrent majority of registered nationalists and registered unionists in the Assembly; and the inclusive Executive Committee, filled by the d'Hondt proportional allocation mechanism. Second, it is built on the application of *proportionality principles* throughout much of the political/public sector. This feature is manifestly evident in the Executive, built on the d'Hondt executive.⁶ It is also true of the Assembly, elected by the single transferable vote (STV) electoral system, and with committee places partly allocated through the d'Hondt mechanism. Pending the full implementation of the Patten Report, to coin a phrase that echoes the old Irish Constitution, the police should, with political will from the UK government and others, eventually become representative of Northern Ireland society. Proportionality is also envisaged in both the public sector and the private sector; vigorous fair employment legislation and the strong emphasis on 'mainstreaming' equality contained in section 75 of the Northern Ireland Act (1998) suggest as much.⁷ Third, the new system respects *community self-government and equality* in culture. Respect for religion, and parity of esteem and equality between different national identities, is part of the Agreement, and already partly built into public law. Existing provisions for full funding of different pre-tertiary education systems were (tacitly) respected by the Agreement, and new provisions create greater room for public use of, and edu-

cation in, Irish and Ulster Scots as well as the English language. Finally, the new system respects a range of veto rights, or to put it more positively, a range of *consensual and participatory devices*. These exist explicitly in the cross-community consent procedures of the Assembly and the petition procedure.⁸ They now exist for individuals in the form of the (UK) Human Rights Act (1998); but they might also exist through the comprehensive or supplementary elements of a local Bill of Rights envisaged by the Agreement.

My claim, widely accepted, is that the Belfast Agreement was and is internally consociational, even if this terminology was not, and is not, explicitly used by its makers. It was a liberal consociational agreement because it did not mandate that individuals must have group identities—citizens are free to exit from, and to adopt other, recognised group identities, but are also free to insist that they belong to none (or 'others'). If that is accepted then the question that must arise is this: what 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. The Belfast Agreement envisaged that the new Northern Ireland Human Rights Commission (NIHRC) would consult and advise on the scope for defining, in Westminster legislation,

rights supplementary to those in the European Convention on Human Rights, drawing as appropriate on international instruments and experience . . . to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and—taken together with the ECHR—to constitute a Bill of Rights for Northern Ireland.

On the preceding logic, the NIHRC needs to design supplements to the existing Bill of Rights that would protect, in an

appropriate and mutually consistent manner, each of the four consociational elements, namely

- inclusive executive power-sharing;
- proportionality principles;
- community-self-government and equality; and
- mutual veto rights and consensual procedures.

Inclusive power-sharing and participation in government

A legal determination by Justice Kerr in January 2001, currently being appealed, ruled that it was unlawful for the First Minister, David Trimble, to refuse to nominate two Sinn Féin ministers to carry out their official duties on the North–South Ministerial Council. The judge acted correctly in finding the First Minister’s action unlawful, but in my view he did not ground his decision-making sufficiently in the text of the Agreement and its legislative enactment. Had he done so he would have paid much greater attention to the requirement that ministers engage in ‘normal participation’. We shall have to wait to discover the reasoning that governs the decision at appeal. But, whatever the rights and wrongs of this case, the episode demonstrates that any Northern Ireland Bill of Rights should, so far as is possible, guarantee the power-sharing logic of the Agreement.

One way to realise this objective would be to have a general equal participation clause, for example:

The representatives of unionists, nationalists and others, are equal before and under the law, and have the right to equal protection and equal benefit of decision-making in the Northern Ireland Assembly and its Executive Committee, and related public bodies, and the right to expect partnership, equality and mutual respect as the basis of their relationships in government, and must use their best endeavours to ensure that these expectations are met. Nothing in this clause affects the validity

of the decision-making rules agreed in the Belfast Agreement.⁹

This general equal participation clause, which draws upon some of the language of the Agreement, would need to be qualified by a commitment that the said representatives are committed to democratic politics. To be consistent with the Agreement, the clause may be worded:

No parties entitled to representation may be excluded from full participation in the workings of the Assembly and its Executive Committee and related public bodies save where their Ministers have been deemed by the Assembly, under the cross-community consent procedures, to be in breach of their obligations under that Agreement, including the obligations of the Pledge of Office.¹⁰

In this way cross-community power-sharing in the Executive and in the Assembly would be fairly and appropriately protected. Such logic would then extend to other public bodies such as the North–South Ministerial Council, the British–Irish Council, the Policing Board and the District Policing Partnership Boards.

General equality and proportionality

The second element of a consociational system is the presence of proportionality principles. In the circumstances of Northern Ireland this requires a general commitment to equality to be embedded in a local Bill of Rights—partly because the European Convention on Human Rights and Fundamental Freedoms is widely, and correctly, deemed deficient in its equality provisions. Any such general equality commitment would, of course, need to be complemented by a clause protecting positive or affirmative action undertaken to redress inequalities, and, possibly, by a clause requiring public authorities to achieve proportional representation of communities and individuals in public bodies.

A general equality clause might take the following form:

All persons are equal before and under the law and have the right to the equal protection and benefit of the law without direct or indirect discrimination, and, in particular, without direct or indirect discrimination based on religion, political opinion, race, national or ethnic origin, colour, sex, marital or family status, sexual orientation, age, or mental or physical ability.¹¹

Any such general equality provision would require at least two further qualifying clauses to ensure its compatibility with consociational proportionality. One clause would be necessary to protect positive or affirmative action programmes that are designed to achieve proportionality—and which might therefore imply temporary inequalities in benefits under the law. It might be worded as follows:

The general equality right of all persons shall not preclude any law, public policy or activity, like the Fair Employment Act (1998), section 75 of the Northern Ireland Act (1998) or the Police (Northern Ireland) Act (2000), that has as its objective reducing inequalities or achieving the proportional representation in public or private bodies of disadvantaged groups or individuals, specifically those that have been disadvantaged or previously under-represented because of their religion, race, national or ethnic origin, political opinion, colour, sex, sexual orientation, age, mental or physical disability or past criminal conviction.¹²

An additional clause might place a positive onus on all public bodies to ensure as far as possible the proportional representation of specified groups. This, of course, would be much more controversial, but entirely consistent with the consociational logic of the Agreement. In particular, it would be sensible through supplementary rights provisions to extend the logic of section 75 of the Northern Ireland Act (1998) fully to bodies such as the police (scheduled for such attention pending the full implementation of

the Patten Report) and the judicial system, including the Northern Irish judiciary. These considerations will be revisited.

Another clause is required on equality and proportionality. Citizens and parties have something to gain from reflecting on this proposal. This argument may be considered idiosyncratic, but needs to be put. Participation rights should include the right to a proportional representation electoral system for the Northern Ireland Assembly, local government elections, European Parliamentary elections and elections to the Westminster Parliament, and for all other or future elected public bodies. The Sunningdale settlement was severely undermined in 1974 by the opposing logic of—and opposed mandates from—the use of the STV system in multi-member districts to elect the Assembly, and the ‘winner-takes-all’ system used in Westminster parliamentary elections. It is possible (indeed, on balance, likely) that the same scenario of competing electoral system logics and mandates may damage the Belfast Agreement, very shortly or subsequently.

Every voter and party in Northern Ireland—unionist, loyalist, nationalist, republican, members of the women’s coalition, and others (including Alliance)—would gain from having compatible, if not identical, proportional electoral systems for electing their representatives in different tiers of government. This idea would be consistent with the logic of the Agreement; and it would be inclusive. It would add a measure of stability to the current dispensation. Any such right would not, and should not, mandate communal representation, or communal rolls. Citizens are and should be free to be ‘others’, and to elect ‘others’, i.e. those who are neither registered nationalists nor registered unionists in the current Assembly.

The Westminster Parliament might, of course, be unhappy with one part of the UK having a Bill of Rights mandating

proportional representation electoral systems for all elections. The Prime Minister and the Secretary of State—who would introduce supplementary provisions for a Bill of Rights for Northern Ireland—will need to be persuaded of the merits of this idea. If Westminster and the Secretary of State were adamantly unhappy, then an exception for Westminster elections would have to be made to such a clause for it to have any prospect of success. But if the SDLP and the UUP jointly made such a case it would be difficult for any Westminster government to resist. Its predecessors did make exceptions for Northern Ireland when STV was introduced for European elections, and for local elections; they might be persuaded to do so again.

An electoral participation-equality clause might be drawn up along the following lines:

Enfranchised citizens in Northern Ireland or those with enfranchised citizenship rights shall have the right to elect representatives to the Northern Ireland Assembly, the Westminster Parliament, the European Parliament, Local Government Districts and any other directly elected representative and public bodies as may be determined by law. In each case the electoral system shall be one of the systems of proportional representation, and in each case determined efforts made to ensure that as far as is feasible each person has a vote of equal value.¹³

The purpose of such a clause would be to assure current and possible future minorities that electoral system changes will not take place that would significantly disadvantage their prospects of representation. When newly independent Ireland considered how to protect the prospects of Irish Protestants, such thinking affected the constitutional design of the electoral provisions of the Irish Free State and of *Bunreacht na hÉireann* (Constitution of Ireland). It would be equally sensible to think like this for the new Northern Ireland—not least for ensuring ‘double protection’, a point that I will

revisit. The sub-clause on making votes ‘of equal value’ is not just the historic demand of ‘one person one vote’ from the civil rights movement; it would act as a guide to legislators in designing electoral systems, including the design of constituency boundaries. A modern Bill of Rights should not specify any particular electoral system, but it is reasonable for it to specify a family of systems: there is an infinite supply of systems of proportional representation.

Community self-government and equality

The third element of a consociation respects and institutionalises groups’ esteem, culture and identity—granting each group self-government where appropriate, recognising difference while protecting equality. How might this principle be embodied?

The Northern Ireland Human Rights Commission is doubly tasked with providing:

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

This paper has already partly addressed the NIHRC’s second task. Professor McCrudden’s counsel in his multiple publications is recommended on how to frame rights protections that outlaw unreasonable direct and indirect discrimination, and support equality of opportunity, in both the public and the private sectors.¹⁴

The first requirement raises different but related issues. The terms of reference of the Belfast Agreement specify two

communities only. The text of that Agreement suggests that these communities should be construed as Irish nationalist and British unionist. The way to give force to this part of the Agreement is to respect and legally recognise both of these political identifications equally, while recognising that Northern Ireland is part of the UK as long as a majority so wish but may become part of Ireland if Irish people North and South so determine. That in turn suggests that the national insignia, symbols, emblems, anthems and cultures of Great Britain and Ireland should be fully and equally respected in the government, administration and public life of Northern Ireland. A preferable formula would be one which respected the use of both the British and the Irish communities' insignia, symbols, emblems, anthems and cultures in public bodies, or of mutually agreed Northern Irish designated markers of identity, *or* none; but not just one. This will be, to put it mildly, a controversial suggestion in some quarters, but it is consistent with the logic of the Agreement. It is therefore proposed that public authorities either fully and equally respect the national insignia, emblems, anthems and symbols of the British and Irish states and nations, *or* that they deliberately choose insignia, emblems, anthems and symbols that are disassociated from both states' or nations' traditions, *or* that they use such insignia, emblems, anthems and symbols as are agreed by the Northern Ireland Assembly under cross-community consent procedures.

Professor Hadden (and other liberal unionists) believe there is an irreducible element of constitutional symbolism which attaches to state membership, and he believes therefore that the flying of two flags looks very much like a symbol of joint sovereignty, and that the argument for 'two flags or none' is partisan.¹⁵ There is, I think, little merit in replying to this view by trying to distinguish state from national flags, as this would not be

practical in Northern Ireland. The two flags in question reflect the respective national identifications, and are official state flags. Provided rights of symbolism in this domain are to be 'doubly protected'—so that they would be the same for Northern Ireland in a unified Ireland as they are in the UK—some may be satisfied. But that logic itself should persuade those unionists worried about the prospects of Irish unification of the merits of the 'two flags, neutrality or none' approach. Professor Hadden and I are agreed on the need for an individual right to use which symbols may be preferred, subject to some sort of protection against stirring up communal divisions or hatred.

It would be constructive, and consistent with consociational logic and the Agreement, to have a general protection against coercive assimilation into another national identity built into Northern Ireland's Bill of Rights, for example:

Whether Northern Ireland remains in the UK or becomes part of a unified Ireland the sovereign government—including its actual and possible central, federal, federated, regional or devolved governments and public bodies—shall refrain from policies or practices aimed at the cultural assimilation of persons belonging to Irish or British national minorities against their will.¹⁶

Respecting national identity and ethos requires recognition and public support for the languages and schooling traditions of 'both communities', and of those who wish to belong to neither. In the judgement of most, it also requires legal recognition and public support for the ethos and schooling of Catholics and Protestants, and of those who are neither.

It would be sensible to have national, religious and linguistic identity and ethos appropriately and separately recognised, for example:

- Every person shall have the right freely to choose to be described and treated as British or Irish or Northern Irish or

other or not to be treated as such, and no disadvantage shall result from this choice, or from the exercise of the rights which are connected to that choice.¹⁷

- Every person shall have the right freely to choose to be described and treated as Catholic, Protestant, not religious or other, including other types of Christian or of other religious conviction, or not to be treated as such, and no disadvantage shall result from this choice, or from the exercise of the rights which are connected to that choice.
- Every person shall have the right freely to choose to use the English, the Irish and the Ulster Scots languages in public and in private, and no disadvantage shall result from this choice, or from the exercise of the rights which are connected to that choice.¹⁸

Qualifications to these rights—to protect positive action for equality and to avoid unreasonable expenditures—would be necessary and appropriate, and can be suitably crafted.

Appropriate Northern-Ireland-wide public bodies, such as the universities, the police, local governments, public broadcasters and public administrators, should under such clauses, or similar clauses, be required to give equal consideration and treatment to the unionist, nationalist and other identities; religious and non-religious convictions; and English, Irish and Ulster Scots language users. That might mean, for example, double or triple names for streets or public buildings. Many believe that these provisions must be there, but that they must not be overdone: for example, public authorities should be entitled to limit their commitments to demonstrated demand in the case of public services in Ulster Scots or Irish.

These suggestions draw to some extent from the European Framework Convention for the Protection of National Minorities (1995). It has several merits:

- It is designed to protect national minor-

ities, not just ethnic, linguistic or religious minorities—though it does not always follow through on this distinction, conceptually conflating national minorities with other kinds of minorities.

- The rights to be protected are to be exercised ‘individually as well as in community with others’ (Article 3.2).
- Its signatories agree to promote the conditions necessary for national minorities to ‘maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage’ (Article 5); and to take appropriate measures ‘to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity’ (Article 6.2.).

Nevertheless, the Framework Convention has the following weaknesses:

- It supports rather weak public language rights for national minorities (Articles 9, 11, 14).
- It does not require its signatories to support the public funding of national minorities’ ‘own private educational and training establishments’ (Article 13.2).
- It makes no mention of fair electoral/proportional electoral arrangements.
- Its linkages to ‘strong equality’ measures are not apparent (just like the document from which it stems, namely the European Convention on Human Rights and Fundamental Freedoms).

For these reasons, among others, Northern Ireland requires tailor-made provisions for the public funding of educational and training establishments; language rights; provisions on national cultures and markers; electoral participation rights; and stronger equality rights.

Any freedom of conscience clause in the Bill of Rights, or any reaffirmation

that Northern Ireland endows no religion, needs to be qualified to permit the full public funding of teacher training colleges for Catholic, Protestant and integrated schools, and the full funding of all appropriate secondary and primary schools.

Suggested clauses are:

- Nothing in the Bill of Rights abrogates or derogates from any rights or privileges guaranteed under extant legislation in respect of denominational, separate, dissentient or integrated schools.¹⁹
- Parents have the right to have full public funding, on a proportional basis, available to support schools for their children of a particular religion or ethos—Roman Catholic, Protestant (of whatever denomination), Jewish, integrated, Irish-medium, of another religious nature, and of a non-religious nature—provided that there is evidence of sufficient demand, and provided that such schools follow the minimal requirements of publicly examinable curricula in the UK, Ireland or in member states of the European Union.

All schools, to protect their ethos and identity, will have to be entitled to determine their own teaching selection, which may require that they be exempt from certain equality of opportunity provisions. Schools may, as appropriate, be required to follow either the UK national curriculum or the Irish national curriculum, or indeed the European *baccalauréat*. But for any such clauses it will be reasonable to constrain rights provision and public policy, by considerations of demand, and equally reasonable to permit disproportionate expenditure on previously disadvantaged schools, to raise their standards of provision. (Whether primary or secondary education should be selective—and if so in what ways—is not something that should be elaborated in a Bill of Rights.)

Speaking from the experience of two types of schooling in Northern Ireland, I would suggest that the children of cultural Catholics, of cultural Protestants, and of parents who send them to integrated schools, should uniformly enjoy the right to refuse to attend religious services or religious education in their schools, provided they spend the relevant time in study. Professor Dickson and his colleagues on the Human Rights Commission, and the experts on the rights of children, should decide whether this stipulation warrants inclusion in the Bill of Rights!

Schools of all kinds, including Irish-medium schools, should be fully funded where there is appropriate demand, and where they follow the minimal expectations of at least one national curriculum. It would also be sensible to have a formal requirement that relevant public bodies be competent to communicate with citizens in the Irish language, and Ulster Scots, with equivalent public funding for such persons as may be required where the numbers involved justify such expenditure.²⁰

Veto rights or consensual participation rights

The last element of a consociational system is the existence of mutual veto rights, or consensual procedures. Most of the above proposals fit this description. The suggested rights protect difference as well as equality, and thereby give each major national and religious community—and the others—sufficient strength to maintain itself socially and politically. Other aspects of the Agreement, already in statutory form, have the same effects, notably the cross-community consent procedures in the Assembly. There are also opportunities for voice for the ‘others’ built into the Agreement—in the Civic Forum and through the British–Irish intergovernmental conference. You

might reasonably ask: 'What more could possibly be sought of a consociational nature?'

To this, I would answer: 'At least two further provisions.' The first would need to be embedded in a British–Irish treaty, and in the Irish Constitution, as well as UK legislation:

Should the people of Northern Ireland in future determine, in accordance with section 1 of the Northern Ireland Act (1998), and in conjunction with the people of Ireland, to become part of a united Ireland then they will continue to enjoy all the rights and freedoms under this Bill of Rights—unless the representatives of the people of Northern Ireland determine otherwise through the parallel consent procedure in the Assembly.

Such a clause would have the virtue of reciprocity. The rights and freedoms agreed now, when the UK is the sovereign stateholder, would remain in being should a northern nationalist majority emerge and win sufficient support in a referendum for Irish unification.

The second provision that is needed is an obligation on all public office-holders in Northern Ireland—be they politicians, judges, police or other officials—to pledge that they will conduct their work in a manner consistent with the Bill of Rights. That would not only suffuse public culture with rights consciousness, but also remedy one of the defective features of the Police (Northern Ireland) Act (2000), namely the failure to require all police, including serving officers, to commit to the codes of conduct required in the new order.

So far this article has sketched how a model of human rights provisions might be constructed consistent with the consociational nature of the Agreement, and with what the negotiators for the most part agreed, explicitly or tacitly. The specific wordings and suggestions outlined may all be controversial, but they are consistent with the letter and spirit of the Agreement. Now I must elaborate

on how human rights provisions might be organised to be consistent with the Agreement's other core political features: its external confederal nature, and its model of double protection.

Confederal rights

The Agreement established two confederal relationships (across Ireland, and across Britain and Ireland) embedded in two institutions (the North–South Ministerial Council, and the British–Irish Council). Both are consistent with the European Framework Convention on the Protection of National Minorities, which endorses transfrontier co-operation (Article 18), and free and peaceful cross-border movement and political association (Article 17). But these Framework Convention clauses are of a negative, 'non-interfering' nature, rather than positive rights of participation; for example: 'The parties undertake not to interfere with the rights of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers' (Article 17. 1). There would be no harm in incorporating these clauses, but they need supplementation.

A clause should be embedded in both UK and Irish legislation, and in Northern Ireland's Bill of Rights, which protects the rights of the current national minority and of a future possible national minority to meaningful cross-border institutional arrangements, for example:

- As long as Northern Ireland remains part of the United Kingdom the UK government will ensure the continuing functioning of the North–South Ministerial Council or of bodies with equivalent powers and functions to ensure transfrontier co-operation and free and peaceful functional co-operation between the nationalist minority and their co-nationals in Ireland.
- If the people of Northern Ireland in future determine, in accordance with

section 1 of the Northern Ireland Act (1998), and in conjunction with the people of Ireland, to become part of a united Ireland then the Irish government will ensure the continuing functioning of the British–Irish Council, or of bodies with equivalent powers and functions (equivalent to those of the former North–South Ministerial Council), to ensure transfrontier co-operation and free and peaceful functional co-operation between the British unionist minority and their co-nationals in the United Kingdom.²¹

Double protection

It should be clear that, to be consistent, I have been arguing that the SDLP and other northern nationalists should advocate that northern nationalists be entitled to the same rights now as British unionists should enjoy in a united Ireland. This position is entirely consistent with the Agreement. It is ‘double protection’ because national communities would be protected as minorities and as majorities. Note that this argument does not require that Ireland should have exactly the same rights in place now, or shortly, as the UK should now, or shortly, protect in Northern Ireland. It merely requires that the provision and protection of such rights would be triggered by a change in sovereignty. A clause that would give this effect has already been proposed above. I stand by it.

A more immediately radical harmonising strategy would also be consistent with this proposal and the Agreement. It would mandate the Northern Irish Human Rights Commission and the Irish Human Rights Commission to develop an all-island Charter of Rights and Freedoms that would apply in the event of a change of sovereignty, but that could also be incorporated now in both jurisdictions. This too is consistent with the Agreement, but may face difficulties in winning sufficient support in both jurisdictions for

immediate and wholesale incorporation. Alternatively, such a policy could be pursued incrementally, in stages. If so, it might be proposed that the provision and protection of rights and freedoms in the field of criminal justice and its regulation—and the severe delimitation of emergency regimes—should be the first priority for all-island harmonisation. Other domains could be pursued serially. This would be consistent with the SDLP’s and others’ strategy of consensual cross-border co-operation.

The implementation and protection of a new Bill of Rights

The Northern Ireland Human Rights Commission was mandated by the Belfast Agreement to propose supplements to the European Convention. It is argued here that it should do so, and design a Bill of Rights for Northern Ireland. Its exact statutory form should be left to the experts; it might be attached to the Northern Ireland Act (1998) which it would, of course, qualify; it might be a separate Northern Ireland Human Rights Act, drawing on various international instruments, including the European Convention, in Schedules. (This would imply the repeal of the UK Human Rights Act for Northern Ireland but would still meet the terms of reference of the Agreement.) But rights provision and protection should be elaborated that are consistent with the models of consociational, confederal and double protection institutions that make up the core of the political institutional design of the Agreement. We may quibble over the details and wording of clauses but not, I hope, about the broad vision.

But supposing that the NIHRC does produce such a draft Bill of Rights, which achieves these goals, and others, such as a novel, comprehensive Bill of Rights suited to the early twenty-first century, what

should happen then? The Commission should, I believe, argue that its proposed Bill of Rights should be made part of an international treaty between the UK and Irish governments, so that neither could unilaterally repeal nor amend it without renouncing its treaty obligations. But, before passage of the treaty through the UK Parliament and the Oireachtas, the Northern Assembly should be free to propose amendments to the proposed Bill of Rights by the cross-community consent procedures—and free to reject it outright by cross-community consent procedures. After the treaty is signed the Assembly should also enjoy the right to propose changes to the Bill of Rights, again by cross-community consent, and to send such amendments to the UK Parliament and the Oireachtas for incorporation in any modified treaty. Also, the UK and the Irish parliaments should declare that they would rule out any changes to the Bill of Rights which had not previously been requested by the Northern Assembly by cross-community consent—thereby adding domestic to international entrenchment. In this way ownership of the Bill of Rights would be Northern Irish but the two sovereign governments would protect the Bill of Rights.

Therefore it can be argued that a referendum on Northern Ireland's Bill of Rights is not necessary—partly because the provision and protection of rights are not entirely devolved functions, and partly because the Agreement, and the NIHRC and its mandate, have already received popular endorsement in the 1998 referendums. The promises in the Agreement of what would happen in the field of rights provision and protection were reasonably clear—certainly no more demanding than some of its other provisions. And frankly, the danger of a referendum on the Bill of Rights becoming a second referendum on the Agreement itself is one that hopefully will be avoided: current or past opinion polls cannot assure us that this would not happen.

The Bill of Rights should also be incorporated within Northern Ireland differently from how the European Convention has been incorporated into the rest of the UK's political system. The UK government—or the Irish government in one possible future—should not be allowed to legislate 'notwithstanding these rights'. That of course would mean that the courts would obtain the right to strike down both UK legislation as regards Northern Ireland and the laws and executive actions of the Northern Assembly, its Executive and the other institutions of the Agreement. Such a world, of course, would of course shine an intense spotlight on the judiciary—neglected in the negotiation of the Agreement, aside from the Criminal Justice Review.

The senior judiciary is not currently representative of Northern Ireland. To say so implies no criticism of the existing judiciary, either personally or in their decision-making. But if all other public bodies, including the police, are to be rendered consistent with the Agreement, why should the judiciary be exempted from reform, especially if they are inevitably to play a larger role in the determination of law and the qualification of public policy? Unless and until the composition of the judiciary is addressed, many will be reluctant to have the judiciary enjoy the power to strike down legislation or executive activity.

Here too it is hoped the NIHRC will be bold, and address the composition and appointment of the judiciary. On consociational and democratic logic, at least some of the following proposals should be considered:

- The Lord Chancellor's Office—or its successor—should have section 75 of the Northern Ireland Act fully applied to it, as regards Northern Ireland's judiciary and judicial officials.
- The composition of Northern Ireland's current supreme court (i.e. the High

Court and the Court of Appeal) could be periodically proposed to the Northern Ireland Assembly by a joint resolution of the First and Deputy First Ministers. Their proposals would be agreed or rejected by a judicial and human rights committee of the Northern Ireland Assembly—where the committee could reject a resolution only with cross-community consent procedures. If agreed, the court's composition would be sent to the UK Cabinet and the Lord Chancellor for ratification. Each judge might be assured a ten-year term of office, rescinded only for an impeachable offence.

- A new judicial appointments commission might operate to ensure a more representative and broad-ranging judiciary over time; its relations with the First and Deputy First Ministers, and the Assembly, would have to be the subject of further reflection.
- Consideration might be given to a Constitutional Court charged with protecting the Belfast Agreement, the Bill of Rights, and the all-island Charter of Rights and Freedoms.

Of course, protection of the new Bill of Rights will require more than appropriate incorporation and appropriately designed, trained and retrained judiciaries. It will require the NIHRC to have sufficient resources to educate the public in their rights, and sufficient resources to use its right to initiate legal cases, and act as a third party, and to have many of the powers of its new Irish counterparts. Indeed, a world in which both parts of Ireland compete in the expression and protection of human rights will provide excellent proof that our historic conflicts are being successfully managed—if not yet resolved.

Notes

1 See e.g. 'Essays: Analysis of the Northern Ireland Peace Agreement', *Fordham Inter-*

national Law Journal, April 1999; Joseph Ruane and Jennifer Todd, eds, *After the Good Friday Agreement: Analysing Political Change in Northern Ireland*, Dublin, University College Dublin Press, 1999; Brendan O'Leary, 'The Nature of the British-Irish Agreement', *New Left Review*, Jan.-Feb. 1999, pp. 66–96; Rick Wilford, ed., *Aspects of the Belfast Agreement*, Oxford, Oxford University Press, 2001; John McGarry, ed., *Northern Ireland in a Divided World*, Oxford, Oxford University Press, forthcoming 2001.

- 2 Brendan O'Leary, 'The Nature of the Agreement', *Fordham International Law Journal*, April 1999; 'The Nature of the British-Irish Agreement'; 'The Character of the 1998 Agreement: Results and Prospects', in Wilford, ed., *Aspects of the Belfast Agreement*, pp. 49–83; 'Comparative Political Science and the British-Irish Agreement', in McGarry, ed., *Northern Ireland in a Divided World*, pp. 53–88.
- 3 For a salutary criticism of some naïve views of rights protection see Tom Had-den, 'The Pendulum Theory of Individual, Communal and Minority Rights', in S. Caney and P. Jones, eds, *Human Rights and Global Diversity*, London, Frank Cass, 2001, pp. 77–90.
- 4 The Northern Ireland Human Rights Commission has not yet taken either a minimalist or a maximalist position. Examples of distinctive and comprehensive suggestions include those of Amnesty International ('Northern Ireland: An Inclusive Bill of Rights for All', London, February 2001), the Committee on the Administration of Justice ('CAJ's Preliminary Submission to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland', Belfast, March 2001) and Sinn Féin ('A Bill of Rights for the North of Ireland, Submission to the Human Rights Commission', Belfast, 27 February 2001).
- 5 Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, London: Yale University Press, 1977; see also O'Leary, 'The Nature of the British-Irish Agreement'.
- 6 For a full discussion of the d'Hondt mechanism see Brendan O'Leary, Bernard Grofman and Jorgen Elklit, 'Divisor

Methods to Facilitate and Sequence Portfolio-Allocation in a Multi-Party Cabinet Coalition: Evidence from Northern Ireland', paper presented at the European Public Choice Conference, Paris, 19 April 2001.

- 7 See Christopher McCrudden, 'Equality and the Good Friday Agreement', in Ruane and Todd, eds, *After the Good Friday Agreement*, pp. 96-121; 'Mainstreaming Equality in the Governance of Northern Ireland', *Fordham International Law Journal*, April 1999; 'Equality', in C. Harvey, ed., *Human Rights, Equality and Democratic Renewal in Northern Ireland*, Oxford, Hart, 2001, pp. 75-112.
- 8 For details see O'Leary, 'The Nature of the British-Irish Agreement'.
- 9 This equal participation clause, especially 'equal benefit of decision-making', would need to be qualified by the positive or affirmative action equality clause (see below). This clause has been drafted without the benefit of legal advice, and may be improved through criticism. The last sentence is designed to prevent 'others' from challenging the constitutionality of the cross-community consent procedures. I propose it for consistency with the Agreement. It may indeed be necessary to have a general clause which would prohibit the (Northern Ireland) Bill of Rights, or any provision within it, from having the effect of 'striking down' any or all of the institutions of the Agreement, and their decision-making mechanisms.
- 10 This clause has been drafted without the benefit of legal advice; I would be happy to have it improved through criticism.
- 11 This clause has been drafted without the benefit of legal advice; I would be happy to have it improved through criticism. I draw on Brendan O'Leary, Tom Lyne, Jim Marshall and Bob Rowthorn, *Northern Ireland: Sharing Authority*, London, Institute of Public Policy Research, 1993, pp. 39-41, influenced by the Canadian Charter of Rights and Freedoms (Ottawa, 1982), clause 15, and the thinking of Professor Christopher McCrudden at that time. Article 4. 3 of the European Framework Convention on the Protection of National Minorities (1995) similarly states that measures intended to achieve full and effective equality do not constitute discrimination.
- 12 I would be happy to have this clause improved through criticism. I draw on O'Leary et al., *Northern Ireland: Sharing Authority*, which was influenced by the Canadian Charter of Rights and Freedoms (Ottawa, 1982), clause 15, and the thinking of Christopher McCrudden at that time.
- 13 I would be happy to have this clause improved through criticism.
- 14 For details see O'Leary, 'The Nature of the British-Irish Agreement'.
- 15 Personal communication.
- 16 I would be happy to see this clause improved through criticism. I draw upon the European Framework Convention on the Protection of National Minorities (1995), Article 5.
- 17 This clause, and the one that follows, have been drafted without the benefit of legal advice: I would be happy to see them improved. I draw upon the European Framework Convention on the Protection of National Minorities (1995), Article 3. These clauses would need to be qualified by the positive or affirmative action clause above.
- 18 This clause draws upon the European Framework Convention on the Protection of National Minorities (1995), Article 3. It would need to be qualified by the positive or affirmative action clause above, and may need to be qualified by considerations of demand and cost.
- 19 This clause is modelled on clause 29 of the Canadian Charter of Rights and Freedoms (Ottawa, 1982), which is designed to protect the full funding of religious schools and their rights to select their teachers.
- 20 The predecessor of the NIHCR proposed provisions of this type. See the Standing Advisory Commission on Human Rights, *Religious and Political Discrimination and Equality of Opportunity in Northern Ireland: Second Report*, London, HMSO, 1990.
- 21 Dr Julia Black has pointed out that it would be useful to have a clause obliging both states to ensure co-operation in protecting confederal rights whether Northern Ireland is part of the UK or Ireland.