FUNDAMENTAL RIGHTS IN THE CONSTITUTION OF NORTHERN IRELAND

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I

From one standpoint it could be argued that the term "fundamental rights" is a misnomer when used in relation to Northern Ireland. It is true that section 75 of the Government of Ireland Act, 1920,[1] preserves the supreme authority of the Parliament of the United Kingdom over Northern Ireland, but the exercise of that authority has been limited by the practice of almost forty years.[2] Thus the limitations on the powers of the Parliament of Northern Ireland, and the judicial interpretation of those limitations, provide an example of the protection of certain fundamental rights by means of restrictions on the exercise of governmental power. Since the Privy Council rule against consideration of draft Bills[3] does not apply to an article such as this, the "Home Rule Bills" (those proposals "for the better government of Ireland" which did not come into operation) can be utilised to place this aspect of Northern Ireland's constitution in its historical setting.

II. *Legislative Restrictions in the Home Rule Measures*[4]

The British North America Act, 1867,[5] was not two decades old

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This article is based on a paper with the same title prepared for a colloquium on Constitutional Provisions for Fundamental Human Rights held by the United Kingdom National Committee of Comparative Law at Belfast in September, 1957. The writer is indebted to the Committee for permission to use this material. For a report of the colloquium by Professor J. L. Montrose see (1958), 7 Int. and Comp. L.Q. 144.

[1] 10 & 11 Geo. 5, c. 67, in this article generally referred to as "the Act of 1920".

[2] See Donaldson, The Constitution of Northern Ireland: Its Origins and Development (1955), 11 U. Tor. L.J. 1, at pp. 28-9.

[3] *Attorney-General for Ontario* v. *Israel Winner*, [1954] A.C. 541, *per* Lord Porter, at p. 554.

[4] For a shorter summary on similar lines see *op. cit., supra*, footnote 2, at pp. 13-15.

[5] 30 & 31 Vict., c. 3.

when Gladstone introduced his first Home Rule Bill in 1886. During the debates on that Bill there were references to the 1867 Act and its federal scheme, but the 1886 Bill went further than the earlier enactment in the restrictions proposed for the subordinate Irish Legislative Assembly. Clause 4 provided that no religion was to be established or endowed by the legislature. The free exercise of religion was not to be prohibited, disabilities were not to be imposed nor privileges conferred on account of religious belief, denominational education and charities were not to be interfered with, nor was the right to public secular education to be affected. As well as placing these barriers in the way of religious discrimination, the 1886 Bill preserved the rights of statutory or chartered corporations which were then in existence. At that time, the nearest precedent on the Westminster statute-book was to be found in section 93 of the British North America Act with its protection for the educational rights of religious minorities. But the fact that the 1886 Bill was refused a second reading meant that it did not produce the crop of litigation which has sprung from the Canadian section.

A more direct and personal connection between Canada and Gladstone's second Home Rule Bill (introduced in 1893) existed in the person of Edward Blake. The former Premier of Ontario, and Liberal Minister and Leader of the Opposition in the Canadian House of Commons, entered the House of Commons at Westminster in 1892 as an Irish Nationalist. He was consulted by the government on the drafting of the 1893 Bill, and used his Canadian constitutional experience to advantage during the debates on the Bill in the Commons, but, since the measure was rejected by the Lords, he did not see the application to Ireland of the views he expounded.[6]

When the 1893 Bill was introduced it repeated in clause 4 the restrictions contained in the 1886 Bill with some additions, the most important of which would have prevented the Irish legislature from making any law,

> Whereby any person may be deprived of life, liberty or property without due process of law, or may be denied the equal protection of the laws, or whereby private property may be taken without just compensation.

During the committee stage debates an additional ban was placed on legislation diverting the property of any religious body, while

[6] See Banks, Edward Blake, Irish Nationalist (1957), especially Ch. III, "The Home Rule Bill of 1893".

in the provision just quoted there was added to the phrase "due process of law" the words "in accordance with settled principles and precedents", an obvious attempt to marry parts of the British and United States constitutional methods. On the report stage various detailed restrictions were added. Those concerning religion prohibited the use of the public revenue for religious purposes, or for the benefit of holders of religious offices; banned the alteration of the constitution of any religious body; and prohibited the establishment or endowment out of public funds of theological professorships, or of any university or college where religious tests would be imposed. Another restriction would have prevented discrimination against any of the Queen's subjects on account of their parentage, place of birth or business, or against corporations constituted elsewhere in the Queen's dominions. It would be interesting to know whether Blake had any hand in the "due process of law" provision, but in any event it is surely not fortuitous that James Bryce (whose work on *The American Commonwealth* was first published in 1888) was Chancellor of the Duchy of Lancaster in Gladstone's Cabinet, and a member of the committee responsible for the production of the 1893 Bill. However, the rejection of the Bill deprived the Irish courts of the interesting task of developing a body of constitutional law similar to that produced on the other side of the Atlantic.

Almost two decades passed before the next Home Rule Bill was introduced. In the intervening years section 51 (xxxi) of the Australian constitution[7] had declared that Commonwealth legislation for the acquisition of property from any state or person should provide for "just terms", a provision which bears some resemblance to one of the restrictions eventually imposed on the Parliament of Northern Ireland. Again, section 116 of the Australian constitution prohibited the establishment of religion, the imposition of religious observances, interference with the free exercise of religion, and the use of religious tests for public offices;[8] the corresponding Irish proposals were more detailed. Significantly, when a form of administrative devolution was proposed by the Irish Council Bill, 1907, there was included in clause 16 a prohibition on the showing of a preference for any religious denomination. Two years later the South African constitution used the method of "entrenching" to control the alteration of provisions relating

[7] Commonwealth of Australia Constitution Act (1900), 63 & 64 Vict., c. 12. See Wynes, Legislative, Executive and Judicial Powers in Australia (1953), pp. 461-76.

[8] See Wynes, *ibid.*, pp. 176-82.

to electoral rights and official languages.[9] Therefore, when the third Home Rule Bill was introduced in 1912 there were some more constitutional precedents on the Westminster statute-book.

However, the 1912 Bill merely repeated in brief terms the restrictions previously proposed on the establishment or endowment of any religion, on interference with the free exercise of religion, and on privileges or disabilities related to religious belief or status. An additional restriction prevented the making of any religious belief or ceremony a condition of the validity of any marriage. At the committee stage there was inserted an earlier provision preserving the right of a child to attend a school receiving public money without receiving religious instruction there. The report stage saw the addition of prohibitions on the alteration of the constitution of any religious body, and on the diversion from religious denominations of the fabric of cathedral churches or of any other property, except for the purpose of specified public utilities and on payment of compensation. In contrast to the wide provisions of the 1893 Bill, the 1912 restrictions related only to religious matters. The 1912 Bill eventually became law, in accordance with the Parliament Act, 1911,[10] as the Government of Ireland Act, 1914,[11] but was preceded on the statute-book by the Suspensory Act, 1914,[12] and never came into operation, being eventually repealed by the 1920 measure. But the restrictions contained in section 3 of the 1914 Act were approved by the majority of the members of the Irish Convention, a widely representative and officially appointed body which reported in 1918 on the contents of a possible Home Rule Bill.[13]

It is thus apparent that the Home Rule proposals which preceded the Act of 1920 shared the common aim of providing some kind of legislative restriction. The various forms of Irish legislature which were proposed would not have been able to interfere with the exercise of religion, the constitution and property of religious bodies, and religious education. Naturally, those provisions did not amount to anything like a Bill of Rights on the United States model, and even when, in 1893, an attempt was made to widen the scope of the restriction on Irish legislative power, the generality of

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[9] South Africa Act (1909), 9 Edw. 7, c. 9, ss. 35, 137, 152. See McWhinney, Judicial Review in the English-Speaking World (1956), Ch. 8; Marshall, Parliamentary Sovereignty and the Commonwealth (1957), Ch. XI.

[10] 1 & 2 Geo. 2, c. 13.

[11] 4 & 5 Geo. 5, c. 90.

[12] 4 & 5 Geo. 5, c. 88.

[13] Report of the Proceedings on the Irish Convention (1918), Cmd. 9019, pp. 25, 110.

the words used was later qualified. Among academic commentators, Dicey was especially critical of the general language of the restrictions in the 1893 Bill, and he doubted whether they would be effectively enforced.[14] In dealing with the 1912 Bill, Sir John Macdonnell cited section 93 of the British North America Act and some Canadian authorities in support of the proposed religious restrictions, and concluded that the 1912 provisions "guard, in explicit terms, against the dangers to religious liberty and equality in a way in which probably no other constitution does".[15] Professor J. H. Morgan defended the omission of other restrictions on the ground that reservation of powers would provide more effective protection, and that in any event judicial interpretation on "police power" lines would be necessary if the Irish legislature was not to be unduly trammelled.[16] Clearly, the Irish situation demanded constitutional guarantees of some kind, but neither legislators nor commentators were in agreement on the form which those guarantees should take. The pragmatism typical of British constitutional development characterised this aspect of the attempts to deal with Ireland's problems.[17]

III. *Restrictions on the Northern Ireland Parliament's Legislative Powers*

This pragmatic trend was continued in the Government of Ireland Act, 1920. The Act of 1920 had a number of novel features, one of them being that there should be two subordinate Parliaments in Ireland, one for Northern Ireland and one for Southern Ireland (which later became the Irish Free State and is now the Republic of Ireland). As events happened, the Act of 1920 remains operative only in Northern Ireland, where it forms, in effect, the constitution. The legislative power is distributed between the United Kingdom and Northern Ireland Parliaments, but the principle of distribution is different from that used in the British North America Act. A number of matters, relating to the United Kingdom as a whole, are excepted from local legislative jurisdiction by section 4, while sections 9, 21, 22 and 47 "reserved" to the Westminster Parliament

[14] A Leap in the Dark (2nd ed., 1911), pp. 80-100.

[15] Constitutional Limitations upon the Irish Legislature and the Protection of Minorities, in Morgan, The New Irish Constitution (1911), p. 110. The Canadian authorities cited were *City of Winnipeg* v. *Barrett*, [1892] A.C. 445, *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202 and *Brown* v. *Curé et Marguillers de Notre Dame de Montréal* (1874), L.R. 6 P.C. 157.

[16] The Constitution: A Commentary, in *op. cit.*, *ibid.*, pp. 17-24.

[17] As to this pragmatic trend, see McWhinney, *op. cit.*, *supra*, footnote 9, Ch. 1.

certain other topics until the "date of Irish union". This was the date on which the Parliaments of Northern and Southern Ireland were to merge themselves into a single, all-Ireland Parliament under the Act of 1920, but the fate of that measure means that the "reserved" matters remain outside the jurisdiction of the Northern Ireland Parliament. Leaving aside these *ultra vires* topics, the Parliament of Northern Ireland can operate in the rest of the legislative field, subject to certain restrictions. It is these restrictions which make up the fundamental rights existing in the constitution of Northern Ireland.

Some of these restrictions provide protection for particular institutions. Thus, section 64 of the Act of 1920 protects the property and constitution of the Queen's University of Belfast, while section 65(2) prevents the privileges and exemptions of the Grand Lodge of Freemasons in Ireland from being abrogated or prejudicially affected. It is, however, in section 5 of the Act of 1920 that the general restrictions on the Northern Ireland Parliament's powers are to be found. (With this section must be coupled article 16 of the Anglo-Irish Agreement of 1921, more familiarly known as "the Treaty". This is part of the statute law in force in Northern Ireland by virtue of the Irish Free State (Agreement) Act, 1922,[18] but, as will be seen, this article differs from section 5 only in a few particulars.) For purposes of comparison the following classification of the restrictions is based on the order in which the subjects most nearly related to them appear in the 1948 Universal Declaration of Human Rights, and the bracketed references are to the articles of that document.

Equality and non-discrimination (Articles 2 and 7). Here the emphasis which the Act of 1920 laid on religious matters is clearly seen. Section 5(1) prohibits the making of a law which will give a preference, privilege or advantage, or impose any disability or disadvantage, on account of religious belief or religious or ecclesiastical status. This legislative restriction is reinforced by a similar limitation on the exercise of the executive power. Under section 8(6) of the Act of 1920 the Governor of Northern Ireland (the successor to the Lord Lieutenant of Ireland) may not, in the exercise of the powers delegated to him, give any preference, privilege or advantage, or impose any disability or disadvantage, on account of religious belief, except where "the nature of the case" otherwise requires.

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[18] 12 & 13 Geo. 5, c. 4.

Marriage (Article 16). No law may make any religious belief or religious ceremony a condition of the validity of any marriage.

Property (Article 17). There are three relevant provisions, two comparatively narrow and one extremely general. First, section 5(1) of the Act of 1920 prohibits the diversion from a religious denomination of the fabric of a cathedral church or of any other property, except where the latter is taken for such works of public utility as roads, railways, lighting, water or drainage, and where compensation is paid. Next, article 16 of the Anglo-Irish Agreement of 1921 prohibits the diversion from any religious denomination or any educational institution of any property "except for public utility purposes and on payment of compensation". Thirdly, the concluding words of section 5(1) of the Act of 1920 prohibit any legislation which will "take any property without compensation". These words were inserted at a late stage of the 1920 Bill, and their generality has been the cause of some argument but, taken at their face value, they constitute one of the most complete restrictions imaginable on expropriation legislation.

Freedom of religion (Article 18). Although most of the limitations contained in section 5(1) of the Act of 1920 have some connection with religion, three are especially directed to the preservation of religious freedom. The Parliament of Northern Ireland may not establish or endow any religion, nor may it prohibit or restrict the free exercise of religion, nor may it alter the constitution of any religious body without the approval of its governing body. Linked with the other restraints, these limitations constitute considerable impediments to any legislative attempt to delve into waters which in Ireland have been especially troubled.

Freedom of education (Article 26). Section 5(1) prohibits legislation affecting prejudicially "the right of any child to attend a school receiving public money without attending religious instruction at that school". To this protection for individual interests Article 16 of the Anglo-Irish Agreement added a ban on discrimination "as respects State aid between schools under the management of different religious denominations".

Three other points on section 5 of the Act of 1920 are relevant to this résumé of legislative restrictions. First, by subsection (1) the Parliament of Northern Ireland may not "make a law so as, either directly or indirectly," do any of the prohibited things; this is aimed at colourable evasion of the restrictions. Next, the subsection laid down that any law made in contravention of the restrictions imposed was to be void in so far as it contravened those

restrictions; clearly the principle of severability was to be applied.[19] Thirdly, by subsection (2) the Act of 1920 swept the statute-book clear of enactments imposing "any penalty, disadvantage, or disability . . . on account of religious belief, or on a member of a religious order as such".

This summary of the relevant provisions of the Act of 1920 shows them to be in marked contrast to the wide terms of the text issued in 1958 of the proposed Canadian Bill of Rights.[20] The two documents exemplify two vastly different methods of formulating constitutional guarantees. In 1920 the Westminster legislators were mainly concerned to prevent the abuses to which they thought the subordinate Irish parliaments might be prone. One must also bear in mind the general background to the Act of 1920. Internal tensions in Ireland had produced considerable dissension, while at the other end of Europe the Russian Revolution had taken place only three years previously. It was, therefore, understandable in the circumstances that the new Irish constitution should impose certain restraints on religious discrimination and expropriation. The detailed emphasis on matters appertaining to religion, the width of the ban on taking property without compensation, the lack of any specific reference to personal guarantees of liberty or to such collective guarantees as freedom of assembly and association—all these point to a reluctance to go further than the immediate needs of the moment appeared to demand. (Two more years were to elapse before a full "Bill of Rights" appeared in a constitution on the Westminster statute-book. This was the Irish Free State's 1922 constitution, now replaced by the 1937 constitution of the Republic of Ireland.)[21] At the same time, section 61 of the Act of 1920 continued in force the then existing law,[22] so that for the protection of other fundamental rights reliance must be placed on the common law and ordinary legislation. Almost forty years later, the projected Canadian Bill of Rights, setting out to provide, in the words of its long title, for "the recognition and protection of human rights and fundamental freedom" declares

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[19] See Newark, Severability of Northern Ireland Statutes (1950), 9 N. Ire. Leg. Q. 19.

[20] First Session, Twenty-Fourth Parliament, 7 Eliz. II, Bill C-60. First Reading September 5th 1958.

[21] See Delany, The Constitution of Ireland: Its Origins and Development (1957), 12 U.Tor. L.J. 1; Donaldson, Some Comparative Aspects of Irish Law (1957), pp. 136-180.

[22] This section differs from s. 129 of the B.N.A. Act in that there are no restrictions on the repeal by the Northern Ireland Parliament of pre-1921 British legislation, so long as it relates to an *intra vires* matter.

these in positive terms, referring directly to rights of the individual and to specified freedoms. Instead of proceeding by way of legislative restriction, the Canadian Bill deals with the problem directly. Naturally, the subject-matter of these two sets of guarantees corresponds at a number of points. With the detailed provisions relating to religion in Northern Ireland's constitution may be contrasted the generality of section 2(b) of the Canadian Bill, recognising and declaring "the right of the individual to protection of the law without discrimination by reason of . . . religion", and section 2 subsection (c), guaranteeing simply "freedom of religion". Similarly, the ban on the Northern Ireland Parliament legislating to "take property without compensation" is in contrast to the Canadian section 2 subsection (a), guaranteeing "the right of the individual to . . . enjoyment of property, and the right not to be deprived thereof except by due process of law". Another common feature is to be found in sections 5(1) and (2) of the Act of 1920, negativing past and future legislation with a contrary effect, and section 3 of the Canadian Bill, which, to protect the specified rights, lays down a similar rule of construction for past and future Canadian legislation, both original and subordinate. On the provincial level, similar comparisons could be drawn between the Act of 1920 and the Saskatchewan Bill of Rights Act,[23] though this measure differs in that it specifies both criminal penalties and remedy by injunction. In Northern Ireland the power of judicial review is more general.

Despite these differences in scope there is ground common to Northern Ireland's legislative restraints and the Canadian proposals and provincial legislation. In that part of the task of judicial interpretation which consists of measuring legislation against constitutional restrictions Northern Ireland lies well within the Commonwealth tradition, so that both the general attitudes adopted by the judges, and their approach to particular problems, are suitable for examination in this article.

IV. *General Judicial Views*

The Act of 1920 makes provision in two ways for the determination of constitutional questions arising in Northern Ireland. If a point about the validity of a Northern Ireland statute is raised in the course of litigation, and no appeal would otherwise lie to the Northern Ireland Court of Appeal, section 50 of the Act of 1920 provides that such an appeal may be brought. Similarly, section 49, as well as preserving rights of appeal to the House of Lords,

[23] R.S.S., 1953, c. 345.

provides that a question of the validity of a Northern Ireland statute may (if no appeal already lies) be appealed from the Court of Appeal to the House of Lords, with the leave of either court.[24] The second method of testing constitutional questions is by way of reference to the Judicial Committee of the Privy Council under section 51 of the Act of 1920. This section empowers the Governor of Northern Ireland or a Secretary of State (normally the Home Secretary) to represent to the Queen that a question of the validity of a Northern Ireland Bill or Act should be judicially determined, and the Queen may direct that the matter be referred to the Judicial Committee for hearing and determination. This procedure may be set in motion by means of petition, presented either by individuals or institutions.

Whatever the method used for the decision of such questions, the task given to the judges by the Act of 1920 was a fresh one. Commenting on the 1886 Home Rule Bill, Sir William Anson remarked that "there would be some novelty in the spectacle of an English court considering an Act of Parliament not as regarded its construction, but as regarded its validity".[25] The introduction of a quasi-federal constitution for Northern Ireland meant that the judges there were given just this task, which was also a novel one for the House of Lords, though of course the problems were by no means unfamiliar to those who served on the Judicial Committee. However, in the result a bare dozen cases relating to the validity of Northern Ireland legislation have been decided during the thirty-eight years since the Act of 1920 came into operation.

One explanation for this paucity of authority may be that since constitutional questions are comparatively novel they do not occur to potential litigants as possible subjects for judicial decision. Again, members of the legal profession who are concerned mainly with questions of private law may feel that matters of public law are of less immediate interest to them, but however interested they may be in constitutional points they have to rely on suitable circumstances arising (and litigants appearing) before they can bring such points before the courts. Occasionally some authority or body of persons affected by a piece of legislation may raise the question of its constitutionality without taking the matter as far as the courts. An undoubted deterrent to litigation is provided by the "enablements" which the United Kingdom Parliament gives to that of

[24] See Newark, On Appealing to the House of Lords (1947), 8 N. Ire. Leg. Q. 102.

[25] The Government of Ireland Bill and the Sovereignty of Parliament (1886), 2 L.Q. Rev. 427, at p. 432.

Northern Ireland in the course of day-to-day legislation. The effect of those *ad hoc* extensions of the subordinate Parliament's powers under the Act of 1920 is to reduce to a margin the area of potential constitutional dispute. Yet a greater awareness of the possibility of constitutional challenge would supply further decisions on the validity of Northern Ireland legislation.

Certain decisions which have so far been given on the Act of 1920 have been concerned with the distribution of legislative power between London and Belfast. Unlike some recent Canadian cases on the powers of provincial legislatures, these Northern Ireland decisions have not touched on the fundamentals of parliamentary government. Instead, they have been fairly closely confined to the construction of the Act of 1920 and of the impugned legislation. They are, however, of interest in demonstrating how cases arising in other parts of the Commonwealth have been applied, and how in turn a decision in a case from Northern Ireland may be included in the corpus of authority on similar Commonwealth matters. For instance, the case of *Gallagher* v. *Lynn*[26] went from the Northern Ireland courts to the House of Lords, where Lord Atkin drew attention to the relevance of Canadian decisions in determining the validity of Northern Ireland legislation. A year later the same learned judge, in the Canadian case of *Shannon* v. *Lower Mainland Dairy Products Board*[27] specifically brought *Gallagher* v. *Lynn* into "the line of authority on constitutional cases arising in the Dominions". Another link with Canada, this time on a procedural matter, relates to the practice of intervention by the Attorney General in a case in which a constitutional point is raised. In one Northern Ireland case the Attorney General appeared both on behalf of a party (a statutory body) and in his own right.[28] Later, the point was fully discussed in *Northern Ireland Road Transport Board* v. *Benson*[29] when the Attorney General cited Canadian authorities and argued that he was entitled to intervene on the invitation of the court. The Court of Appeal agreed with this contention, and Murphy L.J. (with whom Andrews L.C.J. concurred) went further, stating that:

> In my opinion not merely is the court entitled to request the Attorney-General to appear and to assist them, but in a case where a question arises as to the legality of a statute of Northern Ireland, the Attorney-General by virtue of his high office and as a person responsible for

[26] [1937] A.C. 863, at p. 868; [1938] N.I. 21, at p. 39. See also *The King (Lynn)* v. *Gallagher*, [1936] N.I. 131.
[27] [1938] A.C. 708, at p. 719.
[28] *O'Neill* v. *Northern Ireland Road Transport Board*, [1938] N.I. 104.
[29] [1940] N.I. 133, at p. 140.

> the proper administration of justice, would be *entitled* to intervene at any stage. The right of the court to invite him to intervene is in my opinion inherent in the court, and the Attorney-General's right to intervene is inherent in his high office.[30]

In practice, in one subsequent constitutional case there was no appearance or intervention by the Attorney General, while in a second the Attorney General was invited to appear and did so. When the validity of legislative action is in question the arguments of the Law Officer are clearly relevant, more especially since it is the practice for the Attorney General for Northern Ireland to certify Bills before they are sent to the Governor to receive the Royal Assent.[31]

Turning to the other class of constitutional decision in Northern Ireland (relating to legislative restrictions), it is clear that in their approach to the Act of 1920 the judges have in general adopted the traditional view that they are construing a statute rather than a constitution. However, there are indications that on one or two occasions individual judges have considered the importance of the fact that the Act of 1920 is the basis of local legislative jurisdiction. For instance, Andrews L.J. (as he then was) in one case remarked of the impugned enactment that ". . . it is our duty, if possible, to avoid a construction which would make the legislation *ultra vires*."[32] These words have a distinct ring about them of the "presumption of constitutionality", and indicate that the onus of rebuttal will lie on the party challenging the validity of an enactment. More recently, Sheil J. has pointed out that in the opening words of section 5(1) of the Act of 1920, forbidding the legislature to do certain things, either directly or indirectly, the phrase "directly or indirectly" must be held to apply throughout the whole of subsection (1); otherwise, the learned judge said, the result ". . . would be to render the whole section, with the exception of the phrase immediately following the words 'directly or indirectly' quite useless as a protection to any minority".[33] At first sight the concluding words might

[30] *Ibid.*, at p. 169.

[31] This practice has not deprived attorney generals of judicial impartiality when they ascend the bench; see *ibid.*, at p. 150, *per* Babington L.J. "I listened to the arguments on both sides and to the Attorney-General with attention, and I was the more inclined to accede to his defence of the statute by reason of the fact, which I mentioned to counsel at the opening of the case, that as Attorney-General I must have certified it to be *intra vires* before it received the Royal Assent. But after full consideration I find myself driven to the conclusion that the statute is *ultra vires*. . . ."

[32] *Robb* v. *Electricity Board for Northern Ireland*, [1937] N.I. 103, at p. 125.

[33] *Ulster Transport Authority* v. *James Brown and Sons, Ltd.*, [1953] N.I. 79, at p. 89.

seem to open up interesting possibilities of the assertion of fundamental rights, but any attempt to use section 5(1) for the protection of minority interests would have to be made in terms clearly within the Act of 1920 to have any chance of success.

As for the specific techniques which have been used in the constitutional cases, no one has so far attempted to breach the rule against consideration of parliamentary history, though there is no doubt that reference to Hansard throws some light on the intention of the legislators at Westminster in adding the words "or take any property without compensation" at the end of section 5(1) of the Act of 1920.[34] Yet without quoting Hansard Andrews L.J. gave a concise summary of the relevant parliamentary debates when he said:

> . . . the Parliament of the United Kingdom in its wisdom deemed it expedient, when delegating certain of its legislative powers, to provide against the confiscation of any property in Ireland, of which under local legislatures there was always at least a possibility in a country where religious differences were not the only causes of personal and class animosities.[35]

In another case the same learned judge stressed the background, policy and possible economic consequences of the enactment under consideration, though he did so in general terms and without consideration of evidence.[36] In the more recent case of *Ulster Transport Authority* v. *James Brown and Sons, Ltd.*, the case stated which was the subject of appeal contained certain findings of fact on which the judges were able to base their reasoning, but Lord MacDermott L.C.J. used familiar language when he stated:

> I see no reason to speculate upon the motives of the Legislature in enacting this particular piece of legislation. Whatever in fact those motives may have been, the intention of the Legislature, as gleaned from its terms, is what must guide the court in this instance.[37]

On another occasion Lord MacDermott said of legislation apparently lying within a "permitted field" that "how far the colourable nature of such legislation can be proved by facts and circum-

[34] See Newark, Ejusdem Generis and the Government of Ireland Act, 1920, s. 5 (1939), 3 N. Ire. Leg. Q. 77; Coutts, The Ejusdem Generis Rule and *O'Neill* v. *N. I. Transport Board, ibid.*, at p. 138; Montrose, Taking Property without Compensation (1956), 11 N. Ire. Leg, Q. 278. On the general question of the use of legislative history, see Corry, The Use of Legislative History in the Interpretation of Statutes (1954), 32 Can. Bar Rev. 624; Payne, The Intention of the Legislature in Interpretation of Statutes (1956), 9 Curr. Leg. Probs. 96, at pp. 102-4.

[35] *O'Neill* v. *Northern Ireland Road Transport Board, supra,* footnote 28, at p. 116.

[36] *Northern Ireland Road Transport Board* v. *Benson, supra,* footnote 29, at pp. 147-9.

[37] *Supra,* footnote 33, at p. 114.

stances extraneous to the text of the enactment has not been finally settled. Where the consequences are relevant evidence as to what they are and how they came about appear to be admissible."[38] But, apart from quoting a dictum of Lord Maugham L.C. to the effect that speeches in legislatures have little evidential value,[39] Lord MacDermott did not pursue this interesting topic further.

The novel problem of severability gave the judges some difficulty, particularly when they contemplated the possibility that words might be *intra vires* when they were considered in relation to certain individuals or groups, and *ultra vires* when they were applied to other persons or classes.[40] But in *Brown's* case Lord MacDermott L.C.J. put the matter succinctly when he commented on the declaration that any law contravening section 5(1) of the Act of 1920 is to that extent void, and said:

> I am not aware of any authority for the view that language such as this necessarily means that contravention must produce an actual gap in the statute book in the sense that the measure concerned, or some specific part thereof, simply drops out of the authorised text. As well as this vertical severability, if I may so describe it, I see no reason why, if the circumstances warrant such a course, the terms of section 5(1) should not be sufficiently met by what I may call a horizontal severance, a severance that is which, without excising any of the text, removes from its ambit some particular subject-matter, activity or application. This, I think, would give effect to the words "so far as it contravenes" without impinging on the meaning or weight to be attached to the word "void".[41]

This portion of Lord MacDermott's judgment has been quoted both by an Indian commentator and by the Supreme Court of India,[42] so that once again the utility of cross reference between decisions in various parts of the Commonwealth becomes apparent.

In the corpus of Canadian constitutional law there are, naturally, comparisons which may be made with the judicial attitudes which have just been mentioned. Thus, Andrews L.J.'s ideas on the tendency to lean against a finding of invalidity could be compared with Duff J.'s reference in *Attorney-General for Ontario* v. *Reci-*

[38] The Supreme Court of Northern Ireland—Two Unusual Jurisdictions (1954), 2 J. Soc. Pub. Teachers of Law (N.S.) 201, at p. 205.

[39] *Attorney-General for Alberta* v. *Attorney-General for Canada*, [1939] A.C. 117, at p. 131.

[40] *Northern Ireland Road Transport Board* v. *Benson supra*, footnote 29, *per* Andrews L.J., at pp. 149-150.

[41] *Supra*, footnote 33, at p. 118.

[42] Thiruvenkatachari, The Unconstitutional Statute, [1957] Mad. L.J.; *Sundararamier & Co.* v. *State of Andhra Pradesh*, [1958] S.C.J. 459, at p. 483. The writer is indebted to Professor Alan Gledhill for these references. For a recent summary of the views of the United States Supreme Court see *Staub* v. *City of Baxley* (1957), 355 U.S. 313, *per* Frankfurter J., at p. 330.

procal Insurers to "the presumption which imputes to the Legislature an intention of limiting the direct operation of its enactments" to matters within its territorial jurisdiction.[43] The hint which Sheil J. gave about the protection of minorities will be contrasted later in this article with recent developments in Canadian cases on the protection afforded to individuals by the British North America Act. Lord MacDermott's views on "vertical severability" are in line with *Toronto Corporation* v. *York Corporation*.[44] But perhaps the most interesting point is that which Lord MacDermott mentioned, but on which the Northern Ireland judges have not yet committed themselves—namely the question of the material which will be considered in constitutional cases. Lord Maugham L.C., considering the validity of the 1937 Alberta banking, social credit and press legislation, said that "... the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be."[45] A decade later, in *Commonwealth of Australia* v. *Bank of New South Wales*[46] the Privy Council appeared to contemplate that "economic activities" and "social development" might influence the interpretation of section 92 of the Australian constitution (which provides that inter-state trade shall be "absolutely free"). But in a subsequent case on this Australian provision Dixon J. (as he then was) equated the "object or purpose" of an enactment with its "necessary legal effect" and rejected the idea of "ulterior social or economic effect".[47] This attitude was approved by the Privy Council, who did not think that their 1950 ruling applied.[48] The refusal by the Supreme Court of Canada to allow a successful appellant costs of documentary material[49] indicates that that court is similarly inclined. The position seems to be that the High Court of Australia has declared itself against the use of evidence as an aid to interpretation, that the Supreme Court of Canada is reluctant to use evidential material and the Privy Council has not yet indicated what is a "proper case" for the consideration of social and economic material relevant to the effect of an enactment.

[43] [1924] A.C. 328, at p. 345. [44] [1938] A.C. 415.

[45] *Attorney-General for Alberta* v. *Attorney-General for Canada*, *supra*, footnote 39, at p. 131.

[46] [1950] A.C. 235, *per* Lord Porter, at p. 299. See McWhinney, *op. cit. supra*, footnote 9, Ch. 6.

[47] *McCarter* v. *Brodie* (1950), 80 C.L.R. 432, at p. 465.

[48] *Hughes and Vale Proprietary Ld.* v. *State of New South Wales*, [1955] A.C. 241, at pp. 295-6, 308.

[49] *Saumur* v. *City of Quebec and Attorney-General of Quebec*, [1953] 4 D.L.R. 641, *per* Kerwin J., at p. 666.

There is, however, a further consideration which is relevant to this matter in Northern Ireland. As has already been mentioned the prohibitions in section 5(1) of the Act of 1920 ban the making of a law which will "directly or indirectly" run counter to the specified prohibitions. Counsel might rely on these words to justify consideration of the "ulterior social or economic effect" of an impugned statute. Thus it is not impossible that among the members of the Northern Ireland Bar there is some emulator of Brandeis who will be able to persuade the judges to consider extra-legal matters in determining whether a Northern Ireland statute falls within the terms of the Act of 1920.

As yet, however, Northern Ireland's constitutional cases have been decided in the more usual manner, so it is not surprising that they have been largely concerned with semantic arguments. The following summary will indicate the way in which the judges have applied in particular cases the traditional views just outlined.

V. *Some Particular Decisions*

A remarkable feature of the cases on the restrictions in the Act of 1920 is that religious matters, on which so much emphasis was placed, have been the subject of only one decision. This case was *Londonderry County Council* v. *McGladè*[50] where a minority of the trustees of a school were ordered to join with the majority in transferring the school to the local education authority constituted under Northern Ireland legislation. Wilson J. rejected arguments, based on section 5 of the Act of 1920, that the statutory provisions were void. He held that Roman Catholic pupils could not be said to have a property right in the education they were receiving, that they could not be compelled to attend religious instruction under the new educational regime, and that in any event the payment of public money for the provision of sectarian religious instruction would be tantamount to the endowment of religion. So far, the judges in Northern Ireland have not been faced with the problems which have confronted their Canadian counterparts.[51]

For a case on the effect of section 5(2) of the Act of 1920, abolishing discriminatory enactments, one must turn to the decisions of the Irish Free State courts. In *In re Byrne*[52] Johnston J.

[50] [1929] N.I. 47.

[51] See, for example, *Toronto* v. *Roman Catholic Separate Schools Trustees*, [1926] A.C. 81; *Hirsch* v. *Protestant School Commissioners of Montreal*, [1928] A.C. 200; *Roman Catholic Separate Schools Trustees* v. *The King*, [1928] A.C. 363; Scott, comment on *Chabot* v. *Les Commissaires d'Ecoles de Lamonandière*, [1957] Q.B. 707, (1958), 36 Can. Bar Rev. 248.

[52] [1935] I.R. 782.

held that the effect of section 5(2) was to repeal the restrictions imposed on the activities of the Jesuit and other orders by the Roman Catholic Relief Act, 1829,[53] and in this he was upheld by the Supreme Court. This is one decision which fulfilled the purpose of the relevant legislation, for it accords with the intention of the members of the Irish Convention who in 1918 proposed a provision on the lines of section 5(2).[54] There is no reason to suppose that the courts in Northern Ireland would come to a different conclusion. Moreover, the decision accords with the view expressed by Sir Arthur Quekett, the learned commentator on the Act of 1920.[55]

The portion of section 5(1) of the Act of 1920 which has given rise to most litigation is that phrase which was tacked on at the end, the words ". . . or take any property without compensation". In the four cases in which this provision has been discussed, the Northern Ireland courts have held:

(i) that the electricity code provides compensation for the erection of a pole to carry an electric line over private property (*Robb's* case);[56]

(ii) that the payment of certain stock constituted compensation for a transport operator whose business had been acquired by a Northern Ireland statutory body (*O'Neill's* case);[57]

(iii) that increased statutory restrictions on certain activities of transport operators constituted a taking of property (*Brown's* case);[58]

(iv) that (in one judge's view) the refusal of planning permission for certain development of land constituted a taking of property (*McConnell's* case).[59]

To these may be added *Benson's* case,[60] but that decision had a curious history which detracts from its authority. It turned on restrictions imposed on transport operators, which the Court of Appeal (by a majority) held did not constitute a "taking of property" but a "mere negative prohibition". The case had, however, started its career as a prosecution which had been dismissed, and not until it reached the House of Lords was it pointed out that no appeal lay from a dismissal.[61] In *Brown's* case the Court of Appeal

[53] 10 Geo. 4, c. 7.
[54] *Op. cit., supra,* footnote 13, at p. 25.
[55] The Constitution of Northern Ireland, Part II (1933), p. 13.
[56] *Robb* v. *Electricity Board for Northern Ireland, supra,* footnote 32.
[57] *O'Neill* v. *Northern Ireland Road Transport Board, supra,* footnote 28.
[58] *Ulster Transport Authority* v. *James Brown and Sons Ltd., supra,* footnote 33.
[59] *McConnell* v. *Belfast Corporation,* (1957), unreported.
[60] *Northern Ireland Road Transport Board* v. *Benson, supra,* footnote 29.
[61] *Benson* v. *Northern Ireland Road Transport Board,* [1942] A.C. 133.

did not regard *Benson's* case as authoritative, but was inclined to favour the reasoning of Babington L. J. in his dissenting judgment.[62] Presumably the fate of *Benson's* case will lead to the use, *ex abundanti cautela*, of sections 49 and 50 of the Act of 1920, dealing with appeals on constitutional points arising in ordinary litigation.

It is, therefore, with the right to private property that the Northern Ireland judges have been chiefly concerned. In dealing with the protection afforded by the contentious words at the end of section 5(1) of the Act of 1920, the words "take", "property" and "compensation" have been subjected to ingenious argument and close judicial scrutiny.[63]

For example, one question which arose was whether a "taking" of property necessarily involves the giving of that property to a transferee. The majority of the Court of Appeal in *Benson's* case had drawn a distinction between a taking and what Wright J. (as he then was) had in *France, Fenwick and Co.* v. *The King*[64] called "a mere regulatory prohibition". But Babington L.J. in his dissenting judgment in *Benson's* case had suggested that a person whose property had been taken was not concerned with what happened to it after it had been taken.[65] In *Brown's* case Curran J. (as he then was) considered that the imposition of additional restrictions did not transfer property from the transport operators affected to the statutory transport authority, but that a right to carry on business had been taken; Sheil J. considered that these additional restrictions constituted a prohibition on the transport operators coupled with a benefit to the authority; Lord MacDermott L.C.J. left the matter undecided since he thought that the intention of the legislature was to cause a transfer, and that this was supported by the facts; and Black L.J., while saying that he would be slow to hold that a transferee was necessary to constitute a taking, also thought that it was unnecessary to decide the point, since there was a transferee.[66] In this case three judges were united in holding that a transfer had taken place, but in *McConnell's* case there was no question of a transfer. In his judgment Sheil J. referred again to *France, Fenwick's* case, and held that the refusal of planning permission for the

[62] For arguments in favour of regarding *Benson's* case as authoritative, see Sheridan, case-note on *Brown's* case (1954), 17 Mod. L. Rev. 249.

[63] For comments on these problems see Newark, The Taking of Property without Compensation (1941), 4 N. Ire. Leg. Q. 168; Judicial Review of Confiscatory Legislation (1954), 3 Am. J. Comp. L. 552; Sheridan, *op. cit., supra*, footnote 62; Nationalisation and Section 5 (1954), 10 N. Ire. Leg. Q. 183; Montrose, *op. cit., supra*, footnote 34.

[64] [1927] 1 K.B. 458.

[65] *Supra*, footnote 29, at p. 160.

[66] *Supra*, footnote 33, at pp. 91, 98, 111-4, 128.

development of land was more than a negative prohibition, in that it effected "a paring or whittling down of one of the claimant's rights in his property". It could hardly be argued that a planning authority which prevented the erection of shops instead of houses in a residential area was the transferee of any property in the site in question, so the implication is that such a taking does not necessitate a transfer. Sheil J. cited the Uthwatt Report, a United Kingdom official publication,[67] to distinguish the power of the sovereign United Kingdom Parliament to destroy rights by regulatory legislation and the inability of the subordinate Northern Ireland Parliament to do so. The question of the regulation of property rights and their destruction may well prove to be one of the main factors in the future development of the constitution of Northern Ireland.

On the meaning of the word "property", two questions have been asked—whether it is limited by the ecclesiastical context in which it appears, and what matters are covered by the term. In *O'Neill's* case it was argued that the *eiusdem generis* maxim of construction should be applied and that the word "property" at the end of section 5(1) should be construed as referring only to ecclesiastical property. In answer Mr. Arthur Black, K.C. (later judge of the High Court and now a Lord Justice of Appeal) pointed to the similarity between section 5 and section 64 (which protects university property), and argued that the insertion of general words in the former section meant that the term was to be construed widely. The Court of Appeal agreed with this contention, but the judgment was the cause of some academic controversy, in the course of which it was pointed out that the parliamentary history of the Act of 1920 showed clearly that the term "property" was not intended to be construed narrowly but was designed to cover property other than ecclesiastical property.[68] Black L.J. (as he now is) reiterated in *Brown's* case the view which he had expressed as counsel in *O'Neill's* case, and in this he was supported by three of the four other judges. If the point should be taken before the House of Lords it will be interesting to see whether the arguments which have convinced the Northern Ireland judges prevail on their Lordships to adopt a similar view.

On the question of the various types of property included in the general prohibition on confiscation, the majority of the judges in *Brown's* case, like their predecessors in *Benson's* case, had no difficulty in finding authorities for the proposition that goodwill

[67] Final report of the Expert Committee on Compensation and Betterment (1942), Cmd. 6386. at pp. 19-22.

[68] See the articles cited *supra*, footnote 34.

was a form of property. However, Curran J., following an academic analysis of the problems raised by *Benson's* case, based his judgment on the proposition that what had been taken in *Brown's* case was a right to trade. In doing so he followed certain United States authorities,[69] but he was not accompanied by his brother judges, and it remains to be seen whether in future cases reliance will be placed on a recognition of the right to trade as a property right, or on an analysis of other meanings of the term "property". Another aspect of the meaning of "property" arose in *McConnell's* case, where, as has already been indicated, Sheil J. took the view that a property right was destroyed whenever a planning restriction was placed on the user of land. Once again the scope for argument before the House of Lords becomes apparent.

The term "compensation" has also been the subject of some debate. In *O'Neill's* case Andrews L.J. pointed out that it must be fair compensation, so that an unscrupulous legislature could not evade the prohibition imposed by the Act of 1920 merely by providing some illusory benefit.[70] He also relied on such well-known authorities as *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*[71] and *Fraser* v. *City of Fraserville*[72] for the criterion of fair compensation. What is not clear is the way in which compensation may be obtained if it is established that property has been taken and the statute authorizing the taking makes no provision for the payment of compensation. Two of the judges in *Brown's* case (Lord MacDermott L.C.J. and Black L.J.) did not favour an argument that the impugned legislation was valid because it did not bar a common law right to compensation.[73] In *McConnell's* case the question of compensation was very much to the fore but Curran J. regarded the proceedings as ". . . merely a step taken by the claimant to determine his entitlement to compensation" and said that it would be for ". . . the claimant and his advisers to consider whether, in appropriate proceedings, he should seek to establish that his property has been 'taken' within the meaning of section 5 of the 1920 Act and, accordingly, that the refusal of the Corporation to allow him to develop his property is *ultra vires.*" This view of the case differs widely from Sheil J.'s outright declaration that the legislation in question was *ultra vires* because there was a

[69] *Dent* v. *West Virginia* (1889), 129 U.S. 114 and *Hanker* v. *New York* (1898), 170 U.S. 189, referred to by Newark, *op. cit., supra,* footnote 63. The use of these authorities is discussed by Sheridan, *op. cit., supra,* footnote 63.

[70] *Supra,* footnote 28, at pp. 119-20.

[71] [1914] A.C. 569.

[72] [1917] A.C. 187.

[73] *Supra,* footnote 33, at pp. 117, 129.

taking of property without compensation. However, the main emphasis in the cases under discussion has not been on the method of payment of compensation but on the severability of the valid and invalid portions of the legislation under scrutiny, a topic mentioned in the previous section of this article.

To this summary of judicial opinions on the meaning of the various terms used in the controversial phrase in section 5(1) of the Act of 1920 may be added another point—the extent to which the doctrines of "pith and substance" and "incidental effect" are relevant in interpreting constitutional prohibitions. In *Benson's* case Black A.-G. (as he then was) advanced the argument that such tests were not relevant to section 5, and Lord MacDermott L.C.J. in his judgment in *Brown's* case contrasted the arguments on the point by saying that on one view section 5 was concerned with the consequences of an enactment, so that the "pith and substance" was irrelevant; on the other hand, it was argued that the character of the enactment was vital and its incidental effects not necessarily conclusive on the question of validity.[74] His Lordship did not find it necessary to choose between these two views in *Brown's* case, but Sheil J. in *McConnell's* case favoured the earlier argument, saying that:

> If the result or effect of the sub-section is to take property without compensation the sub-section is to that extent void. I use the words "result or effect" because I agree with [the] argument that the words "so as" in Section 5(1) of the 1920 Act are words of consequence and in my view if the result or effect of [the impugned enactment] is to take or authorise to be taken the claimant's property the doctrine of "pith and substance" cannot be invoked.[75]

This part of Sheil J.'s judgment raises the question of "effect" which has previously been mentioned, but it also shows the method of reasoning applied to the Act of 1920 to protect property rights. The next matter for consideration is the type of problem raised by these decisions on the evocative words at the end of section 5(1) of the Act of 1920.

VI. *Some Problems and Comparisons*

From the summaries which have been given of general judicial

[74] *Ibid.*, at pp. 115-6.

[75] This is in line with the judgment of Dixon J. when he said in relation to s. 92 of the Australian constitution ". . . the question what is the pith and substance of the impugned law, though possibly of help in considering whether it is nothing but a regulation of a class of transactions forming part of trade and commerce, is beside the point when the law amounts to a prohibition or the question of regulation cannot arise." (*McCarter* v. *Brodie*, *supra*, footnote 47, approved by the Privy Council in [1955] A.C. 241, at pp. 295-6.)

attitudes and decisions on particular matters it will be seen that property rights are securely protected —so securely, indeed, that it is not clear how this protection is to be reconciled with the general duty of the Parliament of Northern Ireland to legislate, in the traditional phrase, for the "peace, order and good government" of Northern Ireland. It has been suggested that:

> The prohibition contained in s. 5(1) of the Government of Ireland Act, 1920, cannot be as absolute as it appears. To hold it an absolute prohibition would reduce the legislature to an impotence never before seen, and the golden age for wrongdoers would dawn when persons fined for failure to comply with Northern Ireland statutes could argue that their fines were a taking of property without compensation.[76]

Yet in *McConnell's* case Sheil J., declaring that he had unwillingly reached his decision that the impugned legislation was void, stated:

> I realise quite well its implications should it stand—that some laws made by the Parliament of Northern Ireland may have infringed section 5. These problems must be faced when set—even perhaps the question of fines for offences created here since 1920.

From the concluding words of this passage it would seem that the learned judge contemplated precisely that possibility which was regarded as unthinkable in the comment just quoted. Yet this reasoning recalls the remark of Griffiths C.J., referring in *Duncan v. State of Queensland* to section 92 of the Australian constitution —"But the word free does not mean *extra legem* any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law."[77]

Again, *Brown's* case raises problems as to the extent to which restrictions may validly be imposed on the carrying on of a legitimate activity. This problem has been discussed in the context of the "police power" as it is known in United States constitutional law, and a number of tests have been propounded to assist in solving this problem.[78] But the efficacy of such tests depends on the willingness of the courts to draw a line between the rights of the individual and the powers of the legislature, for such a boundary cannot be deduced from the terms of the Act of 1920. (As a Canadian commentator remarked of a similar attitude to the 1867 Act, such a view "overlooks the fact that the British North America Act will have whatever meaning the courts choose to ascribe to it".[79]) Commonwealth constitutional cases provide useful comparative

[76] Newark, *op. cit., supra*, footnote 63, at p. 177.
[77] (1916), 22 C.L.R. 556, at p. 573; for Privy Council approval see [1950] A.C. 235, at p. 310.
[78] Newark, *op. cit., supra*, footnote 63, at pp. 178-9.
[79] LaBrie, Canadian Constitutional Interpretation and Legislative Review (1950), 8 U. Tor. L.J. 298, at p. 312.

material, since judges in Northern Ireland can study the solutions of problems confronting their brethren across the Atlantic and in the Antipodes. Yet reference to such precedents cannot be expected to dissipate automatically the mists of uncertainty which shroud the powers of the Parliament of Northern Ireland and the rights of persons within its jurisdiction.

It has been suggested that the problems raised by section 5(1) may be approached in a different way, by regarding the controversial prohibition as an "eminent domain" rather than a "due process" provision. This argument is supported by an appeal to the parliamentary history of the disputed phrase, which began its career as an amendment to insert the words "or take any private property for public use without just compensation".[80] Clearly these words were taken from the Fifth Amendment to the United States constitution, but the fact is that the words emerged in an unqualified form; the property need not be private, the use is not specified, the courts have had to imply that the compensation should be just. If it had been intended to insert an eminent domain provision on the United States lines, the conflict between legislative intention and the unambiguous statutory expression of that intention is indeed great. It is true that, if the House of Lords reversed the present trend of the Northern Ireland decisions, some problems would be easier to solve. But the unqualified wording of section 5(1), coupled with the judicial implication that even a police power may be difficult to spell out of the 1920 Act, places the "eminent domain" interpretation, in the present climate of judicial opinion, at least one step further away from acceptance.

In *McConnell's* case the present Attorney General suggested that in 1920 the Westminster Parliament must be taken to have had in contemplation that the Parliament of Northern Ireland would need to make laws which would seriously interfere with property. Sheil J. was impressed by this line of reasoning, but only sufficiently so to reach his decision unwillingly. Yet possibly a consideration of the views of some of the Canadian judges would be of assistance in placing the Northern Ireland restriction in the perspective of parliamentary government.

The link could be provided by the methods of reasoning used in some Canadian cases decided during the past two decades and based on the declaration in the preamble to the British North America Act that Canada is to have "a constitution similar in principle to that of the United Kingdom". Duff C.J.C. in *Re*

[80] See Montrose, *op. cit., supra,* footnote 34.

Alberta Legislation[81] declared that the 1867 Act contemplated a Parliament working under the influence of public opinion and public discussion; since the Parliament of Canada was entrusted with the protection of that right, it followed that the provincial legislatures were incompetent to abrogate it. The question which arises is how far a similar argument might be applied in relation to Northern Ireland. That area remains part of the United Kingdom but has had delegated to its Parliament the legislative powers of the Westminster Parliament, subject to certain exceptions and to the restrictions which have been discussed. The United Kingdom Parliament has created a smaller image of itself, lacking some features, but retaining the essential characteristics. Some judicial scrutiny of the fundamentals of parliamentary government in Northern Ireland would undoubtedly throw light both on the limits of local legislative power and on its impact on the citizen.

The value of fundamental analysis has been shown in some of the judicial attitudes adopted in subsequent Canadian cases. For instance, in *Saumur* v. *City of Quebec and Attorney-General of Quebec*[82] the question whether freedom of religion is a "civil right in the Province" within the meaning of section 92(13) of the British North America Act was determined by some of the judges solely by a consideration of the terms of the Act and the relevant legislation. But Rand, Kellock, Estey and Locke JJ., in holding that religious freedom did not fall within provincial competence, displayed some interesting attitudes towards constitutional interpretation. Rand J.'s analysis of the function of positive law in the protection of fundamental freedoms, the examination of the relevant statutory history, Locke J.'s view that liberty of conscience is a constitutional right implicit in the preamble to the 1867 Act, all these point to a deeper probing into constitutional problems than has hitherto been the case.[83] A similar examination of the Act of 1920 would be revealing alike for citizen and legislator. Both positive right and legislative power can, and indeed must, co-exist in the framework of parliamentary government and the delicate judicial task of the declaration of both right and power would be made easier by the fullest consideration of the working of that system of government in its application to Northern Ireland.

Again, the attitudes adopted in *Switzman* v. *Elbling and Attorney-General of Quebec*[84] show how a broad consideration of constitu-

[81] [1938] 2 D.L.R. 81, at pp. 107-8; see also *per* Cannon J., at p. 119.
[82] *Supra*, footnote 49.
[83] See McWhinney, *op. cit., supra*, footnote 9, pp. 190-8.
[84] (1957), 7 D.L.R. (2d.) 337.

tional problems can be used to determine particular points. In his dissenting judgment Taschereau J. contended that fundamental liberties did not give absolute rights but must be exercised "within the bounds of legality" which he considered had been overstepped in this case. In this he was not, however, followed by his brethren on the Supreme Court Bench. Once again Rand J. stressed the political theory of the British North America Act, with its system of parliamentary government dependent on popular opinion and free discussion of ideas, but added that the degree and nature of the regulation of discussion must await future consideration.[85]

This opinion, contrasted with the view of Taschereau J., illustrates the responsibility of the judicial task of holding a balance between the individual and the legislature. For one judge, that balance eventually came down on the side of the legislation which was challenged; for the other, the scales pointed to the individual who asserted his rights. It has been suggested that the tendency of these and similar cases is to construct something like a Bill of Rights out of the apparently unpromising material of the British North America Act.[86] Whether or not this will be the result of the attitudes of the Canadian judges, the broad views adopted by some of them in these cases should certainly be of value to their brethren in other parts of the Commonwealth.

In the present context, certain distinctions between the situation in Canada and that in Northern Ireland immediately become apparent. For one thing, the Canadian cases turned on the distribution of legislative power between Ottawa and the provinces; the Northern Ireland cases discussed in this article were concerned with restrictions on the exercise of legislative power, so it might be argued that the Canadian decisions are more properly relevant to section 4 of the Act of 1920 (dealing with matters excepted from the Northern Ireland Parliament's powers), rather than with the restrictions imposed by section 5. But it is submitted that the general approach of the Canadian judges could be used in determining whether a Northern Ireland enactment is *ultra vires*, either because of section 4 or section 5 of the Act of 1920; in both cases the allegation is that the legislature purported to do something it could not do, and, while the process of severability may be applied differently, the net effect on the individuals concerned is the same. Again, the result of the Canadian decisions has been to invalidate, or at least to restrict very considerably the operation of, certain Canadian

[85] *Ibid*, at pp. 358-9.
[86] See Brewin, comment in (1957), 35 Can Bar Rev. 554.

enactments, so as to protect the personal rights of individuals. The result of the Northern Ireland cases mentioned in this article has been that the restrictions imposed on the activities of one class of transport operators have been declared inoperative and that one judge has held a planning restriction to be invalid; the emphasis has been on the property rights of individuals. Yet there is common ground between the two sets of judges since both are construing, not self-contained constitutions, but Westminster enactments drafted for special purposes; they are using common-law techniques; and they are seeking to do justice between the legislature and the citizen. It is this identity of method and aim which makes the decisions in both jurisdictions reciprocally interesting. And if, as has been suggested, the use of the Canadian authorities throws some judicial light on places at present overshadowed by the Government of Ireland Act, this inter-change of Commonwealth ideas will more than justify itself.

VII. *A Speculation and a Summary*

Turning from the judicial sphere to that of legislation, it may be noted that Northern Ireland has not sought to reinforce the provisions of the Act of 1920 by legislation for the protection of human rights such as has been enacted in Saskatchewan and has been introduced into the Canadian House of Commons. Since the accession of William and Mary the Westminster Parliament has fought shy of general declarations of rights, though in recent years some attempts have been made to legislate on this topic.[87] The pragmatism of British constitutional development has induced reliance on specific branches of the law to afford protection to the individual.[88] The post-war constitutions produced for areas outside the United Kingdom have shown that the subject of fundamental rights is important in some other parts of the Commonwealth, but this tendency has not been reflected on the Northern Ireland statute-book, though there would be no constitutional impediment to the enactment by the Parliament of Northern Ireland of provisions similar, say, to the Saskatchewan Bill of Rights. It is true that such a measure would relate only to matters within the competence of the Northern Ireland Parliament. Also, an Act of this kind could

[87] See, for example, the Racial Discrimination Bill introduced by a private member into the Westminster House of Commons in 1956, and the Race Discrimination Bill, similarly introduced in 1958.

[88] For a recent statement of the position in the United Kingdom, see Human Rights in the United Kingdom, a Central Office of Information pamphlet issued in October 1958 in connection with the tenth anniversary of the Universal Declaration of Human Rights.

not declare any other legislation unconstitutional, since the Act of 1920 is not capable of local amendment; it could, however, control the interpretation of Northern Ireland legislation in such a way as to give protection to the individual whose rights might be affected. Yet if such a measure were to be proposed one may hazard the guess that the debates it would cause would take much the same course as those which have taken place in Canada over the proposal for a Canadian Bill of Rights. To an observer judging from a distance, the discussions which have taken place in Canada over the past ten years or so have provided text-book examples of the ways in which this problem of fundamental rights can be approached. The proposal has been supported by declarations of the necessity of some general statement of principle, and countered by expressions of dubiety about the desirability of departing from an unwritten tradition. Further, the problem has been complicated by the Dominion-provincial relationship, and by the question of amending the British North America Act. Transposing these discussions into Northern Ireland terms, there is little doubt that any move for the enactment of a Bill of Rights for *intra vires* matters would be met with the argument that the British system should continue to be used within Northern Ireland. Further, it would probably be pointed out that it would be anomalous to have a Bill of Rights controlling Acts of the Northern Ireland Parliament while there was no similar yardstick for Acts of the Westminster Parliament in force in Northern Ireland. Again, no doubt the counter proposal would be made that if any steps were to be taken they should be in the direction of amending the Act of 1920. On the other hand, the proposal would probably be supported by arguments pointing out that the legislative restrictions in the Act of 1920 were confined to two matters, leaving scope for a local declaration of rights in other fields. It is because of such similarities between the constitutional position in Canada and that in Northern Ireland that the outcome of the proposals in the former jurisdiction will be of particular interest to lawyers in the latter area.

Reverting from speculation to fact, the matters discussed in this article may be briefly summarised. We have seen the fate of the Home Rule proposals relating to fundamental rights, in the discussion of which a prominent Canadian personality took part. The culmination of those proposals was the passing of the Act of 1920, with its restrictions on Northern Ireland legislation dealing with religious matters, and its ban on the taking of property without compensation. The relevant decisions have been largely confined

to property rights, and while the judges have drawn on Commonwealth precedents they have used traditional techniques of interpretation. Since there is a large unexplored field, there is room for consideration of new techniques (such as the scrutiny and evaluation of evidence) and the possible adoption of the Canadian judicial attitudes which have been mentioned. For the moment, neither the area of legislative power, the extent to which individual rights are protected nor the judicial attitudes are sufficiently clearly marked to enable opinions to be given with confidence. Further decisions, especially an authoritative declaration by the "voices of infallibility", would aid both the citizen and the legislator.

In the post-war period the position of fundamental rights in relation to the rule of law has been much discussed, particularly by the International Commission of Jurists. At the Commission's Congress at Delhi in January, 1959, that pithy commentator on the rule of law, Lord Denning, said: "When I came to this Congress I thought of the rule of law as being essentially concerned with protection of the individual from arbitrary power. . .". He now realized "that the rule of law was wider than I thought: not limited to a preventive negative function, but laying upon governments a positive duty—admittedly unenforceable in a court of law—to act for the welfare of the people." Lord Denning compared this concept to the "unwritten law" in Britain, which protected the courts of law and free speech, although the only sanction lay in a mature and vigilant public opinion. Coupled with this conception of the rule of law was the conclusion of the Congress's legislative committee, which laid down that the legislature must be restrained from trespassing upon certain fundamental human rights, either by written constitutional safeguards or by respect for "established standards of legislative behaviour". Yet even here there was room for debate, for the recommendation that these restraints should be enforced by judicial sanctions was resisted by a British delegate on the ground that it denied the legislative supremacy of Parliament.[89] Once again the need to search among the foundations of parliamentary government becomes evident. In the wide context of comparative constitutional development both Canada and Northern Ireland have their contributions to make on this crucially important topic of the protection of fundamental rights.

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[89] See the report in The Times, January 10th, 1959. See also Mr. Nehru's speech at the opening of the Congress "Protection of the rights of the individual was not the sole function of the rule of law; it had also to protect society from individuals' selfish instincts", The Times, January 6th, 1959.