Are National Conflicts Reconcilable?
Discourse Theory and Political Accommodation in Northern Ireland

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Questions of identity and difference appear to be ubiquitous in the landscape of contemporary political theory. Debates among egalitarian liberals, libertarians, socialists, and Marxists about the appropriate distributive arrangements in modern societies have, for better or worse, been overshadowed of late by the challenge of a politics of identity.[1] The impulse for this form of politics has been articulated in theories that are inspired by communitarian, feminist, and poststructuralist concerns and the shift of emphasis from conflicts of material interest to conflicts of identity has brought the issue of incommensurability to center-stage in current debates. Is there any shared standard that might allow us to achieve political reconciliation among social groups whose identities appear to conflict? Is rational progress possible in regulating such conflicts or are we faced with competing and irreconcilable rationalities? Is communal 'war' of some form inevitable or can differences be sorted out through reasoned agreement? These issues are clearly urgent in contemporary politics at a global level and they continue to demand urgent attention at national level. Conflicts of national identity typically call into question the legitimacy of the state, the justice of its key institutions and the inclusiveness of the ethos in which those institutions are embedded. When the state and its territorial boundaries, or the fit between citizenship and national identity, are at stake the threat of incommensurability looms large.

I want to address pertinent theoretical issues with reference to one of the most intractable national conflicts of the recent past: the dispute about the constitutional status of Northern Ireland. I will first clarify the issues at stake by classifying into two teams those contemporary theorists who address such matters. My argument is that if theory is to have a critical role in the analysis of such conflicts then it should be used to indicate how political reconciliation might be achieved in a manner that is fair to all. One theoretical source for such a form of analysis can be found in the discourse theory of democracy defended by Jürgen Habermas, particularly when the institutional dimensions of this approach are given their due. Having outlined briefly some apposite features of the discourse theoretical approach, I will indicate how this theoretical framework might be put to use in analyzing the national conflict in Northern Ireland and the ongoing attempts to

establish institutions there based on norms of political accommodation. The conclusion will broaden the agenda by drawing out some of the implications of the possible theoretical attitudes that might be adopted in the face of an apparent incommensurability of perspectives on contentious political issues rooted in conflicts of identity.

The Status of Incommensurability in Political Theory

One of the major divisions in recent theory has concerned the possibility of resolving conflicts of identity through the public use of reason. This is just the latest round in the seemingly interminable clash of rationalist and relativist perspectives on politics. On the one hand, there are those who have proposed a variety of procedures designed to indicate how rational outcomes are to be achieved so that conflict can be overcome in a way that is fair to all involved. Let's call this the PIPRO team of *Proceduralists In Pursuit of Rational Outcomes*. On the other hand, there are various critics who reject this project for its failure to take the incommensurability of the perspectives involved in such deep political conflicts sufficiently seriously. We'll call this the TIAG team of those *Taking Incommensurability As a Given*.

Members of PIPRO team include those working in the dominant egalitarian liberal strand of Anglo-American theory. Many of these have followed the agenda set by John Rawls' project of working out the fair terms of social cooperation in political communities characterized by a plurality of conceptions of the good.[2] In the wake of the communitarian critique of abstract individualism egalitarian liberals have responded to the challenge of diversity by taking seriously the cultural embeddedness of individuals. This has led Will Kymlicka and others to outline the liberal grounds for group-differentiated rights.[3] In Kymlicka's work we find a more context-sensitive form of procedural liberalism. It seeks to prove its worth not just with regard to the elegance or rational coherence of its theoretical framework but rather in relation to its practical value as a guide to fair political accommodation under conditions of ethnocultural and national diversity.

The PIPRO team also includes those who have taken one particular path out of German critical theory, that which has led to the discourse theory of law and democracy outlined by Jürgen Habermas. The central claim of Habermasian critical theory is that modern complex societies cannot be held together solely by money and power; they also rely, at a fundamental level, on the generation of solidarity through communicative action. The main political implication of this is that we can only prevent the disintegration of pluralist societies if we achieve mutual understanding through procedures of democratic self-organization in legal communities. When the identities of particular social groups appear to conflict it is only through actual inclusive democratic discourse that a basis for fair political accommodation can be generated. In contemporary debates, egalitarian liberals and discourse theorists share the PIPRO concern to inquire into the possibilities

of just and peaceful coexistence among the citizens of increasingly diverse and complex democratic societies. I want to defend the PIPRO project from its critics and my argument draws primarily on Habermas's discourse theory of democracy.

The TIAG team has a wide variety of influences ranging from classical philosophy through to contemporary poststructuralism, or Aristotle to Derrida. The neo-Aristotelianism we find, for example, in Alasdair MacIntyre's *After Virtue* leads one to despair of any possibility of rational solutions to modern political conflicts, although it should be noted that MacIntyre has revised his views somewhat on the relation between rationality and tradition since then.[4] Another theorist who has considerable influence on TIAG thinking is Hobbes. This influence can be detected in those liberal pragmatists who think that political accommodation must be based not on reasoned agreement but on acquiescence.[5] There is also a Hobbesian tone to the authoritarian decisionism that Carl Schmitt derives from his conception of the political as realm of friend and foe. Schmitt's work has been taken up recently not only by thinkers on the right but also in the allegedly 'radical democratic' agenda of left-wing theorists such as Ernesto Laclau and Chantal Mouffe.[6] TIAGs can also look for support to many twentieth century philosophers who are skeptical of an overly rational approach to politics. These include those who question the very possibility of rational progress in the natural or human sciences;[7] those who advocate forms of 'difference' feminism premised either on psychoanalytical theories of human sexuality or on the rejection of an idea of universal human reason;[8] and those who think that the force of an argument depends entirely on the context in which it is made.[9] Finally there are those neo-Nietzschean thinkers who reject all forms of systematic normative theory as just some outmoded grand narrative or other. Such a stance might follow from certain readings of poststructuralist thinkers such as Michel Foucault and Jacques Derrida.[10]

What is crucially at stake in the dispute between TIAGs and PIPROs is the status we grant to the notion of incommensurability in our analysis of political conflicts. While TIAGs accept an incommensurability of irreducibly different perspectives to be the very stuff of politics, PIPROs insist that we must try, through the public use of reason, to unearth some political common ground that facilitates the accommodation of different perspectives in a manner that is fair to all. So while PIPROs argue that political theorists should seek to indicate how conflicts in modern complex societies might be resolved rationally, all TIAG perspectives converge in adopting a much less sanguine view about the prospects for reasoned agreements on frameworks of political accommodation. This means that when it comes to political analysis, TIAGs usually end up with rather strange bedfellows, neo-Aristotelians with difference feminists, Schmittians with poststructuralists and so on. The political implications of these alliances should give all concerned pause for thought. While they converge in assuming that reasoned agreements are unlikely to provide a basis for resolution to such conflicts, these theorists have radically different views about the nature of the conflicts and the best means of dealing with them.

One reason why the national conflict in Northern Ireland has been so difficult to resolve is because it cannot be thought of simply as a demand for the equal status of a national minority within one particular state. The constitutional status of the territory is itself at stake and this raises the issue of legitimate boundaries and claims to sovereignty. It also puts in question the appropriate institutional relationship between fellow nationals in neighboring jurisdictions. The demands of constitutional justice in Northern Ireland could not be met were we to achieve equality based on an ideal of assimilation.[11] It would not be sufficient to achieve either equality for Irish nationals as citizens of the United Kingdom, or equality for unionists as citizens of Ireland. In both cases, a significant national minority would remain alienated from the institutions of state. It is for this reason that the problem can be described as one of double-minorities.[12] The conflict has appeared so intractable to some analysts that they have concluded that it is in principle irresolvable since there is no 'solution' to be found.[13] Since the political dispute is structured by differences of religious, cultural and national identities that tend to reinforce one another, Northern Ireland offers an appropriately challenging test for any PIPRO analysis.

Given the historical evidence, the conflict in Northern Ireland is a case from which TIAGs draw confidence in their dispute with PIPROs. Whenever they need an example of how two social groups will remain entrenched in incommensurable worldviews, in spite of any PIPRO's best efforts to argue that reasoned agreement is possible, they can point to a vast stock of historical evidence from Northern Ireland to support their case. Political developments since at least the mid-1990s, however, most notably the Good Friday Agreement of 1998, have been significant enough to alter the balance of historical evidence quite considerably. Perhaps there was a principled 'solution' waiting to be found after all, if only the key participants had sufficient will to look for it? In order to address the issues at stake between PIPROs and TIAGs, I want to offer an interpretive assessment here of the peace process in Northern Ireland. For TIAGs the process, and the Agreement at its heart, is to be thought of as nothing more than a piece of legalistic sticking plaster with no rational grounds that could be shared by all the key participants. On the other hand I will argue from a PIPRO perspective that we should understand recent developments as an important stage in a long-term process of mutual recognition among historically antagonistic national communities. The process is certainly reversible but it provides an important opportunity to secure over time a shared basis for principled accommodation to anchor peace and stability in Northern Ireland.

While the Good Friday Agreement addresses some fundamental constitutional issues, there are a number of other related matters that have been deeply divisive in hindering the implementation of the Agreement and the establishment of its institutions. Some participants, and many observers, interpret these matters as zero-sum conflicts in that any gain for the 'other side' is viewed as a loss for one's own. Questions regarding the constitutional status of Northern Ireland itself and

the new post-Agreement political institutions are often thought of in such terms. Other matters have included the paramilitary prisoner release scheme, the decommissioning of illegally held weapons, the demilitarization process, policing, the public use of flags and symbols, contentious parades, and the dispute in North Belfast concerning the route taken to a primary school for Catholic girls. All of these issues of on-going cultural conflict have the potential to destabilize the peace process. As long-term peace is certainly far from secure as yet, the political stakes are high. Many people are likely to suffer unnecessarily if these contentious issues are not resolved fairly.

I am going to argue, in PIPRO fashion, that Habermas's discourse theory of democracy helps to ground the expectation that rational progress is possible in the political quest to reconcile unionism and nationalism in Northern Ireland. Before I present an analysis of the Irish peace process, I will anticipate three TIAG objections to the discourse-theoretical approach I adopt. This will show how the theoretical issues at stake are relevant not only to the particular dispute that is my focus here, but to political conflicts in general. The three objections I address could be made from across the range of TIAG perspectives from Schmitt to Feyerabend, MacIntyre to Butler. They represent some of the most forceful criticisms to be made against the PIPRO approach, especially as that is represented in Habermas's discourse theory of democracy.

First, TIAGs maintain that there is an apparent motivational deficit in Habermas's account of normative justification. They question the validity of Habermas's approach by seeking to expose as a chimera its neutrality with respect to a diversity of conceptions of the good. What independent grounds do we have for believing that all rational agents should follow the discursive path that Habermas lays down as the best means of dealing with political conflict? Secondly, TIAGs insist that the discourse principle central to Habermas's procedural approach underdetermines the outcome of the deliberative process. This leads them to allege that the discourse approach is politically ineffectual since both sides to deep conflicts (such as that concerning the constitutional status of Northern Ireland) could, with apparently comparable plausibility, argue that their rival positions are justified with respect to the same discursive procedures. Finally, TIAGs conclude that since the procedure is in effect empty, any PIPRO attempt to derive a rational solution from it is self-defeating since it amounts to nothing but the arbitrary imposition of one partial perspective on the matter. The TIAG seeks to tear away the shroud of discursive impartiality in which the discourse-theoretical framework is dressed so as to expose the decisionism that is detected beneath.

Most of these TIAG objections will have a familiar ring for those who have followed debates concerning Habermas's discourse theory of morality.[14] But the political dispute at issue here raises questions not primarily of morality but of democratic legitimacy, and it seems to me possible to disarm TIAGs of many of their criticisms by attending to the important differences between Habermas's moral theory and his discourse theory of law and democracy. It is important to

give the institutional features of discourse theory their due before we can use this approach to assess the prospects of long-term political accommodation in Northern Ireland. A direct response to these three key TIAG objections will follow in the concluding section before I attend briefly to the most fundamental difference between PIPROs and TIAGs. This concerns the main purpose of political theory itself.

Political Institutions and Democratic Discourse

This is not the place to offer a detailed account of Habermas's discourse theory of law and democracy, but I must highlight certain relevant features of the framework that most contemporary TIAGs seem to overlook. Most notably, it is vital that we distinguish between moral and legal validity, as this distinction has been fundamental to developments in Habermas's critical theory for at least a decade. If we do not acknowledge this distinction then we are likely to give Habermas's account of democratic politics an inappropriately moralistic interpretation. Since TIAGs wants to show that discourse theory is politically ineffectual, there is an irony in their tendency to read his democratic theory in moral terms.[15] If we are to evaluate the political merits of the discourse theoretical approach, then we need to focus on the complex and detailed procedural theory of law and democracy that Habermas elaborates in *Between Facts and Norms* and subsequent works. It is not surprising that TIAGs find Habermas's *moral* theory to be wanting from a *political* point of view. It's like complaining to a neighbor that the screwdriver I borrowed was ineffective when I was using it to tighten a nut.

Habermas's discourse theory of law and democracy attempts to show how the idea of human rights can be reconciled with the principle of popular sovereignty. For him the idea of human rights is "inherent in the very process of reasonable will-formation."[16] It is only by guaranteeing private autonomy of individual citizens that we can establish forms of communication that will produce reasonable political outcomes. While there can be no political autonomy without individual rights, these rights are neither handed down to us from a higher authority, nor derived from the vagaries of any particular culture. They are rather the core presuppositions of the very idea of a self-regulating legal community. Rights are the discursively agreed conditions of equal citizenship.

This idea of the co-originality of private and political autonomy leads Habermas to think of political constitutions as established sets of procedures that enable citizens to exercise their political autonomy in an inclusive and non-oppressive manner. If citizens are to think of themselves not only as subjects of the law but also as its authors, then they will need to establish forms of communication and decision-making procedures that can ground the expectation that political outcomes will be reasonable. This is what happens at the founding moment of any constitutional state but it is also an on-going collective project that involves the realization of a particular self-regulating legal community of free and equal citizens in its unique

historical context. As citizens engaged in this collective project we always face this question: "what rights must we mutually accord one another if we want to legitimately regulate our common life by means of positive law?"[17] This question presses itself with particular force on the founders of particular constitutions, and I will suggest that those who negotiated the Good Friday Agreement of 1998 can be thought of as constitution founders. But the question stays with us as citizens of particular states through successive generations.[18]

Another important feature of Habermas's discourse theory is the idea that we have no viable alternative to the medium of law as a means of regulating our common life in modern political communities. Once we engage in the process of claiming, justifying, and upholding rights in modern democratic contexts, then we are operating in the medium of positive law. This is unavoidable and citizens cannot expect rights to be upheld by the coercive powers of the state if they are not legitimated through the appropriate legal procedures. Coercive law, according to this discursive conception of democracy, must emerge from a process of reasonable will-formation in which all citizens have enjoyed equal liberties. If we are to think of ourselves as authors of the laws to which we are subject, then it is vital that formal decision-making bodies are informed by opinions generated by the unorganized communication processes that operate in the public sphere. Democratic procedures must be maximally inclusive in their capacity to transmit messages from all sectors of society to the formal political system.

But how is the legitimacy of any particular law or statute to be determined? Discourse theory presents us with a principle of agreement that tests the democratic legitimacy of any such political outcomes. This is the principle of democracy: "Only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted."[19] This principle specifies how discursively justifiable outcomes are to emerge in the political or legal domain. We should not confuse the principle of democracy with discourse principles that are appropriate to other domains, in particular the principle of universalization (U) that Habermas defends in his famous essay outlining discourse ethics as a theory of morality.[20] 'U' is not an appropriate specification of discursive requirements with regard to questions of legal validity or democratic legitimacy. The kind of agreement that is appropriate for the moral domain, a universal rational consensus on the normative substance of some claim, is far too demanding for the legal domain. Legal validity is dependent rather on the constitution of democratic procedures through which legally binding decisions emerge with *a presumption of rationality*.[21] This means that different citizens can assent to the legitimacy of the same legal statutes for a wide variety of reasons, of which some will be substantive, others procedural. It follows that Habermas's account of legal validity differs sharply from his strongly cognitivist account of moral validity.[22]

When we analyze political conflicts, such as the constitutional dispute in Northern Ireland, in discourse theoretical terms, we are concerned primarily with

questions of democratic legitimacy and the justification of certain legal rights. Law is broader than morality, particularly in its responsiveness to a number of different modes of reasoning. Moral considerations, such as a concern for human rights, are certainly important features of political and legal discourse in modern societies, but they are far from being the only ones. Such discourse is also fed by ethical considerations of the good for individuals, particular social groups, or the political community itself, and by pragmatic considerations as to what the most efficient means might be to an agreed end. More often than not, legitimate law is also based on fair compromises that emerge through the interaction of groups with competing values and interests.[23]

The distinction between law and morality is central to Habermas's efforts to "refute the objection that the theory of communicative action is blind to institutional reality."[24] In the tradition of critical theory, he adopts a methodologically pluralist approach by seeking to examine the medium of law from the perspectives of both the participating citizen and the external observer who takes account of the operation of the legal medium as a whole. The discourse theory of law and democracy combines the insights, and overcomes the opposing limitations, of normative theory and systems theory.[25] While the former explores the self-understanding of free and equal citizens, it all but ignores the functioning of modern complex legal systems, while the opposite is true of the latter. In effect, discourse theory marries John Rawls and Niklas Luhmann so that the resultant union produces a more comprehensively critical framework for the analysis of democratic politics. If they ignore the important institutional dimensions of the approach, as Habermas's TIAG critics often do, they fail to notice how significantly different discourse theory is from Rawls' political liberalism. Habermas and Rawls, as the two leading contemporary PIPRO theorists, clearly share much normative ground, but we must also acknowledge the contribution of Luhmann's systems theory to the discourse theoretical marriage.

Habermas is insistent, therefore, that legitimate law should not be thought of as the application of moral norms to the political sphere. It is more complex and multilayered than that. Discourse theory presents democracy rather as a system of "legitimation through procedures."[26] Rights are realized in the everyday workings of those legally constituted procedures that act as "structures of mutual recognition . . . stretched like a skin around society as a whole."[27] Under conditions of modern complexity we rely, not on endless, direct, face-to-face encounters, but rather on constitutionally established procedures of deliberation and decision-making to generate legitimate and binding law. This leaves us with plenty of time and energy to pursue other projects and, generally speaking, to get on with our lives.

Actual processes of opinion- and will-formation always fall short of the ideal that is presupposed when we seek to resolve our differences through a communicative use of language oriented to mutual understanding. "By its very nature," he notes, "positive law serves to reduce social complexity."[28] No legally binding

decisions would be forthcoming if we were to argue with one another about every possible dispute that might arise. It is the medium of law that allows us to achieve social integration by stabilizing behavioral expectations and thus compensating for the action-coordinating weaknesses associated with everyday communication, or indeed with moral argumentation. Law relieves us of cognitive, motivational, and organizational burdens that would otherwise be impossible to bear.[29] It settles disputes, demands compliance and provides a structure of accountability in the operation of organizational institutions. So the key to the generation of legitimate law is the constitution of institutions that produce outcomes with a presumption of rationality. This means that we need legislative decision-making procedures that can themselves pass the test of the principle of democracy, if they are to provide an adequate institutionalization of that same test for future legislation.

Reading the Northern Irish Peace Process in Discourse Theoretical Terms

I now want to assess key features of the peace process in NI from a discourse-theoretical perspective. First, we can understand the peace process and the political struggle concerning the Good Friday Agreement as an attempt to overcome the double-minority problem at the root of the Northern Ireland conflict. The Agreement emerged out of a series of negotiations involving elected representatives from Northern Ireland's political parties and the two governments under the independent chairmanship of US Senator George Mitchell. These negotiations led to the complex institutional proposals outlined in the Agreement, which was then subject to a referendum in both parts of Ireland, the first time any such constitutional proposal was put to people in both jurisdictions. The Agreement won the support of 71 percent of voters in the North and 94 percent in the South. This was the first time in the history of British-Irish relations that an inclusive process of negotiation led to substantive agreement on the shape of a constitutional settlement regarding the disputed territory of Northern Ireland. The negotiating process was inclusive in that it involved both sovereign governments and political parties representing both main national traditions in Northern Ireland. We can, for these reasons, view the legitimation of the Agreement as a founding moment in establishing a new political constitution for Northern Ireland. How are we to understand this in relation to Habermas's principle of democracy?

The Agreement formed an inclusive basis for the legal constitution of a set of decision-making procedures that are to embody the principle of democracy in a manner that is sensitive to this historically unique political context. These institutions have been legitimated procedurally, first, through the election of negotiating representatives at the Forum and, subsequently, by the result of the referendum. In that process a sizable majority of the people of Northern Ireland endorsed a set of proposals that place severe limitations on the operation of majoritarian politics in Northern Ireland. Due to their understanding of the nature of the national division in the overall British-Irish context, the history of the conflict, projected

demographic trends, and a host of other considerations, a large majority of repre-
sentatives and voters accepted the political opportunity on offer. They gave their
assent to the idea that a broadly consociational structure, coupled with cross-
border and British-Irish institutions, would be the most appropriate and legitimate
arrangement for the government of Northern Ireland.[30] The Agreement also gave
a central constitutional role to human rights, and the way in which these rights are
to be applied in this context is of growing significance for international debates
within constitutional law.[31]

The legitimacy of the opposing national aspirations to self-determination of the
two communities is also recognized. While there is an acknowledgment that at
present the majority wishes Northern Ireland to remain within the United King-
dom, the Agreement provides for the possibility that a majority of people in both
parts of Ireland may decide to form a united Ireland at some point in the future.
But the normative core of the settlement is the guarantee that members of both
national communities will be treated as equals in their differences regardless of
which sovereign government has jurisdiction over Northern Ireland at any given
time. This commitment to national impartiality is bolstered by those federal and
confederal elements of the Agreement that established British/Irish and
North/South institutions. Its primary significance, however, is the recognition it
gives to the idea that equal citizenship in Northern Ireland can only be secured on
a binational basis. This means that governmental power must be exercised

> with rigorous impartiality on behalf of all the people in the diversity of their iden-
> tities and traditions and shall be founded on the principles of full respect for, and
> equality of, civil, political, social and cultural rights, of freedom from discrimina-
> tion for all citizens, and of parity of esteem and of just and equal treatment for the
> identity, ethos and aspiration of both communities.[32]

These norms of national impartiality and parity of esteem must be unpacked in a
context-sensitive manner if the project of realizing rights is to lead to some reso-
lution of those continuing aspects of cultural conflict in Northern Ireland.
Context-sensitivity here requires at least two things. First, it depends on an objec-
tive, self-critical reading of the empirical details of these contentious issues, one
that takes account of the competing perspectives advanced by participants to the
disputes. Second, it requires an application of norms that are not only impartial
but also appropriate to the particular situation.

Before we address those issues of continuing cultural conflict, it must be
acknowledged that 29 percent of voters in Northern Ireland disagreed with the
substance of the Agreement, or at least with enough of its dimensions to reject the
proposal. TIAGs may well argue that the arrangements do not, therefore, pass the
test of the principle of democracy since that hinges on "the assent of *all* citizens."
But this is a mistake that follows from a failure to acknowledge that Habermas's
account of legal validity, in contrast with moral validity, does not demand a ratio-
nal consensus on the substance of a set of normative claims. Legal validity is

concerned with procedural legitimation and the relevant procedures in this case were the election of negotiating representatives and the referendum on the Agreement itself. If opponents of the Agreement are to reject the legitimacy of the institutions it established, then they also have to reject the legitimacy of these procedures.

Since most of those who do reject the Agreement are inclined to extol the virtues of majority rule, it seems rather difficult for them to deny powers of legitimation to a majoritarian decision-making procedure like the referendum. This is true of anti-Agreement unionists and the small number of anti-Agreement republicans. In practice the best the former can do is to argue that a majority of the "Unionist people" were opposed to the Agreement, a claim that is not substantiated by exit polls.[33] Even if they were right about that, it would only destroy the legitimacy of the Agreement if the votes of non-Unionists were to count for nothing, hardly a defensible view on any plausible account of democracy. On the other hand, anti-Agreement republicans have to face the rather annoying fact (for them) that almost 90 percent of voters on the island of Ireland as a whole said 'Yes.' The point is that regardless of one's views on the contested question of partition, whether we think that all the people of Ireland or the people of Northern Ireland only should decide the matter, the conclusion must be the same. Anyone committed to majoritarian principles must recognize the legitimacy of the constraints on majoritarianism, and the commitments to national impartiality entailed in the Agreement. This Agreement therefore passes the test of the principle of democracy because all citizens can, and indeed do, assent to the legitimacy of the procedures that put these institutions in place.

Note, however, that while these opponents must recognize the democratic legitimacy of the Agreement, it is perfectly reasonable for them to continue to argue that they view it, in part at least, as an immoral or unjust arrangement. They may, for example, find the prisoner release scheme offensive to their moral sensitivities. Those who think the Agreement immoral must, however, bear the unenviable *political* burden of convincing their fellow citizens that there is a better democratic alternative. This point provides an illustration of some of the common normative ground that is shared by discourse theory and political liberalism. Rawls' distinction between comprehensive and political morality is helpful here in clarifying how one might object to some details of the Agreement while affirming the democratic legitimacy of the settlement overall. The views some people hold on punishment and justice for the victims of violence, as aspects of their comprehensive worldviews, may prevent them from accepting the morality of early prisoner releases. At the same time, they may be able to see beyond this by acknowledging that the norms of impartiality that underpin the Agreement's institutional proposals, and the democratic procedure used to test its legitimacy, are vital aspects of a shared political morality that should structure our legal relations.

In discourse theoretical terms, the Agreement establishes a set of procedures that enable citizens of Northern Ireland to exercise their political autonomy in an

inclusive and non-oppressive manner. As members of a self-regulating legal community, citizens of Northern Ireland, like those of all other jurisdictions, need to have a sense of authorship of their laws, as well as the experience of being subject to law. In order for them to achieve this, the Agreement, with its commitment to national impartiality, plays a foundational role in establishing forms of communication and decision-making procedures that can ground the expectation that political outcomes will be reasonable. But the project of realizing rights among free and equal citizens in this historically unique legal context is ongoing. There are still many issues of cultural conflict that demand answers to the crucial question: "what rights must we mutually accord one another if we want to legitimately regulate our common life by means of positive law?"[34]

The most pertinent and controversial issues are those where members of the two national communities oppose one another with conflicting right claims. These include the question of contentious parades such as that at Drumcree and the conflict in Ardoyne, North Belfast over the route taken by young girls attending the Holy Cross Primary School. These matters are interpreted as zero-sum conflicts since many participants believe that if the state does not uphold 'their' claimed rights it is because its officials are willing to sacrifice these for the sake of upholding rights claimed by the privileged 'others.' There would, therefore, appear to be incommensurable perspectives on these matters. The Agreement must prove its worth by grounding the required normative resources to take us beyond this apparent incommensurability so that these problems might be resolved in a manner that is transparently fair to all concerned. This realization of a 'parity of esteem' for both national traditions is one of the main challenges for post-Agreement politics in Northern Ireland. What guidance does a discourse-theoretical reading of the peace process provide for those citizens who are committed to the project of mutually according to one another those rights that will allow the people of Northern Ireland to regulate their common life legitimately in law?

Discourse theory facilitates the critical assessment of various competing legal proposals for the realization of appropriate rights in such cases. It encourages all concerned to ask which proposals are likely to satisfy the principle of democracy's requirement that they meet with "the assent of all citizens in a discursive process of legislation." The process of legislation is established by a constitutional framework that facilitates the transformation of an unrestricted flow of communication in the public sphere into binding law through the procedural operation of formal decision-making bodies. So the more promising legal proposals should reflect the better arguments that have been articulated in the public sphere by all those people who have been affected by these particular disputes. In the language of the philosophy of the social sciences, discourse theory is a form of critical hermeneutics. It provides a normative filter for the evaluation of competing, interpretive perspectives on political conflicts by testing the objectivity of the disputed empirical accounts of the matter, and the

impartiality and appropriateness of the norms invoked by the differing parties. The test of the principle of democracy, with its emphasis on inclusion and difference-sensitivity, guides citizens to provide the best possible interpretation of the meaning of key normative terms such as 'democracy,' 'equality,' 'impartiality,' and 'parity of esteem' in this unique context.

It should be possible, on the basis of a discourse-theoretical reading of these continuing cultural conflicts in Northern Ireland, to draw provisional, fallible conclusions as to how these matters might best be resolved. Any such proposed legal resolution will have to accord with the principles of democratic legitimacy to be found in the constitutional framework established under the Agreement. The proposals will be based on self-critical, difference-sensitive *interpretations* of public debates on these matters with a view to outlining an impartial basis for further legislation. The point of such a theoretically driven analysis is to intervene politically in these disputes that threaten the constitutional achievement of the Agreement. The analysis makes a contribution to the debate in the public sphere by putting forward a critical interpretation of the appropriate meaning of key normative values in this specific context. It also contributes to the procedural filtering process by sifting through various perspectives on these matters as they are articulated in the public sphere, with a view to identifying which ideas might be taken up by the appropriate decision-making bodies. In this way it assists citizens who want to ensure that the British and Irish governments are held to account in their commitment to ensure that power is exercised in a suitably democratic way and in a manner that is consistent with the normative content of the Agreement.

This is not the place to develop in detail a discourse-theoretical reading of any specific matter of cultural conflict. It should, I hope, be clear how such an analysis might proceed in relation to these disputes.[35] One point that follows from my account of the legitimation of the Agreement as a constitutional framework is worth stressing here. Arguments that emerge through the critical hermeneutic lens of discourse theory will chime with the general idea that political accommodation in Northern Ireland depends on mutual recognition and equality of status for two historically antagonistic national communities. The legal proposals that follow from these arguments will build on the Agreement's commitment to guarantee equal respect for each individual in his or her own identity-forming context, including people's deep attachments to differing national communities. In other words the great significance of the Agreement for the people of Northern Ireland is that it provides a legitimately constituted legal framework that is designed to achieve accommodation between these two national communities by treating both traditions impartially. So while the defense of the human rights of all is a vital aspect of this settlement,[36] the application of these rights must be framed by this commitment to national impartiality.

If we want to resolve ongoing cultural controversies legitimately in law, we must do so by clarifying a set of norms that will guarantee equal rights for all citizens in

their differing identity-forming contexts. So, for example, with respect to the parades controversy, ideals of national impartiality and parity of esteem will be better realized if future legislation on the matter provides appropriate protection to members of both main national traditions. This means that no citizens should have foisted on their doorstep public rituals that they have good reason to view as involving the systematic devaluation of their religious beliefs and national aspirations. Both traditions should enjoy this protection, and neither could be said to enjoy a parity of esteem were it not to be provided to them in equal measure. Matters of national and religious sensitivity like this should be resolved inclusively so that the equal political status of both national traditions is guaranteed. But if there is no accommodation at a local level, then the forces of the state should be used to protect local communities, be they unionist or nationalist, from unwelcome parades, marches, and public rituals. The aim of any future legislation based on such ideals would be to address certain shortcomings in the operation of the Parades Commission at present, notably the lack of normative clarity in its determinations and the related deficits of transparency and accountability.

But what of those who claim that to block such a parade at the demand of local residents is to violate their cultural identity, since using this route is an essential part of a tradition that is constitutive of their identity? Only those aspects of national or religious cultures that are compatible with an inclusive political culture can be protected. We cannot esteem or protect those aspects of people's culture that require them to demand that state officials be used to force a march through an area populated by citizens who have reasonable grounds for refusing to host the parade. Reasonable grounds in this case would be based on historical evidence that support the residents' view that such forced marches are provocative forms of harassment that devalue their religious and national identities. Those aspects of culture that are incapable of recognizing the equal status of others in their difference must be abandoned if the rights of all are to be realized effectively in a new binational Northern Ireland. Both traditions must be appropriated critically, and this means that they must, in time, be filtered in ways that make them responsive to the demands of mutual recognition.

In spite of initial similarities concerning the limits on freedom of movement, the Holy Cross dispute raises very different issues. It is one thing for Roman Catholic, Irish nationalist residents' groups to find historical evidence to support the reasonableness of their refusal to host a ceremonial march that celebrates a crucial historic defeat of their national and religious tradition by that of the marching loyal Orders. It is quite another thing for British loyalist residents to refuse to host Irish nationalist primary schoolchildren, aged 4-11, as they walk to and from their school, which happens to be located just across the communal divide in a loyalist area. The children's right to an education free from harassment is not to be equated with the loyal Orders' right to march on their traditional routes. This is not to say that the protesting residents of the loyalist Glenbryn estate do not have legitimate concerns about their own security. It is perfectly

reasonable for them to have a right to safety from sectarian violence enforced by the coercive arm of the state, and to have walls built around their estate if this is deemed to be necessary to the achievement of that end.

The real tragedy in this case is that the residents have misplaced their anger with consequences that have shocked television viewers around the world. The young girls who have been caught up in this conflict driven by deep hostility and mutual suspicion, have come to symbolize the challenge that is facing those people of Northern Ireland who want to leave their sectarian past behind. If religious and national divisions are allowed to spiral out of control in these areas then they set the socialization process on a path towards pathology. This spiral must be broken. In the short term, these conflicts must be managed if they cannot be resolved through dialogue at local level. This means that if these local communities cannot live together, then the forces of state must be used to ensure that that they are allowed to live separately and securely. This policy is perfectly consistent with the operation of an egalitarian, binational political process that allows the concerns of both communities to filter through to the legislative process. But the right of these girls to an education free from systematic abuse and its associated traumas must be upheld as a matter of priority.

Discourse Theory as Social Criticism

We are now in a position to address the three TIAG objections mentioned in the introduction. Consideration of these will lead to some general conclusions about the political purpose of normative theory. First, regarding the alleged motivational deficit in discourse theory, TIAGs wonder why we should assume that all citizens would be willing to accept the constraints that the path of deliberation appears to place on them. Why should they accept the legitimacy of those statutes that result from the filtering of ideas articulated informally in the public sphere, thorough to democratically constituted decision-making procedures?

Unlike other PIPRO approaches, including Rawls's, discourse theory lays down no formal constraints on democratic deliberation. There is, however, an expectation that, in order to resolve our differences with others, each of us may need to think our way beyond the initial standpoints we adopt in our dispute, and to accept as legitimate some outcomes that fall far short of our staunchly held ideals. This is a characteristic of discourse as a reflective form of communicative action. In order to find some common ground with our opponents, we may all have to agree to a principle or procedure that abstracts from first preferences or from aspects of our conceptions of the good. So discourse theory assumes that diversity will lead to disagreements in politics, and that norms of justification will have to be grounded at a sufficiently abstract level. This does not imply that we should take a 'view from nowhere,' since common ground can be found in clarifying shared goals that remain substantive, such as a commitment to mutual recognition in Northern Ireland. Discourse theorists' alleged crime seems to be

this: they adopt a procedural approach to democratic theory because they assume that there is no general agreement on the good for human beings! But just because we don't agree on a comprehensive conception of the good, it does not follow that we can never achieve a principled agreement on anything.

More specifically on the question of motivation, discourse theory cannot *guarantee* that citizens will adopt the kind of reflective attitude that is required if we are to regulate social interaction on the basis of communicatively grounded norms. Recent history suggests, however, that an increasing number of people in Northern Ireland are motivated to achieve a fair accommodation of national differences. Changes in the positions adopted by key political leaders such as David Trimble or Gerry Adams would seem to bear this out. Almost all of those who support the Agreement have been willing to abstract from their first preferences on constitutional matters. For many, the desire to end violence is, presumably, a key factor but mutual recognition of the reasonableness of the conflicting aspirations is also significant. Discourse theory does not motivate citizens itself but it assumes that there are some motivating sources to work with and that these will be nurtured through the inclusive workings of a democratic system. The specific role of theory is to present an account of those procedures according to which laws are enacted legitimately, and to help anticipate which possible legal proposals are likely to assist in the long-term resolution of ongoing conflicts.

Even in the case of those who are not inclined to accommodate others, as may be the case among many citizens in Northern Ireland, the medium of law itself has a certain motivating force. The language of law is unavoidable for all those who make right-claims in a constitutional democracy. If we want the state to uphold those rights we believe to be justified, by coercive force if necessary, then we need to work within the democratic procedures that are constitutive of a self-regulating legal community. The legal medium, in the full complexity of its various institutional levels of operation, is the only resource we have to enforce a legitimate resolution of our differences in modern complex societies. It seems that those involved in disputes such as those at Drumcree and Holy Cross have acknowledged this by couching their claims in the language of rights. But once they do this, they find themselves already on a path of justification within a certain institutional structure that they cannot wish away. In other words, the appeal to rights discourse, signals an assent to the legitimacy of legally constituted democratic procedures of justification operating according to the principles of a separation of powers.

What about the TIAG view that the discourse theoretical approach is politically ineffectual, since outcomes are underdetermined by its procedures? Here it is important to recall the institutional features of the theory especially with regard to the relation between the unrestrained flow of communication in the public sphere and the actual decision-making procedures that have been established by positive, constitutional law. If we are committed to the legal resolution of conflicts through the democratic justification of right-claims, and the language

used by all sides to key disputes in Northern Ireland tie them into this project, then we have two alternatives. We should either accept the legitimacy of procedural outcomes or else we should show why the actual procedures involved are not themselves legitimate. Democratic orders must have self-correcting mechanisms built into their legal frameworks so that procedures can be revised and reformed if the outcomes they produce are not thought to merit a presumption of rationality. Take, for example, the operation of the Parades Commission, a legally constituted body set up to make determinations on contentious parades and marches in Northern Ireland. Participants on all sides have argued that the Commission's determinations lack transparency and accountability. There would appear, therefore, to be a legitimation deficit in the Commission's current mode of operation. In order to make this good the Commission may, as I indicated earlier, need to be reformed so that it can make its determinations in line with a more robust set of norms that give substance to the ideals of national impartiality and parity of esteem entailed in the Agreement.

It is part of the responsibility of citizenship for those involved in cultural conflicts of this kind in Northern Ireland to make alternative recommendations as to how binding decisions are to be taken in the absence of local accommodations or informal agreements. It is not enough simply to reject the procedures that are in place or to refuse to consider any procedurally generated outcomes that deviate from initial preferences. The discourse theoretical framework directs us to judge alternative procedural recommendations according to their inclusiveness and difference-sensitivity and the objectivity of their interpretations of the particular disputes they are designed to address in the fraught binational context of contemporary Northern Ireland. What is needed in most cases is a further elaboration of the normative ideals enshrined in the Agreement so that legitimate procedures can be established to deal with these continuing conflicts in ways that respect the dignity of all individuals in their differing identity-forming contexts.

Finally, does the discourse theoretical approach collapse into a form of decisionism? Is its claim to discursive impartiality really a mask that conceals the arbitrary imposition of one perspective on others? We would only have to agree with this skeptical conclusion were we convinced that the norms of non-domination and respect for national difference that are implicit in the Agreement do not *enhance* the legitimacy of the government of Northern Ireland. We need to ask whether direct rule from London was really no less legitimate a form of government even though virtually nobody wanted it. Was the old Stormont regime that preceded direct rule really no less legitimate than the Agreement even though Irish nationalists were systematically alienated from the political community? All the discourse theorist, or indeed any PIPRO, needs to show is that political struggles can *sometimes* be resolved in a rationally progressive manner and that the theory helps us to judge when this is the case. TIAGs need to show that normative theory can do nothing to help us to achieve rational resolutions to political conflicts, as opposed to the decisionistic imposition of effective solutions regardless of the

arguments that might be made in their favor. This is a position that is difficult to maintain when one considers the gains made historically through the political struggles of those workers, women, and a wide range of minority groups who were inspired by democratic ideals of inclusion and equality.

TIAGs tend to focus on the alleged shortcomings of PIPRO approaches to politics, especially their alleged tendency to look past the *real politics*, in their over-eager quest for agreements.[37] PIPROs certainly need to be wary of this but the danger for TIAGs is that they may be misguided in judging all political conflicts to be, in principle, irresolvable through rational engagement. The point has clear political implications that are damaging to the democratic process. If the work of theoretical reflection on political conflict is not directed to the fair and inclusive resolution of the conflict, then it can only make matters worse. If we are too quick to judge particular conflicts to be irresolvable then we give citizens little or no reason to reflect critically on their own aspirations in ways that might help them to reach fair accommodations with others. This devalues the constructive efforts of those citizens who are willing to engage in such reflection and it offers comfort to those who are entrenched in closed worldviews. When it comes to the analysis of political conflicts that threaten to lead to oppression or violence, such as those related to national diversity in Northern Ireland, optimism is a political responsibility. TIAG skepticism discourages political actors from arguing with one another and keeps them focused on securing the means to enforce their will on their adversaries. One key aspect of the political struggles characteristic of the modern age has been the impulse to maximize inclusive agreements and to minimize the forceful imposition of the will of some on others. The point of critical philosophy is to contribute to this task. In their denial of the possibility that conflicts can be resolved in ways that enhance the legitimacy of our legal relations, TIAGs reject this project. The political implication is not that the world is left as it is but rather, through the encouragement given to closed-minded belligerence, that the problems we face become even more difficult to tackle.

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