

A New Beginning for Human Rights Protection in Northern Ireland?

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The Northern Ireland Human Rights Commission submitted its final advice on a bill of rights to government on 10 December 2008. This marked the completion of a significant phase in a process that was formally launched in March 2000. The delay in submission is some indication of the problems experienced and – for those contemplating their own bill of rights process - shows how long it can take to generate proposals. This article outlines the final advice submitted and elements of the process. The principal argument is that the process and the advice deserve wider discussion and debate. The Northern Ireland experience will be instructive for any divided society seeking to develop a bill of rights (supplementing existing human rights protections), because it demonstrates the difficulties involved in attempting to build consensus in such contexts and therefore ground any new instrument effectively. It remains to be seen how the process will now be taken forward by government and whether the anticipated new beginning to human rights protection in Northern Ireland will be realised.

Introduction

On 10 December 2008 the Northern Ireland Human Rights Commission submitted advice to the Secretary of State for Northern Ireland on a proposed bill of rights.¹ The advice fulfilled a mandate given to the Commission by the Belfast (Good Friday) Agreement² and was in accordance with the Northern Ireland Act 1998.³ More specifically, the proposals were in response to a request received in March 1999 from the then Secretary of State, who had written to the Commission inviting it to provide advice of the kind referred to in paragraph 4 of the relevant section of the peace accord.⁴ Since the completion of this task there has been ongoing work to ensure the implementation, through legislation at Westminster, of the recommended rights. There is both support for⁵ and criticism of the recommendations.⁶ Extensive

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¹ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, December 2008). See also *Summary: A Bill of Rights for Northern Ireland – Advice to the Secretary of State* (NIHRC, July 2009).

² *The Agreement: Agreement Reached in the Multi-party Negotiations* (1998) pp 16-17. For an analysis of the nature of the Agreement see John McGarry and Brendan O'Leary, *The Northern Ireland Conflict: Consociational Engagements* (2004, OUP, Oxford) chapter 12. On the role of human rights in the peace process see Colin Harvey and Stephen Livingstone 'Human Rights and the Northern Ireland Peace Process' (1999) 2 *European Human Rights Law Review* 162.

³ Northern Ireland Act 1998, s 69(7)

⁴ Letter from the Secretary of State for Northern Ireland (the late Dr Mo Mowlam) to the Northern Ireland Human Rights Commission (24 March 1999).

⁵ Eight commissioners endorsed the final report (Monica McWilliams, Thomas Duncan, Colin Harvey, Alan Henry, Ann Hope, Colm Larkin, Eamonn O'Neill, and Geraldine Rice). Support has come from the SDLP, Sinn Féin, trade unions and a range of leading human rights NGOs, 'Unionists react angrily to proposed Bill of Rights' *Irish Times* 11 December 2008. See also submissions to inquiry below n. 6.

deliberation on such a constitutionally significant text would be expected in any democracy, but in the often acerbic context of a post-conflict transition, such as the one happening in Northern Ireland, the intensity of debate has a particularly deep political and social resonance. A bill of rights can provide national recognition of values that are viewed as significant precisely because they reflect national endorsement of universal and/or internationally recognised principles. Properly constructed, such national attempts to ground rights more securely and appropriately in particular circumstances have merit. The difficulty that can arise is how to deal with a society where people are fundamentally divided on the issue of national identity itself. The nationally integrative function that a bill of rights might promote confronts the reality of national communities that do not desire integration. This is precisely the challenge in Northern Ireland, where any attempt to promote human rights in ‘nationalist’ terms (British or Irish) is flawed and divisive.

The aim of this article is to detail the context within which discussions on a proposed bill of rights for Northern Ireland are taking place, as well as examine the key components of the advice provided by the Human Rights Commission. Our aim is also to advance a specific argument. We argue that the process followed in developing this advice, and its substantive content, merit a wider assessment. In a society that is deeply divided along ethno-national lines, the Commission has produced a document which pays due regard to the particular circumstances of Northern Ireland and upholds international standards, while also advancing progressive recommendations for the evolution and promotion of human rights protections. The proposed bill is instructive for those involved in broader discussions concerning constitutional reform within the United Kingdom and Ireland and will, in our view, prove informative to those in other jurisdictions considering the adoption of similar approaches. In our view, the Northern Ireland experience demonstrates the challenge of addressing particular societal contexts credibly, while attempting to ensure that international guarantees are promoted and protected. It raises the broader question of how a ‘bill of rights’ can be grounded effectively in any society, and not just those that are deeply divided on ethno-national lines.

The context and background of the debate

Deliberation on a bill of rights for Northern Ireland has taken place over many years. Recommendations were contained in a government white paper on the Northern Ireland Constitution Act 1973,⁷ the Anglo-Irish Agreement 1985⁸ and the Framework

⁶ Criticism has included internal dissent within the Commission by two Commissioners, Daphne Trimble and Jonathan Bell. This internal dissent found external support from the UUP, DUP, Conservative Party and others, see ‘DUP rejects NIHRC Bill of Rights Report’ Press Release, 10 December 2008, ‘UUP gives initial response to Bill of Rights Report’ Press Release, 10 December 2008, ‘Rights Culture out of Control – Tory MP’ *News Letter* 10 January 2009, ‘Tories will not take McWilliams’ path’ *Belfast Telegraph* 27 May 2009 (quoting the views of the Conservative Party leader David Cameron), ‘Human rights proposals infuriate unionists’ *Belfast Telegraph* 10 December 2008. In the 2008-2009 Session, the Northern Ireland Affairs Committee at Westminster conducted a short inquiry on ‘A Human Rights Bill for Northern Ireland’. The Commission gave evidence to the Committee on 16 March 2009 (Thomas Duncan, Colin Harvey, Ann Hope and Virginia McVea). Daphne Trimble was asked to provide written and oral evidence to the inquiry. The oral evidence, and the 23 written submissions (including an intervention from the former Chief Commissioner, Brice Dickson), are available on the Committee’s website. http://www.parliament.uk/parliamentary_committees/northern_ireland_affairs.cfm

⁷ *Northern Ireland Constitutional Proposals* (HMSO, London, 1973), part 4.

Documents 1995.⁹ In 1977, the Standing Advisory Commission on Human Rights (SACHR) produced a report in which it argued for the incorporation of the European Convention on Human Rights (ECHR) as a bill of rights for the United Kingdom as a whole.¹⁰ The report also recognised, however, that the particular circumstances of Northern Ireland could justify additional human rights protections. More specifically, it recommended that:

‘...in the event of the return of devolved legislative and executive functions to a new government in Northern Ireland (either before or after the incorporation of the European Convention into domestic law), it would be desirable for the enabling legislation to include a clear and enforceable charter of rights for Northern Ireland. The guarantees in this charter should be consonant with those which may accompany devolution in other parts of the United Kingdom. This charter of rights could be more comprehensive than the European Convention and should be framed in the light of whatever at the time seem to be the special needs of the people of Northern Ireland.’¹¹

In the years that have followed the SACHR report, the ECHR has been given further effect in domestic law via the Human Rights Act 1998¹² (HRA), and constitutional reform has afforded Scotland, Wales and Northern Ireland devolved self-government.¹³ The advent of the HRA may be appropriately considered, as envisaged by SACHR, within the analytical framework concerning bills of rights in general.¹⁴ It is certainly possible to make the case that the HRA is already a ‘Bill of Rights’, and we acknowledge that such an argument has force. But this does not mean the matter is settled for Northern Ireland purposes nor, as Andrew Clapham argues, that the HRA should necessarily constitute a bill of rights for the United Kingdom.¹⁵ On the contrary, the Lord Chancellor and Secretary of State for Justice, Jack Straw, recently published a Green Paper, *Rights and Responsibilities: developing our constitutional framework*, proposing that public and parliamentary deliberation should address the question of whether the United Kingdom ought to have a bill of rights.¹⁶ The issue

⁸ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland* (London, HMSO, 1985), Section C, ‘Political Matters’, Article 5(a).

⁹ *The Framework Documents: A New Framework for Agreement* (HMSO, London, 1995) ‘Protection of Rights’, para. 50.

¹⁰ *The Protection of Human Rights by Law in Northern Ireland* (SACHR, Belfast, 1977), paragraph 6.05, p.55.

¹¹ *Ibid*, para. 6.15, p.60.

¹² Human Rights Act 1998, Schedule 1.

¹³ Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998; Northern Ireland (St Andrews Agreement) Act 2006.

¹⁴ Philip Alston, ‘A Framework for the Comparative Analysis of Bills of Rights’, in, Alston, ed, *Promoting Human Rights through Bills of Rights* (Oxford University Press, Oxford, 1999), p.9.

¹⁵ Andrew Clapham, ‘The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights’, in, Alston, ed, *Promoting Human Rights through Bills of Rights* (Oxford University Press, Oxford, 1999), pp.118-119. There is considerable discussion of this point, and those who argue that the HRA is a Bill of Rights, see for example, Francesca Klug ‘A Bill of Rights: Do we need one or do we already have one?’ (2007) *Public Law* 701-719.

¹⁶ *Rights and Responsibilities: Developing our Constitutional Framework* (Ministry of Justice, London, March 2009). See also JUSTICE *A British Bill of Rights: Informing the Debate* (2007, JUSTICE, London); Joint Committee on Human Rights *A Bill of Rights for the UK* (Twenty-ninth Report of the

continues to have political significance, with the Labour and Conservative parties currently supporting the notion of a Bill of Rights and Responsibilities.¹⁷ In our view, whatever debates develop in Britain, one thing is perfectly clear: there is a secure basis for a separate and distinct Northern Ireland Bill of Rights process. The ongoing defence of the Human Rights Act should not, in our view, take precedence in Northern Ireland over the need for the expected new beginning to human rights protection. We are, however, equally mindful of the political context and can understand the importance of stressing throughout these discussions that any new instruments that emerge within the UK build on existing protections.

While a great deal of the recommendations in the SACHR report have been enacted, one outstanding matter is the question of whether, and to what extent, Northern Ireland requires clear and enforceable human rights protections additional to those guaranteed elsewhere in the United Kingdom. The argument in favour of supplementary protections, and the idea that this should be fulfilled through a regional solution, is significantly developed, but has not yet been realised in legislation. Bills of rights for both the United Kingdom and its devolved jurisdictions could be mutually reinforcing and are in the government's view desirable.¹⁸ But it is the past experience of violent conflict and the continuing presence of deep ethno-national divisions (British unionism and Irish nationalism) which provide an added impetus to address the issue comprehensively in Northern Ireland. While certainly not unique, Northern Ireland does have its own particular circumstances. The concept of a regional bill moved decisively forward in 1998 when it became integral to the peace process and was included in the Belfast (Good Friday) Agreement.¹⁹ In 2006, the importance of the proposal was again highlighted when referenced in the *modus operandi* negotiated between Sinn Féin and the Democratic Unionist Party at St Andrews.²⁰

Many of the best known bills of rights, including the United States, France and South Africa, have been produced following periods of conflict and during times of democratic transition.²¹ This is an unsurprising fact since, as observed by Christine Bell, most contemporary peace accords also tend to 'include human rights institutions with measures such as bill of rights, constitutional courts, human rights commissions or other national institutions for protecting rights.'²² The abuse, neglect or restriction of fundamental rights and freedoms are often at the core of attempts to provide an explanation for the outbreak of violent intra-state conflicts. Guaranteeing protections, so that violations of this sort cannot be repeated, is crucial for building peace and democratic stability. Northern Ireland is consistent in this regard with historical experience and comparative analysis.

Session 2007-2008). The Northern Ireland Human Rights Commission gave oral evidence to the Joint Committee on Human Rights on 24 February 2009 on 'A Bill of Rights for the UK and the Work of the Northern Ireland Human Rights Commission' (Monica McWilliams, Colin Harvey and Nazia Latif).

¹⁷ See Colin Harvey, 'A British Bill of Rights?' (June/July 2007) *Fortnight*.

¹⁸ *A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of the Session 2007-08* (Joint Committee on Human Rights, Third Report of Session 2008-09, 2009), p.16.

¹⁹ *The Agreement: Agreement Reached in the Multi-party Negotiations* (1998) pp.16-17.

²⁰ *Agreement at St Andrews* (2006) Annex B.

²¹ *A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of the Session 2007-08* (Joint Committee on Human Rights, Twenty-ninth Report of Session 2007-08, 2008), pp.23-24.

²² Christine Bell, 'Human Rights and Minority Protection', in J. Darby and R. MacGinty, eds, *Contemporary Peacemaking: Conflict, Violence and Peace Processes* (Palgrave MacMillan, Basingstoke, 2003), p.162; For a detailed account see, Christine Bell, *Human Rights and Peace Agreements* (Oxford University Press, Oxford, 2000).

In as much as they reflect the circumstances of the society in which they develop, bill of rights are context dependent. Philip Alston argues that whilst there is some difficulty in achieving a general definition, we might nonetheless reasonably conclude that a bill of rights is in part ‘a formal commitment to protection of those human rights which are considered, at that moment in history, to be of particular importance.’²³ They are, as Jürgen Habermas suggests, ethically permeated, by which he means:

‘the process of setting normative rules for modes of behaviour is open to influence by the society’s political goals. For this reason every legal system is also the expression of a particular form of life and not merely a reflection of the universal content of basic rights.’²⁴

Following Habermas, we can see how a bill of rights may commit to universal standards, but will also most appropriately represent an agreed understanding of what those standards mean in a specific social and political setting. A bill of rights that is not properly grounded will have an insecure future and risks irrelevance. There is a balance to be struck, in navigating abstract universalism and cultural relativism. There is a need to reflect the situation within which the law is to apply, because otherwise the symbolism of a bill and its moral force will risk being lost. At the same time a critical distance must be ensured so that an external perspective can be offered on the internal democratic and legal processes within a given jurisdiction.

The Belfast (Good Friday) Agreement was explicit in recognising the challenge of upholding the principle of universality and the need to guarantee contextual relevance. It provided the newly-created Northern Ireland Human Rights Commission with a mandate to:

‘advise on the scope for defining, in Westminster legislation, rights supplementary to those in the [ECHR], 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.’

Issues for consideration by the Commission were to include:

‘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.’²⁵

From the outset the Commission faced a formidable challenge to address the question of what constituted the ‘particular circumstances of Northern Ireland’. The need to do

²³ Philip Alston, ‘A Framework for the Comparative Analysis of Bills of Rights’, in, Alston, ed, *Promoting Human Rights through Bills of Rights* (Oxford University Press, Oxford, 1999), p.9.

²⁴ Jürgen Habermas, ‘Struggles for Recognition in the Democratic Constitutional State’, in, A. Gutmann, ed, *Multiculturalism* (Princeton University Press, Princeton, New Jersey, 1994), pp.124.

²⁵ *The Agreement: Agreement reached in the multi-party negotiations* (1998), pp.16-17.

so, because of lack of clarity within the terms of the mandate, generated a complex and continuing discourse concerning the function and content of the proposed bill. It was apparent that only by articulating the local situation within which rights supplementary to the ECHR might be justifiable could the process be advanced. The Commission set a strategic direction in March 2000 to encourage wide ranging public and political deliberation on the issue. In September 2001, it published *Making a Bill of Rights: A Consultation*.²⁶ Over 650 formal submissions were received, with many hundreds more letters and oral evidence presented.²⁷ A further consultation document, *Progressing a Bill of Rights: An Update*, was then published in 2004.²⁸

At the centre of discussions was analysis of the requirement for any supplementary rights to reflect the principles of mutual respect for the identity and ethos of both communities (British unionist and Irish nationalist) and parity of esteem. When SACHR first suggested the idea, over two decades previously, it acknowledged that a regional bill of rights ‘might be a necessary part of a constitutional settlement in which all political parties and persons interested would be consulted; but it could never be a substitute for such a settlement’.²⁹ For this reason, following the Belfast (Good Friday) Agreement some commentators argued that a bill could both protect the human rights of all while also respecting the principles of power-sharing that underpinned the new democratic settlement and existing protections in areas such as equality law. To do otherwise, they suggested, would risk creating a vehicle for undermining the core ethical values of the peace accord (and guarantees surrounding it) thereby becoming a source of political instability.³⁰ Opponents of this approach, sceptical about the central tenets of the peace accord, suggested that a bill ought to rise above the prevailing conditions of political life, and act as a necessary counterweight to ensure the rights of all would be protected on an equal basis, rather than, as they saw it, the entrenchment and promotion of two exclusionary and competing identities.³¹

The complexity of deliberations, and the inability to find definitive or consensual solutions, led to stagnation.³² Some observers might argue that there was

²⁶ *Making a Bill of Rights: A Consultation* (NIHRC, Belfast, 2001). An extended debate around these original proposals can be found in the Special Issue of the *Northern Ireland Legal Quarterly* (2001) volume 52. See, for example, the case made for a Bill of Rights by the late Stephen Livingstone ‘The Need for a Bill of Rights in Northern Ireland’ pp.269-285. Christopher McCrudden’s assessment of this first consultation (pp.372-384) reflected the sense of disappointment: ‘In large measure, the chorus of criticism to which the Document has been subjected is justified. It is sloppy, rushed, internally inconsistent, technically unconvincing, and lacking any coherent vision. A fresh start is necessary. It seems unlikely at the time of writing, that the NIHRC will be able to achieve what is necessary. The NIHRC should recognise that fact and devise, in co-operation with all relevant political actors, an alternative process for progressing this project.’

²⁷ *A Summary of Submissions* (NIHRC, Belfast, 2003).

²⁸ *Progressing a Bill of Rights: An Update* (NIHRC, Belfast, 2004).

²⁹ *The Protection of Human Rights by Law in Northern Ireland* (SACHR, Belfast, 1977), para. 6.16, p.60.

³⁰ Colin Harvey, ‘Stick to the terms of the Agreement’, *Fortnight*, (July/August 2003). For further reading also see, Colin Harvey, ‘The Implementation of a Bill of Rights in Northern Ireland’, (2001) 52 *Northern Ireland Legal Quarterly* pp. 342–71; Christopher McCrudden, ‘Consociationalism, Equality, and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities’, in John Morison, Kieran McEvoy, Gordon Anthony, eds, *Judges, Transition, and Human Rights*, (Oxford University Press, Oxford, 2007), pp.315-354.

³¹ Robin Wilson ‘Am I Me Or Am I One of Them? Who Has Rights: Groups or People?’ *Fortnight* (May 2003), Andrew Finlay ‘Beware of Communal Rights’ *Fortnight* (November 2003).

³² For an assessment of the work of the Commission see Stephen Livingstone and Rachel Murray ‘Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human

even a risk of total collapse following the resignation of a number of the Commission's members. An equally valid point of view, however, might recognise that debate on a bill of rights was merely in keeping with the tenor of the peace process more generally, which has itself been characterised by 'fits and starts'. Either way, the appointment of seven new Commissioners in September 2005 (including one of the authors), and the replacement of the then Chief Commissioner, Professor Brice Dickson, with Professor Monica McWilliams, provided a fresh impetus.³³ Further momentum was added at the multi-party talks in St Andrews, October 2006, when the political parties agreed that a Bill of Rights Forum should be created to formulate a set of agreed recommendations for consideration by the Human Rights Commission.³⁴ An independent Chair, the Australian lawyer Chris Sidoti, and twenty eight members, were subsequently appointed. The Democratic Unionist Party, Sinn Féin, Ulster Unionist Party and Social Democratic and Labour Party had three seats each. The Alliance Party had two seats. Business, trade unions and the main Churches had two seats each, and representatives from civil society (children and young people's sector, people with disabilities, ethnic minorities, older people, people of different sexual orientations, women, the community and voluntary sector as a whole, and human rights organisations) each had one seat. The Commission welcomed the creation of the Forum and observed its proceedings. A submission was also made to assist its work.³⁵ On 31 March 2008, the Forum concluded and produced a final report.³⁶

Within the Forum's report there were views on more than fifty areas of human rights, and on many more times that number of particular issues. Evaluating the experience, Chris Sidoti, acknowledged that:

'the Forum was committed to working for consensus but it had difficulty reaching it. In fact, it achieved this goal on only a few of its recommendations. It was split by both general ideological divisions and specific divisions related to Northern Ireland's situation.'³⁷

Once again, the question of contextual relevance was a major area of dispute. The Forum was arguably, in this regard, a re-run of the experience that had gone before it. Since there is no agreed history in Northern Ireland, no shared understanding of what happened during the conflict and why, so Chris Sidoti concluded, it was 'unsurprising that in the Forum there was no common position on what the past and present require in terms of better human rights protection.'³⁸

Although it failed to achieve cross-party consensus on the majority of its recommendations the Forum did succeed in agreeing that a bill of rights:

Rights Commission with Comparisons from South Africa' (Nuffield Foundation, 2005). See generally, Anne Smith 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28 *Human Rights Quarterly* 904.

³³ A working paper, *Taking Forward a Bill of Rights for Northern Ireland* (NIHRC, Belfast, 2005), was produced by the remaining members of the Commission, in February 2005, to assist the newly appointed Commissioners to assess the progress made.

³⁴ *Agreement at St Andrews* (2006) Annex B. Further information on the Bill of Rights Forum is available at <http://www.billofrightsforum.org/>

³⁵ *Submission to the Round Table on a Bill of Rights for Northern Ireland* (NIHRC, Belfast, 2006)

³⁶ *Bill of Rights Forum Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*, (Bill of Rights Forum, Belfast, 2008).

³⁷ Chris Sidoti, 'Bill of Rights Forum Concludes', *NIHRC Review*, (NIHRC, Belfast, Summer 2008), No.7, p.2.

³⁸ *Ibid*, p.3.

‘is needed to provide strong legal protection for human rights for all the people of Northern Ireland; should be in accordance with universal human rights standards, reflecting the particular circumstances... must be effective, realistic and implementable; must address the needs of the poorest and most marginalised... should be aspirational and look to the future.’³⁹

On receipt of the Forum’s conclusions the Commission announced its intention to complete the process before the end of the 2008. In the intervening months an attempt was made to overcome the perennial dispute of how to interpret the particular circumstances of Northern Ireland. Specifically, the Commission formulated a detailed methodology, endorsed unanimously by its members, to explain how any proposed right would be context-dependent.⁴⁰ This laid out seven principles, at least one of which had to be met, in order for a proposed right to be justified for inclusion. For example, where there were grounds for the belief that the right in question had ‘been abused, neglected or restricted by state or non-state actors in Northern Ireland to an extent greater than or in a manner distinct from any abuse, neglect or restriction in other parts of the United Kingdom?’ Or was ‘the proposed right one of those which “against the background of the recent history of communal conflict,” the parties affirmed in particular in the Agreement?’⁴¹ On 10 December 2008 (international human rights day and the 60th Anniversary of the Universal Declaration on Human Rights) the final advice was handed over to Minister of State, Paul Goggins, with eight Commissioners agreeing the content and two dissenting.⁴²

The proposed content of a bill of rights

A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland is presented in five chapters: Chapter one - the Bill of Rights process; Chapter two - Advice on the content of a Bill of Rights for Northern Ireland; Chapter three - Explaining the advice and additional recommendations; Chapter four - Effective enforcement and implementation; and Chapter five - Realising a Bill of Rights for Northern Ireland. The document includes a Foreword by the Chief Commissioner, a list of current Commissioners (with a clear indication of the two dissenting members) and six appendices, to provide a sense of the scale of the process.⁴³

At the beginning (Chapter one) an historical narrative is provided, explaining the genesis of the project, as well as offering clarity on how the mandate given by the Belfast (Good Friday) Agreement was interpreted and the methodology used to determine much of the content.⁴⁴ An issue of crucial importance addressed here is the relationship between the ECHR and any future bill. Although the mandate states that

³⁹ *Bill of Rights Forum Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*, (Bill of Rights Forum, Belfast, 2008), p.7.

⁴⁰ *A Briefing on the Methodology used in Preparing the Advice of the NIHRC to Government on A Bill of Rights* (NIHRC, Belfast, 2008).

⁴¹ *Ibid.*

⁴² See Daphne Trimble’s submission to the Northern Ireland Affairs Committee, above n. 6.

⁴³ For an overview of the final advice see, *Summary: A Bill of Rights for Northern Ireland – Advice to the Secretary of State* (NIHRC, July 2009).

⁴⁴ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008).

identified supplementary rights will be ‘taken together with the ECHR to constitute a bill of rights for Northern Ireland’,⁴⁵ the Commission recognised that, in the intervening years, some ECHR provisions had been given further effect in domestic law via the HRA⁴⁶ This being the case, a decision had to be made on how to reconcile the HRA and ECHR with the mandate. The Commission proposed that the government ought to consider giving domestic effect throughout the United Kingdom to the full range of protections contained in the ECHR, but that pursuant to its mandate, the Commission also analysed those rights not contained in the HRA to determine if, given the particular circumstances of Northern Ireland, their inclusion in a bill might be justified.⁴⁷

In Chapters two and three the proposed content of a bill of rights are outlined in detail. This includes calling for the re-enactment of protections guaranteed by Schedule 1 of the HRA, as well as recommending the inclusion of a number of ECHR rights not incorporated within the HRA.⁴⁸ The advice proposes rights supplementary to the ECHR, the context-dependency of which is explained according to the particular circumstances of a society characterised by deep ethno-national divisions. More specifically, consideration is given to whether the rights in question have been a cause or location of conflict, and the extent to which they were recognised and referenced in the Belfast (Good Friday) Agreement.⁴⁹ There is also a description of how each recommendation is compliant with international standards.

Rather than produce draft legislation (some had argued that this was not within the Commission’s remit), the approach adopted is to preface every substantive proposal with the formulation ‘A provision should be drafted to ensure that...’⁵⁰ The advice does not say, ‘*This* provision should be *included* to ensure that...’ On the one hand, how the recommendations are prefaced may appear to be insignificant. Regardless of what is said prior to the substantive proposals there is a legal precision in the advice which leaves little room for misunderstanding the intention. The recommendations are, according to the Commission, ‘specific enough to provide clear direction’ to government on what needs to be included in a bill of rights.⁵¹ On the other hand, however, the wording of a preface may be of vital importance. The Commission was invited to ‘consult and advise on the scope’ for a bill. Having decided that there are grounds to justify a Bill of Rights for Northern Ireland, the introduction of every subsequent recommendation with recognition that this is advice and not an actual bill deflects any criticism that might be levelled against the Commission of subverting the mandate. The approach adopted acknowledges that it is for Parliament to determine how the provisions contained within it should be finally drafted, while making the intentions of the Commission plain.

The advice reflects the indivisibility of all human rights, with a proposed preamble stressing that a bill of rights for Northern Ireland should be ‘[f]ounded on the principles of full respect for, and equality of, civil, political, economic, social and

⁴⁵ *The Agreement: Agreement reached in the multi-party negotiations* (1998), pp.16-17.

⁴⁶ Human Rights Act 1998.

⁴⁷ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), p.9.

⁴⁸ *Ibid*, p.52.

⁴⁹ *Ibid*, Appendix 1, p.179.

⁵⁰ See, for example, Chapter 2, pp.17-60.

⁵¹ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), p.13.

cultural rights and of freedom from discrimination...'⁵² Citing a strong evidence base, the Commission argues for the inclusion of a broad range of protections.

Right to life

A directive to supplement the domestic application afforded to Article 2 of the ECHR by the HRA is included. Specifically, it recommends that government legislates so as to ensure that all violations 'relating to the conflict in Northern Ireland are effectively investigated'. This, in the Commission's view, should also guarantee that all investigations are conducted according to the same procedural standards and are compliant with international law.⁵³

Liberty and Security of the Person

The incorporation of Article 1 of the Fourth Protocol to the ECHR, on the matter of deprivation of liberty connected to a failure to fulfil a contractual obligation, is recommended for inclusion. This is because the protocol has not been afforded domestic effect in the HRA. To supplement Article 5 of the ECHR detailed proposals also include the right to consult with a legal representative and be represented during questioning, a right to be visited by family members, obligations on public authorities on reintegration, as well as express recognition of the needs of the child or vulnerable adult in the general context of this right.⁵⁴

Fair Trial and No Punishment Without Law

Supplementary to Articles 6 and 7 of the ECHR the Commission proposes a right to trial by jury for serious offences and the right to waive it, as well as recognition of the particular needs of groups such as children and vulnerable adults, witnesses, jurors, and members of the judiciary and legal profession.⁵⁵

Marriage or Civil Partnership

A right to legal termination of marriage and the right to enter and terminate a civil partnership both 'in accordance with the laws governing the exercise of this right' are recommended to supplement Article 12 of the ECHR.⁵⁶

Equality

The Commission recommends that free standing equality and non-discrimination clauses be drafted. This is because Article 1 of the Twelfth Protocol of the ECHR was not afforded domestic effect in the HRA, whilst the inclusion of Article 14 is parasitic and therefore limited in its reach and application. The proposals include the right to be 'equal before and under the law' and the 'equal protection and equal benefit of the law' combined with detailed provisions relating to 'unfair discrimination'.⁵⁷ So as to make clear its intentions, the Commission defines unfair discrimination as consisting 'of any provision, criterion or practice which has the purpose or effect of impairing

⁵² *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), p.17.

⁵³ *Ibid* p.20.

⁵⁴ *Ibid* pp.24-25.

⁵⁵ *Ibid* pp.26-27.

⁵⁶ *Ibid* p.32.

⁵⁷ *Ibid* p.p.33-34.

the ability of any person to participate on an equal basis with others in any area of economic, social, political, cultural or civil life'.⁵⁸

In this section of the advice, a directive to enact legislation to prevent or prohibit unfair discrimination is included, as well as a recommended duty on public authorities to:

‘...take all appropriate measures, to eliminate unfair discrimination and where circumstances so warrant and in accordance with the law, must take all appropriate and proportionate measures to ameliorate the conditions of disadvantaged groups.’⁵⁹

The proposals make clear that nothing in a bill of rights for Northern Ireland should stand in the way of any (proportionate) law, programme or activity that has as its object addressing the conditions of disadvantaged individuals or groups. Express additional reference is made here to the rights of older persons and ‘those who are disabled...to participate in the life of the community’.⁶⁰

Democratic Rights

The need to protect the basic components of democracy, so as to ensure that the procedures and institutions of government are reflective of the society they serve and whose name political decisions must be made, is recognised. Proposals are made for democratic rights supplementary to those of Article 16 and Article 3 of the First Protocol of the ECHR. These include rights to direct participation in political and public life and guarantees of representative government, a right to vote, a right of access (on general terms of equality) to public service and a right to participate in elections conducted on the basis of proportional representation at regional and local level. The latter recommendation is formulated as a directive to legislate for equivalent safeguards in local government to those already guaranteed in the Northern Ireland Assembly by the Northern Ireland Act 1998.⁶¹ Positive obligations on public authorities to facilitate the full and equal participation of women in public and political life, as well as ensuring that the membership of public bodies is, as far as practicable, representative of society, are also proposed.⁶²

Education

Supplementary to Article 2 of the First Protocol of the ECHR, the Commission proposes two education rights. First, it recommends that education ‘in all its forms’ must be ‘directed towards the promotion of human rights, equality, dignity of the person, respect for diversity and tolerance’.⁶³ Second, it proposes that ‘[n]o child shall be denied the right to access the full Northern Ireland education curriculum.’⁶⁴

Freedom of Movement

⁵⁸ *Ibid* p.33.

⁵⁹ *Ibid* p.34.

⁶⁰ *Ibid* p.34.

⁶¹ Northern Ireland Act 1998, s 34 (2) and (3).

⁶² *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), pp.35-36.

⁶³ *Ibid* p.38.

⁶⁴ *Ibid* p.38.

There is no recommendation made for the inclusion of rights supplementary to the ECHR in relation to freedom of movement. However, in accordance with its decision to analyse those ECHR rights not contained in the HRA, the Commission did conclude that given the particular circumstances of Northern Ireland, incorporation of Article 2 (1, 4) of the Fourth Protocol of the ECHR was justifiable.⁶⁵

Freedom from Violence, Exploitation and Harassment

While Article 3 of the ECHR secures freedom from violence and harassment,⁶⁶ and Article 4 obligates state parties to criminalise ‘trafficking’ and other forms of ‘forced labour’⁶⁷ the Commission has made a number of recommendations that are supplementary in terms of their reach. The role of sectarian harassment is expressly recognised, but the proposals go beyond this to include domestic violence, sexual violence, gender-based violence, and ‘violence or harassment motivated by hate on any prohibited ground of discrimination’, as well as referring to sexual exploitation and ‘sexual and other forms of trafficking’. A positive obligation is also recommended for public authorities to ensure the protection of these rights⁶⁸ and extend their application in accordance with evolving jurisprudence.⁶⁹

Identity and Culture

The proposals include a right to identify as British, or Irish or both and be accepted as such ‘with no detriment or difference of treatment of any kind’.⁷⁰ There is also a recommendation that this right should ‘not be affected by any future change in the status of Northern Ireland’. Similar provision is then made for citizenship, with a right to hold British or Irish citizenship or both.⁷¹ These are supplementary to the limited protections afforded by Article 8 of the ECHR to personal identity and the assurances afforded by the ECHR of procedural fairness when determining citizenship.

The concept of ‘parity of esteem’ between the two main communities is given due recognition by a recommendation that ‘[p]ublic authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities’.⁷² Reflecting the Commission’s mandate, this provision is supplementary to the ECHR principally because it is a right afforded to groups *qua* groups, rather than to their individual members, as is the case with Convention rights. Although the ECHR does offer numerous protections relevant to the protection of identity and culture, such as Article 9 and Article 10, it does not contain any equivalent to, for example, section 16 (1) of the Canadian Charter of Rights and Freedoms, which recognises the equal status of the English and French linguistic communities.⁷³ In this regard, the proposal to recognise two communities in Northern Ireland is creative and innovative in its approach to supplementing the ECHR.

Recognising the significance of achieving an appropriate balance between the individual and the communal, the Commission includes a qualification and additional

⁶⁵ *Ibid* p.39.

⁶⁶ *Ibid* p.95.

⁶⁷ *Siliadin v France* (2006), 43 EHRR 16, para. 148.

⁶⁸ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), p.40.

⁶⁹ See, for example, *Sheffield and Horsham v UK* (1999) 27 EHRR 163, 185.

⁷⁰ *Ibid* p.41. On the debates around culture and identity see Colin Harvey and Alex Schwartz ‘Designing a Bill of Rights for Northern Ireland’ (2009) 60 *Northern Ireland Legal Quarterly* 181.

⁷¹ *Ibid*, p.99.

⁷² *Ibid* p.41.

⁷³ *Canadian Charter of Rights and Freedoms* (1982), Section 16 (1).

protections. First, it qualifies the equality of treatment clause by recommending that '[n]o one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others'.⁷⁴ Secondly, it supplements the ECHR with a recommendation that will provide a similarly qualified right to the members of national, ethnic, religious, linguistic and cultural minorities with regards practising religion, culture and the use of languages.⁷⁵ Thirdly, it proposes a positive obligation on public authorities to 'encourage a spirit of tolerance and dialogue among persons living in Northern Ireland, irrespective those persons' race ethnicity, language, religion or political opinion'. Fourthly, it recommends a prohibition in relation to compelled oaths that are contrary to religious or other beliefs in general.⁷⁶

Language

With the qualification of there being 'substantial numbers of users and sufficient demand',⁷⁷ the Commission has recommended - supplementary to Article 2 of the First Protocol of the ECHR - a right to learn or be educated in or through a minority language.⁷⁸ It includes the right of access to essential services in a language and medium that a person understands, including sign language. The Commission's advice also links Irish and Ulster-Scots and would place an obligation on public authorities 'as a minimum' to act compatibly 'with the European Charter for Regional or Minority Languages in respect of the support and development of both'.⁷⁹

Victims

The Commission recommends guarantees for every victim of crime, for example, a right to 'appropriate material, medical, psychological and social assistance'.⁸⁰ It also recognises the needs of victims of the conflict with the call for legislation which would 'ensure that their rights are protected'.⁸¹ These provisions are supplementary to the ECHR, which does not provide explicitly for the needs of the victims or place positive obligations upon the state to provide the various form of assistance proposed in the advice.⁸²

Civil and Administrative Justice

While Article 10 of the ECHR prohibits a government from restricting the flow of information between individuals, it does not place an obligation on state parties to impart information.⁸³ The Commission recommends that the ECHR be supplemented therefore with the inclusion of a free-standing right to access information held by public authorities⁸⁴ and a right to administrative action that is 'lawful, procedurally fair, rational, proportionate and taken within a reasonable time'.⁸⁵ It also includes an

⁷⁴ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), pp. 99-102.

⁷⁵ *Ibid* p.41.

⁷⁶ *Ibid* p.41.

⁷⁷ *Ibid* p.42.

⁷⁸ *Cf. Belgium Linguistic Case* (1979-80), 1 EHRR 252, para. 13.

⁷⁹ *Ibid* p.42.

⁸⁰ *Ibid* p.43.

⁸¹ *Ibid* p.43.

⁸² *Ibid*, pp. 99-102. For detailed explanations on the supplementarity of each recommendation.

⁸³ See, for example, *Gaskin v UK* (1990), 12 EHRR 36, para 52; *Leander v Sweden* (1987), 9 EHRR 433, para 74; *Guerra and Others v Italy* (1998), 26 EHRR 357, para 60.

⁸⁴ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), p.44.

⁸⁵ *Ibid* p.44.

obligation on public authorities to give reasons for decisions and provide review and appeal mechanisms.⁸⁶ These provisions supplement existing protections by expressly providing for key elements of civil and administrative justice.

Health, Standard of Living, Accommodation, Social Security and Work

As noted, the Commission's advice acknowledges the indivisibility of all human rights. It therefore includes social and economic rights. Some of the rights are made immediately realisable, such as a right to emergency medical treatment and essential primary healthcare as well as emergency accommodation, and others (such as a right to the highest attainable standard of physical and mental health and a right to adequate accommodation) are subject to the requirement of progressive realisation.⁸⁷ The recommendations include provision for carers, with a right to 'appropriate respite from their responsibilities'.⁸⁸

Environment

The advice includes provision for environmental rights ('the right to have the environment protected so as to foster the health and well-being of present and future generations, while promoting justifiable economic and social development'), with a call for additional legislative measures to limit pollution and environmental degradation, as well as 'secure sustainable development'.⁸⁹ These provisions are supplementary to the ECHR because of the clear focus on environmental protection as significant in its own right and deserving of separate recognition.

Children's Rights

The Commission's advice includes a separate section on children's rights. This includes specific provision on equality and non-discrimination, the 'best interests of the child' principle, as well as other significant guarantees and protections.⁹⁰ These provisions supplement the ECHR by providing express recognition of children's rights in the Bill of Rights.

Implementation and Enforcement

Central to deliberations on a bill of rights for Northern Ireland are questions concerning its implementation and enforcement. In chapters two and four the Commission gives considered views on these issues. The Belfast (Good Friday) Agreement is clear that necessary primary legislation must proceed through the Westminster Parliament. To make certain that it acted within its mandate, the Commission repeats this view.⁹¹ In practice it is worth noting, however, that the existence of the Sewel Convention and a Memorandum of Understanding drawn up between central government and the devolved regions (Wales, Scotland and Northern Ireland) means that it is unlikely a bill will pass through Westminster without the support of the Northern Ireland Assembly.⁹²

⁸⁶ *Ibid* p.44.

⁸⁷ *Ibid* pp. 45-48, and p. 50.

⁸⁸ *Ibid* p.48.

⁸⁹ *Ibid* p.49.

⁹⁰ *Ibid* p.51.

⁹¹ *Ibid*, p.148.

⁹² In the House of Lords on 21 July 1998, Lord Sewel said: 'We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'. See, P. Bowers, *The Sewel Convention* (Parliament and Constitution Centre, London, 2005), p. 2. The Convention was

By contrast, there is no direction afforded in the mandate on the question of amendment. Underpinning the Commission's advice, however, is the principle of *primum non nocere* with regards to democratic institutions and existing domestic human rights and equality protections. To guarantee that a bill would be compatible therefore with the operation of power-sharing government in Northern Ireland, the Commission recommended that following adoption, any future amendments ought to require cross-community approval within the Assembly. This is the standard for operation of devolved government in Northern Ireland, according to which key political decisions must receive support from a majority of those members of the Assembly present and voting, including a majority of designated unionists and a majority of designated nationalists.⁹³ As with the question of adoption, the practicality of amending any future bill of rights for Northern Ireland will, however, in all likelihood see a balance struck between the Westminster Parliament and the devolved administration (the doctrine of parliamentary sovereignty notwithstanding).

In terms of the scope of application, the Commission's advice largely follows the established HRA model, but is explicit in terms of the active steps required of public authorities to respect, protect, promote and fulfil the rights.⁹⁴ Many of the social and economic rights are subject to the normal (and well-established in human rights law) requirement of progressive realisation. In Northern Ireland, the Commission believes that this could be given practical effect by the Executive reporting annually to the Assembly. The devolved administration has already published its Programme for Government 2008-11, the delivery framework for which includes robust and effective monitoring, with published annual reports.⁹⁵ This could, in the Commission view, afford a strong foundation upon which to implement the recommendation with respect to progressive realisation. The standing provisions display a preference for the 'judicial review' model, with reference to the 'sufficient interest' test, but clarifying that this term should be interpreted with reference to the 'need to ensure access to justice'.⁹⁶ On interpretation, courts are directed to pay due regard to international human rights law, and they may consider comparative and international practice.⁹⁷ There is an obligation to achieve the purpose of a bill of rights for Northern Ireland and 'to give practical effect to the fundamental values underpinning it, as set out in the Preamble...'⁹⁸ Detailed clarification is provided on devolved and non-devolved issues.⁹⁹

repeated in a Memorandum of Understanding, which states that 'the UK government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature' *Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee* (2000), Cm 4806, para.13.

⁹³ The rule for cross-community decision-making in the Northern Ireland Assembly known as parallel consent, and second less rigorous requirement for weighted majority voting are detailed in the Northern Ireland Act 1998 section 4 (5).

⁹⁴ *Ibid* p.56.

⁹⁵ Northern Ireland Executive *Building a Better Future – Programme for Government 2008-2011* (2008).

⁹⁶ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (NIHRC, Belfast, 10 December 2008), p.56.

⁹⁷ *Ibid* p.57.

⁹⁸ *Ibid* p.57.

⁹⁹ *Ibid* pp. 57-58.

The Commission opted for a general limitations clause to apply to all those rights ‘which are immediately realisable’.¹⁰⁰ The recommendations contain many familiar elements from international experience and comparative practice. The section makes clear that where a recommendation relates to an obligation to enact legislation or a positive obligation to take appropriate or effective measures, that the limitation does not apply.¹⁰¹ The advice deals with derogations in detail, with a clear statement that no derogation ‘shall be lawful unless a state of emergency has first been declared and confirmed by Parliament’.¹⁰² It makes plain those rights which are non-derogable, the time-limited nature of such a declaration (3 months) and that the validity of derogation can be challenged in judicial proceedings.¹⁰³

The debate on whether there should be a new judicial institution, for example, a Constitutional Court for Northern Ireland, is addressed in the advice through the recommendation that the Bill should be enforced through the existing judicial system.¹⁰⁴ Recognising the ongoing importance of the judicial role, the advice stresses the need for an independent and diverse judiciary that is broadly representative of society in Northern Ireland.¹⁰⁵ The Commission would be given an ongoing role in monitoring and auditing compliance with the Bill, and the advice proposes the establishment of a Committee in the Northern Ireland Assembly similar to the Joint Committee on Human Rights at Westminster.¹⁰⁶ For those rights subject to progressive realisation, there is a proposal that the Northern Ireland Executive should report annually to the Assembly, and the UK government to Parliament, ‘on the progress made during the previous year in realising these rights in Northern Ireland’.¹⁰⁷ There is also provision for a periodic review of implementation every five years by independent reviewers.¹⁰⁸

Conclusion

The Bill of Rights debate in Northern Ireland long pre-dates the current process. However, it was with the conclusion of the Belfast/Good Friday Agreement 1998, and the St Andrews Agreement 2006, that this aspiration genuinely entered the realms of the possible. The Northern Ireland Human Rights Commission was charged with providing advice to the Secretary of State, and the length of this process (from 1 March 2000 – 10 December 2008) is an indication of how extensive its work was, but also the scale of the problems encountered. The Commission has now succeeded in delivering its final advice to the Secretary of State for Northern Ireland. In our view, such a constitutionally significant enterprise should provoke extensive debate on process and substance. We would be concerned about the health of any democratic society that did not generate a lively discussion on a bill of rights. There has certainly been much debate in Northern Ireland on the subject. The Commission’s advice now advances to the next stage and it will be seen whether Northern Ireland will get a bill of rights that lives up to the expectations created by this process.

¹⁰⁰ *Ibid* p.52.

¹⁰¹ *Ibid* p.52.

¹⁰² *Ibid* p.52.

¹⁰³ *Ibid* p.53.

¹⁰⁴ *Ibid* p.59.

¹⁰⁵ *Ibid* p.59.

¹⁰⁶ *Ibid* p.59.

¹⁰⁷ *Ibid* p.59.

¹⁰⁸ *Ibid* pp. 59-60.

The advice has attracted support and criticism.¹⁰⁹ In our view, and as participants in this process, the advice is context sensitive, respectful of international standards, and also manages to be ambitious for human rights. This is not to argue that everything is perfect, it is to suggest that the recommendations are credible and defensible as advice on a specifically Northern Irish Bill of Rights. As dissent within the Commission and continuing debate outside it demonstrate, the challenge of constructing cross-party consensus on the substance of a bill of rights - and even on the proper interpretation and application of the remit - remains. However, the Commission has now delivered its final advice, grounded in an interpretation of its mandate, and has sought to defend constructively its proposals and its approach. Recent evidence gives a basis for some hope that while political parties remain divided, communities in Northern Ireland can see merit in a bill of rights which contains an inclusive range of protections.¹¹⁰

¹⁰⁹ See, for example, the submissions to the Northern Ireland Affairs Committee inquiry noted above n. 6.

¹¹⁰ See 'Bill of Rights for North gaining support, MPs told' *Irish Times* 2 July 2009, '70% in North back Bill of Rights, poll finds' *Irish Times* 13 May 2009.