

Bill of Rights Forum

Preamble, Enforcement & Implementation Working Group

Notes of Twelfth Meeting, 22 January 2008

Present: Aileen Gilmore; Catherine Donnelly; Laura McMahon; Peter Weir; Brian Crowe; Alban Maginnis; Barry Fitzpatrick; Colin Harper; Neil Faris; Stephen Farry; Shannonbrooke Murphy.

Apologies: Patrick Yu.

Observers: Paula Molloy (DFA); Lisa Coyle; Maria O'Donovan.

1. Notes of Previous Meeting

These were accepted as an accurate account of what was discussed and agreed upon.

2. Apologies and Welcome

Apologies as above. The convenor welcomed the new member, Shannonbrooke Murphy, who has replaced Martina Anderson as the Sinn Féin representative.

3. Revised Timetable and Final Report

A finalised timetable was circulated. Catherine and Aileen will prepare materials on the subject of a preamble to the Bill of Rights for the meeting scheduled for 5 February 2008. Miscellaneous outstanding items such as the legal definition of a person, as well as the issue of whether public authorities should have a duty to consider the supplementary rights when making decisions or whether instead it will be sufficient that their final decisions are compliant with the supplementary rights, will also be considered at that meeting.

It was agreed that three working group reports will be examined at each of the meetings scheduled for 12 and 19 February 2008. These examinations will centre upon the areas within the working group reports that implicate and overlap with the remit of the Group. It was further agreed that members should assist Catherine in carrying out preliminary examinations of the working group reports in preparation for these meetings and Aileen will allocate tasks accordingly. These meetings will also be used to revisit and make final recommendations upon the various matters that had been discussed at previous meetings whose final consideration had been deferred until the final recommendations of other working groups on associated matters would emerge.

Aideen advised the Group that Catherine will take the lead on drafting the final report. Neil stated that it is necessary for the Group to consider the preferred theme and structure of this report in advance of its drafting. For example, should it have an introduction, etc? Aideen suggested that the format employed by the Children and Young Peoples' working group in its interim report could be used. This report - which had been highly commended by the Forum plenary - used the headings of 'recommendation,' 'rationale,' and 'level of consensus,' for each right being consulted upon. Neil cautioned that while this format may have suited children's rights it may not be as well suited to the areas under consideration by the Group given that the latter are more discursive and require more explanation. He suggested that if the format employed by the Children and Young Peoples' Group proves unsatisfactory, in light of the different nature of the subject matter being discussed, that an alternative one should then be considered. Neil also stated that members should be able to suggest other amendments to and provide feedback on the final report prepared by Catherine. Aideen agreed and requested that to the extent possible people do this in advance of the meetings in questions.

Brian raised the matter of possible conflicts that may arise between rights contained within the Human Rights Act 1998 and the supplementary rights. He stated that it is necessary that courts be clearly directed that in such cases ECHR rights should always be afforded precedence over supplementary rights. It was agreed to discuss this further at the meeting earmarked for dealing with miscellaneous issues.

4. Submissions Received

Aideen advised that the secretariat has circulated a list of the submissions received by the Forum which are relevant to the Group. She stated that Mari has agreed to read through all the submissions received and extract the appropriate parts from those found to be relevant to the Group.

5. Areas of Overlap with Other Groups

Catherine is attending a meeting of all the Human Rights Advisers being convened by the Chair next week and one of the items on the agenda is areas of overlap with other groups, on which she would appreciate the thoughts of this Working Group. The Group considered whether any conflicts and overlaps that may emerge between areas being considered by the Group and other groups should be placed before the Forum plenary, or instead be resolved by the groups themselves. Barry suggested that given the high level of expertise that prevails within working groups, they may be best suited to resolve these matters. Peter pointed out that the role of working groups is merely to feed into and do the groundwork for the Forum Plenary. Neil stated that at the end of the day the Forum plenary has the final say as to what recommendations should be placed before the Secretary of State - its report may inevitably include recommendations that are at variance with those included in working group reports given that it is free to vote against

the latter. He and Laura agreed that the Forum plenary is not, however, entitled to amend working group reports. Catherine suggested that if the Group disagrees with the recommendations of another working group that clearly conflict with its recommendations, then this discord could be brought to the attention of the Forum.

The convenor stated the process for pulling together the Working Group reports, along with any submission received, to produce a draft report for the Forum plenary is not yet clear, and Catherine agreed to seek clarification on this point from the Chair.

6. Justiciability of Supplementary Rights (the Judicial Enforcement of Supplementary Rights)

Alban and Barry presented papers on the matter of the justiciability of the supplementary rights.

(A) Alban's paper centred upon the justiciability of social and economic rights. In summary:

There has been a prevailing reluctance in the past to extend the concept of justiciability to social and economic rights. Concerns have been expressed that such a step may place an undue burden upon available resources and would result in courts usurping the powers of the legislative and executive branches.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), to which the UK is a party, obliges parties to take steps within their maximum available resources, progressively, rather than immediately, to achieve full realisation of the rights contained within the Covenant. The principle of progressive realisation has been invoked to support a view of the Covenant rights as aspirational policy objectives which do not impose precise legal objectives on states in the same way as civil and political rights do.

Elements of the Covenant rights, such as the obligation of non-discrimination in the guarantee of the Convention rights under Article 2(2) and Article 3, as well as the right not to be forcibly evicted without due process of law, and the right to form trade unions, do not, however, require allocation of resources for their protection and can thus be regarded as imposing immediate obligations, in the same way as civil and political rights.

Current UK Model :

The current UK legal system lacks full judicial protection of social and economic rights. UK courts now address socio-economic rights through two avenues:

- 1) Under current UK legislation in areas such as, for example, housing, healthcare, employment relations and discrimination, significant aspects of the rights contained within the ICESCR are the subject of obligations on public bodies that may be judicially reviewed in the courts. Judicial review has been described by academics as a minimum enforcement model to protect due process through the social and economic sphere. UK courts do not directly review social and

economic rights under this approach, but instead have the legal capacity to decide whether access to particular services provided by the state to citizens and others is fair, impartial, non-discriminatory and in compliance with basic procedural protections. The advantages of this model are that it avoids claims of judicial overreach; it places judges in their traditional role of dealing with procedural protections; the level to which social and economic rights are to be protected is left to be determined by Parliament and the Executive; and courts thus avoid intruding into areas traditionally reserved for elected officials. The disadvantages of this model are that it limits the extent to which intended beneficiaries can have their rights protected by the courts; and certain vulnerable and marginalised groups of people or individuals who fall outside the scope of the legislation are not protected.

- 2) More recently, the House of Lords extended the application of Article 3 ECHR to provide social support to destitute asylum seekers in the *Limbuella* case. This extension of the application of civil and political rights guaranteed under the Human Rights Act 1998 to include the protection of certain social or economic rights is similar to the approach of the Supreme Court of India which extended the application of the right to life to cover protection for social and economic rights such as the right to water. The advantage of this model of protection is that it provides an avenue for seeking remedies for non-justiciable rights to the extent that violations also infringe upon the most essential civil and political rights. A disadvantage of this model is that it provides a limited opportunity to challenge deficiencies in existing legislation for the protection of social and economic rights – the deficiencies can only be challenged if they can be fitted under ECHR rights protected under the HRA.

3 Models for the Justiciability of Social and Economic Rights Suggested by the NIHRC :

In 2004 the NIHRC proposed the following models for the justiciability of social and economic rights:

1. The Bill of Rights could protect a set of minimum rights including access to healthcare, protection from destitution, the right to shelter, the right to engage in work and protection against a dangerous environment. These rights would be directly enforceable through the courts, with the remedies available at the discretion of the judge. While there may be inevitable disagreement over the exact meaning to be attributed to these minimum rights, guidance on how to apply them would be included in an interpretive section. The advantage of this model is that it provides social and economic rights the formal legal status given to civil and political rights. The disadvantages attached to this model are that it leaves much room for interpretation; it may create unrealistic demands on available resources; or it may result in rights being too narrowly construed; and it may create controversy about having a highly selective element, favouring some rights over others.
2. Under this model the Bill of Rights would protect a larger range of social and economic rights, all of which would be enforceable not as fully-fledged rights but through imposing an obligation on the state to ensure that these rights are progressively realised and to pursue measures to allocate the necessary resources

to this end. The annual progress toward achieving these rights would be monitored by an annual progress report by the NI Executive to the NI Assembly. This model would enable the courts to review only whether the state was making a proper effort to secure basic rights. This option is intended to allow for litigation in a similar manner to which social and economic rights are legally enforced in South Africa where review by courts is limited to the reasonableness of the steps taken by the government, considering the available resources in light of the petitioner's claim in implementing the respective rights. (See further *Soobramoney v Minister of Health*; *Grootboom v Oostenberg Municipality et al*; and *Minister of Health v Treatment Action Campaign*). The advantages of this model are that it maintains the distinction between the respective duties of the judiciary, the executive and parliament; it would allow courts to determine on a case by case basis whether the protected rights are being provided in light of the available resources and the facts involved in the particular claim, which may not warrant protection under the Bill of Rights; and it would consider whether the right can be realistically protected without placing an undue burden on budgetary resources.

3. The third model combines models 1 and 2 so that there would be a set of minimum rights enforceable through the courts along with a range of additional rights which are to be progressively realised.

(B) Barry's presentation highlighted that justiciability can both involve the question of whether issues before a court are capable of judicial determination as well as whether a particular text is capable of judicial enforcement. The first question may include the issue of whether a matter is too speculative in nature to be litigated. Barry pointed out that the Group had already decided that standing should not be afforded for purely speculative cases. Barry's presentation largely focused on the second question of whether a particular text is capable of judicial enforcement. In summary:

The ECJ has developed principles of 'direct effect' broadly similar to the Section 6 duty on public authorities in the HRA; 'indirect effect,' an interpretive duty not dissimilar to the section 3 duty in the HRA; and an action for damages, known as state liability, where a state fails to fulfil its obligations.

1. Direct Applicability/'direct effect' of Treaty Provisions in EU Law:

The Treaty of Rome from its inception has used the term 'directly applicable' to describe the direct effect of EU regulations in national law. The ECJ held in the 1963 case of *van Gend en Loos* that Article 12 EEC which contains a negative obligation was to have direct application, and in the 1976 case of *Defrenne v Sebena* it held that Article 119 EEC which involves a positive duty to act, and involves the principle of equal pay which was interpreted by it as a fundamental social principle of the Community, was also held to have direct application. The ECJ has also, however, concluded that some Treaty provisions are too vague to be directly effective. For example, in the 1987 case of *Zaera*, the Court concluded that the objective of improving living and working conditions in Article 2 EEC was aspirational and could not be directly effective.

2. The Direct Effect of Directives:

While it was originally thought that directives could not be directly effective as only regulations are described as 'directly applicable,' and directives are intended to give member states a time scale, normally 3 years, within which to bring their laws into line with the provisions of a directive, the ECJ has, however, taken a purposive approach towards them. The Court has concluded in a long series of cases that member states can not avoid their obligations under a directive by failing to implement them after the time limit, particularly where the provision of the directive set down a minimum standard below which national law could not be allowed to fall. For example, in the 1979 case of *Ratti*, the Court concluded that any sufficiently clear and precise provision could create direct effect, as the member state had no alternative but to implement it. Hence, the case law of the ECJ is based on the principle that a legal provision must be sufficiently clear and precise to be interpreted and enforced by a national court. Nonetheless, where a 'minimum guarantee' can be identified in the provision, that guarantee can be applied even if the member state has discretion to exceed that minimum.

3. The Principle of Indirect Effect:

The ECJ has supplemented the principle of direct effect with a principle of purposive interpretation, also known as indirect effect. For example, in the 1984 case of *von Colson*, the Court held that while Article 6 of Directive 76/207/EEC was not directly effective, the German court must still do everything possible in interpreting its national compensation provisions to reconcile these provisions with the requirements of Article 6, thereby giving an effective sanction to the applicant. What is significant about the indirect effect principle is that it applies to the interpretation of all national law, irrespective of the public or private nature of the respondent.

4. The Principle of State Liability:

In the 1991 case of *Francovich*, the failure of Italy to implement a consumer directive resulted in the award of compensation to the applicant. The provision had to be sufficiently clear to sustain such an action, whether or not it was directly effective. The Court has since held in the 1996 *Factortame II* case that this liability is only strict where there is a total failure to implement the provision. Where there is an imperfect attempt to implement a provision, various criteria are in place to determine whether this liability has been incurred.

Conclusions:

There are similarities between the EU system of judicial enforcement and that of the HRA, in that vertical direct effect resembles the Section 6 duty on public authorities and indirect effect resembles the 'purposive interpretation' duty in Section 3. The issue in EU law, which is not necessarily confronted through the HRA, is that some EU legal provisions will be sufficiently clear and precise to be directly effective, others will have sufficient substance to underpin indirect effect and State liability and others will be too ill-defined to be justiciable at all. On the other hand, the provisions of the ECHR are seen to be justiciable, as interpreted by the ECtHR, and subject to the limitations in some Articles, and the 'margin of appreciation' which states enjoy.

Some Practical Examples of Rights Proposed in Working Group Interim Reports :

Broadly speaking, there are at least three broad types of provision. Some provisions will be sufficiently clear and precise to be directly enforceable against public authorities. Some provisions will be a source of interpretation of statutory provisions and the common law (including as an element in judicial review proceedings, etc.). Some provisions will be genuinely programmatic and may, subject to consideration of enforcement, not be subjected to the judicial process at all. What is not clear is the degree of justiciability necessary to maintain a declaration of incompatibility.

The following are examples from the proposed 'victims of crime' provisions from the CJ&V working group:

3. *'The Public Authority shall take all necessary steps to reduce the risk of victimisation or repeat victimisation through measures consistent with international human rights standards.'*
7. *'Victims have the right to make representation at every stage of the investigative, judicial or administrative process, where their personal interests are affected, in a manner appropriate to their needs and are entitled to receive a written reply for the decisions taken, without prejudice to the accused.'*
9. *'The Public Authority shall provide victims with access to mechanisms of justice and redress which are expeditious, fair, inexpensive, transparent and accessible, and provided for by legislation through:*
 - a. *judicial and administrative mechanisms which will enable victims to obtain redress;*
 - b. *informal mechanisms for the resolution of disputes, including mediation, arbitration and restorative processes, where appropriate, to facilitate conciliation and redress for victims;*
 - c. *information about their rights in seeking redress through all these mechanisms.'*

Barry stated that it would seem from the language used in the three above rights, that the first right is not justiciable, the second is, and despite the fact that the third right is addressed to a public authority, it too seems to be justiciable.

Barry suggested that it may be advisable to carry out a 'justiciability audit' of all the working group reports in order to determine whether the rights contained therein are intended to be justiciable, programmatic, or somewhere in between.

Group Discussion on the Justiciability of Supplementary Rights:

Peter stated that his party is content with the judicial review model that now exists in the UK. It believes that any extension of the current model would involve an encroachment into the domain of public policy which is best dealt with by democratically accountable bodies. In light of this, he did not see any need to downgrade the justiciability of the supplementary rights.

Brian stated that in addition to the three justiciability models suggested by the NIHRC in 2004, there is another model which states that rights are not justiciable, and merely imposes a set of policy objectives upon the legislature and executive.

Shannonbrook pointed out that the European Social Charter had not been mentioned in either of the two presentations. She stated that the Charter is an important point of reference and requested Catherine to provide the Group with an overview of same. She also suggested that it would be useful for the Group to consider the social and economic rights that are already justiciable. The latter have been identified by the Social and Economic Rights Working Group. Shannonbrook also stated that her party is of the opinion that the justiciability of social and economic rights is now well established under international law and it rejects the idea that some of these rights should be non-justiciable. She believed that the judicial review model is insufficient as it unjustifiably leaves the legislature and executive to exclusively decide upon the scope of social and economic rights; the interpretive model used in India is too uncertain; and model one as suggested by the NIHRC requires a clear non-diminution clause. This non-diminution clause would provide insurance that the scope of internationally guaranteed human rights could not be rolled back. She suggested that Catherine examine existing non-diminution clauses in international law for the Group. Shannon stated that her party opines that the South African model is a minimum model and that it prefers the third model – together with the inclusion of a clear non-diminution clause – suggested by the NIHRC. She believed that an audit of all rights proposed by the various working groups would be useful for the purpose of clarity.

Catherine advised that a change in attitude towards social and economic rights is now being evidenced in both the UK and European legal landscapes. This is exemplified through the House of Lords *Limbuela* decision and the EU Charter which contains many social and economic provisions. While it is not yet clear whether the latter will be justiciable, the history of the ECJ indicates that they could be. She stated that the Directive Principles of Social Policy contained within Article 45 of the Irish Constitution provide an example of a non-justiciable model, as advanced by Brian. Catherine believed that an activist judiciary is required to achieve any headway with such a model and/or to afford a social and economic aspect to civil and political rights.

Neil suggested that the Group's report make reference to the possibility of non-binding or non-justiciable rights (e.g. such as is envisaged for the all-Ireland Charter). He pointed out that Alban's paper referred to social and economic rights and that Barry's paper referred to supplementary rights. He believed that it was preferable to refer to supplementary rights in the final report. Neil stated that the issue of the progressive realization of rights relates to the international circumstances of a convention and that it is not an appropriate doctrine for a national/regional bill of rights – instead a programmatic approach is more appropriate. He stated that the matters of resources and policy are important considerations why courts should not get involved with social and economic rights. He suggested that courts could perhaps extend the current judicial review model in relation to social and economic rights insofar as, in a manner akin to planning appeals, they could

decide to refer matters concerning the scope of rights back to the executive/ legislature for their reconsideration. This approach would not allow courts to decide upon how resources should be allocated. Neil stated that despite the Directive Principles of Social Policy, some Irish courts have looked to other measures to give effect to social and economic rights.

Catherine confirmed that the right to personal integrity has been used by Irish courts in the past to give effect to social rights. She stated that their current position, however, due to concerns for the separation of powers, is to avoid the issuing of injunctions to require the state to take action in the sphere of social and economic rights. This stance was recently evidenced in the *Synott* case.

Neil believed that it was necessary to mention in the final report that judges can be reluctant to issue remedies such as injunctions to do something as opposed to stop doing something as they feel the former are too oppressive.

Barry stated that it is impossible to create a crude dichotomy between civil and political rights and social and economic rights. For example, the *YL* case had vast economic implications. So too has the EU right to equal pay. He believed that there is no reason why social and economic rights cannot be regarded as fundamental and suggested that resource implications drive political opposition towards their justiciability.

Brian stated that the extension by UK courts of ECHR rights to apply to social and economic rights has happened in an organic and modest way. He believed that it was important to bear in mind the overall UK context, in particular the Green Paper, the Governance of Britain, questions the advisability of the incorporation of social and economic rights into British law as it 'would involve a significant shift from Parliament to the judiciary in making decisions about public spending, and, at least implicitly, levels of taxation.'

Peter stated that he shared Brian's concerns. He believed that there should be no departure from the current UK model unless it applied to all of the UK.

Shannonbrook stated that her party does not share the assumption that an all-Ireland Charter of Rights should be non-justiciable. She pointed out that the Committee on ESCR has stated that the progressive realization of the rights contained within the ICESCR is obligatory and the UK is bound internationally by this obligation.

Laura expressed concern that the current UK judicial review approach to social and economic rights is insufficient. She stated that it merely provides a negative way of enforcing rights and does not allow the scope or substance of rights to be increased. She stated that there is an expectation on the part of the people of NI that the supplementary rights will be judicially enforceable – the Bill of Rights will have 'no teeth' if it is not justiciable.

Colin suggested that the Group should contact the other working groups and advise them that their final reports must be clear as to the level of justiciability intended for the various rights being recommended.

Barry and Catherine agreed that there was a need for groups to give clear direction as to the intended level of justiciability. Barry stated that it was also necessary to alert working groups to the need to consider transferred, excepted and reserved matters.

Agreed

- ✓ The issue of the justiciability of social and economic rights will be revisited upon further recommendations from that Working Group. Aideen to contact that Group to ask for a copy of a background paper on the issue prepared by their legal advisor.
- ✓ Aideen agreed to write to the convenors of all the working groups advising them to present the range of models of justiciability available, and ask them to carefully consider the language that should be used in the rights being recommended by them so as to ensure it conveyed the intended level of justiciability. Catherine also agreed to discuss the matter with the legal advisors of other groups.

7. Next Meeting

The next meeting will be on 29 January 2008 at 16.00 in Room 21, Stormont.