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The Road Not (Yet) Taken: A Charter of Rights for the Island of Ireland

A RESPONSE TO ‘THE PROTECTION OF RIGHTS IN A UNITED
IRELAND’ BY BRICE DICKSON

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Professor Brice Dickson’s reflection¹ contains the first substantial comparison of the legal landscape of human rights protection operating in Northern Ireland and Ireland in the wake of the seismic changes in the former jurisdiction generated by Brexit. As he acknowledges, any attempt to forecast the likely changes that will need to be made to the legal status quo in both jurisdictions to facilitate unification will depend greatly on the terms of unification. In this regard, while his ultimate conclusion is sanguine, that the implications for the protection in human rights in Northern Ireland may be

¹ Brice Dickson, ‘The protection of human rights in a United Ireland’, *Irish Studies in International Affairs: ARINS* 32 (2) (2021), 589–610, doi: <https://doi.org/10.3318/isia.2021.32b.48>

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minor (whichever route is chosen), the methods that will likely have to be adopted to bring about change in any scenario are by no means straightforward. In other words, Dickson's analysis of the gaps that will need to be plugged inevitably prompts questions of process which are laden with pragmatic legal, not to mention political, difficulties. Would it be realistically possible, for example, to achieve the outcomes required without substantial amendment of the Irish Constitution? Do other creative possibilities arise?

These questions (while beyond the focus of Dickson's paper) bring to mind previous attempts to implement change in human rights protection on an all-island, trans-jurisdictional basis. These include the 'Irish dimensions' of the Sunningdale Agreement (seen at that time to be too extreme by unionists), followed by the idea of an all-island Charter of Rights in the Joint Framework Document 1995, which emerged from the talks process in the 1990s. The Joint Framework Document envisaged a Charter or Covenant, to be adopted by democratic parties north and south, which would specifically include:

an enduring commitment...to guarantee and protect the rights, interests, ethos and dignity of the unionist community in any all-Ireland framework that might be developed with consent in the future, to at least the same extent as provided for the nationalist community in the context of Northern Ireland.

While the Belfast Agreement subsequently incorporated the notion of a Charter, it was silent as to its potential terms, with the issue being left at the eleventh hour of the negotiations to the Joint Committee of the envisaged human rights commissions to '*consider, among other matters, the possibility of establishing a Charter, open to signature by all democratic political parties reflecting and endorsing agreed measures for the protection of human rights on the island of Ireland*'(emphasis added). The Joint Committee made two concerted attempts to deliver on the responsibility hastily thrust on it by the terms of the Agreement. The first of these—which took the form of a pre-consultation paper listing potential options for a Charter issued in 2003—resulted in a range of critiques, not least concerning the legitimacy of the role of the Committee in drafting a Charter and its failure to identify the purpose any such Charter could potentially serve. The Committee's express preference for a legally binding instrument with implementation mechanisms open for signature by the two governments, as opposed to a declaratory Charter to be signed up to by the political parties, was also queried on feasibility

and necessity grounds.² The Joint Committee's second attempt to deliver on the Charter clause in 2011 resulted in advice to the two governments that a Charter of Rights aimed at achieving an equivalence of rights protections in both jurisdictions would be justifiable. The latter advice was based on a rather rudimentary, box-ticking exercise of the applicable rights in both jurisdictions, which the Committee deduced revealed a 'commonality of rights' between the two. Neither initiative resulted in any semblance of meaningful political engagement in the two jurisdictions and in fact, not surprisingly, neither received any support at all from the unionist parties.

Ironically, the failed attempt to draft an all-island Charter brings into view important insights³ that can be drawn upon in the current context in which the prospect of unification is firmly on (as opposed to hovering behind) the horizon. The first would appear to be that whatever institution is invested with responsibility to scope out the changes that might be required to human rights protection on the island of Ireland in the event of unification should be seen to have the legitimacy, resources, necessary expertise and political support to do so. Second, a set of clear objectives will need to be identified to guide analysis and the framing of specific proposals. Dickson's paper points to a number of key desiderata that could well serve this purpose. These include the importance of ensuring that there be no regression in the protection of human rights in Northern Ireland; a levelling up on the rights regime in the south of Ireland where higher standards currently obtain in Northern Ireland; and more robust guarantees to be provided as regards the crucial issues of identity, culture and participation in political life. In this respect, it may well be that in a changed context in which unification becomes inevitable, the formula used in the Joint Framework Document on the preservation of the unionist identity would ultimately find grudging support on pragmatic grounds within the unionist community. Third, while concrete legal measures are inevitable whichever settlement might be chosen, the idea of a declaratory Charter to be signed up to by the political parties to safeguard rights in a unified Ireland should not be so swiftly rejected. Such a Charter is arguably more in line with the wording expressed in the Belfast Agreement and previously in the Joint Framework Document. There are clear advantages to

² Suzanne Egan and Rachel Murray, 'A Charter of rights for the island of Ireland: an unknown quantity in the Belfast Agreement', *International and Comparative Law Quarterly* [ICLQ] 56 (4) (2007), 797–835. See also Suzanne Egan and Rachel Murray, 'Casting a cold eye on the origins and development of an all-Island Charter of rights', *Fordham International Law Review* 34 (1) (2010), 78–92.

³ For an in-depth analysis, see Egan and Murray, 'A Charter of rights for the island of Ireland'.

an agreed text delineating general principles to which political parties can commit themselves and be held accountable to rights-based governance in the event of a united Ireland. While generating political buy-in for any such document would undoubtedly be difficult, its accomplishment might again be more easily achieved with the changed stakes that the reality of unification would undoubtedly create.