








Human Rights and Peace-Building in Northern Ireland:

an international anthology

CAJ Committee on the Administration of Justice

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What is the Committee on the Administration of Justice?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights (FIDH). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the rights of all. We are opposed to the use of violence for political ends.

CAJ has made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Human Rights Committee, the Committee Against Torture, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, Extra judicial, Summary and Arbitrary Executions, and Freedom of Opinion and Expression, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international non-governmental organisations, including Amnesty International, Human Rights First, Human Rights Watch and the International Commission of Jurists. Our activities include: publication of human rights information; conducting research, holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, criminal justice, equality, and the protection of rights.

Our membership is drawn from across all the communities in Northern Ireland, and beyond, and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

In 1998, CAJ was awarded the Council of Europe Human Rights Prize in recognition of our work to promote human rights in Northern Ireland.

Human Rights and Peace-building in Northern Ireland – an international anthology

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Foreword

in dedication to Professor Stephen Livingstone

The Committee on the Administration of Justice (CAJ) is an independent cross community organisation working for a just and peaceful society in Northern Ireland where the human rights of all are protected. Since our formation in 1981, CAJ has campaigned for a Bill of Rights and, particularly in the last decade, we have invited a range of speakers to Northern Ireland to contribute their international perspectives to this local debate about how best to protect civil, political, economic, social and cultural rights.

This Anthology brings together a series of speeches given over the years at various events, conferences and seminars organised by the Committee on the Administration of Justice (CAJ).

The Anthology is compiled in memory of Professor Stephen Livingstone, who served on CAJ's executive committee for over 15 years, but who died tragically young in 2004.

The work for a Bill of Rights was particularly close to Stephen's heart, as was the need to make links between international and domestic human rights work.

The contribution that Stephen made to human rights in Northern Ireland, and indeed on the wider world scene, was beautifully summed up in a letter to the Livingstone and McCartney families from Professor Kader Asmal. Writing as the then Minister of Education in South Africa, Kader Asmal, recorded –

> *"I remember Stephen from the time when he became a human rights activist. Great seriousness of mind combined with extraordinary courage and clear intellect made his contribution irresistible. His greatest virtue was to ensure that people recognise the way in which the development and pursuit of human rights rely on ensuring that the ordinary person, whether protestant or catholic, would be able to reach out for legal clarities."*

"His subsequent progress as an academic and his appointment to public office reflected the way in which he worked with an abiding belief in a non-sectarian approach."

"He was a pilot in other words, and helped us navigate in the very treacherous waters of Northern Ireland. I am very saddened by his death and hope that others will pick up the banner that he has handed to us of a lively, committed, passionate human rights approach to public life. I shall remember him."

All CAJ activists from the 80s, 90s and 2000s will also continue to remember Stephen with affection and deep respect.

We hope that the following Anthology will both be a fitting memorial for a great and good man, and signal a willingness in this, CAJ's 25th anniversary year, to take up the human rights banner that Stephen bequeathed us.

Justice Beverly McLachlin

Justice Beverly McLachlin was called to the Bar of Alberta in 1969, to the Bar of British Columbia in 1971, and practised with different law firms from 1969 – 1975. Initially she worked as an academic – as a lecturer, associate professor and professor with tenure at the University of British Columbia 1974 – 1978.

Thereafter, Beverly McLachlin was appointed to the County Court of Vancouver 1981, to the Supreme Court of British Columbia 1981, and to the Court of Appeal in 1985. She was appointed Chief Justice of the Supreme Court of British Columbia in 1988 and was appointed to the Supreme Court of Canada in 1989, of which she has been Chief Justice since January 2000. Justice McLachlin has numerous publications to her name.

"The Canadian Experience of a Bill of Rights"

Chief Justice Beverly McLachlin, Supreme Court of Canada[1]

A central problem facing many democracies at this point in time is how we deal with human rights. Generally western democracies feel that there must be some recognition of individual and minority rights within a majoritarian democracy as it has developed on the British model. The question is how we go about doing this.

In Canada, we have tried a variety of ways. We started with the British model – being, as we were, a colony of Britain. There was no written constitution – other than that dealing with the separation of powers necessary for a federation – hence, no constitutional bill of rights. Nor did we, until the middle part of this century, have much in the way of written legislation guaranteeing rights. While there had been a number of cases in the 1930s in which the courts in Canada had affirmed an implicit freedom of expression and certain implicit democratic rights, much in the way the Australian High Court has done recently in Australia with respect to freedom of speech and certain aboriginal rights, human rights were not formally recognised.

Then, in the 1960s and 1970s, we witnessed a growing interest in human rights statutes. Each of the provinces and the federal government introduced human rights statutes, which dealt with issues such as employment equity and discrimination. They shocked a lot of people at the beginning. Many employers asked "why do I have to provide a toilet for females? I'm quite content to run my business with men only" or "what kind of country is this where I am not allowed the freedom to have as many or as few toilets as I want?". As you can see – a very high level of debate generally! But in reality

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[1]This text reflects the oral remarks made by Justice McLachlin at a specialist CAJ organised seminar held in January 1995.

> *"It seemed to people that the best way for us to live together was to have some sort of an understanding of the rights of minorities and individuals in the context of this multi-cultural society."*

the change was big and I do not mean to trivialise it. Many people felt that these new laws represented an unjustifiable invasion of their liberties.

However, over the years, I think a consensus developed that human rights protections were, by and large, a good thing. Canada is a country which was based originally on two colonies – one French and one English – with a subsequent overlay of immigration from all parts of the world: we are consequently a multicultural society with a great deal of religious, racial and cultural diversity. It seemed to people that the best way for us to live together was to have some sort of an understanding of the rights of minorities and individuals in the context of this multi-cultural society.

For a while we continued on the basis of human rights statutes supplemented by a federal Bill of Rights which purported to have some kind of quasi-constitutional status, to which the courts took a very conservative approach.

In the 1970s, the Prime Minister of the day – Pierre Elliott Trudeau – decided to crown his last term in office by "bringing back the constitution to Canada" and taking the amending process away from the Westminster parliament, together with a constitutional Bill of Rights binding provincial and federal governments. He embarked on a process of discussion and debate aimed at achieving as much consensus as possible between the provinces and the federal government. He was largely successful, although in the end Quebec did not sign the document (this is one of the outstanding grievances lying behind some of the present difficulties that we are facing).

After much discussion, debate, and hearings, a Charter of Rights was agreed to. I should say something about the process, since in retrospect it was very important in securing public acceptance of the document. We heard so much about it; there was so much debate; so many different interest groups which were funded to participate and present their viewpoints (aboriginal groups, women's groups, poverty

groups and so on) that in the end, practically everyone knew about the Charter and a lot of people felt that they had had a hand in developing it. It was their document. It was not something imposed on them from the outside.

So, what is in the Charter? Basic protections for rights such as freedom of speech, freedom of religion, democratic freedoms, an equality and non-discrimination provision, a general liberty provision, and a number of provisions aimed at the criminal justice system. It is a unique document in that it did not follow the American model but rather posed rights and enumerated them in the language we are used to – some of which is nearer to the European charters of rights than to the American – and then made those rights subject to several conditions. These conditions – which ensured the primacy of majoritarian government – were necessary to secure approval; otherwise the Charter would never have been adopted.

There was a great fear, and rightly so, that the powers of the legislatures and parliament would be reduced too much; that the judges would be given too much power; and it was felt that parliament and the legislatures must retain the right to override the courts in the case of a real dispute over the ambit of rights. So we have a number of compromises to ensure that the power of parliament continues.

The first is in Section 1, which says that every individual is guaranteed the rights enumerated, except insofar as there are reasonable limits, which can be demonstrably justified in a free and democratic society. In effect you have your right, but it can be limited or overridden if a government law impinging on it is found to be reasonably justified in a "free and democratic society". This means that the rights are not absolute in an American sense, even on paper. They are subject to certain limits, which are seen to be for the good of everyone.

In addition there is the "override" provision. Section 33 says that if a government wants to pass a law which violates Charter provisions (and even fails the test of Section 1 because the law cannot demonstrate its reasonableness), it can do so if it is passed by a certain majority. It can then remain on the books for up to five years when it should be reviewed. This "override" provision applies to all the rights

except democratic rights (voting rights and so on). It has not been used very much, and the only significant time it was used was by Quebec when they had a language law which was found to be unconstitutional in that it limited freedom of expression in an unjustifiable way. The legislative assembly in Quebec used the "override" provision but, at the end of five years, chose not to renew the law, in favour of a law in conformity with the Charter. Our former minister, Mr Mulroney, was very upset about the "override": he thought that it should not be there. It certainly detracts from the logical symmetry of the document but it was something that had to be conceded at the last minute to get the parliamentarians to agree to the Charter. The provision has not been abused, so it has not posed a great problem.

The Charter has changed the legal landscape in Canada and I can briefly list those changes in a minute. This came as a surprise to many people, even its supporters. The general expectation was that this document would be something of a dead letter and would be interpreted conservatively by the courts to reflect the *status quo*. Indeed some of the opponents of the Charter had suggested that the Charter would limit such rights as we already had. We all know the history of the American Bill of Rights which in the first century of its use was used to uphold slavery and all sorts of things which would not be countenanced today, and we know a Charter is only as good as the interpretation it receives. The expectation was, because Canadian courts had always been very conservative on rights' issues, that the Charter would continue to be interpreted in a similar way. If that had been the case, the Charter would not have made much difference.

In fact, however, this has not proved to be the case. I think this is due partly to the process I referred to earlier – the extensive debate which had taken place and the fact that so many people had indicated that they were serious about the document. This meant also that the courts themselves did a lot of thinking about it. Whatever the reason, the Supreme Court of Canada in its first decision signalled very clearly that it was going to view this document in a broad and purposive way, and the rights should be interpreted generously, giving full respect to the citizen or the minority group alleging infringement. It was made clear that this approach should govern all future cases. This signalled to the lower courts how they should go about their

jobs and the result, I think, has been that the Charter has been much more significant than even its framers had anticipated. The factors in making the Charter effective were, to recapitulate, the process leading up to its passage, the fact that the judiciary took an open and purposive point of view and, additionally, the fact that after the adoption of the Charter there was continued public participation.

"...the Charter has been much more significant than even its framers had anticipated. The factors in making the Charter effective were, to recapitulate, the process leading up to its passage, the fact that the judiciary took an open and purposive point of view and, additionally, the fact that after the adoption of the Charter there was continued public participation."

The government provided funds to minority groups to make Charter arguments. So it did not become an elitist document; it became a document used by ordinary people. I should mention in connection with the judiciary that at the same time that this was happening, we had an opening up of the ranks of the judiciary. There was a perception in society that it was not good enough to have a judiciary composed (pejoratively put) of "ageing males". People felt that, without going into tokenism, we needed a bench representative of the society that we had. That too made the Charter effective.

What are the changes? We have had the Charter now for twelve years, so I could go on and on, but I will try to run through some of them briefly. The criminal justice system is obviously a very important area: we have guarantees regarding detention, right to silence, right to counsel, search and seizure, interrogation (and confessions indirectly, so that as a matter of practice we have videos used in all criminal case interrogations in most areas), and trial procedures (with guarantees for a prompt trial). In this latter respect, we had to speed up the work of certain courts. In one area of Canada, near Toronto airport, there were very many drug cases being tried, and people were not being brought to trial for 4 or 5 years. Though most of the accused were out on bail for much of the time and were not incarcerated, the delay was nevertheless a flagrant violation of Charter guarantees. The court had tried to find remedies but basically the government had done little in response. Ultimately our court issued a very controversial decision where we said that if there were flagrant

and lengthy delays, it was appropriate for the trial judge to issue a stay of proceedings. This is very draconian: someone is charged with and quite possibly guilty of a very serious offence, and a stay is entered. The public was very upset about that but the courts did it as a last resort: it was the only way (other methods having been tried) of bringing the system of justice into line with the Charter. In the longer view, I believe that the decision can be defended. Now one does not have these delays. If the price was stays on some cases, at least at the end the system of justice is moving much more in accordance with the Charter than before.

Another area is trial procedures. The Charter has affected the composition of juries, and the use of stand-aside provisions to pack a jury one way or the other gave rise to a controversial decision on the right of cross examination in sexual assault cases. We had what is called a "rape shield" law in effect, which imposed a blanket prohibition on cross-examination by accused persons of anything to do with a victim's previous sexual history. Our courts said that that was too draconian because it demonstrably prevented an accused from raising certain defences, which the law said were open to him. So, we struck it down but suggested that parliament improve it. I used this example because I think it shows how the Charter has worked. The immediate response to striking down a law like that is criticism of the court from the group that is affected: in this case women who are rightly concerned to secure convictions for sexual assault. What then happened was that the matter went back to parliament, and within a few months, after rigorous debate, a new law was passed which hopefully this time (it has not been challenged yet) will withstand Charter scrutiny. This is a pattern which has emerged. If possible, we try to strike out only an offending portion of the law or read it up or read it down to save the law, but if we cannot and must strike it out, the matter goes back to the parliament or the legislature, and usually one then has a new debate, and very quickly another law is in place.

"So, rather than thwarting the will of parliament, the courts may be viewed as working in tandem with it. Obviously they are independent, but they work together in the sense that by determining that legislation is bad, hopefully new legislation, which passes constitutional muster and better respects the rights guaranteed by the Charter, is passed."

So, rather than thwarting the will of parliament, the courts may be viewed as working in tandem with it. Obviously they are independent, but they work together in the sense that by determining that legislation is bad, hopefully new legislation, which passes constitutional muster and better respects the rights guaranteed by the Charter, is passed.

Quickly on other issues: in sentencing, there is a guarantee against cruel and unusual punishment. Under that provision, provisions for indeterminate sentences for dangerous criminals have been upheld. If we had a death penalty, it might well be challenged under this provision. Extradition has arguably been affected since liberty comes into play and if there is an extradition request to a country which does not meet minimal concerns, it might well be challenged. Penal law is affected also: we have held that, notwithstanding a sentence of incarceration passed by a court, there is a residual liberty interest. There have not been many prisoner cases, and those which have been brought have not had a great deal of success because the courts are prepared to allow fairly wide discretion to prison authorities in handling difficult situations and so on. But a minimum of fair procedure – e.g. governing a move to solitary confinement for example – would be guaranteed, I would think, under these provisions. So the criminal justice system has been affected very greatly by the Charter. I believe that, in general, police interrogations are much better conducted.

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I cannot say that we have eliminated all cases of police brutality – there have been a number of notorious examples in the last years – but I do believe, in talking with people who are lawyers in the field, that the interrogation system and the general way that people are treated is at a higher level than it was before. Police are obliged to take care before they search, before they seize, before they detain: they know they have to justify their actions and they do take care. It is not as easy and not as casual as it was before. I did not come prepared with all the statistics, but I read recently an article in one of our leading newspapers citing statistics saying serious crime has, if anything, diminished somewhat in the last few years. People still are securing convictions. There are, it is true, stays because of a

technical violation of rights, and there are cases where laws, which are designed to create certain offences, are struck down or limited, but generally the process is working reasonably well.

Equality and discrimination: we have not had an enormous number of cases but I can cite some of them for you. Under the equality provision the right of a non-citizen to practise law was upheld; the mandatory retirement provisions were upheld (it was argued they violated equality provisions as well as liberty); limited parental rights to make decisions on behalf of children have been recognised; we now have some contentious cases before us concerning child support payments; we have challenges by common-law couples and gay couples challenging certain benefit schemes they are not allowed to participate in; successful challenges for pregnancy benefits; and paternity leave for fathers adopting a child. As regards freedom of expression we have dealt with cases on hate literature, signposting cases and so on. We have adopted a middle road between the American absolutist position on freedom of expression and the more continental European approach, which permits significant limits on freedom of expression, and I think the balance has been reasonably well received.

Freedom of religion: Sunday shopping laws have been struck down; parental instruction in education has been addressed. The limit here is that one's religious beliefs cannot justify imposing those beliefs on others against their wishes or in a way that harms others. An interesting guarantee is Section 7, which guarantees every individual's liberty, subject to "principles of fundamental justice". This is not fully defined yet, but the majority of the Court has left it open to cover more than the criminal process. It may cover things like freedom of movement and parental rights and other basic freedoms which we take as inherently part of what our society takes as befitting the individual, and pertinent to how the individual is entitled to live his or her life.

In the criminal sphere, the liberty section has been used to strike down absolute liability offences: there has to be a *mens rea* component. We have said however that it may be objective, which allows certain manslaughter and environmental offences. We have also allowed

automatism as a defence, relying on the same provisions – the argument running that if you did not have a guilty mind, you should not be deprived of your liberty.

Democratic liberties, equality of voting powers and so on: the court has said that we will not insist on one-person, one-vote in an absolute form but that there should be, subject to other considerations (e.g. the ability to service a very large riding or whatever), general voter parity. In summary, I think there have been great changes due to the Charter and that our society, in my own view at least, is probably a better society for that."

There are critics of the Charter; there are people who say that the judges have too much power and laws should not be struck down. But one must take the long view of this: when one looks at where laws have been struck down, one usually finds that there is legislative action to replace them with something better in fairly short order. I think that, on the whole, the balance has been struck in a reasonable way. Indeed the argument can be made that the functioning of democracy has been enhanced by a constitutional bill of rights because it has given a voice to individuals and minorities, which, if they are not given a voice, can threaten the functioning of democracy. Grievances can start to build up to a point where people start to lose confidence in the system and then we can expect forms of reaction, which we would rather not have. It is much better to allow a minority group or a disgruntled individual to go to court to argue his/her case in court and have them win or lose it, than to have them resort to violence or try to take other anti-social measures.

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The Charter has really empowered people who before felt a sense of victimisation and a lack of empowerment. The Charter, with the previous legislation, has really created a different climate in Canada. People take their human rights very seriously and hold them very dearly.

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To give you an example: talking to a cab driver in Quebec city last weekend, the issue of the emergency measures introduced in Canada in the early 1970s came up. An organisation called the FLQ in Quebec was using violent means to advance their political agenda and they had bombed some buildings and taken some hostages (one of whom was killed). It was an alarming situation for a country that had never seen anything like this before. The premier of the province of Quebec asked the federal government to impose the War Measures Act to dispense with the usual civil liberties. The Act was imposed and police arrested many people who had nothing to do with FLQ but had gone to the same cafes, or were friends of friends, or young radicals. They were, however, released quickly and the state of emergency ended, so that one might not think of it as having great significance twenty years later. But the taxi driver was really angry and upset about it and complaining that "that was a terrible thing that Trudeau did when he arrested those 200 people: that was in violation of our fundamental liberties." People have long memories. Perhaps this story epitomises the value system and culture that has grown up in our country. Notwithstanding the anti-crime sentiment, and the right-wing view that the "police have to get tougher," there is an acceptance that the individual and the minority have certain constitutional expectations of society, and that the people who govern cannot overstep them.

I have gone on long enough. Let me just conclude by going back to the question I started with – the question of how you go about dealing with rights. There are a couple of models: you can constitutionalise them or you can choose not to. If you constitutionalise them, you have the sort of thing I have been describing in Canada. If you take the other route, two things can occur: you might have absolutist majoritarianism, which would mean the elected government could do as it chooses. Or you may have what has happened in Australia recently, and what was happening to some extent in Canada before the Bill of Rights, that is judicial

recognition of what are called implicit rights. I suspect that, in this day and age, when human rights are so accepted by so many countries on such a basic level, absolute majoritarianism is probably untenable. So the real choice for people may be between a system where you set your rights constitutionally or one where you allow the courts to develop them on an ad-hoc common-law basis, as is being done in Australia. That is perhaps where the debate should focus.

My personal view is that it might be better to proceed by expressly entrenching these rights in the constitution. You then have a more general acceptance in society that these are the rights which govern; you have a better basis for developing a coherent jurisprudence; and, given that the judges are going to be legislating on these areas of conflict anyway, you cannot avoid some exercise of judicial power in determining the values of the nation and in resolving areas of conflict when the rights of the individual and the minority come into conflict with the majority. The Chief Justice of Australia once said to me, having weathered great criticism over their freedom of speech decision, that he wished they had a written Bill of Rights. Then the courts would have a document to refer to, and it would make the task of judging easier, and make the decisions more acceptable to extreme right wing elements, which find decisions upholding individual's rights against majoritarian interests unacceptable. Such groups might often find the decisions more acceptable if they were based on some document recognised by society as a whole.

Thank you very much.

John Shattuck

John Shattuck was sworn in as Assistant Secretary of State of the US government's Bureau of Democracy, Human Rights and Labour in June 1993. Immediately preceding this appointment, he was Vice-President of Harvard University where he taught human rights and civil liberties law.

A long time human rights advocate, Mr Shattuck was the Executive Director of the American Civil Liberties Union (ACLU) Washington Office from 1976-1984, having previously (1971-1976) served as ACLU National Counsel, litigating in the areas of privacy, government secrecy and political surveillance. In a voluntary capacity, he was vice-chair of the US section of Amnesty International and was in the executive of the Leadership Conference on Human Rights.

"Human Rights, the Northern Ireland conflict and the peace process"

John Shattuck, US Assistant Secretary of State for Democracy, Human Rights And Labour, Clinton Administration[2]

I come today to Northern Ireland as President Clinton's Assistant Secretary of State for Human Rights. Having in the last two years travelled all over the world on human rights missions, I just want to make a couple of observations about the world that we are all living in today and to put this conference in some context. This is a time of enormous tragedy and hope for human rights all over the world - six years after the fall of the Berlin Wall and the end of the Cold War, and five years before the end of the bloodiest century in history. We know of the tragedies of this time all too well - I certainly personally know them very well having been engaged with them and travelled to them repeatedly. The great forces of conflict that have been unleashed in places like Bosnia and Rwanda seem in many ways very far from here – but in the world we live today, everything is very close. There are many other places where human rights have been destroyed and where even the horrors of genocide, which we thought had been banished forever, given the world's revulsion at the Holocaust, have reappeared like ghosts.

But there is also enormous hope to be found in the powerful, worldwide, popular, grassroots movement – of which all of you are a very central part – for human rights and democracy. This movement has in many respects fundamentally changed the face of the globe over the last six or seven years. Not only through the liberation, of course, of all of Eastern Europe and the countries of the former Soviet Union, but also even more powerfully and recently in the transformation of South Africa. This country has been transformed into a multi-racial society

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[2] This speech was given as a keynote address to a human rights conference organised by CAJ in March 1995.

and a multi-racial democracy, headed by a powerful and perhaps the most distinguished figure in office today, also a former political prisoner, President Nelson Mandela.

We also have the brave example of millions of Cambodians, in an often forgotten part of the world, who defied Khmer Rouge terrorism to go to the polls to vote for the first time in their country's history not so very long ago. We have the return of democracy and human rights in perhaps halting ways (but nonetheless there) to places such as Haiti and El Salvador, which not very many years ago were deeply deeply riven by crisis and human rights abuses. In the case of Haiti, such was the situation until just a few months ago.

We can see many triumphs for human rights around the world. Let me tell you just one brief personal story in a way that shows the dramatic changes that have occurred. I was earlier this week in Geneva at the United Nations Human Rights Commission, where I met my counterpart Sergei Kovalyov, Director of the Russian Ministry of Foreign Affairs Office of Human Rights. Not so many years ago, he was a Soviet political prisoner and when I met him two years ago, he and I had a flicker of recognition that somehow we had encountered each other at some earlier stage of our lives. It turned out that I had been the Vice-Chair of Amnesty International working on his case when he was a former Soviet political prisoner in Siberia for eight years. He has now moved from being a prisoner of conscience to a Russian Minister of Conscience, and he was now one of the principal critics of his government's human rights abuses in Chechnya.

"Today, here in Belfast, there is another odyssey of hope, another struggle for human rights taking place before the world – and all the world is watching."

Today, here in Belfast, there is another odyssey of hope, another struggle for human rights taking place before the world – and all the world is watching.

You in this room are propelling it forward. Northern Ireland in the last seven months has become one of the places where visions of peace and justice are coming to life. These visions were perhaps once held only by grieving relatives and families – including

many of you here – but are now vindicating the hopes and dreams of people of Northern Ireland of various backgrounds, eager for a better life for their children and a new start for their country.

Of course these events are not happening by magic. The demanding and often tedious work of democracy and the challenges of economic development still lie ahead. But there is another task – an urgent task – one that involves building political and legal structures of justice, civil liberties and reconciliation. This task is the responsibility of government, together with everyone in a society working to overcome decades of violent struggle.

Movement towards the future begins with a responsibility of governments and people for reckoning with the legacy of the past. The human cost of long conflict is felt not only in lives lost, but also in pervasive damage to society. The tragic history of violent conflict must be confronted and then transcended on the way to reconciliation.

What do I mean by reconciliation? I mean the responsibility of governments to help end discrimination, protect civil liberties and promote equal opportunity. I mean the responsibility of paramilitary groups to decommission their arms and obey the rule of law. I mean the responsibility of groups in society to set aside differences for the larger project of building a better future, in which different traditions and communities in conflict come to live together, and see each other as partners in a common project of strengthening a shared society. This is the great enterprise in which all of you are engaged.

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This is not an erasure of memory or of truth – but on the contrary, a construction of a shared public space in which people are not identified by their differing identities, but one where they associate with each other through new cross-cutting networks of commerce and culture, mediated by an overarching commitment to a peaceful society grounded in justice, civil liberties and the rule of law.

Two absolutely essential and related ingredients of justice and reconciliation are firstly, a climate of security and secondly, and perhaps even more importantly, the protection of civil liberties and human rights. Unless people feel fundamentally secure in their persons and homes, there can be no rebuilding of society riven by conflict. Basic physical safety must be assured to all, irrespective of political beliefs or affiliations.

"The other major element of reconciliation is respect for civil liberties and human rights. Human rights must begin at home. The timeless expressions of the Universal Declaration of Human Rights must be translated into the daily prose of governance."

The other major element of reconciliation is respect for civil liberties and human rights. Human rights must begin at home. The timeless expressions of the Universal Declaration of Human Rights must be translated into the daily prose of governance.

The challenge of putting respect for human rights into the responsibility of government is perhaps the greatest and most urgent challenge of the peace process that is underway. History has shown that real reform, real democracy, real reconciliation, real justice, real human rights, cannot be guaranteed by any specific set of political mechanisms, unless those mechanisms are complemented by a structure of tolerance, which in turn, and above all, must be protected and promoted by government. Civil society, the arena lying between government and the individual, in which citizens meet each other as people, is the seedbed of democracy and freedom.

A friend and former colleague of mine in Harvard, Robert Putnam, published a book last year called "Making Democracy Work". In it, he traces political development in Italy from the late Middle Ages to the present day. He found that the one critical variable that held true over all the centuries for those areas of Italy that have successfully engaged in political reform and the cultivation of freedom was civic culture – groups of people coming together to solve social problems and ultimately, today, groups of people protected by civil liberties. Indeed, the emphasis among social scientists and political writers in recent years on civil society did not spring from abstract reflection, but from real life experiences, like those of dissidents behind the so-called Iron Curtain, people such as Vaclav

Havel and Adam Michnik. They saw that civil society was an organising principle that not only gave form to dissent, but also enabled them to carve out their own freedom, even under totalitarianism.

The dissidents struggling against Soviet-style dictatorship faced awesome challenges. The starkness of their struggle etched all the more vividly what the French writer Alexis de Tocqueville said in the United States more than a century and a half ago: no amount of government reform can ever assure long term democracy in the absence of cross-cutting networks of local groups which can flourish without fear of reprisal. That is the essence of civil liberties, and that is the essential task of government.

The American Catholic theologian, John Courtney Murray, characterised the clauses of the US Constitution that guarantee the religious freedom of all, while disallowing the primacy of any one creed, as the "great article of peace". The United States itself is a highly imperfect society – it has known many injustices and continues to grapple with its many human rights shortcomings. But we in the US have in place a legal system and a political culture that enables us to confront, debate and work to correct injustices and inequalities, and deeply felt divisions over questions of morality and law. Our commitment to the procedures of democracy is rooted to the civil culture and civil liberties that we constantly work to deepen and strengthen.

The task of civil liberties, of creating public space where all can come together on an equal basis, can only proceed in a climate in which individuals feel secure and in which their individual human rights are protected. How then, to get to there from here?

I would like to outline several basic steps that might begin the process of building a framework of justice and reconciliation – steps that you are already taking, but steps which I would like to review. The first three are directed towards further neutralizing the culture of violence that has plagued Northern Ireland for decades. A climate of tolerance and fairness cannot exist in a society divided along political and social lines.

I think the framework for this process involves three basic elements. First the rule of law and civil liberties, protected by government, is the role of

"I think the framework for this process involves three basic elements. First the rule of law and civil liberties, protected by government, is the role of government and it should enjoy the confidence and commitment of all the various groups in the community. The rule of justice should be incorporated as an essential element in the peace process."

government and it should enjoy the confidence and commitment of all the various groups in the community. The rule of justice should be incorporated as an essential element in the peace process. Unlike many societies, you already have systems of criminal justice on which to build – the law, the police and the courts. The foundations of these systems, shared with comparable institutions of the US, the Irish Republic and other democratic societies, have proven their worth. However, as part of the peace process, it is the responsibility of government to strengthen the commitment of these systems to civil liberties.

Efforts should be made by the government to recruit substantially more minority members into all ranks of the justice system and to increase its local contact and accountability. We in the US are dealing with similar issues ourselves, and we have much to learn and share with you as we strive on both sides of the Atlantic to make our justice systems into genuine guardians of civil liberties and democracy.

One cannot overestimate the importance of the rule of law for the health and survival of civil society. The judiciary and the law it interprets and enforces must stand above the political fray and render its judgements in the light of abiding principles of human rights and equity. The judiciary must not only check abuses of power – it must also give citizens the opportunity to pursue their grievances and work out their differences, on issues great and small, in a shared civic arena. Basic civil liberties, such as the right to trial by jury, the right to silence and against forced self-incrimination, and the right to due process of law are all essential elements of an effective justice system. So are the rights of prisoners to be visited by their families and to fair and humane treatment. So is the right to truth, the right to speak one's own language and other basic elements of justice, fairness and tolerance, which lie at the heart of government's responsibility in its promotion of civil liberties.

The second element of this framework is that the rule of paramilitary groups must be supplanted by the rule of law. Paramilitary groups derive their power from secrecy and dedication to their particular goals. Civil society, by contrast, is strengthened precisely by openness and by the yielding of defensive identities for the common good. While guns silence dialogue and fracture society, the builders of civil society actively work to promote a shared feeling of security and active ongoing dialogue among all the sectors of society.

The history of violence leaves a legacy of suspicion and fear. It is the responsibility of governments to promote a climate of tolerance and civil liberties that can overcome that climate of fear. Anyone and everyone desiring a peaceful future for Northern Ireland must support the dissolution of terrorist organisations, the decommissioning of arms, the demobilisations of troops and the elimination of such deadly security measures as the use of plastic bullets for civilian crowd control.

The third element of reconciliation is the creation of a broad opportunity for employment and economic growth, and the end of discrimination. History has repeatedly shown that economic opportunity has benefits far beyond material well-being. It creates the breathing room necessary for civil liberties, it empowers people throughout society, and it gives everyone a stake in continued, peaceful, social evolution.

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For the values of civil liberties to take root they must also extend to the workplace – non-discrimination and equal access are not only important for a durable reconciliation; they also make good economic sense. Northern Ireland is fortunate in having a highly skilled population offering tremendous talent and potential. In this respect, as in many others, you are well ahead of the game already.

Over the last quarter century, you have suffered from high levels of unemployment, disproportionately affecting Catholics, while the disappearance of large-scale industrial sectors has combined with the

poor security environment to stifle economic growth. Many young people have emigrated precisely because of the absence of hope that has for so long pervaded the community.

Today there is great hope, and out of this hope it is clear that the economic future of every man, woman and child in Northern Ireland is intimately bound up with the peace process. Material prosperity stands or falls with the chances for peace. It is for these reasons that President Clinton has put one of our most distinguished public servants, former Senator George Mitchell, in charge of our efforts on behalf of economic development for Northern Ireland, and why we will be hosting a Northern Ireland investment conference this spring in Washington. This conference must address issues of justice and equity as part of a strategy for economic rebuilding of Northern Ireland.

The ceasefires have not only stilled the violence. They have also ushered in new opportunities for growth, which in turn will fortify the peace. Throughout all of these efforts the United States is seeking to play a strong supportive role – supporting the Joint Declaration of 1993, the Framework Agreement, the efforts to build on the ceasefires, and strengthen the justice system and support all those who want to lay down arms and walk the paths of peace.

The United States does not intend to take sides, but will do everything it can to support peace and work with the governments of Ireland and the United Kingdom to build on the courageous steps that have been taken in recent months. Beyond the institutions of justice, and the private sector and the government, there is another group of institutions that has a very crucial role to play – indeed, I would say, the critical role to play in the process of civil liberties development.... and that is you.

You of course will know this role, because you are already playing it. The non-governmental organisations represented here in this room, and your counterparts elsewhere, are in many ways the key institutions of peace in Northern Ireland, and the key institutions of justice. It is you who synthesize politics and culture; it is you who cultivate ties of trust and solidarity; it is you who create networks of cooperation across group lines; and, above all, it is you who pressure governments to deal with the injustices that have occurred.

Non-governmental organisations (NGOs) provide a forum for people to discuss and organise around issues, thrash out their differences, create alliances and coalitions, and press governments for justice. In short, your role in cultivating civil society is very, very important. Northern Ireland's NGOs, including all the ones represented in this room, have played stirring roles in the struggle for human rights. Very brave people, whose work and commitment and great courage and vision, over many years, should be at the heart of this conference, and should be what this conference is dedicated to, as you press governments to meet their responsibility to protect civil liberties.

Respect for human rights is not, and must not, be used as a camouflage for a partisan political agenda of any kind. It is, rather, a vessel of justice and reconciliation. Guaranteed human rights do not simply balance communities off against each other - they make it possible for communities to develop a broadly-shared allegiance to justice that enables them to work out their inevitable differences.

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In civil society, democratic politics is not a zero-sum game in which somebody's gain automatically means someone else's loss. It is true that human rights find their realisation in the highly imperfect arena of politics – and politics will be with us until the end of time, as will the competing claims of various interests. But that does not free governments from their responsibility to support respect for human rights in the processes of law; they cannot shirk this responsibility by invoking claims of national security, or social stability, or economic development, or religious difference.

Human rights protections have emerged in the course of a long and painful struggle, in the United States and elsewhere, in a sweeping historical drama displaying great cruelty and injustice alongside great

courage and vision. The challenge of reconciliation and justice must meet the unique features of every society even as it aspires towards universal norms of justice. It is hard, painful work but it is work well worth doing. You are showing the way, and it is the heart of your struggle and that of millions of others around the world in this period where there are grassroots movement for human rights in many countries – and nowhere more poignantly and powerfully than here in Northern Ireland – that is changing the face of the globe that we are living in. I congratulate you and salute you. Thank you for inviting me. I bring you greetings from our President, and wish you the very best as you address the issues of the day in this very important conference.

Justice Albie Sachs

Albert (Albie) Louis Sachs was born of immigrant Lithuanian-Jewish parents in Johannesburg in 1935. As a civil rights lawyer, activist and political dissident, he was detained twice without trial and, in 1966, went into exile. As a leading member of the African National Congress, he was targeted as a "race traitor" by the *apartheid* security forces who, in 1988, planted a car bomb in Maputo, Mozambique in an attempt to assassinate him.

Albie survived, but he lost part of his right arm, and the sight in one eye. Undeterred, he went on to take an active role in the negotiations for a new constitution and in ensuring that the new South Africa would cultivate a culture of respect for human rights. He was appointed to South Africa's first Constitutional Court by the then President Nelson Mandela, and he continues to serve as a Justice on that Court.

"Transition in a divided society – The role of the South African judiciary"

Justice Albie Sachs, South African Constitutional Court[3]

In February 1995, in a room jam-packed with dignitaries and not much larger than this, eleven people sat in their gowns on a slightly raised platform and listened to Nelson Mandela say "The last time I stood up in court was to find out if I was going to be hanged, today I rise to inaugurate South Africa's first Constitutional Court".

It hardly gets more dramatic than that, and individually we were sworn in afterwards. I am going to tell you a little bit about the court, its composition, its role, its function, the kind of work we do etc. The day might not be too far off when, in this part of the world, you have a court exercising similar functions. It might be interesting then for you to know what our experience was of a court functioning in a deeply divided society, one with a long history of intense conflict, of people living in separate areas of the same country having a sense of different histories, different destinies, and yet locked together by geography, bound by history and interrelated through conflict - all trying hard to make a country out of their country.

The inauguration of the Constitutional Court of South Africa was a euphoric day as you can imagine, and we felt especially graced to have Nelson Mandela launching us and giving the imprimatur of the president to the new institution. To show our gratitude, eight months later we struck down two proclamations of President Mandela!

The first of these presidential proclamations related to local government elections. Closed democratic local government elections in South Africa

[3] This address was given at a lecture hosted by CAJ in April 1998.

were very important, in some ways even more important than the national elections, because at the level of local government you had the problems of housing, health, crime, personal safety etc. These are often the areas where the divisions of society are often most strongly felt and where flashpoints are the greatest. Now for the first time, black, white, Zulu speaking, English-speaking and Afrikaner-speaking were all voting as citizens in the areas and localities where they lived. We struck down the proclamation authorising the structures for the supervision of the elections in the Western sector (a hotly contested area) on the basis that they did not comply with certain provisions of the Constitution.

In very simple terms, parliament entrusted the President with the power of issuing proclamations to alter legislation dealing with the organisation of local government elections. The Court held that Parliament could not entrust that power to the President, Parliament itself had to pass the law. A proper law had to be adopted according to certain procedures, with readings in the house, a chance for the public to be involved and so on. Even though it was Parliament itself authorising the President, that was unacceptable. If Parliament had laid down all the details and principles of the law and simply gave the President the power to adopt regulations that would have been acceptable. But to allow the President to deal with such important questions of policy was not acceptable, and we struck the proclamation down in various critical judgements.

What was the reaction of the President? We were all very anxious to see how he would respond. He issued a statement immediately saying that when he had passed the proclamation he acted on legal advice but he accepted now that the legal advice was wrong, and thus fully accepted the decision of the Court. We are now living in a constitutional state where nobody is above the law and Mandela almost turned the defeat into a victory, as if to say 'see what a marvellous country I am President of?'.

Although initially we had a large number of cases dealing with a great body of issues, the important thing was having the Court itself, the written constitution, and a set of principles and procedures laid down in a negotiated form. That way, people felt they knew where they stood, they knew the framework within which government operated, and they knew what their basic rights were. In a society where conflict

is always threatening to erupt and touches on deep historical passions, the knowledge that there is that framework, that the particular problem can be contained, that there will be wise men and women dealing with the problem within agreed principles, has an enormously calming effect on society. Whether a case is won or lost, one accepts the decision because it came from this body of people who are functioning in terms of agreed principles and setting out the reasons for their decisions in a way that becomes acceptable. If one accepts the process, one accepts the principles, and in the context of South Africa, I think one could argue that that has been an enormous source of stability in our country.

South Africa is still a fragile country, it is still dealing with enormous problems of injustice and inequity, and still has the machinery of the past trying to adapt to new powers and functions. Although we have a new constitution, we have the same people, and with that we bring in our old mentalities, our outlooks, our angers, our hatreds and our hopes. We did not suddenly reconstitute ourselves as human beings - we are still the same 40 million people as before, but the framework within which we function is a completely different one. So the first thing a new constitutional order does is establish a framework within which government functions, and that deals naturally with the relationship between the legislature, the executive and the judiciary, as well as the relationship between national, provincial and local government.

The other function of a constitutional structure is to establish certain basic norms and principles in society which are binding on everybody and which ensure that everybody has certain basic agreed upon fundamental rights.

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In a society that is functioning quite well, where the popular public culture is one of respect and tolerance and so on, these things are not as important. I am not saying that to be a good decent modern democracy you have to have an entrenched bill of rights, a constitutional court, etc. For example, I have spent some time in Sweden, Holland and Norway, all of whom have very progressive, decent, open, tolerant societies, but whose constitutions are

historical documents from the last century. The constitutions are not important guides to current government; people do not rush to court to have laws struck down - because they are relatively homogenous societies, and as such have developed cultures of tolerance, of mutual give-and-take, and a great diversity of personal choice and opinion. But in South Africa, it was different. We did not have that shared common history. We had to establish the norms and principles that would guide everybody, including the institutions.

Let me give you a few examples of the kinds of cases our Court has dealt with. The most spectacular by far was the decision in which the Constitutional Court of South Africa declared the Constitution of South Africa to be unconstitutional - that was unique!

That case emerged from the two-stage process of constitution making. In the old regime, it was the minority - the whites - who effectively had all legislative and executive power, control over the judiciary, the army, the police force, the civil service and so on. There were a few exceptions but it was basically a white parliament. Soon they began to realise that there was no other way but to negotiate settlements. They could not contain international impatience, all the time violence was threatening inside the country, and there were no major black figures of any substance or credibility willing to work with the variants of *apartheid*. They had to negotiate.

But they were scared that if they handed over parliament to a democratically elected constituent assembly, there would be no protection for the minority at all. Now remember at that time in South Africa, the minority behaved like the majority although they were the minority in number - their languages were the official languages, they occupied the central business districts, they controlled the state administration, the decent housing areas and so on. It was the minority in charge, and the majority living on the outskirts of the city and country, whose languages were despised, whose history and culture were despised, whose sense of identity, personality and belonging to the country was dismissed, who were divided up into all sorts of little groups.

The minority was fearful of going from a privileged position to an oppressed one, so they wanted to press ahead with negotiating the

constitution together with the majority. The majority refused, as they saw it as an exercise of minority power to write the constitution. The majority insisted that the only body that could have legitimacy to draw up a new constitution for South Africa would be one in which everybody participated. That way it would have a mandate from the whole nation and it alone would have the authority and legitimacy to adopt a new constitution.

The majority were also saying that they could not draw up the constitution, as they were self-selected people sitting around a table who did not have a mandate from the population at large. They felt that if a self-selected group could draw up the constitution, a similar group could undo the constitution afterwards. The constitution then would not have either the legitimacy of history or a sense of involvement of the whole nation. People could say 'I am not going to obey that constitution, I was not there, I was not represented', or 'some little group there wrote the constitution and they represented fifteen to thirty per cent of the population, we were eighty per cent and we only had fifty percent of the vote'.

The minority on the other hand were afraid that if they handed over constitution making to a majority in a constitutional assembly, they would have no guarantees that their land would not be taken away, that they wouldn't be oppressed, that they wouldn't be treated as they had treated others. Suddenly they discovered humanity - they are only human after all! They argued that the whole point of a constitution was that it did not leave everything simply to the majoritarian electoral process.

There were certain core values and certain basic processes that would help keep that society together and acknowledge pluralism, diversity, divergence, and the right to be different as well as respecting the particular interests of minorities and individuals.

They argued that if they simply allowed the majority to draw up the constitution, they would have no guarantees that their minority interests would be respected with their rights.

"There were certain core values and certain basic processes that would help keep that society together and acknowledge pluralism, diversity, divergence, and the right to be different as well as respecting the particular interests of minorities and individuals."

So who was right – the minority or the majority? The answer of course is that they both were. As I find so much in your Agreement, the art of negotiation is not for one position to triumph over the other, but for each to accommodate the other, in as fairly a balanced way as is possible.

So in the end we went for a two-stage process of constitution making. The first stage was to create a framework for the final constitution, and I stress that it was a framework. We elected a constitution-making body through proportional representation to ensure that all groups big and small were represented and not just the major parties. That way no one could say 'this is not our constitution, we are just a small group and we were not represented there'. The constitution-making body was quite large – 400 in total – and there was no threshold or cut-off point. It operated through a simple list system - national list and provincial list. We agreed that only a two-thirds majority could adopt the constitution, and we also agreed that certain principles would be laid down in advance which would be binding on the constitution at the time.

At first we thought these would be a few very simple principles, for example, that there would be a Bill of Rights, separation of powers etc, but we ended up with thirty four principles, and some of them had sub-sections. The minority groups negotiated for those principles to be as binding as possible, whereas the majority wanted to keep the constitution-making body as open as possible. But we ended up with thirty-four principles that had to be complied with by the constitution-making body, which then became the parliament, which then elected the president, which operated through the interim constitution and interim Bill of Rights. So the question arose as to who would decide on whether or not the thirty four principles had been agreed to and complied with, and that was the origin of our Constitutional Court - we had to have an independent judicial body, operating outside the political process and depending on the interim Bill of Rights, to ensure that the thirty four principles were complied with.

In the end, we had something like eighty different people litigating in the process. I was in charge of logistics, and what a job that was. Some lawyers thought this would be their great moment in South African constitutional history but in reality we had time-keepers whose job was to press the buttons: green light meant five minutes, amber meant two

minutes and red meant your time was up. So that was their contribution to the making of the new South African constitution! In the end we struck down the framework text on nine different grounds. It then went back to parliament and was rectified there. When it came back to us again we certified it. So we had the extraordinary privilege, if you like, of being the court that declared the constitution to be unconstitutional because it did not comply with those principles.

The first 'proper' case we heard was on capital punishment. South Africa used to lead the world in capital punishments, with over one hundred executions a year. Our constitution was open on the subject: it said everyone should have the right to life and no one should be subjected to cruel, inhuman, degrading punishment or treatment. But it was then subject to a broad general limitation clause which said that the rights set out in the Bill of Rights could be limited by a law provided that law was reasonable and justifiable in an open and democratic society based on freedom and equality. This results in balancing decisions all the time on proportionality, so the question was whether capital punishment - which clearly violated the right to life and which clearly was an inhuman punishment - could be justified as a reasonable limitation, justifiable in open and democratic countries.

The Court decided unanimously that it was unconstitutional and we all agreed on a basic decision, the opinion on which was given by the President of the Court. However, each of us on the Court had separate opinions. For my part, I felt the limitation clause did not apply at all, because there are no limits to death. There cannot be an incremental invasion of the right to life: you are either alive or dead; proportionality does not come into it at all. Other judges adopted different approaches. But it was no accident that the first Constitutional Court of South Africa, operating in a country where a clear majority of people from all backgrounds supported capital punishment, felt it to be unconstitutional.

That may be partly due to the clinical way in which the Constitution was written. Ours is nothing like the American constitution which says that no-one shall be deprived of life, liberty or property except by due process of law, which would appear to authorise capital punishment if

there is due process of law. If this was interpreted by some of the more 'aggressive' judges as there never being due process of law when you have taken someone's life, then so many arbitrary factors come into it and inevitably there will be injustice and discrimination. For example, if you have a good lawyer and you come from a well-off family with whom the judge can identify, the statistics show that the chances of your being sentenced to death are far smaller than if you come from a poor family, if you are black or if you do not have proper legal representation and so on.

So each of us on the Constitutional Court gave the same decision but for different reasons. We are not popular as a result of that decision, at least that is we are not popular in South Africa, but we are very popular in Sweden!

The Court has also declared traditional corporal punishment to be unconstitutional. We felt that the deliberate infliction of pain as a means of punishing people violated the whole ethos and spirit of our new society and the values in our new constitution.

The only case where we have had people protesting with placards outside our Court dealt with selling liquor on Sunday. Surprisingly it was not the Sabbatarians who protested, but the chain stores that wanted the right to sell booze on Sundays! They made up one side of the case, and the other side of the argument was made by the 'shebeens' (that is an Irish word, isn't it?) - the illegal taverns and so on. In the localities, the taverns did not want the chain stores to be selling alcohol; they wanted to restrict the formal sale of alcohol in the big stores so that the smaller outlets in the townships would have less competition.

An interesting part of the case dealt with the treatment of economic activity - which is a section of our Bill of Rights that changed in the final text - but the most contentious part dealt with the fact that these stores could not sell liquor on Sundays, Good Friday and Christmas. The argument put forward was that this was exalting Christian holidays and endorsing Christianity as a form of state recognised religion. Our constitution is not anti-religious by any means - it contains the phrase 'God bless Africa'. It allows for religious instruction in schools, provided

it is done on an equal basis and without discrimination. There is no strict separation between religion and the state; there is no wall, and that has been part of the history and culture of our people. There is a lot of tolerance in allowing people to practise their faith in circumstances that are meaningful for them. We also felt it gave democracy a softer landing than adopting quite a harsh position such as that in the United States, where you banish any religious observance in any state institutions whatsoever and end up with mobilisation to the contrary - "bring prayers back into school"! In those situations, society can end up more divided than tolerant.

The position our Court adopted was not motivated by any feeling for or against the idea of the state co-operating with religious bodies or institutions. The problem was singling out for a secular purpose - that is the sale of liquor - the days of observance of one particular religion. What message was that sending to Muslims, to Jews, to Hindus? That somehow their holy days were less important, their religion less important? Was it saying that they were living in that sense in a Christian country and not a country that had freedom of religion in which the majority of people were Christians and had a right to express their Christianity in public and in private life? Was it saying that whether you are Christian or not you are prohibited from selling and buying liquor on those days?

In any event, the Court was divided. Two of the judges said it was a violation of freedom of religion, conscience and thought, in a broad sense - I was one of them. It was not so much singling out Christianity itself as opposed to other religions, it was the state compelling observance of an orthodoxy in what is really a very heterogeneous society. The state cannot require citizens to obey any set of beliefs or faiths, whether they are Marxism, Leninism, neo-liberalism, Confucianism or Christianity.

But my colleague and I admitted that it was such a trivial breach for such a slight thing that it could be justified under the limitation clause. The way the court saw it was that if it had the effect of stopping the sale of portable liquor on weekends, the Easter weekend (when there is an enormous amount of driving) and Christmas (where there is also a lot of driving) it could be justified. So the law was not struck down in the end.

But it was a very interesting discussion of the whole meaning of state endorsement of a particular faith in our country. I was able to quote from Gandhi when he fought against the rule that the only marriage to be recognised in South Africa was a Christian marriage, one man and one woman for life. Because people of Indian origin were either Hindus or Muslims and their marriages were potentially polygamous, this was something that really seared the souls of an important section of the South African community. It marginalised those people; it made them feel inferior – like second-class citizens. This combined with the association with origin and colour exacerbated the feeling that the 'goodies' were the Christians and others were simply tolerated but treated as second class. So the question of religion means more than simply the right to practise your faith, it is a question of your common citizenship and your sense of moral citizenship in the society.

We also had an interesting case on social and economic rights, which was possibly the first reported case of its kind in a national jurisdiction. It was a very sad case of a man suffering from chronic renal failure who went to the hospital and asked to be attached to the dialysis machine. The hospital said he could only have one treatment to stabilise his condition, but after that they would have to give priority to those who would benefit from a renal transplant. They only had enough machines to deal with thirty per cent of people in his condition, and since he was suffering from heart disease and other illnesses, they did not consider him to be a priority candidate.

The man argued that the constitution gave everybody the right of access to medical care and the right to emergency medical treatment (subject to the availability of resources). As the man was dying, we had to give judgement in a hurry and we decided that this was not *emergency* medical treatment. We felt what was intended by that term was people who were knocked down in the street, people who suffered a sudden collapse, and so on. Otherwise a lot of medical resources would go to AIDS sufferers, TB sufferers, cancer sufferers etc, and there would be very little left for mother and child care, for preventative medicine, and other longer term medical needs. We felt that this latter interpretation could never have been the intention of the constitution makers.

It was a very difficult and poignant case, and the day after we gave the judgement the man died. There was a lot of press coverage of it and not all of it was sympathetic to the decision of the Court. A lot of people were asking who we were to decide these questions of the constitutionality of the constitution. Indeed these are common questions asked about the judiciary in general, and particularly where socio-economic rights are at stake.

In an effort to address this, I would urge countries with systems of judicial administration based on the English model to consider a Judicial Services Commission. I am going to Canada after leaving here as I have been asked expressly to speak on this issue. One of the provinces there is having a lot of disputes about the way in which judges are appointed.

The important point is this: the greater the scope given to the judiciary in terms of not simply deciding guilty or not guilty or interpreting a statute, but whether the statute itself is constitutional or not, whether the behaviour of important officials is constitutional or not, whether the President has behaved constitutionally or not, the more important does the process of selecting the judiciary become and the less acceptable is it to allow, which used to be in our case the Minister of Justice, after a non-public consultation to simply appoint X, Y, Z and announce it in the press.

"The greater the scope given to the judiciary... the more important does the process of selecting the judiciary become."

In South Africa now we have a constitutionally created Judicial Services Commission that decides on the appointment of all High Court judges, and makes recommendations (along with a list of three extra names) to the President for Constitutional Court judges. The President then has the final choice. The Commission consists of approximately twenty people, of whom about half are judges and other members of the legal profession: the Chief Justice, the President of the Constitutional Court, one judge and President of the High Court, two people representing the barristers' society, two representing the solicitors' society, and one dean of a law faculty. The other half comes from parliament, and those representatives are elected on to the Commission on a proportional representation basis. The judicial candidates can be nominated by anybody, even by themselves. The Commission draws up a short list

and then public hearings are held. These hearings usually last between half an hour and an hour. The cameras are not allowed in but the press can be there - a compromise of sorts. We did not want the American-type situation of playing to the gallery, but we still wanted it to be public.

I think the Commission has been a huge success in this period of transition. People feel that the candidates have been grilled and questioned about their abilities. The recommendations that go through are not politically motivated and it is not a political figure in the government who makes the choice. It is a combination of parliamentarians and others from across the board that have chosen people because they have some prestige and credibility within the broad political community. They could be lawyers or trade unionists or religious people, whatever - it is a question of objectivity.

In this very difficult period, we have had to transform our judiciary from being almost completely white and male, to one where people can confidently say 'this is our court' and not even think about whether it is a white judge or black judge, or a male or female judge presiding. Even though the judiciary is overwhelmingly the old judiciary, just changing ten per cent of it injects new people, a different generation, and a different outlook; one that is more tuned in to constitutional values and the Bill of Rights.

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For example, Edwin Cameron, a brilliant legal scholar who is very active in the gay movement, was questioned by the Judicial Services Commission and asked whether he could deal objectively with a case on sexual orientation given his partisan position on gay rights. He replied by saying he assumed they asked the same question of heterosexual candidates, but that in any event, the constitution laid down certain principles and the

Bill of Rights expressly prohibited discrimination on grounds of sexual orientation, and he would do his duty accordingly. He then became a very distinguished judge and has written some outstanding judgements. Appointments such as his give a lift to the whole judiciary – all the others benefit from the new younger person.

The signal that goes out to the whole of society of the new openness and the right to be different is very, very powerful, and we on the Court can also tap the brains and intellectual capacities of the new members. On our bench now, we have two females and nine males (not as good as it should be but better than any other sector of our judiciary). We have four people of colour and seven of those that used to be called white (not as good as it should be but again better than any other bench). When we swore the oaths we did so in five different languages for the five different mother tongues. We have two disabled people - I am one of them as you can see, and Zakeria Yacoob is blind. He uses Braille and has a computer now that we can e-mail material to and it automatically transforms it into Braille.

So there is a degree of diversity in our Court that you do not get in any of the other courts. We did not want to destroy the existing judiciary - it is a dangerous thing to start mucking around with judges, however good your reasons. We still have some judges on the bench who sentenced so many people to death, who always believed the police, who never accepted there was torture, who given the choice always interpreted the law in favour of the executive, who denied the fundamental dignity and rights of people. That is their problem now - what we need are the new faces, the new thoughts, the new outlook, and of course the constitution. The basic values of the constitution apply to everybody, including these old style judges.

I think it is fair to say that our Court has become a major institution in South Africa. One even hears people saying on television 'If they do not stop I will take them all the way up to the Constitutional Court'; a husband and wife are having an argument - 'I'll take you all the way up to the Constitutional Court!' We have in that sense become a kind of symbol, and to be quite candid it was only when we struck down the proclamations of Mandela that we gained that credibility. It is quite sad - the government does so much work applying the constitution and it

does not seem to count for very much. Then when we strike down how the government has applied the constitution, there is suddenly applause all around, even from the most critical newspapers that were totally against us after the death penalty case. Suddenly we heard, 'at last we have got a real court, a real constitutional court'.

But the fact is that we only hear a relatively small number of cases. We do not deal with the more ordinary cases of people in dispute and so on. In many ways, the strength of our Court and its functioning depends upon having a whole variety of other institutions to deal with other matters. We have a Human Rights Commission, which has not been very active on the ground so far, but has been more of a strategic policy-orientated body. We have a very dynamic Commission on Gender Equality, and it has focused particularly on the most oppressed of the oppressed - rural African women. These women are by far the poorest; these are the people denied education, with least access to health, messed around by their husbands, and surviving in patriarchal systems. So the focus has been very much on them, but without ignoring the importance of middle class women and better-off women, and the general problems of sexism in contemporary society.

We have a Public Protector who has turned out to be a very busy person! He looks into complaints in the administrative area - nepotism, abuse, correction and so on. We could not agree on whether to call the person the ombudsman or the ombud, so we ended up with the term 'public protector'. This is a very valuable institution and one that deserves examination. There is a real need for an upstanding independent figure, with strong legislative back-up, otherwise a lot of cases can get embroiled in government cover-ups and so on. They are not discrimination cases; they are malfunctioning of government cases. It is very, very useful to have an independent, constitutionally protected body dealing with that, and I would strongly recommend you consider a similar institution.

In addition we have human rights lawyers, we have the Legal Resources Centres, organisations like the CAJ, and so on. Some of them thought they could have a long holiday when the Bill of Rights was introduced. In fact, the director of the Legal Resource Centre, Arthur Chaskalson, is

now President of our Court. But these organisations are busier than ever. Abuses do not stop; the context is just very different. Now instead of the government being almost always automatically the enemy, it is now the people involved - directors general, senior officials, someone in the government, maybe a government minister or someone they worked with etc.

The Minister of Justice in our country actually works a lot with NGOs. He finds it very useful to work with them as it relieves his department of a lot of logistical work, it brings grassroots involvement into things that are happening, and generates a variety of ideas. This creates a dynamic that one would not get if everything were simply done through the administrative bureaucracy. So I think I can predict, assuming everything is on track in this country, that your organisation is going to be more rather than less busy. But it will not just be the old types of abuse; you will also be involved in more strategic work, in looking at the effectiveness of institutions, and generally working in a different kind of way - but all to achieve the same basic sense of justice.

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Let me conclude by talking about a very special institution in our country that has been a central part of the total process of transition, that is, the Truth and Reconciliation Commission (TRC). The TRC grew out of our history; we did not just have it for the sake of having it. It actually had a rather extraordinary origin in that it started off dealing with abuses

So I think I can predict, assuming everything is on track in this country, that your organisation is going to be more rather than less busy. But it will not just be the old types of abuse; you will also be involved in more strategic work, in looking at the effectiveness of institutions, and generally working in a different kind of way - but all to achieve the same basic sense of justice.

in the ANC camps in Angola during the years of exile. Thousands of young people left Soweto after the 1976 uprising to go for military training and ended up in Angola. Terrible things happened in those camps in '79, '80 and '81.

Pretoria was sending agents to kill us – that was not a fantasy or paranoia; my car was blown up by people like that. They wanted to kill the leadership of the ANC - that was real. But instead of having proper investigations and so on, suspects were put in the camps and treated appallingly. When the word got out about this, the leadership was very distressed and set up its own Commission of Inquiry, which established a code of conduct. This meant that the liberation movement, even in very difficult conditions, amidst civil war in Angola, was able to set down procedures governing detainees – for example, their right to trial, the right to defence, the different levels of charges that could be made, punishments, penalties, systems of appeal and so on.

The ANC Commission of Inquiry found that there was credible evidence of abuses in the camps and decided it needed an international commission with more credibility than theirs. The international commission met, but it said that the ANC had not complied fully with the principles of due process and, given this, we therefore should not point fingers definitively at any of the camp guards or the commanders. Despite this finding, we were convinced that there had been abuses and gross violations of fundamental human rights, and we felt that action ought to be taken.

The matter went to the National Executive Committee of the ANC a few months before the election. There were about eighty of us on the NEC and we were really divided on the subject. I felt quite deeply and passionately that a liberation movement must have higher and not lower standards than the people who are attacking them. I remember the now current Minister of Environment standing up and saying 'Comrades, I have learned something very interesting this evening, there is such a thing as ANC torture and such a thing as regime torture, and regime torture is bad but ANC torture is okay; thank you very much for enlightening me', and he sat down.

There were others who stood up and asked 'what would my mother say?' Often 'my mother' would be the example used by the ordinary working class African person. The mother was not a stupid person, but also not very learned. She was just a decent person with basic morality, so how would she react? They felt 'my mother' would say they were mad. Here was the ANC punishing its own and maybe for just reason, but all the others who had been killing and massacring and torturing us for decades were getting off scot-free! Were we so pure, so eager to prove to the world how 'one hundred per cent' we were that we were going to condemn our own while the others were also guilty? That is why Professor Kader Asmal, who spent thirty years in exile in Trinity College Dublin, stood up and said we needed a Truth Commission which would look at all the cases of abuses: by our people in the camps, by the regime, whoever. And that was the origin of the Truth Commission in South Africa.

A few months later we signed the constitution and thought our troubles were over. Then suddenly the whole constitutional endeavour was in jeopardy, as the security people were saying that if they did not get a general amnesty they were not going to protect the elections. What should we do? We had already signed off on the constitution, we had a party, we celebrated, and we thought it was over. I can remember saying that the idea of an amnesty was not an unreasonable one, but that it must not be a blanket amnesty. It should be an individual amnesty where people must own up to what they did and then get an amnesty for that. Essentially we wanted the truth, and would exchange truth for indemnity.

In the end, a postscript was added to our Constitution, speaking about the importance of remembering the untold hardships, suffering and injustices of our society. Not in a spirit of vengeance, but in one of reconciliation, and with this in mind, everybody who violated the law in pursuance of critical objectives would be entitled to indemnity subject to procedures and tribunals to be established by parliament The new parliament then passed the Truth and Reconciliation Act (that is not the actual title but I will call it that). That was then linked up to the Truth Commission idea of an across the board investigation of what had happened, of all the violations and all the amnesty claims from all sides.

The reason for accepting the call for amnesty was very, very concrete. The then security forces (which was the old regime security) said that they knew there were plans to bomb the elections out of existence, and that they would loyally protect the elections, but only if they were not going to go to jail afterwards. It was not an unreasonable statement to make. There was a general feeling that this was not the old regime giving itself immunity, which was what happened with Pinochet in Chile, but rather it was an agreement between the old and the new for the sake of furthering the transition, introducing the constitutional order, allowing us to have elections and so on. Without elections, we would not have had Mandela, we would not have had a Constitutional Court, we would not have had a new Parliament, and we would not have had the rule of law. Instead we would have had a theoretical right to punish the old regime for their violation of human rights, but no instruments or framework within which to do this, and we felt on that basis that we could support individual indemnity in exchange for truth.

Our Truth Commission has three parts. The first listened to the victims, 'the little people'. They have finished their work now and it was an essential piece of work. As Archbishop Tutu said 'it's the little people who haven't been heard'. They were more important than the Albie Sachs' of this world who can go around the place telling their story, writing books, appearing on TV and so on. It is the little people who have never had a chance to speak their pain, have never had their pain acknowledged, understood, perceived or accepted. That is almost like a double-punishment of suffering - being made to feel you cannot be heard or you cannot tell your suffering only made things even worse.

Then there is a Reparations Commission. It will not give large sums of money, but will give nominal amounts, for example, it will send children to school, or it will fund a memorial. It will rebury people and bodies that have been discovered now for the first time, for example, some of those lost as a result of the old regime. When their story is told in order to get amnesty, the victim can be reburied with a proper headstone and so on. These are simple acts of human compassion and understanding from our new government in relation to the victims of the past.

The third most difficult part is the separate section with two judges sitting on it who grant amnesty according to certain criteria. They have to give decisions in the most difficult cases, which involve spectacular assassinations and awful, terrible crimes. The judges have to work out whether or not the people qualify for amnesty in terms of the criteria laid down. It is a difficult, painful process and is not one I would necessarily urge on any other country to even try. I am just saying that we needed it.

But we also feel more able to handle the pain now, and feel that it must come out so that we are not in effect living in two different countries. We are living in one country, with different historical experiences. Tutu and the others are right when they describe it as a kind of a narrative of the period. It does not cover the whole history of South Africa or of *apartheid*, but it does cover those gross violations of human rights: how they came about, the responsibility of different sections of society for them, and how we can prevent them happening in the future. That will be very important for us. The kind of sense of trauma and disquiet that we are undergoing now is proof to me that it's real. The reconciliation that emerges is more than just individual victims or their families crying out to the torturers and killers and saying 'we forgive you'.

There have been some quite extraordinary cases, for example there was an attack by the Pan African Congress on people worshipping in a church. It was a charismatic Protestant church and with inspired leadership the survivors and the victims have actually forgiven the perpetrators. There have been other individual cases like that. But national reconciliation is of a different order. We are living in the same country, we are on the same map, and there is a now a set of values in place, so no one can deny anymore that these things happened. The worst thing would be if there was still a section of society that obdurately claimed that these things had never happened, that there had been no torture, that there were no human rights violations....that it was all propaganda. But in the current framework no one can deny that anymore. I would prefer to go through the discomfort and stress now, rather than in ten, twenty, or maybe thirty years time, seeing some demagogic group mobilising and manipulating the past for some kind of ethnic or other type of communal mobilisation for political power. I think it is much better that it comes out now.

In any event it has been a very profound process and it still continues, and different people react in different ways. I personally feel that it has been extremely important in our country, and it does have many interesting lessons for the world. The choice is not between punishment on the one hand and impunity on the other. With the former you have to have due process of law, which takes forever, and can often result in only catching the small fry. There is an intermediate way of dealing with the violence and the crimes of the past that encourages apology and truth telling.

There is actually a lot of shame involved for the people who come forward, so they are not getting off completely scot-free. It is a very human process that does not involve the strict requirements of truth "beyond reasonable doubt". It is a different kind of a process which is much more open - people cry, there are comforters helping the people and soothing them, people might sing and so on. Archbishop Tutu has that very special way of presiding that a judge could never do, and that helps bring out the humanity in everybody involved in the whole process.

I think the TRC is something that we have contributed to the world. So while previously we contributed *apartheid*, concentration camps, and many other awful things, now South Africa is contributing negotiation, peaceful resolution of conflicts, catering for diversity and difference within the same society through institutions based on a set of fundamental values, and encouraging people to discover the humanity that we all have inside ourselves.

Thank you very much.

Justice Richard Goldstone

Richard J Goldstone was born on the 26th October 1938. After graduating from the University of the Witwatersrand with a BA LLB cum laude in 1962, he practised as an Advocate at the Johannesburg Bar. In 1976 he was appointed Senior Counsel and in 1980 was made Judge of the Transvaal Supreme Court. In 1989 he was appointed Judge of the Appellate Division of the Supreme Court.

Since July 1994 he has been a Justice of the Constitutional Court of South Africa. Previously, he served as Chief Prosecutor of the United Nations International Criminal Court for Rwanda and the former Yugoslavia. He also chaired the Goldstone Commission, a commission of inquiry established in 1991 regarding the prevention of public violence and intimidation in South Africa.

"Justice in times of transition"

Justice Richard Goldstone,
South African Constitutional Court[4]

I have been asked to speak to you today on the change between the *apartheid* judiciary and our new democratic, South African judiciary. It is an interesting topic in a way because, by and large, it is the same judiciary.

One of the consequences of a relatively peaceful transition from oppression to democracy, and one of the highest costs in my view, is that all the former *apartheid* operators apart from senior government members continue in office. The civil service is changing slowly, the judiciary is changing slowly, and one has a completely new form of government and a completely new constitution. But the implementers, the executors of the change, are in fact very much the same people who did the same work during the *apartheid* era.

It is interesting to see how quickly people can change, and I think that is a beacon of hope for many societies when you realise that people can genuinely change to embrace a moral, rational, reasonable, sensible form of government so quickly

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Between 1910 and 1994, the method for appointing judges in South Africa was based more or less on the English model, that is, they were appointed by the government from the ranks of Senior Counsel. So, the government had a free hand in the choice of judges, but was somewhat limited by the tradition of the

[4] This address was given at a lecture hosted by CAJ, in Belfast, in April 1999.

dual bar system. There was no legal requirement that the judges be chosen only from the ranks of silks, they could be chosen also from senior members of the barrister's profession. The reality was that the government generally appointed leaders of the Bar to the bench.

However, they obviously gave preference to those leaders of the Bar who supported their policies. That meant that before 1948, when we had predominantly English-speaking governments under General Schwartz and his predecessors, mainly English-speaking white South Africans were appointed. Let me also say that before 1994, the selection was restricted to whites. It was an all-white, all male bench, which was therefore not representative of either majorities in our country - women and black South Africans.

When the National Party came to power in 1948, they implemented the world's most impressive and successful affirmative action policy, not only in respect of the judiciary, but also in respect particularly of the civil service. It was never recognised as that, since it was before the days of affirmative action, but they really succeeded in converting the civil service into an Afrikaans civil service within very few years. The judiciary was also converted into a predominantly Afrikaner-dominated judiciary. The policy started off – as most affirmative action policies do – wanting to correct an imbalance. But of course, politicians always tend to overdo it and they ended up with almost the entirely opposite extreme with an Afrikaner-dominated judiciary.

Having succeeded in doing that, they could then be a little bit more flexible and fair. From the early to mid-sixties, non-Afrikaner and non-*apartheid*-supporting senior members of the Bar began to be appointed to the judiciary. That had important consequences both for the judiciary and for the implementation of *apartheid* laws generally in South Africa. By 1979, maybe ten or fifteen percent of the senior members of the judiciary (that is in the provincial high courts and in what was then our highest court, now called the Supreme Court of Appeal, then called the Appellate Division of the Supreme Court) did not support the policy of *apartheid*. Some of them may well have been in favour of discrimination, and might well have feared the thought of a black government and equality, but they did not support the excesses of the *apartheid* government at that time, and some of them actively opposed it.

In 1979, a landmark meeting was held in the University of Capetown - the first national meeting ever to discuss human rights. That might sound strange, but before that meeting, and at that time generally, talking about human rights was almost the equivalent of treason. Human rights and communism were all put in the same pigeonhole by the South African government, the security police, and even the law faculties of the leading Afrikaans establishment-supporting universities. But some United States foundations, particularly Ford and Carnegie, sponsored a human rights conference in Capetown in 1979, and they invited a member of our highest court, Justice Michael Corbett, to speak at it. Justice Corbett startled the judiciary by suggesting in a detailed lecture that the answer to South Africa's problems was a Bill of Rights and a written constitution. Suddenly, having come from one of the most senior members of the South African judiciary, the human rights debate was put into the mainstream where it had never been.

Also at that conference two new organisations were born. One was Lawyers for Human Rights, which became an important organisation that enabled lawyers, solicitors and barristers who supported human rights and who opposed racial discrimination to band together. They provided funding and, more importantly, free legal services for South Africans who were receiving the raw end of *apartheid's* oppressive laws, and who were being hauled before our criminal courts for contravening one or other of the racial and racist laws that the *apartheid* government had spawned from 1948. That was, and still is, an important and very active organisation in South Africa.

The second organisation born at that conference, and perhaps more important historically, was the Legal Resources Centre. This is a non-governmental organisation that was set up at that time with money from Ford and Carnegie. Indeed it was Professor Jack Greenburg – who had been the director of the Legal Defence Fund and the NAACP in the United States, and who had been one of the junior counsel in the landmark case of *Brown v the Board of Education* – who really started the LRC off and spent a great deal of time training South African lawyers on how to organise themselves into that sort of public interest law firm. Arthur Chaskalson left an extremely lucrative practice and agreed to take two years off from the Johannesburg Bar to become the first director of the Legal Resources Centre. Fourteen years later, Arthur Chaskalson was

still the director of the Legal Resources Centre and, very appropriately, President Mandela appointed him as the first president of our new Constitutional Court in 1994.

So that was a turning point, and indeed the United States legal fraternity stayed involved. It is interesting that the English Bar, judiciary and lawyers generally I think wrote off South Africa. In general they did not have or seek any contact with the South African legal community, which is ironic in a way, because our contacts and our history had been associated with England. As I have already mentioned, the physical make-up of our profession was copied, imported, and brought with the British during our colonial period in the nineteenth century.

It was not really until the late seventies and eighties that we began to have close contact with the United States - they came in and made contact and really 'adopted' the South African lawyers. Almost half of all High Court and Appeal Court judges between 1980 and 1990 were invited to visit the United States and introduced to the concept of the internationalisation of human rights. Speaking from a very personal, subjective point of view, my introduction to the internationalisation of human rights and my learning of how the law could be used to further human rights - even in a repressive society and even on an *apartheid* bench - is due entirely to those contacts which began in the early 1980s when I was a High Court judge in the Transvaal Provincial Supreme Court (now called the High Court).

It was an important educational experience for many of us, because those of us who came from an anti-*apartheid* perspective went on the South African judiciary during the *apartheid* years with very heavy hearts and even heavier consciences. It was a difficult decision for any leading barrister at the South African Bar to decide whether to take an appointment on a bench where the oath of office required one to implement *apartheid* laws. I can say without any hesitation that, but for efforts of the Legal Resources Centre and the Lawyers for Human Rights, who were using the courts to establish rights for many millions of black South Africans, a number of us would not have accepted appointments or, having accepted them, would not have continued to sit on the bench. On visits to Europe and the United States, I was frequently asked to

justify how, as they flatteringly said, such a 'decent' person could sit on the *apartheid* bench. My own personal attitude was that as long as black South Africans were using the courts - not the criminal courts I might hasten to add, but the civil courts - to establish rights, to obtain benevolent interpretation of *apartheid* laws, or as long as they felt that they could not get justice and it was worth a candle to go to court, then it seemed to me that those of us who were sympathetic to non-racism, democracy and human rights had a duty to remain on that bench.

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So, it was with a great deal of gratitude and respect for the efforts of organisations such as Lawyers for Human Rights and the Legal Resource Centre that we accepted our positions. Ironically, Arthur Chaskalson and other leading barristers understandably refused appointments and made it clear to the government that they would not go on the bench. Yet, it was them who encouraged us to take appointments, because they felt it was important that when these sorts of cases came to court, there was at least some prospect of getting a sympathetic judge, and not a racist, *apartheid*-supporting member of the judiciary. So those were difficult decisions and very difficult times.

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Many important cases were heard. In fact, the *apartheid* law began to wither and die because of some of the cases that the Legal Resources Centre and Lawyers for Human Rights brought before the courts. One of them with which I was involved as early as 1982 related to the *apartheid* laws which enabled the government to ensure that residential areas were exclusively white and, in typical *apartheid* philosophy, also ensured, in theory, that

some areas were exclusively black. But of course no white would ever live in a black area. However, many tens of thousands of blacks were criminally prosecuted for living in what were declared white areas, and many millions of black South Africans were forcibly removed from areas that were declared white, and moved to areas that had been reserved for black South Africans.

That legislation was dealt a death blow in an appeal case in which I sat in Pretoria in 1982. We held that black people in white areas could not be evicted from their premises, even though they were in unlawful possession, if the government could not offer them alternative accommodation. Very often, alternative accommodation could not realistically be offered, certainly to the Asian community - and this case involved an elderly Indian woman and her family. The law in question said that where any court found a person guilty of living in the wrong area, the judicial officer 'may' grant an eviction order. Of course from 1950 to 1982, the 'may' was read as 'must', and it was an automatic eviction order. However, we held at that appeal that 'may' meant 'may', and not 'must' and that there was discretion involved. We decided that the lower courts were obliged to have the existence of a separate hearing, and one of the things that would have to be established was the existence of alternative accommodation.

As it turned out, unexpectedly, that was the last time there was a prosecution under the legislation providing for separate group areas, because what none of us realised was that the government was using the eviction proceedings to keep the areas for the whites. They were not interested in the fines, or even the imprisonment – all they wanted was the eviction order - and when they ceased being able to get the eviction order, they ceased prosecutions. Many foreign lawyers, particularly in the United States, could not understand why in a country with legislative supremacy, parliament could not have amended the law the following week or month, to say 'shall' instead of 'may'. The reason was that by that time, the South African government had come increasingly under pressure from the international community. It had for decades boasted about having an independent judiciary and it did not want to be seen - inside or outside South Africa - as 'interfering' with the judiciary by over-ruling a decision; so they did not even bother to appeal.

Another case was one that involved an *apartheid* law that said that black South Africans were not allowed to live in large urban areas if they were not born there. It was a way of keeping blacks out of the cities. Many of them obviously wanted to work in the cities but under the laws, male black men were only allowed in to cities for a certain period and under certain conditions. For example, they could not break their period in the cities for more than three weeks in a year, and they were not allowed to bring in their families, wives or children. As a result, there were millions of black South Africans who were forced to leave their families in the rural areas and live in the cities for most of their working life. For some of them this lasted for decades, and of course, social problems arose because, naturally, many of them ended up with second families in the cities, and they went back for a few weeks at the end of the year to visit their families at home.

The Legal Resources Centre brought a case to challenge this law and argued that the interpretation which the *apartheid* civil servants had given to this legislation was incorrect and that on a proper interpretation, wives and families were entitled to join their men-folk in the cities. Happily, in the High Court and in the Appeal Court, there were unanimous judgements upholding the case. As a result, many hundreds and thousands of black women and children came into the cities.

I could spend some time giving you details of similar cases that were brought to the South African courts in the eighties by the Legal Resources Centre but I won't. Let me just say that they chose their cases very carefully. Their success rate was extremely high. I do not believe I have seen statistics, but my guess would be that they must have won eighty percent of the cases they brought. Lawyers like Arthur Chaskalson were very careful to choose test case situations affecting literally many millions of South Africans.

I do not want to give the wrong impression by those examples - the great majority of judges in South Africa were very comfortable with the *apartheid* system. They came from a typical white, upper middle-class background, and they had not met many black South Africans as peers. They knew black South Africans as domestic servants and gardeners etc, and *apartheid*, certainly in their hearts, was alive and well. Then came the states of emergency in the late eighties – between 1986 and 1989 –

when the policy of the African National Congress was to make South Africa ungovernable. We had a series of states of emergency, with huge numbers of people detained without trial. Almost 90% of them were young, black activists who were removed from society. At one point in 1988, we had over ten thousand young black South Africans who were being kept in detention without trial, some of them for over two years.

It was in that atmosphere really that *apartheid* began to unravel. It was the international anti-*apartheid* movement along with the ungovernability in black townships that led President De Klerk in 1990 to bring *apartheid* to an end with the release of Nelson Mandela and his colleagues from prison. Then began the negotiating process and the transition to black government and to constitutional democracy. What is not often realised in South Africa is that once it became obvious that there was going to be black majority rule and a Bill of Rights, a constitutional place on a majority parliament became very attractive to the white minority. All of a sudden, the white South Africans who had spurned human rights suddenly embraced them as their protector, because they feared that a black parliament would trample on rights and quickly withdraw the privileges that whites had won because of a system of racial discrimination and racial oppression. So, it was not unusual for white minority parties, all of a sudden, to be great protagonists of human rights, constitutionalism, and a Bill of Rights.

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Fortunately for South Africa, the anti-*apartheid* movement, internationally and within our country, was really in essence a human rights movement. The anti-*apartheid* movement was very much linked to international human rights and the leaders of the African National Congress in particular were no strangers to human rights. They had always wanted a constitution. In 1956, after consulting millions of their

followers throughout the country, they drew up a Freedom Charter and adopted it at a huge meeting outside Johannesburg, which was eventually broken up by the South African security police. The Charter was really based on the Universal Declaration of Human Rights, and it recognised that South Africa and its land belonged to its entire people regardless of their colour. So, the African National Congress assumed - it was absolutely a given - that we had to have a constitution and a Bill of Rights.

Therefore, from two very different corners there was an overwhelming majority of white and black South Africans supporting a Bill of Rights in a written constitution. That I think begins to explain part of the ease – the comparative ease at least - with which there was a settlement during what was, nonetheless, a very difficult period of transition. The major problem that arose during the negotiations was the terms of a final constitution. The De Klerk camp - the white right-wing to middle ground - was insistent that they were not prepared to allow a black majority constitutional assembly to fashion any constitution it pleased. They feared that such an assembly would be prejudiced against whites, against property rights and that socialism, if not communism, would be introduced. All the fears of the past came to the fore.

"Therefore, from two very different corners there was an overwhelming majority of white and black South Africans supporting a bill of rights in a written constitution. That I think begins to explain part of the ease – the comparative ease at least - with which there was a settlement during what was, nonetheless, a very difficult period of transition."

The African National Congress and other liberation movements on the other hand were not prepared to have an undemocratic, un-elected constitutional assembly fashioning the final constitution. Their view was that if that was done, the constitution would never be meaningful, it would have no credibility and it would not be taken to the hearts of the masses of South Africans. So there was an impasse. No representative black-dominated constitutional assembly said the white leadership, no constitutional assembly that was not representative and democratic said the black majority party.

The solution was an ingenious one. It was a two-stage process whereby an unrepresentative, undemocratic constitutional assembly would fashion an interim constitution. In this assembly all parties had a veto and it worked by consensus - the national party of De Klerk had the same power as the mass movement of the African National Congress. But they fashioned an interim constitution, with a very acceptable and very impressive Bill of Rights, and they added to that constitution a schedule, which set out the principles of the final constitution. It was decided that the first democratic two-house parliament would fashion the final constitution, and would do so within the four corners of the thirty-four constitutional principles.

We had our first democratically elected elections in April of 1994 under the interim constitution, and the parliament that was elected then sat for two years debating the final constitution within the four corners of the agreed principles. The next question that arose was who would decide whether the final constitution fell within those four corners. It had been agreed under the interim constitution to set up a new Constitutional Court for similar reasons the Germans did in 1949. In Germany in 1949 the Nazis had appointed most of the judges, and it was felt by the German constitution-makers that they could not leave that judiciary as guardians of the new constitution.

The majority of South Africans in 1992 and 1993 felt the same way - that a new constitution could not have as its guardian the *apartheid*-appointed judiciary. Therefore it was decided that a new judiciary should be appointed, one that was more representative of the people. I have already mentioned the unrepresentative nature of the South African judiciary in 1994 - of about 160 High Court judges and above, 158 were white men. Two were black and there was one woman in the appellate division.

So a new Constitutional Court was appointed. I will not bore you with the complex method of appointment – but the new court, which became operational in 1994, was appointed from a short-list prepared by a very democratic constitutional Judicial Services Commission. We ended up with seven white and four black people in a court of eleven, two with a disability, and two women, one black and one white. Not representative necessarily, but certainly a great deal more representative than any other court sitting in South Africa.

It was decided that the Constitutional Court would decide whether the new constitution fell within the four corners of the thirty-four principles. After two weeks of difficult hearings, we held that in twelve fundamental respects the new constitution failed to comply with the thirty-four principles, and under the Interim Constitution that meant that the constitution did not pass certification and had to go back to the Constitutional Assembly. We issued a long judgement of over two hundred pages setting out precisely where it went wrong. The Constitutional Assembly did a very zealous job of amending the constitution, and when it was sent back to us we held unanimously that it fell within the thirty-four principles, we certified it, and that Constitution came into force in February 1997.

At present, many cases are being brought under the new Constitution: the Bill of Rights is being used to reform many criminal statutes dealing with the onus of proof, fair trial procedures, the relationship between the central government and the nine provinces, socio-economic rights and so on. But it is not plain sailing. Just recently there was great controversy about what was seen to be anti-black racist judgements by white judges who are still there. Our judges have life appointments, so many of them are young men and are going to be there for quite a long time. But at the same time - some 50 or 60 new judges have been appointed, the majority of them being black, and many of them being women.

So, the face of the judiciary is slowly changing and by and large, the judges are doing a good job. All of them - the older appointed judges and the newly appointed judges -are working well together. There is a collegiality on the South African bench that is leading to sensible interpretations of the law, and in particular great use is made of comparative law. If you look at judgements of our courts – both the High Courts and the Constitutional Court – you will find that the judgements are peppered with references to comparative constitutional law from Europe, Asia, Africa and North America.

However, there is still a huge need for judicial education. None of the South African judges appointed before 1994 were ever taught human rights because, as I mentioned, our university law schools did not teach human rights. As a result none of the judges have learned constitutional

law, and certainly not comparative constitutional law, so there is a huge gap in knowledge. As well as that, there is resistance. The older judges in particular object to the very thought that they might need education. However, the Judicial Services Commission and the Minister of Justice have insisted, and judicial education is now beginning to gather momentum. It was made voluntary for the new judges and there was over a ninety percent turnout, but there is still a great deal to be done with the *apartheid*-appointed judiciary.

"On two occasions where the government has lost important cases in the Constitutional Court, President Mandela has come out very strongly and said that is what the Constitutional Court is for. Its main purpose is to tell the government when it does wrong, and the government in turn must see that it puts things right."

So, it is an exciting time and I think we are making progress and the Constitution is growing in credibility. The Constitutional Court has certainly grown in credibility. I think the certification of the constitution process indicated that we were not in any way party hacks or obedient to the legislature. We have had many cases where the government has won and we have had many cases where the government has lost.

We are also extremely fortunate to have a President who is a great proponent of constitutionalism. On two occasions where the government has lost important cases in the Constitutional Court, President Mandela has come out very strongly and said that is what the Constitutional Court is for. Its main purpose is to tell the government when it does wrong, and the government in turn must see that it puts things right.

Thank you very much.

Professor Stein Evju

Professor Stein Evju is former Vice-President of the European Committee on Social Rights, President of the Norwegian Labour Court and, Professor of Labour Law at the University of Oslo, Norway. At the time of this address, he was an attorney in private practice.

"Applying the European Social Charter Within the National Legal System"

Presentation by Professor Stein Evju[5]

The headline designated for this presentation points at an important task *and* a challenge - not merely, I might add, with respect to Northern Ireland.

The European Social Charter is a reflection of fundamental values recognised in social and economic rights' standards more generally, such as the 1966 UN Covenant on Economic, Social and Cultural Rights and various International Labour Organisation (ILO) instruments. Further, like law-making treaties and domestic legislation generally, the Charter presupposes consequences in the national legal regime. It is a dynamic instrument - one important aim of which is to contribute to social change.

It is often argued against social and economic rights that these are abstract and collective notions, and not rights in the true sense. This argument must be rejected. Granted, the provisions of the European Social Charter (ESC) are framed in general and, on many counts, seemingly vague terms. This is however not different from the case of civil and political rights. The European Social Charter is the counterpart of the European Convention on Human Rights (the ECHR), and it is important to underline, and not to lose sight of, the fact that, just like civil and political rights, social and economic rights have as their aim individual protection.

"It is often argued against social and economic rights that these are abstract and collective notions, and not rights in the true sense. This argument must be rejected."

[5] This address was given at a conference organised by CAJ on "Fundamental Social Rights in Northern Ireland: Building upon the Agreement and the European Social Charter", Belfast, in June 1999.

The relationship between civil and political and social and economic rights is, indeed, of key importance. The fundamental principle of the interdependence and indivisibility of human rights - on which the 1961 Social Charter is based (and which is now expressly stated in the Preamble to the Revised European Social Charter, 1996) - is essential. There would seem to be no call to argue this point here. I have noted that the interdependence of civil, political, social, economic and cultural rights is essentially recognised in the Good Friday Agreement.

This merits being mentioned, however, with a view to the prospective Bill of Rights for Northern Ireland.

There is no dichotomy, or no strict demarcation lines, between the ECHR - to which the Good Friday Agreement explicitly refers - and the European Social Charter. Nor is that a novel view. For example, the point was made twenty years ago by the European Court of Human Rights; in the *Airey* case judgement (9 October [1979]; Series A No. 32). On the contrary, there is an intrinsic interrelationship and - contrary to what is often suggested - on many points an overlap between the two treaties.

Let me just briefly note, by way of example.

- Prohibition of forced labour is embodied both in article 4 of the ECHR and in Article 1(2) of the ESC.

- There is a relationship between Articles 2 and 3 of the ECHR, on the right to life and protection against "inhuman and degrading treatment", and Article 3 of the ESC on the right to safe and healthy working conditions. The European Committee of Social Rights has made reference to this on many occasions in its rulings.

- There is also an obvious relationship between Article 11 of the ECHR on freedom of association and Article 5 of the ESC on the right to organise, pertaining to workers', trade union, employers' and employer association rights. The European Court of Human Rights has also referred to this relationship. There is in turn a relationship with Article 6 of the ESC on the right to bargain collectively.

- Protection of the family is covered in Article 8 of the ECHR and in the ESC in Article 16, as well as in other provisions (e.g. in Article 19 on migrant workers and their families).

"Social and economic rights are an important complement to civil and political rights. At the same time, the latter provide pertinent guarantees in the context of the former. It is only by a combination that a good balance may be achieved."

Speaking generally, then, there is an essential link between the ECHR and the ESC. Social and economic rights are an important complement to civil and political rights. At the same time, the latter provide pertinent guarantees in the context of the former. It is only by a combination that a good balance may be achieved.

Thus, it would be of major significance if such a holistic approach were applied to the drafting of the Bill of Rights for Northern Ireland. While the ECHR now is in the process of becoming part of the national legal order, and is referred to explicitly in the Good Friday Agreement, no similar standing is yet accorded to the ESC. Hence, from the perspective of the protection of social and economic human rights, it would mark an important step and a major achievement if rights and guarantees embodied in the European Social Charter were included in the Bill of Rights.

"...it would mark an important step and a major achievement if rights and guarantees embodied in the European Social Charter were included in the Bill of Rights."

This is, of course, particularly true given the status and role of the Bill of Rights in the national legal order pursuant to the Good Friday Agreement (a point to which I will return later on).

While the Charter's provisions on many counts may seem vague - as I have already touched upon - and not always easy to implement, at a closer look it will be seen that in many respects it contains rights and guarantees that are certainly concrete, justifiable and enforceable.

A first task and challenge, then, would be to analyse the Charter and to identify such rights and guarantees as could suitably be included in the Bill of Rights. A second, perhaps, would be to consider how to transpose those rights and guarantees into specific provisions adapting in an appropriate way to national circumstances and legal tradition. That would depend on whether one favours a technique of straightforward incorporation or one of transposition. In either case, it may also be considered whether to include rules on the right of access to courts and related procedural guarantees.

To illustrate briefly and by way of example. Firstly, it is firmly established that the right to social and medical assistance in Article 13(1) lays down an entitlement to public assistance as of right. Social assistance should be granted as a "subjective (individual) right". The European Committee of Social Rights (ECSR) has consistently held that this implies a requirement of that right being supported by a right of appeal to an independent body or, as the case may be, a court, empowered to rule on the basis of objectively determined criteria. Furthermore applicants ought to be able to benefit from legal assistance despite their lack of resources.

Secondly, and on a more general note, in many cases complaints by individuals may be a measure not readily resorted to in practice. At the level of the ESC itself, the supervisory machinery has now been reinforced by the introduction of the collective complaints procedure, under which organisations have a right to lodge complaints to the ECSR. In the context of social and economic rights, procedural rights are no less important at the national level. It could be argued, and should be considered, that non-governmental organisations should be recognised as partners to be consulted, and as entities with the capacity to institute legal proceedings for the protection of the more general aspects of social and economic rights and in instances in which no aggrieved individual with a sufficient interest - or the requisite resources - to take court action can be found.

Put even more generally, the principle of effectiveness, including recourse to effective remedies - which is so important in the context of the ECHR - is equally important in the context of the European Social Charter, and with regard to the interrelationship between the two instruments. This, I submit, is an important aspect that needs to be taken into consideration in the framing of national legislation as well as in its application.

Good faith compliance with international law obligations implies that the standards imposed by international treaties are guaranteed in the domestic legal order.

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The obligation to ensure that international standard requirements are met rests, primarily and fundamentally, with the State. Hence, the focus, also as far as the European Social Charter is concerned, may be said to be first and foremost on the national legislature.

I have noted that according to the Good Friday Agreement, the Westminster Parliament will retain power to legislate as necessary to ensure that the UK's international obligations are met in respect of Northern Ireland. Nonetheless it may, perhaps, be appropriate to observe that the Charter's requirements are further reaching.

National - in this context, Westminster - legislation may provide a basis and general framework, but not necessarily a comprehensive or exhaustive regulation of all aspects to be considered. Where legislative and policy making powers are divided between "central" and "regional" governments, responsibility to ensure compliance will rest also on the government at the "regional" level. This, I might add, is not merely a theoretical observation. Examples exist, in the case-law of Charter supervision, of states found not to be in compliance on the grounds of violations ensuing from measures adopted by regional governments e.g.. Germany, Belgium.

Now entering an unprecedented era of devolved government, this will bring with it new challenges for the UK, with respect to Charter compliance - and challenges as well as opportunities, it would seem, for the Northern Ireland authorities.

Where the Northern Ireland Assembly and administration have competence in fields covered by the Charter, they will have to be aware of its standards, to take account of them, and see to it that the Charter's requirements are respected. That should impact not only on legislative measures, but also on administrative procedures and practices and, as

the case may be, on policy measures in a broader sense. It is pertinent here to recall the principle of effectiveness (which I have already briefly referred to). It is inherent in this that the Charter (like other treaties) requires not only formal compliance *de jure*. In a general context, within a legal framework, it is equally important that the situation in practice also conforms to the Charter's standards. The importance of this *de facto* compliance is readily attested to by the case law of the Charter supervisory machinery, in particular the ECSR.

To put this a little differently, the Charter and its effective implementation at the national level presuppose an active legislature being able and willing to take social and economic rights into account and to take them seriously.

However, from the point of view of the Charter, the national courts and their role should also be studied. There is, of course, an interrelationship here, between legislation and courts. On a general note - also from the point of view of the Charter - it is clearly preferable if legislation lays down concrete and individualised rights and obligations. They can more easily be handled by courts and can be better applied than abstract intentions or goal-oriented declarations.

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Then, in this context it is pertinent to recall the provision of the Good Friday Agreement in which it is stated that any legislation passed by the Northern Ireland Assembly and subsequently found by the courts to violate the ECHR *or* the Bill of Rights will not be valid. This is, indeed, a highly significant provision, laying down an important principle of constitutional law. This kind of principle I am familiar with, albeit in a different context. The power of courts to review and set aside legislation on the grounds of non-conformity with constitutional law norms is a

well-embedded principle of long standing in Norwegian constitutional law.

How important it would be if rights and guarantees embodied in the European Social Charter were made part of a Bill of Rights. It would as a matter of principle amount to a significant strengthening of the protection of social and economic rights in domestic law.

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At any rate, the norm thus expressed in the Good Friday Agreement certainly emphasises the point I touched upon a little earlier, of how important it would be if rights and guarantees embodied in the European Social Charter were made part of a Bill of Rights. From the point of view of the Charter that would, of course, be welcomed as a way of recognising its importance in the national legal order. More importantly, though, it would as a matter of principle amount to a significant strengthening of the protection of social and economic rights in domestic law. The courts will then be empowered to review and, as the case may be, set aside statutory provisions not conforming to the rights and guarantees thus included. And in the case of a conflict of norms the courts will, presumably, be able to base a decision in the individual case directly on the relevant provisions of the Bill of Rights itself.

The importance of a possible inclusion of Charter standards in a Bill of Rights may however also go further.

Before proceeding, however, let me note that from the way it is worded, I take it that this provision of the Good Friday Agreement on judicial review will *not* apply in respect of legislation passed by the Westminster Parliament. That may seem a rather significant limitation of the scope of the principle. Again, I am not as well versed in your legal system, or how it may be foreseen to develop, as to venture to try and assess the potential importance in practice of such a limitation. What I would suggest, however - with reference to the observations I am about to make - is that it should not necessarily be considered to exclude the courts from drawing on guarantees embodied in a Bill of Rights also in this regard.

Beyond - or supplementing - judicial review in the strict sense (if it may be put in such terms), the inclusion of Charter standards in a Bill of Rights would also - at least so I presume - provide a strong foundation and impetus for the courts to interpret and apply statutes so as to conform in the best possible way with those standards and the requirements implied therein. By this kind of approach the courts would have the possibility to contribute in a positive way to the effective implementation and enforcement of the rights and guarantees concerned. This could be applied not only to points of substantive law. As I have already touched upon, procedural rights are important and can be used to make social and economic rights more effective. For instance, applying this kind of approach and relying on the principle of effectiveness as one inherent in the Charter, the courts could grant NGOs *locus standi* - if that right is not already recognised in domestic law - to act as plaintiffs or interveners in litigation pertaining to social and economic rights in such contexts as I have mentioned previously.

As this last point would suggest, the general approach could be taken even a step further. If basic principles or provisions of the Charter are recognised in a Bill of Rights, that may be seen as a basis for applying the same kind of approach in respect of the standards that are not explicitly incorporated or transposed into the Bill of Rights. And recognition in principle of Charter standards could in a similar way be given effect with regard to the interpretation and application of national legislation generally.

Whether this could be a viable approach will of course depend both on how a Bill of Rights is framed and on constitutional or other principles of law otherwise prevailing in the national legal order. Once again, I am not in a position to assess or purport to advise. What I am doing here is merely indicating possible lines of thinking, drawing on experience from my own domestic legal order.

At this point, and on the same basis, I could add an observation on a differing note. An act incorporating certain human rights conventions into Norwegian law was passed just recently. In the course of the debate preceding the enactment, some notes of concern were voiced that when limiting the Act to encompass only certain specific treaties, this may be taken as a basis for arguing that those that are not included can not be

regarded as equally important and hence not be accorded similar importance or weight with regard to judicial review and the construction by courts of domestic laws.

Still, it is arguable that being one arm of the State, the courts must be - or, at any rate, should be - obliged to take due regard of all international obligations undertaken by the State. Consequently, a general principle of "presumption of harmony" should prevail. Domestic legislation must be presumed to respect, and not be intended to breach, international law obligations, and thus it should be interpreted and applied by the courts accordingly, so as to ensure that conformity is attained as far as possible.

This is, in principle, the prevailing approach in Norwegian law. To counteract distinctions being made between different treaties or treaty obligations, a principle to that effect may be asserted in some form of "general clause" or preamble to legislation or in the preparatory work of the relevant Act - whichever is appropriate in the national legal tradition. In Norway, it is the latter approach that has been relied on. How effective that will prove to be remains to be seen.

From this, I shall turn to a different point, but again based on the debate connected to the recent Act on incorporation of human rights treaties in Norway. The point I wish to make is that, if the implementation of international human rights standards is to be effective, legislative action needs to be supplemented and supported by other measures of a practical nature. You have, I am sure, already recognised and taken due account of this in conjunction with the incorporation of the ECHR into domestic law. Permit me to say, however, that while the ECHR in general is well known - though perhaps not its content in detail and the substantial case-law pertaining to it - the situation might not be the same when it comes to the European Social Charter. It is my experience, on home turf and elsewhere, that people - and that would include judges - have scant, if any, knowledge of the Charter, its standards and requirements.

Hence, it is a paramount task also to promote knowledge, to disseminate information, and to make the relevant materials and adequate resources available - to government officials and judges, and also to legal and other practitioners and to individuals - so that law on the books may become law in practical reality. Put bluntly, if no one knows, nothing happens.

"It is a paramount task also to promote knowledge, to disseminate information, and to make the relevant materials and adequate resources available - to government officials and judges, and also to legal and other practitioners and to individuals - so that law on the books may become law in practical reality."

In closing, let me just briefly note, that the European Convention on Human Rights is now in the process of becoming an effective part of your national legal order. Drafting a Bill of Rights is a unique opportunity to expand on this - "supplementing the ECHR", to employ the language of the Good Friday Agreement - thereby laying the foundations of a more comprehensive and coherent protection of human rights. That is a challenge and an aim, which, if attained, would mark a significant achievement that, no doubt, will be highly appreciated and warmly welcomed well beyond the boundaries of Northern Ireland.

Thank you.

Bruce Porter

Bruce Porter is the Director of the Social Rights Advocacy Centre and the Coordinator of the Charter Committee on Poverty Issues, a national coalition of low income advocates, anti-poverty groups and legal advocates dedicated to defending the human rights of poor people in Canada. Bruce has spearheaded precedent setting human rights claims in relation to access to housing, coordinated interventions by the Charter Committee on Poverty Issues at the Supreme Court to advocate for social and economic rights and initiated law reform campaigns for better protections of social and economic rights.

He has been instrumental in successful campaigns at the UN for better access by domestic NGOs to review procedures and has published a number of articles and chapters of books. He is a member of the Steering Committee of the NGO Coalition for an Optional Protocol to the ICESCR, campaigning for a comprehensive complaints procedure for economic, social and cultural rights at the UN.

"Socio-economic rights in a domestic charter of rights – a Canadian perspective"

Bruce Porter,
Centre for Equality Rights in Accommodation[6]

It really is a great privilege for me to be here and be able to participate in what I gather is a fairly early stage of the process of constructing a Bill of Rights for Northern Ireland. It is a particular privilege to be asked to talk about socio-economic rights, because I sense from experiences elsewhere, and from the few days I have been here, that this could be a critical aspect of the discussion, and perhaps the foundation for a visionary and unifying Bill of Rights which might not otherwise be possible.

The process is at an early stage, but already I sense a really critical energy and enthusiasm among the few people who are working on it. I have had a chance to look at the background papers that have been created for the Human Rights Commission, and also the work that CAJ has done, and I have been immensely impressed by all of that work, particularly the work on socio-economic rights and equality. The debate is off to an incredible start.

At this stage it is perhaps a somewhat cloistered discussion among people who have experience of human rights and has not yet engaged a wider audience. That is not surprising, though. In my experience there tend to be four important phases of constitution building when it happens. This is the first phase, when a relatively small group of experts - people who already know the field - start to survey the terrain and come up with drafts and proposals of the kinds of rights and categories of rights that you might think about putting into a constitution or Bill of Rights.

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[6] This address was given as part of a series of lectures hosted by CAJ in Belfast in May 2001.

The second stage, which I do not think has really happened here in any major way yet, is a more political stage when politicians start to wake up to the process and see that there are some implications for them in all of it. At that point, an earlier conceptual and intellectual discourse turns more into a discourse of 'power' and debates about jurisdiction. People start to think 'what are the implications here in terms of what institutions have what power? To what levels of government does this apply? Do we really want courts to have power to reverse decisions that we as legislators have made? Do we want a Human Rights Commission to have this kind of power – for example, to bring complaints against government?' There is a danger, in fact, that the whole process can flounder at this stage because you can get all sorts of different political groups reading political agendas into the constitution making process, sometimes when they are not even there. Social democrats and trade unionists can fear that it is a conservative agenda to give social policy issues over to the courts. Conservatives complain that it is a left-wing agenda to give too much power to particular interest groups. As you can imagine, it can all start to unravel.

Hopefully, though, the process moves on to the third phase. That is the phase when the people wake up to the fact that this is something that could be pretty important to *them*. This happens in different ways in different contexts. In South Africa, of course, there was the personality of Nelson Mandela to bring a unique energy and enthusiasm to the human rights debate, and make it an integral part of starting anew, defining a new constitutional democracy. But even without Mandela, I don't think those who had struggled against *apartheid* for so many years would have been willing to hand over the issue of what rights would be protected to a few politicians. So there was an engagement there that was unquestionable.

In Canada, twenty years ago when we were engaging in the debate about our constitution, it was a bit more problematic. Pierre Elliott Trudeau, the Prime Minister at the time, dedicated himself in his last term to repatriating the Canadian Constitution from Westminster and to getting agreement on a new charter of rights and freedoms. But this was not a vision which was necessarily shared by other politicians, particularly our provincial premiers, and the more we moved from phase one to phase two, and the politicians started to look at what the implications were, the more it began to become mired in politics.

At a First Ministers' meeting called in order to discuss the idea and see whether it was possible to proceed with any consensus, the prevalent view among the other first ministers seemed to be that this was likely to go nowhere. There were a number of Provincial Premiers who felt that federal government had too centralist a vision. There were others who felt that a Charter of Rights would permit unacceptable judicial intrusion into the legislative domain, contrary to our parliamentary tradition. They condemned the "creeping republicanism from the south" – which for us, of course, referred to the United States.

Interestingly it was the first time a First Ministers' conference was televised – they probably expected nobody to be watching. But Prime Minister Trudeau, knowing that the project was in jeopardy of unravelling into political disarray, simply ignored all the Premiers around the table and spoke, at the outset, directly to the television camera, addressing the Canadian people. Essentially he said: 'This whole process is not really about us around this table. It is not about how much power the provinces have, or how much power the federal government has, or how much power the court has. It is about the citizens of Canada setting rules and establishing basic values, a framework within which all of us have to operate. The discussion is not really about us and what we want, it is about the basic rules and values that the Canadian people want to set for their governments.'

And it worked. The public woke up and said, 'Hey this project is kind of interesting'. Of course what was most interesting to them was not the stuff about amending clauses and jurisdictional levels but this idea of a charter of rights. What kinds of rights did we want? What kind of values did we want to protect from assault by politicians and governments? All of a sudden the discussion was back on track and we were into phase three.

Of course, it is not always clear sailing after the public is engaged. In Canada 20 years ago it became clear that the politicians might not support clauses that had been proposed to enhance protection of women's equality and equality in general. Important phraseology had been proposed to include protection of the "equal benefit of the law" which was very important to women in order to distinguish any emerging cases under the new Charter from an earlier Bill of Rights. Under the earlier

Bill, equality had been restricted to equality "before" the law, so that as long as a law was applied equally to all, it did not matter if it was discriminatory in its effect. One infamous decision under the old Bill had found that a woman who was discriminated against because she was pregnant had not been discriminated against on the grounds of her sex because there were no pregnant men to compare her to - thus no basis for finding unequal treatment.

In order to ensure that the new Charter of Rights would guarantee more than this formalistic notion of equality and would address the underlying causes of disadvantage and how to remedy them, new phraseology for the protection of equality was developed which referred not only to being "equal under the law" and "before the law", but also entitlement to "equal benefit of the law". This wording suggested that even when it comes to the substance of legislation itself, such as the provisions of benefits in social programmes, the right to equality would impose substantive obligations on governments to promote and protect equality and address disadvantage. I see that in some of the drafts that people have come up with already in Northern Ireland that language has been incorporated, so to that extent Canada may have made some positive contribution.

When it became clear that this language was threatened, along with a separate section that talked about the equality of women and men, almost instantaneously - it was kind of miraculous – a group called the Ad Hoc Committee of Women sprung up. What was incredible was that it was not just lawyers, although there were lawyers, and it was not just political parties, although there were political parties represented, but there were women working in shelters, there were women working on anti-poverty, women working on issues of violence against women. It was really quite unprecedented to have this kind of diversity of women united around one cause, and it became very clear within a short time that politicians would not get away with weakening the protection of women's equality rights in the draft Charter.

The fourth stage of the debate starts off from the moment at which a constitution or Bill of Rights is finally adopted. I think it is at that point that one realises that all this enthusiasm and all this work went into something that *is* very important, but is at the same time only a lot

of words on paper. One of the women from a grassroots organization who was involved in the Ad Hoc Committee of Women said at the end of the lobbying that "constitutional rights are a hell of a lot to lose, but they are not a hell of a lot to gain".

In other words, when it is all over, even if you succeed in winning the rights you fought for, you have only rights that are written. Rights are not really for writing - they are for claiming. Most of the definitions, most of the problems, most of the questions about what these are really going to mean to people, and what difference they are going to make in their lives, are going to be resolved in that process of claiming rights.

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It is worth thinking now about how you can draft a Bill of Rights with the real purpose of rights in mind, remaining cognisant of how the words on paper will play out in the claiming process. What messages are you sending to courts about what rights claims are not going to be heard and what rights claims are going to be heard, and who is going to be included in and who is going to be excluded from this new constitutional democracy that you are designing? Sometimes these questions get lost in debates about what categories of rights to include and which to exclude, and we lose sight of what is really at stake in the constitution making process. When you consider the claiming process that gives social meaning to rights, you realise that many of the categories through which the debate is conceptualised are not, in fact, that meaningful. Rights claimants do not claim categories of rights. In fact I would really suggest that this whole category of rights we are talking about tonight - socio-economic rights - is really a conceptual abstraction, it does not really exist as a separate category of rights at all.

At home, I never get a phone call from a woman who is facing homelessness saying 'I want to make a social and economic rights claim to a right to adequate housing'. She does not say 'I want to make a civil and political rights claim to non-discrimination'. She outlines the situation she is facing. Perhaps her entitlement to social assistance has been reduced

to the point where the level of her shelter allowance is $300 lower than she can find an apartment for, so she can barely afford what is out there. She may have found an apartment that morning but the landlord said he would not rent it to her because she would be paying 65% of her income towards rent. (There is a rule where they will not rent to anyone paying over 30% of their income towards rent.)

There are components in that scenario that have been the basis of rights' claims that we have brought forward to address the systemic issues that this woman is facing and that are causing homelessness, and I will talk a bit later about what we have tried to do under the Canadian Charter to advance those claims. Of course, that is informed by what is in the Canadian Charter, and is limited by what is not. But the point I am making here is that it is my job on the other end of the phone to put the categories of rights in place, to put a little framework over what she is telling me, but that is not the story she is telling me. She is telling me a rights' story, she is telling me that a human right has been violated, she is telling me that what has happened to her is not fair, she is telling me it does not feel like it is just, she thinks there should be something that can be done about it and she thinks it is a human rights issue. But she does not disaggregate her claim into a social and economic rights claim and a civil and political rights claim. It is a human rights claim.

And she is right. She is right not only in terms of the indivisibility of the issues denying her adequate housing, but she is right conceptually. Even at the international level, we talk about human rights being indivisible, and revolving around the central values of dignity, security, integrity and equality. She knows what she is describing is a human rights issue; she is describing systemic barriers which deprive her of these values.

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I think this is going to be important as you think through what is going to be in your Bill of Rights and hear people making arguments about this and that category of rights. Social and economic rights will be described and debated as if they were a distinct compartment of rights. Do we really want to include this category? Do we want to give courts powers

to adjudicate these types of issues? The issues will be defined in some quarters by what they mean to legislators, or as areas in which money is spent. They may also be defined by lawyers and judges saying that these issues are complicated, that they involve complex social policy elements. But what does it mean to the woman on the other end of the phone? It is what is keeping her from a life of dignity, equality and security. Surely that has to be the focus in deciding what rights you want in there, and what message you want to send, not only to the courts, but to politicians and as a sort of reflection within the community itself, about what values are being held dear, and what kind of constitutional democracy you want to live in.

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When social and economic rights were referred to in the debates about the Canadian Constitution twenty one years ago, it was suggested that there be a reference put in to the International Covenant on Economic, Social and Cultural Rights. It was not a big lobby; it got no attention at all. When it was put forward, the then Minister of Justice, Jean Chretien - now our Prime Minister - responded by saying that these rights were high-sounding rhetoric - the right to food, the right to housing and so on, but you could not put everything in a constitution. He said 'I am waiting for somebody to suggest that we put my Aunt Bertha's recipe for apple pie into the constitution'.

In your discussions about social and economic rights, you will need to consider this argument, that the inclusion of such rights broadens the framework of rights so far as to blur the focus of rights protection. What I would suggest in fact is that it does the opposite. With emerging jurisprudence it is becoming clear that the inclusion of economic and social rights actually refines the focus of constitutional rights so that the issues of the most disadvantaged groups are not lost, so those who most

need the protection of the constitution are not ignored, so the claims that are actually at the heart of these fundamental values of dignity and equality are validated and made central to the ongoing process of rights claiming.

We did not manage to get socio-economic rights into the Canadian Charter, but we were living in a different world then. Social and economic rights were in a complete backwater of the international human rights movement. The Universal Declaration had affirmed that economic and social rights were integral components of human rights generally. Rights like the right to an adequate standard of living, including food, clothing and housing, the right to education, the right to work freely chosen, the right to health – these were all included in the Universal Declaration, and there had been a long-standing commitment to the notion that all these rights, both civil and political and economic, social and cultural were indivisible and interdependent. But this was largely on the intellectual level.

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When it came to the concrete institutional level, on the civil and political rights side you had a very well respected treaty monitoring body established in 1976 called the Human Rights Committee. This Committee not only carried out five-year periodic reviews of governments for their compliance with the Covenant on Civil and Political Rights, but was also able to receive individual complaints or petitions alleging violations of civil and political rights. The Optional Protocol, as it is called, to the Covenant on Civil and Political Rights came into force at the same time as the Covenant itself. So since 1976 - for twenty-five years - we have had on the international level evolving jurisprudence about what civil and political rights mean and what constitutes a violation of civil and political rights. This evolving international jurisprudence has fed into all sorts of jurisprudence on the domestic level.

On the economic, social and cultural rights side, on the other hand, although you had an International Covenant on Economic, Social and Cultural Rights, which was supposed to have the same status, there was no Optional Protocol permitting complaints of violations. There still isn't, although there is debate about having one. There was little evolving jurisprudence. In most domestic regimes, there was no recognition that social and economic rights could be adjudicated. It was generally thought that these were more policy objectives than rights – 'high sounding rhetoric' as Jean Chretien said. But that has really dramatically changed in recent years. There is now a recognition at the international level that socio-economic rights are rights which are not mere policy objectives of governments, not just goals or aspirations, but rights which need to be claimed and adjudicated.

Virtually every modern human rights treaty system, whether it is in Africa or Europe or in the Inter-American system, now has provisions not only for socio-economic rights in words, but for socio-economic rights' adjudication, with complaints procedures and so on. The European Social Charter now has protection for rights, even such as protection from poverty and social exclusion, and a group complaints mechanism whereby violations of those rights can be alleged and adjudicated.

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While at the UN level we do not yet have an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the review of countries' compliance with the Covenant has dramatically improved, so that we now have an emerging jurisprudence on social and economic rights which feeds into domestic adjudication. In the early years of the Covenant there had been at the UN level only a few quite ineffective working groups charged with monitoring compliance with the Covenant. In 1985/86, the Economic and Social Council of the United Nations constituted the Committee on Economic, Social and Cultural Rights. This Committee has now developed quite a respectable jurisprudence, not from individual complaints, but from general comments and periodic reviews of State Parties.

In the Canadian context, the changes to the way the Committee monitored compliance with the Covenant made a significant difference in advancing social and economic rights claims domestically. At its first review, in 1988, the only participants in the process were the government of Canada and the Committee members. Those whose rights were at issue had no place in the process, and no one really paid any attention to it. In 1993, when Canada was to be reviewed for the second time by the Committee, a coalition of groups from Canada asked that they develop a procedure so that NGOs could actually make submissions to the Committee about what constituted violations of economic and social rights in Canada. We argued that the whole process did not mean much if the UN Committee only heard from the government and could not hear from the people whose rights were at stake. In response, the Committee initiated a new procedure allowing NGO submissions. A couple of us rushed over to Geneva to represent the National Anti-Poverty Organisation and the Charter Committee on Poverty Issues, to present to the Committee (in the context of the periodic review of Canada) alleged violations of the Covenant. Since then, NGO submissions have become a critical component to the Committee's periodic reviews of states' compliance with the Covenant.

It is a kind of quasi-adjudicative procedure, even within the periodic review process, where NGOs from most countries that are being reviewed will show up before the Committee and will present documentation. It is very much like a court-case in that the evidence has to be very well documented and based on solid authority if you want the Committee to pay any attention to it. The Committee reviews it and puts questions to the government and officials based on this information, providing the government with the opportunity to dispute contested evidence or justify impugned actions or policies. At the end of the process, one gets "concluding observations" in which the Committee identifies positive areas where compliance with the Covenant is being advanced and "concerns" about areas where the Covenant is not being implemented or where it is being violated. We go back to Canada, then, with decisions or observations from a UN treaty monitoring body, which constitute respected jurisprudence interpreting how the Covenant applies to contemporary issues and policies in Canada. We are able to rely on these when the issues addressed by the Committee go before courts and tribunals in Canada, not as binding law, but as relevant sources of law

from which our courts and tribunals should benefit in interpreting the meaning of domestic law.

So socio-economic rights have really emerged from the "high sounding rhetoric" referred to by Mr. Chretien in 1980 and have entered a whole field of rights adjudication, both internationally and in many regional and domestic contexts. Why have they emerged? Why are they considered such a pressing issue now?

In the twenty years since we debated our Charter of Rights in Canada, we have witnessed dramatic changes that are making us think differently about human rights and what is necessary to protect dignity, security and equality. If I had approached one of the parliamentarians involved in drafting Canada's Charter of Rights and Freedoms back in 1980 about food banks, I would have been greeted with a blank stare. There wasn't a single food bank in Canada at the time. We now have 2,600 food banks across Canada feeding over 300,000 children every month. Thousands of families cannot make it from the beginning to the end of the month without this kind of assistance in order to receive basic nutrition. Hunger has become a real issue after 20 years of unprecedented economic prosperity and growth in the country, which, for six years, has perched at the top of the UNDP development index, which measures the quality of life and well-being in various countries.

In 1980, a parliamentarian interested in the problem of "homelessness" in Canada would find in the parliamentary library a couple of reports about transient men living in weekly rental accommodation or "flop houses" in a few of the larger cities in Canada. Now, of course, there are many more reports, but parliamentarians would not need to go to the library to find out about homelessness. They would have stepped over homeless people on the way to the parliament buildings and would read about deaths on the cold streets every winter. It would have been unthinkable twenty years ago that after two decades of unprecedented economic prosperity, development and new technology, we would see Canada move from a system in which we would rarely see anyone homeless - in which people were entitled in law to financial assistance to cover basic necessities such as housing - to one in which legislators have revoked the most basic legal protections of income adequacy and access to housing, and have explicitly adopted policies that would force people

into homelessness and hunger. A Canada where we have tens of thousands every night without a home, many sleeping in shelters that are significantly below the UN standards for refugee camps. A Canada where we have people dying on the streets, where if you walk around in any of the big cities like Toronto in the winter, you will be sure to see dozens of homeless people huddled over grates for warmth.

So what happened? It is not just happening in Canada. When Canadians look to our neighbours in the south, the richest nation in the world, things are significantly worse even than in Canada in terms of poverty and homelessness. And in virtually every developed country, we have seen increases in poverty and homelessness in recent years despite strong economic growth.

We are dealing with a very different world compared to twenty years ago - a world in which governments both see themselves and act differently, particularly in relation to protecting fundamental social rights. At the time Trudeau was Prime Minister in Canada and we adopted the Charter of Rights, it was assumed that governments were perhaps better situated than courts to protect vulnerable groups and ensure a "just society." Politicians didn't imagine that we needed social and economic rights to force governments to do what they did naturally. Now, however, things have changed.

Our governments now see themselves fundamentally as actors in a global market place. They must always have one eye on the credit rating agencies in New York who are looking critically at how much they are spending on social programmes. If these agencies downgrade the government's credit rating, that could change the deficit significantly. If governments improve social programmes and have to raise corporate tax rates to pay for them, then they may repel investment and leave more people unemployed.

Competition between and among governments for investment, and their interaction with private market forces, has seriously eroded the commitments to social rights, which, twenty years ago, seemed unquestionable.

One response to these trends has been that emerging constitutional democracies are beginning to see the kinds of values that have to be protected through rights as being social and economic in nature, as well as civil and political. The fear about governments acting outside of an agreed set of rules or standards can no longer be defined solely in terms of what governments might do when they intrude on our privacy, or our freedom. We have to worry increasingly about what governments are failing to do when they abdicate their fundamental responsibilities to protect disadvantaged groups.

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One country, however, cannot accomplish this alone. Together, we have to develop an international rule of law, which says that social and economic rights are not just fundamental values in South Africa, or Canada, or Europe, or South America, but that these are universal rights, which courts everywhere will begin to enforce and ensure that governments live up to.

Certainly we have not responded fast enough. We are way behind the corporations and behind the trade and investment agreements which are making sure that a regulatory measure which might protect jobs in one country, but might disadvantage a trading partner, can be challenged by a corporation and that these corporate claims can be adjudicated and enforced. Corporations from other countries can challenge legislative regulation or subsidies before a trade panel fairly quickly, and get a decision. On the side of the people who might be hurt by those kinds of decisions, on the other hand, we are struggling to quickly catch up with a notion of human rights which can allow us to insist that these too are universal values that we can build into our shared agreements with other

countries. Europe, of course, has been significantly ahead of the game in trying to develop social rights that go with trading relations, but it not something that can just be done on a regional basis.

It is increasingly clear that the protection of social and economic rights cannot be restricted to international agreements. All the evidence we have shows that rights have to be rights locally within your own constitution, and within your own legislation, if they are really to make a difference. You have to be able to claim and enforce them locally. So, in emerging constitutional democracies, whether it is Latin America or South Africa, countries are opting for including social and economic rights as enforceable rights that can be adjudicated. These are standards and international rights that countries and governments need to be held accountable to, and many governments, to their credit, are choosing when they are drafting constitutions to be held accountable to them through domestic courts and tribunals.

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The most recent example is South Africa. South Africa chose to include the right to adequate housing, the right to social security, the right to water, the right to food, the right to access to healthcare - a number of very important social and economic rights - in its Bill of Rights. Recently, the first 'right to adequate housing' case was adjudicated in the Constitutional Court in South Africa and it found that the government had failed in its constitutional duties when it allowed 900 individuals, including 500 children, to live in a sports field after having been evicted from their squatter community, without basic facilities, without drinking water, and without a decent roof over their heads.

This is a democratically elected government and one in which we can actually have a lot of faith. But things get missed, and when the government of South Africa was before the Constitutional Court in this

case, it had to admit that there had not really been any hearings into how much it would cost to deal with the issues faced by these families and others like them. There had not really been a process of costing out what would be required to have a program to deal with emergency housing for families in this type of situation. The government had a pretty good housing programme in place for dealing with longer-term housing problems, but they had somehow failed to address this shorter-term problem. So the Constitutional Court found that the government had failed in its constitutional duty with respect to these families but they left it up to the government of South Africa to work with other levels of government to remedy the problem.

Giving constitutional legitimacy to social and economic rights claims inevitably gives rise to new types of relationships between courts and legislators. The Court struck nothing down in this case. This was not a constitutional challenge that struck down a piece of legislation and said 'no, you went too far and violated these individuals' rights'. The Court did not find that the eviction itself had been a violation, because it was an eviction that was long-planned and was a component of actually developing affordable housing. It was done in accordance with the law. The violation was in not providing what was necessary, and in not meeting positive obligations that are necessary to protect the right to adequate housing. Thus, the Court cannot itself achieve the remedy simply by striking down legislation or stopping an eviction. The Court left it up to the government to take the necessary positive actions. So this decision was not the court taking over housing policy, but the court essentially doing what is the job of courts - to determine whether basic values of security and dignity and equality are being complied with in government policy.

What we are seeing, then, is not to be understood as an expansion of the role of courts into a new "category" of rights, which were previously excluded, but rather an important move towards a new paradigm of human rights. We are dealing with new problems, new kinds of issues and we need new approaches to rights in order to effectively deal with them.

It seems to me that the contradiction that we had in the heart of the earlier paradigm of rights, and which restricted them predominantly to

civil and political rights, was the premise that somehow the primary thing we had to fear from governments was excessive government action. If we thought of governments negatively as things that tended to act excessively, or in ways that were improper, then we forgot about the problem that sometimes governments do not do the things that they have to do to ensure dignity, security and equality. Excluding the positive components of government obligations from the ambit of human rights clearly leaves us with a paradigm of rights which is increasingly incapable of dealing with the kind of problems brought by people to organisations like mine in Canada and to organisations like the Legal Resources Centre in South Africa.

In the Canadian context, what we had to do with those claims, rather than using socio-economic rights - which were not in our Charter - was to try to exploit the fact of indivisibility and interdependence in order to validate claims with a substantive social rights component. Part of that was something that I think was inevitable in the evolution of the concept of equality in Canada and elsewhere. When people with disabilities brought claims to the Human Rights Commission in Canada, it was clear that in asking for equality, they were asking for more than the "*same* treatment". Equality meant having a job along with other people, and having a job meant the provision of accessible premises or special technology in order to accommodate the needs that were unique to a particular disability. These things cost money, and so within our human rights jurisprudence, we had an evolving recognition that equality sometimes makes demands on governments to provide things.

This approach really means that things, which in another regime might be claimed as a socio-economic right, could be claimed in Canada as a component of the right to equality. Let me give the example of a recent case at the Supreme Court of Canada - the Eldridge case. Susan Eldridge and Linda Warren were both deaf and were unable to communicate effectively with their doctors because sign language interpreter services were not provided. Linda Warren had the frightening experience of giving birth to twins prematurely without being able to communicate with hospital staff about what was happening. She and Susan Eldridge alleged that the failure to provide interpreter services as a component of healthcare in British Columbia violated their right to equality. The government argued that this was a disadvantage that the claimants already had; the

government did not cause the disadvantage, there had been a programme (funded as a non-profit), which had provided interpreter services, but it ran out of funding so it stopped providing the services. The government had never provided the services, so the issue was not that it had stopped providing the services; the government really had not done anything, and they were being asked in a sense to start a new programme to meet a need that they had not met in the past.

The government had argued successfully at the Court of Appeal level that if the Court told them that interpreter services was a need that had to take priority over needs in the healthcare system, or over different needs in the social services sector, they would be acting inappropriately. They argued that this type of decision about which needs should be prioritised was not the role of courts but of legislators. So at the Court of Appeal level, the Eldridge claim was defeated because it was seen to extend the reach of courts into an area that was not really their terrain. The Supreme Court of Canada unanimously reversed that decision, however, and said that governments were advancing "a thin and impoverished vision of equality" to suggest that equality means simply providing services in the same manner to everyone while failing to provide the resources necessary for disadvantaged individuals and groups to enjoy them in a meaningful way.

If you take that kind of approach to equality, it seems to me that the kinds of changes that we have seen in Canada - dealing with poverty, homelessness, leaving single mothers without adequate financial assistance - could be subjected to exactly the same kind of analysis. In fact, we have our first poverty and homelessness claim going to the Supreme Court of Canada in the Autumn. I have to say that it has been a real battle to try to convince the courts to extend the "substantive" approach to equality to issues related to poverty, and so far the experience on some of the most important poverty related issues has been the opposite of the Eldridge experience. The response of lower courts to poverty related inequalities has been to say that because socio-economic rights are not included in the Canadian Charter, these kinds of claims to security and dignity are beyond the scope of the Charter's protections.

In Ontario, for example, we had welfare cuts in 1995 of 22%, reducing benefits, which were already inadequate to a level which we showed in

undisputed evidence before the court would probably double the reliance on food banks and force 120,000 households and 67,000 single mothers out of their homes. All of what our experts predicted, unfortunately, came true. A number of recipients challenged the cuts as violations of the Charter, arguing that they clearly deprived single mothers, people with disabilities and other people relying on social assistance, of basic dignity, security and equality.

The court did not really question the validity of our evidence. It accepted that "the daily strain of surviving and caring for children on a low and inadequate income is unrelenting and debilitating; all recipients of social assistance and welfare payments will suffer in some way from the reduction in assistance; many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in metropolitan Toronto, many may become homeless."

Clearly, on that evidence, "security of the person" and "equality" were breached under any reasonable definition of those terms. However, what the court said was that the right to security of the person does not provide the applicants with any legal rights to live on social assistance. The legislature could repeal the social assistance statutes if it wanted. Well, that was pretty shocking - that we would have a charter of rights which guarantees security and equality, but the legislature could take away everything that the most vulnerable groups in society rely on in order to be able to feed and clothe and house themselves – where is the reasoning in that? The reasoning, of course, was that this was an economic right, and there are no economic rights in the Canadian Charter of Rights and Freedoms.

It was the same in other lower court cases. Eric Fernandez suffered from a muscular degenerative disease and had relied on a partner to provide attendant care in order for him to live in his home. When the partner left, he needed attendant care for certain times of the day in order to stay in his home. The alternative was to move into hospital full-time at a significantly higher cost than paying for attendant care in the home. So he asked for financial assistance, which was available on a discretionary basis from the province of Manitoba, so that he could stay in his home. When he was refused, he challenged that decision as

violating his Charter rights to security of the person and to equality. The court ruled in that case too that this was a socio-economic rights claim and therefore excluded from the ambit of the Charter. It said Fernandez "was not being disadvantaged because of any personal characteristic or because of his disability - he was unable to remain community-based because he had no carer, because he must rely on public assistance, and because the facilities available to meet his needs were limited."

So the experience we have had is that it is the Supreme Court that has applied a "substantive" approach to equality, to issues of disability, sex equality or the protection of sexual orientation in human rights codes. Further, the Supreme Court has made it clear that courts are supposed to interpret rights in the Charter consistently with Canada's international obligations, including our international obligations under the Covenant on Economic, Social and Cultural Rights and under the Convention on the Rights of the Child.

The Court has recently found that international human rights law should be a "critical influence on the interpretation of the scope of the rights included in the Charter." This was in a case dealing with the deportation of a woman from Jamaica who had four children born in Canada, and who would have to be separated from her children if she were to be deported. In the exercise of discretion on humanitarian and compassionate grounds, the question was whether the administrator had erred in failing to consider the best interests of the child, which is a right protected under the Convention on the Rights of the Child. The answer was 'yes' – the reasonable exercise of discretion must give sufficient weight to the central values contained in international human rights instruments, and the provisions of the Charter of Rights should be interpreted in a manner that is consistent with these values. So it is clear that courts should be interpreting the Charter rights to "security of the person" and "equality", if they can, in a way that is consistent with the recognition that adequate food, clothing and housing are basic rights.

The Committee on Economic, Social and Cultural Rights has suggested quite clearly that the right to equality should wherever possible be interpreted in a manner which provides remedies to violations of socio-economic rights. When cases like the challenge to welfare cuts in Ontario, or the denial of special assistance to Eric Fernandez, were reviewed by

the U.N. Committee on Economic, Social and Cultural Rights in its periodic review of Canada in 1998, the Committee made it very clear that the courts in Canada were not acting in compliance with Canada's international obligations when they denied legal remedies to these types of claims. Even the government of Canada was saying before the Committee that section 7 of the Charter on the right to security of the person can and should be interpreted to include basic necessities. Yet back in the Canadian courts, provincial governments were arguing that you can eliminate social assistance altogether without violating the Charter.

So we have had this kind of disjuncture. None of the cases like the Fernandez case, or the welfare cuts case, got to the Supreme Court of Canada - they were both denied leave. The case that will be heard in the Autumn is the case of Louise Gosselin. She was a welfare recipient in Quebec who was the victim of a regulation which limited the amount of social assistance for under 30's who are employable to $158 a month – about £60 a month. It is essentially undisputed in the evidence that you could not provide yourself with food, clothing and housing in Montreal with that amount of assistance. So she suffered all the kinds of hardships that are typical of women who are forced into homelessness – she was vulnerable to an attempted sexual assault, she had to turn at one time to prostitution to survive, she lived for a time with a man for whom she had really little affection, essentially because he was her only source of food and shelter. When she finally turned 30 and her entitlement went up to $470, she said she felt like she had survived this horrific ordeal and was finally emerging into a meaningful life.

It would be hard to suggest that Louise Gosselin had any meaningful security of the person, and it would be hard to argue that she had any meaningful equality in the sense of that term adopted by the Supreme Court of Canada in other cases. What will trouble the Supreme Court when they hear the case, however, is the fact that this may be seen by some as a different kind of rights claim – a substantive rights claim that deals with the positive obligations of governments in social programmes. The Eldridge case required interpreter services, which required programme and cost money – but not that much money. We are dealing here with social programmes and social programme cuts, which engage some of the major fiscal issues that governments are dealing with. The Court will be asking itself, is this really the role of the courts?

I am hopeful that the Court will realise that to interpret the Charter of Rights as applying to these kinds of issues is absolutely critical if you are going to make it a Charter of Rights for everybody in Canada. If they reject Louise Gosselin's claim, what kind of message is it really sending out to Canadians about our Charter of Rights? It is a message that says that this is a Charter of Rights which will validate discrimination claims as long as it is somebody who is disadvantaged by discrimination, perhaps refused a job, but not from someone who is jobless. It will validate a claim that is related to some sort of personal characteristic that might be defined in current parlance as 'the worthy poor'. But if it is a claim from somebody who is increasingly subject to quite incredible stereotypes and hostility - 'the welfare poor' – then somehow, because it is coming from the most marginalized and disadvantaged person, it loses its standing under the Charter of Rights.

This is a critical kind of decision to leave up to the Supreme Court of Canada - one which will have a major impact on the future of the Charter of Rights and what it means for Canadians. We are looking at complex situations, where we know there was pressure from the International Monetary Fund on our Finance Minister in the mid-nineties to remove the Canada Assistance Plan Act, which required provinces to provide adequate levels of financial assistance so as to cover the costs of basic necessities like food, clothing and housing. It was the decision to revoke the Canada Assistance Plan which actually enabled provinces to put in place the kind of welfare cuts that have had all these devastating consequences.

So, these are issues where the Supreme Court in Canada is not just dealing with a particular violation in one province, or even simply in one country. It is dealing with systemic issues that are confronting the human rights movement around the world. The fact that our Supreme Court justices are now talking to judges in South Africa and in many other countries, and that judges everywhere are starting to wrestle with these kinds of questions, means that where ten or fifteen years ago courts might have been fairly comfortable asserting that "it's not our role", "we're not competent to determine these types of issues" or "that's not our legitimate role in a constitutional democracy", now I think they must see that courts and tribunals elsewhere are successfully adjudicating these types of claims, that they are increasingly central to the international human rights

"Courts do have an important role to play holding governments accountable to fundamental values necessary to dignity, equality and security of the person."

movement which gave birth to our Charter, and that courts do have an important role to play holding governments accountable to fundamental values necessary to dignity, equality and security of the person.

There was one case in which our current Chief Justice, Beverly McLachlin, was dealing with arguments from the government to suggest that somehow the courts should not be playing any kind of role in these complex social policy areas. I think what she said is something that is worth thinking about in your deliberations about what rights go into a Bill of Rights for Northern Ireland. She said:

> *"Parliament has its role, to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role to determine, objectively and impartially, whether parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is parliament. To carry judicial deference to the point of accepting parliament's views simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."*

I think the drafters of the Canadian Charter would probably agree with that, and even though they did not include socio-economic rights when they drafted the Charter, I think these days they would recognize that this "category" of rights is actually an integral component of many of the rights that were explicitly enumerated in our Charter. When there were consultations last year about what should go into a new Canadian Human Rights Act, it was unanimous in every consultation with equality-seeking groups – women, people with disabilities, visible minorities, youth – that social and economic rights are fundamental to the protection of equality. They all said that "for us, the big equality issue is poverty'. There was an organisation of low-income women in Ottawa a number of years ago that distributed a button that I always liked. It said, "Poverty

stops Equality – Equality stops Poverty". These rights cannot be separated into airtight categories – courts cannot do it and constitutional drafters cannot do it. If we really want to protect dignity and equality and security, we have to deal with poverty, we have to deal with homelessness, and we have to deal with access to basic social and economic rights. It is really ultimately a question of full citizenship, of affirming a progressive notion of a "just society".

"If we really want to protect dignity and equality and security, we have to deal with poverty, we have to deal with homelessness, and we have to deal with access to basic social and economic rights. It is really ultimately a question of full citizenship, of affirming a progressive notion of a "just society"."

These are the kinds of things we talked about twenty years ago in Canada and which we continue to debate through the process of claiming and adjudicating fundamental rights. They are the kinds of things you are going to be talking about in the next couple of years in Northern Ireland. I hope that you will be able to work collaboratively with groups in other countries who are trying to bring these types of issues forward as claims, because we are in it for the long haul. It is not something that is going to be solved just in the drafting of a Northern Ireland Bill of Rights, but I think if we work together and within an evolving human rights framework, we really can start to make a difference to people's lives.

Thanks very much.

Professor Sir Nigel Rodley, KBE

Professor Sir Nigel Rodley is Professor of Law at the University of Essex. In 1993 he was made Special Rapporteur on Torture of the United Nations Commission on Human Rights. He is a member of the UN Human Rights Committee. In 1998 he was knighted for services to human rights and international law.

"A Bill of Rights for Northern Ireland: Some International Lessons"

Professor Sir Nigel Rodley,
University of Essex, UK member of the
UN Human Rights Committee[7]

I know that the last thing you want is another outsider coming over and starting to tell you how to handle your affairs here in Northern Ireland, and nothing is further from my mind. In fact, it was far from clear to me when I was invited to come what it was that I would have to say that would be relevant. I have however the sense that some lessons learned from the international dimension may have some pertinence. I am certainly not going to try to draw the connections too closely.

The human rights construct is fairly novel in human history. Some people try to trace it back to the Classics and Antigone - I am not convinced. It really first emerged as part of the Enlightenment in response to a growing awareness, in a more complex society and a more mercantile society, that a heavy autocratic hand was not the best way for societies to be governed. The manifestations we saw of that were the US Bill of Rights, the French Declaration and arguably the revolutions that gave rise to them. But the human rights idea remained one that was not relevant in the international domain, not one that affected international relations. Human rights were perceived as matters essentially within the jurisdiction of states, and therefore not a suitable topic of international relations, much less international law.

While there had been some steps towards an international awareness of human rights issues – for example, in the area of slavery, in the area of minorities' protection after the first World War, and in the area of labour rights protection also after the first World War – the idea did not come into focus as a fully fledged issue on the international scene until the

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[7] This address was given as part of a series of lectures hosted by CAJ on a Bill of Rights for Northern Ireland, in Belfast in May 2001.

Charter of the United Nations (UN) in 1945. At that time, when human rights clauses did appear, including amongst the purposes of the United Nations in Article One of the UN Charter, this came about not least because of the realisation that people came to believe that a bad human rights situation at home could also lead to deep disorder abroad. The shock and revulsion occasioned by the nature, scope and extent of the human rights violations that characterised Nazi Germany were the key impetus to change.

But, the UN had a long way to go. Even at that time, the sense was that *at best* the UN could set standards - it could not look at individual countries' human rights performance, much less individual cases of violation of human rights. So they busied themselves with setting standards, the most notable and resonant of which, and arguably still the most important of which, was the Universal Declaration of Human Rights adopted by the UN General Assembly on 10th December 1948, the day which we now commemorate annually as International Human Rights Day.

The UN then did go on to start developing human rights treaties. Declarations were not seen as necessarily legally binding. There was a sense that only with treaties could one impose clear legal obligations, and even more, only with treaties could one establish the machinery that could begin to hold states accountable. If states themselves, by virtue of their sovereign independence, could not be subject to scrutiny of their human rights performance without their own free will to that effect, ratifying a treaty providing for such scrutiny was a manifestation of that free will. The ratification of a treaty dispensed with the obstacle of 'sovereign independence' that persisted at that time.

So at the international level, work began on an International Covenant on Civil and Political Rights and an International Covenant on Economic, Social and Cultural Rights. These two instruments took a long time to be adopted. The work started around 1950 but the texts were only completed in 1966 - sixteen years later. When eventually adopted by the UN General Assembly, they could not come into force until 35 countries had ratified them. That did not happen for another ten years. So the treaties did not actually come into force until 1976, just a quarter of a century ago – that is pretty recent. Knowing that things were going

very slowly at the UN level, Europe decided to move faster, and indeed in 1950 it adopted the European Convention on Human Rights, the document which, with amendments, now gives us most of the norms that we have incorporated at long last into our own law through the Human Rights Act.

Indeed, there have been more treaties and more machinery since then, although most of that machinery is at first brush rather weak. For example, the only automatic right of treaty bodies - such as the Human Rights Committee established under the Covenant on Civil and Political Rights, on which I now sit - is to require of states that they submit a periodic report. We can then scrutinise this with a delegation of the state concerned, and then after a dialogue, we can formulate some conclusions. That is as far as it goes; there is no complaints system – or at least no automatic complaints system. If a state has accepted, as the UK has, a right of inter-state complaint, then it is possible for one state to bring a complaint against another state. It has not happened yet. Also, under an Optional Protocol to the Covenant, if an individual makes a complaint, then the Committee has a right to receive such complaints and hear them and effectively adjudicate, although its findings are not binding. The UK is not one of the approximately 90 countries that have accepted the right to individual petition to the Human Rights Committee.

The point I am trying to make however is not to give a disquisition on international human rights machinery, but to indicate how slow the implementation of human rights has been in coming, and particularly through the treaty procedure. It was partly frustration at such delays that led the UN Commission on Human Rights to set up certain kinds of 'thematic' machinery, which could look at particular kinds of violations of human rights. There is a Working Group on Disappearances, a Working Group on Arbitrary Detentions, a Special Rapporteur on Summary and Arbitrary Executions, a Special Rapporteur on Torture (the mandate for which I am currently responsible) and others – I think some of you may have heard of the Special Rapporteur on the Independence of Judges and Lawyers. We are able to take up individual cases, ask governments to respond to the information we receive, and formulate conclusions. We can also go on a mission to countries where there seems to be a general problem falling within our mandate, and do a report on what we have found.

The fact that this system is now in play – the non-treaty procedures like the ones I have just mentioned, the thematic ones - and the fact that now more and more countries are bound by treaty procedures (including the optional parts of them) is a remarkable step forward. When I first started working in the human rights field at Amnesty International in 1973, none of that existed. Being Legal Adviser there was a part-time post, and it also involved having other research tasks as well. By the time I had left however, I left behind an office in New York, an office in Geneva, an office in Brussels and about 10 people working solely on international human rights law issues in the headquarters office in London. This was due simply to the fact that the nature of the work had expanded at a quantum rate.

The message I want to convey with all of this is that we are talking about a real sea change. Human rights are now found in the constitutions of most countries. The debate has moved from the national to the international, and from the international back to the national, in a way that I really think permits one to conclude that it is an idea whose time has come. Do I think that means that human rights - especially with the collapse of the major world ideological face-offs - are now the modern ideology? Some, though not usually human rights activists, even claim it is the next religion. The answer is of course not. Human rights are a framework for discourse in conflict resolution. They are about *how*, not about *what*. The *what* has to be worked out, the substance has to be worked out. But human rights create the rules of the game. Human rights constitute the playing field, not the game itself. I would argue that they are arguably a necessary condition for a good game.

"Human rights are a framework for discourse in conflict resolution. They are about how, not about what. The "what" has to be worked out ... but human rights create the rules of the game. Human rights constitute the playing field, not the game itself. I would argue that they are arguably a necessary condition for a good game."

Human rights do not create substantive solutions to problems. They help societies to find the most suitable solutions to those problems. Take the example of the rights to freedom of information and freedom of association. These rights are necessary if decision-makers are going to

be able to gather the information they need to take decisions and if people who are going to be affected by those decisions are able to communicate the relevant information to those who are going to take the decisions. A marketplace of ideas sharpens awareness of the issues; criticism, rebuttal of criticism - all of that is an essential element to eventually arrive at processes of accommodation and, through those processes of accommodation, to legitimating of the outcome, not least by spreading ownership in the outcome. If there are losers, as sometimes there have to be, today's losers may be tomorrow's winners and vice versa. That is the basic idea of those particular rights, as well as others, such as the right to participate in government.

It is no accident that human rights figure large in conflict settlements that have taken place around the world. You can hardly read these days of a settlement of a civil conflict which does not have a substantial human rights component to it, sometimes even of a judicial nature, but certainly of a normative and of an institutional nature. Look at Central and South America, South Africa and the Balkans. Human rights are seen as part of the prescription for creating the possibilities, not only of an end to conflict, but the avoidance of conflict in the future. Very often of course, human rights are addressed because human rights violations have been, or have been perceived by at least some, to be at the heart of the conflict in the first place. It may not always be the case but it is often the case. Frequently, human rights issues are central to the solution as well as sometimes central to the conflict. Evidently, because of that centrality, human rights are often seen as controversial, not least because they tend to be invoked during the conflict predominantly by one side.

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Alternatively human rights is about setting limits to the authority of the existing dispensation whatever that is - remember the English Bill of Rights, remember the French Declaration - those benefiting from the existing dispensation will often be inclined to be suspicious of human rights discourse.

Those remarks are not only relevant to conflict situations – the same can be true in ordinary civil situations. I visit countries around the world to look at conditions of detention and treatment of people deprived of their liberty. If I had been doing it twenty years ago, most of the time I would have been visiting political prisoners. Now, most of the time, I am visiting ordinary criminal suspects, or even convicted criminals. There is a real prevalence of public insecurity around the world. Rises in crime lead to demands for stronger measures to restore public order and draconian measures are seen as necessary in order to deal with the perceived problem on the streets, or in people's homes.

But does this law and order approach work? Does it solve the problem? Of course not - because only certain kinds of people are likely to be the victims of torture and ill treatment: they are almost certainly going to be the poor, the marginalized, the minorities, and people of the wrong colour. Just last year I was in Brazil, and it was simply staggering how the worst places of detention and the worst treatment that people had received at the hands of their captors and interrogators was among the black population. It was vivid. Interestingly, nobody had pointed it out to me, it just jumped out at me, and I am not claiming any special sensitivity. It was just there unavoidably to be absorbed. So these are the people most likely to be tortured.

"human rights are often going to be seen as something threatening by people with comfortable lifestyles that, understandably, do not care for feeling menaced when they walk the streets. So human rights are unpopular, benefiting those who at the bottom seem not to have the same human dignity, or deserve the same respect for that dignity as ourselves."

On the other hand, human rights are often going to be seen as something threatening by people with comfortable lifestyles that, understandably, do not care for feeling menaced when they walk the streets. So human rights are unpopular, benefiting those who at the bottom seem not to have the same human dignity, or deserve the same respect for that dignity as ourselves.

Of course, those who defend human rights then come to be tarred with the same brush. Non-governmental organisations working for human rights, even national institutions working for human rights and lawyers defending unpopular clients are

often seen as partisan, defending unpopular people. This leaves them being identified with the actual acts of those people. They may well be perceived as more concerned with the victims of the violations rather than the victims of the original crime.

One must not of course forget the victims of the original crime - they may be many, and the harm and injury they have sustained may be deep and lasting. But that does not mean that those who work to defend rights should be tarred with the guilt of the offences or suspected offences committed by those they are defending. However professional they are, and however committed to exposing the truth, their message will be ignored if they are tarred that way. I have even known some countries where the tarring of human rights organisations - sometimes called "red-baiting" in right-wing countries, sometimes called "CIA puppets" in other countries - in fact can lead to extra-judicial measures of various nasty sorts, not excluding death, being inflicted on such people.

But human rights are not and cannot be about all the pain and suffering in the world. They are about, in my view, what they have traditionally been about, and what I have already indicated they are about - which is the relationship between governors and governed. They are about the rules that mediate that relationship. That is how it has been historically, that I think is how intuitively most people understand the notion, certainly that is the general approach in international law to the issue.

"But human rights are not and cannot be about all the pain and suffering in the world. They are about, in my view, what they have traditionally been about, and what I have already indicated they are about - which is the relationship between governors and governed."

I am a so-called 'mainstream traditionalist' in my approach to human rights. But just because I take the view that victims of crime, whether the crime be politically motivated or not, are just that - victims of crime - does not mean that they do not merit attention. It is not appropriate, in my view, to describe them as "victims of human rights violations", but it is certainly appropriate to be concerned for them as victims - victims of crime. Indeed there are organisations that work to protect such victims, and so there should be. In fact I particularly remember a very satisfying

experience in the mid-eighties of representing Amnesty International - and there were other human rights organisations - at meetings in which crime victims' organisations were also present. We worked together to develop what was to become the UN Declaration on Victims of Crime and Abuse of Power. This instrument in fact precisely, far from posing a contradiction between the two, perceived that the two issues could be integrated, or at least complementary. Indeed, you will find some individuals working in both human rights organisations and in victims organisations - just as you find them working in human rights organisations and in development organisations. These tasks are complementary but different. I guess that I am saying that human rights defending organisations have a right to stick to their task!

Another topic that often comes up in discussions with governments came up very directly in the drafting of another UN Declaration which is called briefly the Human Rights Defenders Declaration (the full title is the Declaration on the Right and Responsibility of Every Individual, Group and Organ of Society to Promote and Protect Universally Recognised Rights and Fundamental Freedoms)! The title alone is a good example of how the UN tends to be prolix and it is not always by accident, since some governments work very hard to prevent human rights language being too resonant or accessible.

When they were drafting that Declaration in the late eighties/early nineties, there were plenty of delegations talking about responsibilities. These delegations wanted to concentrate on human responsibilities. But first of all, one had to cut through a jurisprudential misunderstanding. Those who know a bit of legal theory know that it is often said that there is no right without a corresponding obligation. That means that a person does not have a right unless some other person has an obligation to meet that right. The obligation and the right do not necessarily vest in the same person.

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But of course, this was not the major concern. There was the more political element to the argument. Countries with notoriously poor human rights records wanted obligations to trump rights.

In the end, we worked it out so that the Declaration included a lot of language about obligations and responsibility, and indeed not least the obligation and responsibility to conform with national law, but it was made clear this had to be consistent with human rights obligations under international law. That was the important point. It should be self-evident that people indeed have a whole range of obligations they must conform to. The whole legal system and the whole political system of society impose responsibilities on them and ignorance of the law is no excuse. But the law itself must be consistent with international human rights standards for it to be worthy of that respect. So each society is absolutely free to control itself the way it sees fit, but within the limits of this rather big ring that they are given to play in by the human rights paradigm.

One of the key problems we have tended to face at the international level is the problem of implementation at the national level. Very often the law is beautiful but the practice is not. Again, let me take an example from the area of torture. Very often, in fact almost uniformly, torture is a crime under a state's law. But it is a crime that tends to get committed with impunity. There are a number of reasons for that. One problem is that, even though the law may prohibit torture, it creates or allows for the preconditions for torture to thrive. For example, prolonged incommunicado detention is permitted creating exactly the conditions that are necessary for the captors and the interrogators to work their will. In other cases the law is good with very strong rules: a maximum of 24 hours detention before having to be brought to a judge - which is best international practice - or access to a lawyer immediately, or at least within 24 hours.

But still torture takes place, and one of the reasons why it still takes place is this continuing problem of impunity. Essentially what we are dealing with - and this is true in respect of most human rights violations - are criminal actions carried out by those who are supposed to be upholding the law. Sometimes those charged with upholding the law may feel that it is necessary to "cut corners", or "bend the rules", or whatever euphemism law enforcement officials around the world give, to justify

torture and torture-like practices. So, what societies are also beginning to discover is that they need new institutions, they need new bodies to help spur the standard institutions into some kind of self-awareness and more, some kind of self-control. But relying, as a number of Commonwealth countries do, and the UK is no exception, on the system itself automatically to police itself has not always proved to be terribly effective. It is often necessary to create new machinery with powers that can really ensure that the information that those responsible for law enforcement do not want to get out does come out, especially when they are breaking the law.

One might ask if there is value-added to a national Bill of Rights? That is a very difficult one. I tend normally to start from a more defensive posture. Whether one is talking about a regional human rights treaty or a national human rights document of some sort, I tend to start by saying 'well fine, but make sure it does not go below the international standards that are out there'. Obviously in the UK context, we have already solved that arguably with the European Convention on Human Rights. But what is also clear is that there are rights contained in the two international covenants on human rights - the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights - to which the UK is a party and yet which have most certainly not been incorporated into national law. So it seems to me there is already fertile ground for potential development in a Bill of Rights. So too in other areas where maybe the law is a bit general, or arcane, or historically resonant, but perhaps not terribly clear - especially as interpreted by national and international courts over the years. It might well be better to be more specific about those norms, more specific about those rules, and use language for them that resonate with the society in question. I suppose also when societies have their own problems, and certain rights speak more to those problems than certain other rights, it might be necessary to give special attention to the articulation of those rights.

> *"In the long run, human rights are in everybody's interest too, because a stable society is in everybody's interest, and respect for human rights is a major contribution to a stable society. Human rights are a necessary, albeit not a sufficient, condition of political stability."*

So, by way of conclusion, I would argue that human rights deserve respect because every human being deserves respect for their human dignity. Deny human dignity and rights to some and you potentially deny them to all. In the long run, human rights are in everybody's interest too, because a stable society is in everybody's interest, and respect for human rights is a major contribution to a stable society. Human rights are a necessary, albeit not a sufficient, condition of political stability.

If anything that I have said does read across to Northern Ireland, that would be very gratifying. In turn, I am confident that what happens here will read across to other societies seeking to improve their conditions of life, dignity and respect.

Thank you for your attention.

Francesca Klug OBE

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Ms. Klug's main expertise and human rights interest is the 1998 Human Rights Act and domestic rights generally, but her expertise and research interests also include the historical evolution of human rights values, international human rights law and constitutional law. Her publications include "Values for a Godless Age, The Story of the UK's New Bill of Rights," and "The Three Pillars of Liberty," of which she was a co-author.

"The Promotion of Human Rights"

Francesca Klug,
Centre for the Study of Human Rights,
London School of Economics[8]

I think it is fair to say that there cannot have been a more difficult time than this to talk about human rights values, and yet there cannot be a more important time to understand what human rights values are. We are probably on the brink of a war fought partly in the name of human rights and freedom, and we are also being told that human rights must not weaken us, nor hamper us, in our resolve to fight this war. So never has it been more important to be clear what we are talking about when we evoke the term human rights.

Until very recently, if you asked most people across the water what they thought human rights were, they would probably have said it is something that foreigners lack. Here in Northern Ireland I am aware that the term human rights has tended to be associated with one side of the political divide but, as Minister for Education Martin McGuinness forcefully just said, the idea of human rights is nothing if it does not apply to all people and all peoples around the world.

The term human rights did not come into common usage until after the end of the Second World War, but its pedigree goes back much further - some would argue as far as ancient Rome and Greece.

Certainly the idea became a popular one at the time of the Enlightenment at the end of the 18th century, from whence the idea of natural rights was used to topple governments and spawned the French and American uprisings, to the 1948 Universal Declaration of Human Rights (UDHR),

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[8]This address was given during a conference on human rights education hosted by the Department of Education and the NI Human Rights Commission, in Belfast, in September 2001.

and its direct descendant the 1950 European Convention on Human Rights (ECHR).

But during these tumultuous 200 years or more, the idea of fundamental rights has not stayed still: it has evolved to reflect different social and political conditions; it has evolved to meet the demands of the men and women who have shaped the idea of rights over time; and it has evolved through what most commentators tend to refer to as three generations of rights. I actually prefer to use the term 'waves' of rights to highlight the dynamism involved in this evolution. In my view, the defining values underlying the three 'waves' are:

- Liberty - which is what we associate primarily with the first wave of the Enlightenment;
- Community - which is a value that came to stand hand in hand with liberty after the second World War, and is manifested in the Universal Declaration of Human Rights and all the treaties and Bills of Rights which have flowed from it; and
- Mutuality - which is the value that we are seeing up and coming in what I call the modern, third, wave of rights.

The underlying principle, which unites those three waves, is, of course, human dignity, and that value has come to have more and more prominence in human rights thinking as the years have gone by.

Now I have to make a confession at this point, I had prepared a speech to give to you which would have unpacked those ideas, which is in written form. But last night I decided to trash that speech, because after having spent an absolutely fascinating afternoon and evening talking to people here, I decided that probably the most useful thing to do at this point was to debunk three myths about human rights that are perhaps even more prevalent this side of the water than the other side.

The first myth is that human rights are all about individualism, irresponsible freedom and selfishness. From my point of view, that view stems from the confusion between the first and second wave of rights that I have just spoken about. What was the first wave of rights about? Basically, individuals rejected the autocratic state and the hold of the church at the time, and they said "we want the state off our backs".

That's very crude, but that was the predominant value of the Enlightenment Bills of Rights, the American Bill of Rights, the French Declaration of Rights and so on, which still have standing in the world today.

But actually, after the Second World War, the human rights community sat down and asked, "Where have we got to?" For it was in the continent of democracy and rights that some of the worst atrocities that had ever been carried out took place. The whole world was embroiled with the atrocities of Europe. Of course, it was not just states that carried out those atrocities: thousands, if not millions, of ordinary men and women, under orders or otherwise, participated in the discrimination, persecution, deportation and murders of millions of their fellow citizens who happened to be of another faith or race or nationality or disability or sexual orientation than themselves. So what the drafters of the Universal Declaration of Human Rights said to themselves was: "It is not enough just to get the state off our backs or to say we demand you don't do this or you don't do that. We have to create a new sense of moral purpose." It was with this in mind that they drafted the Universal Declaration.

Now let us have a look at some of what I am saying and see if I am telling you the truth and not just being a propagandist here. Let us have a look at some of the articles in the Universal Declaration, for example, Article 1. Being the first Article, it is not an afterthought, and it says "*all human beings are born free and equal in dignity and they should act towards one another in a spirit of brotherhood*" (sic). The very first Article talks to all of us – it does not say 'state go away, leave us alone so we can all do whatever we want' – it says we have got to think about this and we have got to behave appropriately.

Now let us move on to Article 29 of the UDHR - this goes even further: "Everyone has duties to the community in which alone the free and full development of the personality is possible." That is not just saying that we have duties, it is saying we are part of a community. That is why I emphasise the value of community in this second wave. Article 29 is saying we are not just isolated individualists, selfish and concerned for ourselves, indeed we do not even develop as people unless we understand we are part of a wider community. The second clause of that Article goes on to talk about limitations on rights. It says there have to be limitations

on rights if we are going to live in a community, and we have to have community. Most importantly of all, by being placed in the same Article, those limitations are tied to the idea of individual responsibilities.

Of course the Universal Declaration is only a declaration - it has informed international law and it is hugely morally important and symbolic - but it is just a declaration. The European Convention on Human Rights, on the other hand, is a binding treaty and it was binding on our government even before it was incorporated into our law and made to be directly binding on our judges and public authorities. If we look at Article 10 of the European Convention on Human Rights, it is particularly interesting, because after saying that we all have a right to freedom of expression, it says the exercise of these freedoms - since it carries with it duties and responsibilities - may be subjected to restrictions.

There are two things to note here. First of all, could there be a greater contrast that illustrates my point than the first amendment of the American Bill of Rights from the great Enlightenment days - which says there shall be no laws to restrict freedom of expression - compared to Article 10 of the ECHR which says that freedom of expression carries with it responsibilities and duties? There is a new mindset in post-war thinking, and it is essential that we all grasp it if any of us want to be ambassadors of human rights in the modern day. It says there have to be restrictions on – or qualifications to – most rights, but equally a right cannot just be restricted whenever the government wants. Restrictions have to be necessary - that is they have to achieve an important legitimate social end. Those ends tend to be goals like public safety; for example, you do not just introduce mass censorship at a time of international conflict. The limitation has to be proportionate to the legitimate end that is trying to be achieved - in other words you do not use a sledgehammer to crack a nut. These are the fundamental principles of human rights thinking.

There is also the International Covenant on Civil and Political Rights (ICCPR), which is, if you like, the legally enforceable arm of the Universal Declaration - sometimes known as one half of the International Bill of Rights. In its preamble it goes even further than this. Although of course preambles are not legally enforceable, they are very strong exhortations. The ICCPR preamble doesn't just say that individuals have

responsibilities, which are reflected in limitations on their rights, and it does not just say that individuals are part of a wider community. It also says we have a duty to promote the idea of human rights.

I am very happy to see that the Northern Ireland Human Rights Commission reflects this approach in the preamble of the draft Bill of Rights, currently out for consultation. I think this Bill of Rights consultation is a wonderful exercise on which I congratulate the Commission. So, there it is. The next time somebody tells you - if you happen to think that human rights is a good idea - that you are an individualist, selfish, anti-communitarian person, you just quote them this preamble which absolutely gets to the heart of what second wave human rights thinking is all about.

Now there is no better illustration of the difference between first and second wave rights than the issue of discrimination, and racial and religious discrimination in particular. The Nazi Holocaust influenced every aspect of the deliberations of the drafters of the 1948 UDHR, leading to a new emphasis on the value of equality. Equality was no longer to just mean the old Enlightenment idea of formal equality, that is that all laws should apply equally to everyone - not that they ever did in practice of course. Now in the Universal Declaration of Human Rights we see a new idea (for its time). States should not just 'be off our backs'; states now have an obligation to protect us, and part of that obligation is to take positive actions to root out racial and religious discrimination, including by private parties. So on human rights grounds, people are told they cannot be free to choose who to let their house to, or who to hire and fire, or who to sit next to on a bus, and this of course completely changes the concept of freedom that is at the heart of second wave rights.

Having I hope stabbed in the heart the first myth that rights are all about individualism, let us move onto the second myth. This is a more difficult and complex one: that human rights are a set of detached, detailed legal rules which are way above the head of most of us. There is even the argument that human rights prevent states taking the necessary steps to protect us in times of crisis. "Bunkum and balderdash", as someone notably said. Human rights are essentially a set of values and principles, which influence law and which establish the framework within which specific legislation and policy operate. Human rights and Bills of Rights

"Human rights are essentially a set of values and principles, which influence law and which establish the framework within which specific legislation and policy operate. Human rights and Bills of Rights are the skeletons from which the law is then interpreted, understood and developed. What human rights are not – precisely what they are not – is a set of rules and regulations like the so-called 'black letter law' with which we are more familiar in the UK."

are the skeletons from which the law is then interpreted, understood and developed. What human rights are not – precisely what they are not – is a set of rules and regulations like the so-called 'black letter law' with which we are more familiar in the UK.

One of the problems is that our lawyers are trained in a different mind-set and a different legal system, so they see words like free speech, privacy and so on, and they translate them into detailed rules and tell you exactly what it means, when they do not know - precisely because they are a set of broad principles and values. So you have to have the confidence to argue back at lawyers if they tell you they are absolutely clear what this means, because most of the time they are not. When you move away from the hard edges - like the right to life, to be free from torture, slavery etc, which yes, do have clear meanings in human rights law – and move into issues like privacy, free speech, freedom of assembly and so on, there are very few once-and-for-all human rights answers. Instead human rights values set the contours of debate and establish what is off limits. Beyond this, however, there is plenty of room for discussion, which incorporates differing views.

After much discussion, I am pleased to say this approach is reflected in the draft human rights unit for key stage 3 produced by the Department for Education and Science (DFES) in London, which I know does not apply to you, but I thought you would be interested in it. Under the heading "Expectations", it says "pupils should realise that human rights legislation is underpinned by values that are common to all people". It goes on to suggest a series of exercises to debate human rights values, for example, suggest what a human rights charter might look like in their school, then compare it to the rights in the European Convention and in the Human Rights Act, and then have a debate about what one does

when these rights conflict with each other - like CCTV and privacy, or free speech and incitement to racial/religious hatred. An anticipated outcome of the unit is an understanding of the distinction between human rights that can be legally enforced and those that reflect broad principles; an understanding of the tension, if you like, between the law that is developing, and a set or principles which will continue to shape the law.

But a more fundamental outcome that I would like to see is greater human rights literacy than we are witnessing today. If we are really to be engaged in some kind of war - whatever form it takes - in the name of human rights and freedom, then you as educators, and all of us as a society, have a responsibility to articulate clearly what we mean by that. We should understand that human rights definitely does not mean that states are prohibited from taking the necessary steps to protect citizens from harm - something that is bound to come up in the current climate in any discussion on human rights. I have to tell you it is quite the opposite: if you want to start quoting human rights law you can start telling people that human rights law requires states to protect their citizens. That is one of the first principles of human rights law, and there are masses of case law about how states have to set up criminal justice systems that are effective and investigate crimes and so on, but the way they do it has to be within the framework of human rights principles, and any steps taken have to be necessary and proportionate to meet the legitimate end of public safety.

What is encouraging about the third wave of rights that I see coming through in this post cold war era - through the Internet, through the web, through the international dialogue that is beginning to form around human rights - is an appreciation that human rights are fundamentally a set of ethical values. They are values that need to be implanted in the board-room as much as in the courts, that need to be embedded in the bloodstream of public services – as one Permanent Secretary in Whitehall recently said – as much as they do in the mainstream of law, and that children need to be educated in human rights values every bit as much as judges.

That leads to my third and final myth, which in many ways is the most worrying of all. Those of us who argue that human rights are a set of values are sometimes accused of being the proselytisers of a new and

dangerous secular religion, a religion that is all the more dangerous because it pretends to be self evident and it tends to present itself as a set of universal truths.

Now where do I begin? First of all let me say this clearly – human rights are not secular values, neither are they religious values. They actually draw from the precepts and the belief systems of all the main religions. I will only mention this once, but outside there is a flyer for my very cheap book "Values for a Godless Age" (and I can dispute 'godless age' afterwards with anyone who wants), which tries to show the link between human rights values and the great religions. But the human rights movement is not a religion – God help us if it ever does become a religion or an ideology of any sort. I hope I have made it clear that it is basically just a set of principles and values, it is a framework for debate and people of very different political and religious persuasions can accept those contours and still hold on to their other beliefs.

"First of all let me say this clearly – human rights are not secular values, neither are they religious values. They actually draw from the precepts and the belief systems of all the main religions."

Let us think clearly about this for one moment: if there is a first wave rights principle that has survived intact and permeated into the third wave, then surely it is freedom of thought, freedom of conscience and freedom of religion. The Enlightenment was partly fought in the name of freedom of religion and the last thing that is about is trying to stop other people holding on to their beliefs.

Human rights are also actually manifestly not universal, and sometimes I do get fed up with some of my human rights colleagues for calling them universal. What I mean is that nothing is universal unless the whole world subscribes to it, and it clearly does not. Actually, I am not even sure that I am entirely comfortable with presenting human rights as an aspiration for universality because there is something kind of messianic about that. What I think it is fair to say is that if these human rights are worth anything, then they are equally applicable to every human being all round the world, and in that sense only – but in a very powerful sense – are they universal.

Human rights very simply put are a set of ethical values, which speak, I hope, to those of all religions and those of none. They are values created by human beings for human beings in times of crisis and in times of peace. They will forever be contested, they forever need to be defended and they forever need to be open to evolution, change and self-reflection. But their potential to inspire should not be underestimated, and no one has expressed this potential better than Nelson Mandela, who reminds us that the UN adopted the Universal Declaration of Human Rights only a few months after the *apartheid* regime formally took power in South Africa.

"Human rights very simply put are a set of ethical values, which speak, I hope, to those of all religions and those of none. They are values created by human beings for human beings in times of crisis and in times of peace. They will forever be contested, they forever need to be defended and they forever need to be open to evolution, change and self-reflection. But their potential to inspire should not be underestimated...."

> *"For all the opponents of this pernicious regime the simple and noble words of the UDHR were a sudden ray of hope at one of our darkest moments. During the many years that followed, this document served as a shining beacon and an inspiration to many millions of South Africans."*

In today's dark hour, the teaching of human rights in schools provides an opportunity to inspire future generations, not to indoctrinate them with a set of fixed rules, but to encourage them to debate and question within a framework built on one simple quality: human empathy and respect for human dignity.

To quote the author Ian McEwan who wrote last week, in connection with the September 11th atrocity:

> *"If the hijackers had been able to imagine themselves into the thoughts and feelings of the passengers, they would have been unable to proceed. It is hard to be cruel once you permit yourself to enter the mind of your victim. Imagining what it is like to be someone other than yourself is at the core of our humanity, it is the essence of compassion and it is the beginning of morality."*

It is that morality quite simply, which underlines all modern human rights thinking. There has never been a more difficult time to explain this, and yet it has never been more important that we do.

Thank you.

Archbishop Desmond Tutu

Archbishop Tutu is Archbishop Emeritus of the Diocese of Cape Town and recipient of many honours and degrees worldwide, including the 1984 Nobel Peace Prize. He chaired the South African Truth and Reconciliation Commission, which made its final report in 1998.

Archbishop Tutu is especially known for his courageous and outspoken opposition to the South African government's *apartheid* system. His life has been dedicated to fighting for justice, equality and racial harmony in South Africa and throughout the world. He recently established the Desmond Tutu Peace Foundation.

"Dignity, Equality and Inalienable Rights"

Archbishop Desmond Tutu[9]

Thank you so very much to CAJ and to your friends in the Global Citizens Circle. Thank you for the privilege of speaking at this meeting. It is a hopeful time and perhaps we want to congratulate you Mr Deputy First Minister on your election.[10]

It is a hopeful time despite the horrendous outrage of September 11th in the United States, and the distressing response, which, as in the United States, has killed innocent civilians in Afghanistan. So may I ask us to observe a moment of silence, and to think of all those who were injured or killed or who have been bereaved in an act of terrorism which we must condemn outright, and for all the casualties since then, in the United States and elsewhere.

Thank you.

You do know of course that I come from South Africa and who I am? I say that because you see, a few years ago in San Francisco I had a dear lady rush up to me and greet me very, very warmly: "Hello Archbishop Mandela"...she clearly thought she was getting two for the price of one!

I come from South Africa and you must admit that God has a huge sense of humour, for who in their right mind could ever have imagined South Africa as a beacon of hope? If you had said, just a few years ago,

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[9] This lecture was the keynote event in a three-day visit by Archbishop Tutu to Northern Ireland hosted by CAJ and the Global Citizens Circle. The lecture was given in Belfast in November 2001.

[10] On the day of the lecture the First Minister and Deputy First Minister had just been (re) elected, and Mark Durkan, the Deputy First Minister, was in the audience.

that South Africa would have been a beacon of hope in the world, then people would have thought that you really needed to see a psychiatrist, or that you had a macabre sense of humour! For those people, South Africa would have been an example only of the most ghastly awfulness; an example of how not to deal with problems and especially not problems between sections of a society who had daggers drawn, baying for one another's blood, incapable of believing that any good could ever come from the adversaries' camp. South Africa, peopled as it were, by those awful creatures who had no right really to a place in the sun - no right to be associated with other normal human beings.

Precisely. God chose us. He chose us because we did not deserve it, at all. We had hardly anything to commend ourselves. If anything, the situation was the reverse. We could not have been described as being particularly virtuous. Anything but, given that we had maintained as crazy and vicious a system as *apartheid* turned out to be, for as long as we had done. And we wouldn't certainly have set the tent on fire for our brightness either.

May I tell the story of two South Africans going to the United States and getting into trouble? They were found guilty of a capital offence, and then they were told: "well you could choose the electric chair or the rope as a means for your execution". The first South African went in and chose the electric chair. They strapped him into the chair and threw the switch, but nothing happened. This was repeated three times and so they said "well, there you are, you are reprieved". As he was going out, the next in line was his fellow South African and he said, "choose the rope, the other damn thing doesn't work".

God chose this unlikely lot – us - so that God could point us out to the other trouble spots of the world and say, "hey, they had a nightmare called *apartheid*, and it has ended. Your nightmare will end too. They had a problem that was described as being intractable and humanly speaking it was hopeless, and yet they have solved it." So now, nowhere in the world, could anyone ever again say that their problem was intractable, could not be resolved, or was a totally hopeless cause.

I come from South Africa, about which only a few short years ago, seven years to be precise, people were making dire predictions. They said:

"Oh they are going to be overwhelmed by the most awful bloodbath, overtaken by a ghastly catastrophe." Right up to the eve of our historic election, violence was endemic in our country. We sighed with relief whenever the statistics for each day were announced and maybe five, six or even ten people had been killed. We would say "oh only five, only six... only, only." It was as ghastly as that.

People were being killed by anonymous assassins on the trains and indeed as they travelled by other means of public transport. It was a bloody contest between the ANC and Inkatha for political turf, in the killing fields of Kwazulu-Natal, now one of the nine provinces of the new South Africa. There were drive-past killings, and "necklace" killings - when they put a tyre round the victim's neck, filled it with petrol and set it alight. Mayhem was seen right across the political spectrum - from extreme white, right wing groups, to the extreme left. Nor were the security forces and the establishment merely innocent upholders of the law. They had units amongst them that were killing machines to assassinate those activists opposed to *apartheid* and thought to pose a threat to the *apartheid* scheme of things. We have since discovered that arms caches had been stashed away everywhere, in different parts of our country, and we were indeed just a whisker away from the racial conflagration so many had predicted for our future. The future could not have been bleaker. There were state sponsored massacres. We were teetering on the edge of the precipice, about to be hurled into the oblivion of utter chaos.

We were in a real pickle in South Africa, and in a way it was because the vast bulk of the population were deliberately excluded from the political process. They had no political clout when it was necessary to have all kinds of political power. The political bosses made no bones about this. They were the top dogs and everyone else who was not white was *ipso facto* the underdog, downtrodden, deprived and oppressed. There was no subtlety at all. The underdogs were totally unequal to the top dogs. With inferior education, inferior health care – indeed, they had not even access to clean water. Shoddy matchbox housing in segregated townships was their lot. And as to dignity, the top dogs didn't think blacks were persons with any dignity to be respected. They rubbed dignity in the dust and trod on it underfoot. It didn't matter if you were educated or not, whatever your status was in the black community, every white person

was your superior. So I might, as a schoolboy, accompany my father down to a store in town. My father was a headmaster of a school and the little slip of the girl behind the counter, because she was white, could and did address my father, "yes boy, what do you want?"

We were called Natives - natives with a capital 'N'. They had some wonderful signs along the roadside, for example, "Drive carefully, Natives cross here." Somebody thought to change one to read, "Drive carefully, Natives very cross here".

We had problems with jobs being set aside for whites only. Blacks were cheap labour. You could have gone to university and qualified, say, as a doctor with your white compatriots, and yet from day one, if you were working for government, your white counterpart would earn a higher salary than yours just on the basis of race. And of course, *apartheid* meant "separation" as you know. They tried to separate us even praying; they didn't want us to be in the same church services. On one occasion, a black woman was in church and she was on her knees. A police officer rushed up and asked "what are you doing"? She said "I'm cleaning sir" and he replied, "oh that's ok, I was about to arrest you because I thought you were praying."

It was an obsession with race purity, and so they had some quite awful laws meant to prevent miscegenation. They had a law called the Immorality Act. Police would spend their time climbing trees to peep into windows - bedroom windows - to make sure that you didn't have sex across the colour line. They would dash into a room and feel how warm the bed sheets were. That's where I come from.

It is not out of a kind of morbidity that I remind you of these things, but I tell you that our antecedents were ghastly, and it should have led to the most awful chaos. And that is not all. For you see, our history, apart from this racism, which I have just been describing, was one that included slavery, colonialism and wars between the races. As you know, there was something called the Anglo-Boer War, where they had concentration camps. Concentration camps are a South African invention. The camps in which the British collected Afrikaner women and children were called concentration camps then for the first time. Given this ghastly history, it should have been that we had no hope. We should have been for the

birds! But this catastrophe, this blood bath that everyone had thought was coming our way, did not happen. We've had a remarkable transition, and we owe a very great deal to folks like you, who have supported us so marvellously well.

We've had a negotiated revolution. Sworn enemies have actually sat around a table together, people who had given each other awful, awful, labels, still sat around a table. People, who had done awful things to one another, sat down and talked and then made a major scientific discovery. They discovered that their adversaries were actually human beings. Human beings who, quite extraordinarily, seemed to be longing for much the same sort of things as they themselves: a secure environment, a happy home, and a good school for their children. They thought, "Hey, we don't have the monopoly on wisdom, and good sense and values." We began almost at daggers drawn, and people would frequently do things just to score points. There was a great deal of brinkmanship, the negotiations were simple; we were not given to being reasonable people who were ready made to make concessions and receive concessions in return.

"People, who had done awful things to one another, sat down and talked and then made a major scientific discovery. They discovered that their adversaries were actually human beings. Human beings who, quite extraordinarily, seemed to be longing for much the same sort of things as they themselves: a secure environment, a happy home, and a good school for their children."

We had an extraordinary roller-coaster ride. The very moment we said, "gee whiz! Hey, we have made a wonderful breakthrough" and were euphoric and found ourselves on cloud nine, the next moment we were plunged into the slough of despond because something had happened that should derail the whole process.

Then, we began speaking about a Bill of Rights, a Constitution, the sort of thing that we thought that we might want. Each, I suppose, initially approached it from the position of, 'well what is good for me?' Then people gradually discovered: "Hey the things that bind us, the things that are common to us, are many times more than the things that divide

> *"Then, we began speaking about a Bill of Rights, a Constitution, the sort of thing that we thought that we might want. Each, I suppose, initially approached it from the position of, 'well what is good for me?' Then people gradually discovered: "Hey the things that bind us, the things that are common to us, are many times more than the things that divide us".*

us". Then they began - even the most prosaic of them - to dream. They began to be idealistic, and they began to talk about values. They went hammer and tongs at it, "no you can't have that, and we should have this." Then they began to discover in fact that this Bill of Rights gives guarantees, unlike any other instrument we might have. What happens to our culture, to our language, what happens when we are a small minority, aren't we going to be over run by this mass of people who are not really quite civilised? What happens? What happens? Then they began talking, they found their eyes opening.

We are a homophobic society. South Africa is as homophobic society as they come, and yet we now have a society in which laws outlaw unfair discrimination on all sorts of grounds, on grounds of gender, and sexual orientation. In South Africa, mind blowing! After these discussions, when appointments came to be made a little later after the adoption of these measures, it was notable that people found that they were beginning to aspire to things that they had never thought possible. So they would ask, "hey we are appointing judges, how many women are there on this bench? How many blacks? How many people with disabilities? What are we doing?"

Cyril Ramaphosa was the Secretary General of the ANC, and became a close friend of Afrikaner Rolf Meyer, despite the fact that their politics were radically different. Improbably, they discovered that they, despite their very many differences, had a good personal rapport, to the extent of enjoying great fishing trips together. These kind of personal and human relationships transcended differences, so that people began to move from win/lose situations to win/win scenarios.

Let's retell the old story of the Rabbi - a very, very wise man. Someone had friends, a married couple, who were always quarrelling and this man said, "I think you should go and see the Rabbi". So the husband

goes off and he tells his side of the story and the Rabbi says, "you are right". The wife comes along and she tells her side of the story, totally different from that of the man. The Rabbi says, "You are right". Then the man who had recommended that they go and see the Rabbi comes along and he is quite flabbergasted. "Rabbi, Rabbi, Rabbi, how can you possibly say he is right and she is right?" and the Rabbi replies 'you are right too'!

Dear friends, you know something? You are wonderful people. God loves you. You are very precious to God. God has given you an incredible gift, in a wonderful, wonderful sense of humour. I haven't met people who are able to take the mickey out of themselves to quite the same extent as you. Almost just for that attribute, you must succeed. So the burden of what I have come here to say to you is "hey, hang in there." Didn't you see a little bit of that magic at work in the kind of stuff that was happening around Stormont? When you said, "well, we will change designation and why not?" [11]

You are precious to God and God loves you as if you were the only people around - hang in there. The prize is too precious for you to allow it to be dissipated. God has placed high stakes on you, and God is not a loser. You know something - you are made for goodness, you are made for laughter, you are made for love, you are made for peace, you are made for gentleness, you are made for compassion, you are made for sharing, you are made for being conciliatory. We belong together; there are no outsiders in this family. All are insiders. You are made extraordinarily for transcendence, for peace, for justice, for goodness.

"We belong together; there are no outsiders in this family. All are insiders. You are made extraordinarily for transcendence, for peace, for justice, for goodness."

You know there is a lovely little African story of the farmer who in his backyard bred some chickens. There was a strange looking chicken, behaving like other chickens, pecking away, and then someone who knew

[11] Again, this is a reference to developments at the Stormont Assembly in the previous few days.

about these things comes along and says, "no, no, no Mr Farmer, that's no chicken, that's an eagle". So he says, "please just give me that strange looking chicken" and the farmer agrees and gives him the chicken. This man carries this strange looking chicken away and he wakes up very early in the morning and walks up to a high mountain and then points the eagle to the sun and says, "Fly eagle, fly". This strange looking chicken shakes itself, spreads out its pinions and lifts off, and soars, and soars, and disappears way into the sun, into the distance.

"God turns to you and says "hey, you're no chicken, you're an eagle. Fly, eagle fly." God expects you to shake yourself, to spread your pinions and to lift off and to soar, to soar. God expects you to move towards goodness and love, justice and peace and compassion. So - fly eagle, fly."

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Thank you very much.

Mary Robinson

Mary Robinson was the United Nations High Commissioner for Human Rights from 1997 to 2002. Previous to that she was the first female President of the Republic of Ireland.

Mrs Robinson has extensive international experience in the field of human rights and now heads up the Ethical Globalisation Initiative.

"Making Right Relationships An Everyday Practice"

Mary Robinson, UN High Commissioner for Human Rights[11]

Thank you very much for the warm welcome when I came in, and thank you for your warm words of welcome. I have been looking forward incredibly to coming back here to Belfast. My previous visit, in this capacity, was in 1998 when we were marking the 50th anniversary of the Universal Declaration of Human Rights. I spoke to a large group, somewhat like this, and I was deeply impressed by the work being done to promote the dignity and worth of all individuals, and the way you were taking seriously the equality in rights that the Universal Declaration was talking about. I was also impressed at the fact that people were talking not only about civil and political rights, but also about economic, social and cultural rights. I was heartened and encouraged by the approach that you were adopting.

It is clear to me that this approach has deepened and continued because of the theme you have chosen for today – "Making right relationships an everyday practice". After all, this is what human rights are all about.

I am also very glad – because I wanted to draw attention to it – that my visit has coincided with the UN Committee on Economic, Social and Cultural Rights adopting its Concluding Observations on the reports of the United Kingdom and the Republic of Ireland. I have tried to absorb some of the observations, but they are also available to you. It is very important that you now continue in the work you have been doing and ensure that governments adhere to those recommendations and comply with their treaty obligations.

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[11] This address was given at an event hosted by the Human Rights Consortium, a coalition of over one hundred community groups, trade unions and non-governmental organisations campaigning for a strong and inclusive Bill of Rights for Northern Ireland. The Consortium is co-convened by CAJ and Amnesty International. The event was held in Belfast in May 2002.

The journey here was far from easy, with terrible delays in London after the air-traffic controllers' computers crashed. Then we arrived in Dublin and faced absolutely appalling weather conditions, and I am just beginning to get the common cold, and you know how awful the early stages of that experience is. So, I was trying to work out in the car coming up here, with the combination of all these things, why was I in such good humour?

I think you know why – it is at the sheer pleasure of having the opportunity to address you and hopefully meet you all afterwards. So let us take a look at what we should make of your theme: "making right relationships an everyday practice."

Some of you in this room will naturally think of yourselves as human rights activists and human rights defenders, but others of you may assume that this is somehow a title that is restricted to lawyers or "experts". But, all of you - whether working on issues of disability, or housing rights, or gender equality, or Catholic or Protestant disadvantage – are human rights defenders in the very true sense of bringing home the reality of human rights.

"Some of you in this room will naturally think of yourselves as human rights activists and human rights defenders, but others of you may assume that this is somehow a title that is restricted to lawyers or "experts". But, all of you - whether working on issues of disability, or housing rights, or gender equality, or Catholic or Protestant disadvantage – are human rights defenders in the very true sense of bringing home the reality of human rights."

The members of the Human Rights Consortium who invited me and who I see in front of me, and the members of the Equality Coalition whom I had the privilege of meeting on my last visit, are part of the growing alliances being built on a north-south and east-west basis across these islands to work on a shared human rights agenda. All of you, therefore, are significant human rights defenders as we deepen the culture of human rights.

Just recently, I was asked to contribute a foreword to a conference report that brought many of you together: 'traditional' human rights people,

lawyers, trade unionists, community and voluntary sector people, academics and local anti-poverty activists, on a north-south basis. The conference was aimed at 'learning by doing'. It sought to explore how international and national tools of right could best be used to effect real change - at local and national policy making levels. In that foreword, I spoke of:

> *"The experience of decades, and indeed generations, of conflict, the experience of poverty and discrimination, and the experience of division and marginalisation, have taken their toll. Yet, just as the Universal Declaration of Human Rights emerged from the horrors of World War II, I believe that the peace agreement negotiated in April 1998 bears within it the seeds of something very important in terms of human rights and equality protections."*

There may be some disagreements in relation to certain aspects of the Agreement itself, but there should at least be consensus about the centrality that must be given to human dignity. In other conflict situations, I often advance the Good Friday Agreement because of the strong emphasis that is placed on human rights, human rights institutions and human rights thinking.

So, I commend again the important efforts that are being made in this part of the world to create a society which is fair to all and which, while respecting our differences, emphasises our shared common humanity.

Let me turn now to what is central to my address to you: the fact that you are involved in addressing the creation of a Bill of Rights for Northern Ireland. I have seen the consultation document issued by the Northern Ireland Human Rights Commission. I understand that there are many divergent points of view around the text, and I think that in its self is both important and enriching. A discussion of rights is complex and important and should, if it is genuine, elicit the expression of strong viewpoints.

I agree with Martin O'Brien when he made the point that the process of debate is almost as important as the eventual product.[12]

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[12] Alluding to remarks made in welcome speech by Martin O'Brien, CAJ's Director.

Creating space for dialogue, learning to address divisive issues across the whole community, seeking to disagree in a respectful manner: all of these are important gains in and of themselves. A society that seeks to respect human rights must find mechanisms to create a shared culture of rights, and the debate around a Bill of Rights is one obvious way in which this can begin to be done.

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As always, I would encourage you to go further. I would suggest that in adopting a Bill of Rights here for Northern Ireland, you should also focus on encouraging the adoption of a Plan of Action for Human Rights, as recommended by the Vienna World Conference in 1993. This recommendation of the Vienna Conference was initially very slow in being taken up, but what is encouraging is that we are now seeing both developed and developing countries, countries of different sizes and with different backgrounds to address, recognising the importance of a Plan of Action. It is interesting that the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights also encourage the adoption of a Plan of Action for Human Rights.

I thought I might just mention a couple of direct examples that I have found impressive. I was lucky enough on my first Human Rights Day as UN High Commissioner –10th December 1997 – to be present at the launch of a process to create a National Plan for Human Rights by President Mandela of South Africa. As you will know, he is a man who speaks very simply and directly, but with profound wisdom. On that day he said:

> *"Do not be in a hurry...take your time. Make sure everyone is consulted. If you take less than a year to develop this plan, I will know you have not done enough work on it".*

As I listened to him I learned what a Plan of Action for Human Rights is about. It goes a step further than your present debate, which has been stimulated, very appropriately, by your national human rights commission and is focussing on pressure from you – as the wider civil society – that there should be the legislation for a Bill of Rights. But there is also the need for government, the Assembly and civic society (in the broadest sense) to work together in taking ownership of the implementation of a Plan of Action.

But let us get back to the stage you are at, and it is a very exciting stage! The final product is obviously important since the real test of the process lies in its ability to advance protection for the most vulnerable in society. It is vital to find ways in which rights are made meaningful to the people who need them most. This goal requires a process of owning, sharing, and shaping rights so that they become the basis for human social development. People can never be, as I have often said in the past, the docile subjects of rights. Rights are not in that sense "given" to people. Rights must be claimed and asserted. And, in asserting rights, we are drawn inevitably to the logical conclusion that we cannot merely assert them on our own behalf, but we also have a responsibility to assert them on behalf of all other human beings - without distinction.

"It is vital to find ways in which rights are made meaningful to the people who need them most. This goal requires a process of owning, sharing, and shaping rights so that they become the basis for human social development. People can never be, as I have often said in the past, the docile subjects of rights. Rights are not in that sense "given" to people. Rights must be claimed and asserted."

I want to pause at this point and encourage you to reflect upon this nexus of "rights" and "responsibilities". I must admit that I am sometimes disturbed at the misuse by some governments of the term "responsibilities". Of course governments in many parts of the world consider that 'irresponsible' behaviour is behaviour that somehow challenges the current power relationships. By writing articles that offend majority opinion, by practising a religion that is not approved of by the ruling elite or by associating with "undesirables", people around the world "prove" that they are irresponsible and, on that basis, are denied basic

rights. Thankfully, in most democratic societies, this blatant misuse of the language of responsibilities is not practised.

But problems arise all the same. It is very important to focus on giving full effect to the first preamble of the Universal Declaration of Human Rights, which affirms that:

> *"Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."*

The common aspiration of the UN family is that the rule of law prevails. To protect individuals and groups from an abuse of power, we have evolved a detailed codification of international human rights principles that governments must respect.

Just this week, I took part in a new UN body that represents some 300 million people – but they are very vulnerable and their rights by and large are not respected. I am speaking about the establishment of the Permanent Forum for Indigenous Issues. It has eight indigenous members and eight representatives of governments, making up sixteen members of the Permanent Forum, with about one thousand observers. I was very interested that, within a day of the discussions, there was a great deal of focus on economic, social and cultural rights, as well as rights not to be discriminated against, protection against the police and other civil and political rights. The Forum will focus on advising ECOSOC on having better co-ordination by the United Nations and efforts by Member States to respect the rights of indigenous peoples.

"So in looking at the protection of human rights – as you are here in relation to the Bill of Rights – you have to have regard to those who are more vulnerable, and who most need to know they have rights and have the solidarity to have those rights protected."

So in looking at the protection of human rights – as you are here in relation to the Bill of Rights – you have to have regard to those who are more vulnerable, and who most need to know they have rights and have the solidarity to have those rights protected.

Inevitably in talking about human rights nowadays, we have a date in our minds – the terrorist attacks in the United States on September 11th and their aftermath. Part of that aftermath is quite worrying for the protection and promotion of human rights. Of course, it is right to combat terrorism and to have co-ordination under the Security Council, but it is also extremely important that we uphold fully both international human rights and international humanitarian standards. The experience of our Office in recent months is that we are receiving complaints from human rights defenders worldwide about a clampdown on political dissent in the name of combating terrorism, about restrictions on journalists, about the 'cold world' for refugees and asylum-seekers, an increase in harassment, xenophobia, intolerance and so on.

So the current challenge is a tough one. It is not just to counter a rolling-back of hard-won liberties and a rise across Europe and further a field in xenophobia, racism and intolerance. Surely we must set ourselves a higher standard of behaviour. Our challenge is to give more than lip service to the language of rights. If we do not make rights real, if we do not make rights inherent in the building of right relationships between both friends and enemies, if we do not use rights to create a proper balance between those with and those without power, if we do not make rights an everyday practice, we can hardly express surprise when they are ignored and rode rough-shod over at times of national or other peril. It is at times of peril that we need that eternal vigilance.

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You in this room, and many outside, are engaged in what I see as an exhilarating project to create a strong and inclusive Bill of Rights for Northern Ireland.

Of course, this initiative cannot and should not be divorced from the broader context of advancing rights protection more generally. The work

being done by the Executive in producing a Programme for Government that effectively addresses issues of equality, social exclusion, combating poverty, and the protection of socio-economic rights is highly significant. The reflection of such principles in actual decisions about resource allocation can change realities overnight. The human rights auditing of government programmes and services, the targeting of resources to those in greatest need regardless of whether they are Protestant or Catholic, and the effective involvement in decision making processes by all of those directly affected, offer exciting models of advancing rights in Northern Ireland. We know that the concept of participation is crucial to the practice of rights, and you are in some senses leading the way in evolving tools to give this practical effect.

But the project of creating a Bill of Rights is one, I think, of applying international standards to the situation of Northern Ireland, or the "particular circumstances of Northern Ireland" to quote the Agreement directly, and I know therefore that the ongoing debates around the text are both lively, and not always ones that reflect easy agreement.

I want to give you certain pointers. Firstly, others will be watching your efforts with great sympathy and hope, and all willing to help. I am talking about my own office; you have many friends in the UN, the Council of Europe and the European Union, and also strong bi-lateral relations with countries around the world. Many nations – particularly Commonwealth countries with similar political and legal traditions – have their own Bill of Rights and it is right to look at these.

Secondly, I would urge you to set the highest possible standards for others to emulate. In my way of looking at things, the agreed international standards are, by definition, relatively minimal, because they have been devised to get broad agreement between states. They should be the floor and not the ceiling of what you might aspire to. I think the fact that you would go in your own direction will also influence others and become a good role model. One of the experiences I have welcomed in seeing what is happening on the ground in Northern Ireland is your capacity to be innovative. You have done things I have talked about elsewhere as I have tried to encourage a similar approach.

So, take the best practice available to you in international law and in other similar texts, and adapt them to your local realities. Find novel

ways for ensuring the inter-dependence and indivisibility of all rights. Think about the concept of "ethical globalisation", which we hear about more and more, and how that might be looked at in the context here in Northern Ireland, in terms of not merely adding on the social to the economic, but reshaping both concepts to serve the human in us all. In doing this – and even by merely seeking to do this – you will be offering much to others around the globe.

I would encourage you both to be courageous and to get it right, because this is a unique opportunity in drafting a Bill of Rights to ensure that it is inclusive. I am delighted that you have formed such good structures for your discussion in this Human Rights Consortium, which I am told consists of over one hundred community groups, and the range of groups and interests involved are truly remarkable. As I understand it, the Consortium has taken as its organising principle the need for wide ownership of the eventual product. This project is seen, as I understand it, to be about making everyone an "insider", and not simply changing the nature of the "outsiders". Or as Maya Angelou said it more pithily, you are engaged in a process of "change not exchange".

"I would encourage you both to be courageous and to get it right, because this is a unique opportunity in drafting a Bill of Rights to ensure that it is inclusive."

I would like to pay tribute to the two co-convenors of the Human Rights Consortium - the Committee on the Administration of Justice (CAJ) and Amnesty International, both of whom I am extremely familiar with in my own work. Last time I was here, I spoke of CAJ being "a beacon of light in Northern Ireland's long, hard night", and it is still at the forefront of the campaign for rights for all. I have had many opportunities to work closely with and draw extensively on the resources of Amnesty International, both at the national and international level – most recently in Kabul, where they are helping us in one of the working groups on transitional justice as well as having a strong presence on the ground.

Apart from these more "traditional" human rights groups, I am glad that the Consortium brings together a whole range of groups working at community level, on children's issues, for women's rights, with people with disabilities of all kinds, on Traveller issues, and working to combat poverty.

I was delighted to be introduced by my dear friend Inez McCormack who talked about being one of the few female labour leaders at the meeting in Italy. But I know she is not the only labour leader here, nor the only representative of the trade union movement here. I understand the Northern Ireland Committee of the Irish Congress of Trade Unions is an active participant in the Consortium, lending the voice of labour to your endeavours.

Business groups, ethnic minority organisations, gay and lesbian groups, health and housing campaigners, women's groups, church bodies, victims' groups, ex-prisoners groups have all engaged – and that's the important thing – in the value of a strong and inclusive Bill of Rights.

As such, you will have different opinions on issues. But you know that your strength lies in that very diversity. I am reminded of the words of my friend Evan Boland, who talked about the challenge to value the unsung and unhealed in our society, and thereby "change the story". That is what you need to do – change the story.

Your role is undoubtedly to provide answers to those who are bound to say, "why do we need a Bill of Rights?" or those who argue that human rights language and approaches encourage attitudes that are self-centred and litigious. As true human rights defenders, your role is to make the invisible beneficiary visible to the decision maker. To show, for example, what difference a Bill of Rights will make to people with disabilities – an issue I have highlighted as High Commissioner. The point is that they want to be treated as people who have rights, not looked after as people who have 'special needs'. There is a big difference. You need also to show that Travellers should not be living in squalid poverty, and I was glad to see that there were trenchant comments on this issue in the work of the UN Committee on Economic, Social and Cultural Rights. You are already showing that a commitment to rights is something that is shared across the political divide, but this must be made ever more visible, if old political enmities are not to surface and hide the reality that you embody.

That reality is that whether unionist or nationalist, republican or loyalist, Protestant, Catholic, Dissenter, Jew, Muslim, or atheist, our shared humanity is at least as important as our many religious and political differences.

As promoters and protectors of human rights, I encourage you to further engage with the political process and 'stir them up'. Create new ways of making connections so that people are mobilised around the rights agenda in the creation of a new and respectful way of exercising power. Influence civil servants, influence people at the local level, influence people on the health, education and other boards. Get this way of doing things across to others. The focus is on making the outsider an insider – for who, after all, is the outsider in any debate about human rights? Black, white, male, female, elderly, young, we are all human beings – there are no outsiders. I think this is a very important value that you can bring about.

"You are already showing that a commitment to rights is something that is shared across the political divide, but this must be made ever more visible, if old political enmities are not to surface and hide the reality that you embody."

I am conscious that there are a number of people here who work as carers, who are very focused on concerns of human dignity, but whose work goes almost entirely unrecognised. I am aware of the union negotiators who argue for the dignity of the worker; of the politician who exercises his or her power for the benefit of others (especially when there is no obvious electoral benefit to them in their action); of the role of the artist who uses his/her talent to remind us of, and indeed reveal to us, our inherent dignity as human beings; and the young people who will take up the mantle of human rights defenders in times to come.

"The focus is on making the outsider an insider – for who, after all, is the outsider in any debate about human rights? Black, white, male, female, elderly, young, we are all human beings – there are no outsiders. I think this is a very important value that you can bring about."

I want to pause here to tell you of the Special Session on Children in New York that I attended last week. I found it very worrying – there was a reluctance to focus centrally on the UN Convention on the Rights of the Child. It almost had to be 'got in sideways' because of huge pressures not to adopt a rights-based approach. There were attempts to roll back

on what was achieved at the Beijing and Cairo World Conferences. The climate was not particularly encouraging in the negotiations at the official level.

But there were wonderful voices – we heard them again and again – and they were the voices of the children and young people who were given an opportunity to participate. They addressed the General Assembly; they addressed each of the sessions I participated in - panels, side events and so on. They were the voices of human rights - very informed and very true - and because of this they resonated. It was great to see heads of state, government ministers, ambassadors and high commissioners sitting listening to true voices who had worked on what they wanted to say and who took the opportunity when it was provided to them.

To be a human rights defender is neither a popular nor an easy job. I often quote from one of my favourite poems - "From the Republic of Conscience" by Seamus Heaney (which coincidentally was given to me by Amnesty when I went to Geneva and now hangs on the wall in my office in Palais Wilson). He writes about the ambassadors of the Republic of Conscience: that they are everywhere, and "no ambassador would ever be relieved".

How do I conclude? In very simple terms, it is to say that looking at you here, seeing the process you are engaged in and seeing how you have broadened to be inclusive is one of the most encouraging affirmations of what the human rights agenda is about. It has to happen in small places, it has to happen for those who first of all must begin to realise that they have rights, and from that knowledge gain the dignity and self-worth of being able to claim those rights in solidarity with so many others.

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dignity and self-worth of being able to claim those rights in solidarity with so many others.

It has been a pleasure to come back, not only to address you, but I hope to really encourage you in what you are doing. As you work to put forward a model Bill of Rights that will serve also to inspire others, remember that you must also be involved in a Plan of Action for the implementation of those human rights.

In doing this, you will also be giving great inspiration and leadership to others.

Thank you very much.

Biographical notes on contributors

Justice Beverly McLachlin

Justice Beverly McLachlin was called to the Bar of Alberta in 1969, to the Bar of British Columbia in 1971, and practised with different law firms from 1969 – 1975. Initially she worked as an academic – as a lecturer, associate professor and professor with tenure at the University of British Columbia 1974 – 1978. Thereafter, she was appointed to the County Court of Vancouver 1981, to the Supreme Court of British Columbia 1981, and to the Court of Appeal in 1985. She was appointed Chief Justice of the Supreme Court of British Columbia in 1988 and was appointed to the Supreme Court of Canada in 1989, of which she has been Chief Justice since January 2000. Justice McLachlin has numerous publications to her name.

John Shattuck

John Shattuck was sworn in as Assistant Secretary of the US government's Bureau of Democracy, Human Rights and Labour in June 1993. Immediately preceding this appointment, he was Vice-President of Harvard University where he taught human rights and civil liberties law. A long time human rights advocate, Mr Shattuck was the Executive Director of the American Civil Liberties Union (ACLU) Washington Office from 1976-1984, having previously (1971-1976) served as ACLU National Counsel, litigating in the areas of privacy, government secrecy and political surveillance. In a voluntary capacity, he was vice-chair of the US section of Amnesty International and was in the executive o the Leadership Conference on Human Rights.

Justice Albie Sachs

Albert (Albie) Louis Sachs was born of immigrant Lithuanian-Jewish parents in Johannesburg in 1935. As a civil rights lawyer, activist and political dissident, he was detained twice without trial and, in 1966, went into exile. As a leading member of the African National Congress,

he was targeted as a "race traitor" by the *apartheid* security forces who, in 1988, planted a car bomb in Maputo, Mozambique in an attempt to assassinate him. Albie survived, but he lost part of his right arm, and the sight in one eye. Undeterred, he went on to take an active role in the negotiations for a new constitution and in ensuring that the new South Africa would cultivate a culture of respect for human rights. He was appointed to South Africa's first Constitutional Court by the then President Nelson Mandela, and he continues to serve as a Justice on that Court.

Justice Richard Goldstone

Richard J Goldstone was born on the 26th October 1938. After graduating from the University of the Witwatersrand with a BA LLB cum laude in 1962 he practised as an Advocate at the Johannesburg Bar. In 1976 he was appointed Senior Counsel and in 1980 was made Judge of the Transvaal Supreme Court. In 1989 he was appointed Judge of the Appellate Division of the Supreme Court. Since July 1994 he has been a Justice of the Constitutional Court of South Africa. Previously, he served as Chief Prosecutor of the United Nations International Criminal Court for Rwanda and the former Yugoslavia. He also chaired the Goldstone Commission, a commission of inquiry established in 1991 regarding the prevention of public violence and intimidation in South Africa.

Professor Stein Evju

Professor Stein Evju is former Vice-President of the European Committee on Social Rights, President of the Norwegian Labour Court and Professor of Labour law at the University of Oslo, Norway. He is now an attorney in private practice.

Bruce Porter

Bruce Porter is the Director of the Social Rights Advocacy Centre and the Coordinator of the Charter Committee on Poverty Issues, a national coalition of low income advocates, anti-poverty groups and legal

advocates dedicated to defending the human rights of poor people in Canada. Bruce has spearheaded precedent setting human rights claims in relation to access to housing, coordinated interventions by the Charter Committee on Poverty Issues at the Supreme Court to advocate for social and economic rights and initiated law reform campaigns for better protections of social and economic rights. He has been instrumental in successful campaigns at the UN for better access by domestic NGOs to review procedures and has published a number of articles and chapters of books. He is a member of the Steering Committee of the NGO Coalition for an Optional Protocol to the ICESCR, campaigning for a comprehensive complaints procedure for economic, social and cultural rights at the UN.

Professor Sir Nigel Rodley, KBE

Professor Sir Nigel Rodley is Professor of Law at the University of Essex. Since 1993 he was Special Rapporteur on Torture of the United Nations Commission on Human Rights. He is also a member of the UN Human Rights Committee. In 1998 he was knighted for services to human rights and international law.

Francesca Klug, OBE

Francesca Klug is a Senior Research Fellow attached to the Centre for the Study of Human Rights at the London School of Economics. She is Academic Director of the Human Rights Act Research Project, a partnership project with Doughty Street Chambers. Her main expertise and human rights interest is the 1998 Human Rights Act and domestic rights generally, but her expertise and research interests also include the historical evolution of human rights values, international human rights law and constitutional law. Her publications include "Values for a Godless Age", "The Story of the UK's New Bill of Rights", and "The Three Pillars of Liberty", of which she was a co-author in 1996.

Archbishop Desmond Tutu

Archbishop Tutu is Archbishop Emeritus of the Diocese of Cape Town and recipient of many honours and degrees worldwide, including the 1984 Nobel Peace Prize. He chaired the South African Truth and Reconciliation Commission, which made its final report in 1998. Archbishop Tutu is especially known for his courageous and outspoken opposition to the South African government's *apartheid* system. His life has been dedicated to fighting for justice, equality and racial harmony in South Africa and throughout the world. He recently established the Desmond Tutu Peace Foundation.

Mary Robinson

Mary Robinson was the United Nations High Commissioner for Human Rights since from 1997 to 2002. Previous to that she was the first female President of the Republic of Ireland. Mrs Robinson has extensive international experience in the field of human rights and now heads up the Ethical Globalisation Initiative.

From the Margins to the Mainstream: Human Rights and the Good Friday Agreement

The Anthology to date consists of presentations made by international academic and other experts who visited Northern Ireland, speaking for the most part at events organised by the Committee on the Administration of Justice (CAJ), in the context of the campaign for a Bill of Rights.

The events occurred over several years, starting in 1995 but, for completeness, it may help readers to set the work for a Bill of Rights within the wider context of the peace process. The following article appeared in a seminal volume published by the Fordham International Law Journal in April 1999.

This article, co-authored by CAJ's then Director, Martin O'Brien, and Legal Officer, Paul Mageean, explains how human rights moved from the margins to the mainstream of life in Northern Ireland.

The Fordham International Law Journal, volume 22, number 4, April 1999 was entirely devoted to an "Analysis of the Northern Ireland Peace Agreement".

Essays and articles were contributed by the key political leaders involved in the peace negotiations (Gerry Adams, John Hume, George Mitchell, Ian Paisley and David Trimble)), and a range of leading academics from the political and legal field.

Paul Mageean and Martin O'Brien (at the time the Legal Officer and Director respectively of CAJ) contributed an article which would look at the peace agreement from their perspective as human rights and equality campaigners.

CAJ would like to thank Fordham Law School in New York for permission to reprint this article.

From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*

Paul Mageean and Martin O'Brien

Introduction

During a recent visit to Belfast, the United Nations High Commissioner for Human Rights Mary Robinson described the Good Friday Agreement[1] (or "Agreement") as

> *"[c]onspicuous by the centrality it gives to equality and human rights concerns. Few documents emerging from divisive and difficult political negotiations have so well captured the importance of fairness in creating right relationships. In its preambular paragraphs, throughout the text, and indeed in all the new institutions and mechanisms established as a result of the Agreement, concerns around fairness and justice are a recurring theme."*[2]

> *The High Commissioner said that the special nature of the Agreement was not restricted to its conceptualization. "This carefully crafted document arose as a result of political parties of very different political persuasions recognizing and endorsing principles of impartiality, accountability, equality, fairness and pluralism."*[3]

These comments underline the quite remarkable extent to which the Agreement placed human rights at its center. A peace process designed to resolve a centuries-old jurisdictional conflict obviously addressed constitutional issues and increased cross-border cooperation, but the specific detail with which human rights issues were addressed is convincing evidence of a sea-change in the way the major players approached the resolution of the conflict.

This Essay examines the process by which the language of human rights moved to center stage in the political process. It looks to peace processes elsewhere to determine whether the Agreement is deserving of the High Commissioner's special praise and analyzes, from a human rights perspective, the content of the Agreement and the extent to which the promises made therein have been fulfilled to date.

I. Human Rights: The Agenda for Change

In the aftermath of the IRA and loyalist cease-fires in the summer of 1994,[4] the human rights community in Ireland and Britain keenly felt the expectation that was shared by the community in general that an unexpected and, in many ways an unprecedented, opportunity for change existed in Northern Ireland. A new departure was anticipated from the traditional reliance on emergency legislation and a highly militarised police force that had characterized the state's response to internal dissent for most of this century.[5] While the human rights community had long campaigned for improvements in the human rights situation, the new security situation challenged the assumed rationale on the part of the government for its continued reliance on emergency laws and practices that had been found to have violated international human rights law.[6] The rationale for such measures had now gone, and with it, the reasoning went, the exclusion orders, the detention centers,[7] the extra-judicial killings, and the effective immunity that members of the security forces enjoyed in relation to these violations. This optimistic and expectant analysis was articulated in a statement issued on International Human Rights Day, December 10, 1994, by five of the leading human rights groups in these islands. In the Declaration on Human Rights, the Northern Ireland Conflict and the Peace Process ("Declaration" or "Human Rights Declaration"), the Committee on the Administration of Justice ("CAJ"), Liberty, the Irish Council of Civil Liberties, the Scottish Council of Civil Liberties (now the Scottish.Centre for Human Rights), and British-Irish Rights Watch echoed the hopes of the wider community in declaring that *"at this historic moment, there is a unique opportunity to put in place new structures which will defend and promote human rights."*[8]

The groups called for the recognition, on the part of all those involved in negotiating a new political framework in Northern Ireland, of the centrality of human rights in the search for a just and lasting peace. New systems of justice were called for that would address the injustices of the past and ensure proper investigation of future violations. These systems included a Commission on Policing, which would produce a model of policing that would be representative of all sections of the community in Northern Ireland and command the

confidence of the community, a fully-independent system for the investigation of police complaints, the introduction of a Bill of Rights, an overhaul of the criminal justice system, a Commission of Investigation to examine human rights abuses arising from the emergency legislation, and the introduction of human rights education into the school curriculum.[9] The Declaration also demanded the end of all forms of discrimination and the strengthening of anti-discrimination legislation.[10]

The Human Rights Declaration was followed up by further action by the human rights community in general, and the CAJ in particular, to ensure that key actors in the political process were engaged with the human rights agenda. In January 1995, a seminar was held under Chatham House rules in Belfast, to which influential policy-makers and senior officials from the Irish and British Governments were invited. The ideas contained in the Declaration were debated, including concepts that later appeared almost unchanged in the Agreement, including a Commission on Policing and a Criminal Justice Review and new measures to promote equality.

Building on this in March 1995, a public conference was held in Belfast to discuss the implications of the peace process for human rights. The keynote address was given by John Shattuck, the Assistant Secretary of State for Democracy, Human Rights, and Labor in the United States Administration. Again, the attendance list included the British and Irish Governments, representatives of the United States Government, many of the local political parties, victims of human rights violations, and a broad cross section of civil society. Its objective was to mobilize a broader support base for the Human Rights Declaration. Since then, the centrality of rights to the peace process has been the mantra of the human rights community and has been advanced on a consistent basis in press briefings, meetings with governments and others, and submissions to international human rights fora.[11]

An examination of the human rights aspects of the Agreement reveals that to a significant extent the proposals from the human rights community made in the 1994 Declaration have been met, and there is little doubt that the broad agenda that the non-governmental

organization ("NGO") community was articulating emerged onto the political agenda in Northern Ireland. Until the weeks before the Agreement, it appeared that the political agenda and that of the peace process were primarily focused on other matters. Indeed, the NGOs were disappointed with the lack of importance attached to human rights matters during the first stage of the peace process up to the breakdown of the IRA cease-fire in February 1996. Given the centrality afforded to human rights issues in the final Agreement, it is important to explore the reasons for the apparent shift in attitudes of some of the key players that led to rights issues taking center stage in the peace process little more than two years later.

II. From the Margins to the Mainstream

A. Republicanism, Nationalism, and the Irish Government

Perhaps least surprising is the weight that the nationalist participants in the process attached to the protection of rights. The experience of the nationalist community within the state of Northern Ireland was forcefully articulated in the language of rights as early as the beginning of the current conflict. Indeed, many would say that the violence of the state's reaction to that expression of discontent led to the re-birth of militant republicanism and the subsequent violence.[12] During the course of the conflict itself, it has primarily, though not exclusively, been members of the nationalist community who have suffered regular human rights violations by the state.[13] Although republicans occasionally viewed aspects of the rights agenda as a distraction from their main task of removing the British presence from Ireland,[14] since the late 1980s Sinn Fein has increasingly used the language of rights in its literature.[15] However, the republican focus on the human rights agenda became more obvious in the period immediately before and during the negotiations. It is likely that there were two reasons for this focus: an acceptance that immediate change in terms of jurisdictional control over Northern Ireland was unlikely, and a degree of satisfaction with statements from the British government that it no longer had any selfish strategic or economic interest in staying in Northern Ireland. Many in the republican community argued that this unprecedented statement, while hardly tantamount to a declaration of intent to withdraw from Northern

Ireland, nevertheless was extremely significant and would never have been made in relation to a region of Britain. These factors, combined with the knowledge that cross-border bodies would emerge from the talks, probably served to sharpen the republican focus on the rights agenda so that their support base would experience real change in what they identified as the interim period before their ultimate goal of Irish unity.

The Irish government has, over a long period, identified the issue of rights as being central to the conflict in Northern Ireland. For example, an analysis of speeches of the Irish government to the General Assembly of the United Nations reveals that in every speech from 1969 until 1977, and from 1987 until 1991, the denial of rights was mentioned as contributing to the conflict.[16] From 1991 on, the Irish government appeared to be more reluctant to identify human rights violations as one of the main problems during the first stirrings of the peace process. This reluctance may have been because of an improvement in relations between London and Dublin, and also perhaps because the Irish government felt that their concerns on these issues were being adequately addressed under the aegis of the Anglo-Irish Agreement,[17] thus avoiding the need to raise the issues in a public international forum.

The Anglo-Irish Agreement of 1985 is believed by some commentators[18] to have been the genesis of the peace process. In it, both governments reaffirmed their commitment to a society *"free from discrimination and intolerance, and with the opportunity for both communities to participate fully in the structures and processes of government."*[19] The intergovernmental conference that was set up under Article 2 of the Anglo-Irish Agreement was given the remit of dealing with "legal matters, including the administration of justice."[20] Matters to be considered by the intergovernmental conference under Article 5 include "the avoidance of economic and social discrimination and the advantages and disadvantages of a Bill of Rights in some form in Northern Ireland."[21] Article 7, dealing with security and related matters, accepts that there is a need for measures to improve relations between the security forces and the community. The measures envisaged include improvements in arrangements for handling complaints and action to increase the proportion of members

of the minority in the RUC.[22] There is also recognition in Article 8 of the importance of public confidence in the administration of justice.[23]

Concern with rights continues to be a feature of the documents drafted by both governments. For example, the Joint Declaration made at Downing Street on December 15, 1993, includes the acceptance on the part of the then Taoiseach, Albert Reynolds, that the exercise of the right of self-determination on the part of the Irish people must:

> *"respect the democratic dignity and the civil rights and religious liberties of both communities, including:*
> - *the right of free political thought;*
> - *the right of freedom and expression of religion;*
> - *the right to pursue democratically national and political aspirations;*
> - *the right to seek constitutional change by peaceful and legitimate means;*
> - *the right to live wherever one chooses without hindrance;*
> - *the right to equal opportunity in all social and economic activity, regardless of class, creed, sex or colour."*

These rights would be reflected in any future political and constitutional arrangements emerging from a new and more broadly based agreement.[24]

These provisions are repeated almost verbatim in the Framework Documents.[25] The Framework Documents add that both governments would encourage the adoption of a charter or covenant that might reflect and endorse agreed measures for the protection of the fundamental rights of all those living in Ireland. Each government also undertakes to ensure the systematic and effective protection of common rights.[26] The British government, of course, was also a signatory to these agreements, but given the content of both the Anglo-Irish Agreement and the Framework Documents, it is widely believed that the Irish government was the driving force behind both documents. The Anglo-Irish Agreement in particular also bore the imprimatur of the Social Democratic and Labour Party ("SDLP"), the largest nationalist party in Northern Ireland.[27]

The SDLP frequently made reference in its election literature to the importance of rights, although its primary focus has been in attempting to resolve the conflict not through the human rights paradigm, but through persuading the two governments to build institutions that reflected the two main traditions in Northern Ireland. The history of the party's involvement in the human rights agenda is a complex one. Senior members of the party including the party leader, John Hume, were centrally involved in the civil rights movement in the late 1960s. To an extent, therefore, the party emerged from that movement. However, since the emergence of Sinn Fein in the early 1980s, the support base of the SDLP has become increasingly middle class. That constituency has generally not been at the sharp end of human rights violations and therefore the motivation, in base political terms, to work on these issues has decreased. However, the party has certainly recognized the potential of human rights violations to increase support for republicanism, and it is perhaps in that context, and that of the past experience of key members of the party's leadership, that much of their work on these issues can be placed.

B. Unionism, Loyalism, and the British Government

The election of a new British Government in May 1997 did effect a discernible change in the public attitude of the British government toward the human rights agenda. First, the new Labour administration made human rights a cornerstone of its foreign policy.[28] The Foreign Secretary, Robin Cook, in a major speech in July 1997, adopted twelve new policies that, he claimed, would put into effect the Labour Government's commitment to human rights. The twelfth of these policies was perhaps the most significant in terms of improving the human rights situation in Northern Ireland. The Foreign Secretary accepted that if *"Britain is to carry credibility when we talk to other governments about their observance of human rights, we must command respect for our own human rights record."*[29] Second, Labour in opposition had on occasion taken a relatively progressive approach to human rights issues in Northern Ireland. The Labour party conference had voted to ban the use of plastic bullets,[30] and for many years Labour had voted against the renewal of the Prevention of Terrorism Act because it violated basic human rights standards and required that the United Kingdom derogate from the European

Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or "European Convention on Human Rights") in respect of its seven day detention powers. Although, as it neared government, the party moved to a position of abstention on this issue, it was clearly more likely to be persuaded by human rights arguments than its predecessor. Indeed, the shadow Secretary of State, Mo Mowlam, held briefings at Westminster to which she invited representatives of the human rights community to help inform her policy on Northern Ireland. [31]

The results of this meeting were reflected in many of the Secretary of State's speeches in which she asserted the importance of rights to the peace process. In her speech to the Labour Party annual conference in the autumn of 1997, she said that the guiding principles for resolving the problems of Northern Ireland would be *"the same principles that guide the government overall. They are principles of fairness, justice and equality of opportunity."*[32] She talked of the legacy of unfairness and injustice that haunts both communities in Northern Ireland, and she placed many of the government's policies in that context, including the incorporation of the European Convention on Human Rights into British law, legislation to deal with the marching issue, changes to the emergency legislation, changes to policing, and measures to combat employment inequality. [33]

It is rare, of course, for governments to act from motives that are completely unadulterated, and support for international human rights standards may have been only one of several reasons for the change in attitude of the United Kingdom. Britain had also been subject to quite severe criticism at an international level in relation to its human rights record in Northern Ireland. In addition to a large number of adverse judgements from the European Court of Human Rights,[34] the United Nations Human Rights Committee and Committee Against Torture had also been highly critical of the United Kingdom in 1991 and 1995. There is evidence that this criticism led to changes in policy[35] and may also have influenced at the time the official opposition that such criticism should be avoided if possible.

In addition, of course, it is very likely that unionists within the talks process were left in little doubt that the extensive protections afforded

to rights in the Agreement were there primarily to reassure nationalists who had suffered under both unionist and direct rule from London that the diluted but extant union that would emerge from the talks would be a safer place for them. More progressive elements within unionism saw the validity of providing extensive safeguards for those whom they were intent on keeping within the union. There may also have been the beginning of a realization that ultimately these self-same protections would be safeguards for unionists within any future Irish structures that might emerge.

The loyalist parties in the talks process that were close to the loyalist paramilitary groups[36] were also responsible for the extent to which the rights agenda made its way so significantly into the final text. The support base of both parties is predominately urban and working class. While traditionally the Protestant working class would have been supportive of the state and its institutions in Northern Ireland, the experience of those institutions subjecting members of the Protestant community to similar treatment as their Catholic counterparts convinced many in the loyalist community that change was necessary. Already concerned about the socio-economic condition of the Protestant and working-class, the more that loyalism experienced the sharp end of paramilitary policing by the RUC, emergency laws, and special juryless courts, the easier it became for its representatives to contemplate widespread and fundamental change to the legal and justice systems.[37] The peace process and the consequent absence of violent attacks on the police also undoubtedly played a part in a process that liberated loyalist opinion and allowed it to criticize those institutions that had previously been under attack. Indeed, some of the proposals from the loyalist parties went beyond those which were finally included in the Agreement itself. The Progressive Unionist Party ("PUP") suggested at one point that there should be a new constitutional court in Northern Ireland that should include judges from Britain, the Republic of Ireland, and Europe, as well as members of the bench in Northern Ireland.[38]

This process was not mirrored in mainstream unionism. Contemplating serious change to the police, judiciary, and criminal justice system would have constituted firm evidence that flaws existed within those institutions and that they had in some ways contributed to the conflict. Such an analysis was a distinct anathema to unionism,

whose mindset, despite the most momentous changes to the political landscape in Ireland since partition, was clearly still stuck in a conflict mode. To effect real change to the police was to accept the validity of the "enemy's" perception of the police, and therefore to betray those who had stoutly defended the state through a quarter century of the worst political violence experienced in any Western state since World War II. In one sense, it could be argued that mainstream unionism could only lose in the talks and the question was really how much would be lost. The potential loss of mainstream unionism helps to explain the extent to which the predominately middle-class strain of unionism represented by the Ulster Unionist Party objected vociferously to changes to the police and criminal justice systems.

C. The Alliance Party and the Women's Coalition - The Center Ground?

One of the more interesting political developments in the peace process was the emergence of the Women's Coalition. This grouping contested the elections that were held to determine which parties could attend the negotiations and managed, through the size of their vote, to become one of the parties at the talks table. The perspective that they brought to the process was, of course, one concerned with gender issues, but they also managed to engage in some difficult issues for a party that drew membership and support from both the nationalist and unionist communities.[39] Their approach to the human rights agenda was positive. Their commitment to equality may have been a product of their origins, but they were also to the fore in the discussion on how best to protect rights constitutionally and also on the sharper issues of policing and prisoners.[40] The other party that has traditionally claimed to occupy the middle ground in Northern Ireland, while paradoxically supporting the union with Britain, was the Alliance Party. While the Alliance Party is also committed to the protection of human rights, issues of fundamental change to policing and the release of prisoners appear to have caused them particular problems. This can be best placed in the context of a party that has traditionally been among the staunchest and uncritical supporters of the RUC.

D. Other Players and the Three Governments

The campaign to place the language employed by the human rights community in the Human Rights Declaration center stage in the peace process also bore crucial fruit when it was adopted by individuals and organizations that would have a crucial role in the process that led to the adoption of the Agreement. In particular, the Mitchell Report on Decommissioning recognized the importance of confidence building measures taken by all sides to strengthen the process.[41] Decommissioning was obviously one of those measures but because, as Mitchell recognized, *"success in the peace process cannot be achieved solely by reference to the decommissioning of arms,"* other steps were needed.[42] Many of the examples that Mitchell gave of such steps related directly to the items on the list of recommendations advanced by the human rights community.[43] For instance, Mitchell expressed the hope that policing in Northern Ireland could be normalized.[44] He also suggested a review of the use of plastic bullets and continued progress toward more balanced representation in the police force, which would contribute to the building of trust.[45] These very matters had been raised with the Mitchell Commission in a submission from the CAJ and a subsequent meeting.[46]

External criticism of the United Kingdom's position in the peace process also began to be articulated in the language of rights. An editorial in the influential publication *The Nation* in March 1996, written in the aftermath of the breakdown of the first IRA cease-fire, placed a significant amount of the blame on John Major, the British Prime Minister at the time.[47] Interestingly, the writer castigated Major for failing on the rights agenda by not changing the emergency legal regime and for releasing a British soldier convicted of the murder of a young Catholic girl after only three years of a life sentence.[48] This critique also came in the context of increasingly strong language in the United States State Department Country Reports on the United Kingdom. [49]

Other influential figures, particularly in the United States, also began to increase their use of the language of rights, on occasion, using the same key phrases as the NGO community. For instance, on St Patrick's Day, the important Friends of Ireland (or "Friends") group in

Washington issued their annual statement. In the 1997 statement, the Friends asserted that *"basic issues of equal justice and human rights are at the heart of the conflict in Northern Ireland and they must be central to any realistic resolution of the conflict."*[50] The Agenda for Change published two years earlier had said that *"human rights have been at the very heart of the conflict in Northern Ireland. They must therefore be at the heart of the peace process."*

Exactly one year after the Friends of Ireland statement, on St. Patrick's Day in 1998, the United States Congress passed a resolution stating its view that any peace agreement reached in Northern Ireland *"must recognize the state's obligation to protect human rights in all circumstances."*[51] The resolution followed two hearings held by the House Sub-Committee on International Operations and Human Rights, which were addressed by members of the human rights community in Northern Ireland and internationally. The resolution, which also described human rights violations and the lack of accountability by those responsible for such violations as being persistent features of the conflict in Northern Ireland, was passed unanimously.[52]

The input of such initiatives undoubtedly impacted the negotiations and those engaged in them, and it is also likely that the two governments and the U.S. administration began to see the important role that human rights could play in assisting the negotiation process. For in essence, although there has been a widely held view that the rights agenda was in effect a nationalist one, both nationalists and unionists in Northern Ireland share an interest in the protection of human rights. Both believe in basic rights like freedom of expression and religion, freedom from discrimination, and other fundamental political liberties. Most of the political parties were committed to the introduction of a Bill of Rights.

Negotiations on these matters enjoy distinct advantages. First, the parameters of the debate can be set by the international standards for the protection of human rights that are already in existence. In this way, the agreed delivery of means to protect rights is externalized and is therefore partially insulated from the potentially divisive nature of an internally-focused debate. It is also difficult for the two governments to disagree with this method or the conclusions that it

reaches insofar as they are consistent with international standards that the governments have helped to set. Finally, the negotiations can be driven by an agenda agreed on by the parties to address matters on which there is already an element of consensus.

Additionally, this mode of dealing with human rights issues will ensure that the vindication of human rights will be seen as an integral part of the process as opposed to being part of the political horse-trading accompanying the peace process. This will avoid situations such as the one that arose when the exclusion order[53] on Gerry Adams and Martin McGuinness were lifted by the British government while many others remained in place. The lifting of these two orders was seen by unionists as a concession to republicans rather than as a positive contribution to the protection of human rights, particularly as there were a small number of extant orders relating to loyalists, and those relating to the Sinn Fein leaders were lifted purely to facilitate the peace process. The other major improvement of the human rights situation, the lifting of the broadcasting ban on parties associated with paramilitaries, was also seen as a concession to the republicans. Although lifting this ban benefited both loyalist and republican spokespersons, it was seen by many as a concession specifically to republicanism. Equally, the release of Private Clegg need not have impacted so negatively on the process if it had been presented as part of a package of review of the sentences of all those imprisoned as a result of conflict. Respect for human rights and, consequently for the rule of law, cannot be successfully built on the notion that human rights are optional extras or trade-offs between parties.. The inverse of the causal link between the abuse of human rights and conflict will not be achieved unless the protection of those rights is a matter of concern to all.

III. The International Experience

In addition to the apparent success of the campaign of the human rights community to place human rights concerns in the minds of the participants of the talks process, NGOs, and indeed, the parties to the talks process often looked to the experience of other jurisdictions that were emerging from conflict. The rationale of the human rights agenda was that the resolution of these issues of concern

not only was positive in and of itself, but also would ease the search for peace. Human rights groups in Northern Ireland have often argued that the abuse of human rights is not only wrong, but also feeds and fuels the conflict.[54] This causal link has been recognized by commentators and indeed by the institutions and declarations of the international community. In the Preamble to the Universal Declaration of Human Rights, it is stated that "*it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.*"[55] In addition, the Preamble recognizes that the inherent dignity and equal and inalienable rights of all members of the human family is "*the foundation of freedom, justice and peace in the world.*"[56] Several international mechanisms for the protection of human rights also, by their very nature, recognize the link between human rights abuse and conflict. These mechanisms include the early-warning systems of the United Nations, specifically, the Human Rights Commission, and the mandate given to the High Commissioner for National Minorities of the Organization for Security and Co-operation in Europe.

Experience in other jurisdictions has also served to lend empirical support to the claims of NGOs and international mechanisms. It is axiomatic that it was the massive and widespread violation of human rights that was central to the conflict in *apartheid* South Africa.

The homelands policy of geographic separation based on race, the forced mass relocation of Black South Africans, the denial of the franchise, political suppression of individuals and political parties, human rights abuses in response to popular protest, the imposition of the Afrikaans language in black schools; all these led to revolt and conditions approaching civil war in South Africa.

It is equally clear that the relative success of the transition from *apartheid* to a multi-racial democracy has been based, to a large extent, on the centrality of human rights and mechanisms for their protection to the process. The 1994 South African Constitution articulates the fundamental freedoms that are to be protected, but goes further than this in trying to inculcate a human rights culture. It directs all South African courts to "promote the values which underlie an open and democratic society based on freedom and equality."[57] Additionally, the constitution establishes

a number of bodies entrusted with the protection of human rights. These bodies include the Constitutional Court, the Judicial Services Commission, the Public Protector, the Human Rights Commission, the Commission on Gender Equality, and the Commission on Restitution of Land Rights.[58] While it may be argued that the mechanisms provided for by the constitution are in many respects the culmination of the negotiations process, the need to protect human rights was recognised throughout by the participants to the process and its frameworks. As early as three months after the opening of talks between the African National Congress and the South African government, a working group was set up in May 1990 to examine issues including the release of political prisoners, security legislation, and steps towards lifting the state of emergency. The fears of the white community were also addressed in an address by President de Klerk at the opening of parliament in 1992 when he outlined protection of language and cultural rights, education rights, and devolution of power to regional levels.

A cursory examination of peace processes elsewhere appears to lend weight to a correlation between relative success of the negotiating process and the centrality of rights to it. For instance, in the Dayton Agreement, all of the parties recognised that the "observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving a lasting peace."[59] To that end, they agreed on detailed measures for the protection of rights including, *inter alia*, a Commission on Human Rights and a Commission on Refugees and Displaced Persons.[60]

In Guatemala, at the beginning of the peace process in April 1991, the government, the army, and the main guerrilla groups met to set the agenda for negotiations. The agenda was to include "human rights, the identity and rights of indigenous peoples, socio-economic issues, a truth commission, and the role of the army during peace time."[61]

Unlike in Bosnia, Guatemala, and South Africa, the peace process in the Middle East placed little emphasis, at least in agreed texts, on the importance of human rights. In a critique of the Declaration of Principles on Interim Self-Government Arrangements for Palestinians ("DP"), published in 1993, the Palestinian human rights group Al-Haq predicts

with considerable foresight the problems that were to arise in the area because of the failure to accord appropriate weight to human rights protections. [62] Al-Haq comments that

> *"the absence of any human rights provision and the failure to agree expressly to the amendment of Israeli military legislation and practice raise serious questions as to the standard of protection of human rights, and the real potential for their improvement, during the interim phase; and, finally, the proposed jurisdiction of Israeli and Palestinian authorities remains obscure, creating potential problems of accountability in the protection of Palestinian human rights."*[63]

There is no express provision for the protection of human rights in the DP. While concentrating primarily on continuing human rights violations by the Israelis, Al-Haq also called on the new Palestinian authorities to uphold human rights standards and to incorporate these standards into domestic law so that "these instruments will set the standards that govern the action of the future Council."[64]

In addition, Al-Haq expressed concern at the DP's reference to a "strong" Palestinian police force. While the DP discussed such a force ensuring public order and guaranteeing internal security, there was no mention of the necessity of holding the police accountable or the importance of human rights to their work.[65] Since the establishment of the new Palestinian police force, there have been particularly disappointing and credible claims of serious human rights abuses even by those at the heart of the Palestinian leadership.[66]

The DP, of course, was agreed upon as a result of intensive and secret negotiations between Israeli and Palestinian delegations in Oslo. While the Norwegian government lent administrative support to the process, there was no further overt external input. The peace processes in Bosnia and Guatemala, apart from the centrality that they accorded rights issues, also both benefited from significant international input; the Organisation for Security and Co-operation in Europe led in the case of Bosnia, and the United Nations led in Guatemala. There was also an institutional international input into the talks process in Northern Ireland in the role of Senator Mitchell and the co-chairs of the talks process, Mr. Harry Holkeri from Finland and General John de Chastelain

from Canada. In addition, we have already seen that influential commentators, external to the formal process, but crucial to its success, had begun to see the importance of human rights.

It is difficult to determine to what extent talks participants in Northern Ireland learned from the successes and failures of similar processes in other jurisdictions. There is little doubt that the conflicts in Northern Ireland, South Africa, and the Middle East were often compared[67] and as the peace processes began, common features were identified. Given the human rights language and commitments that ultimately ended up in the Agreement, it seems likely that the general international trend towards linking the protection to peace was followed, whether or not by all of the talks participants and whether consciously or not, in Northern Ireland.

IV. The Northern Ireland Agreement

There are few segments of the Agreement that do not - explicitly and implicitly - refer to the centrality of human rights concerns. The British and Irish Governments, together with all the parties engaged in the talks process, clearly accepted this as a starting premise. The preambular paragraphs set a clear tone with all the parties to the Agreement firmly dedicating themselves to *"the achievement of reconciliation, tolerance and mutual trust, and to the protection and vindication of the human rights of all,"* as the most fitting memorial to those who lost their lives during the conflict.

More significantly, the commitment in the preamble is given frequent and concrete expression at various stages throughout the Agreement. The commitment is therefore more than rhetorical, and it amounts to a recognition that true respect for human rights must underpin any hope that the Agreement can provide *"a truly historic opportunity for a new beginning."*[68] The extent to which this commitment is given concrete expression can be determined by an analysis of the Agreement itself and an examination of what has happened since.

A. Constitutional Issues

In this segment of the Agreement, the parties affirm that whatever constitutional choice is exercised, power shall be exercised:

> *"with rigorous impartiality on behalf of all of the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities."*[69]

A surprising omission from this listing of rights is that of economic rights, though this right is included in listings elsewhere in the document. One must assume, therefore, that this omission was not deliberate. Nevertheless, it is vital that people concerned about human rights continue to emphasize the inter-dependence between rights and reject the notion that somehow economic rights are less important than other rights. This is a point that the United Nations High Commissioner for Human Rights, Mary Robinson, made about the Agreement in a recent speech in Belfast when she said:

> *"It also, very importantly, recognises that civil, political, economic, social and cultural rights are all interdependent and that, in combination they underpin any democratic society. The inter-dependence which figures in the Agreement reflects the growing consensus at the international level about the importance of addressing rights in a more holistic way.*
>
> *In my travels around the world, it is clear that that the legacy of the Cold War which suggested there was some contradiction between civil and political rights on the one hand, and economic, social and cultural on the other, is slowly dissipating. How can one argue that the right to vote is more important than the right to a roof over one's head? And yet, without the right to vote -and all that entails in terms of democratic choice - how will people ever secure the policies which will provide roofs over their heads?*

"No, it is not one set of rights or the other - it is the pursuit of a broad and inclusive human rights agenda which will create the future we all aspire to for ourselves and our children. The Good Friday Agreement recognises that in a fundamental and exciting way."[70]

B. Strand One: Democratic Institutions in Northern Ireland

The Agreement *"provides for a democratically elected Assembly in Northern Ireland which is inclusive in its membership, capable of exercising executive and legislative authority, and subject to safeguards to protect the rights and interests of all sides of the community."*[71] Among the safeguards listed, explicit reference is made to the incorporation of the European Convention on Human Rights ("ECHR"), a Bill of Rights for Northern Ireland, a Human Rights Commission,[72] arrangements to ensure that key decisions and legislation are proofed to ensure that they infringe neither the ECHR nor any Bill of Rights,[73] and a possible Equality Commission.[74]

We comment elsewhere on the proposals relating to a Human Rights Commission, the Equality Commission, and the question of a Bill of Rights, but it is important here to address the commitment by the U.K. Government to incorporate the ECHR into its domestic law.[75] Since the signing of the Agreement, the Human Rights Act has completed its passage through the UK parliament and is due to come into effect in April 2000. This effectively incorporates the ECHR into domestic law and means that litigants will be able to rely on the protections of the ECHR in local courts. Unfortunately, the U.K. Government did not take the opportunity presented by incorporation to withdraw its derogation from the ECHR regarding seven-day detention powers under the Prevention of Terrorism Act, which were found to breach the fair trial provisions of the ECHR in the Brogan case.[76] Nevertheless, incorporation of the ECHR will provide an important safeguard.

In its clauses on the operation of the Assembly, the Agreement envisages that a special committee may be appointed to *"examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights. The Committee shall have the powers to call people and papers to assist in its consideration of the matter."*[77] It is not clear what relationship, if any,

such a committee would have with the Human Rights Commission, nor what significance, if any, should be placed in the fact that such a committee is optional. However, reassurance as to the central importance of rights can be found later in the same chapter, when the Agreement lists some of the limitations on the authority of the Assembly. Thus, the Assembly only has authority to pass primary legislation for Northern Ireland in devolved areas, subject to "*(a) the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void.*"[78]

Nor are the safeguards limited to the workings of the Assembly. With reference to non-devolved matters, the Secretary of State and the Westminster Parliament must "*legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland.*"[79] This point is particularly important in that it underlines the importance of the United Kingdom's international obligations. Where, for example, the Agreement is silent or indeed, where its commitments are less than those applicable under international human rights law, the government must legislate to ensure compliance with the international obligations.

Furthermore, and very importantly, "*[a]s a condition of appointment, Ministers, including the First Minister and Deputy First Minister, will affirm the terms of a Pledge of Office (Annex A) undertaking to discharge effectively in good faith all the responsibilities attaching to their office.*"[80] Both the Pledge of Office and the Code of Conduct for Ministers incorporate references to human rights. Thus, all Ministers will be expected to take a pledge, which among other things promises that they will "*serve all the people of Northern Ireland equally, and ... act in accordance with the general obligation on government to promote equality and prevent discrimination.*"[81] The Code of Conduct requires that Ministers "must at all times" work in a way that respects a series of key principles: impartiality, objectivity, accountability, openness, responsibility, equality of treatment, personal honesty, and integrity.[82]

These parts of the Agreement are very important, not only for the standards that they set for those in elected public positions, but also in the standards that they set for public life generally. Ministers, if they are

to uphold their pledge of office, will have to ensure that the departments for which they are responsible meet these standards of service. The objectives of serving all the people of Northern Ireland equally, and doing so in an open and transparent manner that makes public bodies fully accountable for their actions, are clearly laid out in the text. It is of course the duty of everyone - elected officials, public servants, and ordinary citizens - to ensure that these objectives are met in practice, but the Agreement at least sets important benchmarks.

C. Rights, Safeguards and Equality of Opportunity

Very significantly, a whole chapter is devoted specifically to the issue of human rights. Additionally, the coupling of human rights with a concern for "safeguards" makes it clear how a commitment to human rights has to underpin any long-term resolution of the conflict. While human rights protections are vital in their own right, as a matter of principle, it is also recognized that they are necessary to create the framework within which political accommodation can be reached and peace ensured. Thus, regardless of whatever structures emerge, each community and the individuals within each community should be assured that their human rights will be respected.

All of the parties to the Agreement affirm "*their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community*."[83] It is not clear to those who were not engaged in the details of the negotiations why an enumeration of certain rights was made, and not others. The particular rights enumerated are the right of free political thought, the right to freedom and expression of religion, the right to pursue democratically national and political aspirations, the right to seek constitutional change by peaceful and legitimate means, the right to choose one's place of residence freely, the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender, or ethnicity, the right to freedom from sectarian harassment, and the right of women to full and equal political participation.

1. Equality of Opportunity

The Agreement's provisions on equality of opportunity are perhaps among the most innovative of the broad range of human rights provisions contained within the document. This issue is dealt with in greater detail in the article by Dr. Christopher McCrudden, who, together with the public service union UNISON, played the key role in shaping the Agreement's equality provisions and their subsequent enactment in the Northern Ireland Act of 1998. Here, we briefly highlight some of the key features of the Agreement and subsequent developments.

The Agreement provided for a new statutory obligation and statutory schemes to promote equality of opportunity. It suggested that these schemes would cover arrangements for policy appraisals, public access to information, consultation, impact assessments, monitoring, and timetables. The Agreement also referred to a recent government proposal to amalgamate the existing equality agencies in Northern Ireland[84] into one new body. Importantly, however, it stressed that this proposal should be subject to the outcome of the public consultation that was currently underway. A reference was also made to the possible establishment of a Department of Equality within government.

An analysis of the first available draft of the Agreement shows that a number of important changes were made in this section of the Agreement in subsequent negotiations. The first of these is that the proposals in respect to equality were all made subject to the outcome of public consultation. This change was pressed by some of the parties to take account of the fact that there was currently a public consultation exercise underway on some of these issues, and it would clearly have been unacceptable to render this nugatory by resolving the matter definitely in the Agreement. Furthermore, a requirement was added to provide for an assessment of the impact of decisions on equality of opportunity for different groups, in addition to a requirement for public access to information about decisions.

The first unpublished draft of the Northern Ireland Bill,[85] the piece of legislation brought forward to implement much of the Agreement, shows, however, that the inclusion of these provisions in the

Agreement did not mean that they would necessarily be implemented. In relation to the question of amalgamating the existing equality bodies, the government brought forward proposals to establish one new Equality Commission. This amalgamation was entirely contrary to the outcome of the public consultation exercise[86] and effectively nullified this aspect of the Agreement.

Similarly, the draft legislation imposed no clear obligation on public authorities to establish schemes to promote equality of opportunity, and there was no reference at all to the question of impact assessments. The provisions on access to information and consultation were also extremely limited and did not reflect the requirements of the Agreement.[87] It was not until the end of the parliamentary process that most of these deficiencies were remedied. Remedying these deficiencies required intensive lobbying and the support of a broad coalition of politicians from across the political divide in Northern Ireland and in Britain.[88]

2. National Security Exemptions

The British Government also undertook to make *"rapid progress with ...a review of the national security aspects of the present fair employment legislation at the earliest possible time."*[89] Given this commitment, it was a source of considerable disappointment to discover provisions in the draft Northern Ireland Bill [90] that replicated the existing provisions under fair employment legislation.[91] Under existing fair employment legislation and under the draft Bill, a certificate signed by the Secretary of State stating that a particular action or decision was taken in order to safeguard national security would be sufficient to prevent any challenge to the decision or action on the grounds that it was discriminatory.[92]

The provisions under the fair employment legislation had been particularly controversial in that they effectively denied any remedy in the local courts. This controversy had led to the provision in the Agreement to carry out a review of the provisions. However, instead of fulfilling this aspect of the Agreement, it was deemed necessary to further extend these provisions to provide national security exemptions under the Northern Ireland Bill as well. The section 42

provisions of the Fair Employment Act 1976 had been the subject of a challenge in the European Court of Human Rights. Ironically, four days after the date of the draft Northern Ireland Bill, the European Court found that the provisions violated the ECHR.[93]

The clear expectation was that the provisions in the draft Bill would be removed, but when the Bill was published on July 15, 1998, the offending sections remained.[94] It was not until the Committee stage in the House of Lords that the Government's intention became clear. It decided not to remove the provisions but to establish a tribunal to deal with any complaints about the application of certificates. However, those complaining to the tribunal would have no right to know the case against them. The special tribunal established to hear the case may sit in secret and exclude the victim, and the victim will have no right to have his or her own lawyer represent them. Instead, the government may itself appoint a lawyer for complainants, and this lawyer will have no responsibilities to the complainants.

These proposals provoked strong criticism in the Lords and in the Commons, and the Northern Ireland Bar Council wrote to the government pointing out that the provisions were contrary to their code of practice and that it would therefore be difficult for them to fulfil the role stipulated for them under the legislation. These criticisms caused some problems with correspondence being exchanged between the Bar Council and the Attorney General and led to the establishment of a working group to address the issues raised. Nevertheless, the legislation was passed, and it remains to be seen how the situation will evolve.

3. The Human Rights Commission

The Good Friday Agreement provided for:

> *"[a] new Northern Ireland Human Rights Commission, with membership from Northern Ireland reflecting the community balance, will be established by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human*

Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so."[95]

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

- *the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and*
- *a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors."*[96]

"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 the democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland."[97]

When this final text is compared with the first available draft of the Agreement, we can see that two important additions were made in the process of the negotiations. The additions to the Agreement included the requirement on the Human Rights Commission (or "Commission") to consult on the content of the Bill of Rights and to have a membership that reflects the community balance in Northern Ireland. An analysis of

the parliamentary process, however, shows that there was opposition to some of the powers and roles envisaged for the Commission on the part of those given the task of drafting the legislation and taking it through the parliamentary process.

Perhaps the most glaring omissions concern the requirement to consult and advise on the contents of the Bill of Rights and the absence of any requirement to establish the joint committee for cooperation between the two human rights commissions in Northern Ireland and the Republic of Ireland. The draft Northern Ireland Bill merely provided for the appointment of members to any such joint committee that might be established. The ability of the Commission to provide assistance to litigants was initially limited to litigation under the Human Rights Act and did not include the power to support litigation under the non-discrimination provisions of the Northern Ireland Bill itself. There was also no provision enabling the Commission to bring court proceedings in its own name as provided for in the Agreement.[98]

Following representations from NGOs and signatories to the Agreement, some of these matters were remedied by the time the Bill was formally published. However, it was not until the final stages of the Bill's passage through parliament that a number of these deficiencies were resolved. The published Bill provided a statutory basis for the consultation exercise on the Bill of Rights and, while not establishing the joint committee, strengthened the provisions to require the Commission to *"do all that they can to facilitate the establishment of the committee referred to in paragraph 10 of that section of the Agreement."*

However, it was not until the Committee stage in the House of Lords that the restrictions on assistance to litigants were removed and the Commission was given a broader power to assist in proceedings relating to the protection of human rights.[99] It was even later in the process that the Government finally moved on the ability of the Commission to bring proceedings in its own name. The Commission's powers in this respect are, however, quite limited and mean that the Commission will be able to bring proceedings on human rights questions but not if they are relying on the protection given by the

incorporated ECHR. If the Commission wishes to pursue ECHR-related points, then it will have to find an individual victim to bring the case.[100]

The other major point of contention in relation to the Human Rights Commission concerns the power to investigate violations of human rights. This matter was not specifically provided for in the Agreement, but the list of issues that were referred to was clearly not envisaged as an exhaustive one, as can be seen from the wording "to include"[101] in the Agreement. NGOs maintained that in light of both the Agreement's frequent references to international standards and the commitment that the Commission would have a greater role than the present role of the Standing Advisory Commission on Human Rights, the Commission should follow the minimum standards laid down in the Paris Principles for National Human Rights Institutions. In addition, given the importance vested in a Human Rights Commission for underpinning an effective peace process, it seemed natural to assume that international good practice would be followed. This assumption represents a view that was shared by the United Nations High Commissioner for Human Rights, who became involved in the debate in both Northern Ireland and the Republic.[102]

These standards envisage human rights commissions being in a position to carry out investigations and having the necessary powers to do so. In particular, the standards suggest that commissions should have the power to discover documents and subpoena witnesses. Finally, after a great deal of pressure, the Government included a power to investigate, but did not provide the Commission with the necessary powers to make these investigations effective. Thus, the Commission has a statutory basis to carry out investigations that is not backed up by any powers to secure information from reluctant sources. This decision was unfortunate because it means that the Commission does not comply with the minimum international standards laid down in the Paris Principles for National Human Rights Institutions. In a further effort to counter criticism on this front, the Government stated that, subject to the requirements of national security, it would cooperate with investigations. It also offered a review of the Commission's powers to be completed within a two year period.

4. The Irish Republic

The Irish Government also committed itself to *"ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland."*[103] This commitment has the potential to improve the human rights situation in the Irish Republic as well. In concrete terms the Irish Government agreed to establish a Human Rights Commission in the Republic with a remit and mandate equivalent to that in Northern Ireland. It also agreed to implement enhanced equality legislation and equal status legislation to ratify the Council of Europe Framework Convention on National Minorities, which the U.K. Government has already ratified. The Irish Government also agreed to take further steps to demonstrate its respect for the different traditions on the island of Ireland.

Interestingly, the Irish Government did not go so far as to commit itself to incorporating the ECHR into its domestic law. Rather, it agreed to consider this issue further. With the decision to incorporate having been taken by the United Kingdom, Ireland remains the only member of the Council of Europe not to have taken this step.

5. Victims

The Agreement indicated that the participants believed that it was essential that the suffering of the victims of violence be acknowledged as a necessary element of reconciliation. In this context they looked forward to the work of the Northern Ireland Victims Commission.[104] The Victims Commissioner produced a report entitled "We Will Remember Them." Although in that report the Commissioner makes clear that his definition of a victim is broad and includes those killed by paramilitaries as well as by the state, he very unfortunately reinforces an already existing hierarchy of victimhood in his report. He devoted a great deal of time and attention to the needs of police officers injured in the conflict and the relatives of those officers who were killed, and also to the relatives of those who disappeared due to the acts of paramilitary groups. However, he was not as sympathetic to the concerns of the relatives of those killed by the state. Here, he simply recorded the concerns and noted that he had agreed to report on them.

His differential approach, and the subsequent appointment of the Minister for Security as the official advocate within government on behalf of victims, had done little to address the concerns of the relatives of those killed by the security forces. Those killed by security forces account for eleven percent of all of the deaths. This figure does not of course include those killed as a result of collusion between security forces and paramilitary groups. This approach has done little to promote reconciliation and healing. Indeed, in some ways it has made matters worse because the victims of the state feel that the mechanism set up by the state, which was meant to address their pain, has served to deny and diminish the fact that they too are victims.

6. Economic, Social, and Cultural Issues

There is a specific section of the Agreement referring to the importance of economic, social, and cultural issues in bringing about greater rights, safeguards, and equality of opportunity for everyone. Specific reference is made to the importance of economic growth, social inclusion, and the advancement of women in public life.[105] It is very welcome that the Agreement refers explicitly to the Targeting Social Need initiative and the need progressively to eliminate the differential in employment rates between the two communities.[106]

Importantly, the Agreement notes that "[*a*]*ll participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.*"[107]While the British Government did not commit itself outright to sign the Council of Europe's Charter for Regional or Minority Languages, it did commit to "active consideration"[108] of this issue. This assertion is followed by a series of specific proposals in relation to the promotion and protection of the Irish language. Subsequent media disclosures[109] caused grave disquiet with respect to the British Government's intentions with regard to its commitments about the Irish language. In a Northern Ireland Office ("NIO") leaked document, a senior official briefing his Minister wrote of these commitments: "*What these worthy sentiments might mean in practice is a matter of interpretation, and we could argue that our*

interpretation is as valid as anyone else's." The tenor of the rest of the memorandum suggests that a minimalist interpretation is to be assumed if not encouraged.

The outcry following these revelations seems, however, to have borne some fruit. Since the signing of the Good Friday Agreement, the United Kingdom decided to sign the European Charter for Regional or Minority Languages.[110] Additionally, the Education (Northern Ireland) Order (or "Order") was passed on July 10, 1998.[111] Article 89 of the Order places a statutory duty on the Department of Education in Northern Ireland to encourage and facilitate the development of Irish-medium education.[112] The lack of state funding for such schools, in comparison to state support for integrated education (schools where Catholic and Protestant children are educated together), had long been a matter of contention. The new Order places Irish language education on the same statutory footing as integrated education.[113]

D. Security

While the Agreement refers to the "normalisation of security arrangements and practices,"[114] it is disappointing that it goes no further than to restate the position *ex post ante*. It is clear that there is no emergency threatening the life of the nation, and therefore there is no justification in international law for emergency legislation.[115] All emergency law should therefore be dismantled.

It is interesting to note that the question of repeal of emergency legislation is left entirely in the hands of the U.K. Government and, indeed, the terms of reference [116] for the criminal justice review established under the Agreement, discussed below, specifically exclude consideration of emergency legislation from its remit.[117] This exclusion is particularly worrisome as the continued use and abuse of emergency legislation would tend to undermine improvements to policing brought about by the commission on policing set up by the Agreement.

In this context, the recent paper published by the U.K. Government on its plans for emergency legislation is particularly disappointing.[118] Instead

of moving away from emergency laws, the Government is proposing to entrench them in a permanent piece of U.K. wide anti-terrorism legislation. In addition, it suggests that even with this legislation, there may be a need to maintain a number of Northern Irish specific provisions.

If the Government continues on this course of action, it is likely to encounter further criticism at the international human rights level.[119] It is profoundly regrettable that the opportunity to break with the past has not been taken in relation to emergency legislation. The failure to do so is likely to impede seriously any efforts to secure support for new arrangements in respect to policing and the criminal justice system.

E. Policing and Justice

The Agreement's provisions on policing are of great significance. The Agreement refers to a *"a new beginning to policing in Northern Ireland with a police service capable of attracting and sustaining support from the community as a whole."*[120] The Agreement goes on to point out that

> *"[t]he participants believe it is essential that policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan political control, accountable; both under the laws and to the community it serves; representative of the society it polices, and operates within a coherent and co-operative criminal justice system which conforms with human rights norms."*[121]

These parameters are very similar to those proposed piece of comparative international research published on policing by the Committee on the Administration of Justice some months before the signing of the Agreement. [122]

In order to achieve this goal, the Agreement requires the creation of an independent commission, which should be broadly representative with expert and international representation among its membership. It also stresses that the Policing Commission should consult widely (including with expert NGOs) and report no later than the summer of

1999. The terms of reference outline the need for widespread community support, a legislative and constitutional framework requiring impartial policing, a clear framework of legal and democratic accountability, and an effective complaints system.[123]

The Policing Commission was appointed in June 1998 by the Northern Irish Secretary of State, Dr. Mo Mowlam, with Chris Patten, the former Governor of Hong Kong, as chairperson. There was considerable controversy surrounding the appointments and in particular the lack of consultation with key groups. A particular gap in the make-up of the commission lay in the absence of any member with specific expertise in the area of human rights.

The Irish Government in particular was extremely unhappy at the lack of consultation. It emerged that only one of ten nominees put forward by the Irish was appointed and that this appointment was only made after substantial effort on their part.[124] The picture that emerges is one of civil servants within the Northern Ireland Office pressing ahead with selecting and approaching members without involving the Irish Government at all in the process.

Problems also emerged in the early days of the Policing Commission's work when it was felt that there was a heavy emphasis on contacts with police officers and policing bodies but no sign of public contact with policing critics. This initial criticism was further heightened when it became known that there was a serving police officer working on a full-time basis with the commission at its headquarters.[125] Given the extreme sensitivity of the policing debate and the suspicions that were rife, the Policing Commission felt obliged to try to reassure the public. They insisted that this officer's role was solely to be a liaison between the commission and the police.

Despite these teething problems, people have continued to vest a lot of hope in the work of the Policing Commission and its ability to deliver the necessary level of change. Literally thousands of people have attended a series of public meetings throughout Northern Ireland. These meetings have sometimes been quite acrimonious but have provided an important space for public debate on this deeply contentious issue.

The key challenge for the Policing Commission does not lie in identifying practical proposals to remedy policing problems in Northern Ireland. There are many good and concrete proposals that have been made and these often draw on good practice elsewhere. Rather, the challenge lies in securing the necessary degree of public and political consensus behind a particular package of measures to deliver change.

Alongside the commission into policing, this chapter of the Agreement promises a "parallel wide-ranging review of criminal justice."[126] In comparison to the detail on policing, the terms of reference and status of this review are much more vague, and the review is to "be carried out by the British Government through a mechanism with an independent element,"[127]

Under the terms of the Agreement, the review is to report by autumn 1999, and this will allow it to consider any matters referred to it by the Policing Commission. While this review was a good idea in principle, it makes it all the more unacceptable that the criminal justice review should be carried out by a mechanism largely internal to the civil service. Important issues relating to the powers of the police, and police relations to the criminal justice system, may be identified by the Policing Commission only to be referred to what effectively amounts to an internal Northern Ireland Office body with the resultant limitations.

The review was formally launched on June 27, 1998, and the Secretary of State indicated that "it would be taken forward by a team of officials from the Northern Ireland Office and will include representatives of the Lord Chancellor and the Attorney General."[128] The team was to be assisted by five independent assessors including representatives from the legal profession, academia, the voluntary sector, and a retired English judge.

On August 27, 1998, the review group published a consultation paper[129] and invited submissions by October 30, 1998.[130] The consultation paper is general in nature and raises questions on topics such as the prosecution process, law reform, and judicial appointments. It is anticipated that the group will publish a more detailed document in due course.

F. Strand Three: British-Irish Intergovernmental Conference

Aside from the specific references and mechanisms referred to above, this section makes it clear that the Irish Government will continue to have the opportunity to raise issues of concern on human rights matters with the British Government through the new British-Irish Intergovernmental Conference, which has yet to be established. The British-Irish Intergovernmental Conference will be the successor to the Anglo-Irish Conference that was established under the Anglo-Irish Agreement in 1985. In particular, the Agreement states that *"[t]he Conference will also address, in particular, the areas of rights, justice, prisons and policing in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration) and will intensify co-operation between the two Governments on the all-island or cross-border aspects of those matters."*[131] The importance of this provision will depend to some extent on the effectiveness of the other mechanisms established under the Agreement. Issues such as prisoners and policing remain matters outside the responsibility of the new Assembly; however, it will continue to provide an important avenue for inter-governmental contact on these issues.

Conclusion

This detailed examination of the Agreement illustrates clearly the extent to which human rights language and principle color all aspects of the text. The emphasis on human rights is undoubtedly a singular victory for the human rights community and indeed for all interested in justice and equality in Northern Ireland. Equally, the Agreement was a major defeat for those in Northern Ireland and Britain who are opposed to the rights agenda. The legislative process of the Northern Ireland Bill clearly showed that there was considerable opposition from elements of the state to the changes envisaged in the Agreement. Our above analysis has shown that there was a concerted attempt on the human rights commission, on equality of opportunity, and on policing to dilute the effectiveness of what was promised in the Agreement. There has been informed speculation that the main stumbling block to full implementation of the Agreement was a number of civil servants within the Northern Ireland Office who were hostile to change or wanted to derail the whole process.[132] Indeed, this speculation has been given

substance by a number of embarrassing and potentially damaging leaks that have come from within government. One of these leaks related to the composition of the Patten Commission on Policing and was seen as particularly embarrassing for the Secretary of State. The other leak was related to internal discussions on the controversial Orange Order march through the nationalist Garvaghy Road area.[133]

The process has managed to continue despite such opposition. Although started by the NGOs on the ground, the fact that this campaign was unprecedented in its success to get human rights into the political mainstream illustrates the way in which this agenda managed to mobilize political parties and others. For a variety of reasons, not all of which are yet possible to discern accurately, many of the major players in the peace process picked up the human rights ball and ran with it. Despite a number of scares, they have not yet dropped it. The focus of those who wish to see society transformed as a result of the Good Friday Agreement will be to ensure that they never do.

ENDNOTES "From the Margins to the Mainstream" article written by Martin O'Brien and Paul Mageean

1. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998 [hereinafter Good Friday Agreement] .The Agreement Reached in the Multi-Party Negotiations ("Good Friday Agreement" or "Agreement") was signed on Apri1 10, 1998, at Belfast, Northern Ireland. The Agreement was agreed upon by representatives of the two governments and eight of the ten parties entitled to take part in the negotiations.
2. Mary Robinson, Equality and Human Rights -Their Role in Peace Building, Speech at the Stormont Hotel (Dec. 2, 1998).
3. *Id.*
4. The Irish Republican Army ("IRA") cease-fire was declared at the end of August 1994 and was followed approximately one month later by cease-fires of the two main loyalist paramilitary groupings, the Ulster Defence Association and the Ulster Volunteer Force. The IRA cease-fire broke down in February 1996 but was restored in July 1997.
5. See Michael Farrell, The Orange State (1980).
6. The United Kingdom adopted this approach in the case of *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser.B) at 16 (1988); and its subsequent derogation from Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), and in the case of *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 31 (1993).
7. Detention centers are used for the interrogation of those arrested under the Prevention of Terrorism Act (Temporary Provisions) Act, 1974, ch.56 (Eng.). There

are three detention centers currently in use in Northern Ireland; one is in Castlereagh in Belfast and the others are in Derry and Armagh. The conditions in all three, but particularly Castlereagh, have been the focus of regular criticism by international human rights bodies and NGOs since the 1970s to date. Such bodies have expressed concern at the ill-treatment of detainees in the centers and in 1993, a visiting delegation from the European Committee for the Prevention of Torture concluded that those detained in Castlereagh faced a significant risk of psychological ill-treatment and occasional physical assault. *Final Response of the United Kingdom Government to the Report of the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its Visit to the United Kingdom from 15 to 31 May 1994*, CPT/Inf (96) 12 (1996).

8. Committee on the Administration of Justice et al., Declaration on Human Rights, The Northern Ireland Conflict and the Peace Process (1994).

9. *See id.*

10. *See id.*

11. See generally Committee on the Administration of Justice, CAJ's submission to "The United Nations Committee Against Torture (1998). Indeed on April 1, 1998, ten days before the signing of the Good Friday Agreement, the United Nations Special Rapporteur on the Independence of Judges and Lawyers issued a highly critical report, in relation to intimidation of defense lawyers in Northern Ireland. In his report, he echoed the language of the NGOs when he said that he was making his recommendations "with the conviction that respect for the rule of law and human rights ... will enhance the prospects for a peaceful resolution of the conflict."

12. *See* Gerry Adams, Pathway to Freedom (1995); Bob Purdie, Politics in the Street (1990).

13. For instance, an analysis of those killed at the hands of the security forces during the course of the conflict in Northern Ireland shows that 89.6% of the victims were from the nationalist/catholic community, which, according to the 1991 census, made up 38% of the population of Northern Ireland.

14. David Schmitt, The Consequences of Administrative Emphasis in Equal Opportunity Strategies: Comparative Analysis of the United States and Northern Ireland, Speech prepared for the Annual Meeting of the American Political Science Association (Sept 3-6, 1981).

15. *See* Sinn Fein, Towards a Lasting Peace in N Ireland, Sinn Fein manifesto for The Westminster Election April 1992 (1992).

16. Martin O'Brien, Northern Ireland at the United Nations 1969-1996 (1996) (unpublished LL.M. thesis, Queen's University of Belfast).

17. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland, Nov. 15, 1985, U.K.-Ir., Cmnd. 9657, *reprinted in* Tom Hadden & Kevin Boyle, The Anglo-Irish Agreement 15-48 (1989) [hereinafter Anglo-Irish Agreement]. The Anglo-Irish Agreement of 1985 was the first of a series of joint declarations to be undertaken by the British and Irish governments in relation to Northern Ireland. The Agreement provoked wide spread Unionist opposition mainly because it recognized the right of the government in Dublin to have an input into the governance of Northern Ireland for the first time.

18. *See* Eamonn Mallie & David McKittrick, The Fight For Peace (1996).

19. *See* Anglo-Irish Agreement. *supra* note 17, pmbl.

20. *Id.* art. 2.
21. *Id.* art. 5.
22. *Id.* art. 7.
23. *Id.* art. 8.
24. The Joint Declaration by An Taoiseach, Mr .Albert Reynolds, T.D. & The British Prime Minister, The Rt. Hon. John Major, M.P., Dec. 15, 1993, U.K.-Ir., Cm.2442 [hereinafter Downing Street Declaration].
25. A New Framework for Agreement, Dec. 1994, 34 I.L.M. 946 [hereinafter Framework Documents]. The Framework Documents were issued in December 1994 by the Irish and British governments and outlined a shared understanding of future political arrangements on the island of Ireland and between Ireland and the United Kingdom.
26. *See id.*
27. Indeed, in a Social Democratic Labour Party document entitled "The Positive Approach," the SDLP asserted its role as the "inspiration for every major advance towards agreement over the last three decades." Social Democratic Labour Party, The Positive Approach (1997). In its 1997 election manifesto, it also included detailed objectives in the human rights sphere including the repeal of emergency legislation, the withdrawal of plastic bullets, transfer of prisoners, etc. Social Democratic Labour Party Real Leadership, Real Peace (1997).
28. Labour Party, Human Rights into a New Century (1997).
29. Foreign Secretary, Robin Cook, Speech at the Labour Party Conference July 1997).
30. *Id.*
31. Shortly before Labour took power, Mo Mowlam held a meeting at Westminster to which she invited representatives of human rights NGOs working on Northern Ireland.
32. Mo Mowlam, Speech to the Labour Party Conference (Nov. 1997).
33. *See id.*
34. See *McCann v. United Kingdom*, 324 Eur. Ct. H.R (ser. A) (1995); *Murray v. United Kingdom*, 300 Eur. Ct. H.R (ser. A) at 19 (1994); *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R (ser. B) at 16 (1988); *Ireland v. United Kingdom*, 25 Eur Ct. H.R (ser. A) at 79 (1978).
35. Paul Mageean, *Human Rights and the Peace Process*, U.S.J. Critical Criminology(1997).
36. The Progressive Unionist Party ("PUP") was generally seen as the political voice of the Ulster Volunteer Force and the Ulster Democratic Party ("UDP") was generally seen as the Ulster Defense Association.
37. Dr. Robbie McVeigh, "Harrassment: It's Part of Life Here ..." The Security Forces and Harrassment in Northern Ireland (1995).
38. Undated statement from the Progressive Unionist Party entitled Human Rights and signed by Mr. W. McArthur, Chairperson (on file with the *Fordham International Law Journal*).
39. For instance, at the Northern Ireland Forum, which met during the talks process, the Women's Coalition voted for the removal of the Union flag that flew over the Forum building. In contrast, the Alliance Party were absent when the vote was being taken.
40. *See* Northern Ireland Women's Coalition, Submission to the International Body on Strand 2, Rights and Safeguards (1995).

41. The International Body, Report of the International Body (1996). The Mitchell commission was established to overcome the difficulties that had arisen because of the decommissioning issue. Mitchell recommended the parallel decommissioning of weaponry at the same time as talks. On the day of the report's publication the British Government changed its tactic from making decommissioning the pre-condition for talks to advancing the need for electoral support, and announced plans to hold an election to the talks process.
42. *Id.*
43. *Id.* at 1-3.
44. *Id.*
45. *Id.* at 18.
46. Committee on the Administration of Justice, Submission to the International Body (Dec.1995).
47. *A Major Blow: British Prime Minister John Major and the Peace Process*, Nation, Mar. 4, 1996, at 3.
48. *Id.*
49. *A. Hegarty, United States State Department Report*, Just News, Mar. 1998. Vol.13 no.3.
50. Annual Statement by the Friends of Ireland, Wash., D.C. (Mar. 17, 1997).
51. 144 Cong. Rec. Hl196-01 (daily ed. Mar. 17, 1998) (expressing sense of congress regarding Northern Ireland).
52. *Id.*
53. Exclusion orders are issued under the Prevention of Terrorism Act by the Home Secretary or the Northern Ireland Secretary of State. Prevention of Terrorism Act (Temporary Provisions) Act, 1974, ch. 56 (Eng.). Their purpose is to exclude Irish or Northern Irish citizens from Britain or from Northern Ireland. The current Labour Government has discontinued their use.
54. *See supra* notes 4-11.
55. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pmbl., at 135-36, U.N. Doc. A/810 (1948).
56. *Id.*
57. The Constitution of the Republic of South Africa of 1996, Act No. 108 of 1996, *reprinted* in Constitutions of the Countries of the World at binder xv11 (Albert P. Blaunstein & Gisbert H. Flanz eds., 1997).
58. *Id.*
59. General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1996, art. VII, 35 I.L.M. 75, 90.
60. *Id.* art. VI, at 90.
61. Richard Wilson, The People's Conscience? Civil Groups, Peace and Justice in the South African and Guatemalan Transitions (1997).
62. AL-HAQ, A Human Rights Assessment of the Declaration of Principles on Interim Self-Government Arrangements for Palestinians (1993).-
63. *Id.* at 1.
64. *Id.* at 10.
65. *Id.* at 12.
66. Joint Mission to Israel, The Occupied Territories and New Palestinian Autonomous Areas on Behalf of the Law Society of England and Wales and the Human Rights Committee of the Bar of England and Wales: Criticisms voiced by Hanan Ashrawi in Human Rights in a Period of Transition, The Case of the Occupied Territories, Jericho and the Gaza Strip (1994).

67. For example, Brian Gormally and Kieran McEvoy in *The Release and Reintegration of Politically Motivated Prisoners* compared the mechanisms for release of prisoners in various conflicts around the world including South Africa and Palestine.
68. Good Friday Agreement, *supra* note I, Declaration of Support I. The text of the Good Friday Agreement is paginated differently in different printed versions. To avoid confusion, all references in the text are made to the chapter title and paragraph numbers rather than page numbers.
69. *Id.*, Constitutional Issues I (v) .
70. Mary Robinson, Speech on Equality and Human Rights – Their Role in Peace Building, Belfast (Dec. 2, 1998).
71. Good Friday Agreement, *supra* note 2, Strand One, Democratic Institutions in Northern Ireland 1.
72. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Safeguards , 5(b).
73. *Id.* , 5(c).
74. *Id.*, 5(e).
75. *See id.*, Rights, Safeguards and Equality of Opportunity, Human Rights, United Kingdom Legislation 2.
76. *Brogan and Others v. United Kingdom*, 145B Eur. Ct. H.R. (ser. A) at 16 (1988).
77. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Operation of the Assembly II.
78. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Legislation 26(a).
79. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Relations with other institutions 33(b).
80. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Executive Authority 23.
81. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Annex A (c).
82. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Code of Conduct.
83. *Id.*, Rights, Safeguards and Equality of Opportunity, Human Rights 1.
84. *Id.*, Rights, Safeguards and Equality of Opportunity, Human Rights, New Institutions in Northern Ireland 6. These are the Fair Employment Commission, the Equal Opportunities Commission, the Commission for Racial Equality, and the Northern Ireland Disability Council. *Id.*
85. Northern Ireland Bill, Bill 229, July 15, 1998 [hereinafter Northern Ireland Bill].
86. See Committee on the Administration of Justice, Preliminary Analysis by the Committee on the Administration of Justice of Responses to the White Paper "Partnership for Equality" (1998) (on file with the Committee on the Administration of Justice). "
87. The Northern Ireland Bill provided only that groups should be consulted about the shape of equality schemes and that they should be given access to information on the schemes. This was eventually changed to ensure that the groups likely to be affected by decisions would be consulted about those decisions and that they would have access to information relevant to the decisions.
88. *See* Northern Ireland Act, 1998, ch. 47, pt. VII (Eng.) (reflecting debates in Commons and Lords on Northern Ireland Bill).
89. Good Friday Agreement, *supra* note 2, Rights, Safeguards and Equality of Opportunity, Economic, Social and Cultural Issues 2.
90. *See* Northern Ireland Bill, 1998, § 75(4), (5).
91. *See* Fair Employment (Northern Ireland) Act, 1976, ch. 25, § 42 (Eng.).

92. *See id.; see also* Northern Ireland Bill, 1998, § 75(4), (5).
93. *Tinnelly v. United Kingdom*, Application No. 2O390/92, July 10, 1998 (Eur. Ct. H.R decision not yet published in Series A) (visited Apr. 15, 1999) <http://www.dhcour.coe.fr/eng/Judgments.htm> (on file with the *Fordham International Law Journal*).
94. *See* Northern Ireland Bill, 1998, ch. 47, § 79(4), (5) (Eng.).
95. Good Friday Agreement, *supra* note 2, Rights, Safeguards and Equality of Opportunity, Human Rights, New Institutions in Northern Ireland 5.
96. *Id.*, Human Rights. United Kingdom Legislation 4.
97. *Id.*, Human Rights, A Joint Committee, 10.
98. *See Id.*, Human Rights, New Institutions in Northern Ireland 5.
99. *See* Northern Ireland Bill (as amended in Committee), H.L. Bill 158, cl. 66.
100. *See* House of Commons, Official Report, vol. 319, Nov. 10, 1998, col. 706.
101. Good Friday Agreement, *supra* note 2, Rights, Safeguards and Equality of Opportunity, Human Rights, New Institutions in Northern Ireland 5.
102. *See* Letter from Mary Robinson, U.N. High Commissioner for Human Rights, to Prime Minister Tony Blair and Taoiseach Bertie Ahern (June 18, 1998) (on file with the *Fordham International Law Journal*) .
103. Good Friday Agreement, *supra* note 2, Rights, Safeguards and Equality of Opportunity, Human Rights, Comparable Steps by the Irish Government 9.
104. Good Friday Agreement, *supra* note 2, Rights, Safeguards and Equality of Opportunity, Human Rights, Reconciliation and Victims of Violence 11.
105. *Id.*, Economic, Social and Cultural Issues 1.
106. *Id.* 2(iii)
107. *Id.* 3.
108. *Id.* 4.
109. *See Exposed*: *NIO Deal Deceit*, Andersonstown News, May 2, 1998, at 1.
110. Irish News, June 10, 1998.
111. Education (Northern Ireland) Order, 1998 (Eng.).
112. *Id.* art. 89.
113. *Id.*
114. Good Friday Agreement, *supra* note 2, security 1.
115. *See* Committee on the Administration of Justice, No Emergency, No Emergency Law (1995).
116. *See* Good Friday Agreement, *supra* note 2, Policing and Justice 4-6.
117. *See id.*, Policing and Justice, Annex B.
118. Legislation Against Terrorism, 1998, Cm. 4178.
119. *See* The Conclusions and Recommendations of the Committee Against Torture, on its examination of the United Kingdom of Great Britain and Northern Ireland and Dependent Territories, Nov. 19; 1998 (CAT/C/SR354, 355, and 360).
120. Good Friday Agreement, *supra* note 2, Policing and Justice 1.
121. *Id.* 2.
122. See Mary O'Rawe & Dr. Linda Moore, Human Rights on Duty (1997).
123. *See* Good Friday Agreement, *supra* note 2, Policing and Justice 3, Annex A, Terms of Reference.
124. *See Policing Commission*, Irish Times, June 4, 1998, at 17.
125. *See* Sunday Business Post, Oct. 4, 1998.
126. Good Friday Agreement, *supra* note 2, Policing and Justice 5.
127. *Id.*

128. *See* Northern Ireland Office, *Secretary of State Launches Review of Criminal Justice*, June 27, 1998 (visited Apr. 15, 1999) <http:/ /www.nio.gov.uk/980627a-nio.htm> (on file with the *Fordham International Law Journal*) .
129. Criminal Justice Review Group, Review of the Criminal Justice System in Northern Ireland: A Consultation Paper (1998).
130. *See generally* Committee on the Administration of Justice, Submission to the Criminal Justice Review No. 78 (1998).
131. Anglo-Irish Agreement, *supra* note 17.
132. Kevin McNamara, *Inattention to Detail on Amendments Could Be Costly*, Irish Times, Oct. 29, 1998, at 10.
133. *See* DeagIan de Breadun, *Leaked Memo Exposes Rift over Police Body*, Irish Times, June 9, 1998, at 8; *see also Broken Heads, Dashed Hopes*, Economist, July 12, 1997, at 49.

This Anthology is being published to mark 25 years of work by the Committee on the Administration of Justice (CAJ) to ensure the highest standards in the administration of justice in Northern Ireland.

The pages that follow indicate some of the highlights of work throughout those 25 years in terms of publications, events, campaigning and litigation efforts.

Brief Chronology of CAJ's work 1981-2005

1. Publications

1981 CAJ founded at conference in Queens
1982 Reports on emergency laws and police complaints
1983 Report on emergency laws
1985 First staff member appointed; reports on policing, minority rights and plastic bullets
1986 Report on Bill of Rights
1988 Report on policing
1989 Report on prisoners and Payment of Debt Act
1990 Reports on policing (lay visitors, plastic bullets and complaints) and Bill of Rights
1991 Submissions to UN Human Rights Committee and UN Committee Against Torture (UNCAT) and Royal Commission on Criminal Justice
1992 Reports on inquests and miscarriages of justice
1993 Report on Bill of Rights, Irish language, emergency legislation, racism and Children's Order; submissions to UN Sub-Commission and Committee on Elimination of Racial Discrimination (CERD)
1994 Report on harassment, right to silence, policing, young offenders, Criminal Cases Review Authority, miscarriages of justice, lethal force, UN Human Rights Committee, UN Economic, Social and Cultural Rights Committee and UN Committee on Rights of the Child (UNCRC)
1995 Report on emergency law, policing and submissions to UN Human Rights Committee and UNCAT
1996 Report on fair employment, public order policing, racism, parading, and submissions to UN Sub-Commission and CERD
1997 Reports on mainstreaming equality, Bill of Rights, parading, public order policing, emergency law, sex discrimination, lethal force, intrusive surveillance, criminal justice, prisoners and UN Economic, Social and Cultural Rights Committee
1998 Reports on equality, plastic bullets, criminal justice, parades, peace process, victims and a prisoner handbook
1999 Report on policing, European Social Charter, audio recording, fair employment, intimidation of lawyers, parades, freedom of information, equality and submission to Committee on Elimination of Discrimination Against Women (CEDAW)
2000 Reports on Diplock Review, New TSN, post primary education
2001 Reports on family law, Bill of Rights, policing, equality, children, socio-economic rights, and submission to UN Human Rights Committee

2002 Reports on criminal justice, coroners rules, Bill of Rights, Healing Through Remembering, parades, policing, post primary review, rates, public private partnerships, and submission to UN Economic, Social and Cultural Rights Committee
2003 Reports on Bill of Rights, parades, hate crime,, plastic bullets, Shared Future, civil contingencies, deaths in custody, inquests, Policing Board and criminal justice
2004 Reports on hate crime, Public Prosecution Service, submission to UNCAT
2005 Reports on District Policing Partnerships, Police Ombudsman, criminal justice devolution; human rights anthology

In addition, the organisation printed a major Civil Liberties Handbook (editions in 1990, 1993, 1997 and 2003) which is routinely used as a reference source for students, community workers, advice staff etc.

2. Conferences/Seminars/Events

Apart from contributing to the international scrutiny of NI's human rights record, CAJ has hosted a large number of events to which human rights experts from around the world have been invited to visit Northern Ireland and contribute to local debates.

John Alderson, former Chief Constable, Devon & Cornwall
Regis Brillat, Council of Europe
Beatrix Campbell, journalist and author
Andrew Coyle, former governor of Brixton Prison
Ralph Crawshaw, University of Essex
Dato Param Cumaraswamy, UN Special Rapporteur
John Darcy, Council of Europe
Professor Stein Evju, European Committee of Social Rights
Lord Gifford, QC
Justice Richard Goldstone, South African Supreme Court Judge
Lord William Goodhart, International Commission of Jurists
Francesc Guillen, Catalonian Police Training Academy
Professor David Harris, Council of Europe
Anita Hazenberg, Council of Europe Police and Human Rights Division
Mary Holland, journalist

Zelda Holtzman, Asst Commissioner, South African Police Service
Professor Paul Hunt, UN Committee on Economic, Social & Cultural Rights
Abid Hussain, UN Special Rapporteur
Lee Jasper, 1990 Trust
Helena Kennedy, QC
Justice Michael Kirby, Justice of the High Court of Australia
Frank LaRue, Guatemalan human rights campaigner
Lord Anthony Lester QC
Professor Christopher McCrudden, University of Oxford
Justice Beverley McLachlin, Canadian Supreme Court judge
Dr. Markus Mohler, Swiss police chief
Professor Rod Morgan, University of Bristol
Felix Morka, Nigerian human rights activist
Egbert Myjer, Court of Appeal, Amsterdam
Michael O'Boyle, European Court of Human Rights
Ramona Ortega, New York anti-hunger campaigner
Gareth Pierce, solicitor
Professor Allyson Pollock, University College, London
Bruce Porter, Social Rights Advocacy Centre, Canada
Mary Robinson, as Irish President, and then UN High Commissioner for Human Rights
Sir Nigel Rodley, KBE, UN Special Rapporteur on Torture
Professor Bob Rowthorn, University of Cambridge
Justice Albie Sachs, South African Constitutional Court
Professor Phil Scraton, Edge Hill University College
John Shattuck, US Assistant Secretary of State
Jon Snow, broadcaster
Justice Barry Strayer (Canada)
Jonathan Swallow, Swallow Consulting
Katarina Tomasevski, UN Special Rapporteur
Archbishop Desmond Tutu, Archbishop Emeritus, South Africa
Professor Dirk van Zyl Smit, University of Cape Town
Heather Ward, Vera Institute of Justice, New York

3. Litigation efforts

CAJ successfully took several cases to the European Court of Human Rights – Kelly et al v UK, McShane v. UK and Shanaghan v.UK, and has recently been granted a waiver to appear in the domestic courts. Over the years we have sent observers to a range of trials before the Diplock courts, inquest hearings, and in 2005 we were awarded a legal waiver to allow us to appear directly in the domestic courts on behalf of clients claiming human rights abuses.

4. Government policy making

As a result of the introduction of the section 75 duty (the equality duty outlined in Section 75 of the Northern Ireland Act), which CAJ had long campaigned for, government is obliged to consult extensively on the equality impact of its policies. Accordingly, the organisation has responded to hundreds of legislative and policy proposals – fuller details of these interventions are available from the organisation's website.

5. International alliances

CAJ is member of the International Federation of Human Rights, and in this capacity meets regularly with its sister organisations in these islands – Liberty, Irish Council for Civil Liberties, and the Scottish Human Rights Centre – as well as a range of other international human rights organisations such as Amnesty International, Human Rights First, Human Rights Watch, and the International Commission of Jurists. CAJ has been awarded a number of prizes including the prestigious Council of Europe Human Rights Prize in 1998, which was determined by the then 39 member states for our efforts to mainstream human rights and equality into the Agreement.

All of the above activities are outlined in more detail in CAJ's annual reports, and we produce a monthly newsletter *Just News* which is available to all members, and on subscription. See www.caj.org.uk

Committee on the Administration of Justice

The Committee on the Administration of Justice (CAJ) works for a just and peaceful society in Northern Ireland where the rights of all are protected.

Aims

- to secure the highest possible standards in the administrtion of justice
- to defend and advance civil liberties and the rights and freedoms recognised by international law
- to increase public awareness of, and activism on, human rights issues

In order to be part of, or give support to, an organisation that is active on justice issues in Northern Ireland - please complete the tear off membership application form on the back page.

As a member, you will receive:

- a copy of the Annual Report;
- invitations to public events; and
- up to date information via CAJ's regular newsheet Just News.

For information on forthcoming events, press releases, latest publications, please check out the website

www.caj.org.uk

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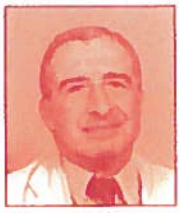

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