Nation-making and Re-making: A Response to Brice Dickson, 'The Protection of Human Rights in a United Ireland'

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Nation-making and Re-making

A RESPONSE TO BRICE DICKSON, 'THE PROTECTION OF HUMAN RIGHTS IN A UNITED IRELAND'

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Brice Dickson's 'The Protection of Human Rights in a United Ireland'[1] demonstrates well the legal and doctrinal challenges that might arise in ensuring that, on the occasion of unification, there is no regression in rights protection for people in what is currently Northern Ireland. Dickson also offers solutions—there are, as he ably shows, 'fixes' that can be envisioned and pursued with relatively little legal complexity. Dickson thus demonstrates (a) that there are potential gaps in rights protection (substantive and procedural) which must be acknowledged if we are to ensure non-regression, and (b) that these gaps might be filled on the occasion of unification.

[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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However, if I have understood him correctly, Dickson proceeds on the understanding that the current constitutional arrangements for rights protection in (the south of) Ireland would remain more or less undisturbed on the occasion of unification, and that rights protections currently enjoyed in Northern Ireland under the Human Rights Act 1998, equality legislation, and international treaties would be fitted in around and within the current constitutional settlement encapsulated in Bunreacht na hÉireann and its *acquis*. In this short response I want to use Dickson's contribution as a jumping off point for thinking about constitutionalism in a united Ireland; for suggesting that the *status quo* need not be our starting point. In doing so I am heavily influenced by the challenging, imaginative, and inspiring conversations I have been party to as a participant in the Northern/Ireland Feminist Constitutions project led by Máiréad Enright, Aoife O'Donoghue, Catherine O'Rourke, and Liam Thornton.[2]

These conversations have challenged me to think about the possibility of unification not as one in which 'amendments would need to be made to the Constitution of Ireland' to preserve the law in the 'six counties', or as a process by which people in Northern Ireland would 'vote…to leave the United Kingdom…in order to join Ireland, which already has a set of laws that could in theory be immediately extended to the north'.[3] Instead, it has opened to me the possibility of thinking about unification as a potential process of nation-making; a moment of re-making in which a country founded on principles of participation and inclusion, equality, rights, and co-created identity might emerge from and replace current constitutional, political, and socio-economic arrangements.

This seems urgent to me for at least three reasons. First, in the event of unification, 'fresh' human rights challenges—challenges around representation, inclusion and belonging of people who do not identify as Irish, for example—will no doubt emerge. Resolving these will require a robust, inclusive, and participatory system of political and legal (re)settlement which it is difficult to envisage within the current constitutional structures in Ireland, which already fail to ensure these principles for minority and minoritised populations in the country. Second, the existing framework of human rights protection in (the south of) Ireland is manifestly inadequate if measured against either 'civil and political' benchmarks (like participation or non-discrimination) or

[2] See Feminist Constitutions: http://feministconstitutions.com.
[3] Dickson, 'The protection of human rights in a united Ireland', 602.

'socio-economic' ones (like adequate housing, the highest attainable standard of physical and mental health, and access to adequate food). Third, notwithstanding the dominance of 'popular sovereignty' in Irish constitutional lore, 'ours' is not a constitutional, legal or political order formed by or reflecting the vision and will of the polity. Rather, it remains one that reflects the norms and values of a conservative Catholic social class in the 1930s, and one in which we have so far failed to reckon with the systemic, systematic, individual, intergenerational, and intimate harms it produced. While it evolves through litigation and constitutional referendums, in its structures and modalities it remains fixed in time, and in the vision of its pen holders.

I want, thus, to suggest that it need not be taken for granted that the options for people in Northern Ireland must be limited to remaining in one country or joining another.

If we widen our contemplation to imagine the option of *joining in the making* of a new country, questions of rights protection might be moved on from the technical to the principled. This does implicate a different undertaking: prior to any referendum we would have to have already had a (no doubt difficult, no doubt prolonged) set of processes to negotiate a shared vision for the future of a re-constituted Ireland (if that is what we chose to continue to call it). That would require support and buy-in from people, politicians, and institutions on both sides of the now border. In other words, there would still be technical and process questions of great magnitude to be addressed, but rather than repair we would re-make.

Dickson's commitment to non-regression in rights protection for people in Northern Ireland on the occasion of unification is one that I share wholeheartedly. However, I fear that if we start from questions of technicality we elide the opportunity to recognise that the mere maintenance of the *status quo* may not be something to which we are satisfied to aspire on either side of the existing border.