

Fordham International Law Journal

Volume 34, Issue 1

2010

Article 3

TWENTY-FIRST ANNUAL PHILIP D. REED MEMORIAL ISSUE

Casting a Cold Eye on the Origins and Development of an All-Island Charter of Rights

Suzanne Egan*

Rachel Murray†

*

†

Copyright ©2010 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Casting a Cold Eye on the Origins and Development of an All-Island Charter of Rights

Suzanne Egan and Rachel Murray

Abstract

One of the most striking outcomes of the Good Friday/Belfast Agreement ("Agreement") was the extent to which the establishment of human rights institutions and mechanisms was brought center-stage into the shaping of the political settlement. The dynamic talks process that led to the signing of the Agreement resulted in an extensive range of obligations in regard to human rights on the part of the Irish and British governments, many of which were implemented very soon afterwards. Paragraph 10 of the "Rights, Safeguards and Equality of Opportunity" section of the Agreement makes mention of a trans-jurisdictional human rights initiative that would mimic the institutional arrangements provided for elsewhere in the Agreement. Specifically, it vests jurisdiction in a Joint Committee of the two Human Rights Commissions to "consider, among other matters, the possibility of establishing [an all-island] charter [of Rights], 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. But, despite the implications of such a potentially transformative constitutional proposal, to date, the Charter has been the subject of negligible political engagement in both jurisdictions. Undoubtedly, there are a number vital issues that must be considered in attempts to construct an all-island Charter of Rights, given the numerous potential models for its implementation. Accordingly, in order to place the matter in context, Part I of this Essay reviews the background to the clause in the Agreement which envisaged the Charter; Part II discusses the progress that has been made to date by the Joint Committee in fulfilling its mandate; and finally, Part III offers some tentative reflections for a roadmap ahead in the current political climate.

ESSAYS

CASTING A COLD EYE ON THE ORIGINS AND DEVELOPMENT OF AN ALL-ISLAND CHARTER OF RIGHTS

*Suzanne Egan and Rachel Murray**

INTRODUCTION

One of the most striking outcomes of the Good Friday/Belfast Agreement¹ (“Agreement”) was the extent to which the establishment of human rights institutions and mechanisms was brought center-stage into the shaping of the political settlement.² As is well-rehearsed elsewhere,³ the dynamic talks process that led to the signing of the Agreement resulted in an extensive range of obligations in regard to human rights on the part of the Irish and British governments, many of which were implemented very soon afterwards. These included commitments on the part of the two governments relating to the

* Suzanne Egan is Lecturer in Law at the School of Law, University College Dublin and a member of the Irish Human Rights Commission. Rachel Murray is Professor of International Human Rights Law at the School of Law, University of Bristol. The Irish Research Council for the Humanities and Social Sciences provided the funding for the research that generated this Essay. The authors are grateful to Ms. Evelyn Larney B.L. for her excellent research assistance and to Donncha O’Connell for his very helpful comments on an earlier draft. This Essay is written by the authors in a personal capacity and all errors or omissions are their own.

1. The term “Good Friday/Belfast Agreement” (“Agreement”) is a collective one denoting the two documents entitled (1) The Multi-Party Agreement and (2) The British-Irish Agreement. *See* Agreement Reached in the Multi-Party Negotiations, Ir.-U.K., Apr. 10, 1998, 37 I.L.M. 751 (1998) [hereinafter Agreement]. *See generally* COLM O’CINNÉIDE, EQUALITY AUTHORITY, THE IMPLICATIONS OF THE MULTI-PARTY AGREEMENT FOR THE FURTHER DEVELOPMENT OF EQUALITY MEASURES FOR NORTHERN IRELAND AND IRELAND 7–13 (2005); AUSTEN MORGAN, THE BELFAST AGREEMENT: A PRACTICAL LEGAL ANALYSIS 3–14 (2000). On the Agreement generally, see also the collection of articles on various aspects of it authored by politicians, academics, and practitioners in 22 FORDHAM INT’L L.J. 1136, 1136–775 (1999).

2. *See* Paul Mageean & Martin O’Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT’L L.J. 1499 (1999).

3. *See id.*; *see also* Stephen Livingstone & Colin J. Harvey, *Human Rights and the Northern Ireland Peace Process*, 2 EUR. HUM. RTS. L. REV. 162, 163 (1999).

incorporation of the European Convention on Human Rights into domestic law;⁴ the establishment of Human Rights Commissions in Northern Ireland and the Republic of Ireland;⁵ and enhanced equality legislation in both jurisdictions.⁶ In

4. In section 6, paragraph 2 of the Agreement, the British government agreed to complete the process of incorporating the Convention into law in Northern Ireland. This was eventually done by means of the Human Rights Act 1998, which entered into force on October 2, 2000. Human Rights Act, 1998, c. 42 (Eng.). See generally Brice Dickson, *Northern Ireland*, in HUMAN RIGHTS LAW AND PRACTICE 741–84 (Lord Anthony Lester, Lord David Pannick & Javan Herberg eds., 3d ed. 2009); Brice Dickson, *The Impact of the Human Rights Act in Northern Ireland*, in JUDGES, TRANSITION AND HUMAN RIGHTS 201–22 (John Morison et al. eds., 2007). Strictly speaking, the Irish government, on the other hand, only committed itself in the Agreement to examine further the question of incorporation in its jurisdiction. See Agreement, *supra* note 1, at 768. Legislation incorporating the Convention into domestic law was eventually enacted in the form of the European Convention on Human Rights Act 2003. European Convention on Human Rights Act 2003 (Act No. 20/2003) (Ir.), available at <http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html>. See generally ECHR AND IRISH LAW (Ursula Killkelly ed., 2d ed. 2009).

5. See Agreement, *supra* note 1, at 767–68. The Northern Ireland Human Rights Commission (“NIHRC”) was subsequently established by section 68 of the Northern Ireland Act 1998 and its functions and powers are delineated in sections 69–71 thereof. See Northern Ireland Act, 1998, c. 47, §§ 68–71 (Eng.). The Irish Human Rights Commission (“IHRC”) was subsequently established by section 4 of the Irish Human Rights Commission Act (as amended) 2000. Human Rights Commission Act, 2000 (Act No. 9/2000) (Ir.), available at <http://www.irishstatutebook.ie/2000/acts.html>. Its functions are set forth in section 8 of the Act. *Id.* § 8.

6. See Agreement, *supra* note 1, at 767–68. In Northern Ireland, the Northern Ireland Act 1998 established a new Equality Commission, and section 75 of that Act imposes a duty on public authorities to promote equality of opportunity between persons of different ages, marital status, political opinions, racial groups, religious beliefs, sex, or sexual orientation; between persons with disability and persons without; and between persons with dependants and persons without. Northern Ireland Act, 1998, c. 47, §§ 73–75 (Eng.). A detailed schedule of the Act sets out the measures to be implemented by public authorities in order to comply with this duty, including the preparation of an “equality scheme” for scrutiny by the Equality Commission for Northern Ireland. See Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 FORDHAM INT’L L.J. 1696, 1759–63 (1999). The commitment was honored in the Republic of Ireland by means of the Employment Equality Act 1998 and the Equal Status Act 2000. See Employment Equality Act 1998 (Act No. 21/1998) (Ir.), available at <http://www.irishstatutebook.ie/1998/en/act/pub/0021/index.html>; Equal Status Act 2000 (Act No. 8/2000) (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0008/index.html>. These two pieces of legislation outlaw discrimination in employment, vocational training, advertising, collective agreements, the provision of goods and services, and other opportunities to which the public generally have access on nine distinct grounds. The Employment Equality Act (as amended) provided for the establishment of two distinct bodies, *viz.* the Equality Authority and the Equality Tribunal. The latter is an independent statutory body, established to investigate or mediate complaints of discrimination. The Equality Authority is a semi-state body established to work towards elimination of unlawful

addition to these essentially parallel-processing arrangements, paragraph 10 of the “Rights, Safeguards and Equality of Opportunity” section of the Agreement also makes mention of a *trans-jurisdictional* human rights initiative that would mimic the institutional arrangements provided for elsewhere in the Agreement.⁷ Specifically, it vests jurisdiction in a Joint Committee of the two Human Rights Commissions to “consider, among other matters, the possibility of establishing [an all-island] charter [of Rights], 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.”⁸

Despite the implications of such a potentially transformative constitutional proposal, to date, the Charter has been the subject of negligible political engagement in both jurisdictions. Undoubtedly, there are a number of vital issues that must be considered in attempts to construct an all-island Charter of Rights, given the numerous potential models for its implementation. Accordingly, in order to place the matter in context, Part I of this Essay reviews the background to the clause in the Agreement which envisaged the Charter; Part II discusses the progress that has been made to date by the Joint Committee in fulfilling its mandate; and finally, Part III offers some tentative reflections for a roadmap ahead in the current political climate.

I. *BACKGROUND*

The notion of enhancing human rights protection on an all-island basis as part of a negotiated peace settlement was not unique to the Belfast Agreement.⁹ Each of the peace agreements that preceded the Belfast Agreement contained commitments on the part of the Irish and British governments to introduce legally

discrimination as defined in the legislation, to promote equality of opportunity, and to provide information to the public on equality legislation. It can also advise and support persons in bringing applications to the Equality Tribunal. See Siobhan Mullally, *Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation?*, 21 *LEGAL STUD.* 99, 105 (2001).

7. See Agreement, *supra* note 1, at 768.

8. *Id.*

9. See Suzanne Egan & Rachel Murray, *A Charter of Rights for the Island of Ireland: An Unknown Quantity in the Good Friday/Belfast Agreement*, 56 *INT’L & COMP. L.Q.* 797, 800–03 (2007).

entrenched measures in Ireland and Northern Ireland, respectively, to improve human rights protection on both parts of the island.¹⁰ The Joint Framework Document, which built upon the Downing Street Declaration¹¹ and which immediately preceded the Good Friday/Belfast Agreement in the chain of peace agreements, went a step further in proposing the possibility of an all-island Charter of Rights. Specifically, the Joint Framework Document provided that

both Governments would encourage democratic representatives from both jurisdictions . . . to adopt a Charter or Covenant, which might reflect and endorse agreed measures for the protection of the fundamental rights of everyone living in Ireland. It could also pledge a commitment to mutual respect and to the civil rights and religious liberties of both communities.¹²

10. The Sunningdale Agreement provided that a newly established Council of Ireland, to be comprised of representatives from the two parts of Ireland, would be invited to consider what way the principles of the European Convention on Human Rights and Fundamental Freedoms would be expressed in domestic legislation in each part of Ireland. It would recommend whether further legislation or the creation of other institutions, administrative or judicial, is required in either part or embracing the whole island to provide additional protection in the field of human rights.

Sunningdale Agreement, Ir.-U.K., ¶¶ 7, 11, Dec. 9, 1973, *available at* <http://cain.ulst.ac.uk/events/sunningdale/agreement.htm>; *see* KEVIN BOYLE & TOM HADDEN, NORTHERN IRELAND: THE CHOICE 119–20 (1994). Under the Anglo-Irish Agreement the parties were directed to concern themselves “with measures to recognise and accommodate the rights and identities of the two traditions in Northern Ireland, to protect human rights and to prevent discrimination.” Anglo-Irish Agreement, Ir.-U.K., art. 5(a), Nov. 15, 1985, 1413 U.N.T.S. 197 [hereinafter Anglo-Irish Agreement]. Although the measures specified in this regard (i.e., measures to foster the cultural heritage of both traditions, changes in electoral arrangements, the use of flags and emblems, the avoidance of economic and social discrimination, and the advantages and disadvantages of a bill of rights in some form in Northern Ireland) were primarily concerned with Northern Ireland, Article 5(b) of the Anglo-Irish Agreement stated that the Irish government was not excluded from applying any human rights measures arising as a result of this provision in its jurisdiction. *See id.* art. 5(b). *See generally* TOM HADDEN & KEVIN BOYLE, THE ANGLO-IRISH AGREEMENT: COMMENTARY, TEXT AND OFFICIAL REVIEW (1989).

11. A New Framework for Agreement, Ir.-U.K., Feb. 22, 1995, 34 I.L.M. 946 (1995) [hereinafter Joint Framework Document]; The Joint Declaration (Downing St. Declaration), Ir.-U.K., Dec. 15, 1993, *available at* <http://www.foreignaffairs.gov.ie/home/index.aspx?id=8734>. *See generally* Ronald A. Christaldi, *The Shamrock and the Crown: A Historic Analysis of the Framework Document and Prospects for Peace in Ireland*, 5 J. TRANSNAT’L L. & POL’Y 123 (1995).

12. Joint Framework Document, *supra* note 11, ¶ 51. A particular list of rights was specified here, namely:

Interestingly, the Joint Framework Document went on to provide that the Charter or Covenant “might also contain a commitment to the principle of consent in the relationships between the two traditions in Ireland”¹³ and that it could also incorporate

an enduring commitment on behalf of all the people of the island to guarantee and protect the rights, interests, ethos and dignity of the unionist community in any all-Ireland framework that might be developed with consent in the future, to at least the same extent as provided for the nationalist community in the context of Northern Ireland.¹⁴

Further, the Charter might also affirm a solemn commitment from all sides in the divide to the exclusively peaceful resolution and a solemn repudiation of all recourse to violence for any political end or purpose.¹⁵ Clearly, the Charter envisaged here was a *means towards* a political settlement, by inducing Sinn Féin to sign a political declaration wherein it committed itself to seeking constitutional change through peaceful means,¹⁶ as well as fulfilling a trust and confidence building function for unionists by guaranteeing them an equivalent level of protection in the context of an all-Ireland government as that enjoyed by the nationalist community in the North under any new agreement.¹⁷

When the political parties came to the table to draft the terms of the Good Friday/Belfast Agreement from 1997 onwards, it is hardly surprising that the human rights provisions of the Joint Framework Document¹⁸ apparently formed the basis for the

the right of free political thought, the right to freedom and expression of religion, the right to pursue democratically national and political aspirations, the right to seek constitutional change by peaceful and legitimate means, the right to live wherever one chooses without hindrance, and the right to equal opportunity in all social and economic activity, regardless of class, creed, sex or colour.

Id.

13. *Id.* ¶ 52.

14. *Id.*

15. *Id.* ¶ 53.

16. Interview by Evelyn Larney with an anonymous civil servant involved in the negotiations on the Good Friday/Belfast Agreement (Nov. 29, 2004) [hereinafter Interview with civil servant].

17. *Id.*

18. Joint Framework Document, *supra* note 11, ¶¶ 50–53.

negotiations on that section of the Agreement.¹⁹ But the section on human rights (let alone the notion of a Charter) was by no means high up the political agenda. With attention mostly diverted to the more contentious issue of establishing North-South institutions,²⁰ the section on human rights was apparently only dealt with at the final stage of the negotiations, and even then, in what has been described as a “haphazard” way.²¹ The Charter concept was clearly a casualty of this disorganized approach, with provision being ultimately made for it during the negotiations on the establishment of Human Rights Commissions for both sides of the island.²² Sinn Féin and the Social Democratic and Labour Party (“SDLP”) had lobbied for an all-island institution of this nature, but when unionists and the British government opposed this proposal, a compromise was reached in the decision to provide for a Joint Committee of the newly established Commissions whose mandate would be “to consider human rights issues in the island.”²³ The decision was accordingly made that one of those issues should be the possibility of establishing a Charter of Rights for the island of Ireland, and thus, the concept of the Charter found its home on the agenda of the Joint Committee.²⁴

19. Interview with civil servant, *supra* note 16.

20. See Agreement, *supra* note 1, at 761–64.

21. Stephen Livingstone, *Human Rights in Northern Ireland: In From the Margins?*, in *TOWARDS A CULTURE OF HUMAN RIGHTS IN IRELAND* 47, 57 (2001).

22. See Egan & Murray, *supra* note 9, at 802.

23. Interview with civil servant, *supra* note 16.

24. *Id.*; see also Egan & Murray, *supra* note 9, at 802.

II. *THE WORK OF THE JOINT COMMITTEE ON THE CHARTER*

Initially, the Joint Committee (which was established in November 2001) moved swiftly in regard to the Charter.²⁵ At its first official meeting, a paper of possible options was tabled and discussed.²⁶ Shortly afterwards, a sub-committee of the Joint Committee was established to advance the process of developing work on the Charter.²⁷ By 2003, the sub-Committee had produced the text of what became known as the Pre-Consultation Paper on the Charter, which was subsequently approved by the plenary Joint Committee.²⁸ The rationale behind producing a pre-consultation paper was to elicit opinions on a menu of proposals from the political parties and civil society, with a view toward advancing to full-blown consultation at a later stage.²⁹

25. Section 69(10) of the Northern Ireland Act, 1998, c.47 (Eng.) assigned to the NIHRC the obligation to “do all that it can to ensure the establishment” of the Joint Committee. A similar provision is contained in section 8(i) of the Human Rights Commission Act 2000, requiring the IHRC to “take whatever action is necessary to establish and participate” in the Joint Committee. (Act No. 9/2000)(Ir.), *available at* <http://www.irishstatutebook.ie/2000/en/act/pub/0009/index.html>. The Joint Committee decided at its first official meeting on November 8, 2001 that the two Commissions meeting in plenary would constitute the Joint Committee. *See* N. IR. HUMAN RIGHTS COMM’N AND THE IRISH HUMAN RIGHTS COMM’N [JOINT COMM.], Minutes of the First Official Meeting, ¶ 3.0, Nov. 8, 2001 [hereinafter JOINT COMM., First Meeting], *available at* http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82. This decision was reaffirmed following the appointment of a new Chief Commissioner and new Commissioners to the NIHRC Commission. *See* JOINT COMM., Minutes of the Sixteenth Meeting, ¶ 3.2, Jan. 18, 2006 [hereinafter JOINT COMM., Sixteenth Meeting], *available at* http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82.

26. This paper was tabled by Commissioner Tom Hadden. JOINT COMM., First Meeting, *supra* note 25, ¶ 4.2.

27. *See* JOINT COMM., Minutes of the Third Meeting, ¶¶ 3.2–3.3, Mar. 22, 2002, *available at* http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82.

28. *See* JOINT COMM., A CHARTER OF RIGHTS FOR THE ISLAND OF IRELAND: PRE-CONSULTATION PAPER 2 (2003), *available at* http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/67/preconsult_COR.pdf [hereinafter PRE-CONSULTATION PAPER].

29. *See id.*; *see also* JOINT COMM., Draft Minutes of the Eighth Meeting, ¶ 3.3.4, Apr. 11, 2003, *available at* http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82. The views of relevant governmental departments were also sought. *See* JOINT COMM., Minutes of the Eleventh Meeting, ¶

A. *Pre-Consultation Paper*

Before summarizing the Joint Committee's proposals, it is important to recall first the wording of the Agreement, which directed the Committee to "consider the possibility . . . of establishing a Charter."³⁰ The Joint Committee extrapolated from that tentative wording that it would be "*failing to meet the general public's expectations*" if it failed to produce a draft charter.³¹ To this end, it produced a menu of three possible models for an all-island Charter of Rights, setting forth in some detail their respective advantages and disadvantages.³² Each would be open to signature by the political parties in Northern Ireland and the Republic of Ireland, the Northern Ireland Executive, and the two governments of the United Kingdom and Ireland.³³

The first model ("Model A") posited is a declaratory Charter, which would set forth a list of non-binding rights deemed worthy of protection in Ireland, similar in nature to the Universal Declaration of Human Rights.³⁴ The second model ("Model B") is a "programmatic" charter of "basic principles" and "specific commitments"³⁵ that signatories³⁶ would be bound to implement progressively,³⁷ similar to the International

4.1.1, Dec. 11, 2003, *available at* http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82.

30. *See* PRE-CONSULTATION PAPER, *supra* note 28, at 3.

31. *See id.* (emphasis added).

32. *See id.* at 5–12.

33. *See id.* at 9, 11.

34. *See id.* at 5–9.

35. *See id.* at 5, 9–10, 13–14. These are presented at the outset as including such matters as agreement to incorporate international human rights standards into domestic law, recognition of the rights and aspirations of all national, religious, ethnic, or linguistic communities throughout Ireland, and a determination to abide by democratic means when pursuing political objectives. *See id.* at 9. Other rights potentially posited include equality rights, children's rights, rights of the elderly, rights of disabled persons, and economic, social, and cultural rights dealing with housing, health and poverty, education, and language. References to mutual respect for the identity and ethos of the two communities, the rejection of violence, equivalency of rights protection between the two jurisdictions, and a commitment to eradicating racism are suggested along with provisions relating to criminal justice, emergency legislation, environmental issues, migration, and asylum. *See id.* at 13–18. The Committee also proposed that this model might draw its content from the Report of the International Body on Arms Decommissioning, Jan. 22, 1996, *available at* <http://cain.ulst.ac.uk/events/peace/docs/gm24196.htm>. *See* PRE-CONSULTATION PAPER, *supra* note 28, at 9.

36. The European Union and the United States are posited as further possible "guarantors" of the principles. *See id.* at 9.

37. *See id.* at 6.

Covenant on Economic, Social and Cultural Rights.³⁸ The proposed method of supervision here would be by means of annual reporting requirements to an independent body of international experts, parliamentarians, or possibly the Joint Committee itself.³⁹ The final model (“Model C”) would take the form of a legally binding charter which would be judicially enforceable in both Northern Ireland and the Republic of Ireland, allowing individuals the possibility of asserting and vindicating the guaranteed rights in the courts in either jurisdiction.⁴⁰ Ultimately, the Joint Committee came down firmly in favor of the programmatic model elaborated in Model B.⁴¹ This model was preferred over the other two models because it offered a practical compromise between the legally superfluous declaratory model and the politically unfeasible enforceable model.⁴² Further, the Committee believed that it would not be too difficult to secure the support of the political parties throughout the island of Ireland for such a charter, and that its adoption would make “an appreciable difference to the lives of people throughout both parts of the island.”⁴³

The current authors have argued elsewhere that the Joint Committee’s approach to its work in respect of the Charter was over-ambitious in a number of vital respects.⁴⁴ First, the Committee appears not to have considered in any great depth its own role in relation to the Charter and specifically the mandate, which it was given by the Agreement, to examine “*the possibility of establishing a Charter.*”⁴⁵

Experience gained from efforts to draft similar documents (including the Bill of Rights in Northern Ireland) has demonstrated that the entity carrying out the process must have the “legitimacy, expertise and capacity to do so.”⁴⁶ It is by no means clear that the Joint Committee is the appropriate organ to carry out the task of consulting on the Charter, let alone to

38. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

39. See PRE-CONSULTATION PAPER, *supra* note 28, at 18.

40. *Id.* at 7, 11.

41. *Id.* at 13.

42. *Id.* at 8, 11–13.

43. *Id.* at 13.

44. See Egan & Murray, *supra* note 9, at 807–35.

45. See Agreement, *supra* note 1, at 768.

46. Egan & Murray, *supra* note 9, at 808.

provide a draft text, and it is therefore essential that this issue be revisited by the Committee in its current attempts to grapple with the Charter.⁴⁷

Still further, at a conceptual level, the Committee would appear to have placed the proverbial cart before the horse in positing a number of options for a Charter without attempting to ascertain the *need* for an all-island Charter of Rights in the first place.⁴⁸ Again, the Agreement directed it to consider the *possibility* of such a Charter,⁴⁹ which immediately begs the question of whether an all-island Charter would add value to the current panoply of existing and potential rights protection on either side of the island. These include the United Kingdom's Human Rights Act of 1998,⁵⁰ a projected Bill of Rights for Northern Ireland,⁵¹ a range of fundamental rights protection in the Irish Constitution,⁵² the European Convention on Human Rights Act of 2003,⁵³ as well as other human rights legislation in both jurisdictions, not to mention international agreements to which both states are party and which can be presumed to have a harmonizing effect. It is only if a gap can be identified in that edifice that a potential objective for a charter, and the best means of its implementation, will present itself.

We have suggested elsewhere a number of potential objectives,⁵⁴ and further potential objectives have been generated

47. *Id.*

48. *Id.* at 808–10.

49. *Id.* at 807.

50. *See generally* Human Rights Act, 1998, c. 42 (Eng.).

51. Section 6, paragraph 4 of the Agreement provided that once established, the NIHRC would be invited “to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland.” *See* Agreement, *supra* note 1. Section 69(7) of the Northern Ireland Act 1998 subsequently made provision for this commitment to be fulfilled. Following the establishment of a Forum composed of political parties and civil society representatives, the Commission eventually submitted detailed advice to the Secretary of State for Northern Ireland in December 2008. *See* N. IR. HUMAN RIGHTS COMM'N [NIHRC], A BILL OF RIGHTS FOR NORTHERN IRELAND: ADVICE TO THE SECRETARY OF STATE FOR NORTHERN IRELAND (2008).

52. *See* IR. CONST., 1937, arts. 40–44, *available at* <http://www.taoiseach.gov.ie/upload/static/256.htm>.

53. *See generally* European Convention on Human Rights Act 2003 (Act No. 20/2003) (Ir.), *available at* <http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html>.

54. *See* Egan & Murray, *supra* note 9, at 810–20.

in other academic commentary. Brendan O’Leary, for example, has suggested a declaration that all political parties and governments would sign, which would crucially respect the Agreement, clarify its principles, and commit the parties to respecting rights, especially in the North-South institutions for which some mechanism for enforcement should be included.⁵⁵ Colm O’Cinnéide has posited the innovative idea that the concept of “equivalence of rights” protection in both jurisdictions expressed in paragraph 9 of the Good Friday/Belfast Agreement⁵⁶ could provide a potential blueprint for the Charter.⁵⁷

As regards the results of the pre-consultation process, the response from the list of 121 bodies drawn up by the Joint Committee to its Pre-Consultation Paper was clearly disappointing.⁵⁸ Some twenty-eight bodies replied, only two of which were political parties.⁵⁹ Most of the responses were from the non-governmental sector. While the overall tenor of their feedback was receptive to the notion of a Charter of Rights, preferences varied regarding the various models mooted by the

55. Proceedings of a Conference at University College Dublin Law School: A Charter of Rights for the Island of Ireland (Nov. 6, 2009) (transcript on file with the authors).

56. Agreement, *supra* note 1, at 768. Under this section, the Irish government committed itself to taking steps towards strengthening human rights comparable to those taken by the British government regarding Northern Ireland. Specifically, the Irish government agreed to “bring forward measures to strengthen and underpin the constitutional protection of human rights” drawing upon the European Convention on Human Rights (“ECHR”) and other international human rights instruments and to examine, in this context, the possibility of incorporating the ECHR into the domestic legal system. *Id.* Paragraph 9 continues: “The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.” *Id.* The section stipulates further specific measures to be undertaken by the Irish government, including establishing a Human Rights Commission with a mandate equivalent to that of the NIHRC; ratifying the Framework Convention on National Minorities; implementing enhanced employment equality legislation and equal status legislation; and continuing to take active steps to demonstrate its respect for the different traditions in the island of Ireland. *Id.*

57. O’CINNÉIDE, *supra* note 1, at 36.

58. This feedback on the results of the pre-consultation process is drawn from a speech given by the President of the IHRC. See Maurice Manning, President, IHRC, Speech at a Conference at University College Cork: A Charter of Rights for the Island of Ireland (Oct. 2, 2004), available at <http://www.ihrc.ie/publications/list/paper-on-a-charter-of-rights-for-the-island-of-ire>.

59. *Id.* The two political parties were the Alliance Party and Sinn Féin.

Joint Committee. This variation discloses the many obstacles that will be faced in securing agreement on an all-island Charter of Rights—a task that the Joint Committee would appear to have seriously underestimated in its initial foray on the Charter.

Whatever one's view on the substantive merits and outcomes of the Pre-Consultation Paper, it did serve two disjointed purposes. On the one hand, it focused *some* minds on the prospects of a Charter, thus generating the seeds of a debate on what by any stretch is at least an interesting proposal. On the other hand, its publication served to reveal a distinct level of disinterest on the part of the political parties, and even among civil society, on both sides of the island in the idea. The latter issue presents perhaps the greatest challenge to the Joint Committee in any decision that it might take to move forward with its work on the Charter.

B. *The Aftermath*

This initial lackluster response to its Pre-Consultation Paper coincided with institutional and financial difficulties in the operation of the Joint Committee, the result of which further effectively delayed progress on the Charter for several years.⁶⁰ While a new sub-committee on the Charter was established in

60. Delay in the reappointment of members to the NIHRC led to difficulties in the operation of the Joint Committee from 2004-2005 during which attendance at meetings was substantially depleted. See JOINT COMM., Minutes of the Twelfth Meeting, Mar. 11, 2004, available at http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82; JOINT COMM., Minutes of the Thirteenth Meeting, Sept. 9, 2004, available at http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82; JOINT COMM., Minutes of the Fourteenth Meeting, Dec. 2, 2004, available at http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82; The Fifteenth Meeting of the Joint Committee was not convened until October 2005 when it was decided to consider *de novo* progress on the charter. See JOINT COMM., Minutes of the Fifteenth Meeting, ¶ 4, Oct. 19, 2005, available at http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82. There was some discussion at a conference organized by University College Cork and the University of Leeds in October 2004. See Conference on A Charter of Rights for the Island of Ireland at University College Cork (transcript on file with the authors); see also A Charter of Rights for the Island of Ireland—One Day Conference to Debate and Explore the Issues (Oct. 2, 2004) (transcript on file with the authors). There was also a follow-up debate on Slugger O'Toole.com. See Mick Fealty, *An E-Debate on a Charter of Rights?*, SLUGGER O'TOOLE, (Sept. 28, 2004, 1:00 PM), http://sluggerotoole.com/2004/09/28/an_e_debate_on_a_charter_of_rights.

2006,⁶¹ and the matter was kept on the Joint Committee's agenda, the Committee correctly deferred pressing forward with a consultation process until the Bill of Rights forum in Northern Ireland had concluded.⁶² In May 2008, the process was to some extent reinvigorated and a full program of work was identified in relation to the Charter.⁶³ Thus far, however, no further concrete plans or proposals have been elaborated.

III. *THE ROAD AHEAD*

If the Committee is to move forward with its task in regard to the Charter, it seems essential, as noted above, that it should go back to the drawing board and unpack the assumptions which led it to draft potential models for a Charter in the first place, paying particular attention to what its own mandate should be in this regard. The potential objective and purpose of a Charter of Rights will only emerge once a careful analysis is made of the need for such a document in the current political and legal landscape. This is a truly daunting task, particularly as the framework for a potential Bill of Rights in Northern Ireland is still by no means clear.⁶⁴ Progress on the Charter will inevitably

61. See JOINT COMM., Sixteenth Meeting, *supra* note 25, ¶ 3.4.

62. See JOINT COMM., Minutes of the Twenty-Third Meeting, ¶ 4, Jan. 29, 2008, available at http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82.

63. See JOINT COMM., Minutes of the Twenty-Fourth Meeting, ¶¶ 5–6, May 14, 2008, available at http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82. The most tangible result of this renewed focus to date has been the co-hosting of a Conference in 2009 with the University College Dublin School of Law. Designed to be the first in a number of such consultative events, the conference was aimed at eliciting academic analysis as well as the current views of the non-governmental sector in regard to the possibilities for an all-island Charter of Rights. See University College Dublin School of Law—News and Events, *Charter of Rights for the Island of Ireland*, <http://www.ucd.ie/law/newsevents/name,44418,en.html> (last visited Sept. 19, 2010). Following that conference, particular Commissioners were identified at the Joint Committee's meeting in April 2010 who would take the task forward. JOINT COMM., Minutes of the Thirty-First Meeting, ¶ 6, Apr. 14, 2010, available at http://www.nihrc.org/index.php?page=committee_minutes&category_id=&from=0&committee_id=82.

64. Following the establishment of a forum composed of political parties and civil society representatives, the NIHRC eventually submitted detailed advice to the Secretary of State for Northern Ireland in December 2008. NIHRC, *supra* note 51. In November 2009, the Secretary of State published the government's response to the Commission's advice in the form of a consultation paper, inviting feedback from interested parties. NORTHERN IRELAND OFFICE, CONSULTATION PAPER: A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS (2009). The Consultation Paper rejects the need to enshrine many

be halting until the position on the Bill of Rights is resolved, as even an approach to the Charter based on the concept of “equivalence of rights” such as the one advocated by Colm O’Cinnéide depends on the outcome of that process.⁶⁵

With that caveat in mind, one way forward for the Committee that is not entirely dependent⁶⁶ on the Bill of Rights would be to explore in more depth the potential for a declaratory Charter to be signed up to by the *political parties* on both sides of the island, to act at all times in furtherance of an agreed set of rights or “to adopt a ‘rights-based’ approach to governance.”⁶⁷ This is the kind of document which would appear to align most closely with the intentions of the political parties as evidenced by the drafting history and the text of the Good Friday/Belfast Agreement outlined above. It is also one which could, in our view, add practical value to a peace process that is still evolving and in which levels of distrust between the political parties in Northern Ireland are obviously still discernible.⁶⁸ In the initial burst of enthusiasm to breathe life into the clause on the Charter, the Joint Committee seems to have strayed quite far from that mainstay by advocating a legally binding instrument that would not only be open for signature by the political parties, but also by the two governments. Even though it may have been technically free to do so,⁶⁹ the result has possibly been to raise

of the rights suggested by the NIHRC in a potential bill of rights on the basis that they are already sufficiently protected in Northern Ireland or fail to be considered in a UK-wide context. *Id.* at 17. The Commission is deeply dissatisfied with the government’s Consultation Paper and published a detailed response to it in February 2010. NIHRC, A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS: RESPONSE TO NORTHERN IRELAND OFFICE (2010). It maintains that the government has *inter alia* failed to understand the purpose and function of a Bill of Rights; failed to take account of appropriate international standards; and has misrepresented the Commission’s advice. *See id.*; *see generally* Collin Harvey & David Russell, *A New Beginning for Human Rights Protection in Northern Ireland?*, 6 EUR. HUM. RTS. L. REV. 748 (2009).

65. Egan & Murray, *supra* note 9, at 829–31.

66. It must be acknowledged that the outcome of the Bill of Rights process will inevitably be an important barometer for gauging political attitudes in regard to the framing of an all-island Charter of Rights, at least in Northern Ireland.

67. Egan & Murray, *supra* note 9, at 816.

68. Such levels of distrust are being openly articulated by some politicians in the run-up to the United Kingdom general election. *See e.g.*, Dan Keenan, *TUV Leader Makes First Minister Post Pledge*, IRISH TIMES (Dublin), Apr. 24, 2010, at 8.

69. Pre-Consultation Paper, *supra* note 28, at 4–5. In its pre-consultation paper, the Joint Committee took the view that the use of the words “agreed measures” in the Agreement suggested that “something more than a purely declaratory document was

expectations in regard to a Charter for which, at this remove, there is no demonstrable need⁷⁰ or political appetite.

envisaged” and that while the wording specified that the Charter should be open to signature by democratic political parties, it was not exclusive in that respect. *Id.*

70. Dan Keenan, *Catholics and Protestants “See Human Rights Differently,”* IRISH TIMES (Dublin), Aug. 31, 2009, at 7. See the comments of the former leader of the Labour Party in the Republic of Ireland, Pat Rabbitte T.D., at the McCluskey Civil Rights Summer School, at which the concept of an all-island Charter of Rights was discussed. He questioned:

Is Northern Ireland to have the European Convention, the European Social Charter and an All-Island Charter, while the Republic has the Constitution, the European Convention, the European Social Charter and an All-Island Charter? What purpose is served by multiplying the number of legal instruments designed to achieve the same end?

Pat Rabbitte T.D., Former Leader, Labour Party in the Republic of Ireland, Address at the McCluskey Civil Rights Summer School (Aug. 29, 2009).