

Ad Hoc Committee on a Bill of Rights for Northern Ireland

Written Evidence from Committee on the Administration of Justice (CAJ) Brian Gormally and Anne Smith

Oral evidence to be given 19th November 2020

Introduction

1. The Committee on the Administration of Justice (CAJ) is an independent human rights non-governmental organisation with cross community membership in Northern Ireland and beyond. It was established in 1981, campaigns on a broad range of human rights issues and is a member of the International Federation of Human Rights (FIDH). CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.
2. On 22nd October 2020, CAJ and UNISON gave evidence to the Committee in their capacities as Co-conveners of the Equality Coalition. It is a network of over 90 non-governmental organisations and trade unions that cumulatively work across all nine equality categories within Section 75 of the Northern Ireland Act 1998 (as well as on other protected equality grounds). The Evidence focused on the contribution that a comprehensive Bill of Rights could have made to the stability of the devolved institutions and to the solution of a range of long-lasting, divisive issues. It also criticised a number of common misconceptions about the role and impact of a Bill of Rights, especially when it comes to economic, social, cultural and environmental rights.
3. That evidence built upon the Manifesto for a Rights-based Return to Power Sharing that the Equality Coalition had produced in 2019; a position vindicated by the many progressive commitments in the New Decade New Approach (NDNA) series of documents. However, our evidence went on to argue that, without the Bill of Rights, there was a lack of a unifying focus, as well as an absence of particular, rights-based solutions to otherwise intractable problems. The entire constitutional structure of Northern Ireland (NI), established by the Good Friday Agreement (GFA), suffers through the lack of its keystone, a Bill of Rights.

4. This evidence wishes to develop that argument in a future direction. We will look at some of the existential challenges facing this region in the intermediate future and how a rights-based approach in general, and a Bill of Rights in particular, could assist in meeting them.

Challenges facing Northern Ireland

5. A range of challenges faces our society in the coming period. Some threaten our peace and prosperity as well as our enjoyment of human rights. The Good Friday Agreement has given us two decades of relative peace, but our institutions and political culture are fragile and febrile. Our society is at risk but there are also opportunities to change it radically for the better. In our view, we need a set of guiding principles to help confront and overcome the challenges and also to point the way to a transformation of society that will make it more equal, more united and more stable. Those guiding principles can be found in a human rights-based approach, ideally focused and systematised in a comprehensive Bill of Rights, as envisaged in the Good Friday Agreement.

Brexit and the Protocol

6. The lack of progress in negotiations between the EU and UK means that either a “thin deal” or a “no deal” scenario in relation to the EU-UK Future Relationship seems most likely. Either will have serious economic consequences. Although NI will be protected to an extent from the impact of tariffs on trade with the EU and from some of any moves towards de-regulation, the economic link to GB will mean that we will also suffer from any recession there. The South, with its large GB trade, is also likely to suffer economically. Combined with the impact of the pandemic, the economic outlook does not look good. Unless progressive measures are taken, it will be the already poor, disadvantaged and excluded who will suffer most from economic recession.
7. The Northern Ireland and Ireland Protocol to the Withdrawal Agreement, enshrined in domestic legislation, established a special regulatory and customs regime for the North that prevented a hard border on the island of Ireland but would mean certain checks in relation to goods passing between Britain and Northern Ireland. The Protocol also recognised potential threats to established human rights and set up “dedicated mechanisms,” involving the NI Human Rights Commission and the Equality Commission for NI, for the limited protection of some rights guaranteed in the Good Friday Agreement and underpinned by EU anti-discrimination directives. The Internal Market Bill (IMB) now puts the infrastructure and rationale of the Protocol under threat. Admittedly in breach of international law, the Bill arrogates to

UK Ministers the right to unilaterally change aspects of the Protocol. It also specifically limits the role of the Human Rights Act in relation to challenges to any new regulations.

8. This shows the current weakness of our human rights protections; a justiciable Bill of Rights would better have ensured no regression in standards of human rights and equality than the cobbled-up provisions of the Protocol.

The Pandemic

9. The Covid-19 pandemic has exposed the gross inequalities and the distorted set of values that so far have been “normal” in our society. Specifically, it has also exposed the impact of the failure to implement the rights framework envisaged in the peace agreements, including the Bill of Rights and an anti-poverty strategy. The unequal impact of the virus will be further felt in economic, social and environmental rights (health, work, adequate standard of living, food safety, energy) terms by those who bear the brunt of its economic impact, concurrently with the out-workings of Brexit.
10. In that sense, the Covid-19 pandemic has put an existential question mark over our entire society in raising doubt about habits and structures that seemed fixed and certain and forcing novel and disturbing policy responses. It has and will cause great suffering and hardship but also has perhaps struck a blow against complacency. The pandemic has laid bare the inequality afflicting our society, with the poor, the old, the sick and ethnic minorities suffering worse.
11. There is a widespread acceptance that, following the pandemic, the health and social care service in our region must be rebuilt. There can be no return to “the old normal.” A health service that is properly resourced, which cherishes the most socially disadvantaged and offers everyone “the highest attainable standard of physical and mental health,” is required. The right of all our people to that highest attainable standard is the necessary guiding principle of reconstruction. More work is needed on how a right to health translates into policy development, budget allocation and prioritisation but the direction of travel must be made clear.
12. The policy and political landscape has been unfrozen and there is an awareness that we cannot and should not go back to what was normal. The task for our legislators will be to use the opportunity of an increased willingness to embrace progressive change to create a fair, just and human rights-based future.

Legacy of the Conflict

13. Decades of delay, prevarication and obfuscation by the British government on dealing properly with the legacy of the past has left a weeping wound in our social fabric. Salt was rubbed into the wound by a two page Written Ministerial Statement on 18th March which involved a wholesale rejection of the Stormont House Agreement and proposed a “fast-track” process designed to avoid proper investigations and provide impunity for soldiers and other state actors. This throws the whole legacy project into confusion and it will become a greater source of anguish and disaffection.
14. In the *Finucane* case, a few weeks ago, the Secretary of State was forced to apologise for delay and promised to state a way forward by the end of November. The Northern Ireland Office also claim to be preparing legislation but, so far, nothing has appeared. If the 2008 Advice of the Commission had been accepted and a Bill of Rights enacted including legacy issues, we would now have a dozen years of progress behind us. The Commission said:

“Legislation must be enacted to ensure that all violations of the right to life relating to the conflict in Northern Ireland are effectively investigated. Any mechanisms established must be fully in compliance with international human rights law.”
15. Instead of progress, we have regression. In 2014 the Stormont House Agreement was made; in 2020, the UK Government unilaterally tore it up (including the draft British-Irish Treaty) without proffering any alternative. A Bill of Rights today could still point the way to a fair, human-rights compliant response to the legacy of the conflict.

New Decade New Approach

16. Devolved institutions were re-established at the beginning of the year on the basis of an agreement, New Decade New Approach (NDNA), which includes detailed commitments by the parties on priorities and the Programme for Government, many of which are basic to social, economic and cultural rights, proposals on changes to the mechanisms of the institutions to increase transparency, fairness and equality, this new Ad Hoc Committee of the Assembly on a Bill of Rights for Northern Ireland and legislative and other commitments by the British and Irish Governments.
17. Progress by the Assembly and Executive on the pledges made in NDNA has obviously been disrupted by the pandemic. It would anyway have amounted to a huge

programme of work and the challenge has only been increased by the impact of Covid-19. The questions for MLAs include how that work will be guided, on what basis the necessary agreements will be made and what the new society will look like. It is our view that the answers to those questions lie in the adoption of a rights-based strategy culminating in the framing of a Bill of Rights.

Constitutional Conversations

18. There is an increasing appetite, particularly within the nationalist population, for a serious debate on the constitutional question. This was provoked by the Brexit decision itself and strengthened by a number of developments, such as the Internal Market Bill, which seem to disregard key aspects of the GFA and the active engagement of the people of Northern Ireland, through devolved institutions, in decisions on their own future. CAJ is neutral on the substantive constitutional question, but it is essential that there is a rights-based dispensation regardless of who has jurisdiction. Without that, there is a risk that the proposed constitutional models for a united Ireland will consider the issues of rights protections as a marginal concern and thereby threaten peace and community cohesion.
19. Of interest is the fact that a new unit has been established in the Department of the Taoiseach “to work towards a consensus on a shared island. This unit will examine the political, social, economic and cultural considerations underpinning a future in which all traditions are mutually respected.” It has been formally launched by the Taoiseach and is developing a programme of dialogues. It is important that the importance of human rights – specifically the Bill of Rights and a Charter of Rights for the island of Ireland – are promoted within these upcoming dialogues.
20. There is an extent to which post-pandemic reform and the implementation of the Protocol will increasingly indicate the sense of all-island cooperation and the argument for parity of rights across the island will be promoted. In particular the post Brexit ‘hardening’ of free movement across the land border for EU26 and non-EEA visa nationals and the increasing restriction of ‘reciprocal Common Travel Area Rights’ to British and Irish citizens only has already prompted the question of rights across the border for other residents.
21. Nonetheless, the importance of a Bill of Rights becomes ever greater in these times of constitutional uncertainty. CAJ has been arguing in favour of the GFA, including a Bill of Rights, as the foundation stone of the peace settlement while NI is in the UK. There is already an argument about the extent to which it would apply if there were a united Ireland. Which raises a very simple question in relation to the Bill of Rights: What is it that in moving to a united Ireland would vitiate or make irrelevant its

provisions? It would need a very good argument to say that measures designed to protect all our people when nationalists were in the minority should not be there when the minority was unionist.

22. In those circumstances, the proposition that a Bill of Rights would be a force for stability as well as the protection of everyone's rights, would become even stronger. In preparing for the future, whatever direction it takes, the Bill of Rights is an essential support for the legitimacy of any political and constitutional arrangement.

The Case for Human Rights

23. CAJ and many other people and organisations refuse to go back to a normal that includes gross violations of human rights and a society marked by inequality, poverty and ill-health. With the implementation of Brexit and the NI Protocol, this region will have a unique set of circumstances and will have to make its own path through the difficulties to come. We need close working relations with our partners to South and East but there will be no blueprint from either for our future direction.
24. It is our view that we need a Bill of Rights for Northern Ireland, based on our particular circumstances and including economic and social rights, as the basis of our new society. If we are to achieve this we need to convince everyone that human rights are the best framework in which to approach the construction of a new, fair future.
25. Human rights are not a replacement for politics and programmatic action across a multiplicity of areas, but they are an indispensable benchmark. No political programme that contravenes or ignores human rights standards will, in the end, achieve the willing and informed allegiance of humanity. The actual treaties, laws, statements and codifications produced over the years at an international level represent not necessarily the highest imaginable aspirations for humanity but the highest aspirations that are practically and concretely achievable at this stage of history. As such, they are the most appropriate goal and normative framework for an imperfect world.
26. For the most fundamental characteristic of human rights is their universality – they accrue to all people in all circumstances by simple virtue of their humanity. That outstanding feature gives them their practical strength as well as their moral power and has a number of implications.
27. First, human rights are the enemy of racism, xenophobia and all forms of prejudice and discrimination, not just in the sense that these are violations of international

standards but also that universal values transcend sectional interest. Second, human rights are not relativist or contingent but apply to all cultures and all circumstances. Third, they are not comparative – the fact that worse violations occur elsewhere does not excuse any level of violation. In that sense human rights standards oppose and reprove the widespread and cynical exercise of “whataboutery,” and approve the simple morality of “two wrongs don’t make a right.”

28. The argument for a human rights-based approach applies *a fortiori* to social and economic rights. The Covid-19 disease itself and the necessary responses to it have created unemployment, economic hardship and illness. However, the point is that the pandemic has exposed the pre-existing frailty of the mechanisms that should have protected these rights better. In effect, the disease has demonstrated existing violations of social and economic rights. As a response, both in the context of the Bill of Rights and more generally, we should re-emphasise the importance of social and economic (and cultural and environmental) rights.
29. In so doing, we will have to re-engage with the arguments around the nature of the enforceability of such rights, including the concept of “progressive realisation,” and the argument about restricting the scope for political decision making. There is a useful passage on progressive realisation in the Advice given by the NIHRC in 2008 itself: <https://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>
30. The Commission noted (on page 166): “that economic and social rights cannot always impose immediate obligations on states and that economic and social rights frequently impose an obligation of ‘progressive realisation’ rather than one of immediate effect.”
31. It went on to say “While progressive realisation does not require that the result sought by the particular right be achieved immediately, it does, however, require that ‘all appropriate measures’ be taken towards achieving the full effectiveness of the right... A duty to ‘progressively realise’ a right also imposes an obligation to move as expeditiously and effectively as possible towards that goal...”
32. If the social and economic rights in the Advice had been enacted, there might not have been such glaring holes in our health and social care systems, public authorities would have been clearer in their duty to put people’s welfare first and the death toll could have been lower.. These rights do not intrude on the prerogative of politicians but simply point them in the right direction, with appropriate objectives and milestones. Since the direction has palpably been wrong in the recent past, we

should adopt the “progressive realisation” of social and economic rights to point us along the right path.

The Case for a Bill of Rights

33. The Agreement said that the Bill of Rights would be enacted at Westminster. That would enable it to be clearly authoritative, as passed by the UK Parliament, a “constitutional” document similar to the Northern Ireland Act and entrenched in that it could only be amended, explicitly and transparently, by Parliament, with the cross-community consent of the Assembly. It would also cover all governmental activities undertaken in Northern Ireland, not just those within devolved competencies. That should still be the position. It is the responsibility of the UK Government to fulfil the commitments it made over two decades ago.

34. There is no excuse. The Bill of Rights project by Professor Harvey and Dr Smith has shown what a Northern Ireland Bill of Rights could look like and how it might be done. The project translated the NIHRC’s advice into a draft model Bill:

https://www.ulster.ac.uk/data/assets/pdf_file/0017/205451/Bill-of-Rights-NI-Draft-Model-Bill-June-2017.pdf

A copy of the full report can be accessed via this link:

https://pure.ulster.ac.uk/ws/portalfiles/portal/71185685/Full_Report.pdf

35. We would therefore ask this Ad Hoc Committee, in its report, to recommend that the UK Government bring forward legislation, based on an updated version of the 2008 Advice from the Human Rights Commission, to enact a Bill of Rights for Northern Ireland.

36. We would also ask that the Ad Hoc Committee recommend to the Assembly that a human rights-based approach be taken towards the many challenges that it will face in the coming years. In particular, the task of rebuilding a health and social care system that actually works for our people should be based on human rights principles. International human rights standards should be the starting place for policies and, where appropriate, should be incorporated in domestic law.

25th October 2020