

## ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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### INTRODUCTION

Delivering a report to the Human Rights Commission on what economic and social rights should be in a Bill of Rights was a microcosm of the much wider process now taking place prior to the Commission publishing its own advice to the Secretary of State.

The twenty two members of the working group came from diverse occupational interests including employers' organisations, the trade union movement, academic life, health and social services management, the voluntary sector, and community based health, economic development and environmental groups. The final report represented a document that no individual would have drafted if left to his or her own devices, but one that everyone was able to sign off in agreement.

The starting point in making the case for economic and social rights is the relevant text on a Bill of Rights contained in the Belfast Agreement:

“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;
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors”.

In effect, there are four key components that must be addressed in bringing forward economic and social rights in any Bill of Rights. These are rights that must:-

- be supplementary to those already contained in the European Convention on Human Rights (ECHR);
- reflect the particular circumstances of Northern Ireland;
- draw on international instruments and experience as appropriate;
- recognise the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

Whether these elements are interpreted narrowly or more broadly will determine, in significant measure, the scope and value of any Bill of Rights eventually enacted. The working group's clear position was to take a broad approach in offering its advice.

### **Interpreting The Mandate**

The European Convention on Human Rights protects fundamental rights and freedoms including the right to a fair trial, the right to life, freedom of expression, thought, conscience and religion, and the right to family and private life. In practice, the Convention concentrates mainly on protecting civil and political rights. Nonetheless, creative attempts have been made to enforce economic and social rights within the confines of the Convention. For example, the Law Centre in Belfast currently has cases lodged with the European Court of Human Rights arguing that the failure to provide widowers with social security benefits equivalent to those paid to widows is contrary to the right to family life (Article 8), freedom from discrimination (Article 14) and the right to personal property (Article 1, Protocol 1). Economic and social rights (for example, the right to housing, health, an adequate standard of living, and the right to work) are contained in other international human rights instruments which are not enforceable by individual legal action.

The defining feature of the Convention, namely individual legal enforcement in court, has been strengthened by the introduction of the Human Rights Act. Paradoxically, this has increased the gap between the scope for enhancement of civil and political rights and their economic and social counterparts.

The United Kingdom government has ratified a number of international and European human rights instruments including the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of Discrimination against Women (1979), the Convention on Elimination of all forms of Racial Discrimination (1966), the Convention on the Rights of the Child (1989), and the European Social Charter of the Council of Europe (1961). These human rights instruments require the UK government to justify periodically to UN and other human rights committees that it is meeting its international obligations. This process effectively amounts to an elaborate dance with the government highlighting all the policy provision that meets its obligations whilst pressure groups point out all the gaps in provision plus malign policy and legislation which run contrary to such obligations. A report by the relevant monitoring committee is then produced which is often critical of the UK government in specific areas. This process is useful in highlighting deficiencies in policy and strengthening accountability yet falls a long way short of having real bite. Moreover, the process does little to stimulate an effective debate within local communities. A Bill of Rights offers an opportunity to place particular emphasis on economic and social rights which are not contained in the Convention.

A major issue for consideration is what are the particular circumstances of Northern Ireland which need to be addressed within a Bill of Rights? Economic and social problems are not specific to Northern Ireland. Whilst the extent of poverty, unemployment, ill-health and disability is on average greater than elsewhere in the United Kingdom, there are pockets of

deprivation in some areas which match those faced in Northern Ireland. This, however, misses the point.

Economic and social conditions cannot, any more than political circumstances, be divorced from the civil conflict. Take just one example, the prevalence of ill-health and disability. Comparative health statistics within the United Kingdom or across Europe generally place Northern Ireland at the wrong end of any league table. Life expectancy rates, death rates from cancer, coronary heart disease, the proportion of the population suffering long term illness, the prevalence of teenage pregnancies all point to a society where health standards are low. In Northern Ireland, the proportion of people with a disability is 20 per cent higher than in Britain. Unravelling all the reasons for the differences in health is difficult, though it is clear that the prevailing economic and social conditions and civil conflict have played a role. Moreover, the violence of over 30 years has shaped economic and social conditions as well as the response to tackling such problems. As a result, economic and social rights fall legitimately within the Bill of Rights.

In the context of the Belfast Agreement, a Bill of Rights is designed to strengthen the transition towards peace and to recognise parity of esteem between the two main communities. The Research Evaluation Services Northern Ireland Omnibus Survey conducted in July 1999 for the Human Rights Commission demonstrated over 80 per cent support in both main communities for the inclusion of rights covering health, housing and employment in a Bill of Rights. Written responses prior to the publication of the Commission's own consultation document confirmed a high level of support for economic and social rights being part of a Bill of Rights. Therefore, economic and social rights have a unifying potential and are a building block towards a more prosperous and peaceful society.

### **The Working Group's Approach**

How should economic and social rights be developed within a Bill of Rights? The working group's starting point was the development of a clear set of principles, in effect, a statement of intent framed in an interpretative clause. The clause would act as a frame of reference for all economic and social rights. A number of key principles could then be encompassed. First, that poverty and social exclusion represent a fundamental denial of human dignity. Secondly, that legal remedies by themselves are not sufficient to guarantee such dignity. A more systematic, government led approach is required recognising the need for interdepartmental co-operation, partnership with civic and political organisations, and a transparent and accountable approach to legislative and policy development.<sup>1</sup> Thirdly, that economic and social rights should be guaranteed beyond effective legal redress by the development of a programmatic response which charges government as well as courts with responsibilities for tackling violations of economic and social rights.<sup>2</sup> This brings an additional dimension whereby government and public

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<sup>1</sup> Such a clause would entail explicit reference to the importance of consultation, access to information, and public education and the necessity of public participation in decision-making processes.

<sup>2</sup> This statement would be tied to an acknowledgement that resources still need to be allocated in a proportionate manner.

authorities are charged with pro-actively developing strategies to enhance the development of economic and social rights.

These principles would then be underpinned with an equality statement protecting rights equally without discrimination on the basis of religious belief, political opinion, age, race, ethnicity, gender, disability or sexual orientation.

The interpretative clause read as follows:-

- “(1) the provision of economic and social rights is subject to the general principle that poverty and social exclusion represent a fundamental denial of human dignity;
- (2) legal remedies alone cannot assure the dignity of the human person. The conditions which alleviate social exclusion and deprivation include, but are not limited to, consultation and communication with the public, education and effective access to information, advancing inter-agency responsibility for the enforcement of economic and social rights, facilitating public participation in decision making processes and acknowledging the inter-dependency of rights;
- (3) without prejudice to effective judicial and administrative remedies and the need to allocate resources in a proportionate manner, government is encouraged to develop programmatic responses to the underlying causes of social and economic rights violations;
- (4) all the rights outlined below shall be protected equally and without discrimination on the basis of religious belief, political belief, race, ethnicity, gender, sexual orientation, disability, or age”.

The interpretative clause was designed to bring a collective as well as individual dimension to developing economic and social rights. With the current United Kingdom government emphasising individual and personal responsibility at least as much as individual rights when formulating policy, the collective response assumes greater importance. Whilst responsibilities sit legitimately alongside rights, much of the existing debate uses the language of responsibilities as a means to stifle rights. Moreover, individual rights rely on the confidence and awareness of an individual to exercise his or her rights. Whilst some commentators have suggested that people in Northern Ireland are litigious, the overall picture is more complex.

The marked reluctance to challenge the level of domiciliary, respite and other forms of social care or express dissatisfaction with health care treatment suggests that some entitlements are not seen in terms of rights. With social security, where a culture of rights has developed, the low take up of means-tested benefits is evidence that lack of awareness, complexity and stigmatisation all act as powerful barriers to establishing entitlements. Moreover, studies of use of the National Health Service suggest that well educated, middle and higher income groups make most effective use of health care services.

It is clear, therefore, that some individuals and social groups are more adept at exercising rights than others. Those already marginalised and socially

excluded will benefit less from an exclusively individual rights based approach.

It is important to emphasise that the argument for a programmatic dimension to economic and social rights is to augment and not to replace judicial legal enforcement.

The rights recommended for inclusion in the Bill of Rights were a right to health, to an adequate standard of living, to housing, to work and to a healthy and sustainable environment. The framing of these rights all drew on existing international human rights instruments, particularly the United Nations Covenant of Economic Social and Cultural Rights (1966), the European Union Charter of Fundamental Rights (2000), the Economic Social Charter (1996)<sup>3</sup>, as well as the South African Bill of Rights (1996). One departure from international norms was the creation of a right to social and civic care, in effect, a recognition of state support for provision of social services and community care (for example, respite and domiciliary care, nursing and residential care). This builds on the internationally recognised principle of social assistance which has traditionally covered financial support only. Within the working group, there was a strong demand for a Bill of Rights to address the concerns of carers and those in need of care.

Finally, the working group tackled, head on, a number of common objections to making economic and social rights judicially enforceable. First, it has been argued that economic and social rights are vague, imprecise and difficult to draft in legislation. This does not effectively stand up to scrutiny as international human rights legislation has been able to come up with specific definitions and the question of what is an adequate standard of living is no more open to interpretation than what makes a fair trial. Second, economic and social rights have been argued as being less susceptible to legal enforcement. In practice, courts already have long experience of deciding questions of whether public bodies are meeting their statutory obligations (for example, whether health and social services trusts are meeting their duties to provide services to people with disabilities, or whether education and library boards are meeting statutory obligations to people with special learning needs). Moreover, the European Court of Justice in enforcing rights under the Treaty of Rome, particularly on freedom of movement and co-ordination of social security and the right to social and tax advantages, has long experience of judicially addressing what are effectively economic and social rights. Here though is where we move closer to the nub of the debate. Economic and social rights come with a price tag attached. A right to civic care including social services support or to health care entails substantial public expenditure. At the same time a cost is also attached to guaranteeing a fair trial which necessarily entails funding the judiciary and legal administration as well as paying lawyers through a legal aid scheme. These costs are, rightly, seen as essential in preserving a fundamental right. The principle applies equally to economic and social rights. A further cogent argument is made that placing economic and social rights in the hands of courts distorts democracy inasmuch as judges are left to take policy decisions. Putting aside the question of selection procedures and representativeness of the judiciary which is an overdue matter for legal

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<sup>3</sup> As revised.

reform, experience suggests that judges have long performed this balancing act when dealing with judicial review applications. There is a strong resistance, in some quarters, to legally enforceable economic and social rights on the grounds that this dilutes the powers of policy makers and legislators. Enforceable economic and social rights do not cede powers to micro-manage social and economic policy and provision to judicial authority. Instead, they subject policies and practice to scrutiny to ensure that basic standards are met and proportionate responses to needs and demands are applied.

### **The Approach Of The Human Rights Commission**

An initial reading of the chapter on economic and social rights suggests that much of the working group's report has been adopted. Closer scrutiny however, reveals that a significantly different approach has been taken by the Commission.

To begin positively, the Commission recognised that the protection of economic, social, civil and political rights are interdependent. The rights to be protected are those identified by the working group and the wording of the rights (with one or two exceptions) does not significantly differ from those recommended. The idea of a right to civic and social care has also been accepted.

Where the Commission's consultation document parts company with the working group's approach is on enforcement. In its discussion on enforcement the Commission noted:-

“The working groups on social and economic rights and on implementation, and a number of submissions, drew the Commission's attention to the need to develop innovative approaches to the delivery of social and economic rights in addition to enforcement by judicial decisions.

These would treat different types of rights differently, some being justiciable and directly enforceable by judges and some being enforceable in a programmatic way according to prescribed processes. The working group on social and economic rights was unanimous in its conclusions regarding the inclusion and implementation of social and economic rights in the Bill of Rights. As regards enforcement, the group said:-

Legal remedies are necessary but not sufficient to assure the dignity of the human person. The conditions which alleviate social exclusion and deprivation include but are not limited to: consultation and communication with the public, education and effective access to information, advancing inter-agency responsibility for the enforcement of economic and social rights, facilitating public participation in decision making processes and acknowledging the inter-dependency of rights”.

The working group was clear about its approach, namely, that legally enforceable social and economic rights should be augmented by a programmatic response that embeds the rights in policy and practice. The programmatic approach supplements legally enforceable rights. This is in

recognition that making legal rights meaningful is not confined to legal remedies, but extends to how legislation, policy and practice are developed and implemented. Moreover, this approach, combined with clearly worded legal rights, is designed to foster an approach which ensures a Bill of Rights is readily understandable and has resonance with everyday concerns across the two main communities. There should be no ambiguity, however, economic and social rights are about building on the foundation of judicially enforceable legal rights.

The Commission's approach appears to limit legal enforcement to protection of due process and equality rights. In expanding on what this means, the Commission notes:-

“The courts would not be able to take direct decisions on how to allocate resources (beyond perhaps specifying certain minimum standards which must always be met) but, would be able to supervise the proper implementation of the rights in question by applying concepts such as proportionality, reasonableness, equality and human dignity”.

There is a major inconsistency in that the failure to provide a legal remedy to review substantive decisions (except on grounds of procedural flaws or discrimination) undermines the desire to ensure the proper implementation of the rights. In effect, the provision of inadequate financial assistance to meet economic and social rights cannot be challenged where such assistance is at least targeted fairly and without discrimination. Equally, sustained cutbacks in provision will not be open to challenge where implemented in a fair and non-discriminatory manner. As a result, economic and social rights will have made a limited move forward.

The Commission has a difficult task and the dilution of the working group's approach may reflect pragmatic considerations about ultimately persuading the Secretary of State and the Westminster parliament to include any economic and social rights within a Bill of Rights. It is wise not to underestimate the powerful forces opposed to a Bill of Rights, never mind one that is expansive in form. Nonetheless, the current proposals from the Commission represent a squandered opportunity.