Austen Morgan
THE HAND OF HISTORY?
LEGAL ESSAYS ON THE BELFAST AGREEMENT
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Preface

‘This is not a time for sound bites. We’ve left them at home.’ The speaker was Tony Blair, the new and vigorous UK prime minister, arriving in Belfast on Tuesday, 7 April 1998. However, he went on to tell journalists (ever the consummate actor): ‘I feel the hand of history upon our shoulders. Maybe we can’t do it…I’m here to try.’

The ‘it’ was to become, three days later (Good Friday in the Christian calendar), the Belfast Agreement, perhaps the greatest, if not only, legacy of his time in number 10. The Belfast Agreement, after years of starts and stops (Trimble/Mallon and Trimble/Durkan), was to bear fruit apparently – over nine years later – in the return of devolution to NI on 8 May 2007. On that day, Dr Paisley was sworn in as first minister, with Martin McGuinness as deputy first minister. Tony Blair and Bertie Ahern, the Irish premier, were watching in the assembly gallery at Stormont … and so were three prominent republicans. Two days later, the prime minister announced his resignation after ten years in office.

I was involved professionally as a lawyer in the negotiation of the Belfast Agreement. In 2000, I published The Belfast Agreement: a practical legal analysis (London). At 601 pages, it covered legal issues in depth. I was engaged intermittently in the implementation of the agreement, during the transition to devolution on 2 December 1999 and the subsequent period interrupted by suspensions. On occasions, I was invited to give papers and write articles on various aspects of the Belfast Agreement,

1 Irish Times, 11 April 1998.
2 ‘Progress in the Northern Ireland peace process…may well be seen as one of Blair’s unequivocal achievements as Prime Minister, albeit one where he built…significantly on the record of John Major.’ (Anthony Seldon, Blair, London 2005, p. 707)
3 Brian Kennan, Brian Gillen and Bobby Storey (Irish Times, 9 May 2007).
and this I did – respecting legal confidentiality – whenever I could. *The Hand of History?* (with the sceptical query) is a collection of legal essays, pretty much as they were written or published in the period since 1998 (each essay is dated in a footnote). I have, however, removed repetitions. The essays contain the flavour of the debates, when the Belfast Agreement was more off than on. But the book also assesses UK and Irish statecraft from the perspective of the rule of law – the only one available to a lawyer (unless one is an *ersatz* politician, which I am not). It asks, and answers, the question: were Tony Blair and Bertie Ahern correct to persist in trying to lock Sinn Féin into an involuntary coalition through devolution regardless of the constitutional costs?

My answer is no. But, given the earnest hope that NI will be spared future rounds of troubles, I do not seek intellectual vindication in others’ misfortunes. I simply warn as a constitutionalist: some, if not all, of the necessary nonsense designed to appease republicans, will come back to haunt the body politic.

It would be churlish not to recognize the political achievement of Paisley/McGuinness, when many observers had given up on the Belfast Agreement (as revitalized by the St. Andrews agreement of 13 October 2006). Dr Paisley came to show that, at the age of 81, he would do almost anything to become, and remain, top unionist dog. Martin McGuinness’s objective, as a revolutionary nationalist,

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4 This book is structured to follow the Belfast Agreement. Essay one is introductory and constitutional. There is no essay on strand one (devolution), even though I am a proponent of voluntary coalitionism. Essay two deals with strand two, north-south relations (strand three, east-west, being mentioned in passing). Half the book, essays three to seven, deals with the human rights community and equality industry. This reflects practical interests in human rights and anti-discrimination law, and I do not wish to add to the self importance of the aforementioned groups. Essay eight deals with victims, who were given three paragraphs in the Belfast Agreement. I do not address decommissioning, the principal reason for the failure of the Belfast Agreement, nor security nor prisoners (another reason) in separate chapters. Essay nine is about policing, and to a lesser extent justice. And essay ten tracks the restoration of devolution from the St. Andrews agreement of 13 October 2006.
remains unchanged: a united Ireland – even if republican violence has given way, tactically or strategically, to partnership government.

Against the official promise of reconciliation in NI, there are clearly defined characteristics pointing in the opposite direction. Dr Paisley is an unreconstructed protestant evangelist (anchored in the constitutional watershed of the seventeenth century). Martin McGuinness is also deeply tribal, the imagined community of the Irish nation perplexingly appealing – nearly a century after the partition of Ireland⁵ – to Ulster catholics.

One can safely say there is no credible NI reconciliation project (W.R. Rodgers’s poetic through-otherness of Armagh in 1951, which has been adopted by Seamus Heaney⁶), to be led by these two men and their parties. The first minister does not do humanitarianism, as opposed to folksy sentimentality. Some colleagues of the deputy first minister (such as Martina Anderson MLA) do an all-Ireland version of reconciliation, which would be better described as patronizing revanchism. The smiles and laughs of 8 May 2007 obscured two warlords bargaining, the project – whether or not commonly intended – being the Balkanization of NI. Dr Paisley has shown himself to be an Ulster nationalist (rather than a UK civic unionist). And Brit bashing only encourages Irish republicans. There is a basis for tactical unity, in seeking to extract more and more from the British. There might even be agreement in

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⁵ I have long been struck by the contrast with India. While the partition of Ireland, which was violent, has seemingly festered as a grievance, the division of India into India and Pakistan (and then Pakistan and Bangladesh), with a great deal more communal violence, has not led to Indian irredentism (except among marginal Hindu elements).

⁶ Paul Gillespie wrote of the Belfast Agreement: ‘Can it deliver a “place of through-otherness” in which community divisions are healed by common actions and identities, or will it reproduce those divisions? On the answer to this question depends the agreement’s relevance as a model for other peace processes around the world.’ (Irish Times, 12 May 2007)
the division of sectarian spoils (assisted by a provincial civil service isolated from London, Edinburgh and Cardiff). Most likely, the outcome will be breakdown, sooner or later (as a result of events, dear boy, events), or a structured sectarianism, with weak prospects of stability beyond 2011 (when the next assembly elections are due).

Tony Blair – who will have the hand of Iraqi history feeling his collar after number 10 – was surprisingly honest about the lack of achievement in NI, even while he was keeping the process on the go, in a foreign-policy speech in the US at Georgetown university on 26 May 2006: ‘The problem we have had in Northern Ireland [in contrast to Israel and Palestine] is that there has never been agreement on the basic nature of the final outcome, one part wanting Union with the UK, the other with the Republic of Ireland. Nonetheless we have achieved extraordinary progress, by relentless working at it through every stop and start.’

NI worse than the middle east? It – that word again – can only be a band aid-type solution (in the medical and musical senses). Trimble/Mallon and Trimble/Durkan did not work. Why should Paisley/McGuinness succeed? An optimistic answer requires the belief that republicans, who may have abandoned their arms, but not yet their organization, will behave in a democratic way. That is too much to expect of a revolutionary conspiracy, unfortunately still legitimised, at least as regards a united Ireland, by the political leadership of the ROI.

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7 Number 10 website.
8 ‘It is an unchallengeable consensus on how any future change in the status of Northern Ireland will be effected: only with consent freely given and with full respect for the rights of all traditions and identities on the island. As an Irish republican, it is my passionate hope that we will see the island of Ireland united in peace. But I will continue to oppose with equal determination any effort to impose unity through violence or the threat of violence.’ (Bertie Ahern, address to the houses of parliament, Westminster, 15 May 2007)
NI’s consociational democracy faces three theoretical challenges in practice. One, there is little evidence that Arend Lijphart’s Dutch model is a better alternative to the direct rule of NI from London (the one option that has never been seriously tried).9 ‘At most, consociation is a politics with a shared vision of catastrophe.’10 Two, NI is not a state (or even a potential state), and it has not been a colony since 1800, when Ireland united in an expanding united kingdom. It remains a region, not in a federation, but under a system of relatively recent asymmetrical devolution.11 The pragmatic London solution of power-sharing, dating from 1972, owes nothing to consociationalism, and has become, under the Belfast Agreement, London (plus Dublin) imposition of an involuntary coalition with much sectarian competitiveness. Three, Irish republicans are unlike the socialist and labour (and even communist) parties which were assimilated in national democracies in twentieth-century Europe. They wish to make NI work (in a dirigiste sort of way), not to reconcile catholics and protestants, much less (better) integrate Ulster catholics in the UK, but to pull NI out of the UK to join an extremely reluctant ROI – an outcome they have failed to achieve by violence, and, if it were to be seriously pursued democratically, would probably lead to civil war.

This volume was first collected, in a slightly different form, in 2006. I returned to it, in 2007, following the restoration of devolution. This preface was written then, and I leave it as a historical statement. With Northern Ireland facing its first normal

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11 The NI parliament, it needs to be remembered, was wound up by London in 1972.
election in May 2011, I have decided – under the usual pressure of legal engagements – to publish it directly on the internet, on the occasion of the rebuilding of my professional website: www.austenmorgan.com. I know that things may have changed in the past four years: but are these putative changes fundamental or superficial? I suspect the latter.

Austen Morgan,

1 March 2011
Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>BIA</td>
<td>British-Irish Agreement (part of the Belfast Agreement)</td>
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<td>BIC</td>
<td>British-Irish Council</td>
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<td>BIIC</td>
<td>British-Irish Intergovernmental Conference</td>
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<td>CAJ</td>
<td>Committee on the Administration of Justice</td>
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<td>CTC</td>
<td>Counter-Terrorism Committee (of the United Nations)</td>
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<td>DPP</td>
<td>District Policing Partnership</td>
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<td>DUP</td>
<td>Democratic Unionist Party</td>
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<td>EC</td>
<td>Equality Commission</td>
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<td>FENIA</td>
<td>Fair Employment (Northern Ireland) Act 1976</td>
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<td></td>
<td>Fair Employment (Northern Ireland) Act 1989</td>
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<td>FETNIO</td>
<td>Fair Employment and Treatment (Northern Ireland) Order 1998</td>
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<tr>
<td>GB</td>
<td>Great Britain</td>
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<tr>
<td>GOIA</td>
<td>Government of Ireland Act 1920</td>
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<td>HRA</td>
<td>Human Rights Act 1998</td>
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<tr>
<td>ICLVR</td>
<td>Independent Commission for the Location of Victims’ Remains</td>
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<td>IRA</td>
<td>Irish Republican Army</td>
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<td>JAC</td>
<td>Judicial Appointments Commission</td>
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<td>MPA</td>
<td>Multi-Party Agreement (part of the Belfast Agreement)</td>
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<td>NI</td>
<td>Northern Ireland</td>
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<td>NIA</td>
<td>Northern Ireland Act 1998</td>
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<td>NICA</td>
<td>Northern Ireland Constitution Act 1973</td>
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<td>Acronym</td>
<td>Full Form</td>
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<td>NIHRC</td>
<td>Northern Ireland Human Rights Commission</td>
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<td>NIMPB</td>
<td>Northern Ireland (Miscellaneous Provisions) Bill</td>
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<tr>
<td>NIO</td>
<td>Northern Ireland Office</td>
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<td>NIOB</td>
<td>Northern Ireland Offences Bill</td>
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<td>NSMC</td>
<td>North/South Ministerial Council</td>
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<tr>
<td>PSNI</td>
<td>Police Service of Northern Ireland</td>
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<tr>
<td>ROI</td>
<td>Republic of Ireland</td>
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<tr>
<td>RUC</td>
<td>Royal Ulster Constabulary</td>
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<tr>
<td>SACHR</td>
<td>Standing Advisory Commission on Human Rights</td>
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<tr>
<td>SDLP</td>
<td>Social Democratic and Labour Party</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UUP</td>
<td>Ulster Unionist Party</td>
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Acknowledgements

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The Belfast Agreement: law and politics

Introduction

I have been invited to speak on the Belfast Agreement as a legal instrument. This I will do. However, it is difficult to avoid the politics of the NI problem. It is even more difficult to avoid intellectually dishonest cultural appropriation; by this I mean the way Irish nationalism has, given weak Ulster unionism, imagined the so-called Good Friday Agreement.

I want to argue: one, the Belfast Agreement is firmly rooted in the 1920-22 partition settlement in Ireland, and is best seen in continuity with the 1973 Sunningdale agreement and the 1985 Anglo-Irish agreement; two, in answer to the first question - what went wrong? - I want to suggest unequivocally: the failure of the republican movement to complete the transition from terrorism to democracy (plus consequent failures on the part of others); I have no prescriptive answer to the second question 'where do we go now?', because lawyers are only technicians in a constitutional process (unless of course they are ersatz politicians).

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12 This paper was delivered to a Northern Light Review conference at Parliament Buildings, Belfast on 28 May 2004.
The Multi-Party Negotiations

The Belfast Agreement was the result of two years of multi-party negotiations in 1996-98, facilitated by the UK and Irish governments. It was signed on 10 April 1998 - Good Friday in the Christian calendar - , in a nondescript civil service building at Stormont (Castle Buildings). The Belfast Agreement is, in fact, two agreements: the Multi-Party Agreement (‘MPA’); and the British-Irish Agreement (‘BIA’).

Treaty Interpretation

It is not surprising that politicians and commentators do not understand the relationship between the two agreements, and adopt a generally biblical approach to all the words. It is surprising that some NI lawyers and even judges, who should be familiar with the international rules in the law of treaties (in particulars articles 31 to 33 of the 1969 Vienna convention on the law of treaties), adopt a golf club conversational rather than legal scholarly approach.

There are two general approaches to the bible, one catholic and the other protestant. First, the church, meaning its hierarchy, tells you what it means. Second, the believer reads it unmediated, or with the assistance of fundamentalists. I take a catholic view on the Belfast Agreement; the mediation of lawyers is necessary. Fundamentalist catholics and protestants have spoken a great deal of nonsense in the last six years, about the legal meaning of the Belfast Agreement.
It was foreseeable in 1998 that the Agreement would be litigated in the courts of Belfast, London and Dublin. There have been cases in both states. However, while aspects of the Belfast Agreement have been touched upon, there is neither a UK nor Irish landmark judgment.

**Cultural Appropriation**


My objections to the term Good Friday Agreement are twofold: first, it brings religious terminology into the discourse of politics and even law; and second, that is exactly what early twentieth-century republicanism did with the myth of Easter week in 1916. Even the *Irish Times* (which latterly has been referring to the Belfast Agreement) succumbed to the still-dominant political culture of the ROI on 11 April 1998.

A number of people knows, but never says, that Sinn Féin did not sign the Belfast Agreement on 10 April 1998 (in fact, the political parties were not invited to sign anything; they were asked to vote for an agreement at the end of the multi-party negotiations). Gerry Adams declined twice to vote, and this can be found tucked away in the following day’s press reports.\(^\text{13}\)

\(^\text{13}\) See further, Morgan, *The Belfast Agreement*, xi-xii.
Nor did Sinn Féin, despite meeting on 18-19 April and 10 May 1998, ever endorse the Belfast Agreement. It remained opposed to consent. However, it did decide belatedly - in order to catch up with the leadership of nationalist Ireland - to call for a 'yes' vote in the two referendums of 22 May 1998.

It was Gerry Adams who first claimed that the Belfast Agreement was transitional to a united Ireland. Subsequently, the Irish government tried to dress up its involvement as joint London and Dublin sovereignty or authority.\footnote{This was most evident in the Irish assertion that the UK could not suspend devolution in February 2000. Somehow, according to Dublin, a bilateral international agreement, where the Irish had not even been involved in the negotiation of Strand One, had subverted the UK constitution, London losing sole control of NI. See my article in the \textit{Irish Times} of 10 March 2000, written in reply to one by the Irish taoiseach on 14 February 2000.} Third, and after Sinn Féin proclaimed there would be a united Ireland by 2016\footnote{Gerry Adams first made this claim in New York in 2000 (\textit{Irish Echo}, 8-14 January 2003).}, the SDLP - under the new leadership of Mark Durkan - called for a referendum in the ROI during the life of the current Oireachtas (2002 - ).\footnote{This was also a response to David Trimble calling for a referendum in NI. However, that referendum would have showed majority support for the union.}

The most recent instance of this political \textit{machismo} was Senator Martin Mansergh's call on 20 March 2004 for nationalists to start making the case for a united Ireland.\footnote{\textit{Irish Times}, 20 March 2004.} Dr Mansergh knows something about statesmanship, and he sees the Belfast Agreement as embodying the interests of the ROI. But those interests are articulated in terms of Pearseian self-deception at moments of political necessity for the Fianna Fáil party.

The tragedy about this cultural appropriation is that, where nationalism led, unionism followed blindly. The DUP, and other 'no' unionists, even cited as their authority the
fact that Sinn Féin was claiming the Belfast Agreement was about moving towards a united Ireland.

I have to concede that the pro- and anti- division in the majority community between 1998 and 2003 mirrors in irreconcilability, that in the Irish Free State between 1921 and 1932 on the so-called Anglo-Irish treaty - which was never, of course, an international agreement.

The consequence since 1998 has been clear. The republicans clearly never intended to become simply democrats. They refused to disarm, and disband, as required expressly by the Belfast Agreement, but also by the principle of legality in international and domestic law. However, having never voted for the Belfast Agreement, they milked it politically for a stream of concessions. These went to the myth of transitionalism. But they also embarrassed 'yes' unionists and further alienated 'no' unionists.

Contents

The Belfast Agreement is not a late-twentieth-century version of Moses's tablets of stone, with prohibitions replaced by mandatory orders.

The Belfast Agreement has 11 sections, as they are called. The first main section is 'Constitutional Issues' (of which more below). The Agreement provided mainly for

18 Martin Smyth MP, who has a professional competence in these matters, corrected me at Parliament Buildings: the ten commandants are not all prohibitory.
another devolved administration in NI\textsuperscript{19} (Strand One), with north-south (Strand Two) and east-west (Strand Three) institutional links. There are also five sections dealing with rights, decommissioning of paramilitary arms, security, policing and justice, and prisoners - which were characterized in 1999 as (moving) 'from Terrorism to Democracy'\textsuperscript{20}.

**Entry into Force**

The BIA was signed at Castle Buildings on 10 April 1998. The provisions for entry into force are in article 4 of the BIA. The Belfast Agreement had no legal effect for its first 600 or so days.

This is because there were three conditions precedent to entry into force, mainly constitutional changes in UK and Irish law. The 'Constitutional Issues' section is not legally a substantive part of the Belfast Agreement. The UK and Irish governments were hardly in a position to commit, respectively, the Westminster parliament and the people of the ROI when they signed on 10 April 1998.

**Constitutional Changes**

Nevertheless, one must summarize the constitutional changes brought about in association with the Belfast Agreement. There has not been a great deal of light on this subject. The Irish state ended its territorial claim to NI. There was no balancing

\textsuperscript{19} The NI Parliament had existed from 1921 to 1972. There was also a short-lived so-called power-sharing experiment in 1974.

by the UK (just spinning). True, the Irish government reinvoked the nationalist project in the new articles 2 and 3, largely to encourage Sinn Féin. It is also the case that the UK switched the statutory emphasis from a majority for the union to one for a united Ireland. NI was not ceded by the UK to the ROI in 1998, and, at an unlighty point in the future - when there are majorities in NI and the ROI for unity - , the end of the union will still be a matter for the UK and Irish governments.

Of more significance is article 1 of the BIA (reproduced in Constitutional Issues), where London and Dublin developed the constitutional understanding of the 1985 Anglo-Irish agreement. That was when the ROI first accepted the consent principle in a bilateral international agreement. In the BIA of 1998, the ROI accepted further that NI was a part of the UK. Tony Blair and Bertie Ahern did not sign up to the principle of self-determination for the people of Ireland on 10 April 1998. Gerry Adams's original idea was transmogrified by John Hume and the Irish government, to become the idea of two referendums in Ireland; and with the risk that the Irish supreme court might reject a NI majority of voters as not the majority of the people specified in the new article 3 of Bunreacht na hÉireann.

Nor did the Belfast Agreement provide anew for Irish citizenship. That was done in the Irish Nationality and Citizenship Act 1956. That was when the Oireachtas legislated extra-territoriality for NI, and the UK felt unable to diplomatically object (it should, of course, have responded by legislating further for British subjects in the ROI, especially those born after 1 January 1949).
Citizenship, in article 9 of Bunreacht na hÉireann, is a matter for the Oireachtas. The new article 2 of the Irish constitution gave northern nationalists nothing. And everyone seems to have forgotten that the BIA has a second annex, which made clear that one could not acquire Irish citizenship by virtue of birth in NI. It is an interesting question whether the amending Irish Nationality and Citizenship Act 2001 changed this, and whether this was constitutionally required. The Oireachtas seems to have extended citizenship by birth to NI, but the law is tautologous: 'a person born in the island of Ireland is an Irish citizen from birth if he or she does...any act which only an Irish citizen is entitled to do.'\(^{21}\) Irish citizenship for northern nationalists is a matter of southern administrative discretion, based arguably upon the continuing indefinite descent rule first applied to NI in 1956.

The Irish department of justice was concerned about citizenship law in 1998, given the likelihood of immigration. It was overruled; peace in NI was more important. Now, minister McDowell promises to interfere unilaterally with the Belfast Agreement.\(^{22}\) We face the prospect of the Irish state abolishing its simple birth rule in the ROI, while continuing to provide extra-territorially for northern nationalists.

**New Institutions**

The Belfast Agreement was principally about restoring devolution in NI, with Strands Two and Three linkages.

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\(^{21}\) Section 3(1), substituting a new section 6(1) in the 1956 Act.  
\(^{22}\) This is a reference to the referendum in the ROI on 11 June 2004.
**Strand One**

The Irish question of Victorian politics had led to the Government of Ireland Act ('GOIA') 1920, and to the idea of two home rule parliaments in Ireland within the UK. They were to be linked by a council of Ireland. Consent was enshrined in statute. NI was the successful part of the GOIA 1920, and its parliament lasted for over 50 years. It was restored as the NI assembly in 1973, but brought down by the Ulster Workers' Council strike the following May. The Northern Ireland Constitution Act ('NICA') 1973 institutions were short lived (though the act remains in force). Power sharing with the SDLP may have been the reason for the end of the experiment. But constitutional nationalism gave the strikers good cause by insisting upon the immediate establishment of the council of Ireland.

Devolution was rearticulated in the 1985 Anglo-Irish agreement, where the ROI was given a consultative role in NI. This was not joint authority, much less sovereignty, though Irish governments like to present their involvement in such terms.

The wisdom of UK policy at the time (Mrs Thatcher revised her view) is open to question. Has the ROI behaved like a friendly neighbouring liberal democracy, treating UK internal security as an issue of concern to the Irish state? Or has political opportunism, and the cultural burden of the dead generations, seen Irish governments help republicanism become an internal threat to the Irish state, while maintaining its threat to the UK state?

The constitutional origins of the Belfast Agreement are: one, the GOIA 1920 framework; two, power-sharing from the NICA 1973, plus an Irish dimension; and three, the decision to accommodate republicans suing for peace from the late 1980s.

Could the IRA have been defeated in the early 1990s? That is an important question. UK policy, encouraged by Dublin, became one of abandoning centrism (as in 1973), and going for the enfolding of the sectarian extremes. However, appeasement of republicanism became, and remained, the central dynamic.

The NIO lost the DUP early in the multi-party negotiations. Between 1998 and 2003, pan-nationalism and Trimble unionism formed a new consensus. All-party talks, which were always being called for, and less often achieved, excluded the growing force in the majority community.

The verdict came in November 2003 with the assembly elections. It is surprising that some people were surprised. Trimble unionism did relatively well, returning with 27 seats. The DUP did better, with 30 seats. Unionism gained a seat. However, the failure of a pan-unionist strategy for reviewing the Belfast Agreement, saw the defection of the Donaldson three - and DUP hegemony.

Sinn Féin had a pyrrhic victory - 18 to 24 seats - because it finds itself in a more difficult position.
The SDLP, which declined from 24 to 18 seats, looks to have been fatally wounded. And this the party of peaceful nationalism. Moreover, it was the party Irish governments built up and sustained; the Anglo-Irish agreement, after all, was to see off the Sinn Féin threat to John Hume's new Irelanders. And finally, the SDLP was the party that, on the basis of the long transition of 1998-99, thought nationalist ministers could outshine republican ones in the inclusive executive. Martin McGuinness, who did to education what he had been doing to people and buildings for years, made more of a splash by abolishing the eleven plus (without putting anything in its place) than Mark Durkan and Sean Farren did allocating the block grant from Whitehall to NI departments.

Strand Two

Strand Two was a success in comparison. The council of Ireland was an important institution in the GOIA 1920, where, of course, it would have linked two subordinate parliaments in the UK. The Irish government had no idea how to turn it into a transnational institution at the time of Sunningdale in December 1973, and there was no formal agreement in any case.

Some fantastic claims were made about practical north-south cooperation in the run up to the Belfast Agreement. The North/South Ministerial Council ('NSMC'), as agreed, was an international body shared by the Irish state and a UK devolved administration. A secretariat in Armagh was an unnecessary concession by unionism to nationalism, this religious city having already been designated by the SLDP as its

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new capital. The invasion of cross-border Mercedes - one per southern minister - for the first plenary meeting in NI shows how the Irish government remained unreconstructed at worst and opportunist at best.

One of the successes of the multi-party negotiations was the tearing up of Dublin's all-Ireland wish list. Six implementation bodies were agreed subsequently. They may, or may not, be doing important work. They account for small proportions of the budgets in Belfast and Dublin. It is regrettable that officials in NI are unable to properly run the international organizations established; Irish officials have more excuse - they seem to believe they are getting a united Ireland by instalments, or maybe they are just pretending as the price of peace.

Strand Three

Strand Three was the success of the negotiations, even if the promise has not been realized. It comprises two institutions: the British-Irish Council ('BIC); and the British-Irish Intergovernmental Conference ('BIIC').

The BIC embraces all the administrations in these islands. It is not really necessary for the UK. The UK may be becoming quasi-federal, but devolution all round led central government to set up a centripetal joint ministerial committee with concordats between departments in London, on the one hand, and Edinburgh, Belfast and Cardiff, on the other. The BIC does, however, lock the ROI into cooperation with the UK on a bilateral basis.
The BIC is multilateral. While, arguably, some of the administrations could establish implementation bodies, either within the UK, or internationally between the UK and the ROI, the emphasis has been on practical cooperation - action rather than institutions. This part of Strand Three points up a difference between unionists and nationalists. The former are not interested in empire building, merely in enjoying the benefits of multicultural British life. The latter, in contrast, want an Irish dimension that may be portrayed as an embryonic Irish state, and are wary of anything presentable as a return to the old UK of Great Britain and Ireland.

The BIIC is, in contrast, a legacy of the 1985 Anglo-Irish agreement, after devolution from London to Belfast. The Belfast Agreement expressly superseded that agreement. The Maryfield secretariat was closed. However, the UK allowed the ROI to maintain its Belfast toehold with a new secretariat in Windsor House. The BIIC was not prominent after devolution, Tony Blair preferring personal diplomacy with Bertie Ahern. (It only became active with suspension.) The 1985 Anglo-Irish agreement had always envisaged a diminishing role for the Irish government. This did happen with devolution. But it was the failure of the republicans, refusing to disarm and disband, which kept pre-10 April 1998 diplomacy going, and saw the Irish continually involved, at head of government level, and then, during suspension, through meetings of the BIIC.

**From Terrorism to Democracy**

If the constitutional aspects of the Belfast Agreement have been uncontroversial, and the workings of the institutions in their three strands have been unremarkable (when
working), much of the difficulty - both before entry into force on 2 December 1999, and since then through interrupted devolution - has been with this miscellaneous third of the Belfast Agreement.

The areas covered are: rights, safeguards and equality of opportunity; decommissioning; security; policing and justice; and prisoners. The republicans have been largely responsible for the problems, aided and abetted by the NI equality industry and the human rights community.

There is only one possible interpretation a lawyer may put on the above five sections of the Belfast Agreement. In the context of IRA disarmament and disbandment, the UK (with the Irish government playing a subordinate role) would be able to: offer equality and human rights reforms; normalize security to pre-troubles levels; reform the police and the criminal justice system for peacetime; and, eventually, release terrorist prisoners (loyalists having cooperated with republicans to get this in the Belfast Agreement).

It is necessary to contrast: the law and order culture of the majority community; with the partly insurrectional and more general abstentionist values of the minority community. It is also necessary to add: official indulgence of the equality industry; and the political correctness, and sheer lunacy at times, of the human rights community. That is why most of the difficulty with the Belfast Agreement has been in these five areas.
Decommissioning

The Belfast Agreement provided for 'the decommissioning of all paramilitary arms within two years' from the referendums on 22 May 1998. (The prime minister's letter of 10 April 1998 to David Trimble stated that 'the process of decommissioning should begin straight away'.)

Sinn Féin, of course, never voted for the agreement. Later, the IRA was to state it was not bound by it. The IRA remained a proscribed organization throughout. The principle of legality, in domestic law, and in the Belfast Agreement through the law of treaties, implies that the IRA should never have existed, nor engaged in some 30 years of violence. Eamon de Valera ensured that this principle was express in Bunreacht na hÉireann: 'No military or armed force, other than...raised and maintained by the Oireachtas, shall be raised or maintained for any purpose whatsoever.'

The struggle to get the IRA to disarm and disband dominated events from 10 April 1998. It will not be recounted here. Nor will the spurious arguments put up by Sinn Féin by way of excuse. I assert that, without this prevarication (whereby we now know they never intended to decommission under the Belfast Agreement), it may well be that the 'truly historic opportunity for a new beginning' would have come to pass.

25 Article 15.6.2.
26 Declaration of Support, paragraph 1.
**Prisoners**

The Belfast Agreement also provided for the release of terrorist prisoners, within two years of the end of June 1998. The UK honoured its commitment, releasing loyalists and republicans on licence. The Irish state breached the Belfast Agreement, but did not act unlawfully in domestic law, when it declined to release the killers of Garda McCabe.

Some of those involved in the multi-party negotiations drew comfort from the two two-year timescales. They should have ensured express linkage in the Belfast Agreement between the two sections; prisoners for guns.

The time for a truth and reconciliation commission would also have been as part of a process of prisoner releases. The Belfast Agreement should have dealt with terrorists on the run. They were not, and should not now be facilitated. Bloody Sunday was one of Tony Blair's early reckless decisions. Seven years and £150m later, few believe it will do anything to reconcile the Derry people. The release of terrorist prisoners was, or should have been, the exercise in line drawing in history. Pan-nationalism has an appetite for endless Bloody Sundays, but the law lords, if not number 10 and the NIO, may have surgically brought NI's endless round of judicial inquiries to an end.\(^\text{27}\) The most useful inquiry would, of course, be one by the Irish government, into collusion between the IRA and Dublin ministers at the start of the troubles.

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\(^{27}\) *In re McKerr* [2004] 1 WLR 800.
Policing and Justice

The greatest aggravation, which helped diminish Trimble unionism, was the policing and justice section.

The Belfast Agreement included provisions for an independent commission on policing, and a civil service review of criminal justice. The UK did both of these. It was not obliged to turn the Patten report on policing, and the much less controversial criminal justice review, into primary legislation by statutory incorporation. The Belfast Agreement reads: 'Implementation of the recommendations arising from both reviews will be discussed with the political parties and with the Irish Government.'

The word is recommendations. And every law student knows that a minister cannot fetter his discretion by agreeing to something without proper examination. The Belfast Agreement made it clear that there would be a continuing process of political bargaining. There wasn't.

The UK pressed ahead with the Police (Northern Ireland) Act 2000 and the Justice (Northern Ireland) Act 2002. When the SDLP demanded more, it got the Police (Northern Ireland) Act 2003; though nationalists have inadequately reciprocated, the government pushed another Justice (Northern Ireland) Act through parliament in 2004.

28 Policing and Justice, paragraph 6.
Last, but not least, if a centrist-dominated administrative was to have had any prospects, during the transition in 1998-99, and then after devolution on 2 December 1999, it would have needed active support within from civil society. The Belfast Agreement refers, after all, to 'the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.'

The Equality Commission (based on existing bodies) and the NI Human Rights Commission were part of the package. No doubt, some in the multi-party negotiations felt they could work with some members of the equality industry and the human rights community.

This was to reckon without reality. Undoubtedly the worst aspect of the Patten report, and of everything since 1998, has been the 50/50 quota for police recruiting. Sounding equitable, 50/50 is in fact institutionalized sectarianism, providing for direct religious discrimination. Patten got his European law wrong in the report, and, because nationalists wanted the reforms implemented in full, the UK had to secure an opt out, not in a treaty, but in the equal treatment framework directive.

The Equality Commission is not in the least embarrassed. Indeed, with more enthusiasm than sense, it argues for quotas all round for its favourite client groups.

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29 Declaration of Support, paragraph 2.
Patten's 50/50 could never work, being a crude instrument. And it has not. The costs of recruiting have been extravagant. Initially, given lower catholic application rates, it was protestants in the merit pool who were rejected. Now, possibly because of protestant alienation, catholics are being directly discriminated against. And the purpose of the scheme was to recruit catholics to make the police more representative.

The Equality Commission has, however, been eclipsed by the Human Rights Commission. At the time of the Belfast Agreement, the human rights bill was going through parliament. This incorporates the European Convention on Human Rights. However, the Human Rights Commission, relying upon a casual reference to a bill of rights\(^\text{31}\), has majored since 1999 in the production of its own. Seventy seven per cent of it is new rights; yet the Belfast Agreement refers only to supplementary rights. The Irish government does not want this bill of rights in its constitution\(^\text{32}\). Nor does the UK want Prof Brice Dickson's bill of rights. Yet it continues to pour money into a commission in the final throws of ideological decay.

**Conclusion**

Why does the UK do this? The reason is simple. The republicans are in politics to get a united Ireland. They are not modest about proclaiming their discredited goal. They will use the Belfast Agreement to advance their cause. One does not need to be astute to appreciate this. It remains an open question whether the republicans will revert to violence, as opposed to simply using the threat. They are past masters as grievance mongering. They have eschewed obligations under the Belfast Agreement.

\(^{32}\) As required by the first paragraph 9.
And they have found policing and justice, and especially equality and human rights, open-ended provisions. They remain able to find a failure by the UK to implement something, sufficient to justify refusing to irreversibly cross the bridge from terrorism to democracy.

[Essay 2]

Permeating the Irish Border:

practical north-south cooperation under the Belfast Agreement

Introduction

This is a report on government work in progress in Northern Ireland. It deals in particular with the six so-called implementation bodies, agreed by the transitional Assembly on 18 January 1999. These are north-south institutions to be shared by the ROI, and one of the devolved regions of the UK.

I’m interested in precedents for such state to state relations elsewhere in the world. In this paper, I will explain the constitutional/legal nature of these north-south bodies – one set of institutions in the Belfast Agreement - in the context of the political history of the Northern Ireland problem.

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While permeability presupposes an international boundary, the problem in Ireland was to have it mutually recognized so practical cooperation could be constructed. My theme is: the Irish government\textsuperscript{34} cannot distinguish adequately the rhetoric of reunification, and practical – mainly socio-economic - cooperation\textsuperscript{35} (which Ulster unionists are prepared to accept).

**An intractable dispute?**

An intractable dispute is probably how Northern Ireland is perceived globally. But I want to make two points. One, London and Dublin worked for about ten years to produce the Belfast Agreement of 10 April 1998. And two, this is seen by Bill Clinton and Tony Blair as prototypical of solutions to local disputes in the post-communist global world. They want it to work; they have bigger fish to fry.

**The Belfast Agreement: a health check**

A health report, however, is probably necessary. David Trimble and Seamus Mallon were elected first minister and deputy first minister on 1 July 1998, as effectively a transitional administration. By 18 December 1998, most of the major decisions had been made.

Decommissioning of paramilitary – mainly IRA – arms has been the principal cause of the failure to transfer power. David Trimble’s party has affirmed a no guns, no

\textsuperscript{34} Thus, the foreign minister, David Andrews, characterized Strand Two as creating the embryo government of Ireland.

\textsuperscript{35} The term practical cooperation was used in article 10(c) of the 1985 Anglo-Irish agreement, Cmd. 9657, November 1985. It was also used by John Major in his forward to the 1995 Framework Documents, Cmdn. 2964, December 1995.
government policy. Sinn Féin says it is doing all it can; and that is all that is necessary. The Hillsborough declaration of 1 April 1999 was allowed to unravel. And *The Way Forward* plan of 2 July 1999 collapsed (leading to the resignation of the deputy first minister). Senator Mitchell has been sent for, and a review of the Belfast Agreement commenced on 6 September 1999 (it is expected to end before Christmas).

Last year at Durham\(^{36}\), I argued – on the basis of the referendums of 22 May 1998 - that the two governments had got the balance wrong. That in Northern Ireland produced a 71.12 per cent ‘yes’ vote for the Belfast Agreement (on an 81.1 per cent turnout): however, it split the majority unionist community. The referendum to change the constitution in the ROI produced a staggering 94.4 per cent ‘yes’ vote on a 56.3 per cent turnout.

Since then, Irish nationalism has culturally appropriated what it calls the Good Friday Agreement (not entirely a bad thing), leaving the unionist population feeling the historical losers. To have a party with a private army in an involuntary coalition of four (including Dr Paisley’s party) is no longer - if it ever were - politically possible.

**Prospects?**

The Belfast Agreement is not dead. It may be described loosely as fundamental international law; the United Kingdom and Irish governments have no alternative. There is an analogy with the Olso accords in the middle east. Statecraft may produce

\(^{36}\) At a conference hosted by the International Boundaries Research Unit.
a solution in the Mitchell review (with the 22 May 2000 deadline for decommissioning approaching).

If it does not, there will still be the 108 elected members of the transitional assembly. After 30 years of violence (to misquote the prime minister), 30 months is a reasonable time in which to manage a transition to democracy.

The six implementation bodies

By way of an appetiser, I will start with the institutions agreed on 18 December 1998, and approved by the assembly on 18 January 1999:37

- Waterways Ireland;
- The Food Safety Promotion Board;
- The Trade and Business Development Body;
- The Special EU Programmes Body;
- The North/South Language Body;
- The Foyle, Carlingford and Irish Lights Commission.

One estimate (designed to impress) is an annual expenditure, after three years, of IR£56m and a total staff of about 880; these are not realistic figures. Given that the

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37 The 18 December 1998 agreement is Annex 1b of New Northern Ireland Assembly, Report from the First Minister (Designate) and Deputy First Minister (Designate), NNIA 7, 15 February 1999. It was approved in New Northern Ireland Assembly, Official Report, 18 January 1999, pp. 416-75, but only on the basis of New Northern Ireland Assembly, Report of the First Minister (Designate) and Deputy First Minister (Designate), NNIA 6, 18 January 1999. However, the assembly took note again, in New Northern Ireland Assembly, Official Report, 16 February 1999, pp. 68-109.

Foyle, Carlingford and Irish Lights Commission – which exists in separate entities – employs some 300 people, the achievement is commensurately less.

Un peu d’histoire

Towards an international frontier

Ireland was once united as an administrative unit, within the United Kingdom of Great Britain and Ireland. This constitutional unity (under the Irish Office in London), however, masked a significant nineteenth-century socio-economic divide between north and south.

The consequence, given a majority Irish desire for self-government, and a minority (Ulster) attachment to the constitutional status quo, was partition under the GOIA 1920. The Irish border developed as follows:

- **1920-22:**

  an internal UK administrative frontier, between Northern Ireland and Southern Ireland, based on parliamentary areas;

- **1922-25:**
an international land boundary, with some uncertainty about the status of the Irish Free State, a dominion within the British Empire;

➢ 1924-25:

a three-person boundary commission, to reconcile the wishes of the inhabitants with economic and geographic conditions, which led to a London-Dublin-Belfast agreement to accept the 1920 border\(^{39}\);

➢ 1937 to present (the Irish view):

the Irish territorial claim to Northern Ireland in Eamon de Valera Bunreacht na hÉireann (constitution of Ireland);

➢ 1949 to present (the UK view):

the independent ROI not a foreign country\(^{40}\);

➢ the (putative) constitutional balance in the Belfast Agreement of 10 April 1998:

\(^{39}\) Ireland (Confirmation of Agreement) Act 1925; Treaty (Confirmation of Amending Agreement) Act 1925.

\(^{40}\) Ireland Act 1949 s 2(1).
the end of the Irish territorial claim (in return for alleged UK recognition of the Irish people’s right to self-determination\textsuperscript{41}).

The boundary between NI and the ROI has been one of the most stable in Europe. It is also now among the older land frontiers. The only threatened international incident was in 1969-70, when an Irish cabinet minority attempted a policy of limited military invasion.

The concept of consent in Northern Ireland (after nearly 30 years) is foregrounded in the constitutional part of the Belfast Agreement (awaiting entry into force as an international agreement).

\textit{North-south relations after partition}

The GOIA 1920 – it is little remembered – provided for so-called Irish union (within the United Kingdom), by identical acts of the Northern Ireland and Southern Ireland parliaments. This was ‘with a view to the eventual establishment of a Parliament for the whole of Ireland, and to bringing about harmonious action between the parliaments and governments of Southern Ireland and Northern Ireland, and to the promotion of mutual intercourse and uniformity in relation to matters affecting the whole of Ireland, and to providing for the administration of services which the two

\textsuperscript{41} Constitutional Issues section of Belfast Agreement.
parliaments mutually agree should be administered uniformly throughout the whole of Ireland…" 42

The Council of Ireland was given immediately powers in the areas of:

- railways;
- fisheries; and
- the Diseases of Animals Acts.

This, however, was not at the expense of domestic jurisdiction in the two parts of Ireland.43

None of this came to pass. The 1925 agreement, whereby the Irish Free State recognized Northern Ireland, also saw the end of any possibility of a Council of Ireland. It was another 40 years – 1965 – before the heads of government in Belfast and Dublin met again.

Paradoxically, it was during the Irish cold war of the 1950s, that some practical cooperation took place:

- (1) drainage of the river Erne. A draft agreement was drawn up by the ministry of finance for Northern Ireland and the electricity supply board in the ROI for works on both sides of the border. This looks like a contract in private international

42 GOIA 1920, s 2(1).
43 GOIA 1920 s 10(2).
law. While provision was made for a UK or Irish arbitrator\textsuperscript{44}, the law of the contract is not specified. Under the Erne Drainage and Development Act 1950, the board was authorized to enter into the agreement. There does not appear to have been related NI legislation;

\textbullet\ (2) the Foyle Fisheries Commission. Under the Foyle Fisheries Act (Northern Ireland) 1952, and an apparently identical act of the ROI (seemingly drafted in Belfast), the ministry of commerce for Northern Ireland and the minister for agriculture in the ROI, were permitted to purchase jointly fisheries and land. Conservation boards in both jurisdictions were dissolved. And the above commission established, to preside over a lough and other areas without the territorial sea being determined. The commission purports to be a body corporate. And the administrations in Belfast and Dublin appoint the members. It is required to have an office in NI and in the ROI\textsuperscript{45};

\textbullet\ (3) the Great Northern Railway. Under the Great Northern Railway Act 1953, and a similar act in NI, the minister for industry and commerce in the ROI and the ministry of commerce for NI, were permitted to purchase jointly the Great Northern Railway Company (Ireland), which ran a number of cross-border routes. There was to be an office in Dublin and another in Belfast. The two ministers jointly appointed the board, and could jointly direct its members. The board again purported to be a body corporate. The 1953 agreement was

\textsuperscript{44} The terms United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland were used in the second schedule to the draft agreement.

\textsuperscript{45} Paragraph 10 of the third schedule of the Irish act. It is in fact administered from Derry/Londonderry.
terminated in 1958. Under the Transport Act (Northern Ireland) 1958, and a similar measure in the ROI, the undertaking was divided between the Ulster transport authority and Córas Iompair Éireann.
The term, Irish dimension, emerged in the Northern Ireland Office document, *The future of Northern Ireland: a paper for discussion*, October 1972. It was juxtaposed to ‘the United Kingdom interest’: ‘The United Kingdom Government stated it had three major concerns in Northern Ireland. First, that it should be internally at peace….Second, that it should prosper…. Third, that Northern Ireland should not offer a base for any external threat to the security of the United Kingdom.’\(^{46}\) The following reasons were given for an Irish dimension: one, Northern Ireland is part of the geographical entity of Ireland; two, ‘an element of the minority in Northern Ireland has hitherto seen itself as simply a part of the wider Irish community.’; three, ‘the problem of political terrorism…has always had manifestations throughout the island’.\(^{47}\)

Sunningdale included provision for (again) a Council of Ireland. There would be a council of ministers – seven each from Belfast and Dublin – ‘with executive and harmonising functions and a consultative role’. There would also be a 60-member consultative assembly ‘with advisory and review functions’. These institutions would have a secretariat headed by a secretary-general, with permanent headquarters and its own staff.

What were these institutions to do? There were to be ‘studies’ (seemingly to be completed by the time of the formal conference early in 1974) being directed to identifying ‘suitable aspects of activities in the following broad fields’:

\(^{46}\) Paragraph 74.
\(^{47}\) Paragraph 76.
- exploitation, conservation and development of natural resources and the environment;

- agricultural matters (including agricultural research, animal health and operational aspects of the Common Agricultural Policy), forestry and fisheries;

- co-operative ventures in the fields of trade and industry;

- electricity generation;

- tourism;

- roads and transport;

- advisory services in the field of public health;

- sport, culture and the arts.\(^{48}\)

None of this came to pass. The power-sharing executive had fallen by May 1974, due mainly (but not entirely) to the Irish dimension.

The problem of legal forms

How does a state create a body shared with a neighbour? Two models – neither adequate – are extant:

- **Identical acts of the Northern Ireland and Southern Ireland parliaments:** this idea (as noted) was contained in the GOIA 1920. But it was redundant from the point at which nationalist Ireland refused to accept the 1920 act. It would never have worked in the Irish Free State, or its successor, Éire/Ireland. Yet, it was nationalist Ireland’s chosen method of creating the implementation bodies (paragraph 10 of the Strand Two section of the Belfast Agreement);

- **(unspecified) agreements or arrangements between Belfast and Dublin:** this appeared first in section 3(1)(a)(ii) of the Ireland Act 1949 (which recognized the ROI as a separate state). It was not used seemingly. Agreements or arrangements were reenacted in section 12 of the Northern Ireland Constitution Act (‘NICA’) 1973. This power was not used either. It has been reenacted again, in
section 53 of the Northern Ireland Act (‘NIA’) 1998
(which has yet to come into force).

The correct model – the international organization – was found eventually in 1998-99
(as we will see).

*The 1985 Anglo-Irish agreement*

This was a consultation plus agreement between London and Dublin to do with NI. It
established an intergovernmental conference, to discuss: political matters; security
and related matters; legal matters, including the administration of justice; and the
promotion of cross-border cooperation.

While the UK government was principally interested in security cooperation, the Irish
government succeeded, after the 1988 review, in having north-south economic, social
and cultural cooperation treated as a regular agenda item.

The origin of Strand Two of the Belfast Agreement lies in article 10(c) of the Anglo-
Irish agreement (which was opposed fundamentally by Ulster unionists from 1985).
However, it is being replaced by the BIA, a new start in state to state relations.

But there is a problem about Dublin’s role in the transition. The Anglo-Irish
agreement envisaged the Irish government acting as guarantors for northern
nationalists in the search for devolution, or if there was no solution.\textsuperscript{49} The Belfast

\textsuperscript{49}Articles 4(c) and 5(c) respectively.
Agreement is a devolution settlement in escrow. There is no role specified for the Irish government under the Anglo-Irish agreement, while, under the British-Irish Agreement, it will be shifted away from NI to a genuine bilateral basis.

The negotiation of the Belfast Agreement

The 1993 *Downing Street Declaration*, Cmnd. 2442, and the 1995 *Framework Documents*, Cmnd. 2964, preceded the multi-party negotiations in 1996-98. The Sunningdale proposals were revived by Dublin, and accepted seemingly by London.

This was evident at least quantitatively, in the Mitchell Draft Paper (the penultimate version of the final agreement); 49 instances of north-south cooperation were specified.\(^{50}\) Between 6 and 10 April 1998, this was whittled down to the Strand Two text, including the work programme to select six implementation bodies and six areas for cooperation by 31 October 1998 from an annex.\(^{51}\)

Strand Two of the Belfast Agreement

This relates to north-south relations. The text of this 19-paragraph section of the Belfast Agreement (along with its annex) is appended. It provides for mainly a NSMC – a treaty body - (a more practical and modest version of the 1920 and 1973 plans).\(^{52}\)

Strand Two is then covered by Strand Three, the east-west dimension,

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\(^{50}\) Available at: http://www.nuzhound.com.


\(^{52}\) This is to be established under article 2(i) of the BIA. However, there was also a supplementary agreement of 8 March 1999, Cm 4294, Ireland No. 3 (1999), March 1999: *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing a North/South Ministerial Council.*
comprising a BIC (and a BIIC), the former treaty body comprising two states, three
devolved administrations and the lesser islands\textsuperscript{53}.

The six implementation bodies

These, as noted, were agreed by the first minister and deputy first minister, with the
ROI and UK governments involved, on 18 December 1998. They were approved by
the assembly on 18 January 1999. They are listed here again for convenience:

1. Waterways Ireland;
2. The Food Safety Promotion Board;
3. The Trade and Business Development Body;
4. The Special EU Programmes Body;
5. The North/South Language Body;

The provenance of the six may be ascertained from publicity during the negotiations.
The first and fourth were anticipated by the annex to Strand Two. The third and
fourth were the deputy first minister’s preferred choices; tourism – long a favourite –
was downgraded. The remainder – it may be inferred - came from the first minister’s
camp\textsuperscript{54}: the second raised the question of differential agricultural standards; the fifth
activated parity of esteem between Ulster Scots and the national language of the Irish
state (Irish); and the sixth raises indirectly the question of the territorial seas in Lough

\textsuperscript{53} The Isle of Man and the Channel Islands.

\textsuperscript{54} Two of these – trade and language – had not been endorsed by the UK government in the Mitchell
Draft Paper.
Foyle and Carlingford Lough; further, Irish Lights – an anomalous UK-law body located in Dublin – may well be run through the British-Irish Council\textsuperscript{55}.

**Legal creation**

Article 2(ii) of the British-Irish Agreement (‘BIA’) – the legal form of the Belfast Agreement – signed by Tony Blair and Bertie Ahern on 10 April 1998, purports to create the Strand Two, paragraph 9(ii) bodies. However, this cannot be the case; they are not specified sufficiently.

Thus, on 8 March 1999 in Dublin, the secretary of state for Northern Ireland, and the Irish foreign minister signed an *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing Implementation Bodies*, Cm 4293, Ireland No. 2 (1999). This was one of four agreements supplementing the BIA\textsuperscript{56}.

Article 1 creates the six bodies in international law. Article 6 states they shall have legal personality (in Irish and NI law). And article 3 puts them under the NSMC (as required by paragraph 11 of Strand Two).

Whereas the 1973 legislation envisaged partial transfers of sovereignty, as functions were moved out of NI into the ROI, and the 1998 act still allows for this, the international organization model is completely mutual.

\textsuperscript{55} See article 4 of the international agreement cited in the section below.

\textsuperscript{56} Articles 8 and 9.
Each administration (one a state) is affected in the same way. The two administrations (NI through the UK) agree to the temporary transfer of functions out of their jurisdiction into an international organization. The organization (a single body) is then given legal form in NI, and Irish, law. There is no transfer of sovereignty – though there is pooling - , and the functions can be brought back by agreement or even unilaterally.

However, there are three problems with the 8 March 1999 international agreement.

First, Article 2(1) refers to the ‘functions’ in Annex 1, while article 2(2) specifies consequential ‘arrangements’ in Annex 2. The 18 December 1998 agreement, approved by the assembly under section 1(1) of the Northern Ireland (Elections) Act 1998 on 18 January 1999, is contained in Annex 1.

The legality of Annex 2 – pages 13 to 50 of the agreement – remains to be tested. It was not approved by the assembly. And it is more than technical details. The intention of ROI and NI officials appears to have been to make the six bodies more meaningful. Thus, Waterways Ireland was to have functions added ‘progressively thereafter’ (Annex 1). In Annex 2, this becomes by 1 April 2000. Most likely, Annex 2 will be construed restrictively by the courts in terms of Annex 1.

Second, under article 5, the NSMC has to resort to the two governments for amendments of the international agreement by exchange of notes. Indeed, there was one such on 18 June 1999 (even before the agreement had entered into force), seeking
to clarify an aspect of the Special EU Programmes Body.\textsuperscript{57} (The secretary of state had little difficulty putting this through Westminster by a – direct rule – order in council.\textsuperscript{58} In Dublin, the Oireachtas had to resort to primary legislation\textsuperscript{59}.)

Third, article 7(1) reads: ‘Each Body shall act in accordance with any directions of the British Secretary of State for Foreign and Commonwealth Affairs or the Irish Minister for Foreign Affairs necessary to ensure compliance, within their respective jurisdictions, with any international obligations of the British Government or the Irish Government other than the international obligations arising under this Agreement or the British-Irish Agreement.’

Matters have been transferred from London to Belfast. The NI administration is responsible under devolution. But, when it comes to cooperating with the Irish government, the UK foreign secretary can step in paternalistically. (There is no issue for Dublin: the foreign minister is a member of the Irish government which sits on the NSMC.)

Under article 6, the UK government legislated on 10 March 1999: the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999 SI 859/1999. The international agreement was scheduled to the order. The Irish government also did this with the British-Irish Agreement Act 1999, promulgated on 22 March 1999.

\textsuperscript{57} The exchange of notes is scheduled to each of the pieces of legislation in the two notes immediately below. This was not made under article 5. The Irish government was concerned to amend the original agreement in accord with article 31(3)(a) of the 1969 Vienna convention on the law of treaties.

\textsuperscript{58} North/South Co-operation (Implementation Bodies) (Amendment) (Northern Ireland) Order 1999, SI 2062/1999, made on 19 July 1999.

\textsuperscript{59} British-Irish Agreement (Amendment) Act 1999.
APPENDIX

EXTRACT FROM THE BELFAST AGREEMENT OF 10 APRIL 1998

STRAND TWO

NORTH/SOUTH MINISTERIAL COUNCIL

1. Under a new British/Irish Agreement dealing with the totality of relationships, and related legislation at Westminster and in the Oireachtas, a North/South Ministerial Council to be established to bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland - including through implementation on an all-island and cross-border basis - on matters of mutual interest within the competence of the Administrations, North and South.

2. All Council decisions to be by agreement between the two sides. Northern Ireland to be represented by the First Minister, Deputy First Minister and any relevant Ministers, the Irish Government by the Taoiseach and relevant Ministers, all operating in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly and the Oireachtas respectively. Participation in the Council to be one of the essential responsibilities attaching to relevant posts in the two Administrations. If a holder of a relevant post will not participate normally in the Council, the Taoiseach in the case of the Irish Government and the First and Deputy First Minister in the case of the Northern Ireland Administration to be able to make alternative arrangements.

3. The Council to meet in different formats:

(i) in plenary format twice a year, with Northern Ireland representation led by the First Minister and Deputy First Minister and the Irish Government led by the Taoiseach;

(ii) in specific sectoral formats on a regular and frequent basis with each side represented by the appropriate Minister;

(iii) in an appropriate format to consider institutional or cross-sectoral matters (including in relation to the EU) and to resolve disagreement.

4. Agendas for all meetings to be settled by prior agreement between
the two sides, but it will be open to either to propose any matter for consideration or action.

5. The Council:

(i) to exchange information, discuss and consult with a view to co-operating on matters of mutual interest within the competence of both Administrations, North and South;

(ii) to use best endeavours to reach agreement on the adoption of common policies, in areas where there is a mutual cross-border and all-island benefit, and which are within the competence of both Administrations, North and South, making determined efforts to overcome any disagreements;

(iii) to take decisions by agreement on policies for implementation separately in each jurisdiction, in relevant meaningful areas within the competence of both Administrations, North and South;

(iv) to take decisions by agreement on policies and action at an all-island and cross-border level to be implemented by the bodies to be established as set out in paragraphs 8 and 9 below.

6. Each side to be in a position to take decisions in the Council within the defined authority of those attending, through the arrangements in place for co-ordination of executive functions within each jurisdiction. Each side to remain accountable to the Assembly and Oireachtas respectively, whose approval, through the arrangements in place on either side, would be required for decisions beyond the defined authority of those attending.

7. As soon as practically possible after elections to the Northern Ireland Assembly, inaugural meetings will take place of the Assembly, the British/Irish Council and the North/South Ministerial Council in their transitional forms. All three institutions will meet regularly and frequently on this basis during the period between the elections to the Assembly, and the transfer of powers to the Assembly, in order to establish their modus operandi.

8. During the transitional period between the elections to the Northern Ireland Assembly and the transfer of power to it, representatives of the Northern Ireland transitional Administration and the Irish Government operating in the North/South Ministerial Council will undertake a work programme, in consultation with the British Government, covering at least 12 subject areas, with a view to identifying and agreeing by 31 October 1998 areas where co-operation and implementation for mutual benefit will take place. Such areas may include matters in the list set out in the Annex.

9. As part of the work programme, the Council will identify and
agree at least 6 matters for co-operation and implementation in each of the following categories:

(i) Matters where existing bodies will be the appropriate mechanisms for co-operation in each separate jurisdiction;

(ii) Matters where the co-operation will take place through agreed implementation bodies on a cross-border or all-island level.

10. The two Governments will make necessary legislative and other enabling preparations to ensure, as an absolute commitment, that these bodies, which have been agreed as a result of the work programme, function at the time of the inception of the British-Irish Agreement and the transfer of powers, with legislative authority for these bodies transferred to the Assembly as soon as possible thereafter. Other arrangements for the agreed co-operation will also commence contemporaneously with the transfer of powers to the Assembly.

11. The implementation bodies will have a clear operational remit. They will implement on an all-island and cross-border basis policies agreed in the Council.

12. Any further development of these arrangements to be by agreement in the Council and with the specific endorsement of the Northern Ireland Assembly and Oireachtas, subject to the extent of the competences and responsibility of the two Administrations.

13. It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent, and that one cannot successfully function without the other.

14. Disagreements within the Council to be addressed in the format described at paragraph 3(iii) above or in the plenary format. By agreement between the two sides, experts could be appointed to consider a particular matter and report.

15. Funding to be provided by the two Administrations on the basis that the Council and the implementation bodies constitute a necessary public function.

16. The Council to be supported by a standing joint Secretariat, staffed by members of the Northern Ireland Civil Service and the Irish Civil Service.

17. The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.
18. The Northern Ireland Assembly and the Oireachtas to consider developing a joint parliamentary forum, bringing together equal numbers from both institutions for discussion of matters of mutual interest and concern.

19. Consideration to be given to the establishment of an independent consultative forum appointed by the two Administrations, representative of civil society, comprising the social partners and other members with expertise in social, cultural, economic and other issues.

ANNEX

Areas for North-South co-operation and implementation may include the following:

1. Agriculture - animal and plant health.

2. Education - teacher qualifications and exchanges.

3. Transport - strategic transport planning.

4. Environment - environmental protection, pollution, water quality, and waste management.

5. Waterways - inland waterways.


7. Tourism - promotion, marketing, research, and product development.

8. Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors.

9. Inland Fisheries.

10. Aquaculture and marine matters

11. Health: accident and emergency services and other related cross-border issues.

12. Urban and rural development.

Others to be considered by the shadow North/ South Council.
What Bill of Rights?^60

Introduction

I am opposed to the current proposal of a Bill of Rights (‘BOR’) for NI. This is not because I am against human rights, a motherhood issue. As a lawyer in London and Belfast, human rights are integral to the law I practise. I have been critical of the Northern Ireland Human Rights Commission (‘NIHRC’) since its appointment on 1 March 1999.\footnote{On 30 September 1999, the NIHRC issued a draft strategic plan for consultation. I responded to this, and the document of 13 November 1999 was available on my professional website: \url{www.austenmorgan.com}. I never expected it to have any effect. However, I was amused to find that all such responses were vetted, in accordance with an ideological interpretation of section 75 of the Northern Ireland Act (‘NIA’) 1998: NIHRC minutes, 13 December 1999; 17 January 2000.} This is because it has failed to contribute to the reconciling pretension of the Belfast Agreement. The draft BOR of 4 September 2001 makes no contribution to the rule of law, and to a badly needed culture of legality. The NIHRC’s 155-page consultation document, \textit{Making a Bill of Rights for Northern Ireland} (‘Making’) is a sloppy academic exercise.\footnote{This paper was delivered at a conference at Queen’s University, Belfast on 8 December 2001, and published subsequently in the \textit{Northern Ireland Legal Quarterly}, vol.52, nos.3&4, autumn-winter 2001, 234.} If implemented in the name of a greatly misunderstood international law (which is most unlikely), the NIHRC’s BOR would seriously disrupt the constitutional law of the UK (and, as I shall show, the Irish) state.

Prof David Kennedy of Harvard University has recently articulated the general phenomenon of which the NIHRC is a particular instance: ‘The human rights community degrades the legal profession by encouraging a combination of overall...
formal reliance on textual articulations which are anything but clear or binding and sloppy humanitarian argument. This combination degrades the legal skills of those involved, while encouraging them to believe that their projects are more legitimate precisely because they are presented in (sloppy) legal terms.63

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

The Legal Meaning of a Bill of Rights

There has been an important debate since the early 1990s about human rights. However, there is a clear distinction between the so-called incorporation of the European Convention on Human Rights (‘ECHR’), and a full-blown constitutional

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bill of rights for the UK (which could be part of a written constitution). The former is part of a continental project; the latter would be unique to the UK. The Human Rights Act 1998, which entered fully into force throughout the UK on 2 October 2000, is the only legal show in town. The new Labour government re-elected in 2001 is committed to its bedding down. This remains the position as regards NI, despite the particularity of the Belfast Agreement (of which more below).

**What are human rights?**

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

The source of contemporary human rights is post-world-war-two multilateral agreements, associated principally with the United Nations and the Council of Europe. These instruments are greatly misunderstood in NI, where international law

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and human rights tend to be considered as identical: international human rights standards.\textsuperscript{66}

Public international law (hereinafter ‘international law’) remains essentially the law of states, though it was once known as the law of nations.\textsuperscript{67} However, international legal personality may be bestowed on international organizations. Arguably, individuals remain the objects of international law.\textsuperscript{68} They are the beneficiaries of international humanitarian law. This has come to include human rights, which are governed by the law of treaties. Not all international documents (as the human rights community tends to suggest) have legal effect. They certainly do not become domestic law in dualist constitutions, such as the UK and the ROI. Only some international agreements are, what are called, law-making treaties. So-called soft law is not, of course, binding anywhere. International law remains largely customary, and based upon the practice of states.\textsuperscript{69} International instruments bind states parties; they are essentially of evidential value, as regards the customs and overriding principles of international law.\textsuperscript{70} There is also customary international human rights law, based upon state policy. This deals with a finite number of rights, though no state claims the right to practise genocide, slavery, torture, systematic racial (including religious?) discrimination etc.\textsuperscript{71}

Geoffrey Robinson QC has expressed the distinction between the culture of the human rights community and international law thus: ‘Many overoptimistic

\begin{footnotesize}
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  \item See the definition of international law in \textit{Making}, p. 94, which misconstrues article 39(1)(b)-(c) of the South African constitution.
  \item See \textit{Making}, p. 145.
  \item Though Hersch Lauterpacht thought otherwise.
  \item See the NIHRC’s misuse of this concept: \textit{Making}, p. 94.
  \item Ian Brownlie, \textit{Principles of Public International Law}, 4\textsuperscript{th} ed., (Oxford 1990), p. 4.
\end{itemize}
\end{footnotesize}
international lawyers argue that everything in the Universal Declaration of Human Rights is by now part of international law, but this is the sort of wishful thinking that has made international human rights law such a fatuous exercise. If human rights are to have the force of law in the twenty-first century, we must abandon these norms of the imagination (which guarantee sophisticated rights to hundreds of millions of women and children who have no hope of possessing them) and concentrate on consolidating, and above all enforcing, the elemental rules which have already ripened into rules of international law.\footnote{72}{Crimes against Humanity (London 2000), pp. 81-2.}

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the associated Commission and Court in Strasbourg (now just the Court), has been of most practical use in Europe. Its principal drafter was a retired UK official, who inspiration was the (originally English) common law. Much is made of the so-called positive rights of multilateral agreements, but the ECHR reflects the effectively negative freedoms of the common law.\footnote{73}{Peter Duffy QC & Paul Stanley, annotators of the HRA 1998, Current Law Statutes, vol. 3, 1999, p. 42.} What are now called (international) Convention rights in the HRA 1998\footnote{74}{S 1(1).} retain a complex relationship with judge-made law in the UK\footnote{75}{Derbyshire County Council v Times Newspapers [1993] AC 534, 551 per Lord Keith of Kinkel.}.

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

*Human rights: violations v abuses*

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

The problem of terrorism has been experienced among Council of Europe member states most intensively in NI by the UK (which is not to underestimate the internal

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76 ECHR, art 34.
77 *Tyrr v UK* (1978) 2 EHRR, 1 at 10.
security threats experienced by France, Germany, Italy and especially Spain, in the 1970s and 1980s, and still continuing). There is now something called Irish terrorism in the UK.\textsuperscript{78} Victims of terrorism had no recourse to Strasbourg, other than against a state party for inadequate protection. With the so-called incorporation of the ECHR in UK law, it may well be possible for such persons (or their relatives), by suing paramilitaries, to develop the indirect horizontal effect in the HRA 1998, to secure relief and remedies in NI courts.\textsuperscript{79}

I alerted the NIHRC to this exciting possibility early in its existence.\textsuperscript{80} The indirect horizontal effect is the principal significance regionally, of the shift on 2 October 2000 from Strasbourg and the ECHR to domestic courts and the HRA 1998. The NIHRC has continued to rail against state violations, and effectively ignore paramilitary and other abuses. And this in spite of \textit{HLR v France} (1997) 26 EHRR 29, where Strasbourg held (though it rejected the application of a Columbian drug trafficker against deportation) that the source of the risk could be the threat of reprisals by drug traffickers, coupled with the fact that the Columbian State is allegedly incapable of protecting him from attacks by such persons.

\textit{International refugee law}

\textsuperscript{78} This originated in the definition of terrorism as connected with the affairs of NI. Lord Lloyd of Berwick’s \textit{Inquiry into Legislation against Terrorism}, Cm 3420, October 1996, argued for a tripartite distinction: Irish, international and domestic. This was accepted by the government: \textit{Legislation against Terrorism}, Cm 4178, December 1998. The Terrorism Act 2000 applies to Irish, international and domestic terrorism. It is not known if the ROI objected to the term Irish terrorism after 1996. None of the terms is defined in the Terrorism Act 2000.


\textsuperscript{80} See note 1 above.
An analogy may be drawn between refugee law and human rights law; both are aspects of international humanitarian law. The former derives in the main from the 1951 Geneva Convention and a 1967 Protocol. It is, therefore, law based upon a multilateral international agreement. This has not been incorporated in UK law, but it is referred to in statutes and other domestic instruments. Immigration law is a major aspect of the public law of, principally, England and Wales. Applicants for asylum may appeal to special courts, against decisions of the Secretary of state. Practitioners in the Immigration Appellate Authority apply the law of asylum – a well-founded fear of persecution for, what is called, a Convention reason – using international and domestic jurisprudence.

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

In Horvath v Secretary of State for the Home Department [2000] 3 WLR 379, the House of Lords held: given that the general purpose of the refugee convention was provision by the international community of surrogate protection, the test of whether ill-treatment amounted to persecution was dependent upon, not only the severity of the ill-treatment, but also upon there being a failure by the state to afford protection against the ill-treatment. The Appellate Committee did not blame ‘the state’ for the putative persecution by non-state agents. However, it insisted that the authorities should be able to deal with the consequences: there is a *per curiam* that the standard is a system of criminal law which makes violent attacks by the persecutors punishable...
and a reasonable willingness to enforce that law on the part of the law enforcement agents.

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

*The particularity of Northern Ireland*

The greatest abusers of human rights in NI in the 30 years of the troubles – contrary to the impression given by the NIHRC – were, not the police and the army, but republican and loyalist terrorists. According to the Costs of the Troubles Study at the University of Ulster, for the period 1969 to seemingly the end of February 1998, some 3,593 people were recorded as having been killed in political violence. The largest category is people killed by republican paramilitaries: 2,001 or 56 per cent. The second largest is killings perpetrated by loyalist paramilitaries: 983 deaths or 27 per cent. The security forces combined were responsible for 382 deaths or 11 per cent.\(^8\)

It is therefore the position that the vast majority of deaths – at least 83 per cent – are attributable to illegal paramilitary organizations; just over one in ten was the responsibility of what the human rights community calls ‘the state’. Not all of the latter would have been as a result of force that was no more than absolutely

necessary. Almost all (if not all) of the former will have amounted to the abuse of the right to life under article 2 of the ECHR.

A bill of rights?

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

However, it was in November 1968 that Anthony Lester made his first call for the incorporation of the ECHR in domestic UK law, in his Fabian pamphlet, *Democracy and Individual Rights*. The term incorporation has stuck, and may be used colloquially. Strictly, incorporation refers to customary rules of international law having domestic effect. Transformation\(^83\) would have been a better term for a multilateral agreement in international law. Recognition should also be given C. Desmond Greaves, in the context of the NI civil rights movement. He argued on behalf of the Connolly Association in London, that Westminster should legislate for the province.\(^84\) This was part of a democratic solution, inspired by socialism but mainly by nationalism.

A regional bill of rights was suggested by the Ulster Unionist Party (‘UUP’), the Alliance Party and the Northern Ireland Labour Party in October 1972. This was in the NIO document, *The Future of Northern Ireland: a paper for discussion.*

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\(^{82}\) There is no Strasbourg case finding the UK liable for a substantive breach of art 2 in NI. *McCann v UK* (1996) 21 EHRR 97 concerned Gibraltar (a substantive breach by ten votes to nine). The Jordan, McKerr, Kelly & Others, and Shanighan decisions of 4 May 2001 relate only to a procedural breach (seven votes unanimously).

\(^{83}\) Confer transposition of European Community/Union law.

Nationalists did not join in these calls\(^\text{85}\), which were made shortly after the fall of Stormont. (There had, of course, been a provision against religious discrimination in the Government of Ireland Act 1920.) The UK posed, by way of comment, the question of human rights abuses by terrorists.\(^\text{86}\) A subsequent white paper\(^\text{87}\) hinted at a (unenforceable) charter of human rights. In the NICA 1973, part III on the prevention of religious and political discrimination prohibited such acts by public authorities. A Standing Advisory Commission on Human Rights (‘SACHR’) was also established. Though its remit was discrimination, it was SACHR which advised in 1977 – with the help of Anthony Lester – that there should be a bill of rights.\(^\text{88}\) The proposal amounted to the incorporation of the ECHR. This was to be UK wide, though Robert Cooper (dissenting) favoured a NI bill rather than wait for GB to catch up.

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

However, the matter was to rest for over 20 years, following the publication of the SACHR report. The UK was opposed in the 1980s and 1990s to the incorporation of

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\(^{85}\) For a later assessment, see chapter 4 of the CAJ’s *Making Rights Count* (1990).

\(^{86}\) Paras. 27-32 & 64.

\(^{87}\) *Northern Ireland Constitutional Proposals*, Cmnd 5259, March 1973, part IV.

the ECHR. So also was the ROI, which was content with its fundamental rights in Bunreacht na hÉireann (articles 40 to 44). In the concerted attempt from the late 1980s to settle the NI problem, London and Dublin jointly eschewed any commitment to ECHR incorporation.\textsuperscript{89} It was suggested in 1995 that democratic representatives might adopt instead a (non binding) all-Ireland charter or covenant.\textsuperscript{90} The UK idea of a non-binding charter of 1973 for NI became, 22 years later, the Irish idea of an all-Ireland charter.

The significance of the Belfast Agreement, from the point of view of human rights protection, was the way the UUP, drawing on new Labour’s commitment to the ECHR (see below), forced the Irish state to agree to an equivalent level of protection of human rights with the UK\textsuperscript{91}.

What Anthony Lester initiated in 1968, would take 30 years to be realized as the HRA 1998. A whole series of legal factors contributed to this process.\textsuperscript{92} NI’s contribution was the troubles. There were also adverse human rights decisions against the UK at Strasbourg. New Labour (but only in GB) – inspired by the Institute of Public Policy Research\textsuperscript{93} and Liberty\textsuperscript{94} - embraced the ECHR in 1993\textsuperscript{95}. There followed the 1996

\textsuperscript{89} Downing Street Declaration, Cmnd 2442, 15 December 1993; Framework Documents, Cmnd 2964, February 1995.  
\textsuperscript{90} In the 1995 Framework Documents. This was to be based apparently upon the six so-called rights included in the 1993 Downing Street Declaration. See further, Austen Morgan, The Belfast Agreement: a practical legal analysis (London 2000), pp. 373-4 & 375-6.  
\textsuperscript{91} First paragraph 9 of the Rights, Safeguards and Equality of Opportunity section.  
\textsuperscript{93} A British Bill of Rights (1990), included subsequently in The Constitution of the UK (1991). It was based upon the ECHR, with additions from the 1966 International Covenant on Civil and Political Rights. It was published again, as A Written Constitution for the UK (1993).  
\textsuperscript{94} National Council for Civil Liberties, A People’s Charter (1991). This referred to ‘the UK Bill of Rights’. It was based upon the ECHR and the 1966 international civil and political rights covenant.  
\textsuperscript{95} The party conference that year agreed: one, incorporation of the ECHR; two, an all-party commission to consider and draft a homegrown bill of rights for the UK.
consultation paper, *Bringing Rights Home*[^96], which led - following the election of the Blair government - to the October 1997 white paper, *Rights Brought Home*[^97] (Cm 3782).

*The Committee on the Administration of Justice (‘CAJ’)*

The above narrative is broadly complete. But it leaves out an important sub-current, the CAJ founded in Belfast in 1981. And it is not possible to understand the NIHRC individually and ideologically, without reference to this controversial pressure group. Indeed, the precedent for the draft BOR of 2001 is the CAJ’s bill of rights of 1993[^98].

The CAJ styles itself a non-governmental organization (NGO in the argot of diplomacy), but is not state wide. It would claim to take no position on the constitutional question, to be effectively neutral in NI. Neutrality here means: a refusal to accept NI's constitutional position in the UK (including especially the legitimate use of force); and an acceptance of a united Ireland as a viable alternative (diminishing its criticism of republican violence).[^99] The CAJ did not anticipate, and has not followed, the ‘consent’ principle of the Belfast Agreement, a constitutional provision that may be traced from 1922[^100]. As for its opposition to violence, it has

[^96]: 18 December, published in [1997] EHRLR 71. This was the only UK document to refer to a BOR for NI: ‘a distinct package of rights as part of a new agreed and balanced settlement for Northern Ireland.’ However, it was looking back to the 1977 SACHR report, and the human rights bill had not then even been drafted.

[^97]: There is a reference to NI in para. 2.23.

[^98]: *Bill of Rights for Northern Ireland*. See also, *The Blessings of Liberty* (1986) and *Making Rights Count* (1990), which contains an earlier draft of the BOR.


[^100]: Austen Morgan, *The Belfast Agreement: a practical legal analysis* (London 2000), pp. 134-49. The Belfast Agreement did not alter NI's position in the UK. The ROI, in contrast, ended its territorial claim. Aspirations remain legitimate, and further effect was given to unity by consent.
used ‘international law’ to justify its non-criticism of the main human rights abusers.\(^1\)

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

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

\(^1\) ‘We have set ourselves up as a non-governmental organization to comment on how the State deals with non-State violence…You may not like it but it is our function…We are simply abstracting ourselves from the local situation and applying international law.’ (Michael Ritchie, Forum for Peace and Reconciliation, Report of Proceedings: volume 12: Friday, 31 March 1995, pp. 44-5) See also, Brice Dickson, ‘The Protection of Human Rights: Lessons from Northern Ireland’ [2000] EHRLR 213 at 222 (equating state violence with paramilitary violence in the context of the NIHRC's definition of victim).
that the greatest abuse of human rights in Northern Ireland in the last twenty five years is that carried out by paramilitary groups…".102

The answer to Steve McBride’s question is, of course, no. This is evident from the public session of the Irish government’s Forum for Peace and Reconciliation in Dublin Castle on 31 March 1995, when the CAJ (and its sister organization, the Irish Council for Civil Liberties ['ICCL']) made a joint presentation to members103, comprising nationalist and other political leaders but no unionists. Two future human rights commissioners in, respectively, Belfast and Dublin - Angela Hegarty and Michael Farrell - led the delegation. Revealing a gross ignorance of international law, and its relationship to the UK and Irish constitutions, the future NI commissioner showed herself to be anti-police and opposed to the judiciary in NI. She claimed: ‘there is no emergency’ (less than a year before the IRA broke its complete ceasefire with the London docklands bomb).104 Elected politicians - including Dr John (now Lord) Alderdice of the Alliance Party (and now speaker of the NI Assembly), Mary Harney TD (leader of the Progressive Democrats and now tánaiste) and Michael McDowell TD (of the same party and now Irish attorney general) - criticized severely what was becoming a radical community in both parts of Ireland, using human rights to promote a political project with a considerable vanguard role for itself.

103 Angela Hegarty, Anne McKeown and Michael Ritchie represented the CAJ; Tom Cooney, Michael Farrell and Úna ní Raifeartaigh represented the ICCL.
The *hauteur* of this self-appointed elite, and its disdain for what ordinary people believe to be human rights (whether drawing on religious consciousness or secular values), is remarkable.105

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

Strangely, this was a bill only for Northern Ireland, at a time when civil liberties organizations in GB were putting forward proposals for the UK as a whole. Why the CAJ’s isolation? The answer is its relationship to nationalism, reflected in its purported constitutional neutrality. The preamble began: ‘However Northern Ireland is governed’. Why the doubt? The commentary read: ‘The CAJ intends this Bill of Rights to apply whatever the constitutional arrangements are in place at any particular time for governing the area known as Northern Ireland. The organisation takes no position on what the constitutional status of Northern Ireland should be.’106 The identification of a BOR with a territory only is legally problematic, and compounded by an effective denial of UK sovereignty which is not legally balanced by an apparent disavowal of Irish sovereignty.

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

106 This phrase, of course, reappears on p. 19 of *Making*. 
CAJ members drafted this BOR, mainly: Christine Bell, Brice Dickson, Donall Murphy, Martin O’Brien and Fionnuala Ni Aoláin. The first two were to become members of the NIHRC in 1999, Brice Dickson becoming the Chief Commissioner. The fourth is the CAJ’s director. And the fifth is a member of the Irish Human Rights Commission (‘Irish HRC’), set up belatedly under the Belfast Agreement in the ROI.

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

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

The NIHRC’s campaign

107 There was, however, a reference to an ordinary Act of Parliament in the commentary on article 20. 108 See, for example, paragraph 2 of the Validation, Implementation and Review section of the Belfast Agreement.
The NIHRC focussed early upon the BOR project. As the end of their three years approached (and before their reappointment), Prof Brice Dickson and his fellow commissioners became more frantic to achieve the CAJ’s objective. This campaign at public expense was marked by the following highlights:

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

- **September 2000**: publication of 11 NIHRC pamphlets on aspects of a BOR;

- **15 January 2001**: publication of the conclusions of nine working groups on the same areas;

- **4 September 2001**: NIHRC submits its draft BOR to the UK government, and launches a short consultation (ending on 1

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109 NIHRC minutes, 10 September 2001.
110 This paraphrased the first paragraph 4 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement to read: ‘consulting and advising on the scope for defining rights additional to those in the European Convention on Human Rights’. It also claimed: ‘Under the Good Friday Agreement the [NIHRC] has been given the job of preparing a Bill of Rights for Northern Ireland.’
111 One on women was announced for November 2000, but delayed to at least February 2001. The titles are: Introduction; Children & Young People; Criminal Justice; Culture & Identity; Education; Equality; Language; Social & Economic Rights; Victims; Women; Implementation.
112 These were on: Children & Young People; Criminal Justice; Culture & Identity; Education; Equality; Language; Economic & Social Rights; Victims; and Implementation. There was nothing on Women. These (with the exception of Language, Equality and Implementation) made no reference to the Belfast Agreement provisions. The conclusions on Criminal Justice rewrote article 5 of the ECHR. That on Culture & Identity recommended the incorporation of the Framework Convention on the Protection of National Minorities, contrary to the intention of the contracting states.
December 2001), to be followed presumably by a redrafted BOR;\textsuperscript{113}

- collaboration with an ad-hoc Human Rights Consortium, in which the CAJ played a major role\textsuperscript{114}, including the production of a joint \textit{Belfast Telegraph} supplement, \textit{Right here Write now: making a bill of rights for Northern Ireland}\textsuperscript{115} and other advertising.

Prof Dickson, and the NIHRC, persisted in giving the false impression that every political party in NI supported his BOR.\textsuperscript{116}

On 25 September 2001 (as was foreseeable), a motion in the NI Assembly originating with two liberal unionists condemned the NIHRC.\textsuperscript{117} When the nationalist SDLP organized a petition of concern, the motion secured a majority (48 to 39), but not a cross community, vote a week later.\textsuperscript{118} It was subsequently inevitable that the NIHRC’s BOR would not secure necessary political support.

\textit{The NIHRC’s BOR}

\textsuperscript{113} \textit{Making}. The original intention had been to publish draft proposals in March 2001 and submit final recommendations in September 2001 (NIHRC, \textit{The Bill of Rights: Introduction}, September 2000, p. 8). The NIHRC envisaged \textit{Making} as ‘draft advice’ to be sent to the Secretary of State (Minutes, 14 May 2001). A NIHRC press release of 4 September 2001 referred to ‘preliminary advice to the Secretary of State’, and to ‘final advice for the Secretary of State early in 2002’. Prof Dickson referred to ‘provisional recommendations to the Secretary of State’ on 4 September 2001, but also to consultation (supplied text).

\textsuperscript{114} The first telephone number of the Consortium is the CAJ’s; the second is Amnesty International in Belfast.

\textsuperscript{115} This was distributed on [?November 2001.

\textsuperscript{116} NIHRC press releases, 1 March 2000 & 17 October 2000. For a belated qualification of this claim, see \textit{Making}, p. 6; \texttt{www.utvinternet.com} for 4 September 2001; \textit{Belfast Telegraph}, 4 September 2001. The former position is reasserted in the undated \textit{Belfast Telegraph} supplement, p. 2.


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

The structure of the BOR is: a preamble followed by 18 other numbered chapters, each containing several clauses.\(^{119}\) The ECHR (including protocol articles which are now Convention rights under the HRA 1998) appears to be the basis of the document. However, the Convention rights are grouped in certain chapters.\(^{120}\) This BOR is essentially the NIHRC’s work. It is responsible for most of the chapters, and (as noted) the vast majority of the clauses. The chapters range far beyond civil and political rights, and even economic, social and cultural ones; included are: electoral rights, identity and communities, women (though there are no actual rights in this chapter); victims; children; education; and language. Most of these are topics dealt with normally by representatives in legislatures, elected on the basis of political programmes. The NIHRC’s BOR eclipses in scale those of: France (1789); the United States (1791); Germany (1949), various Caribbean states (1962-81), Canada

\(^{119}\) This suggests that the drafter does not understand the status of a preamble. Moreover, we are given here the preamble of an international agreement, not domestic legislation.

\(^{120}\) For example, articles 2, 3 and 4 in chapter 6, articles 5, 6 and 7 in chapter 7, articles 8 and 12 in chapter 9, and articles 9, 10 and 11 in chapter 12 (where there is an attempt to play down freedom of peaceful assembly).
(1982), New Zealand (1990), Hong Kong (1991), and South Africa (1996).\footnote{Robert Blackburn, \textit{Towards a Constitutional Bill of Rights for the United Kingdom} (1999), pp. 443-529.} Each one of those bills of rights was created in a particular historical conjuncture. Not one is analogous to NI in 2001-02. They may be looked at for drafting purposes, but none is a precedent for a NI where the Belfast Agreement did not include provision for a NIHRC BOR (see further below).

The Belfast Agreement was the work of the political parties of NI in 1996-98, under the guidance of the two governments. The NIHRC, judging by appendix 5, seems not to understand what sort of legal instrument it is.\footnote{It is listed under ‘Domestic standards and references’.} This would-be BOR is a document of almost equal stature. However, an unrepresentative human rights community\footnote{See my submission of 13 November 1999: \url{www.austenmorgan.com}.}, which is the beneficiary of NIO patronage, has produced it. It was also facilitated by an extraordinary amount of public money. Having declined repeated NIHRC requests for more funds, the NIO relented and gave £357,200 to conduct a consultation exercise. This would appear to be one of the most expensive consultations in the history of the UK state. One looks forward to the NIHRC being held to account financially by London.

The preamble of the bill is framed: ‘The people of Northern Ireland...have requested the adoption of the following Bill of Rights.’ What people? Is this the real people of NI, in their divided unity? Or is it the obedient people of revolutionary mythology? It certainly does not include people ‘of a certain kind’ - those opposed to some or all
of the BOR\textsuperscript{124}. Popular demand is difficult to resist. And the NIHRC is clearly attempting to appeal over the heads of elected representatives. There was a fantasy in the NIHRC about popular pressure producing a cross-community vote of the Assembly.\textsuperscript{125} Fortunately, as noted above, this has not, and will not, succeed. The BOR is a political initiative of stunning audacity, for a statutory body (or quango) of less than three years’ existence. The NIHRC was not set up to mobilize the people, and short circuit the NI Assembly, to press demands upon, not just the UK government, but also (as I shall show) the Irish government. Its functions were laid down in the NIA 1998, on the basis of the first paragraph 5 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement.

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

Four Arguments Against

There are four principal arguments against the NIHRC’s draft BOR. Points are, of course, interrelated, but my case is presented as four discrete legal submissions. If it is political to campaign for a BOR, one becomes involved in political debate by opposing the NIHRC’s grandiose plan. Argument (3) is an attempt to engage with any rational wing of the human rights community. It takes a constitutional stand in

\textsuperscript{125} \textit{Making}, p. 18.
favour of elected politicians, and against a veritable fourth branch of government (as
the NIHRC conducts itself)\textsuperscript{126}, making policy decisions on behalf of the people.

\textit{(1) the draft BOR of 4 September 2001, if enacted in NI law, would shatter human
rights protection in the UK}

This argument is concerned with the human rights protection provided in the UK by
the HRA 1998. I contend that the NIHRC’s BOR would separate NI from GB in this
respect. Further, and even more worryingly, it would undermine many rules of
statutory, but mainly common, law. I do not envisage parliamentary counsel in
London starting with the NIHRC’s BOR, and amending every necessary rule in order
to have an extensive human rights regime uniquely in NI. Incredibility, there is no
reference to the HRA 1998, in appendix 1 of \textit{Making}. Nor is there any serious
discussion of existing human rights law in the commentary.\textsuperscript{127} There is very little
acknowledgement of Westminster legislation, though Prof Kevin Boyle gave the
game away on 4 September 2001, at the launch of the draft BOR, by referring to
‘entrench[ing] by law when the Westminster Parliament ultimately legislates Northern
Ireland’s Bill of Rights.’\textsuperscript{128}

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

\textit{(i) Northern Ireland: states and nations?}

\textsuperscript{126} See my article in the \textit{Observer}, 19 August 2001.
\textsuperscript{127} See pp. 59, 87, 100, 102, 103, 138 & 144; it is not referred to on p. 149.
\textsuperscript{128} Supplied text. The NIHRC referred bizarrely to ‘enact[ing] any necessary legislation as quickly as
possible.’ (Press statement, 4 September 2001)
There is complete legal continuity between the CAJ in 1993 and the NIHRC in 2001. Reference has been made above to the constitutional perspective of the first Bill of Rights for Northern Ireland. The CAJ was confused about states and nations. After the Belfast Agreement, there is less reason for the NIHRC reproducing the CAJ idea of a NI territory with its own BOR, effectively in movement between the UK and the ROI.

The drafter of the NIHRC’s BOR treats NI as constitutionally autonomous (less a part of the UK and more a part of the Irish nation\(^{129}\)). Thus, the strange analogy on page 107 of Making with the 1931 Statute of Westminster. This concerned relations between states, in the transition from empire to commonwealth. It has no application to NI’s position within the UK, a unitary state that has devolved power to its regions and nations.

The second aspect of this legal continuity is the view that NI, while – *sotto voce* – a part of the UK, has a destiny in an all-Ireland state. This reflects more a transition to a united Ireland view (characteristic of Sinn Féin), than a joint sovereignty, or authority, view, sometimes associated with the SDLP and the Irish government. Thus, on pages 18 to 19 of Making, there is an oblique reference to article 1 of the British-Irish Agreement, in particular paragraphs (v) and (vi).\(^{130}\) The identities of Irish or British (acknowledged in the Belfast Agreement) do not justify what the

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\(^{129}\) Nation is treated uncritically as a legal category: Making, pp. 144-5.

\(^{130}\) The phrase ‘The Commission, of course, holds no views on what the future constitutional status of Northern Ireland should be.’ repeats that in the CAJ’s 1993 BOR. Does the NIHRC have a view of the current constitutional position? Does it accept that the Belfast Agreement provides further for unity by consent? If so, the only possible future constitutional status is a united Ireland. The improbability of that corresponds neatly with the legal imperative of dealing with the constitutional present of NI, and not a hybrid or halfway house.
NIHRC has done: namely, drafted a BOR for a NI which is, currently, in the UK, but could, just as reasonably, be a part of the ROI. Many of the legal difficulties in the text stem from this old CAJ prejudice. It is also to misconstrue the Belfast Agreement, which is very clear about NI being a part of the UK. Virtually no attention has been paid the second paragraph 4 of Strand Three: ‘There will be no derogation from the sovereignty of either Government (sic).’ Further, article 1(i) of the British-Irish Agreement recognizes the legitimacy of the choice of a majority of the people of Northern Ireland with regard to its status.

(ii) The relationship between international law and domestic law

This is confused in the draft BOR. While article 56 of the ECHR (territorial application) allowed London to extend the geographical scope of its international obligations, there is no concept in international law of intra-state differences (unless expressly or impliedly agreed?). However, the NIHRC envisages in domestic law: the HRA 1998 continuing to apply in GB; and, after the repeal of section 22(6), having the ECHR incorporated in NI law (in a different way from the rest of the UK). This could potentially fracture the UK’s international obligations. To the argument that NI would have higher standards than GB (the minimum), there is the reply that it would rapidly get out of synchronization and could fall below particular standards\(^\text{131}\). The NIHRC’s BOR would also, obviously, separate NI from GB. I discount the NIHRC wanting consciously to extend its BOR to GB, having the HRA 1998 repealed in its entirety and the ECHR incorporated there on the same basis as in NI.

\(^\text{131}\) Article 11 is one example.
(iii) Derogations and reservations

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

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

(iv) The extent of the BOR?
The NIHRC may believe it is providing only for NI (even if it is floating between the UK and the ROI). However, clause 14(a)(1), dealing with social, economic and cultural rights, includes the following: ‘All public bodies through which any of the legislative, executive or judicial powers of the State are exercised in Northern Ireland...shall therefore take legislative and/or other measures to develop and enforce programmatic responses to the social and economic rights set out below.’

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

(v) States of emergency?

Chapter 17 is headed ‘Emergencies’, and clause 17(b) deals with ‘States of emergencies’. This is legal nonsense. There is no such concept in UK law. There is
the Emergency Powers Act (Northern Ireland) 1926, and similar legislation in GB. This was passed during the general strike. It refers to interference with the supply and distribution of food, water, fuel or light, or with the means of locomotion. It is, in any case, a reserved matter, under the NIA 1998.\textsuperscript{132} Stormont has no responsibility in this area, though it could. This, however, is not what the NIHRC means by a state of emergency.

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

Most probably, the NIHRC is again confusing international and domestic law. Article 15 of the ECHR, which deals with derogations, specifies these as permissible in time of war or other public emergency. Public emergency is a concept of this multilateral agreement in international law. It does not necessarily require, or follow from, a declaration of a state of emergency in domestic law. Since 11 September, the UK state has sought to derogate from article 5(1) as a result of the Anti-terrorism, Crime and Security bill being introduced in Parliament, with a section 19 statement by the Secretary of State about compatibility with Convention rights.\textsuperscript{133}

\textsuperscript{132} Para 14 of sch 3.
\textsuperscript{133} The Bill was published on 13 November 2001, with the Secretary of State’s statement of compatibility. Also, on that day, the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644 came into force. This referred to a proposed UK derogation.
It should not need stating, but it does, given the NIHRC’s equal treatment of the UK and the ROI, that a NI administration, already provided for in Bunreacht na hÉireann, would never be allowed to exercise state of emergency powers. These are reserved for central government in the Irish constitution. I discount, though the NIHRC may not, major amendments to Bunreacht na hÉireann.

(vi) Entrenchment?

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

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

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134 Art 15.2.2.
135 Art 28.3.3.
136 This is recognized, *inter alia*, in paragraph 33 of Strand One of the Belfast Agreement.
138 Paras 3(c) and 22(b) of sch 2.
Again, it should not need stating, but it does, given the NIHRC’s equal treatment of the UK and ROI, that a NI Assembly could not have such a role under Bunreacht na hÉireann. Human rights, as fundamental rights, are dealt with in articles 40 to 44. These are a matter initially for the Oireachtas, but ultimately for the people.\(^{139}\) I discount, though the NIHRC may not, major amendments to Bunreacht na hÉireann.

\((vii)\) The NI Assembly

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

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

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

First, under the first paragraph 9 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement, the ROI is required to provide ‘an equivalent level of protection of human rights as will pertain in Northern Ireland.’

\(^{139}\) Arts 46 & 47.
Reference is made also to ‘measures to strengthen and underpin the constitutional protection of human rights.’ So, if the NIHRC is to succeed with its BOR in NI, and the ROI is to implement its few international obligations under the Belfast Agreement, the 164 draft clauses will have to be added to the fundamental rights in Bunreacht na hÉireann.

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

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

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

The chances of the ROI adopting the NIHRC’s BOR are nil. That means there is no guarantee that NI would be so covered if it were absorbed into the ROI. That’s also why Dublin, which has interfered in the running of the NIHRC, is now promoting an unenforceable all-Ireland charter of rights as a practical alternative to the BOR in NI.\textsuperscript{142}

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

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

\textsuperscript{142} Under the first paragraph 10 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement.
Human rights are dealt with in the Belfast Agreement in the section headed Rights, Safeguards and Equality of Opportunity\(^{143}\) (which is divided into a Human Rights subsection and one on Economic, Social and Cultural Issues\(^{144}\)). But there are also important references to a BOR in Strand One, paragraphs 5(b)-(c), 11 and 26(a). Given the Belfast Agreement is a bilateral international agreement, these paragraphs fall to be construed under articles 31 to 33 of the 1969 Vienna convention on the law of treaties (with article 2 of the British-Irish Agreement ['BIA'] being decisive). Article 31(1) reads: ‘A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

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

**STRAND ONE**

**Safeguards**

5. There will be safeguards…including:

…

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

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

…

Operation of the Assembly

\(^{143}\) Note the concept.

\(^{144}\) Note the word ‘rights’ has been avoided.
11. The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights...

... Legislation

[21.]

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

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

RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY

... United Kingdom legislation

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

... United Kingdom legislation

4. The new Northern Ireland Human Rights Commission (see paragraph 5 below) will be invited to consult and advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and

- a clear formulation of the new rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

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

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

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

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

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

(i) the duties of the NIHRC

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

(ii) the obligations of the UK state

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

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

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

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

The Secretary of State played a straight bat, referring to the Belfast Agreement (sic) and the NIA 1998. She stated that she was writing, as required under section 69(7), ‘to invite you to provide advice of the kind referred to in paragraph 4 of the relevant section of the Agreement’. She ended the letter: ‘The Act does not set a time limit for those proposals, and I am sure that you will want to consult widely. I look forward to receiving your advice in due course.’ As far as the Secretary of State was concerned – and she was correct – the UK government discharged its obligations under the
Belfast Agreement, as incorporated by the NIA 1998\textsuperscript{145}, fully in this regard on 24 March 1999, upon the despatch of the letter to the Chief Commissioner.

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

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

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

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

- one, entered into correspondence with the Secretary of State, as to the meanings of ‘consult’, ‘advise’, ‘scope’ and ‘supplementary’. To the

\textsuperscript{145} The first paragraph of the letter is legally correct, even if ‘commitments’ is not exact: ‘The Northern Ireland Act 1998 which established the Northern Ireland Human Rights Commission implements the commitments in the Rights Safeguards and Equality of Opportunity section of the Belfast Agreement.’
best of my knowledge this did not happen. However, there is an intriguing reference on page 14 of *Making* to the views of the UK government;

- two, sought independent legal advice, ideally not from within the human rights community, but from independent specialist counsel in Belfast or London. I do not know if this was considered;

- three, arranged a friendly legal action, such as summary disposal on a point of law, or an application for judicial review, in the High Court in Belfast, which would have given the NIHRC legal immunity (if successful), and credibility, for the project it embarked upon, involving considerable public resources of time, persons and money.

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

There are two ideological views about rights in NI. The first is that of the human rights community. It believes that, if it had had its way, the troubles in NI would never have taken place.\(^{146}\) Such counter-factual history is difficult to justify. This view may be characterized as self-serving. The second is that of the government of the UK, which gave further effect to the ECHR in domestic law through the HRA 1998. This is the view that rights are integrally related to responsibilities. It is,

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\(^{146}\) See the view of Prof Kevin Boyle, at the launch of the draft BOR, 4 September 2001 (supplied text).
indeed, inherent in the structure of Convention rights: a right followed in many instances by a limitation; the individual benefits from living in a democracy, but also contributes to others in society.

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

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

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

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

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

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

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147 This was the text voted upon in NI on 22 May 1998 (see paragraph 2 of the Validation, Implementation and Review section).
148 Respectively, the country series (before entry into force) and the treaty series (after entry into force).
There have been repeated references to the participants in the 1996-98 multi-party negotiations signing up to the Good Friday Agreement. This claim fails to distinguish the two contracting states and the NI political parties. It also neglects to appreciate that Sinn Féin did not even vote on 10 April 1998 for the MPA (and it never subsequently endorsed the Belfast Agreement).\textsuperscript{149} The other political parties did vote for the MPA under the rules of the multi-party talks, which came to an end on Friday, 10 April 1998. So also did the UK and Irish governments (but to no legal effect). Tony Blair and Bertie Ahern, and, though it was unnecessary under the law of treaties and their respective constitutions, Mo Mowlam and David Andrews, signed the BIA at the end of the talks - without, I believe, the MPA being annexed to the vellum copies.

The Belfast Agreement binds the two states parties. This contains four types of text: one, international obligations, binding on one or both states parties; two, terms implied by international law, both general and particular, three, political text; and four, rhetoric. (The references to a BOR, as argued above, amounted to the Secretary of State requesting advice from the NIHRC, and thereby discharging the UK’s international obligation.) An important implied term is the principle of legality in international law. An example of political text is the section on policing and justice, with ‘a new beginning’ being nothing other than a literary flourish. The Belfast Agreement binds the NI parties politically (for what that is worth), more particularly by what I call its political face. But domestic NI law also binds them. This also includes a principle of legality. If it did not, there would be no constitution. On, for example, the dominant issue of decommissioning, the Belfast Agreement (governed

\textsuperscript{149} Austen Morgan, \textit{The Belfast Agreement: a practical legal analysis} (2000), pp. x-xii.
by the law of treaties) did not alter the domestic law of NI, to the effect that the IRA remains an illegal organization in possession of illegal arms. The international and domestic provisions for amnesty relate only to the handover and/or destruction of weaponry. The Belfast Agreement does not provide that the IRA may hold on to its weapons, until such time as Sinn Féin achieves what it considers the full implementation of the Good Friday Agreement.

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

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

151 P. xvii.
Sinn Féin would have none of this, and it has managed to dominate adversely the implementation of the Belfast Agreement since 1998. It originated ‘the Irish peace process’ in the late 1980s, meaning Brits out and a united Ireland. And it formulated the pan-nationalist strategy. The IRA’s 1997 ceasefire, a restoration of the complete cessation of 1994 (which the republicans broke), has been observed only as regards the police and the army.\textsuperscript{152} Sinn Féin characterized the Belfast Agreement as transitional to a united Ireland, and then, by invocations such as ‘the agreement’ and ‘Patten’, has managed to reconcile revolutionary absolutism and democratic participation - this being tolerated by an appeasing UK government, at the behest of the Irish government, and with constitutional parties playing supporting roles in the power-sharing administration.

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

\textsuperscript{152} Andrew Rawnsley, \textit{Servants of the People} (2001), p. 123.
The NIHRC has majored in the BOR project. To some extent, the 1999 commission seemed determined to realize its goal before the end of its three-year period (its reappointment may lead to a revised strategy). However, the NIHRC’s lack of political realism suggests continuity with the CAJ days. Then, a BOR, despite moments of rationality\textsuperscript{153}, was put forward as a Utopian panacea. Since 1999, the NIHRC has attempted populist mobilizations. Commissioners imply that everyone will gain more rights, through their BOR rather than the courts administering the HRA 1998. The corollary also applies: there has been an extraordinary attempt in \textit{Making} to play down what Strasbourg considers a right fundamental to a democratic society, because the loyal orders, while they hesitantly invoke article 11 of the ECHR (peaceful assembly), have not looked (quite reasonably) to the NIHRC to resolve the issue of parading.\textsuperscript{154}

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

\textsuperscript{153} Brice Dickson, ‘What practical difference would a Bill of Rights make in Northern Ireland?’, June 1994 typescript.
\textsuperscript{154} Clause 12 (heading); \textit{Making}, pp. 77-78; NIHRC minutes, 12 March 2001.
Its non-appearance, in the next series of demands it will make, supposedly in return for further action on decommissioning.

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

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

155 Sinn Féin has said remarkably little about a BOR. It was not interestingly included in the two governments’ ‘take or leave it’ document of 1 August 2001 which resulted from the Weston Park talks. For an indication of the likely response, see Michelle Gildernew: www.utvinternet.com, 4 September 2001.

156 Supplied text, 4 September 2001.

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

158 House of Lords, 1999-2000, Select Committee on the European Union, 8th Report, EU Charter of Fundamental Rights, p. 37. See also, Robert Blackburn, Towards a Constitutional Bill of Rights for the
Among the maximalist demands of the NIHRC are:

- electoral rights\textsuperscript{159}, including (unrepealable) proportional representation, the possibility that NI MPs might have to be included in a UK (or Irish) government, and voting and representing for children at 17 years (or conceivably younger) in NI\textsuperscript{160}; these, of course, are political issues and not questions of right;

- identity and communities, the issue on which the NIHRC was asked to advise: the term ‘parity of esteem’ has been rejected\textsuperscript{161} (though unionism needs to be treated equally with nationalism); however, nationality has been turned into a question of fundamental law (for the UK and the ROI), reverse political discrimination (‘representivity’) has been parenthetically trailed, the Framework Convention for the Protection of National Minorities has been incorporated in part (contrary to the advice of the Council of Europe\textsuperscript{162}), travellers (new age

\textsuperscript{159} Part of the democratic rights chapter. This begins with a paragraph replete with major errors: \textit{Making}, p. 20.
\textsuperscript{160} The criticism has been made that any such change in the voting age would have the sudden effect of boosting the nationalist vote. The point has also been made that the BOR might prevent a voting age lower than 17 years.
\textsuperscript{161} It survives in an alternative. A moment of rationality descended when the NIHRC wrote: ‘It is hard to envisage how the Government could guarantee that the two communities feel respected by each other.’ \textit{(Making}, p. 25)
\textsuperscript{162} Paragraph 11 of the explanatory report accompanying the Convention reads: ‘In view of the range of different situations and problems to be resolved, a choice was made for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue. These provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.’
and otherwise) have been recognized, and public authorities have been given the duty to ‘preserve’ minority cultures;

- a quasi-communist equality agenda, based on equality of outcome, and reverse discrimination\(^{163}\), which subverts NI and European Community anti-discrimination law, and the equality of opportunity vision of the Belfast Agreement;

- a shell for women's rights, which only cross-refers to four other chapters;

- dissolution of the institution of marriage, in favour of the rights and responsibilities of all ‘long-term domestic partnerships’;

- children's rights (29 of the 164 clauses), with a child being defined as under 18 years, including raising the age of criminal responsibility to 12 years (and abolishing juvenile justice); there is a direct horizontal effect uniquely in this chapter; there is also, apparently, a ‘right to play’;

- education rights: while the BOR sends out separatist signals - ‘religious ethos’, ‘Irish-medium education’ -, in the commentary the NIHRC states it is opposed to the continuing exclusion of teachers from fair employment legislation; however, ‘genuine occupational

\(^{163}\) ‘full and effective equality…by reducing inequalities affecting groups disadvantaged on the grounds specified…or on socio-economic grounds’.
requirement’, in the context of recent EC anti-discrimination law (which has not been absorbed properly), would amount to the status quo prevailing;

- language rights: again, the Charter for Regional or Minority Languages is unnecessarily incorporated, part IV providing for an adequate international reporting mechanism, involving a committee of experts within the Council of Europe;

- social, economic and environmental rights (20 of 164 clauses), including health care, adequate standard of living, housing, work, and healthy and sustainable environment; these are clearly intended to be legal rights, given the references to ‘legal remedies’, ‘judicial and administrative procedures’, ‘fair legal process’, and, in chapter 18 (enforcement), compensation and other court orders; and this despite the specific interpretative approach requiring public bodies to ‘take legislative and/or other measures to develop and enforce programmatic responses to the social and economic rights set out below.’;

- there are no limitations in the individual chapters, but, in chapter 16, there is a general limitation clause similar to that in the CAJ's 1993 BOR;

- finally, on the right to life, the BOR is concerned only with violations of article 2. Nothing is offered by way of a horizontal effect (as in the
children’s chapter). Terrorists, however, have an additional 127 clauses. And ‘law enforcement official[s]’ have further restrictions imposed upon them. As for article 5 (liberty and security), the three existing clauses are expanded to 17. Twelve new clauses are added to the existing three in article 6 (right to a fair trial).

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

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

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

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

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

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

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

164 Counsel, December 1999, pp. 20-22.
in interpreting the Convention right, to take into account inter alia the jurisprudence of the Strasbourg Court.)

Section 7(1)(b) states that a person may rely upon a Convention right in any legal proceedings. It is possible – given this express (albeit indirect) horizontal effect (mentioned above) - to proceed against a non-state human or legal person in private law, and have the court find a breach of a Convention right (this is possible in the UK; not in Strasbourg)\(^{165}\).

Section 8(1) allows the court to grant such relief or remedy, or make such order, within its powers, as it considers just and appropriate.\(^{166}\) ‘English law’, as Lord Wilberforce once said, ‘fastens not on principles but on remedies.’\(^{167}\)

The current lord chief justice, Lord Woolf, wrote in 1999 of the creation of human rights torts in both public and private law: ‘These torts will redefine the relationship between the individual and the State but will go beyond this by operating ‘horizontally’ to influence the rights of individuals as well. The interests of minorities will be protected in a way which, up to now, has not been possible.’\(^{168}\)

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

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\(^{165}\) See also s 22(4).
\(^{166}\) Query: if there is a private defendant, could damages be awarded against a (non-appearing) public authority?
This was clear to the drafter of the Belfast Agreement, but the form of incorporation - remedies not rights - was not. The human rights bill had been introduced in the House of Lords in October 1997, and debated there until February 1998. On 10 April 1998, the bill was before the House of Commons. However, no specific reference is made to the bill in the Belfast Agreement. The first paragraph 2 of the Rights, Safeguards and Equality of Opportunity section refers to completing the incorporation of the ECHR (which was not strictly correct). So also does paragraph 4, where the BOR for NI is defined as the ECHR plus any supplementary rights accepted by the UK government. (Strand One refers similarly to the ECHR.)

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

Section 1(1) of the HRA 1998 defines what are called Convention rights, citing their source in the multilateral ECHR. These are also reproduced in schedule 1 of the HRA 1998. It therefore follows that the act may be amended to embrace further Convention rights simply by adding to section 1(1). Section 1(4)-(6) allows the Secretary of State to add by order an ECHR protocol that has been signed or ratified. Rights from other international instruments would require a new section 1(1)(A) by primary legislation, plus inclusion also in schedule 1. They would not be justiciable in Strasbourg, unlike the Convention rights. Amendment of the HRA 1998 is the

\[169\] It had had a second reading on 16 February 1998. The committee stage followed on 20 May 1998.
most obvious way to improve the protection of human rights in UK law throughout the state. There is no technical obstacle to specific NI rights. They could also be added to the HRA 1998. And they would not be justiciable at Strasbourg.

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

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

**Conclusion**

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

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

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

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

*An Assembly human rights committee*

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

The joint human rights committee was not established until the last session of the 1997 Parliament. It held its first meeting on 31 January 2001. Its chairman was (and remains) a Labour MP, Jean Corston. Among the 11 other members was: Desmond
Browne MP (now a junior NIO minister); and Lord Lester of Herne Hill QC and Lord Goldsmith (now the attorney general for England and Wales and also, for the moment, NI). The committee’s terms of reference are: ‘to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)’. It could, for example, enquire into the NIHRC. Before the end of the 1997 Parliament, it rushed out three reports.\(^{170}\) This work has continued in the 2001 Parliament, commencing with an important report on the Anti-terrorism, Crime and Security Bill\(^{171}\).

A human rights committee, with appropriate powers, could be established at Stormont, under paragraph 10 of Strand One of the Belfast Agreement. Standing order 48, made under the NIA 1998, provides for non-statutory committees, including standing committees. Such a committee could not take over all the functions of the NIHRC in section 69 of the NIA 1998. However, it could do a great deal to monitor human rights law and practice. It would have the virtue, given the rules governing the appointment of Assembly committees, of being politically representative.

**A new NIHRC?**

This is quite simply an imperative. An alternative would be the scrapping of the idea altogether, involving an amendment to the NIA 1998. The idea in the Belfast Agreement might encourage the Irish government to cause difficulties. However, Dublin is likely to grow disenchanted with the Irish HRC, and the human rights

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community in both parts of Ireland might find it less easy to maintain its newfound status.

The NIHRC has lacked public confidence since 1 March 1999. It must be doubted that it was recruited on the basis of merit. A minister defined representativeness, when the Northern Ireland bill was going through Parliament, as ‘the broad Unionist community and the broad nationalist community’\(^{172}\). It was not defined in sociological terms: religion, gender, etc. However, that was what was done when the Secretary of State made the appointments.

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

A genuine human rights culture for all

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

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

- action on article 2 (the right to life), as outlined above, namely the develop of the indirect horizontal effect in the HRA 1998. A leading case might well arise from the Real IRA bombing of Omagh on 15 August 1998;

- article 5 (liberty and security, not liberty or security), as a result of 11 September, where the Anti-terrorism, Crime and Security Act 2001 will extend to NI, as will other domestic and European measures;

- article 11 (freedom of peaceful assembly), an issue created by republicans in 1994, and not resolved by the UK’s public order approach, combined with a regulating Parades Commission, which has failed to embrace a genuine human rights approach. There is now another NIO review, and this may well lead to a new approach to the problem, capable of winning the assent of those who wish to exercise this particular human right;

- ECHR protocol no. 12 (the right not to be discriminated against): the UK is refusing to sign, let alone ratify, this measure, adopted in Rome on 4 November 2000. The most distressing human rights moment
since the Belfast Agreement was the Patten report on policing proposal for 50/50 reverse discrimination. This necessitated the disapplication of NI’s anti-discrimination law as regards the police, and an opt out in a European directive (also allowing teachers in NI not to benefit from equality protection). The NIHRC (and the Equality Commission) were gung-ho for reverse discrimination in favour of ‘Roman Catholics’ (but not other groups?). Both organizations will have to choose between Patten and protocol no. 12. And, given allegations about lower-merit catholics being recruited over higher-merit protestants, this issue is likely to end up in the NI courts and the European Court of Justice and/or the European Court of Human Rights.

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

What's wrong with the NI human rights community? The answer is: a great deal. While I have had cause to criticize this movement in the past, I have never directly answered this question. I do now. And I wish to argue: one, the NI human rights community failed to rise to the challenges of the troubles after 1968; two, it came to consort with catholic nationalism as a putative vehicle of progress; three, this led to the human rights community benefiting from the patronage of the UK (including the provincial state bureaucracy); four, it has consistently misconstrued the 1998 Belfast Agreement, as to its general character and particular provisions; five, while there may be surviving secular and radical elements in the human rights community, it is already clear that ethnic (Irish) nationalism will not tolerate a genuine human rights culture outside its tribal concerns; six, the NI human rights community became legally redundant when the Human Rights Act ('HRA') 1998 came into force on 2 October 2000.
I need to define what I am discussing.\textsuperscript{175} The rhetoric of human rights has echoed in international relations since the 1970s\textsuperscript{176}, and in domestic UK politics from the 1990s (and also in the ROI). The NI human rights community originated in the Committee on the Administration of Justice ('CAJ'), founded in Belfast in 1981. Legal radicalism was embedded in NI's two universities, well before human rights became part of the professional training of solicitors and barristers. The CAJ dominated the NIHRC, established under the Northern Ireland Act 1998. I refer to the first, or Dickson, commission, given that Prof Brice Dickson was chief commissioner between 1999 and 2005. I also refer to the second, or McWilliams, commission, since Prof Monica McWilliams took charge on 1 September 2005. The rest of the community comprises those members of NI's state-sponsored community and voluntary sector, who have backed the NIHRC's plans for a comprehensive bill of rights - even though this formed no part of the Belfast Agreement. (I should also mention British Irish Rights Watch in London, which acts as the overseas office - as members see it - of the NI human rights community.)\textsuperscript{177}

\textsuperscript{175} Human rights and equality are indeed linked. Equality of opportunity may be considered an aspect of human rights. However, in NI, there is an equality industry which is both older and more extensive than the human rights community. I have already considered the equality industry in 'The equality industry: a constitutional critique', a paper presented to a Northern Light Review conference on 5 November 2004. I make no references here to equality issues.

\textsuperscript{176} On human rights in international relations, see Kirsten Sellars, \textit{The Rise and Rise of Human Rights}, Sutton 2002. See also the foreign and commonwealth office's - increasingly fatter - annual reports on human rights, published since 1998. These reports are commented upon each year by the foreign affairs committee of the house of commons.

\textsuperscript{177} For a humorous, but no less accurate, description of the NI human rights community, see Steven King, \textit{Belfast Telegraph}, 14 April 2004.
The CAJ, 1981 -

I have referred already to this organization\(^{178}\), and to one of its luminaries: Angela Hegarty, a legal academic and later a human rights commissioner in NI. At the Irish government’s forum for peace and reconciliation at Dublin Castle on 31 March 1995, she made the following claims in her evidence\(^ {179}\):

- one, the CAJ was constitutionally neutral;

- two, it derived all its positions from international law;

- three, it opposed derogations from particular human rights;

- four, it stood for international human rights standards in domestic law;

- five, this could be done by incorporating such standards by analogy with EC law;

- six, there was no basis for emergency legislation (and in any case there was no emergency);

\(^{178}\) In What Bill of Rights? (pp. 43-102).

seven, the CAJ's bill of rights of 1993 was the appropriate vehicle; and

eight, there should be a human rights commission for (Ireland?) NI.

These claims require the following responses. One, the CAJ was constitutionally confused. It operated in a jurisdiction of the UK (not part of the Irish nation). Constitutionally, it should have affirmed the rule of law, including the legitimate use of force, and opposed especially paramilitary violence. Two, the CAJ certainly rifled texts of international diplomacy and politics in order to indict the UK government. But only a proportion of those contain international law, and it requires some subtlety to identify the law recognized by a customary system. Further, such international law needs to be legislated at Westminster to have domestic effect. Three, derogation is of course an aspect of many international human rights agreements, provided for in the 1969 Vienna convention on the law of treaties. Derogation permits agreements to remain effective. Four, incorporation is simply a debating point. States say and do things internationally - where standards differ from obligations - for reasons of diplomacy. There is no necessary relationship, for a dualist state such as the UK (or ROI), with their domestic, constitutional order. Five, the EC analogy could never have worked, except for human rights expressly made part of European law. The Human Rights Act 1998 gave further effect to the council of Europe's human rights convention: it did not incorporate Strasbourg human rights (despite the judicial use of

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181 The 1975 Helsinki Final Act, for example, is not a treaty.
such layperson's language). Six, the IRA was on ceasefire on 31 March 1995. It broke it the following year (on 9 February 1996). The argument about emergency legislation is best met with: if ordinary law is more than adequate, why do governments not rely simply upon what they have got? Seven, the CAJ’s bill of rights was eclipsed by the Human Rights Act 1998, though the NIHRC, with little or no remit, went for a comprehensive, provincial bill of rights (regardless of implications for the other two UK jurisdictions and ignoring the ROI, which had been expressly related to NI by the Belfast Agreement\textsuperscript{182}). Eight, the CAJ was always keen on Irish institutions, its putative human rights internationalism taking little interest in the rest of the UK. A human rights commission was the strategic objective of the CAJ: it secured it through the Belfast Agreement, and indeed became the predominant force on the first NIHRC.

**What Should the Human Rights Community Have Done?**

Given the character of the conflict in NI, I submit that the priorities should have been: one, opposition to terrorism, domestically and internationally, including support for extradition; two, an emphasis upon the positive obligations of public bodies as well as the negative ones; three (in anticipation of the HRA 1998), the development of the idea of an indirect horizontal effect; four (also from more recently), attention to the analogy of international refugee law; and especially five, reliance upon the concept of human rights abuse as well as violation - which could have been done from 1981.

\textsuperscript{182} Rights, Safeguards and Equality of Opportunity, first paragraph 9.
(1) Counter-terrorism (including Extradition)

We know now that Irish republicans, and Ulster loyalists in reaction, ran 30-year terrorist campaigns. Neither was in anyway justified. The failure of the IRA (1969 to 2005\textsuperscript{183}) contrasts with the 30 months of 1919 to 1921, which led subsequently to Irish statehood. Equally, the criminality of loyalists compares unfavourably with the 30 months of 1912 to 1914, when Ulster unionists defeated nationalist irredentism through popular mobilization.

But the 1970s to 1990s also saw instances of terrorism in many other European countries, with roots in late-nineteenth-century anarchism and anti-state violence, and helped shape the present-day phenomenon of international - Islamic - terrorism.

Extradition is an important weapon for democratic states, preventing a terrorist hiding, or even conspiring, in another state. The IRA, in its war against NI, used the ROI for its headquarters and other things. Irish terrorism had an international character.

The council of Europe's 1957 European convention on extradition (which entered into force in 1960) is the principal regional multilateral agreement. A suspect had available the long-established defence, under article 3(1): 'Extradition shall not be granted if the offence…is regarded by the requested Party as a political offence…'.

The ROI signed and ratified this instrument in 1966; the UK did not do so until 1990/91. The latter preferred to rely upon domestic legislation in both states rather than a multilateral agreement: the Extradition Act 1965 (in the ROI); and the Backing

\textsuperscript{183} But continuing?
of Warrants (Republic of Ireland) Act 1965. But the ROI, even though it had emergency legislation to deal with the IRA in its own state, refused to cooperate effectively with the UK. Dublin dragged its heals in 1974 in the Sunningdale-inspired UK/Irish law enforcement commission. The Irish government - referring to its courts - would not deny the IRA its spurious political offence defence as regards NI. Parallel legislation - the Criminal Law (Jurisdiction) Act 1976 (in the ROI) and the Criminal Jurisdiction Act 1975 - simply permitted fugitive political offenders to be tried in one part of Ireland for terrorist crimes committed in the other.

The issue in Europe then became counter-terrorism generally. The 1977 European convention on the suppression of terrorism - a response to Palestinian violence in several countries - entered into force in 1978. It denied terrorists access to the political offence defence. The UK signed and ratified the convention in 1978. The ROI refused. It continued to do so until the 1985 Anglo-Irish agreement. Even then, while it signed in 1986, it did not ratify until 1989. However, the Oireachtas did legislate on extradition: Extradition (European Convention on the Suppression of Terrorism) Act 1987 (plus amending acts in 1987 and 1994).

This was to reckon still without the Irish courts. In *Finucane v McMahon* [1990] IR 165, the Irish supreme court did a great deal to restore the political offence defence for earlier cases.

Terrorism has been recognized as a global problem since the league of nations elaborated the convention for the prevention and punishment of terrorism in 1937.

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The 1975 Helsinki final act stated, in its declaration of principles: 'The participating States...will, *inter alia*, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the régime of another participating State.'

At the United Nations ('UN'), there have been five conventions on terrorism - in 1973, 1979, 1997, 1999 and 2005 (not yet in force) - adopted by the general assembly. These deal respectively with: internationally protected persons; hostages; terrorist bombings; financing and nuclear terrorism. (There are a further eight UN conventions - from 1963 to 1991 - deposited other than in New York.) A comprehensive convention - in response to 9/11 in 2001 - awaits general assembly agreement; Islamic states have been trying to exclude Palestine from the definition of terrorism.

There are also seven regional conventions on terrorism (from 1971 to 1999), including the 1977 European convention on the suppression of terrorism mentioned above.

The principal institution at the UN is the security council's counter-terrorism committee ('CTC')\(^{185}\) (established in the wake of 9/11). The CTC seeks to encourage member states to become parties to the 13 UN conventions, and then to implement these instruments. Terrorism prevention is the responsibility of the UN's office on drugs and crime in Vienna. It provides legislative assistance to member states, in furtherance of this international law.

\(^{185}\) There is also a counter-terrorism executive directorate, headed by an ambassador.
I am unaware of the NI human rights community having engaged with this UN and other work. Has international counter-terrorism ever been taught in the two university law departments? It is true that the office of the high commissioner for human rights in Geneva has, since 11 September 2001, ‘placed a priority on the question of protecting human rights in the context of counter-terrorism measures’\textsuperscript{186}. But the response, we are only concerned with human rights, is an inappropriate precedent for NI. The CAJ became identified as defenders of (republican) terrorism, in a context of sectarian polarization. It advanced a simplistic notion of international law. The NIHRC in turn continued to behave like a tribal pressure group, rather than a public body with a statutory responsibility. The NI human rights committed has exhibited nothing but bad faith.

\textit{Who killed whom in the NI Troubles?}

In the NI troubles - it is necessary to recall - , 3,593 people were killed between 1969 and February 1998.\textsuperscript{187} The largest category is those killed by republican paramilitaries: 2001 or 56 per cent. The second largest is killings perpetrated by loyalist paramilitaries: 983 or 27 per cent. (Republican and loyalist organizations killed respectively more republicans and more loyalists.) The security forces combined were responsible for 382 deaths, or 11 per cent. It is therefore the position that the vast majority of deaths - 83 per cent - are attributable to illegal paramilitary organizations; just over one in ten was the direct responsibility of the state.

\textsuperscript{186} \texttt{www.ohchr.org/english/issues/terrorism}.

\textsuperscript{187} The costs of the troubles study: Marie-Therese Fay, Mike Morrissey & Marie Smith, \textit{Northern Ireland's Troubles: the human costs}, London 1999, p. 170 (table 6.13). A total of 3,601 is given on p. 130. It is unclear whether these figures include the ROI, Great Britain and mainland Europe.
The NI human rights community created a considerable hierarchy of victims. It went for the one in ten state killings. Within that category, it came to the defence of invariably republican terrorists, who (in their own light) were waging war.\textsuperscript{188} The nearly nine in ten, who were killed by republican and loyalist paramilitaries, were - and are - ignored. Police, soldiers, judges and ordinary civilians are treated with contempt; political protestors (Bloody Sunday), IRA members (Loughgall) and so-called human rights lawyers (Finucane, Nelson) are sanctified. Human rights activists are unapologetic about this. Indeed, rare challenges lead to displays of tetchy superiority. 'Clearly we need to have another go at restating our position on the question of non-State violence', said another CAJ member at the 1995 forum for peace and reconciliation in Dublin. 'We have said that we are opposed to it. Clearly that is not adequate for many people. Unfortunately that may be a matter of the lack of a human rights environment that we have.'\textsuperscript{189} Jane Winter of British Irish Rights Watch also had a go at patronizing critics: 'Something we have noticed in our work already, even though the Human Rights Act is in its infancy, is that ordinary people, and others, are ignorant about human rights. Many people, including some politicians, are confused about how human rights apply, thinking that the rights protected by the Human Rights Act can regulate disputes between citizens, rather than between citizens and public authorities. Education is clearly needed to dispel this confusion, otherwise there is a danger that people will feel let down by the Act because of erroneous perceptions about its scope.'\textsuperscript{190}

\textsuperscript{188} Fionnuala Ní Aoláin, \textit{The Politics of Force}, Belfast 2000.
This is hardly consistent with a humanitarian view of people in strife, where a death is a death. Yet human rights law is derived from international humanitarian law. The NI human rights community is of course wrong - as I intend to show with the next four points below. Fortunately, the courts lack the rigid discrimination of the NI human rights community (exemplified above by the CAJ and British Irish Rights Watch). In the Bloody Sunday tribunal litigation, in London rather than Belfast, in 1999 and 2001, which led to the London hearings, former British soldiers were seen, not as human rights violators, but as persons whose right to life had to be protected from republicans in NI.191

(2) Positive and Negative Obligations

The human rights convention was agreed by the UK and other member states of the council of Europe in 1950. Article 1 reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in...this Convention.' Some of the rights and freedoms are defined negatively, prohibiting states parties from acting in certain ways. Others are defined positively, imposing obligations on the member states. An example of the former is: 'No one shall be subjected to torture...' (article 3). An example of the latter (arguably) is: 'Everyone has the right to respect for his private and family life...' (article 8). There is a line of Strasbourg cases regarding the UK and other member states, which point to the

191 R v Lord Saville of Newdigate, ex parte B, 16 March 1999 DC & 15 April 1999 CA; R v Lord Saville of Newdigate, ex parte A [2000] 1 WLR 1855 CA; R (A) v Lord Saville of Newdigate [2001] EWCA Civ 248 [2002] 1 WLR 1249. There were only, it is estimated, 81 convictions for the 668 soldiers killed in NI (Kevin Myers, Sunday Telegraph, 17 April 2005, citing the work of Col. John Wilson, editor of the British Army Review).
positive obligations of the state (and also introduce the idea of horizontality: see further below).\textsuperscript{192}

The principal positive obligation has become the duty of domestic protection. In a member state, rights and freedoms are bestowed on everyone. Persons in turn have responsibilities (as stressed by the Blair government following the enactment of the HRA 1998). However, these responsibilities are expressly only negative, in article 17: prohibition of abuse of rights. But what if there are abuses of human rights? It follows that the member state has a duty of domestic protection. The legal question of standard arises: does the member state have to protect everyone from every possible abuse or is there a lower standard? The answer is the latter, but foresight is important\textsuperscript{193}. There is authority, in Strasbourg case law, in an unsuccessful application against deportation from France, for the duty of domestic protection (and also for human rights abuses): \textit{HLR v France} (1998) 26 EHRR 29 (a Colombian drug trafficker, potentially at risk from former associates in a context where the domestic authorities could not adequately protect him).

Applying this distinction to NI, which is done rarely by the human rights community, human rights law prohibits 'the state' (in international discourse only) from acting in certain ways. But it may also require it to act positively in other ways. The most likely scenario is the duty of domestic protection. But the Northern Ireland human rights community has not developed the positive/negative distinction, because - I submit - it raises the related questions of domestic protection and human rights law.

abuses. Human rights activists, dependent upon nationalism, are happy to accuse the
UK of violations: they do not seek to require it to discharge its duty of domestic
protection (through the rule of law and minimum use of force).

(3) Indirect Horizontal Effect

The coming into force of the HRA 1998 on 2 October 2000, opened up the possibility
of an indirect horizontal effect, flowing from sections 6(3) and 7(1)(b): 'In this section
"public authority" includes - (a) a court or tribunal…A person who claims that a
public authority has acted (or proposes to act) in a way which is made unlawful by
section 6(1) may - …(b) rely on the Convention right or rights concerned in any legal
proceedings…'. Murray Hunt first suggested this. Other legal writers have
developed the idea of indirect horizontal effect - which is inspired by EC law. A
litigant could invoke convention rights in a private law action. There is authority,
which does not close off this option: Wilson v First County Trust Ltd (No 2) [2001]
EWCA Civ 633 [2001] 3 WLR 42 paragraph 18 - though the case turned on the
remedy of a declaration of incompatibility regarding legislation.

On 20 September 1999, the NIHRC published its draft strategic plan. It contained the
usual CAJ stuff. I wrote a 157-page legal commentary, which was sent to the NIHRC
and to the NIO. I made the point that, when the HRA 1998 came into force, there

195 Thomas Raphael, 'The Problem of Horizontal Effect', EHRLR 493; Ralf Brinktrine, 'The Horizontal
Effect of Human Rights in German Constitutional Law', [2001] EHRLR 421; Ivan Hare, 'Vertically
196 While the case was reversed by the house of lords, there was no criticism of the human rights point:
197 This is available on my professional website: www.austenmorgan.com.
would be a possibility of an indirect horizontal effect in domestic human rights law. I
was excited by the possibility. The NIHRC was not. I never expected it to take my
document, and the ideas therein, seriously. However, I was amused when I learned
what it did. Each submission was vetted by workers (as these public officials are
called) - chanting their simplistic interpretation of section 75 of the Northern Ireland
Act 1998 - in accord with whether it promoted the causes supposedly identified in
statute. ¹⁹⁸ Only the so-called section 75 groups would be allowed to comment on the
NIHRC's draft strategic plan.

(4) International Refugee Law

This is based principally upon the 1951 Geneva convention and a 1967 protocol:
multilateral agreements (like the human rights convention). Asylum seekers are
entitled to international protection, where they can show that they have been, or will
be, persecuted in their country of origin. As with the human rights convention, the
assumption in the immediate post-war period was that agents of the state would be
responsible. However, in *Horvath v Secretary of State for the Home Department*
[2000] 3 WLR 379, the house of lords held: given the general purpose of the refugee
convention was provision by the international community of surrogate protection, the
test of whether ill-treatment amounted to persecution was dependent upon, not only
the severity of the ill-treatment, but also upon there being a failure by the state to
afford protection against the ill-treatment. Leaving aside the domestic protection
point, the house of lords did not adopt a negative argument about non-state agents
(alternatively, sub-state actors). Skinheads might persecute Roma in Slovakia, or at

least the treatment received was equivalent to persecution. (Horvath was unsuccessful, because their lordships accepted the earlier finding that there was sufficient protection in Slovakia.)

This case is now sufficiently authoritative, regarding the refugee convention, that it is unlikely to be affected by a dictum\textsuperscript{199} of Lord Brown of Eaton-under-Heywood, in \textit{R (Bagdanavicius) v Secretary of State for the Home Department} [2005] UKHL 38 [2005] 2 WLR 1359, even though it was an article 3 human rights convention case.

\textit{(5) Violations and Abuses}

There are two jurisdictions in the European court of human rights at Strasbourg: state versus state (article 33); and individual applications (article 34). Article 34 permits any person to apply, if he claims to be 'the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.' Thus, member states of the council of Europe may be held to have violated a person's human rights.

But there is also an entirely different concept, of abuse in the human rights convention. Article 17 (prohibition of abuse of rights) reads: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or to their limitation to a greater extent than is provided for in the Convention.'
Article 17 has not been widely used. It has been described as applying to 'enemies of democracy'. However, the text actually refers to 'any State, group or person'. It does not deprive terrorists of the benefits of the rights and freedoms set out in the convention: *Lawless v Ireland (No 3)* (1979-80) 1 EHRR 15, 22. However, it has been used against German communists and Dutch racists: Application No. 250/57 *Parti Communiste v Federal Republic of Germany* (1957) YB 222, 224; *Glimmerveen and Hagenbeek v Netherlands* (1979) 18 DR 187. NI - I submit - could benefit from article 17. There is a doctrine of Strasbourg jurisprudence, to the effect that the convention is a 'living instrument': *Tyrer v United Kingdom* (1980) 2 EHRR 1, 10. This has been applied in the context of Irish terrorism: *McVeigh v United Kingdom* (1983) 5 EHRR 71, 88. Consideration should be given to using the human rights convention against, for example, nationalists who seek to prevent peaceful loyalist parades (or vice versa). It could also be used against the NIHRC: as a public authority under section 6(3) of the HRA 1998, it is prohibited by section 6(1) from acting incompatibly with convention rights. The attempted denial of article 11’s application to parades is an instance of abuse under article 17.

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199 'Non-state agents do not subject people to torture or the other proscribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into article 3 ill-treatment would be the state's failure to provide reasonable protection against it.' (paragraph 24)
201 A decision of the European commission on human rights
202 A decision of the European commission on human rights.
203 'It is well established in the case-law of the Court that the Convention must be interpreted and applied in the light of present-day conditions. The existence of organised terrorism is a feature of modern life whose emergence since the Convention was drafted cannot be ignored any more than the changes in social conditions and moral opinion which have taken place in the same period.'
204 Article 11 is entitled: freedom of assembly and association. Assembly includes parading. However, the NIHRC, referring to articles 9 to 11, which are often taken together, described them as providing for: rights to freedom of thought, expression, information and association: *Making a Bill of Rights for Northern Ireland*, Belfast September 2001, pp. 77-78.
One of the most important cases in NI is the civil action against the alleged perpetrators of the Real IRA bomb in Omagh on 15 August 1998. The NIHRC did not take this view. It chose to try and stop the Panorama programme, which was decisive for the campaign. It is to be hoped that the lawyers acting for the relatives of the dead will seek a declaration from the court in Belfast that the latter's right to life was abused by republican bombers. That will put a better connotation on the article 2 cases which have been championed by the NI human rights community.205

The First NIHRC, 1999 - 2005

The NIHRC, established by the London government in 1999, had collapsed in ignominy by 2005. Nationalists like to blame the British. I prefer to focus on the human rights community. It was the author of its own destruction. London is responsible to the extent that it indulged six years of radical gestures with money and legal status.

The Belfast Agreement

The achievement of the Belfast Agreement was unexpected. There was a vote in NI of 71 per cent in favour on 22 May 1998. But there has also been a significant decline in support since the referendum. There is nothing mysterious about the Belfast Agreement. It was anticipated by the 1985 Anglo-Irish agreement. And, like the latter, it took the form of an international agreement between the UK and Irish states. However, the Belfast Agreement, as a treaty, had annexed to it a multi-party

205 I refer to Jordan, McKerr, Kelly & Others and Shanaghan, decided by Strasbourg on 4 May 2001.
agreement, reached by political parties in NI (but also voted upon by the London and Dublin governments). A great deal of nonsense has been talked about the Belfast Agreement. The UK and Irish states signed a British-Irish agreement. The political parties voted on the multi-party agreement under the rules of the talks. Sinn Féin abstained; it never 'signed up to' what nationalists call with increasing reverence, the Good Friday agreement. That was reported in the following day's Irish Times.²⁰⁶

The Declaration of Support section included: 'we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights for all.' The Belfast Agreement might have worked if: one, the Irish government had not been concerned principally with getting Sinn Féin into government in NI and keeping it there; two, the UK government had stood by its pledges, upholding the rule of law, and not embarked upon a fanciful appeasement strategy; three, the inclusive executive finally established in December 1999 had evolved, after a transition, into a voluntary coalition with an opposition in the assembly; four, officials in Dublin and Belfast had run strand two (north-south) as practical international cooperation, rather than incremental Irish takeover of NI; five, everybody had run strand three (east-west) as an alternative emphasis; and six, the UK and Irish governments had not gone outside the Belfast Agreement, Tony Blair to get a series of quick fixes and Bertie Ahern to indulge the fantasy of NI under joint administration. This critique does not blame Sinn Féin, from a position of desired inclusiveness (in the manner of a partner to a marriage nagging the other). The republicans deserve to be excluded, and the IRA has reinforced that view throughout

the past seven years. We know now they never intended to disarm within two years of the Belfast Agreement; we also know they do not intend to disband.

The NIHRC continued the CAJ tradition of constitutional confusion. It took to referring to the Belfast (Good Friday) Agreement, as if unionism and nationalism could be merged. The Belfast Agreement was another attempt at UK devolution, within the 1920-22 partition settlement. It offered the catholic minority, with considerable incentives, the chance to integrate in NI after decades of abstentionism. Republicanism had failed to achieve a united Ireland by violence. And nationalism was to continue to fail democratically, the 2001 census results indicating inadequate consent for reunification. Certainly, there was a certain Irishness to the Belfast Agreement. But this had more to do with integration in NI than with the construction of a unitary Irish state by, as some nationalists appear to believe, 2016. There is also a certain Ulster-Scotsness in the agreement, which has allowed the majority community to resist nationalist patronizing.

The Belfast Agreement promised the human rights community the following:

- the HRA 1998 (though the NIHRC would be little interested);

- a human rights commission 'with membership from Northern Ireland reflecting the community balance';

- the NIHRC to advise the UK on the scope for supplementary rights (two instances being given);
• the principle of 'the constitutional protection of human rights [in the ROI]...[with] 'at least an equivalent level...as will pertain in Northern Ireland';

• an Irish human rights commission; and

• the possibility of a joint committee linking the two bodies.  

The NI human rights community was ecstatic. It: one, set out to colonize the NIHRC; two, adopted the strategy of a comprehensive bill of rights, to be legislated at Westminster during the first NI assembly; three, imported the culture of a pressure group into a public body; four, ignored the (unionist inspired) principle of human rights equivalence between north and south; five, succeeded in colonizing the Irish human rights commission; and six, chose not to press its bill of rights on the ROI.

Appointments and Resignations, 1999 - 2005

The wording of the Belfast Agreement was clear: 'membership from Northern Ireland reflecting the community balance'. This became, in the Northern Ireland Act 1998: 'representative of the community in Northern Ireland'. A minister told parliament that this meant the unionist/nationalist divide. The government had some discretion -

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for example, centrist domination - but unionists and nationalists generally had to be represented.

What did the human rights community do? It set out to substitute itself for this provision of the Belfast Agreement. In May 1998, a little-known academic, Brice Dickson, had suggested the principles for selection: one, representatives of bodies such as the equality commission; two, 'persons with experience of working for a non-governmental organisation in the human rights field'; and three, familiarity with international human rights standards. He cited the so-called Paris principles, indicating at an early stage his unwillingness and/or inability to comprehend the principle of legality, international and domestic. On 2 July 1998, 18 academic so-called human rights experts met at Queen's University, Belfast to agree proposals. Four - Christine Bell, Brice Dickson, Tom Hadden and Angela Hegarty - would later be appointed to the NIHRC. Brice Dickson was appointed on 18 January 1999. And the following additional people on 1 March 1999: Margaret-Ann Dinsmore QC, Tom Donnelly, Rev. Harold Good, Patricia Kelly, Inez McCormack and Frank McGuinness. 'Nationalists welcome human rights appointees', proclaimed the Irish Times. The list had not one person', said Sam Cushnahan of families against intimidation and terror ('FAIT'), 'who "made their reputation by agitating on behalf of the victims of violence."

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209 There is also an analogy with the equality industry. The Belfast Agreement, and the resultant legislation, provided for an equality commission. The existing bodies and their client groups sought to persuade parliament otherwise.

210 Creating an Effective Human Rights Commission for Northern Ireland, SACHR paper. See also, a parliamentary briefing by Michael Lavery QC, the outgoing chairman of SACHR, of 17 September 1998.


212 2 March 1999.
It is believed there were six perceived protestants and four catholics. There were also clearly five males and five females. But, on the crucial criterion, there was not one person identified with the majority, unionist community. More importantly, the CAJ was dominant: the Irish government, and the NIO, identified Brice Dickson as CAJ, at least another three had acknowledged membership in their applications; Inez McCormack's union was also involved with the CAJ; the CAJ even made an application to the council of Europe on behalf of the NIHRC before it was established. Professionally, the NIHRC had: four academic lawyers (all CAJ); a non-practising lawyer; and only one practising lawyer, albeit senior counsel.

At the time, I was inclined to attribute this to NIO naivety given Belfast Agreement optimism. However, in subsequent years, additional appointments - Lady Eames, Chris McGimpsey, Kevin McLaughlin, and Patrick Yu - did not cure the problem. Experienced watchers concluded that the NIO, while staffed by here-today-gone-tomorrow career civil servants from Britain, did not do anything without political calculation. The NIHRC, through the CAJ, was part of the process of attracting the IRA fish into shallow waters. The problem is: the IRA knew that; the CAJ is only slightly constitutionally minded; and the NIHRC was in the hands of academic idealists and ideologues.

More interesting are the resignations:

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216 NIHRC minutes, 9 August 1999.
217 ‘even 35 years within diverse voluntary and public bodies did not prepare me,’ Harold Good wrote subsequently, ‘for the way in which some members [of the NIHRC] acted within meetings of the Commission.’ (*Fortnight*, April 2004)
• Angela Hegarty in December 2000, for personal reasons;

• Inez McCormack and Christine Bell in September 2002, over Holy Cross in north Belfast\textsuperscript{218};

• Patrick Yu in July 2003, over minority rights\textsuperscript{219};

• Paddy Kelly and Frank McGuinness in September 2003, over again Holy Cross\textsuperscript{220}, though they only withdrew (being paid by the NIO)\textsuperscript{221}; and

• Chris McGimpsey in October 2003, in order to stand (unsuccessfully) for the NI assembly.

Ten plus four had been appointed. Seven resigned. Brice Dickson stayed to the end: 28 February 2005. Two commissioners - Lady Eames and Kevin McLaughlin - survived. The staff took over the commission.

\textsuperscript{218} Admittedly, this is difficult to disentangle from a subsequent memorandum: Joint Committee on Human Rights, \textit{The Work of the Northern Ireland Human Rights Commission}, 14\textsuperscript{th} report of 2002-03, Ev 33–45 (especially 38-9).

\textsuperscript{219} Though this is also difficult to entangle from his resignation letter of 7 July 2003.

\textsuperscript{220} NIHRC minutes, 10 November 2003.

\textsuperscript{221} Paddy Kelly resigned in June 2004.
The ROI

The NIHRC's interest in the ROI contrasts with its lack of concern for the rest of the UK. Three points are worthy of comment: one, the Irish government's acceptance of UK human rights norms; two, the human rights community's colonization of the southern human rights commission; and three, its failure to press its bill of rights on the ROI.

(1) Irish equivalence.

In the Belfast Agreement, the Irish government undertook to strengthen human rights protection. This was at the behest of the Ulster unionist party. For too long, Dublin had criticized NI, apparently oblivious to defects in the ROI. The UK, when making concessions, always seemed to fail on reciprocity. In 1998, the HRA was being enacted at Westminster. The ROI remained the only council of Europe state not incorporating the human rights convention. In the first paragraph 9 of the Rights, Safeguards and Equality of Opportunity section, the Irish government undertook 'to strengthen and underpin the constitutional protection of human rights' (note constitutional): 'The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.' That is a long-term commitment.
I have not found in the work of the NIHRC, any reference to this important principle, much less any attempts to act upon it strategically.222

(2) the Irish Human Rights Commission.

The Irish government was slow to implement its part of the Belfast Agreement, including the Irish human rights commission (‘IHRC’). The legislation was not ready until 31 May 2000.223 Dublin also failed to learn from the mistakes of the NIO in Belfast in 1999. The department of foreign affairs, indeed, seemed to have been conspiring with Brice Dickson against its own head of government.224 The legislation allowed for a judge to be president of the IHRC. On 20 July 2000, the appointment of Judge Barrington, formerly of the supreme court, was announced. The Irish council for civil liberties (the CAJ's sister organization), claiming to speak for 15 non-governmental organizations, criticized the appointment for lack of transparency.225

The legislation also provided for the appointment by the government of eight commissioners. T.K. Whitaker was asked to chair an independent selection panel. Though this was internal to the ROI, two of the four members were from NI: Martin O'Brien of the CAJ; and Inez McCormack, a human rights commissioner. The panel selected 16 names from 177 applications: an A team of eight, apparently unanimously recommended; and a B team of eight, which was also balanced equally between men and women. The legislation provided that the government had to have regard to the

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222 Brice Dickson mentioned it casually in a presentation he gave at University College, Cork on 2 October 2004.
224 The NIHRC minutes for 12 June 2000 record: ‘It was agreed that as suggested by the Department of Foreign Affairs, the Chief Commissioner should seek to telephone the Taoiseach regarding the membership of the new Commission.’
need to ensure that 'the members of the Commission broadly reflect the nature of Irish society'. Have regard is a well-known concept in public law. Irish society was nowhere defined, and is a highly problematic concept, not least as to whether Irish refers to the Irish state (called 'Ireland'!) or to geographical Ireland.

The Irish government delayed acting on the panel's recommendations. On 5 December 2000, the minister then announced he had selected: one of the A team (Fionnuala Ní Aoláin); three of the B team (Robert Daly, Suzanne Egan and Jane Liddy); and four of his own names (William Binchy, Olive Braiden, Mervyn Taylor and Tom O'Higgins). A major human rights conference at Dublin Castle was scheduled for three days later. 'There is likely to be concern', noted the *Irish Times*, 'that some prominent activists in the human rights and voluntary sectors have not been nominated.' There was. The human rights community, which had said not a word about the NIHRC, found its voice regarding the IHRC. The minister changed his mind. On 20 December 2000, he added six of the A team: Michael Farrell, Martin Collins, Gerard Quinn, Clodagh McGrory, Nuala Kelly and Katherine Zappone. Ursula Barry - the eighth member - remained rejected, and not because of her family connections with Fine Gael. However, an amending statute was necessary. The increase from eight to 14 was not authorized until the second half of 2001 more than three years after the Belfast Agreement and towards the end of the NIHRC's first term of office.

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(3) Why no bill of rights for the ROI?

The joint committee of the Belfast and Dublin commissions was established on 8 November 2001. It met, in alternative capitals, roughly quarterly, though there are no minutes available after 11 April 2003. The list of apologies - especially for Belfast meetings - is even longer than for the NIHRC and IHRC.

Brice Dickson, apparently, made no attempt to promote his bill of rights in the ROI, as required - I submit - by the first paragraph 9 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement. At a first, shadow, meeting of the joint committee on 30 May 2001, he reported that they would be giving final advice to the UK government in March 2002. 'The NIHRC', the minutes record, 'has written to both the British and Irish governments seeking their views at this stage. The British government has arranged for officials to meet with Commissioners and the Irish government's response was that they would not comment until the consultation document is produced.' Reports were made at subsequent meetings, as the NIHRC became bogged down in consultation. But there is no evidence of any member of the IHRC asking about the constitutional protection of human rights in the ROI and the principle of equivalence with NI.

Part of the reason was the distraction of a charter of rights for Ireland. This originated in a UK idea for NI in early 1973.228 It was recycled by the ROI - then still opposed to incorporating the human rights convention - in 1993 as an all-Ireland charter. In the Belfast Agreement, the remit of the joint committee was simply: 'to consider,

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226 6 December 2000.
among other matters, the possibility of establishing a charter, open to signature by all
democratic political parties, reflecting and endorsing agreed measures for the
protection of the fundamental rights of everyone living in the island of Ireland.\footnote{Northern Ireland Constitutional Proposals, Cmnd 5259, March 1973, part IV.}  This was hardly mandatory. Sinn Féin also seems to have been accepted uncritically
as a democratic political party. However, at the behest of the IHRC, the non-binding
charter of rights for the island of Ireland became the joint committee's principal
project. No substantive reference was made to the human rights convention (and
Strasbourg jurisprudence), which applied in NI through the HRA 1998 and was being
legislated in the ROI through the European Convention on Human Rights Bill 2001
(which would not come into force until 31 December 2003). Surely Strasbourg
integrated the UK and Irish states in a common human rights legal space (the council
of Europe). Nor was any serious reference made to EC law\footnote{TEU, preamble, articles 6, 7 & 46 (1997 Amsterdam treaty); articles 7 & 46 were replaced by the
2001 Nice treaty.}, and in particular the
charter of fundamental rights (solemnly proclaimed by the European parliament, the
council and the commission at Nice on 7 December 2000). This created a common
non-binding human rights space throughout the EU. Effect is being given through
part II of the EU constitutional treaty\footnote{See also, declaration 12.}, though some rethinking will be necessary
following the French and Dutch referendums. The IHRC received some replies from
parties in the ROI (including Sinn Féin); the NIHRC received none.\footnote{Minutes, joint committee, 13 December 2001, 31 January 2002, 22 March 2002.} It became
clear that the northerners did not want the charter of rights making it difficult to
promote their bill of rights.\footnote{See Brice Dickson, ‘A charter of rights for the island of Ireland’, 2 October 2004.} Paddy Kelly, Tom Hadden and Inez McCormack were
appointed to a sub-committee. On 3 September 2002, the joint committee - now

\footnotetext{First paragraph 10. Unfortunately, part of the language of article 2 of the Irish constitution (‘the
whole island of Ireland, its islands and territorial seas’) is preserved by this paragraph.
\footnotetext{See Brice Dickson, ‘A charter of rights for the island of Ireland’, 2 October 2004.
under Maurice Manning from the ROI\textsuperscript{234} and Brice Dickson - agreed 'that there [was] considerable work to be undertaken on this project before going to public consultation.'\textsuperscript{235} In September 2004, a pre-consultation paper on a charter of rights was published, following a more selective circulation.

\textit{The NIHRC and the Courts}

Law comes from parliament, and to a lesser extent from the courts. The NIHRC was empowered to assist individuals, though not seemingly to bring proceedings on general points.\textsuperscript{236} Brice Dickson emphasized his bill of rights, and not the common law (perhaps because of his time on the equal opportunities commission); however, some of his commissioners became keen on helping certain individuals.

NIHRC intervention.

In August 2000, two years after the Omagh bombing, the coroner asked the NIHRC to make submissions. When an application to intervene was refused as ultra vires, the NIHRC applied unsuccessfully to Sir Robert Carswell LCJ for judicial review. It appealed unsuccessfully to the court of appeal in Belfast; however, Kerr J dissented, relying upon section 69(6) of the Northern Ireland Act 1998. He took the view that the NIHRC was entitled to apply, not necessarily to intervene: 'I should perhaps observe that I do not believe that such a result would herald a proliferation of

\textsuperscript{234} The NIHRC had objected to his appointment: minutes, 12 August 2002.
\textsuperscript{235} Minutes.
interventions by the Commission.\textsuperscript{237} The NIHRC succeeded eventually in the house of lords (Lords Slynn, Woolf, Nolan and Hutton, with Lord Hobhouse dissenting): In re Northern Ireland Human Rights Commission [2002] UKHL 25. Four law lords accepted that the capacity to apply was implied. Lords Slynn and Hutton urged caution upon the NIHRC.\textsuperscript{238} Lord Hobhouse commented: 'The question whether a Human Rights body should be empowered to intervene…could be an activity with considerable political significance so long as sectarian divisions persist.'\textsuperscript{239} This was the NIHRC's principal victory in the courts, and it is significant that it concerned its own powers. Little thought seems to have been given to the argument: did not the commission, as a legal person (a body corporate), have a common law right to apply to intervene which had not been removed by the Northern Ireland Act 1998?\textsuperscript{240}

Holy Cross.

On 9 June 2003, an anonymous applicant, 'E', identified as the mother of a child at Holy Cross school in north Belfast, secured leave from Kerr J to apply for judicial review.\textsuperscript{241} The issue was not academic, according to the court. The test is: an arguable case. A year later, Kerr LCJ dismissed the application, including all the arguments taken by Seamus Treacy QC: 'The sense of outrage that these events [in autumn 2001] provoked cannot be allowed to substitute for a dispassionate and scrupulous examination of the legality of the policing strategy and the decisions taken

\textsuperscript{237} In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review, Kerr J, p. 20. This was not Brice Dickson's view: see the NIHRC statement to the UN Commission on Human Rights, Geneva, April 2004, p.6.

\textsuperscript{238} Paragraph 25 & 61.

\textsuperscript{239} Paragraph 66.

\textsuperscript{240} McCollum LJ, p. 12.

\textsuperscript{241} In the Matter of an Application by 'E' for Judicial Review [2003] NIQB 39.
as to how the protest should be handled…I have concluded that the policing judgments made have withstood the challenge that has been presented to them.\textsuperscript{242}

The 'E' case was to be the undoing of the NIHRC. It contains salutary lessons. An element of the NIHRC, including (some?) staff members, rallied immediately to the catholic parents and children.\textsuperscript{243} There was a right to education, they proclaimed. The protestant residents presumably were abusing this.\textsuperscript{244} Frank McGuinness, Patricia Kelly, Inez McCormack and Christine Bell attended the scene of the sectarian confrontations in October and November 2001. They were critical of the police. These commissioners later gave evidence in the 'E' case. Brice Dickson had called a special commission meeting for 26 October 2001. The casework committee (backed by case workers) wanted to take legal action. Not all commissioners agreed (the practice being consensus). Further advice was to be sought from, it seems, Michael Lavery QC. The best interests of the child were foremost (the implication being that public authorities were not upholding the principle). On 5 November 2001, the casework committee\textsuperscript{245} decided to proceed by legally assisting a Holy Cross parent; Harold Good (plus two commissioners) objected subsequently. Brice Dickson had the support of three commissioners\textsuperscript{246}. When he wrote to the chief constable on 4 December 2001 regarding Holy Cross (the NIHRC having been told about police criticism\textsuperscript{247}), Paddy Kelly and Inez McCormack accused him of a breach of confidentiality.\textsuperscript{248}

\textsuperscript{242} In the Matter of an Application by 'E' for Judicial Review [2004] NIQB 35.
\textsuperscript{243} Minutes, 10 September 2001.
\textsuperscript{244} Minutes, 8 October 2001.
\textsuperscript{245} Believed to comprise: Christine Bell; Frank McGuinness; Patricia Kelly; and Brice Dickson.
\textsuperscript{246} Believed to be: Harold Good; Margaret-Ann Dinsmore; and Tom Donnelly.
\textsuperscript{247} Minutes, 26 November 2001.
\textsuperscript{248} This followed an earlier suggestion levelled at the Holy Cross supporters: minutes, 26 November 2001.
Subsequently, Brice Dickson tried, and failed, to withdraw the legal support. The resignations of Inez McCormack and Christine Bell took place before ‘E’ came to court in June 2003; the withdrawals of Paddy Kelly and Frank McGuinness after the grant of leave. Costs were awarded against the NIHRC following the substantive hearing. It seemed prepared to fund an application to the court of appeal. Other cases were affected.

*The Joint Committee on Human Rights Intervenes*

This cross-party committee - which comprises six peers and six MPs - was established at the end of the 1997 parliament. A leading member was Lord Lester of Herne Hill. In 2001-05, it published a total of 87 reports, scrutinizing bills and on particular human rights topics; Murray Hunt, the most-recent legal advisor, has been a prolific influence.

Writing in 2001, I suggested that this Westminster select committee was a good model for the NI assembly, and it would allow elected representatives to deal with the self-appointed human rights community. I even suggested the joint committee on human rights should inquire into the NIHRC.

The NIHRC took little interest in the committee, being concerned principally that any human rights commission in England and Wales (or Britain) - which the committee

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249 Minutes, 8 April 2002.
250 This was noted in: minutes, 9 June 2003.
advocated - would not have a UK remit.\textsuperscript{251} Fortunately, the (British) commission for equality and human rights, envisaged in the Equality Bill, will effectively act as a UK body.\textsuperscript{252}

The joint committee on human rights decided to throw a lifeline to Brice Dickson (Lord Lester's representative in NI\textsuperscript{253}) in the wake of the McCormack/Bell resignations. Evidence was taken from Brice Dickson, the two former commissioners and the NIO in late 2002. No further oral evidence was sought. There was no proper investigation, despite the 20 individuals and organizations who had submitted written evidence\textsuperscript{254}. The committee reported on 15 July 2003: \textit{Work of the Northern Ireland Human Rights Commission, 14\textsuperscript{th} report of 2002-03, HL Paper 132/HC 142}. The report went easy on Brice Dickson.\textsuperscript{255} There were shades of: blame the British. However, the committee operated in a Westminster environment of practical (and incremental) policy persuasion. The last of the 24 recommendations was: a new consultative structure regarding the advice on a bill of rights.


\textsuperscript{252} As assumed by Alvaro Gil-Robles, commissioner for human rights in the council of Europe: Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4 - 12 December 2004, CommDH(2005)6, paragraph 153.


\textsuperscript{254} I submitted written evidence: Ev 71-3.

\textsuperscript{255} For his reply of 29 March 2004, see appendix 5 to: Joint Committee on Human Rights, \textit{The Work of the Committee in the 2001-2005 Parliament, 19\textsuperscript{th} report of 2004-05}, HL Paper 112/HC 552, pp. 126-36.
The only written evidence that counted was a memorandum from Madden and Finucane, solicitors, dated 24 November 2002.\textsuperscript{256} It related to Holy Cross, 'E' being their client. Madden and Finucane were livid about Brice Dickson's letter to the chief constable of 4 December 2001 (referred to above). They stated that he had expressed the view that the policing of Holy Cross was not unlawful. As we now know, this was also the view Kerr LCJ was to express on 16 June 2004. It is difficult to believe that subsequent events after 15 July 2003 were entirely spontaneous. Nationalist Ireland rallied to Madden and Finucane. Brice Dickson, it was implied, had sabotaged the struggle of the Holy Cross parents and children.\textsuperscript{257} The Irish News played a pre-eminent role in this.\textsuperscript{258} The republicans went cold on the NIHRC: at first, they blamed the British, demanding more resources and powers;\textsuperscript{259} then, the commonality of the NIHRC and the republicans marching together to realize the possibilities of the Good Friday agreement disappeared.\textsuperscript{260}

It took a liberal unionist, Lord Laird, to point out: that unionists had criticized the commission consistently from March 1999; that Holy Cross could usefully be compared with Garvaghy Road (which catholic residents had closed to the orange order);\textsuperscript{261} and that human rights were individual though they could be enjoyed collectively. 'As a result of Madden and Finucane's outburst,' he concluded, 'Brice

\textsuperscript{256}Ev 63-7.
\textsuperscript{259} Bairbre de Brún, UTV website, 15 July 2003.
\textsuperscript{261}'No part of Northern Ireland is, or should be, Catholic or Protestant. People have a right to freedom of peaceful assembly. And children should be allowed on the streets, whether to play, go to school, or whatever.'
Dickson is the victim of tribal rage. He is being unfairly treated. Even before the Westminster report, and after the fourth resignation from the commission, Dublin was interfering ominously\textsuperscript{262}. Then Mark Durkan went for Brice Dickson. The republicans woke up and were almost too late on the scene. However, on July 30\textsuperscript{th}, Martin McGuinness paid a visit to the commission.\textsuperscript{263}

\textbf{The McWilliams Commission}

The NIO learned no lessons, judging by the commission which took office on 1 September 2005…or rather, it indicated that government policy was: continue to appease republicans, and let NI become an even colder house for protestants.

\textit{Monica McWilliams}

Monica McWilliams, in contrast to her predecessor, is not an obscure academic. She was a member of the NI assembly between 1998 and 2003, as leader (?) of the NI women's coalition.

A relative of Charles Haughey, she is unashamedly a nationalist. However, she has deep political roots in another tradition, though little mention is being made of past political allegiance.\textsuperscript{264} Monica McWilliams was a favourite of Mo Mowlam\textsuperscript{265}, who wanted an expanded 108-seat assembly to help the women's coalition and loyalist

\textsuperscript{262} This was confirmed by Brice Dickson, in a NIHRC statement to the UN Commission on Human Rights in Geneva in April 2004, p. 2; see also the article by Harold Good in \textit{Fortnight}, April 2004.

\textsuperscript{263} \textit{Irish Times}, 11 August 2003.

\textsuperscript{264} Though see the contribution of Nigel Dodds MP, \textit{Hansard}, Northern Ireland Grand Committee, 29 June 2005, col. 55.

\textsuperscript{265} Mo Mowlam, \textit{Momentum}, London 2003, pp. 146-7 & 256.
fringe parties. No touchy feely person, Monica - as she was designated by the NIO\textsuperscript{266} - combines an ability to exploit her gender with apparatchik qualities Brice Dickson fortunately lacked. Monica McWilliams has no affinity for UK constitutionalism, and her human rights experience does not extend beyond radical rhetoric. In the multi-party talks, she - a younger member of the class of '68 - provided cover for Sinn Féin (and strangely the loyalists). The women's coalition is not really a feminist organization, given its respect for catholic theology\textsuperscript{267}. Nor does it belong to NI's tiny centrist current, despite its cross-community membership. It has no identifiable positions, other than support for the Belfast Agreement - regardless of the will of the people. Two party members were elected in 1998 (Monica McWilliams and Jane Morrice). However, there were 12 other women in that assembly, from the range of parties - and there was little evidence of gender solidarity. The women's coalition designated as 'other'; that is, neither nationalist nor unionist. But they redesignated - Monica McWilliams as a nationalist and Jane Morrice as a unionist - to help David Trimble and Mark Durkan secure election (unsuccessfully) on Friday, 2 November 2001, and then - when the speaker returned from his private weekend visit to France - to restore the executive successfully four days later outside the statutory six-week period (in a piece of constitutional jiggery-pokery upheld narrowly by the judiciary\textsuperscript{268}). The women's coalition lost its two seats in the November 2003

\textsuperscript{266} Press release, 16 June 2005. This intimacy was extended also to Ann Hope - Ann.

\textsuperscript{267} Dr Sean Brady, the catholic archbishop, should be relieved at her appointment: Irish Times, 15 November 2004.

It is not known when Monica McWilliams applied to become chief commissioner. Nor is it known if she was headhunted. It is known that the NIO had other candidates in mind. Lord Dubs - a former minister with a genuine human rights background - was a strong contender. There are also another six persons who interviewed unsuccessfully, and a further seven who were not short listed. Monica McWilliams's name was kept under wraps (parliamentary questions were withdrawn) until Thursday, 16 June 2005. It now looks like the announcement of the McWilliams commission was choreographed as the first\textsuperscript{269} in a line of Blair concessions in return for the dump-arms IRA statement of 28 July 2005.

The other members of the second NIHRC (announced at the same time) are: Jonathan Bell; Thomas Duncan; Prof Colin Harvey; Alan Henry; Ann Hope; Eamonn O'Neill; and Geraldine Rice (seven joining the two surviving members\textsuperscript{270}). They are supposedly the best and brightest of some 164 applicants.\textsuperscript{271} The public reputation of the chief commissioner is more significant that the composition of the commissioners. Nevertheless, it is possible to analyze the McWilliams ten (as with the Dickson commission). There would appear to be six catholics and four protestants, the reverse of the position in 1999. There are also four women and six men, a slip from Mowlam's fifty/fifty principle. Significantly, the CAJ has not been handed the second

\textsuperscript{269} It interrupted a two-week media campaign, 'highlighting criminal justice', between 13 and 24 June 2005. A further concession was the appointment of Bob Collins, formerly of RTE in Dublin, to head the Equality Commission, on 19 July 2005, the equivalent of the Irish government appointing Lord Birt, now a number 10 advisor, to head its equality body in Dublin.

\textsuperscript{270} Lady Eames and Kevin McLaughlin.

\textsuperscript{271} Though the NIO lost track of some applicants!
NIHRC. However, Ann Hope was involved in the CAJ front organization, the human rights consortium. Further, the CAJ agenda has been adopted, to a considerable extent, by the NIO. What about politics? Officials now seem to accept that representative of the community means unionists and nationalists. However, they appear to have forgotten the general election results in May 2005. The following are the affiliations of the NIHRC: women's coalition - two - , a party that no longer has any representatives; social democratic and labour party - two; alliance - one - , a party that maintained its position in November 2003; and democratic unionist party - one - , a party now responsible for negotiating on behalf of the majority community in a non-Trimbleish manner. This composition, after the years 1999 to 2005, is simply scandalous. What do Paisley pere et fils intend to do, having condemned the NIO?272

The minister, John Spellar, had tried to do something, namely obey the law273, only to fall foul of Dame Rennie (now Baroness) Fritchie, whose concept of merit means politically correct patronage. The NIO, beholden to a driven number 10, appears to have internalized the strategy: to publicly humiliate protestants in order, through enhanced sectarianism, to win catholic nationalists; no one appears to be on iceberg watch any more.

What is to be Done?

273 When he decided to advertise in the Daily Telegraph, a senior official advised (successfully) on 28 May 2004: 'My own view is that there is significant risk of our being asked to explain this decision both by the Irish, who have a considerable focus on our process, and by representatives of the nationalist community in Northern Ireland. Given that the "Sunday Times" is pretty well recognised as the standard place to advertise British public appointments and the "Guardian" might be thought to be the paper of choice for those with an interest in human rights, what lines might be take in presenting or defending the decision not to use them?"
The fate of the McWilliams commission is related to the political survival of Tony Blair and Bertie Ahern (the NIO will outlast both), and the draining of legitimacy, if not yet legality, from the Belfast Agreement. It is possible to sketch two scenarios - one benign and the other malignant - for the second NIHRC. I would like to see the former; I fear the second is already being played out.

*The Benign Scenario*

At its first meeting - 16 September 2005 - the NIHRC will have decided to embark upon: one, a transformation from a radical pressure group, with attendant work practices, to a public sector body, with respect for the UK taxpayer and the public it serves; two, asked the NIO, following the 'lost' interviews, to make it representative of the community; three, abandoned the Belfast (Good Friday) agreement ideology for a proper constitutional understanding; four, working closely with the (British) commission for equality and human rights when established, and stressing the equivalence principle in any dealings with the ROI; five, scrapped the Dickson bill of rights, and turned to what it was asked to do by Mo Mowlam in 1999: provide advice on the scope for defining supplementary rights, including the two specified issues (one of which would undermine Patten's 50/50); six, started from the premise that the majority community has cultural roots in the 1688-89 bill of rights (and sees the world in subtle English/British and Ulster/UK ways), and that the minority community should not have the monopoly of 'human rights' (about which consultants warned the NIO); seven, dumped the CAJ mantras about international human rights.

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275 Interim progress report, Saxton Bampfylde Hever, 1 July 2004: 'Almost without exception, [over 100 senior public and private-sector] sources have emphasised the inherent difficulty in human rights in...
standards\textsuperscript{276}, and started with the HRA 1998 (taking the work of the Westminster joint committee on human rights as a model); eight, realized that human rights abuses have been more serious than violations, and, if there is no drawing of a line under the troubles (as suggested by the release of terrorist prisoners but contradicted by the Bloody Sunday inquiry), they should affirm the principle: all victims are equal, with the legitimate use of force and opposition to terrorism inherent characteristics of this constitutional idea; nine, started to take case work seriously\textsuperscript{277}, instructing lawyers on the basis of ability and not favouritism; and ten, rejected the fourth branch of government fantasy, in favour of economy and efficiency plus human decency and public responsibility.

\textit{The Malignant Scenario}

Unfortunately, following her appointment, Monica McWilliams proclaimed business as usual, and hinted at NIO support. I therefore predict much of the following: one, the packing of the NIHRC with cronies, provincially educated and formed under NI sectarianism; two, a cynical interviewing process by the NIO, intended to produce no additional commissioners; three, increasing pan-nationalist Good Friday prattle about joint administration and even sovereignty; four, a parochial perception of the British commission as a threat to little Northern Irelandism, and no serious human rights internationalism in the ROI; five, the progressing of the Dickson bill of rights, and therefore the failure of the NIHR (with the NIO's roundtable forum remaining

\textsuperscript{276} This slogan even found its way into the protocol between NI departments and the NIHRC, dated 30 July 2002.

\textsuperscript{277} The NIHRC received about 500 enquiries a year. However, it only funded about eight to ten cases a year.
stillborn\textsuperscript{278}); six, dismissal of 1688-89 as 'sectarian', and failure to perceive the convergence of nationalism and human rights (Rosemary Nelson was a human rights lawyer!); seven, much more of 1999 to 2005, and rejection of the joint committee on human rights as outside the Belfast Agreement settlement; eight, maintenance of the hierarchy of deaths, with reference to certain academic lawyers for more patronizing comments about people not understanding human rights; nine, more propaganda and proselytizing, dangerous populism in an increasingly unstable and unpleasant NI; ten, red guardism, and we alone tell the government, local and national, the assembly (if ever restored) and parliament, and the judiciary all about human rights.

\textsuperscript{278} This is not provided for in the Belfast Agreement. It emerged on 1 April 2003 (joint declaration by the British and Irish governments) and was repeated on 8 December 2004 (in a similar joint declaration). It has been reaffirmed at the second meeting of the British-Irish Intergovernmental Conference, at Downing Street on 27 June 2005. For evidence that the NIO does have a policy on the bill of rights, see service wide trawl notice number TN 5/05. The idea of the roundtable forum first surfaced in the NIHRC minutes of 10 February 2003, which record that Monica McWilliams was to chair a preparatory committee.
Jordan and After: the right to life in Northern Ireland

Introduction: the right to life

The right to life of natural persons, it has been asserted judicially, is the most fundamental of all human rights. In the 30 years of the troubles in NI, approximately 3,600 people died violently. However, article 2 of the European Convention on Human Rights ('ECHR'), which provides for the right to life, did not figure prominently in NI cases at Strasbourg in the 1970s, 1980s and early 1990s. (It was not, of course, readily arguable in domestic, NI, courts before the so-called incorporation of the ECHR in UK law by the Human Rights Act ['HRA'] 1998.) The landmark decision, McCann & Others v UK (1996) 21 EHRR 97, involved three IRA members in 1988, who had been killed by the UK's Special Air Service ('SAS') in Gibraltar. McCann is an exception, albeit an important one with a NI connection, to the failure of the Strasbourg court to centrally address the question of the right to life of those killed in NI between 1969 and 1998 (with paramilitary killings continuing).

The four joined Jordan cases as I shall call them - Jordan, McKerr, Kelly & Others and Shanaghan - decided by the third section of the European Court of Human Rights

I am grateful to Barbara Hewson and Neil Faris for comments on an earlier draft.

McCann & Others v UK (1996) 21 EHRR 97, paras 146-7; R v Secretary of State for the Home Department, ex parte Bugdaycay [1987] AC 514, 531 per Lord Bridge of Harwich; R v Lord Saville of Newdigate, ex parte A [2000] 1 WLR 1855, para 68 per Lord Woolf MR.

Jordan v UK (Application No. 24746/94); McKerr v UK (Application No. 28883/95); Kelly & Others v UK (Application No. 30054/96); and Shanaghan v UK (Application No. 37715/97).
(‘ECtHR’) on 4 May 2001 and made final three months later, constitute the first
effective examination of the right to life in NI. The jurisprudence of the Jordan cases
is the focus of this article. Strasbourg looked at four controversial incidents involving
Irish republicans between 1982 and 1992. The judgments are perceived as yet another
defeat for the UK. It was held to have violated article 2 of the ECHR. Nevertheless,
the Jordan cases - and this is my theme - are notable for the relative failure of the
litigation strategy of the applicants' lawyers. Strasbourg found that there was only a
procedural breach of the ECHR. McCann was not followed on a substantive violation
of article 2. Further, the applicants failed on all their other allegations. However, the
award of damages in each of the four Jordan cases (which had been refused in
McCann) may prove to be the most significant aspect of the litigation.

The four Jordan cases promised, in May 2001, to be the beginning of a flow of
decisions from Strasbourg about procedural violations of article 2. Whatever of other
applications awaiting decisions on admissibility, or substantive hearings, the ECtHR
effectively waived the principle of the exhaustion of domestic remedies, to which is
attached the rule about an application within six months of final decision. Strasbourg, of course, also under article 35 of the ECHR, is not able to deal with an
application that is substantially the same as a matter that has already been examined.
However, the award of damages means that there could be potentially dozens and
even hundreds of cases in coming years. The next case in this line - dealing with an
event in 1996 - was decided on 28 May 2002 (becoming final three months later)
without a hearing on the merits\textsuperscript{282}: \textit{McShane v United Kingdom} (2002) 35 EHRR 23. I do not discuss it, since it contains no new points of Strasbourg jurisprudence.\textsuperscript{283} It was followed by \textit{Finucane v United Kingdom} (2003) 37 EHRR 29, a decision of the fourth section of the ECtHR of 1 July 2003\textsuperscript{284}, which became final on 1 October 2003. The Finucane case, which deals with events in 1989, constitutes a tributary off this flow, and is considered separately below given its unique point (following Shanaghan) about alleged collusion between the state and paramilitaries.

Why did the right to life in NI receive so little attention in the first fifty years of the ECHR? The analysis here perforce is synoptic given the generality of the question. The first answer is that the ECHR is a multilateral international agreement made by states parties. These are members of the Council of Europe. The UK was directly responsible for a small minority of the deaths in NI. Nevertheless, it was the only possible respondent under article 34 of the ECHR. The second answer is that the human rights community in NI has been largely anti-British state, for a variety of reasons.\textsuperscript{285} It has concentrated upon, not the victims (or the majority of victims), but state violations - ignoring in the main paramilitary abusers.\textsuperscript{286} Things, however, are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{282} Mr McShane was killed in Derry on 13 July 1996 by an army vehicle, after he left a bar at 01.30. According to the judgment, 'a commercial skip and a large piece of hoarding were being used by persons in the crowd [including Mr McShane] to shield them from plastic baton rounds as they moved towards the police.' This was reported as: 'After the group left the bar they were caught up in the disturbances and took shelter from plastic baton rounds by crouching behind a skip and the hoardings.' (\textit{Independent}, 29 May 2002)
\item \textsuperscript{283} The award of damages was reduced to £8,000.
\item \textsuperscript{284} Application number 29178/95. I refer to the version on the ECtHR website, quoting paragraph numbers: \url{www.echr.coe.int}.
\end{itemize}
\end{footnotesize}
changing for the better. First, the coming into force of the HRA 1998 on 2 October 2000, created the possibility of an indirect horizontal effect.\textsuperscript{287} The very many more victims in NI of terrorist organizations may be able to have their right to life vindicated in domestic law. The HRA 1998 is a decided advance upon Strasbourg. Second, the Omagh bomb of 15 August 1998, in which 29 people plus two unborn were killed by dissident republicans after the Belfast Agreement, has produced a relatives’ campaign against paramilitarism which is simultaneously critical of the lack of state protection.\textsuperscript{288} It is to be hoped that the plaintiffs in the forthcoming civil action seek \textit{inter alia} a declaration from the NI court that the defendants abused the right to life of the Omagh victims. A new genuine human rights culture may be emerging - slowly and antithetically - in NI, following the HRA 1998.\textsuperscript{289}

\textbf{Who killed whom in Northern Ireland?}

The Bloody Sunday inquiry in Derry and London (March 2000 - January 2005), presided over by Lord Saville of Newdigate, gives the impression worldwide that

\textsuperscript{287} This is not the place to review the burgeoning literature on the issue. Important recent contributions include (especially the first): Murray Hunt, ”"The Horizontal Effect” of the Human Rights Act' [1998] PL 423; Thomas Raphael, 'The Problem of Horizontal Effect' [2000] EHRLR 493; Ralf Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law' [2001] EHRLR 421; Ivan Hare, ‘Vertically Challenged: private parties, privacy and the Human Rights Act' [2001] EHRLR 526. I have discussed elsewhere the important precedent of the 1951 refugee convention, and the leading concept of persecution, especially \textit{Horvath v Secretary of State for the Home Department} [2000] 3 WLR 379, where, in effect, the House of Lords decided that persecution, from the point of view of the victim, could be at the hands of state agencies or non-state actors: 'What Bill of Rights?', \textit{Northern Ireland Legal Quarterly}, vol. 52, nos. 3 & 4, autumn & winter 2001, pp. 238-9. This general issue is discussed further in the next part of this article.

\textsuperscript{288} \textit{Daily Telegraph}, 21 February 2002.

\textsuperscript{289} This may be tracked in the belated emphasis upon victims, defined empirically and not legally (under article 34 of the ECHR), in the work of the Northern Ireland Human Rights Commission: \textit{Annual Report, 2001}, pp. 35-6; \textit{Annual Report, 2002}, pp. 50-1; \textit{Annual Report, 2003}, pp. 3, 38-9; \textit{Annual Report, 2004}, pp. 48-9.
British soldiers - as a general rule - killed unarmed catholic protestors in NI.  Television films on ITV and C4 accentuated this in January 2002, to coincide with the thirtieth anniversary of the events in Londonderry on 30 January 1972 when paratroopers killed 13 civilians. 'When [the film] Bloody Sunday was shown at the [Sundance] festival in Park City, Utah [in January 2002], it sparked bitter anti-British feelings among the audience, with many saying it had shaken their belief in Britain as a progressive liberal democracy…Susanna Amberson, 19, of Los Angeles, said: "I saw Gandhi and it was the same story - the English firing on peaceful protesters. British history is not one to be proud of.”

Ironically and parenthetically, Tony Blair's Bloody Sunday inquiry, in seeking to reconcile the families of the killed and injured and their supporters to a modernized UK state, did a great deal legally for the right to life of agents of the state. Soldiers successfully judicially reviewed Lord Saville and his colleagues in London (and not in Belfast) in 1999 and again in 2001, when the tribunal ruled that they should give evidence openly in Londonderry. In the first reported unsuccessful appeal of the tribunal, on 6 July 1999, Lord Wolff MR criticized it for failing to attach sufficient significance to the soldiers' right to life. In the second reported unsuccessful appeal, in December 2001 (after the Human Rights Act 1998 was brought into force), Lord Philips of Worth Mantravers MR placed the article 2 right of the soldiers at the

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290 For example, in 1989, the year Patrick Finucane was killed, 81 people died in NI. 57 were killed by republicans, and 19 (including Finucane) by loyalists. The security forces killed two, including a loyalist who had just killed a catholic.
293 1877G-H.
The heart of the judgment. The Court of Appeal suggested that the standard of protection for the Bloody Sunday soldiers was higher than normal.\textsuperscript{294}

The Bloody Sunday judicial reviews marked, or should have marked, the intellectual demise of simple anti-statism. No human rights activist in NI had ever portrayed the army as other than a violator.\textsuperscript{295} The common law, however, moved swiftly and discreetly to transcend this view in the Bloody Sunday cases. Similarly, the courts were also recognizing human rights in private actions: \textit{Wilson v First County Trust Ltd (No 2)} [2001] EWCA Civ 633 [2001] 3 WLR 42 CA; while this decision was reversed by the House of Lords\textsuperscript{296}, there was no criticism of the original point about the human rights of private parties. It is therefore in the courts, and not in academic debates about horizontality (see note 9 above), that progress will be made.\textsuperscript{297} Judges tend to look initially at human rights in terms of the potential victims. No member of the senior judiciary has accepted an argument that only violations, and not abuses, matter because of who the respondents historically have been at Strasbourg.

According to the monumental volume, \textit{Lost Lives}, edited by David McKittrick and colleagues, and published in 1999 (and updated in 2004 and 2006/7), 3,720 persons died in the troubles, from 1966 to 2006 (a moving end point). The largest category is persons killed by republican (mainly IRA) terrorists: 2,152 or 57.8 per cent. The second largest is killings perpetrated by loyalist paramilitaries: 1,112 or 29.9 per cent.

\textsuperscript{294} Paras 17 & 28. Thus, Lord Williams of Mostyn, discussing human rights in NI in a parliamentary debate, cited the second reported Bloody Sunday judicial review as an important case: 'the Human Rights Act protects everyone, without fear or favour, prejudice or ill will.' (House of Lords, \textit{Hansard}, vol. 632, col. 1190, 18 March 2002)

\textsuperscript{295} Liam Clarke, \textit{Sunday Times}, 25 May 2003, discussing the Pat Finucane Centre website.


\textsuperscript{297} An analogous point may be made about parliamentary sovereignty. There was considerable debate about its demise in the last quarter of the twentieth century. However, when the HRA 1998 was premised on this constitutional principle, and this was seen not to affect the 'entrenchment' of human rights, much of the academic literature became redundant.
The security forces combined were responsible for 361 deaths: 9.7 per cent\(^{298}\) (in 2001, the European Court of Human Rights held, given there had been only four successful convictions for excessive use of force, that only that number had been unlawful\(^{299}\)).

It is therefore the position that the vast majority of deaths – at least 87.7 per cent – are attributable to illegal terrorist organizations; less than ten per cent were the responsibility of the state. Most of the latter would have been as a result of force that was no more than was absolutely necessary.\(^{300}\) Almost all (if not all) of the former will have amounted to the abuse of the right to life under article 2 of the European Convention on Human Rights.

Republicans sloganize that there should be no hierarchy of deaths. There is. There are those lawfully, and then unlawfully, killed by the state. There are then those – almost certainly all – unlawfully killed by republican and loyalist terrorists. The republicans seek to obscure their responsibility by talk of state killings (and of the autonomous role of loyalism by referring to collusion). A new hierarchy is created: at the top are the victims of state killings, especially those who warrant an (international) judicial inquiry; there follow all the rest – including the 2,152 republican victims whose killers are unlikely to be pursued for fear of the contemporary peace process roles of Gerry Adams and Martin McGuinness being jeopardized.


\(^{299}\) *Jordan v United Kingdom* (2003) 37 EHRR 52 paragraph 152.

\(^{300}\) There is no Strasbourg case finding the UK liable for a substantive breach of art 2 in NI. *McCann v UK* (1996) 21 EHRR 97 concerned Gibraltar (a substantive breach by ten votes to nine). The *Jordan, McKerr, Kelly & Others, and Shanigan* decisions of 4 May 2001 relate only to a procedural breach (by seven votes unanimously).
NI at Strasbourg

Many factors determine which cases make it to Strasbourg, and are declared admissible by (formerly) the European Commission of Human Rights ('EComHR') and now the ECtHR.

Since 1966 (when the UK first allowed individual petitions), there have been over 50 adverse judgments, where the ECtHR has found that the UK violated one or more human rights. There have been 17 NI cases at Strasbourg to date. Four of these individual applications failed. Of the thirteen that succeeded, six did so on aspects of articles 5 and 6. Another was on article 8. The remaining six are the Jordan cases of 4 May 2001 under consideration, raising a common article 2 point, plus McShane and now Finucane.

The right to life in NI had been raised unsuccessfully at Strasbourg earlier, in an interesting joint application: App. No. 9348/81 v UK and App. No. 9360/81 v Ireland (1983) 5 EHRR 465. The (NI resident) female applicant complained about the killing of her husband in the ROI, and, shortly afterwards, of her brother in NI. Republican terrorists were responsible for both murders. The EComHR declared the ROI complaint inadmissible. It had not been made within six months of her husband's death. (The ROI's claim to NI was also considered indirectly.) As for the UK

301 This does not include the inter-state case, Republic of Ireland v UK (1979-80) 2 EHRR 25.
303 Dudgeon v UK (1982) 4 EHRR 149.
304 At pp. 504-7.
complaint (which was within time), it was not dismissed on the ground that it was directed against the acts of private persons. This point has been entirely missed. Strasbourg seemed to accept that, given the emergency in NI, the UK was required, under article 2, not only to have a system of criminal prosecution, but also to have preventative control by security forces. There was no positive obligation, however, to prevent any particular act of violence. The claim was held to be manifestly ill founded, as regards the brother and the applicant herself (who felt her right to life was not being adequately protected in all the circumstances).

The same happened with Kelly v UK (1993) 16 EHRR CD 20. This concerned a teenage joyriders in Belfast, who was killed by a British soldier. (Two other youths were injured.) The High Court in Belfast held that it was reasonable for the soldiers to have believed that the car had contained escaping terrorists. The EComHR concluded that, having regard to all the surrounding circumstances, the use of force by the soldiers (to effect a lawful arrest) was justified.

There has been no NI case at Strasbourg since 1983 dealing with inadequate protection (Shanaghan, the fourth Jordan case, was couched in terms of agents of the UK state.) However, where Kelly failed in 1993, McCann was to succeed - albeit in Gibraltar - in 1996: a so-called substantive violation of article 2, as it would be described subsequently (concerning the state's negative obligation).

Article 2
Article 2, when considering its effect in UK law, now needs to be read with articles 1 and 2 of the sixth protocol\textsuperscript{305}, as a result of section 1(1)(c) of the HRA 1998:

**ECHR, Article 2**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   
   a. in defence of any person from unlawful violence;
   
   b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   
   c. in action lawfully taken for the purpose of quelling a riot or insurrection.

**Protocol No. 6**

**Article 1**

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

**Article 2**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instance laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

\textsuperscript{305} This was ratified by the UK on 27 January 1999.
In international law, article 1 of the sixth protocol is (under article 6) to be regarded as an additional ECHR article. Article 2(1) - as applied in peacetime - therefore now reads: 'Everyone's right to life shall be protected by law.' Article 2(1) in wartime is the full text as qualified by article 2 of the sixth protocol. A member of the Council of Europe is permitted, but not required, to have a death penalty in time of war or imminent threat of war (which is a narrower test than in time of war or other public emergency threatening the life of the nation in article 15).  

Article 2 refers to the right to life in the heading and in paragraph (1). However, the legal implication is only to have the right to life 'protected by law.' This refers to the state's positive duty. But there is also the negative duty not to take life unlawfully, in the references to deprivation of life in paragraphs (1) and (2). Protected by law implies that the positive duty also includes practice. Whether anterior to the ECHR, or part of article 2, there is a right to life (though the scope of 'everyone' is likely to remain undefined). The question remains whether the right can be enforced against, in the NI context, republican and loyalist terrorists, or whether the UK state has to be blamed for inadequate protection. That is a question for legal practitioners, aided by victim-based human rights scholarship.

McCann v UK

306 Protocol No. 13 of the ECHR proposes the abolition of the death penalty in all circumstances.
307 This contrasts with article 6 of the international covenant on civil and political rights: 'Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his right to life.'
This is the landmark case on article 2.\textsuperscript{308} It deals with events in Gibraltar on Sunday, 6 March 1988. The UK had intelligence that three IRA members (two men and a woman) were intending to plant a bomb. The target was to be a regular military parade on the following Tuesday. Four members of the SAS shot the three republicans dead. The IRA members turned out to be unarmed, but it was believed they had the capacity to detonate the bomb remotely if an attempt was made to apprehend them.

An inquest in Gibraltar six months later held by nine votes to two that the killings were lawful. At Strasbourg, in September 1993, the EComHR declared the application admissible. But, in a subsequent report, it expressed the opinion, by eleven votes to six, that there had been no violation of article 2.

The ECHR held on 27 September 1995 that the soldiers had not violated article 2. They had an honest belief about detonation. However, it criticized the control and organization of the operation, finding by the narrowest of margins that there had been a violation of article 2 by the UK. The Court concluded: ‘having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than

\textsuperscript{308} See also, \textit{Andronicou & Constantinou v Cyprus} (1998) 25 EHRR 491, heard by a nine-judge court, including the president, Judge Ryssdal: no violation of article 2, by five votes to four.
absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the Convention.\textsuperscript{309}

The ECHR split ten to nine. The president, Judge Ryssdal, was in the minority. Several weeks later, lecturing in London, he described the majority decision as 'unfortunate'.\textsuperscript{310} The nine dissenters took issue with the finding on the control and organization of the operation. They made three general points. One, hindsight should be avoided. Two, there was a grave danger of an irreconcilable conflict between the duty to protect the lives of the terrorists and the duty to protect their potential victims. Three, full account had to be taken of terrorist capacity in NI. The president and his colleagues queried whether arrest at the border would not have been followed legally by release. 'We consider', they concluded, 'that the use of lethal force in this case, however regrettable the need to resort to force may be, did not exceed what was, in the circumstances as known at the time, "absolutely necessary" for that purpose and did not amount to a breach by the United Kingdom of its obligations under the Convention.\textsuperscript{311}

The applicants - relatives of the three IRA members - had sought just satisfaction under then article 50 of the ECHR (now article 41). The Court held unanimously that the claim for damages should be dismissed: 'having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the

\textsuperscript{309} McCann & Others v United Kingdom (1996) 21 EHRR 97, para 213.
\textsuperscript{311} McCann & Others v United Kingdom (1996) 21 EHRR 97, para 25.
Court does not consider it appropriate to make an award [of pecuniary and non-pecuniary damage].

Strasbourg had been generally sympathetic to the UK, faced as it was with a terrorist problem in NI. The troubles were coterminous with the growth in the Court's caseload. However, on 27 September 1995, the IRA had been on, as it turned out temporary, ceasefire since 31 August 1994. Nevertheless, the narrowest of margins among the 19 judges, combined with the refusal to award damages, against the stark background of the Gibraltar killings, indicate judicial hesitancy about allowing terrorists to gain propaganda victories, with findings of article 2 violations against members of the Council of Europe.

McCann would come to be referred to as a substantive violation. It was a green light for other applications. However, the ECtHR - which had to deal with a number of Turkish cases involving Kurds mainly in 1998 on the right to life quickly retrenched to the idea of only a procedural violation: inadequate investigations of state killings. This was after the Belfast Agreement of 10 April 1998, which many

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312 McCann & Others v United Kingdom (1996) 21 EHRR 97, para 219.
313 Mentes v Turkey (1998) 26 EHRR 595 (no violation of article 2 for a Kurdish woman, whose home had been destroyed, either by the security forces or the PKK, and whose prematurely born twins subsequently died); Kaya v Turkey (1999) 28 EHRR 1 (a violation of article 2, by eight to one, given the failure of the authorities to conduct an effective investigation into the death of the applicant's brother, an alleged PKK member); Kurt v Turkey (1999) 27 EHRR 373 (unanimously, not necessary to decide on article 2 given other violations, for a Kurdish applicant whose son appears to have been seized by the security forces but where killing had not been proved); Gulec v Turkey (1999) 28 EHRR 121 (unanimously, a violation of article 2, where a schoolboy was killed during spontaneous demonstrations, the government having failed to prove that the very powerful weapons had been fired by PKK terrorists); Yasa v Turkey (1999) 28 EHRR 408 (a violation of article 2, by eight to one, because of inadequate investigation of an attack upon the Kurdish applicant, and his uncle who was killed); Ogar v Turkey (2001) 31 EHRR 40 (a violation of article 2, by 16 to one, as regards the planning of an operation which led to the applicant's son's death in a suspected PKK area, and unanimously a violation of article 2 as regards the investigation). Significantly, in Yasa's case, the ECtHR held that the implied duty to investigate under article 2 applied to all killings: '…the mere fact that the authorities had been informed of the murder of the applicant's uncle gave rise ipso facto to an obligation under Article 2 to carry out an effective investigation. The same applies to the attacks on the applicant…' (411).
believed or hoped has brought about an end to Irish terrorism. In such a context, it might have been expected that the degree of judicial review by Strasbourg would have intensified. The opposite would appear to have been the case.

The Jordan cases

The four judgments of 4 May 2001 were the result of separate applications by relatives of the deceased: by Pearse Jordan's father, on 13 May 1994; by the son of Gervaise McKerr (following the death of the original applicant), on 7 March 1993; by the next-of-kin of nine men, Kelly & Others, on 5 October 1995; and by the mother of Patrick Shanaghan, on 3 October 1996. McCann had been decided on 27 September 1995. This means that two applications had been made before, and two after, the ten to nine vote in Strasbourg. The proceedings in the four cases were declared admissible on 4 April 2000, and conducted simultaneously. (It is not known why McShane, and indeed other cases, were not also joined.) There was oral argument. Jordan and McKerr were represented by Seamus Treacy QC of the NI bar, Kelly & Others and Shanaghan by D. Korff of the bar of England and Wales (who had been counsel in McCann).

The 12 deaths

Pearse Jordan (the first case) was shot and fatally wounded by a Royal Ulster Constabulary ('RUC') officer, on the Falls Road in Belfast on 25 November 1992, after a chase in which he abandoned the car he had been driving. Other facts are in dispute. The Strasbourg judgment contains the following information: Pearse Jordan
was given a IRA funeral, and described in a republican newspaper as on active service.

Gervaise McKerr (the second case, but the first in time) was driving two passengers, when, at Tullygally Road East in Lurgan on 11 November 1982, having seemingly broken through a road block, the car was fired upon by pursuing RUC officers, all the occupants being killed. The facts remain in dispute. The Strasbourg judgment contains the following information: the two male passengers were suspected of having committed terrorist acts including murder, and were believed to be on their way to commit another murder.

Patrick Kelly and seven other men (the third case) were killed by SAS soldiers, at Loughgall on 8 May 1987, during a IRA attack on the RUC station. (A ninth man, Antony Hughes, 'a civilian [sic] unconnected with the IRA gunmen', who had been behind the republicans' vehicles in his own car, was also killed by the SAS.) Official evidence remains untested. The Strasbourg judgment contains the following information: the application on behalf of the first eight men acknowledged that they were deserving of arrest rather than killing, despite their use of weapons.

Patrick Shanaghan (the fourth case) was killed, while driving his van near Castlederg on 12 August 1991, seemingly by loyalist paramilitaries following the loss by an army patrol of terrorist recognition photographs, including of him. The facts remain in dispute. The Strasbourg judgment contains the following information: Patrick Shanaghan was an active member of Sinn Féín, who was suspected of being a IRA member involved in terrorism.
The domestic proceedings and Strasbourg applications

In the first case, the Director of Public Prosecutions (‘DPP’) directed no prosecution of the RUC officer who had killed Pearse Jordan. Inquest proceedings (which had not terminated by the date of deliberation at Strasbourg) followed. These gave rise to legal challenges to the coroner and others. Civil proceedings were also commenced. In the Strasbourg application (after 18 months), violations of articles 2, 6, 13 and 14 were alleged: unjustifiable killing and no effective investigation. The ECtHR declared the case admissible by a majority, the six-month rule in article 35(1) being 'applied with some degree of flexibility and without excessive formalism'.

In the second case, three RUC officers were charged with the murder of one of the passengers. Gibson LJ acquitted them in a criminal trial on a submission of no case to answer. Inquest proceedings were again interrupted by legal challenges. They were abandoned by the coroner in 1994, the RUC having successfully resisted the disclosure of certain documents (see further below). There were also civil proceedings. In the Strasbourg application after over ten years, violations of articles 2, 13 and 14 were alleged: no effective investigation, and no redress for the deaths. The ECtHR declared the case admissible by a majority, the six-month rule being 'applied with some degree of flexibility and without excessive formalism'.

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314 Decision on Admissibility, 4 April 2000.
315 The IRA later killed the appeal judge and his wife. Considerable controversy was caused when Gibson LJ, stating that the three police defendants were blameless, went on to commend them for 'bringing the three deceased men to justice, in this case to the final court of justice.' He later clarified that he was not endorsing a shoot-to-kill policy, and had not been advocating summary justice. (para 20)
316 Decision on Admissibility, 4 April 2000.
In the third case, the DPP decided not to prosecute the SAS soldiers. Inquest proceedings were held, but counsel for the applicants withdrew when they failed to secure an adjournment in order to legally challenge the coroner. There were also civil proceedings. In the Strasbourg application after more than eight years, violations of articles 2, 6, 13 and 14 were alleged: unjustifiable killing, without any attempt being made to bring them before a court. The ECtHR declared the case admissible by a majority, the six-month rule being 'applied with some degree of flexibility and without excessive formalism'.

There were no prosecutions in the fourth case. The inquest was interrupted by a successful legal challenge by the RUC. In the Strasbourg application after more than five years, violations of articles 2, 13 and 14 were alleged: collusion by members of the security forces, and inadequate investigation. The ECtHR declared the case admissible by a majority, the six-month rule being 'applied with some degree of flexibility and without excessive formalism'.

**Guerrilla war and human rights**

The IRA maintained it was at war with the UK state for three decades. This was never conceded, and so the 1949 Geneva conventions and 1977 protocols have never been held to apply to NI. Excused all international humanitarian law obligations, members of the IRA have been able to avail of international and domestic human rights protection. This is in their capacity as natural persons. They have been held to

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317 Decision on Admissibility, 4 April 2000.
318 Decision on Admissibility, 4 April 2000.
319 In particular, Convention (IV) relative to the Protection of Civilian Persons in Time of War and Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.
be liable under the criminal law, which - through the common law in the UK - also applies equally to agents of the state.

The first substantive case at Strasbourg - *Lawless v Ireland (No. 3)* (1979-80) 1 EHRR 15, concerning a IRA member detained without trial in the Republic in 1957 - held that article 17, which prohibits the destruction of other persons' rights, did not mean an alleged terrorist was denied his human rights. In the course of the NI troubles, republicans were able to rely upon the *Lawless* case, without having to accept the rule of law or the legitimacy of the UK and/or Irish states. The *Lawless* case deserves distinguishing today under the living instrument doctrine. The Irish government, in taking the article 17 point in 1960, had not argued as is often assumed, that its international obligations were simply waived in the face of a terrorist campaign. And surely Lawless, to a greater extent than the German communist party in 1957, had sought to use the ECHR - propaganda by deed at Strasbourg - to abuse the human rights of Irish and UK state officials and civilians?

*Who killed whom in the Jordan cases?*

Twelve people (eleven republicans and one civilian according to the judgment) had been killed in these four cases: one in 1992 in Belfast by the RUC; another in 1982 in

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320 The Irish state was found not to have violated any human rights because it had derogated from the ECHR.
321 See para 16 of the individual opinion of Judge Maridakis on responsibilities.
322 Para 5.
323 Application No. 250/57 *KPD v Germany* (1957) 1 YB 222 EComHR.
324 Lawless had secured his release through a verbal undertaking to the detention commission in Dublin. He continued with the case at Strasbourg in order to obtain damages. Few saw the case as not connected with the republican campaign against so-called British occupation of NI.
Lurgan, also by the RUC; nine (including Antony Hughes) in Loughall in 1982 by the SAS; and one in 1991 near Castlederg by it appears loyalist paramilitaries.

Kelly and Others (the third case) was, in republican terms, a battle. The authorities secured intelligence about an IRA attack, and stationed the SAS in and around the police station in Loughgall. The Jordan and McKerr (first and second) cases were more easily portrayed as the shooting of unarmed men. Shanaghan is a bizarre (fourth) case. Private persons killed him. The 1983 joint applications against the UK and Ireland (discussed above) were not an argument against pursuing republican paramilitaries at Strasbourg. However, the case would have become difficult on the positive duty of the UK state, to extend protection to Patrick Shanaghan driving his van towards Castlederg on 12 August 1991. Shanaghan, however, was arguably entitled to additional police protection, given the apparent negligence of the army in losing his photograph. He was twice warned by the RUC about risks to his life. Arguably, there was a greater duty to protect him.\textsuperscript{325} It is another matter whether he would have accepted it. The respective roles of the army and the police have also been obscured.

The UK was responsible in the first three cases. In the Shanaghan application, it was blamed - given the state's negative obligation - through the concept of collusion between the police (not the army) and loyalists. Collusion has become a key concept of Irish nationalists in the 1990s (discussed further below), given the premise of an Irish/British contradiction in their ideology, which denies the autonomy of loyalism (the concept of collusion suddenly embraced republicanism in the summer of 2003,

\textsuperscript{325} Osman v UK (2000) 29 EHRR 245.
following media allegations about a former IRA member, Alfredo Scappaticci - aka Stakeknife [sic]. There was a so-called 'community inquiry' after the Shanaghan killing, presided over by a retired United States judge. It returned a verdict of: 'murdered by the British Government and, more specifically, with the collusion of the RUC.'

Stalker

One word explains the eclipsing of the SAS, responsible for Gibraltar and Loughgall, by the RUC, and the substitution of the RUC for loyalist paramilitaries - Stalker. John Stalker was assistant chief constable of Greater Manchester. In 1984, he had been appointed by the RUC to investigate three cases in which six suspected republicans in all were killed in Co. Armagh in November/December 1982. (The first was the McKerr case above, though Stalker looked at all three victims.) These cases were the origin of the shoot-to-kill notion, a term which has been applied imprecisely, even by some lawyers. It is significant that the RUC officers involved - from headquarters' mobile support units - had been trained by the SAS. However, Stalker was not to consider this issue the way the ECtHR subsequently did in the McCann case, distinguishing the use of force by specially trained soldiers from the control and organization of the operation. Stalker, in fact, was asked only to inquire


327 Para 40.


329 This was also the position in the first and second cases.
into the police investigations after the killings, attempts having been made within the RUC to prevent disclosure of its counter-terrorist capabilities.

The Englishman was removed subsequently amid considerable public controversy. The government claimed this had nothing to do with NI; many believed otherwise. The investigation was handed over to Colin Sampson, chief constable of West Yorkshire. Stalker/Sampson reported finally in 1987. Their work remains unpublished.

The attorney general, having considered the conduct of the RUC, declined in the public interest to pursue charges of perverting the course of justice. There was no basis, apparently, for any other prosecutions, though this is part of the controversy. Stalker, however, published his own account in 1988, attributing his removal to a desire to prevent him finding out, and/or revealing, an unsavoury truth about RUC so-called shoot to kill tactics. The coroner in the second case abandoned the inquest, when the RUC refused legally to hand over the Stalker/Sampson reports.

John Stalker never said the RUC engaged in shoot to kill in the early 1980s. His later opinion was ambivalent: 'I never did find evidence of a shoot-to-kill policy as such…But there was a clear understanding on the part of the men whose job it was to pull the trigger that that was what was expected of them.' This was challenged subsequently in a RUC critique of his investigation. Further, other members of the RUC engaged in shoot to kill in the early 1980s.

330 The circumstances of those shootings pointed to a police inclination, if not a policy, to shoot suspects dead without warning rather than to arrest them. Coming, as these incidents did, so close together, the suspicion of deliberate assassination was not unreasonable. The later disclosures to the courts of police malpractice and deviousness made an investigation independent of the RUC both desirable and inevitable. (Stalker, Stalker, p. 253)
331 Para 32, quoting The Times, 9 February 1988. This was the day after the publication of his book.
Stalker/Sampson team denied after the conclusion of the investigation that there had been any such policy. Stalker, however, is a cultural phenomenon, and a figure in contemporary NI history. Nevertheless, his investigation remains contaminated by the nature of his removal and subsequent attempt to clear his name.332

Much was made of shoot to kill in the second case, but also in the first and third cases. Stalker inspired the rhetoric of the applicants333, and the judgments were hailed as vindication of the shoot-to-kill allegations. Stalker's book was used to establish a critique of the RUC investigation of the McKerr killing.

The litigation strategy

The applicants' lawyers adopted a maximalist approach, seeking to indict UK policy in NI throughout the troubles. They relied upon article 14 (presumably in combination with article 2).

Article 14 (prohibition of discrimination)334.

The allegation was of discrimination, as between catholics and protestants. Between 1969 and March 1994, the security forces in NI had killed 357 people. The applicants appear to have been relying without attribution upon the work of Fionnuala Ní Aoláin, published subsequently as The Politics of Force (2000). No reference was made to

332 His story inspired Ken Loach's film, Hidden Agenda (1990). 'This film is inspired by actual events' claimed the distributors.
333 Shoot to kill was used by Gibson LJ, when he sought to clarify his judgment in the Toman case.
334 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'
context, simply to the fact that the victims were predominantly catholic or nationalist. There had only been 31 prosecutions, and four convictions. 'This showed [the applicants claimed] that there was a discriminatory use of lethal force and a lack of legal protection vis-à-vis a section of the community on grounds of national origin or association with a national minority.\textsuperscript{335}

The ECtHR unanimously rejected this alleged violation. It accepted that a policy or practice could be indirectly discriminatory, if it had a disproportionately prejudicial effect on a particular group. 'However, even though statistically it appears that the majority of the people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. There is no evidence before the Court which would entitle it to conclude that any of those [357] killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.'\textsuperscript{336}

The allegation of discrimination was modified in Shanaghan, to take account of collusion between the security forces and loyalist paramilitaries. The vast majority of victims, it was alleged, were nationalists. 'While it was difficult [claimed the applicants] to establish with certainty the cases where collusion actually occurred, there was evidence to suggest that it was widespread.' The ECtHR similarly dismissed this allegation, but not before noting: '…despite the legitimate concerns about collusion and the specific examples that have been highlighted…'\textsuperscript{337}. This

\textsuperscript{335} Jordan, para 152.  
\textsuperscript{336} Para 154.  
\textsuperscript{337} Para 129.
raises a question which will be answered below: why were the concerns legitimate if the allegation was only worth dismissing?

*Other articles*

Seamus Treacy QC took articles 2, 6 and 13 (but not article 6 in the case of McKerr), and D. Korff did likewise (there also being no article 6 point in Shanaghan). Surprisingly, in view of the outcome, while Jordan, McKerr and Shanaghan all alleged that there had been no effective investigation of the deaths, this was not done in Kelly & Others (a Korff case) - involving nine of the 12 deaths before the ECtHR. No reason for this can be ascertained on the basis of the judgments. What can be determined is that the applications to Strasbourg occurred after the opening, and before the closing, of the inquests in three of the four cases. Better inquests were not evidently the motivating factor in the applications. The four Jordan cases will go down in legal history as about inadequate investigations, even though the point was never taken on behalf of the majority of the deceased.

Article 6 (right to a fair trial)\(^{338}\).

\(^{338}\)‘1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

‘2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

‘3. Everyone charged with a criminal offence has the following minimum rights: ....’
The decision on article 6(1) in the first and third cases was brief. The applicant in Jordan alleged that his son could have been arrested, and presumably tried. The same point was taken in the third case. The Court held unanimously that there had been no violation of the applicants' rights, though strictly it did not decide the issue. It was concerned only with the rights of the deceased, through the applicants. Civil proceedings were pending in both cases, having been commenced by the next of kin. As for criminal proceedings involving police officers or soldiers, they fell to be considered under articles 2 and 13.

Article 13 (right to an effective remedy).

The ECtHR reiterated that contracting states were afforded some discretion, in providing domestic remedies to an arguable complaint in order to enforce the substance of the ECHR. The scope varied with the nature of the complaint. In the case of lethal force by agents of the state, compensation and investigation capable of leading to identification and punishment were necessary, this to include effective access for the complainant to the investigating procedure. The Court found unanimously that there was no violation of article 13. The civil proceedings answered the first point (compensation). There were no criminal proceedings in the first, third and fourth cases. Three police officers had been charged in the second case, and acquitted. However, the decision on the procedural aspect of article 2 (see below) was held to answer the second point (investigation).

339 'no basis for reaching any findings as to the alleged improper motivation behind the incident.' (Jordan, para 149; Kelly & Others, para 143)
340 ‘Everyone whose rights and freedoms are set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’
Commencing civil proceedings in Belfast had been a tactical mistake, from the point of view of establishing an allegation of article 13 violation. No doubt the applicants’ legal advisors had been intent upon denying the UK any argument about domestic remedies not being exhausted. (This, as things turned out, was not necessary.) They may also have been hoping for a substantive violation of article 2 (in the third case, the ECtHR held that three of the applicants, who had not commenced or continued civil proceedings, could not pursue the substantive violation allegation).

The Court animadverted to its southeast Turkey (Kurdish) cases on the article 13 point. There, complainants could join criminal proceedings. The public prosecutor essentially controlled access to civil proceedings. NI was different. Civil proceedings - necessary to exhaust domestic remedies - were wholly independent of any possible criminal proceedings. The Turkish cases were, therefore, easily distinguishable.

*Article 2*

The applicants succeeded only on article 2. In all four cases, it was held unanimously that there had been a violation, in respect of failings in the investigative procedures. This aspect of the right to life was derived by implication, following *McCann* and one of the more recent Turkish cases (*Kaya v Turkey* (1998) 28 EHRR 1): "The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official
investigation when individuals have been killed as a result of the use of force…The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.\textsuperscript{341}

Substantive violation?.

The Court found that, given the ongoing civil proceedings, and, in all but the second case, inquests, it would decline jurisdiction on the question of substantive violations of article 2. The domestic courts were better-placed and equipped to make findings of fact. It also rejected the applicants', and the state’s, documentary evidence as untested. The Court is also not prepared to conduct, on the basis largely of statistical information and selective evidence [from the applicants], an analysis of incidents over the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force.\textsuperscript{342}

However, given that investigations under articles 2 and 13 must be able to lead to the identification and punishment of those responsible, it turned to the procedural aspects of article 2.

\textsuperscript{341} Jordan, para 105. 
\textsuperscript{342} Jordan, para 114.
Procedural violations.

Inquests in Northern Ireland are governed by the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. These were considered in judicial reviews in all four cases, some of which went to the House of Lords. Coroner, with or without juries, are required to ascertain only: who the deceased was; how, when and where [he] came by his death; and the time, for registration purposes. 'Neither the coroner nor the jury [reads rule 16] shall express any opinion on questions of criminal or civil liability or on any other matters…'. NI inquests survived judicial review.

In England and Wales, in contrast, opinions on criminal liability are permitted, without identification of any person - though it is somewhat difficult to conclude there is liability without a particular criminal in mind.

The Court distinguished the two systems as follows: in NI, the coroner reports to the DPP if he considers a criminal offence may have been committed; in England and Wales, a jury verdict of 'unlawful death' requires the DPP to reconsider any decisions not to prosecute and to give reasons. In the former, the onus is upon the coroner; in the latter, the DPP.

The Court found in the first case - having considered the roles of the RUC, the DPP and the coroner with/without a jury - that there had been a violation of the procedural obligation implied in article 2 (read in conjunction with article 1), as instanced by:
(i) a lack of independence of the investigating police officers;
(ii) a lack of public scrutiny, and information to the family, on the part of the DPP;
(iii) non compellability of the police officers who fired shots;
(iv) the impossibility of an inquest verdict playing an effective role in securing a criminal prosecution;
(v) the absence of legal aid (then), and the disclosure of statements only when a witness gave evidence, prejudicing the applicants in the inquest;
(vi) lateness and slowness in inquests.

Similar instances were given in the other three cases. Public interest immunity certificates were mentioned in the second case. No investigation of collusion allegations was mentioned in the fourth case.

Changes?.

The Court declined to specify detailed procedures. It did not endorse the Scottish model of a sheriff's inquiry. The Court held 'It is not for the Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method
available. Nor can it be said that there should be one unified procedure providing for all requirements.\textsuperscript{343}

The Court concluded (this appearing in all four judgments): 'If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities…the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance.'\textsuperscript{344}

Contradiction?.

There is a possible contradiction in the four Jordan cases. When invited to investigate alleged substantive violations of article 2, the ECtHR refused on the ground that civil proceedings and inquests in NI were a more appropriate forum for fact finding. However, in holding that there had been a procedural violation of article 2, the ECtHR queried the scope of inquests in NI law and practice. It also held that civil proceedings were inadequate, as they did not involve the identification and punishment of any alleged perpetrator. Further, when the UK argued unsuccessfully that domestic remedies had not been exhausted, the Court held that damages were inadequate: the investigations required under articles 2 and 13 must be able to lead to the identification and punishment - if an excessive use of force is proved - of those responsible.

\textsuperscript{343} Jordan, para 143.
\textsuperscript{344} Jordan, para 143.
Public confidence

The issue, I submit, in all four cases, is less investigation after the lethal use of force by state agents, and more the question of public confidence. Articles 2 and 3, after all, are described as 'enshrin[ing] one of the basic values of democratic societies making up the Council of Europe.' The problem detected by the Court was less NI's type of inquest (in comparison with that in England and Wales), and more the minority community's suspicion and mistrust of the RUC and the DPP. Because of nationalism, ideas of shoot to kill and collusion took root. The ECtHR, however, comprising judges of hopefully entirely a liberal democratic disposition, took a rational optimistic view. The Court implied that greater transparency and effectiveness would, instead of 'add[ing] fuel to fears of sinister motivations', lead to fewer allegations of shoot to kill and collusion.

The day of judgments

Perhaps the ECtHR was thinking in a medium-term timescale. There was no sign of any change when the judgments were delivered on 4 May 2001. The applicants, acting presumably on legal advice, maintained their allegations of shoot to kill and collusion. Few journalists detected that this political view was not endorsed in the four lengthy judgments totalling 195 pages (or even the six-page press release from Strasbourg).

345 Jordan, para 102.
346 Jordan, para 144.
The Irish press reported that the UK had violated the right to life of 12 men (including one killed by loyalist paramilitaries) (Denis Staunton, *Irish Times*, 5 May 2001). Shoot to kill and collusion allegations were repeated. The Relatives for Justice group called upon the Irish government to press for a United Nations inquiry into the deaths. 'This case', said a spokesman, '…is a severe indictment of a [United Kingdom] government that claims to be democratic and lectures others on human rights.' (Monika Unsworth, *Irish Times*, 5 May 2001)

The secretary of state for NI, Dr John Reid, said: 'The criticisms are of procedures; the investigations, not the deaths themselves.' He went on to say that the UK always accepted Strasbourg rulings. The Northern Ireland Office ('NIO') later clarified that the judgments were still being studied, and any question of compensation was premature (Paul Tanney, *Irish Times*, 5 May 2001).

**Just satisfaction**

Public attention in NI focused on the award of £10,000 per applicant, especially to the next-of-kin of the eight IRA men who had attacked the Loughall police station in 1987.

In September 1995, in the *McCann* case, the ECtHR had also considered the question of damages. There had been a violation of the substantive article 2 right (the Court found no fault with the Gibraltar inquest, despite some similar legal constraints to those in NI). Despite this, the Court refused unanimously to make any award of damages to the applicants, as personal representatives of the deceased. It also refused
to make an award for costs in the inquest. The reason was clear: the three terrorists killed by the SAS in Gibraltar were intent upon planting a bomb. The Court did not consider it appropriate to make an award.347

This surely was an argument for no damages in at least the first, second, and especially the third, case. The Court cited McCann in all four cases, distinguishing the substantive from the procedural violation. This argument is hardly convincing, even given the reference to non-pecuniary damage to the applicants in the Jordan cases. A substantive violation is more serious than a procedural one, and therefore likely to require more by way of just satisfaction - whether to the applicant as representative or in his/her own right. Precedent does not bind the ECtHR, but it made no effort to justify this damaging decision.

The contrast between terrorists on active service receiving damages retrospectively, and their very many more victims, who have no cause of action at Strasbourg against private persons, was immediate in Northern Ireland. This is not to say that the majority of victims could not rely upon the Jordan judgments regarding investigations; however, the relatives of those killed by paramilitaries are not generally likely to want to blame the UK (even for inadequate protection). A thoughtful editorial in the Irish News (the main catholic and nationalist newspaper) on 5 May 2001 stated: 'While nationalists may respond positively to the decision in Strasbourg, they must also make every effort to understand the deep frustrations expressed by unionists over yesterday's developments. Republicans have murdered almost 2,000 people over the last 30 years, with the IRA directly responsible for most

of the carnage. None of these killings have been scrutinised by the European Court of Human Rights, and a high proportion have never been followed by criminal convictions and remain unsolved.'

Appeal?

Protocol No. 11 to the ECHR greatly altered the machinery at Strasbourg, from 1 November 1998. The ECtHR became a full-time body. A right of appeal was also created effectively, under articles 42 to 44\textsuperscript{348}. This is because of the distinction between three-judge committees, seven-judge chambers (or sections), and a 17-judge grand chamber (the total number of judges being equivalent to the high contracting parties). Under article 43, the UK could have appealed, if not the procedural violation, then the awards of damages, within three months. Appeals (or referrals) are envisaged as 'exceptional cases', the tests for leave being 'a serious question affecting…the Convention' or 'a serious issue of general importance' (article 43).

The NIO had described any question of compensation as premature on 4 May 2001. It is not known what advice was forthcoming from the government's legal advisers. It is known that No. 10 was urged to appeal the £10,000 sums, and was presented with reasoned arguments.\textsuperscript{349} One can only surmise about political advice from the NIO on

\textsuperscript{348} Plus article 27(3).

\textsuperscript{349} Private information.
the state of the NI peace process. The 4 August 2001 came and went without any move from the UK government. The judgments became final.

The Finucane case

The facts of this case, and its consequences, may be stated briefly. On Sunday, 12 February 1989, two masked gunmen killed Patrick Finucane at home in Belfast in front of his family. The following day, a loyalist paramilitary organization claimed that it had killed an IRA officer and not the solicitor. His case has become a cause célèbre for those who maintain legal professionals were at risk from the security forces. In fact, there is evidence that being a solicitor gave Patrick Finucane immunity in the eyes of loyalists. It is also clear that the Ulster Freedom Fighters (‘UFF’) only proceeded with the killing because one or more RUC officers suggested it to them.

The applicant - Patrick Finucane's widow - alleged no effective investigation 'in circumstances giving rise to suspicions of collusion of the security forces with his killers'. The application was made on 5 July 1994. This of course was before McCann, and the idea of a substantive violation of article 2. The applicant had been much concerned about threats from within the RUC regarding her husband (whether because he was a solicitor or believed to be an important IRA member). She was not apparently aware at the beginning of the involvement of one or more police

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350 In contrast, in the Heathrow night flights case (Hatton & Others v United Kingdom (2003) 37 EHRR 28), the UK appealed the damages awards - successfully ((2004) 15 BHRC 259).
351 Panorama, BBC1, 17 & 18 June 2002.
353 Para. 60.
354 However, no complaints were ever made to the RUC (Stevens 3, para. 2.16).
officers in the UFF's killing. In any case, following *Yasa v Turkey* (1999) 28 EHRR 408, she would have been entitled to a proper investigation of her husband's death without any allegation of collusion implicating an agency of the state.\textsuperscript{355}

Collusion in general had been the subject of investigations by (later, Sir) John Stevens, a British police commander, in 1989-90 and 1993-95. The first report (Stevens 1) led to the arrest, charging and conviction of members of the Ulster Defence Regiment, part of the British army. No police officers were implicated. A loyalist, Brian Nelson, who was working for military intelligence, was sentenced to ten years for conspiracy to murder. The second report (Stevens 2) dealt *inter alia* with a BBC television *Panorama* programme on 8 June 1992, in which it was claimed that Nelson had admitted involvement in the Finucane killing. Stevens 3 (which was set up after 12 February 1999) was the first direct investigation of the events of 12 February 1989. In the summary report published on 17 April 2003\textsuperscript{356}, Sir John concluded that the killing of Patrick Finucane could have been prevented. He also criticized the RUC for failing to detect the killers.\textsuperscript{357} Stevens 3 affirmed collusion, but defined it broadly as: 'the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder…'.\textsuperscript{358}

Because of the four Jordan cases, the UK conceded in Finucane at Strasbourg that 'the RUC investigation, the inquest and the [first and second] Stevens inquiries did not cumulatively satisfy the procedural requirements imposed by Article 2 of the

\textsuperscript{355} P. 411.
\textsuperscript{356} Stevens Enquiry: Overview & Recommendations, 20 pp.
\textsuperscript{357} See Stevens 3, para. 2.9 for Sir John Stevens's comment on the prospect of conviction.
\textsuperscript{358} Para. 41. For a critique of this conclusion by a former RUC detective, see *Belfast Telegraph*, 20 April 2003.
Convention. Stevens 3 was proceeding, but the UK accepted that it had begun only ten years after the killing. The UK made much of the fact that the applicant, who complained that she had not been consulted from 1989, and who wanted only an independent judicial inquiry, was refusing to cooperate with Sir John Stevens and his colleagues.

The ECtHR made a finding only on the point of collusion: 'the proceedings for investigating the death…failed to provide a prompt and effective investigation into the allegations of collusion by security personnel.' The same point may be made as was made above about the four Jordan cases: the issue for the ECtHR was public confidence. The duty of agents of the state in 1989 was to detect and charge the killers: there were two members of the UFF; if there was one or more RUC officers involved, they might have been liable as accessories.

No damages were awarded the applicant. The decision of the ECtHR was not for her just satisfaction. She wanted a proper investigation, even given the passage of time.

After Jordan in Northern Ireland

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359 Para. 64.
360 Para. 84.
361 “In so far as the investigation was conducted by RUC officers, they were part of the police force which was suspected by the applicant and other members of the community of issuing threats against Patrick Finucane…In the circumstances, there was a lack of independence attaching to this aspect of the investigative procedures, which also raises serious doubts as to the thoroughness or effectiveness with which the possibility of collusion was pursued.” (para. 76)
362 Para. 89.
If the floodgates at Strasbourg had closed temporarily with Finucane, they were to be closed seemingly permanently - after some uncertainty in NI - by the House of Lords in early 2004: *In re McKerr* [2004] HLUK 12 [2004] 1 WLR 807.

When the applicant in the McKerr case, who had accepted the £10,000 from Strasbourg, tried subsequently to reopen the inquiry into his father's death in NI, the High Court in Belfast ruled on 27 July 2002 that the damages award was the end of the matter.\(^{363}\) The Court of Appeal overturned the McKerr decision on 10 January 2003.\(^{364}\) The secretary of state appealed. On 11 March 2004, the House of Lords held that killings before 2 October 2000 (when the HRA had been brought into force) could not rely upon the Jordan cases in applications concerning investigations of deaths. This was a surprising decision, given an earlier case which had gone to the Lords: *R(Amin) v Secretary of State* [2003] UKHL 51 [2004] 3 WLR 1169; and *R (Middleton) v West Somerset Coroner* [2004] UKHL 10 [2004] 2 WLR 800, announced also on 11 March 2004. The House of Lords held in *McKerr* that Amin and Middleton had been decided *per incuriam* (without argument on the point).\(^{365}\)

**Consequences**

How did the UK respond to the four Jordan judgments? A package of measures was drawn up in 2001-02. This was not made public initially. However, as a result of a parliamentary question from Kevin McNamara MP, a document was placed in the

\(^{363}\) Decision of Campbell LJ: not available on www.courtsni.gov.uk.

\(^{364}\) [2003] NICA 1, Carswell LCJ, McCollum LJ & Coghlin LJ.

\(^{365}\) The final paragraph in Middleton reads: 'In this appeal no question was raised on the retrospective application of the Human Rights Act and the Convention. They were assumed to be applicable. Nothing in this opinion should be understood to throw doubt on the conclusion of the House in [McKerr].'

(paragraph 50)
libraries of both houses on 7 November 2002. McShane was added subsequently to the four Jordan cases, and Finucane followed.

The UK document contains: a ten-page and 35-paragraph response by the government, detailing the law and practice on the investigation of state (and other) killings; and 14 annexes of legal and policy materials.

The government paper - drawn up by a group of officials led by the NIO - made principally the following points: (1) the Human Rights Act 1998 prohibited public authorities from acting incompatibly with human rights, including article 2; (2) addressing the question of a lack of independence of investigating officers, there was now a police ombudsman in post; (3) 'the Government…has concluded that, in view of the passage of time since the incidents in question…, it would not be feasible to re-open the police investigations…'; (4) opposition to the requirement that the director of public prosecutions always give reasons for non prosecution; (5) unnecessary to allow coroners to bring in verdicts of unlawful killing given existing law; (6) an amendment to the coroners rules by the lord chancellor, allowing witnesses to be compelled to attend; (7) an extra-statutory scheme, introduced by the lord chancellor, for legal aid in exceptional inquest cases; and (8) the development of the law of public interest immunity.

It is noticeable that the government did not respond the way it did after the Belfast Agreement, with wholesale reform through the Police (Northern Ireland) Act 2000.

367 Para. 7.
368 Prosecution of Offences (Northern Ireland) Order 1972 article 6.
and the Justice (Northern Ireland) Act 2002\textsuperscript{370}. Minimalism was back in fashion for the civil service. Nevertheless, the point was well made: under section 6(1) of the Human Rights Act 1998, it was unlawful for a public authority to act in a way incompatible with Convention rights; and, under, section 2(1), courts had to take account of Strasbourg jurisprudence when interpreting Convention rights, including that on procedural violations of article 2.

One of the measures concerned the director of public prosecutions for NI: he had decided - according to a parliamentary answer given by the attorney general on 1 March 2002 - that there is a public interest in giving reasons for non-prosecution in state killings.\textsuperscript{371} This does not mean that the director must give reasons in every case: that public interest has to be balanced with reasons for non disclosure.

By 19 March 2002 (ten months after the judgments), a draft package of measures had been sent to the Council of Europe. By 8-9 October 2002, a final version was available. Further information was received in Strasbourg in May 2003 and April and June 2004. UK officials met with the secretariat on 20 September 2004.

Under article 46(2) of the ECHR, the committee of ministers is required to supervise the execution of final judgments. Normally, the ministers' deputies (the ambassadors) agree interim and/or final resolutions, which are forwarded to the respondent state. The ministers' deputies had recalled, on 9 January 2002, replying to a parliamentary assembly resolution of 2000, the principle of subsidiarity in the

\textsuperscript{370} Plus the Justice (Northern Ireland) Act 2004.
They also complained of an increased workload as a result of protocol no. 11 to the ECHR.

The ministers' deputies had asked for a memorandum on 3-4 December 2002. On 9-10 April 2003, they decided to await the House of Lords' decision in Middleton (see above). Middleton and McKerr followed on 11 March 2004. The secretariat concluded on 7 December 2004 that: 'significant improvements in existing procedures and additional safeguards [had] been introduced. Several questions nonetheless remain outstanding and further information/clarifications are requested… The principal outstanding issues were: reasons for new DPP decisions regardless of the date of death; a pending judicial review on legal aid for inquests. As for the six actual cases, the secretariat expressed the view that the age of cases did not necessarily mean they could not be investigated; the House of Lords had deferred to the ECtHR on whether there was an article 2 obligation on the UK in international law.

On 23 February 2005, the committee of ministers agreed an interim resolution to pursue supervision in general and in particular; it would return to the former within nine months. The issue was less the six cases, on which the UK reported in appendix II to the interim resolution. The committee referred to eight outstanding general issues, on which the member state had reported in appendix I to the interim resolution.

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372 The Committee recalls that the subsidiary nature of the supervisory machinery presupposes that the rights guaranteed by the Convention should, first and foremost, be protected at the national level and implemented by the national authorities. This subsidiary character is also reflected in the "declaratory" nature of the Court's judgments, which leaves Governments wide discretion in choosing the means of implementing them.


There was another interim resolution of 6 June 2007. The committee of ministers had closed its examination of five issues in November 2005: inquests and criminal liability; the scope of inquests; the compellability of witnesses at inquests; the prior disclosure of witness statements at inquests; and legal aid at inquests. It went on to express satisfaction regarding the following: the limited nature of DPP reasons for non prosecution; the use of a public interest immunity certificate in the McKerr inquest; and the application of the measures to the armed forces. Three issues remained outstanding. The first was the ombudsman’s review of her powers, and the government response. These were to be provided. The second was defects in police investigations. The committee wanted to hear further from the PSNI’s historical enquiries team. The third was slow inquests. The committee wanted to know about the effect of reforms to the inquest system. The principal difference between London and Strasbourg remained outstanding individual investigations (on which the UK reported in appendix II to the interim resolution). The UK was urged ‘to take, without further delay, all necessary investigative steps in these cases in order to achieve concrete and visible progress’, and to keep the committee of ministers informed.

**Conclusion**

A number of points may be made. One, the four Jordan cases joined the list of adverse UK decisions regarding NI, and gave rise to invocations of shoot to kill and collusion. Two, Strasbourg never said any of this. Three, the UK responded minimally (in keeping with its practice), and it awaits the final opinion of the committee of ministers of the Council of Europe. There are unlikely to be any major

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repercussions. Four, it is difficult to accept that the degree of investigation was the only issue, given the ECtHR’s comments about public confidence. Five, it is not known how many more of these cases will flow from Strasbourg. UK acceptance of the Jordan decisions did not prevent a judgment in Finucane. Future applicants would be entitled to pursue claims for damages. Six, all those killed in NI could benefit from the judgments, though the very many victims of republican terrorists are unlikely to want to blame the state. Seven, the emphasis upon procedural, and not substantive, violations means that McCann is not being followed fully as regards NI (though it has been as regards Turkey’s treatment of the Kurds). Eight, it may be, in time, that the minority in McCann will be vindicated, particularly on the point that, when the state becomes concerned to protect the lives of active terrorists, it may fail in its duty towards their innocent victims. Nine, the principal failure of the UK as regards the four Jordan cases was the failure to appeal on the award of damages.
Introduction

We had a choice between good government and peace - and we chose peace.

Sir John Chilcot, Northern Ireland Office, early 1995. 377

I believe this conference is about the equality industry in NI. We all know what we are talking about. Here I want to state my conclusion: the equality industry is an indulgence NI could do without. I am not reneging on my civil rights origins; discrimination makes me even more angry today. I remain in favour of anti-discrimination law. And I want to see the UK sign and ratify the 12th protocol to the human rights convention. However, I part issue with the denizens of Equality House, and their social engineering fantasies. Societies are complicated entities. So also are constitutions - and I am speaking only as a constitutional lawyer - : after three decades of republican (and loyalist) terrorism, and with a UK government mired in appeasement on the back of the Belfast Agreement 378, NI badly needs, not quangocrats, but - with or within an assembly - reconciliation between catholics and protestants.

376 This paper was delivered at a Northern Light Review conference in the Malone Lodge hotel, Belfast on 5 November 2004.
378 ‘My worry is not only the USA…It's bombs in London’ (Peter Mandelson to Eoghan Harris, 30 January 2000, quoted in Dean Godson, Himself Alone, London 2004, p. 554).
I will chart the constitutional development in NI of protection against discrimination, and, a very different entity, affirmative action (which has become caught up in catholic nationalism). I will show where and when the norms of liberal democracy - through the concept of equality of opportunity - succumbed to minority sectarianism, focussing on the following four topics: the exclusion of teachers from anti-discrimination legal protection; the statutory duty on public authorities contained in section 75 of the Northern Ireland Act (‘NIA’) 1998; reverse discrimination in policing - the 50/50 policy - as a result of the Patten report; and the threat of reflectiveness (formerly representation) to judicial independence posed by a statutory judicial appointments commission.

**Protection against Discrimination**

*Government of Ireland Act 1920*

None of the histories starts with the GOIA 1920. However, section 5 prohibited discriminatory legislation (in the subordinate parliaments of Northern and Southern Ireland) on the basis essentially of religious belief; the provision was described as interfering with religious equality (seemingly a right in the common law). A series of prohibited instances was given: including the taking of any property without compensation (though NI courts interpreted this as a separate right\(^\text{379}\)).

Also, under section 8(6), executive authorities were prohibited from discriminating on the ground of religious belief.

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\(^{379}\) *O'Neill v NIRTB* [1938] NI 104; *Robb v Electricity Board for NI* [1937] NI 103.
Section 5 of the GOIA 1920 was not extensively used during the time of the NI parliament. There was little in the way of religiously discriminatory legislation. However, the courts were not then seen as an arena for addressing catholic grievances.

*Northern Ireland Constitution Act 1973*

The NICA 1973 - which led to the short-lived, power-sharing, Sunningdale administration - provided in part III for the prevention of (direct) religious and political discrimination.

Section 17 prohibited legislation, which discriminated against any person or class of persons on the ground of religious belief or political opinion. (These are separate grounds.) Legislation could be referred by the secretary of state to the judicial committee of the privy council for a decision on validity: section 18. Section 19 - building on the GOIA 1920 - made such discrimination by public authorities unlawful.

The NI courts have had three decades of experience interpreting section 19, drawing upon gender, race and disability discrimination cases where relevant.

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380 Section 5(2) provided: 'Any existing enactment by which any penalty, disadvantage, or disability is imposed on account of religious belief or on a member of any religious order as such shall, as from the appointed day, cease to have effect in Ireland.' It is not clear whether this was ever used. It stands in stark contrast to the Police (Northern Ireland) Act 2000.
Fair Employment (Northern Ireland) Act 1976

This is the act which established the fair employment agency for Northern Ireland. The idea stemmed from the report of the van Straubenzee committee in 1973-74. While the NICA 1973 had prohibited religious or political discrimination by public authorities, the Fair Employment (Northern Ireland) Act ('FENIA') 1976 extended this to private-sector employment.

The FENIA 1976 also imposed on the fair employment agency a duty to promote equality of opportunity (but only between persons of different religious beliefs).

Affirmative Action

Fair Employment (Northern Ireland) Act 1989

This is the act which created the successor fair employment commission for Northern Ireland. It was inspired by a report of the standing advisory commission on human rights ('SACHR'), a body created by the NICA 1973 to advise the secretary of state on (only) discrimination prevention and redress.

The Fair Employment (Northern Ireland) Act ('FENIA') 1989 required employers to religiously monitor their workforces. It also provided for affirmative action, but not reverse discrimination. Affirmative action was based upon the idea of fair participation in employment by catholics and protestants. The FENIA 1989
prohibited in addition indirect religious or political discrimination in private-sector employment.

The fair employment agency had a duty to promote equality of opportunity; the FENIA 1976 was now amended to add, for the fair employment commission, the duty to promote affirmative action.

The FENIA 1976 had established a fair employment appeals board, to hear and determine appeals involving allegations of religious and political discrimination. This was now replaced by the fair employment tribunal for Northern Ireland, with additional powers.

*Northern Ireland Act 1998*

This is the act, following the Belfast Agreement, which replaced the NICA 1973. Section 17 was re-enacted in section 6 on the legislative competence of the assembly: '(2) A provision is outside that competence if…(e) it discriminates against any person or class of person on the ground of religious belief or political opinion;'. The role of the judicial committee was expanded in part VIII of the act. Section 19 was re-enacted in section 76 (plus 90 to 92 and schedule 11): '(1) It shall be unlawful for a public authority…to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.'
I consider section 75 (statutory duty on public authorities) - which has excited inordinate attention in the past six years - below.

*Fair Employment and Treatment (Northern Ireland) Order 1998*

The Fair Employment and Treatment (Northern Ireland) Order ('FETNIO') 1998 is a consolidation of the two fair employment acts. This had been recommended by SACHR in 1997, which envisaged a fair treatment act. An order in council was passed on 16 December 1998 - after the Belfast Agreement - and it came into operation during 1999. This equality legislation was added to the NI statute book (not the UK's), in anticipation of devolution - equality being a transferred matter under the NIA 1998.

The FETNIO 1998 extended anti-discrimination protection, and equality of opportunity promotion, from employment in the private sector to: bodies in charge of further and higher education; goods, facilities, services and premises (with an exception for small dwellings); and barristers.

It also strengthens affirmative action: lawful recruitment from the unemployed; and religion-specific training for non-employees.

The principle concepts - after nearly three decades of equality legislation - remain: discrimination and unlawful discrimination (article 3); affirmative action (article 4); and equality of opportunity (article 5).
First, discrimination and unlawful discrimination. This concept originated in section 16 of the FENIA 1976. (There is no concept of lawful direct discrimination\(^{381}\).) Discrimination is defined in article 3(1) of the FETNIO 1998 as ‘(a) discrimination on the ground of religious belief or political opinion’\(^{382}\) or (b) discrimination by way of victimisation. Discrimination is either direct - treating another person less favourably than other persons - or indirect: applying a requirement or condition, but where ‘the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller’\(^{383}\). There is a defence of justification to alleged indirect discrimination. And the requirement or condition has to be to the detriment of the complainant. Committing unlawful discrimination - a statutory tort - is defined in paragraph (7) as doing any act prohibited by part III (discrimination in the employment field) or IV (discrimination in other fields) or where a person is treated as doing such an act by part V (other unlawful acts).

Second, equality of opportunity (article 5) (which originated in section 3 of the FENIA 1976) - even if affirmative action is article 4. Equality of opportunity applies only to religious belief. It is defined in article 5(2) of the FETNIO 1998 as: having ‘in any circumstances the same opportunity…as that other person has or would have in those circumstances, due allowance being made for any material difference in their suitability.’

\(^{381}\) The only lawful discrimination is indirect discrimination which passes the test of justification.  
\(^{382}\) In Re Northern Ireland Electricity Service's Application [1987] NI 271, Nicholson J held that the belief or opinion could be that of a relevant third party (the employees of a company alleging discrimination).  
While article 5(5) appears to state that the promotion of equality of opportunity includes the promotion of affirmative action, article 5(3) determines the relations between the concepts: 'a person is not to be treated as not having the same opportunity as another has or would have by reason only of anything lawfully done in pursuance of affirmative action.'

Affirmation action is therefore logically placed as article 4 (and is the leading concept of the FENIA 1989). It is defined as 'action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community'. This includes the adoption of practices encouraging such participation, and the modification or abandonment of practices that may not. The key phrase is fair participation. Fairness usually refers to process. It is not about results. Participation is also an action concept, not one of structure. However, the strange concept of representativeness (which has a different legal source) has intruded; under- (never over-) representation is taken to be a sign of the need for more affirmative action, and even to be evidence of continuing discrimination.

*Why and How?*

The reason for this law was the civil rights movement of the late 1960s/early 1970s. Discrimination was a generalized charge pressed against the unionist government. It would be used to justify republican violence. It was based upon some elementary

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384 NIA 1998 ss.68(3) & 73(4).
385 Covering public housing, public appointments, electoral arrangements and even public order legislation.
public employment statistics.\textsuperscript{386} It was never clear whether such discrimination (direct or indirect) had actually taken place, the grievance becoming shortfalls in employment from communal representativeness.\textsuperscript{387} With present discrimination arguably diminishing, intellectual reliance came to be placed upon past discrimination (a dubious and unworkable concept for legal liability). John Whyte - who did not publish until 1983 - produced the first scholarly review of the literature.\textsuperscript{388} It is extraordinary that the article did not stimulate proper academic research. Graham Gudgin advanced more recently an economic hypothesis to explain persisting catholic overrepresentation among the unemployed: a higher rate of population growth (incontrovertible) combined with catholic out-migration being less responsive to high unemployment (to be measured).\textsuperscript{389} It remains to be seen whether the unemployment differential - an increasingly meaningless statistical ratio which continues to be cited\textsuperscript{390} - may or may not be influenced by targeting objective need, as suggested by the Belfast Agreement.

Policy development on fair employment was mediated by the SACHR. This was as true of 1976-89\textsuperscript{391}, as it would be of 1989-98\textsuperscript{392}. It was characterized more by political drive than by scholarly integrity. The world, or at least selected countries,

\textsuperscript{387} Austen Morgan, \textit{Labour and Partition}, London 1991, pp. 7-12. This work was done in Belfast in the early 1970s under John Whyte. The seminal article was: E. Aunger, 'Religion and social class in Northern Ireland', (1975) \textit{Economic and Social Review}, 7, 1.
\textsuperscript{388} 'How much discrimination was there under the Unionist regime, 1921-1968?', in T. Gallagher & J. O'Connell, eds., \textit{Contemporary Irish Studies}, Manchester 1983.
\textsuperscript{389} 'Discrimination against Catholics during the Stormont regime', in P.J. Roche & B. Barton, eds., \textit{The Northern Ireland Question}, Aldershot 1999.
\textsuperscript{390} This position has persisted despite significant changes both in the composition of the labour force and in the overall rate of unemployment over the past 30 years. A recent instance is: UTV website, 18 October 2004 ('Catholics twice as likely to be unemployed').
was rifled for ideas and legitimacy: the United States of America (‘USA’) in the 1960s and 1970s\textsuperscript{393}; Canada in the 1980s\textsuperscript{394}; South Africa (?) in the 1990s\textsuperscript{395}.

Other Categories

Equality in NI was mainly about catholic/protestant relations. However, anti-discrimination law developed throughout the UK (and in advance of the ROI), taking the following institutional forms in NI:

- the equal opportunities commission for Northern Ireland, established under the Sex Discrimination (Northern Ireland) Order 1976;
- the commission for racial equality for Northern Ireland, established under the Race Relations (Northern Ireland) Order 1997;

NI was included in a UK statute in the latter instance; in the other two cases, direct rule legislation - orders in council - was relied upon to extend British law to NI.

\textsuperscript{393} The MacBride principles, based upon the Sullivan principles.
\textsuperscript{394} Especially the Abella report of 1984, which recommended employment monitoring and affirmative action.
\textsuperscript{395} Article 9 of the 1996 constitution, containing the idea of ‘disadvantaged by unfair discrimination’ and the defence of fair discrimination.
The Belfast Agreement

A great many things are attributed to the Belfast Agreement, by proponents and opponents, usually based upon a political reading of a text that is not wholly legal.

There is a section headed: rights, safeguards and equality of opportunity. Because this occurs in the multi-party agreement, which is annex 1 of the British-Irish agreement, the section (including its title) falls to be construed under articles 31-33 of the 1969 Vienna convention on the law of treaties. It is significant that, when equality might have been used in the title (as shorthand), the two states parties - the UK and the ROI - expressly opted for the phrase equality of opportunity.

The first part of the section, human rights, contains the following relevant provisions:

- a qualified promise to legislate by the UK government, along the lines of what became section 75 of the NIA 1998 (the first paragraph 3). Again, the reference is to equality of opportunity;

- a qualified promise to legislate by the UK government for a unified commission, to replacing the existing four bodies (the first paragraph 6).

The second part of the section, dealing with economic, social and cultural issues, is also relevant. There is another qualified promise by the UK government. The second paragraph 2(iii) reads: ‘measures on employment equality included in the recent White
Paper ("Partnership for Equality") and covering the extension and strengthening of anti-discrimination legislation, a review of the national security aspects of the present fair employment legislation at the earliest possible time, a new more focused Targeting Social Need initiative and a range of measures aimed at combating unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need.’

This was the basis of the FETNIO 1998, and of other measures which will be considered below.

The Equality Commission

The UK had therefore created in NI between 1973 and 1998: the fair employment agency (later commission); the equal opportunities commission; the commission for racial equality; and the (non legal) disability council. The perceived beneficiaries were the disadvantaged (in their and/or others’ eyes): catholics, women, ethnic minorities and the disabled.

These four public bodies created a degree of institutional power, shared by: officers and other employees; the great and good (and not so great and good) who ran them; their clients, through lobby groups and individually; academics and students attracted by intellectual opportunities; and subcontracted lawyers and others - what are probably called stakeholders.
Fair employment was a catholic or nationalist concern, and, given the internal security threat of republicanism, the one that received most attention from the UK government. Catholic representatives, while not particularly enamoured of anti-sexism, anti-racism and (to a lesser extent) fighting for the disabled, tended to back demands for resources all round. The lesser causes, while fearing the bigger fair employment commission, also saw it as a useful precedent. Secular radicals became dependent upon nationalism, even as the more catholic elements of that tradition were prepared to cut the former ideologically adrift.

The stakeholders adopted a less than deferential attitude to the first paragraph 6 of the rights, safeguards and equality of opportunity section of the Belfast Agreement (in contrast, the first paragraph 3 and the second paragraph 2(iii) were demanded with customary righteousness). A unified equality commission was perceived as a threat to vested interests, though the disadvantaged were always invoked as the justification for maintaining separate institutional power.

The UK government surprisingly declined to back down (probably because it wanted to rationalize the management of four quangos). The major lobby on the bill which eventually became the NIA 1998 - sections 73 to 78 dealing with 'equality of opportunity' (that phrase again) - was on the desirability of maintaining the four separate agencies, even though the people of NI had voted on 22 May 1998 for a unified equality commission.396

The new Equality Commission ('EC') - it was eventually established in 1999 - was given functions by the NIA 1998 and the FETNIO 1998 (the latter also amended the Sex Discrimination (Northern Ireland) Order 1976 and the Race Relations (Northern Ireland) Order 1997\textsuperscript{397}).

The NIA 1998 simply dissolved the four bodies and transferred their principal functions to the EC. However, there was to be a consultative council - selected by the commission - to advise on the appropriate division of resources between the different constituencies.

The FETNIO 1998, consolidating, also listed the principal functions of the EC regarding fair employment. The general duty of the EC (article 7) is to: promote equality of opportunity; promote affirmative action; to work for the elimination of unlawful discrimination; and to keep the working of the order under review. Article 10 requires the EC to identify and keep under review patterns and trends of employment and occupations; the principal purpose of this is to consider whether they reveal the existence or absence of equality of opportunity.

Equality of opportunity, then, and not affirmative action, would appear to be the principal responsibility of the EC. It is significant that the elimination of unlawful discrimination plays a secondary role. Is this a coded statutory admission that the problem has been solved, or - as some fear - an indication that further equality is to be promoted if necessary through discrimination?

\textsuperscript{397} The first post-devolution NI legislation in this area - the Equality (Disability etc.) Bill (Northern Ireland) - was a victim of suspension. Westminster had to step in: Equality (Disability etc.) Order 2000.
The FENIA 1976 was a concession to catholic nationalism. However, while nationalists were against discrimination (against them), catholics wanted to protect catholic institutions. The main area was education. Here, catholic schools had employed catholic teachers (imposing religious tests), while protestant teachers worked for state schools (which might also recruit catholics).

The catholic church objected to fair employment for teachers; it wanted to continue to discriminate. But the problem was: if catholics could continue to do this, should there be equal opportunities regarding state schools? A decision was made simply to exclude all teachers - a whole occupational group - from legal protection. This was unique: and to be distinguished from the other exceptions: clergymen and ministers; private households; and where the essential nature of the job requires. However, the fair employment agency, and later the fair employment commission, were charged with keeping the exception of teachers under review in the light of equality of opportunity.

The law on teachers in sections 37 to 39 of the FENIA 1976 survived the FENIA 1989 and is now consolidated in the FETNIO 1998:

**Article 71 School teachers**

(1)...this Order does not apply to or in relation to the employment as a teacher in a school.

(2) The Commission shall keep under review the exception...with a view to considering
whether...it is appropriate that any steps should be taken to further equality of opportunity...

(3) For the purpose of assisting it in the discharge of its duty...the Commission may conduct investigations...

(4) The Commission may, and shall whenever the Department so directs, report...upon the exercise of its functions under this Article...

...

(6) The Department may by order provide that paragraph (1) -

(a) shall cease to have effect;
(b) ...

The story of the exclusion of teachers since 1976 is one of abject cravenness. The NIO did nothing. The fair employment agency, and commission, and the EC, did very little.\(^\text{398}\) Meanwhile, catholics demanded more and more rights, safe in the knowledge that they had a monopoly in catholic schools and, probably, equal opportunities in state schools simply because of the culture of fair employment\(^\text{399}\).

The story got worse, with the extension of European anti-discrimination law, from equal treatment for men and women, to - as a result of article 13 EC of the 1997 Amsterdam treaty - , 'sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

\(^\text{398}\) The fair employment agency reviewed the exception in 1981 and 1987. 'The bulk of opinion among interested parties favoured the retention of the exception.' In December 2001, the EC asked two academics to survey educational opinion. 'Their research highlighted the complexity of the issue and concluded that...the exception of teachers...is widely accepted, and the support for change is a minority view.' It was only in October 2003, 27 years after the FENIA 1976, that the EC launched an investigation. (Letter, Evelyn Collins to Lord Laird, 5 July 2004) The EC has declined to release the results of the 1981 and 1987 reviews (letter Joan Harbison to Geoffrey Dudgeon, 6 November 2001).

\(^\text{399}\) I researched this issue in 2001. I was left with the decided impression that the education and library boards thought they should not discriminate on the ground of religious belief or political opinion.
European law against discrimination based on religion or belief alarmed clerical interests, even though article 4 of the draft equal treatment directive (now less sex and racial or ethnic origin) allowed exception for 'genuine occupational requirement'. On 2 October 2000, the Irish taoiseach, Bertie Ahern, received a catholic led, but protestant participating\textsuperscript{400}, delegation in Dublin. The catholic bishops' spokesman said later that they had been 'pushing at an open door'\textsuperscript{401}. That was very true.

The Irish minister, John O'Donoghue, at the council of employment ministers, in Luxembourg on 17 October 2000, managed to force through significant amendments to article 4. [Deletions] and additions are shown thus:

**Preamble**

\[...

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate....

\[...

**Article 4**

[Genuine] Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned

\textsuperscript{400} One of these was the Rev. Harold Good of the methodists, but then a member of the Northern Ireland human rights commission. Increasingly, protestants want what catholics have (see the view of Jim Wells MLA of the DUP: News Letter, 22 October 2004).

\textsuperscript{401} The full story of this lobby is in the Irish Times, 17, 18 & 19 October 2000.
or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. [Notwithstanding paragraph 1, the Member States may provide that in the case of public or private organisations based on religion or belief, and for the particular occupational activities within those organisations which are directly and essentially related to religion or belief.] Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference in treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute [sic] a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment [may not, however, give rise to any discrimination on the other grounds referred to in Article 13 of the EC Treaty] shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public and private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.
The principal casualty was text advanced by the UK delegation in COREPER 1. This is believed to be the main Irish contribution to European secondary legislation. What does it mean? John O'Donoghue claimed that the Irish status quo had been vindicated. But Martine Aubry of France, in the chair, insisted that, say, catholic schools could only insist upon a catholic to teach religion. Article 4, in fact, seems to suggest that the catholic church could insist upon all teachers being catholics. And the Irish minister interpreted it as meaning institutions with a religious ethos could impose that upon all potential and existing employees.

Irish catholic interests no doubt thought article 4 applied to school teachers in NI. However, the UK, in another of its NI is different stances, had gone even further and negotiated a specific regional derogation (against the wishes of the European Commission):

PREAMBLE

Recital (34)

The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.

...

PARTICULAR PROVISIONS

Article 15

Northern Ireland

1. ...

2. In order to maintain a balance of opportunity in employment for teachers in
Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

This was an afterthought to the provision on policing (see below). However, the UK had been supported by the Irish government. What does it mean? It will not be difficult to disprove that the exclusion of teachers is to maintain a balance in equality of opportunity. Furthering reconciliation is even more spurious; even the dogs in the street know that is the mission of integrated schools.

The result of Dublin and London's interventions is: nothing prevents the assembly, or Westminster, ending the exclusion of teachers from anti-discrimination protection.

**Topic (2): the Statutory Duty on Public Authorities contained in section 75 of the Northern Ireland Act 1998**

This idea - essentially of proofing all public policy for equality - originated in the UK with Ken Livingstone's greater London council in the early 1980s. Mrs Thatcher's government put paid to metropolitan loony leftism in 1986, and new labour did a great deal in the 1990s to restore the balance towards middle Britain; that left NI (probably the most conservative part of the UK) open to continued social experimentation by unelected - and unelectable - political radicals.
NI, indeed, has inspired a general statutory duty, to promote equality of opportunity and good relations, on a wide range of specified authorities, including the police, in England and Wales and Scotland, under section 2 of the Race Relations (Amendment) Act 2000.  

A statutory duty was proposed in NI by SACHR in 1997. This was to replace the voluntary policy appraisal and fair treatment ('PAFT') administrative guidelines (which had been announced in 1992, and relaunched in 1994, along with targeting social need ['TSN']). As noted above, it was included in the first paragraph 3 of the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement.

Section 75, as drafted, and as presented to parliament by the government, appeared relatively innocuous. It begins: 'A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity…'. This acknowledges that public authorities have functions, and that they will continue to do what they were established to do. 'Due regard' is the key phrase, it being implied that the public authority - subject to judicial review (and the advice of the EC) - is the best judge of what it needs to do to promote equality of opportunity; that is both a question of resources and of the impact of the statutory duty on a particular public body.

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404 There is now a new targeting social need (new TSN).
405 Subject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables.
Subsection (1) then goes on to define the potential beneficiaries of policy proofing. Paragraph (a) refers to the following discrimination categories: 'between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation.' Religion and politics had been part of NI law since the 1970s. Race and marital status were included in the PAFT guidelines. Sexual orientation came through the Belfast Agreement. These categories are characterized by more than two options. Paragraphs (b) to (d), however, contain dualities: between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

Promoting equality of opportunity is programmatic; anti-discrimination protection - in contrast - is strictly legal.

References to subsection (2) of section 75 are usually ignored in enthusiasm about the statutory duty: 'Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.' The equality industry is much taken with the difference between due regard and regard in subsection (1) and (2). But due regard is unlikely to be interpreted legally as a priority duty. Why would parliament distinguish duties in NI when, in the Race Relations (Amendment) Act 2000, it refers

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407 Equality Commission, Section 75 of the Northern Ireland Act 1998, Belfast n.d. but 2002(?), p. 27, which introduces the concepts of need and desirability.
to due regard to promote equality of opportunity and good relations. If parliament was distinguishing, it could be argued equally that regard is more emphatic than due regard. Most likely, due regard and regard are the same (as is suggested by ministerial statements in parliament). Subsection (2) raises the question of good relations as a possible restraint on the promotion of equality of opportunity (reverse discrimination in policing is a case in point). But why is the duty to promote good relations confined to religious belief, political opinion and racial group? Is it that all such bad relations are considered undesirable, while bad relations between different ages, married and single and different sexual orientations meet with less official disapproval?

Section 75 has added greatly to the work of the equality industry. First, schedule 9 of the NIA 1998 gives the EC a major responsibility. It is required to keep section 75 under review, and to offer advice to public authorities and others. It polices the system of equality schemes, whereby each public authority has to produce, and revise on request, a document setting out how it proposes to fulfil the statutory duty. These equality schemes have to provide for impact assessments of particular policies, screening exercises, timetables etc. The result is a torrent of paper, and bureaucratic ideological grinding - in short, consultation overload.

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408 It has been impossible to get any assessment of the impact of section 75: House of Lords, Hansard, vol. 663, col. WA13, 29 June 2004.
409 There is a public-sector statutory duty unit in the EC and a statutory duty committee.
410 ‘Many of the early draft equality schemes were deficient, to varying degrees, in screening methodology, consultation and monitoring arrangements, and provided only limited evidence of top level commitment.’ (Equality Commission, Summary Report on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities, n.d. but 2003, p. 6)
411 I found this particular example: ‘Mainstreaming equality is important for several reasons. Experience in Northern Ireland and elsewhere shows that questions of equality may easily become sidelined in organisations. Effective attention to mainstreaming addresses this problem, by requiring all public authorities to engage directly with equality issues at an early stage in policy development. This is complementary to making more effective those measures adopted specifically to tackle discrimination, such as anti-discrimination law.’ (Equality Commission, Guide to the Statutory Duties, n.d. but 2000(?), p. 6)
Second, the statutory duty in the NIA 1998, after the Belfast Agreement, was seen to be in the interest of the following groups: catholics, blacks and ethnic minorities, older people, married (mainly) women and gays and lesbians (and maybe transsexuals). They are given legal recognition through paragraph 5 of schedule 9, whereby public authorities, under direction from the EC, 'shall consult…representatives of persons likely to be affected by the scheme' (affect means, of course, negatively as well as positively). That means every lobby group in NI, whether comprising a handful of individuals or the NI branch of an established UK civil society body.

This is the point to refer to the unique voluntary and community sector in NI. Voluntary activity is characteristic of every society. What distinguishes NI is the state-sponsored nature of these groups. In fact, voluntary groups believe it is their right to be maintained by the state. In the transition from terrorism to democracy, with republicans still behaving like fundamentalists, the UK government has done reconciliation no service by giving constitutional status to other self-appointed groups (some of whom have paramilitary connections). Accountability should be between the executive and a - elected - legislature in Belfast or London, with an independent judiciary, and not an EC (under secretary of state supervision) directing all other public authorities (including the NIO) to subject their work to review by an endless procession of so-called representative groups.

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412 The EC has failed to follow the practice of European law, where the emphasis is upon anti-discrimination; men and women are treated equally. In NI, in contrast, the disadvantaged group has been championed: Equality Commission (in conjunction with ICTU and WRDA), Women's Manifesto, Belfast 2003.

413 People in Northern Ireland have been given a new voice in public policy decision making…[Section 75] provides an opportunity for the community to participate in public policy-making, right from the start of the process.’ (Equality Commission, Summary Report on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities, Belfast 2002, p. 1)

414 On 7 April 2000, the NIO published for consultation the first draft of its equality scheme 'to a list of NGOs thought to be representative of the main groups relevant to the section 75 categories for Northern Ireland purposes.' (NIO, A Progress Report, 31 July 2001, p. 3) Thirty seven NGOs -
Topic (3): Reverse Discrimination in Policing - the 50/50 policy - as a result of the Patten Report

When parliament legislated in 2000 to directly discriminate on the ground of religious belief, a line was crossed in NI. This had, of course, been implicit in the promotion of affirmative action after 1989. And the equality industry shows every desire to press ahead with quotas for selected disadvantaged groups in every employment or occupation.

The under representation of catholics in the former Royal Ulster Constabulary ('RUC') is well known; on 31 December 1998, 8.0 per cent were catholics: 88.1 per cent were protestants (with 3.9 per cent others). However, when it comes to senior officers (superintendents and above), catholics were over represented, at over 16 per cent. Were catholics the victims of discrimination? Hardly. For this to be true, the RUC would have to have discriminated against catholics when recruiting, and then discriminated in their favour when promoting.

There are three alternative explanations for catholic under representation: (1) intimidation by republican paramilitaries; (2) social ostracism by important elements of the catholic community; and (3) political abstentionism from the institutions of government in NI.

including the SDLP(!) - responded. Later, 'despite the persistent, determined pursuit of responses by letter, telephone calls and on the Department's website a disappointing total of only six responses was received.' (p. 3)
The 50/50 policy is not part of the Belfast Agreement.\textsuperscript{415} However, paragraph 3 of the policing and justice section provided for an independent commission to make recommendations for future policing arrangements. Mo Mowlam appointed Chris Patten as chairman.

Patten came up with three recommendations: (1) selection on merit, but into a pool; (2) 'an equal number of Protestants and Catholics should be drawn from the pool of qualified candidates';\textsuperscript{416} and (3) a new, enlarged part-time reserve, 'the additional recruits to come from those areas in which there are currently very few reservists or none at all.'\textsuperscript{417} Patten stated in his report (paragraph 15.11) that he had consulted the fair employment commission, and received a legal opinion from counsel: his proposal for reverse discrimination was contrary to NI anti-discrimination law, but would not be contrary to European law. Wrong. Either Patten was mislead by one or both of his advisors; or he put something in his report he knew not to be true (or he was simply careless). Patten reported on 2 September 1999. On 25 November 1999, the European commission published a draft equal treatment directive dealing with article 13 EC (which had been agreed on 2 October 1997 and entered into force on 1 May 1999).

The UK government had asked Patten to make recommendations. In public law, a decision maker cannot fetter his discretion. However, Mo Mowlam immediately

\textsuperscript{415} The NIO disagrees: 'This policy must be implemented with its differential impact as described because it is a fundamental element of the Good Friday Agreement.' (A Progress Report, 31 July 2001, pp. 36-7) See also, B. Osborne & I. Shuttleworth, eds., Fair Employment in Northern Ireland, Belfast 2004, p. 168.

\textsuperscript{416} Recommendation 121.

\textsuperscript{417} Recommendation 104.
accepted everything, sight unseen seemingly (though Peter Mandelson tried later to slightly accommodate liberal unionist opinion\textsuperscript{418}).

Parliament set about implementing Patten. It led to the Police (Northern Ireland) Act 2000.\textsuperscript{419} What would an equality impact assessment of 50/50 say about promoting good relations in NI?

Section 46 (discrimination in appointments) requires the chief constable to appoint from the pool of qualified applicants: ‘one half shall be persons who are treated as Roman Catholics; and...one half shall be persons who are not so treated.’\textsuperscript{420} It adds the police to the exceptions part of the FETNIO 1998, and similarly amends the Race Relations (Northern Ireland) Order 1997 (while section 74 and schedule 5 of the Police (Northern Ireland) Act 2000 applies other anti-discrimination law to the police!).

Section 47 refers to these temporary provisions, to expire after three years. However, the secretary of state may, and did, renew the temporary provisions\textsuperscript{421}, ‘having regard to the progress that has been made towards securing that membership of the police...is representative of the community in Northern Ireland’ (subsection (4)(a)).

\textsuperscript{418} ‘But the NIO also felt that during Mandelson’s tenure, they had not - in the words of one senior official - "hit him hard enough with the idea of "Patten must be adhered to, right or wrong", and had let him deviate from that template for understandable political and administrative reasons.’ (Dean Godson, \textit{Himself Alone}, London 2004, pp. 638-9)

\textsuperscript{419} I annotated this statute for Sweet & Maxwell’s Current Law Statutes.

\textsuperscript{420} This is not of course recruitment on merit. Surprisingly, the oversight commissioner, Al Hutchinson, maintains that it is (Office of the Oversight Commissioner, \textit{Report 11: September 2004}, Belfast, pp. 88 & 94)

Section 48 provides for an action plan for women. Women were only 12.6 per cent of the Royal Ulster Constabulary (including in the part-time reserve), according to Patten. However, there were to be no quotas for them. Why? Because that was not possible in European law. For once, Patten got his European law correct.

Because of the mistake made by Patten, and Mowlam/Mandelson's acceptance of the report, the UK had to negotiate a special opt out from the equal treatment directive. This was done through COREPER 1. Article 15 of the equal treatment directive has already been cited above in the discussion on the exclusion of teachers:

**PREAMBLE**

Recital (34)

The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.

...

**PARTICULAR PROVISIONS**

**Article 15**

**Northern Ireland**

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

2. ...
This provision - which was implemented on 2 December 2003 along with the rest of the directive - contains the concept of representativeness. The effect of article 15(1) is to disapply the equal treatment directive regarding the police in NI. However, that is only as long as Westminster provides for reverse discrimination through national legislation.  

Catholic applications to the new Police Service of Northern Ireland have increased. That is to be welcomed. However, the UK government seeks to argue that this is because of 50/50. Most likely, it is all the changes - including the end of mainstream republican intimidation and the presence of nationalists on the policing board - which have taken place since 1998. When the government was renewing the temporary provisions in parliament, it published figures for catholics and women. They were roughly similar, showing that reverse discrimination has made little or no difference. If 50/50 is to be defended as the principal cause of the increase in catholic applications, the UK government is effectively saying that catholics expect to be more favourably treated than protestants. That is most unlikely. If, however, it is true, what consequences will that have for an integrated police service in coming years?

**Topic (4): the Threat of Reflectiveness (formerly Representation) posed by a Statutory Judicial Appointments Commission**

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422 This point seems to be misunderstood by the employment and social affairs DG: letter Odile Quintin to Ulster Human Rights Watch, 15 March 2004.
The starting point is the idea of an independent judiciary. This is related to how the common law works. How are judges slotted into the constitution, along side the executive and legislature?

In NI from 1921, the problem was partly solved with the lord chancellor in London being responsible effectively for senior judicial appointments in Belfast; when Stormont was closed down in 1972, he - later aided by the court service for Northern Ireland423 - became responsible for all judges and magistrates.

However, there was also a sectarian principle involved; catholics wanted catholic judges (albeit on a rotating basis). This predated the troubles, and is not a consequence of the equality industry's power within the state.

In 1968, Maurice Gibson QC (killed by the IRA in 1987) was judged the best candidate for a high court vacancy. The unionist prime minister, Capt. Terence O'Neill, however, wanted to appoint a catholic. He was overruled by the UK government. Writing to the lord chancellor in October, Capt. O'Neill stated: 'It is distasteful to me to have to mention considerations which, in an ideal world, would be irrelevant but we have learned from hard experience here that appointments made on merit alone are frequently criticised if they do not result in a balance between the two sections of our community.'424

423 Established under the Judicature (Northern Ireland) Act 1978.
424 Belfast Telegraph, 1 January 2004.
This became the view of a different UK government in 1971. The then lord chancellor suggested two catholic candidates for a High Court vacancy, Turlough O'Donnell QC and Eoin Higgins QC. The then unionist prime minister, Maj. James Chichester-Clark, agreed but mentioned that his own attorney general, Basil Kelly QC, a protestant, was somewhat senior. The lord chancellor insisted upon a catholic. Eoin Higgins accepted.\textsuperscript{425}

A statututory judicial appointments commission ('JAC') was not part of the Belfast Agreement. However, there was provision for a wide-ranging review of criminal justice. This was to be carried out by the very officials who had run such policy during the troubles.

The criminal justice review was concerned about confidence building, and assumed that responsibility would be devolved to an administration in NI. It recommended a JAC: 'a strong and broad-based body of opinion (from most parts of the political spectrum) favoured the establishment of some form of Judicial Appointments Commission…'\textsuperscript{426}.

This was provided for in the Justice (Northern Ireland) Act 2002. However, it was dependent upon the devolution of policing and justice (which the criminal justice review saw as the reason for the JAC\textsuperscript{427}). Then, following the joint London/Dublin

\textsuperscript{425} In 1988, he and his wife narrowly missed IRA assassination (another family being blown up in error).
\textsuperscript{426} Review of the Criminal Justice System in Northern Ireland, March 2000, paragraph 6.46.
\textsuperscript{427} Paragraph 6.102.
declaration of 1 May 2003, the UK government legislated - in the Justice (Northern Ireland) Act 2004 - to establish the JAC regardless.\textsuperscript{428} It is being set up.

What is the problem? The UK government claims not to know the community background of the senior judiciary.\textsuperscript{429} Nevertheless, parliament has legislated for a reflective judiciary.

This can be seen in section 5 of the 2002 act, as amended by section 3 of the 2004 act. [Deletions] and \textit{additions} are shown thus:

\begin{verbatim}
5 Appointment to listed judicial offices

...(8) The Commission must, so far as it is reasonably practicable to do so, secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office.]

[(9) But the selection of the person to be appointed, or recommended for appointment, to the listed judicial office (whether initially or after reconsideration) must be made solely on the basis of merit.]

(8) \textit{The selection of a person to be appointed or recommended for appointment, to a listed judicial office (whether initially or after reconsideration) must be made solely on the basis of merit.}
\end{verbatim}

\textsuperscript{428} I annotated both these statutes for Sweet & Maxwell's Current Law Statutes.
\textsuperscript{429} House of Lords, \textit{Hansard}, vol. 663, col. WA76, 6 July 2004. The problem would seem to be the overrepresentation of catholics in the senior judiciary: the lord chief justice is a catholic; two of the three court of appeal judges are catholics; and at least half of the ten-strong high court bench is catholic.
(9) Subject to that, the Commission must at all times engage in a programme of action which complies with subsection (10).

(10) A programme of action complies with this subsection if -

(a) it is designed to secure, so far as it is reasonably practicable to do so, that appointments to listed judicial offices are such that those holding such offices are reflective of the community in Northern Ireland;

(b) it requires the Commission, so far as it is reasonably practicable to do so, to secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office; and

(c) it is for the time being approved by the Commission for the purposes of this section.

This amendment, to a section which had not come into force, shifts the emphasis from merit to reflectiveness. Section 5 of the 2002 act originally distinguished a reflective shortlist and selection on merit. As amended, the emphasis is now upon the JAC’s programme of action. The shortlist is to be reflective: section 5(10)(b). Selection is still on the basis of merit: section 5(8). But the selection now also has to be reflective: section 5(10)(a). Section 5(9) appears to stress merit. However, in NI, with its equality industry, and JAC lay members expected to follow the EC, section 5(10) will be used to make the selection of judges about the promotion of reflectiveness.

But what is reflectiveness? It legal evolution may be traced:
• the idea of *fair participation* by catholics and protestants as the objective of affirmative action: FENIA 1989 section 58;

• the goal of a police service *representative* of the community in NI (where community is effectively defined as comprising catholics and non-catholics): Police (Northern Ireland) Act 2000 sections 45(3) and 47(4)(a) but 48(1)(c);

• the criminal justice review's substitution of the word *reflective*\(^{430}\) regarding the judiciary: Justice (Northern Ireland) Act 2002 section 5(8); and Justice (Northern Ireland) Act 2004 section 3;

• and the idea that, initially the lay members had to be *representative*, but now the JAC as a whole had to *reflective*, of the community in Northern Ireland: Justice (Northern Ireland) Act 2002 section 3(8) & paragraph 5(3) of schedule 2; Justice (Northern Ireland) Act 2004 section 2(1).

Reflectiveness will, once again, contain a tension between those who argue catholic advance (and certainly not retreat), and the lesser social forces, who will seek to imprint their image on the concept.

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\(^{430}\) Paragraph 6.85.
Conclusion

I mentioned the 12th protocol at the beginning. This was opened for signature on 4 November 2000. So far, only eight members of the council of Europe have ratified the protocol (entry into force requires ten). Neither the UK nor the ROI has signed. The 12th protocol adds an equality provision to the human rights convention. It guarantees that no-one shall be discriminated against on any grounds by any public authority: article 1(2). In Strasbourg jurisprudence, a difference of treatment is discriminatory if it has no objective and reasonable justification: that is, there is no legitimate aim; and the means are disproportionate.\textsuperscript{431} In other words, public authorities have a defence. That does not justify, despite the third recital, the idea that positive action can override the anti-discrimination principle and become reverse discrimination to deal with disadvantage.\textsuperscript{432} The UK recently declined to take any action on the 12th protocol.\textsuperscript{433} The NIO was involved in the decision making, though no specific NI reason is given. I can think of two. Teachers do not have the equal protection of the law. Applicants to the police - mainly protestants but also in one recent competition catholics - are discriminated against - unjustifiably - on the ground of religion.

NI was described once as having a workhouse economy (seemingly the fault of the British).\textsuperscript{434} It is better to distinguish it as a small province of the UK, where republican terrorism has led to separate treatment by Westminster and Whitehall. Catholic nationalism has advanced a range of grievances; the responses, however,

\textsuperscript{431} Abdulaziz, Cabales & Balkandali (1985) 7 EHRR 471 paragraph 72.
\textsuperscript{432} Explanatory Report, paragraph 16.
have not led to minority integration in NI. Discrimination has been (and remains) a great cause: the past is mythologized; and the present needs continual government intervention. However, this has been based, less on historical and sociological scholarship, and more on continuing political expediency in dealing with a domestic security problem of the UK.

NI has had its current anti-discrimination law since the 1970s (ignoring for the moment the lesser social forces). It also has an effective fair employment tribunal, which could be integrated with industrial tribunals (where other discrimination cases are determined). This protection is acceptable, regardless of whether religious and political discrimination is rampant or occasional. There is unlikely to be a major issue with an average of 3.3 complaints being upheld annually by the fair employment tribunal; however, it is correct that alleged victims should be allowed to apply, and to have their cases fairly determined.

What is not acceptable is the equality industry which has developed around the fair employment agency, later commission, and now the EC. The term equality industry (of some explanatory force) is paradoxical. It is not principally a private-sector phenomenon, based originally on enterprise, supply and demand, and the making of profit - though there are now consultants and others who make money out of equality. The equality industry is a late twentieth-century nationalized industry, courtesy of UK policy in NI.

This substantial vested interest is not open to reason. Knowledge speaks onto power pointlessly. Self-congratulation, and justification, substitute: Bob Osborne & Ian
Shuttleworth, eds., *Fair Employment in Northern Ireland*, Belfast 2004. Where are the academic articles, doctoral theses or books answering the following questions: is there equality of opportunity for teachers?; what impact has section 75 had, for good or ill?; were catholics discriminated against by the police, and has reverse discrimination encouraged applications?; what impact will the pursuit of a reflective judiciary (whatever that means) have on independence?; in short, what has the EC (and its predecessors) achieved in nearly three decades?

Equality of opportunity was the leading concept of the two fair employment acts (now the FETNIO 1998), and of the Belfast Agreement. However, affirmative action in the FENIA 1989, and the idea of fair participation by catholics (and only formally protestants), has led - via representativeness and reflectiveness - to the catholic nationalist equality agenda; this is about communal assertion and segregation - not reconciliation - (and preparing for a supposedly inevitable united Ireland in 2016).

The progressive face of equality in 1976 has been obscured by this sectarian one. Teachers remain excluded from anti-discrimination protection, and the forces favouring this are greater now. Section 75 of the NIA 1998 had led to an apparent bouleversement between government and governed. Does anyone know any single individual who has benefited from the torrent of equality schemes, impact assessments and so on? The line was crossed on 9 September 1999 with the Patten report (in the

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435 Gerry Adams, *Irish News*, 15 October 2004 is one of many examples of this post-Belfast Agreement use of equality. There is, of course, a form of nationalist reconciliation, where unionists are treated as future citizens of this new republic. A newspaper report states that the following is contained in the 2004 student handbook at Queen's University: 'The inclusion of the Irish language in this publication is to challenge the perception that it is exclusive to only one community or grouping...Irish is there to be embraced by anyone - irrespective of race, religion, sexuality or political opinion.' (*Irish News*, 5 October 2004)

shadow of the Belfast Agreement), and the subjection of a liberal democratic polity to the idea of direct religious discrimination - institutionalized sectarianism - by act of parliament. Catholic participation in the new police is very welcome. But it did not take discrimination against men to encourage more women to apply to become police officers. And finally, the judicial appointments commission. Quangocracy comes easily in NI. But now we will have lay people (think of some of the human rights commissioners) responsible for appointing judges, with a statutory requirement of reflectiveness. That means more and more catholics (or is it now especially nationalist catholics?437), with others jockeying to interpret the law in their favour.

The equality industry is only a mirage of civil society. It is really an arm of UK state policy in NI. But it is an arm capable of throttling mainland ministers, who, with an undergraduate text in one hand and taxpayers' money in the other, think they are civilizing a highly tribal society when all they have done is make NI more sectarian than it might have been.

I have a dream (or rather nightmare438) of NI coming to resemble a lesser east European country formerly under soviet hegemony. The NIO is the communist party: it is the source of all life. If you do not agree with the dominant line, you are a non person. There is a peace process. And the so-called Good Friday Agreement will be implemented. The EC is the central committee, with all policy flowing in and out of Equality House. Are there any cellars there? EC officers are the political commissars

438 The minister for justice, Michael McDowell, in the Republic of Ireland, has already articulated his: ‘Driven to a complete extreme, the current rights culture and equality notion would create a feudal society. A society so ordered, static and where the Government tries to order everything by law, it would become as atrophied as a feudal society.’ (Irish Times, 7 June 2004)
correcting the public sector. But hark, who is that, an Ulster Vaclac Havel439 daring to culturally resist the equality industry's primitive communism. Is there a charter in his hand for 2004? Be warned: no velvet revolution is imminent in NI; equality, which should be about fairness and opportunity, has become the clarion call of a catholic communalism, which a divided unionism - liberal and fundamentalist - variously fears and despises, but has failed so far to come to terms with intellectually.

439 His official *curriculum vitae* says of his essay, 'The Power of the Powerless' (1978): 'he analyzed the essence of Communist totalitarian oppression and described the means and mechanisms used by the Communist regime in its efforts to create a powerless, resigned society consisting of timid and morally corrupt individuals.'
Recent European Anti-Discrimination Law: 

the Irish and United Kingdom Contributions\textsuperscript{440}

Introduction

I think you are absolutely right that positive discrimination is totally counter-productive, based on my experience in other areas. People have to be advanced on merit.

Ken Livingstone MP, addressing Sir Ronnie Flanagan, then chief constable of the Royal Ulster Constabulary, Northern Ireland Affairs Committee, 12 November 1997.\textsuperscript{441}

The advice above is highly ironic. It was given by the former leader of the Greater London Council; until abolition in 1986, ‘Red Ken’ had championed gesture politics by self-styled oppressed minorities. Sir Ronnie Flanagan was entrusted with upholding the law. Just over three years later, Westminster would legislate uniquely for reverse discrimination in Northern Ireland. Here, I want to discuss an important private-law topic, recent European anti-discrimination law, where, as a result of interventions by Dublin and London in the autumn of 2000 based upon political expediency, a collectivist one inspired by social engineering obliterated the individual perspective essential to any system of justice.

\textsuperscript{440} This paper was written to be presented at the Irish Association of Law Teachers conference – cancelled due to foot and mouth - , on ‘The Person in the Law’, to be held at Dublin City University Business School, on 30 March to 1 April 2001. I am grateful to Barbara Hewson for comments on that draft. It was published subsequently in (2002) 3 University of Limerick Law Review, 1.

\textsuperscript{441} Northern Ireland Affairs Committee, Third Report, Composition, Recruitment and Training of the RUC, 8 July 1998, 337-II, p.31.
The harm done by those two governments, however, may be reversible. There are options - discussed below - of domestic and European litigation. But it is not clear that radical social engineers using the law\textsuperscript{442} - and implicated variously in Irish catholic nationalism - will be on the side of those opposed resolutely to discrimination against persons on the ground of religious belief.

\textbf{The Sorry Tale in Essence}

In advance of the Lisbon special European Council on 23-24 March 2000\textsuperscript{443}, the UK and Irish governments submitted a joint paper to the Portuguese presidency. The paper signalled growing cooperation between London and Dublin in Europe in three broad policy areas: education and lifelong learning; innovation and enterprise; and fighting social exclusion. Under the latter, Tony Blair and Bertie Ahern committed themselves to 'combat all discrimination, and make early progress on the Commission's Article 13 anti-discrimination proposals [which are explained below].\textsuperscript{444}

Spool forward to Luxembourg on 17 October 2000, and a meeting of the Employment and Social Policy Council chaired by France’s Martine Aubry. After difficult

\textsuperscript{442}Erika Szyszczak, for example, obliterates action, where discrimination applies, in favour of structure, where her version of equality is located: 'If there is a formal right to equality where measures attempt to rectify existing inequalities, they cannot be regarded as discriminatory as they are designed to establish equality, not limit it.' ('Positive action after Kalanke', 1996, MLR, 59, 876, 883)

\textsuperscript{443}This is the summit which set the goal of making Europe the most competitive, dynamic and inclusive knowledge-based economy in the world within ten years. Tony Blair reported to the house of commons: 'The Council marks a sea change in European economic thinking. It points Europe in a new direction - away from heavy-handed intervention and regulation, towards a new approach based on enterprise, innovation and competition…We have made clear that the central European economic issue…is reform: how we modernise the European social model and how Europe embraces the enterprise agenda and seeks to match the dynamism of the United States, while preserving our commitment to social justice…We also agreed that EU social policy must be modernised to respond to changing employment patterns, increased life expectancy and deepening social exclusion.' (House of Commons, Hansard, vol. 347, col. 21, 27 March 2000).

\textsuperscript{444}www.irlgov.ie/taoiseach/press/current/16-03-2000.htm
negotiations, the Council reached unanimous political agreement on the proposal for a Directive establishing a general framework for equal treatment in employment and occupation (this is introduced below). However, two amendments were secured at this last moment in the European legislative process: one by London, which became article 15 of the Directive, headed 'Northern Ireland', and dealing with the police, but also catholic schools; the other by Dublin, greatly extending what became article 4 ('occupational requirements'), designed to exempt discrimination by religious bodies throughout the European Union.

Neither of these amendments was canvassed in parliamentary scrutiny of draft European legislation in London or Dublin. The House of Lords Select Committee on the European Union, having taken evidence, made a series of 45 recommendations at an early stage.445 There was also a debate in the upper house on 30 June 2000.446 The House of Commons European Scrutiny Committee failed to properly scrutinize government negotiations.447 Nor were the Irish and UK amendments put forward for consideration by the Commission, the European Parliament, the Economic and Social Committee, or the Committee of the Regions. The decision of 17 October 2000 should not have been a carve up between national politicians; the Council of Employment and Social Affairs ministers was acting, under the European treaties, as a legislator.

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445 It raised the problem of teachers in Northern Ireland, and religious voluntary schools in England and Wales (p. 31). It also discussed positive action constructively (pp. 32-4). On the former, the government adopted a status quo position: no amendment of section 60 of the School Standards and Framework Act 1998 (Government Response, para. 65: www.parliament.the-stationery-office.co.uk). On the latter, it stated: 'The Government agree with the Committee that positive action should be permitted, not required, and that in general quotas should remain unlawful.' (para. 74)


It is not clear that London and Dublin cooperated to eat their words of six months earlier.\footnote{The UK - where the lead department was education and employment - appears to have only considered the draft equal treatment Directive after Lisbon. On 25 July 2000, the House of Commons voted, by 302 to 115, to take note of it. The motion stated that the government would negotiate for ‘the proposals to be made clear and workable;’ and to ensure that the proposals take proper account of the legitimate concerns of employers and make a real difference to the lives of those whom they are designed to protect.’ (House of Commons, \textit{Hansard}, vol. 354, cols. 919-22, 25 July 2000)} However, two things (discussed below) explain this \textit{bouleversement}: the first is 'Patten'; and the second is 'the church' - which church being self evident in both parts of Ireland. In Northern Ireland, the UK government had the enthusiastic support of the human rights community over one if not both issues. As for the exception in European anti-discrimination law achieved by the Republic, activists there seem to have been preoccupied more with their own self interest; however, a Northern Ireland human rights commissioner played a crucial, and surprising, role (discussed below) south of the border.

\textbf{Anti-discrimination Law in Ireland}

This dates from 1920 and the Westminster parliament. The Government of Ireland Act of that year provided for devolved administrations in Northern Ireland and Southern Ireland. Section 5 had the side note: prohibition of laws interfering with religious equality, taking property without compensation, etc.. It related to the competence of the two subordinate parliaments. Religious equality was apparently a right. And the section prohibited discriminatory legislation, various incidents being specified. A prohibition on taking property without compensation was also included.\footnote{\textit{O’Neill v NIRTB} [1938] NI 104; \textit{Robb v Electricity Board for NI} [1937] NI 103.} (Also, under section 8(6), executive authorities were prohibited from discriminating on the ground of religious belief.)
Southern Ireland was short lived. Section 5, however, remained the law in Northern Ireland, until repealed in 1973. And no Act of the provincial parliament (1921-72) was held by the courts to be void for contravening religious equality. No one has proved statutory discrimination by the former Stormont parliament, despite the passage of 30 years since its ending.

Article 8 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 provided for freedom of conscience. It went on to prohibit religious discrimination in terms similar to those in Northern Ireland.

In 1937, Bunreacht na hÉireann constituted a legal revolution (and founded a new state). Article 40 (personal rights), stated: 1. ‘All citizens shall, as human persons, be held equal before the law.’ However, it went on to arguably permit (unfair) discrimination: ‘This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.’

The Impact of the European Economic Community

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450 Northern Ireland Constitution Act 1973 s 41(1) & sch 6 part I.
451 In 1996, the Constitution Review Group recommended changing this to: 'This shall not be taken to mean that the State may not have due regard to relevant differences.' It also recommended adding a new section prohibiting direct and indirect unfair discrimination on specified illustrative grounds. (Report of the Constitution Review Group, Pn 2632, Dublin May 1996, p. 242)
The European Economic Community ('EEC') is premised, it may be said, on opposition to discrimination on the ground of nationality, even if the motives had more to do with constructing a common, and then a single, market.

There is also a Aristotelian tradition informing the idea of equal treatment — 'Things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness' in ECJ jurisprudence; however, this is often misunderstood, equal opportunities, the objective of European policy, being elided with equality of outcome.

*Equal Pay*

The EEC's first venture in anti-discrimination law related to equal pay for men and women. Article 119 of the original EEC treaty (Rome, 1957) contained the principle 'that men and women should receive equal pay'. (Directive 75/117/EEC, made under article 100 dealing with the approximation of the laws of member states, essentially added 'work of equal value' to the definition.) Article 119 is attributed to French fear of competitive disadvantage, given its more favourable domestic legislation; it had little to do directly with the advance of women.

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452 See now article 12 EC (inserted by the 1997 Amsterdam treaty).
455 Now article 141 EC (following the 1997 Amsterdam treaty).
The Equal Pay Act 1970 was passed in Great Britain, before it joined the EEC at the beginning of 1973. The minister was Barbara Castle. There was also an Equal Pay Act (Northern Ireland) 1970. In the Republic, the Anti-Discrimination (Pay) Act 1974 followed entry (along with the UK) into the European Economic Community.

Equal pay litigation at the European Court of Justice ('ECJ') in Luxembourg helped found a constitutional principle of equal treatment of men and women: Case 80/70, Defrenne v Belgium (Defrenne I) [1971] ECR 445; Case 43/75, Defrenne v Sabena (Defrenne II) [1976] ECR 455 (article 119 pursues economic and social objectives); Case 149/77, Defrenne v Sabena (Defrenne III) [1978] ECR 1365 (the scope of article 119 does not extent beyond equal pay, but the elimination of sex discrimination is a fundamental principle of Community law).

Equal pay is now provided for in article 141(1)-(2) EC, as amended by the 1997 Amsterdam treaty (see further below).

Equal Treatment of Men and Women

Directive 76/207/EEC affirmed a principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. It prohibited discrimination on the ground of sex either directly or indirectly by reference in particular to marital or family status. Its legal basis was

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458 Also, article 119 directly effective from the end of the first stage of the transitional period, though the ruling only had effect prospectively.
article 235 of the then EEC treaty, allowing action to attain a Community objective outside the powers of the treaty. Article 2 of the Directive contained three important exceptions to the anti-discrimination rule. The first - article 2(2) - allowed member states to exclude 'occupational activities...[where] the sex of the worker constitutes a determining factor'. Under article 9(2), the occupational activities were to be assessed periodically 'in the light of social developments'. The second - article 2(3) - exempted 'provisions concerning the protection of women, particularly as regards pregnancy and maternity'. And the third - article 2(4) - was without prejudice to 'measures to promote equal opportunity for men and women, in particular by removing existing inequalities in the areas referred to in Article 1.' The Directive was addressed to all member states, and these exceptions were applicable throughout the European Economic Community.

Directive 76/207/EEC had been anticipated by, or led to, the following domestic legislation in the two member states considered here:

- Sex Discrimination Act 1975 (Great Britain only);
- Sex Discrimination Act 1986 (Great Britain only);
- Sex Discrimination (Northern Ireland) Order 1976, SI 1976/1042;

461 Now article 308 EC (following the 1997 Treaty of Amsterdam).
462 Case 165/82, Commission v United Kingdom [1983] ECR 3431 (male midwives case: the ECJ upheld legislative restriction). This case turned on articles 2(2) and 9(2). The female advocate general was for opposing the discrimination.
Sex Discrimination (Amendment) Order 1988, SI 1988/249 (Great Britain and Northern Ireland)\textsuperscript{464};

Employment Agency Act 1971 (ROI);

Employment Equality Act 1977 (ROI).

\textit{Article 141(3)-(4) EC}

This is based on the former article 119. While article 141(1)-(2) deals with equal pay, article 143(3) deals with the principle of equal opportunities and equal treatment for men and women (despite the reference to 'sex' in article 13 EC). Article 141(4) provides for positive action. The treaty of Amsterdam entered into force on 1 May 1999.

\textit{Directive 2002/73/EC}

Directive 76/207/EEC has been amended by Directive 2002/73/EC of 23 September 2002. This is on the basis of article 141(3)-(4) EC, and not article 13 EC. It entered into force on 5 October 2002. It is due to be implemented by the member states by 5 October 2005. Directive 2002/73/EC follows article 13 EC, in that it defines the concepts of direct and indirect discrimination. The three article 2 exceptions to the anti-discrimination rule in Directive 76/207/EEC have been replaced. The article 2(2) exception is now article 2(6): 'particular occupational activities'. The article 2(3) exception is now article 2(7): pregnancy and maternity. And the article 2(4) exception is now article 2(8): 'Member States may maintain or adopt measures within

\textsuperscript{464} Following the ECJ decision in \textit{Johnston v Chief Constable of the Royal Ulster Constabulary (Case 111/84)} [1986] 3 CMLR 240.
the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.\footnote{465}{Article 141(1) reads: With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures to providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’}

The first and third exceptions, in Directive 76/207/EEC as amended by Directive 2002/73/EC will be considered further below in the contexts of ECJ jurisprudence and/or recent European legislation.

\textit{The Burden of Proof}

The principle of civil litigation in adversarial systems is: he who alleges has the burden of proof to discharge. In 1997\footnote{466}{This followed two aborted attempts, in 1988 and in 1993.}, this was changed by Europe for cases of sex discrimination: Directive 97/80/EC, with effect from 1 January 2001.\footnote{467}{[1998] OJ L14/6. This had been stimulated by ECJ jurisprudence, where, it was held, that, following the establishment of a prima facie case by the claimant, the burden of proof should then shift to the respondent to show there had not been direct or indirect discrimination. But this did not apply to inquisitorial systems (Belgium, France, Italy and Luxembourg) or other member states with an inquisitorial component.} (This Directive also defined indirect discrimination for the first time.) Its legal basis was the agreement on social policy annexed to a protocol in the 1992 Maastricht treaty. Under article 4 of the Directive, it is the respondent who has to prove there has been no breach of the principle of equal treatment. However, this is only where the claimant establishes facts from which it may be presumed that there has been direct or indirect discrimination. The thinking is that the employer has privileged access to information not shared with the person alleging discrimination. The UK, however,
which had not signed up to the 1989 Social Charter, a political declaration, and secured opt-outs in the 1992 Maastricht treaty, was exempted from 15 December 1997. With the depositing of the instruments of ratification of the 1997 Amsterdam treaty on 15 June 1998, the UK agreed on 13 July 1998 to reverse the burden of proof in sex discrimination cases, from 22 July 2001: Directive 98/52/EC\textsuperscript{468}. The legal basis for this extension was article 100 EC. The government elected in 1997 argued that, on the basis of legal advice, the Directive would make little practical difference in the UK. There was no need for legislation to implement the reversing of the burden of proof; it was already part of the common law.

A reverse burden of proof may well raise a human rights point. Under article 6 of the European Convention on Human Rights (right to a fair trial), 'in the determination of his civil rights and obligations…, everyone is entitled to a fair and public hearing…'. This is to be given a broad and purposive interpretation. However, under article 6(2), it is only the person charged with a criminal offence who shall be presumed innocent until proved guilty according to law.\textsuperscript{469} The presumption does not apply to civil liability. Nevertheless, there is a principle of 'equality of arms' in Strasbourg jurisprudence\textsuperscript{470}: 'The right to a fair hearing requires that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent.\textsuperscript{471}

\textsuperscript{469} For a recent case on statutory defences in criminal liability, which held that two instances were not contrary to article 6(2), see: \textit{R v Lambert} [2001] 2 WLR 211 CA.
\textsuperscript{470} \textit{Neumeister v Austria} (1960) 1EHRR 91.
Other Anti-discrimination Law

Within the UK, the grounds of race, political and religious belief (Northern Ireland only) and disability were added by:

- Race Relations Act 1976\(^{472}\) (Great Britain only);
- Race Relations (Northern Ireland) Order 1997, SI 1997/869;
- Northern Ireland Constitution Act 1973;
- Fair Employment (Northern Ireland) Act 1976 (now repealed);
- Fair Employment (Northern Ireland) Act 1989 (now repealed);
- Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162;
- Northern Ireland Act 1998;
- Disability Discrimination Act 1995 (Great Britain only);
- Discrimination Rights Commission Act 1999 (Great Britain only);
- Equality (Disability, etc.) (Northern Ireland) Order 2000, SI 2000/1110\(^{473}\).

\(^{472}\) Also Acts of 1965 and 1968.

\(^{473}\) This began in the Northern Ireland assembly, but, due to suspension, it was enacted at Westminster under the Northern Ireland Act 2000.
In the absence of European pressure, there was no similar anti-discrimination legislation in the ROI in the 1970s, 1980s and for much of the 1990s. Despite delays brought about by President Mary Robinson's referral of two bills to the Supreme Court\footnote{Employment Equality Bill 1996 [1997] 2 IR 321; Equal Status Bill 1997 [1997] 2 IR 387.}, the following domestic legislation - uncharacteristically - anticipated article 13 EC:

- Employment Equality Act 1998;

It remains to be assessed whether the implementation of the two European Directives will require amending domestic legislation in the Republic. This is not a task I address here. Both the above measures, however, are remarkably dependent upon European concepts and terminology.

**The United States: a Lesson for Europe**

Anti-discrimination law may be said to originate in the United States. This is a federal state with a written constitution dating from the eighteenth century: its fourteenth amendment of 1868 introduced an equal protection clause. However, legal action against unfair discrimination is a phenomenon of the 1960s, when Chief Justice Earl Warren presided in the Supreme Court.

Discrimination, as a legal concept, is bound by the idea of action (a natural or legal person discriminates, directly or indirectly, against another or a group). Anti-
discrimination law bears on conduct. Discrimination is also time bound: there must be evidence of recent conduct, in litigation between living parties; with public policy bearing on the immediate future.

It was in the United States that political movements - of ethnic minorities and women principally - articulated an analogous concept of past discrimination. By definition, this falls outside any possible legal process governed by limitation. (An exception may be the treatment of blacks, who were, under United States constitutional law, legally discriminated against.) However, the concept of past discrimination (on the basis of ideological assertion as well as emerging scholarship) was used to generate the idea of reverse discrimination - also known as positive discrimination. This was related to the idea of structural inequality. The solution to discrimination against, say, blacks and women was lawful discrimination in favour of blacks and women (and therefore against whites and men). Thus the idea of quotas for disadvantaged minorities, or, in a milder form, goals or targets (which preserved the idea of fairness in selection whatever of their practical effect).

This affirmative action originated in United States courts, as a legal remedy obtained against employers found to have discriminated. The purpose was to stop discrimination on a case-by-case basis, not re-engineer society. It was based on due process, and also the idea of fault. The Kennedy and Johnson administrations, however, made affirmative action a tool of executive action - not always with legislation authority. Contract compliance - the use of state economic power - was a principal weapon. This forced private interests to carry out action plans benefiting blacks etc. if they wished to benefit from public contracts. The term affirmative
action in the United States came to embrace reverse discrimination. But it also had a
narrower meaning: namely actions taken to ensure genuine equality of opportunity
between candidates distinguished on various grounds.

It is in this latter sense that affirmative action crossed the Atlantic, to the UK in the
1970s. It is the equivalent of positive action in Europe, though this is often confused,
by supporters, with positive discrimination\(^{475}\).

The United States Supreme Court has consistently opposed a system of rigid quotas:
*Regents of the University of California v Bakke* 483 US 265 1978 (a special
admissions programme for medical students, which discriminated against the white
respondent\(^{476}\), held to be invalid under the constitution). The Supreme Court has
accepted goals, but imposed conditions. This affirmative action must be transitional,
correcting imbalance with equality of opportunity: *United Steelworkers of America,
AFL-CIO-CLC v Webster* 443 US 193 1979 (a voluntary\(^{477}\) collective bargaining
agreement, with a company which had recruited mainly white skilled workers,
containing an affirmative action plan reserving fifty per cent of training places to
blacks, not contrary to civil rights legislation\(^{478}\)). It must also be justifiable by a
number of objectively verifiable facts: *City of Richmond v Croson* 488 US 469 1989
(city plan requiring contractors to subcontract to country-wide minority businesses).
The Supreme Court held\(^{479}\) that the plan was not justified by a compelling

\(^{475}\) For example, Meg Russell, *Women's Representation in UK Politics: what can be done within the
law?*, The Constitution Unit, June 2000, who defines positive action as quotas.

\(^{476}\) He also appears - in one of the first recorded instances of political correctness - to have been
victimized (p. 277).

\(^{477}\) The office of federal contract compliance was, however, involved (p. 222).

\(^{478}\) The minority dealt better with the legislative history. No judge queried the relationship between
training and recruitment.

\(^{479}\) Distinguishing *Fullilove v Klutznick*, 448 US 448 1980. There would be no race-based relief under
the fourteenth amendment of the constitution.
government interest, there being no evidence (as opposed to assertion) of
discrimination by the city in awarding contracts; further, the 30 per cent set aside was
not narrowly tailored to accomplish a remedial purpose.

Affirmative action in the United States - certainly under William Rehnquist's Supreme
Court\textsuperscript{480} - may be said to be in a state of legal crisis. The doctrine of strict scrutiny in
United States federal law - which has served to arrest affirmative action - is
essentially constitutional, justifying judicial review across the separation of powers
between the judiciary, legislature and the executive.\textsuperscript{481}

Three socio-economic arguments, to do with the operation of labour markets, and the
economy in general, emerged in response to the United States experience of
affirmation action. The first has to do with unsuccessful applicants.\textsuperscript{482} Those
discriminated against - unfairly treated - had a legitimate grievance. Secondly, and
more important for workplace relations, those perceived to have benefited unfairly in
their selection, tended to be treated as second-class colleagues; some such
beneficiaries - according to anecdotal evidence - found affirmative action personally
oppressive. Thirdly, in a heavily free market society, this degree of state intervention
was considered inefficient: the lack of competitiveness, in allocating the best people

\textsuperscript{480} 'From the perspective of the more liberal Justices and their supporters, today's Supreme Court - the
Rehnquist Court - has been engaged in a sustained and evil counterrevolution, undermining or
destroying the civil rights and civil liberties that the Warren Court properly championed. In curtailing
affirmative action and civil rights enforcement, in limiting the right to abortion and enhancing the
power of the police and prosecutors, in rushing executions and curbing the power of the federal
government, including the judiciary, the Rehnquist Court, it is said, has been turning back the clock on
social progress and retreating from the institution's own duty to enforce the constitutional promises of
liberty and equality.' (Edward Lazarus, \textit{Closed Chambers: the rise, fall, and future of the modern
supreme court}, New York 1999, pp. 7-8)

\textsuperscript{481} \textit{Matadeen v Pointu} [1998] 3 WLR 18 PC, 26-9 per Lord Hoffman.

\textsuperscript{482} A contemporary example is the two Garda officers who were not short listed by the Police Authority
of Northern Ireland, leading to less than fully informed indignation in the Republic: \textit{Irish Independent},
to the best jobs, was seen as an excessive economic cost; and this in a context of a popular revolt from the 1970s, which spread to Europe, against big government tax and spend.

In 1996, the Clinton White House published a review of federal affirmative action programmes. The president reaffirmed his support, but, crucially, instructed federal bodies to review their policies to ensure they did not: create quotas; prefer unqualified candidates; use reverse discrimination; or continue after the achievement of their purposes. The basis of contract compliance was shifted from race to all contractors from deprived areas.

'Discrimination' in Northern Ireland

The word dates from the 1960s, and was used by the civil rights movement in a general political critique of unionist rule. The reputedly irreformable nature of Northern Ireland became a justification for republican terrorism. Discrimination became part of a communal assertion related to the solution of a united Ireland.

Now orthodoxy, certainly outside Northern Ireland, it is remarkable how little scholarly study there has been of the extent and nature of anti-catholic (and anti-protestant?) discrimination. John Whyte's seminal article, 'How much discrimination was there under the unionist regime, 1921-68?', was not published until 1983.\textsuperscript{483} It was largely a review of the literature. The topic was not seriously revisited, until after the Belfast Agreement: Graham Gudgin's 'Discrimination against Catholics during the


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Stormont Regime’, written in August 1998 and published the following year. This uses census data, and also focuses on the private sector, where most jobs are located. Gudgin attributes continuing catholic over-representation among the unemployed, even with fair employment legislation, not to past and present discrimination, but to a higher rate of minority population growth, combined with less catholic out-migration by way of response to unemployment. While unemployment (of catholics or protestants) is a social problem, it is not one amenable to anti-discrimination law; affirmative action practice may, however, have a role.

Northern Ireland catholics have now acquired their place in history, but they have also earned the acronym MOPE (most oppressed people ever) given their attachment to, and use of, victim culture.

**ECJ Case Law on the Principle of Equal Treatment between Men and Women**

Here I want to concentrate upon the third exception in Directive 76/207/EEC (before amendment), what has come to be called positive action in European law: article 2(4). I look at the schemes before the ECJ in four important cases (three of them from Germany), and also the reasoning of the advocates general which led to the

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486 Coined by Liam Kennedy.
487 See also, Recommendation 84/635/EEC of 13 December 1984 ([1984] OJ L331/34), where the Council stated in the third recital: ‘existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures.’
judgments of the Court on - it should be noted - the questions referred by national courts.\footnote{In a memorandum of 9 February 2000, Odile Quintin, the acting deputy director general of the Commission's employment and social affairs directorate general, stated that positive action in the Directives was as defined in ECJ case-law: House of Lords, Select Committee on the European Union, 9th Report, \textit{EU Proposals to Combat Discrimination}, HL Paper 68, 1999-2000, evidence p. 14.}

\begin{enumerate}
\item \textit{Case 312/86, Commission of the European Communities v French Republic} \[1988\] \textit{ECR} 6315
\end{enumerate}

France had national legislation which maintained special rights for women in collective agreements concluded before the Directive came into force. (It also belatedly left the removal of such inequalities to the social partners without specifying timescales.) The member state was held to have failed to fulfil its obligations under the treaty by not implementing the Directive in full.

According to the Court, 'the exception provided for in Article 2(4) is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. Nothing...makes it possible to conclude that a generalized preservation of special rights for women in collective agreements may correspond to the situation envisaged in the provision.'

Sir Gordon Slynn, the advocate general, had stated: 'It is not permissible to argue, as France appears to argue, that because women in general have been discriminated against then any provisions in favour of women in the employment field are \textit{per se} valid as part of an evening up process...Community law does not require, and the
Commission in this action does not seek, the withdrawal from women of the benefits in question: it merely requires them to be offered to men and women on equal terms.'

(2) *Case 450/93, Kalanke v Freie Hansestadt Bremen [1995] ECR I - 3051*

The male plaintiff applied unsuccessfully for promotion in the Bremen parks department, the managerial position going to an (arguably) equally qualified woman because of local public service equal treatment law: this provided that women were underrepresented where they did not make up at least half of each relevant group of employees. Bremen had a system of quotas dependent on candidates' abilities (women only benefited if they were equally qualified). The German federal labour court sought a preliminary ruling from the ECJ, instituting a case in which the successful candidate intervened.

The Court held that article 2(4) of the Directive precluded such national rules. As a derogation from an individual right (not to be discriminated against), positive action (as an exception) had to be interpreted strictly: *Case 222/84, Johnston v Chief Constable of the RUC [1986] ECR 1651, para. 36.*

According to the judgment, 'national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of
opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.'

The opinion of advocate general Tesauro contrasted 'formal equality, in the sense of equal treatment as between individuals belonging to different groups, and substantive equality, in the sense of equal treatment as between groups.'

There were three models of positive action: dealing with the causes of disadvantage through vocational guidance and training; social policy designed to balance home and work and the contributions of men and women; and 'preferential treatment in favour of disadvantaged categories…in particular through systems of quotas and goals.' The first two aimed at achieving equal opportunities, and, in the final analysis, attaining substantive equality. While the third was 'certainly suitable for bringing about a quantitative increase in female employment, it is also true that it is the one which most affects the principle of equality as between individuals…'.

Construing article 2(4), the advocate general distinguished equality with respect to starting points or with respect to points of arrival. The two candidates - accepting the finding of the regional labour court - had equal opportunities at the starting block. By then giving priority to women, the national legislation '[did] not seem to [him] to fall within either the scope or the rationale of Article 2(4) of the Directive.' The permitted derogation from the principle in article 2(1) - following the Commission case above - was 'only discrimination in appearance in so far as it authorizes or requires different treatment in favour of women and in order to protect them with a view to attaining
The male plaintiff applied unsuccessfully for promotion as a teacher, in a different German land, an equally suitable woman candidate succeeding because of a different local public service equal treatment law: this provided that where there were fewer women than men in the relevant group of employees, 'women [we]re to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt[ed] the balance in his favour [A.M.].'

This case, eminently distinguishable from *Kalanke* above\(^{489}\), was referred by the first instance administrative court (which did not think so\(^{490}\)), to the ECJ for a preliminary ruling shortly after *Kalanke* was decided.

The Court held that the Nordrhein-Westfalen national rule was not precluded by article 2(1) and (4), provided that 'in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female

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\(^{489}\) This was the view of Nordrhein-Westfalen, Spain, Austria, Finland, Sweden and Norway. France and the UK held that it fell foul of *Kalanke*, as it was concerned with equality of representation and not opportunity. The Court, however, took account of the observations of France and the UK in its judgment.

\(^{490}\) It thought there was discrimination under article 2(1). As for article 2(4), the provision had nothing to do with equal opportunities.
candidates where one or more of those criteria tilts the balance in favour of the male candidate, and such criteria are not such as to discriminate against the female candidates.'

In Bremen, Kalanke could not have been promoted. Here, Marschall could have been selected fairly under the law in question - though it seems from the report that he was not so considered.491

According to the judgment, 'a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are underrepresented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above [that is, prejudices and stereotypes about work being less important to women] and thus reduce actual incidents of inequality which may exist in the real world.'

The opinion of the advocate general, F.G. Jacob - whose conclusion was qualified by the Court492 - emphasized the legal uncertainty of the proviso in the German law. He accepted implicitly the observations of France and the UK. Article 3(1) referred to 'no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts…' The advocate general followed Kalanke,

491 The ECJ did not decide the case for the German court. It simply gave a preliminary ruling on the questions posed.
492 He had said: 'I would add as a general point that in my view any temptation to distinguish Kalanke on narrow technical grounds should be resisted…Straining to differentiate similar cases on the grounds of nuances in the contested legislation is likely to lead to confusion as to the law and a proliferation of litigation with arbitrary results.'
arguing that article 2(4) could not embrace the scheme in question. Advocate general Tesauro's insight was accepted: 'Whether it is expressed in terms of removing obstacles rather than imposing results, or ensuring equality at starting points rather than at points of arrival, or guaranteeing equality of opportunity rather than equality of result, the distinction is conceptually clear, and will in my view normally be apparent on which side of the line a given measure falls.'

Advocate general Jacobs concluded by considering what might be permitted by article 2(4). 'A gender-specific measure will not to my mind be proportionate to the aims of remedying specific inequalities faced by women in practice and promoting equal opportunity if the same result could be achieved by a gender-neutral provision.' One example was an extension of the age limit for candidates who had been engaged in full-time childcare, though this would be indirectly discriminatory in favour of women.

(4) Case 158/97, Badeck and Others, Hessischer Ministerpräsident intervening, unreported 28 March 2000

Forty-six members of the landtag of Hesse applied on 28 November 1994 (before Kalanke) to the state constitutional court for a review of the legality of a local public service equal treatment law (which had 13 years to run from the end of 1993), the prime minister and land attorney of Hesse intervening. The law provided for advancement plans for women, including two-year binding targets of more than fifty per cent women. This was known as a flexible result quota. Underrepresentation was defined as fewer women than men; in the academic service, it was the percentage of
women graduates, or women with higher degrees, in each discipline. The state constitutional court referred the case to Luxembourg on 16 April 1997 (before Marschall) for a preliminary ruling.

The Court (with advocate general M.A. Saggio) - which answered a question of five parts - held that article 2(1) and (4) did not preclude a national rule which provided that, where women were underrepresented, and they were as equally qualified as men, it was possible to comply with an advancement plan 'if no reasons of greater legal weight are opposed'\(^{493}\), and 'provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.'

This was consistent with Kalanke, as developed by Marschall, though Badeck conceded that legally binding targets (as targets) were acceptable (other aspects of the Hesse scheme were criticized). As with Marschall, the ECJ did not decide Badeck for the German court.

According to the judgment, following Marschall: 'It follows that a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if: it does not automatically and unconditionally give priority to women when women and men are equally qualified; and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates. It

\(^{493}\) A reference apparently to German basic law, in particular the social state and the protection of marriage and the family.
is for the national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provision at issue.'

Reactions to Kalanke after 17 October 1995

On 6 April 1995, advocate general Tesauro had concluded his opinion: 'In sum, positive action may not be regarded, even less employed, as a means of remediying, through discriminatory measures, a situation of impaired inequality in the past.'

Kalanke produced a furore of legal and other academic responses, mostly by women. References to case notes and articles litter the opinion of 15 May 1997 of advocate general Jacobs in Marschall. I do not propose to review this literature. One of the severest articles I have seen is: Sandra Fredman of Oxford University (with an acknowledgement to Christopher McCrudden), 'Reversing Discrimination', Law Quarterly Review, 1997, 113, 575. 'A law', she writes, 'which genuinely aims to narrow the disparities and eventually achieve equality must tolerate unequal treatment where necessary to achieve more equal results.' The article criticizes Kalanke (and other cases) through an examination of the philosophical and strategic dimensions of affirmative action. Fredman reveals no awareness of labour markets and socio-economic mobility, of history and politics (other than her own theoretical practice),

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494 She distinguishes three approaches: the 'symmetrical' (the UK's), which rejects reverse discrimination; the 'substantive' (United States, in part), which supports it; and the 'equal opportunities' approach (ECJ), which favours positive action. 'Individualism' is specified as a theoretical error. She also rejects, what she calls, formal justice, and the neutrality of the state. Fredman concludes: there are 'deep moral differences between discrimination against a group which has been subject to historical and continuing detriment on the basis of their race or sex, and programmes which aim to remedy that discrimination.' (p. 600)

495 For example, the document of the Portuguese presidency, 'Employment, economic reforms and social cohesion - towards a Europe based on innovation and knowledge', issued in January 2000, stated that the twofold strategic objective of combating unemployment and increasing the employment rate required, inter alia, 'a resolute inversion of the trend towards early retirement from the labour market',

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and of how legal principles, may, and may not, be applied to influence the conduct of natural persons.

_The European Commission_

On 2 May 1996, the Commission proposed an amendment to article 2(4) of the 1976 Directive in the light of _Kalanke_ (which was misconstrued in the preamble to the draft Directive): [1996] OJ C179/8, 22 June 1996. The Commission proposed to add to the existing text: 'Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.'

Advocate general Jacobs criticized this draft in his opinion in _Marschall_, as being more innovatory than the Commission suggested. He cited a critical opinion of the Economic and Social Committee of 25 September 1996, which had been carried by 97 votes to two with eight abstentions: [1997] OJ C30/97, 30 January 1997. According to the Committee, which wanted the Commission to take a clear stand on positive measures, a Directive was not the appropriate legal instrument: it should be left to the intergovernmental conference and primary legislation.

_Amending the European Treaties_

—and 'an increase in the rate of female employment, encouraging equal opportunity of access to the labour market and positive action…'. (Document 5256/00)
The EEC treaty, or treaty of Rome, dates from 1957. It was amended by the 1986 Single European Act. The next major step was the Treaty on European Union (‘TEU’), agreed at Maastricht in 1992; the EEC became the EC. This treaty was amended at Amsterdam (1997), and again in Nice (2000). The TEU and the Treaty establishing the European Community (‘EC’) are two separate but related instruments.

In terms of the principle of the equal treatment of men and women, a major advance was made with the agreement on social policy, annexed to a protocol to the Maastricht treaty. This was because the UK secured an opt out in the negotiations. Article 6(3) of the protocol provided, with regard to the equal pay principle, for positive action. It was only in 1997, that equality between men and women was added to the treaties proper, applying throughout the EC: articles 2 and 3(2), under principles; and, under social provisions, articles 137(1) and 141(3) and (4); article 141 is the former article 119 on equal pay, to which has now been added equal treatment and positive action.\footnote{With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’ This is the provision the Economic and Social Committee argued for on 25 September 1996 (see above). Article 141(4) has to be read with declaration No. 28, attached to the treaty of Amsterdam: ‘When adopting measures referred to in Article 141(4)…, Member States should, in the first instance, aim at improving the situation of women in working life.’}
The most important aspect of the Amsterdam treaty is article 13 EC (inserted as article 6a EC of the Maastricht treaty⁴⁹⁷), under part 1 on 'principles'. Article 13 reads:

*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

The provision was, of course, permissive and not mandatory. The Amsterdam treaty was signed on 2 October 1997. It entered into force on 1 May 1999. There followed speedy action by the Commission. This action, comparing articles 12 and 13, has to be construed narrowly, when examining the acts of the Council, given that its competence is defined by: 'within the limits of the powers conferred by [the Treaty] upon the Community'.

**The Implementation of Article 13 EC⁴⁹⁸**

On 25 November 1999, the Employment and Social Affairs Directorate General of the Commission published three texts:

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⁴⁹⁷ See *Grant v South-West Trains* [1998] 1 CMLR 993, 1013-4.

⁴⁹⁸ Article 13 EC has been amended by the 2001 treaty of Nice, which has yet to enter into force. The original article 13 becomes paragraph 1. A new paragraph 2 is added, allowing derogation from paragraph 1: this applies to EC incentive measures, not based on harmonization, to support action taken by member states to contribute to the achievement of paragraph 1 objectives.
• a proposed Council Directive establishing a general framework for equal treatment in employment and occupation (with an explanatory memorandum\textsuperscript{499}) ('the equal treatment Directive');

• a proposed Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (with an explanatory memorandum\textsuperscript{500}) ('the race Directive');

• a proposed Council decision establishing a Community Action Programme to combat discrimination 2001-2006\textsuperscript{501}.


I do not propose to discuss this article 13 EC initiative in full. (The idea of two Directives, one general the other particular\textsuperscript{502}, gave way to making the race Directive a priority\textsuperscript{503}: political agreement was reached by the Council on 6 June 2000: Council Directive 2000/43/EC). Hereafter, I will refer only to the equal treatment Directive,

\textsuperscript{499} COM(1999) 565 final.
\textsuperscript{500} COM(1999) 566 final.
\textsuperscript{501} COM (1999)567 final.
\textsuperscript{502} Referred to initially as respectively the horizontal proposal and the vertical proposal.
\textsuperscript{503} COM(2000) 328 final, 31 May 2000 (amended proposal). This was seemingly due to the European Parliament.
from which racial or ethnic origin was to be deleted.) I simply want to make a number of relevant points about proposed European equal treatment law.

One, the addressees were 'the Member States' (then article 18). There were no opt outs or derogations for particular regions, industries or professions. Two, the ground of gender (men and women) was extended to: racial or ethnic origin; religion or belief, disability, age or sexual orientation. The absence in the proposed directive of sex, now provided for expressly in article 141 EC, counts against this list being illustrative of a general principle (then article 1). Three, the principle of equal treatment was being extended from Council Directive 76/207/EEC, meaning the case law of the ECJ on men and women was relevant. Four, discrimination was defined as direct and indirect (then article 2). Five, the material scope was further specified compared with 1976, but remains essentially the world of work (then article 3). Six, the exceptions were threefold: first, for 'genuine occupational qualifications' (following the 1976 Directive) (then article 4); more exceptions for the ground of age than other grounds (then article 5); and positive action (then article 6), inspired in part by article 141(4) EC - which applies only to men and women. The Commission stated in the explanatory memorandum: 'as positive action measures are a derogation form the principle of equality, they should be interpreted strictly, in the light of the current case-law on sex discrimination [Kalanke and Marschall being cited].' Seven, the burden of proof was reversed (then article 9). Eight, the implementation date was to be 31 December 2002 (then article 15).

The equal treatment Directive had a coherence based on extending the law on men and women to other groups. Mention should also be made of a proposed Directive of
the European Parliament and Council, amending Council Directive 76/207/EEC to bring it into line with the article 13 EC initiative. This (as noted above) led to Directive 2002/73/EC of 4 October 2002. The explanatory memorandum accompanying the proposed Directive stressed that positive action as between men and women was now to be based on article 141(4) EC: 'The proposed Directive puts this obligation in concrete terms and takes account of the case law of the European Court of Justice, which comprises 40 judgments in the last 25 years.'


The relevant changes were as follows. One, the addition of 'the constitutional traditions common to the Member States' to article 6(2) EC in the first recital of the preamble. Two, the first exception in then article 4 was altered to 'genuine occupational requirement', and substantially redrafted. Any instance had to have a legitimate objective, and the requirement had to be proportionate. But there was a loosening up of the restriction, for 'public or private organisations based on religion or belief'. The explanatory memorandum stated this was to allow for 'social work' by religious organizations. Three, the positive action provision in then article 6 was brought more into line with the spirit of article 141(4) EC. Four, under implementation in then article 16, provision was made for the social partners, at their joint request, putting into effect the principle of equal treatment through collective

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agreements. Five, under reporting in then article 17, reference was made to 'the principle of integration of equal-opportunities policy'.

The Council of Employment and Social Affairs Ministers of 17 October 2000

This document then went to the member states, in particular the lead departments and ministers.

However, a Council working group had negotiated on the original text in private, using documents largely in French. The working group reported to COREPER 1\(^\text{506}\) in early October 2000, there being three meetings on the Directive. This COREPER text was not received in London until 16 October 2000. Ministers, therefore, did not actually consider the amended Commission proposal on 17 October 2000. Nor did they take account of the European Parliament's amendment, as required by article 13 EC. The political bargaining conducted by officials in Brussels for much of 2000 was continued by national ministers lacking familiarity with the text and the issues.

On 6 July 2002, I applied to the Council for access to relevant documents. This was granted on 23 July 2002, for six documents on interinstitutional file 99/0225 (CNS), some in French and the remainder in English. A social questions group had reported to COREPER 1 on 29 September, 2 and 10 October 2000. COREPER 1 then reported to the Council on 11 (twice) and 12 October 2000. These documents cast interesting light on the roles of the Irish and UK governments.

\(^{506}\) Committee of permanent representatives.
The house of lords select committee on the European Union was to comment shortly afterwards: 'with a [French] Presidency desperate for unanimous agreement, any Member State [could] effectively force the Council to accept their demands…Nine months of detailed examination by the working group failed to produce a text to which all fifteen Member States were prepared to agree…Hurried last-minute bargaining is not the way to prepare good legislation…We note that of the major changes agreed by the Council…all but one were additional exemptions; the final change was the extension of the implementation period from three to six years…The general structure and the underlying objectives…were agreed by this stage - but the UK and Ireland were able to exploit the situation to secure agreement to specific provisions weakening the application of the principle of equal treatment.'

At this point, it is necessary to trace events in Dublin and London separately. The accounts below are not comprehensive; however, they are likely to be essentially accurate.

_Dublin: ‘pushing at an open door’_

Though it was not obvious at the time, it is now clear that religious interests throughout the European Union had been alarmed by the prospect that then article 4 ('genuine occupational [qualifications] requiremen') would restrict their abilities to discriminate. It may be inferred that the opinion of the European Parliament of 5 October 2000 would have satisfied most in the fifteen member states. However, most lobbyists, including those beseeching the Irish government, were railing against the

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text of 25 November 1999.\textsuperscript{508} (So much had been evident in the house of lords debate in London on 30 June 2000.) Also, as noted above, the European Parliament's 5 October 2000 text had been eclipsed by the work in COREPER 1 with went to the 17 October 2000 Council.

On 2 October 2000 - according to \textit{Irish Times} reports\textsuperscript{509} - the taoiseach, Bertie Ahern, had received a religious delegation (this was three days before the European Parliament opinion.) Gone were the days of direct catholic interference in politics.\textsuperscript{510} The Bishop of Clogher and Fr O'Connor of Dublin were accompanied by five protestants representing three churches\textsuperscript{511}. Subsequently, the Irish government represented itself as concerned with minorities, such as Buddhists!\textsuperscript{512} It was at this meeting, seemingly, that Dublin decided to try and amend then article 4 of the equal treatment Directive. However, it would not do this through COREPER, where the UK was taking the lead in protecting religious interests.\textsuperscript{513} (The religious delegation had a good argument in domestic law: section 37 of the Employment Equality Act 1998, which the churches had inspired originally, exempted 'religious, educational or medical institution[s]...under the direction or control of a body established for religious purposes' in two ways; one, they could discriminate on the ground of religion 'in order to maintain the religious ethos of the institution', and, two, they could take reasonable action to prevent employees from 'undermining the religious

\begin{flushleft}
\textsuperscript{508} David Quinn referred subsequently to an early opinion of Prof Ian Leigh of the University of Durham: \textit{Sunday Times}, 22 October 2000.
\textsuperscript{509} 17, 18 and 19 October 2000.
\textsuperscript{511} Archbishop of Dublin and Canon John McCullagh (Church of Ireland); Rev Sam Hutchinson and George McCullagh (Presbyterians); and Rev Harold Good (Methodists).
\textsuperscript{513} The UK, supported by the Irish delegation and two others, had proposed an amendment to article 4(2) on 29 September 2000.
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ethos of the institution'. What the churches had achieved in 1998 they wanted to repeat in 2000.)

The catholic bishops' spokesman said later that, as regards protecting religious education, in Northern Ireland, and in the Republic, the delegation had been 'pushing at an open door'.

A Human Rights Commissioner

One of the pushers, representing the methodists, was the Rev Harold Good. (He has not contradicted press reports of his role.) The Rev Good lives and works in Northern Ireland, and has been, since March 1999, a member of the Human Rights Commission there. It is not known how he reconciles his public appointment in one jurisdiction, with his lobbying of the government of another state. The Human Rights Commission has not, so far, expressed any view on the matter.\textsuperscript{514} However, it its first annual report\textsuperscript{515}, under 'education work', the Commission listed seven issues of concern given the Human Rights Act 1998. The sixth is: 'exempting the appointment of teachers from [Northern Ireland's] fair employment legislation'. But the exemption is precisely what the delegation of clerics and lay members to the Irish government was seeking to protect from Brussels.

\textsuperscript{514} The chief commissioner, Prof Brice Dickson, defended the Rev. Harold Good in a letter to Lord Laird of Artigarvan on 26 February 2001.
\textsuperscript{515} HC 715, 1999-2000.
Permitted Religious Discrimination

At this point it is appropriate to look at article 4, as proposed by the Commission, and after agreement in the Council on 17 October 2000. [Deletions] and additions are shown thus:

**Preamble**

…

(23) *In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.*

…

**Article 4**

(Genuine) **Occupational requirements**

3. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine *and determining* occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

4. [Notwithstanding paragraph 1, the Member States may provide that in the case of public or private organisations based on religion or belief, and for the particular occupational activities within those organisations which are directly and essentially related to religion or belief,] *Member States may maintain national*
legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference [in] of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute [sic] a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment [may not, however, give rise to any discrimination on the other grounds referred to in Article 13 of the EC Treaty] shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public and private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.

This is a remarkable article, in a Directive, which remains relatively well drafted. The principal casualty was the text originating with the UK delegation. The distinct contributions of the Irish draftsman are clear: 'national practices'; 'national constitutions and laws'; 'to act in good faith and with loyalty to the organisation's ethos' (minor amendments appear to have been made by other ministers, and the preamble may prove decisive in limiting the effects of article 4).
The original exception in Council Directive 76/207/EEC had envisaged waning away with time, in accord with a liberal-democratic worldview\textsuperscript{516}. Almost 25 years later, in a major venture in secondary anti-discrimination legislation, the Irish government - apparently - committed the European Union to tolerance of widespread cultural control (extending beyond major churches into the territory of organizations with a religious ethos).

I say apparently, because the jurisprudence of the ECJ remains that the principle of equal treatment is to be construed broadly and any derogation, such as article 4, construed narrowly. Most likely, if Irish courts indulge Irish national practices, enacted by the Oireachtas, the ECJ will, in considering Irish and other cases, significantly limit the effects of the Irish intervention.

\textit{The Council of Ministers}

Nevertheless, it was a considerable morale booster for religious and other interests, which had been alarmed in the summer of 2000. How did the Irish do it? Again, I am limited mainly to press reports, though I have also spoken to journalists who were covering the Council in Luxembourg on 17 October 2000.

That morning, the \textit{Irish Times} reported that the Republic might veto the Directive. John O'Donoghue, the minister for justice, equality and law reform, was said to have consulted 'church leaders and educational interests' the day before. Normally, a junior minister, Tom Kitt, responsible for labour affairs, consumer protection and

\textsuperscript{516} Articles 2(2) and 9(2).
international trade, attended the Employment and Social Affairs Council. This time, John O'Donoghue took the lead on behalf of the Irish cabinet.

The Council was chaired by Martine Aubry, the then French employment minister (also known for being Jacques Delors's daughter). The official press release of this 2296th meeting included: 'After difficult negotiations the Council reached unanimous political agreement…Agreement was finally reached on the basis of a compromise text which accommodated the difficulties encountered by certain Member States concerning, in particular, the possibility of churches and organisations the ethics [sic] of which are based on religion or belief of applying different treatment on account of essential, legitimate and justified professional requirements.'

The *Irish Times* elaborated: 'as Mr O'Donoghue left Luxembourg after an ill tempered, 12-hour meeting, the EU [French] Presidency cast doubt on his interpretation of the new equality Directive and complained that Ireland gave no warning of its doubts about the original draft.' The minister was quoted as saying: "I don't believe we squandered any goodwill. It's very unusual for Ireland to put its head above the parapet like this. We've always sought to compromise with others."

Three positions seem to have crystallized. One, a (say) catholic school could insist upon a catholic to teach religion (a concession which ignores multi-faith education). Two, a catholic school could insist upon a catholic to teach even mathematics, regardless of whether he/she was competent (competence only comes into it if there is another catholic candidate). And three, any catholic-owned or controlled institution

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517 12125 (Presse 378), http://ue.eu.int.
518 18 October 2000.
(including hospitals) could insist upon catholic secretaries, drivers, gardeners and cleaners etc. etc.

Martine Aubry was reported afterwards as interpreting article 4 in terms of the first position.\textsuperscript{519} The second was undoubtedly achieved by the amended text. And John O'Donoghue claimed victory for the third position: Irish national practices (whether legal or not?) would be unaffected by this important European Directive (an argument now available in the other 14 member states).

The Commissioner, and her ministerial colleagues, also appear to have missed the probable human rights significance of the Irish requirement, whereby employees may not undermine their institution’s religious ethos, being adopted by the European Union: there are surely articles 8, 9, 10, and 11 of the European Convention on Human Rights points here.

\textit{London: Northern Ireland is different!}

There is no reference to the UK in newspaper reports of this Council. Its two usual junior ministers represented London: Tessa Jowell, minister for the new deal in the department of education and employment; and Alan Johnson from the department of trade and industry. There was no NIO attendance, though Peter Mandelson, the secretary of state, had once presided over trade and industry. However, his impact on the Commission’s amended proposal on 17 October 2000, whether negotiated earlier

\textsuperscript{519} This had been the view of the employment and social affairs directorate general from the start: House of Lords, Select Committee on the European Union, 9\textsuperscript{th} Report, \textit{EU Proposals to Combat Discrimination}, HL Paper 68, 1999-2000, evidence, pp. 17-8, 27.
in the working group or COREPER 1, was undoubtedly greater than that of the Irish justice minister.

It is impossible to comprehend any particular NI policy of London's without appreciating two mantras of UK statecraft after 30 years of terrorist violence. The first is that NI is different; ministers and officials never say how\textsuperscript{520}, much less appreciate that, by their special treatment, they help make it different. The second mantra, laid down in the 1990s is simply: the peace process\textsuperscript{521}. Mere utterance allows for the suspension of reason, and the abandonment of the need for argument - apparently necessary for good public administration in all other times and places.\textsuperscript{522}

\textit{Permitted Religious Discrimination}

At this point it is appropriate to look at article 15, which was agreed on 17 October 2000 without apparently any fuss:

\textbf{PREAMBLE}

\textbf{Recital (34)}

\textit{The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.}

\textsuperscript{520} Thus, John Major, then prime minister and leader of an anti-devolutionist party, wrote in his foreword to the 1995 Framework Documents: 'For reasons that are unique to Northern Ireland, devolution...has always been a central plank of Government policy for Northern Ireland alone.'

\textsuperscript{521} For a recent judicial example, see \textit{Re Williamson's Application} [2000] NI 281, 291g per Kerr J.

\textsuperscript{522} Having written the above, I located the following: 'The Minister was asked whether a specific exemption for Northern Ireland on the face of the Directive was appropriate, given that other Member States, present or future, might at some point wish to overcome similar problems of historical under-representation of particular ethnic or religious groups. She replied that in the Government's view "the situation in Northern Ireland is unique", and so requires a specific provision...' (House of Lords, Select Committee on the European Union, 4\textsuperscript{th} Report, \textit{The EU Framework Directive on Discrimination}, HL Paper 13, 2000-1, para. 53).
PARTICULAR PROVISIONS

Article 15

Northern Ireland

3. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

4. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

I will look first at the law as applied to teachers in Northern Ireland, and then at policing. This requires an examination of the policy antecedents to a consideration of the equal treatment Directive in the UK in 2000. The provision as regards teachers seems to have been an afterthought to the opt out for the police in NI. It seems to have first appeared in a COREPER 1 report of 11 October 2000 to the Council.

In a report of 12 October 2000, under other outstanding issues, COREPER 1 noted:

(b) Northern Ireland
The Irish delegation said that it fully supported the addition of recital 35 and Article 18 as proposed by the United Kingdom delegation, but that the UK and Irish authorities were still holding talks on the exact wording of those provisions.

The delegations stated that they were able to give their provisional agreement to the texts set out in 12269/00.

For its part, the Commission reiterated its position of principle that explicit derogations for a part of Community territory should be avoided in Community texts. It nevertheless took note of the Council's unanimous stance on recital 35 and Article 18.

Teachers in Northern Ireland

Religious and Political Discrimination

Reference was made above to the Northern Ireland Constitution Act 1973, and the Northern Ireland Act 1998.

In the former, part III was devoted to the prevention of religious and political discrimination. This was direct discrimination only. Section 17 prohibited legislation which 'discriminated against any person or class of persons on the ground of religious belief or political opinion'. It replaced section 5 of the Government of Ireland Act 1920. Legislation could be referred by the secretary of state to the judicial committee of the privy council for a decision on validity (section 18). Section 19 made discrimination by public authorities unlawful.
A statutory tort was created. Arguably, Westminster also created a human right not to be discriminated against on one if not two of the specified grounds. The Northern Ireland courts were to have nearly three decades of experience interpreting section 19 (religious and political discrimination), drawing also upon gender, race and disability discrimination legislation extended from Great Britain.

The Northern Ireland Act 1998 - the second full devolution measure since 1968 - reacted and developed this law: sections 6(e) (legislative competence of the assembly); 24 plus 90 to 92 and schedule 11 (executive competence); 79 to 83 and schedule 10 (judicial scrutiny); 76 plus 90 to 92 and schedule 11 (discrimination by public authorities).

However, it is the Fair Employment Acts of 1976 and 1989, now re-enacted (with some amendments) as the Fair Employment and Treatment (Northern Ireland) Order ('FETNIO') 1998, SI 1998/3162, which governs teachers in Northern Ireland.

Here, the story is again one of exception (part VIII of the order). Article 70 contains three: for clergymen or ministers; private households; and where 'the essential nature of the job requires'. Article 71 is for 'school teachers':

(1) Subject to paragraph (2), this Order does not apply to or in relation to employment as a teacher in a school.

(2) The [Equality] Commission shall keep under review the exception contained in paragraph (1) with a view to considering whether, in the opinion of the Commission, it is appropriate that any steps should be
taken to further equality of opportunity in the employment of teachers in schools.

(3) …

(4) …

(5) …

schedule 2 [all dealing with Commission investigations].

The exception is for all school teachers in Northern Ireland, school being defined in the Education and Libraries (Northern Ireland) Order 1986, SI 1986/594: article 2(2).

Sir Robert Cooper, former chairman of the Fair Employment Commission, told the House of Lords Select Committee on 5 April 2000: the teachers' exception was proposed 'for all sorts of reasons which I think are complicated but are probably valid'; the major problem was avoiding giving catholic teachers a monopoly in their own schools, and equal opportunities in state or protestant schools (thus all teachers were exempted from the principle of fair treatment); there had been no move, by the government or from within the Commission, to stop exempting teachers from fair employment and treatment legislation during his time at the Commission.\(^{523}\)

_Domestic Legislation and the Equal Treatment Directive_

Looking at article 71 of FETNIO 1998, it may be argued that the provision for commission investigations was so as to make the exemption proportionate. However, it is difficult to see what purpose was being pursued (Westminster was conceding to catholic power, and in practice disadvantaging protestant teachers). Paragraph (2)

\(^{523}\) Question 300. Interestingly, on the article 4 exception in the equal treatment Directive, Sir Robert said that the government had resisted religious pressure to allow churches to employ only coreligionists. It was left to the courts. He distinguished 'a representational role or proselytising' from 'the janitor' (Question 301).
clearly indicates that there was little or no equality of opportunity given the exception. Further, it would have to be removed if there was to be equality of opportunity for all teachers in Northern Ireland.

However, article 15(2) of the Directive (see above), gives two reasons for exempting domestic legislation (of whatever nature) from the equal treatment principle. One, 'in order to maintain a balance of opportunity in employment for teachers in Northern Ireland' (in French: 'afin de maintenir un équilibre dans les possibilités d'emploi pour les enseignants en Irlande du Nord'). This clearly contradicts national legislation. It is, in other words, meaningless. Two, 'furthering the reconciliation of historical divisions between the major religious communities there'. This is spurious. The separate education of catholics and protestants is related to communal division. The proof of this is the emergence in the last twenty years of a voluntary movement for publicly funded integrated education; the state, while responding, is failing fully to meet popular demand.

Article 15(2) is unlikely to survive judicial scrutiny by the ECJ. Since it states that the Directive will not apply to teachers in Northern Ireland, domestic courts will have no occasion to consider it directly (they would have difficulty interpreting 'in so far as this is expressly authorised by national legislation').

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524 The first translation to emerge from the UK government was: 'In order to maintain equality of opportunity for teachers in Northern Ireland'.
525 A reference presumably to 'the recruitment of teachers in Northern Ireland'. Domestic legislation cannot disapply a Directive. But will any legislation on teachers be enough?
There is a considerable irony here, as a result of the separate Irish and UK interventions, neither of which prevents the ending of the exception for teachers in Northern Ireland.

'The provisions on religion or belief' refers to a ground in article 1. However, it was the Irish who diminished protection against discrimination on the ground of religion or belief by their amendment to article 4. The catholic church clearly thought, when it was lobbying Dublin, that it was looking after interests in Northern Ireland. However, while article 4 applies to hospitals and any other institutions there, it does not apply to schools with an 'ethos…based on religion or belief' in Northern Ireland. That is the effect of article 15(2): 'the provisions on religion and belief in the Directive [including article 4] shall not apply…'. Courtesy of the UK, and also under rules of legislative interpretation about general and particular provision, it disapplies article 4 as regards Northern Ireland schools.

The interests of the catholic church as regards its schools in Northern Ireland are protected by, first, domestic legislation, and then by article 15(2). If the latter were to be nullified, article 4 would then apply. If article 4 were to fall in the ECJ, the church would be left with only domestic protection - now the responsibility of the Northern Ireland assembly (currently suspended). If the exception for teachers in Northern Ireland were to be removed, and the Directive survived unchallenged, then articles 15(2) and 4 would be of no use. The maintenance of catholic teachers in catholic schools will owe nothing to the Irish and UK amendments on 17 October 2000; articles 4 and 15(2) simply prevent the equal treatment Directive being used, after 2 December 2003, in domestic courts against national legislation.
Policing in Northern Ireland

The Belfast Agreement

The origin of article 15(1) of the equal treatment Directive is the Belfast Agreement of 10 April 1998, in particular the section on Policing and Justice. Paragraph 3 provided for an independent commission to make recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread support for these arrangements. An independent commission, chaired by Chris Patten, was announced on 3 June 1998 by the secretary of state. It reported on 9 September 1999. The report, however, contained no recommendations on how to encourage widespread support for reforming the police.

The Belfast Agreement did not make any practical provisions for police reform. 'A new beginning to policing in Northern Ireland' is political rhetoric. Nothing was legalized, in international law. Under general principles of domestic public law, the UK government had to consider the Patten report after 9 September 1999. It could not fetter its discretion. It had a choice, and responsibility, about what it would do as regards policing in Northern Ireland.

Such were the politics of the Belfast Agreement, that the Northern Ireland Office conceded to nationalist Ireland, and treated what Patten said as legitimized by the Northern Ireland referendum (that in the Republic was about amending the

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constitution only). But Chris Patten had not even been a twinkle in Mo Mowlam's eye on 22 May 1998 when the people of Northern Ireland voted on the Belfast Agreement (not including the Patten report).

Things changed when Peter Mandelson took over in October 1999. He gave his considered opinion to the house of commons on 19 January 2000. This was the basis of the Police (Northern Ireland) Bill, which passed through parliament between May and November 2000.

The Police (Northern Ireland) Act 2000\(^{527}\) received the royal assent on 23 November 2000. Relevant sections were brought into force on 22 December 2000 and 30 March and 4 November 2001.\(^{528}\)

*The Patten Report*

I am concerned only with the question of reverse discrimination. Patten quotes the figures of 8.0 per cent catholics, 88.1 per cent protestants (with 3.9 per cent others) in the Royal Ulster Constabulary for 31 December 1998. This is clearly unrepresentative, and Peter Mandelson, as secretary of state, referred to the problem time and time again. It is obvious that catholics are underrepresented in the RUC. However, when it comes to senior officers (superintendents and above), catholics are overrepresented at 16 per cent. This is strong evidence that the RUC has not

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\(^{527}\) I annotated this Act for Current Law Statutes, published by Sweet & Maxwell.

discriminated against catholics during, at least, the period when those senior officers were promoted from lower ranks.

The only alternative hypothesis is: the RUC discriminates against catholics in recruitment, but not in promotion.

If there is no discrimination, then anti-discrimination law will have no effect outside any cases brought. The problem is different, namely structural inequality. And here the question is what sort of reforms might work legally. What are the causes of catholic underrepresentation?

Alternative Explanations

Alternative explanations must be found for minority underrepresentation (some of which were mentioned by Peter Mandelson at third reading in the house of commons on 11 July 2000). They include: (1) intimidation by republican paramilitaries; (2) social ostracism by important elements of the catholic community; and (3) political abstentionism from the institutions of government in Northern Ireland. The first factor can be measured in part by the increase in catholic applicants after the temporary IRA ceasefires of 1994 and 1997. It may be measured further by the decrease in catholic applicants, after Patten's 50/50 was being implemented. No significant studies have been carried out on the second factor. The third factor is a

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529 Paragraph 3.11 of the Patten report.
530 Paragraph 15.3 of the Patten report.
531 In June 2002, the Real IRA planted a bomb under the car of a catholic police trainee in Ballymena. This reportedly deterred catholics in training, and those who had been offered places: Sunday Times, 11 August 2002. This was denied by the PSNI: Sunday Times, 25 August 2002. But see, Sunday Independent, 8 September 2002 & Belfast Telegraph, 15 September 2002.
matter of historical record, and has been implicit in the government's handling of recommendation 121 of the Patten report: catholics must be given reverse discrimination on paper, because only then will they apply in sufficient numbers to achieve the 50/50 representation on merit to which their numbers entitle them. This proposition, if true in 2000, has been proved by 2002 not to be the full story. Implement Patten in full may be as much about, continuing communal and national opposition, as democratic accommodation in a new Northern Ireland.

The Patten Report

Three recommendations are relevant: 'All candidates for the police service should continue to be required to reach a specified standard of merit in the selection procedure. Candidates reaching this standard should then enter a pool from which the required number of recruits can be drawn.' (120); 'an equal number of Protestants and Catholics should be drawn from the pool of qualified candidates.' (121); 'there should be an enlarged Part Time Reserve of up to 2,500 officers, the additional recruits to come from those areas in which there are currently very few reservists or none at all.' (104) There was little apparent appreciation of the significance of these recommendations.532

The Secretary of State's statement of 19 January 2000

Peter Mandelson announced: 'I attach particular importance to Patten's recommendations for action to transform the composition of the police service,

532 Note Sir Thomas Legg's distinction between maximal and minimal merit, and his separate treatment of the 'state' of Northern Ireland: [2001] PL 62, 69-70.
which are essential to gaining widespread acceptability. I endorse the proposal for 50/50 recruitment of Protestants and Catholics, from a pool of candidates all of whom - I stress - will have qualified on merit. We propose that the requirement for this special measure should be kept under review on a triennial basis, with rigorous safeguards to ensure that the, rightly, challenging targets for recruitment do not diminish the standard required of recruits.\textsuperscript{533}

In so deciding, Peter Mandelson reversed the policy of Mo Mowlam and the entire Labour government elected in May 1997; reverse discrimination - quotas - had been opposed for Northern Ireland as well as Great Britain.

\textit{Merit and Discrimination}

The following comments are apposite on the government's acceptance of Patten's 50/50 proposal: selection of qualified applicants to form a pool of applicants is on the basis of merit; that does not mean that appointments from the pool of qualified applicants are on that basis; they are clearly discriminatory; so also is the non-appointment of those left in the pool; they have been discriminated against on the ground of religious belief, having been selected as qualified applicants. This is not recruitment on merit, as the government tried to pretend; it is rejection despite merit, because of the imperative of religious discrimination.

An example will elaborate. Suppose the police seek 200 recruits each year. If 100 catholics and 100 protestants come forward, and are admitted to the pool on merit,
there is no problem. The police can empty the pool. There has been recruitment on merit. If, however, 50 catholics and 150 protestants come forward, and all are admitted to the pool, the police take out the 50 catholics followed by 50 protestants (on what basis of selection?). There are 100 qualified applicants in the pool, but they cannot be taken. The police are also short of 100 trainees. If - as seemed possible in September 1999, given catholic over confidence and protestant alienation after Patten - 150 catholics came forward along with 50 protestants, all being admitted to the pool, the police would select the 50 protestants followed by 50 catholics (on what basis of selection?). There would be a 100 qualified applicants, and a 100 short in the recruitment. That's why Patten's pool, while it has discriminated against protestants since 2001, is direct discrimination on the ground of religion or belief; it could just as readily keep out further catholics who wished to join (and who should be admitted under the principle of fair treatment, thereby achieving the objective which quotas are unlikely to facilitate).

*Compounding Religious with Political Discrimination?*

Before the full scale of Patten's - unprecedented - adoption of reverse discrimination had been appreciated, arguments were raised in public for compounding religious with political discrimination. Seemingly, fifty per cent catholic recruits was not good enough. These would not all be nationalists and republicans, it was claimed.
The research of Graham Ellison was quoted to suggest that at least a third of catholics in the RUC were ex-army and largely not from Northern Ireland.\textsuperscript{534} However, according to Patten in September 1999, 'the RUC do not at present ask candidates their religion. Assumptions are made on the basis of what school a candidate attended. If a candidate attended a school outside Northern Ireland, no determination is made.'\textsuperscript{535} So, far from these politically incorrect catholics inflating the figures of underrepresentation, there may in fact be more catholics - those from outside Northern Ireland (as well as those who did not attend catholic schools in Northern Ireland) - in the RUC.

The idea of political discrimination originated with John McGarry and Brendan O'Leary's \textit{Policing Northern Ireland: proposals for a new start}, Belfast 1999, where the idea of 'especially nationalist Catholics' was put forward.\textsuperscript{536} In the \textit{Irish Independent} of 2 November 1999, Brendan O'Leary shifted the argument from the percentage of catholics to the percentage of nationalists and republicans. This tactic was adopted belatedly by Sinn Féin, in talks with the UK government after the enactment of the Police (Northern Ireland) Act 2000.\textsuperscript{537} It was another reason for not agreeing to policing.

Reverse discrimination in favour of catholics is producing legal and other practical problems. How does Brendan O'Leary propose to impose a political test, before otherwise qualified applicants are admitted to Patten's pool? Would they have to

\begin{footnotes}
\item[534] By, for example, Mary O'Rowe & Dr Linda Moore, \textit{Human Rights on Duty: principles for better policing: international lessons for Northern Ireland}, Belfast nd but 1997, p. 27; Mary O'Rowe, in evidence to the Northern Ireland Affairs Committee, Third Report, \textit{Composition, Recruitment and Training of the RUC}, 8 July 1998, 337-II, p. 95.
\item[535] Footnote to paragraph 15.13 of the Patten report.
\item[536] Quoted in paragraphs 1.18 and 14.2 of the Patten report.
\end{footnotes}
produce party membership cards? Or evidence of voting in 1997, 1998 or 2001? Or be certified by Mark Durkan and/or Gerry Adams? What proportion would be nationalist? And what proportion republican? The fact that we are reduced to such questions is a measure of how low the debate has been brought.

**Patten's Reverse Discrimination Recommendation**

In paragraph 15.11 of his report, Patten stated that, having consulted the Fair Employment Commission (now the Equality Commission), and received a legal opinion from counsel, his proposal, while contrary to existing anti-discrimination law, would not be contrary to European law, unlike the proposal to have reverse discrimination in favour of women (who were 12.6 per cent of the RUC, one third being in the Part Time Reserve).

This calls for the following comments. One, the Patten Commission contained a lawyer, Peter Smith QC, with experience of policing law in Northern Ireland. Two, the Fair Employment Commission (if it did recommend Patten's pool\(^{538}\)) was incorrect. Three, so was unnamed counsel.\(^{539}\) Article 13 EC had been agreed on 2 October 1997, and the Commission moved quickly after 1 May 1999. That should have been known to any lawyer advising on European law, if not to the Patten commission itself. Patten did not report until 2 September 1999, only a matter of weeks before the draft equal treatment Directive was published on 25 November.

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\(^{538}\) Sir Robert Cooper, while accepting Patten as inevitable, subsequently suggested that the equal treatment Directive would cause problems for the UK government (House of Lords, Select Committee on the European Union, 9\(^{th}\) Report, *EU Proposals to Combat Discrimination*, HL Paper 68, 1999-2000, Qs322-3).

\(^{539}\) This person has not identified him or herself. It is interesting that Lord Lester of Herne Hill QC, the father and mother of contemporary human rights and equality law, should find it difficult to criticize Patten's 50/50: [2001] PL 77, 96.
1999. Four, Patten was correct about his proposal being contrary to Northern Ireland law: that is why section 46(10) and (11) of the Police (Northern Ireland) Act 2000 makes the police another exception (while section 74 and schedule 5 applies other anti-discrimination law to the police!). Five, Patten was also correct about ECJ jurisprudence prohibiting reverse discrimination for women.

But, radical social engineers may ask, if 8 per cent catholics justifies reverse discrimination until there is 50/50, why does 12.6 per cent women (the figure is less when the part-time reserve is discounted) not deserve the same special treatment? The logic is irrefutable. But the answer is: equal treatment prevents reverse discrimination, but not positive action, in favour of women; and, with the extension of European anti-discrimination law, it was inevitable that Patten's scheme would be caught by the new Directive.

Patten only recommended 50/50 on the (false) presumption that it was not contrary to European law. At the point at which it became clear that it was contrary, the UK should have rejected the proposal as unlawful. It should then have rationally analyzed the reasons for catholic underrepresentation. None of this was done. Instead, because of the politics of Patten, article 15(1) was inserted at the behest of the UK, with Irish support, on 17 October 2000. Every since, the guiding idea has been: implement Patten in full.

*The Human Rights Community*
There is no evidence, other than with Patten, that the human rights organizations in Northern Ireland, made any substantial contribution to the policy debate. However, when the government came under serious challenge in parliament, the Committee on the Administration of Justice, the Northern Ireland Human Rights Commission and the Equality Commission - for various nationalist, republican and/or radical reasons - threw their considerable weight behind the position: implement Patten in full (using their putative expertise to justify 50/50).

The CAJ, ironically, and unusually, while it was clearly anti-RUC\textsuperscript{540}, did not come up with the idea of 50/50. In its submission to Patten in August 1998, it stated that achieving fair representation 'will be complex and difficult going by the experience of other societies'. It called for serious research, and a review of selection criteria and training practices. It advocated 'the setting of official targets and timetables for greater representation by under-represented groups…'.\textsuperscript{541} However, a little over a year later, and following the publication of the Patten report, it jumped on the Patten bandwagon\textsuperscript{542}: 'The setting of quotas…is a very vexed one but one that we included in the array of options\textsuperscript{543}, since it has been tried reasonably successfully elsewhere.'\textsuperscript{544}

\begin{footnotes}
\item[541] CAJ’s Submission to the Commission on Policing for Northern Ireland, submission no. S.72, August 1998, p. 7.
\item[542] Patten’s quotas were accepted unreservedly at a CAJ conference on 8 October 1999: \textit{The Patten Commission: the way forward for policing in Northern Ireland?}, November 1999, pp. 12, 19 & 33.
\item[543] They did not argue for quotas in August 1998. However, quotas in Canada and El Salvador had been discussed briefly in an earlier book: Mary O’Rowe & Dr Linda Moore, \textit{Human Rights on Duty: principles for better policing: international lessons for Northern Ireland}, Belfast nd but 1997, p. 45. This was supplied to the Patten Commission. There is a footnote (to tie-breaks) on p. 45 referring to \textit{Kalanke} and \textit{Marschall}. It is stated - incorrectly - that the cases ‘suggest that positive discrimination of this kind [?] is likely to be found acceptable’. On pp. 46-7, the authors advised against quotas.
\end{footnotes}
The NIHRC, established in March 1999, and publicly funded, but a very unrepresentative statutory body, had none of the CAJ’s hesitancy. In a long response to the Patten report, it stated: 'The NIHRC is of the view that the kind of positive discrimination recommended by the Patten Report is the only viable option at this time.' It tested the 50/50 proposal against 'relevant international [?] and national laws' in an annex: 'our conclusion is that it passes muster.' It bemoaned the fact that women were not being treated similarly, and then went on to urge the police to act 'consistent with European Community law'. In the annex, it was claimed that the equal treatment Directive would not prohibit Patten’s 50/50. Draft protocol no. 12 to the European Convention on Human Rights (see below) was similarly dismissed as not a problem. The document contains truly extraordinary legal reasoning.

This did not prevent the NIHRC intervening throughout the legislative process at Westminster, with briefings and personal visits by the chief commissioner, Prof Brice Dickson. Before the committee stage in the house of commons, the NIHRC stated: 'We also conclude[d] that the kind of positive discrimination recommended by Patten [is] the only viable option at this time…We would remind MPs that the international standard in this context [is] that the temporary recruitment system should be kept in place until the requisite degree of representativeness of society has been achieved, however long that takes. Our understanding of current European Community law is that such preferential recruitment policies would not be unlawful.'

545 'Even if these Directives applied to the recruitment of police, which is uncertain [?], neither as presently envisaged would rule out the kind of measures proposed in the Patten Report.' (p. 33)
547 Briefing Note for the Committee Stage in the House of Commons, 9 June 2000, p. 9.
Despite reasoned argument presented in public, the Northern Ireland Human Rights Commission declines to upset the Patten bandwagon.

The Equality Commission, through one of its constituents (see above), may have helped stimulate the 50/50 idea. Deferring to the NIHRC, reputed to know more about international, including European, law, it too jumped on the Patten bandwagon.

In its response to the Patten report, the Equality Commission outlined its legal basis, and then went on to endorse the principle of representativeness tout court: 'The recommendation that an equal number of Protestants and Catholics be taken on would not be permitted by present legislation…We support the proposal that equal numbers of Protestants and Catholics should be recruited…The Patten Commission's assessment of the legal position is that the proposal would require an amendment to domestic legislation but is not incompatible with European legislation. We consider that permissive amendments should be strictly limited to specific circumstances and specific time frames, and subject to regular review.' The Equality Commission wanted women (and others) treated the way catholics were being advantaged, and interpreted Marschall (incorrectly) to cast doubt on Patten's reference to European law.

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548 I published two, albeit journalistic, articles on how the Bill would be at risk from the equal treatment Directive: Sunday Times, 18 June 2000; Observer, 23 July 2000. I was not asked to elaborate by any member of the human rights community. The only rejoinder was a published letter from Harry Coll, a solicitor and member of the Equality Commission: Belfast Telegraph, 28 June 2000, who argued that Badeck justified Patten's proposal (even though the latter postdated the former).

549 Minutes, 14 August 2000.

The Equality Commission also intervened in the legislative process. In a press release following the publication of the bill, the chief commissioner, Joan Harbinson, singled out the 50/50 proposal for welcome. She called for all underrepresented groups to be specially treated. While, in the response to the Patten report, the Equality Commission had called for a strictly limited exception in fair treatment legislation, the chief commissioner now favoured sufficient time: 'a ten year period at least, as proposed in the Patten Report should be provided for, and we do not see the need for a review after three years.' In separate comments, the Equality Commission proposed amendments to the bill: aggregation of 50/50 over 2-3 years (accepted by the government); 50/50 for support staff where there was more than one vacancy (accepted in part).

*Permitting Reverse Discrimination*

At this point, it is appropriate to return to article 15(1) (above), added by the UK government at the Luxembourg meeting on 17 October 2000.

The reason given is: 'in order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland'. This, unlike in article 15(2), is not spurious. One of the major religious communities refers to catholics in Northern Ireland. The term 'police service of Northern Ireland' is used, rather than the existing or the new name, under section 1 of the Police (Northern Ireland) Act 2000. The problem with the reason, however, is whether 50/50 will tackle underrepresentation, and without leading to under recruitment. If it could be

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shown that 50/50 - partly because discrimination is not the problem - is not the solution, and that there are other causes, then the reason in article 15(1) might be invalidated. It is also possible of course that recruitment under existing fair employment legislation would achieve 50/50 on merit, or even a higher percentage of catholics, which is the common objective. A higher proportion would, of course, be prevented by Patten and the Police (Northern Ireland) Act 2000.

Again, the point about the relationship between domestic law and the equal treatment Directive may be made: section 46 of the Police (Northern Ireland) Act 2000 was brought into force on 30 March 2001; after 2 December 2003, but for article 15(1), the Directive could be used in Northern Ireland law against section 46; however, it is only section 46 which provides for reverse discrimination; if domestic law were to be amended, there is nothing in the equal treatment Directive preventing this, either before 2 December 2003 or afterwards.

**Passage of the Police (Northern Ireland) Bill**

*The Provisions on Reverse Discrimination*

The Act, at royal assent, contained the following:

- section 46, with the marginal note: discrimination in appointments;

  - subsections (10) and (11) disapply Northern Ireland anti-discrimination law dealing with the grounds of
religious belief or political opinion or race (but not sex because of Council Directive 76/207/EEC);

- subsection (1) requires the chief constable to select police trainees from the pool of qualified applicants (provided for in section 44(5)) on the basis of one half catholics and one half non-catholics;

- subsections (2) to (4) allow for the aggregation of catholics over three years, to a maximum of 75 per cent, where catholics are less than 50 per cent of the pool\(^{552}\);

- subsections (5) to (7): reverse discrimination for police support staff (with a threshold of six) but without aggregation;

- subsections (8) and (9): not discussed;

- section 47 makes 50/50 temporary, with expiry after three years, unless the secretary of state renews it by order; this could be repeated endlessly, but the section does refer to 'temporary provisions';

\(^{552}\) This is also the case with non-catholics, which, in the case of very few catholics, still means under recruitment.
• section 48 deals with women only; it provides for affirmative action, the police having been excluded hitherto from fair employment and treatment legislation; the action plans are likely to include targets and timetables.

The European Law Point

The UK made no reference to the equal treatment Directive when it introduced the Bill in parliament. In answer to a question about domestic anti-discrimination law and human rights, at second reading on 6 June 2000, the secretary of state (answering a different question) said that the government would comply with the Directive or seek a derogation. On 15 June 2000, Peter Mandelson wrote that he was going to 'persuade our European partners that [policing] is a special case of reverse discrimination.' At third reading on 11 July 2000, Lembit Öpik for the liberal democrats led the opposition parties in an attack upon quotas. Dominic Grieve of the conservatives made the point that he would not object to the recruitment of more than 50 per cent catholics on merit. Opposition continued in the house of lords, but the government survived the criticism. By the autumn, the objection of the liberal democrats had been bought off with the 75 per cent limit in what became section 46(4).

When the Bill returned to the house of commons on 21 November 2000, a draft of article 15(1) of the equal treatment Directive was available. It was David Trimble who said: 'The fact that the Government had to get a derogation from the

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Directive shows that the arguments that we made about the Directive before there was a derogation were sound.\textsuperscript{557}

An interesting constitutional point had been raised by the first minister of Northern Ireland at an earlier stage\textsuperscript{558}, about the duty of ministers to parliament. David Trimble referred to an issue in 1998, involving domestic and European anti-discrimination law. Then, Donald Dewar, the Scottish secretary, had wanted to amend domestic sex discrimination law to permit all-women shortlists in the selection by parties of candidates for election to the first Scottish parliament.\textsuperscript{559} Two opinions from Patrick Elias QC, with which all four law officers concurred, held that such a proposal was contrary to, not just domestic law, but also Council Directive 76/207/EEC. Lord Irvine of Lairg, the lord chancellor, chaired a special cabinet committee (including Peter Mandelson) on the issue. Some members raised the constitutional point about advice from the law officers: 'Any minister bringing forward or accepting an amendment [the lord chancellor minuted the prime minister] would not be able to assure the House that it was ECJ proof. That would put him in an impossible position and create handling difficulties.'\textsuperscript{560}

The difference between 1998 and 2000 was between an implemented Directive and a proposed Directive; however, the UK constitutional point about ECJ-proofing was the same. The government, driven by the political imperative of Patten, was enacting

\textsuperscript{559} This had been held to be unlawful by an employment tribunal: \textit{Jepson and Dyas-Elliot v The Labour Party} [1996] IRLR 116.
\textsuperscript{560} This minute was leaked: \textit{Guardian}, 3 March 1998.
50/50 against the draft equal treatment Directive, it only being after 17 October 2000 that it could refer to article 15(1) in parliament.\textsuperscript{561}

**Hypothetical Legal Challenges?**

Section 46 of the Police (Northern Ireland) Act 2000 was brought into force on 30 March 2001. Council Directive 2000/78/EC had entered into force on 2 December 2000 (with an implementation date of 2 December 2003). The first recruitment under Patten’s 50/50 was in the spring of 2001; the second was in the autumn of 2002.

No legal challenges were mounted based upon European law, in whole or in part. Yet, there were, and are, a number of possible bases, which I propose to consider at length. It is clear that section 46 of the Police (Northern Ireland) Act 2000 would be at risk of Council Directive 2000/78/EC - but for the late insertion of article 15(1). But what if article 15(1) was annulled after a successful application or referral to the ECJ? There were, and are, windows of legal opportunity in Belfast and Luxembourg for challenging the Northern Ireland police opt-out: (1) from 2 December 2000, but with a cut-off of 1 February 2001; (2) from 2 December 2000 to 1 December 2003; and (3) after 2 December 2003 but without unnecessary delay. Privileged applicants, including the Commission, are heard by the ECJ; non-privileged applicants, that is natural or legal persons, are heard by the Court of First Instance (CFI) in Luxembourg.

\textsuperscript{561}I could ask a simple question of those who oppose what we seek to do. Which EU Directive do they have in mind? None. There is no EU Directive that prohibits what we seek to do through the bill - not one.’ (Adam Ingram, House of Commons, *Hansard*, vol. 353, col. 805, 11 July 2000)
Under the first paragraph of article 230 EC, the ECJ shall review the legality of acts of inter alia the Council, such as Directive 2000/78/EC. Actions may be brought inter alia by a member state or the Commission (or, once the 2000 treaty of Nice enters into force, by the European parliament), under the second paragraph, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC treaty or of any rule of law relating to its application, or misuse of powers. Here, lack of competence and infringement of the EC treaty would have been the grounds in the period 2 December 2000 to 1 February 2001.

Though it could not have been ruled out theoretically, any member state was unrealistic. The Irish state has an interest in supporting the UK, since it was strongly in favour of article 15(1). None of the other 13 member states was likely to have a general interest in article 15(1). The European parliament also had to be ruled out, given the then delay in ratification of the Nice treaty.

That left the Commission, and in particular the then commissioner, Anna Diamantopoulou, in the employment and social affairs directorate general. A civil engineer by training and profession, and a member of parliament and deputy minister for the socialist party, PASOK, in Greece in the late 1990s, she was appointed Commissioner in March 1999 (and was therefore responsible for all the work on the equal treatment Directive following the treaty of Amsterdam entering into force on 1 May 1999).

563 They were more likely to challenge article 4.
However, no attempt was made to approach Commissioner Diamantopoulou, between the publication of the Patten report and 17 October 2000, and in the crucial 2 December 2000 to 1 February 2001 period. And this in spite of the Commission's principled opposition to explicit derogations for any part of Community territory. Though the Commission operated behind the scenes, students of Brussels were familiar with this general stance.

Commission actions against member states are not uncommon; while actions against the Council are much less frequent, they became more extensive in the 1990s.

It is impossible to retrospectively guess what the response of the Commissioner might have been, after 17 October 2000. The UK chose not to raise the question of Patten's pool through the Commission. The Northern Ireland partial opt-out was not the Brussels bureaucracy's doing. Nor was any action taken by British labour members in the European parliament, either alone or in alliance with Irish MEPs; two of Northern Ireland's three MEPs would have been opposed to article 15(1).

(II) 2 December 2000 to 1 December 2003: the Tobacco Advertising Directive

Route

564 The table of cases in Paul Craig & Gráinne de Búrca, *The Evolution of EU Law*, Oxford 1999, lists respectively 43 and 7 cases (pp. xxxvi-xxxviii).
This window of opportunity - the gap between entry into force and the implementation date - is analogous to what happened with another European directive in 1998-2000.

On 6 July 1998, the European Parliament and the Council adopted Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the member states relating to the advertising and sponsorship of tobacco products: [1998] OJ L213/9, 30 July 1998. It prohibited all forms of advertising and sponsorship of tobacco products (by 1 October 2006, in the case of the latter), there being exceptions for brand names already used in good faith for other goods and services and for certain trade activities. This was, in fact, a public health measure (article 152 EC), but it was formulated under articles 47(2), 55 and 95 EC in terms of the establishment and functioning of the internal market. Tobacco interests objected. But so also did Germany as a member state. It gave rise to the following litigation, conducted principally but not exclusively by tobacco interests, which led to the Directive being annulled by the ECJ on 5 October 2000:

- *R v Secretary of State for Health, ex parte Imperial Tobacco Ltd*
  [2000] 2 WLR 834 CA: [2001] 1 WLR 127 HL;


- *R v Secretary of State for Health, ex parte Imperial Tobacco Ltd*,
  Case 74/99, [2000] 3 CMLR 1175 ECJ;

The key dates in the litigation were:


- 21 September 1998: Imperial Tobacco Ltd made an application in London for permission to apply for judicial review of the intention and/or obligation of the UK to give effect to the Directive; the remedies sought included a declaration of invalidity of the Directive;

- 19 October 1998: *Germany* action brought before ECJ under article 230 (Case 376/98);

- 19/23/26 October 1998: *Salamander* actions instituted in CFI under article 230 EC;

- 30 November 1998, application for permission to apply for judicial review by Imperial Tobacco Ltd in the High Court in London;

- 16 December 1998: Turner J granted permission;
• 2 March 1999: High Court in London makes article 234 referral on the validity of the Directive to the ECJ, instituting Case 74/99 (decision expected November 2000);

• 29 October 1999: Turner J in London grants an injunction restraining the secretary of state from implementing the Directive (scheduled for 10 December 1999) before a decision on the referral;

• 16 December 1999: Court of Appeal reverses Turner J;

• 15 June 2000, Advocate General Fennelly's opinion in Cases C 376/98 and 74/99 that the Directive was adopted on the wrong legal basis, and should be annulled;

• 27 June 2000: CFI dismisses as inadmissible Salamander actions (applicants lack locus standi under article 230 EC);

• 5 October 2000: ECJ annuls the Directive in whole in Case 376/98, consequently holding that there was no need to rule on Case 74/99;

• 7 December 2000: House of Lords declines to decide on the injunction point, the reference procedure not being available;
30 July 2001: Directive was due to be implemented by member states.

Two distinct actions are possible simultaneously, as regards article 15(1) of Directive 2000/78/EC. This has been the position since 2 December 2000; it remains the position until 1 December 2003. The first is an application for judicial review in Northern Ireland. The second is a direct action in Luxembourg, before the CFI or the ECJ. Both turn on questions of standing, in, respectively, Northern Ireland law and in European law.

The persons most likely to be affected by article 15(1) are qualified applicants who will have been discriminated against on the ground of religion or belief after 2 December 2003 (and possibly before, given the failure of the Council to provide them with legal protection against discrimination from any point after section 46 of the Police (Northern Ireland) Act 2000 was brought into force on 31 March 2001).

The whole of the policing family was opposed to reverse discrimination before, during and after Patten sat.565

However, the chief constable (Sir Ronnie Flanagan) had been working closely with the secretary of state to ensure that his Fundamental Review of 1995-96 remained the

bedrock of the reforms. The Police Authority for Northern Ireland was being wound up: Police (Northern Ireland) Act 2000 s 2(3). That left the issue for the Northern Ireland Policing Board, which was intended to comprise ten political members and nine independent members from 4 November 2001. It could, under paragraph 17(4) of schedule 1, have voted by a majority, with a quorum of seven, to launch a test case on reverse discrimination; the NIPB could have begun by taking proper legal advice.\(^{566}\) There was also the Police Federation for Northern Ireland. It bore the brunt of resistance to unacceptable aspects of Patten, and secured important changes. It also remained part of the institutional network of policing, with a continuing statutory function.

The proposal for reverse discrimination, between Patten and the Police (Northern Ireland) Act 2000, remained substantially unchanged, suggesting that, while the UK government felt unable to politically touch it, it might not have been too distressed when the practical - including legal - problems emerged following the establishment of the Northern Ireland Policing Board on 4 November 2001.

The NIPB, and/or the PFNI (or individual representatives), could have commenced (and could still commence) two actions: one in Belfast and the other in Luxembourg. The PFNI would have standing in Northern Ireland. The standing of the NIPB in Luxembourg may be distinguishable from the \textit{Salamander} applications: its role in UK law is defined by section 3 of the Police (Northern Ireland) Act 2000, and, following \textit{Foster v British Gas plc}, Case 188/89, it could come under the fourth paragraph of

\(^{566}\) Assuming full participation by the SDLP and Sinn Féin on the NIPB, it could have been done by ten to nine votes, including possibly a chairman’s casting vote. The two unionists parties would have to have got four or five independent votes. If (as happened) Sinn Féin had not joined the NIPB, the two unionist parties only had to get the support of three or four of the nine independents (less two because of the extra two unionists who replaced Sinn Féin).
article 230 EC. Success on this point, however, is not guaranteed. The first action would be an application for judicial review of inter alia the intention and/or obligation of the UK to give effect to Council Directive 2000/78/EC including article 15(1). The remedies would include referral to the ECJ for a preliminary ruling on the validity of the Directive, especially article 15(1), under article 234 EC. An injunction would not be appropriate in this eventuality. Enjoining implementation of article 15(1) is not possible given the nature of the provision, and enjoining implementation of the rest of the Directive is contrary to what is desired. Secondly, and following the Salamander applications, the NIPB, a public body and therefore an emanation of the UK state, could, as a legal person, institute proceedings under article 230 EC. The hurdles on admissibility would be: proving the Directive, as regards article 15(1), is a disguised decision referring only to the applicants; or is a decision of direct and individual concern to the applicants; any argument that the applicants lack adequate judicial protection is negated by the possibility of judicial review in Northern Ireland and the possibility of referral to the ECJ.

(III) After 2 December 2003: an article 234 EC referral for an ECJ preliminary ruling

It is only after implementation, before or on 2 December 2003, that qualified applicants, who have been discriminated against, in national law, on the ground of
religion or belief, without receiving protection from the equal treatment Directive, could become parties to any action under (2) above. The reason principally would be to secure damages. But a preliminary ruling on article 15(1) is achievable under (2) above. If that were to be successful, article 15(1) would have been held by the ECJ to have been invalid. Section 46 of the Police (Northern Ireland) Act 2000 would then be exposed to the equal treatment Directive from before, or on, 2 December 2003.

Grounds for Judicial Review

This is the most important part of any legal challenge. In domestic law, the ground would be illegality. The issue turns, in European law, on article 15(1) in a Council Directive, made under the treaties, and governed by the jurisprudence of the ECJ.

Ground 1: Treaty Opt-outs

The UK - on analogy with the economic and monetary union and social chapter opt-outs in the 1992 Maastricht treaty - should have addressed the question of Northern Ireland when negotiating article 13 EC at Amsterdam in 1997.

To the argument that Northern Ireland is not a state, there is the argument that it is a region of a state. And, to the argument that it is not a full opt-out, is the argument that police and teachers are two large occupational groups in the public sector. The

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567 Protocol (no. 25) to the EC treaty on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; the social policy agreement and social policy protocol (the social chapter) in protocol no. 14 to the EC treaty. See now the chapter on social policy (articles 136-145 EC) in the 1997 Amsterdam treaty.
Commission certainly considered article 15 to be a derogation for a part of Community territory.

*Ground 2: the Principle of Equal Treatment*

This exists in the EC in the following articles:

- article 2 (principles): equality between men and women as a task of the EC;

- article 3(2) (principles): aim of promoting equality between men and women in all EC activities;

- article 137(1) (social provisions): equality between men and women with regard to labour market opportunities and treatment at work;

- article 141(social provisions): equal pay:
  - (1)-(2): for male and female workers for equal work or work of equal value;

  - (3): application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;
(4): specific advantages to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional career.

Equal treatment still relates to men and women. However, article 141(3) refers to equal opportunities, and article 141(4) to specific advantages. Nothing here provides treaty authority for reverse discrimination as recommended in the Patten report, in general much less in particular.

Ground 3: the Case law of the ECJ

This has been discussed above. Nothing there provides for reverse discrimination as recommended in the Patten report, and the case law remains applicable after the 1997 Amsterdam treaty. Moreover, the principle of equal treatment is to be construed broadly, any exception - such as positive action in article 141(4) - construed narrowly. A principle cannot be overridden by its opposite; the EC is concerned about discrimination.

Ground 4: Article 13

This is contained in Part One ('principles') of the EC treaty. It was added by the 1997 Amsterdam treaty. Article 12 prohibits discrimination on the ground of nationality.
Article 13 permits the Council to take appropriate action to combat discrimination. The ground of sex is mentioned, as are five others: racial or ethnic origin; religion or belief; disability; age or sexual orientation.

While, on the basis of the application of the principle of equal treatment to men and women, positive action is not precluded, the Council was not empowered to disapply the principle entirely, in favour of reverse discrimination, in two main occupational groups in a region of a member state.


Any derogation from a principle in a Directive must have a legitimate objective and be proportionate. The objective in recital (34) of the preamble to Council Directive 2000/78/EC refers to promoting peace and reconciliation between the major communities. That is legitimate. However, it is not clear that discriminating against protestants, and/or catholics, helps achieve reconciliation. Moreover, it is arguable that article 15(1), which relates underrepresentation and reverse discrimination, is not proportionate. No account has been taken of the reasons for the underrepresentation.

*Ground 6: Human Rights*

The preamble to the TEU invokes 'the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'. And article 6(1)

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568 A three-part test: 'The principle of proportionality…requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.' (BSE, para. [96])
repeats this, adding: 'principles which are common to the Member States'. Article 6(2) states respect for fundamental rights as guaranteed by the European Convention on Human Rights, 'and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

The ECJ, in its jurisprudence, is required to accept, as general principles of EC law, human rights.

The European Convention on Human Rights did not contain an equality provision: article 14 refers only to the enjoyment of Convention rights. However, on 4 November 2000 in Rome, member states of the Council of Europe, signed protocol no. 12. This contains a general prohibition of discrimination (article 1). There is no reference to positive action in the protocol. However, the third recital of the preamble refers to 'measures to promote full and effective equality, provided that there is an objective and reasonable justification…'. An explanatory report notes that there is no obligation to adopt positive action: 'such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable.'

The Irish state signed on 4 November 2000; the UK did not. So far, there have only been two ratifications, by Cyprus and Georgia. The UK is still refusing to sign. Ten ratifications are required for entry into force, which, under article 5, is due to take

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569 As of 16 November 2002.
place on the first day of the month following the expiration of a period of three months.

At the point at which protocol no. 12 is ratified, a general prohibition of discrimination becomes a principle of EC law. The protocol may then be invoked before the ECJ.

**Conclusion**

The legislative process in the EC, and the EU, is formally distinct from that in the UK and in the ROI. In both member states, a legislature of elected representatives engages in, at least, legislative scrutiny. In Europe, while there has been a widening of the process to include the Parliament, legislation remains the responsibility of civil servants in the Commission and/or national political leaders (namely ministers) in the Council.

Directive 2000/78/EC started as a rational extension of European law on men and women to new categories. Included was the ground of religion or belief. This is distinct from the ground of religion or political opinion, which had been the ground in Northern Ireland from 1973. The UK has been familiar with combating religious discrimination, at least in this part of its national territory, for nearly three decades. The Irish member state's experience as regards religious discrimination in its own territory was less: at most two years.
Both member states, partly because of a UK concern to consolidate the Belfast Agreement (shared with the ROI), and partly because of a traditional Irish subservience to the catholic church, intervened effectively and destructively in the final shaping of Directive 2000/78/EC.

The result will become clearer, after the implementation date of 2 December 2003.

The Irish attempt to preserve its national ways (namely the autonomy of religious institutions), by forcing through a badly drafted article 4, with consequences for the whole of Europe, but not Northern Ireland schools, is unlikely to be upheld in the ECJ.

Article 15 on Northern Ireland is also likely to lead to interesting litigation in Belfast and Luxembourg.

I have stressed the singularity of Patten’s 50/50 recruitment, as straightforward religious discrimination by quota, of the sort alien to United States and European law. Westminster's institutionalized sectarianism of 2000 contrasts with the absence of any similar measure from the Stormont parliament of 1921-72. There is no shortage of young protestant (and maybe in time catholic) men and women, who are applying to the police in Northern Ireland with a belief in merit, only to find that currently a low-ranging catholic trumps a high-ranking protestant. That is unfairness in anybody's language.
The exclusion of teachers in Northern Ireland from equality protection is a survival of the 1970s. It should have been abolished by now, at the behest of the Equality Commission (and the Northern Ireland assembly). This failure required the UK to buy more time from Europe with article 15(2). If the Northern Ireland assembly does the decent thing, nobody in the European institutions will be concerned in the slightest. However, European law will of no assistance to a Northern Ireland teacher looking for protection against religious discrimination. Unlike the case with policing, there is no issue of reverse discrimination which could be challenged legally in European law. (There is the lesser question of territorial derogation.)

Finally, a nice irony: the catholic church, the beneficiary of the absence of equality protection for teachers in Northern Ireland, would, if it lost that advantage due to Northern Ireland legislation, have to fall back on article 4 of Directive 2000/78/EC, to maintain its practices in its school there, an article likely to be considerably circumscribed by the ECJ due largely to Irish clerical intervention in advance of the Council of 17 October 2000.
Terrorism, Victims and the Rule of Law

Introduction

I wish to talk about terrorism, victims and the rule of law. By terrorism I mean republican and loyalist paramilitarism (now under section 1 of the Terrorism Act 2000) - so-called Irish terrorism. Victim is a term in human rights legislation, though I am aware of a wider humanitarian meaning in NI. This has implications for the rule of law. Republican and loyalist killers are not equivalent - as some discussion would suggest – to state forces observing the minimum use of force (or even exceeding it, since they are entitled to bear arms).

My sympathies are with the victims of paramilitarism and those killed by the excessive use of state force, not republican and loyalist perpetrators. But I speak principally as a lawyer and a constitutionalist. From that perspective, NI policy on victims and survivors appears to me to be profoundly contradictory. The contradiction is constituted by: the desire to draw a line under the troubles, associated with the Belfast Agreement of 10 April 1998; and increasing sectarian rivalry about the 3,600 who died over 30 years. Contradictions may be managed. But I am not

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570 This paper was delivered at a conference, organized by Families Acting for Innocent Relatives, in Belfast on 4 March 2006.
571 Legislation against Terrorism (a consultation paper), December 1998, Cm 4178.
572 European Convention on Human Rights, article 34; Human Rights Act 1998 section 7(1), (3) & (7).
573 ‘A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting an arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.’ (Criminal Law Act (Northern Ireland) 1967 section 3(1)).
sure this one - between reconciliation and retribution - is anything other than a NIO policy mess.

Here, I trace the treatment of victims, from 1998. Before then, things were simpler. The authorities distinguished fallen police and soldiers, innocent civilian victims and perpetrators of terrorist crimes. Republicans and loyalists separately reversed the values: they had legitimate targets (including each other), there were the very many unintended casualties of war and they had, and have, their heroic dead. Unfortunately, these values have seeped into constitutional nationalism and even the two varieties of unionism. The rule of law is being overwhelmed by green and orange tribalism. This is a process that has been getting progressively worse since 1998.

**The Belfast Agreement**

Three paragraphs in the rights, safeguards and equality of opportunity section of the Belfast Agreement were devoted to 'reconciliation and the victims of violence'. The first paragraph 11 stated that it was 'essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation'. The first paragraph 12 (carved out of the preceding one) referred to sufficient resources for the provision of services for victims, and to 'the achievement of a peaceful and just society [being] the true memorial to the victims of violence.' The first paragraph 13 referred to groups in civil society working for reconciliation and mutual understanding. There was a last-minute addition: 'An essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of
society, including initiatives to facilitate and encourage integrated education and mixed housing.'

The theme was very much reconciliation. And this is a cornerstone of the Belfast Agreement, as indicated by paragraph 2 of the declaration of support. The problem of victims was raised; but with little idea as to how it would be solved (if, as was likely, the Belfast Agreement did not succeed). Reference was made to the NI victims commissioner, Sir Kenneth Bloomfield, whose report was awaited (see below).

Other relevant sections of the Belfast Agreement, as it turned out, were:

- policing and justice, providing for: an independent commission on policing; and a review of criminal justice. These led to the Patten report on policing of 9 September 1999, and the criminal justice review of 30 March 2000 (neither of which is a part of the Belfast Agreement);

- prisoners, in which terrorist prisoners were promised accelerated release within two years of the commencement of schemes in NI and the ROI. This led to the Northern Ireland (Sentences) Act 1998, which received the royal assent on 28 July 1998 (and similar legislation south of the border). A total of 444 terrorists prisoners was released in NI (the figure for the ROI being 57); and

- decommissioning, providing for the total disarmament of all paramilitary organizations within two years. Reference was made to
the independent international commission on decommissioning. A loyalist organization began the process in 1998. But the IRA did not complete decommissioning (according to General de Chastelain) until September 2005, with the independent monitoring commission suggesting sections of the IRA have held on to their weapons.  

The Belfast Agreement, to conclude, sought to draw a line under the NI troubles. The normal rule of law would be interrupted. Terrorist prisoners would be released. The police and the justice system would be reformed, largely to appease nationalists. Decommissioning would take place. And victims, while they would not forget, or be forgotten, would find their pain easing in a new, and better, NI. That was the plan…or the hope. The reality would be very different.

The Bloomfield Report

The Belfast Agreement was followed in May 1998 by Sir Kenneth Bloomfield's report, *We Will Remember Them*. This former head of the NI civil service had been appointed victims commissioner the previous October.

His definition of victim comprised relatives of the all the dead plus the injured and their families. Addressing implicitly the question: are there terrorist victims?; Sir Kenneth wrote: 'any individual's involvement in unlawful activity does not lessen the grief and loss of close family who mourn him or her, many of whom may have been unaware of the nature of involvement. We need to remember that our society does

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575 Paragraph 2.13.
not attribute guilt by association. The degree of guilt to be borne by an individual is a
matter, in the civil sphere, for courts of law, and in the moral sphere for a higher
jurisdiction.\textsuperscript{576} The relatives of dead terrorists were victims. But query injured or
imprisoned republicans and loyalists? And their families? Sir Kenneth still thought
surviving republicans and loyalists, but not their families(?), fell to be assessed under
criminal and constitutional law (with a strong role for religious values).\textsuperscript{577}

The Bloomfield report made twenty recommendations. One was that victims must be
as a barest minimum as well served as former prisoners (which suggests the latter are
not victims). Another was that a truth and reconciliation commission might be
possible at some stage. A NI memorial would have to await the definitive end of the
troubles. The victims commissioner also referred to the disappeared (up to 20
republican victims) and exiles, victims of both republican and loyalist paramilitaries.

The Bloomfield report did not compensate for the inadequacies of the Belfast
This was mainly because of an earlier decision of the prime minister's: the Bloody
Sunday, or Saville, inquiry. This did a great deal to stoke up retribution. However,
two other decisions - the independent international commission on decommissioning
and the independent commission on the location of victims remains (inspired by the
Bloomfield report) - pulled things back in the direction of the Belfast Agreement of
drawing a line under the troubles.

\textsuperscript{576} Paragraph 2.14.
\textsuperscript{577} The reference to religious values is potentially subversive. Religious concepts of forgiveness may
undermine criminal law notions of guilt, with, for example, the proposal to abolish the criminal records
of terrorists.
The Bloody Sunday Inquiry

The events of 30 January 1972 in Londonderry are well known. So also are the inadequacies of the Widgery report, though I hazard that the lord chief justice of England and Wales may be seen not to have done too badly. On 29 January 1998 (that is, the eve of the 26th anniversary), the prime minister, Tony Blair, told the house of commons that he was establishing a second tribunal under the Tribunals of Inquiry (Evidence) Act 1921. Lord Saville of Newdigate, a recently appointed law lord, who was to be joined by two retired commonwealth judges, would chair it. It is believed that the new and youthful premier acted swiftly (this was his first Bloody Sunday anniversary in Downing Street) in order to create a public mood among northern nationalists for what became the Belfast Agreement less than three months later. Any official advice to number 10 - which is likely to have been more tempered (if not simply warning of dire consequences) - will not normally become available for 30 years, though one never knows what might happen after Saville reports later this year…if he reports later this year.

The Saville, or Bloody Sunday, inquiry broke all records from 29 January 1998. The most recent estimate of costs is £163 million (well over half of the £300 million spent on the 30 inquiries established since 1990). The tribunal sat between March 2000 and November 2004. Counsel to the tribunal, Christopher Clarke QC, took 42 days to open. Closing, he said that it was not possible to state definitively who had killed whom in ten minutes of shooting, 32 years earlier. Answers to parliamentary

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578 Report of the Tribunal appointed to inquire into the events on Sunday, 30th January 1972, HL 101/HC 220, 18 April 1972.
questions reveal the huge sums paid to barristers and solicitors representing the Derry families, and to the soldiers' and others' legal representatives.

Tony Blair's pre-Belfast Agreement decision, paradoxically, has helped destroy the optimism of 10 April 1998. There is no reference to public inquiries in the Belfast Agreement. But nationalism had been given a great boost, one that cannot possibly be sustained by the likely content of Lord Saville's report. Bloody Sunday has been feeding the culture of inquiry for eight years, with regular calls for judicial inquiries, especially international ones, by nationalists and latterly unionists. It was a precedent that could not, and should not, have been followed. Why do the 13 dead of Derry get £163 million and eight years of attention, and the other victims of state killings do not? I could, of course, compare the 13 killed by soldiers with the hundreds of soldiers and 302 police officers killed principally by republicans.

The Bloody Sunday public inquiry has had another little-appreciated consequence, arising from the status of the evidence obtained. There is a human right, namely the principle against self-incrimination. The tribunal was worried that witnesses would use this to justify saying little or nothing. It is an inquisitorial body, intended to get at the truth. It therefore ruled that an assurance should be sought from the attorney general, not to use any of the oral or documentary evidence in criminal proceedings involving particular witnesses.\textsuperscript{580} This applies to soldiers, but also to the republicans who gave evidence. The families' lawyers, some of whom evidently wanted the soldiers prosecuted, failed to prevent the ruling of the tribunal. While it is the position that there is no immunity against prosecution for witnesses, the tribunal's

\textsuperscript{580} Tribunal ruling, 27 November 1998.
ruling on the status of evidence makes any criminal prosecutions more rather than less unlikely. It is extraordinary that some of the relatives apparently continue to believe that the successful prosecution of soldiers, but not republicans, is an achievable objective.\textsuperscript{581}

**The Independent International Commission on Decommissioning**

This international organization, consequent upon the report of the non-legal Mitchell body of December 1995 to January 1996 on the decommissioning of paramilitary arms\textsuperscript{582}, was constituted as follows: the (Irish) Decommissioning Act 1997, promulgated on 26 February 1997; the (UK) Northern Ireland Arms Decommissioning Act 1997, which received the royal assent the following day; and the agreement establishing the independent international commission on decommissioning (‘IICD’), signed on 26 August 1997, with entry into force on 24 September 1997 (when General de Chastelain took charge)\textsuperscript{583}.

The Mitchell report, in recommending the IICD, had advised there should be no risk of prosecution for terrorists decommissioning their arms. UK primary legislation, but not the Irish statute, referred to the decommissioning of terrorist weapons during an amnesty period. The subordinate legislation in both states was not in force until 30 June 1998, that is more than two months after the Belfast Agreement. From that date, no offences arose from the hiding or moving of terrorist weapons - if the purpose was

\textsuperscript{581} I refer to a report by Eamonn McCann that John Kelly, one of the Derry relatives, participated in a Sinn Féin delegation to Peter Hain on 20 December 2005, to complain about the inclusion of state forces in the Northern Ireland (Offences) Bill, designed to benefit members of the IRA. McCann argues that the likes of Kelly forced Sinn Féin to come out against the bill it had demanded. *Sunday Business Post*, 15 January 2006


\textsuperscript{583} Cm 3753.
to decommission them. It was an amnesty, associated with illegal weapons, for those
who had been hiding them with a view to being used in terrorist crimes.

Section 4 of the UK act states that no proceedings may be brought for an offence
listed in the schedule in respect of anything done in accordance with a
decommissioning scheme. Section 5 prohibits a decommissioned article, or
information derived from it, being admissible in evidence in criminal proceedings
(except evidence adduced on behalf of the accused). Section 6 greatly restricts the
testing of decommissioned articles. But section 11(2) - a saving - states that nothing
in the act shall prejudice any power or discretion exercisable apart from the act in
relation to the institution or conduct of criminal proceedings. The Irish act contains
only prohibitions. Section 5 prohibits proceedings against a person for an offence in
relation to any particular arms if he is involved in decommissioning (as specified in
the act). Section 6 prohibits forensic examination or testing, with a limited number of
exceptions.

The IICD was created to bring about decommissioning. The IRA delayed the process
from 1998 to 2005 and beyond. The amnesty provisions, however, in UK and Irish
law continued, and continue, to apply. None of the weapons surrendered may be used
to assist in any criminal investigation, much less prosecution. This was line drawing -
begun before the Belfast Agreement - of a particularly intense form.

The Independent Commission for the Location of Victims' Remains
The independent commission for the location of victims' remains ('ICLVR') was a direct consequence of the Bloomfield report. Sir Kenneth appealed for information on the disappeared: 'I realise that many of those in possession of such information may fear the risk of inculpating themselves, but I am sure cast-iron arrangements could be made, if necessary through trusted intermediaries, to report such information anonymously and in confidence.' This was in the year following the establishment of the IICD. And the two governments took that body as a precedent. Bloomfield had only asked for cast-iron arrangements regarding confidential information. London and Dublin, however, acceded to an IRA demand for immunity.

They signed an international agreement on 27 April 1999, entering into force on 28 May 1999. On 26 May 1999, the Northern Ireland (Location of Victims' Remains) Act 1999 received the royal assent and entered into force. The Irish legislature enacted the Criminal Justice (Location of Victims' Remains) Act 1999 the following day. Both legislatures granted effectively immunity. There are major restrictions on the admissibility in any future criminal proceedings of evidence acquired in the location, searching for and recovery of remains for burial by the victims' relatives. Section 6 of the UK act allows the police to enter and search premises. This power had to be granted, because existing powers in NI and GB applied only to entry and search in the course of a criminal investigation. The reasonable inference is that no criminal investigations will result from the location of victims' remains.

The ICLVR may well have been inadvisable. The expectations of the relatives and others were raised; then they were dashed. They remained dashed, at least in part.

584 It had also been mentioned in paragraph 52 of the Mitchell report of 22 January 1996.
585 Paragraph 5.38.
586 Cm 4344.
The ICLVR, following the IICD, reinforced the line drawing of the Belfast Agreement. What the republicans asked for, they were now getting. Reconciliation was becoming appeasement and, meanwhile, retribution - for so-called British crimes against the Irish people (to deploy nationalist rhetoric) - was continuing to be fuelled by the Saville inquiry.

**Trying to Save the Belfast Agreement**

The Belfast Agreement never amounted to constitutional finality. Problems with its implementation, flowing almost entirely from the conduct of the republicans, meant that the talks process of 1996-98 continued seemingly endlessly. The Belfast Agreement had envisaged a limited role for the Irish government: in the British-Irish intergovernmental conference, dealing with non-devolved matters, and with members of the NI executive always present. Since 1998, Dublin has continued to work with London, through the long-lasting Blair/Ahern relationship, with shuttle diplomacy and spinning giving the false impression of joint administration if not sovereignty. Landmarks in this increasingly delusional process for UK and Irish political elites are:

- the Weston Park (in Staffordshire) talks in July 2001, following the resignation of David Trimble as first minister. No agreement was reached. London and Dublin, however, published 22 paragraphs of proposals on 1 August 2001, plus a draft statement for the political parties (but not the DUP - then excluded). The parties never adopted this agreement. Nevertheless, in the
process of pan-nationalist extraction of concessions from the UK government, the so-called Weston Park agreement has become as canonical as the Belfast Agreement;

- the Hillsborough talks in March 2003, where Sinn Féin opposed the idea of an independent monitoring commission, and the Ulster unionists’ special treatment for so-called on-the-run terrorists. Again, there was no agreement, or even reconvened conference. London and Dublin, however, published a joint declaration on 1 May 2003. This joint declaration comprises three documents: a London and Dublin agreement; with a second agreement on the independent monitoring commission; and UK proposals regarding on the runs. Again, for nationalist Ireland, there was another series of perceived policy concessions;

- the Sinn Féin/DUP agreement of 8 December 2004, which promised the restoration of devolution but ultimately failed. This was another Blair/Ahern exercise in political manipulation. The other parties were excluded. It is unclear what, if anything, Sinn Féin and the DUP agreed. London and Dublin, however, published another text: a comprehensive agreement. It comprised: proposals by the two governments, with a timetable and amendments to the Belfast Agreement; and draft statements for the IRA, the IICD, the DUP and Sinn Féin.
What happened to victims in this renegotiation of the Belfast Agreement in the years following the Castle Building talks? The answer is: the foregrounding of nationalist victims at the expense of state forces, who were increasingly portrayed as in so-called collusion with loyalism.

**Weston Park, 2001**

Weston Park marks the point at which reconciliation, a cornerstone of the Belfast Agreement, gave way to retribution, following the Bloody Sunday inquiry. This was not simply more nationalist appeasement. Unionists - wittingly or unwittingly - joined in the calls for (international) judicial inquiries. A can of worms was opened. As usual, the optimism and self-confidence of the prime minister overwhelmed any balanced advice coming from within the UK state. Weston Park - and the intergovernmental agreement of 1 August 2001 - was, it needs to be noted, only weeks before 9/11 in the United States: the event that changed so much across the world.

**Collusion?**

Under proposals on normalisation (paragraphs 14 to 22) in the Weston Park text, two paragraphs were devoted to collusion - a term that had slipped from nationalist ideology into the mainstream, with little critical discussion by the NIO: 'Both Governments…accept that certain cases from the past remain a source of grave public concern, particularly those giving rise to serious allegations of collusion by the security forces in each of our jurisdictions.' Six cases were specified: Chief
Superintendent Harry Breen and Superintendent Bob Buchanan, RUC officers killed by the IRA while returning from Dundalk on 20 March 1989; Patrick Finucane, a solicitor close to the IRA 587, killed by a now-convicted loyalist 588 in his north Belfast home on 12 February 1989; Sir Maurice and Lady Gibson, the former an appeal court judge from NI, killed by the IRA while travelling from Dublin to Belfast on 25 April 1987; Robert Hamill, killed by protestants in Portadown on 27 April 1997; Rosemary Nelson, a solicitor, killed by loyalists outside her home in Lurgan on 15 March 1999; and Billy Wright, a loyalist leader, killed by republicans in the Maze prison on 27 December 1997.

These six cases, involving eight people, may be examined. The stimulus for this concession was obviously nationalist inquiry demands: Pat Finucane especially, Robert Hamill, a man more famous in death, and, not to be underestimated, Rosemary Nelson. Where did the other five names come from? Did David Trimble's unionists decide to play the nationalist game? Or did the NIO provide unionist cover for a significant concession? It seems to be the latter. Breen and Buchanan may have been remembered, but a total of 302 police officers was killed. Sir Maurice and Lady Gibson symbolized republican attacks upon the judiciary, and Gibson LJ was the most senior, but not only, judge killed during the troubles. Billy Wright was a notorious loyalist paramilitary. This list represents a loss of moral bearings in UK/Irish diplomacy. The 13 dead of Bloody Sunday were about to be joined by up to another eight, of very mixed pedigree. The 3,600 dead were effectively ignored in favour of the collusion eight (a concept premised on the anterior evil of open state killings). None on the Weston Park list was such a state killing. However, the Irish government

587 This is the view of Sean O'Callaghan, who was in positions to know. It appears to be denied by Lord Stevens, the former chief constable of the Metropolitan Police Service.
588 Ken Barrett.
was equally in the frame with the UK. Four of the eight killed - Breen and Buchanan and the Gibsons - were believed to have died as a result of collusion between the IRA and the police in Dundalk. Nevertheless, four of the six incidents concerned the UK. But what was the collusion? The answer of the campaigners is clear: after Finucane, Nelson was killed for the same reason; so-called human rights lawyers fighting state oppression (even if the dates were 1989 and 1999). But Hamill hardly fits this conspiratorial fantasy: he was an ordinary catholic in the wrong protestant town. And did the UK conspire with republicans in the Maze to kill Bill Wright? Hardly. These six cases were miscast. By all means, have judicial inquiries to find out the truth. But why start with the concept of collusion? Will the answers be: no collusion (which is likely in most of the cases), no problem?

London and Dublin agreed to appoint a judge of international standing, 'to undertake a thorough investigation of allegations of collusion'. Note the wording. Work would begin by April 2002. Though it was not made clear, this was to be a *prima facie* investigation only, essentially a desk review of documents: 'If the appointed judge considers that in any case this has not provided a sufficient basis on which to establish the facts, he or she can report to this effect with recommendations as to what further action should be taken. In the event that a Public Inquiry is recommended in any case, the relevant Government will implement that recommendation.' There might be public inquiries; in NI, might invariably becomes will. There was a minor role for the victims' families: 'Arrangements will be made to hear the views of the victims' families and keep them informed of progress.' No thought apparently had been given as to whether all the families wanted their loved ones turned into posthumous political

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589 The Wright conspiracy theory starts with the loyalist political parties meeting John Major at Downing Street in 1996.
celebrities. The Gibson families - as would emerge - did not favour grieving by public inquiry. This may be the reason they disappeared from the post-troubles radar of finding out the truth.

*The Cory Reports*

The Hon. Justice Peter Cory, a 76-year-old, retired, supreme court judge from Canada, was appointed on 29 May 2002. In six reports to the two governments on 7 October 2003, he found *prima facie* evidence of collusion in all cases, except perversely that of Sir Maurice and Lady Gibson: seemingly, Sir Maurice had booked hotels in England in his own name; but the facts in that case - concerning Dundalk police - were almost similar to those in the Breen and Buchanan report.\(^{590}\) The Irish government published its two reports on 18 December 2003.\(^{591}\) The UK waited until 1 April 2004, before it published its four reports\(^{592}\), having redacted principally the Finucane report in order not to prejudice likely criminal proceedings.

The UK, which had envisaged the unknown Cory as simply a tactic in August 2001, was hoist on its own petard in April 2004. 'Judge Cory's report', said Mrs Finucane, 'confirms that there was a state policy of targeting and assassination.'\(^{593}\) It confirmed no such thing. But the Finucanes were winning the propaganda war, due to the ineptness of the UK government and the opportunism of the Irish. The UK admitted that it had had to ask Justice Cory to add forewords to the reports (the two Irish reports have only prefaces), making clear that his 'collusion investigation' had not led

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\(^{590}\) The difference amounts to a statement of Kevin Fulton, made on 5 September 2003: Gibsons's report, paragraph 1.141.

\(^{591}\) PRN 1450 and 1451.

\(^{592}\) HC 470-473.

\(^{593}\) *Irish Times*, 2 April 2004.
to full judicial findings of fact. It then produced a devastating critique of the work it had set in train: 'Justice Cory's approach has been to adopt a very wide definition of collusion which covers both inaction as well as actions, and patterns of behaviour as well as individual acts of collusion…The Government have not taken a view on the provisional findings which Justice Cory has reached as a result of his wide definition of collusion…'. What is striking about the six Cory reports is the complete absence of knowledge of public law jurisprudence, domestic and international. Questions of executive and state liability are the stuff of public law judgments. The secretary of state ended his statement to parliament: 'Northern Ireland needs greater reconciliation between the communities…We should ensure that we do not concentrate on divisive issues from the past at the expense of securing this.'

But that was precisely what the NIO, with or without the initiative of number 10, had brought about. It would continue to get worse.

*The Hamill, Nelson and Wright Inquiries*

Three inquiries were announced on 1 April 2004: Hamill, Nelson and Wright. The UK did not want to use the 1921 act, governing the Saville inquiry. Instead, it relied upon the Prison Act (Northern Ireland) 1953 for Wright, and, for Hamill and Nelson, the Police (Northern Ireland) Act 1998. The secretary of state wanted: 'better, quicker inquiries'. A statement on governing principles was published on 8 July 2004. A conviction was obtained in the Finucane case later that summer. On 23 September 2004, the UK government announced there would be a fourth inquiry: 'In order that the inquiry can take place speedily and effectively and in a way that takes into account

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the public interest, including the requirements of national security, it will be necessary
to hold the inquiry on the basis of new legislation which will be introduced shortly.\textsuperscript{596} Three of the four tribunals were announced in a written statement on 16 November 2004: Hamill to be headed by Sir Edwin Jowitt, a retired high court judge from England and Wales; Nelson to be headed by Sir Michael Morland, also a retired high court judge from England and Wales; and Wright by Lord MacLean, a retired appellate judge from Scotland. The terms of inquiry tried to shut the stable door after the collusion horses had bolted. The tribunals would inquire into: wrongful acts or omissions by state agencies, including attempts; and 'whether any such act or omission was intentional or negligent (inviting the verdict that public bodies may have been negligent but could never have colluded in the absence of intention - on which there is little or no evidence).\textsuperscript{597}

\textit{The Inquiries Act 2005}

The Inquiries Act 2005 - which had been sniped at during enactment by Lord Saville, writing his report, and, from Canada, by Justice Cory - received the royal assent on 7 April 2005. The Hamill, Nelson and Wright inquiries all began.\textsuperscript{598} Sir Edwin Jowitt applied to convert the Hamill inquiry to one under the Inquiries Act 2005. So did Lord MacLean, in charge of the Wright inquiry.\textsuperscript{599} I can find no indication that Sir Michael Morland is seeking to convert the Nelson inquiry, which remains under the Police (Northern Ireland) Act 1998. The main reason given for conversion has been: the need to compel witnesses. As with Bloody Sunday, in order to avert reliance upon

\textsuperscript{596} NIO press release.
\textsuperscript{597} Sir Michael Morland had his terms of reference amended, to add the army or other state agency (House of Commons, \textit{Hansard}, Vol.432, col. 91WS, 24 March 2005).
\textsuperscript{598} Hamill on 24 May 2005;
the principle against self-incrimination, undertakings have been obtained - by Sir Michael Morland - from the attorney general and others. The evidence obtained will not be usable in criminal or disciplinary proceedings. Sir Edwin Jowitt and Lord MacLean have not moved on this front, as yet. The start dates for public hearings remain in the future: Hamill in Belfast on 5 September 2006; Nelson as early as spring 2006; and Wright in Belfast, not before September 2006.

The three retired judges are not slavishly following Lord Saville. Two of the three are under the Inquiries Act 2005 (if this is okay for Nelson why is it not for Finucane?). But differences in handling these public inquiries may lead to a further discrediting of the process - aside from foreseeable problems with time and costs.

*Joint Declaration, 2003*

The joint declaration - one of the wordiest documents in the history of the NI problem - contained nine paragraphs on rights, equality, identity and community (paragraphs 25 to 33). One of these, following the Belfast Agreement, dealt with victims. Paragraph 26 began: 'The two Governments fully accept that acknowledging and addressing the suffering of the victims of violence is a necessary element of reconciliation.' It ended: 'Remembering and recognition are an essential part of the healing process.' There was no change in perspective.

The only new ideological element was: 'The British Government reaffirms the principle that there is no hierarchy of victims.' So Bloody Sunday, Finucane and

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600 Sir Michael Morland approached the attorney general, the head of the home civil service, the ministry of defence, the PSNI and the NI civil service.
Nelson were not the most important cases? Or was the UK government including dead republican and loyalist terrorists in the list of victims? No hierarchy of victims is a dangerous slogan, and should not have been incorporated in a UK/Irish political agreement following the Belfast Agreement. Certainly, from a humanitarian point of view, every death produces grieving relatives. But there is a hierarchy: there are those killed unlawfully, mainly by paramilitaries, but also through the excessive use of state force; then there are those killed lawfully by state forces exercising a minimum use of force. Paramilitary victims are the greater number. And, in terms of state killings, the lawful deaths far outnumber the unlawful ones. There is not one Strasbourg case that holds that the UK used excessive force in NI.601 There are only a handful of cases in which NI courts held, by convicting members of the security forces, that the force had been excessive. The European Court of Human Rights, in the Jordan series of cases from 2001602, refused to hold there had been a substantive violation of article 2, in general or in particular: 'The Court is…not prepared to conduct, on the basis largely of statistical information and selective evidence [from the applicant], an analysis of incidents over the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force.'603

The substance of paragraph 26 was; the next stage in policies for victims: 'The two Governments will work with the parties, victims and survivors to seek to establish what further practical steps can be taken to recognise and address the suffering of all victims, taking into account the state of readiness of the community as a whole to

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601 There is, of course, the Gibraltar case: McCann & Others v United Kingdom (1996) 21 EHRR 97, a ten to nine decision.
602 Jordan v UK, 4 May 2001; McKerr v UK, 4 May 2001; Kelly & Others v UK, 4 May 2001; Shanagahan v UK, 4 May 2001; McShane v UK, 28 May 2002; Finucane v UK, 1 July 2003..
engage.’ All victims? Consideration would be given to the establishment of a victims' and survivors' forum.

Victims' Policy

A NIO document, joint declaration commitments - deliverables in the near term, dated July 2003, listed, under victims at number 18: 'Consultation with victims, reconciliation experts and the political parties on next phase of victims policy to commence in September [2003].'

Victims’ policy was a post-Belfast Agreement development, aside from the appointment of Sir Kenneth Bloomfield in October 1997. The secretary of state accepted his report of 29 April 1998. Mo Mowlam appointed the first minister for victims, Adam Ingram, though he retained other responsibilities. The portfolio has survived. Adam Ingram established a victims liaison unit in the NIO in June 1998. £5 million was allocated to implement the Bloomfield report. A NI memorial fund was announced in December 1998, £1 million being earmarked to establish this independent charity. This was to be a living memorial for victims and survivors. Following devolution in December 1999, another victims unit was established in the office of the first minister and deputy first minister. This victims unit has survived suspension, coming under the direction and control of the secretary of state. But the NIO victims liaison unit remains the body responsible for overall policy control, as well as reserved and excepted functions. The NIO states that it has spent more than £20 million on victims' initiatives since 1998.
The joint declaration of 2003 was the principal stimulus to institutional development. On 1 March 2005 (before the general election), Paul Murphy announced there would be a victims' and survivors' commissioner. The NIO was also publishing a consultation paper on services for victims and survivors. The commissioner, when appointed, would establish the victims' and survivors' forum envisaged in the joint declaration.

Despite the prime minister's desire to have NI's past dealt with, and a visit by Paul Murphy to South Africa, it is clear that the NIO had ruled out a truth and reconciliation commission in the foreseeable future: 'Northern Ireland needs its own tailored approach to dealing with the past.' The NIO, interestingly, seemed not to be concerned with whether the category of victim should include surviving terrorists. The problem was simply the lack of public consensus. Further, nationalist thinking once again intruded into policy making: 'I recognise...that, for some, the Government's role in past events is itself seen as an issue; and it is hard for some sections of the community to see us as a genuinely neutral party.'\(^{604}\)

On 24 October 2005, Paul Murphy's successor, Peter Hain, announced, as interim commissioner, Bertha McDougall, a police widow, victims' group founder and former educationalist. The appointment was envisaged as lasting a year. The reason for this step back appears to have been the continuing failure of political settlement. Legislation was promised for a victims' and survivors' commissioner. The duties of Bertha McDougall are: to review arrangements for service delivery and coordination;

\(^{604}\) NIO press release, 1 March 2005.
to review funding arrangements; and to consider the modalities of establishing a victims' and survivors' forum. She is to report to the secretary of state.

On the Runs

The on the runs affair began with the 2001 Weston Park agreement (discussed above). It progressed with the 2003 joint declaration. On 9 November 2005, following the controversial final decommissioning by the IRA, the UK government introduced the Northern Ireland (Offences) Bill ('NIOB') at Westminster. The NIOB was withdrawn - following an unprecedented parliamentary alliance against the measure - on 11 January 2006. The issue will almost certainly return to trouble the rule of law.

Paragraph 20 (under proposals on normalisation) of the Weston Park agreement read in full: 'Both governments also recognise that there is an issue to be addressed with the completion of the early release scheme, about supporters of organisations now on cease-fire against whom there are outstanding prosecutions, and in some cases extradition proceedings, for offences committed before 10 April 1998. Such people would, if convicted, stand to benefit from the early release scheme [under section 10(6) of the Northern Ireland (Sentences) Act 1998]. The Governments accept that it would be a natural development of the scheme for such prosecutions not to be pursued and will as soon as possible, and in any event before the end of the year, take such steps as are necessary in their jurisdictions to resolve this difficulty so that those concerned are no longer pursued.'

This was an undertaking by London and Dublin, which had not been supported by the political parties. It would apply separately in the UK and Irish states. The significant
date of 10 April 1998, from the Northern Ireland (Sentences) Act 1998, was invoked. The agreement hinted at the obvious point: if terrorists wanted to benefit from the early release provisions, it was up to them to surrender to the authorities. But the mainly republican paramilitaries clearly wanted more. Thus, the use of the term 'natural development'. Natural is an unusual word to use about a constitutional matter. The two governments could not avoid the criticism that they, at the behest of the republicans, were expanding the Belfast Agreement in a highly undesirable direction.

The issue was revisited in the joint declaration of 1 May 2003. However, on the runs were not dealt with in the principal document (including annexes). There was a separate two-page proposals in relation to on the runs (OTRs), which the unionists said they had not supported. This was not presented as a UK/Irish agreement; seemingly, the former had worked out its position but the Irish had not.

The UK and Irish proposals made reference in the first paragraph to: a context of acts of completion, meaning the decommissioning of terrorist weapons; due judicial process and a sensitivity to the position of victims; similar action in the ROI; and 'the complete ending of exiling and allowing those exiled to return'. The plan involved: an eligibility body; and a special judicial tribunal (the ordinary courts having already been ruled out). The eligibility body would exercise the powers of the sentence review commissioners, with the Northern Ireland (Sentences) Act 1998 being amended as follows: the reduction of the two-year minimum period to zero; and the removal of the requirement of at least a five-year sentence.

*The Northern Ireland (Offences) Bill*
The NIOB had its first reading on 9 November 2005. The bill became known during its passage as the OTR bill, standing for on-the-run fugitive offenders, both republican and loyalist, outside the UK. Surprisingly, the government belatedly included soldiers and police officers (none of whom are believed to be on the run) in the NIOB. Perceived as an amnesty measure for pre-Belfast Agreement terrorist crimes, it would have been better portrayed as an immunity bill for republicans (and any loyalists), but hardly so-called state killers, who did not benefit from the release of paramilitary prisoners after the Belfast Agreement.

The NIOB provided for: certificates of eligibility issued by a certification commissioner (effectively immunity); the non appearance of on the runs in an alternative justice system; trials for certified offences by a special tribunal consisting of a retired judge; the release on licence of anyone so convicted; appeals commissioners (again retired judges) to consider certificates of eligibility and licences; the ousting of judicial review; a right of appeal against conviction and sentence to a special appeal tribunal, again comprising a retired judge; and special prosecutors in the special tribunal and the special appeal tribunal.

There were related proposals in the ROI. However, these were administrative and not legislative, though they would have had a constitutional effect. They were withdrawn at the same time as the UK proposals.

The NIOB was the most controversial piece of NI legislation in the nine years of the Blair government. Initially, the UK government only had the support of the five
abstaining Sinn Féin MPs. It was unprecedented to have a broad parliamentary alliance in the opposition lobby. The Irish government, which keeps a close eye on Westminster, sheepishly supported Sinn Féin. The SDLP, having survived the 2005 general election, was, under the leadership of Mark Durkan, about to use parliament in a way it had rarely done. One hesitates to disturb the satisfying memory of a democratic alliance against Blair and Adams, but, unfortunately, it has to be done to pay full credit to the way the SDLP out-greened Sinn Féin.

The SDLP came out in favour of victims, raising a storm of indignation. However, its position was less than clear. It had spotted the inclusion of state killers in the NIOB, and the fact that the NIO and/or number 10 had probably deceived Sinn Féin. Mark Durkan, from Derry, would also have been sensitive to Bloody Sunday. The SDLP opposed the Bill principally because the Bloody Sunday relatives, and others, would not be able to see state killers prosecuted. This position was contrary to the view of some relatives, and their spokespeople, that they do not want revenge, but they wanted justice in the form of recognition. It also, of course, ignores the point made above that, because of the principle against self-incrimination, the Saville report will not be throwing up new evidence for the public prosecution service to consider. What of the SDLP view of the on the runs? It was not clear whether Mark Durkan and his colleagues were for or against the Weston Park and joint declaration proposals, given their tendency to see the so-called Good Friday agreement as evolving. They were against loyalists being able to benefit. They also affirmed the Belfast Agreement position of release after two years for pre-10 April 1998 terrorist crimes. This was

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605 House of Commons, *Hansard*, Standing Committee B, col.18, 6 December 2005 (Mark Durkan MP).
the line they were happiest defending. However, on the first day of committee, the minister, David Hanson, asked Mark Durkan if his position was: that a terrorist should benefit from the NIOB but not a member of the security forces. Peter Robinson rephrased the question: did he want the NIOB to succeed, less the late addition regarding police and soldiers. Mark Durkan made an interesting admission: 'if the Government say that they are honour-bound to introduce the legislation on the grounds that I mentioned [Weston Park and the joint declaration], we will table and support amendments that confine the legislation to doing precisely those things. [HON. MEMBERS: "Ah!"] I said that we will test the Bill to its logical and its moral destruction.\footnote{608}

On 11 January 2006, Peter Hain, in a statement to the house of commons, announced the withdrawal of the NIOB. The issue, he said, would have to be revisited by legislation, possibly in the autumn. He indicated the government had been thinking of possible amendments. The reason for withdrawal - elicited by MPs' questions - was Sinn Féin's opposition, and in particular a threatened republican boycott of the alternative justice system.

\textit{Comprehensive Agreement, 2004}

The comprehensive agreement purports to replace the Belfast Agreement. That is not the position. The Belfast Agreement, as an international agreement\footnote{609}, would have remained in force…as would the Northern Ireland Act 1998, the principal domestic statute. So much is clear from the comprehensive agreement. The UK and Irish

\footnote{608} House of Commons, \textit{Hansard}, Standing Committee B, col.20, 6 December 2005 (Mark Durkan MP).
\footnote{609} Cm 4705.
governments put forward nine paragraphs of proposals, covering principally paramilitarism, the devolved institutions and policing and justice. Annex A is a timetable. And annex B is changes to strands one, two and three of the Belfast Agreement. While there is a reference to rights, especially the proposal for a bill of rights, there is not one word on victims. The comprehensive agreement added nothing to the Weston Park agreement, with its public inquiries, and the joint declaration, with its less definitive victims' and survivors' forum.

The Historical Enquiries Team

The historical enquiries team, C8 of the Police Service of Northern Ireland ('PSNI'), which began work in Lisburn on 20 January 2006, is the last major development in the story of reconciliation versus retribution. This is a special unit within the police, comprising NI officers and those from the rest of the UK and elsewhere. Its task is to review killings from 1968, where there was no conviction at the time: this is an extraordinary total of 3,268\(^{610}\), which will be examined chronologically. Most of the perpetrators were republican and loyalist paramilitaries. Most of the victims were civilians, catholic and protestant, and members of the security forces. The team has a budget of £30 million, and a staff of approximately 84. Officers from outside NI will investigate cases where soldiers and/or police were responsible for deaths.

The historical enquiries team forms no part of the Belfast Agreement. Indeed, it is antithetical to the spirit of reconciliation. There are four reasons why it was created. One, the effect of public inquiries - Bloody Sunday and then the Weston Park

\(^{610}\) This figure comes from the PSNI. Other sources refer to about 2,000.
inquiries - in the years after the Belfast Agreement: the widespread belief that public money was being used to promote a nationalist version of history. Two, an initiative of the chief constable's, which he promoted with the NIO from September 2004.\textsuperscript{611} Three, Paul Murphy's decision not to follow Tony Blair's suggestion about a truth and reconciliation commission. There was a hint of the historical inquiries team in the press release of 1 March 2005 on the victims' and survivors' commissioner, in the reference to the serious crime review team in the PSNI. Four, funding. Presumably, the PSNI, with the backing of the NIO and number 10, had to approach the treasury for a special budget line. The historical inquiries team will only stoke the demand for retribution.

Instead of soothing the hurt feelings of the majority community, I believe it will be another disappointment. It is very difficult to reinvestigate old cases, even when one is using techniques such as DNA analysis on stored material. Many witnesses will be dead; and others will have genuinely forgotten. The resources - £30 million for 3,268 killings\textsuperscript{612} - contrast unfavourably with the £163 million already spent on the Bloody Sunday 13. Finally, the officers investigating, if they are thinking of prosecution, will have to take the following factors into account: the release of terrorist prisoners for crimes committed before 10 April 1998; the loss of evidence associated with decommissioned terrorist weapons; the loss of evidence associated with the disappeared whose remains have been returned to their relatives; and the inability to use any evidence uncovered by the Bloody Sunday and other public inquiries. The chances of anyone ending up in court are slight. If any associate of Gerry Adams and Martin McGuinness should be questioned, a telephone call to Tony Blair or more

\textsuperscript{611} PSNI press release, 20 January 2006.
\textsuperscript{612} See note 42 above.
likely Jonathan Powell will lead to a message from number 10: continue down this road and you will damage the peace process. That is the measure of how much harm has been done the rule of law, whether one favours retribution or, as I do, reconciliation.
Patten Right or Wrong: constitutional concerns

Introduction

The NIO ... felt that during [Peter] Mandelson’s tenure, they had not – in the words of one senior official – ‘hit him hard enough with the idea of “Patten must be adhered to, right or wrong”’, and had let him deviate from that template for understandable political and administrative reasons.

Dean Godson, *David Trimble and the Ordeal of Unionism*, London 2004, pp. 638-9

Policing reform was provided for in the 1998 Belfast Agreement. And it is a principal issue facing the new assembly at Stormont. The key document remains Sir Ronnie Flanagan's unpublished fundamental review of 1996, which envisaged changes towards community policing by the Royal Ulster Constabulary ('RUC') as the security situation improved. I believe the process went badly wrong in 1999, with the publication of the Patten report. It was a shoddy piece of work (as was the much-less controversial criminal justice review of the following year). The UK government – and, in particular, Tony Blair – were bent on appeasing pan-nationalism, and in particular republicanism. The RUC was to be ideologically, not practically, sacrificed. The Irish government backed UK policy, and the SDLP finally – in

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613 This paper was prepared for delivery at a Northern Light Review conference in Parliament Buildings, Belfast on 17 June 2006.
614 Northern Ireland Act 2006 sch 1 para 1.
November 2001 - accepted responsibility for policing NI. Sinn Féin wanted, and wants, Patten implemented in full, a position it has never been asked to explain, much less justify, given the failures of local journalists, academics and commentators to fill the deficit of intellectual accountability.

Prospects for the constructive implementation of the Belfast Agreement crumbled in the November 2003 assembly elections, when the DUP overtook the UUP: the SDLP gave way to Sinn Féin. The extreme sectarian parties supplanted the centrist ones, contrary to the spirit of reconciliation proclaimed at Castle Buildings five years earlier. Members of the assembly are faced, largely as a result of the (earlier) 2003 Hillsborough joint declaration, with the prospect of putting Sinn Féin in charge of policing and/or justice. This is to happen sooner rather than later, according to the official version of political development espoused by the NIO – devolution worked, the people want it, and it should be restored. However, there is a principle of legality in international, and domestic, law, which is an aspect of the rule of law at home and abroad. It is express in the Irish constitution\textsuperscript{615}, and will keep Sinn Féin out of any coalition government formed in Dublin in 2007. If Gerry Kelly MLA, a convicted member of the IRA, should be permitted to take ministerial control of the courts and/or the PSNI, it would amount - I submit - to a breach of the principle of legality in NI. Continuing direct rule, with or without threats of joint authority, would be better than such a form of all-inclusive devolution. Any surviving legitimacy attached to the Belfast Agreement would be washed away with a Sinn Féin minister for justice or policing (even – especially? - if twinned with a DUP minister).

\textsuperscript{615} Bunreacht na hÉireann, article 15.6.
That is why it is timely to discuss policing reform, and to signal that a Sinn Féin minister - regardless of however-many safeguards the NIO dreams up - is a concession too far. This is a principled constitutional view. I do not seek to tactically aid either brand of unionism, still indulging division as if the tradition were overflowing with talent and ideas. As with a spouse nagged continually by his or her partner in private life, it is difficult to see why Sinn Féin should change it spots on policing and justice on demand, simply to achieve peace and harmony in political life with Dr Paisley’s followers or Sir Reg Empey’s more polite colleagues. The constitutionalist’s rule should remain central: if the republicans are still a terrorist threat, give them nothing; if they are embarked on the road to peace and democracy, given them only what is politically responsible.

The UK government made two major mistakes in implementing the Belfast Agreement. The first is that it did not relate the release of terrorist prisoners to decommissioning by paramilitary organizations. The second is that it did not relate the creation of an executive to the disbandment of the IRA (the only terrorist army able to benefit, because of too many catholic votes, from devolution). Tony Blair is embarked – and this is my theme today - on making a third gigantic mistake: delivering control of policing, and/or justice, to republicanism, when Sinn Féin/the IRA remains opposed to the PSNI despite all the reforms. It is commonly assumed that a Sinn Féin minister could corrupt policing; do not underestimate the (greater?) damage Gerry Kelly MLA would do if Sinn Féin only had control of justice.
I leave the history of the RUC, certainly from its origins in 1922 to the start of the troubles in 1968, to others.\textsuperscript{616} However, one constitutional point needs to be made clearly (given the damage done by Patten): while the RUC was formed out of the Royal Irish Constabulary in 1922, the RUC survived renaming as the PSNI in 2001. The reason is legal.

The legal source of policing is the common law office of constable. Policing powers were transferred from London to Belfast on 22 November 1921, and, on 1 June 1922, under section 1(1) of the Constabulary Act (Northern Ireland) 1922, the new NI parliament reorganized constables in a force 'to be called, with the consent of His Majesty, the Royal Ulster Constabulary'. There was no royal charter (as was believed by even Sir Ronnie Flanagan): consent appears to have been implied through royal assent to the legislation. The position on 4 November 2001 was different. Section 1(1) of the Police (Northern Ireland) Act 2000, passed at Westminster, provides: 'The body of constables known as the Royal Ulster Constabulary shall continue in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary).’ But section 1(2) states: 'The body of constables referred to in subsection (1) shall be styled for operational purposes the "Police Service of Northern Ireland".’ The PSNI is the operational name, whatever that means, of the PSNI (incorporating the RUC), a still unclear legal entity – a body corporate, a statutory corporation or what? – comprising her majesty’s constables in NI.

Another point needs to be made, at once historical and constitutional. Given the
tendency of NIO ministers to absorb elements of the nationalist version of history,
nothing in 1922 to 1968 justified the subsequent 30 years' of violence, in which 302
policemen and women were killed and some 8,500 to 9,000 injured. The RUC of
1922 to 1968 has little for which it need apologize (comparing that police force with
mainland constabularies and the Garda Síochána): those issues may be left to the
historians. Given the RUC’s fourfold increase in size during the troubles, it obviously
became a radically changed police force in the fight against republican and loyalist
terrorism617. It is little appreciated that, from 1972, the RUC was under direct British
control. Whatever of the 50 years of unionist misrule, there were another 30 or so by
the sort of ministers who presided, less directly, over the local constabularies of
England, Wales and Scotland and somewhat differently in the ROI.

Republicans, and their fellow travellers, have got away with: damning the RUC
during NI's first 50 years; and having their dirty war (which ensured there would be
no united Ireland) turned into history as defensive popular resistance. Policing reform
has been projected, by the NIO, on the basis of both of these inaccurate foundations,
as necessary to win the assent of republicans to properly accountable policing. It is
extraordinary that a policy, which did not begin to work between 1998 and 2006,
should still be pursued by a NIO under the policy control of Tony Blair. Republicans
know how to tweak the lion’s tail, and disrupt unionists in the process: the threat of
violence – resisting decommissioning - was their principle weapon; it has been
overtaken by the promise of Sinn Féin on the policing board and DPPs, but only after
the UK delivers on the devolution of policing and justice.

617 Thus, Chris Ryder, in 1997: ‘Today, a new, professional RUC stands, impartially and politically
independent, between the two communities in Ulster.’ (p. 12).
The Flanagan Fundamental Review, 1995 - 96

The fundamental review within the RUC began after the August and October 1994 ceasefires. A team led by Ronnie Flanagan, then deputy chief constable, carried out the review. It was not completed until after the IRA's docklands' bomb in February 1996. The report, entitled A Fundamental Review of Policing, ran to 220 pages plus appendices. It contained 190 recommendations. It has never been published (though it deserves to be released under the Freedom of Information Act 2000). I will refer to it as the RUC, or Flanagan, fundamental review.

Crucially, reform was to be linked to the security position. Flanagan sketched three scenarios: scenario 1, 'a high level of terrorist activity', the position at the time of the completion of the report; scenario 2, 'the level of terrorism is greatly reduced', a position only achieved between 1997, when the IRA ceasefire was renewed, and 2005, when some or all of its arms were decommissioned; and scenario 3, 'terrorist organisations dismantled', a position not yet achieved, and seemingly no longer sought by the UK and Irish governments.

The Flanagan fundamental review inspired a serious policy debate within the policing family before the Belfast Agreement, resulting in the following publications shortly after the announcement of Patten:
• the NI affairs committee report (in two volumes) on the RUC, published on 8 July 1998\textsuperscript{618};

• a 50-page submission (plus six appendices) by the police federation of NI to Patten on 14 September 1998, containing 44 recommendations\textsuperscript{619}; and

• a submission to Patten by the police authority of NI – entitled *Policing: a new beginning* - in December 1998, containing 70 recommendations.

It is extraordinary that a phrase of the now superseded police authority, a new beginning (taken from the Belfast Agreement), should not only have been appropriated by Patten, for the title of his report, but have become the slogan used by the republicans to justify their failure to do what the Patten report was designed to achieve, namely secure widespread support for the police.

These documents, which were little read by politicians, show, one, a willingness to change, and, two, considerable thought being devoted to practical reform. Thus, Chris Ryder, in his memorandum to the NI affairs committee in January 1998 - four months before the Belfast Agreement - was able to write: 'The best model is for a single police service, centrally commanded but with a high degree of local devolution. The arrangements outlined in the Fundamental Review…are therefore eminently suitable. They provide for a new head-quarters, making policy, setting objectives and providing

\textsuperscript{618} Third Report: composition, recruitment and training of the RUC, 337 I & II.  
\textsuperscript{619} Submission by the Police Federation for Northern Ireland.
central and specialized support services to a new network of 24-26 police Areas, co-
terminous with the district council areas.620

The Belfast Agreement, 10 April 1998

The Belfast Agreement, it is important to note, did not provide for policing reform.
The political parties remained divided. The issue was kicked into touch, in the form of an independent (not international) commission on policing for NI.

Policing and Justice

One section of the Belfast Agreement dealt with policing and justice, there being two annexes, A and B. Paragraphs 1 to 3, and annex A, dealt with policing.

Paragraph 1 contained the key phrase: '[The participants]…believe that the agreement provides the opportunity for a new beginning to policing in Northern Ireland with a police service capable of attracting and sustaining support from the community as a whole.' Paragraph 2 outlined principles of policing. And paragraph 3 provided for 'an independent Commission…broadly representative with expert and international representation among its membership…[,] …to make recommendations for future policing arrangements in Northern Ireland' by the summer of 1999. Note the word recommendations. And the extremely short time scale. The obligation on the UK was, not permanent reform, but the establishment of a commission to report with recommendations.

620 Volume II, p. 137.
Annex A contained the terms of reference for the commission. The first paragraph referred to the proposals of the commission, 'including means of encouraging widespread community support for those arrangements'. This was added to the Mitchell draft paper of 6 April 1998, on which the Belfast Agreement was based. The terms of reference made clear that the commission was a matter solely for the UK government.

The Patten Commission (1998-99)

The independent commission on policing for NI ('the Patten commission') was announced hurriedly by the secretary of state, Mo Mowlam, on 3 June 1998, after the referendum on 22 May 1998 and before the assembly elections on 25 June 1998. It was to be chaired by Chris Patten, recently governor of Hong Kong, and also a former NIO junior minister. Patten's background as a conservative MP and minister reassured the Trimble unionists. They would not have let Patten's catholicism prejudice them. Little did they realize that governor Patten, having taken on the Chinese government and lost, was ready for more statecraft bearing on Irish nationalist antipathy to the RUC and policing in general.

The other members of the commission were: Sir John Smith, formerly of the metropolitan police, and Kathleen O'Toole, secretary for public safety in Boston, Massachusetts; Peter Smith QC, a NI barrister, and Maurice Hayes, a former civil servant; Prof Clifford Shearing, a South African academic from Canada, and Dr
Gerald Lynch, of John Jay College in New York; plus Lucy Woods, chief executive of British Telecom in NI.

**The Patten Report, 9 September 1999**

The commission reported unanimously after a little over a year. The secretary of state immediately accepted in principle the findings of the Patten commission, announcing a full implementation plan would be published in December 1999. This was exceptional in the history of public administration. Peter Mandelson was appointed secretary of state on 11 October 1999. There was a pause. In the queen's speech on 17 November 1999, a bill was promised to implement proposals from the Patten commission. It was only on 19 January 2000, that the new secretary of state announced a considered government response to the Patten report in parliament. UK hesitancy, and an attempt to keep David Trimble on board, led nationalists to suspect Patten might not be implemented in full.

**Constitutional Questions**

A major issue in NI from September 1999 was the relationship between the Belfast Agreement and the Patten report, and between the Patten report and the proposed bill. On one view (the better one), it was argued that the Agreement provided only for the UK government setting up the Patten commission. The Patten report was a matter subsequently for the UK government, there being a general legal requirement on the government not to fetter its discretion. There were recommendations to be considered. On the other view, the reference to 'a new beginning' in the policing and
justice section meant that the Patten report was effectively part of the Belfast Agreement. Further, that the UK government was obliged to implement the Report in full through Westminster legislation; effectively incorporating 175 recommendations in domestic law. Neither of these propositions withstands any serious legal scrutiny. However, the government was to act as if they were self-evident and fundamental truths.

*Political Controversy*

All observers agree that the Patten report was the hardest-fought political issue following the Belfast Agreement, this being focussed on the legislative process at Westminster.

Ulster unionists generally concentrated on paragraph 17.6 on symbols (recommendations 150 to 153), and concluded that the RUC was being disbanded. Anti-agreement unionists blamed this on the Belfast Agreement. Pro-agreement unionists worked to improve the bill from their perspective. Irish nationalists were generally pro-agreement. The SDLP welcomed the Patten report as a compromise. Sinn Féin did not endorse Patten. However, nationalists generally focussed on symbols, in lieu of having achieved the disbandment of the RUC or its radical restructuring; they were determined to prevent the government resiling from any of Patten’s 175 recommendations.

It is truly extraordinary – and an indication of the ideological vigour of nationalism – that, while the policing family affirmed the fundamental review, and whispered its
willingness to have much of Patten implemented, it was Patten – an unashamed plagiarist and elite tory manipulator – who dominated the debate and set the legislative agenda. One cannot say policing reform without invoking Patten’s report, yet there would have been no report without Ronnie Flanagan’s fundamental review. Patten is Flanagan dressed for street walking on the Falls Road. And business has been brisk.

‘It is the beginning of wisdom in Northern Ireland to recognise that while there are absolute values, there are also relativist views on them’, Chris Patten told the Irish Times the day after he reported. ‘It was borne in on me more strongly than anything else when we did those public meetings that there are two stories in Northern Ireland, two sets of experiences. And, all right, they’re to a degree propagandised, mythologised, but a lot of what’s said and felt and suffered is genuine and credible.’

It is wrong to see Lord Patten as having gone native, while taking evidence on policing in NI. He simply looked at two communities – the Sinn Féin marshalled, angry, self-styled victims and the law abiding, respectable and conservative policing family – and decided that the latter had to be culturally sacrificed to the former, to buy security for the future. Thus, the Patten report deliberately avoided acknowledging the 302 dead officers, which the criminal justice review rushed belatedly to correct the following year.

Some observers took the view that, while the Patten report was based largely upon the fundamental review, it attracted catholics and repelled protestants by its radical line

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621 11 September 1999.
622 In fact, it is worse. The report tried to justify the oversight (paragraph 1.7). The 302 were mentioned as an argument in favour of personal protection weapons (paragraph 8.18).
on symbols. The NIO may not have wanted this. In time, it came to find Patten’s politicization of policing conducive to what British ministers, following the republicans, call the peace process. It is not unduly cynical to suggest that protestant alienation became the dynamic of seeking to reach out to the minority community. The senior NIO official quoted at the beginning, who sounds remarkably like Sir Quentin Thomas, let the appeasement cat out of the civil-service bag in his interview with Dean Godson. New labour’s perceived political imperatives had, as regards NI, assumed an increasingly green tinge.

The Patten report is open to constitutional criticism for the following extraordinary propositions.

(1) Policing in Great Britain not a function of government.

This – incorrect - idea is advanced in the report: ‘The roots of the problem go back to the very foundation of the state. Since 1922 and the establishment of the Royal Ulster Constabulary (in part drawn from the ranks of the old Royal Irish Constabulary), the composition of the police has been disproportionately Protestant and Unionist. This has become much more pronounced during the last 30 years…. Both in the past, when the police were subject to political control by the Unionist government at Stormont, and more recently in the period of direct rule from Westminster, they have been identified by one section of the population not primarily as upholders of the law but as defenders of the state, and the nature of the state itself has remained the central issue of political argument. The identification of police and state is contrary to policing practice in the rest of the United Kingdom…In one political language they
are the custodians of nationhood. In its rhetorical opposite they are the symbols of oppression….624

The passage quoted above contains fundamental constitutional errors. First, NI is not a state; it is a region of the UK. Second, the association of protestant and unionist (between 1922 and the present) is unsubstantiated625, and treats the meaning of unionism ahistorically. Third, the RUC had become highly professional in the previous 30 years (not more unionist), under successive secretaries of state, the police authority and different chief constables. Four, while Irish nationalism is a legitimate political tradition in NI, its analysis does not accord with constitutional reality. The RUC upheld only the law; and that included dealing with terrorists who have tried – and failed – to break up the UK state using violence. Five, while some unionists may have treated the RUC as their police force, it is interesting that the generally law-abiding majority community also quickly supported the PSNI – while believing it had replaced the RUC.

The problem of the RUC upholding the law of part of the UK was only oppressive to republican (and loyalist) terrorists, because of their disregard for consent (enshrined in the Mitchell principles of democracy and non-violence). Patten’s romantic view of, essentially, English rural policing, redolent of John Major invoking George Orwell, does not survive reference to Margaret Thatcher’s use of local constabularies nationally in what she called ‘Mr Scargill’s Insurrection’ of 1984-85626 (when Chris Patten was a junior minister at the NIO).

624 Paragraph 1.3.
625 Steve McBride made the same point at the Forum for Peace and Reconciliation in Dublin, 31 March 1995 (Report of Proceedings, Volume 12, p. 27.
The passage above from the Patten report may have been inspired in part by David Cook and Chris Ryder, following their dismissal from the police authority in March 1996 by the then secretary of state. I do not wish to follow that intervention here. It may be explored in greater depth in the police federation submission to the NIO, following Patten, of November 1999\(^{627}\), available at: www.austenmorgan.com.

The police force in NI has the same legal status as every other police force in Scotland, England and Wales – and the ROI.

They originate in the office of constable\(^{628}\), even if they exercise statutory powers and duties; ‘in essence a police force is neither more nor less that a number of individual constables…organised together in the interests of efficiency.'\(^{629}\) Robert Peel, chief secretary for Ireland (1812-18), is the father of British and Irish policing. His Irish plans inspired the metropolitan police force of 1829. The constabulary of Ireland – based on counties - followed in 1836; it was renamed the Royal Irish Constabulary by the monarch in 1867.

These police forces discharged public functions; ‘a member of a police force…when carrying out his duties as a constable acts as an officer of the Crown and a public servant’\(^{630}\). The forces were, and are, created by statute. They are funded predominantly by the exchequer. They are accountable to central or local government. While the head of the force is independent of the executive, it is a

\(^{627}\) Paragraphs 3.6 to 3.11.
\(^{628}\) A civil office of trust under section 3 of the Act of Settlement 1700.
relative – operational - autonomy. Police forces (including the RUC) were, and could only be, part of the UK state (vigilantes and private armies being the forces of civil society).

(2) It is possible to take the politics out of policing (and policing out of politics).

At the launch of the report on 9 September 1999 in Belfast, the chairman was quoted as saying he wanted ‘more effective “depoliticised” policing’\textsuperscript{631}. Two days later in The Times, Chris Patten wrote of the people he had met in Northern Ireland: ‘Above all they want the politics to be taken out of policing’.\textsuperscript{632} Two weeks later in the United States, he wanted to ‘take the politics out of policing and the policing out of politics’.\textsuperscript{633}

There was no problem taking the politics out of policing. Under the then police regulations: ‘A member shall at all times abstain from any activity which is likely to interfere with the impartial discharge of his duties or which is likely to give rise to the impression among members of the public that it may so interfere; and in particular a member shall not take any active part in politics.’\textsuperscript{634}

The problem of taking policing out of politics was of quite a different order, especially given Patten’s adoption of the fundamental review and its vigorous spinning.

\textsuperscript{631} Irish Times, 10 September 1999. Also, ‘our aim is to take the politics out of policing’.

\textsuperscript{632} 11 September 1999.

\textsuperscript{633} Electronic Telegraph, 25 November 1999.

\textsuperscript{634} Regulation 6 and schedule 2 of the Royal Ulster Constabulary Regulations 1996.
The RUC was under the (unionist) minister for home affairs in the NI government, until the 1969 Hunt report recommended inter alia establishment of the police authority. The Police Act (Northern Ireland) 1970 led to a new regime of accountability (which prevailed throughout the troubles). In 1972, the position of secretary of state for NI was created; critics of the RUC considered political control from London rather than Belfast to be preferable. Under the Police (Northern Ireland) Act 1998, changes were made to the tripartite relationship between the chief constable, the police authority and the secretary of state.

The slogan of chairman Patten – adopted by the secretary of state – was rhetoric of no intellectual merit. If it meant that an assembly minister would do better than a former NI government minister, that is to analyze policing aspirationally along the lines of: if the Belfast Agreement works, there will be no old-style sectarian politics (and therefore no problems with policing). The problem, as has been clear from 1998, is getting to that utopian objective.

**The Police (Northern Ireland) Act 2000**

Patten led to the Police (Northern Ireland) Act (‘PNIA’) 2000, which received the royal assent on 23 November 2000. This was to transform the RUC into the PSNI. We have looked above at section 1: name of the police in NI.

The PNIA 2000 provided for a NI policing board, comprising 19 members; ten were to come from the assembly, running d’Hondt on the basis of the assembly on 1 July 1998, while the secretary of state would appoint the remaining nine, including the chairman and vice-chairman. Parliamentary counsel wisely provided for
appointments during suspension: then, the secretary of state would appoint all the members, ‘to secure that as far as practicable the membership of the Board [was] representative of the community in Northern Ireland.’

The PNIA 2000 also provided for a network of district policing partnerships (‘DPPs’). Each district council would have one. They would have eight, nine or ten political members, reflecting the balance of parties after the last elections, and seven, eight or nine independent members, nominated by the district council and appointed by the policing board. The general functions of DPPs are: providing views to the district commander; monitoring police performance; obtaining public views and cooperation in crime prevention; and ‘to act as a general forum for discussion and consultation on matters affecting the policing of the district.’

Sections 50 to 56 contained the more controversial provisions: notifiable memberships (section 51); a code of ethics (section 52); guidance on public order equipment (section 53); regulations on emblems and flags (section 54); identification of police officers (section 55); and cooperation with the Garda Síochána (section 56).

I make no apology for stating that the most significant provision was for 50/50 recruitment, with entry into a pool of candidates on the basis of merit followed by the selection of a specified number of catholics and an equal number of non-catholics. This involved direct religious discrimination, against protestants in the main, but also, on one occasion, catholics – the intended beneficiaries of this so-called temporary

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635 Schedule 1, paragraph 3(3).
636 Section 16.
provision. Patten’s 50/50 is not difficult to understand: that has not prevented a great deal of nonsense being talked about it by people who should know better.

A number of points may be made synoptically: (1) the NI parliament never legislated for direct religious discrimination. 50/50 is completely unprecedented; (2) Patten either misunderstood or distorted advice he was given, and the report is wrong about no obstacle in EU law; (3) the US supreme court, in considering limited affirmative action schemes, has always opposed quotas; (4) so has the European Court of Justice, when considering positive action measures from member states; (5) the PNIA 2000 suspended anti-discrimination protection in NI; (6) the equality industry and human rights community, having gorged on catholic anti-discrimination rhetoric, have shown enthusiasm for 50/50 for general social engineering reasons; (7) Patten forced the UK government to demand an opt out in the 2000 equal treatment directive (something that was not inevitable); (8) 50/50 is incompatible with the 12th protocol to the European Convention on Human Rights (which the UK refuses to sign much less ratify); (9) it ought to be properly challenged in EU law, as I have been advocating publicly since Patten made his mistake and Peter Mandelson – ‘Patten must be adhered to, right or wrong’ – rushed to save the then EU commissioner (Chris Patten) with the NI opt out courtesy of the then French presidency.

**Implementing Patten in Full**

NI is over-governed by UK standards, and its policing is subject to excessive regulation. We may leave aside the policing board, the main product of the PNIA 2000; it is the police authority modernized. (The police ombudsman was provided for in the Police (Northern Ireland) Act 1998, conceived before the Belfast Agreement,
though Nuala O’Loan was appointed in November 2000, just before the PNIA 2000 came into force). Policing in NI has been shaped administratively in recent years by: the secretary of state, through two implementation plans; and two oversight commissioners, with a long series of reports. But Patten, and the PNIA 2000, did not settle the matter: policing was thrown further into the political maelstrom, through the succession of failed attempts to get the Belfast Agreement working properly. There was even a need for further legislation, the Police (Northern Ireland) Act (‘PNIA’) 2003.

The basic chronology is:

- September 1999: Patten report
- November 2000: Nuala O’Loan appointed
- November 2000: PNIA 2000
- March 2001: 50/50 recruitment legalized
- November 2001: RUC renamed PSNI
- November 2001: policing board takes over
- April 2002/March 2003: DPPs established

*Implementation Plans*

Mo Mowlam had promised an implementation plan on the Patten report in September 1999, and Peter Mandelson reiterated this in January 2000.
An implementation plan – dated 6 June 2000 (before the PNIA 2000 had passed through parliament) – was published by the NIO. It took each of Patten’s 175 recommendations. Officials then added: the programme of work required; who had the lead responsibility; the timescale for implementation; and the key milestones for progress. The government accepted most of Patten’s recommendations: on 24, it qualified its acceptance; it temporized on only three recommendations: four DPPs in Belfast (28); DPP purchase of additional services (32); and the designation of the chief constable as a sub-accounting officer (43). A revised implementation plan was promised for autumn 2000, to follow the enactment of the legislation.

It appeared on 17 August 2001 (after Weston Park: see below). John Reid was then the secretary of state. This second implementation plan, entitled The Community and the Police Service, acknowledged there would be further legislation (following a report by the oversight commission: see below). Comparing the first and second plans, it is clear that the government shifted its position – towards implementing Patten in full – on ten recommendations. It still reserved its position on 16 recommendations; it was only holding out on DPP purchase of additional services (32).

Oversight Commissioner

The idea of an oversight commissioner comes from the final four recommendations in the Patten report. He was to be an eminent person from outside the UK or the ROI, with a five-
year appointment. The oversight commissioner was provided for in sections 67 and 68 of the PNIA 2000. His general function made no reference to Patten (to the chagrin of the SDLP): ‘to oversee the implementation of changes in the policing of Northern Ireland (including, in particular, those resulting from this Act) described in his terms of reference.’ (section 67(3)) Patten’s five years became renewable three-year appointments.

However, on 30 May 2000, that is before the first implementation plan, the secretary of state had appointed, as oversight commissioner, Tom Constantine, the retired director of the US drugs enforcement agency and, before that, the chief of police in New York state.

Tom Constantine produced his first report in November 2000. He had appointed a number of (mercifully non-NI) consultants. And secured secretary of state approval to involve the international association of chiefs of police. The second report did not appear until September 2001. Thereafter, there were three a year, the minimum required by statute, in April/May, September and December. In December 2002, Tom Constantine, advising that the oversight commissionership should not become permanent, told the secretary of state that he would be leaving at the end of 2003.
His successor, Al Hutchinson, formerly of the Royal Canadian mounted police (and a consultant), took over in January 2004, and was responsible for the tenth and subsequent reports. The number of consultants had also grown. ‘If progress continues at the present rate’, Al Hutchinson wrote in April 2004, ‘the majority of the Independent Commission’s recommendations will either be functionally implemented, or will be well on the way to implementation by May of 2005.’

Nevertheless, the secretary of state extended his appointment for a further two years, to May 2007. The reports kept coming, taking the form of thematic reports. The most recent is report number 16 of June 2006. In it, Al Hutchinson concludes: ‘I noted in June of 2005 that the primary institutions of policing … had largely accomplished or were well on their way to implementing [Patten] ….. These agencies, and more importantly the people that run them every day, have done what was asked of them; as I have also noted in past reports, the remaining obstacles to further progress are largely political and societal in nature, and in the collective sense at least, politics has failed policing, not the reverse.’

Further Negotiations

The Trimble unionists suffered major political difficulties between September 1999 and November 2000 (devolution occurring on 2 December 1999). This was in spite of Peter Mandelson, who tried to help. Paradoxically, the latter’s attempt to mitigate the impact of Patten, most notably through recommending the award of the George cross to the RUC, may have hastened the exeunt of disenchanted officers. Commemoration made them look like yesterday’s men and women. In January 2001, Peter Mandelson

638 P.2.
resigned, for reasons that had nothing to do with NI. The task of implementing Patten fell to John Reid. But he also came under pressure from the Irish government and the SDLP; they wanted more on policing – and this before any of the legislated reforms had taken effect.

On 1 July 2001, David Trimble provoked a political crisis by resigning as first minister. The UK government arranged for political talks to be held at Weston Park in Staffordshire (9 to 11 and 13 to 14 July 2001). No agreement was reached. However, Tony Blair and Bertie Ahern announced on the last day that London and Dublin would draw up a package of measures to be put to the political parties. On 1 August 2001, Belfast and Dublin - facing a deadline for the re-election of the first minister and deputy first minister - published a 22-paragraph set of proposals, including five on policing, plus an accompanying draft statement.

The proposals on policing, which the SDLP was to claim satisfied them, but Sinn Féin was to argue did not amount to the implementation of Patten in full, were: implementation of the Patten report by the UK government; a revised implementation plan; and a review of policing reform by the oversight commissioner, to be conducted between March and October 2002 (it began on 30 April 2002). The document promised: ‘Legislation will be introduced as soon as practicable thereafter to amend or clarify some provisions to reflect more fully the Patten recommendations. These amendments will be set out in detail in the revised Implementation Plan.’ This was the SDLP’s Weston Park side deal, something the party has become antagonistic to in principle subsequently, when Sinn Féin became the nationalist beneficiary of UK legislative reform.
In the forward to the revised implementation plan of 17 August 2001, the secretary of state announced reforms he had already accepted, dealing with: the core function of community policing; the tripartite arrangements for accountability; the powers of the policing board; the role of the police ombudsman; and exchanges between the Garda Síochána and the PSNI.

*The Police (Northern Ireland) Act 2003*

On 25 November 2002 (and before the oversight commissioner had reported), the next secretary of state, Paul Murphy, announced a draft policing bill. It comprised 16 clauses. But there were also three further clauses and a schedule, dealing with independent members of the policing board and DPPs in Belfast. These, of particular interest to Sinn Féin, were being held back. There had to be acts of completion. The Sinn Féin clauses were incorporated in the bill after 20 March 2003 (the government’s bluff having been called). The Police (Northern Ireland) Act (‘PNIA’) 2003 was enacted subsequently, but before the Hillsborough joint declaration of 1 May 2003.

The PNIA 2003 dealt principally with: the policing board (at the expense of the secretary of state); reports and inquiries; the ombudsman (whose powers were again increased); DPPs – independent members and provision for Belfast; police functions and service (including circumvention of the 50/50 recruitment requirement for constables with special policing skills).

*The Devolution of Policing and Justice*
Weston Park 2001 was the high point of SDLP influence over policing reform. It obtained enough to join the policing board on 4 November 2001. Thereafter, Sinn Féin ran with the nationalist baton. It had its moment, with the 2003 Hillsborough joint declaration; the promise of the devolution of policing and justice powers from London to Belfast.

This is a truly extraordinary development. Policing and justice had been devolved to NI in 1921. However, nationalists complained about 50 years of unionist misrule. In 1972, with direct rule, these powers were returned to London. One might imagine that the devolution of policing and justice was a unionist sentiment after 1998, not a practical political goal of republicanism. However, two things explain Sinn Féin’s interest in recent years: one, its strategy of extracting endless concessions from the UK government (and destabilizing other parties); and two, the fact that, in November 2003, it would become the largest nationalist party, able to capture the deputy first minister position and the second ministerial post under the d’Hondt rules.

_The Belfast Agreement_

Paragraph 7 of the Policing and Justice section of the Belfast Agreement reads in full: ‘The participants also note that the British Government remains ready in principle, with the broad support of the political parties, and after consultation, as appropriate, with the Irish Government, in the context of ongoing implementation of the relevant recommendations, to devolve responsibility for policing and justice issues.’ This was not a weighty commitment. The UK government did not even state the principle. The
reference is to the political parties noting the readiness of London, but with a host of qualifications.

**The Hillsborough joint declaration**

There were five paragraphs on policing and justice. Paragraph 20 reads in full: ‘The British Government has accepted, under the Agreement, the desirability of devolving policing and justice on a basis that is robust and workable and broadly supported by the parties. In accordance with the paper contained in Annex 2, the British Government would take an early initiative to facilitate a dialogue between the parties to address and agree the practicalities of such further devolution, including the necessary institutional arrangements, with a view to the introduction of the necessary legislation in the Westminster Parliament at the earliest opportunity and with a view to ensuring that it is achieved within the lifetime of the next Assembly [2003-07].’

Annex 2, on the devolution of policing and justice, ran to 21 paragraphs. It included four departmental models: (1) a single department under a single minister (perhaps with a junior minister from the opposite tradition); (2) a single department under two ministers (or the first minister and deputy first minister); (3) adding policing and justice to the office of the first minister and deputy first minister; (4) separate policing and justice departments, one under a nationalist, and the other under a unionist, minister.

In the 1998 assembly elections (which determined the outcome of the d'Hondt system for appointing ministers), the results had been: UUP, 28; SDLP, 24; DUP, 20; and
Sinn Féin, 18 (plus another 18 from minor parties). The first minister was UUP and the deputy first minister SDLP. In addition, the UUP took the first portfolio and the SDLP the second. So, if policing and justice had been devolved before 2003, the two centrist parties would have been in control through the office of the first minister and the deputy first minister and/or the one or two proposed new departments.

Things changed significantly in the 2003 assembly elections: DUP, 30; UUP, 27; Sinn Féin, 24; and SDLP, 18 (with 9 from the minor parties). However, on 15 January 2004, there were three defectors from the UUP to the DUP, giving: DUP, 33; UUP, 24, Sinn Féin, 24; and SDLP, 18. This was good for the DUP; bad for unionism. Back in November 2003, there would have been a DUP first minister and a Sinn Féin deputy first minister. However, the DUP would have taken the first position, and the UUP the second. With the defections, Sinn Féin would have remained as deputy first minister. Moreover, while the DUP would have taken the first ministerial position, Sinn Féin would have captured the second. This remained the position when Paul Berry MLA was expelled from the DUP. The significance of David Ervine joining with the UUP on 15 May 2006, in the new assembly, is twofold: one, the five unionists to five nationalists division (brought about by Paul Berry) would return to six to four (a unionist majority); and two, the DUP would take the first position, followed again by the UUP (though Sinn Féin would still be the deputy first minister). Thus, since November 2003, Sinn Féin would have had a role in policing and justice, under the Hillsborough annex 2 options (2) and (3). Further, since January 2004, and even today (if the DUP succeeds in scuppering the David Ervine ploy), Sinn Féin would, through the second ministerial position, have a similar role, under the annex 2 options (1) and (2).
The DUP bears a heavy political responsibility. Its preferred solution is to delay the devolution of policing and justice. The better, indeed only, guarantor against Sinn Féin involvement in policing and justice, is no devolution – certainly this side of an assembly election, where, unlikely though it is, the SDLP could once again do better electorally than Sinn Féin.

The Comprehensive Agreement

The comprehensive agreement of 8 December 2004, which promised devolution under the DUP and Sinn Féin, comprised: proposals from the UK and Irish governments (9 paragraphs); annex A, a timetable; annex B, UK proposals for changes to strand one and joint proposals for changes to strands two and three; and annex C, draft statements by the IRA, the independent international commission on decommissioning, the DUP and Sinn Féin. It is unclear how much, if any, the two latter parties agreed. The main point about the comprehensive agreement is that it did not work. However, we do have the separate commitments of the DUP and Sinn Féin.

639 'The DUP is a devolutionist party and wants to see policing and justice powers devolved just as soon as conditions permit. These matters affect the lives and liberties of all our citizens and must be handled with great sensitivity. There is a recognition that policing and justice functions should be devolved just as soon as the community confidence exists. We will dedicate ourselves to reach agreement on how such powers could be exercised.'

640 'As a result of our discussions we now have a commitment from the British government and the DUP to the transfer of powers on policing and justice to the Assembly as soon as possible, a DUP commitment to a speedy, time framed discussion on the departmental model and powers to be transferred with a view to agreement by the time the Executive is established, and a commitment from the British government that it will enact in 2005 the necessary legislation to enable the transfer of policing and justice powers away from London.

'In the light of these critically important developments I now intend to call together an Ard Chomhairle meeting and to recommend to it that we convene a special Ard Fheis to decide on the issue of policing as soon as the legislation is exacted.'
Paragraphs 7 and 8 of the UK and Irish proposals dealt with policing and justice. Paragraph 7 made clear there was a deal: the UK to devolve policing and justice; Sinn Fein to join the policing board. The party had stated this would require a vote in a special conference. The UK and Irish governments had ‘a strong expectation’ that this would happen: ‘The Governments expect that Sinn Féin will be in a position to join the Policing Board no later than the date on which the Bill enabling devolution of policing and justice is enacted.’

Paragraph 8 referred to the choreography. The independent international commission on decommissioning would confirm that the IRA had decommissioned its arms. The UK government would then discuss devolution with the political parties. A bill would then be introduced ‘by the summer of 2005’: ‘Such legislation will come into force as soon as possible, once sufficient confidence exists across the community, as expressed in a cross-community vote in the Assembly, proposed by the First Minister and Deputy First Minister.’ The timescale for the assembly vote was within two years (of December 8, 2004).

Annex A (timetable) had: committees established in the shadow assembly in January 2005 to consider the modalities of devolution; agreement in February; and legislation introduced in the ‘early summer’ of 2005.

*The Northern Ireland (Miscellaneous Provisions) Bill*

The Northern Ireland (Miscellaneous Provisions) Bill (‘NIMPB’) was introduced in parliament on 16 February 2006. Four of the original 34 clauses dealt with the
devolution of policing and justice (there are currently five). It is still going through the legislative process. The NIMPB is Sinn Féin’s promise from the comprehensive agreement. Ironically, the DUP, perceived as the architect of that supposed replacement of the Belfast Agreement, has obtained no balancing concessions.

Also on 16 February 2006, the NIO issued a 46-page discussion paper, Devolving Policing and Justice in Northern Ireland. This made reference to an important principle regarding policing and justice functions: all together and at the same time. Quibbling about some particular functions provided no contrasting reassurance. The paper also returned to the models in the 2003 Hillsborough joint declaration. Emphasis was placed upon the two departments model, one unionist and one nationalist. Given the inevitability of the nationalist being Sinn Féin, this added only to the concern that the UK government is prepared to hand over policing and/or justice to Sinn Féin.

The bill, as it was about to begin its passage in the house of lords, contained a clause (clause 17\textsuperscript{641}) (department with policing and justice functions) that differed from the models in the discussion paper. Provision is made only for one department. There seems no reason why the assembly could not provide for two departments, one exercising policing functions and the other justice. There are currently three models in the bill. One, a single NI minister, but appointed by the first minister and deputy first minister (as the two junior ministers were appointed in 1999). This was added in the house of commons. Two, two ministers acting jointly. And three, a minister and a junior minister, rotating the positions at statutory intervals. Such specification, and

\textsuperscript{641} Clause 17 of HL Bill 110, inserting a new section 21A in the Northern Ireland Act 1998.
amendment, however, did not make for legal certainty: Subclause (2) of HL Bill 110 provides: ‘The Act of the Assembly may (but may not) make provision of the kind mentioned in subsections (3), (4) and (5).’

It is clear that the bill's introduction is part of a deal with the republicans, to get them on to the policing board. However, it is only enabling legislation. The NI assembly has to be restored. It has to establish a department or departments. The assembly then had to request devolution. Parliament and the UK government have to agree. Only then, the bill having become an act, could the secretary of state devolve policing and justice by order rather than fresh legislation.

Conclusion

The story of policing in NI since 1998 is one simply of political expediency. Patten right or wrong is an appalling admission from a senior civil servant entrusted with public administration. The cynicism of the UK, with Tony Blair pulling most of the strings, is alarming. London used the RUC (and Ulster Defence Regiment), before and during Ulsterization, to fight the IRA. When the republicans gave up the fight without surrendering, the UK embarked upon appeasement at the expense of the police: it is prepared to sacrifice the Belfast Agreement if it does not incorporate Sinn Féin/the IRA. The behaviour of the Irish government has been little better: it still fails to act intuitively like a European liberal democratic neighbour of the UK’s (though something called the Good Friday Agreement fills its vision); Dublin ministers and officials acted like nationalists over policing reform, finally coming to the aid of their oppressed brothers and sisters in, what they still call, the north. The performance of
the nationalists should occasion no surprise. It is to the credit of the SDLP that it is taking responsibility for policing, one of the few real achievements – the other being the independent monitoring commission - of the past eight years. It is to the discredit of this somewhat self-righteous party that it waited until 2001, and, despite some Bri-bashing from Mark Durkan, is still providing nationalist cover for Sinn Féin. The contribution of unionism should not evade assessment. The Trimble unionists took risks bordering on the reckless. But were they not ultimately naïve about: incorporating the catholic minority into a multi-cultural UK?; and the willingness of the SDLP to co-govern NI responsibly, as leaders, rather than followers, of the nationalist shoal? The DUP now has responsibility. It maintained its evangelical purity when it walked out of Castle Buildings in 1997. But the so-called comprehensive agreement is nothing other than a reworking of elements of the Belfast Agreement. The negotiated outcome of December 2004 has been rightly criticized as less than brilliant. But it remains the position that, so far, the Paisley wing of the DUP ensured, through preventing devolution, any chance of Gerry Kelly controlling policing and/or justice. There is surely a lesson there somewhere.
Introduction

One problem with Tony [Blair], Tony’s fundamental view of Northern Ireland is that the process is the policy…[that] if it stops you will roll back into disaster and God alone knows what.

When Gerry Adams and Martin McGuinness entered the room you were expected to stand up. They were senior military, they were top brass. Apart from being leaders of Sinn Féin they were leaders of the [army] council. And they knew it and they knew you knew it. They were lordly, this pair. They were always operating psychological games on me, always. They are bloody hard people. There was very, very tough psychological game-playing, a lot of unspoken intimidation….

Peter Mandelson, former secretary of state, *Guardian*, 13 March 2007

The first quotation above – number 10’s so-called bicycle theory of Northern Ireland – authoritatively captures the Blair government’s policy perspective from 1997. The second is a stark admission from one of the five secretaries of state\(^{643}\) responsible for negotiating with the political parties. Now add two photographs, following Dr

\(^{642}\) This article was written in April 2007, before editing, for inclusion in Brian Barton & Patrick J. Roche, eds., *The Northern Ireland Question: the peace process and the Belfast Agreement*, Basingstoke 2009.

\(^{643}\) Mo Mowlam (1997-99); Peter Mandelson (1999-2001); John Reid (2001-02), Paul Murphy (2002-05); Peter Hain (2005 - ).
Paisley’s breaking of a statutory devolution deadline\textsuperscript{644}: the first, of the leader of ‘no’ unionism and Gerry Adams, at the star-shaped table in the members’ dining room at Stormont, on Monday, 26 March 2007, announcing that they had agreed to share power\textsuperscript{645}; and the second, nine days later (4 April 2007), of the leader of the Democratic Unionist Party (‘DUP’) shaking hands with Bertie Ahern, the Irish taoiseach, at Farmleigh (the state guest house) in Dublin\textsuperscript{646}.

It is too early for historians to proclaim that the Northern Ireland troubles, which began in 1968, and amounted to a veritable 30 years’ war, ended in the spring of 2007. Political scientists will debate whether there can be sustained devolution in Northern Ireland, after suspension in 2002, from 8 May 2007, based upon an involuntary coalition of the four parties dictated by the d’Hondt rule. Others, hopefully, will react at the thought of Ian Paisley and Martin McGuinness Balkanizing part of the United Kingdom. Journalists and commentators, caught up in the political drama, will speculate about the new first minister’s change of heart, brought about by the fond embrace of the establishment in London (and latterly Dublin).\textsuperscript{647} There is a question of legitimacy; did the people of Northern Ireland vote on 7 March 2007 for this? If they did, and Ian Paisley is right, why was David Trimble wrong in 1998? My purpose as a constitutionalist is to be both more fundamental and more ephemeral in this article: to look at Northern Ireland’s underlying position within the United Kingdom state; and at the changing institutions of devolved government. My concern is legality, namely the rule of law internationally (binding states parties) and domestically (binding public bodies and natural and legal persons).

\textsuperscript{644} 26 March 2007: Northern Ireland (St Andrews Agreement) Act 2006 s 2 & schs 2, 3 & 4.
\textsuperscript{646} Irish Times, 5 April 2007.
\textsuperscript{647} The role of Eileen Paisley, who was ennobled as Baroness Paisley of St. George’s, should not be underestimated. Friday, 13 October 2007 was their golden wedding anniversary.
The Belfast Agreement of 10 April 1998

The Belfast Agreement, facilitated by the United Kingdom and Irish governments, was concluded on 10 April 1998. It had a section entitled constitutional issues (of which more below). But the Belfast Agreement provided mainly for another devolved administration in Northern Ireland (Strand One), with north-south (Strand Two) and east-west (Strand Three) institutional links. There were also five sections dealing with rights, decommissioning of paramilitary arms, security, policing and justice, and prisoners - which have been characterized as 'from Terrorism to Democracy'.

The Belfast Agreement is readily analysable by United Kingdom and Irish domestic constitutional lawyers, versed in public international law. Following professional engagement in the negotiation, and implementation, of the agreement, I wrote such a textbook: The Belfast Agreement: a practical legal analysis (London, 2000). It deals with relations within, and between, states, in ways familiar to the common law world. But the focus is a text that is at once political and legal, the law being international and domestic.

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648 The following paragraphs on the Belfast Agreement first appeared as ‘Did David Trimble Really Agree to a United Ireland’, The Commonwealth Lawyer (journal of the Commonwealth Lawyers’ Association), April 2003, 64.
649 The Northern Ireland Parliament had existed from 1921 to 1972. There was also a short-lived so-called power-sharing experiment in 1974.
651 Published by The Belfast Press.
Political controversy

The agreement, however, became the subject of a strange and irrelevant political controversy. The nationalist minority, which favours a united Ireland, culturally appropriated the Belfast Agreement (and christened it the Good Friday Agreement).

All this was in spite of the new unionist, David Trimble, elected first minister of Northern Ireland (with a nationalist deputy first minister), who went on to share the 1998 Nobel peace prize with John Hume. There would have been no Belfast Agreement without this leader of the Ulster Unionist Party (‘UUP’). David Trimble split unionism in 1998 into pro- and anti-agreement camps (much as the so-called Anglo-Irish treaty of 1921 had led to a civil war between pro- and anti-treaty nationalists in the south). Pro-agreement unionism managed to survive in the Northern Ireland Assembly, partly through suspensions because of the republicans’ failure to decommission their illegal arms. Trimble was challenged seriously by other unionists (within his own party and without) on issues such as prisoner releases, terrorists in government and reform of the police - as well as decommissioning. He chose to make decommissioning the crunch issue of the republicans’ transition from terrorism to democracy.

The reason the political controversy was strange is that anti-agreement unionists took the same view as nationalists. What Gerry Adams, the leader of Sinn Féin, affirmed,

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653 Senator George Mitchell of the United States, who chaired the multi-party negotiations, voiced this opinion authoritatively. In his memoir on the talks, Making Peace, London 1999, Mitchell opens his first chapter with David Trimble telling him he was prepared to accept the agreement, and, in his penultimate chapter, he poses the question: 'Why did Trimble take that fateful step?' (pp.3-5 & 180-1)
Dr Ian Paisley, as chief critic of the Belfast Agreement, accepted. Indeed, anti-agreement unionists cited in support of their worst fears about a united Ireland, the political claims of those they opposed most vehemently.

In 2003, the DUP published a policy paper, *Towards a New Agreement*, styled as a critical assessment of the Belfast Agreement after five years. ‘The flaws in the Belfast Agreement’, it stated, ‘are so fundamental that it requires to be replaced with a new agreement…It is clear that the Belfast Agreement is a process towards a united Ireland.’ This message was conveyed typically with photographs and stark layout. The theme of the policy paper was negative advertising: the UUP was responsible for all unionism’s misfortunes; only the DUP could correct the position. The DUP criticized, in chapters 2 to 8, terrorists in government, an unaccountable executive (including two non-cooperating DUP ministers!), unaccountable all-Ireland implementation bodies, stand alone all-Ireland government in the form of the North/South Ministerial Council and an imbalance when it came to east/west relations. Strangely, it considered the remainder of the Belfast Agreement under non-devolved provisions in chapter 9: constitutional changes; the British-Irish Intergovernmental Conference; human rights and equality; reconciliation and victims; decommissioning (‘The provisions in relation to decommissioning in the Belfast Agreement were utterly ineffective.’); security; policing and criminal justice; and prisoners.

It is striking that, given the DUP’s rejectionism, it could not muster an intellectual critique of especially the latter issues in chapter 9. Signs of the compromise of spring

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654 Pp.5-6.
655 P.31.
2007, despite the reference to forcing a renegotiation after an assembly election, were evident in this DUP policy paper of four years previously – not that any journalist or commentator, much less UUP member, predicted the taming of Ian Paisley once the office of first minister beckoned.

*Alternative Theory*

There is an alternative, and better, theory of the Belfast Agreement, for which there is evidence. The United Kingdom sought to solve the problem of terrorism in Northern Ireland, by harnessing the Republic of Ireland to a devolution project with green edges⁶⁵⁶. It was hoped that a unionist-nationalist centre (led by the first minister and deputy first minister) would constrain republicanism and loyalism, leading Northern Ireland catholics to feel that they had a place in a multi-cultural United Kingdom⁶⁵⁷.

This had been the principle of the 1973 Sunningdale solution, which collapsed in 1974. It was also evident in the 1985 Anglo-Irish Agreement, with the alternative of continuing direct rule or devolution. In 1998, there were more continuities in United Kingdom and Irish policy, than there were radical new developments. The integration of northern catholics in Northern Ireland, I submit, is the project of central government, even if the Northern Ireland Office (‘NIO’) increasingly adopts the nationalist version of history in its endless appeasement of republicans.

⁶⁵⁶ Green is the colour of Irish nationalism (even if the great nineteenth-century leader, Charles Stewart Parnell, had a phobia about it). This phrase means that a United Kingdom based proposal is presented in a light favourable to nationalist aspiration.

The strategy of the United Kingdom shifted from the centre to the extremes, following the suspension of Stormont in 2002. The focus remained on Sinn Féin, encouraging the republicans to give up violence by giving them political opportunities. As a result, London and Dublin undermined the Social Democratic and Labour Party (‘SDLP’) – the most selfless party in these islands. At the same time, the two governments also abandoned David Trimble: when, as was inevitable, Ian Paisley became the top unionist dog, they had to try and woo the anti-Belfast Agreement unionists into…a modified Belfast Agreement arrangement.

A political and historical debate about the viability of such a theory will continue. It does not affect my central constitutional thesis: the Belfast Agreement is firmly rooted in the 1920-22 partition settlement in Ireland.

**One Agreement or Two?**

The Belfast Agreement comprises two agreement: the Multi-Party Agreement (‘MPA’), voted upon by the political parties, plus the two governments, on 10 April 1998; and the British-Irish Agreement (‘BIA’), signed immediately afterwards by the two heads of government, Tony Blair and Bertie Ahern.658

It has been published in a number of forms in Belfast, London and Dublin, but the definitive text is the 44-page Cm 4705, no. 50 in the United Kingdom treaty series for 2000.659

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658 Plus Marjorie ‘Mo’ Mowlam and David Andrews.
659 Unfortunately, a version published in Dublin in March 1999 (and based on Cm 4292 of March 1999) confuses the position by having the BIA at the front and again at the back.
The Belfast Agreement has two faces, political and legal. The political face is the MPA, with the support of the two governments having no legal effect, and the BIA being annexed only for information.\(^{660}\) The legal face is the BIA, signed by Tony Blair and Bertie Ahern, with the MPA as annex 1 (there being an annex 2). The relationship between the BIA and the MPA is determined by article 2 of the former: 'The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement.' And where appropriate implement means that the obligations have to be legally extracted from the text.

**Did the Belfast Agreement provide for a united Ireland?**

This assertion, made by the DUP and all other anti-agreement unionists, may be examined through the focus of eight discrete issues contained in the Belfast Agreement.

(1) **The Preamble to the BIA: 'a new beginning'**

One of the five recitals refers to 'a new beginning in relationships within Northern Ireland, within the island of Ireland and between the peoples of these islands.' This phrase had been the basis of the Strands One to Three organization of the multi-party negotiations.\(^ {661}\)

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\(^{660}\) Cm 3883 of 1998, entitled: *The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland.* This was voted upon in the referendum of 22 May 1998 in Northern Ireland: Validation, Implementation and Review, paragraph 2.

\(^{661}\)
First, 'a new beginning' is in the context of the MPA. Second, it is recital rhetoric, of little use to a court interpreting the Belfast Agreement. Third, a new beginning (read with the other recitals, including 'partnership, equality and mutual respect') refers more likely to the integration of catholics in Northern Ireland. Fourth, the recitals are unlikely to refer to a united Ireland, since this is not provided for in any detail in the agreement.

(2) Article 1 of the BIA: consent, recognition and self-determination

The inspiration for this is article 1 of the 1985 Anglo-Irish Agreement, where the two states parties had failed to fully define (not determine) the status of Northern Ireland. There was Irish acceptance of the consent principle, but no recognition of Northern Ireland as a part of the United Kingdom. This article represents an updated constitutional understanding by London and Dublin, made possible by the ending of the Irish territorial claim (see further below).

For the first time, the United Kingdom obtained recognition of Northern Ireland as a part of the United Kingdom, in paragraphs (i) and (iii). Reference to the union 'reflect[ing] and rel[y[ing]'] upon unionist aspiration is a political statement, and not a legal repealing of the fundamental 1800 Acts of Union (which could only be repealed expressly by Parliament).

The ideological price paid by the United Kingdom government was the introduction of the concept of self-determination. In Ireland, this has always been associated with

separatism. Few there recognize the changes in its meaning in international law since 1945.\textsuperscript{663}

There is some evasive drafting in paragraphs (ii)\textsuperscript{664} and (iv), but it is clear the United Kingdom did not concede that the Irish people (in two states) had a classical right of self-determination. This is evident in the idea of separate referendums in Northern Ireland and the Republic of Ireland, of two conditions precedent to a united Ireland and not simply a numerical majority in an all-Ireland vote.

Paragraph (vi) deals with citizenship. However, few realize that annex 2 of the BIA contains an important qualifying declaration by the two states parties. Evidently, the London and Dublin negotiators, when working on their constitutional understanding, did not have a full grasp of the limits of United Kingdom and Irish nationality law.

According to the United Kingdom, those born in Northern Ireland became British citizens (though the birth rule changed in 1983). As for the Republic of Ireland, there was no birthright in Northern Ireland to Irish nationality. There was, under heavily retrospective 1956 domestic legislation\textsuperscript{665}, with an extra-territorial effect (to which London did not object), a peculiar descent rule. All those born in Ireland before 1922 (whether alive or dead) were deemed to be Irish citizens. A successor born in Northern Ireland could acquire citizenship by descent. This descent rule seemingly expanded across generations with time. The descent rule for the Republic of Ireland, in contrast, ran for only one generation.

\textsuperscript{663} See Morgan, \textit{The Belfast Agreement}, pp. 113-6.
\textsuperscript{664} Essentially, the separate United Kingdom and Irish positions of 1993 and 1995 were added together, with important deletions in the latter.
\textsuperscript{665} Irish Nationality and Citizenship Act.
Paragraph (vi) does not give Irish nationality to Northern Ireland catholics for the first time. It, along with annex 2, acknowledges United Kingdom acquiescence in the extra-territoriality of Irish law since 1956. This is when the real change was made. An amending citizenship act in the Republic of Ireland in 2001 was necessary because of the Irish constitutional changes. Unfortunately, the United Kingdom allowed the Irish to legislate a new tautologous birth rule by entitlement, which may have further extra-territorial implications.

(3) The Declaration of Support in the MPA: 'a new beginning' and reconciliation

This first section resembles a preamble to an international agreement. However, it refers only to the political parties and not to the two states parties. This is partly because paragraph 5 begins: 'We acknowledge the substantial differences between our continuing, and equally legitimate, political aspirations.' States do not have such political aspirations.

There is a reference to 'a new beginning' in paragraph 1, but this would seem to resemble 'a fresh start' in paragraph 2. That does not imply a legal constitutional revolution. The object of the MPA (?) is defined in paragraph 2 as 'reconciliation, tolerance, and mutual trust', and in paragraph 5 as 'reconciliation and rapprochement within the framework of democratic and agreed arrangements.'

666 Irish Nationality and Citizenship Act.
667 Section 6(2)(a) of the 1956 act as amended states: 'a person born in the island of Ireland is an Irish citizen from birth if he or she does...any act which only an Irish citizen is entitled to do.' It does not state citizenship is acquired under a birth rule: note 'from' and not 'by'. Citizenship would appear not to be a matter of law, but of administrative discretion. However, this will be determined, as regards Northern Ireland, by the continuing descent rule, which survives through section 3 of the 2001 Act.
(4) Constitutional Issues: two referendums

This section of the MPA has two paragraphs. The first is an endorsement of the constitutional understanding of the two states parties in article 1 of the BIA (but without any reference to annex 2). This endorsement has no additional legal effect.

Paragraph 2 introduces Annexes A and B to this section, proposed constitutional changes in respectively United Kingdom and Irish law. First, these are part of the MPA. Second, they are only annexes to a section. Third, the wording of paragraph 2 shows that they relate to government undertakings, politically conditional upon the MPA being agreed.

The legal status of Annexes A and B is to be found in article 4 of the BIA. Neither government agreed to change its constitution; that is a matter for parliament in the United Kingdom and the people in the Republic of Ireland. But constitutional changes were stated to be conditions precedent for the BIA entering into force (which it did on 2 December 1999).

Annexes A and B are not equivalent, despite references before and during the negotiations to balanced constitutional changes. The United Kingdom did little. It was the Republic of Ireland that ended its territorial claim contained in articles 2 and 3 of its 1937 constitution.
Annex A contained two provisions: the so-called constitutional guarantee to Northern Ireland; and the repeal of the Government of Ireland Act 1920.

The latter - the partition act - had been largely repealed in 1973. It was finally scraped by section 2 of the Northern Ireland Act 1998, on 2 December 1999. Some provisions were re-enacted.

Section 75 of the 1920 Act, misunderstood by anti-agreement unionists as some sort of United Kingdom territorial claim to Northern Ireland, was about parliamentary, and not territorial, sovereignty. Repeal did not affect Northern Ireland's constitutional status as part of the United Kingdom. Nor did it affect Westminster's power to devolve functions to Northern Ireland, and then to subsequently suspend the operation of the Assembly on four occasions to date.

The phrase 'and this Act shall have effect notwithstanding any other previous enactment' was legally of no consequence. Later acts may expressly or impliedly repeal earlier enactments. This provision refers to a reverse process. The United Kingdom intention was to allow some nationalists to argue that, somehow, the 1800 Acts of Union was being repealed by the Northern Ireland Act 1998. They were not.

Section 1 of the Northern Ireland Act 1998 amounted to a shift in United Kingdom constitutional law. Parliament had applied the consent principle to Northern (and Southern) Ireland from 1920. In 1949, in the Ireland Act, Westminster stated that Northern Ireland would not cease to be a part of the United Kingdom, without the consent of the Northern Ireland Parliament. There was a similar so-called
constitutional guarantee in 1972. In 1973, the law was changed to provide for the consent of the people of Northern Ireland.

The difference between then and now is that, while in 1949 the assumption was that Northern Ireland would remain a part of the United Kingdom, in the Belfast Agreement the guarantee was extended to envisage an option of a united Ireland. What had been implied was made express. This is the effect of section 1(2) of the Northern Ireland Act 1998. Meaning may be assigned in the form of United Kingdom intention; the point is that, if there is no vote to leave, Northern Ireland will remain part of the United Kingdom.

The United Kingdom constitutional change amounted to the incorporation of part of article 1 of the 1985 Anglo-Irish Agreement: the idea of introducing legislation at Westminster to provide for a united Ireland. However, a new condition precedent, a London-Dublin international agreement, is specified in law. This had not been in the 1985 Anglo-Irish Agreement. It is now in the Northern Ireland Act 1998.

The cession of territory from one state to another (an extremely rare act) has to be by international agreement. Another reason for such a London-Dublin agreement is: the possibility that the Republic of Ireland might not vote for a united Ireland even if Northern Ireland did so. The people of Northern Ireland can no longer bring about a united Ireland on their own; they need, not the Irish government, but the people of the neighbouring state, who have shown no desire to take over a part of the United Kingdom.

668 I discuss the uncertainties in the cession of Northern Ireland in Morgan, The Belfast Agreement, pp. 144-5.
Such legal drafting did not mean a united Ireland by consent (even with two referendums) was a likely consequence of the Belfast Agreement.

However, an old idea, of catholics eventually out breeding protestants, promoted by a few nationalist ideologues\(^{669}\), became almost an inevitability in minority culture. The hand was overplayed in the run up to the 2001 census. On 19 December 2002, the figures on the religious breakdown of Northern Ireland were published. It was 53.13 per cent protestants to 43.76 per catholics, with 3.11 unallocated.\(^{670}\) The expectation had been 46-47 per cent catholic. One statistical estimate puts the sectarian split at: 55.5 per cent protestant to 44.5 per cent catholic.\(^{671}\)

The prospect of demographic parity lies in the medium term, if at all. Given the lack of complete fit between ethnicity and politics, a united Ireland by democratic means is not necessarily achievable. It is an open question whether nationalists' chances, with the Belfast Agreement, will improve or diminish over time. The integration theory suggests the latter.

Annex B is much more important, and involved an Irish constitutional amendment by referendum. Its effect was to end the Irish territorial claim. (By the way, the people of the Republic of Ireland did not vote on the Belfast Agreement; only Northern Ireland was so consulted.)

\(^{669}\) Principally, Tim Pat Coogan and Brian Feeney, joined later by David McKittrick.
\(^{670}\) BBC News, 19 December 2002. In terms of religious identification, it was 46 per cent protestant to 40 per cent catholic with 14 per cent declaring no religion. Seven per cent of the latter were allocated to the protestant category and four per cent to the catholic one, with three per cent being unknown. It is possible that the seven per cent is an underestimate, the four per cent an overestimate, and many of the three per cent being more protestant than catholic ethnically.
\(^{671}\) Garret FitzGerald, Irish Times, 21 December 2002.
Articles 2 and 3, which had referred to the 'national territory' as being the whole of Ireland, and to 'the re-integration of the national territory', were scrapped.

Unfortunately, out of a desire to placate republicanism, the logic of the Irish constitution was disrupted with new articles 2 and 3. New article 2 referred to nationality, citizenship (already dealt with in article 9) and, strangely, the so-called Irish diaspora. New article 3, drawing upon suggested reforms over the years, contained unity by consent (with two majorities necessary), and the principle of peaceful means. Both articles referred to the Irish nation, which was described as having a 'firm will' in article 3. The Irish nation would have been acceptable in the preamble to the constitution, or even a redrafted article 1 with no legal effect. It has no meaning in practical articles of the Irish constitution.

The new articles 2 and 3 failed to convince sufficient unionists, and this was compounded by republican spinning, encouraged by the Irish government, about essentially reformulating the irredentist claim to Northern Ireland.

(5) Strand Two: North/South Ministerial Council

In the multi-party negotiations, Strand Two was balanced by Strand Three, dealing with east-west relations. This was a new development. The aborted Sunningdale agreement of 1973 had envisaged a more significant Irish dimension, than the one, which emerged eventually on 2 December 1999. And the concept of north-south

672 See Morgan, The Belfast Agreement, pp. 151-3.
practical cooperation in the 1985 Anglo-Irish Agreement was not then balanced by any concept of a west European council of the isles (similar to the Nordic council).

To the bilateral North/South Ministerial Council (‘NSMC’), unionists were able to retort: there would be a multilateral British-Irish Council (‘BIC’); and even the bilateral British-Irish Intergovernmental Conference (‘BIIC’) with Northern Ireland observers.

One difference must be acknowledged. The unionists cut back the number of north-south matters in the multi-party negotiations from 49 to nil. They agreed to a work programme to identify six implementation bodies and six areas of cooperation by 31 October 1998. These were eventually agreed between Belfast and Dublin on 18 December 1998. There was no similar provision for a work programme in Strand Three, though arguably the first paragraphs 5 and 10 of Strand Three allow for east-west arrangements of varying geometry.

The point has been made about the Irish government, in alliance with Northern Ireland nationalists, driving the NSMC since 2 December 1999. The answer is there is a unionist veto to all this activity. It is not the fault of the Belfast Agreement. Similarly, there are no limitations on the extent of the BIC and the BIIC (even given nationalist foot dragging and a lack of United Kingdom enthusiasm). It is to the credit of unionists, who are ideologically adverse to over government that they do not want to create pretence about a restoration of the old United Kingdom.
A great deal of ink was spilt providing for legislation in London and Dublin. The NSMC did not need Strand Two of the Belfast Agreement to be created, much less a supplementary London-Dublin agreement of 8 March 1999. It comprises ministers from a subordinate administration in the United Kingdom meeting with ministers of a sovereign neighbouring state, the Republic of Ireland. Such activity is part and parcel of good neighbourly relations: Dublin ministers can do what they want; Belfast ministers must operate within the constitution of the United Kingdom.

The six implementation bodies, which account for tiny proportions of the budgets in Belfast and Dublin, are widely misunderstood. Again, legislation was talked about. So even was private contract law. Eventually, the bodies were created by another international agreement of 8 March 1999. They are treaty bodies, or international organizations. Legislation was only necessary to transfer domestic functions out of the two states. These international organizations represent the alienation of sovereignty by two states. The result is all-Ireland public bodies, but without unilateral interference by the Republic of Ireland in Northern Ireland. They are mutual. Northern Ireland ministers share responsibility for what were once aspects of the domestic life of the Republic of Ireland.

During the suspension, which began in October 2002, questions were even being asked, by a unionist peer, at Westminster, about rivers in the Republic of Ireland now under Waterways Ireland. The United Kingdom government had to answer these questions, though some officials in Dublin (and Northern Ireland) were clearly uneasy about what appeared to be a partial restoration of the old United Kingdom.
(6) The Rights, Safeguards and Equality of Opportunity section

This is divided into two subsections: human rights and economic, social and cultural issues (sic). While nationalists emphasize the constitutional aspects of the Belfast Agreement plus the NSMC, it was secular radicals (some of whom would take the same position regardless of the state in which they resided) who have read into the loose drafting of this section many of their own aspirations.

In the human rights subsection, the new Northern Ireland Human Rights Commission ('NIHRC'), based upon the controversial Committee on the Administration of Justice ('CAJ'), which had promoted its own draft bill of rights in 1993, was required to consult and then advise the United Kingdom government on the scope for defining in Westminster legislation rights supplementary to the European Convention on Human Rights (which was incorporated in domestic United Kingdom law through the Human Rights Act 1998).

Though the United Kingdom state discharged its obligation under the first paragraph 4 of this section of the Belfast Agreement on 24 March 1999, the NIHRC has continued to campaign for its bill of rights. In doing so, it has shown its dependence ultimately upon republicanism.673 A bill of rights is one of the things Sinn Féin says the United Kingdom still has to deliver. The United Kingdom and Irish governments are known to be opposed to any such NIHRC bill of rights. Indeed, a NIO minister, Des Browne

MP, wrote to the NIHRC on 22 November 2001, effectively rejecting what was proposed.674

It is unlikely that the NIO now favours a CAJ bill of rights for Northern Ireland. Central government reviewed the position after the Human Rights Act 1998 (which applies throughout the United Kingdom), and decided upon no new rights. The Belfast Agreement commitment was always limited: advice (which has a clear legal meaning); and supplementary rights, which is plain, clear English. The NIHRC promoted a human rights consortium based on the state-sponsored community and voluntary sector. As a result of the comprehensive agreement (see below), the idea of a human rights forum – embracing the political parties – was articulated. This finally became a term of the St Andrews Agreement (see below). On one view, the community and voluntary sector will force the political parties to do its bidding; on another, political disagreement675 will mean the human rights forum goes nowhere fast or at all.

Most likely, this process in Northern Ireland will be overtaken by events. David Cameron has articulated the idea of a United Kingdom bill of rights (with domestic rights). The European Convention on Human Rights would remain.

The first paragraph 9 of this section is extremely important. Though the Belfast Agreement is a bilateral treaty, the Republic of Ireland has very few obligations under

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674 Letter in the House of Lords' library.
675 A bill of rights was originally a unionist idea. It then became identified with nationalism. David Trimble and the UUP stuck with the Belfast Agreement. The DUP, however, came out in favour of a bill of rights in the comprehensive agreement, but it also criticized the NIHRC as exceeding its remit. The UUP, under Sir Reg Empey, appears to be tailing the DUP. It remains unclear what either unionist party understands by a bill of rights.
it. Most of them are concentrated here: 'comparable steps by the Irish government'. These include 'strengthen[ing] and underpin[ning] the constitutional protection of human rights' to 'at least an equivalent level protection...as will pertain in Northern Ireland.' The Irish government was late in introducing a European Convention on Human Rights Bill. The European Convention on Human Rights Act 2003 - only partly modelled on the United Kingdom's Human Rights Act 1998 – does not meet the requirements of the Belfast Agreement.

Nationalists have made little if any effort to ensure mutuality on the part of the two states parties. The Irish government has been tardy about its obligations. But it has joined Sinn Fein and the SDLP in continually demanding of the United Kingdom that it fully implement the agreement.

The first paragraph 10 of this section provides for a joint committee between the NIHRC and a similar body in the Republic of Ireland. Again, nationalists see this as another instance of all-Irelandism, even though these two bodies needed no such sanction to meet. However, this is not seen by the NIHRC as an example of human rights internationalism (involving a similar interest in Great Britain). It is seen as an aspect of a new constitutional arrangement where Northern Ireland, on the basis only of paragraph 1(v) of the BIA, is seen as an entity in transition from the United Kingdom to the Republic of Ireland.

(7) Decommissioning
The Belfast Agreement required all paramilitary organizations to decommission their weapons by 22 May 2000. Even if it had not, there is an argument that the principle of legality (in the absence of express exception), in both international and domestic law, could, and should, be read into the Belfast Agreement.

The loyalist paramilitary organizations (one of which did begin voluntarily to decommission on 18 December 1999) are not in issue here. Only one of them had (two) representatives in the Northern Ireland Assembly in 1999. Neither of these members had a hope of becoming a minister in the devolved administration. In 2003, and again in 2007, there was only one loyalist elected to the assembly.

Not so Sinn Féin, which had two ministers from 2 December 1999. Having refused to decommission before then, the republicans continued refusing. All sorts of spurious arguments were tried. With the Belfast Agreement limping badly, they were forced to decommission on two occasions. However, there was a complete lack of transparency. The fourth suspension in October 2002 was occasioned by a number of incidents allegedly involving republicans: the training of FARC narco-terrorists in Colombia; the raiding of police special branch in Belfast; and the spying on Northern Ireland Office ministers.

The year 2005 – seven years after the Belfast Agreement – may have seen a significant breakthrough: a IRA statement of 28 July 2005 formally ordered an end to its armed campaign (but not disbandment of the paramilitary organization); on 26 September 2005, the independent international commission on decommissioning
reported that the IRA had finally decommissioned\(^6\) (but not necessarily completely disarmed, as was subsequently indicated by the independent monitoring commission\(^7\)).

\(8\) Policing and Justice

This section looked like it would lead to the undoing of the Belfast Agreement. It provided for the United Kingdom government establishing an independent commission on policing (which Chris Patten, the former governor of Hong Kong, chaired) and a review of the criminal justice system (an inside job performed by civil servants). United Kingdom ministers rapidly discharged these obligations.

Reports were published respectively in September 1999 and March 2000. The United Kingdom government had only promised in paragraph 6 of this section to discuss implementation of the recommendations. In domestic law, ministers could not fetter their discretion. The response of nationalist Ireland was: implement Patten in full and much the same for the criminal justice review, though it excited very little public attention.

Legislation followed: the Police (Northern Ireland) Act 2000; and the Justice (Northern Ireland) Act 2002. The SDLP went on the new policing board, with the support of the Irish government. Sinn Féin still wanted to implement Patten in full,

\(^6\) Available from IICD at its addresses in Dublin and Belfast. See also the IICD report of 19 January 2006.

and, at Weston Park in July 2001, further legislation on policing was promised. A second bill was introduced in Parliament in December 2002. In February 2003, Sinn Féin was still arguing that it was not enough.

They claimed that 'a new beginning', used in paragraph 1 of this section, meant essentially what they wanted it to mean as regards policing.

The Rise of the DUP

Terrorists in government, and David Trimble’s failure to secure decommissioning, further discredited the Belfast Agreement in unionist eyes. It was to the first minister’s credit that he brought about suspension in October 2002. However, the DUP – the principled opponent of power-sharing and practical north-south cooperation – was to be the electoral beneficiary. The 2003 assembly elections, and the 2005 Westminster contest, set the context for the political emergence of the DUP as the voice of Ulster unionism.

The DUP overtook the UUP in the 2003 assembly elections, with 30 members to David Trimble’s 27. The no unionists took the seats of independent unionists. However, the consequence was David Trimble, as the interlocutor with Tony Blair, gave way to Ian Paisley. (Shortly afterwards, the Donaldson three defected to the DUP. Paisley had 33 seats, later reduced to 32 over Paul Berry’s private life. Trimble was reduced to 24, becoming the third party, behind Sinn Féin, for the purposes of d’Hondt.) The sectarian principle also saw Sinn Féin supplant the SDLP: 24 to 18 seats. The republicans now justified their standing with number 10. Mark Durkan went off to become more republican than Sinn Féin. The SDLP – the creature of the
department of foreign affairs in Dublin\textsuperscript{678} - began to show signs of government withdrawal symptoms.

The switch from proportional representation to first past the post, made the emergence of the extremes even clearer in the May 2005 Westminster elections. This was Tony Blair’s third successful electoral outing. In Northern Ireland, Paisley came back with nine seats to the UUP’s one (Lady Sylvia Hermon). Disaster was symbolized in David Trimble’s exit from the house of commons (to be ennobled subsequently as Baron Trimble of Lisnagarvey). The formerly dominant unionist party – now under Sir Reg Empey – effectively relied upon its crossbench peers for parliamentary profile. In the nationalist camp, Sinn Féin came back with five seats (up one) to still three for the SDLP (Eddie McGrady, Mark Durkan and Dr Alasdair McDonnell). The government continued to indulge Sinn Féin abstentionism, by giving them rooms, money and propaganda and lobbying opportunities at Westminster. The SDLP managed the transition from John Hume and Seamus Mallon to much fuller parliamentary participation, being pro-government on general issues but anti-government on Northern Ireland.

**The Comprehensive Agreement**

This agreement of 8 December 2004 (following the Leeds Castle talks in Kent), was the first in which the DUP participated. Paisley had his 33 assembly seats, but a Westminster general election was also anticipated. The scheming of

the two governments fell apart seemingly over the refusal of the republicans to have decommissioning photographed; Dr Paisley, and his son Ian Paisley Jr, outmanoeuvred the modernizing wing of the DUP, led by Peter Robinson MP.

Given that the comprehensive agreement – eclipsing the Belfast Agreement(?) – reappeared in a subsequent form, it may be visited only briefly. The full title of the 20-page document is: Proposals by the British and Irish Governments for a Comprehensive Agreement. It comprised: a set of proposals by London and Dublin (nine paragraphs); annex A, a timetable for devolution; annex B, United Kingdom proposals for changes to Strand One and joint proposals for changes to Strands Two and Three; and annex C, draft statements by the IRA, the independent international commission on decommissioning, the DUP and Sinn Féin (seemingly all crafted by United Kingdom and Irish officials). It is unclear how much, if any, the two tribal parties agreed with Tony Blair and Bertie Ahern.
The comprehensive agreement is the source of the sectarian trade: decommissioning by the IRA (and support by Sinn Féin for the police and justice); for DUP support for power-sharing and effectively the Belfast Agreement (negotiated when Ian Paisley was on the outside)\(^{679}\). The DUP, to all intents and purposes, signed up to the Belfast Agreement on 8 December 2004, even though it did not lead to the restoration of devolution in February 2005 (to be followed by the devolution of policing and justice).

**The St Andrews Agreement of 13 October 2006\(^{680}\)**

Tony Blair and Bertie Ahern decided to hothouse the Northern Ireland parties in a hotel at St. Andrews (the apostrophe not being used) for three days, this Scottish coastal town being chosen to impress the DUP, which affirms Ulster-Scots culture in Northern Ireland.

As in 2004, the parties did not agree, even with the two governments mediating. However, they were given until 10 November 2006, to endorse the St. Andrews agreement. The principal issues were: would the DUP support power-sharing

\(^{679}\) This is clear from paragraphs 2 and 3 of the joint proposals.

\(^{680}\) The paragraphs below first appeared in my Current Law Statutes annotations to the Northern Ireland (St Andrews Agreement) Act 2007.
including Sinn Féin; and would Sinn Féin come out in support of the Police Service of Northern Ireland (‘PSNI’).

The agreement comprised 13 paragraphs, and the following annexes: institutional changes (A); human rights etc. (B); financial package (C); timetable (D); national security (E).

The St. Andrews agreement is not legally binding in international law (something the UK government sought to avoid admitting in a parliamentary answer\(^{681}\)). It therefore differs from the Belfast Agreement. The St Andrews Agreement resembles, in derivation and status, the 2001 Weston Park proposals, the 2003 Hillsborough joint declaration and the 2004 comprehensive agreement; indeed, the St Andrews Agreement is the comprehensive agreement reheated.

The DUP secured its institutional changes (annex A), but the nationalists also obtained concessions. There was very little on finance for either side (annex C). The extreme unionists effectively agreed in annex D to: Ian Paisley and Martin McGuinness being nominated as first minister and deputy first minister on November 24, 2006; and the assembly going live on March 26, 2007.

Sinn Féin, in contrast, surrendered little or nothing. It had to consult its executive ‘and other appropriate party bodies’ by 10 November 2006 (but not expressly the special conference necessary to endorse the police). However, the devolution of policing and justice was scheduled, in the main text, for May 2008. Annex E also

\(^{681}\) Hansard, HL Vol.686, col.WA149.
provided for MI5 accountability in Northern Ireland. The republicans also gained in the profuse annex B: a bill of rights forum; an Irish language act; more powers for the human rights commission; and effectively the employment of Irish nationals from the Republic of Ireland in the senior civil service (the DUP, in comparison, getting empty gestures on Ulster Scots, parading and reverse discrimination – the 50/50 rule - in police recruitment).

The secretary of state, Peter Hain, told parliament on 16 October 2006 that the St Andrews Agreement ‘may come to be seen as a pivotal moment in Irish history’682.

Lord Smith of Clifton, for the liberal democrats, was uncharacteristically dyspeptic on 22 November 2006, during the passage of the first Northern Ireland (St Andrews Agreement) Bill: ‘This flawed Bill accurately reflects the character of the politics of Northern Ireland. It is but a fig leaf to camouflage the almost irreconcilable elements at work. Whether it will provide a foundation for an operating, representative and democratic system of devolved government – as all people of good will would wish – is extremely doubtful. This wretched Bill comprises the wish list of DUP demands and a corresponding Sinn Fein wish list. Where the two conflict, it is either silent or offers a fudge. The idea that the Bill is based on robust principles which, taken together, facilitate the creation of a power-sharing Executive, as it should be, is far from the truth. Rather, it is a patchwork of cobbled-together partisan clamourings with a touch of half-baked Northern Ireland Office ingenuity.’683

682 Hansard, HC Vol.450 col.587.
683 Hansard, HL Vol.687 col.352.
Disagreement broke out immediately. The DUP over-spun the idea of Martin McGuinness taking an oath on 24 November 2006, supporting the police, the special branch and even MI5. Sinn Féin continued to do nothing, demanding effectively party control of the police and justice before it would even schedule a conference to abandon opposition to the rule of law.

On 27 October 2006, the DUP published a short, illustrated paper, *Your Verdict: what is it to be?* Formally a consultation for the 10 November 2006 decision, the document made four points: (1) negotiations were continuing; (2) the DUP’s position was: no delivery (by Sinn Féin), no deal; (3) the St. Andrews Agreement was immeasurably better than the Belfast Agreement; and (4) essentially, there was no alternative – saying ‘no’ would let Sinn Féin off the hook on law and order.

According to the St Andrews Agreement, the political parties had to accept it by 10 November 2006. The sanction was dissolution of the assembly (even though there was no such power in the Northern Ireland Act 2006). There was no such acceptance, not even seemingly from the centrist parties. The DUP stated it did not have to move towards power-sharing (there was work in progress), until Sinn Féin had moved on policing; Gerry Adams affirmed the need to agree on the devolution of policing and justice first.

The next deadline – according to the St Andrews Agreement – was 24 November 2006, when the ‘Assembly [would] meet[s] to nominate FM/DFM’, that is the first minister and deputy first minister.
The DUP thought that the St Andrews Agreement meant that: Martin McGuinness would have to sign up to the rule of law at an early stage. The UK government, therefore, sought to downgrade 24 November 2006, to spare the DUP from its miscalculation, but above all to protect Sinn Féin from having to affirm the rule of law.

First, the Northern Ireland Act 2006 (with the key deadline) was repealed on 22 November 2006. Second, a new transitional assembly was created by legislation; the nomination of first minister and deputy first minister was detached from the due date of November 24, 2006. Third, a new deadline of 26 March 2007 – after an election on 7 March 2007 - was created by the Northern Ireland (St Andrews Agreement) Act 2006.

The assembly was summoned to meet on Friday, 24 November 2006, with the DUP and Sinn Féin required to indicate an intention to nominate at some point in the future. Commentators would describe the proceedings, which had to be adjourned to Monday, 27 November 2006 (because of a paramilitary attack on Parliament Buildings by Michael Stone, a convicted loyalist, who had been released from prison under the Belfast Agreement), as resembling Alice in Wonderland.

First, Dr Paisley read out a statement, less a key sentence agreed with the prime minister. Second, Gerry Adams stated an intention to nominate Martin McGuinness, and the latter was even permitted to speak. Third, the speaker, reading from a text prepared by the secretary of state, pronounced that the requisite intentions had been indicated. Four, the DUP showed the first signs of splitting, when a faction – dubbed
the dirty dozen - put out a statement denying that Dr Paisley had done any such thing. Five, Dr Paisley, clearly under pressure from 10 Downing Street, added the sentence back in, in a personal press release later that day. He said it, but not in the assembly.

Sometime in early December 2006, the NIO – with no working assembly much less an executive – moved aides to Dr Paisley and Martin McGuinness into the rooms in Parliament Buildings, formerly occupied by David Trimble and Mark Durkan as first minister and deputy first minister respectively.

Later still, their staffs were moved to rooms in Stormont Castle, from where the secretary of State ran Northern Ireland.

In mid-January 2007, Sinn Féin published a resolution to be put to a special ard fheis or conference. It referred to civic policing, to be distinguished from MI5 security work. The resolution referred to ‘support for the PSNI and the criminal justice system’. Few commitments were given: (1) to join the Policing Board; and (2) to take the pledge of office for ministers. The resolution concluded: ‘the ardchomhairle [or executive] is mandated to implement this motion only when the powersharing institutions are established and when the ardchomhairle is satisfied that the policing and justice powers will be transferred.’

On Friday and Saturday, 26 and 27 January 2007, an IRA convention was held in Dublin. The following day, Sinn Féin – including considerable numbers of IRA members – held its ard fheis. The party formally came out in support of policing, but the terms of the commitment were as above.
Assembly elections were held on 7 March 2007. The extremes prevailed further over the centre parties. The DUP came back with 36 seats and Sinn Féin with 28: that is, 64 of the 108 members. The UUP and SDLP had respectively 18 and 16 seats. There were seven Alliance members and three independents.

The government had threatened devolution or dissolution (the DUP claiming that the secretary of state had used this phrase 56 times in public). On Sunday, 25 March 2007, the secretary of state prepared his exit route: if the parties could reach agreement, then the UK and Irish governments would help. The secretary of state denied that legislative amendment was possible. Suddenly, on Tuesday, 27 March 2007, emergency legislation was presented to parliament. The Northern Ireland (St Andrews Agreement) Act 2007 was rushed through in just over five hours. The deadline was put back to 8 May 2007, the dated agreed by the DUP and Sinn Féin.

**Did the DUP replace the Belfast Agreement?**

The simple answer is no. The BIA signed by Tony Blair and Bertie Ahern on 10 April 1998 is intact. So also is the MPA, voted upon by the parties (with Sinn Féin abstaining) on the same date.

The DUP, of course, had walked out of the all-party negotiations in July 1997. But for that, David Trimble – in the opinion of Senator George Mitchell, the chairman[^684] –

would not have voted on Good Friday for the MPA, and everything that ensured: devolution in 1999 and suspension in 2002.

Decommissioning seems to have happened in 2005. This was partly because David Trimble had majored in this issue from 10 April 1998. Admittedly, it happened on the watch of Dr Paisley, between the comprehensive agreement and the St Andrews Agreement. However, the DUP cannot claim – as it does – to be solely responsible for forcing the IRA to disarm.

The Belfast Agreement had led to the Northern Ireland Act 1998. The DUP did not alter the former. It did, however, secure amendments to the latter. Such amendments had been prefigured in annex B of the comprehensive agreement, for Strands One, Two and Three. The same amendments resurfaced as annex A of the St Andrews Agreement. They were legislated in part 2 (sections 5 to 19) of the Northern Ireland (St Andrews Agreement) Act 2006.

The changes secured by the DUP, as a result of coming in from the cold (or rather, being brought into the centre of politics by unionists voting against David Trimble) fall into five categories. They may be listed as follows:

**Ministerial conduct**

- widened scope of executive committee;
- a strengthened ministerial code;
- 30 assembly members able to refer ministerial decision to executive committee;
- a strengthened pledge of office;

Ministerial appointments

- separate election of first minister and deputy first minister (the former position going to the largest party);

Committees

- a statutory committee for office of first minister and deputy first minister;
- committee to review functioning of assembly and executive committee;

NSMC and BIC

- strengthened control over ministerial participation in NSMC and BIC;

Miscellaneous

- change of community designation only on change of party.
Three points may be made. One, some of these provisions, particularly under ministerial conduct, are decided improvements, and should have been – but were not agreed by Trimble/Mallon or Trimble/Durkan. Two, others, in particular the separate election of the first minister and deputy first minister, are retrograde and indicative of the Balkanizing tendencies of the DUP and Sinn Féin. And three, the reforms in total – which were opposed generally by the SDLP – fall far short of the DUP’s criticisms of the Belfast Agreement’s implementation. Their major proposals, for example, are now reduced to a committee to review the functioning of the assembly and executive committee. Where now a smaller assembly? And the shift from involuntary, to voluntary, coalition?

**Conclusion**

A number of points may be made. One, Ian Paisley, rather than Sinn Féin, moved on 26 March 2007. It is naïve to hail this as an outbreak of reconciliation. The two tribal leaders had separate reasons for cooperating, in securing the return of devolution. Two, 8 May 2007 is unlikely to go down in history as the beginning of a new phase of self-government. Trimble/Mallon and Trimble/Durkan did not work. Things are different, but Paisley/McGuinness has no inherent dynamic – other than cooperation for tribal ends. Three, d’Hondt pushes everything into the executive committee. Ten plus two ministers are unlikely to engage in meaningful political bargaining; instead, a civil service agenda will be dressed up as a programme of government. The only possible dynamic is the SDLP and UUP supporting Alliance against Sinn Féin and the DUP (nearly 60 per cent of the assembly). Four, which tradition is winning? Republican terrorism may have ended (the principal concern of the United Kingdom),
but the price is nationalists in power – aided, not hindered, by officialdom in Belfast. Unionists still think Stormont is the answer to all problems; nationalists have learned to use it in an all-Ireland context. Five, the Belfast Agreement, as amended by the St Andrews agreement, remains Baroque. The dependency culture and sectarianism of the troubles has been institutionalised. The right of dead assembly members to vote – section 17 of the Northern Ireland (St Andrews Agreement) Act 2006 – is an example of the loss of constitutional touch. This may have been enacted by Westminster, and is therefore lawful, but how does it relate to the framework of democratic and agreed arrangements in the declaration of support in the Belfast Agreement? Six, there was considerable merit in the DUP’s critique of the Belfast Agreement. Unfortunately, Ian Paisley – looking for historical rehabilitation late in life - , has plumped for a system of government that can only unite Irish and Ulster nationalists vis a vis London, the better to then fight at home about the division of sectarian spoils.