MAKING A BILL OF RIGHTS STICK:
Options for implementation in Northern Ireland

A Discussion Paper published by the Committee on the Administration of Justice

September 1997

MAKING A BILL OF RIGHTS STICK:
Options for implementation in Northern Ireland

A Discussion Paper published by the
Committee on the Administration of Justice (CAJ)

ISBN : 1 873285 58 2

MAKING A BILL OF RIGHTS STICK:

Options for implementation in Northern Ireland

Introduction

In Northern Ireland there exists a broad consensus that a Bill of Rights would be a "good thing". The Committee on the Administration of Justice (the CAJ), in its work on this issue to date, has concentrated on devising the best possible content for such a Bill of Rights. In doing so it has drawn upon the content of existing international documents (especially the European Convention on Human Rights) but has supplemented these with provisions that are of particular relevance to the difficulties facing people in Northern Ireland. The resulting draft Bill of Rights has been widely circulated and discussed. Numerous changes have been made to it in response to points suggested by consultees.[1]

Firm in its conviction (evidenced also by the findings of numerous opinion polls) that the people of Northern Ireland are overwhelmingly in favour of being protected by a Bill of Rights, the CAJ now wants to widen the debate and discuss the practicalities of how a Bill of Rights might be implemented. It sees at least three aspects to this problem: how could a Bill of Rights be made into an immovable fixture in our legal system (i.e. how could it be **entrenched**), how could it be shielded against being too easily **amended** and how could it be **enforced**? While the answers to these questions may ultimately depend on whatever institutional structures and political settlements are arrived at for Northern Ireland, it is possible at this stage to outline possible mechanisms for dealing with each of them. Mechanisms such as these will need to be put in place no matter what the content of a Bill of Rights might be.

This paper surveys the relevant possibilities and presents the CAJ's preferred options.[2] These are provisional; in the light of the discussions prompted by this paper the CAJ may well alter its view and plump for different options. We would therefore welcome comments on this discussion paper from all quarters.

---

[1] The latest version of the CAJ's proposed Bill of Rights dates from July 1996. Copies can be obtained directly from the CAJ at 45-47 Donegall Street, Belfast BT1 2FG (price:£3.00).

[2] The CAJ's sub-group on the protection of rights wishes gratefully to acknowledge the assistance it obtained in the preparation of this paper from the paper presented to the Forum for Peace and Reconciliation in Dublin by Kevin Boyle, Colm Campbell and Tom Hadden entitled **The Protection of Human Rights in the Context of Peace and Reconciliation in Ireland** (1996).

1. ENTRENCHMENT

A Bill of Rights, to be fully effective, must have a more elevated status than other legislation in the sense that it must be a document which cannot later be easily repealed. As it is meant to be part of the bedrock of society, it must be protected from the whim of subsequent legislators or judges. This is not to say that its terms must be completely immutable - the next section of this paper discusses the methods that could be used for inserting amendments to the Bill of Rights - but they must be immune from evasion or abolition. This is what we mean when we say that the Bill of Rights needs to be **entrenched.**

Some people would argue that entrenchment of a Bill of Rights, or indeed of any legislation, is impossible. This is because they believe in what is called "the doctrine of parliamentary sovereignty". According to this doctrine, which at the moment is fundamental to the British constitutional system but not to many others in the world, a Parliament which passes a law cannot prevent a later Parliament from changing that law. The Parliament which happens to exist at any one time is "sovereign", or supreme. Thus, if a Bill of Rights were passed, any subsequent legislation which was inconsistent with it would take precedence over the Bill of Rights and would have to be applied in preference to it. Over time the fundamental rights and freedoms enshrined in the Bill of Rights could thus be whittled away.

In Britain the Conservative government of recent years strongly supported this doctrine of Parliamentary sovereignty. It therefore believed that a UK-wide Bill of Rights could not be entrenched. The Labour and Liberal Democratic Parties, on the other hand, are committed to constitutional reform in this regard; they are in favour of Parliamentary legislation having to comply with the standards on human rights laid down in the European Convention on Human Rights, which is to be incorporated into United Kingdom law by an Act of Parliament during the 1997-98 Parliamentary session. But such an Act could itself be repealed by a subsequent Act.

However, whatever the possibilities for entrenchment of a UK-wide Bill of Rights, this does not mean that entrenchment of a Bill of Rights for Northern Ireland alone is equally difficult. If, for example, there were ever a law-making body within Northern Ireland, it could be constrained in its law-making activities by the legislation which created it. That legislation could stipulate that any law made in Northern Ireland was to be invalid if it violated the provisions of a Bill of Rights. A Northern Ireland Assembly could not itself avoid the operation of such an Act. This kind of model has already been used for Northern Ireland: the Government of Ireland Act 1920 and the Northern Ireland Constitution Act 1973 each constrain law-making bodies and other public authorities in Northern Ireland from doing anything which disadvantages people on religious grounds. It would be a relatively small step to expand this model along the lines just suggested.

Of course, if the United Kingdom were ever to acquire a written Constitution, like virtually every other country in the world,[3] entrenchment of a Bill of Rights (which would probably be included in the Constitution itself) would be entirely feasible. This is what has already happened (to some extent at least) in the Republic of Ireland and, most recently, in South Africa. There is now a worldwide recognition of the fact, manifested in national Constitutions as well as international treaties, that human rights are too vital to leave unentrenched.

[3] Only Israel is like the United Kingdom in not having a written Constitution.

Bearing in mind all of the above, what are the ways in which a Bill of Rights in Northern Ireland might realistically be entrenched in the foreseeable future and which option does the CAJ prefer? In this section we canvas four broad options.

(a) By ordinary legislation

Despite the doctrine of Parliamentary sovereignty, enactment of the Bill of Rights as an ordinary Act of Parliament still stands as an option. We could, for instance, have a "Protection of Rights (NI) Act". While ordinary legislation of this nature would not absolutely guarantee protection of rights and freedoms, it would at least raise people's consciousness of their rights and freedoms by providing a public statement about them. Also, there would be some protection for individuals in that they could presumably seek remedies under the Act through the ordinary courts, provided those remedies were claimed in connection with breaches stemming from the actions of officials (rather than directly from legislation) or, perhaps, from the consequences of legislation enacted prior to the Act coming into force. The Act could presumably do nothing to protect people against infringements of rights resulting from legislation passed after the Bill of Rights, since the doctrine of Parliamentary sovereignty gives priority to later legislation.

In 1990, New Zealand acquired a Bill of Rights in the form of an ordinary Act of Parliament. The courts can use it to judge the legality of actions taken by public officials but they cannot use it to assess the validity of Parliamentary legislation, whether enacted before or after 1990. The country's Attorney-General has a duty to tell Parliament if proposed new legislation conflicts with the Bill but the Bill does not actually say what Parliament must then do.[4] Canada used to have an "ordinary" Bill of Rights too,[5] as did some of the Canadian provinces;[6] these were later replaced by a more entrenched Charter of Rights in 1982.[7]

A variant of the ordinary legislation model is the suggestion that a Rights Act could be passed containing an explicit provision saying that the Act cannot be overridden without a specific declaration that the overriding is deliberate. This device was again part of the first Canadian experiment with a Bill of Rights, and has been proposed on a number of occasions for the adoption of a Bill of Rights for the United Kingdom as a whole. In such circumstances a court would determine the validity of legislation subsequent to the Rights Act by inquiring into whether it had been properly passed by Parliament in compliance with the Rights Act. Legislation passed prior to the enactment of the Rights Act would, however, escape such scrutiny.

The real effect of an "ordinary" Bill of Rights is thus heavily dependent upon the good faith of the government of the day and a willingness on the part of Parliament to consider itself bound by the Bill of Rights' provisions when enacting legislation which potentially infringes

---

[4] Already a series of law reports has been produced to cover the cases decided under the New Zealand Bill of Rights. See generally Stephen Levine, "Bills of Rights in Parliamentary Settings: New Zealand and Israeli Experience" (1991) 41 **Parliamentary Affairs** 337-352.

[5] Canadian Bill of Rights 1960. For an explanation of the scope of this Act see Dale Gibson, **The Law of the Charter: The General Principles** (1986), pp.12-27.

[6] E.g. Manitoba Human Rights Act 1974.

[7] See Roland Penner, "The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?" [1996] **Public Law** 104-125.

rights. Given the poor response of recent British governments to recommendations of United Nations', European and even its own appointed human rights bodies (e.g. the Standing Advisory Commission for Human Rights in Northern Ireland), it may not be wise to hope for too much in this regard. Nevertheless, we should remember that several ordinary Acts of Parliament **are,** in practice if not in theory, already entrenched in the sense that they are already recognised as being absolutely fundamental to the functioning of our democracy. Could one imagine, for instance, that a Parliament would repeal the provisions in the Representation of the People Acts giving votes to women? Or the provisions in the sex discrimination legislation saying that women and men must be treated equally? It is possible that a similar fundamental character would soon accrue to something like a Protection of Rights Act.

In its "A Framework for Accountable Government in Northern Ireland" (1995) the British government seems to favour protecting rights in Northern Ireland in the way just envisaged:

> "Protection for specified civil, political, social and cultural rights would be reinforced in respect of a range of matters including those for which the new political institutions would have responsibility, on a basis arrived at in consultation with the parties. **The means of such protection would accord with the constitutional arrangements of the United Kingdom, and could build on existing safeguards."**[8]

(b) By special legislation

It is arguable that there is an unwritten constitutional rule in the United Kingdom that certain constitutional measures, such as the Act of Union with Scotland in 1701 and the Statute of Westminster in 1931 (which granted legislative independence to the then Dominions), cannot be repealed without the consent of those affected. Even if it has been decided that the Act of Union of Great Britain and Ireland in 1800 is not in this category,[9] this does not mean that the category does not exist at all. A Bill of Rights for Northern Ireland, a "Protection of Rights (NI) Act", or a new "Northern Ireland Constitution Act", if its wording were carefully devised and its initial enactment were endorsed by a local referendum, might qualify for this special status.[10]

As an example of this type of entrenchment some commentators point to the European Communities Act 1972, which accords a higher legal status to European Community law. The Institute of Public Policy Research (the IPPR) is fond of this analogy.[11] The 1972 Act incorporates "enforceable Community rights" into domestic law and requires British courts to give effect to the judgments of the European Court of Justice in Luxembourg. It also commands the courts to interpret existing and future Acts of Parliament, and subordinate legislation, in accordance with directly effective Community law. English courts have been strongly Community-minded in applying the 1972 Act. They have implied into Acts of

---

[8] Para. 12 (emphasis added).

[9] In **Ex parte Molyneaux** [1986] 1 WLR 331 the English High Court decided that no challenge could be mounted to the Anglo-Irish Agreement 1985 on the basis of its inconsistency with the Act of Union 1800. But that was because there was no real inconsistency, given the limited character of the 1985 Agreement.

[10] Section 1 of the Northern Ireland Constitution Act 1973 already affirms that "in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section".

[11] See **A British Bill of Rights** (2nd ed, 1996), pp.8-9.

Parliament a presumption that they have been enacted without prejudice to enforceable Community rights. Further, they have interpreted the apparently inconsistent language of UK statutes in a way that makes them conform with directly effective Community law, leaving open the questions as to whether and in what circumstances it is open to a future Parliament to override enforceable Community rights. A British court has even "disapplied" sections of a British Act of Parliament because they were inconsistent with the requirements of European Community law.[12]

The IPPR argues that if this approach were adopted in the case of the Bill of Rights, with that Bill incorporating the European Convention on Human Rights, it would follow that the Bill's provisions could not be impliedly repealed by future legislation. The courts would first require Parliament to suspend or repeal the Bill of Rights and Parliament would in practice be seriously inhibited from doing so by the effect it would have upon public opinion and by the knowledge that in the end the European Court of Human Rights would be likely to hold that Parliament had violated the European Convention on Human Rights. Of course Parliament might decide to ride out any storm of protest and go ahead with express repeal of the Bill. In that eventuality there is not a lot that could be done under national or international law. Society would have to rely upon political forces to bring about a reversal of such a policy.

It would also be possible to strengthen the entrenchment of the Bill of Rights by making it part of a new written Constitution for Northern Ireland. Normally a Constitution cannot later be changed by an ordinary Act of Parliament (though this was the case with the Irish Free State Constitution of 1922, replaced in 1937). The requirement that such changes be made only through special legislation, perhaps with the support of a significant majority of both Houses of Parliament and of the people in a referendum, is now customary in national Constitutions. Any legislative attempt to avoid the Bill of Rights would thus, almost inevitably, require express debate. This is the model adopted by the Canadian Charter of Rights and Freedoms of 1982. Under it, legislation passed before or after the Charter came into force can be reviewed by the courts and declared in breach of the Charter, but Parliament can still have the last word by re-enacting legislation (or sections of it) overturned by the courts. The judges are bound to enforce this re-enacted legislation provided it carries what is sometimes called a "government health warning", that is, a clause expressly declaring that it has been passed **notwithstanding** the Bill of Rights.[13]

Even if it were possible to devise a means of introducing an entrenched Bill of Rights for Northern Ireland, this does not mean that the Bill, or parts of it, has to be incapable of being suspended in times of genuine state crisis. The commonest way of achieving this is through a "derogation" procedure. For example, in its model Bill of Rights,[14] the IPPR provides for a derogation procedure similar to that in Article 15 of the European Convention of Human Rights, which says that governments can "derogate from" (i.e. opt out of) many of the Articles in the Convention "in time of war or other public emergency threatening the life of the nation". The Bill of Rights proposed by the Scottish Council for Civil Liberties also contains this type of

---

[12] See the **Factortame** case [1991] AC 603 and **Ex parte EOC** [1994] 1 All ER 910.

[13] Section 33 of the 1982 Charter.

[14] Clause E.

mechanism, but it further provides that the existence of a state of emergency must be officially proclaimed by a majority of two-thirds of those voting in the Scots Parliament.[15]

In the wake of the 1988 decision of the European Court of Human Rights in **Brogan** v **UK**,[16] the United Kingdom government used Article 15 to derogate from the Convention in relation to the 7-day detention power in the Prevention of Terrorism Act, on the ground that the situation in Northern Ireland represented a public emergency of the required kind. To the surprise of many, the validity of this derogation was later upheld by the European Court of Human Rights in **Brannigan and McBride** v **UK**.[17] Because derogation effectively amounts to an admission that in some circumstances the government will refuse to comply with the Bill of Rights, thereby detracting from its entrenched status, we are not in favour of any such general provision being included in a Bill of Rights for Northern Ireland. The CAJ's own draft Bill, in Article 17, allows rights to be limited only in truly exceptional circumstances; some rights, it believes, should be non-derogable, as is already the case with most international treaties on human rights and in many national Bills of Rights.[18]

(c) By "ring-fencing" a Bill for Northern Ireland

The Government of Ireland Act 1920 prohibited the Northern Ireland Parliament from passing legislation that disadvantaged any person on religious grounds and the Northern Ireland Constitution Act 1973 prohibited the Northern Ireland Assembly (which operated for the first few months of 1974) from passing Measures that discriminated on religious or political grounds. A similar sort of Act could be passed at Westminster governing all subsequent legislation passed for Northern Ireland, whether by the current Order in Council procedure or by a new Northern Ireland Assembly. This would lead to what has been called a "ring-fenced" Bill of Rights. Orders in Council could not ignore such an Act because they are a type of secondary legislation which must always give way to the requirements of primary legislation, but Acts confined in operation to Northern Ireland (such as the current Emergency Provisions Act 1996) would not be so constrained. Those Acts could expressly deviate from or repeal the earlier Bill of Rights if that was Parliament's wish.

(d) By incorporating guarantees in an international treaty

Given that entrenchment is such a problem for United Kingdom constitutional law, an attempt could be made to use international law as a mechanism for guaranteeing rights. International law consists primarily of those obligations which countries have agreed to accept among themselves. On some occasions the countries may even set up a dispute-resolution procedure in case they later disagree over whether a particular obligation is owing or not. A popular model in this regard is the International Court of Justice at The Hague in the Netherlands. The European Court of Human Rights in Strasbourg, dealing with applications under the European Convention on Human Rights, is another example.

---

[15] **A Bill of Rights for Scotland**, Clause E. This is comparable to Clause E of the IPPR's draft Bill, which, "unless the urgency of the situation makes it impracticable to do so", requires an Order in Council suspending the Bill to be approved by a two-thirds majority of those voting in each House of Parliament.

[16] (1989) 11 EHRR 117.

[17] (1993) 17 EHRR 539.

[18] Most recently, s.37(5) of the 1996 Constitution of South Africa includes a Table of Non-Derogable Rights.

In Britain and Ireland, treaty obligations are regarded as binding only on the international plain. Unless they happen to be expressly "incorporated" into domestic British and Irish law, they cannot be used by individuals living in those countries to assert their human rights. As yet, neither the United Kingdom nor Ireland has incorporated the European Convention into domestic law. The new British government intends to alter this, but the Report of the Constitution Review Group in Ireland (the Whitaker Committee) has recently recommended no change in this regard.[19] On the other hand international agreements do serve as a political disincentive against any unilateral abusive action on the part of one of the countries vis-à-vis individuals. No country likes to be diplomatically embarrassed by having to explain why it has not adhered to treaty provisions, especially if individuals have suffered as a result. This kind of reasoning has recently persuaded countries such as Iceland and Sweden to incorporate the European Convention directly into their domestic law.[20] The Swedish Constitution now simply states:

> "No law or other regulation may be enacted contrary to Sweden's obligations as follow from the European Convention on Human Rights".[21]

As far as the situation in Northern Ireland is concerned, a treaty dealing with the protection of rights there could be entered into by the United Kingdom and Ireland alone or together with others such as the USA or countries in Europe. In theory the treaty could take the form of a protocol (i.e. an appendix) to an existing treaty, such as the Maastricht Treaty of European Union or the European Convention on Human Rights, but in practice this is difficult because it requires the unanimous agreement of all the current adherents to those treaties.

The involvement of third states in this way would prevent future British and Irish Governments from effectively agreeing to abandon or amend the provisions on rights, though of course it would remain possible for all the states concerned to agree to such a change. To involve the European Union or the Council of Europe (which operates the European Convention on Human Rights) would be more problematic, since there is as yet no precedent for an area-specific agreement of this type. But the Council of Europe has recently adopted a more general treaty on the protection of minority rights;[22] it may be more feasible to add area-specific protocols to that. The Organisation for Security and Co-operation in Europe is another international organisation which may be able to help in this fashion by brokering some agreement between governments. Of course, if any such agreement were also incorporated into the domestic law of Northern Ireland through a Bill of Rights, it could be enforced by Northern Irish courts as well as by an international body.

---

[19] The Committee felt that the Irish Constitution itself, if amended along the lines it was suggesting, could provide a greater degree of protection for rights than provided for by the Convention: **Report of the Constitution Review Group**, Pn 2632 (May 1996), pp.216-9.

[20] **Ibid.,** citing Scheinin (ed), **Incorporation and Implementation of Human Rights Norms in the Nordic and Baltic Countries** (Martinus Nijhoff, 1996).

[21] **Ibid.** p.217.

[22] Framework Convention for the Protection of National Minorities 1994, reproduced at (1995) 16 **Human Rights Law Journal** 92.

The CAJ's Preference

At present the CAJ's preferred solution to the entrenchment problem is to apply a combination of the second and fourth options outlined above. In other words, it is in favour of "special" legislation, endorsed by a vote in a referendum, which incorporates into Northern Irish law the human rights guarantees set down in an international treaty as supplemented by additional guarantees that are of particular importance in Northern Ireland. At the moment it does not see any other way of practically entrenching a Bill of Rights into Northern Ireland's law.

2. Amendment

It is unrealistic to expect a Bill of Rights to address all issues for all time, so the wish for permanent entrenchment must be balanced against the need to have some mechanism whereby later generations can change the Bill of Rights in appropriate circumstances. All laws on human rights are coloured by the particular concerns of the period in which they have been formulated, and most have had to be developed or altered as time has passed. The problem, then, is how to provide for **amendments** to the Bill of Rights.

The main difficulty lies in devising a mechanism for amendment that is neither too easy to invoke nor too difficult. Under the doctrine of Parliamentary sovereignty, an "ordinary" Act could very simply be changed by a subsequent Act;[23] on the other hand, in a country where there is a written Constitution, such as the USA, it may be so difficult to change the Bill of Rights that even very important issues (e.g. equality for women) cannot find a place there.

Of the various methods for achieving amendments, four are outlined here. It may be, of course, that some provisions in the original Bill of Rights are considered to be so sacrosanct that they should not be subject to amendment at any time. This is the approach adopted in the 1949 Basic Law of Germany as well as in many other national constitutions around the world. In some countries much the same effect is achieved by making some rights non-derogable, as explained at the end of 1(b) above.

(a) By a referendum

A referendum of the people is probably the most familiar mechanism for altering a constitutional guarantee. It is the mechanism employed in the Republic of Ireland.[24] There the preferred wording of an amendment is put to the whole electorate, who then vote on it, a simple majority being enough to pass the amendment.[25] This raises the problem of **which** electorate should vote on whether to amend a Bill of Rights for Northern Ireland. The simple answer is, those people to whom it currently applies, though of course this does not mean that other electorates could not also be asked for their views on the matter, even if those views could not alter the result of the main referendum.

In Northern Ireland, however, given the political divisions among the population, it is questionable whether a simple majority should be allowed to determine the result of a referendum (or indeed many other votes). Democracy does not always mean that a majority should be able to have its way. On such a fundamental issue as whether the Bill of Rights should be changed it would be better if a majority of both major traditions in Northern Ireland had to be in favour of it before the change could be made. In other words, all persons in Northern Ireland should be encouraged to feel a sense of "ownership" of the Bill of Rights.

---

[23] See 1(a) above.

[24] Article 46.2.

[25] Two recent examples are the 1995 referendum on divorce and the 1996 referendum on reform of the bail laws.

(b) By a weighted majority vote in Parliament

Alternatively, it would be possible to provide for amendment to the Bill of Rights by a weighted parliamentary majority. This again raises questions the answers to which depend upon the parliament being talked about. If it were some sort of Northern Ireland Assembly, as envisaged in the Framework Documents, then the crucial question is again whether there should be a majority within each of the two main communities or an overall majority of, say, 75%. If the Parliament in question were the UK Parliament, or some North/South body, it would be sensible to require an overall percentage majority.

(c) By community votes

The Bill of Rights in the USA can be amended if a resolution is passed by a two-thirds majority of both Houses of Congress and this is then approved by the legislatures of three-quarters of the states. Although this means that amendments are very difficult to achieve,[26] the model shows how different communities rather than different individuals can be recognised as having an interest in the matter. It would be possible to devise a similar form of community vote in Northern Ireland, based on district council areas or even wards. If well designed, such a system might prevent the vote from becoming a straight contest based on alleged Protestant and Catholic interests.

(d) By a preferendum

A more unusual mechanism for amendment is the preferendum.[27] This method starts from the premise that single issue votes which look for a Yes or No vote around one set of words are often divisive. They can lead to a "winner takes all" solution which may reflect little but the lowest common denominator of what is acceptable while leaving other more generally popular options unexplored. An alternative is to put forward a series of options for the proposed amendment and to ask people to vote by ranking these in preferential order. The option which gains the most consensus (i.e. the most number of "points" in the ranking of options) would then be the solution adopted. A relatively novel proposal, though one already used in some states of the USA and in Newfoundland, this kind of "preferendum" is arguably a more democratic way of managing amendments, especially where more than two or three options are put before the electorate.

---

[26] There have been 27 amendments to date. The 26th (reducing the minimum voting age to 18) was agreed in 1971, the 27th (no law varying the salaries of members of Congress to take effect until an election of the House of Representatives has intervened) was agreed in 1992.

[27] See **The Politics of Consensus** by Peter Emerson (Belfast, 1994) and Appendix 27 to the **Report of the Constitution Review Group**, by Gerard Hogan (Dublin, 1996).

The CAJ's Preference

As stated in Article 20 of its draft Bill of Rights, the CAJ is in favour of a system whereby any proposed amendment to the Bill of Rights must secure the consent of at least 75% of those voting in a two-option referendum. We suggest, that, in situations where it is deemed appropriate to suggest more than two versions of the proposed amendment to the electorate, a preferendum should be used. The option which secures at least a 75% level of consensus support from all those voting would be the one considered to have been approved.

3. ENFORCEMENT

Finally, there are different options as to how a Bill of Rights could be **enforced**. They revolve around three inter-related questions: Who should be able to complain about an alleged breach? Who should deal with those complaints? What remedies should be available if a complaint is upheld?

(a) Who should be able to complain?

This is what lawyers call the **locus standi,** or standing, issue. It involves assessing whether a person has a "sufficient interest" to take a case under the Bill of Rights. There are several possible positions to adopt. First, the right to take legal action could be granted to any person who alleges that he or she has personally been a victim of a violation of the Bill of Rights. This is the stance taken within the European Convention on Human Rights itself.[28] Second, it could be extended to groups of persons who, without identifying any particular victim, allege that a particular piece of legislation is contrary to the Bill of Rights; an example would be a woman's group challenging a law because it supposedly violates the right of equality. Experience in other countries (such as Canada) has shown that campaign groups acting as advice centres for individuals as well as taking cases to further their collective interests provide the life-blood of the Bill of Rights.

Third, the right to complain could be vested in some public body with the remit to take action **for the general good** whenever it identifies a breach of the Bill of Rights (this is called "public interest litigation"). In Northern Ireland the experience of the Equal Opportunities Commission and of the Fair Employment Commission indicates that it is very valuable to have a body which can not only help people with the enforcement of their individual legal rights but also take legal action in its own name on behalf of unnamed individuals.[29] In Canada and Australia the Human Rights Commissions have played this dual role, particularly in relation to allegations of discrimination, and they have been quite successful in fending off inappropriate judicial interference with their decisions.[30] Watchdog bodies such as these can have a vital role in creating a human rights culture within a society.[31]

Fourth, some body, perhaps a Human Rights Commission or a stipulated number of Parliamentarians, could be given the power to refer proposed legislation to the courts or to the people whenever they feel that, if enacted, the legislation would breach the Bill of Rights. This is possible in the Republic of Ireland, where the President may refer a Bill to the Supreme Court[32] and where a majority of the Seanad and one-third of the Dail may jointly petition the President to refer a Bill to the people for a referendum.[33] In France, 60 members of the

---

[28] Article 25.

[29] The Standing Advisory Commission on Human Rights in Northern Ireland is **not** a model to follow in this regard. since it has no powers at all to take court action in cases of alleged human rights violations.

[30] Alison Harvison Young, "Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons" (1993) 43 University of Toronto Law Journal 65-124.

[31] See the report on Human Rights Commissions prepared by Sarah Spencer and Ian Bynoe for the Institute for Public Policy Research.

[32] Article 26 of the Constitution.

[33] Article 27 of the Constitution.

National Assembly or of the Senate may insist upon a Bill being referred to the **Conseil Constitutionnel** for an opinion as to its constitutionality.[34] Some mechanism of this type has in the past been favoured by the Standing Advisory Commission on Human Rights for Northern Ireland.[35] Consideration might also be given to permitting the monitoring of human rights, including minority protection and the operation of emergency laws, to be conducted by one or more established agencies, such as the European Committee for the Prevention of Torture or the OSCE's High Commissioner for Minorities. These agencies could be given the standing to initiate actions in the courts of Northern Ireland. Internationalising the triggering of the Bill of Rights in this fashion may add considerably to its credibility in the wider world as well as within all sections of the community inside Northern Ireland.

Whoever is allowed to take legal action to enforce the Bill of Rights, it is essential that adequate public funding be made available for the task. Worthy of note in this regard is the rule in Germany that any person may enter a complaint of unconstitutionality if one of his or her fundamental rights under the Constitution has been allegedly violated by public authority and no filing fee or formal papers are required. Legal assistance is not compulsory at any stage of the proceedings.[36] It is equally important that whenever a legal case involving the Bill of Rights is under consideration, interested third parties should have the opportunity to submit their views as to how the case should be resolved. This is permissible both in the European Court of Justice and in the European Court of Human Rights and should be in this context too. Such third party briefs (sometimes known as amicus curiae briefs) can be of particular help to those adjudicating upon human rights claims, especially if the briefs are permitted to include arguments based on matters other than interpretation of existing texts or precedents.

The CAJ's Preference

The CAJ wishes the locus standi requirements for enforcement of the Bill of Rights to be very widely stated. It therefore advocates acceptance of all four of the positions outlined above. It also underlines the importance of proper state funding being made available for legal actions raising the Bill of Rights, of expert training being given to the judges who are asked to decide those actions, and of the rules of court procedure being drafted so as to allow the full range of arguments to be put before those judges.

---

[34] Article 61(2) of the Constitution of the Fifth French Republic 1958. See John Bell, **French Constitutional Law** (1992), pp.30-33.

[35] **The Protection of Human Rights by Law in Northern Ireland** (1977; Cmnd.7009), para.7.17.

[36] Article 93(1)[4a] of the German Basic Law 1949. See Donald P Kommers, **The Constitutional Jurisprudence of the Federal Republic of Germany** (1989), pp.15-17.

(b) Who should deal with complaints?

i. Adjudication within Northern Ireland's present courts

In the United States all legislative, administrative or judicial acts which allegedly do not conform with the Bill of Rights can be challenged in any court and, if a violation is found, declared to be invalid. Although this is a power which the US courts themselves have claimed, ever since the decision of the Supreme Court in **Marbury** v **Madison** (1803), other more modern constitutions expressly confer it upon judges.

It would be possible under present constitutional arrangements for the ordinary courts, or some of them, to enforce a Bill of Rights in Northern Ireland, with the final court of appeal being the House of Lords in London. However opinions differ as to how well the present courts have performed in recent times, whether in Northern Ireland or in England. Whatever the true position, the CAJ believes that a Bill of Rights will command full respect in Northern Ireland only if disputes concerning its effects are ultimately adjudicated by a body that is different from any of the existing courts. The CAJ feels that special expertise is required when human rights documents have to be interpreted.

ii. Adjudication within a special court

A special court could be created to deal with cases raising the Bill of Rights, at any rate as the court of ultimate appeal. Thus, the new proposed Constitution for the Republic of South Africa proclaims that the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.[37] Likewise there is a Federal Constitutional Court in Germany and a Constitutional Court in Spain.[38] Occasionally it is suggested that the Judicial Committee of the Privy Council could under present constitutional arrangements be given the job of dealing with disputes raising an issue concerning a Bill of Rights for Northern Ireland, since that court already has experience of adjudicating upon human rights issues and interpreting written constitutions in various Commonwealth jurisdictions, such as New Zealand.[39] But the Judicial Committee's commitment to a human rights culture has been criticised by some commentators,[40] as has that of the judges in the House of Lords when dealing with cases emanating from Northern Ireland.[41] The whole idea of creating a specialist court for Bills of Rights cases has been rejected in a 1996 Report issued by The Constitution Unit at University College London.[42]

---

[37] S.172(2)(a).

[38] See James Casey, "The Spanish Constitutional Court" (1990-92) 25-27 **Irish Jurist** 26.

[39] See e.g. **Prebble** v **Television New Zealand Ltd** [1994] 3 All ER 407.

[40] See K D Ewing, "A Bill of Rights: Lessons from the Privy Council", in W Finnie, C Himsworth and N Walker, "Edinburgh Essays in Public Law " (1991) pp.231-249. The Privy Council's record is defended by Michael Zander in **A Bill of Rights?** (4th ed, 1987), pp.101-102.

[41] See Stephen Livingstone, "The House of Lords and the Northern Ireland Conflict" (1994) 57 **Modern Law Review** 333.

[42] **Human Rights Legislation** (1996).

iii. Adjudication within an international court

For many years the United Kingdom and Irish governments have allowed individuals to make applications to the European Commission of Human Rights in Strasbourg alleging a violation by the governments of the European Convention on Human Rights. The Commission can in turn, after dealing with the application, refer the matter to the European Court of Human Rights. It is also possible for two or more countries to agree by treaty to establish a special adjudicatory body - an International Tribunal - to hear disputes arising within or between those countries. This kind of model could be adopted for the enforcement of a Bill of Rights for Northern Ireland, especially if the Bill itself emerged from an international agreement.

In addition to adequate rules concerning who should be able to initiate a complaint that the Bill of Rights has been breached, it is important that a body be given the power to screen proposed new laws with a view to determining if they risk future breaches of the Bill of Rights. In this context, as in so many others, prevention is better than cure. The CAJ would favour this screening role being given to a Human Rights Commission, or to a Parliamentary committee, but it is crucial that any such body be empowered to issue rulings which at least delay, even if they cannot prevent, the introduction of the new laws.

The CAJ's Preference

The CAJ's preferred option is to have a special court appointed to hear final appeals on the interpretation and application of the Bill of Rights. It believes existing courts should also have the power to hear such cases at first instance. Provision would have to be made, as in South Africa, for references to be made to the new court from lower courts and for direct access by litigants in appropriate cases.

(c) What remedies should be available?

As we have seen when considering models of entrenchment, a Bill of Rights could be enforced in different ways with different impact. More particularly, it could be enforced by prevention and/or by adjudication. Preventive enforcement includes the review of proposed new legislation before it becomes law, in order to make certain that it conforms with the Bill of Rights. This review might be conducted by a court. Adjudicative enforcement usually presupposes the conferment of a right on some body or individuals to litigate when they feel that their rights have been breached. It normally leads to a claim for compensation and to the striking down of any legislative provision or official act which has caused the breach. Whether enforcement is preventive or adjudicative, however, there are basically two types of remedies which might be made available.

i. "Simple" judicial review

This type of remedy would provide a ruling on whether or not a law or action was compatible with the Bill of Rights and, if the law or action were declared incompatible, would result in an order making the law or action null and void. In appropriate cases an injunction would be granted to prevent an action from being carried out or continued. The court order

would otherwise leave the final resolution of the issue in question to the usual political processes.

At present the United Kingdom law on judicial review allows for secondary legislation and administrative acts to be struck down by the courts. But apart from having no control over primary legislation, the law suffers from three other serious defects. First, no-one can obtain an injunction against the government unless it is to protect his or her rights under European Community law. Second, in general the law provides no financial compensation for loss caused by administrative action carried out by a public authority in excess of its powers, or improperly or unreasonably, unless the conduct falls into a recognised common law category such as negligence or breach of statutory duty. Third, the grounds upon which an act or decision by a public authority can be challenged are limited to illegality, impropriety and irrationality. Each of those terms has a restricted meaning. In particular, they do not embrace the concept of dis-proportionality, whereby an act or decision could be challenged for being disproportionate to the aim it is seeking to achieve. If simple judicial review were to be the means chosen for enforcing a Bill of Rights, these defects would need to be cured.

ii. "Expanded" judicial review

In cases concerning the Bill of Rights it might be possible to develop an expanded form of judicial review under which, as already in the USA, the relevant court would have the power to order a particular resolution of the dispute either as part of its initial ruling or, if no political resolution was forthcoming, after a prescribed delay. This form of residual power, which would be similar to the existing power of ministers under a number of Northern Ireland statutes to give directions to local authorities and other public bodies, might be more appropriate if the court concerned were an international one rather one based exclusively in Northern Ireland.

Quite apart from international adjudication of this type, it would be helpful if a formal mechanism existed for the channelling of complaints about Bill of Rights violations to international bodies charged with monitoring states adherence to agreed international norms, bodies such as the UN's Human Rights Committee or the Council of Europe's Committee on the Prevention of Torture. Victims or potential victims, of human rights abuses sometimes prefer to have their grievances aired in the less confrontational environment provided by those bodies rather than in a court room. The CAJ would be happy to see a Human Rights Commission given the duty to collect and transmit such grievances to international fora. Of course this should in no way undermine the right of non-governmental organisations to do likewise.

The CAJ's Preference

The CAJ prefers "simple" judicial review to "expanded" judicial review because the latter gives too much power to judges, who, after all, are unelected officials. However it wishes to see radical reforms to the principles of judicial review applying in Northern Ireland so that it becomes easier to obtain effective relief from, and compensation for, public action which violates the Bill of Rights.

SUMMARY OF THE CAJ'S PREFERRED OPTIONS

A Bill of Rights for Northern Ireland should be enacted by special legislation and endorsed in a referendum. It does not need to be "entrenched", though that would be preferable if there were whole scale constitutional reform.

A Bill of Rights for Northern Ireland should be subject to amendment only if 75% of those voting in a preferendum so desire.

A Bill of Rights should be capable of being invoked by a very wide range of complainants, including representative groups.

A Bill of Rights for Northern Ireland should be enforceable by the ordinary courts, but the ultimate appeal court should be a court specially created for the purpose.

CHART SUMMARISING THE FEATURES OF SOME BILLS OF RIGHTS

(a) International Bills of Rights

DOCUMENT / FEATURES	ENTRENCHMENT	AMENDMENT	ENFORCEMENT
International Covenant on Civil and Political Rights 1966	A part of a state's international legal obligations until expressly renounced or until state's expulsion or suspension from the United Nations	By agreement among all the member states of the United Nations	By a Human Rights Committee, which considers reports from member states and, if the state has ratified the Optional Protocol, allows individuals to make applications
International Covenant on Economic, Social and Cultural Rights 1966	A part of a state's international legal obligations until expressly renounced or until state's expulsion or suspension from the United Nations	By agreement among all the member states of the United Nations	By the Committee on Economic, Social and Cultural Rights which considers reports from member states
European Convention on Human Rights and Fundamental Freedoms 1950	A part of a state's international legal obligations until expressly renounced or until state's expulsion or suspension from the Council of Europe	By agreement among all the member states of the Council of Europe	Judgments of the European Court of Human Rights must be complied with, but only on pain of further political embarrassment

(b) National Bills of Rights

DOCUMENT / FEATURES	ENTRENCHMENT	AMENDMENT	ENFORCEMENT
Amendments 1-10 of the Constitution of the United States of America 1791	Part of the US Constitution	By a resolution passed by a two-thirds majority of both Houses of Congress and approved by the legislatures of three-quarters of the states	By any court, with an ultimate appeal to the US Supreme Court
Articles 40-44 of the Constitution of Ireland 1937	Part of the Irish Constitution	By a referendum	By the High Court, with appeals to the Supreme Court
The Canadian Charter of Rights and Freedoms 1982	Part of the Canadian Constitution, but can be bypassed, if Parliament expressly declares this intention, for up to 5 years at a time (s.33)	Resolutions of the Senate and House of Commons and resolutions of the legislative assemblies of at least two-thirds of the provinces that have more than half of Canada's population.	By any court, with an ultimate appeal to the Supreme Court of Canada
The Hong Kong Bill of Rights Ordinance 1991	Subsequent legislation must, if possible, be interpreted so as to comply with the Bill of Rights (s.4)	By an Act of the Hong Kong legislature expressly amending the Bill of Rights	By any court
Chapter 2 of the Constitution of the Republic of South Africa 1996	Part of the South African Constitution	By a Bill passed by a vote of at least two-thirds of the members of the National Assembly and the President (s.74)	By any court, with an ultimate appeal to the Constitutional Court of South Africa

(c) Proposed Bills of Rights within the United Kingdom

DOCUMENT / FEATURES	ENTRENCHMENT	AMENDMENT	ENFORCEMENT
The Bill of Rights of the CAJ	Pending wholescale constitutional reform, entrenchment results from the political consequences of any proposed repeal	By a vote in a preferendum supported by 75% of those voting	By the ordinary courts, but the ultimate appeal court should be one specially constituted for the purpose
The Bill of Rights of Liberty	Repeal possible only by a resolution passed by a two-thirds majority in both Houses of Parliament and after a 5-year delay	By an Act of Parliament passed after a resolution passed by a two-thirds majority in both Houses of Parliament	By the ordinary courts and tribunals, though minor courts and tribunals must refer the validity of an Act to the High Court
The Bill of Rights of the Institute for Public Policy Research	Pending wholescale constitutional reform, entrenchment results from the political consequences of any proposed repeal	Makes no provision for amendment but allows parts of the Bill to be suspended after a resolution passed by a two-thirds majority in both Houses of Parliament	By the ordinary courts and tribunals, though minor courts and tribunals must refer the validity of an Act to the High Court
The Bill of Rights of the Scottish Council for Civil Liberties	Preamble says "This Bill is to be entrenched by the Parliament of Scotland"	By a two-thirds majority vote in the Parliament of Scotland or by a national referendum	By the ordinary courts and tribunals, though minor courts and tribunals must refer the validity of an Act to the Supreme Court of Appeal of Scotland

A discussion paper
by
the Committee on the Administration of Justice

Published and distributed by the

Committee on the Administration of Justice (CAJ),
45/47 Donegall Street, Belfast BT1 2FG
Tel: (01232) 232394 Fax: (01232) 246706

September 1997