

Unionists as ‘Court Sceptics’: Exploring Elite-Level Unionist Discourses about a Northern Ireland Bill of Rights

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Abstract

One of the most significant characteristics of the peace process in Northern Ireland has been the profound importance attached by a range of academic, political and non-governmental actors to the concept of human rights. However, unionists, more so than other elite-level political actors in Northern Ireland, have expressed scepticism about proposals from the Northern Ireland Human Rights Commission (NIHRC) for a Northern Ireland Bill of Rights. This article explores how unionists relied on a ‘court sceptic’ narrative to argue against the Bill of Rights proposals. It argues that at one level unionist reliance on ‘court sceptic’ arguments can be conceived of as instrumental in the sense that it was a mere tactical response to, as unionists argue, the inflation by the NIHRC of their mandate contained in the Good Friday Agreement to devise a Bill of Rights. However, at another level unionists reliance on ‘court sceptic’ arguments can also be traced to their constitutional experience within the British polity.

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Introduction

One of the most significant characteristics of the peace process in Northern Ireland has been the profound importance attached by a range of academic, political and non-governmental actors to the concept of human rights. Human rights have, as one scholar puts it, 'moved from the margins to the mainstream' (Harvey 2001, 342) of political life in Northern Ireland and in so doing have become a dominant characteristic of contemporary political discourse there (Mageean and O'Brien 1999; Kavanagh 2004). The pervasiveness of human rights discourse in both the practical circumstances of the body politic in Northern Ireland and in theoretical reflections about the nature of the conflict there is in many ways a reflection of the fact that we live in what one scholar has called the 'age of rights' (Bobbio 1996). Despite profound philosophical disagreement about what rights are (Griffin 2008), over the past 60 years human rights have established themselves, as one scholar puts it, as the 'coin of the normative realm, the lingua franca of moral and political claim making' (Ingram 2008, 41). Political culture in Northern Ireland has not been immune from 'rights talk' (Glendon 1991). Indeed, in many ways, the legacy of ethnic conflict, territorial division and political disagreement there has proved fertile ground for the emergence of a strong, hegemonic and powerful rights discourse. In Northern Ireland the new rights culture has found strong support within three key sections of society: first, within scholarly circles—particularly among a particular group of Northern Ireland-based legal academics who argue that the post-conflict circumstances of Northern Ireland and the constitutional, legal and political change that has occurred there are more appropriately explained, analysed and reflected upon using analytical frameworks offered by transitional justice discourse (Bell 2003; Campbell et al. 2003; Bell et al. 2004; Campbell and Ni Aolain 2005; McEvoy 2007); second, by Irish nationalist and Irish republican political parties in Northern Ireland (SDLP and Sinn Fein) which have a long tradition of expressing political preferences and positions during the conflict in Northern Ireland using the language of human rights; and third, by human rights activists in non-governmental organisations such as the Committee on the Administration of Justice (CAJ) who have long argued for a 'rights-based' solution to the seemingly intractable problem of the conflict in Northern Ireland (Mageean and O'Brien 1999).

However, in Northern Ireland support for this new narrative of human rights has not been universal. Influential strands of unionist opinion, more so than other elite political actors in Northern Ireland, have expressed

scepticism about many of the institutional developments in human rights protection that have occurred as a result of the Belfast Agreement, have been suspicious of the political claims that human rights discourse has made in Northern Ireland since 1998 and are anxious about the attempt to create a new orthodoxy in the body politic of Northern Ireland which places human rights at the apex and pinnacle of political discourse. The anxiety felt by unionism is neatly encapsulated in this statement from a unionist Member of the Northern Ireland Assembly, who in a contribution to a debate in the Assembly about a Bill of Rights for Northern Ireland argued that:

Unionists, however, became detached—or more accurately, dislodged from the rights process. That was understandable in Northern Ireland ... It was sickening for many Unionists to hear the clamour for rights coming most loudly and frequently from those who denied basic rights to people in our country. It was nauseating to hear how barristers or solicitors who defended terrorists or suspected terrorists were referred to as human rights lawyers. That caused great unease in our community (DUP MLA, Simon Hamilton, 27 October 2007).¹

The purpose of this article is to explore how unionist political representatives increasingly relied on a ‘court sceptic’ narrative to articulate a case against the proposals from the Northern Ireland Bill of Rights Forum (NIBoRF) (2008) and the Northern Ireland Human Rights Commission (NIHRC) (2001, 2004 and 2008). The fundamental point made by elite-level political actors from the unionist community is that the Bill of Rights proposals would emasculate the legislature and result in the transfer of power over social policy matters from the legislature to the judiciary. This ‘court sceptic’ concern is reflective of a narrative found in other parts of the common law world in countries with similar legal, political and constitutional traditions to the UK about the constitutional protection of human rights. In those countries such as Canada, Australia and New Zealand, vigorous debate has taken place about the utility of constitutionally entrenched rights. Central to this ‘court sceptic’ (Hiebert 2006) narrative is this claim—why when certain individual needs, interests and desires have been identified as a right should that right then be constitutionalised in the form of a Bill of Rights and the power to resolve, adjudicate and apply what is meant by a certain right be handed to the judiciary? The suggestion of this article is that the ‘court sceptic’ narrative is a useful analytical lens through which to explore post-Good Friday Agreement (GFA) unionist discourses about human rights and will help scholars of the conflict in Northern Ireland arrive at a deeper

understanding of this particular aspect of post-conflict politics there. In the period after the Belfast Agreement scholarly literature on unionism and the Belfast Agreement tended to focus on intra- and inter-unionist divisions on the agreement (Evans and Tonge 2001; Kaufman and Patterson 2007), explanations and analyses on why unionism decided to reach agreement in 1998 (Farrington 2006a and 2006b), deconstructions of 'new' unionist ideology (Patterson 2004), cleavages in unionist identity (Ganiel 2006; Southern 2007a) and unionist alienation (Southern 2007b) rather than on exploring unionist discourses about human rights. In many ways Christopher Farrington's (2006a and 2006b) work on unionism and the Northern Ireland peace process, some of which has featured in this journal, offers a useful framework for understanding unionist responses to the peace process but it fails to engage sufficiently with unionist responses to a Bill of Rights. Therefore, this article hopes to fill a gap in the literature on this particular aspect of post Agreement unionist politics. For the empirical aspect of this article which explores how unionist responses to the Bill of Rights debate relied on 'court sceptic' arguments, a range of sources have been examined and analysed. First, the article examined the five debates that took place in the Northern Ireland Assembly on a Bill of Rights from 2001 to 2010. Second, it has examined the responses of the unionist parties to the various public consultation exercises organised on a Bill of Rights by the NIHRC and by the government from 2001 to 2010. The article is divided into three sections. It will begin by considering the more abstract discussion about what is meant by the term 'court sceptic' before, second, moving on to provide an overview of how rights discourse has moved from the margins to the mainstream of the body politic in Northern Ireland. Third, it will go on to examine the evidence supporting the argument that unionist responses to the Northern Ireland Bill of Rights debate increasingly relied on 'court sceptic' arguments before discussing the significance of this.

The 'Court Sceptic' Concern

The term 'court sceptic' first appeared in the literature in an article written by the Canadian political scientist, Janet Hiebert (2006) in the *Modern Law Review*. The phrase was used by the author as a way of summarising sceptical concerns about Bills of Rights and the practice of entrenching individual rights within a constitutional charter subject to strong judicial review that had arisen within a significant body of literature (Griffith 1979; Waldron, 1993, 1998 and 1999; Allan 1996, 2002 and 2008; Tomkins 2005; Bellamy 2007). Hiebert defines a court sceptic as someone who accepts 'the legitimacy of individual rights but doubt[s] the prudence

of giving courts final responsibility for interpreting and resolving political disagreements involving rights, for a range of reasons such as democratic concerns or institutional competence' (Hiebert 2006, 10). In other words these scholars are 'troubled by the implications for liberal democratic communities of structuring and evaluating political debates through a judicially interpreted bill of rights' (Hiebert 2006, 24). Hiebert distinguishes the sceptical positions in the academic literature between those who are 'rights sceptics' and those who are 'court sceptics'. As Hiebert argues,

Rights sceptics criticise the ways in which a bill of rights influences notions of citizenship and political community ... Court Sceptics argue that a bill of rights will distort debates about contested issues ... the very notion that judicial interpretation replaces debate contradicts the democratic imperative of on-going deliberations about the role of the state, the nature of problems that affect a polity and the propriety of specific social policies (Hiebert 2006, 10).

The idea and scholarly expression of 'court sceptic' arguments against a constitutionally entrenched Bill of Rights has been heavily associated with the distinguished legal philosopher Jeremy Waldron who, according to one colleague who would share his scholarly analysis of Bills of Rights, 'is without doubt, the leading Bills of Rights critic writing today' (Allan, 2008, 161). Within the literature it is possible to discern three central elements to the 'court sceptic' narrative. First, to paraphrase Waldron, 'there are many of us and we disagree about rights'. In other words the court sceptic concern questions the desirability of taking an individual human, moral or legal right and translating it into a constitutionally entrenched right given the profound disagreement that exists at a philosophical level about what precisely is meant by a human right, what needs, interests or entitlements constitute human rights and about what the foundations of human rights are. As Waldron argues,

It is puzzling ... that some philosophers and jurists treat rights as though they were somehow beyond disagreement, as though they could be dealt with on a different plane in law—on the solemn plane of constitutional principle far from the hurly burly of legislatures and political controversy and disreputable procedures like voting (Waldron 1999, 12).

Second, because of the considerable disagreement about the nature, scope and foundations of human rights, court sceptic discourses argue that the judiciary should not have the final say in the resolution of these

arguments—that it is profoundly inappropriate to privilege judges over elected legislators under this process. Court sceptics question why the judiciary is better placed to resolve these disagreements. As J. A. G. Griffith argues,

The trouble with the higher order law is that it must be given substance, be interpreted, and be applied. It claims superiority over democratically elected institutions; it prefers philosopher kings to human politicians; it puts faith in judges whom I would trust no more than I trust princes (Griffith 2000, 165).

Put a different way, the issue can be conceived as one of ‘institutional morality’ (Phillipson 2007). In other words, where should the power and authority to resolve and adjudicate on disagreements about the nature of human rights lie: with the judiciary or the legislature? The third aspect of the ‘court sceptic’ narrative is that a constitutionally entrenched Bill of Rights enforced by the judiciary limits the right of citizens to participate in the ebb and flow of political life in the body politic. Participation, according to Waldron, is the ‘right of rights’ in any democratic polity, but when disagreements about matters of social policy are removed from the legislature and transferred to the judiciary under a Bill of Rights, resolving disagreements about the ‘circumstances of politics’ can no longer be the citizen's concern. As Waldron argues,

Some of us think that people have a right to participate in the democratic governance of their community, and that this right is quite deeply connected to the values of autonomy and responsibility ... We think moreover that the right to democracy is a right to participate on equal terms in social decisions on issues of high principle and that it is not to be confined to interstitial matters of social and economic policy. I shall argue that our respect for such democratic rights is called seriously into question when proposals are made to shift decisions about the conception and revision of basic rights from the legislature to the courtroom (Waldron 1993, 221).

Entrenching a Bill of Rights within a nation's constitutional system would, in Griffith's words, mean that ‘political questions of much day to day significance would, even more than at present, be left to decision by the judiciary’ (Griffith 1979, 14). In other words these decisions would no longer be left to elected politicians to deliberate upon and where, through elections and other means, citizens can participate in the process, but would be left to an unelected judiciary to resolve. The potential for the

increased politicisation of the legal process that may occur under a constitutionally entrenched Bill of Rights, particularly one that enshrines social and economic rights, is a theme taken up recently by the human rights academic Connor Gearty, who argues that:

The least effective way of securing social rights is via an over-concentration on the legal process, with the constitutionalisation of such rights being an especial disaster wherever it occurs. Such a move turns the whole subject over to its falsest of false friends, the lawyers, a community which (in this context and however generally well meaning) amount to little more than an array of pseudo-politicians on the look out for short cuts to difficult questions and for ways for plying their trade that are more agreeable to their ethical slaves (Gearty and Mantouvalou 2010, 1).

Both Waldron and James Allan have argued that the idea of 'precommitment' inherent within a set of constitutional rights, which 'presents constitutional constraints as a form of immunization against madness' (Waldron 1999, 306), ultimately leads to citizens becoming further alienated and disenfranchised from the political process. Court sceptics would argue that the process of regular free and fair elections within a democracy permits some degree of democratic accountability and participation for the citizen, but precommitting a set of rights in a constitutional charter making it immune from change merely transfers power from a much larger elite with at least some degree of democratic control for the citizen to a much smaller elite with virtually no entry points for the citizen to express his or her say about their decisions.

Those familiar with both normative and descriptive accounts of the UK's constitution and with recent debates about its future will recognise the 'court sceptic' narrative as sharing many similarities with the discourse of the 'political constitution' (Griffith 1979; Tomkins 2003 and 2005; Bellamy 2007). Whereas once the British constitution was traditionally viewed as a political constitution with its defining characteristic contained in Griffith's dictum that 'the constitution of the United Kingdom lives on changing from day to day for the constitution is no more and no less than what happens' (Griffith 1979, 19), it is now caught up in a battle between competing conceptions of the UK constitution—the legal and the political constitution. In more recent times political theorists (Bellamy 2007) and public law scholars (Tomkins 2003 and 2005) have sought to build upon Griffith's original work and attempted to outline a more normatively grounded theoretical statement of what constitutes a discourse of political constitutionalism rather than the descriptive account that they argue

Griffith provided. Adam Tomkins argues that orthodox understandings of the UK's 'political constitution' have, over the past 30 years, 'come under increasing pressure from the rival theory of legal constitutionalism' (Tomkins 2003, 21). Indeed, according to Tomkins the distinction between visions of the political constitution and the legal constitution is of more profound significance to understanding constitutionalism in the 21st century than the more familiar distinction often made in public law scholarship between written and unwritten; codified and uncodified constitutions. Richard Bellamy (2007) argues that political constitutionalism is 'superior both normatively and empirically to the legal constitutional devices' that are imposed as essential constraints upon democracy and majority rule. He argues that legal constitutionalism subverts 'these democratic protections, creating sources of arbitrariness and dominance of their own in the process' (Bellamy 2007, 2). At the heart of discourses of legal constitutionalism lies a commitment to the constitutional entrenchment of individual rights and, as Bellamy argues, 'nothing has been so influential in driving constitutionalism along the paths of legal rather than political thought than the emphasis on rights, their entrenchment in a constitutional document and their interpretation and elaboration by a supreme or constitutional court' (Bellamy 2007, 15).

Some commentators trace the emergence of this debate between the legal and political constitution in the UK to the passage of the Human Rights Act (HRA) in 1998. According to one scholar the HRA represents the 'cornerstone of the new British Constitution' (Bogdanor 2009, 62). Until the HRA came into force in 2000, the UK was, in Colm O'Connell's words, a 'partial exception' to trends in other countries in Europe and in other countries such as New Zealand and Canada that have similar legal, constitutional and political traditions as the UK. Under the political constitution the protection of rights and the expansion of the realm of individual freedom was realised in the UK constitutional tradition through the legislature and not through the judiciary. As O'Connell points out, 'fundamental rights have historically been governed by political, not legal processes' (O'Connell 2008, 159). The British experience of rights protection prior to the HRA was very much based on a Diceyan notion of negative liberty where citizens' fundamental rights and liberties were protected, defined and decided on through the legislative process, not by handing power over this area to the judiciary and unelected judges. This blurring of the political and legal is of paramount importance to political constitutionalists who warn that the problem with constitutionally entrenched charters of rights is that they facilitate the judicialisation of the body politic and the legalisation of political discourse. In other words, as

Griffith (1979, 12) argued, 'what are truly questions of politics and economics are presented as questions of law'. One scholar (Gardbaum 2001 and 2010) argues that the UK example of the HRA 1998 and the New Zealand example of the New Zealand Bill of Rights Act (NZBORA) 1990 have both attempted to preserve parliamentary sovereignty by trying to strike the appropriate institutional balance between the legislature and the judiciary. Both Stephen Gardbaum (2001 and 2010) and Hiebert (2004 and 2006) argue that the UK and New Zealand examples of rights protection represent a halfway house between an American model of rights protection, with strong judicial review over legislative actions, and the constitutionalism exemplified by the tradition of the Westminster Model where rights and liberties are guaranteed through a pragmatic compromise between the legislature and the courts. One of the main reasons why scholars view the UK model of rights protection as a 'halfway' house is because of section 4 of the HRA which allows the judiciary to determine whether a provision of primary legislation is compatible with the rights enshrined in the European Convention on Human Rights (ECHR). Where a conflict is deemed to arise, a judge is at liberty to issue a declaration of incompatibility that invites parliament to respond and have the final say on how to deal with the legislative provision in question. Gardbaum (2001) refers to this model as 'commonwealth constitutionalism' and argues that this 'third model of constitutionalism ... stands between the two polar models of constitutional and legislative supremacy' (Gardbaum 2001, 876). Under this model, as Gardbaum argues, parliament, not the courts, has the final word. As Gardbaum observes, 'most noticeably, while granting courts the power to protect rights, they decouple judicial review from judicial supremacy by empowering legislatures to have the final word' (Gardbaum 2001, 709). Hiebert argues that the parliamentary rights model is fundamentally different from an American-style system of judicial review because of the 'political rights review' and institutional dialogue it creates (Hiebert 2004, 82). These questions will continue to dominate UK constitutional thinking in the future and will be a very real source of dialectical tension played out in the competing debates in theory and in practice between political and legal constitutionalists. Having sketched out briefly what is meant by the term 'court sceptic' and how it connects to contemporary debates in British constitutionalism, this article now turns to consider how human rights have moved from the margins to the mainstream of political life in Northern Ireland.

From the Margins to the Mainstream

The Belfast Agreement/Good Friday Agreement of 1998 marked a watershed for the emergence of human rights in Northern Ireland. Indeed, one of the distinctive features of the Belfast Agreement compared with previous attempts at finding a solution to the conflict in Northern Ireland lies in the fact that human rights were afforded such a central status in the final text of the Agreement. As the late Queen's University Belfast human rights academic Stephen Livingstone commented,

while many have commented on the fact that, unlike the Sunningdale Agreement of 1973, the Belfast Agreement of 1998 included all the parties to the conflict and made more extensive provisions on North–South and East–West relationships, few have observed that it also contains a much more extensive set of provisions on rights (Livingstone 2001, 279).

For Brendan O'Leary, the explicitly liberal consociationalist nature of the political settlement reached in the Belfast Agreement required a strong Bill of Rights to reinforce the consociational settlement:

what system of human rights provision does this liberal consociation require? The answer most obviously, is: a Bill of Rights and a legal system that is consistent with it. That in turn implies that each of the four elements of the consociational system must be appropriately protected where necessary (O'Leary 2001, 354).

The Belfast Agreement, given statutory form by the Northern Ireland Act 1998, created an entirely new framework for human rights protection in Northern Ireland that included a new Human Rights Commission, an Equality Commission and, under the St Andrews Agreement of 2006, a Forum to consider a Bill of Rights for Northern Ireland. However, it is the debate about the nature, scope and detail of any future Bill of Rights that has dominated post-Agreement human rights discourse in Northern Ireland following the recommendation contained in the Belfast Agreement for the newly constituted Human Rights Commission 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 (Belfast (Good Friday) Agreement 1998, s. 4).

There has been a long history of debate and consideration of the issue in the context of Northern Ireland politics, which predates the Belfast Agreement (Harvey and Schwartz 2009). In the turbulent world of Northern Ireland politics in the 1960s the Liberal MP Sheelagh Murnaghan attempted to introduce a human rights bill four times in the Northern Ireland Parliament between 1964 and 1968² but on each occasion was frustrated by the Unionist government. The Ulster Unionist party in its 1973 election manifesto³ supported the introduction of a Northern Ireland Bill of Rights and in 1977 a report by the Standing Advisory Commission on Human Rights (SACHR) advised that human rights in Northern Ireland would be best protected through the incorporation of the ECHR 'as the basis for any Bill of Rights whether for Northern Ireland or for the United Kingdom'.⁴ The NIHRC, under its first chair, Professor Brice Dickson, began the process of drafting a Bill of Rights for Northern Ireland in 2000 with the establishment of nine working groups to assist the Commission in its work of identifying which rights would be suggested for inclusion in any future bill. In September 2001, the Commission officially launched a public consultation document⁵ and in April 2004 issued a further document for public consultation with the intention of consolidating the work that had been carried out to date. The lack of progress on a Bill of Rights was a constant source of frustration to the many human rights NGOs in Northern Ireland such as the CAJ and Irish nationalist and republican parties such as the SDLP and Sinn Fein. However, this must be viewed against the backdrop of the uncertain political context in which the NIHRC operated. Devolution in Northern Ireland was suspended in 2002 and was not restored until May 2007. That period was characterised by an intensive focus on political negotiations aimed at restoring the power-sharing executive and by intra-unionist and nationalist political wrangling. At times a Bill of Rights for Northern Ireland did not appear to be high on the political agenda of any political party. Furthermore, as the chief commissioner of the NIHRC during this period, Brice Dickson observed, the work of the NIHRC, particularly on a Bill of Rights and the question of increased powers for its work, was caught up in the zero-sum politics of the peace process and was being used as a bargaining chip by the two governments with Sinn Fein over the matter of IRA decommissioning and in securing further progress in the political process in Northern Ireland. As he put it in an interview in December 2004,

They have allowed, it seems to us, the powers of the commission to be used as one of the bargaining chips in the talks between the political parties. I wouldn't be surprised if the two prime ministers don't make some

reference to the powers of the Human Rights Commission which they see as something they can give to Sinn Fein in return for concessions from the republican movement. The reality is that human rights should be above politics, and the Human Rights Commission needs effective powers whatever the political environment in which it is working (Dickson 2004).

As a result of the lack of progress on the issue, the St Andrews Agreement (2006) contained a commitment to establish a forum to consider a Bill of Rights for Northern Ireland consisting of representatives from political parties and civil society. The forum met for the first time in December 2006 and in its final report of March 2008 made 41 substantive proposals and 216 secondary recommendations. On the basis of the forum's report and its own deliberations, the NIHRC, in fulfilling its statutory duty contained in section 69 of the Northern Ireland Act 1998 to advise the secretary of state on a Northern Ireland Bill of Rights, issued its advice to the secretary of state for Northern Ireland on the nature, size and scope of a Northern Ireland Bill of Rights in December 2008. The NIHRC advice to the UK government proposed the inclusion of 27 substantive rights in a Northern Ireland Bill of Rights, and the incorporation of 12 (from this total of 27) substantive rights with 42 provisions that are supplementary to both the ECHR and the HRA.

The main unionist parties in Northern Ireland, the Democratic Unionist party (DUP) and the Ulster Unionist party (UUP), withheld their support for both the NIHRC advice and the Bill of Rights Forum report while two NIHRC commissioners identified with the unionist tradition—Daphne Trimble (wife of former first minister and UUP leader David Trimble) and Jonathan Bell (DUP councillor, now a member of the Northern Ireland Assembly)—dissented from the NIHRC's advice. In November 2009, in a move that some unionist politicians claim vindicated their position on the NIHRC proposals for a Bill of Rights, the Northern Ireland Office (NIO) issued a formal response to the NIHRC's advice.⁶ To the consternation of a number of human rights organisations, the NIHRC and both the SDLP and Sinn Fein, the government explicitly recommended only two provisions proposed by the NIHRC advice for inclusion in a future Bill of Rights: the 'right to vote/be elected' and the 'right to identify oneself and be accepted as British or Irish or both'. In short, the government rejected over half the proposals contained in the advice received from the Human Rights Commission. In response to the public consultation on the NIO's position, a number of civil society organisations, nationalist political parties and the NIHRC have all heavily criticised the British government for issuing such a weak document (e.g. CAJ 2010; NIHRC 2010). Furthermore, supporters

of an expansive Bill of Rights for Northern Ireland are now faced with the fact that the largest party in the UK's coalition government, the Conservative party, has already indicated, while in opposition, that it did not support the NIHRC's recommendations and would be dealing with Northern Ireland-specific issues as a subset of its proposal for a British Bill of Rights which David Cameron intended to enact to replace the HRA. As the then shadow secretary of state for justice, Dominic Grieve MP, argued in a speech in Belfast,

The NIHRC report, as has been widely acknowledged, went a long way outside the remit that had been laid down for it. Although I recognise its good intent, it [the NIHRC] produced a blueprint for Northern Ireland which if implemented would represent a fundamental constitutional change (Grieve 2010).

Having outlined the context, both empirically and theoretically, this article will now turn to explore how unionists came to rely increasingly on 'court sceptic' arguments as part of their narrative on a Bill of Rights.

Unionists as 'Court Sceptics'

It is important to understand that at the very beginning of the NIHRC consultation process on a Bill of Rights for Northern Ireland, the 'court sceptic' narrative was not as prevalent within unionist discourses as it was later to become. Rather, unionist opposition to and criticisms of the Bill of Rights process tended to be framed in terms more familiar to political life in Northern Ireland. The perception held by unionist politicians was that human rights discourse in Northern Ireland was inimical to unionist narrative self-understandings in the sense that the draft proposals had the potential to undermine the constitutional relationship between Northern Ireland and the rest of the United Kingdom. Furthermore, unionists argued that human rights discourse in Northern Ireland disproportionately focused on the human rights abuses conducted by the state rather than by non-state actors such as the various paramilitary, terrorist organisations in Northern Ireland. Significantly, their narrative was framed as a response to, as they perceived it, the unrepresentativeness of the first NIHRC under the chairmanship of the distinguished human rights scholar Brice Dickson. The Northern Ireland Act 1998 did not specify how many part-time commissioners were to be appointed, unlike the Equality Commission created by the Act, which recommended that the Equality Commission should have between 14 and 20 members. Initially, in addition to the chief commissioner, there were nine part-time commissioners appointed by the

then secretary of state for Northern Ireland, Mo Mowlam MP, to the NIHRC. In terms of gender and religious breakdown the first Commission comprised five women and five men and six of the first commissioners were from a perceived Protestant background and four from a perceived Catholic background. However, unionism's problem was not with the religious composition of the NIHRC but with the fact that, as unionist leaders perceived it, the commissioners were insufficiently identifiable with the unionist community. In other words, while they would be nominally Protestant for the purposes of an equality monitoring forum it did not necessarily follow that they were representative of the unionist community at large. According to a former adviser to UUP leader David Trimble, the UUP 'took umbrage because while it was technically representative in terms of religion it was as far as we were concerned, in no way representative politically' (interview with Dr Steven King as recorded in Livingstone and Murray 2005, 40). Or similarly as a DUP policy document put it,

We are concerned about the make-up of the Commission and the activity of the Commission since its inception. We believe it has shown scant regard for the unionist community in general and the majority anti-Agreement opinion of that community in particular (DUP 2003).

By 2001, however, it appeared that the government was beginning to take steps to address unionist concerns about the NIHRC's composition through the appointment in November 2001 of Dr Chris McGimpsey. At the time McGimpsey was a UUP councillor in West Belfast and a high-profile liberal unionist who was a strong supporter of the Belfast Agreement. McGimpsey was the first obvious party political appointee to the Commission and whereas his appointment was welcomed by the UUP, unionists who opposed the Belfast Agreement treated it with more caution.

Members of the Northern Ireland Assembly (MLAs) first had the opportunity to deliberate upon the proposals from the NIHRC's first public consultation exercise in September 2001 during a debate on a motion brought before the Assembly by two unionist members of the Assembly. The motion stated that the NIHRC, 'in the context of the development of a Bill of Rights ... has failed to discharge its remit, as given to it by the Belfast Agreement (1998), in its various contributions on the debate on developing human rights in Northern Ireland'.⁷ Such was the strength of feeling against the motion brought by the unionist politicians that a petition of concern was presented by 30 MLAs from the main nationalist parties, the Social Democratic and Labour party (SDLP) and Sinn Fein,

and from cross-community parties, the Alliance Party (APNI) and the Northern Ireland Women's Coalition (NIWC). During the debate nationalist and republican politicians supported the efforts of the NIHRC, arguing that in certain places they were not going far enough in terms of the constitutional protection of certain rights. They also criticised unionist politicians for bringing the motion and lamented their failure, as they saw it, to implement faithfully the vision for human rights contained in the Agreement. As one Sinn Fein representative stated,

Rights and equality are alien words to the Unionist mind-set, but the agreement and the Act put human rights at the centre of political, social and economic change on this island ... Unionism has never recognised, let alone reflected on, the particular circumstances of the North and the construction of a state whose very existence depended on division, inequality and the abuse of human rights.⁸

Unionist contributions to that first debate in the Northern Ireland Assembly focused heavily on the unrepresentativeness, as they perceived it, of the NIHRC and its bias against the unionist community rather than relying on a 'court sceptic' narrative. As one DUP representative argued,

The role played by the Northern Ireland Human Rights Commission has diminished the human rights issue in Northern Ireland. It has led many people to reflect that those who speak for human rights issues are speaking on behalf of criminals, terrorists, and people who do not wish goodwill to others in our country ... The Human Rights Commission did not have representatives from the Unionist community, nor did it have people who had previously been members of either of the main Unionist parties.⁹

Significantly, during the debate only one unionist representative relied on a 'court sceptic' argument:

Every Member should pause before endorsing the commission's maximalist interpretation of human rights. A maximalist human rights culture is in danger of eclipsing this institution. Under direct rule, limited democratic accountability lasted for too long. The intervention of a massive bill of rights into all areas of policy-making would imply that judges would have decision-making powers that would otherwise rightly rest with this democratically accountable body.¹⁰

The DUP (2003) responded formally to the NIHRC's 2001 public consultation but the UUP issued no such formal response. While the

DUP's overarching narrative against the proposals was dominated by a wider critique of the GFA, concern about the NIHRC's unrepresentativeness and how it had exceeded the remit given to it in the Agreement to consult on a Bill of Rights, there is evidence in the document to suggest that the 'court sceptic' narrative was creeping into unionist discourses. For example, as argued in the DUP's 2003 document,

The more detailed and extensive a bill of rights, the less scope exists for democracy to function. People elect politicians not judges or Human Rights Commissioners. This reality must not be ignored or forgotten. We therefore support a more limited bill of rights where the democratic process can flourish free from arbitrarily defined boundaries ... For the most part where the Human Rights Commission seeks to extend these rights it trespasses on essentially political questions. We believe such matters are best left to a democratic, accountable and fair Assembly in Northern Ireland (DUP 2003, 4).

We would caution that the judiciary should not be permitted to assume the role of the legislative branch of government (DUP 2003, 60).

Despite the robust opposition expressed in public about the NIHRC's proposals, unionists were, nevertheless, eager to demonstrate that they were not against the idea of a Bill of Rights for Northern Ireland. Indeed, writing in the *Belfast Telegraph* just after the NIHRC had launched its public consultation, the then UUP MP Jeffrey Donaldson argued that the NIHRC's proposals disappointed and concerned him because of his 'commitment to the importance of a Bill of Rights for Northern Ireland'. Furthermore he stressed that 'my party and I have long advocated such a Bill for all the people of Northern Ireland. As a parliamentarian, I recognise the fundamental significance of a Bill of Rights for any truly democratic society' (*Belfast Telegraph*, 1 October 2001). Specifically, the unionist MP critiqued aspects of the NIHRC's proposals by relying on a 'court sceptic' argument, arguing that the Commission's proposal in the Bill of Rights that all elections in Northern Ireland should be held under a system of proportional representation 'should be decided in democratically elected forums after consultation and debate, not by the courts'. Despite not making a formal response to the NIHRC's 2001 public consultation, three UUP politicians responded individually to the consultation. One of those respondents, Dr Esmond Birnie, raised 'court sceptic' concerns about many of the socioeconomic rights proposed in the NIHRC's document:

Whilst having no doubt that many of the aspirations listed are very worthy they will involve the outlay of resources by government and are they necessarily justiciable? Whilst it might be claimed that judges in practice would exercise their capability to scrutinise socio-economic rights with modesty, should we have to rely on such reserve? The institutions of democratically accountable regional government at Stormont are still fragile and it may be dangerous to be seen to be putting legislators into a straightjacket of enshrined socio-economic rights (Submission 268 NIHRC, 2003, Dr Esmond Birnie MLA, Response to making a Bill of Rights for Northern Ireland, 30 November 2001).

Between September 2001 and March 2010 the specific issue of a Bill of Rights for Northern Ireland was debated on five separate occasions.¹¹ Four of those debates took place after May 2007 when devolved, power-sharing government returned to Northern Ireland. The return of devolution also coincided with the work of the Northern Ireland Bill of Rights Forum which, as we have noted, met for the first time in December 2006 but began its serious work under the chairmanship of international human rights lawyer Chris Sidoti in April 2007. However, since that first debate in the Assembly, ‘court sceptic’ arguments have become increasingly prominent within unionist discourses about a Northern Ireland Bill of Rights compared to earlier parts of the Bill of Rights process. For example, during a debate in April 2008 in the Assembly on the recently published proposals from the NIBoRF, one unionist representative explained that he was:

Surprised that the group adopted such a maximalist approach. When I, as a member of the politicians' grouping within the forum, expressed my concern that attempts were being made to take decision-making away from the political process and to create a legal or courtroom-based decision-making process, I was ignored.¹²

Similarly DUP MLA Nelson McCausland argued that:

Power, particularly over social and economic matters, must not be transferred from democratically elected representatives to the courts. The role of the courts is to interpret and apply law but not to make it ... The maximalist approach that was taken would, if implemented, disempower the democratic process. I fear that decisions would be made in the courts rather than in the Assembly and Parliament.¹³

One explanation that deepens our understanding of why ‘court sceptic’ arguments became more prevalent within unionist discourses surrounds the creation of the Bill of Rights Forum. Its deliberative structure of plenary meetings and working groups meant unionist representatives were sitting across the table from political and community representatives who disagreed with their position on a Bill of Rights. This required unionist politicians to reach much deeper into their intellectual reserves on the issue than before in order to justify, defend and explain their position. Furthermore, the quality and experience of both the DUP and UUP representatives in terms of the legal, constitutional and often philosophical issues raised by discussions about rights was of a sufficiently high standard to engage with the issue. Both delegations consisted of lawyers, academics and those with public policy experience. It would appear that unionists came to view ‘court sceptic’ arguments as a narrative within which they could frame their criticism of the proposals that emerged from the NIBoRF and subsequently the NIHRC in 2008.

As noted previously, the paragraph contained in the Belfast/Good Friday Agreement that mandates the NIHRC to consult on the nature, size and scope of a Northern Ireland Bill of Rights refers to the fact that a Bill of Rights should reflect the ‘particular circumstances’ of Northern Ireland and that, specifically, these additional rights should ‘reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem’. This debate about the particular circumstances has been absolutely foundational to the entire debate about the Bill of Rights. The question of whether the Agreement empowered the NIHRC to adopt a limited or expansive interpretation of its responsibilities is a highly contested issue among the political parties in Northern Ireland. As the chair of the Bill of Rights Forum, Chris Sidoti put it in the final report of the Bill of Rights Forum,

No issue divided Forum members more than the understanding of what constituted ‘the particular circumstances of Northern Ireland’. This challenging issue was discussed explicitly on many occasions and ultimately arose in discussion of almost every proposed recommendation (Bill of Rights Forum 2008, 12).

Differences and disagreement about the answer to that question have broadly reflected conventional political dividing lines with the two main unionist political parties in Northern Ireland, the DUP and UUP, on one side advocating a limited interpretation where a Northern Ireland Bill of Rights deals with issues around parading, language and some cultural

identification issues, and the nationalist and republican political parties, the SDLP and Sinn Fein, on the other side supporting an expansive interpretation of the Commission's mandate where a wider range of socioeconomic, civil and political rights are considered and supported for inclusion. Additional rights proposed by the NIHRC included a general right to work; a right to accommodation; five new provisions to ensure the rights of persons arrested or detained for questioning; a right for everyone to have access, on general terms of equality, to public service; a right that membership of public bodies must, as far as practicable, be representative of society in Northern Ireland; a right to appropriate healthcare and social care services free at the point of use and within a reasonable time; a right for everyone to an adequate standard of living sufficient for that person and their dependants; a right not to be allowed to fall into destitution; a right to adequate accommodation appropriate to needs; a right to work; a right to have the environment protected; and a right to social security (NIHRC 2008). It needs to be emphasised that the NIHRC did not pluck its proposals from nowhere but, instead, engaged in a detailed exercise to identify a methodology that could be used to take a position on what constituted the particular circumstances of Northern Ireland. The Commission's methodology applied a comprehensive and detailed seven-step process that was applied to the consideration of each of the individual substantive rights and then the secondary provisions (See NIHRC 2008, appendix 1). As the NIHRC would argue, it is being both faithful to the 1998 Agreement in its interpretation of the phrase the 'particular circumstances' and consistent with international human rights norms in proposing for inclusion in a Northern Ireland Bill of Rights the rights it has.

In many ways it could be argued that the greater prominence of 'court sceptic' arguments within unionist discourses on a Northern Ireland Bill of Rights came as a response to the fact that both the NIHRC and the Bill of Rights Forum adopted, as unionists argued, an expansive and elastic interpretation of what the phrase 'particular circumstances' meant. In other words it could be viewed as an instrumental response to the concern that if acted upon and translated into law as they currently stood the NIHRC proposals would see power over these matters transferred from the legislature to the judiciary. As one DUP representative put it,

It should be in the domain of the Assembly, not the courts, to direct where our limited resources go. At times, I might have an argument with the Health Minister about his use of resources, but neither he nor any other Member would disagree that we all want the highest attainable standard of

health for the citizens of Northern Ireland. However, I believe passionately that the decisions on where limited resources should go should lie with the Assembly and with other elected institutions; it should not be in the domain of unelected judges to make up laws and spend resources from the bench. I would oppose that very strongly.¹⁴

Similarly, as another unionist representative argued,

The agreement mandated the commission to engage in a modest task, not one of industrial proportions. The commission was merely invited to consult and advise on the scope for supplementary rights, nothing more. It was not mandated to devise a new bill of rights or to change our socio-economic context through the creation of numerous new rights; it was merely mandated to examine the scope for rights supplementary to the European Convention on Human Rights. Quite how we got from that very modest, realistic task to a 189-page document from the Northern Ireland Human Rights Commission that proposes to hand over significant sections of public policy to the courts—taking them from democratically elected representatives—is something of a mystery.¹⁵

Unionists' reliance on a 'court sceptic' narrative to articulate their opposition to the NIHRC proposals for a Bill of Rights increased significantly after publication of the NIHRC's advice on a Bill of Rights to the UK government in December 2008. The prominence that 'court sceptic' arguments came to assume within unionist discourses can be demonstrated in three ways. First, for Daphne Trimble, one of the unionist members of the NIHRC who dissented from the NIHRC's advice on a Bill of Rights, concern about the expansion of judicial power that might result from the proposals regarding the rules on *locus standi*, which govern an individual or group's ability to bring a case to the courts under the legislation, was the issue that caused her to issue a note of dissent in opposition to the NIHRC's report. As Trimble argued,

That just widens the whole thing up so much so that any and every NGO will be able to go to a judge and say my little interest group who doesn't think their housing is adequate will be able to go to the court and seek a remedy. It will take so much power away from the political process and put it into the hands of our judiciary. For me, once I realised that was going to happen I felt that was the point at which I could no longer even look at what was being proposed in terms of individual rights and saying yes I could live with that one or no I can't live with that one. That was the point where I came to the view that I had to say no to everything.¹⁶

Second, an Assembly debate in March 2010 on a Sinn Fein motion criticising the British government for its response to the NIHRC's proposals shows that seven out of the eight unionist MLAs from the DUP and UUP who made contributions to the debate did so by relying partly on a 'court sceptic' argument to express concern. For example, as Jonathan Bell, a former member of the NIHRC and unionist politician argued, 'we cannot have a situation where democracy is diluted and where the voting system is made subservient to some form of unelected court'.¹⁷ Third, in their responses to the government's 2010 consultation, both the DUP and UUP expressed their concern that the NIHRC's advice to the government could result in an enhanced role for the judiciary at the expense of the legislature in Northern Ireland:

The effect of these proposals would be to ring-fence certain rights and government activities, thus placing crucial democratic decisions in the hands of non-elected lawyers rather than the wishes of the people. The Northern Ireland Executive would not be free to respond to the genuine needs of Northern Ireland when their hands and much of their budget would be tied by judicial decisions (DUP 2010).

The UUP is firmly of the view that such provisions would undermine the authority of democratically elected legislatures in the Assembly and in Parliament. They would also inevitably lead to increasing judicial activism, to an extent incompatible with the UK's constitution's understanding of the role of the courts (UUP 2010).

Conclusion

This article has sought to explore how post-Agreement unionist discourses about a Bill of Rights came to rely increasingly on what has been described as a 'court sceptic' narrative. It has sought to do this by considering the significant body of scholarship that exists on this topic which has examined both the normative and descriptive basis for what a 'court sceptic' narrative might look like. It has argued that a 'court sceptic' narrative understands that in a democratic polity citizens will have genuine disagreements about what rights are constitutive of the common good but that this narrative identifies the legislature and not the courts as the most appropriate place for the resolution of disagreement about rights, and has located the 'court sceptic' narrative within a wider discourse of political constitutionalism. Furthermore, it has considered the evidence that exists from a range of sources such as debates in the Northern Ireland Assembly and consultation responses, which show that over the past 10

years a ‘court sceptic’ narrative has become increasingly prominent within unionist discourses about a Bill of Rights. It would be easy to dismiss how unionists have relied on a ‘court sceptic’ narrative as nothing more than an instrumental response to, as they saw it, the NIHRC's insistence on going beyond the remit of the Belfast Agreement in proposing an expansive Bill of Rights for Northern Ireland—as a short-term tactic with no more significance than that. Furthermore, one could dismiss unionist recalcitrance when it comes to human rights in Northern Ireland as indicative of a wider ideological malaise within unionist political thought and yet further evidence to support the claim often made by unionism's political opponents that it is a profoundly backward-looking, regressive and incoherent tradition of political thought. Others may choose to compare unionist reluctance to embrace proposals for a Northern Ireland Bill of Rights to the myopic attitudes held by many unionist politicians during the years of single unionist party rule at Stormont from 1921 until 1972.

However, to dismiss the unionist narrative in such a way would be like throwing the baby out with the bathwater. Indeed, far from unionist discourses about a Northern Ireland Bill of Rights representing another example of ‘unionist exceptionalism’, it could be argued that there is something deeper going on within unionism that might be missed without closer reflection and analysis. Relying on ‘court sceptic’ arguments has created an opportunity for unionism to become part of a much larger, broader narrative of commonwealth constitutionalism than the marginal, recalcitrant and sectarian rump that it is often perceived to be, and places them within a much wider debate and narrative about the future of the protection of human rights in the UK and the protection of rights in common law countries more generally. As one public law scholar argues, ‘there is no neutral language of public law. We can understand what a writer is saying only if we understand the political tradition within which the writer works’ (Loughlin 1992, 230). In other words a deeper understanding of why unionists relied heavily upon ‘court sceptic’ theory can only be acquired by considering the tradition of reflection about the British constitution in which unionism is grounded. Unionism, because it is shaped by the British constitutional tradition in terms of its constitutional analysis, will arguably feel more comfortable within a discourse of political constitutionalism, where ‘court sceptic’ arguments find their theoretical origins. This discourse recognises and prioritises the sovereignty of parliament, is sceptical of judicial processes for resolving matters of public policy and considers that it is parliament's job to protect rights and liberties, not that of the courts. Indeed, so interwoven are

unionists with this British constitutional tradition that when support has been expressed for human rights by influential strands of unionist opinion it is often done so with an appeal to UK constitutional history. For example, as argued by one unionist politician,

The Democratic Unionist Party will bow to nobody in its defence of human rights. We stand in the British tradition of the Magna Carta and in the British tradition of William of Orange and the Bill of Rights. We also stand in the British tradition of the mother of Parliaments, which has enshrined democratic rights and freedoms here.¹⁸

In this sense unionism is very much rooted in the British parliamentary experience (Aughey 1989). Therefore, as Catherine Turner argues, ‘democratic responsibility features predominantly in Unionist political thinking reflecting the primacy afforded to the position of Parliament as sovereign law making authority’ (Turner 2010, 454). To a certain extent, therefore, this narrative was there for unionists to discover, rather than invent, because of how interwoven a ‘court sceptic’ narrative is with the very essence of the British constitutional tradition of respect for the sovereignty of parliament, of which unionism views itself as being a central part. However, and this is important,¹⁹ because of the constitutional reforms introduced by the Labour government in the period between 1997 and 2005, UK constitutional discourse and practice have shifted away from the old constitution with its political orientations towards a new constitution, and it may become increasingly difficult for unionists to maintain this position in the uncertain and shifting constitutional culture in the UK. As one scholar has identified, this shift towards legal constitutionalism in the UK will be a ‘major axis of constitutional tension, change and development over the next ten years’ (O’Cinneide 2008, 161). In maintaining this position on a Bill of Rights for Northern Ireland unionists will have to acknowledge this significant dialectic in UK constitutional discourse. Nevertheless, while there is a sense that over the course of recent history unionism's political representatives have been guilty of scoring intellectual own goals and of finding themselves in a condition of ideological stasis, what influential strands of unionist opinion think about human rights as that term has been interpreted in Northern Ireland is considerably more nuanced and complicated than the narrative often presented in academic literature and in popular political discourse in Northern Ireland.

Notes

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2. For further information see Rynder (2006).
3. UUP election manifesto for elections to a new Northern Ireland Assembly, 'Peace, Order and Good Government', 1973.
4. Paragraph 4.08, Standing Advisory Commission on Human Rights 1977, the Protection of Human Rights by Law in Northern Ireland (London: HMSO, 1977), Cmnd. 7009.
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6. 'A Bill of Rights for Northern Ireland: Next Steps', Northern Ireland Office (2009).
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14. Simon Hamilton, Proceedings of the Northern Ireland Assembly, 3 November, 45:2, 86.
15. Danny Kennedy, Proceedings of the Northern Ireland Assembly, 3 November 2009, 45:2, 79–80.
16. Interview with Daphne Trimble, 27 May 2009.
17. Jonathan Bell, Proceedings of the Northern Ireland Assembly, 1 March 2010, p. 19.
18. Jonathan Bell, Proceedings of the Northern Ireland Assembly, 1 March 2010, p. 19.
19. I would like to acknowledge one of the anonymous reviewers for suggesting this point and whose comments helped clarify my thinking on this.

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