

A CHARTER OF RIGHTS FOR THE ISLAND OF IRELAND: AN UNKNOWN QUANTITY IN THE GOOD FRIDAY/BELFAST AGREEMENT

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Abstract The basic aim of the Good Friday/Belfast Agreement was to try to achieve a political settlement to the conflict in Northern Ireland. While the channels for the settlement were to be primarily institutional, the importance of safeguarding the rights of both communities in Northern Ireland by addressing equality and justice issues was recognized, to varying degrees, by all parties to the process that led to the drafting of the Agreement. As the negotiations progressed, the human rights section of the Agreement grew exponentially, moving 'from the margins to the mainstream' so that the final Agreement contains a whole section on human rights protections. Not only have these particular elements of the Agreement come to fruition, but they also have received a considerable amount of public and political interest as well as academic comment and analysis. Buried within the human rights chapter, however, is a concept that has so far received minimal interest or enthusiasm from any quarter. That is the reference in paragraph 10 of the 'Rights, Safeguards and Equality of Opportunity' chapter to the possibility of establishing an all-island Charter of Rights.

The purpose of this article is threefold. First, it traces the genesis of the Charter of Rights concept through to its inclusion in the Good Friday/Belfast Agreement; secondly, it examines the approach thus far taken by the Joint Committee of the two human rights commissions to the task entrusted to them in relation to the Charter by the Agreement; and finally, it explores some of the issues that need to be considered and the challenges faced by that Committee in future efforts to assist in the construction of any such Charter. In so doing, it describes the political and legal difficulties faced in attempts not only to formulate agreement on human rights but also to create a legal document which may be applicable to two jurisdictions. It concludes by suggesting ways in which the project may be progressed.

I. INTRODUCTION

The basic aim of the Good Friday/Belfast Agreement¹ was to try to achieve a

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¹ The term 'Good Friday/Belfast Agreement' (10 Apr 1998) is a collective one denoting the

political settlement to the conflict in Northern Ireland. While the channels for the settlement were to be primarily institutional, the importance of safeguarding the rights of both communities in Northern Ireland by addressing equality and justice issues was recognized, to varying degrees, by all parties to the process that led to the drafting of the Agreement.² As the negotiations progressed, the human rights section of the Agreement grew exponentially, moving 'from the margins to the mainstream'³ so that the final Agreement contains a whole section on human rights protections. This section, entitled 'Rights, Safeguards and Equality of Opportunity'⁴ included agreement between the parties on the establishment of a new statutory framework in Northern Ireland to promote equality of opportunity; incorporation of the European Convention on Human Rights (ECHR) in the United Kingdom and in the Republic of Ireland; and the establishment of two Human Rights Commissions in both jurisdictions. Not only have these particular elements of the Agreement come to fruition, but they also have received a considerable amount of public and political interest as well as academic comment and analysis.⁵ Buried within the human rights chapter, however, is a concept that has so far received minimal interest or enthusiasm from any quarter. That is the reference in paragraph 10 of the 'Rights, Safeguards and Equality of Opportunity' chapter to the possibility of establishing an all-island Charter of Rights:

It is envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, 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.⁶

two documents entitled (1) The 'Multi-Party Agreement' and (2) The British-Irish Agreement: <<http://cain.ulst.ac.uk/events/peace/docs/agreement.htm>>. See generally A Morgan, *The Belfast Agreement: A Practical Legal Analysis* (The Belfast Press, London, 2000) ch 1; and C O'Cinnéide, *The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (The Equality Authority, Dublin, 2005) 7–13.

² See generally, T Hennessy, *The Northern Ireland Peace Process: Ending the Troubles?* (Gill & Macmillan, London, 2001) pt 111.

³ See P Mageean and M O'Brien, 'From the Margins to the Mainstream: Human Rights and the Good Friday Agreement' (1999) 22 *Fordham Intl L J* 1499.

⁴ Section 6, entitled 'Rights, Safeguards and Equality of Opportunity'. Although it should be noted that human rights are mentioned in other parts of the Agreement: *ibid* 1519–1537. See also, C Harvey and S Livingstone, 'Human Rights and the Northern Ireland Peace Process' (1999) 2 *European Human Rights Law Review* 162, 168–70 (EHRLR).

⁵ See, eg, the collection of articles on various aspects of the Belfast Agreement by politicians and academics in (1999) 22 *Fordham Intl L J* 1136–775.

⁶ Para 10, 'Rights, Safeguards and Equality of Opportunity' section of the Belfast Agreement 1998.

The purpose of this article is threefold. First, it traces the genesis of the Charter of Rights concept through to its inclusion in the Good Friday/Belfast Agreement; secondly, it examines the approach thus far taken by the Joint Committee of the two human rights commissions to the task entrusted to them in relation to the Charter by the Agreement; and finally, it explores some of the issues that need to be considered and the challenges faced by the Joint Committee in future efforts to assist in the construction of any such Charter. In so doing, it describes the political and legal difficulties faced not only in attempting to formulate agreement on human rights but also in creating a legal document which may be applicable to two jurisdictions. It concludes by suggesting ways in which the project may be progressed.⁷

Difficulties in obtaining agreement on human rights within one jurisdiction have received considerable attention.⁸ Those drafting Bills of Rights or their equivalent often draw heavily on international and other countries' experiences in doing so.⁹ The difficulties are compounded, however, when the task is to draft a document that applies to two separate jurisdictions with different legal structures, frameworks and principles and different political settings. The experience in drafting the European Charter of Fundamental Freedoms¹⁰ illustrates the problems in achieving consensus among different States on the content of the rights;¹¹ how to relate the Charter to existing legal commit-

⁷ The article was the brainchild of the late Professor Stephen Livingstone of Queen's University, Belfast. Professor Livingstone and Suzanne Egan received a major grant from the Irish Council for Research and Social Sciences to conduct the research and Professor Livingstone worked on the project until his untimely death in March 2004. Professor Rachel Murray and Suzanne Egan resumed the work together in 2005. As part of the research, interviews were conducted with key figures involved in drafting the human rights section of the Belfast Agreement. The project was greatly aided by the assistance of Ms Evelyn Larney, BL LLM. It should be noted that Suzanne Egan is a member of the Irish Human Rights Commission but, since undertaking the writing of this article, ceased to participate in Joint Committee Meetings regarding the Charter of Rights.

⁸ See, eg B Emmerson, 'This Year's Model: The Options for Incorporation' (1997) 4 EHRLR 313; F Klug, 'A Bill of Rights for the United Kingdom: A Comparative Study' (1997) 5 EHRLR 501; JL Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 MLR 7–28; R Malherbe, 'A New Beginning: Introducing the South African Constitution and Bill of Rights' (2000) 18 Netherlands Quarterly of Human Rights 45–65 (NQHR); S Sedley, 'A Bill of Rights for Britain' (1997) 5 EHRLR 458–65.

⁹ P Alston, *Promoting Human Rights Through Bills of Rights* (OUP, Oxford, 1999); A Butler, 'The Bill of Rights Debate: Why the New Zealand Bill of Rights is a Bad Model for Britain' (1997) 17 Oxford J of Legal Studies 323; M Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] Public Law 266; DM Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local history in the Reconstitution of Comparative Influence: The South African Experience' (2003) 1 Intl J of Constitutional L 181–95; JMM Chan, 'Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence' (1998) 47 ICLQ 306–36.

¹⁰ G De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 ELR 126; RW Davis, 'A Brake? The Union's New "Bill of Rights"' (2005) 5 EHRLR 449–60; S Douglas-Scott, 'The Charter of Fundamental Rights as a Constitutional Document' (2004) 1 EHRLR 37–50.

¹¹ D Ashiagbor, 'Economic and Social Rights in the European Charter of Fundamental Rights' (2004) 1 EHRLR 62; E De Smijter and K Lenaerts, 'A Bill of Rights for the European Union' (2001) 38 CML Rev 273–300.

ments, both domestic and international; as well as the legal status it should eventually have. Whether it should be a legally binding document or a political declaration has been the subject of considerable debate.¹² '[T]he end result is inevitably something of a compromise'.¹³ Beyond the fact that the Charter of Rights for the island of Ireland is a unique endeavour in terms of trans-jurisdictional human rights protection, there are particular sensitivities as the Charter was born out of a peace agreement and any provisions would therefore need to be sensitive to political divides.

II. THE GENESIS OF THE ALL-ISLAND CHARTER OF RIGHTS

The idea of protecting human rights on some form of trans-jurisdictional, all-island basis was raised in each of the three agreements that have been negotiated in order to obtain peace in Northern Ireland;¹⁴ but as will be seen, it is the talks process of the 1990s, informing the content of the Good Friday/Belfast Agreement, that can be regarded as the direct lineage of the reference to an all-island Charter in paragraph 10.

At the time the Good Friday/Belfast Agreement was drafted, the most important priority for the drafters was to achieve a human rights package which would include commitments to enact legally entrenched human rights protections in Northern Ireland and in the Republic. In the Sunningdale Agreement (1973) it was envisaged that this need would be met in two ways: first, incorporating the ECHR into the domestic legal systems of both parts of the island and secondly, legislating or setting up institutions for any additional human rights protection 'in either part or embracing the whole island'.¹⁵ In the

¹² 'My own view is that the political declaration route was the right approach. There are two reasons for that. First, it is easier in a political declaration to show a clear statement of values which people can understand without the qualifications and exceptions necessary in a written law. The second reason is that in the end I believe the Charter lacks the precision of language necessary to allow it legal force. President Herzog wanted us to draft so that the Charter could be integrated into the Treaties if that was subsequently decided. In this respect I believe we have not succeeded. Even with the helpful commentary of the Presidium, the Charter will lack the precision necessary for a law. So whilst it should be acceptable and valuable as a political statement, my own view is that this text is not suitable for incorporation into the Treaties whether directly or by cross-reference': Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 CML Rev 1201, 1215.

¹³ *ibid* 1209.

¹⁴ The Sunningdale Agreement (9 Dec 1973): <<http://cain.ulst.ac.uk/events/sunningdale/agreement.htm>>; Anglo-Irish Agreement (15 Nov 1985) (Cmd 9657, 1985) <<http://cain.ulst.ac.uk/events/aia/aiadoc.htm>>; Belfast Agreement (n 1). See generally, K Boyle and T Hadden, *Northern Ireland: The Choice* (Penguin, London, 1994) 119–20.

¹⁵ '... 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. Such recommendations could include the functions of an Ombudsman or Commissioner for Complaints, or other arrangements of a similar

Anglo-Irish Agreement (1985) 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.¹⁶ Although the discussion of various matters such as electoral arrangements, flags and emblems, and economic and social discrimination was to be primarily concerned with Northern Ireland, Article 5(b) of the 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.¹⁷

In the Good Friday/Belfast Agreement, both governments commit themselves to incorporating the ECHR (or in the case of the Irish Government at least to 'examine further' the issue), and the need for any additional human rights protections is met by the enactment of a Bill of Rights to supplement the ECHR in Northern Ireland, the strengthening of the human rights provisions in the Irish Constitution and enhanced equality legislation in both jurisdictions. The concept of an all-island Charter of Rights appears in paragraph 10 entitled 'Joint Committee'. This paragraph envisaged the establishment of a Joint Committee of representatives of the two Human Rights Commissions to act as a forum for the consideration of human rights issues in the island. The Agreement confers on the Joint Committee the task 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.¹⁸

At that stage there did not appear to be great discussion over this provision. As one political party representative noted: 'I was there fairly constantly and the issues that were controversial stand out and I do not recall the Charter being controversial. That is not to say that if we do come to the point of fleshing it out that there won't be controversy.'¹⁹

The two key documents, the Downing Street Declaration and the Joint Framework Document, which led to the Belfast/Good Friday Agreement, however, both refer to the concept noting, respectively, 'full respect for the rights and identities of both traditions in Ireland', and not just to Northern

nature which the Council of Ireland might think appropriate', The Sunningdale Agreement (Dec 1974) para 11.

¹⁶ Anglo-Irish Agreement (n 14) Art 5(a).

¹⁷ Interestingly, however, the British Government indicated that it was prepared to consider the idea of a joint declaration of rights by both governments at the ninth meeting of the Intergovernmental Conference on 6 October 1986, although this went no further. T Hadden and K Boyle, *The Anglo-Irish Agreement: Text, Commentary and Official Review* (Edwin Higel Ltd, Dublin and Sweet & Maxwell, London, 1989) 9–14.

¹⁸ Para 10, 'Rights, Safeguards and Equality of Opportunity' section of the Belfast Agreement 1998.

¹⁹ Interview with member of political party, 6 Dec 2004.

Ireland²⁰ and pledged that the two governments would take complimentary measures to guarantee that common specified civil, political, social and cultural rights would be enacted in both jurisdictions as part of any agreement²¹ and 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.²²

This all-island-Charter concept had already been the subject of discussion between senior civil servants in the British and Irish Governments at the initial stages of the negotiations, before representatives of the political parties in Northern Ireland became participants. It was decided that rather than providing for the adoption of a Charter, the final Agreement should act as that Charter²³ and that since governmental responsibility for protecting human rights was catered for elsewhere, responsibility for upholding the Charter rights should vest in the political parties.²⁴ Thus, the Charter concept initially took shape in paragraph 1 as an affirmation or endorsement of rights which were already legally binding in Northern Ireland law but which had not necessarily been respected or adhered to by the political parties in the past.²⁵ One of the political parties, the Social Democrat and Labour Party (SDLP), had been strongly supportive of the Charter concept throughout the negotiations and raised concerns that by simply inserting it in the Agreement, in the manner effected by paragraph 1, its application would be confined to those parties who signed the Agreement. With this in mind, Sean Farren of the SDLP pressed for the retention of an all-island Charter open to signature by all democratic parties in the island. This suggestion initially met with indifference from the other participants. At a later stage when provision was made for a Joint Committee of the two Human Rights Commissions, however, it was felt that the task of drafting such a Charter would be amenable to the remit of such a body.²⁶ The drafters ensured that the Joint Committee's business would not be confined solely to this task by inserting the phrase 'among other matters'. Thus in the final hours the idea of an all-island Charter, which had initially been put to bed by paragraph 1, resurfaced in paragraph 10.

²⁰ Harvey and Livingstone (n 4) 166.

²¹ *The Joint Declaration on Peace: The Downing Street Declaration*, issued by AN Taoiseach, Mr Albert Reynolds and the British Prime Minister, The Rt Hon John Major MP, 15 Dec 1993 UK-Ir, Cm 2442: <<http://cain.ulst.ac.uk/events/peace/docs/dsd151293.htm>>; *A New Framework for Agreement—22 February 1995* <<http://cain.ulst.ac.uk/events/peace/docs/fd22295.htm>>. See generally, R Christaldi, 'The Shamrock and the Crown: A Historic Analysis of the Framework Document and Prospects for Peace in Ireland' (1995) 5 *J of Transnational L & Policy* 123.

²² Joint Framework Agreement, para 51.

²³ Interview with civil servant, 29 Nov 2004.

²⁴ Interview with member of political party, 6 Dec 2004.

²⁵ Interview with civil servant involved in negotiations, 29 Nov 2004.

²⁶ *ibid.*

With regard to institutional structures, during the negotiations of the Good Friday/Belfast Agreement, the choice of a single all-island institution or two separate but equal institutions was presented. The latter option was eventually provided for in the form of the establishment of the two Human Rights Commissions. Sinn Féin and the SDLP had lobbied for an all-island institution but when this proposal met with Unionist and British opposition, a compromise was reached in the form of a Joint Committee of representatives of the two Commissions.²⁷

III. THE JOINT COMMITTEE AND THE CHARTER

The Joint Committee was formally established in November 2001.²⁸ At an early stage, the Committee decided that while its programme of work should include a number of issues, work on the Charter should be a priority.²⁹ A sub-committee was subsequently established³⁰ to drive the process for the elaboration of the Charter forward.³¹ A paper originally prepared by the sub-committee, and subsequently approved by the Joint Committee, was released in May 2003 as a 'Pre-Consultation Paper'.³² The purpose of the pre-consultation paper was to invite opinion on the proposals contained therein,

²⁷ *ibid.*

²⁸ Section 69(10) of the Northern Ireland Act 1998, which established the Northern Ireland Human Rights Commission, listed amongst its functions the obligation to 'do all that it can to ensure the establishment' of the Joint Committee. A similar provision is contained in s 8(i) of the Human Rights Commission Act 2000, establishing the Irish Human Rights Commission, requiring it to 'take whatever action is necessary to establish and participate' in the Joint Committee. The Joint Committee decided at its first official meeting on 8 November 2001 that the two Commissions meeting in plenary would constitute the Joint Committee: <<http://www.ihrac.ie/documents/article.asp?NID=74&NCID=36&T=N&Print>>, para 3.0.

²⁹ At the Joint Committee's first official meeting on 8 Nov 2001, a range of issues was identified, presenting human rights concerns both north and south of the border. These included racism, asylum seekers, children's issues, education rights, poverty, disability, issues connected to the border, an audit of human rights instruments north and south: *ibid* para 4.0.

³⁰ Minutes of the Third Ordinary Meeting of the Joint Committee (22 Mar 2002): <http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/46/Minutes_of3rd_Ordinary_Meeting.doc>, para 3.2. The membership of this sub-committee originally included Paddy Kelly (convenor), Olive Braiden, Martin Collins, Michael Farrell, Tom Hadden, Nuala Kelly (alternate member) and Inez McCormack. The Presidents of the two Commissions, Donal Barrington and Brice Dickson, were entitled to attend, *ex officio*.

³¹ Another sub-committee was also established on racism. Together these two sub-groups constituted the focus of much of the work of the Joint Committee to date. One substantial output of the Committee's work on racism was its publication of a user's guide to the International Convention on the Elimination of All Forms of Racial Discrimination: Joint Committee of the Irish Human Rights Commission and the Northern Ireland Human Rights Commission, *A User's Guide to the International Convention on the Elimination of Racial Discrimination* (Sept 2003) <<http://www.ihrac.ie/documents/article.asp?NID=63&NCID=7&T=N&Print=>>.

³² Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights Commission, *A Charter of Rights for the Island of Ireland: Pre-Consultation Paper* (May 2003): <http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/67/preconsult_COR.pdf>.

initially from political parties and other members of civil society.³³ Based on the responses received, the Joint Committee's intention was to amend the paper, if necessary, before broadening the consultation process at a later date.³⁴

A. The Proposed Models

The pre-consultation paper explains that although paragraph 10 of the Good Friday/Belfast Agreement only required it to 'consider the possibility . . . of establishing a Charter', the Joint Committee had interpreted this to mean that it would be 'failing to meet the general public's expectations' if it failed to produce a draft Charter.³⁵ The Committee clearly made a number of further assumptions in regard to the wording of the Agreement. These included the view that the underlying idea for the Charter seemed to be 'a common foundation of fundamental rights for both political entities in Ireland or, more precisely, for the people living in them'.³⁶ Moreover, the use of the word 'measures' in paragraph 10 suggested that 'something more than a purely declaratory document was envisaged'³⁷ 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.³⁸ Based on these working assumptions, the pre-consultation paper puts forward three possible models for a Charter, explaining the advantages and disadvantages of each, without ruling out the possibility of other models being considered. A common feature to all three models is the idea that they 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. The three options posited range along a spectrum of potential enforceability in that the key distinction between all three lies in the method of implementation envisaged for each.

At one end of the spectrum is a declaratory model ('Model A'), which would be limited to enunciating rights worthy of protection on the island of Ireland. Envisaged as being similar in structure to the Universal Declaration of Human Rights, the Committee clearly viewed this model as posing little difficulty in terms of legal feasibility and acceptability at the political level.

³³ Minutes of the Eighth Meeting of the Joint Committee (11 Apr 2003): <http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/46/11th_April_2003_-_8th_Ordinary_meeting_-_Belfast.doc>, para 3.3.4. The views of relevant governmental departments were also sought: Minutes of the Thirteenth Meeting of the Joint Committee (11 Dec 2003): <http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/46/13th_Ordinary_Meeting_Draft_minutes_of_Joint_Committee_September1.doc>, para 4.1.1.

³⁴ The initial projection was to open the consultation process up 'around the end of 2003': Pre-Consultation Paper (n 32) para 2. However, as is explained below, this broader consultation has not happened to date.

³⁵ *ibid* para 5.

³⁷ *ibid* para 10.

³⁶ *ibid* para 8

³⁸ *ibid* para 11.

However, it expressed reservations about this type of model on the basis that it would have no practical value in terms of concrete human rights protection and because its lack of enforceability could even transmit a negative message concerning the importance of human rights guarantees to the maintenance of democratic society.³⁹

At the opposite end of the spectrum, the Committee posits a legally binding, judicially enforceable Charter of Rights ('Model C'). This model would contain a detailed list of human rights standards to which the courts in both jurisdictions would have to adhere in applying and interpreting existing domestic law.⁴⁰ The Committee noted the strong attraction of this model in conferring practical human rights protection to individuals seeking a remedy. However, it also noted a number of disadvantages attaching to it, including the lack of political feasibility, disputes as regards the method of incorporation into both legal systems, as well as inevitable disagreement as to its content.⁴¹

The model preferred by the Joint Committee (Model B) occupies the middle ground between these two extremes. It is presented as a programmatic charter, committing signatories⁴² to the progressive implementation of certain 'basic principles'. The latter are initially presented 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.⁴³ A far more detailed list of rights, however, was ultimately envisaged here, as is made clear in a subsequent section of the document which sets forth the proposed content of Model B.⁴⁴ The Committee conceived of this model as being similar in format to programmes of action implemented by the United Nations in recent years.⁴⁵ The proposed method of implementation appears to be by periodic reporting requirements similar to those employed by United Nations treaty

³⁹ *ibid* para 16.

⁴⁰ *ibid* para 20.

⁴¹ *ibid* para 22.

⁴² The European Union and possibly the United States of America are mooted as further possible 'guarantors' of the principles: *ibid* para 17.

⁴³ The Committee also proposed that this model might draw its content from the Belfast Agreement, the *Mitchell Principles of Democracy and Non-Violence* and the *Code of Standards in Public Life*, Report of the International Body on Arms Decommissioning (22 Jan 1996) para 20: <<http://cain.ulst.ac.uk/events/peace/docs/gm24196.htm>>.

⁴⁴ Other rights potentially mooted include equality rights; children's rights; rights of the elderly; rights of persons with a disability; economic, social and cultural rights dealing with housing, health and poverty, education and language issues. 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 eradicate racism are suggested along with provisions relating to criminal justice; emergency legislation, environmental issues, migration, and asylum are also suggested.

⁴⁵ Examples given by the Committee of such programmes include the Vienna Declaration and Programme of Action 1993, UN Doc A/CONF 157/23 (12 July 1993) <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>, and the World Conference on Women's Rights: <<http://www.un.org/womenwatch/daw/beijing/platform/>>.

bodies.⁴⁶ The Committee favoured this approach because it struck the appropriate balance between the other two extremes, would not pose difficulties in terms of securing the agreement of the political parties and because it thought that it would make 'an appreciable difference to the lives of people throughout both parts of the island'.⁴⁷

The outcome of the pre-consultation process reflected the many difficulties raised by the Charter concept in the Good Friday/Belfast Agreement and the Joint Committee's approach to it.⁴⁸ To begin with, the number of responses received by the Committee was disappointing. While requests were sent to 121 bodies for comment on the pre-consultation paper, only 28 substantive responses were received. Only two of these were from political parties.⁴⁹ While the responses that were received were mainly positive towards the notion of an all-island Charter of Rights, and to the notion of robust consultation in regard to it, there was a significant degree of variation in receptivity to the models mooted by the Joint Committee. While few organizations opted for Model A, there was divergence as regards preference for Model B over Model C, with some organizations preferring not to express a preference at all. This degree of variation indicates the difficulties that will inevitably flow from any attempt to construct a Charter of Rights in whatever guise, a difficulty that would appear to have been seriously underestimated by the Joint Committee in the Pre-Consultation Paper. Apart from the critiques raised in regard to the various models mooted, certain responses pointed to more fundamental difficulties underlying the pre-consultation process itself. In particular, certain submissions raised the question of the precise mandate of the Joint Committee in regard to the Charter concept, querying whether this had been well enough worked out by the Committee itself before advancing to consultation. Finally, and perhaps most importantly, others expressed concern that the Committee had not made clear the purpose that would be served by constructing an all-island Charter of Rights in the first place.

Progress by the Joint Committee on the Charter of Rights project ultimately stalled, partly due to difficulties in the operation of the Committee itself.⁵⁰

⁴⁶ The pre-consultation paper states that implementation would be by 'regular monitoring...by an independent body, akin perhaps to the work currently being done by the Committee on Economic, Social and Cultural Rights when it looks at how States are implementing the UN's International Covenant on Economic, Social and Cultural Rights': Pre-Consultation Paper (n 32) para 17.

⁴⁷ Pre-Consultation Paper (n 32) para 23.

⁴⁸ The following feedback on the results of the pre-consultation process was given by the President of the Irish Human Rights Commission at a conference on the Charter of Rights in University College Cork, 2 Oct 2004 (a copy is available at the offices of the Irish Human Rights Commission, Jervis House, Jervis Street, Dublin 2).

⁴⁹ The Alliance Party and Sinn Féin.

⁵⁰ Delay in the reappointment of members to the Northern Ireland Human Rights Commission (NIHRC) led to difficulties in the operation of the Joint Committee from 2004 to 2005, during which attendance at meetings was substantially depleted: See Minutes of 12th, 13th, and 14th Meetings of the Joint Committee in March, September and December 2004 respectively. The 15th

Following the appointment of two new Commissions, the process looks set to be revitalized.⁵¹ Incomplete as it may have been, the results of the pre-consultation process should provide valuable guidance to the new sub-committee as it approaches its work. The remaining sections of this article examine more closely some of the themes raised by the consultees in an effort to illuminate the extent of the challenge faced by the Joint Committee by the terms of the Good Friday/Belfast Agreement.

IV. CONSTRUCTING AN ALL-ISLAND CHARTER OF RIGHTS

A. The Mandate of the Joint Committee

As noted above, one of the issues raised by the pre-consultation process was the precise mandate of the Joint Committee in regard to the all-island Charter.⁵² It is important to recall here the exact wording of the Good Friday/Belfast Agreement, which provided that the Joint Committee ‘. . . will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic parties . . .’ (emphasis added). This wording is phrased ambiguously, such that it could be interpreted in a number of ways. It could, for example, be interpreted as requiring the Committee to simply discuss and make recommendations to the two governments as regards the necessity and/or legal implications of establishing an all-island Charter of Rights, without necessarily producing a draft Charter. The Committee has adopted a more robust interpretation to the effect that it would be failing in its duty if it did not produce a draft Charter, which should be the subject of public consultation.⁵³

Certainly, it would appear that the drafters of the Agreement had not clearly worked out the role of the Committee in regard to the Charter:

The two nationalist parties’ policy was for a single human rights commission for the island of Ireland. The British government and the unionist parties were opposed to this. So then when we decided we would go on a compromise which

Meeting of the Joint Committee was not convened until October 2005 when it was decided to consider *de novo* progress on the charter: <<http://www.nihrc.org>>. There was some discussion at a conference organized by University College Cork and the University of Leeds in October 2004, ‘A Charter of Rights for the Island of Ireland—One Day Conference to Debate and Explore the Issues’ (2 October 2004), and follow-up debate on Sluggie O’Toole: <http://www.sluggero-toole.com/archives/2004/10/charter_debate_7.php; http://www.sluggero-toole.com/archives/2004/10/charter_debate_5.php> (last accessed 3 July 2007).

⁵¹ Minutes of the 16th Meeting of the Joint Committee of Representatives of the Two Human Rights Commissions on the Island of Ireland (18 Jan 2006) paras 3.4 and 3.5: <http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/46/Joint_Committee_meeting_minutes_January_2006>.doc>.

⁵² Submission of John Spellar, Northern Ireland Office (4 Dec 2003) and Dr Ursula Kilkelly, Faculty of Law, UCC (1 Sept 2003).

⁵³ Pre-Consultation Paper (n 32) para 5.

was the Joint Committee and since a Charter of fundamental political rights would be all-Ireland, it was ascribed to the Joint Committee at the very last minute and there wasn't a huge amount of thought given.⁵⁴

Nonetheless, if the Commissions are to consider a Charter of Rights, it is clear from the process of drafting such documents elsewhere, that the institution or organs carrying out the process of consultation and drafting of the Charter must be seen as having the legitimacy, expertise and capacity to do so.⁵⁵ This requires adequate resources and political support. The principal issue that arises out of placing the Charter in the hands of the two Commissions is that, while they are independent bodies, they are outside of the political process. Given the centrality of the political parties' acceptance of the success of the project, it is inevitable that the legitimacy of the Commissions in taking forward this task will be questioned. This concern arises from the legacy of the Bill of Rights in Northern Ireland, where many have questioned whether the Northern Ireland Human Rights Commission (NIHRC) was the appropriate body to carry out the task of the drafting of the Bill of Rights, often centring their concerns on the wording of the Agreement itself.⁵⁶ This made the task of the NIHRC especially difficult.⁵⁷ Care must be taken to ensure that the same does not arise with respect to the Charter of Rights. In this respect, it is crucial that the Joint Committee considers this issue in more depth, providing a more convincing rationale for its interpretation of the text of the Agreement. Indeed, any future consultative process on the Charter project should include space for debate on the actual meaning of this aspect of the Agreement.

B. The Need for an All-Island Charter of Rights

The next fundamental issue arising in regard to the Joint Committee's Pre-Consultation Paper is its apparent lack of analysis as regards the need for an all-island Charter of Rights. This issue is somewhat related to the last, in that the Committee's appreciation of its role in regard to the Charter should be influenced by a careful consideration of the necessity for such a document in the first place.

As we have noted in the first section of this article, while the history of a Charter of Rights for the island of Ireland may date back to before the

⁵⁴ Interview with civil servant, 29 Nov 2004.

⁵⁵ J Sarkin, 'The Drafting of South Africa's Final Constitution from a Human Rights Perspective' (1999) 47 AJCL 67.

⁵⁶ See Northern Ireland Human Rights Commission, *Summary of Submissions on a Bill of Rights* (July 2003) 19. See also House of Commons, Joint Committee on Human Rights (Fourteenth Report), paras 70–3: <<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/13202.htm>>.

⁵⁷ See S Livingstone and R Murray, *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with Comparisons from South Africa* (Jan 2005) 97–9. A Bill of Rights Forum has now been established composed of political party and civil society representatives.

Agreement, and may have been suggested in various ways by political parties as part of the peace process through the 1980s and 1990s, it is by no means clear whether the implications and constitutional position of such was fully thought through at the time of the drafting of the Good Friday/Belfast Agreement. This is not merely of historical interest, but is important for the legitimacy of the Commissions in carrying out the task and the eventual success of their endeavours. This makes it all the more urgent that the Joint Committee use its best endeavours to clearly work out the need for the Charter to begin with. The text of the Agreement certainly gives the Committee the possibility of deciding that a Charter might not be suitable and of therefore deciding that it is *not* necessary to actually produce a draft of such an instrument. The response to the suggestion that such documents should be considered is usually a resounding 'let's have one' followed by a discussion of what they should contain, how they should be implemented and what status they should acquire. Unfortunately, this would appear to have been precisely the attitude adopted by the Joint Committee in regard to the Charter. A more considered approach would have been to enter into a detailed assessment of existing human rights protections on both parts of the island, with a view to deciding whether an all-island Charter, in whatever incarnation, should be adopted at all.⁵⁸

To this end, the Committee must ask itself whether sufficient protection is already available, in the context of Northern Ireland and the Republic, in the form of legal protection such as the Human Rights Act 1998, the Bill of Rights being developed in Northern Ireland, constitutional rights under the Irish Constitution, the European Convention on Human Rights Act 2003, as well as other human rights legislation. International treaties and standards to which the two governments are parties, such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Framework Convention on National Minorities and the European Social Charter, will also have to be taken on board. The Joint Committee's analysis will have to address fundamental questions such as whether a Charter would simply add an extra layer of complexity to the existing spectrum of human rights protections already available. And further, whether enhanced protection for human rights on the island could be achieved in any other way.⁵⁹

⁵⁸ There is often a presumption that a Bill or Charter of rights will provide safeguards, but as Alston and Darrow argue, 'causality can be difficult to demonstrate. The role of other factors, such as population size, inequality type of political regime, the extent to which the views of citizens can be effectively represented, and the extent to which the state is linked into international economic and trade networks will all need to be taken into account': M Darrow and P Alston, 'Bills of Rights in Comparative Perspective' in P Alston (ed), *Bills of Rights* (OUP, Oxford, 1999) 466–7.

⁵⁹ As Combat Poverty argued in its submission to the Joint Committee: '...before a charter text is undertaken it needs to be shown in more concrete terms how preparing yet another text at this

An obvious difficulty arising in performing this assessment, of course, is the relative prematurity of such an exercise in regard to both jurisdictions. This is particularly true as regards Northern Ireland, given that the Bill of Rights process is still ongoing. As one political party representative stated:

If you want an all-island Charter, my view is that you first have to see what the rights are in Northern Ireland first of all—I will not go to a position of having an all-island Charter of Rights until I see clearly what the response and responsibilities of my neighbouring State is to human rights—in particular and in general, and as to what we in Northern Ireland view as our responsibility to rights. When we get both of our positions clear, we can see how we may have cooperation. So it's premature for me to consider because I do not yet see the environment conducive to me as a Unionist giving it serious consideration.⁶⁰

Indeed, some organizations refused to respond to the pre-consultation process by the Joint Committee, viewing it as premature until the Bill of Rights in Northern Ireland was more advanced.⁶¹ In the Republic, incorporation of the European Convention on Human Rights is still in its infancy and hence opinion as to its effect is still substantially untested.⁶² Progress on the Charter will necessarily be slow, certainly until there is more clarity on the shape of the Bill of Rights in Northern Ireland. But this should not inhibit the Committee from at least entering into a preliminary assessment of the need for a Charter.

C. Possible Objectives of an All-Island Charter of Rights

Crucial to any assessment of the need for a Charter will be reflection on the possible objectives of such an instrument in an all-island context. The purpose of a Charter or Bill of Rights will vary according to the political, social and cultural context in which it applies. In some situations it may be there to ensure national unity or 'guarantee' human rights;⁶³ in others, to introduce constitutional order in a post-colonial jurisdiction; in yet others, to mediate political transition in a revolutionary society. The concept of the all-island, trans-jurisdictional Charter, as expressed in the Good Friday/Belfast Agreement, is completely unique, and hence a considerable degree of thought needs to go into the objectives that it might serve if any resulting document is to be truly coherent. In this section, we advance a number of possible objectives that might be served by such a Charter.

point would add value and coherency to existing rights protections on the island rather than adding possible unnecessary elements of confusion, overlapping and complexity' (Nov 2003) para 3: <http://www.combatpoverty.ie/publications/submissions/2003_Sub_HumanRightsCommission.pdf>.

⁶⁰ Interview with member of political party, Dec 2004.

⁶¹ See British Irish Rights Watch, *Director's Report* (July/Aug 2003).

⁶² For a preliminary analysis, see D O'Connell, S Comiskey, E Meenaghan, and P O'Connell, *ECHR Act 2003: A Preliminary Assessment of Impact* (Law Society of Ireland, Dublin, 2006).

⁶³ See PH Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Rev* 30.

1. To achieve or further the goal of equivalence of protection

One possible aim of an all-island Charter would be to harmonize the protection of human rights across the Republic and Northern Ireland and to fill any gaps that may be found to exist in the framework of human rights protection in both jurisdictions. As Livingstone has argued, 'There is good reason to have an equivalent human rights machine North and South to encourage the free movement of people between the different parts of the island'. Lower degrees of protection in areas affecting people's lives (for example, educational or religious rights) may discourage people relocating from the North to the South or vice versa.⁶⁴

The concept of 'equivalence of rights' protection in both jurisdictions finds explicit expression in paragraph 9 of the Good Friday/Belfast Agreement. Under this section, the Irish Government committed itself to taking comparable steps towards strengthening human rights to those taken by the British Government in regard to Northern Ireland. Specifically, the Irish Government agreed to bring forward measures to 'strengthen and underpin constitutional protection of human rights', drawing upon the European Convention on Human Rights and other international human rights instruments, and to examine, in this context, the possibility of incorporating the ECHR into the domestic legal system. Paragraph 9 continued: 'The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.'⁶⁵

Thus, this conception of 'equivalence of rights' protection is limited in the sense that it commits the Irish Government only to bring forward measures aimed at matching the scope and nature of human rights protection pertaining in Northern Ireland. It does not commit the British Government to remedy deficiencies that obtain in Northern Irish law as compared to those which obtain in the Republic.⁶⁶

⁶⁴ S Livingstone, 'Human Rights in Northern Ireland-In From the Margins?' in I Bacik and S Livingstone, *Towards a Culture of Human Rights in Ireland* (Cork University Press, Cork, 2001) 89.

⁶⁵ The section stipulates further specific measures to be undertaken by the Irish Government, including the establishment of a Human Rights Commission, with a mandate equivalent to that of the Northern Irish Human Rights Commission; ratification of the Framework Convention on National Minorities; implementation of enhanced employment equality legislation and equal status legislation; and to continue to take active steps to demonstrate its respect for the different traditions in the island of Ireland.

⁶⁶ 'The equivalence requirement only requires the strengthening of existing Irish rights guarantees to match the level of protection available in Northern Ireland. Therefore, it would appear that achieving equivalence is solely a matter for Ireland. The Agreement contains no parallel legal requirement to ensure an equivalence of rights in Northern Ireland as that applying in Ireland. The Agreement cannot be read as supporting an interpretation that would require the equivalence requirement to apply throughout the whole island'. C O'Cinnéide, *Equivalence in Promoting Equality: The Implications of the Multi-Party Agreement for the Further Development of Quality Measures for Northern Ireland and Ireland* (The Equality Authority, Dublin, 2005) 35.

The genesis of the provision is, like the Charter, somewhat uncertain. According to Morgan, its roots may be traced to Article 5 of the Anglo-Irish Agreement 1985, which allowed the Irish Government latitude to comment on Northern Irish Affairs, but which also provided that some of the proposals being considered then might also have application to the Republic.⁶⁷ In his view, the concept of ‘equivalence’ in the Good Friday/Belfast Agreement delivered on the latter part of the 1985 Agreement for the first time and ‘in a significant way’.⁶⁸ From a Unionist perspective, it was an attempt to enshrine an obligation on the Irish Government to ‘practice what it preached’ as regards protection of human rights in Northern Ireland: ‘. . . we viewed that there were a lot of rights in Northern Ireland already that the Southern government should come up to the same standard as here—be equivalent in that sense—that is loosely in mind what the concept of equivalence means.’⁶⁹

The Irish Government, on the other hand, appears to have been confident that the human rights framework in the Republic was superior to that obtaining in Northern Ireland, though it was cognisant of the political imperative to commit to implementing an equivalent human rights package to that pertaining in Northern Ireland:

We took the view that the human rights framework in the South was probably at that stage superior to that in the North . . . But what we were saying here with equivalence was that with respect to the rights in the Good Friday Agreement, we weren’t just telling them what to do. We would live by them too. . . .⁷⁰

Whatever the objective behind the provision, it is clear that the equivalence commitment is legally binding on the Irish Government,⁷¹ though the scope and intensity of that commitment is open to question.⁷² Some have argued that it cannot be interpreted as a ‘blank cheque’ requiring every development in Northern Ireland to be matched in the South,⁷³ while others maintain that the

⁶⁷ Art 2(b) and 5(b) Anglo Irish Agreement (n 8).

⁶⁸ Morgan (n 1) 394. See discussion on the Anglo-Irish Agreement (n 8).

⁶⁹ Interview with political party representative, Dec 2004. Other political party representatives also indicated a ‘certain degree of sympathy’ with Unionist views ‘that at times Irish governments can be quite keen on certain rights introduced in Northern Ireland which they are not in the least bit keen on seeing introduced in the Republic’, Interviews of 29 Nov 2004 and 1 Dec 2004.

⁷⁰ Interview of 29 Nov 2004.

⁷¹ ‘By virtue of Article 2 of the British Irish Agreement, where the two governments pledged “to support, and where appropriate” implement the Multi-Party Agreement’s provisions, this equivalence requirement binds Ireland’: O’Cinneide (n 66) 32.

⁷² ‘The Irish State, at least in principle, has agreed to measure its protection of fundamental rights against the yardstick of an as yet to be drafted Bill of Rights from another neighbouring jurisdiction. The scope of this obligation could be interpreted in different ways, and the depth of the Irish government’s commitment is unclear in this regard, and may indeed remain that way’: R Byrne, ‘Changing Modalities: Implementing Human Rights Obligations in Ireland after the Good Friday Agreement’ (2001) 70 *Nordic J of Intl L* 1, 19.

⁷³ ‘. . . Some people are saying that there is a blank cheque here for all times (with the principle of equivalence) but there can’t be really because if in Northern Ireland they decided on some area with which we didn’t agree in the South well then it doesn’t mean that we are committed to follow their lead regardless’: Interview with civil servant, 29 Nov 2004.

Republic has a long way to go in terms of matching human rights protection in Northern Ireland in a number of vital areas.⁷⁴ Certainly, it seems that the Irish Government has interpreted the provision in a minimalist way by limiting its delivery to the specific commitments to incorporate the European Convention on Human Rights,⁷⁵ to establish the Human Rights Commission,⁷⁶ to ratify the Framework Convention on the Protection of National Minorities⁷⁷ and to implement enhanced equality legislation.⁷⁸

An interesting question arises as to the relationship between the Charter concept and the concept of equivalence in the Agreement. In formal terms, the concepts are distinct: the obligation on the Irish Government to implement equivalence in paragraph 9 is binding on that government, whereas the Charter concept in paragraph 10 does not bind either government. Morgan has argued that the Charter was a 'human rights gesture of no legal import', whose *raison d'être* is all but made redundant by the obligations regarding equivalence undertaken by the Irish Government in paragraph 9.⁷⁹ O'Cinnéide, on the other hand, makes a convincing argument that the Charter concept could be a means for developing a more robust concept of equivalence than that which is expressed in paragraph 9 of the Agreement. In his view, the broader thrust of the Good Friday/Belfast Agreement suggests that achieving a common stan-

⁷⁴ O'Cinnéide identifies a number of such areas, focusing in particular on equality legislation (n 66) section 7. One representative of a civil society organization expressed the view that the full potential of the equivalence provision has yet to be fulfilled by the Irish Government: 'So it really seems to me that what would be really interesting to go for in the Republic would be to look at what rights are better protected in the North than they are here, and to get that and use it because that (equivalence) seems to be a fairly strong commitment actually and it almost seems as if the Republic's government has been let off the hook on this one', interview of 29 Nov 2004.

⁷⁵ The Convention was incorporated by means of the European Convention on Human Rights Act 2003, which came into force in the Republic on 31 December 2003 (Act No 20 of 2003): <<http://www.oireachtas.ie/documents/bills28/acts/2003/a2003.pdf>>. There was widespread criticism of the method of 'interpretive' incorporation adopted by the legislature in the Act, which makes the Convention guarantees subordinate to the Constitution and contains very limited remedies: See generally, S Egan, 'The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation' (2003) 25 *Dublin University Law Journal* 230–48 (DULJ); D O'Connell, 'The ECHR Act 2003: A Critical Perspective' in U Kilkelly (ed), *The ECHR in Irish Law* (Jordans, Bristol, 2004) 1–11; and G Hogan, 'Incorporation of the ECHR: Some Issues of Methodology and Process', *ibid* 13–34.

⁷⁶ The Human Rights Commission was established in July 2001. Its powers and functions are set forth in the Human Rights Commission Acts 2000 and 2001: <<http://www.ihrc.ie>>.

⁷⁷ The Irish Government ratified the Framework Convention on 7 May 1999.

⁷⁸ See the Employment Equality Act 1998 and the Equal Status Act 2000. 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 1998 provided for the establishment of two distinct bodies, namely, the Equality Authority and the Equality Tribunal. The latter (formerly known as the Office of the Director of Equality Investigations) is an independent statutory body, established to investigate or mediate complaints of discrimination. The Equality Tribunal is a semi-State body established to work towards elimination of unlawful 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.

⁷⁹ Morgan (n 1) 404.

dard of rights protection in both jurisdictions should be an important *policy* objective.⁸⁰ Interpreted in this light, paragraph 10 can be viewed as a vehicle for achieving such a standard on a cross-border basis:

Firstly, the process of discussing and framing a charter of rights may help to flesh out the commitments entered into in the Agreement and create debate on the level of protection of rights that should be guaranteed throughout the entire island of Ireland. Secondly, if a text of a charter is agreed, whether it is expressed to be declaratory, programmatic or legally binding, it will provide a standard against which the protection of rights and equal opportunities in Northern Ireland and Ireland can be assessed.⁸¹

But if this rationale is to provide an objective for the Charter, it will be essential for the Joint Committee to analyse carefully existing protections in both jurisdictions, with a view to identifying those areas where each jurisdiction can borrow from the other to arrive at a better approach. If such a methodology is adopted, the content of the Charter would necessarily become much more focused and targeted than the content suggested by the Joint Committee in its Pre-Consultation Paper. At the same time, it is by no means clear that pursuit of 'common equivalence'⁸² is best obtained by the construction of an all-island Charter. Even if the Committee recognizes it to be a desirable objective, it might well conclude that a more suitable means for achieving it would be to amend existing human rights protections in both jurisdictions, leaving space for the Charter to fulfil an alternative and equally worthy objective.

2. To augment or harmonize 'upwards' human rights protections in both jurisdictions

An even more ambitious objective, stretching beyond the expanded notion of 'common equivalence' outlined above, is that of a Charter designed to augment the scope of existing human rights protection in the domestic law of both jurisdictions. Debate on the proposed content of the Northern Ireland Bill of Rights has already focused minds on the extent to which there is a need for additional human rights protection in the domestic sphere, going beyond the parameters of the ECHR.⁸³ Specifically, attention has focused on the appropriateness and feasibility of including economic, social, and cultural rights; protection for especially vulnerable groups like children; and of rights which would more fully reflect the 'particular circumstances of Northern Ireland', as the Bill of Rights is supposed to do. Likewise, reform and improvement of the existing human rights framework in the Republic has been a persistent theme

⁸⁰ *ibid* 36.

⁸¹ *ibid* 72.

⁸² This is the phrase coined by O'Conneide in his seminal work (n 66).

⁸³ S Livingstone, 'The Need for a Bill of Rights in Northern Ireland' (2001) 52 *Northern Ireland Legal Quarterly* 269 (NILQ).

in the Republic, to varying degrees, at least since the Constitution Review Group Report in 1996.⁸⁴ Therefore, some groups view the Charter concept as a potential springboard for the construction of a fresh instrument that will go beyond existing provisions in both jurisdictions.⁸⁵ Potential inspiration for any such instrument might be drawn from international instruments heretofore unincorporated in national law.

In this respect, there can be little doubt that charters of rights can assist in aligning national law with international law. However, any conclusion as to the merit of this type of instrument would need to be based on a very thorough assessment of the gaps that currently exist between national law and international human rights law in each jurisdiction. That process cannot fully be informed until the Bill of Rights is eventually drafted in Northern Ireland, when it can be expected that the gap in Northern Ireland at least will have narrowed considerably. If that process is completed, some would argue that the 'equivalence' objective would trump this type of approach because of its status in the Good Friday/Belfast Agreement:

Even if you get a joint Charter, unless its very detailed which seems unlikely for political and legal reasons, its not going to be as strong as the equivalence protections . . . At best it will simply confuse people; at worst it will be used as an opportunity to undermine the Bill of Rights, you know 'let's go for a Charter' which for both legal and political reasons will have to be a lot more aspirational than a bill of rights would be. Whereas, if we got a bill of rights, then the Republic would come in beautifully on it as could the rest of the UK.⁸⁶

Leaving aside this perspective, and assuming that the relevant gaps between national law and international law are identified, the Joint Committee would then need to consider what international law needs to be incorporated, and whether it should be incorporated in full or in part. If in part, which parts and why? The importance of coherence and consistency in any such endeavour cannot be gainsaid. The NIHRC has been criticized in several quarters in regard to its two draft Bills of Rights for not being clear on why it has included some international provisions and not others.⁸⁷ The Committee would have to consider whether a resulting Charter would simply restate international obligations so that they apply domestically. If so, would it draw on the exact wording, use them in whole or in part, or only use them to ensure domestic protection is greater than that provided internationally? The Human Rights

⁸⁴ Report of the Constitution Review Group 1996 (Government Publications, 1996).

⁸⁵ 'The Charter of Rights must reflect an imaginative and meaningful commitment to progressive human rights, rather than a lowest common denominator. The island of Ireland does not need more aspirational, programmatic and persuasive human rights tools—it needs an effective and accountable framework for enforcement': ICCL, Submission to the Joint Committee (Jan 2004) para 1.2.

⁸⁶ Interview with representative of civil society organization, 29 Nov 2004.

⁸⁷ C McCrudden, 'Not the Way Forward: Some Comments on the Northern Ireland Human Rights Commission's Consultation Document on a Bill of Rights for Northern Ireland' (2001) 52 NILQ 372; Livingstone and Murray (n 57) 107–8.

Act and European Convention on Human Rights Act already play some role in this regard, but the question is what role other documents such as the International Covenant of Civil and Political Rights (ICCPR), International Covenant of Economic, Social and Cultural Rights (ICESCR), Framework Convention on National Minorities, the European Union Charter on Fundamental Rights and European Directives would play. At the very least, the Committee would have to ensure that the text they proposed did not fall below the existing international commitments of the two governments.

3. To operate as a pledge by political parties to act at all times in furtherance of particular rights

A third possible objective of the Charter would be to serve as a pledge for political parties in both jurisdictions to act at all times in respect of or in furtherance of the rights enshrined. The historical development of the Charter concept and a textual analysis of the wording of paragraph 10 certainly indicate that this is the type of all-island Charter originally envisaged by the drafters of the Good Friday/Belfast Agreement:

. . . the Charter was seen as something which the parties would sign up to—all of the parties. It would be open to signature by all of the parties on the island so that you would have as it were the political establishment, as in the parties to the political or democratic process, would have committed themselves to safeguarding and upholding the rights to be specified in the Charter.⁸⁸

It may be that this type of instrument was perceived as providing a means of getting all parties on board after the adoption of the Good Friday/Belfast Agreement, including in particular those who were opposed to the Agreement. It offered a way of leaving open the door for them to participate in discussions. Its value would come in providing a common floor of understanding on basic minimum rights protection, which could end the culture of suspicion on both sides of the border:

It's again the concept that the two governments felt that the fundamental rights were already enshrined but weren't being respected and this is really a nudge to the parties. In other words we were going to get people like the IRA and UDA [Ulster Defence Association], UVF [Ulster Volunteer Force] etc to sign up to this and help people to exercise their rights. Their rights might have been there in law but not in reality. The origin there again was to get the parties to say that 'we are wholeheartedly committing ourselves to anti-sectarianism'.⁸⁹

In effect, an instrument of this nature could bind political parties to adopt a 'rights-based' approach to governance.⁹⁰ Of course, even if this was the

⁸⁸ Interview with member of political party, 6 Dec 2004.

⁸⁹ Interview with civil servant, 29 Nov 2004.

⁹⁰ Austen Morgan has commented that: 'At best, it [the Charter] amounts to political endorsement by democratic parties of the human rights protection created otherwise' (n 1) 404.

purpose which was loosely intended by the drafters of the Agreement, the Joint Committee is by no means bound to implement it. However, if this purpose is identified by the Joint Committee as being an appropriate one for the Charter, then the nature of rights and the method of enforcement will need to be carefully worked out. This objective is more likely to be achieved by delineating general principles to which the parties can commit themselves, rather than a detailed enumeration of substantive rights. Moreover, if it is to attract unionist support, it can be nothing more than a declaratory statement:

The success of any Charter will rely on the likes of the DUP [Democratic Unionist Party] and the Unionists signing up to it and its clearly for them to take a position on this but my own assumption would be that they would not hanker for it being any more than a declaratory statement because of the implications it has for all-island institutions.⁹¹

As a result, the Charter would be ‘essentially declaratory, not legally binding’ and ‘voluntary’ because, in the words of one of the drafters, ‘. . . there was to be no compulsion of the political parties to sign up to it because nothing was dependent on signing up to it’.⁹²

However, the role of the two Human Rights Commissions in such an enterprise must be questioned. Getting political parties round the table to discuss human rights in Northern Ireland was difficult.⁹³ Using a Charter of Rights for the island of Ireland as a tool may initially appear attractive as a practical exercise, but given that the title of the document suggests an all-Ireland basis, this is not likely to appeal to all political parties, particularly unionists. The Bill of Rights experience in Northern Ireland illustrates the problem in giving a constitutional and politically difficult task to a human rights commission.⁹⁴ In short, if this format for the Charter is pursued by the Joint Committee, it will need to reflect very carefully on the role which it should play in bringing it to fruition.

4. To enhance North–South cooperation as provided for in the Good Friday/Belfast Agreement

Given that paragraph 10 envisages that the Charter should have an all-island basis, one conceivable purpose for the Charter would be that of enhancing cross-border cooperation on a practical basis. Viewed through this lens, the Charter could be looked upon as a practical task on which the Joint Committee could start work, by identifying human rights issues which would benefit in particular from coordination on a cross-border basis:

⁹¹ Interview with civil servant, Dec 2004.

⁹² Interview with member of political party, 6 Dec 2004.

⁹³ Livingstone and Murray (n 57) 100–2.

⁹⁴ *ibid.* (n 57) 101; and see also Joint Committee on Human Rights, *Fourteenth Report. Work of the Northern Ireland Human Rights Commission* (15 July 2003) HL 142, HC 132, p 34.

It fitted in very well, when we were looking at what to give the Joint Committee to do. One of the areas we were looking at was racism because obviously racism was a difficulty facing both sides of the border so it seemed to fit in perfectly to give the Joint Committee a programme of work. My slight worry at the time was that the Charter was interesting but we wanted cooperation across a whole series of levels and we didn't want the Joint Committee to focus too heavily on the Charter to the exclusion of other matters. We wanted to give them the Charter to look at but we didn't want them to think that the North-South Joint Committee, which would be a substitute for the single Human Rights Commission would be confined to that area . . . that's why we put 'among other matters' in the reference to the Joint Committee in paragraph 10.⁹⁵

This approach could offer the possibility of North-South cooperation in targeted areas, culminating in a very specific Charter of Rights tailored to these particular areas. Certain human rights issues naturally lend themselves to this type of cooperation; for example, the treatment of travellers and asylum seekers, the campaign against racism, language rights and linguistic diversity.⁹⁶ It would also be consistent with the emphasis placed on the institutionalization and expansion of North-South cooperation generally in the Good Friday/Belfast Agreement. This includes the establishment of the North/South Ministerial Council (NSMC) in Strand Two of the Agreement, with its triad of purposes 'to develop consultation, cooperation and action within the island of Ireland' in regard to a number of distinct policy areas;⁹⁷ the British-Irish Intergovernmental Conference,⁹⁸ whose brief includes that of intensifying cooperation between the two governments on the all-island and cross-border aspects of areas such as rights, justice, prisons and policing in Northern Ireland;⁹⁹ and the emergence, albeit tentatively, of a North-South consultative forum.¹⁰⁰

⁹⁵ Interview with civil servant, 29 Nov 2004.

⁹⁶ See, eg, initiatives taken by the Nordic countries through the vehicle of the Nordic Council: <<http://www.norden.org>>; F Wendt, *Cooperation in the Nordic Countries: Achievements and Obstacles* (Almqvist & Wiksell International, Stockholm, 1981) 243-54; M Qvortrup and R Hazell, *The British Irish Council: Nordic Lessons for the Council of the Isles* (Constitution Unit, London, 1998); G Alfredsson, 'Minimum Requirements for a New Nordic Sami Convention', (1999) 68 *Nordic J of Intl L* 397.

⁹⁷ See paras 1 and 5 of Strand Two of the Agreement, which set out the functions of the Council. The various areas of potential cooperation are set out in an Annex and include agriculture, education, transport, environment, waterways, social security/social welfare, tourism, relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors, inland fisheries, health, urban, and rural development.

⁹⁸ The British-Irish Governmental Conference and its Secretariat were established in December 1999 by the British-Irish Agreement with the purpose of promoting bilateral cooperation between the United Kingdom and Ireland. The Conference replaced the Anglo-Irish Conference established by the Anglo-Irish Agreement 1985: <http://www.nio.gov.uk/index/key-issues/the-agreement/british_irish_intergovernmental_conference.htm>.

⁹⁹ See para 6 of Strand Three, Multi-Party Agreement (MPA).

¹⁰⁰ Para 19 of Strand Two of the Agreement mandated the North/South Ministerial Council to give consideration to the establishment of ' . . . an independent consultative forum appointed by the two Administrations, representative of civil society, comprising the social partners and other

Indeed, despite North–South cooperation having been an area of greatest difficulty during the negotiations,¹⁰¹ it has since become an unlikely success story.¹⁰² Focusing on practical, low-level cross-border matters, relatively free from political symbolism, has enabled unionists to accept cross-border bodies as necessary institutions for political, economic, social, and cultural well-being in Northern Ireland, as well as for improved relations between unionists and the Republic. The close consultation between the two Ministers responsible for agriculture in dealing with the outbreak of foot and mouth disease on both sides of the border in 2001 is an excellent example of how practical problem solving can foster mutual trust and understanding and bring about reconciliation in a very practical manner.¹⁰³ Indeed, the comments of Jeffrey Donaldson, speaking in December 2001, are a good illustration of how far the concept and indeed realities of cross-border cooperation have come:

You will find today, more so than in 1974 with Sunningdale and the Council of Ireland that there is less resistance to North/South institutionalised cooperation. That is heavily influenced by changes that have taken place in the republic. It is seen today as being much less dominated by the Roman Catholic Church, with changes to the Constitution that reflect this. It has become a more open society; a more modern society; economically, it is doing very well . . . [We] feel that perhaps we can do business with the Irish republic in a manner that will be mutually beneficial. So long as there is recognition of the principle of consent, then the border is going to be there as long as that is the wish of the majority of the population here but that should not prevent cooperation between the two areas that are part of the European Union . . . If the North-South ministerial Council and the Implementation bodies are about cooperation between both parts of this island then I think unionists rest easy.¹⁰⁴

members with expertise in social, cultural, economic and other issues'. See R Wilson, *North–South Civic Relationships: Where Next?*: <<http://www.crossborder.ie/pubs/wilson2002.pdf>>.

¹⁰¹ E Tannam, *Cross-Border Cooperation in the Republic of Ireland and Northern Ireland* (Macmillan, Basingstoke, 1999) 5; B Laffan and D Payne, *European Integration and Domestic Territorial Politics: INTERREG III and Cross-Border Co-operation* (UCD Geary Institute for the Study of Social Change: Discussion Paper Series, Dublin, 2004): <<http://www.ucd.ie/geary/publications/2004/integration.pdf>>, 6–7.

¹⁰² See generally, C McCall, 'From Barrier to Bridge: Reconfiguring the Irish Border after the Belfast Good Friday Agreement' (2002) 53 NILQ 479. See also *Implementing the Agreement: The North–South Bodies Five Years On* (UCD and QUB, *Mapping Frontiers, Crossing Pathways* Conference Report, 27 May 2005, UCD, Dublin): <http://www.ucd.ie/ibis/con_rep4.pdf>.

¹⁰³ P Clarke, *The Foot-and-Mouth Disease Crisis and the Irish Border* (Centre for Cross-Border Studies, Jan 2002): <<http://www.crossborder.ie/pubs/footandmouth.pdf>>. 'Well I suppose there is a huge chunk of agriculture which isn't covered officially but has de facto become part of cross-border arrangements—I mean because of "foot and mouth" for example. I think there was a degree of coming together on things like environmental protection matters—I mean from being on the environmental committee and having followed that—I mean that to me was one of those classic examples—I can't actually remember even at the very beginning DUP members getting particularly shirty when Sam Foster discussed environmental protection because its so patently obvious that its relevant...': Interview with member of political party, 29 Nov 2004.

¹⁰⁴ Quoted in McCall (n 102) 493.

Applying the logic of cross-border cooperation to the issue of rights could, therefore, produce a possible objective for the Charter, and one that at least deserves consideration: 'I just don't know, but I do think it is interesting to think about these institutions that lie between the two jurisdictions and whether the existence of a Charter might be a safety net to ensure at least a minimum standard of protection . . .'.¹⁰⁵

However, whether or not a Charter of Rights would be a useful, or indeed suitable, vehicle to underpin that type of cooperation would have to be thoroughly canvassed by the Joint Committee. As one interviewee stated:

I mean there is no doubt that in other areas, legislation is required to set the tone for things like fair employment, but I think when that kind of cross-border work is basically set to work principally on the basis of good will and perceived benefits to both sides, I think that you can exaggerate the benefits of a Charter if it was only going to be covering just specifically the North/South relations.¹⁰⁶

This view was also expressed by another political party representative: 'If it was just a case of sharing best practice, I think that need could be readily fulfilled without it being underpinned by a Charter because the legal position both North and South is not convergent'.¹⁰⁷ Certainly, this would appear to be the approach thus far adopted by the Joint Committee to its programme of work, whereby matters such as racism are worked on independently to the Charter project.¹⁰⁸ The suggestion being made here is that it should at least consider whether the Charter could be a suitable end-purpose to this type of cooperation.

D. Legal Status of the Charter and Enforceability

A decision on the appropriate objective for the Charter, assuming one is to be drafted at all, will necessarily influence the content of the substantive rights to be protected by it, as well as the legal status and method of enforcement, if any, to be adopted. The Pre-Consultation Paper issued by the Joint Committee laid emphasis on the method of enforcement as the distinguishing feature of each of the models proposed. As the preceding discussion has indicated, however, a preoccupation on the best method of enforcement may have served to distract attention from the objectives that could best be achieved by a Charter. Having canvassed some of those possibilities, it is possible to comment briefly on the question of legal status and enforcement.

¹⁰⁵ Interview with representative of civil society organization, 29 Nov 2004.

¹⁰⁶ Interview with member of political party, 29 Nov 2004.

¹⁰⁷ Interview with member of political party, 6 Dec 2004.

¹⁰⁸ T Hadden, 'Joint Protection of Human Rights in the Island of Ireland', Unpublished paper presented at the First Annual Student Conference, NUI Galway, 2002.

1. A legally binding and enforceable Charter?

As noted above, one of the options mooted by the Joint Committee (Model C) was that of a legally binding Charter which would be enforceable in the courts of both jurisdictions. At first glance, the attractions of a legally binding and justiciable document are manifold. First, is its visibility: it is something that can be more easily publicized. Secondly, and perhaps most importantly, is its practical advantage, in that it would guarantee aggrieved individuals the possibility of obtaining redress in their domestic courts for any alleged breach of the rights guaranteed. Thirdly, it would be consistent with the general thread running through the human rights provisions of the Agreement, namely that of securing a common basis for the protection of human rights throughout the island of Ireland.

Many of the groups consulted by the Joint Committee in the pre-consultation process strongly advocated this approach. The Irish Council for Civil Liberties, in particular, advanced the position that the benefits of this model far outweighed those of the others. In its view, a legally entrenched charter would offer concrete protection of rights, including of necessity the traditionally neglected category of economic, social and cultural rights.¹⁰⁹ Likewise, Amnesty International viewed Model C as the preferred option to push for by the Joint Committee, particularly in its view because of the lack of an overarching legal framework of human rights guarantees in the Republic of Ireland. As a strategic matter, it took the view that the ‘starting point for the debate must be the most ambitious target we can design, and we should dilute that model where agreement is impossible’.

The Consultation Paper does not set forth a blueprint or mechanism by which a legally enforceable charter could be achieved. However, it does point out the complex legal issues that would arise in terms of bringing about its fruition:

Would it have a higher status than other laws and, in which case, which ones? Specifically, how would it relate to the United Kingdom’s Human Rights Act 1998 and to the Northern Ireland Act 1998? And would it be subordinate to the Irish Constitution or in some way ‘trump’ that Constitution? Would a special court be required for the enforcement process and should the involvement of some international judges be sought?

The rationale for embarking on such a complex constitutional task is by no means clear, especially in the absence of a clearly demonstrable need and objective for the instrument in the first place. Similar questions were raised in both jurisdictions during the drafting of the Human Rights Act in the United Kingdom and the European Convention on Human Rights Act 2003 in the Republic of Ireland. The legal obstacles to constitutional incorporation of the

¹⁰⁹ ICCL, *Response to the pre-consultation paper on a charter of rights for the island of Ireland* (Jan 2004) (n 85).

latter instrument were regarded as being insurmountable and it is unlikely that the matter would be regarded differently in the context of an all-island Charter. The potential interaction of the Bill of Rights in Northern Ireland with the Human Rights Act 1998 is already such a contentious issue as to make it difficult to conceive at this point how a legally entrenched Charter could be added to the legal landscape that is already emerging.

This type of Charter also raises serious issues in terms of its political feasibility. It is not the type of instrument which could attract unionist support as it may be perceived as being akin to a de facto all-island constitution. And while it would offer the possibility of something exciting and ambitious and puts the Human Rights Commissions at the heart of the constitutional process,¹¹⁰ it must be remembered that construction of an all-island Charter of Rights would not take place within a changing constitutional context. Any institution which attempted to take on such a formidable task would have to be very careful of such an ambitious approach when it has not been accompanied by constitutional change in society which may encourage people to move, give the process impetus and encourage people's enthusiasm. Given that political parties in the Republic have shown little enthusiasm for the Charter of Rights so far, and have little knowledge of such, the Commissions should look to the experience of the Bill of Rights in Northern Ireland, where it has now been recognized that it cannot proceed without political-party backing.¹¹¹

Lastly, it would seem that a legally binding document had not been the intention of the drafters of the Agreement:

I don't think (and you can correct me if other sources contradict me) there was ever a suggestion that it would be a legally binding charter because as I said we already have the Irish Constitution and will have a Bill of Rights in the North so the legal provisions as regards buttressing human rights were going to be there and the bill of rights (its passage hasn't been easy and a final draft has not yet been made) is going into considerably more rights than the Southern Constitution (eg economic social and cultural rights) because it's a more advanced document.¹¹²

¹¹⁰ As Colin Harvey has argued: 'The idea of a Bill of Rights exerts a powerful hold. . . . At the most idealistic level, a Bill of Rights might promote the idea of consensual constitutionalism and express the common values of a political community. . . . the notion that there are such things as common values is open to question. Merely asserting their existence does not answer the complex questions which may arise. Common values may be little more than the expression of elite preferences, with minimal popular participation. Unreflective references to common values can perpetuate the vague urge for unachievable and pre-modern forms of consensus in complex and pluralistic societies. Deliberative democracy is easy to defend in theory, but rather harder to do in practice', C Harvey, 'The Politics of Rights and Deliberative Democracy: The Process of Drafting a Northern Irish Bill of Rights' [2001] EHRLR 48, 50.

¹¹¹ Livingstone and Murray (n 57). See J Sarkin, 'The Drafting of South Africa's Final Constitution from a Human Rights Perspective' (1999) 47 AJCL 67, 86; S Gloppen, *South Africa. The Battle over the Constitution* (Ashgate, Aldershot, 1997) 65; A Sparks, *Tomorrow is Another Country. The Inside Story of South Africa's Negotiated Revolution* (University of Chicago Press, Chicago, 1994).

¹¹² Interview with member of political party, 6 Dec 2004.

2. *A programmatic approach?*

A defining characteristic of the preferred approach advocated by the Joint Committee in Model B was its provision for a ‘programmatic’ Charter. According to this model, signatories to the Charter (including the political parties in both jurisdictions, the two governments and the Northern Ireland Executive, and potentially other international guarantors such as the European Union or the USA) would commit to a number of basic principles to be progressively achieved as well as a programme for their implementation. An independent body would then be charged with the task of monitoring implementation in a manner similar to that of the treaty-monitoring bodies of United Nations human rights conventions.¹¹³

As noted above, this ‘middle-ground’ approach proved popular among consultees. In their view, it offered a compromise between the two extremes of the legally entrenched model and the risk of the declaratory approach whereby the charter would appear as ‘nothing more than a loose set of aspirational principles’.¹¹⁴ However, as some of the responses noted, the elaboration of Model B is confused in some respects. While the essence of the approach is initially stated as being limited to certain ‘basic principles’, the list of rights advocated by the Joint Committee as forming part of the Charter is in fact quite extensive. The legal status of this Charter is also unclear. Would the commitment to implement the rights progressively be legally binding on the parties concerned or simply be akin to a ‘programme of action’, the achievement of which is desirable but not necessarily legally binding?¹¹⁵ Also, it is not clear whether this model is directed primarily at political parties. If so, the extent to which it would be possible to make such a commitment legally binding on those parties is manifestly unclear in the document.

Within the broad spectrum of objectives canvassed above, there is certainly scope for a programmatic Charter. The exact parameters of such an approach may vary, however, depending on the chosen objective to be achieved. If the objective of the Charter is to commit the political parties to a ‘rights-based’ approach to policy making and adherence to the principles of non-violence, it may make more sense for the Charter to take the form of a declaratory instrument, though the format of particular guaranteed rights may still be expressed in a ‘programmatic’ fashion. If, on the other hand, the objective being pursued

¹¹³ The specific example of the Committee on Economic, Social and Cultural Rights, which monitors implementation of the International Covenant on Economic, Social and Cultural Rights is given by the Joint Committee: *ibid* 17.

¹¹⁴ Alliance Party submission to the Joint Committee on its pre-consultation paper, above.

¹¹⁵ The pre-consultation paper simultaneously analogizes this model with the Vienna Declaration and Programme for Action, for example, agreed at the World Conference on Human Rights in 1993 and the International Covenant on Economic, Social and Cultural Rights. The former document is not legally binding on States, while the commitment to progressively implement the rights in the ICESCR is legally binding by virtue of Art 2 thereof: see paras 18 (e) and (a) respectively.

is to commit the two governments to pursuit of the goal of 'equivalence' or to cross-border cooperation in particular areas, other models of programmatic implementation might fruitfully be explored.

For example, one possibility would be the setting of very specific policy objectives or targets as regards selected human rights issues that each government would agree to implement in a programmatic fashion. An example might be the targets for social inclusion or gender participation analogous to those set forth in the South African Development Community's (SADC)¹¹⁶ *Declaration on Gender and Development*.¹¹⁷ This Declaration calls for equal representation of women and men in the decision-making bodies of Member States and SADC structures at all levels.¹¹⁸ Member States have recently agreed in principle to transform the Declaration into a legally binding Protocol, which it is hoped will accelerate further the implementation of gender commitments.¹¹⁹

Closer to home, equality-mainstreaming initiatives in Ireland and in Northern Ireland provide fertile ground for analysis in terms of comparable measures in a programmatic charter. Equality mainstreaming has been defined as requiring in essence that '... equality be seen as an integral part of all public policy making and implementation, not something that is separated off in a policy or institutional ghetto'.¹²⁰ Mainstreaming is a quintessential aspect of any programmatic approach in so far as the latter recognizes the need to tackle discrimination not just by means of formal anti-discrimination methods, but

¹¹⁶ The South African Development Council (SADC) is an alliance of South African States, established by treaty in 1992. The objectives of the organization include that of achieving development and economic growth, alleviating poverty, enhancing the standard and quality of life of the people of Southern Africa and supporting the socially disadvantaged through regional integration. The organization also aims to evolve common political values, systems and institutions; promote and defend peace and security; promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; achieve complementarity between national and regional strategies and programmes; promote and maximize productive employment and utilization of resources of the Region; achieve sustainable utilization of natural resources and effective protection of the environment; and strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the Region: <<http://www.sadc.int/home.php>>.

¹¹⁷ <http://www.sardc.net/widsaa/sgm/1999/sgm_genderdec.html>. See also the Addendum on the Prevention and Eradication of Violence Against Women and Children in 1998: <http://www.sardc.net/widsaa/sgm/1999/sgm_eradvio.html>.

¹¹⁸ F Banda, 'Going it Alone? SADC Declarations and the Gender Debate' (2002) *J of African L* 259 (JAL). The Charter of Fundamental Rights adopted by the SADC in 2003 is also noteworthy. Its objective is to facilitate the formulation and harmonization of policies which contribute to the creation of employment opportunities and to facilitate labour mobility. Under Article 16(3) of the Charter, all Member States are obliged to submit regular reports to the Secretariat. Under Article 16(4), the most representative organization of employers and workers must be consulted in preparing reports under Art 16(3).

¹¹⁹ See, 'SADC Ministers Endorse Draft Gender Protocol': South African News Features: No 108, Dec 2006: <<http://www.sardc.net/editorial/newsfeature/061081206.htm>>. For information on the rationale for the Protocol, see background document: <<http://www.sarpn.org.za/documents/d0001444/index.php>>.

¹²⁰ C McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland' (1999) 22 *Fordham J Intl L* 1696, 1699.

also by prioritizing equality in policy making and in practical measures.¹²¹ The most significant difference in equality-mainstreaming measures between the two jurisdictions, however, is that while the approach in Northern Ireland through the vehicle of section 75 of the Northern Ireland Act 1998 is legally binding, the approach thus far adopted in the Republic is not.

In the Republic, mainstreaming has been implemented through a variety of programmes, beginning with gender mainstreaming in the National Development Plan 2000–2006 and the development of poverty proofing in the National Anti-Poverty Strategy and later in the National Action Plan for Social Inclusion.¹²² ‘Equality proofing’ has also formed part of the Partnership 2000 national agreement and in the Sustaining Progress Partnership Agreement 2003–2005.

While these measures are laudable in terms of inculcating a substantive approach to equality throughout the public sector, they have suffered from a deficiency in commitment and resources. In Northern Ireland, on the other hand, section 75 of the 1998 Act imposes a statutory duty on public authorities to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between women and men generally; between persons with disability and persons without; and between persons with dependants and persons without. 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. If dissatisfied with the scheme, the Commission may ultimately refer the authority in question to the Secretary of State for Northern Ireland, who may impose an alternative scheme if necessary.¹²³ This approach is regarded as being infinitely preferable to the more permissive method adopted in the Republic and as being capable of yielding firm results.¹²⁴

McKeever and Ní Aoiláin have already suggested the adaptation of section 75 to the arena of social and economic rights by the enactment of a new statutory duty in Northern Ireland to promote and protect social and economic

¹²¹ ‘... a programmatic approach does not rely exclusively on legal remedies but operates to shape how legislation, policy and practice are developed and implemented’: G McKeever and F Ní Aoiláin, ‘Thinking Globally, Acting Locally: Enforcing Socio-Economic Rights in Northern Ireland’ (2004) 2 EHRLR 158, 166.

¹²² For a synopsis of mainstreaming measures in the Republic and in Northern Ireland, see O’Cinnéide (n 66) 50–5.

¹²³ It is open to the Commission to investigate the extent to which a public authority is compliant with a scheme and to investigate non-compliance on receipt of complaints from individuals. The Commission can again refer a case to the Secretary of State where the authority fails to respond to the recommendations of the Commission following any such investigation. Judicial Review and auditing mechanisms are also possible.

¹²⁴ ‘Equality mainstreaming in Northern Ireland is therefore founded on a firm statutory basis with a strong enforcement mechanism. . . . The adoption of equality mainstreaming strategies in Ireland is not a sufficient stopgap for the absence of a duty, because of the absence of any enforcement mechanism, or of any legal obligation requiring authorities to take mainstreaming initiatives seriously’: O’Cinnéide (n 66) 54–5.

equality.¹²⁵ This begs the question whether such an approach might be imitable in the context of a Charter of Rights more generally, particularly if the emphasis were to be on matters such as, for example, equality, poverty, racism and disability. This could take the form, in the first place, of committing each of the two governments and the Northern Ireland Assembly to setting out concrete targets on the range of rights identified in the Charter for a specific period of time. The method of enforcement could involve requiring the enactment of legislation which obliges all public authorities to take cognisance of the identified rights in implementing their policies and to take proactive measures to avoid violating the rights. Alternatively, or even additionally, it could involve establishing a monitoring body to assess the appropriateness of the targets identified and the extent to which they have been complied with in accordance with the recommendations of the Joint Committee.¹²⁶ The establishment of such a monitoring system would certainly give the document practical value, although the precise mechanics would require careful evaluation.¹²⁷ While stopping short of a justiciable Charter of Rights, and provided that its terms are sufficiently finessed¹²⁸ and anchored to an identifiable objective, this type of programmatic Charter might well add value to the range of rights protection already in place in both jurisdictions.

3. A declaratory approach?

A third model mooted by the Joint Committee in its Pre-Consultation Paper is that of a 'purely declaratory' Charter with no enforcement mechanism.¹²⁹ This model is perfunctorily dismissed by the Joint Committee on the basis that it would only have symbolic value and could not guarantee any practical differ-

¹²⁵ McKeever and Ní Aoiláin (n 121).

¹²⁶ In its submission to the Joint Committee on the Pre-Consultation Paper, the Conference of Religious of Ireland suggested a system of mainstreaming economic, social and cultural rights which would also involve the setting of concrete targets which if not achieved would be justiciable on a class-action basis or similar basis: CORI submission, 24 July 2003.

¹²⁷ Combat Poverty was sceptical of such an approach in its submission to the Joint Committee on the pre-consultation paper, noting that: 'The creation of a single all-Ireland enforcement mechanism for a single all-island Charter would be a highly political decision dependent on the approval of the two governments and the Northern Ireland Executive'; and further that 'The Joint Committee needs to set out more convincingly why it thinks a national level monitoring body would be more successful in compelling or persuading governments than the UN Committee [Committee on Economic, Social and Cultural Rights], which after all was established under the terms of a major international human rights treaty to which both sides have voluntarily adhered.'

¹²⁸ The comments of John Spellar, Minister of State for Northern Ireland, in his submission to the Joint Committee in 2003 are particularly germane here in relation to the content of rights proposed by the Joint Committee in its pre-consultation document where he warned that: 'Such detailed proposals as those on the use of emergency laws or the availability of continuing education are surely for politicians to take on the basis of a democratic mandate. Enshrining so much in an enforceable charter could curtail a government's ability to adapt to changing circumstances or set spending priorities and the ability of their electorates to hold them to account' (n 57) (4 Dec 2003).

¹²⁹ Pre-Consultation Paper (n 32).

ence to the protection of human rights in either part of Ireland.¹³⁰ Most of the respondents to the Pre-Consultation Paper dismissed the notion of a declaratory Charter on the same basis. Amnesty International, for example, was particularly trenchant in its opposition to this model and strongly urged that this option be dropped and given no further consideration. In its view, a non-enforceable declaration ‘. . . would add nothing to the current human rights provisions in the Republic or in Northern Ireland and would be a minimalist and wholly inadequate response to the processes enshrined in the Good Friday/Belfast Agreement’.¹³¹ Only one organization actually advocated a declaratory Charter as offering the best scope of enhancing existing human rights protection on the island, ‘in that it would complement current legislation and be flexible enough to respond to developments in human rights’.¹³²

There can be little doubt that if a purely instrumental view is taken of the Charter, an enforceable model, in whatever guise, will always trump its declaratory counterpart. This perspective is clearly the one taken by the Joint Committee and most of the respondents to the Pre-Consultation Paper. However, it is worth re-examining whether the almost mechanical dismissal of a purely political declaration is appropriate without a deeper consideration of its possible merits. In his analysis of proposals for the Northern Ireland Bill of Rights, McCrudden has indicated that discussion on the merits of drafting that instrument simply as a political declaration will also be ‘an extremely important issue’ in the context of discussions concerning the proposed all-island Charter of Rights:

For some, the potential ‘political’ significance of the Bill of Rights is considerable even without formal legal effect, in that by setting out for the first time the list of rights that the community aspires to, it may increase the likelihood that further discussion of the meaning of these rights may take place and provide the opportunity to consider how political action can be used to develop these rights further.¹³³

Before dismissing the declaratory model, the Joint Committee itself identified some practical advantages to this format. These include the likelihood of reaching agreement on a declaratory model more easily and speedily amongst the political parties of both parts of the island, the fact that it could have inspirational effect and because it could form the basis of a more incremental

¹³⁰ *ibid* para 16(a).

¹³¹ Similar submissions were made by Mental Health Ireland, the Irish Council for Civil Liberties (ICCL) and the Alliance Party.

¹³² Comments of the Confederation of British Industry, 7. While endorsing the notion of a Charter with enforcement and monitoring mechanisms in its submission to the Joint Committee, Age and Opportunity Ireland noted the potential value of a declaratory Charter of Rights, ‘The content of a Charter agreed by the two Human Rights Commissions would have a strong inspirational role and significant moral authority. Even if it provided no mechanisms for the implementation of rights, it would be a benchmark by which the implementation of services could be measured.’

¹³³ McCrudden (n 120) 374.

approach to the protection of human rights in the future when an enforceable model would be achieved more easily.¹³⁴ A declaratory model would also avoid the more theoretical concern that an entrenched Charter might lack democratic legitimacy where there is considerable controversy and disagreement as to its content.¹³⁵ Critiques of judicially entrenched bills of rights generally lament the democratic deficit inherent in investing power in an unelected judiciary potentially to overturn Acts of Parliament negotiated by elected representatives.¹³⁶ These concerns surely apply a fortiori where negotiation of the content of the instrument will have to straddle political and ideological divides in not one, but two jurisdictions. A further advantage of a declaratory approach is its greater potential for inculcating a culture of rights and educative value as compared with a legally binding Charter laced throughout with exceptions and qualifications.¹³⁷

Moreover, it is again important to point out that in the absence of a clearly defined objective for the Charter to begin with, it is a mistake to rule out a declaratory model in principle. Those close to the drafting process have pointed out that this option was probably the original intention of the political parties and the two governments in framing section 5 of the Agreement.¹³⁸ As noted above, if the chosen objective for the Charter was to be that of committing political parties to act in furtherance of particular rights, the argument for a declaratory Charter becomes most compelling. The negotiation process alone for such a document could act as a trust- and confidence-building measure on all sides of the political divide. Not only might an enforcement mechanism be difficult to apply to political parties which wield no executive power, but it may run the risk of acting as a 'sledgehammer to crack a nut',¹³⁹ since the incentive to comply with such a charter would emanate from the more pressing imperative to secure re-election:

Well political parties take their rise and fall from the wishes of the electorate. So if one was to print a report and the report was publicized that political parties were not adhering to human rights requirements and needs. Well if that is enough

¹³⁴ This is clearly the strategy adopted in regard to the European Union Charter of Fundamental Rights where the objective of the drafters was to draw up a text that could be legally binding and enforceable, see Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 CML Rev 1201.

¹³⁵ See generally, Darrow and Alston (n 58) 498–502.

¹³⁶ See, eg, the powerful critique by Gearty of the European Court of Human Rights: C Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal' (2000) 51 NILQ 381.

¹³⁷ This emphasis on raising awareness of fundamental rights was a central objective in the drafting of the EU Charter of Fundamental Rights, the express purpose of which was to make existing rights within the Union more visible, thereby deepening and strengthening the culture of rights within the European Union. The Preamble to the Charter states: 'To that end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in the charter.'

¹³⁸ Interview with member of political party, 6 Dec 2004.

¹³⁹ This phrase was used by one member of a political party during our interview in discussing the value of an enforcement mechanism for the Charter, interview of 1 Dec 2004.

to shake the faith of the community in them, well then that is the punishment that they receive. I think that it doesn't need to be any more than that.¹⁴⁰

If the policy goal to be achieved by the Charter was to be that of cross-border cooperation in particular spheres, the declaratory approach would be evidently more suitable than a legally binding model and arguably more suitable than a programmatic approach. The inevitable governmental preference for a declaratory approach to that of an enforceable model where particularly detailed commitments are concerned is obvious from the comments of one political representative:

Enshrining so much in an enforceable charter could curtail a government's ability to adapt to changing circumstances or set spending priorities . . . In general, I would point out the importance of ensuring that the charter is capable of applying equally in each jurisdiction and is seen to do so. This would be significantly more difficult if the provisions were enforceable, particularly where there were cost implications.¹⁴¹

Finally, the charge that the declaratory model would have a 'purely symbolic significance' may be short-sighted, in view of the examples that could be drawn on from other quarters. While the EU Charter of Fundamental Rights, for example, is still declaratory in nature and currently has non-binding force, it has been drawn on already by the Court of First Instance¹⁴² and by a number of Advocates General as a substantive point of reference in regard to fundamental rights which the Union is bound to protect.¹⁴³ The Universal Declaration of Human Rights has been drawn on for inspiration by national courts in articulating the substance of rights protected by national law. The example of the Harare Commonwealth Declaration 1991 is also an instructive

¹⁴⁰ *ibid.*

¹⁴¹ Interview of 29 Nov 2004.

¹⁴² Case T-54/99 *Max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-00313.

¹⁴³ See the comments of Advocate General Tizzano in the *BECTU* case: 'Admittedly, like some of the instruments cited above, the Charter of the Fundamental Rights of the European Union has not been recognised as having genuine legislative scope in the strictest sense. In other words, formally, it is not in itself binding. However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments . . . I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved—Member States, institutions, natural and legal persons—in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right': Case C-173/99, *BECTU v Secretary of State for Trade and Industry* (2001) All ER (EC) 647. Advocates General Jacobs and Leger have also relied on the Charter in cases concerning biotechnology (C-377/98 *Netherlands v Parliament and Council* [2001] ECR II-07079) and the right of access to EU documents contained in Art 42 of the Charter (C-353/99, *Council v Hautala* [2001] ECR I-09565).

example, enumerating as it does human rights standards to which the Commonwealth association is committed. While it is doubtful that there was ever any clear intention that Member States would be formally bound by the Declaration's language, subsequent developments have indicated that the Declaration could also determine future membership criteria.¹⁴⁴ Developments such as these in their respective contexts indicate that what may start out as a declaratory instrument may end up 'adding value' in ways not necessarily previously envisaged by its drafters.

V. THE WAY FORWARD

A. The Need to Finalize the Bill of Rights Process in Northern Ireland First

As noted above, and as now recognized by the Joint Committee,¹⁴⁵ it is clear that the Charter of Rights is dependent upon the Bill of Rights process for several reasons. First, it is not clear what the Bill of Rights will contain or if it will be legally enforceable, so any assessment of a Charter based on the concept of 'equivalence of rights' or beyond is dependent on the results of the process in Northern Ireland. Secondly, the Bill of Rights process in Northern Ireland has been fraught with difficulties and illustrates the problems of getting political parties in Northern Ireland to agree, let alone parties across the whole of the island of Ireland. Therefore:

It is premature, I think and we have not yet got all the Northern Ireland parties together to talk about a Bill of Rights for Northern Ireland and until that happens, it would be unwise to try and second guess what would happen subsequently in terms of a Charter because the discussion on the Bill of Rights may itself lead on to discussion around the Charter and once people are talking, the two may come together in some form. But I speculate.¹⁴⁶

¹⁴⁴ In 1995, the Heads of Government adopted the Millbrook Commonwealth Action Programme which outlines a tripartite plan to fulfil more effectively the commitments in the Harare Commonwealth Declaration. In the event of a member violating the Harare Principles, the organization's responses may include a public expression of disapproval from the Secretary-General, the appointment of a Commonwealth envoy and the suspension of participation in all Commonwealth meetings. A Commonwealth Ministerial Group on the Harare Declaration was also established under the Millbrook Action Programme in order to deal with serious or persistent violations of the principles contained in the Harare Declaration.

¹⁴⁵ The minutes of a meeting of the Joint Committee held on 27 February 2007 in Belfast (20th meeting of the Joint Committee) indicate that the Joint Committee proposes to resubmit a reduced bid to both governments for funding to engage a researcher to review existing research and compile a paper outlining various models and options for consultation. It goes on so say in paragraph 4.7 that 'The paper would form the basis of a consultation event on models and options for a Charter of Rights, possibly in 2008, when the Bill of Rights Forum in Northern Ireland has concluded its work', <http://www.ihr.cie/_fileupload/news/JointCommittee20th.doc>.

¹⁴⁶ Interview with civil servant, Nov 2004. Further, 'I think that because we want to establish, we want NIHR to establish and if we can get around to having a Round Table Bill of Rights Forum for the Northern Ireland political parties and wider civic society . . . that would come to some sort of consensus on what would be in a Bill of Rights—and it is fundamental for the effec-

Not only must a Bill of Rights process be finalized because of the potential content of any document, but also because it would indicate the political reality of being able to get parties together. As a political party representative commented:

The basis upon which we are cooperating needs to be established first, which means that we need to see a Bill of Rights established in Northern Ireland. I know the SDLP would be keen to move to an all-island approach first—but the very fact that they are bypassing the Bill of Rights and going the all-island route puts the shutters up and the very fact that it has been muttered that Dublin is considering giving speaking rights to Northern representatives in Leinster House again is something that is putting the shutters up with me to say ‘hey, hold on—good fences make good neighbours’.¹⁴⁷

Lastly, the role of the NIHR in drafting the Bill of Rights, some argue, has lessened its reputation and legitimacy. The Joint Committee must be wary of how it deals with the Charter of Rights.¹⁴⁸ The same issues seem to apply: what role will such documents play? What value will they add? What is the political context in which they have to be considered?

B. Not to Advocate an All-Ireland Approach, but to see a Charter as a Point of Collaboration

The Joint Committee should be aware that the concept of an all-island Charter will result in a debate with strong political undertones which have nothing to do with the greater protection of human rights per se. The ‘all-island’ nature of the Charter may be attractive to nationalists. However, Unionist politicians are likely to be suspicious of the ‘all-island’ aspect of the document.¹⁴⁹ In bringing forward its work on the Charter, the Joint Committee should attempt to preserve the neutrality of the concept. To do so, it should have a heightened awareness of the political gains that this instrument offers nationalists and the dangers of alienating unionist support for it. In order to do so it will need to ensure that there is further cooperation that provides real practical benefits without unification by stealth. In addition, in whatever guise the Charter may be forged, the Joint Committee should place stress on the notion of ‘corresponding obligation’ in regard to the contracting parties, as this might be something that unionist politicians could more easily sell to their constituents.

tiveness that that consensus is widespread—until we get to that point, we do not really know what the substance of the Charter of Rights would be’.

¹⁴⁷ Interview with member of political party, Dec 2004.

¹⁴⁸ Interview with representative of civil society organization, 24 Nov 2004.

¹⁴⁹ Hennessy (n 2) 147. Several members of different political parties that we interviewed each mentioned a preference for legislation in each jurisdiction rather than an overarching mechanism in discussing the mechanics of an all-island Charter of Rights: interviews held on 6 December 2004, 29 November 2004, and 1 December 2004.

C. Consultation

The Joint Committee's pre-consultation process failed to ignite a significant debate, even amongst a targeted audience on the value of an all-island Charter of Rights. Nonetheless, the limited response which the Pre-Consultation Paper did provoke has highlighted the myriad of issues that must be faced by the Committee in any future attempts to reinvigorate the Charter concept. Although the Committee clearly recognizes that consultation is important, this needs to be balanced against an agreed view from the Commissions themselves and some clear consensus as to what the document will actually contain. Submissions from and consultation with the stakeholders and the public are likely to produce a wide range of opinions and beliefs, and the Committee needs to find some way of not only consolidating those but more importantly coming to their own conclusions and own consensus, based on their expertise, as to the best document as a result.

Secondly, in the process of this consultation, it is important that the Joint Committee engages the political parties since the Agreement clearly puts political-party acceptance at the heart of the proposed Charter. As the President of the Irish Human Rights Commission has himself concluded:

My own personal view is that, if we want to prevent the process getting out of control and if we want to make the exercise politically meaningful, we need to engage the political parties. Unless the political parties are prepared to engage, nothing will happen. That view may not please some in wider civil society, but it is the reality.¹⁵⁰

Although it must not be used as political football, the Joint Committee's success in producing a document which is likely to be implemented will depend in large measure on its acceptance by and involvement of the political stakeholders. Related to this is the need for the Committee to be clear on what role they wish themselves and the political parties to play in the process. To what extent will the political parties have the final say on the content of the document, or will this be for the Joint Committee to determine? How will the Committee deal with any issue on which the political parties disagree with them? It may be important to set out at the start what is realistic and what role they would expect to achieve.

Thirdly, a Charter can provide an accessible code for the public, setting out their rights. Research shows that the knowledge of rights and perception of rights in both Northern Ireland¹⁵¹ and the Republic is lacking and there is a considerable need for education.¹⁵² If a Charter is to fulfil this role, not only

¹⁵⁰ Manning (n 47) 9.

¹⁵¹ A Smith, 'The Drafting Process of a Bill of Rights for Northern Ireland' [2004] Public Law 526, 533.

¹⁵² As Combat Poverty argued in its submission to the Joint Committee: '... the development of an all-island charter should be informed by a broad-based public education programme on the

in the process of its adoption, but also as one of its central aims, this requires that the text is readable, brief and that there is a sense of ownership over its contents, thus requiring a wide consultation process.¹⁵³ This has most certainly been the lesson learned from the drafting process of the South African Bill of Rights as well as that of Canadian Charter of Rights and Freedoms.¹⁵⁴ The consultative process embarked upon to secure agreement on the EU Charter of Fundamental Rights is often held up as a blueprint for negotiation and consultation for any Bill of Rights.¹⁵⁵ However, it must be remembered that the limited resources of the two Commissions would make it virtually impossible to embark on a wide-ranging consultative process.¹⁵⁶ Consequently, the allocation of a fixed budget to the Joint Committee itself or to the Commissions independently for this purpose is essential if a truly meaningful consultation process is to be established.¹⁵⁷

D. The Need to Appreciate the Complexity of the Task at Hand

There must be a clear timeframe that is realistic and not necessarily immediate. If a Charter is to be drafted with the consultation of many, and the development of a close relationship with political parties, this is more likely to take years not months. Although the Commissions state in their pre-consultation document that even a Model B approach¹⁵⁸ 'will not be too difficult to secure the agreement of the political parties throughout the island of Ireland to such

concepts and content of economic, social and cultural rights, on the options for implementation and so on. There is a challenge to popularize the understanding of rights and to simplify the technical and specialist language into more accessible and people-friendly terminology. This is necessary and vital to enhance the wider public's participation in charter process': (n 132).

¹⁵³ 'If the public feel they have ownership and have participated in helping to draft a Bill of Rights, then it is likely to increase legitimacy. This idea of public, participative democracy has helped countries that have adopted a Bill of Rights to secure its acceptance among the judiciary, politicians, administrators and public bodies': *ibid* 532.

¹⁵⁴ R Penner, 'The Canadian Experience with the Charter of Rights: Are there lessons from the United Kingdom?' [1996] Public Law 104, 107.

¹⁵⁵ McCrudden has suggested it should be considered as a worthy type of approach in regard to the drafting of the Northern Ireland Bill of Rights (n 87) 384.

¹⁵⁶ Again, the experience of the NIHRC is illustrative here whose efforts to mount a public advertising campaign regarding the Bill of Rights had to be stalled pending a budgetary increase from the Northern Ireland Office, Smith (n 151) 533.

¹⁵⁷ The minutes of the 19th meeting of the Joint Committee of 9 November 2006 indicate that this process is already well in train. Para 5.1 indicates that the Irish Government has given a commitment to providing discrete funding to the Committee so as to enable it to have a dedicated secretariat. In the meantime, the Irish Human Rights Commission (IHRC) is providing administrative support to the Joint Committee's sub-committee on racism, while the NIHRC is providing administrative support to the sub-committee on the Charter (para 5.4), Minutes on file at the IHRC office, Jervis Street, Dublin 1.

¹⁵⁸ This suggests 'it could be a charter which sets out a number of basic principles concerning rights as well as requiring a "programmatic" (i.e. a progressively developing) approach to their implementation. This would mean that, subject to monitoring conducted by an independent body, some discretion would be left to the governing authorities in both parts of Ireland to develop

a charter',¹⁵⁹ this is unrealistic. The NIHRC faced considerable difficulties when dealing with the phrase 'particular circumstances of Northern Ireland' in the Agreement, in the context of the Bill of Rights and in terms of what the Bill of Rights should contain. Some, among them unionists, have argued that this phrase required the Commission only to consider certain rights and take into account the wider UK context so as not to entrench rights in Northern Ireland that are not offered elsewhere in the UK. Others, however, believed the Commission should have taken a holistic and broad approach, and included provisions such as economic and social rights. Even setting out 'fundamental rights' or 'basic principles' such as those mentioned in the pre-consultation document has not been straightforward in the Bill of Rights in Northern Ireland. For example, among the 'fundamental rights' mentioned by the Joint Committee in its pre-consultation document are the rights of communities. The Commission in Northern Ireland faced considerable difficulties in defining these rights in the context of the Bill of Rights, and has been criticized for confusing the terms and rights of 'communities' as opposed to 'minorities' and suggesting provisions which may undermine various provisions of the Good Friday/Belfast Agreement itself. The fact that the Charter is intended to be a document for the 'island of Ireland' adds to the politically fraught difficulties of this task for the two Commissions. Further, these issues cannot be examined without considering the implications for the UK as a whole, particularly when this has been a concern raised by unionist parties, in particular in Northern Ireland with respect to the adoption of a Bill of Rights there.

VI. CONCLUSION

The above analysis has advocated that a number of basic issues need to be revisited by the Joint Committee before it makes any further moves to resurrect the concept of the all-island Charter of Rights in the Good Friday/Belfast Agreement. First is the need for the Committee to re-evaluate the extent of its role in relation to the Charter, analysing in particular whether it is necessarily mandated by the Agreement to produce a text of a potential Charter for consideration by the two governments and the Northern Ireland Assembly. Certainly, the wording of the Agreement suggests that the Committee, at the very least, must analyse existing human rights protections in both jurisdictions and arrive at a consensus on whether there is a need to supplement these by means of an all-island Charter. This will inevitably involve taking time to consider the appropriateness of adopting yet another document on human rights, rather than using existing instruments to promote a culture of rights or enhance protection.

measures over time which would make the rights in question a reality for the people living there': Pre-Consultation document (n 32) 6.

¹⁵⁹ Pre-Consultation document (n 32) 13.

An aspect of this enquiry will also necessitate consideration of the possible objectives of any such Charter, what its underlying values would be, its relationship with other human rights provisions and the legal context in which it would operate, and the best method, if any, of enforcement. In the current climate, where the Charter has aptly been described as being 'marooned in political apathy',¹⁶⁰ there can be little doubt that the Committee has its work cut out for it. Progress will inevitably be slow and cannot realistically be completed until a clearer picture of the likely content of the Northern Ireland Bill of Rights emerges. In the meantime, it is hoped that the above observations may be of some assistance in reinvigorating a more forthright assessment of the possibilities inherent in the concept of an all-island Charter of Rights in the Agreement.

¹⁶⁰ O'Cinnéide (n 66) 72.