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Winner of the Council of Europe Human Rights Prize

CAJ's preliminary comments on

“Making a Bill of Rights for Northern Ireland”
a consultation by the Northern Ireland Human Rights Commission

September 2001

Submission No. S.116
Price: £1.00

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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.



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CAJ preliminary comments on “Making a Bill of Rights for Northern Ireland”- a consultation by the NI Human Rights Commission

September 2001

The NI Human Rights Commission launched a 150+ page document on 4 September 2001 including a proposed text for a Bill of Rights for Northern Ireland. The Committee on the Administration of Justice (CAJ) is preparing a detailed commentary in due course. The following is a very preliminary reaction to the main proposals in the text (for copies of CAJ's original submission contact the office – details above).

The Committee on the Administration of Justice (CAJ) has long argued for a Bill of Rights for Northern Ireland, and was pleased that the Good Friday/Belfast Agreement tasked the NI Human Rights Commission (NIHRC) to advise on the scope of any such Bill of Rights. There has long been a cross-party consensus on the value of a Bill of Rights – now everyone in Northern Ireland has an opportunity to comment on what a Bill of Rights should contain.

GENERAL COMMENTS

Overall, CAJ finds that there are very many excellent and positive proposals in the draft prepared by the Commission. We do however have a number of serious reservations and concerns, and feel that the text is deficient in a number of crucial areas.

CAJ welcomes the commitment by the Commission to relate all of their recommendations to “the particular circumstances of Northern Ireland” as mandated in the Agreement. We believe that the conflict has fed upon, and contributed to, serious problems in the areas of criminal justice, equality, housing, education, health, and democratic rights. CAJ moreover believes that issues of victims, communal identity, physical integrity, freedom of movement and association, and linguistic rights need to be reflected in our vision for the future, given how much they have figured in the problems of the past. Sectors such as children, women, people with disabilities, the elderly, and many others have had their unique and special problems ignored, as the conflict, and attempts to resolve it, predominated. It is CAJ's understanding, however, that some people believe that the Bill of Rights should be narrowly limited to rights for unionists/nationalists or Catholics/Protestants. CAJ,

however, believes that the more a Bill of Rights reflects a broad based view of what rights are protected and appeals across all communities, the more the Bill of Rights will meet the particular circumstances of Northern Ireland and - in the words of the Agreement - "reflect the principle of mutual respect for the identity and ethos of both communities and parity of esteem". Any narrow conception of human rights that sees rights as part of a trade-off between communities is divisive and misses a unique opportunity to develop a vision of shared common values.

Contributors may want to comment on this issue explicitly in their submission to the Commission, citing the particular rights they believe should be included in a Bill of Rights for Northern Ireland. ***In our response, CAJ will highlight the importance of making this a Bill of Rights for EVERYONE in NI, and we would encourage other contributors to do so also.***

Any discussion of rights is about placing appropriate limits on the use (and potential abuse) of power and, as such, it is to be expected that some will argue for minimal limitations on that power. The Agreement recognised that the particular circumstances of Northern Ireland required something more than the European Convention on Human Rights (now part of our domestic law in the form of the Human Rights Act) and ***CAJ believes it is important that any Bill of Rights for Northern Ireland be as comprehensive and as wide-ranging as possible.*** Moreover, debates about the protection of rights are underway in Britain (especially Scotland) and in the Republic of Ireland. The better our Bill of Rights, the better role-model we will establish for the protection of rights throughout these islands.

POSITIVE MESSAGES

CAJ welcomes the idea of an introductory section (a preamble) and a detailed interpretation clause that will codify broad public support for principles such as impartiality, inclusion, human dignity and fairness, and also act as a mechanism for helping the judges subsequently interpret the detailed clauses of the Bill of Rights. It is vital that decision makers are given guidance as to the principles that should underpin the implementation of the Bill of Rights. We welcome the proposals to:

- extend proportional voting;
- prohibit direct and indirect discrimination;
- cite many detailed but vital provisions to govern the criminal justice system in future;
- define rights to education; and
- give particular emphasis to the rights of children.

The Commission generally appears to have drawn on the many submissions from individuals and groups, and on the extensive and highly specialised work carried out by their Working Groups. Members of those Working Groups, and people who have made submissions in the earlier consultative phase, will of course want to examine the detailed proposals against that early thinking, to

ensure that the most crucial safeguards are in fact retained in this final draft. Overall, however, there are clearly very many good proposals in this first draft. ***While in its eventual submission CAJ will concentrate on those issues where we feel that the Commission may have been too cautious, or where we disagree fundamentally, we will also want to highlight those aspects of the proposals with which we agree. We would encourage other contributors to do the same.***

CONCERNS

On the basis of a very preliminary study, CAJ does however have a number of serious reservations about the draft. To summarise those concerns:

1. In the chapter on identity and community, we are surprised at the suggestion that the Commission was advised that the terms "community" and "minority" can be treated inter-changeably, and we will want to examine these proposals very closely indeed. It is our understanding that the international community has expressly drawn up its human rights protections with a view to protecting minorities (whether political, ethnic, linguistic or other) rather than communities. In its response, CAJ will insist that local practice conform to and be measured against best international and regional practice.

In the same chapter, CAJ is concerned about the Commission's proposed "right of people *not* to be treated as a member of a particular community". Obviously, individuals should have the right to be treated as they see fit but CAJ believes that the current formulation could create problems for long-established practices such as employment monitoring, integrated and denominational schooling, and the more recent policing changes. ***The Commission was tasked by the Agreement to advise how a Bill of Rights could counter discrimination and promote equality, but CAJ believes that the proposals in this chapter risk undercutting equality proposals elsewhere.*** This is an issue that requires close scrutiny.

2. Elsewhere (page 6) CAJ comments on the confusion created by inconsistencies in how the Commission has dealt with provisions from the European Convention on Human Rights (ECHR). An early example of this in the Commission's draft is clause 1 in the equality chapter, where the text is taken directly from the ECHR, even though that provision has in fact been extensively criticised and in fact largely superseded by more recent legislation. This clause, if left as is, risks narrowing the impact of the positive equality and anti-discriminatory proposals that follow. The chapter also appears to focus on anti-discriminatory issues rather than more positive equality provisions. In response to a specific question about positive action, ***CAJ will argue that positive action is a necessary measure to ensure greater equality in our society.***

3. The NIHRC proposes stricter protections on the right to life which CAJ welcomes, but the proposals on death penalty are ambiguous (see clauses 1 and 4). The Commission asks if there should be explicit reference in this section to personal and physical integrity. **CAJ will argue that this is an important addition & also that references from international human rights instruments to a prohibition on "cruel" treatment be added.**

4. CAJ welcomed most of the proposals in the criminal justice section, though we were surprised there was no prohibition on indeterminate sentences. We also wondered why there should be any question about suspects having the right to see solicitors of their own choice (this is a well-established international practice), and we feel that the provisions on bail are very problematic. **We will be commenting on all these points and will endorse a return to jury trials and, except in specified circumstances, oppose anyone being tried a second time for the same alleged offence.**

5. CAJ was very surprised by some of the proposals in the victims' chapter that appear to ignore recent European Court judgements. It is not possible for the Commission, or the government, to unilaterally decide to forego a formal legal process to which some victims have rights. CAJ also thinks it is unfortunate to suggest different treatment of the rights of past and of future victims. **CAJ would urge victims, and groups working with victims, to study this chapter carefully and submit detailed comments.**

6. In the chapter on freedom of thought, expression, information and association, CAJ was surprised at the reason given for the Commission's decision not to include references to journalistic freedoms and the need to protect a person's reputation, i.e., that these are not required by "the particular circumstances of Northern Ireland". There have of course been concerns around both these issues in Northern Ireland, even fairly recently.

7. In language rights, CAJ welcomes the advances proposed in the area of sign language and protection for ethnic minority languages. However, with regard to Irish and Ulster Scots, it is not at all clear that the Commission has fully complied with the international minimal standards that apply in this area, still less sought to give additional protections. CAJ recognises that the international principles in this area are fairly complex, and that the Working Group found it difficult to reach consensus. However, we understand that the Commission's proposals do not even go as far as the Working Group suggested. Accordingly, we will be studying the text very closely in coming weeks and seeking advice from people expert in this area.

8. The Commission noted the very high level of public support for the inclusion in the Bill of Rights for protections in respect of health, housing and employment. Some socio-economic provisions are included but we feel that

the Commission may have been overly cautious. We also found that the explanatory text was overly cautious and failed to draw sufficiently on some of the excellent analysis carried out by the Working Group into good practice elsewhere. If socio-economic provisions are to be more than a simple "wish list" it is particularly important that there be clear guidance on the interpretation and enforcement of these rights. The Working Group, which was very broadly based, developed a consensus position that CAJ supported. **CAJ will be arguing for at least the level of protections proposed by the Working Group on socio-economic rights.**

9. Few if any rights are absolute and the Commission asks for advice on whether to have one clause in the text noting all the limitations, or whether to have a limitations clause following each specific right. Given CAJ's commitment to a final document that is as user-friendly as possible, we initially argued for a single – very narrow - limitations clause, but we can see the arguments for relating this more directly to each right (and therefore leaving less discretion in the hands of subsequent court interpretation). We will give this matter further thought, but it is clearly an issue that people will want to comment on.

10. There are two quite different approaches that could be taken to the risk posed to human rights at times of extreme emergency and political instability. Either a specific clause can be drafted to regulate in what circumstances the authorities may introduce emergency powers or, alternatively, one can (as CAJ did in its preliminary submission) reject the option of a "catch-all" emergency powers clause and argue for narrowly drawn limitations. The Commission proposes the first option; **CAJ thinks that this is problematic.**

11. The Commission seeks views on how the Bill of Rights should be enforced – they ask specifically if the Bill of Rights requires the establishment of a new (Human Rights or Constitutional) Court. **CAJ is strongly of the view that a new court is necessary both symbolically and practically if we are to give effect to this new beginning to rights protection in Northern Ireland.** Many people have expressed concerns about the need for judicial reform given that, with the passage of a Bill of Rights, judges will have a greater role in protecting and promoting rights. CAJ agrees. Questions are also asked about effective remedies, whether there should be a referral process to higher courts, who can take cases, and whether there should be a referral mechanism to measure proposed legislation against the Bill of Rights. **CAJ will argue that all these provisions be as generous as possible to ensure that the Bill of Rights is both accessible and effective.**

12. A Bill of Rights needs particular protection against constant amendment, but must also be amenable to change over time. The Commission recommends that amendments require the consent of the Assembly in a cross-community vote. CAJ believes that such decisions

should not be taken by the Assembly alone (and it is not clear what process would be used in the absence of an Assembly?) but instead believes that any changes should be agreed by way of a referendum. (We proposed that changes should secure not less than 2/3 of the votes cast).

IMPORTANT OMISSIONS

CAJ has not sought in this preliminary commentary to be comprehensive – there are many important (and possibly contentious) issues that people will need to consider carefully and respond to in due course. However, in addition to commenting on the specific proposals of the Commission, it will also be necessary to ascertain whether there are important rights that have been omitted or insufficiently covered in the draft.

CAJ for example finds little reference to labour rights or people's freedom of movement; the provisions for access to information appear inadequate and there are limited references to democratic rights and the need for civil law provisions. CAJ will be arguing that victims, in addition to the rights proposed by the Commission, should also have the right to have their situation formally acknowledged, and we will be reiterating our proposals regarding the need for prompt and thorough investigations into suspicious deaths or allegations of ill-treatment.

There are also some places in the text where the Commission has included provisions which we think are better dealt with by way of legislation than in a Bill of Rights, which must of necessity stand the test of time (see victims' provisions for example). There is also a lack of consistency in various places regarding the inclusion (or not) of provisions of the European Convention on Human Rights. In a draft this is perhaps not surprising, but the uncertainties and ambiguities (only some of which have been highlighted above) would need to be clarified in advance of any final proposal.

CAJ will be studying our preliminary proposals in the light of the Commission's thinking, we will be consulting widely with others about the best possible human rights protections, and we intend to study closely again the Working Group reports and the various submissions (now available in the NIHRC resource library). On the basis of this more detailed study we will make a fuller and more comprehensive response to the Commission before the end of the consultation process, i.e., before **1 December 2001**.

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*Extra copies of this document can be obtained from the above address
A publications catalogue and details of CAJ membership
are also available on request from the above address*