

**Committee on the Administration of Justice**

# **Making Rights Count**

*Discussion, analysis and documentation of international charters of rights and their application to Northern Ireland.*

*Includes*

***A Bill of Rights for  
Northern Ireland***

*proposed by the Committee on  
the Administration of Justice*

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# The Committee on the Administration of Justice

The **Committee on the Administration of Justice** is an independent civil liberties organisation formed in 1981 to work for "the highest standards in the administration of justice in Northern Ireland by examining the operation of the current system and promoting the discussion of alternatives."

By undertaking and facilitating research, holding conferences, lobbying politicians, issuing press statements, publishing pamphlets and circulating a monthly news-sheet, the **CAJ** hopes to raise the level of public debate around important social justice issues.

Open meetings of the full committee and visitors take place every other month to discuss current justice topics. Various sub-groups meet and work on an ongoing basis. At present the sub-groups are specifically concerned with prisons, a Bill of Rights, policing, emergency laws and aspects of social legislation.

## Membership of the Committee

Membership entitles the individual to attend the organisation's meetings, to take part in the work of sub-committees, to use the **CAJ** library and newspaper clippings service, and to receive all **CAJ** mailings, including our monthly news-letter, **Just News**. Individual membership fees are £5 (£2 unwaged) and £10 for organisations.

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# PREFACE

This pamphlet is the result of long and detailed discussions within and without the C.A.J. over the past five years. During that time a large number of people have had an input into the pamphlet's form and content, even though the final product may bear little resemblance to very early drafts. The Executive Committee wishes to thank sincerely each one of the contributors and regrets if names have been inadvertently omitted from the following list: Kader Asmal, Kevin Boyle, Anupam Chander, Alpha Connolly, Jean Craig, Brice Dickson, Dominic Gates, Tom Hadden, Elisa Irwin, Pat Johnston, Katie Kennedy, Donall Murphy, Martin O'Brien. No single individual should be taken as necessarily agreeing with every statement made in the pamphlet, which is put before the public as pre-eminently a consensus document.

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# Chapter One

## INTRODUCTION

### 1. The value of a Bill of Rights

**A** Bill of Rights for Northern Ireland would assert the fundamental rights and liberties held by every resident of Northern Ireland, regardless of his or her race, gender, or religion. A Bill of Rights would guarantee freedom of conscience and religion, freedom of speech and of the press, and freedom of peaceful assembly and association. It would protect citizens against cruel or degrading punishment, and would secure the right to trial by jury for serious crimes. A Bill of Rights would guarantee equal treatment under the law to all persons.

The Committee on the Administration of Justice believes that the principles embodied in a Bill of Rights represent values shared by the people of Northern Ireland, whether man or woman, Protestant or Catholic, rich or poor. Cast in the form of legal rights and collected in a single document enumerating these rights, these commonly-shared values would effectively protect individuals against government abuses of power. We believe that a Bill of Rights should be enshrined as part of the law of the land. To further this goal, we present in this document our proposal for a Bill of Rights and the reasons why we feel that a Bill of Rights is crucial for the future of Northern Ireland.

At present the people of Northern Ireland do not enjoy legal protection for many liberties which people of most other countries take for granted. Freedoms of speech and of the press and broadcasting media are often denied in Northern Ireland without sufficient justification. A person's right to privacy finds little protection in the law of Northern Ireland. We do not have the absolute right to join the trade union of our choice, or to gain access to stored information about ourselves. Great Britain's Race Relations Act, an important part of the law against racial discrimination, does not extend to Northern Ireland. Acts of Parliament cannot be judged in court to see whether they violate the basic principle of the equal protection of the laws. While the United Kingdom's Bill of Rights of 1688 provides individuals with some rights, including the right to be free from cruel and unusual punishment, it falls far short of providing all of the liberties associated with a modern democracy. For example, although the 1688 Bill of Rights does provide for freedom of speech, this freedom applies only to speech in Parliament. Northern Ireland needs a modern document which protects our basic freedoms.

By supporting a Bill of Rights for Northern Ireland, the Committee on the Administration of Justice does not intend to disparage attempts to establish a Bill of Rights for a broader geographical region. We limit our proposal to Northern Ireland because we feel that human rights are more abused in Northern Ireland than elsewhere in these islands and that such a Bill is especially imperative if harmonious relations between different communities are to be established.

A Bill of Rights offers no panacea for all the ills of Northern Ireland. Instead, it represents a single, but important step to the peaceful resolution of the troubles of this land. By protecting

individual rights against government infringement and by demonstrating the state's ability to protect civil liberties, a Bill of Rights may make peaceful methods of political protest more attractive.

A Bill of Rights represents society's recognition of the fundamental equality of all of its members. It demands from the government respect for the dignity of **all** persons.

## 2. The C.A.J.'s campaign to date

**T**he idea of a Bill of Rights for Northern Ireland was first raised inside the C.A.J. in May 1984 at a conference it organised on the protection of individual and group rights in a divided society. As a result of the discussions at that conference, a resolution was passed requesting the C.A.J. to draft a Bill of Rights for Northern Ireland. A sub-committee was formed which quickly realised that, in light of the existence of numerous such documents around the world, it would be more productive to focus energies on four main areas of research:-

- Existing legislation in Northern Ireland for the protection of civil and human rights.
- The views of Northern Ireland political parties on a Bill of Rights.
- The experience of the U.S.A. and Canada regarding their guarantees of civil and human rights.
- The European Convention on Human Rights.

On the completion of its research, the sub-committee reported to a reconvened conference which endorsed, as a minimum, the incorporation of the European Convention on Human Rights into domestic law. However, it was felt that this in itself was not enough. In June 1985 the C.A.J. therefore organised another conference entitled **Beyond the European Convention** to identify in which specific ways the Convention needed to be expanded to meet the needs of Northern Ireland. Speakers at this conference included Dr. Chris McCrudden, a noted expert in the field of public law, and Mr. Gray McCalley, a specialist in U.S. constitutional law and, at the time, U.S. Vice Consul in Belfast. The C.A.J. also published its first pamphlet on this subject in June 1985. This was entitled **Ways of Protecting Minority Rights in Northern Ireland** and it reviewed much of the debate surrounding the concept.

It was in June 1986 that the Committee began actively to campaign for a Bill of Rights for Northern Ireland. The campaign was launched with a press conference and the printing of 2,000 copies of a leaflet, which briefly outlined the need for a Bill of Rights and our suggestions as to the additional rights which ought to be protected aside from those set down in the European Convention. This leaflet contained a slip which readers could return to us declaring support for the principle of a Bill of Rights for Northern Ireland. A policy document was also prepared which set out the Committee's views as presented in the leaflet. The document stressed that support for the principle of a Bill was the first step. We could then go on to debate mechanics and the structure of such a Bill. The policy document pointed to the advantages of incorporating the European Convention into domestic law and detailed the additional rights which ought to

be protected. It stressed that all of us could benefit from the enactment of a Bill and none of us could be disadvantaged by it.

Members of the C.A.J.'s Bill of Rights sub-committee began to meet with a wide range of other groups to discuss the idea further. These included the Ulster Defence Association, the New Ireland Group, the Campaign for Equal Citizenship and the Women's Information Group. In November 1986 the C.A.J. published "**The Blessings of Liberty: an American Perspective on a Bill of Rights for Northern Ireland**". This was written by Martin Flaherty, a summer intern from the USA who worked with the C.A.J. through Columbia University's International Human Rights Programme. His work considered how the American experience of a Bill of Rights might be helpful to those in Northern Ireland who are interested in exploring the contribution which a Bill might make to our situation.

In February 1987 a member of the Committee attended a conference on constitutional change organised by the Constitutional Reform Centre and the National Council for Civil Liberties in London. This considered the incorporation of the European Convention into UK law. In November 1987 a number of us attended a seminar on the Canadian Charter of Rights addressed by the Canadian High Commissioner in London at the Queen's University of Belfast.

More recently the C.A.J. has taken its campaign to local councils in Northern Ireland in an attempt to gather further support for the principle of a Bill and at the same time to encourage wider debate and discussion of the form and content which any Bill might take. The City Councils of both Belfast and Derry have given their support to the principle of a Bill of Rights and the Derry City Council has agreed to sponsor further discussion of the idea. A committee of Lisburn Borough Council also expressed support.

We have also been involved in a long correspondence with the government outlining the need for a Bill and in particular urging the incorporation of the European Convention into domestic law. We met Mr. John Stanley, a Minister of State at the Northern Ireland Office, and have received a written response from him as to why, in his view, the European Convention cannot be incorporated. We have in turn prepared detailed answers to the objections raised by the Government.

### **3. The C.A.J.'s campaign in the future**

**T**he publication of the present pamphlet marks another, and vital, milestone in our campaign to achieve a Bill of Rights for Northern Ireland. Through conveying information about the defects in the current mechanisms for protecting human rights in Northern Ireland, about the experiences of other societies which have already enacted a Bill of Rights, and about the widespread political support which has already been voiced for a Bill here, we hope to heighten the general public's awareness of the contribution which a Bill of Rights might make to a resolution of the conflict in Northern Ireland.

As can be seen from chapter 4, the political parties in Northern Ireland all support the principle of a Bill of Rights. Article 5 of the Anglo-Irish Agreement also affirms the commitment of both the British and Irish governments to explore the idea. It is rare in Northern Ireland for there to be cross-party agreement about anything. Could the Bill of Rights serve as a basis for inter-party talks? We think the answer is "yes". A discussion about the content of a Bill and its form would

address constructive and important issues, unlike the sterile debate to which we are accustomed. Clearly a Bill of Rights will form part of any eventual solution to our problems. Does it not make sense for us to be aware of the issues and to have given them some consideration before we are forced to?

Having outlined the political and legal advantages to be gained from enacting a Bill of Rights for Northern Ireland, we "lay our head on the block" at the end of this pamphlet by putting forward our own draft Bill for discussion and comment. The appended notes make it clear that our draft is closely modelled on existing documents intended to ensure international protection for human rights (principally the European Convention and the United Nations' Declaration and Covenants). But the draft is also composed with the particular problems of Northern Ireland very much in mind. The rest of this pamphlet provides helpful background material for a full understanding of the draft, but the Bill must stand or fall on its own merits.

In addition to publishing this pamphlet the CAJ plans to continue its visits to local councils and its consultations with political parties and other groups. We shall be seeking further meetings with members of the UK government and will again be contacting the Irish government to establish their current policy regarding a Bill. We have already had discussions with civil servants in Dublin. This was at the time of the last Fine Gael administration and their response was to encourage us to continue with our campaign. The Anglo-Irish Agreement of 1985 committed both governments to considering the "advantages and disadvantages of a Bill of Rights in some form in Northern Ireland" but nothing has been said on the subject by either government since October 1986, when the idea of a Declaration of Rights was mooted and then seemingly abandoned.

In light of the fact that in February 1987 Sir Edward Gardner's private member's Bill to have the European Convention incorporated into the domestic law of the UK narrowly failed to gain the votes required for a second reading, we plan to contact MPs (especially those who voted against that Bill) to ask how they would vote if the suggestion was made simply in relation to Northern Ireland. We feel confident that a special case can be made for this and that there would be sufficient support for the incorporation of the Convention into the domestic law of Northern Ireland alone. We return to this point at page ten.

We have kept in touch with the international developments surrounding the concept of the Bill of Rights and we hope to organise a prestigious lecture by an internationally respected person who would command the attention of Northern Ireland's legal profession and judiciary. We will also try to sponsor and provoke a greater awareness of the issues among students and school children through talks to classes and youth groups.

We call upon you, the reader of this booklet, to assist us in our campaign for a Bill of Rights. This society needs the help of as many people as possible who have peace, justice and equality at the centre of their concerns.



# Chapter Two

## HOW HUMAN RIGHTS ARE CURRENTLY PROTECTED

In the first two sections of this chapter we outline the current legal framework for protecting human rights and civil liberties both in the United Kingdom as a whole and in Northern Ireland in particular. In the third section we examine the defects in that framework. Finally, we consider whether there is a case for new legislation and what its geographical extent should be.

### 1. The position in the UK as a whole

The UK does not have a constitution embodied in one written document. It operates instead on the basis of an unwritten constitution. According to this, supreme power rests with "the Queen in Parliament." Whatever rules the monarch, the House of Commons and the House of Lords specifically agree become the law of the land. It is now accepted, moreover, that the monarch cannot refuse to consent to rules which the two Houses of Parliament have drawn up. In this sense Parliament is "sovereign". It can enact whatever it likes and cannot pass laws which purport to fetter its sovereignty in the future. All laws, at least in theory, are subject to repeal by a later Parliament.

But by common consent some laws are of so fundamental a nature as to be virtually non-repealable. The best known of these is probably **Magna Carta**, which was presented to, and signed by, King John in 1215. It is based on the charter of liberties issued in the 12th century by King Henry II and is similar to other charters defining people's rights granted around the same time by other rulers in Europe. **Magna Carta** regulated the relations between King and people. Clauses 39 and 40 said that no freeman should be imprisoned or dispossessed except by the lawful judgment of his peers or by the law of the land and that the King would not sell, deny or delay right or justice to anyone. These clauses have since been acknowledged as the origins of *habeas corpus* (see below), trial by jury and the liberties of the subject generally.

A further landmark is the **Petition of Right** of 1628, which again limited royal power, especially for arbitrary imprisonment and taxation without Parliamentary authority. When the English Crown was offered to William of Orange in 1687, Parliament issued the Declaration of Rights, which was incorporated the following year in the Bill of Rights. Amongst other things, this **Bill of Rights** - now more than 300 years old - declared that it was illegal to raise a standing army in peacetime unless Parliament had consented to this, that there should be free elections for Members of Parliament, that freedom of speech in Parliament should never be questioned in any court, that excessive bail ought not to be required, or excessive fines imposed, or cruel and unusual punishments inflicted, that juries should be properly empaneled and that no-one should be sentenced before being convicted. This Bill is recognised as one of the greatest documents of British constitutional history. Its provisions are still occasionally referred to in court. For example, in **R. v Secretary of State for the Home Department, ex parte Herbage (No.2)** in

1986, an American detained in an English prison awaiting extradition to the USA was allowed to rely on the provision in the Bill of Rights which said that no "cruel and unusual punishments" should be inflicted. His complaint was that he was being detained in the company of mentally disturbed prisoners, who prevented him from sleeping.

It is crucial to realise, however, that **there have been no significant general documents on human rights issued by the British Parliament since 1688**. Instead, the tradition has been to provide protection against violations of human rights by passing **particular** Acts. Thus, the law on *habeas corpus* (the legal remedy against unlawful imprisonment) is embodied in a series of Acts dating from 1640. The freedom of judges from political interference is guaranteed by the Act of Settlement of 1701. The right to vote is protected by a series of Representation of the People Acts since 1832. Anti-discrimination measures are illustrated by the Equal Pay Act 1970 and the Race Relations Act 1976.

The United Kingdom has also participated in international efforts to protect human rights, but none of the international agreements to which it is a party have been incorporated into the UK's domestic law, except the Geneva Convention on the protection of people during wartime, the United Nations Convention on Genocide and (by virtue of the Criminal Justice Act 1988) the United Nations Convention on Torture. These exceptions may have been made because they entailed no changes to existing UK domestic law - the crimes they dealt with were already crimes (albeit of a different name) in UK law.

The UK's position on human rights and civil liberties is often summed up by saying that people are allowed to do anything unless it is expressly prohibited by the law. This is a gross distortion of the true picture. It fails to reflect the fact that there are many freedoms which are simply not recognised within UK law. Freedoms such as the right to have access to information, the right to privacy, the right to strike and the right to be free from all unfounded discrimination. In addition, there are many social, economic and cultural rights which are given no firm protection at all. There is certainly no tradition of fundamental freedoms being positively stated in Acts of Parliament. The reality is that there are so many restrictions on people's freedoms, and so many gaps in the positive rights and protections conferred by the legal system, that the UK is far from being the extremely free nation it claims to be.

For the government's own description of "Human Rights in the United Kingdom", see the booklet with that title published by HMSO (2nd ed, 1984): COI Reference Pamphlet No. 162 (£4.20).

## 2. The position in Northern Ireland

**V**irtually all of the laws protecting human rights passed by the Westminster Parliament also apply in Northern Ireland, though sometimes the Northern Irish versions are slightly different. The main exception concerns racial discrimination, which is not unlawful in Northern Ireland. In addition, various laws have been passed supposedly enhancing the legal protection of human rights to a degree not yet achieved in Great Britain. Two examples are:

- the prohibition on the passing of discriminatory religious laws by the Northern Irish Parliament, contained in section 5 of the Government of Ireland Act 1920 and

- the further restrictions on religious and political discrimination by public authorities or employers, contained in the Northern Ireland Constitution Act 1973 and the Fair Employment (NI) Acts 1976 and 1989.

We list below most of the legislation which could be said to make provision for preventing discrimination or for protecting human rights in Northern Ireland today:

### *Introduced by the Stormont Parliament*

- **1. Electoral Law Act (NI) 1969** - this provided for universal adult suffrage for local council elections and reduced the voting age to 18.
- **2. Local Government Act (NI) 1969** - set up the forerunner to the Local Government Boundaries Commission.
- **3. Parliamentary Commissioner Act (NI) 1969 and the Commissioner for Complaints Act (NI) 1969** - these created the posts of Ombudsmen for Northern Ireland.
- **4. Prevention of Incitement to Hatred Act (NI) 1970** - now part of the Public Order (NI) Order 1987, this made incitement a crime.
- **5. Police Act (NI) 1970** - this set up the Police Authority for Northern Ireland, thereby introducing an element of independence into police accountability.
- **6. Housing Executive Act (NI) 1971** - this set up the Northern Ireland Housing Executive, which was given responsibility for public housing in place of the local district councils.

### *Introduced after the commencement of direct rule*

- **1. Prosecution of Offences (NI) Order 1972** - this created the Office of the Director of Public Prosecutions, to which was given the responsibility of deciding whether and when most suspects should be prosecuted for crimes (a power previously vested in the police).
- **2. Electoral Law (NI) Order 1972** - this provided for the use of proportional representation at local government elections.
- **3. Education and Libraries (NI) Order 1972 and the Health and Personal Social Services (NI) Order 1972** - these established Area Boards to deal with these matters in place of local district councils.
- **4. Northern Ireland Constitution Act 1973** - Part III made unlawful all legislative and executive actions of central and local government and statutory bodies in Northern Ireland which were discriminatory on religious or political grounds, it also created the Standing Advisory Commission on Human Rights.
- **5. Sex Discrimination (NI) Order 1976** - this set up the Equal Opportunities Commission for Northern Ireland, a body which in particular assists female victims of discrimination.
- **6. Criminal Damage (Compensation) (NI) Order 1977 and the Criminal Injuries (Compensation) (NI) Order 1988** - these created improved compensation schemes for victims of crimes.

- **7. Rehabilitation of Offenders (NI) Order 1978** - this allowed certain sentences to be regarded as "spent" after a set period of time.
- **8. Disabled Persons (NI) Order 1982** - this provided greater rights for disabled persons as regards employment.
- **9. Homosexual Offences (NI) Order 1982** - this legalised certain homosexual acts between consenting males.
- **10. Police (NI) Order 1987** - this created the Independent Commission for Police Complaints, to replace the Police Complaints Board which was set up in 1977.
- **11. Fair Employment (NI) Act 1989** - this set up the Fair Employment Commission and the Fair Employment Tribunal, replacing the Fair Employment Agency created in 1976.

### 3. The defects in the existing framework

**O**n the face of it, it might appear that human rights are already extensively protected in Northern Ireland. The territory enjoys the benefit of special laws as well as the protection of United Kingdom legislation. However, there are very significant defects in the arrangements. We can highlight six here:

- ❑ (i) **The current protection is piecemeal.** There are important human rights which are granted no protection at all in Northern Irish law or in United Kingdom law. We have already referred to Great Britain's Race Relations Act, which has not been extended to Northern Ireland. There is also no law protecting people who are discriminated against because they are disabled or homosexual. The rights of prisoners are treated by the government as privileges which can be withdrawn at will. There is no absolute right to join the trade union of one's choice, or to gain access to stored information about oneself, or to move freely between parts of the United Kingdom. There is very little protection, if any at all, of a person's right to privacy. **Such gaps are bound to exist if there is no single Bill of Rights guaranteeing protection of all commonly recognised human rights.**
- ❑ (ii) **The rights which are protected are rarely worded in a positive manner.** The tradition is not expressly to confer a right to do something (e.g. to demonstrate, to join any lawful association or to acquire shelter if one is homeless). Instead, the system supposes that people have a right to do anything they want unless there is some prohibition or restriction on doing it. This means that whenever a dispute arises as to whether a person has acted lawfully, attention is immediately focussed on the restrictions placed on the activity rather than on the importance of performing the activity in the first place. Someone relying upon a right must prove its existence rather than wait for its existence to be disproved. This leads to people being ignorant of their rights and to a lack of any sense that rights, being truly the heritage of all people, are a vital part of our society's collective consciousness and culture.
- ❑ (iii) **The present system is individualistic in its approach.** There are no provisions which specifically protect rights that are meaningful only in the context of group activity, for instance language rights, broadcasting rights, rights to minority representation and the rights of local communities to a healthy environment. The United Kingdom's legal system very rarely permits the bringing of any action on a group basis (called "representative actions") and

there is nothing akin to the concept of "class action", so familiar and beneficial to Americans. The Legal Aid Act of 1988 widens the availability of "representative actions"; but these are a poor substitute for the American concept, and the Act has in any case not yet been extended to Northern Ireland.

- ❑ (iv) Hanging over the whole framework for the protection of human rights is the doctrine that the Parliament of the United Kingdom is supreme. **No Act of Parliament can be challenged in court as being unconstitutional nor is any Act totally protected from repeal by a later Act.** Any "entrenchment" provision in a Westminster Act, purporting to lay down a special procedure or a stated majority for later amendment or repeal of that Act, can itself be amended or repealed by a simple majority when a later Act is passed. It is really only Acts creating subordinate Parliaments (e.g. the South Africa Act 1910 or the Government of Ireland Act 1920) which can impose limitations on the subsequent legislative powers of that Parliament. But such Parliaments, as in the case of both South Africa and Ireland, have a tendency to go their own way in due course. A related point is that the power of judges to review the legality of legislation is confined at the moment to legislation that is "delegated", that is, legislation which has been issued by a body (such as a department of government) acting with the authority of Parliament as expressly conferred by an enabling Act. The grounds on which even delegated legislation can be struck down by this kind of "judicial review" are still - though recently broadened - narrowly based.
  
- ❑ (v) The United Kingdom government can bind itself internationally on human rights matters but **residents of the United Kingdom cannot automatically take the government to court in Britain for failure to meet its international obligations.** It is for this reason that, although the UK was the first country to ratify the European Convention on Human Rights and Fundamental Freedoms (the ECHR) in 1953, UK citizens are still unable to rely upon the content of the European Convention when seeking protection of their human rights in a UK court. But they must first of all exhaust whatever "local" remedies they have before taking their grievances to the European Commission of Human Rights in Strasbourg see page twenty three
  
- ❑ (vi) **The existing framework can be suspended in times of "emergency"** or, in other words, it allows for exceptions to the protective guarantees normally available. These exceptions are contained in "notices of derogation". The United Kingdom has enacted special laws in an attempt to counteract terrorism (now embodied in the Prevention of Terrorism (Temporary Provisions) Act 1989 (the PTA)). Northern Ireland has always had such laws, beginning with the Civil Authorities (Special Powers) Act (NI) 1922 and continuing now with the Northern Ireland (Emergency Provisions) Acts 1978 and 1987 (the EPAs). Although these laws are called "temporary", "special" or "emergency" laws, they have in fact become permanent. They represent major departures from the normal operation of the rule of law. They confer special powers on the police and army as regards questioning, arresting, detaining, searching, photographing and fingerprinting; they introduce special procedures for bail applications, remands in custody, pre-trial hearings, the trial itself, the admissibility of evidence and the burden of proof. They do not create any offence of being a terrorist, but yet they permit the arrest of a person on suspicion of being a terrorist. In November 1988 the European Court of Human Rights decided in **Brogan v UK** that detentions for longer than four days and six hours were a breach of the European Convention on Human Rights. The British government promptly issued a formal notice of derogation, claiming that its law

had to break the Convention because there was a "a public emergency threatening the life of the nation".

## 4. The need for a new Bill of Rights

**T**o remedy the defects listed in the previous section, it is necessary to enact a new Bill of Rights. This should be much more comprehensive than any previous constitutional document issued by the Westminster Parliament.

- It should contain a catch-all clause to the effect that the listing of particular rights in the Bill must not be interpreted as denying the existence of other **rights already vested** or which might come to be vested in the people.
- The Bill's provisions should be worded in an assertive manner, clearly **affirming the existence of a right** before going on to limit it by only those qualifications which are absolutely necessary.
- The Bill should also recognise **the importance of group rights** and confer the power on individuals to bring class actions on behalf of groups.
- The content of the Bill of Rights should largely be **based on the content of the international human rights agreements** by which the United Kingdom has agreed to be bound.

## 5. The geographical extent of a new Bill of Rights

**I**t is obviously desirable that as large a number of people as possible should benefit from a new Bill of Rights. Some might therefore argue that the Bill should not be limited in geographical extent to Northern Ireland. Further possibilities are that it should be extended to the island of Ireland as a whole, to the United Kingdom of Great Britain and Northern Ireland, or to the islands of Ireland and Britain together.

The recent attempts by members of the House of Commons and of the House of Lords to introduce Human Rights Bills have all focussed on Bills for the whole of the United Kingdom. No Parliamentary vote has been taken, either in Westminster or in Dublin, on the proposal to enact a Bill of Rights just for Northern Ireland or for Ireland as a whole or for these two islands together. Politically the best option would be the last, because the peoples of these islands have a lot in common and no one part would feel aggrieved if the Bill of Rights covered all parts. Both nations have already ratified the European Convention on Human Rights and each is a member of the European Community (the Common Market).

The **Committee on the Administration of Justice** takes no firm view on whether other parts of these islands should have a Bill of Rights comparable to the one we are advocating for Northern Ireland. It believes that progress on enacting a Bill of Rights for Northern Ireland should not be delayed on the sole ground that its geographical extent beyond the boundaries of Northern Ireland cannot immediately be agreed. Whatever constitutional arrangements are finally worked out for the governance of Northern Ireland, an integral part of the plan should be a strong and commonly acceptable Bill of Rights.

# Chapter Three

## EXPERIENCES ELSEWHERE

In the fields of human rights and civil liberties a great deal of experience has been gained in other countries which may be of use to those who are seeking to make progress on these fronts in Northern Ireland. The United Kingdom remains one of the few modern democratic nations that does not afford its citizens a written set of comprehensive, human rights guarantees. Its isolation in this is growing, as nations like Canada and New Zealand have recently acknowledged their peoples' need for a Bill of Rights. While the UK has signed and agreed to abide by several major international human rights conventions, it has not made these agreements generally enforceable inside its own borders. For example, an individual in Northern Ireland seeking to enforce his or her rights under the European Convention on Human Rights must have the resources to litigate the case in Strasbourg.

The people of Northern Ireland deserve the same level of human rights protections as are available to the citizens of many other countries throughout the world.

In the **first section** of this chapter we will look at what has happened in a few countries which share with Northern Ireland a "common law" English heritage and also at some countries which are European and therefore have a "civil law" system derived from the ancient law of the Roman Empire. In the **second section** we will examine a few regional arrangements for protecting human rights - the continents of Europe, Africa and America have all established multi-lateral treaties to this end. In addition, the United Nations has acted more or less on a worldwide basis.

### 1. The position in other countries

#### The United States of America

The Constitution adopted in 1789 contained few personal guarantees and subsequently some states refused to ratify it. James Madison proposed the adoption of ten amendments which became known as the Bill of Rights, even though only the first eight of them guarantee specific rights and freedoms. The Supreme Court of the United States has held the Bill of Rights also applies to State governments. Each State Constitution also contains a declaration of rights. Virginia adopted the first State Bill of Rights as part of its Constitution in 1776.

The first eight amendments to the Constitution contain the fundamental rights and freedoms of every citizen. Amendments 9 and 10 forbid Congress adopting laws that would violate these rights. But the Supreme Court has held that these rights have some limits. For example, freedom of speech does not protect a person who shouts "Fire" in a crowded theatre when there is no fire. Yet the government must respect these freedoms in all but extreme circumstances. The Supreme Court has held that freedom of speech may be limited only when its exercise creates a "clear and present danger" to society.

The C.A.J. has already published a booklet which attempts to draw some lessons for Northern Ireland from the US experience with a Bill of Rights (see Martin Flaherty, "**The Blessings of Liberty**"; C.A.J. Pamphlet No. 9, November 1986). We continue to believe that there is much in the American model which is worth imitating. We are particularly impressed by the reasoning often employed in the US Supreme Court in order to protect human rights. But on balance we see greater advantage in basing a Bill of Rights for Northern Ireland not so much on the first ten amendments to the US Constitution as on Articles 2-18 of the European Convention on Human Rights. Nor would we wish to see a system installed whereby, as in the USA, the judges appointed to interpret the Bill of Rights are in effect political appointments made by the President.

The **US Bill of Rights** reads as follows:

**Amendment 1**

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

**Amendment 2**

*A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.*

**Amendment 3**

*No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner to be prescribed by law.*

**Amendment 4**

*The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

**Amendment 5**

*No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

**Amendment 6**

*In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.*

**Amendment 7**

*In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be*



*otherwise re-examined in any court of the United States than according to the rules of the common law.*

**Amendment 8**

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

**Amendment 9**

*The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.*

**Amendment 10**

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

## Canada

Canada is a federal country comprising ten provinces. It has recently undergone fundamental constitutional reform, the Parliaments being now completely free from any control exercised at Westminster. Under the earlier Constitution a statutory Bill of Rights was enacted in 1960, but under the new arrangements this has been supplemented by the **Charter of Rights and Freedoms**, which came into force for the whole of Canada (except Quebec, where a separate Charter is in force) on 17th April 1982. The Charter contains a more detailed list of rights than the 1960 Bill of Rights, and, unlike that Bill, the Charter can be amended only by special Parliamentary procedures.

According to **section 2** of the Charter, everyone has the following **fundamental freedoms**:

- freedom of conscience and religion;
- freedom of thought, belief, opinion and expression....;
- freedom of peaceful assembly; and
- freedom of association.

**Sections 3-6** are concerned with electoral and mobility rights.

**Sections 7-14** are entitled "**legal rights**" and include the following provisions:

*11. Any person charged with an offence has the right:*

*(b) to be tried within a reasonable time;*

*(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;*

*(e) not to be denied reasonable bail without just cause;*

*(f)...to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or more severe punishment.*

*12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.*

- **Section 15** of the Charter caters for minority interests, including the possibility of **positive discrimination** (section 15 (2)). One third of the Canadian population is French-speaking and there is a strong separatist movement in Quebec. Section 15 provides that:

*15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

*(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

- **Sections 16-23** deal with language and educational rights.

**Restrictions on rights:** **Section 1** of the Charter says that the Charter guarantees rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". And by section 33 any Parliament in Canada may expressly declare that an Act's provisions are to operate (for periods of up to five years at a time) **notwithstanding** sections 2 or 7-15 of the Charter.

**Enforcement of the Charter:** By **section 24(1)** it is the ordinary judges who have the final say as to the Charter's applicability. The effect of their decisions can be altered only if the Charter itself is amended which requires special constitutional procedures. If the Charter is infringed the judges may give "such remedy as the Court considers appropriate and just in the circumstances". In the past eight years there have been hundreds of cases taken to the courts involving the new Charter. The judges are having a busy and challenging time measuring laws and decisions against the new provisions.

## Australia

In 1986 Australia passed the **Human Rights and Equal Opportunity Commission Act**. This established the Human Rights and Equal Opportunity Commission, the functions of which are set out in **section 11 (1)** of the Act and include the following:

*(a) such functions as are conferred on the Commission by the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 or any other enactment;*

*(e) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination;*

*(f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and -*

*(i) where the Commission considers it appropriate to do so - to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and*

*(ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the*

*inquiry or has endeavoured without success to effect such a settlement - to report to the Minister in relation to the inquiry;*

*(g) to promote an understanding and acceptance, and the public discussion, of human rights in Australia;*

*(h) to undertake research and educational programs and other programs on behalf of the Commonwealth [of Australia], for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;*

*(j) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;*

*(k) on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;*

*(m) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;*

*(n) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function under paragraph (f);*

*(o) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues; and*

*(p) to do anything incidental or conducive to the performance of any of the preceding functions.*

*11 (2) The Commission shall not -*

*(a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1)(e) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or*

*(b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1)(f) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a) of this sub-section.*

From other sections in the Act it is clear that "enactments" in section 11(1)(e) does not include the legislation passed by State Parliaments in Australia. Only legislation that applies throughout the Federation (or in territories belonging to the Federation) is subject to the Act's scrutiny as a matter of course. The States are of course free to set up their own mechanisms for protecting human rights. Section 11(2)(a) is comparable to section 15(2) of the Canadian Charter in allowing a certain degree of affirmative action.

The Commission employs a staff of about 50, with a part-time President and three full-time Commissioners (one for human rights, another for race discrimination and a third for sex

discrimination). The Federal government must also appoint at least one committee to advise the Commission and to report to the government on what action needs to be taken concerning discrimination. The rights which the Commission is charged with protecting are those contained in the following documents (a list which can be supplemented by the Australian government):

- (i) the Discrimination (Employment and Occupation) Convention, adopted by the International Labour Organisation in 1958;
- (ii) the United Nations' International Covenant on Civil and Political Rights, 1976;
- (iii) the United Nations' Declaration of the Rights of the Child, 1959;
- (iv) the United Nations' Declaration of the Rights of Mentally Retarded Persons, 1971;
- (v) the United Nations' Declaration of the Rights of Disabled Persons, 1975.

## The Republic of Ireland

In the Republic of Ireland human rights are protected not only by individual statutes and some judicial decisions but also - and mainly - by **the country's written Constitution**, which was adopted in 1937 and ratified by a referendum. The Constitution recognises the family as the unit of society with rights superior to all positive laws (thus the absence of divorce laws). Private property is recognised as a natural right of mankind, though this and other personal rights may be limited by law for the sake of the common good. There are also directive principles of social policy in the Constitution, intended for the guidance of Parliament (the Oireachtas); these include the right of every citizen to a decent livelihood, the establishment of families in economic security on the land and the distribution of property in the interests of the common good.

In 1990 Ireland finally ratified the UN's International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. It also agreed to be bound by the so-called Optional Protocol, which means that residents of Ireland can now take a case against their government through the UN's organs in Geneva. This undoubtedly strengthens the protection of human rights in the Republic. Otherwise that protection would be founded mainly upon the following important provisions in the country's 1937 Constitution:

### **Article 40.**

*1. All citizens shall, as human persons, be held equal before the law.*

*This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.*

*2. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*

*3. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.*

*4. No citizen shall be deprived of his personal liberty save in accordance with law.*

(There follow extensive paragraphs detailing the law of *habeas corpus*.)

*5. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.*

**6. The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-**

**i The right of the citizens to express freely their convictions and opinions.**

*The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.*

*The publication or utterance of blasphemous, seditious, or indecent matters is an offence which shall be punishable in accordance with law.*

**ii The right of the citizens to assemble peaceably and without arms.**

*Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.*

**iii The right of the citizens to form associations and unions.**

*Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.*

*Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.*

#### **Article 42**

*The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.*

#### **Article 44**

**1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.**

**2. The State guarantees not to endow any religion.**

**3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.**

**4. Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.**

Irish citizens can challenge in the High Court or Supreme Court the validity of any Act of Parliament if they believe it to be inconsistent with the Constitution, and, as in France, the President can refer any Bill to the Supreme Court, before it is signed into law, for a check to be made on its constitutionality. Until 1963 the Irish courts adopted a conservative approach in constitutional cases, but in that year the judgements in **Attorney-General v Ryan** (a case about fluoridation of water) recognised that there were other personal rights protected by the Constitution besides those expressly spelt out in Article 40. Since then the courts have been much more active in protecting these "unenumerated rights, amongst which are the rights to bodily integrity, to withdraw one's labour, to refuse to join a trade union, to marital privacy and to free movement

within the state. Several legislative provisions have been struck down as being unconstitutional, such as the ban on the import of contraceptives and the discrimination against married people in the income tax rules.

Irish citizens can also take cases to the European Commission and Court of Human Rights in Strasbourg. In one such case, **Airey v Ireland**, the claimant succeeded in her argument that the unavailability of legal aid for her separation claim against her husband was a breach of the European Convention's standards. In another case the Republic's law criminalising homosexual activity was struck down. (**Norris v Ireland**) The Irish government has itself made use of the European Convention by taking the British government to the Commission and Court over certain interrogation techniques being employed by security force personnel in Northern Ireland. As mentioned below, the Court held that these techniques were "inhuman or degrading treatment".

## India

The demand for a Bill of Rights in India goes back to the nineteenth century and was consistently repeated at meetings of the Indian National Congress in the early twentieth century. In 1934 a Joint Select Committee of the British Parliament recommended that in any new constitutional document for India certain basic principles and rights should be included. These were indeed included in the **Government of India Act 1935**, but this did not go far enough to satisfy Indian leaders. More thought was given to the issue by the Constituent Assembly, convened in 1946 to draw up a **Constitution** for a free and independent India. The country achieved independence the following year but its new Constitution was not finalised until 1950.

As in the USA and Ireland, India's Constitution has specific provisions on human rights. They comprise 26 Articles, in Part III of the Constitution (headed "fundamental rights"), these being arranged under eight broad sub-headings:

- (1) **General:** Articles 12 and 13;
- (2) **Right to equality:** Articles 14 to 18;
- (3) **Right to Freedom:** Articles 19 and 22;
- (4) **Right against exploitation:** Articles 23 and 24;
- (5) **Right to freedom of religion:** Articles 25 to 28;
- (6) **Cultural and educational rights:** Articles 29 and 30;
- (7) **Right to property:** Articles 31 (since deleted), 31A, 31B, and 31C;
- (8) **Right to constitutional remedies:** Articles 32 to 35

The rights contained in these eight categories frequently overlap. The rights, moreover, are fairly precisely qualified by the constitutional provisions themselves, though they apply in all situations where a person has a dispute with any public body (including insurance corporations, airlines, universities and nationalised banks). The courts have been generous in permitting what amount to "class actions" to be taken by claimants. The Supreme Court has held in a series of

cases that the Constitution can be amended in a way which affects these fundamental rights, provided only that the Constitution's "basic structure" is not altered.

The Indian Bill of Rights has been successful in reducing inter-communal tensions in the country. It has had an educative and exhortatory role, even during Indira Gandhi's state of emergency 1975-77. One leading commentator sums up its impact as follows:

*" ... the law reports bear witness to the fact that legislative and executive interference with fundamental rights has been effectively checked by the courts. However, the law reports tell only a small part of the tale because for one case that goes to a court there are hundreds in which action violating fundamental rights has been restrained by the knowledge that a cheap and effective remedy exists for their enforcement." (H.M. Seervai, Constitutional Law of India (3rd ed, 1983), p.212).*

As examples of the content of the Indian Bill of Rights we set out here two key provisions:

**Article 19: Protection of certain rights regarding freedom of speech, etc.**

**(1) All citizens shall have the right -**

**(a) to freedom of speech and expression;**

**(b) to assemble peaceably and without arms;**

**(c) to form associations or unions;**

**(d) to move freely throughout the territory of India;**

**(e) to reside and settle in any part of the territory of India;**

**(f) to acquire, hold and dispose of property; and**

**(g) to practise any profession, or to carry on any occupation, trade or business.**

**(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.**

**(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.**

**(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.**

**(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.**

**(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law**

*imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, -*

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or*
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.*

**Article 30 : Right of minorities to establish and administer educational institutions**  
*(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.*

*(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.*

## **New Zealand**

There are two important reasons why developments in New Zealand should be watched very closely by those who believe that a Bill of Rights could profitably be enacted for Northern Ireland.

- First, New Zealand is, like the United Kingdom, a common law country without a written constitution.
- Second, there is a substantial Maori minority in New Zealand, who suffer familiar problems of discrimination and inequality.

In 1985 the Minister of Justice presented to Parliament a White Paper on A Bill of Rights for New Zealand. It contained a draft of the Bill of Rights (29 Articles), with a commentary on each provision and answers to a number of basic questions. The Minister, in the Introduction to the White Paper, said that a Bill of Rights would provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multi-cultural society. He continued:

*"The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will provide a source of education and inspiration about the importance of fundamental freedoms in a democratic society. It will provide a remedy to those individuals who have suffered under a law or conduct which breaches the standards laid down in the Bill of Rights. It will provide a set of minimum standards to which public decision making must conform. In that sense a Bill of Rights is a mechanism by which governments are made more accountable by being held to a set of standards".*

In 1988 the Justice and Law Reform Committee of New Zealand's Parliament published a report on the government's White Paper. It recommended several changes to the draft Bill and most



of these were accepted by the government. As a result, a Bill of Rights was introduced for debate in Parliament in 1989. Its long title sets out its twin aims as being (a) to affirm, protect and promote human rights and fundamental freedoms in New Zealand and (b) to affirm New Zealand's commitment to the UN's International Covenant on Civil and Political Rights.

The main features of the Bill are as follows:

- (i) The Bill is an ordinary statute, not entrenched. This means that it can be amended or repealed in the same way as any other statute.
- (ii) The Bill applies to actions carried out by the State and its agencies, not to the actions of private individuals.
- (iii) The rights and freedoms contained in the Bill are not absolute, but "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
- (iv) The Bill imposes a duty on the Attorney-General to alert Parliament where any provision of any other Bill introduced into Parliament appears to be inconsistent with the rights and freedoms set out in the Bill of Rights.
- (v) The courts are not given the power to strike down legislation which is inconsistent with the Bill of Rights: where another statute clearly overrides the Bill that statute must prevail. But when interpreting other statutes the courts must, wherever possible, prefer an interpretation which is consistent with the rights and freedoms set out in the Bill.
- (vi) The Bill does not cover social, economic and cultural rights, contrary to the views of the Justice and Law Reform Committee, but a clause makes it clear that the Bill does not pretend to be an exhaustive list of fundamental rights and freedoms recognised in New Zealand law.
- (vii) Novel clauses in the Bill expressly recognise the right not to be subjected to medical or scientific experimentation without consent, the right to refuse any medical treatment and the right to apply for judicial review of any public body's determination affecting one's legal rights or interests.
- (viii) One clause deals with rights of minorities thus: "A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

In August 1990 we learned that a Bill of Rights had indeed been enacted by the New Zealand Parliament. We were unable to establish what changes, if any, were made to it during its Parliamentary stages.

## **Hong Kong**

As the ownership of Hong Kong reverts to the People's Republic of China in 1997 an attempt is being made to protect existing civil and political rights by adopting of a Bill of Rights for the area. The racial and religious mix in Hong Kong is obviously much more diverse than that in Northern Ireland, but it may well be that what is appropriate to preserve order, peace and

human rights there is also appropriate here. In many other ex-colonies Britain has insisted on the introduction of a Bill of Rights in order to preserve harmony and protect minorities. The Judicial Committee of the Privy Council, a court mainly consisting of English judges sitting in London, frequently deals with cases alleging violations of these constitutional guarantees.

A draft Bill of Rights was introduced to Hong Kong's legislators in July 1990. It gives Hong Kong people the right to challenge in the courts actions taken against them on the grounds that they are in breach of the UN's International Covenant on Civil and Political Rights. This Covenant is already enshrined in the Basic Law, the constitution agreed between the United Kingdom and China under which the colony will be ruled after 1997. The Bill is to come into force in 1991 but is not to be entrenched. This means that it is subject to amendment at any time, through normal democratic channels.

## South Africa

For some years now there has been a campaign waged in South Africa for the introduction of a Bill of Rights. Some anti-apartheid activists are against the idea if it means merely a series of clauses plucked out of existing international documents. They believe that this would simply cause the existing inequalities in the country to freeze and congeal. But many others, including Albie Sachs, a prominent activist who himself has suffered horribly from right-wing extremists, would support a Bill of Rights which creates genuine entitlement and effective enforcement mechanisms. An Education Charter has already been drawn up and the churches are collectively devising clauses on freedom of religious association. Sachs himself says: "We should see a Bill of Rights not only as a negative blocking mechanism, that prevents change under the guise of protecting individual rights, but as a positive, affirmative document that requires change and does so according to the general principles of affirmative action" (*The Guardian*, 6 February 1989).

The Pretoria government announced in May 1990 that it too wished any settlement with the ANC to be centred around a Bill of Rights protecting all minorities in the country. This is in line with the recommendations made by the government's Law Commission in its 400-page report published in March 1989 and with the proposals of the ANC put forward in its "Constitutional Guidelines for a Democratic South Africa" (1988). The Law Commission (consisting of members of the judiciary, members of the legal profession, academic lawyers, members of the magistrates' bench and officials of the Department of Justice) set out a 33 - article Bill of Rights which is certainly a starting-point for future discussion.

## European countries.

The states of Continental Europe differ greatly as to the status they accord in domestic law to international treaties entered into by the state's government. In some countries, such as the **Netherlands**, the Constitution does not even require a treaty to be ratified in any formal way if it is one which "may be binding on anyone" (article 65): the provisions of such treaties are self-executing in the sense that they are directly applicable within domestic law without any further ado. In other countries, such as **France** and **West Germany**, ratification of a treaty usually presupposes the enactment of a statute to that effect; by article 55 of the French Constitution, such a statute accords the treaty an authority superior to that of other legislation.

In **Scandinavian** countries, as in the UK and Ireland, treaties, even when ratified, do not become part of the domestic law until expressly incorporated by a further legal or administrative act.

Of the 23 member states of the Council of Europe it is possible to say that the European Convention on Human Rights does function as a domestic Bill of Rights in 14 of them - Austria, Belgium, Cyprus, France, Greece, Italy, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Switzerland, Turkey and West Germany. In these countries people can go into a local court and argue their claim on the basis of the Convention. The nine non-conforming countries are Denmark, Finland, Iceland, Ireland, Malta, Norway, San Marino, Sweden and the United Kingdom. The position in four of the five Scandinavian countries, however, is improved by the fact that the authorities have not incorporated the law either because they are confident that domestic law already conforms with it or because they allow it to be used by the courts as an instrument for the interpretation of statutes. In Ireland and Malta the non-incorporation of the Convention is somewhat compensated for by express guarantees of human rights in the written constitutions of those countries. Indeed, many of Malta's constitutional provisions are taken *verbatim* from corresponding articles of the European Convention.

The only country where the European Convention is neither extensively used as an aid to interpretation nor virtually replaced by provisions in a written constitution is the United Kingdom. It is true that the Convention has occasionally been used in order to support a particular interpretation of a statute, but the times when the Convention's provisions have been ignored are much more numerous. The high number of Strasbourg judgments issued against the UK government is surely conclusive evidence that within British domestic law there are a great many inconsistencies with the Convention. The best way of removing these inconsistencies is by directly incorporating the Convention into domestic UK law.

## **2. International arrangements for protecting human rights**

**V**irtually every region in the world has produced a document guaranteeing protection of human rights to inhabitants of the states in that region. The Pacific Charter is the latest such document (produced by LawAsia's Human Rights Committee) and the League of Arab states has issued a draft Declaration for an Arab Charter of Human Rights.

### **The European Convention on Human Rights**

The European Convention on Human Rights was drawn up by the Council of Europe (**not** by the EEC) in 1950. Cases alleging that the Convention has been breached are considered first by the European Commission of Human Rights. If that Commission decides that the case is "admissible", the case may then be considered by the European Court of Human Rights. Both of these bodies sit at Strasbourg in France. The Commission is staffed by 23 Commissioners and the Court by 23 judges - one from each member state of the Council of Europe. The Commissioners and judges are not always judges in their own countries.

The UK ratified the Convention in 1953, and it is now clearly binding on the UK in international law. Any other state on which the Convention is binding can take a case against the UK if it

believes that the UK has laws or procedures which are in breach of the Convention. This is what Ireland did in 1976 when it complained that the use of the so-called **five techniques** by the security forces in Northern Ireland (wall standing, hooding, subjection to noise, restricted diet and deprivation of sleep) was contrary to Article 3 of the Convention. The ultimate decision went in Ireland's favour to the extent that the five techniques were found to amount to inhuman or degrading treatment, but not to torture.

Since 1966 the UK has been one of the states which allows its own citizens to take cases against it in Europe, though this right has been granted for only five years at a time, not permanently. Before any citizen can bring such a case the Convention says that he or she must first exhaust all remedies available in the UK courts. This is what Mr. Malone had to do in 1982 when he alleged that the police had unlawfully tapped his telephone; every UK court denied him relief (even the House of Lords) and he succeeded only when he took the case to the European Court of Human Rights. The phone-tapping was held to contravene Article 8(1) of the Convention ("Everyone has the right to respect for his private and family life, his home and his correspondence") and the UK was compelled to introduce reforming legislation - the Interception of Telecommunications Act 1985.

It is not uncommon for cases to be settled before they reach the European Court. This happened, for instance, in **Farrell v UK** (1984), where a widow claimed damages against the Ministry of Defence for the death of her husband. She accepted an out-of-court settlement of £37,500, but since the M.O.D. accepted no liability the case does not stand as a precedent for any future case.

Other rights and freedoms protected by the Convention include the rights to life, liberty, security of person, freedom of expression and freedom of peaceful assembly. The protection is sometimes qualified in that a state may interfere with rights in order (for example) to preserve national security or public safety. Moreover, under Article 15 a state may, in time of war or other public emergency threatening the life of the nation, take measures "derogating" from its obligations under this Convention to the extent strictly required by the exigencies of the situation. The UK issued notices of derogation in respect of the Northern Ireland (Emergency Provisions) Act 1978, but it withdrew these in August 1984, claiming that the law in Northern Ireland was no longer inconsistent with the European Convention. In November 1988 the European Court of Human Rights held in the **Brogan v UK** that detentions for periods longer than four days and six hours under the Prevention of Terrorism Act 1984 were a breach of Article 5(3) of the Convention. A month later the UK government reacted by once again issuing a notice of derogation under Article 15.

As of 1990, more cases have been taken against the UK under the Convention than against any other state. About 800 provisional UK files are opened each year. No other state has had so many cases declared admissible by the Commission, nor lost so many before the Court. One reason why people do not obtain adequate relief in UK courts is that these courts are not themselves bound by the Convention: the Convention is not part of the UK's national law. If it were, as it is in several European countries, then people such as Mr. Malone or Mr. Brogan could take a case even in a magistrates' court in the UK and successfully argue that the UK law is not to be applied because it contravenes the Convention. The way to make the Convention part of UK national law is to have it included in an Act of the UK Parliament.

It is beyond doubt that the European Convention on Human Rights is the most developed and best known of all international efforts to devise mechanisms for protecting human rights. It has

certainly been the route by which many people with grievances in the United Kingdom have been able, finally, to vindicate themselves. Besides the law on telephone-tapping, the UK government, in order to comply with decisions of the European Commission or Court, has had to introduce new laws on contempt of court, homosexuality, the care of mental patients, prisoners' rights, immigration, corporal punishment in schools and the rights of children in care. On the other hand, there have been several unsuccessful cases brought to Strasbourg, such as the **Stewart** case on the use of plastic bullets and the **GCHQ** case on the banning of trade unions.

One must remember, too, that the UK government has sometimes changed the law in anticipation of an adverse judgment in the European Court. It has also settled out of court rather than run the risk of losing in court and setting a precedent set. It remains to be seen whether the reforms introduced by the **Security Services Act 1989** and the **Official Secrets Act 1989** will satisfy the European Commission when it hears an application arising out of the **Spycatcher** litigation. In that case the House of Lords did make quite extensive reference to the requirements of the European Convention concerning freedom of expression. An application is also to be made to Strasbourg to test the legality of the ban imposed in 1988 on radio and television interviews with supporters of Sinn Fein and the UDA.

## The United Nations' Covenants

As regards the role of the United Nations in protecting human rights, the following comments by the distinguished jurist Paul Sieghart paint the picture well:

*"Until 1948, the principle of national sovereignty was paramount. How a state treated its own citizens was, as a matter of international law, its own exclusive concern. If the sovereign German nation wished, through domestic laws enacted by its constitutionally elected legislative assembly, to discriminate against its Jewish citizens, that was its sovereign right. No one outside Germany had any legal standing to complain, let alone intervene.*

*"The first major step away from that position came with the **United Nations' Universal Declaration of Human Rights**, adopted by the world's nations in 1948 without any adverse votes (but the USSR, Czechoslovakia, Poland, Saudi Arabia, South Africa and Yugoslavia abstaining). That Declaration set out, in unqualified terms, a catalogue of "human rights" - that is, rights inalienably vested in all human beings as against the public authorities of their states.*

*"The status of the Universal Declaration is now disputed. It is common ground that it was not intended, at the time it was adopted, to have the effect of international law, but merely to set standards for national legislatures. However, since then it has been confirmed at an inter-governmental conference at Teheran in 1968, and approved in several other ways over thirty years. Some lawyers therefore argue that it now has the status of customary international law.*

*"Realising that the Universal Declaration was only a first step, the UN set about converting its content into formal and binding international conventions, which would have the status of international law and be precise enough for legal purposes. The negotiations and the drafting took the best part of 20 years. In 1966,*

*two international conventions of human rights were finally completed and signed: **The International Covenant on Civil and Political Rights; and The International Covenant on Economic, Social and Cultural Rights.***

*"Each of these provided that it should come into force when it had been ratified by not less than 35 nations. That process took another 10 years, and the Covenants entered into force in 1976 following the deposit (by Czechoslovakia) of the 35th instrument of ratification. Since then, other countries have acceded to them; the total roll-call today is over 60.*

*"The coming into force of these international instruments has a profound effect. For the first time in human history, the rights of individuals against the public authorities of their states are no longer a matter of opinion and morality (which may differ between people of different religious, philosophical and political persuasions), but a matter of law, and, therefore, a matter of objective construction and interpretation by lawyers skilled in that art.*

*"Moreover - again, for the first time in human history - those rights are now a matter of **legitimate** international concern. Everyone today has a legal standing to complain of infringements of the human rights of individuals by states which are bound by any of the conventions (and here again some lawyers argue that even a state which has neither signed, nor ratified, nor acceded to any of them is still bound by them as representing customary international law).*

*"How such complaints can be made good is another question. In some countries, international conventions are "self-executing" in the sense that they automatically become part of domestic law. Others have "incorporated" them by a legislative act which makes them part of domestic law. (So far, the UK has not, which is one of the issues in the current debate about a Bill of Rights). Where that is the case, convention points can of course be taken in the domestic courts.....*

*"Under the International Covenant on Civil and Political Rights, there is a **UN Commission on Human Rights**. One of its functions is to study periodically human rights reports from the state parties, or the measures they have adopted to implement the covenant, a process which it has already pursued with some enthusiasm in the few years that it has been functioning. It too has power to receive complaints from state parties that have recognised this possibility (so far 10) and from individuals where an Optional Protocol is in force (so far 27, but not the UK), but its powers of adjudication are more limited than under the two regional conventions."*

The United Nations has also been responsible for the establishment of international conventions on particular types of human rights violations. These include conventions on:

- racial discrimination;
- the rights of children;
- discrimination against women;

- discrimination against disabled persons;
- the rights of mentally retarded persons;
- torture.

More and more states around the world are agreeing to be bound, both nationally and internationally, by these conventions, but to date only one of them (on torture) has been made directly enforceable in the United Kingdom. The UK has ratified the two UN Covenants of 1976 (though it has derogated from the Covenant on Civil and Political Rights in view of the **Brogan** case - page 24). Ireland also ratified both Covenants in March 1990.

## The OAS's American Convention on Human Rights

The **American Convention on Human Rights** was drafted by the **Organisation of American States**. It was adopted in 1969 and entered into force in 1978. By 1986 it had been ratified by 19 OAS member states (but not the USA). The Convention set up the Inter-American Commission on Human Rights, which is a successor to a body of the same name but with lesser powers first established in 1959. It also set up the Inter-American Court of Human Rights in 1979, consisting of seven judges.

The Court of Human Rights has the power to decide specific disputes in which it is alleged that a state has violated a right guaranteed by the Convention, but (as under the European Convention) individuals cannot take their case to the Court - only the Commission or another state may do so, and only if the defending state has accepted the Court's jurisdiction. To date, only nine states have accepted this jurisdiction. The first time cases were referred to the Court in this manner was in 1986.

The Court also has the power to issue advisory opinions on legal questions relating to the interpretation of the Convention and various other human rights treaties applicable in American states. Any OAS member state can seek such an advisory opinion, which can provide "a politically and diplomatically useful technique for avoiding over-politicizing an issue and giving governments a graceful way to comply with their obligations" (Judge Buergenthal, President of the Court, 1986).

## The OAU's African Charter

The **African Charter on Human and Peoples' Rights** was drafted by the **Organisation of African Unity**. It was adopted in 1981 and entered into force in 1986. After the European and American Conventions on Human Rights, the African Charter is the third regional human rights instrument of great political and legal significance. Thirty African nations have so far ratified the Charter.

A distinguished expert has written as follows (see Novak, (1986) 7 Human Rights Law Journal 399):

*"The African Charter on Human and Peoples' Rights contains some major conceptual innovations in the field of international human rights law. By incor-*

*porating a number of collective rights of peoples it marks a major step forward in the development of a third generation of human rights. For the first time an international treaty undertakes to ensure to peoples not only the right to self-determination, but as well the rights of existence, equality, development, peace, security and a general satisfactory environment. Secondly, the African Charter provides for a number of fundamental duties of the individual towards his family and society, the State, other legally recognised communities and the international community. One of these duties is to preserve and strengthen positive African cultural values in relations with other members of the society. The emphasis on the protection of morals and traditional values recognised by the community and on the family as the natural unit and basis of society underlines the specific community-oriented approach that distinguishes the African Charter from other international human rights instruments."*

The Charter establishes an **African Commission on Human and Peoples' Rights**, consisting of 11 African experts in the field. The Commission has judicial functions such as conducting investigations, deciding on complaints from member states, individuals or other bodies, and interpreting the Charter's provisions. It also undertakes studies and organises seminars. It must draw the OAU's attention to any series of serious or massive violations of human and peoples' rights, thereby hoping to prevent any repetition of the terrible atrocities committed during the 1970s in Uganda, the Central African Empire and Equatorial Guinea.



# Chapter Four

## THE POLITICAL DIMENSION

### 1. Introduction

**T**he notion of introducing a Bill of Rights into British or Northern Irish law attracts strong support amongst a wide range of people. It is clear from the views assembled in this chapter that there is almost unanimous support for the idea amongst every political party in Northern Ireland. In spite of this groundswell of opinion there has been little action on the part of our legislators. Such inactivity is not in the public interest.

Those people who claim to represent the public must take a stand on the need for a Bill of Rights. If they think it is a notion that can bring no benefits, they should articulate their reasons for holding such a view. Similarly, it is the duty of those who support a Bill of Rights - as the C.A.J. does - to explain what advantages it can entail. To date, preservation of ignorance has bred immobile contentment. It is highly regrettable that our political parties appear to have done nothing to translate their professed commitment to a Bill of Rights into a more tangible reality.

The CAJ is seeking to raise public awareness of the potential inherent in a Bill of Rights. Our view is that it could provide a mechanism which would work to protect the rights of individuals and break down the tradition that the government, of whatever party, can take whatever measures it deems appropriate to cope with a crisis regardless of their effects on individual human rights. A Bill of Rights would identify these rights and concentrate public opinion on them. But the protection of human rights does not operate in a political vacuum. In this section some consideration is given to the wider political dimension.

A Bill of Rights would in effect amount to a change in the manner in which we are governed. It would mean that the government and its agents could be made accountable for their action or inaction. The legitimacy of legislation as well as of administrative decisions would be tested against new standards. Individuals would be made more aware not only of what rights they are entitled to, but also of what they are responsible for. Very often one person's right is another person's responsibility. Individual and collective self-esteem would be enhanced greatly. A Bill of Rights could contribute to a restoration of confidence in the legal system. The image of Northern Ireland in the outside world could be substantially improved, with consequential economic benefits.

Of course, there is always resistance to change. Some of the opposition to a Bill of Rights is based on fear of the unknown, some is simply founded on distrust of those who are proposing the idea. The idea itself therefore needs to be carefully considered and explained. The C.A.J. hopes that people from every level of society in Northern Ireland will spend some time enquiring into the positive aspects of a Bill of Rights. Only those who are interested in preserving the current stalemate in Northern Ireland can be against thinking seriously about the proposal. Those in government who wish to preserve unaccountability and secrecy benefit from a Bill of Rights not being enacted.

A major benefit of a Bill of Rights might be that groups as well as individuals could take advantage of the new standards applying in society. Groups are normally a minority element in a society, but it should be remembered that there can be majority groupings also (e.g. women, Protestants, electors, consumers). When new laws are being made it is important that the concerns and rights of groups are respected as much as those of individuals. Legislation as well as judge-made law should be constantly evaluated against "higher" norms. Many politicians and judges would be grateful to have such higher norms available so that they can suppress their own prejudices in favour of a safer consensus.

It cannot be convincingly argued that to enact a Bill of Rights now would subvert the doctrine of parliamentary sovereignty. Even today, without a Bill of Rights, the supremacy of Parliament is a fiction. Since the United Kingdom adhered to the European Convention on Human Rights in 1953, and to the European Economic Community in 1973, the Parliament at Westminster has not been supreme. It has had to obey the wishes expressed in Strasbourg, Brussels and Luxembourg. For the most part, it has done so willingly. The sky has not fallen in. A sufficient degree of autonomy remains with Westminster to allow for "national" independence. Sometimes there has been an unfortunately long delay in implementing the measures which the European bodies have requested - even taking a case to Strasbourg under the European Convention can mean a five or six year wait for justice - but a Bill of Rights would help to reduce these delays by enabling people to enforce their rights at home, more or less immediately.

A Bill of Rights cannot be a cure for each and every ill. It cannot be all things to all people. A choice will need to be made as to which rights should be protected, and to what extent. The C.A.J. is anxious to initiate a public debate on what precisely a Bill of Rights should contain. The very discussion will heighten people's consciousness of the importance of the issue. Objections should be brought out into the open and honestly addressed. For instance, is there any justification for introducing a Bill of Rights if it is going to "politicise" the judges? Will such politicisation in fact occur? Is the judiciary already politicised? Should the Bill attempt to guarantee the right to self-determination? If so, among what group? Should "big business" or trade unions be trammelled by a Bill of Rights? Would it tend to jeopardise the capitalistic or socialistic objectives of such bodies? Would a Bill of Rights actually make much difference in everyday life or would it just become another paper tiger unable to galvanise ordinary people into establishing a proper rights-based culture? How exactly might a Bill of Rights be made immune from future repeal or undermining amendment? Just because answers to all or any of the questions may be difficult to come by, the search should not be rejected.

As the following section shows, the need for the introduction of a Bill of Rights is a matter on which all political parties in Northern Ireland - as well as several other groups - would appear to agree. If that is so, should the representatives of these parties not at least sit down to discuss its structure and content? On very many points there would probably be ready agreement; on others agreement may be hard to reach. And who knows what concessions might be achieved in an inter-party forum of dispassionate and responsible discussion? It is even possible that the topic of a Bill of Rights could be a peg on which to hang inter-party talks. It is not something which cannot be discussed until there is a settlement of the constitutional status of Northern Ireland. It is an issue which pre-dates and transcends the signing of the Anglo-Irish Agreement in November 1985. If agreement can be reached on the best solutions to the problems associated with a Bill of Rights, there is a chance that agreement could subsequently be reached on other more contentious issues. Regardless of the outcome, only good can come from as wide a

discussion as possible of the kind of rights which should be protected in our society and the best ways to protect those rights.

At the moment people are imprisoned in a stalemate. A Bill of Rights could be the key which would unlock this prison. All that is required is that people of goodwill and integrity come together to place the topic on the political agenda. Everyone - man, woman or child; Protestant or Catholic; Unionist or Nationalist - stands to benefit from a Bill. No-one can be disadvantaged by it. A Bill of Rights might not only help to defuse current political and societal tensions but also lay the foundation for a more just, a more equal and a more genuinely free society in the future.

## **2. The views of political parties**

We now present short summary statements of the positions held by political parties in Britain and Ireland and by an assortment of other groups on the concept of a Bill of Rights.

The majority of the statements were directly obtained from the groups in question but in a number of cases the views have been taken from published material or interviews. The C.A.J. has attempted to ensure that these statements accurately represent the views held by various groups. Whilst we hope that this is the case we would welcome any corrections which are required. The Committee would also be pleased to receive the views of any other groups or individuals on the idea of a Bill of Rights. Unfortunately, despite a number of attempts, we were unable to obtain the views of several political parties in the Republic of Ireland.

It is our hope that these statements will give some impression of the wide consensus on the need for a Bill of Rights and the level of interest in exploring this idea further.

### **□ Alliance Party of Northern Ireland**

The Alliance Party has published four proposals which it considers to be needed for a negotiated settlement for Northern Ireland. One of these proposals is for a Bill of Rights which would protect the rights of all the people of Northern Ireland who oppose violence.

The rights guaranteed in the document would be based on the European Convention of Human Rights and would be enforced through the courts. A Commission, similar to the Equal Opportunities Commission, would bring complaints of noncompliance to the Commission, which in turn would take the cases to court. The highest Court of Appeal would be either the House of Lords or the European Court of Human Rights. In addition, the Commission would report to Westminster on adherence to the Bill.

The party sees two ways for the Bill to be enacted - as an Act of Parliament or as part of a Constitution. A Bill of Rights could be written into a Constitution for Northern Ireland, which would be an Act of the Westminster Parliament and as such could be amended by Westminster only. Parliament might be persuaded to legislate a Bill of Rights for the province independently of a Constitution or an Act of Parliament; amendments could be made by a simple majority at Westminster.

Finally, in the event that the citizens of Northern Ireland perceive the above methods as not sufficient, certain guarantees could be lodged at the United Nations or the Council of Europe.

## □ Communist Party of Ireland

From its foundation in 1933, the Communist Party of Ireland has argued that democracy the key to political progress in our country. In the Party Programme, "**Ireland's Path to Socialism**", published in 1962, we said that the denial of basic civil rights in Northern Ireland was the main political problem. From the foundation of the Northern statelet, it had been ruled by extraordinary repressive laws. The Special Powers Act represented the negation of normal standards of law in a parliamentary democracy. The gerrymandering of the electoral process itself, the denial of the basic principle of one person one vote and the administration of the law by a thoroughly sectarian, heavily armed paramilitary police force completed the picture of an autocratic regime based on religious bigotry.

Our 1962 Programme suggested the development of a mass movement of civil rights as the way to break out of the sectarian monopoly of power that the Unionist Party had established for itself. The Communist Party was deeply involved in the formation of the Northern Ireland Civil Rights Association and provided several of its leading activists. We supported the formulation of the democratic demands of the movement for a Bill of Rights. The draft written by NICRA (see page 41) more than a decade ago remains the basis of what we would like to see in such a Bill.

Many political elements have come out in favour of a Bill of Rights. But what counts is its content. There can be no question of easy derogations by declaring various forms of "emergency". Northern Ireland has been ruled by "emergency" laws for the past 69 years. It is these very repressive laws -in our opinion at the root of violence in our society - that must be outlawed by the Bill of Rights. The repeal of the Prevention of Terrorism Act, the Emergency Provisions Act, the Payments for Debt Act, the Public Order order and repressive measures included in other legislation must be the basis on which a Bill of Rights is built.

A genuine Bill of Rights should enshrine the principles of due process: it must protect the rights of assembly, political organisation, free speech, free publications and broadcasting; it must protect the liberty of the subject and the rights of those accused or convicted of crimes. A particular feature necessary in a Province with a long history of police torture and abuse is the principle that evidence obtained from suspects in police custody is inadmissible unless it can be proved to have been obtained without oppression.

We do not believe that a Bill of Rights in itself can solve all our political problems. In particular, Communists uphold the right to self-determination for the Irish people and seek the progressive disengagement of the British state from this country. We do believe, however, that an effective Bill of Rights would mark a massive democratic advance. We warmly welcome the current initiative of the Committee on the Administration of Justice. We hope it will be a focus for the courageous and effective work of the Committee on issues of democratic rights.

## □ Conservative Party

The official policy of the party presently in power in the United Kingdom is that a Bill of Rights is unnecessary and undesirable - unnecessary because rights are already adequately protected, undesirable because a Bill of Rights would politicise the judges. On behalf of the government the Solicitor-General spoke as follows in the House of Commons debate on a private member's Human Rights Bill on 6th February 1987:

*"The judiciary must be seen to be impartial. More especially, as far as practicable it must be kept free from political controversy. We must take great care not to propel judges into the political arena... It is not that I do not trust the judges, for I trust them implicitly ... It is that I fear what would happen to the public reputation for political impartiality of judges if that jurisdiction were extended to them ..."*

Ministers at the Northern Ireland Office have stressed a different point:

*"... the Government sees serious practical difficulties about a Bill of Rights for Northern Ireland alone, in addition to the objections of principle which it sees in relation to Bills of Rights whether for Northern Ireland alone or the United Kingdom as a whole. The practical difficulties arise in particular from the provision of a test against which a law might be judged in one part of the United Kingdom but not in another" (per John Stanley MP, letter to CAJ, 26th August 1987).*

Despite its willingness to impose a Bill of Rights on Hong Kong, and to acknowledge the need for one in South Africa, members of the Conservative Party - with some exceptions - remain staunchly opposed to a Bill of Rights for any part of the United Kingdom. This is despite the fact that, in Article 5 (a) of the Anglo-Irish Agreement (signed in November 1985) the Conservative government agreed with the government of the Republic of Ireland (at that time a Fine Gael government) that the Anglo-Irish Intergovernmental Conference should consider, amongst other things, "the advantages and disadvantages of a Bill of Rights in some form in Northern Ireland." At the ninth meeting of that Conference, in October 1986, the UK government indicated that they had difficulties with the Irish government's proposal for a Bill of Rights for Northern Ireland but that they were prepared to consider some form of joint declaration of rights by both governments in relation to Ireland as a whole. Neither government has pursued this matter further.

## □ Democratic Unionist Party

An extract from the DUP document "**Proposals by the Ulster Democratic Unionist Party, Northern Ireland Assembly group, for progress toward full devolution in Northern Ireland**", September 1984:

### **Statutory Safeguards for the Minority**

Further to the special privileges and safeguards already outlined for minority interests namely:

- a. The Departmental and other committees with their special minority participation, and
- b. The provisions for weighted votes on a rejected Bill at second reading,

we are prepared to support the following further safeguards for all sections of the community, including the minority -

(i) We accept that existing safeguards and remedies against discrimination on religious or political grounds as laid down in the 1973 Northern Ireland Constitution Act should be maintained and to this extent would be prepared to accept, in the main, the continuance of Part III of the 1973 Act. We note that section 17 of the 1973 Act makes void any proposed legislation which discriminates on the grounds of political or religious persuasion and further that section 18 gives the Secretary of State power to refer any provision of the Assembly to the Judicial Committee of the Privy Council to see if it might be void under section 17 and that section 19 outlaws discrimination by public authorities, including ministers and district councils. As a means of strengthening these statutory safeguards, which in their terms are adequate, we would support a facility whereby a stated minority, say 30%, of the Assembly could require the Secretary of State to make a referral to the Privy Council under section 18.

### **A Bill of Rights**

(ii) The U.D.U.P., while holding that a Bill of Rights is desirable for the whole of the United Kingdom, would be prepared to accept a proposal for a Northern Ireland Bill of Rights which would incorporate a range of statutory safeguards against abuse of power. We would point out that the oversight of human rights already rests with an independent agency, in that section 20 of the 1973 Act established the Standing Advisory Commission on Human Rights. It is our contention that a Bill of Rights along with the existing safeguards in the 1973 Act and those already mentioned can provide all the safeguards that anyone could reasonably require".

## **□ Fianna Fail**

The office of the Minister for Foreign Affairs had this to say in May 1988:-

*"As you know Article 5 of the Anglo-Irish Agreement, which deals with measures to recognise and accommodate the rights and identities of the two traditions in Northern Ireland, to protect human rights and to prevent discrimination,' specifies that matters to be considered in this area shall include... the advantages and disadvantages of a Bill of Rights for Northern Ireland' .*

*"The Government attach importance to the protection of human rights and the accommodation of the rights and identities of both traditions in Northern Ireland; accordingly they are in favour of a Bill of Rights for Northern Ireland.*

*"As to the geographical area to which a Bill of Rights would apply, the Tanaiste is of the view that the desirability of such a Bill arises out of the circumstances in Northern Ireland and the focus of the Bill should therefore be on Northern Ireland."*

## **□ Green Party**

"The ecological, economic and social crisis confronting all peoples can be countered only by the self determination of those affected and since we stand for self determination and the free

development of each human being, and since we want people to shape their lives creatively together in freedom, solidarity and in harmony with their natural environment, free from external threat, we take a radical stand for human rights and far reaching democratic rights.

“Here in Northern Ireland the denial of basic human rights has been a major cause and effect in the current conflict over the future constitutional status of the province. Just as the Green Party (UK) expresses its support for the National Council of Civil Liberties Charter for Civil Rights and Liberties and states its intention to introduce a ‘Bill of Rights’ based on this Charter, so the Green Party in Northern Ireland has no hesitation in supporting the initiative of the C.A.J. in advocating a Bill of Rights for Northern Ireland.

“Clearly a Bill of Rights for Northern Ireland together with other radical political and legal developments would take this community some steps further towards a sustainable peace which was more than a mere absence of violence, but a basis for new relationships and equal access to economic and political participation.”

The following extract from **A Manifesto for a Sustainable Society** (UK Manifesto Northern Ireland section) gives some further indication of Green Party views:

*(E) It is the policy of the Green Party that the British Government in consultation with the government of the Republic of Ireland should accept the need for a Bill of Rights in which all individual rights are guaranteed by some body outside Northern Ireland, Westminster and Dublin either at European level or at the United Nations.*

## □ Labour '87

Labour '87, as the name implies, is a "young" party, currently formulating its range of policies. As part of this process, the party adopted a discussion document in 1988, entitled Regional Government and a Bill of Rights for Northern Ireland. The party has received initial feedback on this document and awaits more before making a formal response.

Essentially, the party sees a Bill of Rights for Northern Ireland as underwriting the proposal for devolved government. The inspiration behind the proposed Bill of Rights is drawn from various sources, such as Tom Paine's "*The Rights of Man*", the European Convention on Human Rights, the United Nations' Covenant on Economic, Social and Cultural Rights, as well as being based upon the lessons and demands of Northern Ireland. The party supports human rights and fundamental freedoms and envisages that a Bill of Rights would provide a framework for formulating legislation. In this sense, it complements the proposal for regional government. Indeed, Article 28 of the proposed Bill of Rights specifies that "...the Regional Assembly and Local Government for Northern Ireland shall carry out its functions in strict accordance with all the Articles contained within (the) Bill of Rights".

Much of the content of Labour '87's Bill of Rights may be paralleled with the content of other similar proposals. However, in keeping with the party's ethos, there is an inclusion of such clauses as a right to work, strike and join trade unions (Article 16) and taxation based on citizens' ability to pay (Article 15). Labour '87 supports a Bill of Rights as a progressive, relevant advance and welcomes discussion, feedback and co-operation with others on this basis.

## □ Labour Party of Britain

Kevin McNamara MP, the Shadow Secretary of State for Northern Ireland presented the views of the Labour Party.

“The Labour Party believes that there is a clear need for the entrenchment of human rights. The abuses of human rights which have been perpetrated by successive British governments have made it clear that it is impossible to trust the defence of human rights to the government of the day.

“One element in such entrenchment would be the incorporation of the European Convention on Human Rights into the law of Northern Ireland. We do not think that such a step would be a panacea. It would have to be supported by detailed statutes and by institutional arrangements which would hinder executive and legislative violations.

“Taking into account the centrality of constitutional and human rights issues in the political life of Northern Ireland, no workable democratic institutions can be created unless sufficient guarantees are put in place. If, as the Labour Party hopes, a devolved administration is established in the province, part of the settlement will be agreement on the definition and protection of individual and collective human rights.

“It will be necessary therefore to conclude an accord, not only on the sharing of power but also on its proper exercise. A cross-community agreement must include both a common commitment to protection of human rights and agreed legal and institutional mechanisms to give expression to and to uphold this commitment.

“The solution, the Labour Party believes, lies in a combination of three factors. First, the inherent checks and balances in the need for weighted majorities in a power-sharing administration place a substantial limitation on the abuse of power. Second, there will be a need to reflect the political consensus in the legal framework under which a devolved administration would operate. Third, the incorporation of the European Convention would provide a political statement of intent on the determination to treat the protection of human rights as a fundamental objective of government.”

## □ Official Unionist Party

In its document "**The Way Forward 1984**" the Ulster Unionist Council accepts that a case can be made for the entrenchment of citizens' rights as a component of a package for devolved government for Northern Ireland. The document notes that without accepting that there is any foundation in reality for any feeling of minority discrimination or disadvantage, the Ulster Unionist Party nevertheless recognises that such a feeling does exist and that it may be in the interests of the people of Northern Ireland as a whole to have the rights of individuals explicitly set out in the legislation of the British Parliament conferring devolved government on Northern Ireland.

The document envisages that such rights would be sufficiently entrenched if Westminster alone retained the power to amend and that such legislation would "provide machinery whereby any action on the part of the Northern Ireland devolved institution conflicting with any listed right



would be declared void and any act of the Northern Ireland administration conflicting with any such right would be declared unlawful", but does not suggest what form such machinery might take.

The document refers to the European Convention but comments that it would have to be adapted to the particular circumstances of Northern Ireland, observing that "restrictions on the liberty of the individual citizen may be called for in the interests of society as a whole" and that "although rights may often be expressed in absolute terms the interests of other citizens or the interests of society as a whole may necessitate some qualification of apparently absolute rights, even outside periods of crisis."

The document also notes that it is an essential ingredient of an effective Bill of Rights that it be enforced at the suit of the individual citizen as simply, cheaply and expeditiously as possible through the established courts of law.

In April 1988 **Jim Molyneux** the party leader, updated their position with the following statement:-

*"It is true that the Way Forward," suggested, as a possibility, a Bill of Rights as a component of a package for devolved government in Northern Ireland. The Anglo-Irish Agreement has all but extinguished the possibility of such a development and the Government of the Irish Republic now shares in that reality. With Westminster rule continuing for the foreseeable future, a Bill of Rights would have to apply to the whole of the United Kingdom and support for such a proposal would increase as the subject became a live issue, particularly for those concerned with race relations in England. A similar upsurge of interest has followed the publication of the Northern Ireland Office proposal for legislation against discrimination in employment. There is a growing desire to have that legislation extended to Great Britain to relieve the alleged discrimination against ethnic minorities.*

*"We would not object to a Bill of Rights covering the British Isles, which would be in line with the theme of "totality of relationships" expressed by Mrs. Thatcher and Mr. Haughey in December 1980. However, that is probably not realistic given the tension and public disagreement between the two Governments caused by the Anglo-Irish Agreement in its present narrow and defective form."*

## □ Progressive Democrats

The following are excerpts from a speech given by **Geraldine Kennedy TD**, spokesperson on Northern Ireland, on the 10th October 1987.

"We...believe that an examination of the possibility of having the same Bill of Rights in the North, South and Britain should be put on the British-Irish agenda in the near future. Article 5 of the Anglo-Irish Agreement undertook to carry out a consideration of the advantages and disadvantages of a Bill of Rights in some form in Northern Ireland.

"We have undertaken some preliminary work in this regard in the party.

“I am deeply concerned, even allowing for essential security requirements, that the British Prevention of Terrorism Act is almost exclusively evoked against persons of Irish origin and contributes to a prejudicial atmosphere that must raise serious doubts about the provision of a fair trial.

“This Act deprives persons of the fundamental rights that are guaranteed, as a matter of course, even to British citizens by the Irish Constitution and which our Offences Against the State Act must recognise.

“Mindful of the cases of the Birmingham Six, the Maguire family and the Guildford Four, we believe that the possibility of having the same fundamental rights in Britain and Ireland should also be investigated.”

## ☐ **Sinn Fein**

“In a democratic state, a Bill or Charter of Rights is desirable. Sinn Fein supports the view that such legislation is essential to the defence of civil liberties.

“To ensure the widest possible support of such legislation, it would need to be conceived, initiated, enacted and legislated into existence by the combined will of the state legislature.

“Alternatively, the Bill or Charter could be included in the constitution of the state.

“A Democratic state can only exist and function where the people of the state, collectively through their system of government, have unfettered control of their political, economic, social and cultural destiny.

“The six county state - whose very existence is dependent upon a life support system of 30,000 armed British Forces - could not, now or ever, measure up to the definition of a democracy.

“A Bill or Charter of Rights for the six counties would have to be implemented and passed at Westminster by a British government. Such a move is impossible to conceive as it would weaken the basis of British control over this part of Ireland.

“To conclude, Sinn Fein supports the view that a Bill of Rights is an essential part of the legal and judicial structure of any state. However we don't believe that such a proposition is realistically achievable within the artificial confines of the six counties.”

## ☐ **Social Democratic and Labour Party**

**Alban Maginness**, the chairperson of the party forwarded the following statement to the CAJ on 6th April 1988:-

“The SDLP's present position regarding a Bill of Rights for Northern Ireland is that the Party will support in principle the introduction of a Bill of Rights.

"The Party has in previous policy documents indicated its support for such a Bill of Rights and this position will remain unaltered for the foreseeable future.

"The form of a Bill of Rights is a matter obviously for future negotiations and discussion amongst the political parties and the British and Irish Governments. In particular, this is a matter which can be fully discussed and agreed in the context of the Intergovernmental Conference set up under the Anglo Irish Agreement. The Party has no precise view on what shape that Bill of Rights should take.

"However, some of the simplest and perhaps most useful forms which we could take would be the incorporation into domestic Northern Irish Law, of the European Convention on Human Rights. This would be accompanied by the setting up of a division of the High Court of Northern Ireland dealing solely with human rights issues.

"This would allow for a development of human rights law within the Northern Ireland legal system and would be a welcome development in public life. The SDLP will continue to work towards the establishment of a Bill of Rights and a society in which civil liberties are deeply cherished.

"We do not believe that a Bill of Rights can in itself radically tackle the fundamental, political and justice problems that affect our society but rather it can be an important factor in achieving that goal."

## □ **Ulster Loyalist Democratic Party**

"We believe that a Bill of Rights is essential to safeguard the rights of citizens within the U.K. Unfortunately a U.K. Bill of Rights is unlikely to come about in the near future; therefore we feel that the European Convention on Human Rights should be incorporated to cover Northern Ireland.

"The European Convention is not perfect but it exists, and is widely accepted. To formulate a Bill of Rights for Northern Ireland from "scratch" would not only take too long, it could lead to the issue being used by many politicians (and others) for divisive ends. There is no reason for the incorporation to be political as all constitutional parties have been supportive since the early 1970's (which makes its absence all the more remarkable) - unless the issue is made political by linking it with the Anglo-Irish Agreement which of itself removed the right of representative and accountable government from the Northern Irish people.

"Our *Commonsense* proposals advocate both a written constitution and a Bill of Rights as part of a democratic settlement between the Northern Irish people, and as an integral part of the reform process ridding Northern Ireland of the Anglo-Irish Agreement leading to the creation of full and equal citizenship for the Northern Irish people within the United Kingdom State".

## □ Workers' Party

"The Workers' Party remains firmly committed to the concept of a Bill of Rights and would still endorse the points contained in our submission to the Atkins Conference in 1980 as the broad principles which should underlie such a measure.

"We view the proposal for a Bill of Rights as essential to, and inseparable from, the issue of democratic devolved government for Northern Ireland. Such a bill would provide the framework within which government for Northern Ireland could be exercised, and establish a number of positive concepts which would be the entitlement of all the citizens of the state, both as individuals and as a community. In the document, *"The Case for Devolved Government in Northern Ireland"* published by the Workers' Party in 1985, it was stated:

*"Obviously a Bill of Rights must be seen as stemming from the needs of the entire population of Northern Ireland and not just simply reflecting the anxieties of one section, no matter how justified. The purpose of the Bill, apart from providing legislation, sanctions and penalties, must also be to begin the process of a Democratic Northern Ireland."*

"In the Anglo-Irish Agreement of 1985, the British and Irish governments resolved to discuss the advantages and disadvantages of a Bill of Rights in some form in Northern Ireland. Given such a lukewarm, halfhearted reference, it is hardly too surprising that no progress at all has been made on this issue in the three years since.

"We have raised this question a number of times with the Northern Ireland Office, including the Secretary of State, Mr Tom King, but the British government has kept this vital issue on the back-burner. The Irish government has likewise consigned it to a limbo of empty platitudes. With a review of the Agreement due this year, and speculation about devolution again current, the Workers' Party will be reiterating clearly their view that such a Bill of Rights must be a cornerstone on which democratic structures can be built within Northern Ireland.

"The framing of such a Bill would have to take into account, and frequently strengthen, existing legislation covering such areas as fair employment practice, incitement to hatred, electoral and political rights. It would have to deal with the issues raised by the various pieces of emergency law as the basis of justice here.

"The rights to life, to a job, to a home, are fundamental human rights which the state must promote and defend to the best of its ability. In Northern Ireland these rights have been under threat from terrorism for almost twenty years now. It is vital that not only should terrorism be defeated but that, in the process, we should learn the lessons which will enable us to build a strong democracy. That is the importance of a Bill of Rights for Northern Ireland; to lay the foundations of democracy and civil liberties on which we can build peace and political progress."

## 3. The views of other groups

### □ Charter 88 Movement

This group was formed in November 1988 in order to campaign for radical constitutional reform in the United Kingdom. Having pointed out that in recent years British governments have eroded a number of important civil freedoms, and that the country is vulnerable to an "elective dictatorship", the movement's manifesto continues as follows:

"We call, therefore, for a new constitutional settlement which would:

- Enshrine, by means of a Bill of Rights, such civil liberties as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom from detention without trial, to trial by jury, to privacy and to freedom of expression.
- Subject executive powers and prerogatives, by whomsoever exercised, to the rule of law.
- Establish freedom of information and open government.
- Create a fair electoral system of proportional representation.
- Reform the upper house to establish a democratic, non-hereditary second chamber.
- Place the executive under the power of a democratically renewed parliament and all agencies of the state under the rule of law.
- Ensure the independence of a reformed judiciary.
- Provide legal remedies for all abuses of power by the state and the officials of central and local government.
- Guarantee an equitable distribution of power between local, regional and national government.
- Draw up a written constitution, anchored in the idea of universal citizenship, that incorporates these reforms."

By April 1989 about 14,000 individuals had signed Charter 88 and the movement continues to appeal for supporters and to issue statements arguing for reform. A great number of highly respected men and women are signatories. Its current spokespersons include Lord Scarman, Lady Ewart-Biggs, Professor Bernard Crick, Mr. Ian McEwan and Rabbi Julia Neuberger.

### □ Churches

The 1977 report by the Standing Advisory Commission on Human Rights(see page 42) gives details on the views of the Churches and we have no reason to believe that these have changed substantially since that time. The report notes (page.26):

*"The views of the Churches varied. The Church of Ireland supported a Bill of Rights for the United Kingdom whilst the Presbyterian Church was not satisfied*

*that a Bill of Rights was necessary for Northern Ireland and argued that if it was held to be desirable then they suggested a measure based on the European Convention. The late Cardinal Conway favoured the introduction of a Bill of Rights for Northern Ireland based on the European Convention both because of circumstances (including psychological factors peculiar to Northern Ireland) and because he felt that it would be sometime before a consensus about a Bill of Rights would be reached in the United Kingdom."*

In "Violence in Ireland", a report of a working party appointed by the **Irish Council of Churches and the Roman Catholic Joint Group on Social Questions** (1976), one of the main recommendations was that the Church should support the principle of a Bill of Rights to protect minorities. Unfortunately we have been unable to obtain more recent views from the churches

## □ **NCCL Charter of Civil Rights and Liberties**

- 1. To live in freedom and safe from personal harm.
- 2. To protection from ill-treatment or punishment that is inhuman or degrading.
- 3. To equality before the law and freedom from discrimination on such grounds as disability, political or other opinion, race, religion, sex, or sexual orientation.
- 4. To protection from arbitrary arrest and unnecessary detention; the right to a fair, speedy and public trial, to be presumed innocent until proved guilty, and to legal advice and representation.
- 5. To a fair hearing before any authority exercising power over the individual.
- 6. To freedom of thought, conscience and belief.
- 7. To freedom of speech and publication.
- 8. To freedom of peaceful assembly and association.
- 9. To move freely within one's country of residence and to leave and enter it without hindrance.
- 10. To privacy and the right of access to official information.

## □ **The Northern Ireland Civil Rights Association**

The N.I.C.R.A. Bill of Rights was first put forward by the Executive Committee in April 1975. The Bill had four main aims:

- 1. to guarantee the freedom for political thought and activity for all citizens in Northern Ireland
- 2. to guarantee the end of repressive laws which breach common law and contravene human rights legislation

- 3. to guarantee the outlawing of discrimination against any citizen for reason of belief, religion, politics, sex, race or colour
- 4. to guarantee the establishment of law enforcement agencies acceptable to the overwhelming majority of the citizens

The introduction to the Bill also states that these guarantees must be accompanied by suitable and meaningful machinery for their implementation. The Bill is divided into three parts:

- **Part 1** makes the Race Relations Act (1968) applicable in Northern Ireland. It also declares that laws must be construed and applied so as not to infringe the Bill of Rights and that any existing laws infringing the Act shall be void.
- **Part 2** deals with fundamental rights and freedoms. A number of fundamental rights and freedoms in relation to sex equality, religious belief, culture, language and freedom of expression are set out in language similar to that used in the United Nations' Declaration of Human Rights.  
 Section 9 (i) and (ii) deal with the right of political expression and are particular to Northern Ireland. (ii) deals with the abolition of the oath of allegiance as a condition of public office or employment. Section 10 deals with the right of assembly and Section 11 establishes proportional representation as a method of election to local government, which presumably includes election to a local Northern Ireland Assembly. Elections to Westminster are not mentioned.  
 Section 12 establishes freedom of movement in and out of Northern Ireland.  
 Sections 13 and 14 deal with privacy and establish procedures for arrest and fingerprinting..  
 Section 15 deals with post-arrest procedures and sets out various rights of access to a lawyer and the right to remain silent.  
 Sections 16-21 deal with trials and establish the right to trial by jury within a reasonable time..  
 Section 23 establishes certain rights for prisoners to obtain legal advice and to secure parole..
- **Part 3** deals with enforcement and recommends the establishment of a Northern Ireland Constitutional Court with five judges sitting at the same time. The Court would be available to any person aggrieved by an Act that he or she considers to be in contravention of a provision of Part 2 of the Bill of Rights.

## □ Northern Ireland Committee of the Irish Congress of Trade Unions

"The Northern Ireland Committee of the Irish Congress of Trade Unions supports the concept of a Bill of Rights for Northern Ireland.

"We have been supported in our demands by the Irish Congress of Trade Unions' All-Ireland Conference, the British TUC and the Scottish TUC.

"Whilst we would wish to see the Bill encompass the spirit of the UN Conventions, our priority would be for a Bill of Rights which would be "based largely on the enforceability of the European

Convention on Human Rights in both domestic and international courts." (NIC Annual Report 1983).

"Furthermore, the NIC has criticised the Government over various derogations from the European Convention. Whilst recognising that special legislation may be required, that legislation should involve as few derogations from the Convention as possible, and such derogations should be time-limited.

"In its discussions with the Standing Advisory Commission on Human Rights at the time of its Report on the Bill of Rights, the Committee disagreed with the Commission's conclusion in its main report principally on the grounds that if it was possible for Parliament to pass legislation which seriously infringed citizens' rights in one part of the United Kingdom (e.g. internment and exclusion orders) then logically it should be possible to produce a Bill of Rights which, even if it only applied in one part of the UK, could protect citizens' rights.

"Furthermore, the Northern Ireland Committee could foresee no prospect of any early movement towards a Bill of Rights for the UK as a whole.

"Finally, in the Declaration promulgated by the ICTU in connection with its Better Life for All Campaign over a decade ago, the Trade Union Movement gave priority to the following human rights:

- the right to live freely from violence, intimidation and discrimination
- the right to secure and well-paid work
- the right to seek political change by peaceful means
- the right to have access to a proper educational system
- the right to adequate housing
- the right to have adequate social services especially for the poor, children, the sick, the elderly and the unemployed.

"These principles are still reflected in the policies and activities of the Trade Union Movement today."

## □ **Standing Advisory Commission on Human Rights**

The Standing Advisory Commission on Human Rights in Northern Ireland first gave detailed consideration to the need for a Bill of Rights in a paper published in 1977, "**The protection of human rights by law in Northern Ireland**" (Cmnd. 7009) By way of introduction the Commission recognises the futility of merely sloganising about the subject, i.e. using the expression "Bill of Rights" as a vague term in the ways politicians often use it. The paper takes these main issues for consideration:

- whether there is a need for a new measure guaranteeing fundamental rights and freedoms in Northern Ireland; if so



- what should be the nature and scope of such rights and freedoms; and
- what should be the means of enforcing such guarantees?

In **Part I** the paper looks at the nature and scope of rights and freedoms guaranteed in other legal systems or on an international plane. The UK is different from countries such as the USA, or countries within the Commonwealth or EEC, in that it does not have a written constitution defining or limiting the powers of the government, nor does it have any administrative code to regulate the misuse of power by public authorities. The sovereignty of the Westminster Parliament is absolute. In countries with a written constitution the Bill of Rights can be altered only by following defined procedures.

The rights and guarantees differ from country to country, but the common characteristics of Bills of Rights are:

- the rights are defined in positive and general terms;
- the Bills of Rights establish certain basic values stated as legal principles with priority over other laws and are therefore protected from the outcome of elections;
- the Bills are interpreted by judges, often in constitutional courts;
- the judges therefore become more active (and possibly controversial) in deciding moral and social issues.

The Commission noted that the UK, unlike several other member states of the Council of Europe, had not made the European Convention part of its domestic legal system, so its provisions were not directly enforceable by UK courts. But it felt that UK courts did at least recognise the import and content of the Convention as a source of guidance.

In **Part II** the 1977 SACHR paper outlines the arguments for and against a Bill of Rights. The arguments for are:

- (i) at the moment there are inadequate legal guarantees against the abuse of power by central and local government, Parliament or public authorities;
- (ii) a Bill of Rights would remove certain fundamental values out of the reach of temporary political majorities and into the realms of courts;
- (iii) the trend towards decentralisation of powers requires greater protection for civil rights;
- (iv) a Bill would enhance the role of judges;
- (v) incorporation of the European Convention would mean that the UK was conforming with practices of other member states of the Council of Europe;
- (vi) a Bill of Rights would not hamper effective and democratic government;
- (vii) a generally worded Bill would allow it to be flexibly interpreted in line with social changes;
- (viii) a Bill would not replace but supplement more specific statutory safeguards;
- (ix) even some limited guarantees (rather than a complete Bill of Rights) would be welcome; Parliament's sovereignty need not necessarily be fettered.

The arguments against a Bill of Rights are:

- (i) it would increase the uncertainty in the law;
- (ii) it would lead to expectations not being satisfied, which would result in further distress and

unrest;

(iii) it might hamper a government in introducing progressive policies; courts would become legislators and important public issues would become matters of legal, rather than moral or political, considerations;

(iv) the time is not appropriate since there is an insufficient degree of political consensus;

(v) human rights are as well protected in the UK in the absence of a written constitution;

(vi) it would represent a fundamental departure from the existing legal tradition;

(vii) it would not be wide enough unless (e.g.) it were extended to violations of human rights by non-governmental persons or institutions;

(viii) it would generate unnecessary litigation;

(ix) since existing safeguards (e.g. in Northern Ireland Constitution Act 1973) have not been relied upon, there is no evidence that a Bill of Rights would change matters.

After publication of the 1977 paper members of the SACHR gave evidence to the **House of Lords Select Committee on a Bill of Rights**, whose report also endorsed, by a narrow majority, the view that a Bill of Rights should be introduced (H.L. 176, 1977-78). The Commission has held informal discussions with groups (such as the TUC) who have expressed reservations about the introduction of a Bill of Rights.

In April, 1980 it organised a conference to allow discussion of the political, legal, moral and constitutional issues involved (see C.M. Campbell, ed.: **Do We Need a Bill of Rights?**, Maurice Temple Smith, London, 1980). In its 1980-81 Annual Report the SACHR stood over its 1977 paper:

*"Today the Commission's view remains the same viz. the rights and freedoms of all people living in Northern Ireland require further protection by law, that the best means of achieving this are by the introduction of a United Kingdom Bill of Rights, and this Bill should be based on the substantive provisions of the European Convention on Human Rights. But we reiterate, as we indicated in our Study Report, that there might be circumstances in which a Bill of Rights for Northern Ireland alone would be advisable" (p.21).*

In its 1983-84 Annual Report the Standing Advisory Commission remained emphatic in its belief that the UK should incorporate the European Convention (and its First and Fourth Protocols) into domestic law. It was convinced that the organs of the Council of Europe in Strasbourg wanted this to happen as well. It hopes that when the Government enacts a new Northern Ireland (Emergency Provisions) Act it will draft the legislation in a form which shows recognition of the standards laid down by the Convention.

In every report since the 1983-84 one the SACHR has reaffirmed its view that the European Convention on Human Rights should be incorporated into domestic law. The 1985-86 Report carries a detailed paper, prepared by Joseph Jaconelli, on Lord Broxbourne's Human Rights and Fundamental Freedoms Bill which represented an attempt to incorporate the European Convention into domestic law.

## □ Fortnight magazine

In February 1989 the editor of the magazine **Fortnight**, Robin Wilson, put forward the following "framework for a constitutional settlement based on inalienable citizenship rights". It represents

his own personal thinking after close examination of the political and social scenes in Northern Ireland. To date no further action has been taken in promoting his document:

*"We, the undersigned, endorse:*

- The RIGHT to be governed by a constitution for Northern Ireland to which any citizen can reasonably give allegiance as freely as any other.
- The RIGHT to participate equally with every other citizen of Northern Ireland in the democratic exercise of political power.
- The RIGHT of any citizen not to be subject to unaccountable expressions of executive power and to secure effective redress against abuses of such power.
- The RIGHT to liberty before the law, to a fair trial by other citizens and to effective redress where the rule of law is contravened.
- The RIGHT to equality of opportunity with every other citizen in employment and to the equal enjoyment of other life-chances.
- The RIGHT to free expression of cultural identity, and for public support for such cultural pursuits on an equal basis with those of other citizens.
- The RIGHT to freedom of information, association and political expression, excepting only the advocacy of violence for political ends.
- The RIGHT to equality with other UK citizens in the political life of the UK, for as long as Northern Ireland remains by its own consent a part of it.
- The RIGHT to pursue unrestricted economic, cultural and political exchanges with citizens of the Irish Republic, irrespective of the maintenance or otherwise of the border with it, and to public support for such exchanges.
- The RIGHT individually, and in association with other citizens, to pursue by peaceful and consensual means any desired change in the constitution of Northern Ireland - including in its relationships with Great Britain and the Irish Republic - and to oppose any such change by the same means.

*Until such time as such a constitution for Northern Ireland is enacted by act of Parliament, ideally linked to wider constitutional reform of the UK and with the endorsement of the government of the Irish Republic, we, the undersigned, urge all the citizens of Northern Ireland to act upon its principles and the government to base its actions in Northern Ireland upon it."*

# Chapter Five

## The General Legal Implications of A Bill Of Rights

**B**efore a Bill of Rights can be enacted for Northern Ireland, there are many decisions which need to be taken concerning its exact form and content. There can be no denying that such matters are extremely important, for some people may prefer to have no Bill of Rights at all than one they do not like. But the CAJ believes that there are only one or two features which a Bill of Rights **must** display in order for it to be better than the status quo; beyond that there is room for argument as to the precise shape the Bill of Rights should take. In this chapter we briefly consider some of the general legal issues raised by the introduction of a Bill. In the following chapter we nail our colours firmly to the mast by putting forward a draft Bill of Rights which we think would meet Northern Ireland's needs.

### The need for a saving clause

One indispensable feature of a Bill of Rights is that it should state, in a general clause either at the start or at the end, that the rights conferred by the Bill are without prejudice to the rights already enjoyed by individuals in Northern Ireland immediately prior to the Bill's enactment or that might be granted after enactment. This will make it clear that the enumeration of rights in the Bill is not intended to be exhaustive - that Parliament and the courts remain free to add to those rights at any time. In this manner it can be assured that no-one is left worse off after the Bill's enactment than he or she was before, and that the content of the Bill does not become out of date. Two models to follow in this regard are Amendment 9 in the USA's Bill of Rights (see page 13) and section 26 in the Canadian Charter of Rights and Freedoms. The European Convention, regrettably, contains nothing similar.

### Enforcement by individuals

Another important feature of a Bill of Rights is that it should confer upon individuals the right to seek protection of their rights in any court. This would mean that any person who complains, for example, that a new piece of legislation, or some act on the part of the administration or the judiciary, has curtailed his or her rights as referred to in the Bill of Rights should be permitted to raise that matter, directly or indirectly, before any judge or magistrate. Such judge or magistrate should have the power to declare the piece of legislation or the administrative act to be in violation of the Bill of Rights and therefore unenforceable. The individual would be free to carry on as if the legislation or act had never been in existence.

At least two important consequences flow from this aspect of a Bill. First, it does not prejudice the creation of a special body of adjudicators - human rights "commissioners" perhaps - who would have the power to take decisions on Bill of Rights cases (we return to this point below). Many people may wish to see such a body created because they do not fully trust the existing

judges and magistrates - they may believe them to be too pro-Establishment. A special body of commissioners would be the final court of appeal within Northern Ireland in all cases raising a Bill of Rights issue. The European Court of Human Rights at Strasbourg would remain the overall final court of appeal in those cases which also involved provisions of the European Convention on Human Rights. Even if the proposed Northern Ireland commissioners were to decide a case in a certain way, this decision could be reversed at Strasbourg if the matter was one which also involved provisions of the European Convention. This last phenomenon is unavoidable, given that the United Kingdom (like the Republic of Ireland) has international obligations under the European Convention which must take priority over, insofar as they conflict with, purely national obligations - which is not to say, of course, that national obligations may not be **more** demanding of a national government than its international obligations. (This is, for example, already the case as regards to fair employment legislation in Northern Ireland.)

The second consequence flowing from the availability of judicial review is that a decision must be taken as to whether the Bill effects situations arising before the Bill has come into force as well as those arising afterwards. It is a well-recognised principle in most legal systems that new laws - especially new criminal laws - must not be allowed to have a retrospective effect. This means that they must not be permitted to prejudice the position of individuals who have previously acted in a certain manner which was then within their rights. Additionally, the principle does not allow the state, or any individual, to rely upon a pre-existing law in order to **continue** to act in a certain manner after the time when so acting has become illegal.

The CAJ therefore believes that a Bill of Rights for Northern Ireland should contain a clause permitting magistrates and judges (and other persons exercising judicial functions, such as members of tribunals) to declare any law, administrative act or judicial decision to be inconsistent with the Bill of Rights and therefore unenforceable beyond the moment when the Bill of Rights has come into force.

## Entrenchment

Another crucial question, at least for some, is whether the Bill of Rights should be "entrenched", that is, made unalterable by normal legislative or judicial processes. For this to be done, a long tradition within United Kingdom constitutional and legal history would need to be broken. At present, UK law contains no provision which is formally entrenched, and according to the doctrine of Parliamentary sovereignty, which lies at the base of our (albeit unwritten) constitution, Parliament can undo tomorrow what it or any judge has done today. If, for example, a Bill of Rights were to contain a clause saying that the Bill - including this same clause - could not be altered or repealed unless 75% of the Members of Parliament at a particular time so voted, this would be ineffective: the doctrine of Parliamentary sovereignty means that Parliament could immediately vote, by a simple majority of those present at the time, to ignore the entrenchment provision. Logically there is no way out of this impasse.

But there is a difference between what can happen in theory and what is likely to happen in practice. **In practice** there are a great many laws which are entrenched in the United Kingdom. Some of these are not Acts of Parliament at all but constitutional conventions. The doctrine of Parliamentary sovereignty is itself one of these constitutional conventions. Other laws entrenched in practice *are* Parliamentary Acts: the Magna Carta of 1215 and the Act of Succession of 1701 could be cited as examples ( see Chapter 2). A much more recent Act which to all intents

and purposes is entrenched is the Representation of the People Act 1918, which gave votes to women.

The CAJ believes that it is this type of certainty which needs to be created when a Bill of Rights is enacted. To help maintain it there can be little objection to the enactment of a clause (within or outside the Bill) purporting to entrench the Bill - even if, of itself, this would be ineffectual. There might be psychological benefit in such a clause, though on the other hand its very explicitness may serve to remind people of what it is trying to do, which in turn could be an invitation to some to attempt countervailing measures. The best way in which to get a Bill of Rights entrenched is by developing an atmosphere within society that constantly reminds the members of that society of the fundamental importance of the law for their continuing sense of freedom and justice. Such an atmosphere is by no means easy to evoke, but the debate which will no doubt precede the enactment of a Bill of Rights, and the publicity given to cases which will arise under the Bill, should go some way towards creating it.

As regards the desirable content of a Bill of Rights, the CAJ continues to hold that the best model to follow - with reservations - is the European Convention on Human Rights. This is not just because the structure of the European Convention is worth emulating *per se*; it is also for the practical reason that the United Kingdom government has already recognised that if any Bill of Rights is to be enacted it should be on the basis of the existing Convention. Governments are by now quite familiar with the Convention's provisions and considerable expertise has been developed by lawyers, administrators and judges in processing cases under the European Convention. In chapter 7 we set out our own draft Bill of Rights. The notes accompanying it point out the respects in which the draft mirrors or differs from the European Convention.

## Accommodation clauses

One feature of the European Convention which a Bill of Rights for Northern Ireland should **not** emulate, is the proviso which has been inserted in many of the Convention's articles whereby the rights conferred may be qualified by governments insofar as this is necessary in the interests of public safety, morality or national security. These are known as accommodation clauses. We think that this kind of qualification can seriously undermine the effectiveness of a human rights document. Even when a government's resort to the proviso is reviewable by some independent body, such as the European Court of Human Rights, the existence of the proviso provides much too much leeway for a government to take measures which are otherwise in contravention of the Convention. The European Commission and Court currently allow too great a "margin of appreciation" to national governments in their resort to such accommodation clauses. The CAJ would much rather have it that a Bill of Rights for Northern Ireland should not refer at all to specific qualifications upon the rights conferred: the existence and extent of general qualifications should be left to be worked out by the adjudicators whose task it is to decide cases arising under the Bill of Rights. This is the US experience, which today seems to operate satisfactorily.

## Going beyond the European Convention

The CAJ also wishes a Bill of Rights for Northern Ireland to be more extensive than the European Convention. We do not think that the European Convention confers enough rights on under-privileged members of our society, such as the poor, the handicapped, the unemployed, the sick,

the homeless, the imprisoned and the old. Nor do we feel that all of the provisions of the Convention are clearly enough worded. There is scope for tailoring a Bill of Rights more closely to the specific needs of society in Northern Ireland, in relation, for example, to discrimination, the emergency police and army powers and the Diplock courts.

We do not think that the Bill of Rights should attempt to deal with party political grievances, such as those relating to the inability to join political parties based in Great Britain or the Republic of Ireland, or with the political claims of some parties vis-a-vis union with Great Britain or with the Republic of Ireland. These are essentially political matters and all that a Bill of Rights can do is to ensure that basic civil liberties such as freedom of expression, freedom to vote and freedom of association are guaranteed when these political matters are being debated. A Bill of Rights can protect people's rights to argue a point of view: it cannot ensure that that point of view becomes a reality. For this reason it makes no sense, within the context of Northern Ireland's present political climate, for a Bill of Rights to confer in so many words the right to majority rule, to self-determination or to equal citizenship within the United Kingdom. A Bill of Rights should not be concerned with the status of territory.

This Chapter has already touched upon the possibility of a special body being set up to adjudicate upon cases raising the Bill of Rights. The CAJ is in favour of such a body being created in the long term because, on the one hand, there are misgivings among some people in Northern Ireland, rightly or wrongly, about the independence and objectivity of the current judges and magistrates and, on the other hand, it is known that some of the present judges and magistrates are extremely unwilling to become involved in Bill of Rights cases on account, they claim, of the "political" nature of these cases.

It may be thought that the present adjudicators in Strasbourg - the European Commission and the European Court - are all that is required, but this presupposes that a Bill of Rights for Northern Ireland would confer no greater protection than is already provided by the European Convention, which the CAJ believes should not be the case. Nor are we in favour of conferring adjudicatory powers on the existing, or on a revamped, Standing Advisory Commission on Human Rights. Although, by and large, we have been impressed by that Commission's work in recent years, we feel that a greater degree of public confidence would be instilled if a new body of adjudicators were to be set up, comprising well-known specialists in human rights law. Such a body should be given the power to order the government to pay compensation to people whose rights under the Bill of Rights have been violated. It should also be able to look at human rights issues on its own initiative and have a duty to produce an annual report on the work it performs. In this regard the remit of Australia's Human Rights and Equal Opportunity Commission (see Chapter 3 above) looks like an ideal one to follow.

However we do not at this stage think that it is necessary to provide in the Bill of Rights itself for such an independent adjudicatory body to be established. Its creation is a separate issue and the adoption of a Bill of Rights ought not to be made dependent on the creation of such a body. For this reason our draft Bill of Rights in Chapter 7 makes no reference to the establishment of this body; for the moment we are content for the Bill of Rights to be interpreted and enforced by existing judges and magistrates. This presupposes that existing agencies such as the Fair Employment Commission and Equal Opportunities Commission will continue to operate.

# Chapter Six

## CONCLUSION

**T**he time has come for the people of Northern Ireland to demand that their basic civil rights be guaranteed. Freedom of speech, freedom of the press, and freedom from discrimination are not privileges that can be denied by the government when it finds convenient. Fundamental rights and freedoms should be enshrined in a Bill of Rights for Northern Ireland to ensure the equal and respectful treatment of all persons. Under such a Bill of Rights, individuals who find their basic liberties under attack would be able to petition the courts for vindication of their rights. All laws or orders that are found by a court to violate this Bill of Rights would be declared void and unenforceable in Northern Ireland.

### A summary of our conclusions

- The people of Northern Ireland currently lack many basic rights, including:
  - freedom from discrimination on the basis of race, sexual preference, or physical disability;
  - freedom of speech
  - freedom from interference with one's private and family life;
  - freedom of peaceful assembly;
- The UK is becoming increasingly isolated in that it lacks a comprehensive set of fundamental legal protections for its people.
- The UK has agreed to abide by several international human rights charters, but has not made these charters' protections available in its own courts.
- There is widespread support for a Bill of Rights for Northern Ireland among all of the major political parties and other groupings.
- The Bill of Rights should be modelled on the European Convention on Human rights, but should go beyond it. For example:
  - The Bill of Rights should make clear that its enumeration of certain rights does not prejudice the existence of other, unenumerated rights held by the people.
  - There should be no provision for derogation from the Bill of Rights; all limitations on rights must be imposed in strict acceptance with the general restrictions allowed by the Bill of Rights itself.
  - It should be unlawful to discriminate against people on the grounds of disability or sexual preference.
  - It should be possible for groups as well as individuals to seek protection under the Bill of Rights.
- Individuals should be able to bring actions in Northern Ireland's courts to protest against infringements of their rights.
  - Ordinary judges should be empowered to adjudicate claims regarding the Bill of Rights. In



the future a special court could also be created to hear these claims.  
Individuals should be able to bring actions on behalf of larger classes if these individuals are found to be competent representatives for their class.

- Entrenchment of the Bill of Rights should be sought through widespread public support which guards against infringement.
  
- Adherence to a strict theory of Parliamentary sovereignty should not prevent the adoption of a Bill of Rights.  
With the UK's accession to the European Community, parliamentary sovereignty has already been significantly compromised.  
To the extent that the Bill of Rights imposes restrictions on Parliament by preventing it from violating certain basic rights, the Committee on the Administration of Justice supports such limitation of Parliamentary sovereignty as justifiable.
  
- A Bill of Rights offers many advantages for Northern Ireland including:  
The improvement of the Northern Ireland's image in the rest of the world, with possible economic benefits from greater outside investment as a consequence.  
Increased respect for the legal system;  
Increased belief in the possibility of peaceful change; and  
Greater protection for the rights of the people of Northern Ireland.

# Chapter Seven

## A BILL OF RIGHTS FOR NORTHERN IRELAND

proposed by  
the Committee on the Administration of Justice

[The Roman numbers in square brackets refer to the notes added at the end of the document.]

### Preamble

However Northern Ireland is governed, these are the minimum rights which are to be guaranteed by law to all persons in Northern Ireland.[i]

### Article 1

(1) Every person has the right to life.[ii]

(2) Deprivation of life shall not contravene this Article when it results from the use of force which is no more than absolutely necessary to preserve other human life.[iii]

(3) In no circumstances shall a person be executed pursuant to a sentence of a court.[iv]

(4) At an inquest into a death, the close relatives and dependents of the dead person have the right to adequate legal assistance, including representation, free of charge.[v]

### Article 2

Every person has the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[vi]

### Article 3

(1) In the event of a person being killed as a result of the actions or omissions of another person or as a result of the actions or omissions of persons acting in an official capacity, the close relatives and dependents of that person have the right (subject to Article 12) to adequate compensation.[vii]

(2) Every person who has been injured or whose property has been lost or damaged as a result of the actions or omissions of persons acting in an official capacity has the right (subject to Article 12) to adequate compensation.[viii]

### Article 4

(1) Every person has the right to a standard of living adequate for his or her health and well-being.[ix]

(2) Every person has the right to a home, sustenance and security in the event of sickness, disability, old age, unemployment or other lack of livelihood.[x]

### **Article 5**

(1) Every person has the right to education.[xi]

(2) Every person has the right to full financial support for all aspects of education up to the age of 16, and technical, professional and higher education shall be made generally available and financially accessible to all.[xi]

(3) Education shall be directed to the full development of skills, ability and personality, to the strengthening of respect for human rights and fundamental freedoms and to the promotion of understanding, tolerance and friendship among all racial or religious groups[xii]

### **Article 6**

Every person has the right (subject to Article 12) to freedom from interference with his or her private and family life, home and correspondence.[xiii]

### **Article 7**

Every person has the right (subject to Article 12) to marry and to divorce.[xiv]

### **Article 8**

Every person has the right (subject to Article 12) to freedom of conscience and of religion (including the right to no religion). This right includes the freedom to manifest his or her beliefs (or lack of them) in worship, teaching, practice and observance, whether alone or in community with others and whether in public or in private.[xv]

### **Article 9**

(1) Every person has the right (subject to Article 12) to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference.[xvi]

(2) Every person shall have the right (subject to Article 12) to take part in cultural life.[xvii]

### **Article 10**

(1) Every person has the right (subject to Article 12) to freedom of peaceful assembly and to freedom of association with others.[xviii]

(2) Every person has the right to form and to join trade unions and professional bodies for the protection of his or her employment interests.[xix]

### **Article 11**

(1) Every individual has the right to take part in the public affairs of Northern Ireland, both directly and through freely chosen representatives.[xx]

(2) Every individual over the age of 18 who is resident in Northern Ireland in accordance with the law has the right to vote and to be elected at periodic elections. Elections shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.[xxi]

## **Article 12**

The rights laid down in Articles 3, 6, 7, 8, 9 and 10(1) can be subject only to such limits as are shown to be (a) absolutely necessary, (b) prescribed by law and (c) manifestly justifiable in a free and democratic society.[xxii]

## **Article 13**

(1) Every person has the right to liberty and security of the person.[xxiii]

(2) A person may be deprived of his or her liberty if he or she is reasonably suspected of being about to commit, or of being in the process of committing, or of having committed, a specific offence of a serious nature.[xxiv]

(3) In exceptional circumstances, a person may be deprived of his or her liberty and detained under strict medical supervision if he or she is known to be suffering from a serious infectious disease or if he or she is of such an unsound mind that he or she is likely to cause serious harm to himself or herself.[xxv]

(4) Every person who is deprived of his or her liberty has the right to be informed immediately of the reasons for the detention and to be brought publicly and within 36 hours before a lawfully established independent and impartial court in order to have the lawfulness of the detention speedily determined. If the court decides that the detention is unlawful the person detained shall be immediately released. If the court decides that the detention is lawful the person detained may re-apply to the court for an order of release if there is evidence of a material change of circumstances.[xxvi]

(5) A person may not be deprived of his or her liberty as a result of the non-payment of a debt or a fine on grounds of financial hardship.[xxvii]

## **Article 14**

(1) Every person charged with or appealing in relation to a criminal offence shall be presumed innocent until proved guilty beyond all reasonable doubt by evidence presented by the prosecuting authorities.[xxviii]

(2) Unless the interests of the defendant or a victim of a crime require it, all trials of criminal charges shall be held in public.[xxix]

(3) Within six months of being charged with a criminal offence, every person is entitled to a fair and public hearing by an independent and impartial court established by law. The person has the right to waive this time limit if he or she shows to the satisfaction of the court that there has been inadequate time to prepare a defence.[xxx]

(4) Every person charged with a criminal offence has the right to defend himself or herself in person or through adequate legal representation of his or her own choosing and this legal presentation must be provided free of charge.[xxxii]

(5) Every person charged with a criminal offence has the right to examine or have examined witnesses who are giving evidence against him or her. Every such person also has the right to obtain the attendance and examination of witnesses who are giving evidence on his or her behalf under the same conditions as witnesses who are giving evidence against him or her.[xxxiii]

(6) Every person charged with a criminal offence for which, if convicted, he or she could be sent to prison for longer than 12 months has the right, unless he or she chooses to waive it, to be tried by a judge sitting with a jury of 12 randomly selected jurors.[xxxiii]

(7) A person shall not be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the law of Northern Ireland or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the maximum which could be imposed in law at the time the criminal offence was committed.[xxxiv]

(8) Every person convicted of a criminal offence shall have the right to appeal against that conviction and against the sentence imposed for the conviction.[xxxv]

## **Article 15**

(1) In deciding whether a person possesses or may exercise rights or obligations under the civil law, he or she is entitled to a fair and public hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is suing or is being sued under the civil law has the right to represent himself or herself in court and to adequate legal representation of his or her own choosing and this legal representation must be provided free of charge when the merits of the case and the means of the applicant so require.

(3) Every person being sued or suing under the civil law has the right to examine and have examined in court witnesses who are giving evidence against him or her. Every such person also has the right to obtain the attendance and examination of witnesses who are giving evidence on his or her behalf under the same conditions as witnesses who are giving evidence against him or her.[xxxvi]

## **Article 16**

The guarantee of rights in this Bill of Rights shall not be interpreted as in any way denying the existence of other rights already or subsequently protected by law, provided that those other rights do not conflict with the provisions of this Bill of Rights.[xxxvii]

## **Article 17**

(1) The enjoyment of rights, whether referred to in this Bill of Rights or not, shall be secured without discrimination on any ground such as gender, race, colour, language, religion, political or other opinion, ethnic or national or social origin, association with a national minority, sexual orientation, property, mental or physical disability, birth or other status.[xxxviii]

(2) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.[xxxix]

### **Article 18**

(1) Any legislative provision, and any decision by a judicial or administrative body, can be examined by an independent and impartial court established by law with a view to that court deciding whether the provision or decision contravenes this Bill of Rights and, if the court decides that it does, the court shall declare the provision or decision to be invalid and unenforceable.[xli]

(2) Such a declaration shall not affect the legality of actions taken prior to the coming into force of this Bill of Rights.[xli]

(3) A decision taken by a court under paragraph (1) of this Article may be appealed to the Court of Appeal in Northern Ireland.[xlii]

### **Article 19**

(1) Every person whose rights as laid down in this Bill of Rights or otherwise under the law are violated shall have an effective remedy, including the right to compensation, before an independent and impartial court established by law.[xliii]

(2) In the case of a violation of rights which affects a group or class of persons, the group or class shall have the right to bring an action before an independent and impartial court established by law.[xliv]

### **Article 20**

This Bill of Rights may be amended only if a proposal to that effect is approved by not less than two-thirds of the votes cast in a referendum in Northern Ireland.[xlv]

# Notes On The Proposed Bill Of Rights

[i] This Bill of Rights is intended to apply whatever constitutional arrangements are made for governing the area at present designated as Northern Ireland. The Committee on the Administration of Justice takes no position on what those arrangements should be. Nor does it hold a collective view on how the Bill of Rights should be made a part of the law in Northern Ireland but it wishes the Bill to be regarded as a fundamental constitutional document to which all other laws are to be subservient.

The Bill of Rights is to benefit every person who at any particular time is in the area at present designated as Northern Ireland. Where the context permits, "person" includes natural persons as well as "legal" persons such as companies. Like other Bills of Rights, the document is intended to bind the state (in all its manifestations) in its relationships with persons in Northern Ireland. The state is therefore under an obligation to ensure that the law in Northern Ireland fully complies with the provisions in the Bill and the judges in Northern Ireland should interpret the Bill in such a manner as to protect as far as possible the rights guaranteed by it.

[ii] Article 1(1) is similar to the first parts of Article 3 of the Universal Declaration of Human Rights, Article 6(1) of the United Nations' International Covenant on Civil and Political Rights and Article 2(1) of the European Convention on Human Rights. The CAJ takes no position on whether the law of Northern Ireland should permit abortion or euthanasia.

[iii] The test in Article 1(2) is stricter than both the current domestic law of Northern Ireland and the equivalent provision in Article 2(2) of the European Convention on Human Rights. It is deemed appropriate because of the large number of controversial shooting incidents that have occurred in Northern Ireland.

[iv] Article 1(3) is a categorical prohibition on the death penalty, to counter any argument that Article 1(3) still leaves room for the imposition of such a penalty. The CAJ does not believe that any human rights document should countenance the use of such a punishment.

[v] Article 1(4) has been inserted because of the present injustice whereby relatives cannot obtain legal aid for representation at inquests into suspicious deaths. We think it is best placed here in order to emphasise the need for proper measures to protect human life.

[vi] Article 2 is based on the absolute protection currently provided by Article 3 of the European Convention.

[vii] Article 3(1) is designed to counter arguments that a death, as opposed to an injury, does not attract the right to compensation. The right should vest in the deceased's dependents and relatives, who should receive such compensation as is adequate to their needs, regardless of the character of the deceased.

[viii] Article 3(2), which overlaps with others in the Bill of Rights, is intended to put beyond doubt a person's entitlement to compensation from the state for unjustified state action. It is partly based on Article 13 of the European Convention on Human Rights and envisages, for example, the strengthening of the rights recognized in decisions of the Northern Ireland Ombudsman.

[ix] Article 4(1) is a condensed version of what is at present found in Article 25 of the Universal Declaration of Human Rights and Article 11 of the UN's International Covenant on Economic, Social and Cultural Rights. It is also similar in tone to provisions in the Council of Europe's European Social Charter. The Universal Declaration is not a treaty which is binding in international law. The Covenant and the Charter *are* such treaties and in the eyes of international law the UK and the Republic of Ireland have already agreed to abide by their terms. The CAJ recognises that economic, social and cultural rights are of a different order from civil and political rights, if only because they are more obviously dependent upon the financial resources of the country in question. Nevertheless, in the knowledge that they are already a part of the UK's and Ireland's obligations in international law, we view their inclusion in a Bill of Rights for Northern Ireland as of crucial significance.

[x] Article 4(2) reflects our desire to ensure that, however Article 4(1) is interpreted by the courts, shelter, food and reasonable spending money are guaranteed to particularly vulnerable groups in society.

[xi] Articles 5(1) and 5(2) are based on Article 26 of the Universal Declaration and Article 2 of Protocol 4 to the European Convention on Human Rights, though the age limit of 16 is one which we ourselves have inserted. The reference to all aspects of education is intended to ensure that some "extra" school activities are not made available only to children whose parents can afford to pay for those activities.

[xii] Article 5(3) is based on Article 26(2) of the Universal Declaration and is intended to be broad enough to allow for the continuance of state-funded church schools as well as "integrated" schools. We feel that the child's own personality should be the focal point for development in all schools.

[xiii] Article 6 is based on Article 8(1) of the European Convention and represents the first attempt to introduce the right of privacy directly into the law of any part of the United Kingdom. The right of privacy is clearly recognized in many other countries, including the United States of America, where its existence has been inferred from the Constitution. It is not expressly mentioned in the Constitution of the Republic of Ireland, but the courts there have recognised it as one of the "unenumerated" rights.

[xiv] Article 7 is based on Article 12 of the European Convention, except that we have specifically included the right to divorce, which the European Court of Human Rights has held is not protected by Article 12.

[xv] Article 8 is based on Article 9(1) of the European Convention.

[xvi] Article 9(1) is mainly based on Article 10(1) of the European Convention.

[xvii] The phrase in Article 9(2) about cultural life is from Article 15(1)(a) of the UN's International Covenant on Economic, Social and Cultural Rights.

[xviii] Article 10(1) is based on the first part of Article 11(1) of the European Convention.



[xix] Article 10(2) is based on the second part of Article 11(1) of the European Convention. It is here given a separate paragraph because we deem it to be important and because we wish to exclude it from the operation of the general "limitation clause" in Article 12 below.

[xx] Article 11(1) is based on Article 25(a) of the UN's International Covenant on Civil and Political Rights.

[xxi] Article 11(2) is based on Article 25(b) of the UN's International Covenant on Civil and Political Rights. The CAJ is in favour of elections based on proportional representation but is not insisting upon this in this paragraph.

[xxii] This "limitation clause" in Article 12 is comparable to, but less extensive than, the similar clauses found in nearly all national and international charters of rights. It is based in particular on section 1 of the Canadian Charter of Rights and Freedoms of 1982. We realise that very few rights can be said to be absolute, but we have chosen not to follow the practice of the European Convention, which is to insert a specific limitation clause immediately after the conferment of a specific right (see Articles 8(2), 9(2), 10(2) and 11(2) of that Convention). Nor does our Article 12 itemise the sorts of interests which are listed in those paragraphs of the European Convention as justifications for placing a limit on rights, e.g. national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the preventing of disclosure of information received in confidence or the protection of health or morals. Rather than include such a list, the CAJ prefers to focus attention on the requirements that all limitations must be "absolutely necessary" and "manifestly justifiable". We are prepared to leave it to the courts, or to supplementary legislation, to lay down the precise limitations required for each of the rights in question.

[xxiii] Article 13(1) is based on the first line of Article 5(1) of the European Convention. The Bill of Rights contains no provision expressly outlawing the issue of exclusion orders under the Prevention of Terrorism Act, whereby persons can be excluded from any part, or the whole, of the United Kingdom. Although these orders mostly affect persons living in Northern Ireland who want to travel to Great Britain, and although the CAJ vehemently opposes their use, we have not been able to find the appropriate set of words to make such orders clearly illegal. We intend Article 13(1), however, to be interpreted by judges in such a way as to achieve that effect.

[xxiv] Article 13(2) in effect summarises the detailed provisions in Article 5(1)(c) of the European Convention.

[xxv] Article 13(3) partly reflects the grounds for valid detention mentioned in Article 5(1)(e) of the European Convention. The CAJ does not believe that there should be detention of persons of unsound mind, alcoholics, drug addicts or vagrants unless those persons fall into the categories mentioned in Article 13(2) or (3) of this Bill of Rights.

[xxvi] Article 13(4) summarises the detailed provisions in Article 5(2) to (4) of the European Convention. We prefer to insert a specific limit of 36 hours because any phrase such as "with all speed" is bound to lead to abuse. The period of 36 hours is the one currently provided for by the ordinary law on criminal procedure in Northern Ireland - the Police and Criminal Evidence (NI) Order 1989.

[xxvii] Article 13(5) is intended to avoid the injustice of a person being sentenced to imprisonment simply because he or she is not financially able to pay a monetary obligation. It does not affect imprisonment where the non-payment results from reasons other than financial.

[xxviii] Article 14(1) is a strengthened form of Article 6(2) of the European Convention. It refers to proof beyond all reasonable doubt because that is the standard required at the moment in all criminal prosecutions in Northern Ireland.

[xxix] Article 14(2) emphasises the need for hearings to be conducted in open court unless there are sound reasons against doing so.

[xxx] Article 14(3) is based on the first sentence of Article 6(1) of the European Convention, but is limited to criminal cases. Civil cases are dealt with by Article 15(1).

[xxxi] Article 14(4) is based on Article 6(3)(c) of the European Convention. It leaves open the possibility that very wealthy defendants who are found guilty could be ordered by the court to pay the full costs of the prosecution.

[xxxii] Article 14(5) is based on Article 6(3)(d) of the European Convention.

[xxxiii] Jury trial is not guaranteed by any international human rights instrument and by few national Constitutions (well-known exceptions are Article III(2)(3) of the US Constitution and Article 38.5 of the Irish Constitution). Article 14(6) is intended to ensure equality of treatment for all defendants in Northern Ireland who are charged with an offence for which they can be tried in a Crown Court. It is one of the rare rights which a person should be allowed to waive if he or she so wishes.

[xxxiv] Article 14(7) is based on Article 7(1) of the European Convention, where it is one of the rights which states cannot derogate from (i.e. choose to ignore in certain circumstances).

[xxxv] Article 14(8) underlines the importance of proper appeal procedures in any criminal justice system.

[xxxvi] These paragraphs in Article 15 are the same as those in Article 14(5) to (8) of this Bill of Rights, but they deal with non-criminal cases. Only the first of the three paragraphs has a parallel in the European Convention (Article 6(1)).

[xxxvii] The purpose of Article 16 is to make it absolutely clear that this Bill of Rights is not intended to be a fully comprehensive statement of a person's rights in Northern Ireland. It compares with section 26 of the Canadian Charter and the Ninth Amendment to the US Constitution.

[xxxviii] Article 17(1) is based on Article 14 of the European Convention except that it extends to rights not mentioned in this Bill of Rights and it includes ethnic origins, sexual orientation (meaning male and female homosexuality) and mental and physical disability as grounds upon which it is unlawful to discriminate. There are anti-discrimination provisions in Article 2(2) of the UN's International Covenant on Civil and Political Rights and in Article 2(1) of the UN's International Covenant on Economic, Social and Cultural Rights.

[xxxix] Article 17(2) supplements Article 17(1) by ensuring equality before the law rather than just non-discrimination in relation to specified rights. It compares with Article 26 of the International Covenant on Civil and Political Rights.

[xl] Article 18(1) makes it clear that all existing and future legislation as well as judicial and administrative decisions can be the subject of a challenge under the Bill. We think that all courts should have the right to exercise this jurisdiction and that there is no need at this stage for the creation of a new court. The doctrine of Parliamentary sovereignty is being curtailed to the extent that Parliament's authority to violate the basic human rights enshrined in this Bill is being withdrawn. The CAJ believes that such rights should not come and go depending on the wishes of particular Parliaments - they are too fundamental to be made into political footballs.

[xli] In order to be consistent with the principle against retrospectivity exemplified by Article 14(7) of this Bill, we have included Article 18(2) to make it clear that a declaration of invalidity is not to operate in such a way as to render illegal something done which, because the Bill of Rights was not at that time in force, was then legal.

[xlii] Article 18(3) ensures that the highest court sitting in Northern Ireland has the opportunity to settle the law for the benefit of all lower courts.

[xliii] Article 19(1) is based on Article 13 of the European Convention, with the reference to compensation being taken from Article 5(5) of that Convention and made more generally applicable.

[xliv] Article 19(2) recognizes the importance of permitting class actions, which have been much used in the United States of America to afford remedies in situations where a collection of individuals has each suffered a similar loss but where very few of them would want, or be able, to bring an action on their own account. We feel that such a remedy should be made more widely available within Northern Ireland so that various types of groups (not only minorities) can take advantage of them. We have in mind consumer groups, environmental groups, travelling people, women's groups, civil liberties groups, etc.

[xlv] Our formula for amending the Bill is based on a combination of what is currently required in the United States of America and in the Republic of Ireland. We much prefer it to the system used for amending the European Convention, which requires either a unanimous vote by the member states of the Council of Europe or the adoption of Protocols, while the Canadian Charter simply uses the very undesirable device of an "override" clause (article 33), which allows Parliament to declare that a piece of legislation is to operate for at least five years notwithstanding the main provisions of the Charter.

## Further Reading

The literature on a Bill of Rights for the United Kingdom is already voluminous. We list here what we consider to be the items most relevant to the debate within Northern Ireland.

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# List of CAJ pamphlets

- No 1. **The Administration of Justice in Northern Ireland:** the proceedings of a conference held in Belfast on June 13, 1981 (No longer in print)
- No 2. **Emergency Laws in Northern Ireland:** a conference report, 1982. (No longer in print)
- No 3. **Complaints Against the Police in Northern Ireland,** 1982. (£0.50)
- No 4. **Procedures for handling complaints against the Police,** 1983. (Updated by pamphlet no. 16)
- No 5. **Emergency Laws: suggestions for reform in Northern Ireland,** 1983. (Photocopy available)
- No 6. **Consultation between the Police and Public,** 1985.
- No 7. **Ways of Protecting Minority Rights in Northern Ireland,** 1985. (£1.00)
- No 8. **Plastic Bullets and the Law,** 1985 (updated by pamphlet no.15 )
- No 9. **"The Blessings of Liberty", An American Perspective on a Bill of Rights for Northern Ireland,** 1986 (£1.50)
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