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Anne Smith

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INTERNATIONALISATION AND CONSTITUTIONAL BORROWING IN DRAFTING BILLS OF RIGHTS

ANNE SMITH*

Abstract This article looks at the recent phenomena of internationalisation and constitutional borrowing in drafting Bills of Rights. Using South Africa, Canada and Northern Ireland as its focus, this article posits key lessons to be considered in any society hoping to use these two strategies to best effect in designing indigenous Bills of Rights. This contribution makes the case that while these are viable strategies in equality and other rights provision drafting, before embarking on such trajectories, the local context must be considered. In short, effective and sensitive interaction between the ‘local and the global’ can result in a more rewarding project when those involved in formulating an indigenous Bill of Rights simultaneously reflect best international practice. The article is supported in its conclusions by a series of semi-structured interviews with key players involved in the drafting process in Northern Ireland and Canada.

I. INTRODUCTION

When drafting Bills of Rights, is it useful to look outside a country’s own experience, at sources ‘from abroad’?¹ In other words, what role, if any, should internationalisation and comparative constitutional borrowing² play in designing indigenous Bills of Rights? Using three case studies—South Africa, Canada and Northern Ireland—this article seeks to address this

* Lecturer in Human Rights Law, University of Ulster, Transitional Justice Institute (Northern Ireland). <A.smith1@ulster.ac.uk> . This paper is based on an earlier draft presented at the Irish Society of Comparative Law Second Annual Conference (Belfast, 5–6 March 2010). I am grateful to Mary O’Rawe, Fionnuala Ni Aolain and two anonymous reviewers for their comments on an earlier draft of this article. All errors are the sole responsibility of the author. Interview quotations are from interviews conducted by Anne Smith, the late Stephen Livingstone and Rachel Murray as part of a project funded by the Nuffield Foundation, Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with comparisons from South Africa, February 2005. Although this article draws upon the interviews conducted for that research, the views in the article are those of the present author alone. The interviews in Canada were conducted with the assistance of the Molson and Canadian Studies and the UK Postgraduate Students Canadian Studies Travel Awards.

¹ H Corder and L du Plessis, Understanding South Africa’s Transitional Bill of Rights (Kenwyn: Juta 1994) 47.

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question and bring this practice to light by assessing the usefulness of these two strategies for comparative/global constitutionalism. The article postulates that for all the potential upside of constitutional borrowing and internationalisation, before embarking on such strategies the question of ‘fit’ needs to be seriously considered. In such exercises, it is also important that comparative and international law is not be used as a ceiling but rather as a floor, or starting point. The strategies hold most potential where international texts and comparative experience are viewed as benchmarks to measure whether a Bill of Rights reflects (and possibly develops) both best international practice and also the local context.

This article has been written in a period that has witnessed a global trend towards the adoption of Bills of Rights. The issues raised will have relevance for societies, such as Northern Ireland, which are in the process of debating, designing or adopting Bills of Rights. In testing the limits of these increasingly used strategies, the article therefore stands at an interface of academic praxis with policy issues. Although the process of internationalisation is well underway, especially in regard to human rights ‘borrowing’, and some work has been done on what one academic has called ‘transnational judicial conversations on constitutional rights’, less work has focused on the role international and comparative law/experience has played in the drafting process of Bills of Rights, in particular the formulation of an equality provision. Focusing on this issue, this article seeks to fill this gap and will add to the literature on the role sources ‘from abroad’ play in drafting Bills of Rights. The three case studies—South Africa, Canada and Northern Ireland—have been chosen for two reasons. Firstly, although Northern Ireland is still processing their Bill of Rights, like South Africa and Canada, the use of internationalisation and constitutional borrowing have been common themes underpinning the drafting process. The three case studies therefore present micro studies of the challenges and attractions of constitutional borrowing and internationalisation. Secondly, all three jurisdictions have experienced an array of past policies of segregation and unequal treatment, albeit on different grounds and to different degrees (see below). Equality was therefore at the centre of constitutional reform for South Africa, Canada and Northern Ireland. Equality therefore occupies a key position in a Bill of Rights in the sense of being central to the success of constitutional change and without which all rights in a Bill of Rights might remain empty and devoid of meaning.

3 Hirschl has described this phenomenon as a ‘booming industry’. R Hirschl, Towards Juristocracy The Origins and consequences of the new constitutionalism (Harvard University Press 2004) 220.


5 I write in April 2011.
At the outset, for conceptual clarity and coherence of argumentation, Part II will consider briefly what the terms ‘constitutional borrowing’ and ‘internationalisation’ denote. This article views internationalisation and constitutional borrowing as two different though overlapping processes. The article does not engage with a detailed definition of these terms and the different types of borrowing, as the focus of this paper lies not so much with theorising the concepts as examining the merits or otherwise of these phenomena in the three case studies. These will be discussed in Part III. Following on from this examination, Part IV then draws conclusions with resonance, not just for Northern Ireland, but for other jurisdictions involved in constitutional design.

II. WHAT ARE CONSTITUTIONAL BORROWING AND INTERNATIONALISATION?

For the purposes of this article, constitutional borrowing and internationalisation occur when drafters look at other jurisdictions’ Bills of Rights and at international law/standards when considering what provisions should or should not be included in a Bill of Rights. This results (or not) in an act of inserting language taken from another country’s Bills of Rights and from the relevant international treaties. As Alder notes, what is borrowed:

could be any part, large or small, of the [Bill of Rights/international treaty]: a single sentence in the text of the [Bill of Rights/international treaty], a whole article in the [Bill of Rights/international treaty]… a set of formal or informal understandings among legislators, the executive branch, or even among the population at large as to what the [Bill of Rights] requires.7

Some justifications, which are by no means exhaustive, come to mind to explain why countries engage in internationalisation and wholesale constitutional borrowing, ‘partial borrow[ing]’ or ‘non-borrowing’.9 Regarding constitutional borrowing, countries who have little or no experience in designing Bills of Rights may wish to draw upon the experience of other countries, especially those who share similar fundamental values and who have already drafted a Bills of Rights. This may offer the prospect of expanding a country’s understanding of the drafting problems and lead to a consideration of some solutions in designing a Bill of Rights. Likewise, drawing upon internationally agreed standards can be influential in expediting compromises when there is a specific controversial issue at stake, thereby preventing the stagnation of the drafting process or preventing it from becoming enmeshed in

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7 M Alder, ‘Can Constitutional Borrowing be Justified: A Comment on Tushnet’ (1998) U of Pennsylvania J of Constitutional L 350, 351. Alder’s use of the word ‘constitution’ has been replaced with the ‘Bill of Rights’ and ‘international treaty’ to make it specific to this article.
8 Tebbe and Tsai (n 6) 504.
pre-existing divisions and disagreements. In this way, drafters can be enabled to focus on a somehow more neutral, objective and universally approved standard. Or utilising constructions designed by others can provide some distance between the frenetic and impassioned local argumentation and what is actually necessary to meet agreed international standards. In these ways, both strategies can act as a means of ‘persuasive authority’,10 and ‘legitimation’11—giving credibility to a proposed solution. This in turn can enable internationalisation and constitutional borrowing to be valuable tools in the mobilisation and canvassing of support to help ensure recognition and acceptance of a Bill of Rights in the society in which it is to operate. In short, the strategies can potentially be a ‘passport to international acceptability’12 and a ‘badge of legitimacy’13 amongst the local populace.

Departing from another country’s approach and/or international law or ‘non-borrowing’, can also be a useful exercise. As Justice Breyer has argued, although each nation has political and structural differences, the experience of other jurisdictions ‘may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem’.14 Thus, there are many advantages of ‘considering’15 or referring to international and comparative law/experience, short of necessarily ‘adopter’.16 ‘Non-borrowing’ can help sharpen and broaden the drafter’s understanding of a particular problem but, given the differences between countries, different solutions in different places may be necessary. This can help ensure that it is a sui generis Bill of Rights reflective of the local realities/context so that the Bill is not a foreign product which is inappropriate in the domestic context. As noted above, the question of ‘fit’, and the particular history of a country, needs to be addressed if a Bill of Rights is to be accepted and recognised by the local populace. As Davis states:

Notwithstanding pressures, both internal and external, on the country to ensure that its legal system is congruent with international human rights law, the indigenous history of the country plays a vital role in the interrogation of constitutional concepts of the nation state and, accordingly, in the development thereof.17

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15 McCrudden (n 4) 512.
16 ibid. For further information on the choice not to transplant, arguably, one of the most common methods of borrowing, see Tebbe and Tsai (n 6).
17 Davis (n 2) 195.
On the downside of constitutional borrowing and internationalisation, there are a number of practical difficulties including the questions of which nations’ Bill of Rights and international treaties should be considered and how much weight they should be afforded.\textsuperscript{18} It has been argued that internationalisation and constitutional borrowing could encourage ‘cherry picking/forum shopping’ in the choice of jurisdiction/international law/body cited, ensuring that the jurisdiction/international law chosen will likely support the conclusion favoured by the drafters.\textsuperscript{19} This arises as constitutional borrowing and internationalisation are multifarious. Furthermore, as some key international and regional human rights instruments such as the European Framework Convention on the Protection of National Minorities of 1995 (‘the Framework Convention’), do not have a judicial body with the authority to determine the meaning of the various conventions, there is an added problem of determining the implications of the various conventions, especially if the meaning of the conventions is deeply ambiguous. In the absence of a judicial and/or authoritative body, a number of quasi-authoritative bodies have been established. This increases the risk of forum shopping as drafters may take advantage of the growing number of international and regional human rights institutions with quasi-authoritative status to choose the institution most likely to provide them with the advice they prefer. As we will see in the following section, the issue of ‘forum shopping’ has been raised in the Northern Ireland Bill of Rights debate.

In sum, although constitutional borrowing and internationalisation are part of constitutional lawmaking, this does not automatically result in these strategies being successful or valid. There are both benefits as well as interesting tensions underpinning these phenomena, some of which will now be examined in further detail.

\section*{III. CONSTITUTIONAL BORROWING AND INTERNATIONALISATION: SOUTH AFRICA, CANADA AND NORTHERN IRELAND}

Before addressing the validity of these two strategies, as this article argues that Bills of Rights need to be reflective of the local context, this section begins with a brief outline of the political, historical, socio-economic and legal background of the three jurisdictions.

\textsuperscript{18} Theoretically, although there should not be a substantial divergence regarding the core rights to be included in a Bill of Rights, as the case studies illustrates, difficulties arises in the precise formulation and the various kinds of rights to be included in a Bill of Rights.

\textsuperscript{19} The terms ‘cherry picking’ and ‘forum shopping’ are used by McCrudden (n 4) 507 and in his chapter C McCrudden, ‘Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities’ in J Morison, K McEvoy and G Anthony (eds), Judges, Transition and Human Rights Cultures (OUP 2007) 318.
The political and legal history in all three jurisdictions was characterised by inequality albeit on different scales. In South Africa, this was manifested by forty-six years of apartheid rule by the National Party (‘NP’). Under apartheid\textsuperscript{20} numerous statutes were passed by the NP which allowed for the development of what has been described as a a ‘wicked system of law’.\textsuperscript{21} Under this system, the majority of black South Africans\textsuperscript{22} suffered systemic discrimination in a number of areas such as employment, education and housing.\textsuperscript{23} Even prior to apartheid, there already existed a ‘wicked system of law’ under the auspices of the infamous Native Land Act 1913 and the Development Native Trust and Land Act of 1936 which effectively sanctioned the dispossession of land from indigenous people. The Constitution of 1910 also excluded black people from parliament and denied most of them the right to vote.

The above statutes were rarely challenged by the courts as, during the apartheid years, South Africa operated under the doctrine of parliamentary sovereignty. Under this model, the judiciary operated in an extremely ‘executive minded’\textsuperscript{24} manner and came to be regarded in the eyes of the majority as a biased arm of government dispensing ‘white man’s justice’.\textsuperscript{25} Not only did the South African government show disregard for the rights of the majority of South Africans, interestingly, for the purposes of this article, the NP government viewed international and comparative law as irrelevant:

It cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part–let alone a significant part in the decision of the protection of group and individual rights in South Africa. Safety does not lie in the hope that our courts will apply the norms of international law.\textsuperscript{26}

\textsuperscript{20}Apartheid is the Afrikaans word for separateness.
\textsuperscript{22}Using such racial terminology is problematic. Under apartheid, South African society was divided into four ‘racial groups’—whites, coloureds, Indians and Africans. In this account, the term ‘black’ means people of colour and ‘white’ means non-black people. Spitz and Chaskalson state such terminology has the unfortunate effect of perpetuating the usage of apartheid’s racial terminology. R Spitz and M Chaskalson, The Politics of Transition A Hidden History of South Africa’s Negotiated Settlement (Hart 2002) 4.
\textsuperscript{23}Some examples of the discriminatory legislation include the Population Registration Act 30 of 1950 which controlled where South Africans were born; the Group Areas Act of 1950 provided for the segregation of different racial groups in different areas and resulted in a number of forced removals. For further information on these and other legislation. See ibid.
\textsuperscript{24}N Bawa, A Judiciary in the midst of Transformation February 1999, commissioned by the Standing Advisory Commission on Human Rights, 4.
\textsuperscript{25}ibid 3.
This ambivalent attitude was manifested as the South African government refused to sign any international treaties until 1994 with the exception of the UN Charter of 1945. Furthermore, the NP government abstained from voting on the General Assembly’s Universal Declaration of Human Rights in 1948 dismissing it as communist propaganda. However with South Africa’s new dispensation in 1994 which heralded the introduction of a new constitution, the role of international and comparative law moved from the ‘margins into the mainstream’. International law was no longer regarded as irrelevant but played a significant role in mobilising concern against apartheid. South Africa presents an interesting case study to examine the role international and comparative law has played in the drafting of the equality provision and the Bill of Rights generally.

As 1994 is a landmark in South African history, 1982 is equally important for Canadian history as this was the year when Canada, like South Africa, moved from the British model of parliamentary supremacy to constitutional supremacy. Prior to 1982 courts could not set aside a legislative act except on allocative or federalism grounds. Under this system inequality was rife and was experienced by a number of groups such as indigenous people, women and Francophones. For example, up until 1930 women were not recognised as persons which as a consequence, prohibited them from holding elected or appointed offices and from entering into training for various professional occupations, especially in the legal field. It was not until 1940 that all Canadian women gained the same federal/provincial voting rights as men. Federally, Japanese Canadians could not vote until 1948 and status Aboriginals gained the franchise only in 1960.

The French Canadians or Québécois also suffered language-based discrimination. A series of legislative enactments across Canada seriously restricted French-language education and virtually eliminated the use of French in

27 ibid.
28 There was a shift from parliamentary to constitutional supremacy under both the 1993 Interim and 1996 Final Constitutions.
30 In contrast to the NP’s government’s disdain for international law, there was huge interface with international law by international bodies and civil society and non-state actors. The General Assembly’s denunciation of apartheid as a ‘crime’ and ‘genocide’, is an apt illustration of the international community’s role in the fight against apartheid. For further information on this issue see C Bell, Peace Agreements and Human Rights (OUP 2000) 43–44.
31 Canada operated under the British North America Act 1867.
32 This was changed when the Privy Council ruled in the ‘Persons’ case that the word ‘person’ was ambiguous and could include women. This case was brought by five Alberta women who argued that women should be considered ‘qualified persons’ who could be appointed to the Senate under s 24 of the British North America Act, 1867. In the Matter of a Reference in the meaning of the word “Persons”’ in s 24 of the British North America Act, 1867 (1928) SCR 276.
provincial legislatures and courts outside Québec. Likewise, the Jewish community also experienced discrimination and were described by the Minister of Justice in 1906 as ‘outsiders’. It was not desirable for ‘us’ the Canadian citizens, to be ‘too considerate of the wishes of alien immigrants . . .’

Even with the introduction of the Canadian Bill of Rights in 1960 (‘CBOR’), discrimination still took place. This was due primarily, though not exclusively, to the limited formalistic wording of the equality right (see below) and to it being an ordinary Act of Parliament. As the Bill of Rights had no constitutional status, discriminatory federal laws could not be invalidated. The only ‘notable exception’, when the Court by a slim majority of five to four struck down an inconsistent statute, was the case of Drybones.

Like South Africa, there was increased dissatisfaction amongst both Canadian and non-Canadian citizens with this model of parliamentary sovereignty and an increased recognition that citizens should not have to rely on the grace of the legislatures for protection of their rights. Thus, from the late 1960s there were concrete efforts, especially from women in the political sphere, to obtain greater recognition of their rights. Their efforts along with others coupled with the backing of the Prime Minister at the time, Trudeau, paid off as the Canadian Charter of Rights and Freedoms (‘Charter’) was introduced. This was part of the Constitution Act 1982. As will be seen shortly, international law played a key role in helping to strengthen rights protection which ultimately was reflected in the Charter.

Northern Ireland’s political and legal history was dominated by half a century of one-party rule wherein the Nationalist/Catholic minority suffered discrimination on grounds of religion and political belief at the hands of the Unionist majority in areas of public and private employment, housing,

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34 In 1890 the Manitoba legislature passed an Act abolishing official bilingualism and depriving Catholics of their publicly funded schools.
36 CBOR, s 1(b) states ‘the right of the individual to equality before the law and the protection of the law’. The author is not implying that a Bill of Rights can automatically halt discriminatory practices.
37 The CBOR did not apply to provincial laws as the case of Ward et al and Board of the Blain Lake School Unit No 57 [1971] WWR 161 (Sask QB) aptly illustrated. The applicant sought an order to quash a resolution passed by a local school board. The Court ruled that the CBOR did not apply to provincial legislation.
38 R v Therens [1985] 1 SCR 613, 638 per Justice Le Dain.
39 R v Drybones [1970] 3 SCR 355. The Court held that s 94 of the Indian Act 1952 which made it an offence for an Indian to be intoxicated off a reserve, was incompatible with the CBOR as non-Indians were not subject to a similar prohibition. The majority held that this violated the right to equality before the law. For a detailed analysis of this and other equality cases under the CBOR, see H Fogarty, Equality Rights and their Limitations in the Charter (The Carswell Co 1987) 35–84.
40 CAN CONST (Constitution Act, 1982) pt 1 (Canadian Charter of Rights and Freedoms).
education, welfare, policing and emergency law. Similar to South Africa and Canada, discriminatory legislation was allowed as the Northern Ireland courts, which were predominantly dominated by the Unionist community, were reluctant to find against parliament due to the doctrine of parliamentary sovereignty. Northern Ireland is also emerging from decades of violent political conflict. As such it may be termed a ‘conflicted’ or ‘transitional’ society with similarities to other transitional countries such as South Africa. As well as the violent struggle, from the 1960s onwards, there was also a push in several other circles for equality and a Bill of Rights. However despite formal acceptance by political parties of the need for a Bill of Rights and while the previous constitutional agreements set the seeds for a Bill of Rights, it was not until the advent of the 1998 Good Friday Agreement (‘the Agreement’) that the debate moved from a somewhat abstract one to a very concrete phase. The Agreement required the Northern Ireland Human Rights Commission (‘NIHRC’), a statutory body set up by the Agreement, to advise the Secretary of State on a Bill of Rights for Northern Ireland. Thus, unlike South Africa or Canada, the Agreement did not contain a Bill of Rights. Instead, the Agreement enjoins the NIHRC:

to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience.


42 H Calvert, Constitutional law in Northern Ireland, A study in Regional government (NILQ 1968).


45 For an overview of the political parties’ attitude towards a Bill of Rights see CAJ, A Bill of Rights for Northern Ireland Through the Years- the views of the political parties, July 2003; Making Rights Count October 1990.

46 The Anglo-Irish Agreement, 1985 established an Intergovernmental Conference where the Irish government could put forward proposals which included considering the advantages and disadvantages of a Bill of Rights for Northern Ireland (art 5).

47 Strand three, paragraph 4 of the Human Rights Section of the Agreement (emphasis added).
Although the above paragraph is replete with ambiguous phrases relating to the NIHRC’s mandate concerning the Bill of Rights, for the specific purposes of this article, it is clear that the NIHRC is mandated to draw upon international standards/experience. In other words, this explicit injunction paves the way for constitutional borrowing and/or internationalisation. However, as the following section illustrates, this injunction has resulted in both positives and negatives which make Northern Ireland a particularly pertinent case study for the purposes of this article.

B. The (Non-)Usefulness of Internationalisation and Constitutional Borrowing

The above brief and non-exhaustive overview illustrates that due to the inequalities in the three jurisdictions, unsurprisingly, as they embarked on designing their Bills of Rights, equality occupied a key position. For example, in the South African Bill of Rights, equality is the first right. However, notwithstanding its centrality, as equality is an amorphous concept, all three jurisdictions experienced difficulties. These difficulties resulted from the implications of incorporating controversial notions of equality into an equality guarantee.

Broadly speaking, a distinction is frequently drawn between formal and substantive notions of equality. Formal equality requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of arbitrary characteristics such as religion, race or gender. This formulation resonates with the original Aristotelian conception of equality; that like cases should be treated alike. A substantive notion of equality is concerned with making sure that laws and/or policies do not impose subordinating treatment on groups already suffering social, political or economic disadvantage. The focus is on the group and on the impact/effect of the law on its social, economic or political conditions. It recognises that sameness of treatment can reinforce inequality and, in certain circumstances, equality actually requires differential preferential treatment/affirmative action. One of the difficulties facing the drafters was therefore: should the equality right incorporate affirmative action? In other words, can discrimination, which generally refers to differential treatment on grounds such as sex, race and so on resulting in the individual or a group of individuals being disadvantaged, be fair or legitimate? The decision in all three jurisdictions was

48 For an overall analysis of the different elements of the NIHRC’s mandate on the Bill of Rights, see A Smith, ‘The Drafting Process of a Bill of Rights for Northern Ireland’ [2004] Public L 526.
49 It is beyond the scope and focus of this article to discuss the differences between the two notions of equality and the tensions underpinning both understandings. For further information see S Fredman, Discrimination Law (OUP 2011).
yes, though in Northern Ireland, the final decision has yet to be approved (see below). Primarily, though not exclusively, the drafters were able to reach a decision with the help of international law and constitutional borrowing. For example, the drafters in South Africa sought guidance from the International Convention on the Elimination of all Forms of Racial Discrimination (‘ICERD’) and the Convention on the Elimination of All Forms of Discrimination Against Women (‘CEDAW’). Although, arguably, the wording of ICERD ‘special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . shall not be deemed racial discrimination . . .’ is potentially stronger than ‘may be taken’, it is nonetheless an example of ‘partial borrowing’. Furthermore, the difference in wording may be semantic and the inclusion of affirmative action in the first instance in a Bill of Rights is the most important point. The explicit recognition of affirmative action avoids litigation on the question of whether such measures are consonant with the promise of equal protection of the law. For this reason, the Canadian Charter ‘considered’ the American approach to equality but did not ‘borrow’ from it. The absence of an affirmative action provision in the equal protection clause, which was introduced through the Fourteenth Amendment to the US Constitution, has created confusion regarding the legality of whether affirmative action is consonant with the promise of equal protection of the law.

Ignoring the American model, Canada sought to avoid such confusion by reflecting the global trend as the equality provision in the Charter explicitly allows for affirmative action. America’s waning substantive influence may also be attributed to the different vision of equality Canadians and non-Canadians have compared to the American understanding. The former vision focuses on the need to eradicate subordinating treatment through treating people differently if needs be, while the latter concentrates on equal protection and treating people the same. Given the differences not only in the vision of equality but also the political and social structures in place, it makes sense that

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51 S 9(2) reads: ‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken’. See also s 9(4) ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’.

52 The equality provision states that no state ‘shall deny to any person within its jurisdiction the equal protection of the laws’.


54 S 15(2)(1) ‘does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability’.
the Canadian Charter reflects the global human rights instruments more substantially than it does the American model. In such circumstances, it is therefore acceptable for drafters to ignore comparative law/experience if such a source does not provide assistance in helping to formulate a particular provision. Adopting such an approach helped Canada negate the risk of the importation and interpretation of an alien Bill of Rights to the Canadian context.

In the light of the legacies of inequality resulting from the Northern Ireland conflict, arguably, it also makes sense for a Northern Ireland Bill of Rights to reflect international standards and incorporate affirmative action. This is exactly what the NIHRC’s advice to the Secretary of State does in recommending affirmative action as an integral part of the draft equality provision. Internationalising the issue and referring to other jurisdictions, most notably South Africa and Canada, helped change the affirmative action from a permissive to a directive clause. The South African influence in particular is evident with the frequent use of the term ‘unfair discrimination’. Cognisant of the need to address past inequalities, rather than including a simple prohibition of discrimination, the NIHRC opted for a ‘belt and braces approach’.

Using the term ‘unfair discrimination’, as the South African experience shows, helps ensure that affirmative action is possible in contexts where a relatively privileged person experiences discrimination, but that discrimination will not be judged to be ‘unfair’ if it has the effect of advancing and protecting those who are in a less advantageous position. Not only did the strategies of internationalisation and constitutional borrowing strengthen the formulation of the draft equality clause, they helped prevent the debate from becoming an internally focused one which could have become stymied due to lack of

55 Recommendation 5 states ‘Public authorities must take all appropriate measures to eliminate unfair discrimination, and where circumstances so warrant and in accordance with the law, must take all appropriate and proportionate measures to ameliorate the conditions of disadvantaged groups, including those individuals or groups disadvantaged because of the prohibited grounds in Recommendation 2. Recommendation 6 reads ‘Nothing in a Bill of Rights for Northern Ireland shall preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those individuals or groups disadvantaged because of the prohibited grounds in Recommendation 2, and is a proportionate means of achieving this objective’. NIHRC, A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland (10 December 2008) 84.

56 The NIHRC cited CEDAW, ICCPR and CERD.

57 Recommendation 2 states: ‘No one shall be unfairly discriminated against by any public authority on any ground such as…’; recommendation 3 provides an example of unfair discrimination: ‘consists of any provision, criterion or practice which has the purpose or effect of impairing the ability of any person to participate on an equal basis with others in any area of economic, social, political, cultural or civil life’; recommendation 4 is the obligation to enact legislation to ‘prevent or prohibit unfair discrimination’; and recommendation 5 requires public authorities to ‘take all appropriate measures, to eliminate unfair discrimination . . .’. A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland (n 55) 80–83.

58 Corder and du Plessis (n 1) 141.

agreement on this divisive topic.60 In short, the strategies acted as a mean of ‘persuasive authority’.

Affirmative action also came into conflict with the debate surrounding whether to include the right to self-identification in a Bill of Rights for Northern Ireland, and on this occasion, the use of international law/bodies could have potentially compounded the controversy. Before addressing this issue, for contextual purposes, it is important to provide some background information. The Agreement not only explicitly refers to international experience, but also states that the Bill of Rights should ‘reflect the principles of mutual respect for the identity and ethos of both communities’. From the outset of the Bill of Rights debate, this phrase has been problematic for the NIHRC. There has been a distinct lack of consensus, both within the NIHRC, and also as regards political parties and organisations, on the interpretation of this phrase. On the one hand, some have argued and continue to argue for an ‘individualistic/separationist’ interpretation of this phrase, whereby protection and entitlement to benefits (through a Bill of Rights) should be accorded, not on the basis of being a member of a group but through status as an individual.61 On the other hand, some favour a ‘communal/group’ approach whereby some entitlements and responsibilities are given to groups rather than to individuals.62 Individuals, under this approach, are treated as members of groups and benefits are conferred, not on the basis of individual identity, but in relation to group affiliation.63 In the Northern Ireland context, this has translated into a privileging of a discourse around two communities. The shorthand terms ‘Nationalist/Catholic/Irish’ and ‘Unionist/Protestant/British’ have thereby been fixated on to the detriment of other cross-cutting or more fluid identities.

The Agreement itself seems to tend towards incorporation of this latter approach in a number of respects. For example, the voting system in the Northern Ireland Assembly requires parties to designate themselves as ‘Nationalist’, ‘Unionist’ or ‘Other’. Another example is to be found in Northern Irish equality legislation which, although it preceded the Agreement, was underpinned by the Agreement, and requires registered employers and

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62 C Harvey, ‘Stick to the Terms of the Agreement’ Fortnight July/August 2003, 9.

63 The terminology (separationist and group) is borrowed from W Kymlicka, Multicultural Citizenship: A liberal theory of minority rights (Oxford: Clarendon Press 1995) ch 3.
public authorities to monitor the religious composition of their workforce to ensure a fair balance between the ‘two communities’—Catholics and Protestants. However, the Agreement’s emphasis on group identity and the ‘two communities’ has been criticised within and outside the NIHRC. One former human rights commissioner stated:

Bits of the Good Friday Agreement are too much focused on the two communities . . . . I think there are strong individual human rights principles which would justify the Commission in saying: “those bits of the Agreement . . . are not a good thing in terms of the future of Northern Ireland.”

Harvey argues that Irish Nationalists and British Unionists really do exist and the institutional mechanisms and the equality measures established or underpinned by the Agreement are there because of the reality of the political situation in Northern Ireland. The author agrees with Harvey: as the conflict was primarily between two main political communities (Irish Nationalists and British Unionists) it was likely that any settlement would be directed towards building confidence and trust between the two main political communities and trying to avoid some of the legacies of the past. Furthermore, as the current Bill of Rights debate derives its legitimacy from the Agreement, those involved in the debate should, as the title of Harvey’s article, suggests, ‘stick to the terms of the Agreement’. However, when the NIHRC first published its draft Bill of Rights in September 2001, in respect of identity rights, it did not ‘stick to the terms of the Agreement’ but opted for an individualistic approach. The majority of the NIHRC proposed that:

Everyone has the right freely to choose to be treated or not to be treated as a member of what might otherwise be perceived to be their national, ethnic, religious or linguistic community and no disadvantage shall result from this choice or from the exercise of rights connected to this choice.

The NIHRC stated that these proposals drew heavily on the Framework Convention. However, controversially, the NIHRC substituted the word ‘minority’ in the Framework Convention for ‘community’. According to some

64 Interview with a former Commissioner, Belfast, April 2003. Other critics include Wilford (n 61); Dixon (n 61); and Taylor (n 61).
65 Harvey was appointed to the NIHRC in September 2005.
66 Harvey (n 62) 9. Harvey was not a commissioner when he wrote this article.
67 ibid. It is important to note the Agreement, as with all treaties, the ‘terms’ are not always self-evident and constitute constructive ambiguity. Furthermore, for some, the ‘two tribes’ thesis is problematic and has been increasingly discredited for its failure to identify both the State as a key actor and identities such as class as salient factors in the escalation and perpetuation of conflict. See Wilford (n 61); and Taylor (n 61).
68 Making a Bill of Rights for Northern Ireland. A Consultation by the Northern Ireland Human Rights Commission (n 60) 27.
69 Art 3(1) of the Convention states ‘Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice’.
within the NIHRC, the rationale for the substitution was that the term ‘two communities’ was too restrictive. Not everyone in Northern Ireland view themselves as being a member of one of the ‘two communities’. There are those who are neither Unionist nor Nationalist. Some may identify themselves as belonging, for example, to the Muslim or Chinese community. Secondly as ‘minority’ is not defined in the Framework Convention, the replacement with ‘community’ was supposed to avoid constant battles as to who is the minority in a given context. The NIHRC stated that this decision was taken in the ‘light of advice from experts in the field, most notably the legal adviser of the High Commissioner on National Minorities (‘HCNM’) at the Organisation for Security and Cooperation in Europe (‘OSCE’) …’.72

On first reading, the NIHRC’s stance seems defensible. Firstly, the decision to use the word ‘community’ instead of ‘minority’ is an example of ‘partial borrowing’ mentioned earlier—using international law but ensuring it fits the local context and enhances rights protection at the local level. Secondly, it is advisable to seek further guidance from international experts on controversial issues if it helps reach a solution and avoid ongoing conflicts in the process. However, on further examination of the NIHRC’s approach, it becomes less defensible. Instead of enhancing rights protection of the most vulnerable and supplementing existing legislation (which is the purpose of any Bills of Rights), the NIHRC’s approach could have resulted in lowering existing human rights and equality standards for those deemed outside the ‘two communities’, a concern which was expressed by several organisations. For example, the organisation representing ethnic minorities in Northern Ireland, (Council for Ethnic Minorities, NICEM) ‘strongly disagreed’73 with both the NIHRC’s decision and rationale for replacing ‘minority’ with ‘community’ as the cultural concerns of ethnic groups could thereby be undervalued and the disadvantaged position of minority groups could become marginalised or even worse, ignored. The Director of NICEM, Patrick Yu, resigned from the NIHRC on this issue. In his resignation letter, Patrick Yu stated that there was an ‘apparent fixation of a small number of Commission members to pursue identity issues in a way that undermines existing equality protections which threatens aspects of the Agreement’.74

70 Making a Bill of Rights for Northern Ireland. A Consultation by the Northern Ireland Human Rights Commission (n 60) 27.

71 Catholics are the minority in Northern Ireland but Protestants would be the minority if Northern Ireland was ever to join the Republic of Ireland, an option which is provided for in the Agreement.

72 Making a Bill of Rights for Northern Ireland. A Consultation by the Northern Ireland Human Rights Commission (n 60) 27.

73 Interview with a representative of NICEM, 1 November 2002, Belfast.

74 Resignation letter from Patrick Yu to the then Secretary of State for Northern Ireland, Paul Murphy, 7 July 2003. It is important to note that Patrick Yu was not a commissioner when the draft Bill of Rights was produced in September. Patrick joined the NIHRC in the second round of appointments in December 2001, after the first draft Bill of Rights had been published.
Despite the NIHRC’s reassurance that the wording of the draft provision would not undermine existing equality legislation, the Equality Commission for Northern Ireland (‘ECNI’) stated that ‘it is difficult to believe that it would not be used to challenge current monitoring provisions or requirements as to representativeness in public bodies’. As McCrudden states:

For a public body whose function is the protection of human rights and which is under a statutory duty to have due regard to the need to promote equality of opportunity on the basis of religion, it seemed close to irresponsible.

Some, especially those from the individualistic school of thought, may argue that the accusation of irresponsibility seems harsh. As stated above, the NIHRC’s decision was taken only after it sought guidance from the OSCE. However, procedurally, even the NIHRC’s decision to consult with the OSCE rather than the body responsible for the Framework Convention, the Council of Europe, is controversial and flags up one of the dangers of relying on external sources, namely ‘forum shopping’. Although the term ‘forum shopping’ was not explicitly used in Yu’s resignation letter, it is evident that this is what Yu was referring to when stating that:

the precipitous and unhelpful approach by the Commission to get international advisers to intervene in areas where they have no jurisdiction, in particular I have in mind the approach to the OSCE High Commissioner on National Minorities rather than the Council of Europe in respect of the interpretation of the Framework Convention . . . .

Criticisms of forum shopping were not confined within the NIHRC. McCrudden also criticises the NIHRC’s ‘flawed process’ in asking the OSCE to play a role, a role which was arguably inappropriate-asking an international body to give advice on what is a sensitive political issue without knowing the local context. The validity of this point was

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75 The proposed clause stated that the right could not be used to ‘negate equality commitments, including positive action provisions in the Bill of Rights or in legislation’. Making a Bill of Rights for Northern Ireland. A Consultation by the Northern Ireland Human Rights Commission (n 60) 23.
77 McCrudden chapter (n 19) 341. Both the British and Irish governments and the political parties also expressed concern, arguing that the contents of a Bill of Rights should be entirely consistent with the arrangements under the Agreement and should reflect fully the fundamental principles that underpin it. Letter from the Parliamentary Under Secretary of State for Northern Ireland to the NIHRC, 22 November 2001; letter to the NIHRC from the Irish government, November 2001, on file with the author.
78 Forum shopping in this context refers to seeking advice on interpretation from a particular body, not forum shopping on substantive norms.
79 Resignation letter (n 74).
80 McCrudden (n 19) 345.
acknowledged by the OSCE when the NIHRC sought their advice at a later stage in the process:

It is not possible for the Office of the OSCE HCNM to interpret the NIHRC’s own draft Bill of Rights in the absence of a full understanding of the intentions of the drafters and the context of the situation, including appreciation of the wishes of those concerned and the implications which may flow from a particular choice and use of words. This seems better done by the NIHRC itself or by a competent authority acting independently and impartially.81

McCrudden states, that in asking the OSCE to play such a role, the NIHRC placed the OSCE in a ‘paradoxical situation’—instead of preventing or limiting tensions, the OSCE could have contributed to or exacerbated them.82 Although the NIHRC has argued that seeking advice from the OSCE was ‘in furtherance of [their] strategy to involve the international experts’83 and was within the Agreement’s mandate, (which the author accepts) arguably, the NIHRC should have been less selective and more willing to seek advice from a variety of international sources/bodies, especially those with the authority and jurisdiction over a particular treaty.

As a possible result of this criticism, the NIHRC eventually sought advice from the Council of Europe. The Ad Hoc Group was unequivocal in its recommendation against the inclusion of the right to self-identification:

a Bill of Rights should be the product of a broad societal consensus … From the discussions held in Belfast it is clear that there is no such broad societal consensus concerning the inclusion of this provision. Furthermore, it can be said that it is rare for a bill of rights or for a constitution to treat such matters. The experts are therefore of the view that the issue of self-identification should not be examined in the context of the Bill of Rights project, but rather outside of the project in a more appropriate forum.84

Furthermore, the Ad Hoc Group noted a similar concern of the compatibility (or lack thereof) between equality legislation and the right to self-identification and recommended that this ‘is not a matter that should be definitely solved in a Bill of Rights, but rather be addressed in ordinary legislation’.85 They pointed out the potential clash between the right of self-identification on the one hand and affirmative action measures to ensure equality on the other hand. They concluded that this issue ‘could be better and more fully discussed or advanced … in the context of discussions concerning the reform of the equality legislation and proposals to have a single equality act’.86 The NIHRC

81 OSCE HCNM, Note for the NIHRC in response to questions of 12 August 2003 22 March 2004, on file with the author.
82 ibid 346.
83 Interview with the former Chief Commissioner, 4 April 2003, Belfast.
84 Heringa, Malvinverni, Joseph Marko and Giorgio Malinverni, Comments by Council of Europe experts on certain aspects of a future Bill of Rights for Northern Ireland (Strasbourg, 3 February 2004) (Council of Europe, DGH (2004)4 (English) paras 65, 69, on file with the author.
85 ibid para 64.
86 ibid paras 67 and 68.
also sought advice again from the OSCE which adopted a very cautious approach and, as McCrudden notes, was unwilling to give an opinion on the implications of its views for Northern Ireland specifically.87

Notwithstanding the cautious approach adopted by both the Ad Hoc Group and the OSCE, McCrudden concludes that there is ‘little room for doubt as to what approach it considered the NIHRC should now adopt on the issues, viz that the Bill of Rights was not the appropriate place to consider the issues of self-identification’.88 However, the NIHRC chose to ignore this advice and published a second draft Bill of Rights in 2004 which, apart from a few changes, was very similar to its 2001 draft. In the 2004 draft provisions, regarding the controversial substitution, the NIHRC amended the clause to read that ‘everyone belonging to a national, ethnic, religious, linguistic or cultural minority or community in Northern Ireland shall have the right individually and in common with other members of that community, to enjoy his or her own culture, to profess and practise his or her own religion and to use his or her own language’.89 The other important change was the omission of any reference to a person’s right not to be treated as a member of a minority. However, this is only because the NIHRC proposed to incorporate the Framework Convention into domestic law and thus there was considered no need to include it in a Bill of Rights.

When the NIHRC submitted its final advice to the Secretary of State on 10 December 2008,90 it played it ‘fairly safe’91 with the controversial issues above that had dogged the process to that point.92 There is no general right to self-identification in the final draft Bill, and the term ‘minority’ was ultimately preferred to the term ‘community’. Two further notable differences from the previous two drafts are: (1) less emphasis has been placed on the Framework Convention, which is mentioned only once in the culture and identity rights section alongside other international and comparative law instruments;93 and (2) the ‘pendulum’94 has swung back to the group/communal approach congruent with the spirit and the letter of the Agreement. Possible explanations for the NIHRC’s change in direction are a recognition by the NIHRC that it was ‘irresponsible’ to include provisions that could potentially undermine existing equality legislation; a change in the composition of the

87 McCrudden (n 19) 346–348.
88 ibid 351.
89 Progressing A Bill of Rights for Northern Ireland (n 60) 30.
90 As stated earlier, the NIHRC is mandated under the Agreement to submit advice to the Secretary of State on the content of a Bill of Rights for Northern Ireland.
92 These issues were/are not the only controversial issues. Others include the inclusion of social and economic rights, children’s rights, women’s rights. There are other polemic aspects of the identity and culture rights. For further discussion see C Harvey and A Schwartz, ‘Designing a Bill of Rights for Northern Ireland’ (2009) 60(2) NILQ 181; ibid.
93 A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland (n 55) 98–103. Language rights which are not addressed in this article, are addressed separately in the NIHRC’s advice in 103–106.
94 Harvey and Schwartz (n 92) 196.
NIHRC;95 possibly, the findings of the Bill of Rights Forum’s report;96 a possible response to the criticism of forum shopping; and a responsive approach both to international advice and to all those who voiced concern, including both the British and Irish governments. Whatever the motivation(s) behind the eventual changes, the above scenario aptly illustrates the dangers of using international texts and/or bodies without placing them in the local context. Not only does this place the international bodies in a difficult position, but also runs the risk of dividing the local populace and possibly atrophy the Bill of Rights, undermining its capacity to catalyse progressive change.

Deciding to list grounds prohibiting discrimination is an illustrative example of the benefits of combining both the ‘local and the global’.97 Providing a list of grounds arguably strengthens an equality provision as it ensures that those groups who are, disadvantaged, or who may in the future be subject to disadvantage, benefit from protection, and possibly excludes those groups who are in a more advantageous position from added protection afforded by a Bill of Rights. Unsurprisingly, all three jurisdictions have included a list of grounds in their non-discrimination clause/recommendation where both the local and international influence is pervasive. Consider South Africa for example. Initially, an earlier draft chose not to list any grounds on the basis that ‘specific references to particular grounds for non-discrimination may have a restrictive rather than extensive effect on the prohibition of discrimination’.98 However, given that gender alongside racial discrimination were at the core of discriminatory behaviour, ‘there was no way’99 that parties at the negotiating process were going to accept a non-discrimination clause without explicit reference to gender and racial discrimination. Following the international approach of article 26 of the ICCPR, section 9(3) contains a list of proscribed grounds similar to those in article 26. Section 9(3) therefore includes grounds such as race, sex, language, colour, religion, social origin and birth. However, South Africa’s grounds are more extensive than the ICCPR as they include sexual orientation, conscience, belief, culture, pregnancy, marital status, and gender. Their inclusion in the South African Bill of Rights is understandable in view of its particular history and situation. The inclusion of sexual orientation was not uncontroversial, and was influenced partly by the personal involvement of a judge, Edwin Cameron (who is openly gay) and by numerous submissions from South African civil society organisations. In adding sexual orientation to the list of proscribed grounds, the South Africa document became the first national Bill of Rights in the world to assure equality on this

95 The ‘new’ commission was appointed in September 2005.
96 Similar to other rights, the Bill of Rights Forum’s report was divided on culture and identity and provided the NIHRC with two options. Option A included the right to self-identification, option B excluded the right. Bill of Rights Forum (n 60) 67–78.
97 C Harvey, Governing After the Rights Revolution Inaugural Lecture, Belfast, 9 March 2006.
98 Corder and du Plessis (n 1) 141–142.
99 ibid 142.
The addition of marital status and pregnancy as prohibited grounds of discrimination further enhance gender equality. Conversely, there are certain grounds that South Africa did not explicitly include but which appear in article 26 such as political, or other opinion, national origin and property. Arguably, the drafters considered that these grounds did not represent those groups who warranted protection and were cognisant not to include groups already in a more advantageous position. This may explain the exclusion of property as a ground as it would be more likely to be used by the rich than the poor. Furthermore, in the light of the inequalities experienced by people on a number of grounds, South Africa opted for an intersectionality approach to equality. This approach is an acknowledgment of the fact that everyone has multiple identities—people are not defined by a specific facet of identity such as race, sexuality or class, but rather the self is both ‘constituted and fragmented’ by the intersections of various categories of identity. In other words, a person has a sex and a race and a religion and other identities. This has proved beneficial for equality claimants in South Africa as they do not have to ‘fit’ into one of the listed categories. While there are differences between the ICCPR and the South African Bill of Rights, there is also another commonality. Both equality provisions adopt an open-ended approach to equality. Adopting a flexible rather than a fixed approach strengthens the equality right as it broadens the grounds prohibiting discrimination to include non-enumerated grounds.

In this context, it is concerning to note that the then British government in its response to the NIRHC’s advice questioned the NIHRC’s recommendation to adopt an open-ended approach to equality with the inclusion of the phrase ‘other status’. It also queried the NIHRC’s recommendation to expand the list of protected groups, suggesting that this would lead to a loss of ‘focus’ and weaken the existing level of protection against discrimination. The author acknowledges that the list of grounds is more extensive than South Africa and in particular Canada, and has some concerns about certain grounds such as

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100 As we will see, the NIHRC’s advice has followed the South African approach with the inclusion of sexual orientation in the draft equality clause/recommendation.
101 This is explicit in the phrase ‘on one or more grounds’ (s 9(3)).
103 A value which has subsequently being recognised by the courts: see Harksen v Lane NO 1998 (1) SA 300 (CC), para 49.
104 In the case of Larbi-Odam v MEC for Education (North West Province) 1998 (1) SA 745 (CC), the grounds prohibiting discrimination include citizenship.
105 There has been a change in government since the elections in May 2010 with the replacement of the Labour government with a new coalition government of Conservatives and Liberal Democrats.
107 Ss 9(3) of the South African Bill of Rights contains seventeen grounds, ss15(2) of the Canadian Charter has nine grounds, and the equality recommendation in the final advice has twenty-seven grounds. A Bill of Rights for Northern Ireland: Advice to the Secretary of State for
the inclusion of ‘property’. As was noted, the inclusion of such a ground could potentially be used to the advantage of rich people than poor people. McIntyre recommends that ‘property’ should be replaced with ‘receipt of social assistance’. At least this way, it might mean the ‘privileged’ would not be able to use this particular ground to bring such claims under the Bill of Rights. The NIHRC’s inclusion of ‘economic status’ alongside ‘property’ may help negate the improper utilisation of the Bill by rich and privileged people. That said, the author is not persuaded by the NIO’s line of argumentation. Firstly, the NIHRC’s recommendations are congruent with the language and evolving jurisprudence of both international and comparative law. Not only has such an approach broadened the scope of the equality right in Canada and South Africa, but contrary to the NIO’s claim that the existing levels of protection against discrimination might be ‘significantly diluted’, has resulted in the enhancement of human rights and equality protection for both rich and poor.

Furthermore, the NIO’s argument evidenced both a misrepresentation and a misunderstanding of the purpose of a Bill of Rights. Anti-discrimination legislation and Bills of Rights should not be viewed as alternatives whereby people look to the Bill of Rights rather than anti-discrimination legislation. As Livingstone stated, both complement and supplement each other. It paves the way for complex regulations which can be changed relatively quickly and frequently as society develops and needs change, something which the entrenched nature of a Bill of Rights could not easily facilitate within the document itself. The South African experience is an illustrative example as their Bill of Rights has set the framework for further detailed anti-discrimination legislation, detail which is simply beyond the scope of a Bill of Rights. Furthermore, a Bill of Rights is different from ordinary legislation in that it is meant to have a long life. The inclusion of ‘other status’ accommodates this dynamic by allowing the Bill to evolve in line with society’s developing recognition of different issues (such as the law of marriage, family, sexual orientation and so on). It would be undesirable and impracticable for a Bill of Rights to have fixed grounds which are not open to expansion and capable of keeping pace with ordinary statutes. Finally, the inclusion of additional grounds such as ‘nationality’, Irish Traveller Community, family or carer status represent some of the most vulnerable.

*Northern Ireland* (n 55) 81. The 2004 draft had twenty-four grounds, the 2001 draft had ten grounds.

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108 Interview with Professor Shelia McIntyre, Ottawa, August 2004.
109 Ibid 29.
110 For example as a result of adopting an open approach, sexual orientation is now included as an analogous ground in the Canadian Charter, *Vriend v Alberta* [1998] 1 SCR 493, *M v H* [1999] 2 SCR 3.
groups within Northern Ireland. The extensive list is simply an example of how national law supplements international protections and taking into consideration the local context, helps formulate a sui generis equality right.113

Another misunderstanding and mischaracterisation was the NIO’s reference to the NIHRC’s equality proposals as ‘unlimited’.114 The NIHRC has described this as a ‘completely unjustified conclusion’115 as the NIHRC’s recommendations (including on equality) are subject to a general limitation clause.116 The NIHRC’s stance is justified as adopting a general limitation clause, instead of an internal test specific to equality, is again in line with international and comparative law. Both South Africa and Canada have a general limitation clause. To place an internal limitation clause within the equality provision would separate the equality rights from other rights and place an unnecessary extra burden on the equality claimant.117 Subjecting the equality provision to a general limitation clause places the onus on government to establish a limit to that right on grounds demonstrably justified. From the NIO’s response, it is not clear whether the NIO’s incorrect labelling of the equality provision as ‘unlimited’ was deliberate. Was it the NIO’s intention to subject the equality clause to an internal instead of a general limitation clause? Or was it a mere oversight as the NIO acknowledged and surprisingly, agreed in principle with the NIHRC’s advice on a general limitation clause?118 What is clear is that in stark contrast to the approach taken by the NIHRC, the former government neither referred to the local and/or the international context. Rather than developing a Bill of Rights for a local and very specific post-conflict situation (as mandated by the Agreement and, itself, a dominant issue in considering precisely what Northern Ireland needed from a Bill of Rights),119 the government sought to append it to a national discussion on a possible UK Bill of Rights.120 Such an approach not only ignores the fact that both

113 When discussing its final advice, the NIHRC drew up a set of guidelines to help them discuss which rights should be included. The guidelines start with the ‘particular circumstances of Northern Ireland’ and then go into more detail on how to deal with the ‘particular circumstances’ A Briefing on the Methodology used in preparing the advice of the NIHRC to Government on a Bill of Rights 9 June 2008.
114 A Bill of Rights for Northern Ireland: Next Steps (n 106) 28, 29.
116 S 36 of the South African Bill of Rights, s 1 of the Canadian Charter.
117 In South Africa, while the drafters intended to subject the equality provision to a general limitation clause, following the case of Harksen v Lane NO 1998 (1) SA 300 (CC), an internal test (referred to as the Harksen test) now applies to the equality right.
118 A Bill of Rights for Northern Ireland: Next Steps (n 106) 86.
119 This is due to the wording of the Agreement which requires the rights to ‘reflect the particular circumstances of Northern Ireland’.
Discussions emerged from different backgrounds,121 but it also flies in the face of the British government’s international obligation under the Agreement to have a Bill of Rights reflecting ‘the particular circumstances of Northern Ireland’.122 Another distinguishing feature between the NIHRC’s recommendations and the NIO’s response is the lack of reference to international standards. In the NIO’s 116 page document, international law is referred to, in passing, only on two occasions and even then both are improperly referenced.123 In contrast, when submitting its final advice, the NIHRC took pains to cite international standards and explain how and why it had considered the standards relevant. Indeed, reference to international law was a key aspect of the NIHRC’s mandate and methodology in submitting its final advice.124

The influential role international law played is aptly illustrated in the interpretative obligation requiring courts, tribunals and other persons to ‘pay due regard to other international human rights law’ and a permissive clause


121 The current Northern Ireland discussion is derived from the Agreement and is motivated to implement the obligations outlined in the Agreement to help the transition from conflict to a more peaceful and equal society. The motivation behind the UK Bill of Rights is different—the process has been driven by politicians with a specific political agenda with little or no involvement from ‘ordinary’ people (a top-down approach) and is arguably attempting to undermine rather than enhance human rights protection. For further information on the dangers of combining both debates see JUSTICE, Devolution and Human Rights February 2010, 22, available at <http://www.justice.org.uk/images/pdfs/Devolution%20and%20Human%20Rights.pdf>.

122 The other guarantor of the Agreement, the Irish government, has also stated that the international obligation of the UK is to implement a Northern Irish Bill of Rights, not a UK Bill of Rights: ‘Regarding the bill of rights for Northern Ireland, I reiterate the commitment of the Government to ensure the full and effective implementation of all aspects of the Good Friday Agreement and the St Andrews Agreement. In that context, we attach importance to a specific bill of rights for Northern Ireland as envisaged in the Good Friday Agreement. The Government has consistently communicated that position in contacts with the current British Administration and with the Conservative Party Front Bench’. Answer of the Taoiseach in response to a question by Deputy Eamon Gilmore, 21 October 2009, Parliamentary Debates, vol 692, no 3, p 564, available at http://debates.oireachtas.ie/Xml/30/DAL20091021.PDF


The lack of reference to international standards is one of the many criticisms in the NIHRC’s response to the NIO’s paper. A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office (n 115) 14.

124 A Briefing on the Methodology used in preparing the advice of the NIHRC to Government on a Bill of Rights, 9 June 2008. Furthermore, as the above discussion demonstrates, the NIHRC drew substantially on international standards throughout its consultation publications.
stating that they ‘may consider the relevant judgments of foreign and international courts and tribunals’. This reflects a similar provision (section 39) of the South African Bill of Rights. The inclusion of the directive provision to consider international law as opposed to the permissive provision ‘may consider’, indicates both Northern Ireland’s and South Africa’s willingness to embrace the international community. In so doing, the Bill of Rights could be viewed as a ‘passport to international acceptability’. That said, the drafters were also cognisant of the dangers of jettisoning the past and relying solely on international and comparative law. Concomitantly, instead of producing a foreign equality provision, the NIHRC drew on both international and local sources resulting in a comprehensive substantive equality recommendation which, if implemented, could result in the enhancement of human rights and equality protection in Northern Ireland.

Disappointingly, in contrast, the then NIO’s response to both the equality clause and the other recommendations was reductive, regressive and arguably would undermine human rights protection. This was due primarily, though not exclusively, to the NIO’s lack of deference to the ‘local and the global’. Whether the change in government makes a difference is hard to predict. What is not hard to foresee is that if the current government adopts the former government’s stance, it will be not one step forward but two steps back for rights protection in Northern Ireland at a time when that rights protection needs to be cemented into the heart of the ongoing peace process.

IV. CONCLUSION

This article began by asking the question: is it useful to look outside a country’s own experience and consider sources ‘from abroad’ in the drafting of a Bill of Rights? This non-exhaustive overview suggests that the answer is a qualified yes. To ignore international conventions and/or comparative experience would mean that those involved in drafting a Bill of Rights would

125 A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland (n 55) 155, 156.
126 Klug (n 12) 48.
127 The NIO supports the inclusion of only two out of the seventy-eight recommendations of the NIHRC. These are the right to vote/be elected and the right to identify oneself and be accepted as British or Irish or both. Other rights are either ruled out or left open to debate. That said, similar to the equality right, the NIO mischaracterises the right to vote as this right is not unlimited-like the other rights, it is subject to limitations.
128 Space mitigates an examination of other reasons why the NIO’s response undermines human rights protection. For further information see A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office (n 115).
129 The majority of responses have been negative as the NIHRC amongst others has rejected the proposals, A Bill of Rights for Northern Ireland: Next Steps Response to the Northern Ireland Office (n 115) 17–27. See also the Bill of Rights special in Just News, CAJ, January 2010 and the recent Northern Ireland Assembly debate over proposals to amend the Government consultation on a Bill of Rights, 1 March 2010, available at <http://www.niassembly.gov.uk/record/reports2009/100301.html#6>.
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not benefit from the following advantages. Firstly, as the experience of South Africa, Canada and Northern Ireland demonstrates, international processes and instruments can help guide a country in considering what rights to include and how best to formulate an equality right. International law therefore provides benchmarks to initiate debate on rights, and provides an initial element of consensus which can be built upon during the drafting process. The pervasiveness of international law is nicely summed up by the then Canadian Justice Minister Chrétien: ‘I do think that the rights we have agreed upon in international agreements should be reflected in the law or the Charter of Rights that we will have in Canada’. Concomitantly, as noted, the rights and in particular, the equality right, reflect international instruments. International law therefore played a dual role: it provided the ‘necessary and pervasive context in which the Charter of Rights [South African Bill of Rights and the NIHRC’s recommendation] was introduced and adopted [and] also as the direct inspiration for amendments designed to strengthen the human rights protection provided’. Secondly, ‘internationalisation’ as a strategy can be very useful in expanding and setting the boundaries of the debate by referring to international standards that already exist. ‘Externalising’ the process can help drafters to reach a compromise over controversial issues and potentially heads off unwarranted disagreement, where minimum standards are already fixed internationally. This is especially the case if a government is a signatory to a particular treaty. For example, the discussion surrounding the implications of incorporating the controversial notion of affirmative action into an equality guarantee is indicative of how international law arguably helped to dispel some concerns by highlighting what has been accepted (in internationally agreed conventions) or is deemed to work internationally (in a specific local context).

As we have seen, both the South African and the Canadian equality provisions and their Bills of Rights generally were greatly influenced by international and comparative law. In Canada, the use of external sources has been described as a ‘distinguishing feature’ and as the above ministerial statement illustrates, due to the burgeoning of international human rights instruments constituted one of the reasons why Canada took the decision to constitutionalise rights. Those involved in drafting the South African Bill of Rights had the benefit of drawing upon the Canadian Charter for guidance in

131 J Claydon, ‘International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms’ (1982) 4 Supreme Court L Rev 287, 287. Indeed Trudeau, the then Prime Minister noted that 1968, two years before the Constitutional Amendment Bill was enacted, was an appropriate year to embark on an entrenched Bill of Rights as it had been named Human Rights Year by the United Nations General Assembly. See P Trudeau, A Canadian Charter of Human Rights (Ottawa: Queen’s Printer 1968) 7.
formulating their Bill of Rights. Similarly, Northern Ireland has the advantage of the NIHRC having looked to South Africa and Canada amongst others, for guidance in drafting a Bill of Rights for Northern Ireland. Thus, the Northern Ireland case study serves a dual purpose. It provides an opportunity both in terms of evaluating the role external sources have played to date while simultaneously unearthing lessons that could still be applied in Northern Ireland going forward. These lessons derive as much from its own experience as those of South Africa and Canada and serve to enhance the discourse of the merits or otherwise of internationalisation. Unfortunately, one only has to take a cursory look at the previous British government’s response paper to be taught a valuable lesson in the dangers of not taking cognisance of international law.

One of the lessons learnt from the Northern Ireland’s experience of using external sources is the danger of forum shopping. As the foregoing discussion demonstrates, this danger arose around the role of the OSCE and the belated involvement of the Council of Europe in the debate whether to include the right to self-identification in a Bill of Rights for Northern Ireland. To reiterate, this article is not arguing that international law/bodies should not be used, but when they are used, they should be used carefully in a way that makes consensus easier, not more difficult, a lesson not just for Northern Ireland, but for equivalent interventions elsewhere. This requires consideration of the ‘fit’ question—in other words, while internationalisation and constitutional borrowing should be used as strategies in the drafting process, it is equally vital that a Bill of Rights be reflective of the specific context from which it is emerging. Furthermore, while reference to the ‘right’ international instruments/constitutions can provide some insights/solutions to a particular problem, departing from these external sources may be legitimate and arguably advisable, in light of the local realities and context. In this regard, while all three case studies’ equality provision/recommendation reflect article 26 of the ICCPR, they go further in that the latter has only two equality rights,133 whereas section 15 of the Charter, section 9 of the South African Bill of Rights and the NIHRC’s recommendation have four equality rights.134 In so doing, they all espouse a substantive notion of equality as opposed to a formalistic notion. In view of the particular history and situation of all three case studies, the drafters considered it was important to include such a notion of equality, a notion that at times, has been adopted by the courts:

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal

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133 Equality before the law and equal protection of the law.
134 S 15(1) reads ‘Equality before the law, equality under the law, equal protection and equal benefit of the law’. S 9(1) reads (1) ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’, and the NIHRC’s recommendation provides ‘Everyone is equal before and under the law and has the right to equal protection and equal benefit of the law . . .’
treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.\footnote{135} As the author has argued elsewhere, the extended equality provisions/recommendations were due primarily to an open and participative process in all three jurisdictions.\footnote{136} Such processes created an opportunity for people to make submissions to the drafters in the respective jurisdictions which helped to produce an organic and indigenous concept of equality, reflecting the particular needs of the populace in South Africa, Canada and in Northern Ireland. As previously discussed, the local influence is also reflected in the grounds prohibiting discrimination in each of the three case studies. In this context, international law was used not as a ceiling but rather as a floor—a starting point and minimum benchmark to build upon to ensure that the Bill of Rights ultimately reflects both best international and European practice but also the local context. This shows the inverse relationship between international and national law—just as international law helped shape the equality provision and other rights in the respective Bill of Rights in South Africa, Canada and in Northern Ireland’s case, the draft recommendations, so the wording of the equality provision and other rights, can also impact in the future on international law. The consequences of such a two way relationship substantiates the core argument underpinning this article, namely, that the combination of both the local and the global is a more fulfilling and worthwhile project where the domestic equality provision is strengthened by drawing upon both local and international sources. To sum up, it is the local, not the international/foreign context that should be the main driver in any Bill of Rights process/debate—it should be the ‘master’ and the international/comparative law the ‘tool’. If this mantra is followed, as this article has sought to argue, it results in a more rewarding project.

\footnote{135}{\textit{Hugo v President of the Republic of South Africa and Another} 1996 (4) SA 1012 (D), para 41 (per former Justice Goldstone).}