**DRAFT**

**Ruth Adler Lecture on Human Rights**, **University of Edinburgh**

*Using comparative constitutionalism in human rights discourse: Ireland’s past and Scotland’s future*

*Christopher McCrudden[[1]](#footnote-1)\**

Thank you for inviting me. I am delighted to be here in Edinburgh this evening. Being invited to present this lecture gives me the opportunity to pay tribute to the person in whose honour the lecture is named: Dr. Ruth Adler. Juliet Cheetham wrote shortly after Dr. Adler’s death that she “sought to achieve the coherence of theory and practice which she regarded as a necessary condition for achieving justice” particularly in the human rights context, a subject that was close to Dr. Adler’s heart. In this lecture I hope to convince you of the need to strive for just such coherence in the debate about human rights in the Scottish Independence context.

I’m flattered to be following in the illustrious footsteps of Conor Gearty of LSE and Brice Dickson of Queen’s Belfast, who gave the Ruth Adler Lecture in previous years. I did wonder whether it is a requirement that the lecturer must be Irish; I’ve been assured that it isn’t strictly a requirement, but that it clearly helps! I should also add, by way of introduction, that I have been privileged, as have many of you, to be able to take part in the excellent seminar held at the Scottish Parliament earlier today on *Human Rights and Scotland’s Constitutional Futures*, which has helped me clarify my own thoughts on what I want to discuss this evening.

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Now let me turn to Alex Salmond, the First Minister of Scotland. As recounted in the *Scotsman*, First Minister Salmond said in August 2006 that an independent Scotland would become part of a northern European ‘arc of prosperity.’[[2]](#footnote-2) He claimed that Ireland, Iceland and Norway demonstrated that small independent countries were amongst the richest in the world. All three ‘young countries,’ he said, had become independent in the 20th century and moved from being less prosperous than Scotland to being more economically successful. Barely two years later, as Iceland and Ireland became embroiled in the worst financial and banking disaster to have hit either country since independence, the comparison between an independent Scotland, Ireland, and Iceland appears to have become something of an albatross around Mr Salmond’s neck and references to these countries have been toned down somewhat.

Then the comparisons changed, and the talk was of Catalonia. Comparisons with Catalonia also have their downside. In both countries, one of the key issues, much debated in recent months is the risk of Scotland being excluded from the EU if moves to independence are successful; the issue is whether each new state would automatically be admitted or have to reapply, and under what conditions. Would Scotland be required to join the Euro-zone, for example, with the likely political effect on the Referendum and the likely economic effect assuming that the (rump) United Kingdom stays out? And would Spain vote against Scotland being admitted to avoid creating a precedent for Catalonia, whose independence it strongly opposes? Comparisons are tricky things to handle.

The question I want to explore with you this evening is partly stimulated by these examples, but is somewhat broader. The topic I want to develop is the use of comparisons in constitutional development, specifically the use of comparative reasoning in the context of debates about human rights in newly emerging independent states. I realize, of course, that as a non-Scot, I need to tread warily; I shall suggest some lines of thought, and should not be thought to advocate any particular position. That is for the Scottish people.

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In February 2013, the Scottish Government published *Scotland’s Future: from the Referendum to Independence and a Written Constitution* (February, 2013). In this, the Scottish Government set out its proposals for what it wants to happen in the immediate aftermath of any “yes” vote in the forthcoming independence referendum. In Deputy First Minister Nicola Sturgeon’s Preface, she says this: “The Scottish Government has an ambitious vision of the kind of nation Scotland should be - a thriving and successful European country, reflecting Scottish values of fairness and opportunity, and promoting prosperity and social cohesion. A Scotland with a new place in the world as an independent nation, participating fully in Europe and the community of nations, on the basis of equality, responsibility and friendship”. And then a little later, she writes: “an independent Scotland can seize this opportunity by putting in place a modern written constitution that embodies the values of the nation, secures the rights of citizens, provides a clear distinction between the state and the government of the day, and guarantees a relationship of respect and trust between the institutions of the nation and its people.”

The post-referendum timetable envisaged as having two stages, as I understand it. In the first stage, until a new independent Constitution is drafted and comes into force, a “constitutional platform” will be established. This “will enable the transfer of sovereignty from Westminster” (para 2.14). In addition, it will “consolidate the existing rights of citizens and give the Scottish Parliament and Government the legal, financial and other powers necessary to govern Scotland effectively across the full range of national issues.” (para 2.10) As regards the protection of rights in particular, the constitutional platform will “consolidate the protection of human rights in Scotland so that all ECHR human rights are protected as they are for devolved matters under the Scotland Act 1998, bringing Scotland fully into the European mainstream of human rights protection.” (para 2.14).

These transitional arrangements will be followed by the second stage: the establishment of a Scottish constitutional convention, which would be tasked with producing a new written constitution. The Government’s paper sketches out both the process of constitutional development, and the substantive values that it considers should be incorporated. As to process, the Convention should “ensure a participative and inclusive process where the people of Scotland, as well as politicians, civic society organisations, business interests, trade unions and others, will have a direct role in shaping the constitution.” (para 1.9) As to substance, the paper envisages that the new Constitution could include extensive protections for human rights.

The paper indicates the general thrust of the rights protections that the current Scottish government has in mind in a new constitution (para 1.10): “In particular”, it says, “[e]veryone in Scotland should be entitled to equality of opportunity and to live free of discrimination and prejudice. Everyone should be entitled to public services and to a standard of living that, as a minimum, secures dignity and self-respect and provides the opportunity for them to realise their full potential both as individuals and as members of wider society. (…) The constitution should (…) provide a collective expression of the positive values that the people share and a constitutional convention should consider how to further embed equality and human rights within the constitution and the extent to which the people of Scotland should have constitutional rights in relation to issues such as welfare, pensions, health care and education.”

It is not intended as a criticism when I say that these suggestions are somewhat lacking in detail. Indeed, rightly, the Scottish Government makes clear that it considers that all the detailed issues are ones for the constitutional convention to address after the Referendum, rather than by the Scottish Government now. Nevertheless, I want to suggest that it is particularly important that the detailed questions be carefully considered in political and civic society sooner rather than later, and I hope that will be the case. Given the lead-in time before the Independence referendum in Scotland, there seems to me very good reason why the process by which constitutional rights get defined, and how they are to be integrated into a Scottish Constitution more broadly, should be addressed by civic society now, rather than left to later. To use the fashionable phrase, constitutional rights should be mainstreamed into the Scottish constitutional debate, and part of that process should involve serious engagement with different models of rights protections drawing on comparative foreign experience. Of course, these issues will continue to be vital irrespective of the outcome of the Referendum vote, but that vote appears, at the very least, to be concentrated minds.

In Deputy First Minister Nicola Sturgeon’s Preface to *Scotland’s Future*, she says this: “In developing a new written constitution, Scotland will be able to learn from the innovative and participative approaches of other countries.” The primary reference to the use of comparative experience in this context appears to relate to the process of *drafting* the Constitution. But I assume that the content of the rights and the methods of enforcement will also be influenced by comparative learning. The paper says (para 1.9): “international best practice and the practical experience of other countries and territories should be considered and taken into account in advance of the determination of the process for the constitutional convention.” Among that foreign experience that is relevant, I want to suggest that close attention to the Irish experience may be of some interest.

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What lessons, if any, emerge from a consideration of the Irish experience of transition from Home Rule to independence and beyond, and the experiences of Northern Ireland since 1920, culminating in the Belfast-Good Friday Agreement in 1998? I will examine, briefly, four main phases of constitutional development in Ireland: first, the period of the Home Rule debate up to 1914; second, the phase of constitution-making leading to the Free State Constitution in 1922; third, the remaking of the Irish Constitution by Éamon de Valera in 1937. I’ll then turn, briefly, to sketch some of the principal development in Northern Ireland affecting the approach to rights protection now in place. In each phase, I will suggest, the question of what was the relevant external comparison was a central issue, and the comparisons the relevant actors adopted said much about their ideological preferences and popular politics at that time. It also said something quite important about the conception of human rights being pursued.

The issue of what we would now call constitutional rights emerged during the period of the Home Rule debates in a particularly stark form. In a majoritarian political system, a primary issue was how the interests, the rights, of the minority would be safeguarded. At the time, of course, that minority was the Anglo-Irish Protestant Ascendancy in the southern counties, and the large Protestant middle and working class in Ulster. The pervasive assumption in England, reflected in Dicey’s writings, was that a combination of strong citizens’ values, coupled with strong elite values was sufficient to protect the range of interests that needed to be protected. Whether with justice or not, the consensus in Whitehall and Westminster was that neither the citizens’ values, nor the elite’s values would be successful in protecting the minority in Ireland.

Rather than rethink entirely the approach adopted under the British constitution, what emerged was an attempt to incorporate additional elements into the British model. Essentially two strategies were developed: the first, and more traditional approach in the British dominion context, was to build certain institutional protections into the system of voting and representation. Here, the Canadian model encapsulated in the British North America Act was particularly influential. The primary structural protection developed was the creation of a separate section of a one-chamber legislative assembly which would be elected by the minority, and which would represent them and have a degree of influence beyond that which their numbers in the population would guarantee them. Subsequently, this developed into the idea of a separate legislative chamber in which the minority would have additional representation. The basic idea was to ensure that the rights of the minority would be protected indirectly through the system of representation.

The additional approach, developed by James Bryce, the Liberal MP and academic lawyer, born in Belfast and growing up in Glasgow, and a reluctant Home Rule supporter, was to develop legislative protections which sought directly to protect certain rights from being abridged, not just through structural methods. These rights would be ones that the minority would particularly benefit from. It is quite clear that Bryce developed this idea, which was entirely novel in the British colonial context at that time, out of his life-long fascination with the United States. Out of the US Bill of Rights, legislative protections were developed in the Home Rule Bills to protect property from being taken without compensation, and prohibit the establishment of any religions.

In the Irish context, referring to the United States as an alternative model to that of the colonies and dominions created interesting tensions. For Bryce, the United States provided a model of “rights” protections which was strongly conservative. It is noticeable that Bryce, so far as I can ascertain, never referred favourably to the 13th, 14th and 15th Amendments of the United States Constitution; he regarded giving the vote to the freed slaves, for example, as entirely wrong headed. His identification with the United States Constitution as providing a basis for protections in the Home Rule context emphasized the “conservative” first 10 Amendments to the Constitution. On the other hand, for supporters of Home Rule, as for nationalists and republicans, references to the United States served rather different purposes, namely to indicate how a former colony could break away from the British Empire and flourish, as well as serving to flatter Irish Americans who were such an important part of the Irish diaspora.

European, and particularly French, traditions of constitutional recognition of rights and liberties strongly influenced Irish republicans in the early 19th Century. The analogy of the Hungarian people forcing the Austrian Empire to grant extensive Home Rule to Hungary was frequently drawn on in the late 19th Century, particularly by *Sinn Féin*. These European traditions seldom directly impinged on the detailed consideration of the Home Rule Bills. By the time of Independence in the early 1920s, however, the idea that an independent Ireland should join the European mainstream was firmly implanted in the ideological preferences of nationalists and Republicans. The mixed institutional/minority rights approach was still dominant on the British side, however, and this is reflected particularly in the terms of the Treaty that the two sides negotiated in 1922. In terms of protecting the minority in the new Irish Free State, the British insisted on including almost precisely the same terms as had been included in the abortive Home Rule Bills.

The new Irish Free State was, of course, in parlous circumstances, faced almost immediately with a brutal Civil War, and a British state that could well step in and take over again if it thought that the Irish government was unable to cope. Negotiating a new Constitution in such circumstances, particularly given that it was hedged in by the terms of the Treaty, might be thought likely to result in the drafters simply replicating that with which they were most familiar. It would have been entirely unsurprising if what had been produced was an Irish version of British pragmatic empiricism, overlaid with a thin layer of institutional mechanisms and a Brycean American-flavoured conservative rights agenda.

What emerged instead was a Constitution that sought firmly to locate itself in the emerging *European* constitutional tradition. The records of the discussions that are available, coupled with the various drafts, indicate a high level of comparative constitutional knowledge and interest. One indication of this was the fact that the *Dail* published a three-hundred page book collecting together English translations of all the major European constitutions. But this was no superficial exercise designed to impress public opinion; there was a clear detailed engagement by the Committee drafting the Constitution with the differences between the various European Constitutions, and in particular with the Weimar Constitution of Germany. It has been well known for some time that the Weimar Constitution was a profound influence, not least in incorporating a social-democratic vision into the 1922 Constitution. Integrating this model into the Home Rule model took some ingenuity. One example must suffice. The provisions in the Treaty prohibiting the establishment of religion, which the drafters clearly though it was necessary to reproduce in the Constitution was prefaced with a classic European protection of freedom of religion, neatly illustrating the merging of the different traditions.

The Free State Constitution of 1922 was, as I have said, prepared in the throes of the Irish Civil War. One of de Valera’s aims when he turned “slightly constitutional” and won the general elections in 1933 was significantly to amend, and possibly even to replace the 1922 Constitution, a goal he achieved in 1937. In the development of the new Constitution, comparative constitutionalism was, again, well to the fore, as Gerard Hogan’s brilliant new book, published by the Royal Irish Academy last year, clearly demonstrates. Again, as in 1922, the influence of modern European constitutionalism was sought and accepted. By 1936-7, however, the European models of rights protections were looking distinctly different and we see, essentially, two rival European models in contention.

The first model, essentially based on Weimar, continued to exert a powerful influence, but the second model, an essentially conservative Catholic model, was also a potentially significant alternative. Both models had their devotees. Some Jesuits in Dublin argued strongly that the Polish and Austrian constitutions, the latter with strong corporatist leanings, better reflected Catholic teaching in the Papal Encyclicals. On the other hand, some civil servants advising de Valera, particularly John Hearn, were clearly still mightily attracted to social-democratic Weimar. What is particularly intriguing, however, is that the “comparative approach” adopted also incorporated an intense and detailed knowledge of the Papal Encyclicals, in which the tradition of “natural rights” was strongly to the fore and, indeed, to some extent incorporated into the text of the Constitution. De Valera put the new Constitution to a referendum held on the same day as a general election, and was successful in achieving a majority in both.

In Northern Ireland, meanwhile, the Home Rule approach was applied, with a limited set of institutional protections, and weak rights protections in the form of a prohibition on the establishment of religion. These protections were now supposed to protect the minority population in Northern Ireland, which was not the Anglo-Irish Ascendancy but the primarily Catholic working class. The protections put in place were woefully miscalculated. From 1970, the state was essentially restructured, with extensive statutory rights protections being adopted, culminating in the Belfast-Good Friday Agreement of 1998, which completely restructured the constitutional arrangements, incorporating yet further constitutional rights protections, including the incorporation of the ECHR into Irish law, and the adoption of extensive consociational methods of power-sharing in government.

The Agreement effectively left to one side the issue of whether there should be a domestic Bill of Rights for Northern Ireland, and tasked the newly established Human Rights Commission with recommending whether there should be such a Bill of Rights and, if so, of what type. The Commission established a process in which an extremely broad range of community and voluntary groups took part. My preference would have been for this to have been done by the negotiators of the Agreement themselves, but time and exhaustion precluded this from happening. The result was an extremely long drawn out process of negotiations in and around the Human Rights Commission, culminating in the adoption of a report recommending a Bill of Rights, which because of the lack of consensus among the political parties on the proposals, has been moth-balled by Westminster.

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Setting the Scottish debate in the context of debates about Irish Home Rule and independence demonstrates, I think, that there is a quite clear trajectory in these islands from what I have called in previous work, a pragmatic empiricist approach to constitutionalism, which is traditionally British, towards a more ideological constitutional approach, more prevalent, for example, in the United States, Canada or South Africa. The twentieth-century history of Ireland demonstrates that the pragmatic approach, the then dominant Westminster model of British political and constitutional practice, was successfully resisted in the Irish Free State, and though initially transplanted into Northern Ireland between the 1920s and the 1960s, failed abysmally. A tradition based on pragmatic empiricism was unable to cope with a major challenge to the legitimacy of government and the state in either part of Ireland. Since the early 1970s, in Northern Ireland, an approach based on constructing a more explicitly ideological constitutionalism has now been adopted in relation to Northern Ireland, concentrating on the development of explicitly normative principles and the construction of institutional arrangements designed to mesh these with local needs. It seems like the Scottish government has reached a similar conclusion with regard to Scotland.

Within a more consciously ideological approach to constitutionalism, there are several differing and competing approaches, diverging as to which ideology to adopt. Northern Ireland has moved more towards the collectivist/communitarian end of the constitutional ideological spectrum than England which, although moving closer itself towards a more ideological approach to constitutionalism, was firmly individualistic. The Scottish Government is also attempting to locate an independent Scotland more towards the communitarian than the individualist end of the spectrum. So, both in adopting a more ideologically driven constitutional approach, and in commending a more collectivist-communitarian ideology, the Scottish Government is firmly setting its face against what it considers to be the pragmatic empiricist, and the ideologically liberal-individualist constitutional models. (In both respects it is also moving closer to Northern Ireland, by the way.)

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Apart from that, how else does the Irish experience help illuminate the present Scottish debate, and help in the future? I want to suggest that at least four questions can be identified from the Irish experience that it is useful to ponder in Scotland: How do you think that a human rights culture can best be created and sustained? Do you want your constitutional rights provisions to be largely symbolic, or instrumental, or both? Is it your aim to create an ‘autochthonous’ set of constitutional rights, that is one that reflects essentially local interests and local history, or do you want a set of constitutional rights provisions that is outward looking and more ‘universal’ in its orientation? Finally, is your preferred set of constitutional rights one that is essentially conservative (small ‘c’), or transformative? I want to suggest further that how to respond to each of these questions can be helped by knowledge of how human and constitutional rights have been addressed in Ireland, and elsewhere. Let me say a little about each of these questions.

First, how to create and sustain a ‘human rights culture’? We can usefully distinguish between three competing theories of what has been thought over time to particularly affect the protection of human rights. The first theory identifies the values held by ordinary citizens as constituting the key underpinning. According to this theory, citizens must have ‘internalized a critical array of fundamental norms’. Without this, freedoms and rights will not be protected; with it, such rights and freedoms are more likely to be protected. The awareness and support of ordinary citizens, according to this approach, is seen as a necessary and even, by some, as a sufficient condition. Thus, some have argued that ‘liberty flows only from democracy’. We can call this approach the citizens’ values theory. It depends either on a view that majoritarian democracy will produce a broadly human rights culture, or on a view that attempts to restrict majoritarian democracy will ultimately be unsuccessful.

The second theory considers that it is politicians, opinion formers, high-ranking public servants, and other elites (rather than the broad mass of the population) whose support is necessary to protect civil liberties and human rights. These elites are seen as acting to protect human rights from pressures from a public that may well be unsympathetic to such protection. We can call this the elite theory. Some have seen, for example, the abolition of the death penalty in the United Kingdom as arising more from elite concern than from the concern of ordinary citizens. Historically, we have seen that it was the skepticism over the robustness of these methods of protection in a deeply divided society that led to alternatives being developed.

The third theory tends rather to concentrate on institutional and organizational features of our constitutional arrangements, such as the separation of powers, the rule of law, constitutional conventions, and other such mechanisms of constitutional checks and balances, as well as other constitutional traditions. We can call this the institutional theory, and it was that which was initially the preferred approach in the period of the Home Rule debates. Within the third theory, however, there developed a powerful argument that one of the central features of any successful institutional theory is the practice of judicial review, and since the 1970s in Britain this aspect of the institutional theory has tended increasingly to dominate the development and interpretation of constitutional and human rights, with the Human Rights Act being only part of that development. In Ireland, this approach came much earlier, with the development by De Valera of strong judicial review in 1937. Which theory suits Scotland, post referendum?

The second question stimulated by the Irish experience is whether constitutional rights should be instrumental, or symbolic. The ‘instrumental’ approach views the advantages and disadvantages of providing for constitutional rights primarily from the point of view of whether it can be used to advance or retard a particular right or set of rights; what difference will it make *in practice* over the short to medium term? There are, of course, variations within the ‘instrumental’ model: to whom should it apply (Parliament, the Executive?); where it should be enforced (centralized in one Court, or available in all courts?), and by whom (individual victims, quangos, ngos?), with a range of different possibilities evident from the comparative experience. To give only one example: if victims are permitted to enforce rights, will this apply to all victims or only those victims who are citizens?

In contrast, the ‘symbolic’ approach views the function of constitutional rights primarily from the point of view of the benefits that constitutional rights bring as the expression of a set of values, whether or not they address a particular substantive problem of ‘rights’ violations in the short to medium term. This symbolic function is more concerned with what message is sent by constitutional rights about how we view ourselves now, and how we should view ourselves in the future, rather than in the immediate payoff in terms of advancing particular rights or rights in general. Adopting this symbolic view is seen as expressing a view about existing and future national identity.

The difference between the two functions can be seen in how they affect views about the mechanics of enforcement: if one is interested purely in the ‘symbolic’ function, litigating issues in courts might be considered unnecessary, whereas few would consider now that courts are not implicated in the functioning of an ‘instrumental’ approach to rights. Thus a symbolic Bill of Rights might be thought to strengthen the citizen or elite theories, whilst instrumental Bills of Rights are firmly in the ‘institutional’ theory of human rights protections. Before dismissing the ‘symbolic’ function, it is worth remembering that (with the notable exception of the United States), the growth of Bills of Rights in domestic constitutions during the 19th Century was not regularly accompanied by judicial enforcement before Kelsen invented the idea of a Constitutional Court for Austria early in the 20th Century, and that France, for example, viewed its Declaration of the Rights of Man as not judicially enforceable until the early 1970s.

Of course, it is also obvious that there is a third model, which I’ll call ‘hybrid’, that combines both the ‘instrumental’ and the ‘symbolic’, for example with different rights being allocated to each. So, the Irish Constitution (and following it, the Indian Constitution) have a set of rights enforceable in court and a set of responsibilities placed on the state included in a set of ‘Directive Principles’ that are addressed to the legislature, which cannot be litigated directly in courts. The ‘symbolic’ model might be formulated in different ways: with the principles being taken into account in the interpretation of judicially enforceable rights (effectively, the Indian approach), or with the courts being forbidden from even referring to them (effectively, the Irish approach). In the Irish context, the courts do not, in the main, concern themselves at all with the Directive Principles, whereas the Indian courts use the Directive Principles as providing a set of principles to be used in the interpretation of the enforceable rights. Thus the right to life has been interpreted in India to include the right to a minimum level of shelter, under the influence of the Directive Principles. Do the Scottish people want an instrumental, symbolic, or hybrid model of constitutional rights?

Turning to the third question, whether an ‘autochthonous’ or a ‘universalist’ approach to constitutional rights is preferred, I think it is uncontroversial that the increasingly dominant approach to the consideration of human rights in the United Kingdom since 1970, including Northern Ireland, has been to see human rights essentially from a European (and less frequently an international) perspective. A Scottish constitution might further extend this ‘universalistic’ approach. One possible criterion for selecting which issues to consider for inclusion is whether a particular right is missing from the ECHR but is included in other international or European human rights treaties that Scotland intended to ratify. This criterion would indicate that, for example, children’s rights, migrant’s rights, rights of the disabled, and minority rights would be the focus of attention. A different list still would be generated if the criterion adopted is what rights are currently included in Protocols currently attached to the ECHR that the UK government has decided not to ratify, but which a future independent Scottish Government would ratify, such as Protocol No. 12 on discrimination.

Given that the single most influential group in the Northern Ireland Bill of Rights process, in terms of technical information provided to the Commission, were non-governmental human rights organisations, the dominant source of inspiration was European and international human rights law. In one respect, of course, this would be a positive development if it occurred also in the drafting of the Scottish constitution’s provisions on rights. What we would see is an emerging consensus that European human rights standards are now so relatively uncontroversial in Scotland (at least in contrast to England) that there appears to be no real question that an independent Scotland would join the Council of Europe, sign and ratify the European Convention on Human Rights (and, no doubt, most other international and Council of Europe Human Rights Conventions). We might think that the need that previous generations in other countries felt to decide which model of foreign domestic constitutional rights should be adopted, such as we see occurred in Ireland, is now much less pressing; an already existing set of international and European standards is already available, after all. Why go beyond these?

The possible downside of simply adopting European and international standards is that where there is no real debate as to comparative *domestic* models there is also relatively little debate over how the values that the jurisdiction seeks to further should be inculcated into a *constitution,* as constitutional rights. What that lack of debate means, I fear, is that the public commitment to these European values is likely to be, at best, only skin deep. Would they survive the real challenges that rights will pose to independent political institutions? A healthy and extensive debate about values in any future independent state, a debate that I think can only be deepened by greater awareness of competing domestic constitutional models, will ultimately strengthen constitutionalism, by providing the opportunity for a shared commitment to emerge that goes beyond international structures, beyond the relatively open standards of European and international human rights law, to touch people’s everyday lives.

One of the many problems that arose in the Northern Ireland process was that the broad range of international and European human rights standards quickly became the minimum level of protection, and there was a default assumption that these standards should simply be incorporated as they stood into domestic law. Not enough thought was given to translating these human rights into *constitutional* rights that would sit in a broader constitutional structure.

I do not think that there should be any a priori assumption that international human rights obligations must simply be incorporated into constitutional protections in the same way that the ECHR has been, and that not to do so in some way diminishes their importance. In several instances (I am thinking in particular of the Framework Convention on Human Rights), these obligations are not drafted in a way that is at all suitable for domestic incorporation in that form. If domestic action is thought to be necessary then ordinary legislation is far preferable, for example regarding the rights established by the Framework Convention on National Minorities.

At the other extreme is an essentially autochthonous set of Scottish constitutional rights. An autochthonous set of rights would aim to achieve three main things in the development and interpretation of rights: autonomy, self-sufficiency, and a break in legal continuity (at least in so far as following the jurisprudence of the United Kingdom Supreme Court is concerned). Unlike in Britain and Northern Ireland, the development of rights protections in the Republic of Ireland became more strongly autochthonous, at least in want to achieve autonomy and a break in continuity. This is less clearly the case as regards self-sufficiency. There remains in the Republic a much more strongly defined national constitutional tradition of rights interpretation than in Northern Ireland or Britain.

It is unclear to me whether anyone is actually proposing that a set of Scottish constitutional rights should be entirely of this type, but posing the issue in this extreme way should stimulate us to think about the ways in which, and the extent to which, what is being sought is a greater degree of autochthonism, and of what type. Is the concern to ensure that the provisions on constitutional rights deal with issues in a way that is recognizably Scottish, through redrafting for example, or that the rights themselves should reflect local conditions and history?

The fourth distinction I made is between a ‘transformative’ as opposed to a ‘conservative’ set of constitutional rights. By ‘transformative’, I mean a set of rights that aims to *change* an existing status quo, as compared to a ‘conservative’ Bill of Rights that means to *preserve* it. There are many examples that illustrate what I mean. The South African Constitution is a classic ‘transformative’ constitution, in attempting to dismantle the institution of apartheid; the Indian Constitution is also transformative in attacking the caste system. In contrast, several of the Bills of Rights enacted at the time of the independence of former British colonies are ‘conservative’ in the sense that they attempt to preserve the existing status quo; one of the most prominent example is the Jamaican Bill of Rights which goes to far as to provide, in effect, that the Bill of Rights is only prospective. Some Bills of Rights are, of course, both conservative and transformative. The first ten Articles of the US Bill of Rights were intended to be essentially conservative, for example in preserving and protecting property rights, whilst the post Civil War 13th, 14th and 15th Amendments are essentially transformative, prohibiting slavery and addressing its effects.

We saw that during Home Rule, a limited constitutional rights approach was devised by James Bryce for essentially conservative ends, but that since 1970 the increasingly insistent approach in Northern Ireland has been to use rights for transformative purposes. In the Scottish context, a ‘conservative’ set of constitutional rights might seek to preserve what is thought to constitute the rule of law, or entrench the mechanisms that are thought to have protected Scottish liberties in the past. This would, perhaps, lead to a set of rights that codified those rights that are largely based in common law or in ancient legislation but are thought to be under threat from Parliamentary override.

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In other respects, however, Scotland and Ireland (North and South) face common issues about incorporating constitutional rights that neither country has really addressed, let along solved. There are two I want to highlight: the need for an acceptable theory of human rights, and the role of the courts in interpreting sets of constitutional rights.

I suggested earlier that the type of comparison to which newly emerging independent states resort in constructing their systems of rights protections says something about their human rights theory. What do I mean by ‘human rights theory’ in this context? Several different methodologies have been proposed to answer the question of how we are to determine what ‘human rights’ are. One approach to the question is descriptive; the other is normative (although the distinction is perhaps questionable). A descriptive approach attempts to answer the question by describing, for example, how the term has come to be used historically, and how it may have changed over time. Another type of ‘descriptive’ approach to the issue of how best to understand human rights is that which lawyers often adopt. We say that human rights are those rights designated as such by law, whether domestic law, or international law. The alternative to ‘descriptive’ approaches (if, indeed, they are simply descriptive) is to adopt a more explicitly ‘normative’ approach to the idea of human rights. By this I mean that there is some attempt to reason through to the position that a particular claim is appropriately considered to be a human rights claim from a moral or ethical position.

Does Scotland need to identify a theory of human rights before, during, or after any Constitutional convention charged with drafting constitutional rights? In my view, the answer is ‘yes’, although I know this is controversial. In my view, one of the reasons why the human rights project is coming under such hostile fire (and not just South of the English-Scottish border), is because of the absence of any clearly acceptable shared theory of human rights. It is, in my view, a recipe for trouble, in the medium if not the short term, if our understanding of human rights is built on theoretical sand. There are, essentially, three normative theories currently in competition with each other. There are flashes of each in the Government’s paper *Scotland’s Future*. The problem is that it is difficult to hold each of these theories, at the same time. It ends up sending remarkably confusing messages.

‘Naturalistic’ approaches (or ‘orthodox’ or ‘traditional’ approaches, depending on the author) involve attempts to identify a particular norm or value from which human rights are derived, and which therefore delimit their scope and application. These approaches concentrate on the core idea of human rights as those rights that individuals have simply in virtue of their humanity, and attempt to explain and identify what the features of the human person are that generate these rights. We might say, for example, that human rights are derived from the idea of ‘human dignity’, and it is interesting that *Scotland’s Future*, as we have seen, adopts a dignitarian approach at one point.

 Naturalistic approaches may be either metaphysical or non-metaphysical. Taking the example of ‘human dignity’, some argue that the concept of dignity depends on a metaphysical understanding of the human in relation to a deity, for example in the idea of the human person being made in the image of God. But there are also non-metaphysical understandings of ‘human dignity’ that are nevertheless ‘naturalistic’, where the dignity of the person is seen to derive from an understanding of what it means to be human, based on our observations of human experience. Proponents of natural law theories of human rights argue that such theories are of this type.

The clearest example of an explicitly ‘naturalistic’ theory of human rights being adopted is that of De Valera, and the discussion around rights in the Ireland of the 1930s, an approach that lasted in Ireland’s judicial interpretation of the Constitution at least until the 1970s. There are clear indications that the political and legal classes in Ireland during this period adopted a ‘naturalistic’ theory of human rights, and one that was also explicitly metaphysical. There is also clear evidence that comparative reasoning was used in order to provide models of how this intuition could best be integrated into the new Constitution. It is no accident that the Preamble to the Irish Constitution provides the first example of the use of “human dignity” in a Constitutional text, probably drawn in part from *Rerum Novarum*. In our secular age, this approach has largely collapsed in Ireland, and it is unlikely to be any more acceptable in a post-Referendum Scotland.

An ‘agreement-based’ understanding of human rights focuses instead on human rights being derived from some degree of consensus or ‘common’ view of what human rights are, seeing international human rights, for example, as properly reflecting the core, or basic minimum of that agreement. At first sight, an ‘agreement-based’ theory appears to be the best fit for understanding the future adoption of the European Convention of Human Rights by Scotland after independence. After all, the ECtHR purports to adopt a heavily agreement-based, consensus approach in identifying the all-important ‘margin of appreciation’. It is true that this approach only seeks a consensus within Europe, and that the methods of identifying the consensus have been heavily criticized, but despite the partial and flawed approaches adopted, surely the underlying theory of human rights adopted by Scotland would be one fundamentally based on ‘agreement’ or consensus?

This isn’t clear, however. The First Minister’s recent strong commitment to re-introducing the Human Rights Act, in the event that Westminster repealed it, is based not on simply rejoining a European consensus, but on rejoining the group of “civilized” nations. I don’t think this was mere rhetorical flourish. His approach is not a traditional agreement-based approach, but one based on some independent normative criterion of what a “civilized nation” is. Nor does an agreement-based theory explain the incorporation of the ECHR into Irish law. The original basis for adopting the ECHR in Irish law was as part of the Belfast-Good Friday Agreement, in which Ireland agreed to keep its level of human rights protections in tandem with those being introduced in Northern Ireland, including the incorporation of the Convention. That was a very specifically Irish political decision, related to the unique constitutional needs of Ireland at that time, not one that is best described as based on an assumed consensus on the meaning and scope of human rights.

The third, competing, theory of human rights is what has been termed the ‘political’ theory. Unlike those human rights theorists considered to be ‘naturalistic’, the political understanding does not derive the meaning or authority of human rights directly from some objective ‘deeper order of values.’[[3]](#footnote-3) Unlike those who base their understanding of human rights on agreement, human rights norms are regarded as serving ‘as much to frame disagreement as agreement.’[[4]](#footnote-4) In a ‘political’ conception of human rights, human rights are seen as a ‘political doctrine constructed to play a certain role in (…) political life.’[[5]](#footnote-5) We should ‘frame our understanding of the idea of human rights by identifying the roles this idea plays within a discursive practice.’[[6]](#footnote-6) It is, essentially, a functional account. It seeks to theorize practice.

Of the three competing theories, it is the political which most appears to capture the understanding of human rights adopted in Ireland in most of the period we have been considering. I suggest that the view of rights adopted is that rights are seen as ‘political doctrine constructed to play a certain role in [Irish] political life’. The question I want to pose is what human rights theory the Scottish Government is aiming to incorporate in a new Scottish independent Constitution. It is not at all clear, although my guess is that, when pushed, the Scottish Government’s theory of human rights is also essentially political in this sense. Is that also the theory that any future Constitutional Convention would take? I think it is, and that this will guide the choice and use of comparative domestic experience.

In Ireland, in 1922 and 1937, different actors adopted significantly different understandings of the particular role that rights should play in Irish political life. So, despite sharing a broadly ‘political’ understanding of human rights, the differences in the use of comparative reasoning arise from the different approaches the political and legal actors take *within* a shared, broadly ‘political’, theory. The comparators chosen were not just reflections of accidental knowledge, or religious preferences, or to send messages about the degree of independence sought (although all these were part of the picture). Comparisons were also used to indicate to various audiences what constitutional *values* were at stake, and in that context it is not surprising that the battle of comparisons was played out particularly in the area of constitutional *rights*. But identifying the protection of human rights as an issue of where rights fit within political discourse sounds an extremely problematic theory for many. Each of these theories is problematic, though in different ways.

If the first common dilemma we face is the need to develop a robust theory of human rights, the second is more practical: what relationship is there between the underlying approach that those devising new constitutional rights protections have, and how the courts subsequently interpret these protections. To take a specific example that illustrates the point, there is a marked dissonance between the use of comparisons by the Irish courts in the interpretation of the 1937 Constitution and the political use of comparison in constitution *making*. The anxious debates over which comparative constitutional model to take into account during the construction of the constitution simply did not carry over into the phase of constitutional interpretation by the courts. It is noticeable that the relative autonomy enjoyed by the courts in constitutional interpretation resulted in the Irish courts largely ignoring the foreign models adopted at the stage of drafting, in favour of drawing strength from other foreign comparisons that appealed to the judiciary but may not have found particular favour with the constitution makers.

There is, in other words, a potential problem with making constitutional rights. The assumption that if the drafting of a right is changed, that will lead to a change of interpretation by the courts, is a somewhat questionable assumption. This is not only an Irish issue, of course. The experience of the interpretation by the Gibraltar courts and the Judicial Committee of the Privy Council interpreting the Gibraltar Constitution might suggest that the courts may carry on pretty much as before even when the drafting of rights has changed, using the jurisprudence of the European Court of Human Rights as highly persuasive precedents for the interpretation of the new rights as for the old rights. If the Scottish courts are now irrevocably committed to a more ‘universalist’ interpretation of rights, one that is both European and comparative, little may change.

This is not surprising. Not only do the different comparisons drawn on in interpreting the Constitution reflect differences in the normative basis of human rights, they also reflect the different political roles rights play in different institutional contexts. The Irish Constitution, even with the addition of justiciable constitutional rights, is not primarily about human rights. Human rights, it is true, are part of the deal, but only part. The role of the Irish Supreme Court, therefore, is about creating and maintaining a system of economic and political government, in which human rights play a part. As with the US Supreme Court, the role of the Irish Supreme Court is to interpret the function, the meaning, and the scope of human rights in light of the overall structural function of the Constitution as a whole. The Constitution has other things to do as well as protect human rights. Little wonder, therefore, that one court may adopt different comparative reasoning from other courts, and different comparative reasoning from other actors in the broader political system, such as those drafting the Constitution. I doubt if any future Scottish Constitutional Court would behave any differently.

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If there is a message in what I’ve said this evening, it is that the creation of a set of Scottish constitutional rights following a ‘yes’ vote in the forthcoming Independence referendum is a formidable intellectual task, quite apart from its complicated politics. We saw at the beginning of the lecture that comparisons are beginning to play an important and, indeed, controversial role in Scotland on issues related to an independent Scotland’s economy. I suggested that until recently there is much less use of comparisons for the purpose of sending messages about what *values* an independent Scotland would seek to further, and in particular what model of *rights* protections an independent Scotland would adopt. That may be about to change, if Irish constitutional history is any guide. If it does change, then the legal, political science, and history faculties of distinguished universities like Edinburgh will have a critical role to play. So too, I hope, will universities in Ireland, North and South. What perhaps would be useful would be an initiative that brought together academics throughout these islands to share the comparative experience that I have suggested will play a significant role. And Ruth Adler’s insight that we should seek “to achieve the coherence of theory and practice … as a necessary condition for achieving justice” will seem even more prescient.

1. \* Professor of Human Rights and Equality Law, Queen’s University Belfast; William W Cook Global Professor of Law, University of Michigan Law School; Leverhulme Major Research Fellow, 2011-2014. [↑](#footnote-ref-1)
2. *Scotsman*, 12 August 2006, < http://www.scotsman.com/news/scottish-news/top-stories/salmond-sees-scots-in-arc-of-prosperity-1-1130200> [↑](#footnote-ref-2)
3. Beitz, p. 7. [↑](#footnote-ref-3)
4. Beitz, p. 9 [↑](#footnote-ref-4)
5. Beitz, p. 49 [↑](#footnote-ref-5)
6. Beitz, p. 102 [↑](#footnote-ref-6)