



Submission to the Ad Hoc Committee on a Bill of Rights from the GCRF Socioeconomic rights and transition research team

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Gender, Justice and Security Hub

Submission to the Ad Hoc Committee on a Bill of Rights

May 2021

Socioeconomic rights and transition, Research Team

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Summary

The Good Friday or Belfast Agreement 1998 envisaged reforms that would contribute to wider social and economic transformation, among these a Bill of Rights. Many of these reforms have not been delivered and without them society experiences continued economic, social and political problems. The Bill of Rights is an opportunity for transformative change and we highlight especially the need for provisions on economic, social and cultural rights; participation; equality; women's participation in public life; effective implementation.

¹ Part of the GCRF Research Hub on Gender, Justice and Security. Full details of the Hub are at <https://thegenderhub.com/>

Introduction

This submission is made by the cross-University Socioeconomic rights and transition research team from a project funded under the Global Challenges Research Fund and part of the LSE-led Research Hub on Gender, Justice and Security.

As part of this research project, the team conducted research into the potential for transformative social and economic change using the mechanisms envisaged in the Good Friday or Belfast Agreement 1998. Research involved close textual and legal analysis of the Agreement as well as grassroots focused research by conducting semi-structured interviews with diverse representatives of civil society.

This submission focuses on some key messages from our research findings. Many of the organisations involved in the interviews have submitted their own evidence to the Ad Hoc Committee and so here we focus on some key messages, specifically around the need for a Bill of Rights and then some issues about the content of a Bill of Rights.

The need for a Bill of Rights

We conclude that a Bill of Rights is needed in Northern Ireland to address the underpinning causes of the conflict and social problems in this jurisdiction. Among the important causes of the conflict were violations of a wide range of civil, cultural, economic, political and social rights. These included structural problems and inequalities with housing rights, employment rights and cultural rights.

The conflict included and compounded many violations of different rights including economic, social and cultural rights, as well as violations of civil and political rights. Moreover, the conflict's legacy has included sustained collective and individual problems with physical and mental health. The conflict and the way it was presented, with an emphasis on direct violence and the importance of the traditional divide in this society, contributed to other human rights and equality issues being side-lined. Thus, for example a focus on the two main communities often meant that the interests of other groups and individuals (e.g., racial and ethnic minorities, LGBT+ persons, etc) being overlooked. Only in 1997 for example did Northern Ireland adopt legislation banning race discrimination.

The Agreement and wider peace process envisaged a Bill of Rights and a range of other human rights and equality institutions and reforms, as well as measures on civil society participation, women's participation, the Irish language and economic development. Subsequent agreements have included more commitments relevant to these areas e.g., a commitment to an anti-poverty strategy, to an Irish Language Act, and later more wide-ranging language reforms.

As argued by others,² there has not been a full implementation of all the different elements of the Agreement, e.g., no Bill of Rights, no Charter of Rights, disappearance of the Civic Forum, little progress on women's participation, no anti-poverty strategy, no language rights.

This is not just a matter of an audit of unfulfilled promises, important as that is. The failure to implement these reforms also means that there is no legal structure and institutional framework to tackle many deep-rooted problems and rights violations. The failure to address these problems contributes to the ongoing reality of producing conditions conducive to ongoing violence as evidenced sporadically in violent protests. While the catalyst for protest and violence has often been political and cultural (flags, concerns about Protocol checks), those protests and violence frequently originate in communities experiencing greater vulnerability to social and economic exclusion and arguably reflect wider concerns about being forgotten about, about not seeing any 'peace dividend' in concrete terms.

A Bill of Rights has strong cross-community potential. This is especially true for the types of interests protected by social and economic rights: adequate housing, access to health care, access to employment and education are rights that appeal across the traditional divide in this jurisdiction and also appeal to many who do not identify with the main traditions.

The failure to implement effectively the full range of reforms envisaged in the 1998 Agreement and later agreements has affected the top-level political institutions. While devolution has been an important achievement of the Agreement, the devolved institutions have not been consistently operational. And when operational they have not always been a model of successful delivery of public services. As the Human Rights Consortium and others have argued, this may down partly to the unbalanced implementation of the Agreement – we have power-sharing which checks power but no Bill of Rights that could act as an incentive or at least guidelines for the exercise of power. Of even greater concern is the deployment or threat of deployment of the petition of concern as a mechanism to block human rights and equality reforms. As the Committee on the Administration of Justice³ and others have argued, this is far removed from the original purpose and wording of the provisions of the Agreement. The courts have had to conclude that when the petition of concern is deployed to stymie the majority will of the Assembly and block measures to enhance sexual orientation equality (equal marriage), then the courts must exercise more intense scrutiny of the law.⁴

The situation has also been complicated by the UK's decision to exit the European Union (Brexit).⁵ What progress that has been achieved in relation to equality law in

² For instance, *Written Evidence to the NI Assembly Ad-Hoc Committee on the Bill of Rights from the Equality Coalition*, Co-Conveners Equality Coalition, October 2020.

³ Profs O'Connell and Ní Aoláin are members of the CAJ Executive.

⁴ *Close's Application for Judicial Review* [2020] NICA 20 (7 April 2020).

⁵ *BrexitLawNI Brexit and Socio-economic Rights Policy Report* (2018) and *BrexitLawNI Human Rights and Equality Policy Report* (2018) both available at <https://brexitlawni.org/project-outputs/>; Anne

this jurisdiction for the last twenty years has often stemmed from the need to implement relevant EU equality law. The Ireland/Northern Ireland Protocol offers some protection for EU-related rights, especially specified anti-discrimination laws, and protects those in a dynamic manner. At the same time the scope of protection for human rights and equality offered by the Protocol is open to interpretation.⁶

The COVID 19 Pandemic underscores the need for transformative human rights and equality reform. The pandemic has harmed everyone's enjoyment of rights and liberties but has highlighted and reaffirmed existing structural inequalities in society. The pandemic has differentially affected women, carers, racial and ethnic minorities, persons with disabilities, older persons, those experiencing poverty and deprivation, and other groups.⁷ A crisis requires a societal response and that societal response must deliver for everyone.

Provisions to include in a Bill of Rights

Preamble: Equality

Numerous research participants stressed the need for equality rights. This reflected a concern that the history of this jurisdiction was marked by significant persistent discrimination and that this was instrumental in contributing to the causes of the conflict. Our research participants emphasised different forms of inequality and discrimination.⁸ As suggested in the recent Human Rights Consortium workshop with the Committee, equality should also feature if there is a Preamble which lists important values.

Preamble: Participation

The Agreement offered a number of reforms that seemed to herald a more participatory system of governance, e.g., the statutory equality duty later embodied in section 75, the Civic Forum. These have not lived up to their promise. While section 75 has undoubtedly had some successes, there has been widespread concern that it has become overly focused on procedure and is often criticised as not effectively enforceable; the Civic Forum quickly disappeared. As well as being a value in the Agreement, participation is also central to human rights based

Smith, Monica McWilliams and Priyamvada Yarnell 'Does Every Cloud Have a Silver Lining: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights' (2016) 40 Fordham Int'l LJ 79.

⁶ See also *Written Evidence from Committee on the Administration of Justice (CAJ) to the Ad Hoc Committee on a Bill of Rights for Northern Ireland*, November 2020.

⁷ See the Covid Conversations videos organised by the Equality Coalition, Human Rights Consortium and Transitional Justice Institute available at <https://caj.org.uk/2021/04/29/covid-conversations-human-rights-in-a-pandemic/>.

⁸ This aspect was also included by NIC-ICTU in its *Briefing Note for NIC-ICTU Evidence session with Assembly Ad Hoc Committee on a Bill of Rights*, March 2021.

approaches to policy development and implementation. If there is a Preamble which lists specific values, participation should be one of them.⁹

Rights: Economic, social and cultural rights

As a basic principle, any Bill of Rights should give protection to the full range of civil, cultural, economic, political and social rights but we would particularly highlight the need to protect economic, social and cultural rights.

In some ways the Agreement and even more so the subsequent implementation of the Agreement has been unbalanced in rights terms. Whilst there are serious problems remaining in terms of civil and political rights, there is at least a clear legal framework for most civil and political rights in the Human Rights Act 1998. This is not the case for economic, social and cultural rights. These rights – adequate housing, adequate standard of living, work, education, health, language rights – are essential to address both the root causes and the consequences of the conflict, as well as being fundamental to recovery after the pandemic. There are also disproportionate impacts on women in society in socio-economic terms, and they are rights which are relevant to people on the ground living in deprived communities across the entire of society.

Expert bodies, scholars and civil society have provided a better understanding of the content of these rights and how to make them enforceable; several different models have already been drawn to the attention of the Committee.¹⁰

The Committee on Economic Social and Cultural Rights and the Expert Committee of the Charter on Regional and Minority Languages provides considerable guidance on rights in treaties ratified by the UK such as adequate housing, adequate standard of living, work, education, health, language rights. Whilst this has not been ratified, the Revised European Social Charter includes a ‘right to protection against poverty and social exclusion’ which would provide further support for anti-poverty strategy and initiatives.

Rights: Equality

Just as important, the rights in the Bill should include a comprehensive equality right that supports positive action to achieve substantive equality. Such a right should be broadly worded to ensure it covers intersectional discrimination, direct and indirect

⁹ See *Written Evidence to the NI Assembly Ad-Hoc Committee on the Bill of Rights from the Equality Coalition Co-Conveners*, Co-Conveners Equality Coalition, October 2020.

¹⁰ Anne Smith, Monica McWilliams and Priyamvada Yarnell *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* (2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610026; Human Rights Consortium and QUB Human Rights Centre *Economic and Social Rights in Northern Ireland: Models of Enforceability* (2020) <http://www.humanrightsconsortium.org/wp-content/uploads/2020/11/ESR-in-NI-Models-of-Enforceability-Report.pdf>

discrimination and forms of discrimination that may not be obvious or that may emerge in the future. One of the research team has also sent in a separate response outlining what a right to equality in a Bill of Rights might look like.¹¹

Rights: Participation

As well as a value, participation is a right that is integral to many human rights treaties. The Human Rights Act includes as a Convention right Article 3 of the First Protocol to the ECHR but this is a very limited participation right. The International Covenant on Civil and Political Rights, Article 25 has a much more comprehensive right to participate in public affairs, while the Convention on the Rights of Persons with Disabilities has several provisions on participation (Articles 29-30). The Convention on the Rights of the Child also has a provision on voice (Article 12).¹²

Rights: Women's participation in public life

Women's rights as protected by the Agreement have lacked consistent implementation. While there have been recent high-profile appointments of e.g., women High Court judges and civil service positions, these developments have been very late in this jurisdiction and provide only a start to a broader need for diverse representation of women in leadership roles in Northern Ireland. Furthermore, it is apparent that women's participation in public life is frequently overlooked when creating official bodies. A strong commitment to gender equality and to supporting effective measures on women's participation in public life should be included in a Bill of Rights.¹³

Effective Implementation

Consideration should be given to how the rights in the Bill of Rights will be realised for everyone. Judicial protection is essential, but it is also important that the political branches of government and public administration see their role as being driven by a rights agenda. Implementing the Bill of Rights should include comprehensive training for instance for civil servants on the full spectrum of rights protected, as well as plans to align NI Executive departmental activities, outputs and activities to the realisation of an integral approach of human rights in the framework of a comprehensive participation system. This could include for instance building human rights analysis

¹¹ Rory O'Connell and Anne Smith, Submission to the Ad Hoc Bill of Rights Committee on the right to equality and non-discrimination available at <https://pure.ulster.ac.uk/en/publications/submission-to-the-ad-hoc-bill-of-rights-committee-on-the-right-to>

¹² The inclusion of children's participation under an inclusive human rights perspective has already been drawn to the attention of the Committee in *Submission to the Ad-Hoc Committee on a Bill of Rights by the Children's Law Centre*, 2021.

¹³ See Women's Policy Group WPG *Response to Ad Hoc Committee on a Bill of Rights Consultation*, February 2021.

into budgetary processes which would involve consultation and evaluation process with concerned social actors.¹⁴

Conclusion

For most of the Twentieth Century, this society experienced profound challenges including discrimination and segregation that culminated in a decades-long conflict. The Agreement that sought to end that conflict envisaged a Bill of Rights for Northern Ireland as one of many promised human rights and equality reforms. The Agreement provided the basis for transformational change in this society but 23 years later it has not delivered. The failure to deliver on a Bill of Rights, despite the extraordinary work carried out by civil society, the Bill of Rights Forum, the NI Human Rights Commission and others, is part of that record of non-delivery.¹⁵ As we emerge from a global pandemic that has claimed thousands of lives and once more exposed deep structural inequalities in our society, there is an opportunity to legislate for rights and remedies that will enable transformational change to create a fairer future.

¹⁴ On the serious gender inequalities of the austerity and welfare reform policies of the last decade see Women's Regional Consortium *Response to: Consultation on the creation of a Bill of Rights for Northern Ireland* (2021) <https://womensregionalconsortiumni.org.uk/wp-content/uploads/2021/04/February-2021-Response-to-Consultation-on-the-creation-of-a-Bill-of-Rights-for-Northern-Ireland.-Issued-by-Ad-Hoc-Committee-on-a-Bill-of-Rights.pdf>

¹⁵ Anne Smith and Colin Harvey *Where Next For A Bill of Rights For Northern Ireland?* Queen's University of Belfast; Ulster University; Joseph Rowntree, 2018) <https://pure.ulster.ac.uk/en/publications/where-next-for-a-bill-of-rights-for-northern-ireland-4>