

THE NEED FOR A BILL OF RIGHTS IN NORTHERN IRELAND

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INTRODUCTION

Throughout the past thirty years of conflict in Northern Ireland widespread agreement on the need for a Bill of Rights as one element of any constitutional settlement was one of the few beacons of political consensus.¹ Significant disagreement on the objectives and content of that Bill of Rights could be glossed over while the prospect of any such settlement remained remote. In particular the issue of whether any such Bill of Rights should be limited to the incorporation of the European Convention on Human Rights (ECHR) into Northern Irish law or should go further (either to introduce other international human rights provisions or to craft specific human rights provisions for Northern Ireland) could effectively be postponed. With the advent of the Belfast Agreement, however, such issues must now be confronted. The Agreement recognizes that through the Human Rights Act 1998 (HRA) and the Northern Ireland Act 1998, the ECHR has effectively been incorporated into the law governing Northern Ireland.² However it also leaves open the possibility of going beyond the ECHR by providing that the Northern Ireland Human Rights Commission (NIHRC) should advise the Secretary of State as to the scope for defining rights supplementary to the ECHR "to reflect the particular circumstances of Northern Ireland". Some think that with the ECHR now incorporated into United Kingdom law as a whole it is unnecessary and even constitutionally undesirable to go further.

This paper will argue against such a view and suggest that there is indeed a need for additional rights to be reflected in Northern Ireland law, particularly if the protection of human rights is recognized as an important element of the political settlement. However it also acknowledges that giving effective protection to such rights will face a number of difficulties, some deriving from the difficulties of reaching consensus on their formulation within Northern Ireland, others from the current constitutional structure of the United Kingdom. After discussing these difficulties and the extent to which they may be resolved, the paper moves on to consider what the form and content of any such Bill of Rights might be. Having argued that equality, social inclusion and respect for diversity must play an important role in any such Bill of Rights it will then go on to examine the proposals to date of the

¹ See CAJ, *A Bill of Rights for Northern Ireland*.

² The Northern Ireland Act 1998 goes beyond the HRA in respect of Northern Ireland in two ways. Firstly s 6 provides that the Northern Ireland Assembly does not have competence to pass legislation inconsistent with Convention rights. Secondly s 24 provides that a minister or Northern Ireland Department has no power to "make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act" is inconsistent with Convention rights. These provisions mirror similar sections in the Scotland Act 1998.

NIHRC in relation to these matters as reflected in *Making a Bill of Rights for Northern Ireland (Making a Bill of Rights)*.³ The paper argues that these proposals are flawed in a number of respects, which reflect a failure to think through the underlying values of a Bill of Rights, their relation to each other and the legal context within which a Bill of Rights would operate.

Beyond The ECHR

The British Labour Party's conversion to the cause of incorporating the ECHR into United Kingdom law in the 1990s and its carrying out of a manifesto commitment to do so in 1998 are often presented as one aspect of the embracing of a radical new constitutional agenda. However some would argue that the decision to go for the ECHR as representing the content of a human rights law for the United Kingdom was an essentially conservative move which foreclosed broader discussion both of a more extensive set of rights and of a more effective way of securing them in the law.⁴ Such critics would point out that the ECHR is now over 50 years old and was devised at the height of the cold war. Its exclusive emphasis on civil and political rights, which aimed to distinguish "democratic" western Europe from the communist and authoritarian east, is now significantly outdated in terms of international human rights law. In those intervening years the United Nations, in particular, has developed a whole new set of human rights standards relating to economic, social and cultural rights, the rights of women and children, the rights of minorities and of protection against discrimination. Most of these are found in treaties which have been signed by both the United Kingdom and Ireland. The present United Nations (UN) High Commissioner on Human Rights, Mary Robinson, has repeatedly stressed the "interdependence" of civil/political and economic/social/cultural rights and this is reflected in the most recent general UN statement on human rights, the Vienna Declaration and Programme of Action in 1993.⁵ Even in the European context a more recent statement of fundamental rights, the Charter of Fundamental Rights of the European Union (2000), ranges far beyond the rights contained in the ECHR to include sections on solidarity rights and citizens' rights.

Not only is the ECHR outdated it can also be argued that it contains significant flaws. Nowhere is this clearer than in respect to its equality provision, Article 14.⁶ While it offers a broad range of grounds on which discrimination is prohibited, Article 14 only applies to discrimination in respect of the enjoyment of other Convention rights. Since matters such as employment, the distribution of public funds or of public offices are not covered by the scope of other Convention rights, some of the most important areas of inequality in most modern societies are largely left untouched by the

³ *Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission* (2001).

⁴ See, for example K. Ewing, "Social Rights and Constitutional Law" [1999] *Public Law* 104.

⁵ See Vienna Declaration and Programme for Action (1993) paragraph 5. "All Human Rights are universal, indivisible, interdependent and interrelated."

⁶ See, for example J. Monaghan, "Limitations and Opportunities: A review of the Likely Domestic Impact of Article 14" [2001] *EHRLR* 167; S. Livingstone, "Article 14 and the Prevention of Discrimination" [1997] *EHRLR* 25.

ECHR. In addition even where the Convention does bite, such as on discriminatory decisions relating to education or the family, the European Court of Human Rights has offered states a broad margin of appreciation in asserting justifications for different treatment.⁷ Although the Council of Europe has sought to rectify this situation and replace Article 14 with a general equal protection clause through Protocol 12 to the Convention this is still some way off from coming into force, with the United Kingdom indicating thus far that it will be one of the states who will not ratify it.⁸ Moreover it is unclear whether the European Court of Human Rights would adopt a more stringent approach to claims of the justification of discrimination even under a more extensive equality clause such as that provided for in Protocol 12. The ECHR's provisions on protection from torture or the right to a fair trial, though extensively developed by the jurisprudence of the Court of Human Rights, are also some way behind contemporary global standards, as reflected by provisions such as the Body of Principles on the Protection of All Persons in Detention (1990).

While the incorporation of the ECHR is a significant improvement in the level of formal human rights protection, one whose implications have yet to be fully explored in Northern Ireland, it is worth observing that if one were looking for an up to date model of an international human rights standard on which to base a national human rights law it is unlikely you would begin with the ECHR. Its adoption in the HRA is less a reflection of its contemporary quality than of its familiarity in the minds of senior politicians and judges, who have been forced to take account of it through the United Kingdom being frequently challenged before the European Court of Human Rights in Strasbourg. It is noticeable that while many countries who fashioned constitutions and Bills of Rights in central and eastern Europe in the late 1980s and early 1990s took account of the ECHR, few adopted it alone.

Moreover the ECHR remains in the end a set of international *minimum* standards. It is designed to provide a set of rights common to all who find themselves within the jurisdiction of European states and which therefore responds to a set of threats to respect for rights which are common to people throughout Europe. However this does not preclude a recognition that there may be *specific* problems in different parts of Europe which require a more specific response. To return to the example of central and eastern Europe it is clear that several of the human rights provisions adopted in their post-communist constitutions derive directly from an experience of the denial of political or religious rights in the past.⁹ Such states have recognized a need to clearly establish these rights as fundamental to their constitutional order, both to mark a clear break with the past and to provide a framework for the

⁷ See, for example *Petrovic v Austria*, Decision of the Court 23 March 1998. (State granted broad margin of appreciation in offering child care benefits only to mothers).

⁸ See G. Moon, "Draft Discrimination Protocol to the ECHR: A Progress Report" [2000] *EHRLR* 49.

⁹ Many for example enacted bans on former Communists occupying political office. Hungary enacted a ban on police officers standing for election as members of any political party, a ban reviewed and upheld by the European Court of Human Rights in *Rekvenyi v Hungary* [1999] *EHRLR* 114.

future. This was even more pronounced in the drafting of a Bill of Rights for South Africa, whose interim constitution was explicitly described as a “bridge” between the apartheid past and a democratic future.¹⁰ Those who drafted the South African Bill of Rights drew upon international human rights standards, indeed included a clause that in interpreting the Bill of Rights a court or tribunal *must* consider international law,¹¹ but also looked more explicitly at the denial of human rights in South Africa’s past and the likely needs of its future. Hence the inclusion of extensive clauses on language, labour relations, education and access to information as well as many of the civil and political rights familiar to constitutions around the world.¹² In many of the peace agreements which have sought to end conflicts in Europe, the Middle East and Latin America greater protections for human rights, often reflected in a new constitution or Bill of Rights, have been prominent.¹³ These often draw heavily on international standards and indeed the willingness of a state to embrace such standards is often a crucial indication of its desire to fully rejoin the international community. However they are likely to be most fully effective when they also identify and respond to particular problems in the society in which they are located. Then they can perform the dual role of encouraging those who have experienced disadvantage in the past to believe that change will occur, while also reassuring those who were previously in a position of power that such change will not simply take the form of revenge and of similar oppression being inflicted on them.

Hence there are several reasons to believe that a Bill of Rights for Northern Ireland could and probably should go beyond the rights guaranteed in the ECHR. At the very least it is arguable that the ECHR might not provide the ideal set of human rights protections for Northern Ireland. Yet some, such as Austen Morgan in this collection, claim that it is not merely undesirable but also effectively impossible to look beyond the ECHR. This argument appears to have two strands, one political and one legal, though there is a significant amount of connection between them. Neither is ultimately convincing.

The ECHR As Limit: Political Arguments

The political argument essentially suggests that going beyond the ECHR will undermine the Union. Harking back to Diceyan concerns about the need to ensure equal enforcement of the law throughout the kingdom, it suggests that different levels of rights protection in different parts of the United Kingdom undermines the equality of its citizens. It also diminishes the identification of people with the Union as their orientation shifts to institutions shaped by a different set of legal imperatives in Northern Ireland as opposed to Scotland or England. If a Northern Ireland Bill of Rights were to guarantee a right to life for the unborn or require all schoolchildren to be educated in Irish, for example, it may result in a society so different from the rest of the United

¹⁰ E. Murenik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31.

¹¹ Section 39(1)(b) of the Bill of Rights.

¹² See A. Sachs, *Advancing Human Rights in South Africa* (1992).

¹³ See C. Bell, *Peace Agreements and Human Rights* (2000) Chapter 7..

Kingdom as to undermine the claim that all British subjects enjoy a common set of rights and duties.

For many both within and without Northern Ireland this concern will not be a problem. They see themselves as Irish citizens rather than British subjects and their political objective is not to maintain the Union but rather to move towards a situation where Northern Ireland no longer is a part of the United Kingdom. The Agreement clearly recognizes the legitimacy of such aspirations. However it also recognizes the legitimacy of unionist aspirations and the principle that no change should be made in Northern Ireland's constitutional status without the consent of the majority of its people. Overall the Agreement is shot through with the principle that dialogue and consent are the basis for its new institutions.¹⁴ Failure to engage with unionist concerns as to the potential political consequences of a separate Bill of Rights for Northern Ireland is unlikely to lead to the consensus which is necessary for a legitimate and effective Bill of Rights.

Fortunately I would suggest that such concerns can be addressed. They have force only for a particular form of unionism, an integrationist perspective, which sees devolution itself as a danger to the Union. That, however, is currently very much a minority perspective among unionists throughout the United Kingdom. Instead devolution of power to Scotland, Wales and Northern Ireland has been embraced as the best way of preserving the Union, even if it will inevitably mean the development of different political institutions and cultural environments.¹⁵ Constitutional theorists have argued that the United Kingdom should be seen less as a *unitary* state, bound together by strong national institutions and common laws, but rather as a *union* state, held together by the common agreement of its different peoples to share some common institutions and practices while differing on others.¹⁶ There is still considerable scope for debate as to what political, legal or social practices will be necessary to maintain the unity of the United Kingdom, and whether they are capable of being reproduced in the future, but it is far from clear that maintaining an identical set of human rights protections in each of the different nations will be essential.

The ECHR As Limit: Legal Arguments

The legal argument suggests that it will be impossible to have a different set of human rights standards in one part of the United Kingdom from that which prevails in the rest of it and that the HRA is effectively "the only show in town". This argument starts from the premise that Parliament has provided, in section 6 of the HRA, that all public authorities in the United Kingdom must act in a way compatible with the Convention rights and that it cannot therefore countenance some institutions acting in conformity with a different set of standards. The right to family life, for example, must surely be given effect to in the same way throughout the United Kingdom so that

¹⁴ See C. Harvey, "The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland" in C. Harvey (ed) *Human Rights, Equality and Democratic Renewal in Northern Ireland* (2001), Chap 2.

¹⁵ See V. Bogdanor, *Devolution in the United Kingdom* (2001) pp 294-8.

¹⁶ See N. Walker, "Beyond the Unitary Conception of the United Kingdom Constitution" [2000] *Public Law* 384.

the outcome of a custody proceeding should not depend on whether the parent bringing it lives in Derby or Dungannon. Introducing a specific Bill of Rights for Northern Ireland might lead to considerable confusion as public authorities in Northern Ireland struggled to understand which human rights standards they are required to comply with and perhaps failed to ensure that someone's rights under the HRA are given effect to.

This argument has some force if the outcome of deliberations on a Bill of Rights were to produce a set of standards which failed to guarantee to people in Northern Ireland the rights protected by the ECHR. However, to return to a point made earlier, the ECHR is a set of *minimum* standards. It does not prevent states devising national law provisions which go *further* in protecting people from torture or unfair trials than the ECHR does. Nor does the Convention outlaw federalism and require that states have the same law throughout their entire jurisdiction.¹⁷ Instead it simply requires that, whatever the internal constitutional arrangements of the state, all those within the jurisdiction of the member state are guaranteed the rights provided in the ECHR. Certainly one would expect that any Bill of Rights for Northern Ireland would take full account of the ECHR, and of other human rights treaties to which the United Kingdom is a party, but this does not preclude the drafting of a document which differs in some respects from it. Further support for the idea that different human rights provisions may exist in different parts of a state is provided by states which have a strong tradition of constitutional rights protection, such as the USA or Canada. In the former state constitutions have been promulgated in all states and include rights, such as a right to education, which go beyond those provided in the federal constitution. After decades of largely being ignored civil rights lawyers have increasingly turned to these state constitutions in the past decade in response to the limited and conservative reading of the Bill of Rights at the federal level.¹⁸ In Canada, provinces such as Quebec devised a charter of rights in advance of the federal Canadian Charter and have continued to give effect to such provisions while acknowledging the supremacy of Charter rights where the two clash.¹⁹

However the legal arguments against moving beyond the ECHR do raise some problems for the framers of a Bill of Rights for Northern Ireland which they would be well advised to consider seriously. All derive, to a certain extent, from the uncertain legal status of the HRA and the partial nature of the United Kingdom's constitutional revolution in the late 1990s. If the United Kingdom had gone down the path of full blown constitutionalism, with a written constitution and an entrenched Bill of Rights, then the legal context within which a Bill of Rights for Northern Ireland would operate might have been much clearer. Instead the effort to preserve the principle of the sovereignty of Parliament has led to a fudge on both the status of the

¹⁷ See, for example, *Handyside v United Kingdom* (1976) 1 EHRR 737 and *Otto Preminger v Austria* (1995) 19 EHRR 34, recognizing the existence of different laws impacting on freedom of expression in different parts of a state.

¹⁸ See G. Tarr, *Understanding State Constitutions* (1998).

¹⁹ Unless the provision in question is the object of the "notwithstanding" clause in section 33 of the Charter. See I. Molinaro, "The Charter and Quebec: Exploring the Limits of Constitutional Authority" in G. Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (1999) pp 139-66.

ECHR and the structure of devolution. Issues of the extent to which Convention rights are supreme over other legal provisions throughout the United Kingdom as well as the respective spheres of authority of the national as opposed to regional governments have been postponed in order to preserve what may increasingly be a fiction, that the Westminster Parliament may intervene at any time in respect of any matter. Hence the Bill of Rights may be launched into uncertain legal territory.

Three issues in particular will require careful thought. The first is the relationship of the rights guaranteed by the Bill of Rights to those provided for by the ECHR. As has already been discussed the former may extend the protections given by the latter but may not, in international if not domestic law, limit them. However, without amendment to the HRA and the Northern Ireland Act, the obligation to act in conformity with ECHR standards would remain on public authorities in Northern Ireland, in addition to any obligation to comply with the Bill of Rights. The potential for confusion is clear and is exacerbated by the fact that, unlike the US or Canada, it is not clear that the ECHR standards enjoy the status of supreme law as opposed to being simply another set of statutory provisions, on the same level as those which may be contained in the Bill of Rights. Two choices would appear to exist. One is for the Bill of Rights to make no reference to the Convention rights but for it to be drafted in a way which aims to ensure that it does not lessen the standard of rights protection offered by the ECHR. Clearly some conflicts might arise. If the Bill of Rights were to include new provisions on the protection of minority or community rights there may be occasions when these clash with Convention based provisions on the right of individuals to freely associate or express themselves. It would then be left to the courts to adjudicate on whether an interpretation can be found which complies with both standards. If not it is likely that the ECHR standard would prevail given the UK's international commitments and the intention to draft Bill of Rights provisions which would be consistent with the ECHR. However it still might require some legal gymnastics for the courts to reach a position where they effectively uphold one statute as having pre-eminence over another. An alternative is to seek to resolve any potential conflicts in the Bill of Rights itself and to draft a Bill of Rights that would effectively replace the ECHR in Northern Ireland. Such a Bill of Rights might include a fair trial provision, for example, which would be based on the ECHR but could also include guarantees, such as a right to jury trial or to the exclusion of evidence gained in breach of the Bill of Rights, which go further than those provided in the Convention. This option would require amendment of the HRA and Northern Ireland Act to replace the obligation to comply with Convention rights in respect of Northern Ireland with an obligation to comply with the Northern Ireland Bill of Rights. Whether the rights contained in the Bill of Rights did comply with the ECHR could still ultimately be tested by application to Strasbourg but this option would not leave domestic courts with the challenge of deciding which standard should prevail. However it might raise problems with regard to the second issue to be discussed below.

This relates to the scope of the Bill of Rights. The Agreement refers to the need for additional rights in the Bill of Rights to "be defined in Westminster legislation". This suggests they may be given legal force by amendment to the Northern Ireland Act, to put the Bill of Rights guarantees on the same footing as Convention provisions are in sections 6 and 24 of that Act.

However these provisions only bind the Northern Ireland Assembly, when passing legislation, and Northern Ireland departments, when carrying out their statutory functions. However many other institutions in Northern Ireland, including the police, courts and United Kingdom government departments operating in Northern Ireland, are not covered by these provisions. They are however covered by the general obligation contained in section 6 of the HRA. This causes few difficulties where both statutes invoke the same human rights standards but becomes problematic where such standards differ. To limit the effect of any Northern Ireland Bill of Rights to Northern Ireland's devolved government would seem unsatisfactory given that some of the most significant human rights concerns in the recent history of Northern Ireland have related to the actions of bodies such as the police or security services, who would therefore be excluded from the scope of the Bill of Rights. Alternatively the Bill of Rights might be given the same effect as the current non-discrimination provision contained in section 76 of the Northern Ireland Act 1998. This prohibits discrimination on grounds of religion or political opinion by any "public authority carrying out functions relating to Northern Ireland". The section goes on to define these public authorities, which includes the police and any minister of the crown. However such an approach may not be welcome news for United Kingdom wide bodies, such as the Home Office or Inland Revenue, who might now find actions in Northern Ireland, based on the same statutes as operate in Britain, challenged as being inconsistent with the Bill of Rights even if they have been upheld under the HRA.²⁰ It might become even more problematic if the framers of a Northern Ireland Bill of Rights determined that its reach should extend beyond public bodies and even beyond the "horizontal effect" so far associated with the HRA,²¹ to impose duties on private bodies or individuals. Once again the failure to think through concretely the consequences of devolution, to decide what is properly a matter of "federal" law throughout the United Kingdom (governed by a federal Bill of Rights) and what falls to regional authorities, may cause problems for ensuring effective human rights protection in Northern Ireland.

The third issue relates to the enforcement of the Bill of Rights. Although there will no doubt be an expectation that those upon whom it imposes obligations will seek to comply with the Bill of Rights and although the NIHRC will have a very important role in commenting on legislative proposals and educating the wider public, it remains likely that the courts will have to play a significant part in enforcing this new legislation. However the issue is what courts and in particular what courts will have the final say on the interpretation of the Bill of Rights? As it is a statute that only operates in Northern Ireland there may be good reason for arguing that

²⁰ See, for example the immigration detention provisions recently upheld against an HRA based challenge in *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] 4 All ER 961. A NI Bill of Rights could contain a provision that strengthens the right to liberty for immigration detainees. Westminster might not permit such legislation to pass but this would merely compound the problem by resulting in the content of a Bill of Rights for Northern Ireland being dictated by UK wide concerns.

²¹ See I. Hare, "Private Parties, Privacy and the Human Rights Act" [2001] *EHRLR* 526.

the Court of Appeal for Northern Ireland should be the final court for interpretation of the Bill of Rights. Some have even argued that, in light of the significance of the Bill of Rights and by analogy with the experience in South Africa, that this should be the occasion for the creation of a new Constitutional Court for Northern Ireland. Leaving aside arguments as to the desirability and feasibility of this it may be wondered if this is possible. To take but one problem, if the Bill of Rights is to circumscribe the legislative competence of the Northern Ireland Assembly, then any claims that the Assembly had exceeded its competence by passing legislation inconsistent with the Bill of Rights would currently be defined as a “devolution question” and could ultimately be appealed to the Judicial Committee of the Privy Council.²² It seems unlikely that Parliament could agree to issues of compliance with Convention rights being appealable to the Privy Council (to ensure consistent interpretation throughout the United Kingdom) but not issues of compliance with the Bill of Rights, especially if the Bill of Rights had subsumed the ECHR in respect of Northern Ireland. However people in Northern Ireland may subsequently become dissatisfied with the idea that what is essentially an English court will get to have the final say on the interpretation of a Bill of Rights specifically designed for Northern Ireland, especially if the Northern Irish courts have developed an interpretative approach which appears more in keeping with the objectives of the Bill.²³

This possibility raises again the issue of how satisfactory it is that the Privy Council has effectively been “bolted on” to the devolution settlement to provide a final court of interpretation, one arguably now even supreme over the House of Lords. Several commentators have already observed that this may have been a missed opportunity to review the issue of what the United Kingdom’s “top court” should be, how it should be composed and what jurisdiction it should have.²⁴ Issues of interpreting a Bill of Rights from Northern Ireland may raise all these questions afresh and again much can be learned from the experience of US and Canadian courts in dealing with the differing provisions of state and federal constitutions.

In conclusion, in this section it is worth repeating the view that the passing of the HRA does not render impossible the idea of a separate and specific Bill of Rights for Northern Ireland. The way in which devolution has taken place and in which human rights standards have been incorporated into United Kingdom law does raise certain difficulties for the legal formulation of any such Bill of Rights but these are not insurmountable. Moreover there is good reason to say that the ECHR is not the ideal Bill of Rights for Northern Ireland in particular or even for the United Kingdom in general. Only inertia may prevent the drafting of something better.

²² Sch 10 para 1(1)(a) Northern Ireland Act 1998.

²³ Worth noting that already the JCPC appears to be adopting a more restrictive approach to the interpretation of the HRA than that espoused by the Scottish courts. See A. O’Neill, “Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council” (2001) 64 *MLR* 603.

²⁴ For a discussion of the issues see N. Burrows, *Devolution* (2000) pp 174-9.

Producing a Bill of Rights for Northern Ireland.

The Form of the Bill of Rights

The Agreement simply indicates that the Bill of Rights shall be contained in “Westminster legislation”. This leaves it somewhat unclear what status it is supposed to have and in particular whether it should assume a “constitutional” status and be supreme over Assembly legislation. However other sections of the Agreement clearly indicate that neither the Assembly nor the Executive should be able to act in contravention of the ECHR “and any Bill of Rights supplementing it”.²⁵ This would appear to suggest it would have a status at least equivalent to that of the ECHR in the current Northern Ireland Act 1998. Recognising that the Bill of Rights should have this “constitutional” character suggests that it should be drafted in a constitutional manner, more as statements of broad principle rather than the specific injunctions more familiar in statutes. This in turn should facilitate a broad reading of the Bill of Rights provisions by the courts, though it may well require the inclusion of an interpretation clause, similar to section 39 of the South African Bill of Rights, to encourage them to do so.

The Content of the Bill of Rights

The drafters of the Agreement did not make things easy for the Human Rights Commission. Rather than simply drafting a Bill of Rights, or alternatively leaving the NIHRC absolute discretion to do so, they indicated that this Bill of Rights was to comprise rights supplementary to the ECHR “to reflect the particular circumstances of Northern Ireland”. However, apart from indicating that these additional rights should “reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem” and providing two areas to consider (which will be discussed more fully below) the Commission was left with no further guidance in the Agreement. Nor have other accounts of the process by which the Agreement was reached shed much light on the issue. Hennessey, for example, appears to suggest that while Unionists wanted to include aspects of the European Framework Convention on National Minorities, Nationalists opposed this as defining them in terms of minorities rather than equal citizens.²⁶ The resulting clause appears to have been a compromise between these two views.

Each of the elements of the guidance that was offered raises some difficult questions of interpretation. Take “the particular circumstances of Northern Ireland”. One might ask in what way is Northern Ireland particular and particular with respect to what, England, Ireland or Europe for example? Some might locate this particularity in levels of social need or deprivation, others in conservative social mores. Even if one focuses on what might seem the most likely meaning of particularity, that which gave rise to the Agreement in the first place, the existence of a long standing violent conflict, this only raises a whole new set of questions. If the Bill of Rights is to respond adequately to the circumstances of the conflict then there will need

²⁵ Strand One, para 5(1)(b).

²⁶ T. Hennessey, *The Northern Ireland Peace Process: Ending the Troubles?* (2000) pp 145-9.

to be some understanding of what these are and what their causes are. However, as John Whyte pointed out, there are myriad explanations of the Northern Ireland conflict.²⁷ Moving on from this there is the reference to the “two communities”. It might immediately be asked whether Northern Ireland can be reduced to only two communities. Would women in Northern Ireland, for example, not suggest that this ignores gender as a primary reference of identity for many people. Where does it leave the Chinese or Traveller communities? Even if we focus on the two communities whose interests find reflection in the Agreement there is again a question of how they are identified, whether primarily in religious or political terms, which has significance for what aspects of their “identity and ethos” are to be given respect. Finally there are issues of what “parity of esteem” might mean and how it differs from notions of equality.

Such are the difficulties of constructing a clear meaning for the guidance given to the Commission in the Agreement it is tempting to ignore it and launch into a more general analysis of what sort of Bill of Rights might be most desirable for Northern Ireland, drawing upon contemporary international human rights standards. This indeed is arguably what the NIHRC has done, justifying the extent to which it steps outside the Agreement guidance by reference to its general power in section 69(3)(b) of the Northern Ireland Act 1998 to make recommendations for the better protection of human rights in Northern Ireland.²⁸ However there are good reasons for striving to identify a meaning within the terms of the Agreement, not least because this is what all signatories to the Agreement have committed themselves to and hence recommendations on a Bill of Rights which can be claimed to be in line with the Agreement’s guidance should stand a better chance of achieving the political consensus necessary to ensure that they come to legislative fruition.

One way of doing this is to consider more fully the place of human rights guarantees in the Agreement. If it is accepted that the primary aim of the Agreement is to secure a settlement which legitimises and accommodates both Unionist and Nationalist aspirations then it is worth noting that the parties accept that the redesign of political institutions alone can not achieve this. Undoubtedly the arrangements for the creation of the Assembly and the Executive, the new cross-border and east-west bodies are the most significant elements of this accommodation and were the most extensively argued over in the negotiations. However it seems also to have been accepted from the outset that these alone would not provide the basis for a settlement and that the Agreement would also have to include significant provisions about rights. This is an important departure in particular from previous British practice to approaching the resolution of the Northern Ireland conflict and perhaps has not received the attention it should have. While many have commented on the fact that, unlike the Sunningdale agreement of 1973, the Belfast Agreement of 1998 included all the parties to the conflict and made more extensive provisions on both north-south and east-west relationships, few have observed that it also contains a much more extensive set of provisions on rights. Whereas in 1973 it seemed enough to agree a power-sharing

²⁷ J. Whyte, *Interpreting Northern Ireland* (1990).

²⁸ *Making a Bill of Rights* p 14.

formula plus an all-Ireland dimension and then leave the Northern Irish parties to get on with things,²⁹ the settlement of 1998 contains a much more extensive engagement with the “micro” as well as the “macro” elements of constitutionalism.³⁰ This includes not only the human rights provisions but also those on policing, justice, victims and equality.

As to why this should be so I would suggest there are a number of reasons, but all are linked to a recognition that traditional British constitutionalism, whereby individual rights are secured through a mixture of constitutional convention and regular opportunities to change the party in power, is inappropriate for a deeply divided society such as Northern Ireland.³¹ The most important role for rights provisions is that they reduce the risk that politics will become a zero sum game and hence encourage competing political groupings to participate in a political dialogue which involves risk and compromise on all sides. A common aversion of Unionists and Nationalists to many of the political structures proposed for Northern Ireland is a fear that a temporary advantage to the “other” side might translate into total defeat for their “own”. Knowledge that, whatever the complexion of the party in power, certain individual and collective rights are secure may encourage Nationalists to engage with a political system that may see a DUP First Minister or Unionists to accept the appointment of a Sinn Fein Justice Minister. Secondly the development of a rights agenda, and of changes in policing and criminal justice to advance that agenda, offers both the promise that concrete change in the lives of individuals will occur and that any such change will not take the form of simple revenge. The first is obviously crucial to Nationalists, who might fear that Unionists could block significant change through the weighted voting arrangements in the Assembly, the second to Unionists as they might fear a future Nationalist majority (perhaps in an all-Ireland context) could abuse power to discriminate against them. A third reason for a strong human rights component to the Agreement is a recognition that the settlement must be based on certain values to which all are committed. It is not enough simply to create a set of institutions and then let each contending party atavistically pursue their own ethnic or political interests. Instead a stable settlement requires that all accept certain principles and on the basis of a common acceptance of these principles seek to persuade others of the validity of their arguments. Rights provisions are the concrete expression of these principles. Indeed the inclusion of human rights provisions in the Agreement appears to acknowledge that the absence of respect for such principles played a significant role in contributing to the conflict.

If the rights contained in a Bill of Rights are to reflect back to the history of conflict in Northern Ireland the immediate question is whether the content of the ECHR is sufficient to achieve this. Already I have suggested that it may not be. One of the key themes of human rights in Northern Ireland is

²⁹ The only human rights commitment being to establish the Standing Advisory Commission for Human Rights.

³⁰ For a discussion of the distinction between “micro” and “macro” constitutionalism see J. Morison and S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (1995), Chap 4.

³¹ See C. McCrudden, “Northern Ireland and the British Constitution” in Jowell and Oliver (eds) *The Changing Constitution* (3rd ed 1994).

equality, given the central place that concerns about inequality have played in fuelling the conflict. However as I have noted above Article 14 of the ECHR is widely accepted to be one of its most flawed provisions and even the Council of Europe has now recognized the need for something else. Indeed paragraph 4 of the Agreement explicitly identifies equality as one area where the NIHRRC should consider the need for a provision going beyond the ECHR. A second area relates to the issue of accountability. Lack of effective accountability for human rights abuses, whether of state institutions or of armed opposition groups, has arisen as a regular theme in Northern Ireland and has led to a growth in regulatory and oversight bodies. The jurisprudence of the European Court, especially in relation to Articles 2 and 3, has increasingly stressed a need for independent and effective investigation of claims of human rights abuses plus the need for adequate civil and in some cases criminal sanctions against those engaged in them.³² However the ECHR lacks substantive provisions on issues such as freedom of information or victims rights which might significantly enhance accountability for decisions and actions which might infringe individual rights.

The ECHR is also of course limited in that it focuses exclusively on individual rights. The Agreement suggests, as have commentators examining the issue,³³ that there is also a need for certain communal rights to be reflected in the Bill of Rights. Such rights are the “micro” corollary of the “macro” arrangements for establishing the government and passing legislation which work out the consociational principles at the heart of the Agreement.³⁴ Such communal rights provide further reassurance that the “identity and ethos” of the Unionist and Nationalist communities will be respected regardless of the working out of the legislative and executive arrangements. The obvious areas for such rights to focus on are issues of language, citizenship, flags, marches and education. The actual content of these rights will require delicate negotiation and will ultimately depend on what balance of rights is necessary to reassure each community of equal respect. In some cases it may simply involve giving “constitutional” form to the status quo, in others a significant change. It will also be important that however such rights are formulated they do not infringe individual rights protected by the ECHR. Thus an absolute ban on parades would not be consistent with Article 11 of the ECHR, nor would a requirement that all children attend denominational schools be reconcilable with Article 1 of Protocol 2. However within this framework one might well be able to come up with a requirement that the state fund Protestant, Catholic and integrated schools equally or that the union flag is flown at government buildings on certain days.

However the content of the Bill of Rights is not exhausted by the need to provide such communal guarantees. The Agreement itself, notably in paragraphs 1 and 3 of the Human Rights section, recognizes a need to look at human rights concerns beyond issues of the “two communities”. References

³² See F. Ni Aolain, “The Evolving Jurisprudence of the European Convention Concerning the Right to Life” (2001) 19 *Netherlands HRQ* 21.

³³ See K. Boyle and T. Hadden, *Northern Ireland: The Choice* (1994) pp 182-3.

³⁴ For further discussion of the Agreement as a consociational arrangement see B. O’Leary, “The Nature of the Agreement” (1999) 22 *Fordham ILJ* 1628.

in paragraph 1 to “the right to equal opportunity in all social and economic activity, regardless of. . . disability, gender and ethnicity” and to “the right of women to full and equal political participation”, plus the broad ranging equality commitment in paragraph 3, which became section 75 of the Northern Ireland Act 1998, shows an awareness of a broader human rights agenda. This may result from a recognition that the almost exclusive political focus on issues of national identity in Northern Ireland may have resulted in a marginalisation of other human rights concerns, something the political structures of the Agreement may only heighten. More broadly, as O’Leary observes, the consociational structure set out in the Agreement does not seek to exclude other forms of identity.³⁵ It accommodates the existence of two predominant forms of communal identity in Northern Ireland but does not freeze everyone into them permanently³⁶ and may therefore serve as a bridge to greater democratic pluralism in Northern Ireland.

Overall therefore while both recent history and the text of the Agreement suggest a need to tie any provisions additional to the ECHR in a Bill of Rights to issues arising from the Northern Ireland conflict this does not mean that any such Bill of Rights should be a very narrow and limited document. Just as those crafting a Bill of Rights for the new South Africa saw the need for an extensive set of rights provisions in order to provide reassurance both that change had occurred and that the future would be one of equal treatment for all, so the NIHRC is likely to find that “the particular circumstances of Northern Ireland” may require rather more than is offered in the ECHR.³⁷

Issues of Equality and Identity in the Northern Ireland Human Rights Commission’s Draft Bill

As indicated above issues of communal identity and equality are likely to feature significantly in any Bill of Rights for Northern Ireland. Both meet the dual tests of relating specifically to Northern Ireland’s circumstances and of being underdeveloped in the ECHR. *Making a Bill of Rights* does indeed include provisions relating to each. However neither is adequately formulated and in their present guise could actually undermine human rights protection in Northern Ireland.

To take the issue of Identity first the NIHRC indicates that it has taken its lead from the European Framework Convention on National Minorities but has substituted a reference to “communities” for that to “minorities”. Undoubtedly this is influenced by the worthy desire to recognize that not everyone in Northern Ireland sees their identity as exclusively or even

³⁵ *Ibid*, at p 1639.

³⁶ For example unlike Lebanon’s 1943 National Pact, which provided for a Christian President and Muslim Prime Minister in perpetuity, the Agreement’s weighted voting mechanisms allow for change between communal blocs and even potentially their replacement by other forms of political identity.

³⁷ For a study of the South African process see M. Chanock, “A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate”, in P. Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) p 392; H. Klug *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000).

significantly in Unionist/Nationalist terms. However by transposing the Framework Convention obligations onto a “community” framework, *Making a Bill of Rights* places government under a duty to afford the same treatment to powerful majorities as to endangered minorities. For example while requiring government to “adopt effective and appropriate measures to promote. . . the conditions necessary for them[national, ethnic, religious or linguistic communities] to maintain and develop their culture”³⁸ might make sense in terms of the Chinese or Muslim community in Northern Ireland, who otherwise might face discrimination and/or assimilation, it seems rather less comprehensible in respect of powerful Protestant and Catholic communities. Such groups do not face the risk of assimilation into a mainstream for they indeed *are* that mainstream. Indeed there is a risk that taking measures to “maintain and develop the culture” of such groups could run into conflict with other human rights objectives, such as ensuring equal protection for gay men and lesbians. Although this provision is stated to be “without prejudice to existing legal requirements” that leaves a substantial loophole, especially for discussion as to whether “existing” refers to other legislation at the time the Bill of Rights comes into effect or at the time the issue is raised. Overall it may have been better for the NIHRC to have focused more directly on the communal rights of the Unionist and Nationalist communities (as occurs elsewhere in the draft) but also to have included a specific minority rights provision for those religious and ethnic minorities in Northern Ireland who otherwise might find themselves poorly served by the new constitutional arrangements.

In respect of equality paragraph 4 of the Agreement calls for “a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors”. There is certainly a need for such clarity as Northern Ireland now has a range of equality provisions including guarantees against discrimination by government in sections 6, 24 and 76 of the Northern Ireland Act 1998, the obligation on all public authorities to afford equality of opportunity in section 75 of the Northern Ireland Act 1998, a range of legislative anti-discrimination provisions, current European legislation on gender discrimination and impending European Directives against discrimination on a range of grounds.³⁹ There are clear gaps and inconsistencies in this coverage. Notably that discriminatory action by government is only limited to discrimination on the grounds of religion or political opinion and then only in respect of direct as opposed to indirect discrimination. One might have expected that the equality provision in *Making a Bill of Rights* would have referred to this history and also to the issue of how to relate any equality provisions in the Bill of Rights to the proposals for single equality legislation which were contained in the 1999 *Programme for Government*. However neither are referred to and the draft instead proceeds to discuss the equality provisions purely in the context of international and comparative standards. The draft clause is unsatisfactory in a number of ways.

³⁸ *Making a Bill of Rights*, draft clause 3(b)(5)(a).

³⁹ See U. O’Hare, “Enhancing European Equality Rights: A New Regional Framework” (2001) 8 *Maastricht JIL* 133.

Firstly it is anything but a clear statement as it contains both the Article 14 ECHR provision and the Commission's own ideas for an equality clause. If the latter is not to subsume the former then courts will no doubt be forgiven for thinking that Article 14 still has some work to do. One approach they might take is to see Article 14 as still offering the appropriate standard (including its wide margin of appreciation justification standard) to claims of discrimination in respect of "Convention rights" leaving the rest of the equality clause to bite only on "non-Convention rights". It is not clear this is what the NIHRC intends or that it would be desirable. Secondly the draft does not make clear the relationship between the justification tests contained in the equality clause and the general limitation clause it proposes in relation to all "non-Convention rights". Although the definitions of direct and indirect discrimination follow UK legislative practice by allowing justification arguments as a defence to the latter but not the former, there remains the unanswered question of whether a defendant could still invoke the general limitation clause to defeat even direct discrimination claims. It is worthwhile noting that the Canadian and South African Bills of Rights (which also contain general limitation clauses) do not provide for a specific limitation clause in their equality provisions. Thirdly the clarity of the clause is hardly assisted by a specific commitment to promote equality between men and women "in all areas". If this is not to make gender equality "first among equals" and to require positive action by the state in this area (elsewhere the draft leaves it open as to whether positive action should be permitted or required) then it is not clear how a court should read it. Again it is far from clear as to whether this is how the NIHRC intends that it should be read. Finally clarity is not helped by the inclusion of a specific clause against harassment or bullying. This appears more appropriate for a specific statute than a constitutional provision. Moreover the explanation the NIHRC gives for including this provision, that "many people argued that harassment and intimidation in the workplace on grounds of political opinion or gender should be outlawed" overlooks the fact that such discrimination has been unlawful for some time now.

Although the specific clause on affirmative action is valuable and appropriate for a Northern Ireland Bill of Rights overall the equality clause fails to achieve the clarity one might have expected of it. Both the clause itself and the text which introduces it lack any developed discussion on the objectives of the clause, such as where it stands on balance between preventing discrimination and promoting equality.⁴⁰ Such an explicit discussion might have helped a clearer development of this clause as setting out overall principles for the achievement of equality, which might then have been subsequently developed in more specific equality legislation.

CONCLUSIONS

Overall it is to be hoped that this paper has demonstrated the need for a Bill of Rights in Northern Ireland and that it is both possible and desirable that it extend beyond the guarantees of the ECHR. While the Agreement and the conditions which gave rise to it will remain central to the content of that Bill

⁴⁰ For a discussion of the underlying vision of equality law see S. Freedman, "Equality: A New Generation" (2001) 30 *Industrial LJ* 145.

of Rights this should not mean that it is a limited document. The NIHRC draft *Making a Bill of Rights* has already served a valuable purpose by focusing debate on what the content of such a Bill of Rights should be. However, as an analysis of the difficulties in even such key clauses as those on identity and equality reveals, there is still a considerable amount of work to be done.