

MAKING A BILL OF RIGHTS FOR NORTHERN IRELAND

RESPONSE TO THE CONSULTATION DOCUMENT OF THE NI HUMAN RIGHTS COMMISSION

Question 1:

When the Belfast (Good Friday) Agreement says that the Bill of Rights is ‘to reflect the particular circumstances of Northern Ireland’, how should this phrase be interpreted?

Page 12 of the Consultation Document sets out the full text of the relevant part of the Agreement. This includes the direction that the additional rights must:-

‘... 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.’

I can understand why the Commission wishes to pass over this particular part of the text of the Agreement in its treatment of human rights throughout the Consultation Document. Certainly, everyone who wants a non-sectarian society in Northern Ireland would wish to eschew thinking of rights in terms of ‘both communities’. Rather, we would aspire to defend and vindicate the rights of all individuals and all communities. Originally, I myself was tempted to try to find an interpretation of the Agreement which would permit such ‘non-sectarian’ approach. Indeed, the terms of this part of the text of the Agreement were among the issues in the Agreement with which I was most uncomfortable, although I voted in the referendum in favour of the Agreement.

However, I have come to see that as a matter of law one cannot ignore the terms of the Agreement and attempt to re-write it.

I suggest the specific terms of this part of the text of the Agreement should not be ignored or wished away.

But I also suggest there is perhaps a degree of arrogance in the attitude of ‘non-sectarian’ people in trying to re-write the Agreement in this way. Clearly, the Agreement was an honest and detailed attempt by the two governments and the politicians under the Chair of Senator George Mitchell to deal with the serious inter-community problems of Northern Ireland. So the politicians are plainly asking in the text of the Agreement that the Human Rights Commissioners should address the specific task of whether there are any additional human rights (supplementary to the ECHR) which could help in resolving the inter-community conflict in Northern Ireland.

It may be that if the Commissioners carried out such a task they would come to the conclusion that additional human rights as such cannot help in resolving these special Northern Ireland inter community problems. That would be an honest answer to a genuine question. Personally, I would hope that there could be a positive answer. I do believe that law has a role (not the only role) in helping to resolve inter community strife. Consider for instance the contribution of law and the legal process in the civil rights struggle in the United States in the 1960s and more recently in South Africa.

In following the text of the Agreement the Commissioners would be not taking a narrow, negative or restrictive course. Rather, this is an important role for the Commission in the context of the Agreement. In any case the politicians were asking for the Commissioners' expert advice on the particular issue and this is the task to which the Commissioners should devote themselves.

Question 2:

Whichever interpretation you prefer, what are your reasons for doing so?

I have already set out above my understanding of the full terms of the Agreement on this point. It is not a matter of which interpretation one 'prefers', it is a matter of properly applying the text of the Agreement. In this regard one must look at the whole text, and not pick out only the words 'reflect the particular circumstances of Northern Ireland' when the text quite clearly explains what additional rights the politicians were thinking of when they agreed to the text.

Furthermore, I believe that human rights are universal. In the context of Northern Ireland, its position within the United Kingdom, its structured relationship with the remainder of Ireland, and in the context of Northern Ireland, Ireland and the United Kingdom within the European Union I suggest there is no case to be made for peculiar personal, family or social and economic rights for Northern Ireland alone. The case for 'Northern Ireland specific rights' relates to our particular community divisions. In any case, that is what the text of the Agreement states. I submit that in this regard the politicians have taken a properly universal view of human rights. The Agreement acknowledges that one should not approach human rights on a regional basis save for the quite specific areas relating to our 'troubles' which the Agreement clearly identifies.

Question 3:

What are the consequences of your preference as far as the types of rights which are to be included in the Bill of Rights are concerned?

I have a number of comments.

Firstly, from what I have also set out above the consequences are that the supplementary or additional rights for Northern Ireland should relate to the issues of community division within Northern Ireland.

Secondly, the Commissioners appear to regard the European Convention on Human Rights as being an old fashioned and inadequate document. (See for instance the Commission's explanatory pamphlet on Social and Economic Rights.)

But the Convention should be treated as a 'living document'. No doubt it might seem almost bizarre to the drafters of the Convention in 1950 that the terms of Article 8 (right to privacy) meant that the British government could be called into question over its policy for night flights from Heathrow Airport. But that has now happened in the *Hutton* case.'

¹ *Hutton v UK* Application No 36022/97

Finally, I have a serious concern that the catalogue of rights set out in the Consultation Document ~~upsets~~the constitutional balance that was achieved after such great difficulty in the Agreement. The reason for this is that the Commission's mandate in respect of the Bill of Rights is in terms of the text of the Agreement:-

‘... to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights . . .’

The problem is that if Westminster legislation is produced following such advice, and it incorporates many of the rights identified in the Consultation Document, that would constitute a restriction imposed by London on the legislative competence of the Northern Ireland Assembly. For instance, the areas of employment law, family law and most areas of children's law are within the competence of the Northern Ireland Assembly and the Northern Ireland Ministers and their Departments.

I cannot think that it was intended, or that it would be acceptable to most people in Northern Ireland who support devolution, that Westminster should be asked to intervene in this way. The Agreement, as I have indicated, does not ask for such intervention.

Question 4:

Do you agree that there should be a preamble to the Bill of Rights for Northern Ireland?

If it is found that there are supplementary rights that could assist in resolving the community problems in Northern Ireland, then I would agree that a preamble to such rights could be helpful.

Question 5:

If so, have you any suggestions as to how the Commission's suggested wording for the preamble should be changed?

I suggest that the preamble should be changed to reflect the following points:-

- . That human rights are universal.
- . In the particular circumstances of Northern Ireland where there are serious circumstances of inter-community division the rights to be set out in the Bill of Rights are thought to be helpful to resolve these issues. [This is presuming that the Commission after investigation has identified such rights.]
- z That this Bill of Rights is dedicated to that particular purpose and no way diminishes or derogates from the rights of any individual or any other community or group in Northern Ireland.

Question 6:

Do you agree that elected representatives in Northern Ireland should have the right to fair, full and effective participation in the governance of Northern Ireland?

This is one of the issues that demands fuller consideration in the context of addressing the issues between the two communities in Northern Ireland in accordance with the text of the Agreement.

Clearly, the Agreement has achieved something that seems to be quite widely accepted in its system of devolution and executive government for Northern Ireland.

Equally, many (including many who voted in favour of the Agreement such as myself) are really still quite unhappy with the provisions for 'Designated Unionists' and 'Designated Nationalists' in the Northern Ireland Act 1998.

No doubt, these are political compromises that are currently necessary for an agreed system of government for Northern Ireland.

Equally, one would definitely not want to have these incorporated into a Bill of Rights for the future. That would be a negative rather than positive effect, as it would make it all the more difficult to move from the sectarian position to the non-sectarian position.

While it is tempting to say 'yes' to the proposition that elected representatives should have the right to fair, full and effective participation in the governance of Northern Ireland I suggest this is to an extent a misunderstanding of government. Election by the people does not as such entitle one to full participation in government as such. It entitles one to be a representative of the people and, as such, to have full and equal rights with all other elected representatives in the public duties of such representation, including participation in the debates of the body to which you are elected, raising questions, participation in committees, ability to propose and amend legislation and the like.

But participation in executive government demands that elected representatives combine with other representatives to form political parties which as such obtain the support of a majority of the electorate. This has to be immediately qualified by the circumstance that majority rules does not mean all power to the party which achieves such majority. The Agreement seeks to deal with those issues and has achieved a fair degree of consensus.

In this section the Commission should address the right of anyone in Northern Ireland to join the political party of his or her choice where such party seeks to exercise the powers excepted and reserved to Westminster in the Northern Ireland Act 1998. This is fundamental to the individual's right to full and effective participation in the governance of Northern Ireland and the United Kingdom as a whole.

Question 7:

Do you agree that the voting age in Northern Ireland for local and Assembly elections should be reduced from 18 to 17 or lower?

I take it that the question means does one agree that this should be a right included in the Bill of Rights. I agree with the view of those who have argued that any change of this kind, however desirable in itself, should be debated and adopted by ordinary legislation and that it

would be inappropriate to include it in the proposed Bill of Rights. In particular I note that there is no international standard in this respect and that all other European countries currently set their voting age for national elections at 18.

I suggest that those arguing in favour of this change to be incorporated in the Bill of Rights misunderstand the nature of a Bill of Rights. What a Bill of Rights does, in enshrining rights, is to 'protect' them from change at the suit of following generations save by a (restrictive) amendment process. The issue here is that such process restricts future change. So when a right speaks only of the current demands of one generation then it is inappropriate for inclusion in any Bill of Rights.

For instance, Chief Commissioner Professor **Brice** Dickson in a recent article makes the point that it is more than 30 years since the voting age was lowered from 21 to 18 and in the interim 17 year olds have reached a level of maturity not matched in years gone by.² However, the problem is that the new Bill of Rights would be intended to last for at least another 30 years and longer. A Bill of Rights containing a 17 year old franchise limit could in fact restrict the rights of 16 year olds in the next political generation. So this is a negative rather than a radical proposal.

I sense a strong 'anti-political' trend in many sections of Northern Ireland civil society and amongst many of the most vocal 'Bill of Rights' advocates. This may be understandable because of the sectarian nature of Northern Ireland's political life in the past. However, I submit that where there is any question such as of this nature as to whether the matter should be left to the politicians or to the Bill of Rights (and thereby the lawyers and the courts) the politicians should win out unless there are clear reasons to the contrary that the right in question must be protected for the long term from political interference.

Question 8:

Do you think that the Bill of Rights should contain a right to accountable and transparent government? If so, how would you word such a right?

I would certainly support this proposal. I think it is exactly the sort of issue that the Commission should be considering in a proper interpretation of its terms of reference (see my answers to questions 1 to 3 above).

Accordingly, I think it is a pity that there is only a single paragraph on the issue of accountability on page 23 of the Consultation Document. I note it is stated the Commission did not have the opportunity to address this matter in the necessary depth.

I would suggest accordingly that the Commission should extend its task and take on this specific issue.

I have some experience as a practising lawyer in issues of judicial review both in acting for applicants for judicial review and acting on behalf of respondents in defending such applications.

² Fortnight October 2001 No. 399 'Balancing the Agenda' p20

I would have a number of points to make on the advantages and disadvantages of the judicial review system and as to how it could be improved in the overall public interest. However, that is but one aspect of the wider issue of accountability and I suggest it is a task that the Commission should particularly and quite properly take on board as part of its Bill of Rights exercise.

Question 9:

Do you agree that the Bill of Rights should not contain a provision dealing with parity of esteem?

This is an essential question which the Commission should be considering in its proper interpretation of its duties under the Agreement. Again, the task demands more than the short paragraphs on pages 25 and 26 of the Consultation Document, particularly as 'parity of esteem' is specifically mentioned in the text of the Agreement.

Personally, I do not wish to be 'tagged' as a member of one or other of the two main Northern Ireland communities. However, the task is to see to the proper balance between that individual and legitimate position of mine (and no doubt many others) and the overall position reached by the politicians in the Agreement in the interests of finding some measure of accommodation of intractable issues.

Question 10:

Do you think the Bill of Rights should confer a right on individuals not to be treated as a member of a particular community? If so, how should such a right be worded?

If there is to be provision in a Bill of Rights for 'parity of esteem', then I would agree that such rights should be balanced by a right of individuals not to be treated as a member of a particular community.

Question 11:

With which of the proposed clauses dealing with the rights of persons as members of different communities in Northern Ireland do you agree? Do you have any further suggestions to make in this area?

It follows from what I have said in answer to questions 1 to 3 that I do not agree with the grant of rights in this particular supplementary Bill of Rights relating to Northern Ireland to different minority communities in Northern Ireland. (I would appreciate it if the preceding sentence is not misquoted or taken out of its context!). I do consider that there are serious problems for many minority communities in Northern Ireland. These should be addressed by all necessary legislative, governmental and social measures. (This is particularly an instance where a regional Bill of Rights approach may not be proper and could turn out to be detrimental to progress for such minorities.) In a wider context, the issues should also be addressed on the national level by legislation and on the international level by international human rights conventions as appropriate. There is no proper task under the Agreement for the Commission to be involved in propagating such rights on a Northern Ireland basis in this Bill of Rights exercise.

The Commission is of course addressing these issues under its other powers and should be encouraged and supported in that work. However, this is not properly part of the Bill of Rights exercise.

Question 12:

Should 'status of victim' be a ground for protecting individuals against discrimination?

Certainly, we should all be ashamed about the way we have treated victims of the troubles as perhaps 'second class citizens' over the past thirty years. As a practising lawyer I have some personal experience of the difficulties individual victims of the troubles have suffered, and at least until recent years there was little or no statutory or public support beyond the compensation system.

However, the answer is not necessarily more legislation, let alone provisions in Bills of Rights. For instance, as a practising lawyer I have also seen cases where the availability of compensation through the court system just led to just more stress and heartbreak for the victims. This is not at all to disparage the actions of anyone in the compensation offices or the court system. Obviously public money, even compensation money, has to be awarded under, and controlled by, statutory schemes in the public interest. There were desolating cases where elderly parents lost adult children but, because there was no dependency, the amount of compensation was extremely low. But it is I feel a cheap political point to demand simply 'more money'. Such victims themselves would probably genuinely recognise that a young single parent who has lost his or her wage earning partner deserved financial compensation at levels which other victims did not need. In short the measure of money is not the measure of bereavement or grief.

I am not clear that the harm and lack of regard suffered by victims will be cured by yet further anti-discrimination legislation let alone Bill of Rights 'protection'. What is called for is a change of attitude in society beyond anything that legislation or any Bill of Rights can achieve.

Question 13:

Should the clause in the Bill of Rights dealing with positive action require or permit such action?

The issue of equality is a rapidly developing area of social policy and legislation in Northern Ireland, as indeed throughout Europe.

Accordingly, I suggest it would be quite unwise to include such provision in the Bill of Rights as these are matters that should be dealt with by international convention and by appropriate national legislation.

But there is one specific issue of victims' rights which deserves the attention of the Commission, and possibly protection in a Bill of Rights.

I hope the **Commission** do see themselves as defenders of the rule of law. In such role they could help to defend what may be the most precious right of victims: that the file is not closed on the crimes they have suffered until a final court ruling. So the Commissioners should be speaking up for the victims against proposals for indemnity **from** prosecution or other impunity for those who have perpetrated such hurt and destruction.

Question 14:

Where would the rights of women be best placed in the Bill of Bights -within a special chapter on women's rights or allocated as appropriate to relevant chapters in the Bill?

As indicated in my answers to questions 1 to 3 I consider that the Commission should tackle the issues of community division. Certainly, women have played a key role in individual and community action throughout the past thirty years. This could be recognised if the Commission finds for a Bill of Rights on the issues which the Agreement has referred to the Commission for advice. If as part of that task particular issues of women's rights were identified, then I feel they should be dealt with in the relevant chapters, and not in a particular separate chapter.

Question 15:

Should the right to life be more strictly protected than in the way suggested by the Commission through its proposed addition to Article 2 of the European Convention on Human Bights?

I feel the Commission is most unwise to tamper with the terms of Article 2 of the European Convention. As the Commission comments in the Consultation Document,³ the right to life is recognised by the European Court of Human Rights as being one of the most fundamental provisions in the Convention.

The Court is treating the Convention as a 'living document' as is seen by its increased attention to the positive obligations on the State in the various cases that the Commission mentions in its introduction to Chapter 6 of the Consultation Document.

I also suggest it is also unwise to include in the regional Bill of Rights provisions from 'texts' such as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Question 16:

Should the Bill of Bights protect the right to personal and or physical integrity? If so, how should the provision be worded?

This should have been addressed by the Commission in far more detail having regard to the bullying and threats under which many sections of the community live through paramilitary dominance.

Again, the issues need far more detailed treatment than the half page given to it in the Consultation Document.⁴

³ p40

⁴ p43

Question 17:

Should the Bill of Rights confer a right on persons who have arrested to consult with a solicitor of their choice?

Again, I feel the Commission should not tamper with the terms of Article 5 of the European Convention – right to liberty and security. The European Court of Human Rights is treating the Convention as a living document and has in its case law shown that it does restrict the powers of government and defend the rights of individuals.

However, we should continue to leave it to the Court to act as the ultimate determiner of the balance under the rule of law.

There is a particular danger that, in an enthusiasm for imposing more restrictions on the Northern Ireland security forces, a text could be adopted which could in the future be more restrictive of individual rights than those contained in the European Convention. Of course, the European Convention would remain supreme but this would act as a bar to individuals in Northern Ireland if they had to take their cases to Strasbourg to overturn the terms of the Northern Ireland Bill of Rights.

The issue of the rights of access to advice by those under arrest is a matter properly for legislation from time to time after consultation with all interested groups and having full regard to all the balances to be struck. Again, these matters are not proper for a Northern Ireland Bill of Rights as they could result in (unintended) derogation from the protection of the European Convention of Human Rights.

Question 18:

Should the Bill of Rights confer a right to jury trial? If so, when precisely should this right apply?

Clearly the jury system is a jewel in the crown of the common law. But the jury system is not a universal system of providing criminal or civil justice.

Obviously, one cannot demand a jury for the most trivial matter such as a speeding or parking fine. Equally, however, an allegation of an offence in one sense of low value (such as shoplifting) can have an utterly ruinous effect on someone's reputation.

This matter is under detailed consideration both in England' and in Northern Ireland⁶. The circumstances where jury trial should apply should be determined through these systems and not by a regional Bill of Rights.

⁵ The Auld Report

⁶ Review of the Criminal Justice System March 2000

Question 19:

Should the Bill of Rights include a provision protecting people from being tried twice for the same offence?

Again, this is an essential principle of the common law. There appears to be pressure from the government to allow such re-trials. Perhaps this comes from circumstances where new methods of forensic science claim to identify a 'conclusive' link between a suspect and a particular crime, particularly a crime of violence such as rape or child abuse. Where someone in the past was tried, but acquitted for lack of satisfactory evidence, then there must be pressure from the prosecuting authorities, when they now have such evidence to hand, to be allowed the prospect of a re-trial particularly when the acquitted person is walking free and may be quite seriously a risk to the public, particularly vulnerable groups such as women or children in the case of a serial rapist or child abuser.

Here the rights of the individual (duly acquitted in Court) come directly into conflict with other legitimate interests and concerns of the community.

Accordingly, I would suggest that this is not a matter for a regional Bill of Rights but for legislation from time to time after thorough public open debate.

Question 20:

Should the Bill of Rights include a provision which confers rights on all victims of past crimes or one which limits the rights to people who were victims of the conflict?

The most pressing and troubling matter concerns those who are currently 'victims' of paramilitary harassment, bullying and dominance in their own communities.

The issue of whether there should be a 'Truth and Reconciliation' Commission should also have been dealt with in far greater detail by the Commission.

I would encourage the Commission to go back and revisit this topic in far greater detail.

In doing so, if they came up with provisions which would assist the resolution of the rights of victims both in the past and currently, then I would be clear it should relate to the victims of the conflict, but including the current conflict which continues.

Question 21:

Should the definition of 'victim' in the Bill of Rights include people who are not victims of crimes?

If this problem is being addressed as suggested above then I would suggest that 'victims' should not be limited to those who are direct victims of particular crimes but should include those who are victims of paramilitary harassment, bullying and dominance by reason of the area or community within which they live where the police and security forces are unable or unwilling to give full protection and where the rule of law does not apply as it should.

Question 22:**Which approach would you prefer for the protection of children's rights in the Bill of Rights?**

Again, I would prefer that children's rights be dealt with in the context of identifying the issues of conflict between the two communities. As one instance, the rights of children in the Shankill area of Belfast were seriously violated in the summer of 2000 when many families were forced to move because of the dictates of one or other of the paramilitary loyalist organisations. The police and security forces appeared unable to act and the institutions of civil society took no effective or resolute position on the matter. Children's rights in North and West Belfast also come second in the inter-community conflict there.

I recognise the genuine commitment of the Commissioners on this issue but, with the greatest respect, suggest that in this specific Bill of Rights task their attention should focus on the specific issues of children in community conflict. The other issues are properly part of the Commission's more general agenda.

However, it is a different matter to say what provisions in a Bill of Rights would have provided any help or comfort to those children or to all the other children who have suffered through the years of conflict.

My essential position would be that children's rights in this regard should not be segregated from the rights of the communities in general.

My remarks here must not be taken out of context. I am in no way against the rights of the child as contained in the UN Convention and in other international instruments, but (apart from Northern Ireland specific issues) there is no proper case under the Agreement for the Commission in its Bill of Rights project to be seeking to impose in Northern Ireland a different level of children's rights than that which applies in the remainder of the United Kingdom, in Ireland or throughout the European Union.

Question 23:**Where would the rights of children be best placed in the Bill of Rights – within a special chapter of children's rights or allocated as appropriate to relevant chapters throughout the Bill?**

As above, if the Commission were following the approach which I suggest then, if there were a relevant place for children's rights, I would imagine that they should be allocated as appropriate to relevant chapters throughout the Bill.

Question 24:**Should the enhanced right of children to play a constructive role in society be included in the Bill of Rights?**

The mark of a civilised society is how it deals with all those who are incapable of fully representing themselves, such as children. However, the mark of a democratic society is that the decisions are made by its public representatives elected by the free vote of the people.

The best way to protect children's rights is to protect and encourage their parents, their guardians and teachers in their onerous and difficult roles.

None of this is in any way to derogate from the rights of children to be educated about the democratic process and to take a constructive interest in it.

The best way, I suggest, to encourage young people reaching maturity to participate politically is to encourage them to join the youth wings of the political party of their choice. It is also disappointing that there is nothing in the Consultation Document about the rights and important role that political parties play in open and democratic society.

I do prefer such measures to any such declaration as proposed in this question.

Question 25:
If so, how should this right be enforceable?

I have nothing to add to what I have said above in response to question 24.

Question 26:
Should state support for children to enable them to grow in a stable, safe and loving family environment be framed as a positive right or a state obligation?

Neither the state nor any Bill of Rights must do anything to diminish the central role that parents should play in protecting their children. The state and other 'children's advocates' must be required to justify each act of intervention: such intervention is of course necessary in cases such as child abuse.

The difficulty with the way the question is framed is that 'state support' can so easily become 'state intervention' and who – the state or the parents – is to decide what are the marks of any particular 'stable, safe and loving family'?

I suggest that there is a zone of privacy to which every family is entitled. That is not an absolute family right: intervention by the state is justified when there is reasonable suspicion of abuse. Subject to that the privacy of each family should be respected so far as reasonably possible. I am concerned that those who have framed this question seek (no doubt from worthy motives) greater than necessary intrusion and they should be stopped.

Question 27:
Should the age of criminal responsibility be raised from 10 to 12 years?

This is a matter of criminal and social policy which should be the province of our elected politicians after due and thorough research and public debate.

Accordingly, it is a matter for legislation and not one for a Bill of Rights.

Question 28:
Should the Bill of Rights include an obligation on the state to keep the criminal responsibility under review?

Again, this is a matter of legislation from time to time.

Question 29:

Should the Bill of Rights require the state to ensure that admission criteria for educational establishments ensure access to effective education?

Certainly, it is the case that the Government should devote more resources particularly to education for children in the most disadvantaged areas of Northern Ireland. But thereafter the job is for the teachers and the schools working with parents and children. Checks and balances throughout the educational system are needed, but the particular role of the state is to ensure that resources are available so that economic or social disadvantage is not a bar to full access to education. Great care needs to be taken against an encroachment of the state into the classroom. For these reasons I am opposed to this proposal.

Question 30:

Should the Bill of Rights remove the specific exemption of teachers from the laws on religious and political discrimination in Northern Ireland, leaving the matter to be regulated in the same way as in other employment fields?

I agree that the current of exclusion of teachers from the Fair Employment legislation and the specific exemption of teachers from the recent EU directive on employment equality do discriminate against teachers, particularly those who are employed in schools controlled by religious organisations.

However, again it is a matter for legislation to remedy this discrimination and I do not think it is an appropriate specific provision for a Bill of Rights.

Before closing on the issue of children's rights and associated areas, I recognise that these issues are a central concern to the Commissioners and those who work in the Commission. I do hope they will not regard these observations of mine as being restrictive or dismissive in regard to their aspirations. I simply feel that the Commission is going down the wrong road in trying to cram all such children's issues into a Northern Ireland Bill of Rights.

Children's rights are crying out for attention in the context of the continuing community conflict. But that seems to be quite ignored by the Commission in its wide canvass of children's rights. The specific task I outline is that which the Agreement requires and it is indeed the truly positive and progressive task for the Commission in its Bill of Rights exercise.

Certainly, the Commission under its general remit should address the other issues of children's rights but it has no proper power to seek to introduce these into this Bill of Rights exercise.

Question 31:

Should the Bill of Rights supplement the rights to freedom and expression and to receive and to impart information as protected by Article 10 of the European Convention?

The Commission's brief and unsatisfactory treatment of the rights of freedom of thought, expression, information and association in chapter 12 of the Consultation Document is extremely disappointing.⁷

This should have been a key area of concern, dealing as it does with particular tension points between the two communities on the evocative and sometimes inflammatory problems of flags and emblems, parades and public meetings, memorials and commemorations.

It would be a mark of a society at peace with itself if there were not community division over these issues.

But the sad and regrettable fact is that (for the time being at least) such extreme community tension does prevail and seems to be intensifying in particular areas and in certain circumstances.

So this issue deserves far fuller and intense treatment by the Commission.

As I have indicated in my response to questions 1 to 3 this should have formed the core of the Commission's work.

Of course that might have led to the conclusion that there were no supplementary rights which could help us in these regrettable circumstances.

Certainly, I would subscribe to the view that we should rest very firmly within the terms of Articles 9, 10 and 11 of the European Convention and it is really a matter of their interpretation and application.

But the Commissioners could have done so much to help us all in this task.

So I would ask the Commissioners to review their provisional decision and to examine these matters in full detail.

Question 32:

Do you agree with the Commission's approach to the protection of language rights?

Again, this is a question that should be dealt with in the context of language issues between the two main communities in Northern Ireland.

This is not to derogate from the rights and issues facing other minority communities in dealing with their particular language problems, which are no doubt more significant than those of the two main communities.

⁷ p77/78

Any language issues between the two main communities should be dealt with in terms of respect and tolerance, but also in regard to the extent to which public money should be devoted to the promotion of the Irish language and the Ulster Scots language.

The English language should be seen as a unifying element between the two communities, without in any way derogating from the right of each community to 'its own' language. In particular, each community could be encouraged to use and enjoy the language of the other community.

For these reasons I do not agree with the approach of the Commission.

Question 33:

If you do not, what greater degree of protection would you support?

The fair question would have been what if any other degree of protection would you support?

As indicated above I would wish to consider this only in the full context of the treatment of the rights of the two communities, a task which the Commission should now undertake.

Question 34:

Is the proposed general clause, when interpreted in the light of the principles mentioned in the text above, an effective way of protecting social and economic rights in Northern Ireland?

I was a member of the working group of the Commission on social and economic rights, but issued a Note of Dissent to the report of that group to the Commission, and include this Note as an Annex containing my views of the approach that should be taken to social, economic and environmental rights.

Accordingly, I do not support the Commission's proposal.

Question 35:

Do you think that there should be a general limitations clause in the Bill of Rights or would you prefer specific limitations to be drafted for particular clauses?

I consider that the limitation clauses in the European Convention are well drafted and have been thoroughly tested and applied by the European Court of Human Rights. Accordingly, we should not depart from them as this would create the danger of conflicting interpretations of law between the European Court of Human Rights and the Courts applying Northern Ireland's Bill of Rights (whatever it may be).

Question 36:

Whichever you prefer, have you any suggestions as to how the limitation clauses should be worded?

As indicated above, I feel we should strictly follow the terms of the European Convention on Human Rights.

Question 37:

Should the proposed Bill of Rights create a special court to deal with alleged human rights violations in Northern Ireland?

We should not create a special court because the point about human rights law is that it should be subsumed into the general case law and jurisprudence of our courts.

I believe that this is happening with relative success with the Human Rights Act and the human rights provisions of the Northern Ireland Act 1998.

With regard to the ‘advantages’ stated by the Commission for a proposed new court* I would comment as follows:-

- . I do not see how a specific human rights court would increase the human rights thinking of all judges. Rather, it could serve to make human rights the exclusive province of the human rights judges. As a practising lawyer I already see this problem to some extent with the provisions in European Union law for our judges to make reference of a point of European Union law to the European Court of Justice in Luxembourg. In my view this is a cumbersome and unwieldy system which, by virtue of the long delays (and greatly increased costs) it introduces into the litigation, is against the interests of the people involved in each case.
- . The second advantage stated by the Commission is representing ‘a fresh start’ helping to boost general confidence in all sections of the community in the rule of law and removing ‘any doubts some people may have about the attitude of Northern Irish judges when dealing with human rights matters’.

As a practising lawyer I feel that is an unfair (and rather sneaky) attack on the judges in Northern Ireland throughout the years of the conflict. Do the Commissioners accuse the judges of human rights violations? If so, the Commissioners should come clean and make clear the instances of such abuse. If the Commissioners feel there is in fact no such case to be made but there are sections of the community with such jaundiced view of the judiciary then the Commission should address itself to that issue rather than the feeding of such prejudice.

- ⌘ Rather than facilitating the development of ‘innovative approaches’ to enforcement I think a human rights court could make the judges practising there more remote from the ordinary caseload of ordinary judges and so less in touch with the actual social and economic conditions of life with which judges have to deal in their daily caseload.

Question 38:

Do you agree that a clause on remedies, as worded above, should be included in the Bill of Rights?

As a member of the working group on social and economic rights I specifically wanted the courts to be limited in the ‘innovative remedies’ which they might seek to apply to the

⁸ p101

matters of social and economic rights. The point is that these are again properly the province of our elected political representatives and not the judges.

We should not, therefore, give this power to the judges, but should rather expect and demand of our politicians that they be the main promoters of social change. So social and law reformers must engage with the community and the politicians whom the community chooses. There is no case (short of abuse of rights) to seek the easier route of hoping to influence the judges - more particularly as how badly that might backfire!

Question 39:

Should the Bill of Rights impose a duty on lower courts to refer cases to higher courts if they believe that the relevant legislation is incompatible with the Bill of Rights?

I have already given some indication of my answer to this in question 37 with regard to the matter of references in European Union law to the European Court of Justice at Luxembourg.

From a legal practitioner's point of view the great problem for ordinary clients with this is that any such reference system seriously increases the delays and especially the costs of litigation. While this may be intriguing for human rights practitioners and lawyers, specialists and academics, the rights of the ordinary individual are in second place as the litigation goes to and fro up and down and across the court system. So I am opposed to any such proposal.

Question 40:

Should any interested individual or body be able to bring a case under the Bill of Rights?

As a practising lawyer I see that the current system of judicial review as applied by our judges gives some reasonable latitude for interested bodies to be involved in judicial review litigation. I suggest that our judges have exercised this power well, that this should be recognised and openly acknowledged by the Commissioners and that the appropriate level of judicial discretion should be left to the judges.

Question 41:

If so, what test should be applied when deciding whether an individual or body has the requisite 'interests'?

As indicated above, this should be left to the discretion of our judges and the case law on the issue which is being developed.

Question 42:

Should there be a mechanism whereby the compatibility of proposed legislation with the Bill of Rights can be referred to the courts?

The Commission refers to Article 26 of the Irish Constitution which provides for such system of provisional referral.

From my study (many years ago) of the Irish Constitution and the case law on it, it does not seem to me that this system works particularly well. Judges are best suited to dealing with

particular issues on the factual and legal basis which come before them. Often it is only when a piece of legislation is being implemented that the issues and difficulties will emerge.

The Commissioners do identify one problem with the system in the Republic of Ireland that such review decision is then binding on all future courts. The Commission is correct to suggest that this should not be followed here.

However, I would fear that the system would become a tactic in political and social campaigning and be used to frustrate and delay the legislative process and this would not be in the best interests of the people of Northern Ireland. This would be particularly so with well funded interest groups and major corporations which seem to have unlimited litigation war chests.

Question 43:

If so, what kind of mechanism would you propose?

As indicated above, I would not propose any such mechanism for prior review.

Question 44:

What method or combination of methods should be adopted for entrenching and amending the Bill of Rights?

Here again the Commission is departing from the terms of the task given to it under the Agreement. The text specifically states that the Commission's task is '... to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights ...'.

What the politicians agreed in the Agreement is not what the Commission is now proposing. The politicians agreed that the matter would be considered in the context of Westminster legislation. That is the task for the Commission, even if it disagrees with it for the reason which it states⁹:-

'The Belfast (Good Friday) Agreement 1998 states that the rights supplementary to the European Convention on Human Rights which are to form part of the Northern Ireland Bill of Rights should be adopted by Westminster legislation. The same form of legislation has been used to incorporate the European Convention into UK law. But either of these laws could be repealed at any time by a simple majority in the Westminster Parliament, although the UK government would still be bound by the European Convention and cases could still be taken to the European Court of Human Rights in Strasbourg.'

These views of the Commissioners cannot be used to detract from the terms of the Agreement which provides that the matter should be dealt with by Westminster legislation. So the Commissioners are going beyond their mandate and quite wrongly attempting to rewrite the Agreement with their proposals for Assembly approval, incorporation in a new British Irish Treaty or referendum of the people.

⁹ p106

Question 45:

Should amendments to the Bill of Rights be voted by some form of referendum and if so, how should the options be selected and how should the votes be counted?

Again, this is outside the proper task of the Commissioners if they are acting in accordance with the Agreement.

Notes:

- *The views expressed in this paper are solely my personal responsibility and are not to be ascribed to my partners where I work or to my other friends and colleagues there or elsewhere.*
- *I have dealt in this paper specifically with the queries raised by the Commission in the Consultation Document. The fact that I have not dealt with every specific proposal in the Document which does not fall within the terms of any question is not to be taken as indicating agreement to or acceptance of such matters.*
- *I may submit an additional paper on such matters.*

Neil Faris

6 November 2001

ANNEX

Note to Report of Social and Economic Rights Working Group

Note by Neil Paris – 7 January 2001

I suggest that the paper of the Working Group does not go far enough in the following respects:-

Relevance to Northern Ireland

We have attempted at points to demonstrate relevance with statistical evidence. But I feel that such is a quantitative rather than qualitative measure. Further weight is needed.

Any discussion of the need for a Bill of Rights for Northern Ireland must focus on the continuing influence that paramilitary organisations have over sections of the community. That this influence does not further extend and that it may (possibly?) have reached its limit are not reasons to ignore the issue.

I know that this gives rise to difficult questions: do we then recognise paramilitaries as ‘participants’ or even ‘combatants’ in a situation of ‘war’ or ‘armed conflict’?

The governments political parties and others who support the peace process might prefer to avoid these issues. But the Commission is independent and established to deal with difficult matters. So I hope the Commission’s Report will tackle the question of how a Bill of Rights may offer support and protection to those who do not enjoy the full protection of the rule of law because of the influence of paramilitaries over their lives and families.

Truly, we do not achieve full implementation of the Agreement if proposals for a Bill of Rights emerge ignoring these troubling issues.

Participation in democratic society

Another consequence of the past thirty years (and particularly of direct rule) is how large sections of civic society have opted out of direct involvement in the political process.

A new Bill of Rights for Northern Ireland should include (particularly in its Social and Economic Rights Section) parameters on the bounds of decision making such as involves the closure of public facilities, the sale of public assets or the transfer of services to the private sector. That is not to impose any presumption, but there should be a process of fuller public and societal engagement in these decisions.

To some extent we have addressed this in our proposals for an interpretative clause. However, I feel that this needs to be further developed and I hope the Commission will be able to devote some time to this important issue.

≈ Sustainable development

Similarly, I feel that our proposals for the ‘sustainable environment’ need further elaboration.

‘Sustainable development’ properly involves the integration of society, the economy and the environment into all decision making. So it is insufficient to think in terms of a right to conservation of the environment: that is part of the process only.

- *Proportionality*

We have dealt with this only in terms of the need to allocate resources in a proportionate manner: Interpretative clause para 3.

I believe that ‘proportionality’ extends to include a duty to act in a proportionate way in decision making, whether in individual decisions or in policy or strategy.

I believe it should also properly extend to the entire rights process: thus the courts may consider whether a plaintiff's demands are proportionate to the wider needs of society as well as whether government's response has been proportionate.

A positive way forward?

I do not make these points in any negative spirit in regard to this Report.

Had there been more time I am sure we would have debated them in the friendly and constructive manner that characterised our meetings. Though I note and regret the time constraints, I accept that the Commission is working to its programme. So I hope that the Report and this Note will be treated as opening rather than determining the debate on these issues.