

How many of the current negotiation issues could be dealt with by the NI Bill of Rights? (S461)

CAJ Discussion Note March 2017

Next year will mark 20 years since the Belfast/Good Friday Agreement (GFA) mandated an ECHR+¹ Bill of Rights to reflect the ‘particular circumstances of Northern Ireland’ and 10 years since the Human Rights Commission delivered its final GFA-mandated advice as to its content.²

The NI Bill of Rights remains one of the most significant pieces of unfinished business of the Agreements; what this note explores is the range of some of the other outstanding and new crisis issues that could be dealt with through the vehicle of the Bill of Rights. Such a process could take the Bill of Rights as it stands in the Advice given by the Human Rights Commission or also consider how this advice might be updated and augmented to reflect changed circumstances.

- **Impact of BREXIT – a new ‘particular circumstance’**

The particular circumstances of Northern Ireland have been changed by the EU referendum. UK and Irish EU membership, and the exercise of European treaty rights, were a given at the time of the GFA. If this had not been the case matters such as the freedom of movement and concurrent entitlements to reside, work, study etc throughout the Common Travel Area would have been core negotiation subjects at the time. One area where the existing Bill of Rights would have provided significant protections in the context of BREXIT was in the right enshrining the GFA provisions on British and Irish citizenship. The Commission recommended that the Bill of Rights would ensure:

The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland [emphasis added, p41 NIHRC Advice].

¹ The GFA commits to the incorporation of the European Convention on Human Rights (ECHR) into Northern Ireland law; the Bill of Rights is to consist of the existing ECHR rights plus rights supplementary to the ECHR.

² The process was derailed by the UK Government’s insertion of a pre-condition outside the terms of the GFA of ‘political consensus’ as to its content, alongside conflation with the defunct ‘British Bill of Rights’ debate and bizarre assertions that socio-economic rights cannot be justiciable, despite such practice in other jurisdictions. For a narrative on the process see ‘*Political Capacity Building: Advancing a Bill of Rights for Northern Ireland*’ Anne Smith, Monica McWilliams and Priyamvada, Yarnell (Ulster University, TJI 2014): https://www.ulster.ac.uk/data/assets/pdf_file/0005/58271/Advancing_a BOR NI.pdf

A ‘hard’ BREXIT without any special dispensation for NI by definition already offends this provision given persons holding only British citizenship will no longer be able to exercise EU-treaty rights, to for example travel and work elsewhere in the EU. Going forward, this provision of the Bill of Rights would prevent the post-BREXIT legal framework obliging the ‘people of Northern Ireland’ to have to rely on being British citizens to access entitlements in NI, once entitlement provisions for Irish and other EU nationals founded in treaty-based rights cease to have effect. Essentially this provision would require the replication and sustainment of such entitlements within the legal framework insofar as they relate to Irish and British citizens.³

A second example of where Bill of Rights could address a pressing BREXIT issue relates to rights of freedom of movement within the Common Travel Area (CTA). At present the pre-BREXIT Human Rights Commission advice does not address this matter. Rather it is limited to seeking incorporation of a variation on an ECHR protocol (4th Protocol, Article 2) providing for freedom to choose a place of residence and freedom of movement within the UK. Whilst the latter provision may have assisted in mitigating against measures (as were last proposed in 2008, but defeated in the House of Lords) to introduce internal immigration controls between NI and GB, it would not extend to affording freedom of movement within the CTA. However such a measure, essentially underpinning the existing provisions in UK immigration law preventing passport controls within the CTA, could be incorporated within the Bill of Rights in the post-Brexit context. The Commission’s advice could be augmented to:

- Add a provision guaranteeing freedom of movement within the Common Travel Area, providing that journeys within the CTA cannot be subject to passport control;

Incorporation in the Bill of Rights could of course only reflect practice north of the border; reciprocal provisions on the southern side would need to be provided for in the Irish legal framework. These types of issues could be reflected in principle in the (non-binding) Charter of Rights for the Island of Ireland, which was also to be a product of the GFA.

- **Flags and identity**

A framework to deal with the issues currently being dealt with by the Stormont House Agreement mandated *Commission on Flags, Identity, Culture & Tradition* in relation to national identity expressions by public authorities was already included within the GFA as one of two rights explicitly set out for consideration in the Bill of Rights. The GFA provided for the Bill of Rights to consider “*the formulation of a general obligation on*

³ There are related national identity provisions in the GFA and accordingly Bill of Rights providing for rights to identify as British or Irish or both, which also makes it incompatible with the GFA to require even a dual Irish-British citizen to rely on their British citizenship alone to access entitlements in NI, a matter recognised by the UK Home Office in their (aborted) attempt to introduce identity cards.

government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland". The Commission accordingly recommended that this was incorporated into the Bill of Rights as a statutory duty with a limitation clause to ensure the provision is read compatibly with other rights, including those of minority ethnic communities and other protected groups as follows:

Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.

- **Equality legislation and duties**

The second provision the GFA explicitly mandated consideration of within the Bill of Rights related to anti-discrimination legislation on a broad range of grounds seeking "*a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.*"

At present NI anti-discrimination legislation remains fragmented and piecemeal, with significant gaps and threats in existing protections. This includes the blockage on introducing age discrimination protections in relation to goods facilities and services (GFS), and the failed attempt to legalise discrimination in GFS on grounds of sexual orientation when undertaken for reasons of 'religious conscience'. A recent Council of Europe expert report highlighted gaps in racial equality legislation, the lack of a proper definition of sectarianism as a form of racism, and the need to remedy the problems of the existing 'good relations' duty being interpreted in a manner that conflicts with equality and rights duties.⁴ Such matters could be dealt with in legislation further to the Bill of Rights.⁵

Marriage equality

The Bill of Rights could also deal with the issue of LGB marriage equality. The 2008 advice provided for a right to enter into a civil partnership, which reflected the prevailing legal framework at the time; this could be updated to provide for marriage equality.

⁴ Report of the Advisory Committee on the Framework Convention on National Minorities, published March 2017, see link and summary on Rights NI blog at: <http://rightsni.org/2017/03/council-of-europe-minority-rights-report-time-to-move-on-irish-language-act-and-end-abuse-of-the-good-relations-duty/>

⁵ The Bill of Rights advice provides for a 'good relations' type statutory duty formulated as follows "Public authorities must encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons' race, ethnicity, language, religion or political opinion."

The right of women to full and equal political participation

The GFA affirms the right of women to full and equal political participation but no mechanisms have been introduced to progress this goal. On the contrary the implementation of the framework of UN Security Council Resolution 1325, which would have provided a framework designed for post-conflict societies has been blocked in NI. The Bill of Rights was to have incorporated the following statutory duty to progress this GFA goal:

Public authorities must take effective measures to facilitate the full and equal participation of women in political and public life, including, where appropriate, the use of temporary special measures [NIHRC, p36].

Conflict-related convictions

The Fresh Start Agreement tackling paramilitarism action plan, and associated reports, have recommended removing exemptions in the current anti-discrimination law framework that essentially permit discrimination against persons with conflict-related convictions. The Bill of Rights was to deal with this issue – the Commission’s advice providing for ‘irrelevant criminal record’ to be explicitly added as a non-discrimination ground.

Language rights

Whilst the main Agreement-based provisions are the duty for an Irish Language Act contained in the St Andrews Agreement, and the two strategies for Irish and Ulster Scots legislated for (but unimplemented) in the same instrument, there were also provisions in the Bill of Rights. This included provisions not to be discriminated against on grounds of language. Also recommended was a duty to act compatibly with the European Charter for Regional or Minority Languages, which would make the Charter’s provisions, which are often ignored, into a legally binding minimum floor for public authorities.

Non-discrimination and the allocation of resources on the basis of objective need

The (unimplemented) duty to adopt an anti-poverty strategy on the basis of objective need was legislated for further to the St Andrews Agreement. More broadly, the non-discrimination and equalities framework of the Bill of Rights, coupled with the inclusion in the Bill of Rights of a range of socio-economic rights (e.g. rights to housing, social security etc), would provide a framework to assist in countering abuses of power in the allocation of resources in the NI context.

As the Bill of Rights would be binding on Westminster as well as Stormont measures, its provisions also provide a framework to challenge measures such as the new ‘two child rule’ in child benefit, given its discriminatory impact in NI and the Institute of Fiscal Studies’ view that the measure will become a major driver of child poverty here.

- **Legacy of the NI ‘Troubles’**

The Bill of Rights was to have included a provision, supplementary to Article 2 ECHR (Right to Life), to explicitly ensure effective investigations of conflict-related deaths and that all mechanisms established to this end be fully compliant with human rights standards. This would help prevent the ongoing obstruction of effective investigations. The provision was to have read:

Legislation must be enacted to ensure that all violations of the right to life relating to the conflict in Northern Ireland are effectively investigated. Any mechanisms established must be fully in compliance with international human rights law (NIHRC, p20).

The Bill of Rights also was to include measures to protect the rights of victims of the conflict, including rights to redress and services as follows:

Legislation must be enacted to recognise all the victims of the Northern Ireland conflict and to ensure that their rights are protected. These rights include rights to redress and to appropriate material, medical, psychological and social assistance. (NIHRC, p43)

These areas provide some examples of where the outstanding commitment for the Bill of Rights can be harnessed as a vehicle to address a range of pressing negotiation issues. Recently the Assembly has moved towards the important step of making the Ministerial Code more enforceable. The Bill of Rights would entrench a framework providing a range of safeguards against abuses of power; without it compliance with the letter and spirit of past Agreements can clearly be sidestepped.

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