

## **CAJ's submission no. S367**

# **CAJ's submission to the UK Bill of Rights Commission - Discussion Paper: 'Do we need a UK Bill of Rights?'**

**November 2011**

### ***What is the CAJ?***

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

## Summary Response ‘Do we need a UK Bill of Rights?’

CAJ has been working towards the creation of a Bill of Rights for Northern Ireland since the mid-1980s. We have done so with the belief that a Bill of Rights specifically for Northern Ireland is a fundamental building block for peace and will form part of a process for ensuring that the human rights abuses committed in the past will not be repeated. CAJ welcomes the opportunity to share our expertise from Northern Ireland on engaging with our own Bill of Rights process and to set out why we believe the Bill of Rights for Northern Ireland, provided for in the 1998 Belfast/Good Friday Agreement needs to remain a separate process to a broader ‘national’ discussion. In summary:

- CAJ has no objections in principle to human rights protections being strengthened across the UK. However we are conscious that this is neither the primary origin nor the likely outcome of the current process. Our greatest concern is the potential the UK Bill of Rights process has to undermine, further stall or be promoted as a substitute for the Northern Ireland process the mandate for which is set out in an international peace treaty;
- It is important to emphasise that in addition to providing for a Bill of Rights for Northern Ireland the Belfast/Good Friday Agreement also explicitly guarantees the incorporation of the European Convention on Human Rights into Northern Ireland law; retrogression from this in Northern Ireland would therefore be incompatible with international treaty commitments;
- The 1998 Agreement was endorsed by referendums in both jurisdictions on the island of Ireland and there is widespread support among people across Northern Ireland for a Bill of Rights; in a further bilateral agreement, the 2003 Joint Declaration, the UK state again committed introducing the necessary legislation into Westminster for a Bill of Rights giving effect to rights supplementary to the ECHR reflecting the particular circumstances of Northern Ireland; the taking forward of this commitment is still awaited;
- In contrast to the origins of the UK process the development of proposed content for a Northern Ireland Bill of Rights followed a rights-based approach with the debate influenced from the ‘bottom up’ by rights-holders themselves; the methodology involved examination as to what protections were needed to prevent breaches of civil, political, social, economic and cultural rights particular to the Northern Ireland situation and identify the rights important in moving from conflict to a more peaceful society;

- There is a further risk that the UK debate, to the extent it may seek to promote a more 'British' interpretation of rights, will not only be challenging in the British-Irish context but could also risk undermining the broader universality of human rights across Europe.

## **Background**

The creation of a Commission on a Bill of Rights was announced by the UK Coalition government in March 2011 with a remit to investigate the creation of a UK Bill of Rights and to provide advice on reform of the European Court of Human Rights. The present discussion paper 'Do we need a UK Bill of Rights?' issued for consultation between August and November 2011 focuses on the former of these two questions.

CAJ welcomes the opportunity to respond to the consultation document and was also pleased to engage with a delegation from the UK Commission during their visit to Belfast on the 9 November 2011. This submission will outline the context of the treaty-based commitment to a Bill of Rights for Northern Ireland, the current status of the Northern Ireland process and the challenges of the interface between the UK and Northern Ireland processes. This submission will also seek to respond to a number of questions which arose during the visit of the UK Commission.

## **CAJ and Bills of Rights**

CAJ has been an advocate of a Bill of Rights for Northern Ireland since our inception. Since that time, our specific work on a Bill of Rights has included capacity-building and education at a local community level, facilitating dialogue, developing a network of organisations from across the community dedicated to a strong and inclusive Bill of Rights, hosting conferences and events with eminent international speakers, and making contributions to consultations and policy debates. CAJ was also appointed to and participated in the Bill of Rights Forum established further to the 2006 bilateral (UK-Ireland) St Andrews Agreement. This history and experience leaves us well placed to provide comment on the present processes.

CAJ's commitment to a Bill of Rights has been one of its contributions to seeking an end to the conflict. It has increasingly been recognised that infringing rights feeds and prolongs conflict. The lesson of past decades is that it is only when states abide by the rule of law and respect people's rights that a safe and secure society can flourish. The centrality of human rights was one of the key reasons the Belfast /Good Friday Agreement (hereafter 'the Agreement') was possible, and why it has been successful in maintaining peace notwithstanding periodic uncertainty over the political institutions.

## **The 1998 Agreement and human rights**

As merely one example of the spirit of transformation that suffuses the Agreement and the role of rights within that transformation, it is worth quoting the declaration of support at the start of the Agreement:

The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their

families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.<sup>1</sup>

That human rights were at the heart of the Agreement is beyond question. A cursory search of the text of the Agreement shows that the words ‘right’ or ‘rights’ appears 61 times. As noted by the then UN High Commissioner for Human Rights, Mary Robinson:

...the Good Friday Agreement is conspicuous by the centrality it gives to equality and human rights concerns. Few documents emerging from divisive and difficult political negotiations have so well captured the importance of fairness in creating right relationships...equality and human rights have now moved from the margins into the mainstream of Northern Ireland life.<sup>2</sup>

The commitment in the Agreement to enshrining in Westminster legislation a Bill of Rights for Northern Ireland should be seen in this general context. It is not an incidental or optional extra. It is part of what brought peace to Northern Ireland; the guarantee that everyone can feel their rights will be respected and adhered to in the future.

### **The 1998 Agreement and the incorporation of the ECHR**

The Agreement is an international treaty<sup>3</sup> and in addition to providing for a separate Bill of Rights for Northern Ireland also commits the UK to incorporate the European Convention on Human Rights (ECHR) in Northern Ireland:

There will be safeguards...including...the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, *which neither the Assembly nor public bodies can infringe...* ...arrangements to provide that *key decisions and legislation* are proofed to ensure that they *do not infringe the ECHR...*

*The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to: ...the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void;*<sup>4</sup>

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<sup>1</sup> Multi-Party Agreement, Declaration of Support, Paragraph 2.

<sup>2</sup> Mary Robinson, UN High Commissioner for Human Rights ‘Equality and Human Rights-Their Role in Peace Building’, Speech at the Stormont Hotel, Belfast, Dec. 2, 1998.

<sup>3</sup> Treaty Series No. 50 (2000) Cm 4705; the Agreement consisted of the British-Irish Agreement between the two sovereign states and the Multi-Party Agreement between participant political parties. The British-Irish Agreement (Article 2) affirms the solemn commitment of the UK government to support and implement the sections of the Multi-Party Agreement which correspond to it.

<sup>4</sup> Strand 1 of the Agreement paragraphs 5(b-c) and 26(a) respectively, emphasis added.

The British Government will complete *incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR)*, with *direct access to the courts*, and *remedies for breach* of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.<sup>5</sup>

The commitments were given effect in domestic law through both the Human Rights Act 1998 and the relevant provisions of the devolution statute (Northern Ireland Act 1998). During the recent visit one question posed by a member of the Commission was whether the Human Rights Act and devolution statutes already constituted a Bill of Rights for the UK. In addition to emphasising the general principle of no regression in human rights protections CAJ would highlight that the status quo in effect constitutes a constitutional ‘bottom line’ for Northern Ireland. Any regression through changes to either the Human Rights or Northern Ireland Acts which did not meet the above commitments in the Agreement would be incompatible with an international treaty.

### **The Northern Ireland Bill of Rights Process**

The formulation of the Northern Ireland Bill of Rights in the Agreement is ‘ECHR +’:

The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be: the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.<sup>6</sup>

While the formulation around the Bill of Rights in the Agreement is complex, there is no doubt that a Bill of Rights for Northern Ireland was the objective. This was further emphasised in a further international agreement, the 2003 UK-Ireland Joint Declaration, which stated that once the Human Rights Commission had delivered its advice on the content of a Northern Ireland Bill of Rights:

...the British Government is committed to bringing forward legislation at Westminster where required to give effect to rights supplementary to the ECHR to reflect the particular circumstances of Northern Ireland.<sup>7</sup>

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<sup>5</sup> Rights, Safeguards and equality of opportunity, paragraph 2, emphasis added.

<sup>6</sup> Rights, Safeguards and equality of opportunity, paragraph 4.

<sup>7</sup> Joint Declaration by the British and Irish governments, April 2003, Annex 3, paragraph 2.

Another international agreement, the St Andrews Agreement in 2006, contained a commitment to progressing a Bill of Rights in the form of the Bill of Rights Forum. This was convened and delivered its final report to the Northern Ireland Human Rights Commission (NIHRC) in March 2008. On December 10<sup>th</sup> 2008 the NIHRC submitted its advice on a Bill of Rights for Northern Ireland to the Secretary of State. On November 30<sup>th</sup> 2009, the Northern Ireland Office (NIO) issued a consultation document, *A Bill of Rights for Northern Ireland: Next Steps*, which was to take into consideration the commitments made under the Agreement and the NIHRC advice. While the NIO consultation document fell far short of the great hopes that CAJ and over 36,000 others who responded to the consultation document had for a Bill of Rights for Northern Ireland, the process is still ongoing. The NIO published responses to the consultation document in December 2010 (noting considerable support from human rights and community groups for a Bill of Rights similar to that put forward by the NIHRC) but is yet to make clear how it is to take forward the process for a Northern Ireland Bill of Rights.<sup>8</sup>

In addition to the Agreement being endorsed by referendum public opinion polls have consistently demonstrated high levels of support for a Bill of Rights in Northern Ireland in Protestant and Catholic communities and beyond.<sup>9</sup> It is the case differences exist between political parties in Northern Ireland as to the content of a Bill of Rights and how the process should be taken forward. However this should not provide a basis for the NIO to stall progress in discharging the UK's commitment. The Agreement was a package containing many elements different political parties had divergent views upon, and its individual component parts were not subject to consensus requirements on all sides.

In 2009 a UN treaty body called for the enactment of the Bill of Rights for Northern Ireland 'without delay.'<sup>10</sup> CAJ believes it would be a mistake for the UK government to await the next crisis in the peace/political process in Northern Ireland to discharge its commitments to take forward a Bill of Rights provided for in the 1998 Agreement.

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<sup>8</sup> Publication of Responses to Consultation: 'A Bill of Rights for Northern Ireland: Next Steps'<http://www.nio.gov.uk/publication-of-responses-to-consultation-a-bill-of-rights-for-northern-ireland-next-steps/media-detail.htm?newsID=17426>

<sup>9</sup> A Market Research Northern Ireland opinion survey published by the Northern Ireland Human Rights Commission in 2004 found that a large majority of respondents (87 per cent) would support a proposed Bill of Rights. Both, Protestants (87 per cent) and Catholics (85 per cent) were in agreement with the concept of having a Bill of Rights that reflects the particular circumstances of Northern Ireland (*Progressing a Bill of Rights for Northern Ireland: An Update*, Belfast: 2004); in July 2011 a poll of 1000 persons conducted by Ipsos MORI found 80%+ of respondents thought a Bill of Rights for Northern Ireland was important among supporters of all the main political parties (SF 88%, SDLP 86%, DUP 84%, UUP 83%, Alliance 81%) (in Human Rights Consortium 'Bill of Rights for Northern Ireland, Overdue' Belfast, 2011, page 3).

<sup>10</sup> UN Committee on Economic, Social and Cultural Rights, (Concluding observations on the UK) 12 June 2009, UN DocE/C.12/GBR/CO/5, paragraph 10.



This can be done in advance of the more long term UK process. CAJ urges the UK Commission to adopt this view.

### **The Northern Ireland and the UK Bill of Rights process**

The context of the debate in Northern Ireland has been about a specific Bill of Rights which builds on the ECHR and reflects rights particular to the circumstances of the jurisdiction. This mandate came from an Agreement which was drawn up in an effort to address the legacy of the conflict and build a stable and peaceful future. The conflict was particular to Northern Ireland, its legacy has been and continues to be widely felt in Northern Ireland, and as such has little if any resonance at a ‘national’ level. A Bill of Rights is one of the final parts of the Agreement’s jigsaw; it ensures that rights currently enjoyed cannot be taken away at the whim of a government. It is intended to ensure, in a divided society, that whoever rules this disputed ground cannot rule without respecting the rights of everyone who lives here. It also ensures that those who are not or do not identify primarily as part of the two main communities will have their rights respected also. This is a very different premise from the issues involved in a debate on a UK Bill of Rights.

In contrast to the origins of the UK process the development of proposed content for a Northern Ireland Bill of Rights followed a rights-based approach with the debate influenced from the ‘bottom up’ by rights-holders themselves. The methodology here involved analysis as to what protections were needed to prevent breaches of civil, political, social, economic and cultural rights particular to the Northern Ireland situation and identify the rights important in moving from conflict to a more peaceful society. The UK debates have had a very different genesis - motivated by differing political agendas around constitution-building, making rights more British, the linking of rights to responsibilities, and even the proposed weakening of the ECHR. The debate in Britain has been top down and led by political parties who have had no electoral base or mandate in Northern Ireland. The starting point has not been to assess deficiencies in the UKs human rights record and assess which additional protections would serve to remedy them. In short, unlike the specific mandate given to the Northern Ireland process, the potential for the present UK process to strengthen rights protections is limited and the risks of retrogression significant.

### **‘National’ interpretations of Rights and the UK Process**

CAJ is concerned that there is a risk that the ‘national’ debate, to the extent it may seek to promote a more ‘British’ interpretation of rights, will not only be challenging in the British-Irish context but could also risk undermining the broader universality of human rights at home and abroad. In 2007 the previous governments’ proposals for a ‘British Bill of Rights and Duties’ were embedded within a discourse relating to British national identity, the development of common British values and the

development of a British statement of values.<sup>11</sup> In a similar vein the origins and role of the present UK Commission derive from the UK Coalition's Programme for Government which states:

We will establish a Commission to investigate the creation of a **British** Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in **British law**, and protects and extends **British liberties**...<sup>12</sup>

By contrast the 1998 Agreement in Northern Ireland (whose Bill of Rights was directly concerned with "*rights to reflect the principles of mutual respect for the identity and ethos of both main communities and parity of esteem*") was a treaty between two states which, in addition to reaffirming the rights of all, recognizes the plurality of British-Irish nationality in Northern Ireland (both in terms of citizenship and national identity)<sup>13</sup> and also enshrined the principle of impartial governance of the sovereign power on behalf of all the people (British, Irish or otherwise).<sup>14</sup> The focus of the UK debate in alluding only to the British 'nation' or British rights rather than the Irish 'nation' is therefore problematic within the Northern Ireland context where a large percentage of the population do not identify with or have any particular affiliation or connection to 'Britishness'. Furthermore, in general, any approach which risks a move away from the universally recognised 'human rights' for all towards such rights being linked or restricted to 'citizens rights' is particularly problematic. Many persons within UK jurisdiction are not British (or Irish) yet are no less entitled to human rights.

The most serious concern however regarding any initiative to seek a greater 'British' interpretation of rights, or decouple interpretation of rights from Strasbourg jurisprudence, would be the serious impact this could have on the universality of human rights application across Europe. Any attempt to open up and extend the existing margin of appreciation doctrine to provide for more 'national'

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<sup>11</sup> The Governance of Britain Green Paper, Cm 7170 (July 2007), chapter 4.

<sup>12</sup> The Coalition: our programme for government, 3. *Civil Liberties*, p. 11, HM Government (emphasis added). Notably the terms of reference for the Commission make reference to the 'UK' rather than 'Britain' (the latter of which is open to greater interpretation). It is not immediately apparent if this new choice of words is by accident or design.

<sup>13</sup> [both states]...recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland (British-Irish Agreement Article 1(vi)).

<sup>14</sup> ...the power of the sovereign government with jurisdiction [in Northern Ireland] shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities (the British-Irish Agreement, Article 1(v)).

interpretations of Convention rights could be seized on by Council of Europe member states with even worse human rights records than the UK and used to justify culturally specific interpretations of rights. An initiative at reform to this end could make the UK responsible for a lowering of human rights protections well beyond its own jurisdiction and is to be avoided.

### **Moving Forward**

CAJ hopes that the above analysis has assisted the Commission in their endeavor to understand implications of trying to unpack the idea of a UK wide Bill of Rights when a parallel process already exists in Northern Ireland with a very different genesis.

In summary CAJ urges the Commission to:

- Be clear that there is a separate Bill of Rights process for Northern Ireland, the mandate for which is set out in an international treaty, which predates and can be concluded before the present UK process;
- Be clear that the 1998 Agreement also explicitly guarantees the incorporation of the European Convention on Human Rights into Northern Ireland law;
- Caution against the risks of greater 'national' interpretations of rights;

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