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Winner of the Council of Europe Human Rights Prize

***CAJ's preliminary submission to the
Northern Ireland Human Rights Commission
on***

A Bill of Rights for Northern Ireland

March 2001

Submission No. S.106
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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include prisons, policing, emergency laws, the criminal justice system, the use of lethal force, children's rights, gender equality, racism, religious discrimination and advocacy for a Bill of Rights.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

A Bill of Rights for Northern Ireland -

Preliminary Submission by the CAJ

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1. A Bill of Rights for All of Us

1.1. The Bill of Rights exercise is an essential aspect of the process of transition in Northern Ireland. It is of fundamental importance if we are to guarantee that the human rights of all are protected. The process has the potential to initiate an inclusive and continuing discussion of human rights issues. The substantive rights included should ensure that everyone enjoys strong and effective human rights guarantees. An expansive and effective Bill of Rights will be a core building block of the new beginning in Northern Ireland. CAJ firmly believes the Bill of Rights will be central to creating a new human rights culture which will ensure that the rights of all are comprehensively protected.

1.2. At the same time, CAJ recognises that a Bill of Rights is a normal part of the constitutional furniture of mature democratic systems. Most societies have a document such as this, which sets out in a clear and accessible way the constitutional limits to the exercise of state power. Northern Ireland (and the UK generally) is an exception to the rule in this regard. It is time for Northern Ireland to join the international mainstream by adopting a Bill of Rights.

1.3. There has long been a consensus on the need for a Bill of Rights. All the political parties, and many other organisations, have consistently expressed support for the idea. While the current Bill of Rights process springs from the Agreement, the idea long pre-dates this instrument. It is widely accepted that a Bill of Rights is something which Northern Ireland must have. The Agreement is the latest reflection of this thinking.

1.4. The process is of fundamental significance for all those interested in the future of human rights protection in Northern Ireland. It is essential that a Bill of Rights is enacted which is a model of best international practice and that everyone can be proud of. It is equally important that the Bill of Rights reflect the language of the Agreement. This is a Bill of Rights which must reflect the particular circumstances of Northern Ireland, and thus must be drafted to take account of the specific human rights situation here.

1.5. If conducted properly, this exercise will ensure that the Bill of Rights becomes part of the fabric of Northern Ireland. CAJ wishes to ensure that the Bill of Rights reflects an imaginative and effective commitment to a progressive vision of human rights, rather than a lowest common denominator approach.

1.6. The starting point for this debate must be the needs of individuals and communities in Northern Ireland. The Commission's advice cannot be constrained by reference to what the government or political parties are likely to accept. In our view, the Commission's role in this regard is to articulate the best possible Bill of Rights for Northern Ireland and to develop a constituency of support for such a Bill of Rights.

1.7. The Commission's message in relation to this issue has not been consistent and indeed on occasion has suggested that the Commission is likely to defer unduly to the views of the state. In this context, it is highly unfortunate that the Commission, in the current consultation process, has begun to sloganise about rights and responsibilities, even going so far as to talk about a possible Bill of Rights and Responsibilities. We are unclear as to what the

Commission means by this. To take it at its most basic, what responsibilities does a citizen have to fulfil if he or she is to qualify for the right to a fair trial or the right to be free from torture? Imprecise formulations in this area are potentially very damaging to the creation of a human rights culture.

1.8. Talk of the need for a Bill of Rights and Responsibilities is misleading at best and dangerous at worst. It is misleading in that it suggests a rights culture is a culture of licence, where people are free to hurt and abuse others. On the contrary, existing international human rights law not only recognises that rights may be limited to protect the interests of others, but indeed requires states to have in place laws and the means to enforce them in order to protect people against mistreatment from whatever source. It is dangerous in that it suggests that rights should be linked to responsibilities, that one must act “responsibly” in order to be able to avail of rights. There are many in our society, such as prisoners, immigrants or political radicals, whom at least some will see as being irresponsible. However it would clearly be a retrograde step if they were then to be regarded as forfeiting all claims to even the most basic rights, such as those to be protected against torture or arbitrary detention. Indeed it is often in respect of such groups that such rights are most at risk. To allow their rights to be ignored and to permit the developments of islands in our society where power can be exercised unchecked is to endanger the protection of the rights of all of us, even the most “responsible”. Finally it is difficult to see what form responsibility provisions in a Bill of Rights could take. In terms of enforcement, rights guarantees enable individuals and groups to challenge laws and practices which they feel infringe what they regard as their rights. Who would seek to invoke responsibility provisions? The only obvious contender is the state itself.

1.9. This debate about needing to balance out rights and responsibilities ignores the fact that the panoply of criminal laws (and to some extent civil laws) are designed explicitly to deal with our responsibilities towards each other and vis-a-vis society as a whole. It is the criminal justice system to which one turns to deal with those who do not respect, or who abuse, the rights of others. This is not the function of a Bill of Rights.

1.10. The Human Rights Commission must work for the best possible document for Northern Ireland. This ultimately should be a document which stands proudly alongside existing Bills of Rights the world over. The document should be living evidence of the fresh start that has been made, and demonstrate that Northern Ireland can be a beacon of hope in the human rights field.

2. The Agreement: Making Rights Real in Northern Ireland

2.1. The Bill of Rights flows from the Good Friday Agreement. The clear emphasis in the Agreement is on new beginnings and a fresh start. The Declaration of Support states:

‘The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, *and to the protection and vindication of the human rights of all.*’ (emphasis added)

2.2. The Bill of Rights exercise is at the heart of this new beginning. Everyone in Northern Ireland must feel that the Bill of Rights speaks to his or her concerns.

2.3. Reference to the Bill of Rights is included in the section on 'Rights, Safeguards and Equality of Opportunity'. The relevant section merits full citation:

'The new Northern Ireland Human Rights Commission... will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.'

2.4. This section of the Agreement structures the current debate. As argued, this section must be approached as part of the overall emphasis on a fresh start and the fundamental importance of the protection of the human rights of all. While it is clearly essential to justify the adoption of rights within the terms of the Agreement, an equally important issue in this debate must be which rights a modern Bill of Rights should contain, given comparative experience and international developments. There are several factors which support this reasoning. The reference to the "human rights of all" has already been mentioned. The Agreement refers to rights supplementary to the European Convention on Human Rights, and the importance of drawing when appropriate on international instruments and experience. The instrument must 'reflect' the particular circumstances of Northern Ireland and the principles of mutual respect for the identity and ethos of both communities and parity of esteem. The two listed elements are among the matters for consideration by the Commission. The best way to ensure that the identity and ethos of both communities is respected, given the particular circumstances of Northern Ireland, is the creation of an inclusive Bill of Rights dedicated to the protection and vindication of the human rights of all.

2.5. The Agreement clearly envisaged the Bill of Rights as a building block in the process of resolving conflict in Northern Ireland. In our view, the Bill of Rights should be an attempt to identify the basic values that we are all committed to. This is particularly important in the context of a radically divided society like Northern Ireland. Recognising a common set of rights in a document that all can commit to, at least in part, is thus an important element in building a new society, providing the possibility of common identification by all with the basic document. For this reason, it is important that the rights identified should not be too narrow in their focus. The narrower the range identified, the less likely it is that individuals will identify with the bulk of rights on the list. In particular, the more the rights specified are seen to appeal across the communities, the more likely it will be that rights can be seen as something that binds the communities together rather than divides them. There is now extensive international experience of this function of a Bill of Rights.

2.6. For this reason, it might be misguided to focus a Northern Ireland Bill of Rights only on those rights that address specifically Northern Ireland concerns in a narrow way. Such a Bill

of Rights would focus on issues of language, discrimination, minority rights, and so on. Such a Bill of Rights, rather than providing a vision that unites across the communities, reinforces the idea that human rights are narrowly concerned as part of a trade-off between those communities. It separates rather than offering a vision of shared common values. In this respect, the success of the (broad-based) public sector equality duty in section 75 of the Northern Ireland Act 1998 in uniting groups across the community divide is an approach worth emulating in the Bill of Rights more broadly. Perhaps paradoxically, therefore, the broader the definition of protected rights, the more it addresses specifically Northern Ireland concerns successfully.

2.7. To put this in the language of the Agreement: the more that the Bill of Rights reflects a broad-based view of what rights are protected, one that appeals across communities, the more the Bill of Rights will “reflect the principle of mutual respect for the identity and ethos of both communities and parity of esteem.” In doing that, it will address “the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience.” Too often, in the past, rights have been thought to generate antagonism and division. We miss something valuable, however, if we do not take advantage of the opportunity for rights to encourage trust and co-operation between groups that have previously been enemies. By setting out a common vision, a shared set of ideals in a Bill of Rights, we enable ownership of an important element of the Agreement across communities.

2.8. A further aspect of the “particular circumstances” of Northern Ireland is that it is a society where people have experienced an abuse of their basic human rights over a long period of time. This is a society of great inequalities and divisions. As many as one in six people have a disability, Chinese children are being racially and physically abused, women earn on average 84% of a man's salary, Catholic men are twice as likely to be unemployed as Protestant men, long term unemployment is twice as high as in Britain, sectarian attacks are common place, and the infant mortality rate among Travellers is unacceptably high.

2.9. Moreover, one can hardly ignore the legacy of the past. In a relatively small population of 1 1/2 million people, over 3,600 individuals have been killed, and many thousands injured in the last 30 years of political violence. Thousands of people - mainly young males - have passed through the prison system at some point or other. At the same time, many other individuals have been excluded from the mainstream of society. Society's focus on the political conflict has meant that carers, the mentally ill and gays and lesbians for example, and many others have sometimes suffered even greater marginalisation than they might expect to suffer in more stable societies.

2.10. In this context we believe there is an overwhelming case for the articulation of a broad-based Bill of Rights for Northern Ireland capable of addressing all of these concerns.

3. Which Rights?

3.1. The focus of this exercise is to articulate rights which are supplementary to the European Convention on Human Rights. The Convention is of course weak in several areas, notably in relation to a right to equality and on socio-economic rights. It is 50 years old and no longer reflects international best practice in relation to the protection of rights. It was presumably in recognition of these weaknesses that the signatories to the Agreement charged the Commission to include rights in the Bill of Rights which are “supplementary” to the rights

already contained in the Convention. We have followed this approach in the substantive provisions in our draft Bill of Rights. Our document incorporates the mainly civil and political rights contained in the Convention, although on occasion we strengthen them in an effort to tailor the Bill of Rights to the specific circumstances of Northern Ireland and also to make it more accessible to the public. We have also included rights not covered by the Convention, mainly in the sphere of economic, social and cultural rights. We believe this approach of updating and supplementing the Convention rights best reflects both the Agreement and draws upon international practice in the human rights field.

4. Implementation and Enforcement

4.1. We have already indicated our belief that the Bill of Rights offers a fresh start for Northern Ireland. In this context CAJ believes that there must be change to existing mechanisms of implementation and enforcement if we are to give concrete meaning to the promises which the Agreement contains.

4.2. We believe that the Human Rights Act 1998 should be repealed in relation to Northern Ireland and a new Bill of Rights adopted to replace it. The Human Rights Act does not fully reflect the content of the European Convention on Human Rights (ECHR) and is therefore not a suitable place to begin the process of creating a new human rights framework. The Agreement does not refer to the Human Rights Act 1998, but to the ECHR. There are also considerable advantages to having the rights protected in one single document which everyone should have easy access to, and should understand as a plain statement of their rights. This document does not only belong to lawyers, judges and legal academics. An overly complex instrument will have a damaging impact. Finally, enforcement mechanisms will be easier to operate with this unitary approach. This model offers the best chance of giving the people of Northern Ireland the rights protection they expect and deserve.

4.3. CAJ believes a Northern Ireland Human Rights Court should act as guardian of the Bill of Rights. Creating a separate court to enforce the Bill of Rights would have a tremendous psychological impact. New judges sitting on a new court, entrusted as the guardians of the Bill of Rights, cannot help but take those rights seriously and endeavour to ensure that they are respected. A new court that functions as an appellate court will also influence current members of the Northern Ireland judiciary; they would know that their decisions relating to the Bill of Rights would be subject to review. Indeed, the Constitutional Court in South Africa has had precisely this effect. Judges who presided during the apartheid era are now effectively enforcing the new human rights standards.

4.4. Appointments to the new court could also have great symbolic significance. The current judicial arrangements do not command the respect of all sections of society in Northern Ireland. In addition certain senior members of the current judiciary have on occasion shown themselves to be not simply indifferent to, but hostile to human rights concerns. A new court that is broadly representative of the community would be a powerful symbol that the Bill of Rights truly belongs to everyone in Northern Ireland.

4.5. CAJ takes the view that there should be a special Human Rights Court which sits above the Court of Appeal (but under the House of Lords and Privy Council). This would hear appeals of cases decided by the Court of Appeal that involve the interpretation or application of the Bill of Rights. It could also have cases referred to it by other courts.

4.6. We believe there is therefore a compelling case for a new Human Rights Court, charged with driving home the fundamental nature of the Bill of Rights, and aiding the process of mainstreaming a human rights culture. This body must be composed of individuals with proven knowledge and experience of human rights and a commitment to their effective protection in Northern Ireland. Consideration could be given to including judges from outside Northern Ireland, with a particular expertise in human rights matters. This approach was taken, for example, in the arrangements established for the former Yugoslavia by the Dayton Agreement.

4.7. The enforcement mechanisms adopted need not be uniform. The Human Rights Court should have the authority to strike down law which relates to transferred matters and which infringes certain rights contained in the Bill of Rights. In the non-devolved areas the Court should have similar powers of interpretation as exist in the Human Rights Act 1998.

4.8. Our view is that the Bill of Rights should have both vertical and limited horizontal effect, as is the case with the Human Rights Act. The Bill of Rights will of course bind all public bodies, a definition of which will include those discharging public functions. Courts are public bodies and will therefore be obliged to act in accordance with the Bill of Rights. Therefore even in disputes between private individuals, the Bill of Rights is likely to have an indirect effect if such matters reach court.

4.9. Provision should be made, as in South Africa, for references to be made from the lower courts to this new court and for direct access to this court for litigants. It should be made clear that the Human Rights Court should be responsible for the authoritative interpretation of the Bill of Rights.

4.10. Effective human rights protection depends on the ability of individuals to access their rights. CAJ believes that the standing requirements in relation to the Bill of Rights must be drawn as broadly as practicable. The state must take responsibility for ensuring that individuals can make use of their rights. Resources must be provided to guarantee that access to the court is in fact, as well as in law, effective.

4.11. Because of the importance of this new Human Rights Court we believe that the process of appointments should be fair, effective and fully transparent. An independent body should be established in law (which includes lawyers and non-lawyers) to oversee the appointments to this new Court. Given the role of the Human Rights Court it will be essential to be creative in appointing those with a firm commitment to the protection of human rights.

4.12. To ensure that the Bill of Rights is fully adhered to, CAJ believes that extensive work must be conducted with public administration inside and outside of Northern Ireland. All those in positions of public responsibility should be fully aware of the human rights implications of their actions. The Human Rights Court could be accorded the authority to give advisory opinions or directives of policy on action plans presented by public bodies as to the practical implementation of the Bill of Rights. In accordance with modern developments on mainstreaming, a constructive dialogue should take place between this new Human Rights Court and public administration. Thus, human rights can be seen not just as limiting, but as facilitating, policy which is compatible with the Bill of Rights. This will require innovative thinking about how this court is structured and its precise composition.

5. A Bill of Rights for Northern Ireland

Preamble

CAJ believes that there should be a preamble to the Bill of Rights which will stand as a common commitment by society as a whole to the protection and vindication of the rights of all. We propose that a text be developed which is aspirational in tone and which creates a framework against which the specific articles of the Bill of Rights should be measured and interpreted. This could draw upon language used in the Agreement, and contain reference to principles such as equality, respect for human dignity, and diversity.

Article 1

1. Every person has the right to life.
2. Deprivation of life shall not contravene paragraph 1 of this Article when it is the result of the use of force which is no more than absolutely necessary to preserve other human life.
3. In no circumstances shall a court punish a person for an offence with a sentence of death.
4. Wherever there are reasonable grounds to believe that a violation of this provision has taken place, the close relatives and dependents of the deceased have the right to a full, prompt and thorough investigation into all the circumstances surrounding the death.

Article 2

1. Every person has the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
2. Wherever there are reasonable grounds to believe that a violation of paragraph 1 has occurred, a prompt and impartial investigation shall be carried out by the appropriate authorities.
3. Every person has the right not to be sentenced to an indeterminate period of imprisonment.

Article 3

1. Every person has the right to an adequate standard of living.
2. Material provision for each person should be sufficient to ensure esteem for his or her health and dignity.

Article 4

1. Every person has the right to a clean and healthy environment.
2. Every person has the right to have the environment protected, for the benefit of present and future generations. Legislative and other measures must seek to:
 - (a) prevent pollution and the degradation of the environment;
 - (b) promote conservation; and
 - (c) ensure the active promotion of ecologically sustainable development.

Article 5

1. Every person has the right to adequate housing, appropriate to the material, social and mobility needs of the person.
2. Subject to Article 26, every person is entitled to secure establishment in their home.

Article 6

1. Every person has the right to education and to have access to vocational and continuing training. This right to education should allow everyone to the greatest extent possible to develop intellectually, spiritually, physically, emotionally, morally, creatively and aesthetically, and to achieve independence, social and occupational integration, and to participate in the life of the community.
2. Every person has the right to full financial support for his or her primary and secondary education, and technical, professional and higher education and training shall be made generally available, and financially accessible.
3. Every person belonging to a linguistic minority has the right to learn his or her language and, to the greatest extent possible, to receive education in that language.
4. Parents shall have the right, to the greatest extent possible and in accordance with Article 6.1, to ensure education and teaching for their children in conformity with their religious, moral, cultural, philosophical and pedagogic convictions.
5. Every child has the right to be consulted appropriately about his or her education, and to express his or her own views in relation to matters affecting his or her education.
6. Every child has the right to learn about human rights, democracy, religious and cultural diversity (including linguistic diversity), sexuality and disability.

Article 7

1. Every person is entitled to the highest attainable standard of physical and mental health and well-being. Recognition should be given to the fact that reproductive health is particularly central to women's lives.
2. On the basis of need, and in accordance with the law, every person has the right to social security, effective medical assistance, and social welfare services.

3. Equality of access to health promotion, treatment and prevention of ill health will be assured.
4. Every person has the right to be consulted about decisions which affect his or her physical and mental health.

Article 8

1. Every person has the right to contribute to the economic and social life of society, including the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every person has the right to just and favourable conditions of work.
3. Every worker has the right:
 - (a) to form a trade union;
 - (b) to participate, or refuse to participate, in the activities of a trade union;
 - (c) subject to Article 26, to strike.
4. Every worker has the following rights:
 - (a) the right to safe and healthy working conditions;
 - (b) the right to fair remuneration;
 - (c) the right to participate in the determination and improvement of his or her working conditions and working environment;
 - (d) the right to the protection of his or her dignity.

Article 9

1. Every person shall have the right to enjoy his or her own culture and to use his or her own language, in private and in public, freely without interference or any form of discrimination.
2. Every person belonging to a minority shall have the right to participate effectively in the cultural, religious, social, economic and public life of society.

Article 10

1. Every natural or legal person has the right to own, use, dispose of and bequeath his/her or its lawfully acquired possessions and is entitled to the peaceful enjoyment of those possessions. No one shall be deprived of his or her possessions except in the public interest and subject to the conditions provided for by law.
2. Paragraph 1 shall not in any way impair the right to enforce such laws as are necessary to control the use of property, and in accordance with the general interest, or to secure the payment of taxes or other contributions or penalties.

Article 11

Subject to Article 26, every person has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters.

Article 12

Subject to Article 26, every person has the right to freedom from interference with his or her private and family life, home and communications.

Article 13

Subject to Article 26, every person has the right to marry and divorce.

Article 14

1. Every person has the right to freedom of conscience and of religion, including the right to no religion.
2. Subject to Article 26, the right in paragraph 1 includes the freedom to manifest 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.

Article 15

1. Subject to Article 26, every person lawfully in Northern Ireland has the right to freedom of movement within Northern Ireland, and the right to leave and re-enter Northern Ireland.
2. Subject to Article 26, no one shall be expelled from Northern Ireland, by means either of an individual or collective measure. The individual shall be permitted:
 - (a) to submit reasons against his or her expulsion;
 - (b) to have his or her case reviewed speedily;
 - (c) to have effective legal representation before the competent authority;
 - (d) access to a competent interpreter.
3. The collective expulsion of aliens is prohibited.

Article 16

Subject to Article 26, every person has the right to freedom of expression. This right shall include the freedom to hold opinions, and to receive and impart information and ideas without interference, and regardless of frontiers.

Article 17

1. Subject to Article 26, every person has the right of access to:
 - (a) information held by the state; and
 - (b) information that is held by another person, and that is required for the exercise or protection of any rights.
2. Legislation must be enacted to give effect to this right.

Article 18

1. Every person has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Every person whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. Legislation must be enacted to give effect to these rights, and must -
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

Article 19

1. Subject to Article 26, every person has the right to take part in the public affairs of Northern Ireland, both directly and through freely chosen representatives elected by a fair and equitable electoral system.
2. Subject to Article 26, every person aged 18 or over, who is resident in Northern Ireland, has the right to vote. Elections shall be by universal and equal suffrage, and shall be held by secret ballot.
3. Every person aged 18 or over has the right to form and participate in the activities of a political party.

Article 20

1. Subject to the remaining paragraphs in this Article, every person has the right to liberty and security.
2. A person may be deprived of his or her liberty following conviction by a competent court.
3. 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 having committed, a specific offence of a serious nature.
4. Every person has the right not to 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.
5. In exceptional circumstances, and in accordance with law, 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 or others.

6. Every person who is deprived of his or her liberty has the right to be informed immediately of the reasons for the detention, and (if not already released) 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 determined. If the court decides that the detention is unlawful, the person detained has the right to be immediately released. If the court decides that the detention is lawful, the person must be charged or released within a further 24 hours.
7. Every person who is in police custody, or is being questioned by the police at a police station, has the right to see, consult and have present a legal representative. Vulnerable individuals, and in particular every person under the age of 18, being questioned by the police, has the right to have an additional personal representative present during the questioning.
8. Every person taken into police custody or about to be questioned by the police at a police station has the right to be fully and immediately informed, in a language which they understand, of his or her rights under this Article.
9. Every person has the right not to be obliged to incriminate himself or herself, and a person who remains silent in the face of questioning by the police or in a court has the right not to have that silence used as evidence against him or her in court.

Article 21

1. Every person charged with a criminal offence has the right:
 - (a) to be presumed innocent until proved guilty beyond all reasonable doubt, by evidence openly presented in court;
 - (b) to a fair and public hearing by an independent and impartial court established by law, within six months of being charged with a criminal offence. This time limit will only be waived with the agreement of the defence or where the interests of justice require;
 - (c) where they are charged with an indictable offence, to be tried by a judge sitting with a jury of 12 randomly selected jurors;
 - (d) to defend himself or herself in court, in person or through adequate legal representation of his or her own choosing, and subject to Article 26, the right to have this representation provided free of charge;
 - (e) to an interpreter, where required by the individual;
 - (f) subject to article 26, to examine or have examined in court witnesses who are giving evidence against him or her, and to see the witnesses personally when they are giving evidence, and to know their names. 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;
 - (g) not to be held guilty of a criminal offence on the basis of a confession presented as evidence, unless the confession is corroborated by other evidence presented in court;
 - (h) not to be held guilty of a criminal offence on account of any act or omission which was not a criminal offence under the law of Northern Ireland, or international law, at the time when it was committed;

- (i) not to be subjected to a heavier punishment than the maximum which could have been imposed at the time the criminal offence was committed.
2. Every person convicted of a criminal offence has the right to appeal against that conviction, and against the sentence imposed for the conviction.
3. No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been fully acquitted or convicted in accordance with the law. This shall not prevent the reopening of a case if there is new or newly-discovered evidence, or if there has been a fundamental defect in the previous proceedings, which would affect the outcome of the case.
4. Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded, if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Article 22

1. In the determination of a person's rights or obligations under the civil law, he or she has the right 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 representations 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, and subject to Article 26, to assess the demeanour of those witnesses when they are giving evidence and, to know their names.

Article 23

1. Every person is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.
2. Subject to Article 26, every person has the right to be protected from any direct or indirect discrimination whatsoever on grounds of race or ethnic origin, colour, sex, marital or family status, language, religion or belief, political or other opinion, convictions for offences, national or social origin, birth, disability, age, sexual orientation or other status.
3. Laws, programmes or activities aimed at achieving and sustaining full and effective equality, in particular to reduce inequalities affecting disadvantaged groups, and which may include specific measures for individuals from such groups, shall be required in furtherance of these objectives. Such laws, programmes or activities shall not constitute discrimination.

4. Harassment shall be deemed to be a form of discrimination within the meaning of article 23.2, when unwanted conduct related to any of the grounds referred to in that article takes place with the purpose of, or effect of, violating the physical integrity or dignity of a person, or of creating an intimidating, hostile, degrading, humiliating or offensive environment.
5. A difference of treatment which is based on a characteristic related to any of the grounds referred to in article 23.2 shall not constitute discrimination where, by reason of the nature of the particular activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining requirement, provided that the objective is legitimate and the requirement is proportionate.
6. Every person has the right to recognition everywhere as a person before the law.

Article 24

In all actions concerning children, a child's best interest shall be the primary consideration. Every action concerning a child must be in accordance with the UN Convention on the Rights of the Child.

Article 25

1. Every victim has the right to be treated with compassion and respect for his or her dignity.
2. Every victim has the right to formal acknowledgement that his or her rights have been infringed and, subject to Article 26, to full disclosure of information.
3. Every victim has the right to obtain redress through formal or informal procedures or mechanisms of justice that are expeditious, fair and accessible.
4. For the purposes of this Article, a 'victim' means all persons who have suffered harm, including physical or psychological trauma, emotional suffering, economic loss or substantial impairment of their fundamental rights through intentional acts or omissions. It includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm through witnessing an act or in intervening to assist victims in distress, or to prevent victimisation.

Article 26

The rights referred to in Articles 5.2, 8.3(c), 11, 12, 13, 14.2, 15.1, 15.2, 16, 17.1, 19.1, 19.2, 20.1, 21.1(d), 21.1(f), 22.3, 25.2, can be subject only to such limits as are shown to be:

- (a) absolutely necessary; and
- (b) prescribed by law; and
- (c) manifestly justifiable in a free, open and democratic society based upon human dignity, equality and human freedom.

Article 27

Anyone listed in this section has the right to approach a competent court, alleging that a right in this Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in his or her own interest;
- (b) anyone acting on behalf of another person who cannot act in his or her own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest;
- (e) an association acting in the interest of its members; and
- (f) the Northern Ireland Human Rights Commission.

Article 28

1. When interpreting the Bill of Rights, a court or tribunal –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international human rights standards.
2. When interpreting any legislation, and when developing the common law, every court or tribunal must promote the spirit, purport and objects of this Bill of Rights.
3. Nothing in this Bill of Rights shall be construed as denying the existence of rights conferred by the common law or legislation, providing that such rights are consistent with the Bill of Rights.

Article 29

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 of the general public in Northern Ireland.

6. Background notes

Life and Torture

The right to life and the right to be free from torture are the cornerstones of any statement of fundamental rights. They are both enshrined in the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). We have placed them at the beginning of our Bill of Rights in recognition of the importance which the domestic and international community attach to them. In addition we have included provisions beyond those contained in the ECHR stipulating that effective investigations must be held into suspected cases of violations of these rights. Although, under the jurisprudence of the European Court of Human Rights, there is already strong support for the notion that the obligation to conduct such investigations is implicit in Articles 2 and 3 to the Convention, CAJ feels it would be prudent to include an assertion of the obligation in the actual text of the Bill of Rights.

The inclusion of a right not be sentenced to an indeterminate period of imprisonment reflects our concerns at the operation in the past in Northern Ireland of indeterminate sentences for those detained at the Secretary of State's pleasure and for adult lifers.

CAJ does not take any position on whether the right to life provisions cover the issues of abortion or euthanasia.

Socio-economic and cultural rights

Articles 3 to 9 relate to economic, social and cultural rights. CAJ believes that the Bill of Rights for Northern Ireland should extend beyond the realm of more traditional civil and political rights for a number of different reasons.

Firstly, the Good Friday/Belfast Agreement talked about the importance of including in the Bill of Rights supplementary rights to those already contained in the ECHR, and the most obvious omission from the ECHR is the whole realm of economic, social and cultural rights.

Secondly, the same text spoke of the need for the Bill of Rights to reflect the particular circumstances of Northern Ireland. While none could challenge that civil and political rights have been at the heart of the conflict in Northern Ireland, none could challenge the fact that issues of employment, housing, and education have been almost as divisive. Moreover, because of the intensity of the political conflict, many of the advances made in other societies in the realm of economic, social and cultural rights have not taken place. The introductory sections of this document note the serious socio-economic inequalities which pervade Northern Ireland and which need to be effectively addressed to ensure a better future for all.

Thirdly, the move for Bills of Rights to encompass civil, political, economic, social and cultural rights is the trend everywhere else, and we can see no reason for any argument that Northern Ireland should act differently. Thus the "International Bill of Rights" encompasses the International Covenant on Civil and Political Rights *and* the International Covenant on Economic, Social and Cultural Rights. The "European Bill of Rights" consists of the

European Convention on Human Rights *and* the European Social Charter. To constitutionalise only one part of this international and Europe-wide rights' legacy would be to reflect the old-fashioned divisions of the past. With the end of the 'Cold War', when it was suggested that these rights were somehow contradictory, all modern debates recognise that these rights are inter-dependant and CAJ believes that they must figure together in Northern Ireland's Bill of Rights.

Fourthly, some people argue that economic, social and cultural rights might in principle figure in a Bill of Rights, but in practical terms they claim that such rights are too "difficult to enforce". CAJ rejects this argument. Other societies have found ways to render these rights enforceable, and this should be well within the Human Rights Commission's abilities. Other people claim that they support the inclusion of socio-economic rights in principle, but that this would be "too costly". CAJ also rejects this argument. Much poorer societies than Northern Ireland - most recently, South Africa - have chosen to incorporate socio-economic rights into their Bills of Rights. Indeed, one need only think of the major outlay of resources that society is rightly willing to spend on the criminal justice system to ensure the principles of fair trial and due process - judges, lawyers, police officers, prisons, courts etc. Why should the issues that most affect ordinary people - a roof over their heads, a job, an adequate standard of living, a decent education - be considered too expensive in comparison?

For all of these reasons, CAJ has drawn on a variety of international and regional standards to propose a series of economic, social and cultural rights - an adequate standard of living, rights to a clean and healthy environment, the right to housing, education, health, and work, and language and cultural rights. The text for the various provisions have drawn on the following:

- ◆ The Universal Declaration of Human Rights;
- ◆ The International Covenant on Civil and Political Rights;
- ◆ The International Covenant on Economic, Social and Cultural Rights;
- ◆ The Revised European Social Charter
- ◆ The Charter of Fundamental Rights of the European Union

all of which documents bind the UK government at the international or regional level. Of particular importance, however, has been the last of these - the EU Charter of Fundamental Rights. This document is one to which the UK government has most recently committed itself (ie in December 2000), and the next most basic step would obviously be to include these in our domestic Bill of Rights. Given the broad political agreement at the European level around the wording of these rights, we have used the specific wording contained in the Charter as the basis for many of our proposals. Where necessary, we have added some further interpretative clauses to address the particular circumstances of Northern Ireland and/or to draw on other relevant international or regional human rights principles.

Turning to the specific provisions proposed by CAJ, most of the articles in this draft Bill of Rights are self-evident, and little additional explanation is required. Article 4 - the right to a clean and healthy environment - however reflects more recent debates about the kind of rights that should figure in a human rights instrument. CAJ, in including this specific right, bases its reasoning on the UK's commitment in the EU Charter to providing "a high level of environmental protection". Moreover, the many years of violent conflict, limited inward investment, and pervasive poverty, have meant that many people in Northern Ireland experience a very poor natural and built environment. Accordingly, the particular

circumstances of Northern Ireland, combined with international obligations, require that the right to a clean and healthy environment be enshrined in Northern Ireland's Bill of Rights.

The right to education (Article 6) is already well established and well protected in international law, and therefore also figures in the recently-adopted EU Charter. CAJ has, however, specifically included in its text reference to education in one's own language, in order to better reflect the fact that Northern Ireland is a multi-lingual society and will hopefully become an increasingly multi-lingual society in future. Regarding linguistic diversity, it is worth noting here that the UK government has a number of international obligations. The principle of non-discrimination on language grounds is well established in international law and is explicitly addressed elsewhere in this text - see Article 23. However, the positive duty on states to promote actively linguistic pluralism is a more recent development, and is in part based on the distinction between indigenous and non-indigenous languages and their differing needs. Therefore, in interpreting this article, and other relevant articles (e.g. Articles 9, 6 & 23), the authorities will have to have regard to the European Charter for Regional or Minority Languages, the Additional Protocol to the ECHR on the Rights of Minorities, and the Framework Convention for the Protection of National Minorities. These texts use a variety of threshold tests such as "traditional", "substantial numbers", "sufficient demand", "real need", and "legitimate interests".

In the text CAJ argued respect to the greatest extent possible for the right of parents to choose the form of education for their children. Again, this is a right that is laid down in the recent EU Charter. However, in the Northern Ireland context it may be worth clarifying that CAJ understands this right to include respect for parents' rights to choose education in integrated schools; education or teaching in languages other than English; and, for children with learning difficulties or other disabilities, either mainstream schools or schools committed to providing special education. Furthermore, in arguing for the right of children to learn about human rights, CAJ believes that appropriate measures will need to be taken to ensure that such learning occurs in an educational environment which is itself supportive of human rights principles.

The right to the protection of health (Article 7) is included in the EU Charter and the International Covenant on Economic, Social and Cultural Rights, and CAJ has used this opportunity to refer to the particular importance to women of reproductive health.

Civil and Political Rights

The rights under this rubric (see articles 10-19) are of course contained in most national and international Bills of Rights. The rights to property, privacy, freedom of association, expression and religion, fair hearings in civil matters, and political representation rights are common to the International Covenant on Civil and Political Rights, the EU Charter and the European Convention on Human Rights. Moreover, each of these rights has a relevance to the particular situation in Northern Ireland: one need only refer to the concerns around marching, electoral practices, broadcast bans, and freedom of conscience, to see why the rights enumerated here need to figure in a Bill of Rights for Northern Ireland. Obviously, none of these rights is absolute and they are subject to limitations clauses in the various international instruments. We have similarly subjected our clauses in these matters to limitations where appropriate.

Two clauses have a particular resonance for Northern Ireland. Thus, article 17 stipulates that everyone will have the right of access to information held by the state. In a deeply divided society, where mistrust of others, and the authorities in general, has been a serious problem, it makes a lot of sense to address the need for greater access to information. The inclusion of such a paragraph also reflects domestic concern at the weakness of the recently introduced Freedom of Information legislation. The proposed text is based on the EU Charter and reflects a similar provision in the South African Bill of Rights. Article 18 also draws upon the EU Charter and the South African Bill of Rights, and requires just administrative action. In Northern Ireland, there is a legacy of discrimination, a problem of the so-called "democratic deficit", and a persistent culture of officialdom which is often opaque and at times obstructive. This right to just administrative action is included with a view to addressing such problems. It is also included to avoid any doubts about the coverage of article 22, since the European Court of Human Rights has suggested certain administrative proceedings may not be within the scope of "civil rights".

Criminal Justice

Articles 20 and 21 deal with the issues of pre-trial and trial rights. Both articles draw on the relevant provisions of the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the more recent EU Charter of Fundamental Rights. However, criminal justice has been a particularly contentious area in Northern Ireland and it is vital that the rights in this portion of the Bill of Rights be articulated in such a way to reflect and seek to remedy those problems. For instance, in relation to the pre-trial provisions, we have included specific time frames in relation to detention prior to charging, and also an explicit right to have a lawyer present during questioning by the police.

Similarly in relation to Article 21 dealing with trial rights, we have included provisions relating to jury trial, time limits relating to trial, confession evidence and the right to appeal.

Equality

Given the legacy of the past, the Belfast or Good Friday Agreement determined that explicit provision should be made for equality provisions in the Bill of Rights. The NIHRC is expected to give consideration to a general obligation on government and public bodies to ensure equality of treatment for the identity and ethos of both communities (it is not explicit, but the presumption must be that this refers to the Catholic/Protestant and Nationalist/Unionist communities). The Commission must moreover formulate a clear right not to be discriminated against, and to equality of opportunity, in both the public and private sectors. The seriousness of the problem (see introductory remarks - paragraphs 2.8 and 2.9), combined with the fact that problems such as employment and unemployment differentials persist, despite extensive legislative measures in the past, make resolute action crucial. It is CAJ's view that the Bill of Rights for Northern Ireland should promote equality, outlaw discrimination of all kinds, and make it clear that affirmative action measures are not only feasible, but necessary, if our society is to remedy the problems of the past.

In addressing the particular circumstances of Northern Ireland, CAJ draws extensively on the international and regional standards cited above, as well as the more detailed and very recent Framework and Race Directives issued by the European Union (article 23). Closer to home, a major UK-wide study into anti-discrimination legislation and effective equality protections (the so-called Hepple study) has been very useful.

For the sake of brevity, the text itself does not include specific interpretations of what is intended by "direct" and "indirect" discrimination. However, best international practice to date (see the European Union Framework and Race Directives in particular) defines direct discrimination as occurring when *"a person has suffered, will or would suffer disadvantage on the basis of any of the (specified) grounds"*. Indirect discrimination occurs when *"an apparently neutral provision, criterion or practice would put any persons at a disadvantage by virtue of their status (as defined in Article 23.2), unless that provision, criterion or practice is objectively justified by a necessary aim, and the means of achieving that aim are appropriate and proportionate"*.

The rights of children

While we have not included extensive references to the rights of children, CAJ thinks it is necessary to include an explicit commitment to the effect that all actions concerning a child must be in accordance with the United Nations' Convention on the Rights of the Child (article 24). The Agreement recognised the particular problems facing children and noted that *"the achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognised that young people from areas affected by the troubles face particular difficulties..."* If Northern Ireland is to break the cycle of violence (of all kinds) for future generations, rights must be at the cornerstone of our relationships in society, and CAJ believes that the rights of children must be explicitly and clearly recognised.

Victims

Increasingly in the international context, the rights of victims are being given additional focus. Obviously, given the recent history of Northern Ireland, it is also important that a new Bill of Rights gives adequate recognition to these rights. CAJ has received many complaints from victims that they have not been well treated by criminal justice agencies. Often they know very little about what is happening in terms of ongoing investigation or indeed when a case comes to court. It is important that these matters are suitably addressed, and we have tried to do this with the provisions suggested in article 25.

Limitations clause

Obviously CAJ recognises that, in strictly defined circumstances, some rights may require limitation. In the European Convention on Human Rights and other international

instruments, limitations have been built into many of the rights, and CAJ's proposed article 26 seeks to draw on best practice in this regard.

In addition, however, such instruments have also generally contained derogation clauses. Such clauses allow states to derogate from specified rights in certain circumstances, normally at a time of national emergencies or the like. The practice of international judicial and regulatory bodies has generally been to grant states in such circumstances a broad margin of appreciation. The experience of Northern Ireland bears this out.

The use of an almost continuous derogation in Northern Ireland has given CAJ grave cause for concern. We believe that the Bill of Rights for Northern Ireland should not contain such a catch-all clause. Nor would we want our proposed limitation clause to be used to allow derogation by another name. We have therefore attempted to draft the clause narrowly. We hope that this will ensure that any limitation will be open to challenge if it is not proportional to the reason for the limitation, or if the limitation is not strictly time-limited.

Standing

Given the controversy in the past in Northern Ireland around the exercise of one's rights, CAJ believes that individuals must be actively facilitated in future in their efforts to advance the protection and promotion of human rights. Article 27, which is based primarily on the equivalent section of the South African Bill of Rights, ensures that those who believe their rights have been violated or threatened can seek appropriate redress, whether by way of compensation or declaratory relief. It also allows class actions and explicitly grants standing to the Human Rights Commission, thereby limiting judicial ability to undermine the role of the Commission in its function of protecting and promoting the rights of individuals.

Interpretation

CAJ believes that the advent of a Bill of Rights is extremely important. The effects of the passage of such a major document should have an impact throughout the whole court system. Given the problems of the past, and the existing judicial culture in Northern Ireland, we believe that it is necessary to explicitly ensure that the intentions and goals of the Bill of Rights inform all future judicial practice. Moreover, CAJ elsewhere proposed that there be a preamble to the Bill of Rights which would be more aspirational in tone, and reflect a shared vision for a future respectful of the rights of all. Article 28 would make it clear that the courts should draw on any such preamble and on the ethos of the document as a whole in interpreting any particular provisions of the Bill of Rights. The clause, which reflects a similar provision in the South African Bill of Rights, obliges courts to interpret the Bill of Rights in a way which promotes values such as equality and freedom. The clause also ensures that nothing in the Bill of Rights can be used to undermine freedoms that already exist in law in Northern Ireland.

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