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Key Issues for a Bill of Rights

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1 Introduction

This paper has been prepared to support the Ad Hoc Committee on a Bill of Rights. The paper briefly summarises key issues in the consideration of a Bill of Rights for Northern Ireland. The issues are drawn from themes that have been raised in the past and in the context of more recent developments.

2 Background and Context

The Belfast Agreement states¹:

The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland.

The Agreement also makes reference to ‘any Bill of Rights for Northern Ireland’ in relation to:

- Safeguards in the operation of the Northern Ireland Assembly²
- The establishment of a special committee of the Assembly to examine conformity of a proposal with equality and human rights requirements³
- Human rights standards for legislation⁴

One of the commitments of the St Andrews Agreement in 2006 was⁵:

We will establish a forum on a Bill of Rights and convene its inaugural meeting in December 2006.

A cross-party, cross-sectoral Bill of Rights Forum met in 2006 and reported in 2008. The Human Rights Commission published its advice to the Secretary of State in December 2008⁶.

In November 2009, the Northern Ireland Office published proposals for consultation in relation to a Bill of Rights. This considered each of the Commission’s 78 recommendations for substantive rights and proposed five points to include as rights or principles and committed to consider twelve other points⁷. The Commission responded that the consultation paper⁸:

¹ Belfast Agreement 1998, Rights Safeguards and Equality of Opportunity, United Kingdom Legislation, Paragraph 4: <https://www.gov.uk/government/publications/the-belfast-agreement>.

² Ibid., Democratic Institutions in Northern Ireland, Paragraphs 5(b) and (c).

³ Ibid., Paragraph 11.

⁴ Ibid., Paragraph 26(a).

⁵ St Andrews Agreement 2006, Annex B, Human Rights, Equality, Victims and Other Issues: <https://www.gov.uk/government/publications/the-st-andrews-agreement-october-2006>.

⁶ Northern Ireland Human Rights Commission (2008), *A Bill of Rights for Northern Ireland – Advice to the Secretary of State for Northern Ireland*, Belfast: NIHRC: <https://www.nihrc.org/publication/detail/advice-to-the-secretary-of-state-for-northern-ireland>.

⁷ Northern Ireland Office (2009), *A Bill of Rights for Northern Ireland: Next Steps – Consultation Paper*, London: NIO.

⁸ Northern Ireland Human Rights Commission (2009), *A Bill of Rights for Northern Ireland: Next Steps – Response to the Northern Ireland Office*, Belfast: NIHRC, p.5.

1. *Demonstrates a lack of understanding of the purpose and functions of a Bill of Rights*
2. *Fails to take appropriate account of international human rights standards*
3. *Appears to be suggesting the lowering of existing human rights standards in Northern Ireland*
4. *Fails to satisfy the minimum common law consultation requirements, and*
5. *Misrepresents the advice given by the Commission.*

The Stormont House Agreement of 2014 acknowledged the lack of consensus on a Bill of Rights⁹:

Noting that there is not at present consensus on a Bill of Rights, the parties commit to serving the people of Northern Ireland equally, and to act in accordance with the obligations on government to promote equality and respect and to prevent discrimination; to promote a culture of tolerance, mutual respect and mutual understanding at every level of society, including initiatives to facilitate and encourage shared and integrated education and housing, social inclusion, and in particular community development and the advancement of women in public life; and to promote the interests of the whole community towards the goals of reconciliation and economic renewal.

The New Decade, New Approach document in January 2020 contains the following with reference to a Bill of Rights¹⁰:

Bill of Rights

5.26. An Ad-Hoc Assembly Committee will be established to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights, which are currently applicable and “that reflect the particular circumstances of Northern Ireland”; as well as reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

5.27. The Ad-Hoc Committee will be assisted in its work by a Panel of five experts appointed jointly by the First Minister and deputy First Minister.

5.28. The Panel should initially seek to advise the Ad-Hoc Committee on what constitutes our “particular circumstances” drawing upon, but not bound by, previous work on a Bill of Rights and should review and make recommendations on how the UK’s withdrawal from the EU may impact on our “particular circumstances”.

5.29. The terms of reference and timetable of the Committee will be agreed within 30 working days of the restoration of devolution. The establishment of cross

⁹ Stormont House Agreement, Paragraph 69, 23 December 2014: <https://www.gov.uk/government/publications/the-stormont-house-agreement>.

¹⁰ New Decade, New Approach document, 8 January 2020: <https://www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow>.

party and cross community support will be critical to advancing a Bill of Rights.

The next section looks at key considerations in relation to a Bill of Rights.

3 Key Issues in Relation to a Bill of Rights for Northern Ireland

This section considers the key issues in relation to a Bill of Rights. It is not within the scope of this paper to consider the content of such a document, although the nature of the content has a reflection on many of the considerations discussed here.

Defining 'Rights'

A 'right' is described as¹¹:

That which the law directs. That which is so directed for the protection and advantage of an individual is said to be his [or her] right.

Primary rights fall into two categories:

1. Those rights to which every member of the community is entitled, consisting of:
 - a. Personal (or absolute rights)
 - b. Public rights, such as for the use of facilities, etc.
2. Those rights which arise from relations other than those of the community, such as ownership or contracts, etc.

Of the personal or absolute rights, human rights are those which are considered to be universal to all of humanity¹². The European Convention on Human Rights contains primarily universal civil and political rights, although some might be considered to be social and economic rights (such as rights to the protection of property or to education). Other social and economic rights (such as rights to work, an adequate standard of living or social security) are contested in the extent to which they constitute universal rights¹³.

Another challenge to the nature of rights is the extent to which they might be realised. For example, the Constitution of South Africa contains extensive social and economic rights that may not be immediately realisable. In these cases, there has been a tendency for the Constitutional Court to give the Parliament time to amend unconstitutional legislation and there is a balance of limitations, that is, a trade-off between rights and the Government's need to exercise power and the capacity to deliver¹⁴.

Rights and Alternatives

There are different approaches to fulfil a policy goal or address a need. These might include:

¹¹ Daniel Greenberg (ed.), *Jowitt's Dictionary of English Law*, London: Sweet and Maxwell, p.2122.

¹² Richard Clayton and Hugh Tomlinson (2009), *The Law of Human Rights*, Oxford: Oxford University Press, p.25.

¹³ *Ibid.*, p.26.

¹⁴ Heinz Klug (2010), *The Constitution of South Africa: A Contextual Analysis*, Oxford: Hart, pp.114-117.

- Constitutional rights
- Primary legislation
- Secondary legislation, such as Regulations
- Policy
- Enforcement of existing legislation, policy or practice
- Expenditure or funding

The UK Government response to the Commission's advice on a Bill of Rights looks at each of the Commission's recommendations and identifies where the Government considers whether they might be included as a distinct 'right' or a 'principle' in any Bill, and whether there are alternatives to addressing the issue other than inclusion in a Bill of Rights, for example¹⁵:

[T]he Government considers the merits of establishing rights in the areas covered, as opposed to meeting identified needs through a policy scheme, administrative action or normal statutory entitlement, and seeks views on how such rights might be expressed.

In relation to 'principles', the response states:

A Bill of Rights could set out fundamental principles to which any future policies should adhere, but it should not cut across or undermine the roles of the Executive and the legislature, for example by expanding the role of the courts in enforcing rights in a way which cuts across the ability of a democratically elected legislature to make decisions about the allocation of public funds.

The 'Particular Circumstances of Northern Ireland'

There is disagreement on what constitutes the 'particular circumstances' of Northern Ireland¹⁶. The Bill of Rights Forum report noted different approaches as¹⁷:

- A broad interpretation, including aspects of equality, economic and social rights, justice, personal safety and women's rights; and
- A more limited interpretation, focussing on what is demonstrably different to other parts of the UK and those issues directly arising from the conflict.

The Chair of the Forum, Chris Sidoti, also differentiated between what is 'particular' to Northern Ireland, and what is 'unique'.

¹⁵ Ibid., p.21.

¹⁶ See the additional Briefing Paper *Definitions of the 'Particular Circumstances' of Northern Ireland*, 16 March 2020, NIAR-032-20.

¹⁷ Bill of Rights Forum (2008), *Final Report – Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*, Belfast: Bill of Rights Forum, pp.12-14.

In its advice to the Secretary of State, the Human Rights Commission set out a methodology for determining what ‘particular circumstances’ relate to each recommendation¹⁸. The UK Government response referred to the need for the case for a right to be ‘demonstrably greater or different in nature to the rest of the UK’¹⁹.

Additional potential ‘particular circumstances’ might be derived from the UK exit from the EU. These might include:

- Identity and citizenship
- Freedom of movement

The Nature of Bills of Rights

Rights have been included in the constitutional fabric of different countries in different ways. Examples are as follows:

- Absolute rights within a written constitution (e.g. France)²⁰
- Absolute rights and guiding principles within a written constitution (e.g. India)²¹
- A list of rights, some of which are considered aspirational, within a written constitution (e.g. South Africa)²²
- Rights entrenched in legislation (e.g. New Zealand)²³

The more recent approach to rights in the UK has been through legislation: the Human Rights Act 1998²⁴ brings the substantive articles of the European Convention on Human Rights into UK law.

The nature and location of a Bill of Rights in the legal landscape may determine the status of the document, for example, whether the Bill will be enacted through the Northern Ireland Assembly or the UK Parliament. One challenge that has been put forward has been the sovereignty of the Westminster Parliament, i.e. the constitutional position that the provision of rights for citizens is the role of the elected parliament and associated constitutional processes²⁵.

¹⁸ Northern Ireland Human Rights Commission (2008), *A Bill of Rights for Northern Ireland – Advice to the Secretary of State for Northern Ireland*, Belfast: NIHR.

¹⁹ Northern Ireland Office (2009), *A Bill of Rights for Northern Ireland: Next Steps – Consultation Paper*, London: NIO, p.18.

²⁰ Constitution du 4 Octobre 1958: <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Constitution-du-4-octobre-1958>.

²¹ Constitution of India: http://india.gov.in/govt/constitutions_india.php.

²² Constitution of South Africa: <http://www.info.gov.za/documents/constitution/>.

²³ New Zealand Bill of Rights Act 1990: <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>.

²⁴ Human Rights Act 1998: <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

²⁵ A V Dicey (1959), *An Introduction of the Law of the Constitution*, London: MacMillan.

Enforcement of a Bill of Rights

Enforcement mechanisms would entirely depend upon the form that a Bill of Rights might take. In terms of entrenchment, forms of human rights implementation have been summarised into three forms²⁶:

- Full entrenchment – courts can strike down legislation on the grounds of incompatibility of human rights, e.g. in Germany, USA
- Limited entrenchment – legislation can stand notwithstanding a Bill of Rights, e.g. in Canada
- Rule of construction – a Bill of Rights as legislation, used as an interpretive aid, e.g. in New Zealand

In practice, bills of rights have been formulated as integral to a constitution, as a separate bill or charter, or as legislation, and enforcement can differ within as well as between such formats.

The Bill of Rights Forum debated various options for enforcement²⁷. These options were summarised as follows:

- A dedicated Human Rights Court
- A Human Rights Tribunal
- The creation of a Human Rights Division of the High Court
- Rights enforced through the existing court system

Additional enforcement options were also considered as follows:

- Statutory powers of the Northern Ireland Human Rights Commission to include benchmarking, monitoring and auditing of compliance
- An Assembly Committee to monitor compliance

The final report of the Forum did not present a consensus on enforcement²⁸.

The Human Rights Commission issued the following advice on enforcement²⁹:

Provisions should be drafted to ensure that –

²⁶ Richard Clayton and Hugh Tomlinson (2009), *The Law of Human Rights*, Oxford: Oxford University Press, pp.60-62.

²⁷ Bill of Rights Forum Preamble, Enforceability and Implementation (PEI) Working Group (2008), *Preamble, Enforceability and Implementation (PEI) Working Group Final Report*, pp.51-54:
http://www.billofrightsforum.org/index/working_groups/preamble_and_implementation.htm.

²⁸ Bill of Rights Forum (2008), *Final Report: Recommendations to the Human Rights Commission for a Bill of Rights for Northern Ireland*, pp.176-177.

²⁹ Northern Ireland Human Rights Commission (2008), *Advice to Government on a Bill of Rights for Northern Ireland*, 10 December 2008, p.167.

1. *A Bill of Rights for Northern Ireland should be enforced through the existing judicial system.*
2. *Judicial appointments must be such as to ensure an independent and diverse judiciary, which is, as far as practicable, broadly representative of society in Northern Ireland.*
3. *The statutory powers of the Northern Ireland Human Rights Commission should include monitoring and auditing of compliance with a Bill of Rights for Northern Ireland.*
4. *A committee of the Northern Ireland Assembly shall be invited to perform a similar role in the context of Northern Ireland to that performed at Westminster level by the Joint Committee on Human Rights on a UK-wide level. Included in the functions of this Assembly Committee shall be: pre-legislative scrutiny of legislation for compliance with a Bill of Rights for Northern Ireland; conducting consultations; publishing reports; and drawing up departmental guidance to government for compliance with a Bill of Rights for Northern Ireland in respect of statements of compatibility.*
5. *There should be a periodic review, before independent reviewers, of the implementation of a Bill of Rights for Northern Ireland, which should take place on average every five years. The report of the review must be laid before the Assembly and each House of Parliament.*

Amending a Bill of Rights

Amendment to Bills of Rights depend on the statutory nature of the document. Some examples of mechanism are as follows:

- France: Changes to the Constitution³⁰ require a majority decision of both houses of the legislature and a national referendum.
- USA: The Constitution³¹ is the supreme law of the land and cannot be amended except by a two thirds majority of both houses or three quarters of the representatives of each of two thirds of state legislatures (Article V).
- Republic of Ireland: The Constitution³² may be amended by a Bill passed by both Houses of the Oireachtas and confirmed by referendum (Article 46).
- India: Amendments to the Constitution³³ require a two thirds majority in both Houses and ratification by at least half of the state legislatures (Article 368).

³⁰ Constitution de la République française: <http://www.assemblee-nationale.fr/connaissance/constitution.asp>.

³¹ Constitution of the United States of America: <http://www.house.gov/house/Constitution/Constitution.html>.

³² Constitution of Ireland: <https://www.gov.ie/en/publication/d5bd8c-constitution-of-ireland/>.

³³ Constitution of India: <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text>.

- Germany: A two-thirds majority of both the Bundestag and the Bundesrat are needed to amend the Constitution³⁴, but Articles 1 (right to human dignity) and 20 (commitment to democratic principles) cannot be amended, or the statutory relations between the Länder and the state (Article 79).
- Canada: Part V of the Constitution Act³⁵ provides for amendment through a majority of the Senate, House of Commons and two thirds of provincial legislatures, provided they comprise at least half of the population of all the legislatures (Article 38).
- South Africa: The Constitution³⁶ may be amended by a two thirds majority of both the National Assembly and the National Council of Provinces with a supporting vote of at least six provinces, except for Section 1 (founding values of the State of South Africa), which requires a 75% majority in the National Assembly (Section 74).
- UK and New Zealand: Legislation can be repealed or amended through a simple majority vote in Parliament³⁷.

A Bill of Rights and the Future

The withdrawal of the UK from the EU has brought about significant changes in the position of Northern Ireland. The Ireland/Northern Ireland Protocol to the withdrawal agreement states³⁸:

The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol³⁹, and shall implement this paragraph through dedicated mechanisms.

³⁴ Grundgesetz für die Bundesrepublik Deutschland: <https://www.bundestag.de/gg>.

³⁵ Constitution Acts: <https://laws-lois.justice.gc.ca/eng/const/>.

³⁶ Constitution of the Republic of South Africa: <https://www.gov.za/documents/constitution-republic-south-africa-1996>.

³⁷ Edwin Shortts and Claire de Than (2001), *Human Rights Law in the United Kingdom*, London: Sweet and Maxwell, p.15.

³⁸ Protocol on Ireland/Northern Ireland: <https://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration>.

³⁹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

The 2015 Conservative Party manifesto repeated the commitment to replace the Human Rights Act with a British Bill of Rights⁴⁰:

The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.

While the incoming Conservative government reiterated its intention to repeal the Human Rights Act⁴¹, a 2016 report of the House of Lords European Union Committee called into question the feasibility and value of a British Bill of Rights⁴². In February 2017, the Justice Secretary Liz Truss stated that plans for a repeal of the Human Rights Act and a British Bill of Rights would be delayed until after the UK leaves the European Union⁴³.

Such developments raise questions for the consideration of a Bill of Rights for Northern Ireland, such as:

- While there will be no diminution of current rights in Northern Ireland due to the UK withdrawal from the EU, will that commitment apply to any additional rights contained within a Bill of Rights?
- What will be the relationship between a Bill of Rights in Northern Ireland and any future Bill of Rights in the UK?

⁴⁰ Conservative Party (2015), *The Conservative Party Manifesto 2015*, London: Conservative Party, p.60.

⁴¹ Alexander Home, Joanna Dawson, Vaughne Miller and Jack Simson Caird (2015), *A British Bill of Rights?* House of Commons Library Briefing Paper 7193, 19 May 2015, p.18.

⁴² House of Lords European Union Committee (2016), *The UK, the EU and a British Bill of Rights*, London: House of Lords, p.3.

⁴³ 'British Bill of Rights plan shelved again for several more years, Justice Secretary confirms', *The Independent* 23 February 2017.