

Bill of Rights Forum

Preamble, Enforceability and Implementation Working Group

LIMITATION AND DEROGATION CLAUSES

Preliminary Paper by Neil Faris

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1. Introduction

- 1.1 I prepare this Paper as requested at the Working Group second meeting on 23 August.
- 1.2 I have worked from the following sources as ‘base documents’:
 - The NIHRC Implementation Issues Working Group *Report* January 2001 (‘the 2001 Report’)
 - NIHRC *Making a Bill of Rights for Northern Ireland* September 2001 (‘NIHRC 2001’)
 - NIHRC *Summary of Submissions on a Bill of Rights* July 2003 (‘Summary 2003’)
 - NIHRC *Progressing a Bill of Rights for Northern Ireland* April 2004 (‘NIHRC 2004’)
- 1.3 I suggest it is convenient to treat limitation and derogation issues separately as they raise different issues. Accordingly, the next section examines Limitation issues and this is followed by a section on Derogation.
- 1.4 This is a preliminary paper for discussion within the Working Group and accordingly I do not feel it is appropriate to attempt to draw conclusions at this stage.

2. Limitation clauses

- 2.1 The *2001 Report* did not discuss this in detail beyond suggesting¹ the two main approaches:
 - a general clause that would apply to all rights (except a few unlimited ones)

or

 - clauses on a right-by- right basis, depending on the content of the right

¹ Report, para 9, page 33

- 2.2 The ‘right-by- right’ basis is the model adopted by the *European Convention on Human Rights* (‘ECHR’) and *NIHRC 2001* reported that it was in favour of that model but invited submissions on the alternative model of a general limitation clause (and set out a draft for discussion)²
- 2.3 The *Summary 2003* reports³ that 22% of the implementation submissions expressed support for a general clause with 13% preferring a right-by right approach.
- 2.4 Of those who expressed preference for a general clause several wished to redraft (more ‘tightly’) the NIHRC draft clause: the Canadian and South African clauses were suggested as examples.
- 2.5 NIHRC 2004 reported that the Commission was now in favour of a general clause, but with only minor changes to their original draft. They also commented that this clause would apply only to the ‘additional rights’, as one could not permissibly interfere with the limitation provisions of ECHR rights.

3. Derogation

- 3.1 This issue does not appear to be dealt with by the *2001 Report*. Possibly the Implementation Working Group considered it was the prerogative of one of the other working groups at the time? But I cannot trace comment on the issue by any of the other working groups in 2000 to 2001.
- 3.2 *NIHRC 2001* deals with the issue in Chapter 17 on that Report under the title ‘Emergencies’ – possibly a better title? It notes the right of derogation in Article 15 of ECHR and contemplates that ‘To protect the security of people within Northern Ireland a future Government may well wish to put in place measures which require further derogation from the European Convention or indeed from the Bill of Rights for Northern Ireland.’⁴
- 3.3 Accordingly, it proposed derogation provisions based on Article 15 ECHR but supplemented by further provisions drawing to some extent from the provisions of the Constitution of South Africa.
- 3.4 The *Summary 2003* reported⁵ that several submissions argued that the entire Bill of Rights should not be subject to emergency provisions⁶. Some of these submissions apparently went on to suggest very specific limitations on the power to derogate were such to be included in the Bill of Rights. Other submissions⁷ are mentioned as supporting derogation but with amendment.

² NIHRC 2001 Ch 16

³ *Summary 2003* pages 87 to 88

⁴ NIHRC 2001 page 97

⁵ *Summary 2003* pages 88 to 89

⁶ BIRW, CAJ, Amnesty International, CHNI and Sinn Fein are cited

⁷ Alliance Party and Newry and Mourne District Council are cited

Finally there is a group of submissions who support Article 15 ECHR as it stands⁸.

- 3.5 *NIHRC 2004* sets out an amended version of a derogation clause. The key change appears to be that any ‘declaration of a state of emergency’ may only be declared by the UK Parliament if there has been a cross community vote of the Northern Ireland Assembly for the purpose. (A variety of further safeguards are also proposed.)

4. Comment

Perhaps, before we do further work on Derogation, we should check if this issue is on the agenda of either or both of the *Criminal Justice and Victims* or *Civil and Political Rights* working groups?

⁸ Cadogan Group, Probation Board and Ballymoney Borough Council are cited