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# The European Convention and Human Rights in Northern Ireland

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*In this article, the authors explore the implications of a Bill of Rights upon the civil turmoil in Northern Ireland today, with particular attention to the institutions necessary for the successful implementation of civil libertarian ideals. Specifically, the authors examine the critical problem of maintaining public order in a society divided by the subversive activities of extremists, while at the same time working toward an eclipse of the social and economic inequalities from which violence has issued. It is the contention of the authors that the adoption of the European Convention on Human Rights as a bill of rights for the province would not suffice to ensure sustained progress toward achieving civil liberty, political cooperation, and ultimately social and economic equality.*

MORE THAN EIGHT years have elapsed since the Northern Ireland Civil Rights Association (NICRA) began its campaign to secure civil rights for the Catholic minority in that province.[1] Part of that campaign was the enactment of a Bill of Rights for Northern Ireland, one which would have restricted the executive and legislative powers of the Northern Ireland (Stormont) Parliament.[2] As events escalated, the United Kingdom Parliament abolished the Northern Ireland (Stormont) Parliament and established direct rule[3] as the first phase of securing a constitutional settlement acceptable to the minority community. The campaign for a Bill of Rights has continued, and it

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[1] For a brief account of the origin of the civil rights campaign, see SUNDAY TIMES INSIGHT TEAM, ULSTER 27-112 (1972) [hereinafter cited as ULSTER]; K. BOYLE, T. HADDEN, & P. HILLYARD, LAW AND STATE: THE CASE OF NORTHERN IRELAND 6-36 (1975) [hereinafter cited as P. HILLYARD].

[2] Several attempts were made to introduce a Bill of Rights into both the House of Lords and the House of Commons at Westminister between 1969 and 1975. For a commentary on these abortive efforts, see NORTHERN IRELAND CIVIL RIGHTS ASSOCIATION, BILL OF RIGHTS 1-4 (1975).

[3] Northern Ireland (Temporary Provisions) Act, 1972, c. 22. For a survey of the early effects of direct rule, see Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution,* 1 ANGLO-AMERICAN L. REV. 368, 445 (1972).

has generally been accepted by all political parties in the province[4] and by the United Kingdom Government[5] that the constitutional settlement must include a Bill of Rights.[6] However, the form and substance of a Northern Ireland Bill of Rights is unclear. The standing Advisory Commission on Human Rights in Northern Ireland has been examining this issue for more than two years,[7] and there is an emerging consensus that the European Convention for the Protection of Human Rights and Fundamental Freedoms[8] provides the best prototype. In this article we shall examine the key problems in the fields of public order, subversion, and emergency powers with a view to demonstrating why the apparent consensus over the European Convention ignores some fundamental questions which have not been resolved satisfactorily. It is our view that the European Convention does not, of itself, provide any solution to the unique problems of Northern Ireland and, consequently, makes no substantial contribution to the establishment of harmony and stability in Northern Ireland.

## I. THE CAMPAIGN FOR A BILL OF RIGHTS

### A. *From 1968 to 1973*

Prior to the 1960's the Catholic community abstained from participation in the political and constitutional affairs of Northern Ireland[9] because, in part, many desired and believed that the union between Northern Ireland and Great Britain might be dissolved either by the United Kingdom Parliament or by a civil war in Ireland.[10]

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[4] NORTHERN IRELAND CONSTITUTIONAL CONVENTION REPORT ¶¶ 124-41 (1975).

[5] Statement by Mr. M. Rees, M.P., Secretary of State for Northern Ireland, in 894 PARL. DEB., H.C. (5th Ser.) 887-88 (1975).

[6] COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, REPORT, CMND. No. 5847, at 8 (1975).

[7] The Standing Advisory Commission was established by the Northern Ireland Constitution Act, 1973, c. 36, § 20. *See* STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT FOR 1974-75, H.C. 632 (1975); STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, A BILL OF RIGHTS: A DISCUSSION PAPER (Mar. 5, 1976).

[8] CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, CMND. NO. 2894 (1950). On the apparent acceptance of the European Convention as a model for Britain, see P. WALLINGTON & J. MCBRIDE, CIVIL LIBERTIES AND A BILL OF RIGHTS 7-41 (1976).

[9] For a note on the significance of abstentionism, see J. BELL, THE SECRET ARMY: A HISTORY OF THE I.R.A. 417-36 (1970).

[10] For a note on the temporary nature of the 1920 Northern Ireland settlement, see H. CALVERT, CONSTITUTIONAL LAW IN NORTHERN IRELAND 34-49 (1968); and Palley, *supra* note 3, at 368-88.

There were periodic I.R.A. (Irish Republican Army) military campaigns against the Royal Ulster Constabulary along the border between the Republic and Northern Ireland.[11] At the same time, the policy of abstentionism was undoubtedly fostered by the politically weak position of the minority community who could not secure a majority of the seats in the Northern Ireland Parliament.[12] This numerical weakness was exacerbated by the concerted discriminatory measures of successive Unionist Governments, utilizing a range of legal measures to gerrymander the parliamentary and local government constituencies perpetuating the Unionist majority.[13] Furthermore, public employment and private employers—that is, owners of the major industries in the province—discriminated against Catholics. This resulted in continued Catholic emigration, which thereby ensured that Catholics remained numerically an electoral minority.[14]

In the early 1960's, changes in the politics and economy of the Republic and Northern Ireland created the social and economic context for the civil rights movement of the latter years of the decade.[15]

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[11] *See* J. BELL, *supra* note 9, in which a full account is given of the various I.R.A. guerrilla campaigns up to 1969. The I.R.A. campaign of 1956-62 was the last border war waged in the context of absentionism of the Nationalist minority and the absolutist rule by the Unionists.

[12] R. ROSE, GOVERNING WITHOUT CONSENSUS: AN IRISH PERSPECTIVE 93-101 (1971). *See* ULSTER, *supra* note 1, at 33-39.

[13] Indeed, the Commission of Inquiry chaired by Lord Cameron found that Unionists in 1969 "did not contest" the fact that electoral boundaries had been gerrymandered. *See* REPORT ON DISTURBANCES IN NORTHERN IRELAND, CMND. NO. 532, esp. at ¶¶ 134-42, 229 (1969) [hereinafter cited as CAMERON REPORT].

[14] D. BARRITT & C. CARTER, THE NORTHERN IRELAND PROBLEM: A STUDY IN GROUP RELATIONS (1962). The authors record that between 1951 and 1961, 51,000 Catholics emigrated — compared to 41,000 Protestants — notwithstanding the fact that Catholics constituted only one-third of the total population of Northern Ireland. *Id.* at 107-08. In R. ROSE, *supra* note 12, at 366, the author deduces that emigration is the most significant regulator of the proportion of Catholics to Protestants in Northern Ireland. *See also* M. FARRELL, NORTHERN IRELAND: THE ORANGE STATE (1976).

[15] For a full analysis of the political changes, demonstrating a shift from a pastoral economy supplemented by traditional industries such as ship-building, to a diversified capital-intensive economy emphasizing textiles and light engineering, see M. FARRELL, *supra* note 14. This era coincided with the acceptance of the idea of a planned economy, and several Stormont inquiries presaged a new concern with regional planning and industrial development. For a note on the 1963 Mathew Plan and the 1965 Wilson Plan, see Palley, *supra* note 3, at 433-34. *See also* NORTHERN IRELAND DEVELOPMENT PROGRAMME 1970-75, CMND. NO. 547 (1970); and REVIEW OF ECONOMIC AND SOCIAL CONDITIONS IN NORTHERN IRELAND, CMND. NO. 564 (1971).

The shipyards and linen firms, which were the traditional, Protestant owned industries, were declining while foreign investment was playing an increasing role in economic development in the North.[16] The multinational firms did not need to discriminate against the Catholics, and the basis of Unionism gradually was being undermined.[17] In the South, the indigenous developing industrialists had not secured a position in the British or European markets and foreign investment also provided the stimulus for the economic growth. In the North, the prospect that the Catholic middle class would develop protected industries in a United Eire was also disappearing, as was the basis of Nationalism. Finally, the border which hitherto had provided economic protection to the Northern and Republican industrialists now precluded fruitful investment and trade which was being attracted by the economic potential in the deprived and underdeveloped areas near the border.

Another major change was the establishment of the welfare state in Northern Ireland.[18] Prior to the second world war, high unemployment among Catholics ensured not only a high rate of emigration,[19] but also entrenched the marginal privileges of Protestant employees who, although they received average wages lower than their counterparts in Britain, nonetheless earned a stable income and were allocated public housing.[20] As the minority community received social welfare benefits, the necessity to emigrate was ameliorated, permitting more people to remain in the province and to seek periodic employment. More importantly, since the welfare benefits were in parity with those in Britain, the privileges of Protestant workers were considerably eroded. The Catholics received a level of benefits which provided subsistence without the necessity of employment, while the Protestant

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[16] *See* M. FARRELL, *supra* note 14, at 227-56.

[17] On the effect of foreign investment on entrenched patterns of employment discrimination, see E. MCCANN, WAR AND AN IRISH TOWN 211-12 (1974).

[18] Although the devolved Stormont Parliament possessed legislative competence in matters of social welfare, and the Unionist Party had allied with the British Conservative Party in Westminister to oppose various welfare enactments, the Northern Irish Unionist government eventually decided to enact its own parallel social welfare program. However, subsequent amending social welfare legislation at Westminister was not followed automatically by similar legislation at Stormont. M. FARRELL, *supra* note 14, at 214.

[19] *See* D. BARRITT & C. CARTER, *supra* note 14.

[20] For a detailed exposition of the privileged position of the Protestant working class in Northern Ireland and the relationship between Protestant employees and the Unionist Party, see G. BELL, THE PROTESTANTS OF ULSTER (1976).

employees worked at wages slightly above that level.[21] As the social and economic consequences of unemployment among Catholics decreased, Protestant resentment correspondingly increased.[22]

These fundamental changes transformed the Catholic community in Northern Ireland. First, the potential for securing positions as employees and managers in foreign firms in Northern Ireland raised the expectation that Catholics could and should receive their proportionate share of the wealth generated in the province. The traditional Catholic minority view that justice could only be secured by unifying the six counties of Northern Ireland with the Republic to the south became an aspiration instead of an immediate goal, the primary aim becoming social justice in the north.[23] Second, the relative security provided by the welfare state fostered a climate of expectation that the Northern Ireland Government should distribute that justice fairly. Consequently, Catholic attention was directed towards securing it from the Unionists who had enjoyed uninterrupted rule. The desire, however, to participate in Northern Irish politics was paradoxical. As a minority they had little hope that the Nationalist Party would secure a majority of the seats in the Northern Ireland Parliament and, hence, would initiate the necessary legislation to establish civil rights. Participation in the Stormont Parliament offered little hope of success, especially if the Unionist Government continued to perpetuate Protestant supremacy. At the same time, abstentionism offered no hope of calling parliamentary attention to their inferior position. In short, the

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[21] *See id.* at 17-33.

[22] In retrospect, this often inarticulate resentment explains the attraction of Protestant workers to the increasingly strident and sectarian utterances of the Reverend Ian Paisley. Paisley increased his influence and importance during an era in which workers in the traditional, prestigious, and relatively more lucrative skill categories became more insecure because the Protestant Unionist state was unable to maintain the margin of relative economic and social privilege. Thus, the thrust of Paisley's invocations for a return to established Protestant values and protection of Ulster Protestant culture and heritage held considerable significance for the threatened Protestant working class. *See* G. BELL, *supra* note 20, at 26-33. For a critical biography of Paisley see P. MARRINAN, PAISLEY: MAN OF WRATH (1973).

[23] The early civil rights campaigners went to considerable lengths to exclude discussion of the border and eschewed irredentist philosophy as irrelevant to the task of obtaining equality and social justice within Northern Ireland. This inevitably led to the collapse of the Nationalist opposition party. The tensions between the irredentists and the orthodox civil rights campaigners have been recorded graphically by a former civil rights leader in Londonderry. *See* E. MCCANN, *supra* note 17, at 27-74. *See also* ULSTER, *supra* note 1, at 45-58.

Nationalist Party had no prospect of initiating or pressuring the Unionist Government to effect necessary changes.[24]

The other alternative for initiating constitutional reform was nonviolent extra-parliamentary campaigning which, by drawing public attention to the issues, would have initiated the debate for reform and brought pressure to bear on the Unionist Governments. Such a campaign was at first organized by the Campaign for Social Justice (CSJ) in 1963.[25] The CSJ organized civil disobedience to test the will of the Unionists and to enlighten the public.[26] Later, when a campaign was organized throughout the province and led by prominent members of NICRA,[27] marches and public meetings were used to protest against the discriminatory policies of the Unionist Government. Some of the campaigners, perhaps superficially informed of the United States Supreme Court's activist role in stimulating desegregation in the United States, endeavored to initiate legislative reform through test cases in the courts. There was no prospect of success. First, there is no tradition in the United Kingdom of the involvement of the legal profession or judiciary in political issues.[28] Second, the judges in Northern Ireland were appointed by hostile Unionist Governments.[29] In fact, this strategy did fail.[30] Eventually the United Kingdom Government, faced

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[24] *See* E. MCCANN, *supra* note 17, and L. DE PAOR, DIVIDED ULSTER 148-49 (1970).

[25] P. HILLYARD, *supra* note 1, at 11; R. ROSE, *supra* note 12, at 100-06.

[26] *See* L. DE PAOR, *supra* note 24, at 166-68, and CAMERON REPORT, supra note 13, at ¶ 26.

[27] For a brief account of the Northern Ireland Civil Rights Association (NICRA) in organising and leading nonviolent protest, see R. ROSE, *supra* note 12, at 156-62. For a critical view of NICRA's role, see E. MCCANN, *supra* note 17, at 27-74.

[28] *See generally* S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW chs. 2 & 3 (2d ed. 1973).

[29] For an interesting survey of the political antecedents of the Northern Irish judiciary, see A. BOYD, HOLY WAR IN BELFAST 192 (1969). *See also* Miller, *The Orange Judiciary,* HIBERNIA REV., Jan. 16, 1976, at 6.

[30] The most significant test case was McEldowney v. Forde, [1969] 3 W.L.R. 179, in which the House of Lords, by a policy of judicial abnegation, refused to review the use of Reg. No. 42, STAT. R. & O. N.I. (1967), by Mr. William Craig, the Northern Irish Home Affairs Minister, to ban an opposition political party (Republican Clubs). The House of Lords was unwilling to challenge ministerial discretion in the absence of proof of *mala fides,* which had not been alleged. For a description of further abortive efforts to seek redress in the courts by civil rights campaigners, see Carroll, *The Search for Justice in Northern Ireland,* 6 N.Y.U. J. INT'L L. & POL. 28 (1973). *See also* P. HILLYARD, *supra* note 1, at 6-25, in which the authors show that the failure of judicial review closed another major avenue of protest, and that judicial

with escalating disorder which ensued from the confrontation between the civil rights marchers, on one hand, and the Unionist Government and Protestant extremists,[31] on the other, abandoned the convention of non-interference in Northern Irish affairs,[32] and pressure was brought to bear upon the Unionist Governments to initiate major constitutional reform.[33]

The civil rights campaign did more than enlighten the public in Britain about Unionist discrimination: it asserted minority rights of participation in the constitutional and political process. In the provincial politics, the monolithic Unionist Party was threatened in its monopolistic control of the legislative process by this assertion. Unionist toleration of the marches inevitably meant recognizing the legitimacy, if not the Catholic position on the issues. The solidarity between Protestant workers and the elite in the Unionist Party was sustained by the marginal privileges distributed to the former. Unless the Unionists could preserve these, that solidarity eventually would be undermined. The minority demands for democratic rights to initiate reform also posed a serious threat to the Unionist solidarity. Because preservation of Unionism meant denial of this extra-parliamentary political power, the Unionist Home Affairs Ministers endeavored to suppress the civil rights movement as contrary to public order.

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unresponsiveness may have hastened the advent of civil disobedience and street demonstrations.

[31] *See* ULSTER, *supra* note 1, at 78-79, and L. DE PAOR, *supra* note 24, at 160-63.

[32] A highly illuminating account of the United Kingdom Government's attitude, understanding, and approach to the emerging Northern Irish crisis is contained in J. CALLAGHAN, A HOUSE DIVIDED: THE DILEMMA OF NORTHERN IRELAND (1973). (As Home Secretary, Mr. Callaghan carried Cabinet responsibility for Northern Ireland up to June 1970). *See also* ULSTER, *supra* note 1. On constitutional change and the manner of British involvement, see Palley, *supra* note 3, at 406-18.

[33] The pressure by the United Kingdom Government culminated in a meeting between the Premier of Northern Ireland, J. Chichester-Clark, and the British Prime Minister, Harold Wilson. The result of this meeting was a joint declaration which, *inter alia,* affirmed equality of treatment for all in Northern Ireland. *See* NORTHERN IRELAND: TEXT OF A COMMUNIQUE AND DECLARATION ISSUED AFTER A MEETING HELD AT 10 DOWNING STREET ON AUGUST 19, 1969, CMND. NO. 4154 (1969). Unfortunately, this declaration was produced only after serious rioting and use of the army to restore order. It did not speak to the timing of the implementation of reforms. Had the declaration appeared one or two years before 1969 it might have had some utility in de-escalating the conflict. *See also* P. HILLYARD, *supra* note 1, at 15-19, and J. CALLAGHAN, *supra* note 32, at 62-63, 189-92.

The Northern Ireland Civil Rights Association included in its campaign for civil rights a demand for the establishment of a Bill of Rights in the province. In 1969 such a Bill was envisaged as serving both positive and negative functions.[34] By enacting into law the basic rights and freedoms of the individual, there would be a statutory declaration of civil rights from which the courts could not retreat. Moreover, the campaign, through judicial proceedings, could compel the courts to impugn the discriminatory and repressive laws of the Unionist Government. It was hoped that the Stormont Parliament would be forced to initiate the necessary liberal legislation. In its negative function it protected basic civil liberties from repressive measures and liberal legislation from repeal. The Bill of Rights, while it might have reformed the laws governing the drawing of constituency boundaries, never could have secured to the minority the control of the Stormont Parliament and, thus, could not have transferred democratic control over the government to the Catholic political parties. Nevertheless, it might have offered protection of the rights of the minority and granted power to initiate debate over issues concerning civil liberties and rights.

### B. *The 1973 Constitutional Settlement*

Since the Northern Ireland Parliament was prorogued by the United Kingdom Parliament in 1972, the policy of the British Government has been the establishment of a developed government which included a coalition of the minority parties in the executive.[35] The Social Democratic and Labour Party (SDLP), which principally draws its support from Catholic voters, rose to new importance in 1972, because of its role in forming the new government. This is not to suggest that civil rights lost its significance during this period. Rather, it is to draw attention to the first major Catholic political participation in the initiation of legislation. It had never been seriously suggested that there was any need to fetter the power of a government in view of the fact that

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[34] *See* NORTHERN IRELAND CIVIL RIGHTS ASSOCIATION, *supra* note 2, at 1-4; Northern Ireland Bill of Rights, 817 PARL. DEB., H.C. (5th ser.) 384 (1971); Northern Ireland Bill of Rights, 320 PARL. DEB., H.L. (5th ser.) 538 (1971); Second Reading Debate, 332 PARL. DEB., H.L. (5th ser.) 531 (1972). *See also* NORTHERN IRELAND CIVIL RIGHTS ASSOCIATION, THE FEATHER COMMISSION: OBSTRUCTION TO JUSTICE? (1976).

[35] NORTHERN IRELAND CONSTITUTIONAL PROPOSALS, CMND. NO. 5259, at ¶ 52 (1973).

the leading politicians in the SDLP were persons who organized and led civil rights marches and had suffered the abuses of the police.[36] But, by the time that the Unionist Government introduced internment in August 1971, the SDLP had walked out of the Northern Ireland Parliament and abstained from further participation.[37] The SDLP continued to demand an end to internment and the repressive measures by the British army, the former being a condition to their participation in discussions about the constitutional settlement.[38]

The abstention of the SDLP from participation in Northern Ireland Government ceased in 1973, although the United Kingdom Government continued to use internment as its principal weapon against the Provisional I.R.A.[39] The SDLP participated in the new Northern Ireland Assembly during its formative months and agreed to form a coalition executive with the moderates in the Unionist Party and the Alliance Party. In December 1973 they entered into discussion with the Irish and British Governments, together with the other Executive members to reach an accord over the Council of Ireland, the institution which hopefully would satisfy the aspirations of those desiring to see some mechanism for the ultimate reunification of the North and the South. More importantly, the Sunningdale Communiqué included proposals to examine the Royal Ulster Constabulary and establish a Court of Human Rights,[40] both of which provided some evidence that the SDLP would not agree to a constitutional settlement until there was reform of policing and adequate protection of human

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[36] For descriptive accounts of the less than harmonious workings of the coalition cabinet, see P. DEVLIN, THE FALL OF THE N.I. EXECUTIVE (1975); and R. FISK, THE POINT OF NO RETURN (1975).

[37] *See* ULSTER, *supra* note 1, at 258-60, and E. MCCANN, *supra* note 17, at 89-90.

[38] Immediately after the introduction of internment the SDLP called for an intensified campaign of civil disobedience, announced plans for an alternative assembly entitled an Assembly of the Northen Irish People, and refused to accept the opposition benches at Stormont. *See* 1 R. DEUTSCH & V. MAGOWAN, NORTHERN IRELAND 1968-73: A CHRONOLOGY OF EVENTS 120, 130, 135 (1973).

[39] For a critical commentary on the role of the SDLP, see E. MCCANN, *supra* note 17, at 248-50.

[40] Statement on Ireland (Tripartite Conference) 866 PARL. DEB., H.C. (5th ser.) 28 (1974). This statement is universally known as the Sunningdale Agreement. For a perspective on events surrounding the Sunningdale Conference and Sunningdale Agreement, see 2 R. DEUTSCH & V. MAGOWAN, *supra* note 38, especially at 360-62, for the Northern Irish response to Sunningdale.

rights.[41] Nevertheless, whatever may have been thought of the idea of a coalition executive initially, it became apparent that this institution was not a sufficient condition for the protection of civil rights and liberties.[42]

### C. *The Constitutional Convention*[43]

The campaign to establish a Bill of Rights received new life in the debate preceding the Northern Ireland Constitutional Convention in the summer of 1975. First, the minority community no longer expected that the participation of its major party, the SDLP, in the executive sufficed to protect civil liberties, and there was increased belief that a Bill of Rights was necessary to fetter any executive in Northern Ireland. Second, the general strike called by the Ulster Workers' Council Co-Ordinating Committee (UWC) demonstrated the power and temporary solidarity of the Protestant community in their resistance to the Sunningdale Communiqué. This opposition has been construed to extend to coalition government.[44] The extreme Unionist and Loyalist party politicians established their dominance in the Protestant community, reducing the moderate Unionists, who were willing to participate in the coalition executive, to a small rump party.[45] There seemed a strong possibility that the British Government might abandon its policy that executive power had to be shared by both Protestant and Catholic parties, and that the Stormont Parliament might be re-

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[41] The Sunningdale Agreement speaks only of the proposed Council of Ireland being "invited to consider" whether the European Convention on Human Rights and Fundamental Freedoms might be enacted into domestic legislation. 2 R. DEUTSCH & V. MAGOWAN, *supra* note 38, at 360-62.

[42] In fact, the Northern Irish Executive and Assembly were unable to agree upon the establishment of the Council of Ireland proposed in the Sunningdale Agreement; consequently, the European Convention was not examined.

[43] *See* THE NORTHERN IRELAND CONSTITUTION, CMND. NO. 5675 (1974). The Constitutional Convention was established pursuant to powers contained in the Northern Ireland Act, 1974, c. 28, sched. 2.

[44] On the role of the U.W.C. and its use of a general strike to bring down the power-sharing coalition, see R. FISK, *supra* note 36. For a contemporaneous analysis of these events, see WORKERS ASSOCIATION, THE ULSTER GENERAL STRIKE (1974).

[45] In the Convention Elections the pro-coalition Unionists were reduced to 7.7% of the votes cast and only five seats. For a full breakdown of voting figures and patterns under the method of proportional representation used in the election, see R. ROSE, NORTHERN IRELAND: TIME OF CHOICE 97, 171-72 (1976); and I. McAllister, The 1975 Northern Ireland Convention Election, University of Strathclyde Occasional Paper No. 14, Survey Research Centre, Glasgow, 1975.

established.[46] The Republican Clubs were among a small section of the province which would accept majority rule, provided that a Bill of Rights was also enacted.[47] The need for a Bill of Rights seemed the only measure to protect the minority from a traditional form of intransigent Unionist Government.

The general strike of May 1974, organized by the UWC, demonstrated the power and initative of the Protestant paramilitary organizations. In the year that followed, they endeavored to protect that power from encroachment by the political parties which had combined to form the United Ulster Unionist Council (UUUC).[48] Traditionally, the extreme Unionist politicians of the Unionist Party and the Orange Order provided exclusive leadership in the Protestant community, but in the wake of the general strike the paramilitary organization, particularly the Ulster Defence Association (UDA) and the UWC strike council, assumed that leadership.[49] During the next

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[46] R. ROSE, *supra* note 45, at 139-68, explains the several options open to the British Government.

[47] Republican Clubs are the political wing of the official I.R.A., which declared a truce in June 1972 and has not resumed fighting. During the 1960's Republican Clubs gradually moved away from the abstentionist philosophy and shifted to the political left, causing the traditionalist Republicans to split off forming the Provisional I.R.A. As Republican Clubs moved gradually to the left, embracing Marxist philosophy, they began to engage in parliamentary and extra-parliamentary politics. Today the Republican Clubs are identified with the politics of the Communist Party. Both the Republican Clubs and the Communist Parties of Britain and Ireland have long favored a Bill of Rights. *See also* 2 R. DEUSCH & V. MAGOWAN, *supra* note 38, at 250; and C. GREAVES, THE IRISH CRISIS 196-201 (1972). Greaves, an Irish Marxist theoretician, gives extensive arguments in favor of a Bill of Rights as part of a settlement. *Id.* at 197-201. On the ideological split between the Official and Provisional wings of the Republican movement, see C. O'BRIEN, STATES OF IRELAND (1972), and S. MACSTIOFAIN, MEMOIRS OF A REVOLUTIONARY (1975).

[48] The Ulster Citizens Civil Liberties Association (UCCLA), which had been established under the auspices of the most powerful Protestant paramilitary group, the UDA, not only favored a Bill of Rights but published its own draft in June 1975. *See* ULSTER CITIZENS CIVIL LIBERTIES ASSOCIATION, A PROPOSED BILL OF RIGHTS FOR THE UNITED KINGDOM (1975).

[49] Yet another "umbrella" loyalist political organisation was formed late in 1974, namely, the Ulster Loyalists Central Coordinating Committee. This organisation comprised both the paramilitary and political leadership of the extremist Protestant Community. It was useful to the political leadership because it guaranteed them access to and influence over the now powerful paramilitary organisations. On the other hand, this new organisation symbolized the newly found importance of the Protestant paramilitary groups and ensured access for them to political policy-making councils. In this way Protestant paramilitary agencies have been able to frustrate the trend towards

year the traditional Protestant leadership struggled to regain its prominence. The UWC and the UDA for the first time recognized the need for legal protection against a government formed by the UUUC.[50]

The Constitutional Convention failed to produce an agreement between the SDLP and the UUUC; consequently the secondary issues, including a Bill of Rights, received little attention. The Convention Report refers to the varying views of the political parties, including those favoring the enactment of the European Convention for the Protection of Human Rights and Fundamental Freedoms as the Bill of Rights.[51] The UUUC did not accept this suggestion but did recommend that a Bill of Constitutional Rights and Duties be included in the new constitution, without detailed explanation of the form and substance to this proposal.[52] This ambiguity belies a fundamental disagreement on certain issues as yet unexplored in the political debate in Northern Ireland.

The Standing Advisory Commission on Human Rights, chaired by Lord Feather, has stepped into the vacuum left by the collapse of the Convention and has provided a forum for debate. Prior to the Convention, the Advisory Commission announced that it was examining the question of whether a Bill of Rights was necessary, and if so, what form it should take.[53] After the Convention was terminated, the Advisory Commission continued its investigation, receiving evidence from a wide range of organizations. The debate was stimulated by the suggestion of eminent judges in England that there should be a constitu-

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compromise or pragmatism which had, on occasions, enabled some Protestant politicans to seek a political solution to the Constitutional problem in Northern Ireland. *See* Kelleher, *Who's Who in the U.W.C.*, HIBERNIA REV., June 7, 1974, at 5.

[50] Significantly the UDA, by far the strongest and most influential Protestant paramilitary organization, strongly supported the UCCLA draft Bill of Rights. Support from Loyalist political parties remained unkown. Thus, the Convention Report, which wholly reflected the views of the Protestant UUUC majority politicians, contains only a vauge reference to a Bill of "Constitutional Rights and Duties." It is suggested here that the majority Protestant politicians were not anxious to advance a proposal which might circumscribe the notion of absolute majority rule, whereas, the Protestant paramilitary organisations envisaged entrenched protection against *all* future political leadership, including Protestant majority devolved government at Stormont.

[51] All minority political parties, all civil rights organisations, all paramilitary organizations except the Provisional I.R.A., and all trade unions had long been on record as supporting a Bill of Rights as a part of a constitutional settlement.

[52] NORTHERN IRELAND CONSTITUTIONAL REPORT ¶ 141 (1975).

[53] *Probe Into Ulster Bias,* Belfast Telegraph, June 6, 1974, at 1; and *Feather Denies Casual Approach,* Belfast Telegraph, May 10, 1975, at 1.

tional settlement in the United Kingdom that included a Bill of Rights.[54] The Northern Ireland Secretary, Mr. Rees, added his imprimatur to the debate by stating in the House of Commons that a Bill of Rights would be included in a constitutional settlement in Northern Ireland.[55]

Notwithstanding the general agreement that there should be a Bill of Rights for Northern Ireland, there has been virtually no literature which examines the important underlying issues.[56] It is essential that there be a serious and substantial investigation of these questions if an agreement is to be reached. Without such an examination, the consensus lacks substance.[57] The following examines the function of a Bill of Rights in the key areas of public order, subversion, and emergency powers in light of a possible devolution to Northern Ireland of powers excluding jurisdiction over criminals and the enforcement of public order. In addition, these key areas will be scrutinized in the light of a complete devolution of power to a Northern Irish legislature.

## II. DEVOLVED GOVERNMENT IN NORTHERN IRELAND

Until recently, proponents of the Bill of Rights have envisaged the bill restricted to a devolved parliament in Northern Ireland — that is, preventing the *ultra vires* exercise of power by regional government. More recently, however, there has been a suggestion that this Bill of

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[54] L. SCARMAN, ENGLISH LAW—THE NEW DIMENSION (1974); Hailsham, *The British Institution,* The Times (London), May 12, 16, 19, and 20, 1975; Address by Sir Arthur James, The Holdsworth Club, Birmingham, 1976.

[55] 894 PARL. DEB., H.C. (5th ser.) 888 (1975).

[56] P. WALLINGTON & J. MCBRIDE, *supra* note 8, offer a survey of some of the more readily apparent issues relating to a Bill of Rights but do not carry forward a thorough examination of underlying policy and theoretical matters.

[57] Examples of the failure to adequately define the issues inherent in a Bill of Rights are now plentiful. *See, e.g.,* Address by Sir Keith Joseph, Conservative Political Centre Conference (Jan. 26, 1975); G. Hutchinson, *Now is the Time for a Bill of Rights,* The Times (London), Aug. 7, 1976; S. Hastings, *Time To United Against Marxism,* Daily Telegraph, Jun. 24, 1975 Editorial, *Required—A Bill of Rights,* The Spectator, Aug. 7, 1976; J. Griffiths, *Whose Bill of Rights,* New Statesman, Nov. 14, 1975; J. Jacob, *Say No to a Bill of Rights,* Tribune, Feb. 6, 1976; Editorial, *A British Bill of Rights,* The Guardian, Dec. 16, 1975. Even a cursory examination of the writings of the contemporary proponents of a Bill of Rights strongly implies that agreement cannot be reached without settling for rights defined on a very general level. In this way, deeper issues of principle may be avoided; consequently, the European Convention on Human Rights which is both general and declaratory, may be an attractive model for a variety of pragmatic political groups and parties.

Rights should restrict the powers of the United Kingdom Parliament as well. The failure of the Northern Ireland Constitutional Convention to produce an agreement has led to the prolongation of direct rule for an indefinite period. Some see advantages in the United Kingdom Parliament's enacting legislation which establishes a Bill of Rights even though it is unclear whether it would restrict the United Kingdom Parliament's sovereignty. Many have been led to this position, having been deprived of their civil liberties by the British Army during the period of direct rule. As a result, they have reached an understanding that the United Kingdom Government poses no less a threat to their civil liberties than a developed government does.

### A. *United Kingdom Government*

In the absence of a constitutional settlement, there is no advantage to the United Kingdom Parliament's enacting a Bill of Rights in Northern Ireland which purports to fetter exclusively the powers of the United Kingdom Government. At present it is difficult to conceive of the courts accepting the proposition that Parliament can entrench a Bill of Rights so as to include provisions which would prevent a subsequent Parliament from amending or repealing the Act.[58] It is unlikely, therefore, that a judicial proceeding which might be instituted by proponents of civil rights would provide any successes, not to mention confidence in either the Bill of Rights or the judiciary. More importantly, it is generally supposed that a Bill of Rights, by emphasizing the basic principles of fundamental freedom, will engender an atmosphere of respect for civil liberty. Unfortunately, recent events in Northern Ireland indicate that sectarian divisions prevail over respect for human rights. The Bill of Rights, moreover, by applying exclusively to Northern Ireland, would exclude that section of the population in Great Britain sympathetic to those who critically resist the government's measures abrogating civil liberty.[59] While there is an abstract

[58] Under the general rule of parliamentary sovereignty, Parliament cannot deprive itself of power to legislate on any matter or otherwise predetermine the future content of its own legislation. *See* Ellen Street Estates Ltd. v. Minister of Health, [1934] 1 K.B. 590, and Vauxhall Estates Ltd. v. Liverpool Corp., [1932] 1 K.B. 733. *See also* S. DE SMITH, *supra* note 28, at 74-75. *But see* D. KEIR & F. LAWSON, CASES IN CONSTITUTIONAL LAW 7 (4th ed. 1954), in which the authors argue that skilled drafting could entrench an act by providing that repeal of a provision would have no effect unless approved in a referendum. This argument was, however, omitted from the current edition (5th ed. 1967).

[59] For example, residents of Great Britain who oppose British military-security policy in Northern Ireland would remain subject to constraints on freedom of move-

understanding of what constitutes civil liberties in Great Britain, those who seek to protect these ideals have failed to persuade both the Government and the population at large that the erosion of liberty in Northern Ireland is intolerable even in the circumstances of civil unrest in that province. British civil libertarians have been impotent and probably will continue to be unable to mobilize the population to pressure the Government to reduce its emergency measures. The successes in this regard, such as the termination of internment, are attributable to the civil rights campaigners within the province. Furthermore, civil libertarians in Northern Ireland are unlikely to increase either their political stature or their effectiveness in that province through such a Bill of Rights if they remain unable to provide legal action which impugns the action of the United Kingdom Government. Consequently, such a measure will add little to their present campaign.

B. *Devolved Government*

There are two fundamentally distinct forms of devolved government which must be considered: that established by the Government of Ireland Act (1920)[60] and that established by the Northern Ireland Constitution Act (1973).[61] Under the former a wide range of powers were devolved, including the general power to enact laws for the "peace, order and good government of Northern Ireland."[62] There were also powers to make laws for the administration of police, public order and criminal law.[63] Under the Act of 1973, there was a modified general grant of power under which the Assembly could enact measures.[64] Moreover, the Assembly was not authorized to enact

ment, assembly, association, expression, and to restricted due process of law under the Prevention of Terrorism (Temporary Provisions) Act, 1976, c. 8. For an examination of the effect of this legislation on British pressure groups, see NATIONAL COUNCIL FOR CIVIL LIBERTIES, PREVENTION OF TERRORISM: A REPORT ON THE FIRST FOUR MONTHS OPERATION OF THE ACT (1975). For the alienating effects on the Irish immigrant community in England, see M. Maher, *The Irish in London: A Vauge Sense of Threat,* The Irish Times (Dublin), May 25, 1976, at 14.

[60] The Government of Ireland Act, 10 & 11 Geo. 5, c. 67 (1920). For a full examination of the form of devolved government conferred by this statute, see N. MANSERGH, THE GOVERNMENT OF NORTHERN IRELAND: A STUDY IN DEVOLUTION (1936, Newark, *The Law and the Constitution,* in ULSTER UNDER HOME RULE (T. Wilson ed. 1955); and H. CALVERT, *supra* note 10.

[61] The Northern Ireland Constitution Act, 1973, c. 36. For an examination of the 1973 Act, see B. NARAIN, PUBLIC LAW IN NORTHERN IRELAND 417 (1975).

[62] The Government of Irleand Act, 10 & 11 Geo. 5, c. 67, § 4(1) (1920).

[63] *Id.*

[64] The Northern Ireland Constitution Act, 1973, c. 36, § 4(1).

measures in the controversial areas of policing, security, criminal law, public order, electoral law, subversion and terrorism.[65]

In the introduction to this article we identified the campaign for the Bill of Rights with the struggle of the Catholic community to constitutionally entrench and legally protect its extra-parliamentary power to initiate the debate over civil rights issues. This remains the focal point of analysis concerning the efficiency of a Bill of Rights. The major governmental interests that justify restriction of these rights are public order, subversion, and emergency powers. Thus, these matters are the principal area of our examination. If the legislative and executive powers over these crucial areas are retained by the United Kingdom Parliament, there is little to be achieved in contending that there should be a Bill of Rights in Northern Ireland. It is more to the point to suggest desired reforms in these critical areas and campaign for speedy statutory implementation. On the other hand, if these powers are transferred to a Northern Ireland Government, then a Bill of Rights will substantially restrict that Government's exercise of these powers.

### C. *Majority Rule or Coalition Government*

There is one other fundamental distinction between the devolved constitutional governments under the Acts of 1920 and 1973; there was a majority cabinet government under the former, whereas there was a coalition executive under the latter.[66] Under the Act of 1920 the hopes of the minority community to share in the process of initiating legislation were bleak. First, although the Unionist Party was in theory open to Catholic membership,[67] it was closely connected to and dominated by the Orange Order, an organization which stands for the perpetuation of Protestant supremacy.[68] It is most unlikely that a Catholic could ever secure a high position in that party, not to mention in a Unionist Government.[69] Second, the inability of the population to establish a

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[65] *Id.* sched. 3.

[66] *Id.* § 2(1)(b); The Government of Ireland Act, 10 & 11 Geo. 5, c. 67, § 8 (1920).

[67] For a detailed history of the Unionist party, see J. HARBINSON, THE ULSTER UNIONIST PARTY: 1882-1973 (1973).

[68] For historical evaluations of the role of the Orange Order in Northern Ireland, see M. FARRELL, *supra* note 14, and G. BELL, *supra* note 20.

[69] The Unionist Party never nominated or elected a Catholic candidate to Stormont. In the 1969 general election a Unionist Association in County Down, in a major *cause celebre,* preferred not to contest the constituency rather than nominate a

new party (perhaps along the lines of a labor party), not exclusively identified with either religious community, has proved to be impossible.[70] The civil rights movement, which began without political party affiliation or identification or exclusive support from the Catholics,[71] was almost immediately condemned by extremist Unionists who made political capital out of the presence of Catholics in the movement.[72] Other parties, such as the Labour and Alliance parties, have failed to secure more than nominal support in the province and are unlikely to increase membership or support in the foreseeable future.[73] In the present polarized situation in Northern Ireland, the minority community is unlikely ever to command more than a substantial minority of the seats in an assembly or parliament.[74] If the Act of 1920 is adopted as the model for future devolved government in the province, then Catholics are unlikely to realize democratic control over the legislative process. If the constitutional settlement is to effect a democratic solution, a Bill of Rights is insufficient. It is evident that what a coalition government can achieve is a necessary condition to the attainment of the goal of civil libertarians.

It is important to note that a coalition government in Northern Ireland ensures neither stability nor liberalism in that province. As we observed in the introduction, the participation of the SDLP in the ex-

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Catholic local resident who had joined the Unionist Party. *See* R. ROSE, *supra* note 12, at 224. The Unionist Party remained silent throughout the public outcry. *See* A. BOYD, BRIAN FAULKNER AND THE CRISIS OF ULSTER UNIONSIM 38 (1972).

[70] Various attempts have been made to form non-sectarian parties such as the Northern Ireland Labour Party, the New Ulster Movement, and the Alliance Party. None have met with more than transient success. *See* R. ROSE, *supra* note 12.

[71] On the non-sectarian nature of the initial civil rights campaign, see CAMERON REPORT, *supra* note 13, at ¶¶ 56-61, 185-228.

[72] See L. DE PAOR, *supra* note 24, at 169-205. Mr. William Craig, then the Minister of Home Affiars, described the civil rights movement in 1968 as "bogus and made up of people who see in unrest, a chance to renew a campaign of violence," *cited in* ULSTER, *supra* note 1, at 47. This view was later examined and dismissed by the Commission of Inquiry, chaired by Lord Cameron, *supra* note 13, at 218-46.

[73] For an examination of the marriage of party allegience and regime allegiance, see R. ROSE, *supra* note 12, at 218-46.

[74] This particular view has been accepted by both Conservative and Labour Governments in Westminister since 1972 and has led to the conclusion that "power sharing" or coalition would be necessary if the minority was ever to achieve an interest in political power. For an examination of the British view that "no constitution can be established in Northern Ireland that is not acceptable to the bulk of the parties to the dispute," see R. ROSE, *supra* note 45, at 64.

ecutive, created under the Act of 1973, did not result in a termination of internment nor even in the vitiation of the repressive measures being executed by the police and army against the minority population. There is no evidence to indicate that a coalition government will of necessity lead to respect for civil liberties in the province. Thus, it seems that the campaign for a Bill of Rights is justified in continuing to seek a protection of fundamental rights even if a coalition government is finally established in Northern Ireland. It is important also to note that coalition experiments in Cyprus and Lebanon have not secured constitutional stability. In the light of recent events there is no reason to assume that such stability will automatically be secured in Northern Ireland. If the crisis which the province has experienced since 1968 should not abate, the skeptic has reason to doubt that coalition government will be sufficient to preserve the political stability of devolved government.

## III. PUBLIC ORDER

The fundamental principle underlying political liberties, which include freedom of expression, assembly and association, must be briefly explained to enable the reader to fully appreciate the public order problem in Northern Ireland. In the classic exposition of civil liberty, John Stuart Mill grounded his theory upon the premises that men are virtuous, and that the principal virtue is tolerance.[75] This proposition was crucial to his conception of liberty, which was not merely a license for self-regarding action, but was necessary for the production of divergent opinions.[76] Only through the harmonious competition of opposing and conflicting ideas could truth emerge, and this individual conflict constituted the engine of progress of civilized man.[77] Although individuals might be transigent in their opposition to the views of others, the virtue of tolerance in governing the response dictated the sanguine ex-

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[75] J.S. MILL, ON LIBERTY ch. 2 (1956) (1st ed. London 1859).

[76] *Id.*

[77] There is the greatest difference between pressuring an opinion to be true because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.

*Id.* at 24. *See also id.* ch. 5.

amination of the arguments of the opposition, or at least that such examination should be permitted by society.[78] At the same time, Mill recognized that liberty to express opinions might be abused by the propagandist, but nevertheless he did not deem it appropriate that such propagation might be legitimately suppressed; rather, competition of ideas should be trusted to expose the abuses.[79]

In the realm of action Mill formulated a more restrictive view of the realm of liberty by distinguishing "self-regarding" from "other-regarding" action, the latter being taken out of the "province of liberty."[80] Although the individual was completely free to act when his endeavour was "purely self-regarding," he interfered with the rights of others when there was a "definite damage" or a "definite risk of damage" either "to an individual or to the public." The Millian conception of public order includes in the first instances those cases where individual action actually violates another's rights or those of the public, and in the second, where there is a risk of such damage. Unfortunately, Mill never clearly enunciated what was meant by damage to the public, and the boundaries of his conception of liberty remain vague. He did say, however, that where a speaker expresses his opinion in circumstances which provoke his audience, this positive instigation is other-regarding and outside the bounds of liberty.[81]

This classical liberal notion of the public order encounters serious difficulty when applied to Northern Ireland. In the case of public meetings and demonstrations, which upon analysis are found to con-

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[78] The usefulness of an opinion is itself matter of opinion—as disputable, as open to discussion, and requiring discussion as much as the opinion itself. . . . And in point of fact, when the law or public feeling do not permit the truth of an opinion to be disputed, they are just as little tolerant of a denial of its usefulness. The utmost they allow is an extenuation of its absolute necessity, or of the positive guilt of rejecting it.

*Id.* at 27-28. *See also* ch. 4.

[79] *Id.* at 64.

[80] *Id.* ch. 4.

[81] "No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that or morality or law." *Id.* at 99-100. "No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute the expression of a positive instigation to some mischievous act." *Id.* at 67.

stitute a form of extra-parliamentary political power, the public order problem is acute. On the one hand, they reflect not only the expression of new ideas, but also stimulate public debate and progress in civilized society. On the other hand, they threaten to "instigate" the minority and to "damage" the current distribution of political power and certain vested interests in that arrangement. They will be perceived thereby as damaging the "public." Unless those who control the initiation of legislation are both willing and able to introduce progressive reforms, the distribution of political power obstructs rather than furthers progress. In Northern Ireland the evidence is abundantly clear that the Unionists, until they were pressured by the British Government,[82] obstructed progressive reform. In order to impede the initiatives taken in the minority community, the Unionists used the law to repress civil rights activities contrary to the public order.[83]

The inconsistency in the classical liberal position also extends to Mill's limitation on liberty that where there is a "risk" of damage, the action is taken out of the province of liberty. In its narrowest sense, the "risk" of damage might mean the imminent prospect of self-regarding action becoming other-regarding; therefore, action to avert the damage is jusified. The degree of proximity and remoteness is dependent upon numerous factors, so that a society in peril of imminent attack from a foreign enemy or overthrow by internal subversives poses a "risk" that wholly depends upon a theory of society. Furthermore, Mill recognizes that preventive police power is necessary to avert the damage and, hence, that tolerance must be restricted in accordance with what the organization of that society can, in its own view, afford to "risk."[84] This is especially the case where a section of society advocates that there should be an overthrow and abolition of the government. In Northern Ireland such tolerance was very limited under the successive Unionist Governments.

The classical liberal conception of public order, although controversial and certainly far from clear, may extend to what Edmund

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[82] Even after the Downing Street Declaration, *supra* note 33, was put into various reform statutes it remained largely unenforced. For an account of the shift in Unionist tactics, see A. BOYD, *supra* note 69, at ch. 8.

[83] For a descriptive analysis of the abuse of public order powers to repress dissent, see THE SCARMAN REPORT, VIOLENCE AND CIVIL DISTURBANCES IN NORTHERN IRELAND IN 1969, CMND. NO. 566 (1972).

[84] J.S. MILL, *supra* note 75, at 116-22.

Burke[85] and current writers describe as subversion.[86] What Burke discovered in the French Revolution many contemporaries now find parallel in the Bolshevik Revolution and in the spreading acceptance of socialism.[87] First, the philosophy which guided the revolutionaries in France—employing reason to reconstruct the social order—was alien to that which was accepted in Europe and, more importantly, suggested to Burke that the traditional institutions, including the aristocratic ownership of property, should be abolished.[88] Second, the revolutionaries were organized, and they had sympathizers in other countries who found in the Revolution the potential for radical reform in their countries.[89] Finally, through their appeal to the masses, the revolutionaries found not only that their philosophy was gaining acceptance, but that they created a following which enabled them to take direct action to overthrow the older order.[90] Burke continually denounced these activities as subversive, althugh his description lost currency in the 19th century. Nevertheless, in a society where there are persons fomenting rebellion, as was the case in Northern Ireland, then what Burke described as subversion certainly constitutes a problem for the maintenance of the "public" order.

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[85] Burke's descriptions of the French Revolution as subversive are numerous. *See* E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1969) (1st ed. 1790) [hereinafter cited as REFLECTIONS]; *Remarks on the Policy of the Allies with Respect to France* (1793), in 4 WORKS 467 (J. Nimmo ed. 1896) [hereinafter cited as WORKS]; *Letter to Florimond-Claude, Comte de Mercy-Argenteau* (Aug. 6, 1973), in 7 THE CORRESPONDENCE OF EDMUND BURKE 386 (P. Marshall & J. Woods eds. 1968); and *Letter to Rev. Thomas Hussey* (Feb. 4, 1795), in 8 *id.* at 136.

[86] Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech,* 23 U. CHI. L. REV. 173 (1956); Marshall, *The Defense of Public Education From Subversion,* 57 COLUM. L. REV. 587 (1957); Newhouse, *The Constitution and International Agreements or Unilateral Action Curbing "Peace-Imperiling" Propaganda,"* 31 LAW & CONTEMP. PROB. 506 (1966).

[87] *See* O'Brien, *Introduction* to E. BURKE, REFLECTIONS, *supra* note 85, at 56; and A. BAUMAN, BURKE: THE FOUNDER OF CONSERVATISM (1929).

[88] REFLECTIONS, *supra* note 85, at 149-53, 172, 202. For Burke's treatment of this proposition, see *An Appeal from the New to the Old Whigs* (1791), in 4 WORKS, *supra* note 85, at 68.

[89] *Thoughts on French Affairs* (1791), in 4 WORKS, *supra* note 85, at 317.

[90] REFLECTIONS, *supra* note 85, at 121-31. Burke described the appeal as corruption of the masses. *A Letter to a Member of the French National Assembly* (1791), in 4 WORKS, *supra* note 85, at 10-11, 30-31.

The maintenance of public order poses two fundamentally distinct issues, and in the discussion of Northern Ireland it is imperative that these be treated separately. On the one hand, there is the potential for riots which arises out of public meetings and processions conducted by Protestants and Catholics alike. The requirement here is the necessary balance of toleration by both communities, on the one hand, and the prospect of incitement and provocation on the other. We shall examine those issues in this section under the rubric "public order." On the other hand, there is the continual campaign by the minority community, although its organization and tactics may vary widely during history, to reunify the North with the Republic of Ireland. We shall examine that particular problem as one of subversion.

### A. *Incitement and Provocation*

In his chapter on the right of public meeting, Dicey generally accepted the rule that the freedom to hold public meetings included the corollary that those who endeavor to disturb that meeting do not render the exercise of the right illegal. The underlying principle, therefore, is that "a meeting otherwise in every respect lawful and peaceable" must be tolerated by the public, and the hostility of persons opposed to the meeting must not be sanctioned by the law.[91] However, Dicey did limit the principle in one very important respect: where the meeting "may be held to cause a breach of the peace" because it is of a kind "which naturally provokes the opponents".[92] Dicey's example is relevant because it is that of a Protestant speaker holding a meeting in an area inhabited by a large Roman Catholic population, and the speech is "slanderous" of the latter.[93] Here, says Dicey, "the object of the meeting is not strictly lawful, and may therefore excite opponents to a breach of the peace."[94] What renders the meeting "not strictly lawful" is the fact that the speaker, cognizant of the tension between the inhabitants of the area and his listeners, incites the former. Thus, Dicey formulated a concept of provocation as a restriction upon the right of meetings. His second limitation was

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[91] A. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 273 (10th ed. 1959).

[92] *Id.* at 277.

[93] Wise v. Dunning, [1902] 1 K.B. 167.

[94] A. DICEY, *supra* note 91, at 277.

similar, *i.e.*, if the speaker incites his own listeners to breach the peace, then the meeting is unlawful.[95]

Northern Irish law differed fundamentally from Dicey's rules. Significantly, there were numerous offenses which might be committed by a person participating in or organizing a meeting, including the catch-all provision in the Special Powers Act of 1922-43[96] which made it an offense where a person "does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulation."[97] The basic principle that every person should be able to ascertain his legal rights with certainty was undeniably abrogated by this provision.[98] Moreover, the Special Powers Acts of 1922-43 vested in the Civil Authority, in the Minister of Home Affairs, in the police and the magistrates, powers to ban meetings which were held in both public and private places on the grounds that such order was considered necessary for the protection of life, property, the preservation of peace or the maintenance of order.[99] As the

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[95] *Id.* at 278-79.

[96] Civil Authorities (Special Powers) Act, 1922, 12 Geo. 5, c. 5 (N.I.); Civil Authorities (Special Powers) Act, 1928, 18 & 19 Geo. 5, c. 5 (N.I.); Civil Authorities (Special Powers) Act, 1933, 23 & 24 Geo. 5, c. 12 (N.I.); Civil Authorities (Special Powers) Act, 1943, 6 & 7 Geo. 6, c. 2 (N.I.).

[97] *Id.* § 2(4).

[98] For a discussion of this point, see Edwards, *Special Powers in Northern Ireland*, 1956 CRIM. L. REV. 7.

[99] Under the Civil Authorities (Special Powers) Act, 1922, 12 Geo. 5, c. 5 (N.I.), the Home Affairs Minister was authorised to delegate powers contained in the Act to a police officer and to vary or revoke the regulations. First, the Civil Authority was empowered to regulate the hours of licensed premises under Reg. 2(1), 1922, 12 Geo. 5, c. 5 (N.I.); revoked by Reg. No. 147, STAT. R. & O. N.I. (1949); re-introduced as Reg. No. 39, STAT. R. & O. N.I., No. 281 (1969). *See also* Intoxicating Liquor Act, 1971, c. 51, § 5 (N.I.). Second, the Civil Authority was authorized to prohibit and restrict meetings in private places by Reg. No. 38A, STAT. R. & O. N.I., No. 312 (1969). Third, there were several powers to restrict or prohibit meetings in public places. Reg. No. 3(1)(a), 1949, 12 Geo. 5, c. 5; revoked by Reg. No. 147, STAT. R. & O. N.I. (1949). Regulation 4, 1922, 12 Geo. 5, c. 5 was the most comprehensive provision. This regulation was amended by Reg. No. 80, STAT. R. & O. N.I. (1933), and later revoked by Reg. No. 187, STAT. R. & O. N.I. (1951). A modified version was introduced as Reg. No. 38, STAT. R. & O. N.I., No. 173 (1966) and later amended by Reg. No. 214, STAT. R. & O. N.I. (1970). Specific power to prohibit meetings near barracks was provided in Reg. No. 14, 1922, 12 Geo. 5, c. 5; revoked by Reg. No. 187, STAT. R. & O. N.I. (1951). Finally, there was a power to impose prolonged bans

rule of law did not apply to these wide powers, there was no legal mechanism for preventing the discriminatory exercise or arbitrary abuse of powers. In fact, the Flag and Emblems (Display) Act (NI) of 1954[100] provided for a discriminatory exercise of executive powers by empowering the police to remove provocative emblems[101] while at the same time making it an offense to threaten interference with the display of the Union Flag,[102] which in Northern Ireland is the symbol of both Unionism and the supremacy of Protestantism. In effect, the Union flag was a symbol which had to be tolerated by those who, in Dicey's terms, might be "naturally provoked" while other symbols were not similarly tolerated.[103]

The application of the laws provides considerable evidence of the dual standards found in the Flag and Emblems (Display) Act (NI) of 1954. Intolerance towards Republican symbols is illustrated by the celebrated incident during the 1964 general election when the police entered the Falls Road (a Catholic area) in force to remove the display of a Tricolour flag, thereby provoking a major riot.[104] On the other hand, the attempts to compel minority tolerance of Protestant processions is amply testified to by the notorious decision of the Unionist Government to permit the Orange parade of June 30, 1970, through the Ardyone area (another Catholic residential district), which provoked the leading resident Catholics to riot.[105] It was this dual standard which the Unionist Executive continually applied to the civil right marches and the extremist Protestant counter demonstrations which inevitably resulted in conflict. The role of the Home Affairs Minister, Mr. Craig, in banning the civil rights march on October 5, 1968, in

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on public meetings under Reg. No. 40, STAT. R. & O. N.I., No. 198 (1970); amended by Reg. No. 309, STAT. R. & O. N.I. (1971). Special provision was made for meetings in the Stormont Estate Regulations, Reg. No. 112, STAT. R. & O. N.I. (1933). The Public Order Act, 1951, 15 Geo. 6, c. 19 (N.I.), as amended by the Public Order (Amendment) Act, 1970, c. 4 (N.I.), established powers to regulate and ban meetings and processions. For a discussion of these regulations see H. CALVERT, *supra* note 10, at 388-89; and Palley, *supra* note 3, at 404, 434-37.

[100] 2 & 3 Eliz. 2, c. 10 (N.I.). For a discussion of this Act see H. CALVERT, *supra* note 10, at 389.

[101] Flag and Emblems (Display) Act, § 2(1) & (2).

[102] *Id.* § 1.

[103] *Id.* § 2(4).

[104] For a succinct account of these events see L. DE PAOR, *supra* note 24, at 161.

[105] *See* ULSTER, *supra* note 1, at 205-09. *See also* 1 R. DEUTSCH & V. MAGOWAN, *supra* note 38, at 66-67.

Londonderry and permitting the spurious Apprentice Boys parade, was publicly criticized in the Cameron Report.[106]

If the minority community is to be accorded the right to conduct meetings and processions and to display the symbols of their political aspirations which are essential attributes of the limited power to conduct extra-parliamentary campaigns, then three substantial reforms are necessary. First, there must be clarity and certainty in the laws which govern these rights — that is, freedom cannot be secured if the legal position is uncertain. The offenses which may be committed by those carrying out these activities should be enacted in statute form and must be clearly and precisely drafted. Second, the concept of provocation must reflect Dicey's approach, thus requiring two radical reforms in Northern Ireland: mainly, that the minority community must be permitted the liberty to display their political symbols and to conduct their meetings without fear of attack from the Protestant community; and additionally, the Protestant marches and display of symbols must be confined to Protestant residential areas. We deliberatley use the words "residential areas" because during the early phases of the civil rights campaign, which consisted of persons drawn from both the Catholic and Protestant communities, the marches were identified as "Catholic" and the city centers where the municipal buildings were located and which were the focus of the protest, were considered to be Protestant areas.[107] This meant that no non-sectarian movement could emerge in Northern Ireland, and the function of the public order law was, therefore, not merely to subjugate the minority population but also to prevent the emergence of any non-Protestant political group in opposition to the Unionists. In any event, neutral territory is essential to establish the equality of the two respective political positions. This revision of the notion of provocation in Northern Ireland requires that the responsible authorities — the police and regional government — be willing and able to confine the Protestants to their areas; and it is this very suggestion which runs contrary to the essence of Protestant supremacy. In short, "order" can no longer be a shorthand description of Protestant supremacy.

Third, the administration of public order laws must be subject to the rule of law, and the affected communities must have confidence in the administration of justice. The concept of provocation which must be established in Northern Ireland must be enacted in general terms

[106] CAMERON REPORT, *supra* note 13, at ¶¶ 159-67.

[107] *Id.*

and the enforcement of that law vested either in the courts or the executive or both. On the one hand, it is possible that the law might impose no prior conditions or restraints upon the exercise of the rights to freedom of expression, association and assembly, and that those who cause a breach of the peace might be prosecuted only after the offense is committed. In the context of Northern Ireland, where the tension between the two communities provides succor for major sectarian riots, there is undoubtedly a need to prevent breach of the peace where serious disorder will ensue. There is a strong case for providing some form of prior restraint on the exercise of the right to hold public meetings and processions. Ideally, there should be provisions, similar to those found in section 3(1) of the British Public Order of 1936, although more precisely drafted, which permit the police to impose conditions upon the public meeting or procession as to time and manner in order to prevent serious public disorder. Those powers should similarly extend to the flags and emblems which are displayed during such meeting or procession. Moreover, the decision of the police or appropriate authority should be referred to the Divisional Court for review.

The scope of judicial review is limited, and in this context where it does not include a review of findings of fact, these limitations confer a considerable degree of power upon the appropriate administrative authority. Such powers might be vested in the Minister of Home Affairs (or some similar officer in a coalition executive) who may impose conditions in particular cases. The principal control over the exercise of such Ministerial discretion in such an arrangement is essentially Ministerial accountability via questions which might be raised in the Assembly. Such an arrangement inevitably would place the administration of public order laws into the political party arena of the coalition government, and if there is considerable tension in the province, it carries a high potential for precipitating a serious crisis in power sharing. It well may contribute to political instability rather than foster harmony. Furthermore, in view of the history of Unionist administration of public order laws, it seems unlikely that the minority community will have much confidence in reestablishing Unionist executive responsibility for public order law. On the other hand, the deeply embedded Protestant suspicion of Catholic allegiance to the state makes it most unlikely that Protestants would entrust such responsibility to a member of the SDLP or other party which draws its political support from the Catholic community. The prospect of executive responsibility for the administration of the public order laws in North-

ern Ireland, at least over the regulation of meetings and processions, seems unlikely to create a consensus in the provincial government and more likely to precipitate crises.

Another possibility is to vest responsibility for public order in the police in Northern Ireland. Specific, controversial decisions would be the subject of dispute not within the coalition executive, but rather between the community and the police. By expressly providing that there shall be judicial review of such decisions, the law becomes the rational framework for resolving controversial issues. Such a solution necessarily requires the satisfaction of two conditions; first, the communities must have confidence in the police and, second, they must have confidence in the judiciary to apply the rule of law in a fair and non-discriminatory manner. In Northern Ireland, the Royal Ulster Constabulary undoubtedly is identified by the minority community with the security of the Unionist governments, and by the Protestants with the perpetual security of the border between the Republic and the North.[108] The minority community has virtually no confidence that the R.U.C. will make fair decisions which affect liberties, and it appears unlikely to develop such respect in the near future. More importantly, there should be some form of responsibility for the administration of public order law which is analagous to the accountability of a Home Affairs Minister, that is, some local political control. It is essential that there be radical reforms in the administration of policing in Northern Ireland, perhaps to the extent of community control of the police.[109] Such localized democratic control would establish the sug-

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[108] THE SCARMAN REPORT, *supra* note 83, cited 58 abuses of police power, while THE CAMERON REPORT, *supra* note 13, was also critical of the RUC. *See also* REPORT OF THE ADVISORY COMMITTEE ON POLICE IN NORTHERN IRELAND, CMND. NO. 535 (1969); McKeown, *RUC in Search of a Role*, HIBERNIA REV., Sept. 28, 1975; (At the time of writing the RUC remains almost wholly Protestant and has been accused of brutal interrogtion. The current Catholic attitude toward the RUC is that it presents an insuperable obstacle to normal police practice in Northen Ireland.); REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971, CMND. NO. 4823 (1972); REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, CMND. NO. 4901 (1972). The European Commission on Human Rights recently found the RUC had used torture. The matter has been referred to the European Court of Human Rights. REPORT OF THE EUROPEAN COMMISSION ON HUMAN RIGHTS, IRELAND v. UNITED KINGDOM, Application No. 5310/71 (1976).

[109] *See* B. NARAIN, *supra* note 61, at 326-27; 3 COMMUNITY FORUM (Belfast), No. 2, at 7-11 (1973).

gested accountability and contribute to the growth of confidence in the police and concomitantly in administration of public order laws.

The three conditions which we have outlined above demonstrate that the protection of the rights of public meeting and procession are dependent upon the creation or reform of the judicial and executive institutions responsible for administering public order laws. The European Convention for the Protection of Human Rights and Fundamental Freedoms in general terms declares, "Everyone has the right to freedom of peaceful assembly and to freedom of association with others."[110] This establishes in positive law the right, but it does not guarantee the legal certainty of the public order laws which restrict those rights. More importantly, that provision is subject to a clause stipulating a major exception "such as [is] prescribed by law and [is] necessary in a democratic society for the prevention of disorder,"[111] but does not establish the judicial and executive institutions which are necessary conditions to the acceptable administration of the public order laws. It is possible that the judicial interpretation of the general declaration and the exception might lead to a revised concept of provocation but, as we have seen, that is insufficient in the context of Northern Ireland. Even the application of the rule of law has proved inadequate to establish confidence in the executive and police and, consequently, there is little prospect in the liberal interpretation of the Bill of Rights unless adequate provision is made to permit participation in the local control of policing.

In addition to the general provisions of the European Convention, police reform by establishing local control is required if a solution protecting the liberties of the minority community is to be achieved. Furthermore, there should be a comprehensive public order code which contains the offenses which might be committed by persons exercising their fundamental freedoms and, more importantly, which establishes the precise powers of the police to restrict the exercise of those rights. In this way, the rights would be protected with precision and certainty and, if there is controversy over the exercise of power, the judiciary can construe the public order law with reference to the general principle established in the Bill of Rights.

B. *Subversion*

Although subversion is identified essentially with an organized endeavor to overthrow the state, it also encompasses the organization

[110] Art. 11(i).

[111] Art. 11(ii).

of society which that state protects. In Blackstone's *Commentaries* subversion is characterized by the activities of the Roman Catholics, whom Blackstone describes as owing an allegiance to the Pope.[112] There is, therefore, a conflict of loyalty for the Catholics, between the sovereign of Great Britain and the organized Roman Catholic Church; and it is incumbent upon the latter to undermine the authority of the national sovereign. It was Burke's counterrevolutionary genius that separated this connection between subversion and religion and reformulated the concept of modern society in which the affairs of church and state are wholly distinct. In its place he substituted the threat of democracy.[113] Universal suffrage, a fundamental principle declared by the French Revolution, separated the ownership of property from the rule of the affairs of state and society, and for Burke this portended the ignominious deprecation of superiority and inequality which must be protected and preserved if the institution of private property was to continue.[114] Thus, Burke was not concerned narrowly with the preservation of the monarchy nor preoccupied with the aristocratic form of government, but with the organization of society based upon the institution of private property, and it was the threat to this form of society that he most vociferously deprecated in his counterrevolutionary writings.

In the era of classical liberalism, subversion does not receive the explicit treatment found in the 18th century. For example, Dicey does not mention the word subversion nor does he appear to formulate an analagous concept in his discussion of the rights to freedom of discussion or public meetings. As we saw previously in our discussion of public order, the ambiguous explication of the notion of public order permits the argument that subversive threats might be properly dealt with as a "risk" of danger to the public.[115] Nevertheless, this particular problem was not considered so serious as to warrant explicit treatment in the discussion of liberty.

In the present century there has been, following the Bolshevik Revolution, a revival of interest in Burke's writings on subversion, and these have found their way into the jurisprudential debate over the nature of the threat.[116] In the United States the laws enacted by the

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[112] 4 W. BLACKSTONE, COMMENTARIES 102-05.

[113] *Thoughts on French Affairs* (1791), in 4 WORKS, *supra* note 85, at 318-23. *See also Letter to Sir Hercules Langrishe* (1792), *id.* at 257.

[114] *Id.*

[115] *See* note 81 *supra* and accompanying text.

[116] *See* note 86 *supra.*

Federal and State Governments have been principally directed against the activities of the Communist Party and left wing organizations, and it is affiliation with the Communist Party in the Soviet Union that has been identified as the key to the conflict with the citizen's allegiance to the United States.[117] At the same time, the essence of communism is the endeavor to mobilize the proletarian overthrow of capitalsim and it is this aspect of Communist ideology that is equally important to the program of the left wing parties being characterized as subversive. In Great Britain, especially in the 1930's, the threat has not been exclusively from the left, but also from the Fascists whose paramilitary intimidating and provocative marches were proscribed by the Public Order Act of 1936 and have been identified as subversive.[118] In the case of the latter the uniforms signifying association with the Fascists were identified with the alien politics of Nazi Germany and, in this sense, were characterzied as subversive of British democracy.

Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that

> [n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention[119]

is perhaps one of the two provisions which might be construed as defining subversion. The other is the provision in the exception clause of Article 10 which permits restrictions on the right to freedom of expression in the interest of the territorial intergrity of the state.[120] If the words "rights and freedoms set forth herein" in Article 17 are identified with the creation and protections of those rights in capitalist society, which is the view that has been taken by the European Commission,[121] then the activities of the Communist Party, so long as it

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[117] Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957). *See generally* Gorfinkel & Mack, *Dennis v. United States and the Clear and Present Danger Rule,* 39 CALIF. L. REV. 475 (1951); Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1 (1951); Chafee, *Thirty-Five Years with Freedom of Speech,* 1 KAN. L. REV. 1 (1952).

[118] *See* I. BROWNLIE, LAW RELATING TO PUBLIC ORDER (1968), for the history and use of the 1936 Act.

[119] CONVENTION, *supra* note 8, at art. 17.

[120] *Id.* art. 10(2).

[121] German Communist Party v. Federal Republic of Germany, [1957] Y.B. EUR. CONV. ON HUMAN RIGHTS 222 (Eur. Comm. on Human Rights) (Appl. No. 250/57).

aims at the revolutionary overthrow of capitalism, also aims at the destruction of those "rights and freedoms set forth" in the Convention. In this sense, Article 17 is consistent with the jurisprudential definitions of subversion which have been developed in the United States. On the other hand, there is no element of allegiance or notion of conflicting allegiances found in Article 17, a factor which is easily explained by the international character of the Convention. Thus, Article 17 represents an innovation in the concept of subversion, linking it exclusively to the organization of society and not in conjunction with the state as well. At the same time, however, the exception provision in Article 10 does permit restrictions on freedom of expression in the interest of preserving the territorial integrity of the state. Nevertheless, that restriction is distinct and does not form part of the anti-subversion provision and therefore stands on its own.

Once subversion is identified, there is considerable controversy concerning what constitutes the appropriate response. At one extreme is the tolerant position which contends that the falsity of the ideas being propagated by the subversives — which is mainly socialism and communism — will be exposed and condemned to impotence by the critical scrutiny which can take place only if society continues to permit the free exchange of opinions. The other extreme position echoes the eloquent injunction of Burke against tolerating the continued chaos produced in France by the Revolution, when he described it as an "evil in the heart of Europe [which] must be extirpated from that centre, or no part of the circumference can be free from the mischief which radiates from it, and which will spread, circle beyond circle, in spite of all the little defensive precautions which can be employed against it."[122] This extremely intolerant position demands repression of subversive activities, perhaps even at the costs of war or civil war, for otherwise the present order must remain condemned to a precarious existence until it finally crumbles under the corrosive effects of subversion.

It is at this point that we must now return to the ambiguous formulation of the classical liberal conception of public order. On the one hand, if the political power is so distributed that those in control of parliamentary power include all sections of society and are capable of responding to the demands of a particular section, especially where there is a concerted campaign for constitutional reform, then it is unlikely that the tension in that society will ever become such that

[122] WORKS, *supra* note 85, at 401.

there is a substantial risk of a revolutionary overthrow of the government. The advocacy of revolution will produce little, if any, support and, in the terms of classical liberal theory, there is no "risk" of damage to the public. On the other hand, if the sections of society in control of the parliament are incapable and unwilling to respond to the demands which another section is pursuing, and which they perceive as legitimate for the continued participation in the state, then the tension produced by the confrontation will lead to the possibility of a revolutionary overthrow of the state. In classical liberal terms, there is a "risk" of damage to the public, although there is no inquiry into the societal structure which creates that "public." In these circumstances there is the genesis of the United States Supreme Court doctrine of the "clear and present" danger test to the governmental suppression of subversive activity.[123] This position, it should be observed, does not go as far as the Burkian call for repression irrespective of the magnitude of the costs. It is perhaps this position underlying Article 17 which is not conditioned upon there being any form of danger, unless, of course, there is an assumption that the existence of the present organization of society, especially the potential for foment by the socialist states, constitutes a permanent "clear and present" danger.

The extent to which a government may deprive individuals and groups of their fundamental freedoms in its suppression of subversive activities also is a subject of considerable controversy, and the principles are not cleary established. First, there are those rights which permit individuals to mount parliamentary opposition and, possibly, campaigns to secure control of the legislative and executive powers. In this area, the government may impose qualifications for electors and candidates standing for public office. Second, there are those rights which provide the basis for organizing extra-parliamentary opposition against the government or its policies. As we have already noted, these include the rights to freedom of expression, to hold public meetings and processions, and to associate with others. Here the government may proscribe the activities of the subversives, thereby depriving them of the power to organize legitimate extra-parliamentary opposition. Finally, there are activities which do not fall within the traditional ambit of civil liberty, such as employment and trade union activities, which allow the organization of others into a powerful group, although

[123] Schenck v. United States, 249 U.S. 47 (1919); Gitlow v. N.Y., 268 U.S. 652 (1925); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 17-19, 24-27, 47-48 (1948); Chafee, Book Review, 62 HARV. L. REV. 891 (1949).

this is not necessarily directed towards particular governmental policies. In this area, governments sometimes apprehensive of the activities of leftists have proscribed the participation of subversives or conditioned their employment upon their loyalty to the state.[124] The anti-subversion laws are not principally aimed at curtailing the violent struggle to overthrow the state, but rather at eliminating the power base upon which any campaign might be organized.

Unionist Governments in Northern Ireland employed a modified Blackstonian notion of subversion in that nationalism — the establishment of an independent united Irish state — posed the principal threat to the continued union with Great Britain, but it was rooted in the Catholic community, which virtually adhered to no other political view until the 1960's. In this sense, the Protestants, including leading members of the Unionist Governments, identified the Catholics as being bound by two allegiances which undermined their obligatory loyalty to the Northern Ireland Government. First, there was their subservience to the papal edicts of the Roman Catholic Church, whose authority is based in Rome, and, hence, in a foreign state. Second, their adherence to Irish Nationalism resulted in an allegiance to the Irish Free State and its successor, the Republic of Ireland, whose capital is also foreign, thereby further undermining obedience to the laws of the Parliament of Northern Ireland. It was not uncommon to find the extreme Unionists reconciling these two loyalties to a single one: the immediate allegiance to the governments in the Republic, which, in turn, was dominated by the Church in Rome.[125]

Unionist Governments endeavoured to contain subversion as a matter of practicality, although the measures adopted indicate an extreme repression intended to eradicate it from the province. Firstly, parliamentary opposition and the possibility of that being democratically transformed into control of the Northern Ireland Parliament was curtailed by a number of measures. All candidates for the parliamentary seats (as well as local government offices) have to subscribe to the promissory oath and, thus, indicate an allegiance not

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[124] See Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193, for review of the loyalty oath programmes in the United States.

[125] This concept of duality of allegiance is explained in R. ROSE, *supra* note 12, at 218-46. M. FARRELL, *supra* note 14, gives many examples of unscrupulous use of the "Home Rule means Rome Rule" concept in his historical analysis. *See also* A. BOYD, *supra* note 69. On the fear that Protestants have shown of "government from Rome" via Dublin, see G. BELL, *supra* note 20, and on the alienation of the Unionist government from the Catholic Church, see J. CALLAGHAN, *supra* note 32, at 72, 97.

only to Her Majesty's Government but also to the Northern Ireland Government.[126] Furthermore, to prevent the prospect of migration from the Irish Free State creating a majority of Catholic electors, the qualifying period of residence in the province was raised, in 1928 to three years,[127] and in 1934 to seven years,[128] unless the voter was born in Northern Ireland. Moreover, as was well documented, the constituencies were gerrymandered to make the prospect of control by the minority community an impossibility.[129]

Secondly, similar measures were taken to curtail the influx of migrants from the South and to curb the employment of Catholics in the North. The Safeguarding of Employment Act (NI) 1947 restricted employment in the province to persons born there or who had been "ordinarily resident" there for ten or twenty consecutive years following the passage of the Act, or married to a person born in the province or the child of such person.[130] In the field of public employment, persons who received employment from the Northern Ireland Government or a local government had to subscribe to the promissory oath.[131]

The legal certainty which is necessary for the protection of civil liberty was abrogated by the extreme measures directed against the

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[126] Promissory Oaths Act, 1923, 13 & 14 Geo. 5, c. 7 (N.I.).

[127] Representation of People Act, 1928, 18 & 19 Geo. 5, c. 24, § 4 (N.I.).

[128] Representation of People Act, 1934, 24 & 25 Geo. 5, c. 7, § 1 (N.I.). *See also* Elections and Franchise Act, 1946, 10 Geo. 6, c. 8, § 10 (N.I.); Electoral Law Act, 1962, c. 14, § 1 (N.I); Electoral Law Act, 1969, c. 26, § 2 (N.I.).

[129] The most comprehensive exposition of gerrymandering is contained in the CAMPAIGN FOR SOCIAL JUSTICE, THE PLAIN TRUTH (1969), and in the CAMERON REPORT, *supra* note 13, at ¶¶ 132-28.

[130] The constitutionality of this statute was unsuccessfully challenged in Duffy v. Ministry of Labour and National Insurance, [1962] N.I. 6, where in Lord MacDermott, C.J., stated that the extraterritoriality of the legislation could not be admitted so as to fetter the Northern Irish Parliament from enacting legislation to protect Ulster workers. The court held that the "pith and substance" of the impugned legislation was the protection of Ulster workers and not the regulation of the provision of services by outside workers. Similarly, the landmark case of Gallagher v. Lynn, [1937] A.C. 863, established that the "pith and substance" doctrine, when applied to a statute restricting trade between Eire and Northern Ireland, justified regulation of external trade if the "pith and substance" of the impugned legislation was regulation of activity within Northern Ireland. In both cases the courts could arrive at such conclusions only by completely ignoring the legislative history and societal context of the impugned legislation. Knowingly or unwittingly the courts buttressed, rather than scrutinized, the competence of the Northern Irish Parliament (Stormont) to enact discriminatory measures, the real "pith and substance" being the entrenchment of Unionist hegemony. *See also* Calvert, *Gallagher v. Lynn Re-examined—A Legislative Fraud?*, 1972 PUB. L. 11.

[131] Promissory Oaths Act, 1923, 13 & 14 Geo. 5, c. 7 (N.I.).

extra-parliamentary oppositional political and paramilitary activities; the most pernicious piece of legislation was the notorious Special Powers Acts, 1922-43.[132] In the first place, there were numerous exceedingly vague offenses created by the Act and regulations so that it was impossible for any group opposed to the policies of the Unionist Government to carry out an oppositional campaign with the knowledge that such freedom was secure from interference. For example, one sedition-type offense made it criminal to "spread false reports or make false statements."[133] There were four separate incitement-type offenses created by the regulations, one of which included provisions making it a crime to do "any act calculated or likely to cause mutiny, sedition or disaffection . . . among the civilian population."[134] Second, and more important, there were vested in the Civil Authority and Home Affairs Minister very wide powers to proscribe the publication and possession of newspapers, films, records, and virtually any form of document.[135]

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[132] *See* note 96 *supra*. For a critique of the Special Powers Acts, see NATIONAL COUNCIL FOR CIVIL LIBERTIES (NCCL), REPORT OF A COMMISSION OF INQUIRY APPOINTED TO EXAMINE THE PURPOSE AND EFFECT OF THE CIVIL AUTHORITIES (SPECIAL POWERS) ACTS (NORTHERN IRELAND) 1922 & 1933 (1936). *See also* Edwards, *supra* note 98, for analysis of the effect of the Acts between 1944 and 1954.

[133] Reg. No. 25(a), 1922 12 Geo. 5, c. 5. *See also* Reg. No. 25, 25(b), 25(c). These were revoked by Reg. No. 147 STAT. R. & O. N.I. (1949).

[134] Reg. No. 16, 1922, 12 Geo. 5. c. 5. *See* note 133 *supra*. *See also* Reg. No. 26, 1922, 12 Geo. 5, Reg. No. 137 STAT. R. & O. N.I. (1943) which promulgated Reg. No. 26(A), 1922, 12 Geo. 5 and Reg. No. 147 STAT. R. & O. N.I. (1949) revoking Reg. No. 26 & 26(A) Reg. No. 8(2), 1922, 12 Geo. 5, c. 5, and Reg. No. 179 STAT. R. & O. N.I. (1954) were revoked by Reg. No. 40 STAT. R. & O. N.I. (1971) which promulgated Reg. No. 8(1), 1922, 12 Geo. 5, c. 5. For offences relating to possession of information about the police force or "of such a nature as is calculated to be or might be directly or indirectly useful to persons hostile or opposed to the preservation of peace," see Reg. No. 10, 1922, 12 Geo. 5, c. 5, Reg. No. 147 STAT. R. & O. N.I. (1949); Reg. No. 199, 1922, 12 Geo. 5, c. 5, STAT. R. & O. N.I. (1956) which promulgated Reg. No. 26(1), 1922, 12 Geo. 5, c. 5; Reg. No. 27, 1922, 12 Geo. 5, c. 5, and Reg. No. 58 STAT. R. & O. N.I. (1930), which were revoked by Reg. No. 147 STAT. R. & O. N.I. (1949); Reg. No. 24(A), 1922, 12 Geo. 5, c. 5, Reg. No. 35 STAT. R. & O. N.I. (1922).

[135] The Civil Authority and Home Affairs Minister were empowered to ban the publication of newspapers under Reg. No. 26, 1922, 12 Geo. 5, c. 5 and Reg. No. 137 STAT. R. & O. N.I. (1943) which promulgated Reg. No. 26(A), 1922, 12 Geo. 5, c. 5. These were revoked by Reg. No. 147 STAT. R. & O. & N.I. (1949). The Minister was empowered to prohibit the erection of monuments. Reg. No. 8(A), 1922, 12 Geo. 5, c. 5, Reg. No. 85 STAT. R. & O. N.I. (1951). He was also empowered under the same Reg. No. 26(A) to order the proscription of possessions of films and records. Reg. No. 58 STAT. R. & O. N.I. (1930).

Additionally there were powers to proscribe organizations,[136] to order curfews and censuses in particular areas,[137] to exclude individuals from Northern Ireland,[138] to curtail movement by issuing resident restriction orders,[139] and to order the arrest for interrogation or internment of suspects although they might not be suspected of having committed an offense.[140] These powers were not subject to critical judicial scrutiny. Instead the courts construed them to permit the exercise of the powers

[136] Reg. No. 24(A) 1922, 12 Geo. 5, c. 5, Reg. No. 35 STAT. R. & O. N.I. (1922). These regulations were used to ban or proscribe both prohibited parties and paramilitary groups. *E.g.*, Sinn Fein, the Republican party, was proscribed by Reg. No. 199 STAT. R. & O. N.I. (1956), the Republican Clubs, proscribed by Reg. No. 42 STAT. R. & O. N.I. (1967), and the I.R.A., proscribed by Reg. No. 24(A), 1922, 12 Geo. 5, c. 5.

[137] The Civil Authority was empowered to order curfews under Reg. No. 1, 1922, 12 Geo. 5, c. 5, amended by Reg. No. 31 STAT. R. & O. N.I. (1922) and Reg. No. 72 STAT. R. & O. N.I. (1923), but revoked by Reg. No. 147 STAT. R. & O. N.I. (1949) and reintroduced as Reg. No. 19(1) by Reg. No. 199 STAT. R. & O. N.I. (1956). He was also authorised to order occupiers to post a list of occupants at each entrance. Reg. No. 18(B), 1922, 12 Geo. 5, c. 5, Reg. No. 56 STAT. R. & O. N.I. (1922), but revoked by Reg. No. 147 STAT. R. & O. N.I. (1949).

[138] Reg. No. 1(A)(2), 1922, 12 Geo. 5, c. 5, Reg. No. 54 STAT. R. & O. N.I. (1940); Reg. No. 1(B)(1), 1922, 12 Geo. 5, c. 5; Reg. No. 61 STAT. R. & O. N.I. (1940); Reg. No. 3(2), 1922, 12 Geo. 5, c. 5, Reg. No. 18 STAT. R. & O. N.I. (1972); Reg. No. 37(1), 1922, 12 Geo. 5, c. 5, Reg. No. 16 STAT. R. & O. N.I. (1957).

[139] A general power was conferred upon the Home Affairs Minister to restrict movement by order. Reg. No. 23(B), 1922, 12 Geo. 5, c. 5, Reg. No. 36 STAT. R. & O. N.I. (1922), amended by Reg. No. 23(B)(1), Reg. No. 92 STAT. R. & O. N.I. (1940), but revoked by Reg. No. 147 STAT. R. & O. N.I. (1949), and reintroduced as Reg. No. 12(1), 1922, 12 Geo. 5, c. 5, Reg. No. 191 STAT. R. & O. N.I. (1956). A further power to exclude persons from areas is created by Reg. No. 23(A), 1922, 12 Geo. 5, c. 5, Reg. No. 36 STAT. R. & O. N.I. (1922), but revoked by Reg. No. 147 STAT. R. & O. N.I. (1949).

[140] There were two forms of detention which could be directly authorised by the Civil Authority or Home Minister. First, there was detention under Reg. No. 23, 1922, 12 Geo. 5, c. 5, Reg. No. 34 & 41 STAT. R. & O. N.I. (1922), but revoked by Reg. No. 147 STAT. R. & O. N.I. (1949), and reintroduced as Reg. No. 15, 1922, 12 Geo. 5, c. 5, Reg. No. 48 STAT. R. & O. N.I. (1950). This latter was revoked by Reg. No. 187 STAT. R. & O. N.I. (1951), and reintroduced as Reg. No. 11(2), 1922, 12 Geo. 5, c. 5, Reg. No. 191 STAT. R. & O. N.I. (1956). Second, there was the power to make internment orders under Reg. No. 23(B), 1922, 12 Geo. 5, c. 5, Reg. No. 36 STAT. R. & O. N.I. (1922), amended by Reg. No. 41 STAT. R. & O. N.I. (1922), and Reg. No. 48 STAT. R. & O. N.I. (1923). Reg. No. 23(B)(1), 1922, 12 Geo. 5, c. 5, was created by Reg. No. 42 STAT. R. & O. N.I. (1940), but revoked by Reg. No. 147 STAT. R. & O. N.I. (1949), and reintroduced as Reg. No. 12(1), 1922, 12 Geo. 5, c. 5, Reg. No. 191 STAT. R. & O. N.I. (1956), and amended by Reg. No. 309 STAT. R. & O. N.I. (1971).

where the Home Affairs Minister could proffer a rationale for such use.[141] In summary, these anti-subversion measures removed the legal certainty essential to the establishment of fundamental freedoms and, therefore, the legal protection of the organization of extra-parliamentary opposition.

The function of these measures served to perpetuate the organization of the Northern Irish society. The Unionist Government, having successfully defeated the Irish nationalists during disturbances suffered by the nascent state, controlled the Northern Ireland Parliament, consolidating their monopoly of political power through the measures described above. The Unionist Party, however, was dominated by the small elite of the large landowners and industrialists whose privileges depended, in the main, upon this continued hierarchical organization of Northern Irish social and political institutions.[142] On the one hand, the anti-subversive laws, by the fact of their existence, rendered the inferiority of the minority community political activities a fact of social and political consciousness in Northern Ireland; this, in itself, is a factor which contributed to Catholic subjugation and obedience. Nevertheless, the unique feature of Northern Irish society is the failure of a labor movement to emerge as a strong influence in social and political life.[143] The Unionist Party, which was dominated by the large landowners and industrialists, maintained the hegemony of this elite over the Protestant workers. So long as the union between Great Britain and Northern Ireland remained under attack from the Catholics in the North, who were aided by greater numbers of Catholics in the Republic, there was a constant "clear and present danger" that the Northern Ireland Government might be destroyed in a civil war or insurrection. In this way the permanent enactment of the Special Powers Acts contributed to the maintenance of the social solidarity within the Protestant community, and that solidarity meant the continued leadership of the elite. However, the civil rights movement of the late 1960's did not include among its aims the dissolution of the Northern Ireland

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[141] R. (O'Hanlon) v. Governor of Belfast Prison, [1922] 56 Ir.L.T.R. 170; McEldowney v. Forde, [1969] 3 W.L.R. 179; Sills, *The Uncertainty of Special Powers*, 33 MOD. L. REV. 327 (1970).

[142] *See* G. BELL, *supra* note 20, for the composition and interests of the Unionist Party. *See also* M. FARRELL, *supra* note 14; J. HARBINSON, *supra* note 67; and R. ROSE, *supra* note 12.

[143] This is a recurring theme in Bell's historical analysis of Ulster Unionism. *See generally* M. FARRELL, *supra* note 14, and R. ROSE, *supra* note 12.

Government and posed a peculiar problem for the Unionist Government. It threatened social solidarity in that it raised issues of civil rights which were not concerned with the politics of partition, but nevertheless threatened the traditional sectarian allegiances (Unionist and Nationalist). It was this threat to the social solidarity within the Protestant community which prompted the extreme reaction by the Unionist Government.

The critique of these measures offered by the liberal constitutional theorists focuses almost exclusively on Special Powers Acts, overlooking the measures taken to restrict employment and participation in parliamentary politics.[144] Such a critique distinguishes between the existence of the draconian measures which can be examined and criticized for their breadth and vagueness, and the application of the measures. Commentators point out that, notwithstanding the extreme deprivation of civil liberty, the actual use of these measures was infrequent, usually during periods of rebellion by the I.R.A. and, therefore, necessary to preserve the Northern Ireland Government from being destroyed by the Nationalist menace.[145] At the same time, infrequent usage is also evidence that the Unionist Governments, on the whole, practiced tolerance consistent with that found in liberal democratic states where there is no minority community providing succor to insurrection.[146] This view slights the permanent nature of the Special Powers Acts, and, by focusing on the use of these powers only during "emergencies," ignores its principal function of preserving solidarity within the Protestant community. If liberal constitutional analyses are applied to the measures directed against the civil rights movements, then they must admit either that the Unionist Government was intolerant or that the marches constituted subversive activities. The latter notion was dismissed by the Cameron Report which also criticized the Unionist Home Affairs Minister for abusively exercising his powers (and, by implication, for exercising intolerance).[147] The liberal constitutional critique, by overlooking the principal function of

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[144] *See, e.g.*, Palley, *supra* note 3; H. CALVERT, *supra* note 10; Newark, *The Constitution of Northern Ireland,* in DEVOLUTION OF GOVERNMENT (D. Neill ed. 1950); and Shearman, *Constitutional and Political Development of Northern Ireland,* in ULSTER SINCE 1800: A POLITICAL AND ECONOMIC SURVEY (T. Moody & J. Beckett eds. 1954).

[145] *See* Edwards, *supra* note 98 at 18; H. CALVERT, *supra* note 10, at 384.

[146] *Id.;* Palley, *supra* note 3, at 400-11.

[147] CAMERON REPORT, *supra* note 13, at ¶¶ 146, 148, 157-67.

the Special Powers Acts is, therefore, inaccurate and, perhaps more importantly, obfuscates that function.

When we turn to the prospect of establishing a Bill of Rights in Northern Ireland, these observations must guide the definition of the issues and choice of solutions. The liberal critique, which we briefly outlined above, suggests that there are no objections to vesting in the executive wide discretion to devise and employ counter-subversive laws and regulations. We have demonstrated that this approach inevitably led successive Unionist Governments into the use of such measures to secure the hegemony of the elite within their own party. There is no evidence to suggest that the present United Ulster Unionist Council (UUUC) would depart from the approach. If these wide powers were vested in a coalition Executive, there is a very real prospect that the opposing views of the Unionists and SDLP over public order (including subversion) would precipitate crises, rather than promote stability in the government. The problems in Northern Ireland will be exacerbated rather than resolved by re-introducing the approach which vests wide powers in the executive.

A Bill of Rights might be drafted to curtail the devolved parliament's powers to repress subversive activity. This is best achieved by the Public Order laws, which we have previously suggested be incorporated into the schedule of the Bill of Rights, enumerating with precision the measures which may be taken by parliament and the executive. Furthermore, such legislation should draw a clear distinction between legitimate political activity, which includes the display of flags and emblems and the propagation of nationalist opinions, and all paramilitary organization and ancillary activities which might be proscribed along the lines of section 2 of the Public Order Act of 1936.[148] It must be emphasized that this proscription should be provided in general form and there should be no provision which empowers the executive to proscribe particular paramilitary organizations by name or description. If this approach is adopted, then the "territorial integrity" restriction in Article 10(2) of the European Convention must be dropped and the general provision of Article 17 is restricted, as it should be, to actions which interfere with the rights and freedom of others. It should be explicitly provided that no further restriction can be introduced under Article 17 or, alternatively, it should be deleted altogether from the Bill of Rights.

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[148] Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6.

The effect of these suggestions is that the basis upon which the Bill of Rights is established constitutes one of tolerance by the Protestant community of the minority community's propagation of its nationalist or irredentist ideas. More importantly, organizations formed in that community with the aim of democratically bringing about the reunification of Ireland must likewise be tolerated. This tolerance creates an extra-parliamentary opposition with the avowed aim of dissolving the Northern Ireland Government, but such an opposition must be tolerated if the Bill of Rights is to secure the necessary political power desired by the minority community. As we have previously suggested, this tolerance is diametrically opposed to the solidarity of the Protestants, since it is the intolerance towards the minority's propagation of nationalism which creates the "clear and present danger" to the union between Great Britain and Northern Ireland. At the present time, the establishment of a Bill of Rights would not secure this tolerance, unless it was accompanied with the concomitant suppression of the extreme Protestants.

## IV. EMERGENCY POWERS[149]

Providing for state measures to restore and maintain order in times of public emergencies poses the most difficult issue for constitutional theory in the field of civil liberty. On the one hand, the rule of law, if it is to control the governmental response to an emergency, must dictate that governments explain their decision to declare a public emergency and their actions thereunder in any proceedings instituted in the ordinary courts of law. This is the rational element in positivist conception of law.[150] On the other hand, the decision to restore or maintain order by declaring a public emergency is regarded as the act of the sovereign, especially where it is effected by parliament enacting emergency legislation. The sovereign is not subordinate to the rule of law and is not obliged to explain this decision in a court of law.[151]

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[149] On the recent use of emergency powers in Northern Ireland *see generally* P. HILLYARD, *supra* note 1, and CMND. NO. 5847, *supra* note 6. For an examination of the recurring use of internment in this century in Northen Ireland see J. MCGUFFIN, INTERNMENT (1973). On the use of the military acting "in aid to the civil power" see B. NARAIN, PUBLIC LAW IN NORTHERN IRELAND (1975). On the reform of emergency powers, see D. Twining *et al.*, Emergency Powers: A Fresh Start, Fabian Society Tract No. 416, London (1922).

[150] F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 23-28 (1957).

[151] A. DICEY, *supra* note 91, at 229-32; and F. NEUMANN, *supra* note 150, at 26. Greene v. Secretary of State for Home Affairs [1942] A.C. 284.

Even where the response to a situation is by the promulgation of subordinate legislation, the view predominantly adopted is that the executive should be subject only to the control of the parliament, thereby rendering the instrument beyond the competence of judicial scrutiny.[152] This is the political element in the law in that the initiation of the law is controlled at its source. However, once constitutional theory admits that it is exclusively for the sovereign to promulgate the emergency, even under subordinate legislation, then the corollary is also conceded, namely that the executive also decides when it is restricted from using its emergency powers. In short, the restriction upon the government's declaring an emergency to encroach upon fundamental freedoms is political rather than rational. So long as constitutional theory concedes this absolute sovereignty to respond to the emergency, there is a fatal contradiction between the rule of law as the basis of protecting human rights and the absolutism of the sovereign.

The European Convention for the Protection of Human Rights and Fundamental Freedoms has introduced a qualified concept of public emergencies. First, Article 15 specifies that emergencies arise in "time of war or other public emergency threatening the life of the nation,"[153] which provision, although exceedingly general, nonetheless imposes a definition. Second, the determination of when an emergency arises is not left exclusively to the sovereign, but will be reviewed by the European Commission and Court.[154] Nevertheless, the interpretation of these provisions has construed public emergencies to include the state of apprehended emergency as well as actual emergency.[155] Furthermore, national governments have been permitted a "margin of appreciation"[156] to determine when there is an emergency. The scrutiny

[152] R. v. Halliday, [1817] A.C. 260; Liversidge v. Anderson [1942] A.C. 206. *See also* Keeton, *Liversidge v. Anderson*, 5 MOD. L. REV. 162 (1942); Heuston, *Liversidge v. Anderson in Retrospect*, 86 L. Q. REV. 33 (1970).

[153] For a general discussion of Article 15 see P. WALLINGTON & J. MCBRIDE, *supra* note 8, at 90-91 *See also* A. ROBERTSON, *supra* note 121, at 110-17.

[154] Lawless v. Ireland, [1961] Y. B. EUR. CONV. ON HUMAN RIGHTS 438, 472-74 (Eur. Ct. of Human Rights).

[155] "Greek" Case, [1969] Y. B. EUR. CONV. ON HUMAN RIGHTS 42 (Eur. Comm. on Human Rights). *See also* A. ROBERTSON, *supra* note 121, at 39-41, 111-12.

[156] In Lawless this concept is stated to be:

> The concept behind this doctrine is that Article 15 has to be read in the context of the rather special subject matter with which it deals: the responsibilities of a Government for maintaining law and order in times of war or public emergency threatening the life of the nation. The concept of the margin of appreciation is that a Government's discharge of these respon-

undertaken by the Commission and the Court respects, to some extent, the positivist element in the decision.

The consequences of a government taking action pursuant to Article 15 is that it may "take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."[157] Although the government may be obliged to justify its action as "strictly required by the exigencies of the situation," the provision for derogation in an emergency allows the government temporarily to abrogate these fundamental freedoms and, perhaps in some instances, to restrict the extent to which a section of the community can organize extra-parliamentary opposition in order to initiate constitutional reforms. In short, the provision for derogation is also a license rationally to repress the opposition. The key issue is who determines whether the suppression is "rational" and consequently legitimate.

In Northern Ireland, as we have already observed, the Unionist Governments invoked their emergency powers under the Special Powers Acts to combat the periodic military campaigns of the I.R.A. Additionally, the Northern Ireland Parliament enacted the Emergency Powers Act (NI) of 1926.[158] This was invoked in response to the general strike in 1926 and on two other occasions.[159] The determination that there was an emergency warranting the use of such measures was always the exclusive determination of the executive, and it is clear that the use of such powers has been found to be consistent with the provisions in Article 15 of the European Convention on at least one oc-

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> sibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the court is satisfied at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favor of the legality of the Government's appreciation.

Lawless v. Ireland, *supra* note 154, at 408.

[157] Art. 15(1) However, no derogation is permitted from articles 3, 4 (paragraph 1), 7 and 2 so far as it related to deaths resulting from lawful acts of war, per art. 15(2).

[158] 16 & 17 Geo. 5, c. 8. For comments on this act see H. CALVERT, *supra* note 10, at 386-87, and Palley, *supra* note 3, at 403.

[159] Reg. No. 158, STAT. R. & O. N.I. (1966), and Reg. No. 317, STAT. R. & O. N.I. (1970).

casion—namely, the re-introduction of internment on August 9, 1971.[160]

Nevertheless, it is also true that the minority community did not accept the validity of this executive determination of a public emergency, and the SDLP thereafter abstained from further participation in the proceedings of the Northern Ireland Parliament. Whether the SDLP is "wrong" in its judgment about the invocation of the emergency powers is not the issue; rather, it is the discrepancy between the Unionists, on the one hand, and the SDLP and the Catholic community on the other. What is required for a successful solution of the problem created by the provision for derogation in emergencies (that is, if stability of a coalition government constitutes the criteria for success) is a mechanism which reserves consensus between the coalition parties in the exercise of the powers permitting the derogation. There is a very serious risk that if such powers are vested in one minister or member of the executive, his decision to invoke the powers will divide the executive and compel one section to abstain from participation. Similarly, if jurisdiction to review this decision is vested in a judicial body, perhaps a constitutional court, in the coalition composition of the court may similarly divide and, again, there is a substantial prospect that one or more of the judges will withdraw from participation in the further proceedings. Thus, the power to initiate emergency measures introduces political instability into the constitutional settlement.

The doctrine of necessity injects a further complication into the problem.[161] Although the withdrawal from participation of one party from the government, or of a judge from a court, might appear to render the continued operation of the government and courts incongruous or incompatible with the constitution and, hence, unconstitutional, legal positivism presupposes the necessity for a sovereign to continue existing. The temporary breakdown in the government's proceeding in conformity with the provisions of the constitution in times of emergency does not automatically mean the abolition of the sovereign power in that state.[162] Instead, the sovereignty is assumed by those still exercising the powers and, *ipso facto,* those measures iden-

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[160] REPORT OF THE EUROPEAN COMMISSION ON HUMAN RIGHTS, *supra* note 108. This finding has been referred to the European Court of Human Rights for reconsideration and adjudication by the Irish Government.

[161] A.G. of Republic v. Ibrahim, [1964] Cyprus Law Reports 195.

[162] *Id.*

tified as valid law in the circumstances.[163] By invoking the doctrine of necessity, the sovereign, which is in ordinary times identified with the procedures provided in the constitution, is characterized by those still operating the apparatus of the state, the legislative, executive and judicial functions. The abstention by members of the coalition executive or constitutional court would not prevent the declaration of emergency; rather, it would modify the form of legitimacy.[164]

One possible mechanism for taking the initiative out of the coalition executive would be to vest the authority to initiate the emergency measures in the police and local authorities — that is, along the lines of the procedure provided for in the Public Order Act of 1936, section 3(2).[165] As we also have already observed, such a procedure would be highly unacceptable to the minority community without the establishment of some form of control of the police at the community level. It is this body which is perhaps the most appropriate for initiating a recommendation to the local authority for introducing emergency measures in a limited geographic area for a period not exceeding three months. If the emergency extends throughout the province, the introduction of the necessary measures would require a wide consensus in Northern Ireland and, in view of the divergent interpretations of the situation in August 1971, this procedure prevents precipitous action without such a consensus. At the same time, the final decision to promul-

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[163] R. (Childers) v. Officer Commanding, Portobello Barracks, Dublin, and Adjutant-General of the Forces of the Irish Provisional Government, [1923] 1 I.R. 5. Note expecially O'Connor, M.R., at 13 and 14.

[164] Even a "provisional government" has been deemed an acceptable form of sovereign power for the purpose of executing dissidents during an emergency. R. (Childers) v. Officer Commanding, Portobello Barracks, [1923] 1 I.R. at 14. *See also* R. v. Allen, [1921] 1 I.R. 241.

[165] The Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, § 3(2):

> If at any time the chief officer of police is of opinion that by reason of particular circumstances existing in any borough or urban district or in any part thereof the powers conferred on him by the last foregoing subsection will not be sufficient to enable him to prevent serious public disorder being occasioned by the holding of public processions in that borough, district or part, he shall apply to the council of the borough or district for an order prohibiting for such period not exceeding three months as may be specified in the application the holding of all public processions or of any class of public procession so specified either in the borough or urban district or in that part thereof, as the case may be, and upon receipt of the application the council may, with the consent of a Secretary of State, make an order either in terms of the application or with such modifications as may be approved by the Secretary of State.

gate the emergency measures is subject to political control via the local body responsible for controlling the police, the local authority, and the regional assembly or parliament upon the minister or ministers agreeing to make the necessary statutory instrument.

This solution will appear unattractive to those who consider as paramount both the need for a consensus, an impediment to dealing with an emergency, and for vesting such powers in the central government. It is important to bear in mind that the doctrine of necessity most likely extends to the situation where the local authorities might refuse their co-operation in declaring the recommendation of the emergency measures desired by the executive and, if the courts agree that the situation constitutes a public emergency, they may ignore the elaborate procedures. In reality it is impossible to institute constitutional procedures for regulating the declaration of a public emergency when those in the central government are unwilling to subordinate themselves to impartial scrutiny and the courts are similarly unwilling to impose the supremacy of those procedures.

## V. CONCLUSION

The active proponents of a Bill of Rights in Northern Ireland have endeavored to secure constitutional protection of fundamental freedom so that the organization of extra-parliamentary opposition will not be diminished by the government in that province. Prior to the introduction of direct rule in 1972, the campaign, spearheaded principally by the NICRA, linked the campaign for the Bill of Rights to the struggle for civil rights by the minority community. The principal functions of such a Bill would have been to entrench legal protection of the fundamental freedoms which permit the minority community to initiate the debate over certain issues and, thus, a limited form of power over a system of the party government while securing such legislative reforms from later repeal. The campaign for a Bill of Rights has expanded in that it now appears that there is also a desire in the Protestant community constitutionally to protect the fundamental freedoms so that it too may initiate the debate over certain constitutional issues. It is also important to recall that the civil rights movement, although its aims sought equality for the Catholic community, was not exclusively drawn from the minority community, and such a movement inevitably erodes the traditional sectarian boundaries in political parties. The protection of those civil liberties which permit such a campaign will undoubtedly contribute to the progressive

political development in the province, notwithstanding the transient disruption to the stability of extant parties and party allegiances.

The proponents of a Bill of Rights, unfortunately, sometimes assume that consensus over governmental institutions is either irrelevant to the establishment of a Bill of Rights or that once a Bill is enacted, the consensus will subsequently emerge.[166] We have contended that the opposite is the case, and that it is crucial that the proponents of the Bill examine the societal institutions necessary to ensure that there is a basis for tolerance by both communities of each other and toward facilitating the development of cross-sectarian tendencies. First, the existence of a coalition executive is necessary but, as we have seen, it is insufficient for the protection of fundamental freedoms. More important, without the requisite consensus in other areas, the executive inevitably will be brought into the controversy over the functioning of other institutions in society, especially the police, and instability will ensue. Second, there must be some consensus over the police and judiciary, as both will be responsible for administering and construing the laws that protect and restrict these freedoms. As it is accepted that the administration of such laws should be subject to political control analagous to ministerial responsibility, we have suggested that there should be established some form of community control of the police which would institute direct political responsiblity at the local level. This would also have the important advantage of gaining the acceptance of the police in the minority community. Nevertheless, this suggestion undoubtedly would be bitterly opposed by those extreme Protestants who identify the continued central responsibility for public order law with the suppression of republicanism and subversion and, hence, the maintenance of the union with Great Britain and Northern Ireland. In short, although major police reform is necessary

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[166] This is the position of the SDLP, the Alliance Party, the Unionist Party of Northern Ireland, and the Northern Ireland Labour Party as indicated by the NORTHERN IRELAND CONSTITUTIONAL CONVENTION REPORT ¶ 129 (1975). NICRA has taken the same position. NORTHERN IRELAND CIVIL RIGHTS ASSOCIATION, BILL OF RIGHTS (1975). For a critique of the NICRA position, see D. Lowry & R. Spjut, *Loopholes and Liberties—The NICRA Bill of Rights,* FORTNIGHT REV. (Belfast), May 23, 1975, at 5; for the NICRA reply, see *Letters to the Editor,* FORTNIGHT REV. (Belfast), June 6, 1975, at 18. On December 12, 1972, the Communist Party of Great Britain and the Communist Party of Ireland issued a joint statement urging repeal of the Special Powers Act and its replacement with a Bill of Rights. *See* 2 DEUTSCH & MAGOWAN, *supra* note 38, at 250. *See also* G. MCLENNAN, BRITAIN AND THE IRISH CRISIS: A COMMUNIST VIEW OF THE WHITE PAPER 14-15 (1973).

before a Bill of Rights can be administered in Northern Ireland, such measures will be most difficult to institute. Finally, there must be reform of the judiciary in order to secure the minority community's confidence in its interpretation of the Bill of Rights. Perhaps the most appropriate model is the tripartite court which operated in Cyprus.[167]

Those proponents of the Bill of Rights who suggest that the European Convention should be the model must recognize its serious limitations in the context of Northern Ireland. The express declaration in law that the fundamental freedoms shall be recognized and protected is no doubt necessary, but it is far from sufficient. The law governing public meetings and processions, as we have seen, cannot be left to the interstitial methods of judicial development because that will not provide the ncessary legal certainty which is crucial to the protection of those organizing extra-parliamentary opposition on major constitutional issues. Such an approach might induce stability into the confrontation between government and opposition. Moreover, there is no certainty in the field of subversion, which if subsumed under the heading of public order may itself be subverted or emasculated by the regional government. Recent history in the province amply documents the need for extreme caution in this area and we suggest that no provision be made to counter the opposition to the union between Great Britain and Northern Ireland. This suggestion also requires reconsideration of the "territorial integrity" restriction in Article 10(2) of the European Convention. Finally, an examination of the problem of emergencies suggests two related conclusions. Some crises might be dealt with under the procedure which we suggest, but in a major confrontation between the communities, force will undoubtedly prevail and find legitimacy in the doctrine of necessity. Constitutions and Bills of Rights, however, are not drafted to govern the conduct of civil war.

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[167] CYPRUS CONST. (1960) arts. 131-53.