



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

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Dear Chair,

Response to the Ad Hoc Committee's consultation on a Bill of Rights for Northern Ireland

The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with this function, the following advice is submitted to the Ad Hoc Committee on a Bill of Rights in response to their Inquiry into a Bill of Rights for NI.

Background

In 2008, the Commission published its advice to the Secretary of State for NI on a proposed Bill of Rights, as mandated by the Belfast (Good Friday) Agreement and pursuant to section 69(7) of the Northern Ireland Act 1998. The Commission stands over the recommendations contained in that advice and believes that this should be the starting point for the Committee's deliberations, since it continues to represent a thorough consideration of the 1998 mandate.

The 2008 advice is neither maximalist, as it has sometimes been accused, nor does it unduly minimise what might legitimately be described as the 'particular

circumstances' of NI. Answering such a question is, and will remain, subjective. What constitutes the particular circumstances of NI is an ongoing dispute of competing historical narratives. It would be unreasonable to expect the Committee to resolve this conflict and the Commission advises that attempting to do so would best be avoided, if possible. A more productive approach would be to reflect upon the 1998 mandate generously, whilst focusing on the pressing questions of what provisions are required in a Bill of Rights that would be fit for purpose in 2021 and beyond.

The Commission recommends that the Committee affords as much attention to the question of what 'are' the particular circumstances of NI as it does to what 'were' the particular circumstances of NI. The 1998 mandate was not reduced to answering the latter question, a point that appears to have been lost at times in the public and political discourse. The Committee should also remain mindful in its deliberations of the future and ensure that any recommended rights, supplementary to the European Convention on Human Rights (ECHR), will stand the test of time. It is worth bearing in mind that the ECHR rights have always been interpreted organically by the European Court of Human Rights (ECtHR), rather than treated as static from their inception in the 1950s.

Focusing on the future is just as important as being informed by both the present and the legacy of our past. Bills of Rights are typically documents of constitutional standing in most democratic societies and introducing amendments is usually an exception rather than a norm.

Substantive content of a Bill of Rights

When considering the substantive content of a Bill of Rights the Commission recommends that the Committee begins by recognising that any proposals must be underpinned by the principle of *Primum non nocere* (first do no harm). The Commission was itself careful to ensure that the 2008 advice would do nothing to undermine the existing legal system or institutions of government. In addition, a second principle of non-retrogression is an important measure that guided the Commission's approach. The Committee should also commit to this principle and guard against attempts to utilise the process for anything other than raising the bar beyond the current level of protections.

It is important to note that the exercise completed by the Commission was not one of supporting an increase in judicial responsibilities at the expense of the Legislature or Executive, as it has sometimes been caricatured. A significant amount of effort was made to ensure the existing balance between the three branches of government and the established separation of powers was maintained. The Commission did not propose the creation of new human rights, but rather the further entrenchment of protections that largely existed in domestic law reflecting either international obligations, freely entered into by the United Kingdom, or relevant developments in jurisprudence.

There have of course been legislative and policy changes in many areas since 2008. However, for the most part the Commission does not believe that these changes would impact on the question of what provisions might be included in a Bill of Rights or how the supplementary rights would be best drafted. The publishing of a draft model Bill of Rights by Anne Smith and Colin Harvey, in December 2018, largely drew on the Commission's advice, reinforcing that the advice has stood the test of time.¹

Human rights exist within a wider democratic framework and they must therefore be interpreted in light of those conditions. They are designed to safeguard the individual in a real and practical way and are constantly evolving. The Committee should acknowledge this fact and reflect on the need for a Bill of Rights to be designed as a living instrument and one that must be able to withstand changes elsewhere in the law over time.

The Commission advises the Committee against adopting a disproportionate amount of its time on what substantive rights merit inclusion and which do not. Human rights are universal and non-hierarchical. The framework for determining which protections are recognised in the United Kingdom is already well established, and those which supplement the ECHR can be listed by drawing upon the provisions of other ratified regional and international instruments to which the NI Assembly is bound under section 26 of Northern Ireland Act 1998.

The Commission would further advise the Committee that a majority of the ECHR is concerned with shielding individuals from undue interference by the state, with limited qualifications. It is largely framed in what is often referred to as 'negative liberty', underpinned by a requirement of non-interference that seeks to guarantee individuals are safeguarded against arbitrary government interference. However, in order to protect and promote rights and freedoms, the ECHR also operates in practice to guarantee the enforcement of rights. This has been interpreted by the Courts to mean that states are not only required to refrain from action that would amount to an undue or unjustifiable interference in an individual's exercising of their rights, but also to recognise that there are positive obligations upon government to take action in order to protect rights in ways that enable claimants to realise them in practice.

The Commission advises the Committee that a majority of the provisions in the 2008 advice supplemented the ECHR by recommending that a set of positive obligations be further entrenched in domestic law, many of which have already been established in other domestic legislation or through jurisprudence.

In summary, four types of positive obligations were suggested for inclusion in a Bill of Rights and the Commission encourages the Committee to adopt the same approach. The typology is as follows:

¹ Smith, A. & Colin, H., [Where Next For A Bill of Rights For Northern Ireland? \(10 December 2018\)](#).

1. Directives

Directives require a government to take either legislative or policy actions to address a specific issue of concern. They are outcome-based to the extent that they demand a particular designated action to be taken, with a view to achieving a specific objective. Significantly, the practical impact of a directive can also be process-based. Obligations of this sort may give rise, for example, to the introduction of statutory schemes for which a number of public authorities could hold collective responsibility. Crucially, those schemes would, given the nature of the obligation, be time-bound and focused upon achieving a pre-determined and measurable target.

There are two examples of directives in the 2008 advice. The first was a recommended provision that would require the United Kingdom Government to supplement Article 2 of the ECHR (the right to life) by legislating so as to ensure that all violations and abuses relating to the conflict in Northern Ireland are effectively investigated.²

The second was a provision that would direct the Government to address the needs of victims and survivors of the conflict through the introduction of legislation designed to “ensure that their rights are protected... including rights to redress and to appropriate material, medical, psychological and social assistance”.³

2. Procedural duties

Procedural duties refer to circumstances where public authorities are obligated to implement a process with the aim of creating the conditions where individual claimants are better placed to exercise their existing rights as they see fit. This type of obligation can already be found within the ECHR and has been further developed by case law.

There are a number of examples of a procedural approach in the 2008 advice that illustrate how duties of this sort can be constructed. In the case of children, for example, it was recommended that ‘every child alleged to, accused of, or proven to have infringed the criminal law [should have] the right to be treated in a manner that pays due regard to the child’s age, understanding, and needs and is directed towards the child’s reintegration in society.’⁴

3. Programmatic duties

Programmatic duties are those where the core of a positive obligation is outcome-focused, but its realisation is dependent upon a further requirement for the introduction of statutory schemes such as impact assessments. Here a clear

² NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 61-2.

³ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 108-9.

⁴ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 68-9.

statement that sets out the nature of the duty in question and, in particular, the responsibilities that are attached to it are important. This is because the reach of programmatic duties can vary considerably. Where an obligation requires “all appropriate measures” to be taken or indicates that public authorities “must” carry out an action, the fulfilment of the duty is an immediate requirement. By contrast, where the duty is to “have due regard”, there is a greater flexibility when it comes to a public authority initiating a programme for implementation.

Similar to procedural duties, programmatic duties may already be situated within the context of a broader legal framework. However, whereas the purpose of introducing a procedural duty is to enable the better exercising of other existing rights, a programmatic duty is an objective outcome in itself. For example, when the Commission recommended in 2008 a provision requiring public authorities to, “encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons’ race, ethnicity, language, religion or political opinion”⁵ it did so in the knowledge that a similar – but narrower and less rigorous – obligation was already contained within the NI Act 1998.⁶

The Commission was minded to recommend enshrining a duty of this sort, given that the particular circumstances meant it would serve an important public interest. In determining how the obligation should be framed, the Commission drew, as appropriate, upon relevant regional and international instruments.⁷

4. Progressive realisation

Progressive realisation refers to those duties where “deliberate, concrete and targeted”⁸ steps are required by the Government or public authorities, to increase over time both the level of obligation and associated outcome. Some human rights – notably those that are social or economic – such as health, education and social security, may require extra resource commitments before they can be fully realised in practice. Those resources will not always be readily available. It is a challenge for any democratic government to balance its response when faced with competing priorities and a limited budget. For this reason, progressive realisation does not require that the results sought from enshrining a particular right be achieved immediately, but instead demands that all appropriate measures be taken towards meeting that objective, moving as expeditiously and effectively as possible. An example of this approach in the 2008 advice includes the proposal that everyone should have “the right to

⁵ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 103.

⁶ s.75(2), Northern Ireland Act 1998.

⁷ This recommendation would widen the reach of section 75 from three categories (race, religion and political opinion) to five, adding ethnicity and language. It would also raise the level of the obligation. Rather than having due regard to the desirability of implementing the duty as currently conceived by Section 75, public authorities would be required to demonstrate effective measurable outcomes. The status of the good relations duty would therefore become a positive obligation with independent standing.

⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990) on the Nature of States Parties’ Obligations, at para 2.

adequate accommodation appropriate to their needs” and that “public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right”.⁹ Finland is often cited as an example of a success story in reducing homelessness.

It is important to note that whilst some rights may be realised over time, crucially this does not render void the associated obligations of a substantive meaning. Each right, which is subject to progressive realisation will always contain a “minimum core obligation” that is immediately enforceable. Furthermore, that core should demonstrably increase with the passage of time and a government should be required to report on a regular basis in a public forum as to how this is being achieved.¹⁰

The 2008 advice reflects this latter point, by recommending that where rights are subject to progressive realisation, the NI Executive “shall report annually to the [NI] Assembly, and the [UK] Government shall report annually to Parliament, on the progress made during the previous year in realising these rights in [NI].”¹¹ The Commission advises that the NI Executive is positioned as a consequence of the practical operation of devolution to implement this type of reporting requirement. Because a NI Programme for Government is published, so the framework for robust and effective monitoring already exists and there is an established foundation from which Government Ministers could report annually to the Assembly on a Bill of Rights and those provisions that include a duty of progressive realisation.

The machinery of a Bill of Rights

The Commission advises the Committee that the importance of determining the machinery of a Bill of Rights, as well as the substantive rights themselves, cannot be overstated since this is the basis upon which the protections and freedoms it would enshrine will be given meaning and practical effect.

Relationship with the Human Rights Act (HRA)

The Commission’s 2008 advice intended that a Bill of Rights would supplement the HRA. It recommended that a Bill of Rights should coexist with this legislation and that a provision be drafted to ensure that nothing in a Bill of Rights would affect the continuation in force of the HRA. To assist with achieving this objective the Commission also recommended incorporation of HRA jurisprudence into a Bill of Rights.¹²

⁹ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 118-9.

¹⁰ See e.g. the reporting requirements for progressive realisation imposed on contracting states by the UN International Covenant on Economic, Social and Cultural Rights, Part IV.

¹¹ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 165.

¹² NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 137.

Creating similar enforcement mechanisms to the HRA would serve to ensure legal complementarity. Perhaps more importantly, it would also reinforce the UK Government's commitment in the Belfast (Good Friday) Agreement to incorporate into NI law "the ECHR, with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency".¹³

The UK Government has stated that it "remains committed to reforming the domestic human rights framework".¹⁴ In 2019, the Parliamentary Under-Secretary of State for Justice indicated that the UK Government had not ruled out repealing the HRA after Brexit.¹⁵ The Commission notes that the current Independent Review of the HRA, established by the UK Government, has confirmed a commitment to remaining a signatory to the ECHR and not to consider any changes to the substantive rights within the Convention. It does intend to consider the relationship between domestic courts and the European Court of Human Rights as well as the impact of the HRA on the relationship between the judiciary, the Executive and the Legislature.¹⁶

The Commission advises the Committee that the HRA is the fulfilment of the Belfast (Good Friday) Agreement commitment to incorporate the ECHR into NI law. This should be ring-fenced and supplementary rights, taken together with the HRA, enacted to create a Bill of Rights for NI.

Limitations

In 2008, the Commission recommended that a Bill of Rights should include a general limitation clause, as opposed to a right-by-right limitation. This is consistent with recent international practice and can be seen in examples from Canada, New Zealand, and Australia.¹⁷ The Commission continues to support this approach.

Derogation

Given the nature of parliamentary sovereignty in the UK and the existence of derogation clauses under both the HRA, ECHR and other regional and international instruments, the Commission recommended in 2008 the inclusion of a derogation clause in a Bill of Rights.

Amendment

¹³ Belfast (Good Friday) Agreement, RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY, at para 2.

¹⁴ Ministry of Justice, 'Universal Periodic Review, UK, British Overseas Territories and Crown Dependencies, National Report' (MoJ, 2017), at 6.

¹⁵ The letter stated, "our manifesto committed to not repealing or replacing the Human Rights Act while the process of EU exit is underway. It is right that we wait until the process of leaving the EU concludes before considering the matter further". See Letter from Edward Argar, Parliamentary Under-Secretary of State for Justice, to Lord Boswell, Chair of House of Lords EU Committee, 4 January 2019.

¹⁶ Ministry of Justice, Independent Human Rights Act Review: Terms of Reference (7 December 2020), at 1.

¹⁷ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 140.

Entrenching a Bill of Rights so as to prevent easy amendment is important for ensuring its protections are future proofed. Examples from across the world demonstrate that Bills of Rights are rarely altered and, when this occurs, the process of doing so is difficult by design. Consequently, it is common for a Bill of Rights to be 'entrenched' or made semi-permanent. A Bill of Rights for NI will, in accordance with the Belfast (Good Friday) Agreement be enacted by Westminster as primary legislation in a constitutional system where there is a doctrine of parliamentary sovereignty. This means that no Parliament can prevent a future Parliament from legislating as it wishes, and any future Parliament must be capable of amending or even repealing a Bill of Rights for NI.

The Commission advised that any amendment to a Bill of Rights for NI would likely be controversial and should therefore only be undertaken by Westminster, following a cross-community vote in the Northern Ireland Assembly. It may appear that this recommendation runs contrary to the doctrine of parliamentary sovereignty. However, the Commission advises the Committee to consider the now well-established constraints placed on Westminster by devolution and the operation of conventions, such as the Sewel Convention.

In the House of Lords on 21 July 1998, Lord Sewel said, "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament".¹⁸ The Sewel Convention is restated in the Memorandum of Understanding with the devolved administrations, which confirms, "the UK government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature."¹⁹ The Convention was supported by the House of Commons, during a debate on the procedural consequences of devolution on 21 October 1999.²⁰

Standing

The 2008 advice recommended an expansive reading of standing, opting to support the 'sufficient interest' test, which is currently utilised in judicial review proceedings. The victim-based definition, as is used in proceedings under the HRA and the ECHR was considered too narrow, as it does not permit anyone other than the direct victim to initiate a claim.

Save for the Commission's present legal powers,²¹ which do not require a victim, human rights cases are presently restricted to the direct victim taking action.²² Other human rights mechanisms, such as the UN Treaty Bodies Individual

¹⁸ (HL Deb, Vol 592, col 791, 21 July 1998).

¹⁹ (Cm 4806 (2000), para 13).

²⁰ (HC Deb, Vol 336, cols 606-674).

²¹ s.71, Northern Ireland Act 1998.

²² s.7, Human Rights Act 1998.

Petition, permit a complaint to be taken on an individual's behalf, with their consent.²³

The Committee should note that broadening the interpretation of standing as recommended would permit interested third parties to take actions on an individual's behalf.

Application

The Commission's recommendation in 2008 on how to define a public authority for the purpose of determining which entities would be obliged to respect, protect and fulfil the human rights contained within a Bill of Rights was to adopt the same basic approach as the HRA.²⁴ This would be widely drawn and include any organisation that carried out a public function. To assist with legal certainty, the Commission also recommended setting out the factors that should be taken into account when making this determination. The Commission continues to advocate this approach, not least because it will ensure continuity and necessary complementarity between the HRA and a Bill of Rights for NI.

Interpretation

The 2008 advice was that the Courts should be directed to interpret the provision of a Bill of Rights in line with its preamble, ECHR, international and comparative law. The Commission continues to support this approach but would also draw the Committee's attention to the commitment of the UK Government, under Article 2(1) of the EU (Withdrawal Agreement) Act 2020. This suggests that the jurisprudence of the Court of Justice of the European Union will continue to shape law in NI under the non-diminution commitment of the withdrawal treaty. The committee should consider the read-across of this recent development when considering the matter of interpretation.

Devolved issues

The Commission's recommendation in 2008 was that a Bill of Rights should apply to all public authorities and this remains valid. It is important to restate that the intention of this approach is to ensure that the application of a Bill of Rights has a wide enough reach to include central government public authorities that have jurisdiction in NI in respect of their specific functions.²⁵

On how to address incompatible legislation, the Commission continues to recommend that the Courts should have the power to declare invalid secondary legislation, for example, acts of NI Assembly. By contrast, when it comes to primary legislation, for example most Westminster Acts, the Courts should be

²³ See for example, [Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 2.](#)

²⁴ s.6, Human Rights Act 1998

²⁵ NIHRC, [A Bill of Rights for Northern Ireland \(10 December 2008\)](#), at 162.

restricted to issuing a Declaration of Incompatibility.²⁶ This approach is the same as the HRA and ensures adherence to the established constitutional norms of the UK and respect for the principle of parliamentary sovereignty.

Justiciability

The Commission recommends that all provisions within a Bill of Rights should be justiciable.²⁷ While the present human rights protections in NI through the HRA, focus mostly on civil and political rights, the interpretation of those rights by the ECtHR and the domestic courts have increasingly embraced economic, social and cultural rights.

The Commission advises that the Vienna Declaration and Programme of Action confirms, “all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”²⁸

The Commission recommends that the Committee consider the recent research published by the Human Rights Consortium, which sets out options for enforceability for economic, social and cultural rights.²⁹

The research suggested five potential models of enforcement:

1. pre-legislative scrutiny by the Northern Ireland Assembly and amending the Ministerial Code of Northern Ireland Ministers;
2. including socio-economic requirements in specific legislation;
3. Constitutionalising economic, social rights principles, where the Assembly has principal responsibility to implement;
4. Progressive implementation and restricted judicial review, such as on grounds of reasonableness;
5. Incorporating economic, social rights in future free trade agreements applying to Northern Ireland.³⁰

Enforcement

When considering the matter of enforcement, which is vital for the effective operation of any human rights legislation, the Commission advises that the Committee has a number of options to consider. First, to utilise the existing

²⁶ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 159.

²⁷ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 165.

²⁸ UN World Conference on Human Rights, Vienna Declaration and Programme of Action (25 June 1993); see also UN General Assembly, Resolution 60/251. Human Rights Council (15 March 2006).

²⁹ Human Rights Consortium, Economic, Social and Cultural Rights in NI: Models of Enforceability (October 2020)

³⁰ Human Rights Consortium, Economic, Social and Cultural Rights in NI: Models of Enforceability (October 2020), at 5.

courts. Second, to advocate for the creation of a new dedicated human rights court. Third, to recommend establishing a specialist Northern Ireland Assembly Committee, similar to the Joint Committee on Human Rights in the Westminster Parliament.

The Commission's recommendation in 2008 favoured a combination of the first and third option, mainstreaming human rights through existing judicial mechanisms and simultaneously establishing a NI Assembly Committee.³¹ In addition, it was recommended the Commission itself should be afforded a role, to include monitoring and auditing compliance with a Bill of Rights. This latter recommendation would reflect the Commission's existing statutory duty to "keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights"³². As a National Human Rights Institution, with A status under the UN Paris Principles³³, this monitoring function would be typical of the mandate Commissions retain elsewhere.

Remedy

The Commission's recommendation in 2008 was for the inclusion of a general remedy clause, as opposed to specific remedies. This is broader than the current remedies under the HRA, which are limited to a Declaration of Incompatibility and, in some circumstances, damages.³⁴

This Commission's approach draws on the HRA but strengthens the possibility of access to compensation for individuals. It also made a specific reference in respect of legal aid in order to support court actions under a Bill of Rights and as an assurance that there would be access to justice for those who would not otherwise be able to enforce their rights.

Harmonisation and non-diminution

The Commission reinforces its advice to the Committee that there is a need to harmonise the ECHR, as domesticated through the HRA, and any proposed Bill of Rights for NI to ensure a complementary interpretation about the meaning and scope of human rights. It also reinforces the importance of guaranteeing non-retrogression and ensuring that the Bill of Rights effectively serves to protect against the risk of any diminution of current levels of protection in NI across all areas. Finally, the Commission advises on the need to ensure non-diminution of rights, the concept of which has a new relevance following the UK withdrawal from the EU in 2021.

The UK Government is committed to ensuring that certain human rights and equality protections contained in the rights, safeguards and equality of

³¹ NIHRC, A Bill of Rights for Northern Ireland (10 December 2008), at 168.

³² s.69(1) Northern Ireland Act 1998.

³³ UN GA, Resolution 48/134: Principles relating to the Status of National Institutions (20 December 1993).

³⁴ s.4 and s.8, Human Rights Act 1998.

opportunity chapter of the Belfast (Good Friday) Agreement will be maintained under the terms of the EU withdrawal treaty. This is known as the non-diminution commitment. It was formalised in the Ireland/ Northern Ireland Protocol and given legal standing in the European Union (Withdrawal Agreement) Act 2020.³⁵ In addition, there is a commitment that NI law will keep pace with any EU developments under specific equal treatment and non-discrimination EU directives.³⁶

The Commission notes that the political landscape in NI, the UK and Ireland has changed considerably since 2008. Withdrawal from the European Union has largely removed the guarantee of protection afforded by EU law. This notably includes access to the Court of Justice of the EU and the clear and straightforward application of the EU Charter of Fundamental Rights. In the absence of a Bill of Rights since the Belfast (Good Friday) Agreement, the Charter of Rights has arguably served as the instrument most closely aligned to the vision set out in 1998 of enforceable rights that supplement the provisions of the ECHR. In the vacuum that has been created, the reverse would be true if a Bill of Rights for NI is enacted. Put simply, a Bill of Rights for NI may fill the gap that now exists in the human rights architecture and the Commission continues to recommend that the advice provided to the Secretary of State for NI in 2008 should be the basis upon which this is enacted.

The Commission remains at the disposal of the Committee for any further engagement on this issue.

Yours sincerely,



Les Allamby
Chief Commissioner

³⁵ EU (Withdrawal Agreement) Act 2020, Schedule 3.

³⁶ EU Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Article 2(1) and Annex 1.