



NORTHERN
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Is that right?
Fact and Fiction on a Bill of Rights



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Foreword

Under the terms of the Belfast (Good Friday) Agreement 1998, the Northern Ireland Human Rights Commission (the Commission) was asked to consult and advise on a Bill of Rights for Northern Ireland. The Commission delivered advice to the Secretary of State for Northern Ireland on 10 December 2008. The Northern Ireland Office subsequently undertook a public consultation. In that context and more broadly, the form of a possible Bill of Rights has been debated vigorously, although very little progress has been made towards the adoption of the instrument.

The ongoing delay in adopting a Bill of Rights for Northern Ireland is a matter of regret for the Commission, which continues to consider that the advice it delivered constitutes a strong basis on which to proceed. Furthermore, the Commission does not accept that the process has to be stalled pending the outcome of the current consultation regarding a possible United Kingdom (UK) Bill of Rights.

The Commission will continue to support efforts for the adoption of a Bill of Rights for Northern Ireland. The present publication is intended to assist in this regard. It responds to a number of the concerns that have been expressed in the political, civil society and media spheres. It also identifies and corrects a number of technical misunderstandings. It is hoped that the report will thus contribute to a constructive advancement of the process.

In conclusion, the Commission recalls that the onus is now on the Government to take the necessary steps to ensure that a Bill of Rights for Northern Ireland will be adopted. To avoid that responsibility is to renege on one of the most important provisions of the Belfast (Good Friday) Agreement.



Professor Michael O'Flaherty
Chief Commissioner

I. Introduction

Many countries have a bill of rights. Between 1788 and 1948, 82% of the constitutions drafted contained some form of protection for human rights¹, a figure that increased to 93% between 1949 and 1975.² This upward trend continued throughout the 1980s, and from 1990 onwards, as many countries moved through peace processes towards new constitutional settlements, human rights frameworks such as a bill of rights became routine³. Apart from the UK, where the Human Rights Act constitutes a form of bill of rights, Australia is the only common law country not to possess a bill of rights. Yet, even here, it is a topic frequently debated and on the political agenda.

1.1 What is a bill of rights?

Bills of rights are constitutional documents operating as a type of contract between citizens and their government. Bills of rights can take many different forms, however all contain as their primary purpose the provision of human rights protections for citizens. They set out the most fundamental rights to which those within the country are entitled.

1.2 Why do societies choose to have a bill of rights?

Societies choose to have bills of rights because they recognise that there are certain values which are so basic that they wish to put them beyond the reach of any government. Rights such as the right to fair trial, or the right not to be tortured, are often viewed as matters which should not be taken away by any government but should be protected irrespective of the prevailing political climate. Bills of rights in essence aim to lift such values above the political fray.

Societies adopting bills of rights also tend to have a broader understanding of the democratic framework, particularly concerning restrictions on political decision-making. This vision of democracy emphasises participation whilst simultaneously limiting majority rule to the extent that it is deemed necessary so as to ensure the equal participation of all and to protect individuals from abuses of power.

1.3 When and how do societies adopt a bill of rights?

In practice societies tend to adopt bills of rights in one of the following circumstances:

- when agreeing a new or substantially revised constitution, for example, Canada incorporated a Charter of Rights into the Constitution Act 1982 as part of a new constitutional settlement;

- as part of a peace settlement, for example, South Africa agreed an Interim Constitution in 1993 which included a Bill of Rights, a revised version of which was produced within the Final Constitutional Settlement after a period of wide ranging civic participation and consultation.
- in response to moral, political or legal pressure to address failures to protect rights, for example, the adoption of the Human Rights Act 1998 in the United Kingdom – a form of bill of rights - followed in part from a sense that too many cases were being lost at the European Court of Human Rights and the view that a more embedded national approach to rights was required.

1.4 Who needs a bill of rights?

While a bill of rights affords an additional layer of protection to all, it is of particular relevance to members of vulnerable or marginalised groups. In Northern Ireland for example, serious human rights issues have been raised with respect to children in detention, and women with mental health problems who have been detained, often for very minor crimes. These groups are unlikely to be the centre of political attention since their members cannot vote and so it is of vital importance that a bill of rights is put in place to act as their defence.

1.5 Why is a bill of rights important in Northern Ireland?

Since the 1960s different groups from across the political divide have proposed that a bill of rights would be a 'good thing' for Northern Ireland. They have argued that Northern Ireland would be a better place and that relationships between people could be improved if everyone felt sure that no matter who was in power politically, human rights would be respected.

The Belfast (Good Friday) Agreement and St Andrews Agreement provided that the Northern Ireland Human Rights Commission should advise government on a Bill of Rights for Northern Ireland. The Commission presented its advice on 10 December 2008. Opinion polls in Northern Ireland have consistently shown high support for a bill of rights across all sections of the community.

1.6. Are there any concerns about adopting a bill of rights?

Despite the fact that bills of rights are very common, particularly in democratic countries, and that there has been a long-standing commitment to and support for a Bill of Rights for Northern Ireland, objections remain. These objections are sometimes framed as general opposition to bills of rights and how they work, and are the type of concerns that people in any country might have. Other objections are more specific to our particular context. For example, there are concerns that a bill of rights is incompatible with the legal system in the UK, that a Northern Ireland specific bill of rights may be difficult to implement or have a negative effect with respect to the political culture of Northern Ireland.

Many objections to a bill of rights, both general and specific, derive from legitimate concerns about:

- the nature of fundamental values that a bill would protect;
- the relationship a bill of rights might establish between people, politicians and courts; and,
- the type of culture that it would promote.

These are concerns which deserve to be heard and discussed. Indeed, discussion about the nature of human rights, and the appropriate balance of judicial, political and civic participation in our political process, is central to any attempt to produce a bill of rights.

As a consequence of the important concerns raised regarding bills of rights, they have been the subject of much debate, receiving significant attention from academics, judges, politicians and civil society, over many years. The outcome of such discussions did not remain in the abstract but fed into the drafting of future bills of rights. As a result, those responsible found ways of reflecting and addressing the concerns in practice. Today, the outcomes of this long debate and practical experience presents a useful resource for the current process in Northern Ireland.

2. General concerns regarding a bill of rights

A number of general objections to bills of rights have been made and responded to, some over a period of centuries. These concern the relationship of bills of rights to democratic processes, the role of judges in upholding bills of rights, the appropriate content of a bill of rights, and who a bill of rights should apply to.

2.1 'Bills of rights are undemocratic'.

Bills of rights aim to limit what elected politicians can decide, but only in terms of fundamental values, such as the right not to be tortured. However, bills of rights do not dictate government policy, rather they operate by providing a list of minimum standards against which legislation, policy and practice can be measured. The purpose of human rights is to ensure that everyone can participate in the democratic life of the country on an equal basis. They limit the actions of politicians in order to strengthen democracy rather than undermining it.

Human rights work best as part of the legislative process, where proposed legislation is measured against rights, and if found wanting, modified by the legislature before it becomes law. This model already applies in Northern Ireland, Wales and Scotland, through their devolution statutes, whereby Executive ministers must review legislation to make sure that it complies with the European Convention on Human Rights, and make a 'statement of compatibility' in the Assembly or Parliament. Most bills of rights, however, also involve judges and courts in adjudicating on alleged violations.

2.2 'Bills of rights give judges too much power'.

People are sometimes concerned that a bill of rights will result in judges having too much power. Concern about the role of judges tends to be heightened in systems where they are given the power to strike down any law that is deemed incompatible with the bill of rights. The United States constitution, for example, is enforced by the Supreme Court who can strike down legislation where they find that it contravenes the Bill of Rights. People question why it is that an unelected and often unrepresentative group of judges can strike down laws passed by democratically elected representatives.

In fact, giving judges power to strike down legislation which contravenes a bill of rights is only one of many ways in which judges can be used as guardians of human rights. Some bills of rights and constitutions (for example the Irish Constitution) give judges an advisory role whereby proposed legislation can be referred to them for an opinion on compatibility in the light of the constitution. This opinion can then feed into the decision-making process helping to ensure that the rights implications of the legislation have been properly considered. Moreover, as touched on above, bills of rights are often most effectively implemented not through judicial review of human rights violations, but by proofing proposed legislation before it is implemented.

Nonetheless, some form of judicial review remains an important part of enforcing many bills of rights, and to this end the objection that judges have too much power needs to be addressed. Defence of the apparently counter-majoritarian role of judges rests on the concept of bills of rights acting as a set of minimum standards which underpin democracy. The role of the judge in examining whether legislation, policy or practice complies with a bill of rights is not to substitute their view of what a better policy would be, but to inject consideration of how it will impact on fundamental rights. Ultimately their power is constrained by the nature of the judicial function: namely to interpret and apply the law.

Those concerned about the role of judges, however, often have a rejoinder: judicial adjudication of rights looks and feels different from other types of judicial decision-making. Adjudicating on human rights matters is not like applying a piece of ordinary legislation such as criminal law, rather it involves balancing fundamental values, for example, the right to a fair trial against the right to security. This type of balancing is something which we tend to view politicians as elected to do, and we can un-elect them at the next elections if we do not like the balance they come up with. Judges however, are not elected and cannot be removed because we do not like their decisions. Those concerned about the power which a bill of rights can give to judges including strong advocates of human rights, are concerned that the nature of judicial adjudication of rights is different and more open than judicial adjudication in other areas, and that rights which were designed as minimum standards can be interpreted by judges in a more maximalist way so as to encroach on what is the appropriate sphere of politicians and legislatures.

Concern about the nature of adjudication in a bill of rights context has two responses. The first response is to reiterate that while rights seem more political, the task of judges is essentially the same as with any piece of legislation, namely to interpret and apply the law – in this case the bill of rights. Interpreting the protections contained in a bill of rights only seems more political because statements of rights look more abstract than other pieces of legislation, for example, the criminal law.

Second, we should in any case keep in mind that there are ways to recalibrate the balance between the legislature and the judges. Countries have innovated in several different ways in order to address concern over the power of judges with respect to their Bill of Rights. Some have varied in the extent to which they give courts and judges the power to strike down legislation that does not comply with the Bill. Much of the academic literature around the role of judges in enforcing rights has been generated by the US Constitution and Bill of Rights which enables judges to strike down incompatible legislation. In contrast, New Zealand, South Africa, Canada and the UK have sought in different ways and to different extents to limit the judiciary's reviewing powers and respect the primacy of the legislature. The variations in approach are set out below.

- New Zealand: in 1990 a bill of rights in the form of an ordinary Act of Parliament was passed. The Attorney-General was then tasked with a duty to tell Parliament when proposed legislation conflicted with the Bill. The courts were permitted to judge the legality of actions taken by public officials, but not to assess the validity of Parliamentary

legislation, whether enacted before or after 1990. This mechanism was criticized by some as being 'too soft' with too little adjudication of the Bill of Rights, but demonstrates a mechanism based largely on trust;

- South Africa: where a judge finds a piece of legislation to be in violation of the Bill of Rights it is returned to the legislature which is given a period of time to change the legislation;
- Canada: the Charter of Rights 1982 provides that if legislation is found to be in violation of the rights contained therein, the law can still be passed but needs a specific declaration that the conflict is deliberate. The Charter also provides as a safeguard that a process of review must follow for any such legislation;
- UK: the Human Rights Act 1998 is particularly innovative. It provides that where a judge finds a violation between the rights as laid out in the European Convention on Human Rights (ECHR) and secondary legislation - that is to say, legislation not passed by the UK Parliament but by authorities to whom it has delegated power, including the devolved legislatures - he or she can strike the legislation down. However, it also provides that where a judge finds a violation between the ECHR rights and primary legislation - legislation passed by the UK Parliament - he or she may not strike it down but can issue a 'Declaration of Incompatibility'. The Government can then institute a fast-track procedure to make the amendments needed to the primary legislation to ensure ECHR compatibility. Although technically able to ignore the Declaration of Incompatibility, the UK Government has tended in practice to revise the legislation.

Countries have included provision in bills of rights addressing the type of interpretation and the types of sources that should be used when applying their contents. In South Africa, for example, based on concern about legalistic interpretations of legislation during the apartheid era, the Bill of Rights provided that: 'When applying a provision of the Bill of Rights... a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.'⁴

2.3 'Bills of rights often include socio-economic rights which allow judges to interfere with political decision-making'.

Many people think that it is important to include socio-economic rights in a bill of rights. They argue that the interconnectedness of all human rights means that socio-economic rights, such as rights to access a minimum standard of healthcare, must not be viewed as less important than civil and political rights. For others, however, the distribution of socio-economic goods is not an appropriate area for a bill of rights to deal with, since it enables judges to become involved in evaluating public policies and political decisions.

The Government is already committed to implement certain socio-economic rights under international human rights law which imposes legally binding standards. Further, it is not unusual for bills of rights to provide for socio-economic rights. A number of existing bills of rights, such as that of Finland, South Africa, India and Ireland, have included socio-economic rights in different ways indicating that the distinctive nature of socio-economic rights is not an obstacle to including them in a bill of rights. When designing and implementing a bill of rights, it is also good practice to engage in thorough consultation and therefore achieve a level of public support and political consensus for the bill.

2.4 'Bills of rights can result in substantial litigation and legislative upheaval'.

Countries that adopt a bill of rights as a result of a peace process, for example South Africa, have often arrived at a bill of rights through such a painful process, that resulting litigation or legislative inconvenience is not a primary concern. In other situations however, the concern about litigation has been addressed by trying to human rights proof existing laws, policies and practices, prior to implementation, and by educating decision makers on good practice.

However, evidence also suggests that the concern over a possible flood of litigation is misplaced. Evidence demonstrates, for example, that the Human Rights Act in the United Kingdom led to an increase in the number of cases in which human rights arguments were also made. This is not surprising as the purpose of the Human Rights Act was to enable human rights arguments to be made in domestic courts. However, there is no clear evidence of a more general rise in litigation.

In 2003 the Audit Commission which evaluates all new pieces of legislation to see if they are achieving their goals and providing value for money, noted that human rights arguments were only made in around half of judicial review cases.⁴ Figures from a Sweet & Maxwell audit record that the number of reported cases making Human Rights Act arguments more than tripled between 1999-2000 and 2000-1 reaching a peak of 714 in 2001-2, before declining until 2007-8 when it appears to have levelled off.⁵ The overall number of cases in which Human Rights Act arguments were made in 2008-9 was 348.

It is difficult to assess how many of these cases were taken purely due to a Human Rights Act line of argument, and it is therefore difficult to assess how much 'new' litigation has really resulted from the Act. But it is likely to be a very small number out of the 348. Moreover, as the Audit Commission pointed out, litigation can result from a preventable failure of public authorities to implement the Human Rights Act. The Audit Commission noted at the time of its report that a flurry of activity with regard to human rights proofing the delivery of public services immediately after the Act's introduction in 2000 soon gave way to complacency and a failure to embed the practice.

2.5. 'Bills of rights hold out expectations that cannot be met'.

Objectors sometimes allege that bills of rights promise too much and deliver too little. For instance, early criticisms of the Canadian Charter on Rights and Freedoms, tended to assert that it had delivered too little litigation and too little protection of rights, rather than not enough.

Bills of rights are fairly conservative documents. As discussion of the democratic objection has shown, they perform a modest role of making sure that legislation, policy and practice does not deny fundamental rights. They do not ensure a perfect legislative programme or complete and instant protection for all. Neither do they ensure an overnight human rights culture. This is because the protection of rights is the business of everyone, from legislators, courts, civil servants and public bodies, to the media, schools, and all those living in a society.

Nonetheless, bills of rights are an important part of promoting and enforcing human rights as a central value of society, but are only one small part. Providing a bill of rights makes it more likely that government bodies and the public will understand and be concerned about the importance of human rights.

2.6 'Bills of rights only restrain the state when often it is others who violate rights'.

For some of those who are critical of bills of rights, an apparently exclusive focus on the human rights of 'the people' vis-à-vis the actions of government (even taken in its widest sense of including all the activities of any public body) is a distorted emphasis. By focusing principally upon the duties of the state, bills of rights would seem to leave non-state actors untouched including but not limited to: serious criminals, corporations, and terrorist groupings. All of these bodies appear to be capable of violating human rights.

We began by describing a bill of rights as a type of 'contract' between a state and its citizens. The idea of a 'social contract' between the government and the governed has been at the heart of rights thinking for many centuries. It underlies how a bill of rights works to bind common values into the fabric of all of society's relationships. While it is true that bills of rights mainly concern the vertical relationship between the government and the people they also come to bear on horizontal relationships between the people themselves in the following ways:

- some bills of rights do apply to all peoples. Such provisions can signal that the protection of human rights is an ongoing responsibility not just for government, but for everyone;
- international experience has demonstrated that where a government binds itself to rule of law commitments through allegiance to human rights, this has a dampening effect on the acts of groups such as terrorists; and,
- bills of rights can be applied to how laws governing relationships between people or between people and corporations are implemented, by requiring that the interpretation of these laws be consistent with the bill of rights. For example, the application of a bill of rights might ensure that defamation cases between individuals and newspapers take account of rights such as freedom of speech.

2.7 'Bills of rights contribute to a selfish "me" culture where rights are emphasized at the expense of responsibilities'.

Some critics of bills of rights are concerned that a focus on the rights of the individual can encourage negative behaviours. More specifically the concern is that human rights framed as the entitlement of individuals promotes a 'me and my rights' culture whereby people feel less obligated to fulfil their own responsibilities.

In responding to this criticism it must be noted that many rights are in fact balanced with the notion of responsibilities and an obligation to uphold broader societal values. For example, Article 10 of the European Convention on Human Rights states that: 'Everyone has the right to freedom of expression.'

However, the Convention goes on to make clear that: the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

While framed in terms of a right with limitations, the Article which protects freedom of expression taken as a whole indicates that both rights and responsibilities are present. In particular, the right in question must be balanced with other laws important to maintaining democracy and protecting the rights of others.

Some human rights, such as the right not to be tortured, have no limitation. This is not because of a commitment to the individual, but because of a decision not to allow torture in any circumstances. The right not to be tortured exists regardless of whether one has behaved responsibly, or whether it could be argued that torturing people would achieve a wider social good such as preventing a crime. This absolute right demonstrates a second response to the allegation that rights promote a selfish 'me' culture. Human rights are often about ensuring communal values that should withstand the test of time, and be robustly protected in times of crisis when political expediency might seek to do away with them. They are about asserting a common humanity even with those we most distrust or disagree with.

Designing an effective bill of rights with the capacity to protect human rights in practice, often involves identifying the vulnerable and marginalized in a society – groups that do not receive attention in the mainstream political process – and considering how they are treated. The process of debating and establishing a bill of rights is one that requires a society to think very carefully about who it includes and who it does not, what its common sense of community is, and what the fundamental rights are that it wants to protect from the day-to-day business of law, policy and practice. Archbishop Tutu talking about the South African Bill of Rights process has pointed to this dynamic:

*"Then we began speaking about a bill of rights, a constitution, the sorts of things that we thought we might want. Each, I suppose, initially approached it from the position of 'well, what is good for me?' Then people gradually discovered: 'hey the things that bind us, the things that are common to us, are many times more than the things that divide us.'"*⁸

3. Specific UK concerns regarding to a bill of rights

In addition to the general concerns and debates about bills of rights, there has been discussion over whether and how a bill of rights would work in the context of the United Kingdom's legal system. This debate is also sometimes raised in the context of a bill of rights for Northern Ireland.

3.1 'Bills of rights are anti-British and we have got on very well without one'.

This concern stems from the argument that a bill of rights enforceable through the courts is not really the way things are done in the United Kingdom. Here the focus, it is suggested, has tended to be on the protection of civil liberties with limited judicial intervention. Human rights in the United Kingdom have generally been protected through a political culture of respecting rights, or so it is argued, rather than a bill of rights per se.

This debate has been much less prevalent however since the Human Rights Act came into force. Even the recent establishment of a Commission on a United Kingdom Bill of Rights tasked with considering the future of the Human Rights Act, itself a form of bill of rights, has not resulted in an outright demand to remove the framework. Rather the focus has been on the question of whether the Act is itself the most 'British' way of doing things or whether an alternative bill of rights should be introduced to replace the existing law.

The criticism of bills of rights as somehow alien to the United Kingdom is based on a short view of our legal history. Historically, human rights would seem to be a particularly 'British' affair. The very phrase 'bill of rights' comes from England and the Bill of Rights 1689. The United Kingdom made a significant contribution to entrenching human rights and bills of rights internationally. In particular, the United Kingdom often promoted bills of rights as a tool suitable for dealing with identity conflicts in former colonial states. Moreover, civil servants and politicians from the United Kingdom were also key to the drafting of the European Convention on Human Rights and Fundamental Freedoms in 1950.

It is true that prior to the Human Rights Act there was political resistance to an entrenched bill of rights in the United Kingdom. However, a record of losing legal cases before the European Convention on Human Rights (only Turkey had a higher record of litigation) led to a re-think. The incorporation of the ECHR through the innovative enforcement mechanisms of the Human Rights Act, has demonstrated how a Bill of Rights can be reconciled with the United Kingdom's legal system.

3.2 'A bill of rights cannot be entrenched because of the UK doctrine of Parliamentary Sovereignty'.

In the United Kingdom Parliament is supreme. This means, among other things, that no Parliament can bind a future Parliament. For many years the supremacy of Parliament was assumed to be a clear obstacle to entrenching a bill of rights. Judges are bound to give priority to legislation passed by the Parliament of the day, so it seemed impossible to give human rights a special place within the legal system without undermining a basic constitutional premise. However, the Human Rights Act found a balance between entrenching and protecting rights on the one hand, and maintaining Parliamentary sovereignty on the other.

3.3 'We already have lots of international and European human rights law and a bill of rights in the form of the Human Rights Act and do not need another bill of rights'.

There are strong arguments that the United Kingdom's international commitments under human rights treaties and the Human Rights Act, are sufficient to protecting rights and that a Bill of Rights for Northern Ireland is not required. However, human rights treaties while an important form of protection cannot be directly used in courts. The Human Rights Act provides that the ECHR can be used in domestic courts and it places an obligation on all public authorities to act consistently with it. However, there is clearly room to add to these rights with a particular reference to Northern Ireland's political and social context. The Commission has advised government on how additions could be made to the ECHR so as to constitute a Bill of Rights for Northern Ireland. However, ultimately a political process is required leading to legislation in the Westminster Parliament.

4. Specific Northern Ireland concerns regarding a bill of rights

Northern Ireland has seen years of discussion and debate on a bill of rights, during which many objections have been made. Many of these reflect issues already dealt with in this publication.

People concerned about the 'undemocratic' nature of bills of rights, for example, may view this as something to be particularly worried about given the early difficulties experienced in establishing and sustaining the Northern Ireland Assembly.

Concerns about the role of judges in interpreting and enforcing a bill of rights, are also likely to be heightened in a society where the judiciary itself was a subject of political scrutiny and criticism and threatened with violence throughout the conflict.

Others are worried that to give judges a role in what is seen as the primary business of politics, could be particularly negative in Northern Ireland given that politicians have only recently re-gained power, and are still learning to work together.

All of these objections may have some validity, but they are nonetheless subject to the answers already provided. There are, however, additional Northern Ireland specific objections to bills of rights that must be considered. These fall into three groups:

1. objections that question the need for a separate Bill of Rights in Northern Ireland rather than dealing with human rights on a United Kingdom-wide basis;
2. objections that suggest it might be divisive to try to get agreement on the content of a Bill of Rights for Northern Ireland;
3. objections due to concerns over the legal feasibility of having a Bill of Rights for Northern Ireland as a devolved jurisdiction.

4.1 'We don't need a Bill of Rights for Northern Ireland because we already have the Human Rights Act and the human rights protections in the Northern Ireland Act and that is enough'.

In addition to the explanation already given as to why the Human Rights Act might not be enough, it is possible to point to further reasons why a Bill of Rights for Northern Ireland might be a good idea:

- it has popular support and people view it as being of assistance in moving forwards politically;
- the Government has committed to a Bill of Rights for Northern Ireland throughout the different peace agreements and processes of consultation;
- there are specific needs such as sectarianism and victims-rights, which could benefit from being specifically addressed in a tailor-made Bill of Rights for Northern Ireland.

4.2 'We need to await the outcome of the United Kingdom Bill of Rights Process (or, if we need a bill of rights we just need one for the whole United Kingdom)'.

It can be argued that any Northern Ireland process should await the outcome of the consultation on a United Kingdom Bill of Rights. This objection prioritizes a new United Kingdom-wide settlement on human rights ahead of any agreement to a Bill of Rights for Northern Ireland. There might be two reasons for this prioritization:

- first, because it would seem more logical to agree a state-wide Bill of Rights first, and a devolved one thereafter;
- second, because one does not really want a Bill of Rights for Northern Ireland and views the United Kingdom Bill of Rights project as a better alternative.

In response it should be noted that there is no legal or political reason to agree a state-wide approach to human rights protections in advance of a Bill of Rights for Northern Ireland. Neither is it more logical. In Australia, for example, two regional bills of rights have been agreed in Victoria and the Australian Capital Territory. Moreover, the processes and debates by which these regional bills of rights have been agreed also proved useful in helping to clarify a national debate over how an Australia-wide bill of rights might work.

To subjugate a Bill of Rights for Northern Ireland to a United Kingdom-wide debate could unnecessarily stall an advanced process in favour of a new and uncertain outcome. The Northern Ireland and United Kingdom Bill of Rights processes are distinct, with two different political contexts. The first has its roots in the peace process, and has developed over a long period with a much greater degree of public consultation. This second, by contrast, is a very new and time-limited process, involving mainly lawyers, and has no broad public education function or capacity.

It is unclear whether or how a coalition government with publicly-acknowledged different views on a Bill of Rights in the United Kingdom will agree to move forward on the outcome of an initial, quite low-key, consultation. There are also concerns in Scotland and Wales that a United Kingdom Bill of Rights would have a negative impact on the human rights cultures of those jurisdictions, and require a re-working of the devolution Acts.

4.3 'We don't need a Bill of Rights for Northern Ireland because there are no rights violations now that the troubles are over'.

A range of cases, and also investigations by the Commission, have demonstrated that violations of rights continue to take place in Northern Ireland, even though they are often different in scale and nature from those that took place during the conflict. In addition important 'legacy' issues also remain which a Bill of Rights for Northern Ireland might help address.

4.4 'We don't need a Bill of Rights for Northern Ireland because we already have legislative protection for many important rights such as equality'.

It is very important to have legislation relating to issues such as equality. But the primary function of a bill of rights in any society is to enshrine human rights protections. Consequently, the fact that a protection may be found in existing legislation, policy or government practices is not a reason to exclude that protection from what should be a foundational document. The question of the content of a bill of rights is not determined by whether or not protections currently exist in common law or statute, or elsewhere. Rather, the question is how to decide which values to draw from existing protections and give them expression at a constitutional level.

4.5 'It would be difficult to get politicians from all parties to agree on a Bill of Rights for Northern Ireland'.

This has, indeed, been the experience in Northern Ireland concerning a bill of rights. While it is not the intention of the Commission to take this opportunity to re-open the past political debates it hopes that the following reflections may be of assistance.

As a strict legal matter, the United Kingdom government has committed to a bill of rights in a piece of Westminster legislation and so the passage of any bill will not be down to agreement achieved in the Northern Ireland Assembly. Nonetheless, as a political matter it is likely that the United Kingdom government will wish to see cross-community consensus on the content of a bill of rights. Moreover, a Memorandum of Understanding between the United Kingdom government and the Northern Ireland Executive provides that the Westminster Parliament will not legislate on Northern Ireland without the consent of the Assembly. It could be argued that a bill of rights, due to its nature and the fact that it was agreed to as part of the peace process may require a different understanding of consent of the people of Northern Ireland, rather than being tied to consent of the Assembly.

Ultimately the adoption of any bill of rights will involve more negotiation. Not all matters are up for free negotiation. The broad framework of human rights is constrained by international law which provides a useful baseline for agreement thereby limiting the scope of disagreement. Many human rights are matters on which we know people do broadly agree. Consultation on rights has revealed that in practice people have similar concerns with regard, for example, to access to public services such as healthcare and that a greater consensus exists than might be expected.

4.6 'It would be difficult to get politicians and civil society to agree on a Bill of Rights for Northern Ireland'.

It is indeed important that agreement is reached not just between politicians but that it should reflect a wider engagement and consensus within civil society and amongst the people of Northern Ireland more generally. This objective might seem extremely difficult to achieve. There is evidence, however, that broadening a process can assist agreement rather than prevent it. Consultation in Canada and South Africa – two quite different countries – produced strong and interesting bills of rights.

Currently, a wide civil society involvement in the legislative process takes place in Northern Ireland without controversy. It happens informally, and formally through consultation, and has often proved useful to political parties helping them to reach consensus and produce meaningful and fair legislation.

Civil society groups have been working together on the bill of rights project for many years, across divides such as trade unions and business, Protestant and Catholic religious organizations and different language groups. They have found either common concerns or ways of reaching agreements on issues of dispute. This experience can be useful to politicians as they take forward discussions on a bill of rights.

4.7 'A bill of rights in Northern Ireland would abridge matters that are against the beliefs of faith communities.'

Throughout the process in Northern Ireland some religious groupings have had a persistent concern that a bill of rights is linked to campaigns to change the law in manners inconsistent with widely held moral views, such as on abortion. This concern is linked to a general anxiety held by some religious groups that a bill of rights would impact negatively on their beliefs and that human rights are somehow negative for faith communities.

Faith communities have been very active in campaigns for bills of rights, both in Northern Ireland, and elsewhere. At their heart bills of rights aim for equality and fair treatment, and these values are central to most religions. No bill of rights proposal to date has suggested any sort of right to abortion.

4.8 'It is constitutionally unusual to have different bills of rights and different levels of rights protection for different parts of a country'.

The charge that a bill of rights for Northern Ireland is constitutionally unusual can combine several different objections.

The first objection is that it is unusual for devolved regions to have bills of rights. This view is ill-informed when tested against experience elsewhere. While we are perhaps more aware of large centralized constitutions, countries with federal or devolved governments also often have bills of rights at the regional level. In addition to the Constitution of the United States of America, many of the 52 states have their own bills of rights. Similarly, the two entities that make up Bosnia and Herzegovina have their own bills of rights in addition to the central constitution.

The second charge is that it is unusual to have bills of rights for some regions of a country and not for others. Again, this objection can be factually rebutted. Not all countries with regional bills of rights have them in all devolved regions, in fact in most countries with regional bills of rights these were introduced at different times in different regions. Australia, for example, has no central bill of rights and yet two regions Victoria and the Australian Capital Territory do. Similarly, South Africa has nine regional governments only one of which, Western Cape, has its own constitution. While not providing for a bill of rights as such, this Constitution makes provision for some additional language rights, and for a list of 'directive principles' which incorporate human rights commitments.

The third charge is that it is unusual to have 'more' rights for one region and it would be 'unfair' to people in England, Scotland and Wales for people in Northern Ireland to have 'more' rights. In fact, regional bills of rights tend to operate in conjunction with any central bill of rights to ensure a country-wide minimum standard of protection. It is not unusual for regions to build on those rights and provide different and additional protections at the regional level, in the knowledge that the rights that they frame must be 'additional' to the central constitution.

At the moment there is differential provision for human rights in the United Kingdom. The right to equality is enshrined in the Northern Ireland Act as part of the limitation of the Assembly's powers. But there are quite different equality duties in operation in England, Scotland and Wales. In terms of social justice issues, such as fees for education, or healthcare, the devolved regions have taken quite different approaches. There is no reason why these differences could not be extended to include a bill of rights for Northern Ireland. In any case, the baseline for a bill of rights is the United Kingdom's international human rights treaty obligations which are binding with regard to all parts of its territory.

4.9 'It is unclear what laws a Northern Ireland Bill of Rights would apply to: just the Northern Ireland Assembly, or all legislation?'

It would be possible in theory to have a bill of rights which only applied to the devolved powers of the Northern Ireland Assembly and not to those powers reserved by the Westminster Parliament. However, many issues and human rights cut across both devolved and reserved powers. The current equality duty and right to equality in the Northern Ireland Act applies to both devolved and reserved powers, and current proposals for a bill of rights have contemplated that it would apply to all power exercised in Northern Ireland.

Whatever the result, the point remains that it is not constitutionally or legally difficult, nor is it unprecedented to have a Bill of Rights for Northern Ireland, which applies to the actions of both devolved and central government. Devolution in the United Kingdom is asymmetrical with each of the regions maintaining slightly different powers, a slightly different mechanism of government, and as mentioned, a level of differentiated human rights provision. These differences directly connect to the historic concept of the United Kingdom as a union of four entities with distinct elements. Differentiated rights provision for different devolved regions is arguably a constitutionally-appropriate way to deal with the issue.

5. Conclusion

In conclusion, while the objections to and criticism of bills of rights often point to the issues at stake in drafting and implementation, they do not demonstrate that bills of rights are either impossible to achieve or 'bad things' in general. In fact, the overwhelming practice of using bills of rights globally and their variety demonstrates many ways in which these concerns can be avoided or met, or in some instances, that they are just mistaken.

The possible objections to and criticisms of bills of rights, are important in pointing to: the need for ongoing education on how bills of rights work; the need to remain apprised of developments and innovations in other countries as to how legitimate concerns can be accommodated and can influence the type of bill adopted; and the importance of ongoing public debate as to which rights have particular importance in Northern Ireland, and how they can best be agreed on and implemented.

Footnotes

¹ P. Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) at 3.

² *Ibid* at 3, citing Van Maarseven and Van der Tang, *Written Constitutions: A Computerized Comparative Study* (1978), 191-5.

³ C. Bell *Human Rights and Peace Agreements* (Oxford University Press, 2000)

⁴ Audit Commission, 'Human Rights: Improving public service delivery' (September 2003) p5 quoting Public Law Project (June 2003), *The Impact of the Human Rights Act on Judicial Review*.

⁵ Sweet & Maxwell, Press Release (15 February 2010). Available at, <http://www.sweetandmaxwell.co.uk/about-us/press-releases/Annual%20Human%20Rights%20Cases%20Research.pdf>. (Accessed 7 August 2012).

⁶ Constitution of the Republic of South Africa, 1996, Chapter 2, Article 8(3)(a).

⁷ The Committee on the Administration of Justice (CAJ), "Dignity, Equality and Inalienable Rights", Lecture, Belfast, November, 2001, cited in CAJ, 'The Best Bill of Rights – A Guide', Belfast 2008, pg 6

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