



Northern Ireland
Assembly

Ad Hoc Committee on a Bill of Rights

OFFICIAL REPORT (Hansard)

Briefing by Baroness Kennedy

1 October 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Ms Emma Sheerin (Chairperson)
Mr Mike Nesbitt (Deputy Chairperson)
Mr Mark Durkan
Miss Michelle McIlveen
Mr John O'Dowd

Witnesses:

Baroness Helena Kennedy QC

The Chairperson (Ms Sheerin): We are working in reverse, so our next item is the briefing by Baroness Kennedy of The Shaws. Baroness Helena Kennedy QC is a renowned barrister, human rights advocate and broadcaster.

Baroness, welcome to the meeting. I apologise for the delay. I believe that you were online, but it was not showing up here. There was a technological issue on our side, so apologies for that. Thank you for your patience and for staying with us. I invite you to begin your presentation.

Baroness Kennedy: First, it was no hardship listening to Albie Sachs because, in the world of rights and bills of rights, he is an iconic figure, who recognised that often nations need things that can speak to their aspirations and to the better part of people's selves. If anyone can write about law in the language of poetry, he can. I am very sympathetic to his view that a bill of rights is important in nation building. I am going to go back and tell you all about why, but I also want to say that you should listen to his words. His experience is of value to us in the United Kingdom, and I always invoke him. I was thrilled to be here to have the opportunity to listen to him.

As a very young lawyer, I spent time in the United States of America and worked in a law firm that did a lot of work using the American Bill of Rights. My experience of seeing rights becoming a tool in the hands of ordinary people really came from there. Later, in the late 80s, I was one of the people in the UK who got together with others to argue for constitutional change. The constitutional change that we were calling for was that there should be devolution and that there should be a bill of rights and a written constitution. We were calling for a freedom of information Act so that people could be better informed — because you need information to be able to be a real participant in a democracy — that we should reform the House of Lords and, of course, the Committee structures in the House of Commons at Westminster, and that the peoples of our nations should all be making decisions much closer to home.

There was a whole range of things that we were advocating, and we had Charter 88, of which I was chair from 1992 until 1997. People often ask me how I ended up in the House of Lords. The answer is

that I ended up there because I am a lawyer. I would not describe myself as being tribally political. I am a progressive person, and I like to think that I am left of centre. I believe in social democracy, but I also believe in the institutions of law. I believe that law can be an abuser of people. People can use law to do terrible things to other people's lives and, in the hands of authoritarians, law can be a weapon. In a bill of rights, however, you are trying to shift that power and put some of it into the hands of citizens, both as groups and as individuals. I love the way that Albie described the business of having to balance collective community rights with the rights of individuals — which I do not think works successfully in the United States — neither taking complete ascendancy.

Why do I think that a bill of rights is a good thing for Northern Ireland? The paper that I sent you in advance advocates it. First and foremost, it is like all these things; the Belfast/Good Friday Agreement was the product of really hard negotiation and discussions. For me, it was one of the great moments, because I had done trials in London and in other parts of the United Kingdom relating to the Troubles and saw the toll that it took on the lives of the many people who became victims of bombings or who were unfairly tried or where there were miscarriages of justice — the whole range of things and the horrors of what it did to the lives of people in our world. Creating a bill of rights that was protective of all the communities and all the citizens of Northern Ireland seemed to me to be vital. Of course, it made perfect sense to me that part of the prospectus for change and for the future would be a bill of rights.

I want to echo something that Albie said. It really is at the heart of the paper that I sent to you, which I kept rather simple, concentrating on what I thought are the difficult issues here. The difficult issues are that, when you are trying, if you like, to renegotiate relationships — we have been doing that, for example, between men and women in our marriages and our intimate relationships — it can be very disturbing and not what people have come to know. There are anxieties about how a redistribution and, if you like, a fair distribution of rights might, in some ways, leave some people feeling that they would be the ones who will become vulnerable.

I feel very strongly that this too is a protection for the Protestant community in Northern Ireland and for those who feel very strongly that they are British, particularly as we are leaving the European Union. I would have thought that this is a moment when it is really important for all sections of the community to feel that their rights are protected and that they have avenues, as individuals and as communities, for challenging things that might take place. A bill of rights will be really important as you — as we — go forward, so, for me, one of the crucial things is this: how do you deal with the anxieties of people who see it as putting power in the hands of those whom they have felt very threatened by, and that can be on both sides.

I always remember that I went into the House of Lords having been given a plank of the manifesto. I worked on it with politicians in the Labour Party. I went into the House of Lords to help put through the Human Rights Act, the devolution Bills, the Freedom of Information Act etc, and I always remember that, when we were having the discussions about incorporating the European Convention on Human Rights into our law, there was great concern that it was going to empower all the ghastly people that the 'Daily Mail' envisaged it empowering: it would empower terrorists and prisoners, and the courts would be inundated with lawsuits from all the worst elements of society. That is basically how it was being presented. It was said that we would absolutely pull the courts to their knees. In fact, the thing that has pulled the courts to their knees has been taking funds from the courts, in my experience.

I feel that that did not happen. Those fears have not been true. Of course there are occasions on which people bring mad cases to the courts and try to invoke human rights, such as prisoners insisting that they have access to pornography or whatever. Some case always ends up making the front page in order to discredit human rights.

I talk to people up and down the country about human rights, and I have spoken frequently to people in Northern Ireland. These are what human rights are: people here want to make sure that they have access to good healthcare and that their children will be educated. Those are basic things that are fundamental to people's well-being, but they also care about, for example, what happens to the elderly. It is very interesting that, when you start talking about these things, the conversations are like those that you have with the people on the border, who say, "Yes, I am interested in human rights. I just do not want to see them being abused and becoming a tool" — or a weapon, as Albie said — "in the hands of people who have made my life uncomfortable".

You have to have a better conversation, and I cannot pretend to you that the conversation around human rights has been very good in England and Wales. I am currently involved in women's rights in Scotland. I am sitting on an advisory council to the First Minister. There is less resistance, it seems, in

Scotland to the concept of human rights. What we have to remember is the many ways in which access to the courts and using a bill of rights can be really important for people. Look at what happened at Hillsborough, where people lost members of their family and the whole thing seemed to be pushed under the carpet. People called for the opportunity to have a proper inquest. A bill of rights could be invaluable to people in Northern Ireland in their pursuit of justice.

There are ways in which you can do that. You have had examples of it from Albie, such as having conversation and dialogue and asking people what it is that they want. If they did have human rights, what is it that concerns them? It is also about having a much more compassionate and human sort of conversation and finding ways in which you can deal with it.

One of the things that I stated in my paper is that I know that even the United Nations Commission on Human Rights summons up great hostilities in the mind of some people in Northern Ireland. I looked at the advice that was given by the Northern Ireland Human Rights Commission, as it was asked to do by the Belfast/Good Friday Agreement (GFA), and I thought that it essentially presented the international standards and all the stuff that you would see in any decent bill of rights, if you were to create one tomorrow. Of course, it draws on the experiences of South Africa and other places. What the Northern Ireland Human Rights Commission's advice does is that it reflects international standards such as free speech; freedom of political thought; the right to equal opportunity in all social and economic activity, and that is to be regardless of class, creed, disability, gender or ethnicity; and the right to freedom of expression and of religion. Those rights are listed, and listed pretty fully, although the list is not quite as extensive as the one that Albie gave us. They cover the broad spectrum of rights that you would expect to find in a contemporary, modern bill of rights. There are, however, the additional things that were special to the needs of Northern Ireland, and that is what a good bill of rights does: it goes beyond the standard and into what the particular circumstances of a nation are that should be included in a bill of rights for the people. It must be the people who put it together.

The following rights and issues have been highlighted about Brexit and should be addressed, and those concern the whole business of citizen equality. People from the unionist community want to feel very strongly that they are still part of the United Kingdom, with no rights that are any different from the rest of the UK. You will therefore want citizenship equality and freedom of movement. The equivalence of the rights on the island of Ireland are going to be sought, because that is what the nationalist community would want, and they would want their European Union citizenship and voting rights. The bill of rights would have to accommodate what are going to be pressing issues as you go forward, and I think that that is true for everybody. The Northern Ireland Human Rights Commission recommended:

"Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland."

That is where you go to get to the nub of this. It is in the granular bit of that. What are you talking about in there? It is about the right to culture, cultural identity and language. I know that language has been a hotly disputed issue. They should, however, form part of a bill of rights as enforceable provisions in their own right. The emphasis on "both communities" should not be used to entrench divisions. We should be really mindful of that, because what one does want is a coming together and a mutual recognition of the importance of each other's dignity and identity. It is that business of the mutuality that is in all of this: my rights depend on your rights and on respecting your rights, so it is about ubuntu. I wish that we had a word for it that worked. Perhaps we should pinch it.

That also entails those rights extending to individuals who do not fit neatly into either community. Like all parts of these islands, you now have people who are newer arrivals, who have come to live in our midst and who have enriched our lives in many different ways, and many of them are different because of the colour of their skin or their religion. They are not Protestants or Catholics. Again, their rights have to be respected, and we have to find ways of ensuring that.

After the referendum on leaving the European Union, I was chairing a House of Lords Committee, and we were very concerned about the how the rights of people from Europe who were living and settled in the United Kingdom and citizens of the United Kingdom who had settled in other parts of Europe would be protected as we went forward. The Committee also looked at the special arrangement for our Irish neighbours and their comings and goings in the United Kingdom. What if you are an Irish person who happens to be black, however? In the efforts to keep out folk who are not entitled to come in but who come into Southern Ireland, because they are able to do that, and they are a person of colour, as they move towards the North and want to go to Heathrow Airport, are they going to be stopped? How is that going to be done without in some ways invading the rights and protections that there should be for all Northern Irish and Southern Irish people.

It should be noted that the Northern Ireland Human Rights Commission left the meaning of "identities", "ethos" and "aspirations" rather loose for those very reasons: societies change, and those should be developed in case law. I agree with that. It is a way in which to go forward. There should, however, be guidelines on what should be considered as identities, ethos and aspirations, because leaving them open without guidance might leave room for very narrow interpretations, and I would be very concerned about that.

I want to pick up on the commission's pointed reference to respect, understanding and tolerance for linguistic diversity. To that end, it is also imperative for people to have the right to use the language of their choice. It is not just that they can have the language and use it at home, like Jewish people using Yiddish. It has to be about more than that. The commission recommended:

"Public authorities must, as a minimum, act compatibly with the obligations undertaken by the UK Government under the European Charter for Regional or Minority Languages in respect of the support and development of Irish and Ulster-Scots."

To that end, we should be advised that the bill of rights should grant equal status to both English and Irish as official languages in Northern Ireland. I really do think that that is going to be important, and that is as well as giving recognition to Irish and Ulster Scots as indigenous languages by granting them special status, as reflected in the GFA. That is going to be really important, as you can really fall into ditches on this kind of thing. The commission supports the business on language and on special status for language. It states:

"There is also need ... to protect other linguistic, cultural and ethnic minorities so as to prevent the creation or reinforcement of a hierarchy of rights protections."

People always have this awful temptation to create hierarchies. We are seeing it currently, I am afraid, in the United States, where there is talk on rights protections about creating some rights that are somehow going to be privileged over lesser rights. One should be very careful about doing that.

The right of individuals born in Northern Ireland:

"to identify themselves and be accepted as Irish or British citizens, or both, as they may so choose"

is also of importance. I have a very good friend who is a Northern Irish, Protestant businessman. He has two passports: an Irish passport and a UK passport. He has embraced the sense of himself as having those two identities. It should be noted that the provision understands national identity in terms of citizenship, as opposed to guaranteeing equality of treatment between British and Irish national identities. It is essential that that equality be reflected in the bill of rights. The Government and public bodies should also have a responsibility, and duty, to:

"promote tolerance, mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of their cultural, ethnic, religious or linguistic identity, in particular in the fields of education, culture and the media."

There is an issue about the taking of oaths. Sometimes, when one was doing a case, people would have problems with recognising certain things. I remember having a conversation in which, to my surprise, somebody said that they would not become a Queen's Counsel in Northern Ireland because they had to take an oath to the Queen. It never occurred to me that that could be problematic, but you have to have sensitivity to those things. It is a particularly tricky business in Northern Ireland. No one should be compelled to take an oath in a manner that is contrary to their religion or their belief or that requires them to express a belief that they do not hold. You will have to make a special provision to that effect in any bill that you create.

I have a particular thing about children's rights. They should be reflected in your bill. It is worth your having a look at what is going on in Wales, where they are much more proactive on children's rights. They had a children's commissioner before other people did. You could lead the way on some of the stuff on children. When I come to speak in Northern Ireland, people talk about the burden that is being borne by younger generations. I think that you all recognise that. The trans-generational impact and continuing legacy of the conflict has really had serious consequences on children in Northern Ireland. It is not just the numbers, but over 300 were killed and thousands were affected as a result of having family and friends killed, injured or imprisoned. There is a cost to kids from imprisonment. Children have really suffered. Some were subjected to punishment violence by armed groups, as we know. To

repair that damage, there should be ways in which your bill of rights could reflect that for future generations. I would therefore be looking for additional protections for your children.

That is what I wanted to say to all of you. I know that this is hard. Albie put his finger on it when he said that it is about how you conduct these things. It is about how you have the conversation. Listen, do not look to us. What happened in the UK is that, when the Human Rights Act was passed into law in 1998 — it did not come into being until 2000, because a couple of years were needed to train up people and to understand what it meant and so on — one of the problems was that, and I feel very strongly that they did this, the Labour Government backed off from promoting it because they were anxious that, if they promoted it too much, it would lead to tons of cases going through the courts and so on. They got twitchy about getting bad press from the tabloids. They therefore got very defensive about something of which they should have been very proud, which was the introduction of the European Convention on Human Rights into our law across these islands. Do not take your way of travelling from that. Have better conversations and really try to have everyone see that this is for everybody and that everybody stands to benefit.

The Chairperson (Ms Sheerin): That is an appropriate note to end on. Thank you very much, Baroness. That was very interesting, and the presentation that you provided us with was useful as well.

If you do not mind, I want to go into a wee bit more detail on one of the points that you made about Brexit. You explicitly laid out that you feel that Brexit would have impacts on citizenship rights and freedom of movement. There are a couple of prongs to that. You referred to people identifying as Irish or British or both. I do not know whether you are familiar with the Emma DeSouza case. We have seen an example there of where it looks as though the British Government regard people in the North as British whether or not we ever exercise that right to a British passport or ever acknowledge Britishness.

In the Twenty-six Counties, law enforcement has the ability to check the passport of anybody who is from outside the common travel area. Realistically, at the end of this year, that will apply to anyone from the North who is British. We could leave ourselves in a position in which half the population is in a rights deficit, because, technically speaking, Irish passport holders should have more rights than British passport holders, which is not fair. How can those rights be accessed? How you would address that through a bill of rights? You referred to the fact that we are here to consider the particular circumstances of the North and the impact of Brexit on our rights. How do we do that through a bill of rights?

Baroness Kennedy: Listen, I am not going to sit here and pretend that I can draft this for you. You have great lawyers in Northern Ireland who will sit down and battle this one through. I think, however, that you assert the importance of everyone having the same rights. Your courts will then have to deal with the challenges that will be made when it becomes clear that there will be differentials, and there will be.

I will be very honest with you: I was not a supporter of leaving the European Union. I believe in multilateralism. Whatever our criticisms of the European Union, and I had plenty, those countries are our closest neighbours, and we should have struggled on to try to create better relations. People were mis-sold what was on offer. The majority of people in Northern Ireland voted to stay in the European Union. It was a minority that voted to leave, albeit it has been a very powerful minority, because of the way in which it has supported the Brexiteers who are now in government and who are negotiating our exit from Europe.

It will be for your courts to deal with. In drafting of the bill of rights, it should state its commitment to equality and to the rights of citizens being as they ought to be: that those who identify as British should have the same rights across Europe and those who identify as Irish should enjoy the same rights as the people of Southern Ireland. That becomes a problem for the courts, and it will be a very difficult one. It should not be a difficult one for you, however, in creating your bill of rights. If you try to create it on anything other than the grounds of equality, you will end up with a hierarchy of rights. I do not believe that a hierarchy of rights is what rights is about.

The Chairperson (Ms Sheerin): Brilliant. Thank you very much. I agree with that point.

I will go to Mike, the Deputy Chair, over the video link. Mike, do you have questions?

Mr Nesbitt: Ordinarily, Chair, I would, but I thank Baroness Kennedy for her engagement and apologise, because I have my hospital consultant contacting me in a few minutes.

Baroness Kennedy: I hope that you are all right.

Mr Nesbitt: I am fine. I had a procedure a wee while ago, and it is just a follow-up. Sorry, Chair, but I am going to have to go in a couple of minutes.

The Chairperson (Ms Sheerin): That is OK, Mike. Thank you very much. Michelle has not indicated, so we will go to John. Do you have any questions?

Mr O'Dowd: The Baroness said that she is not going to write the bill of rights for us, and I appreciate that position. You mentioned trans-generational rights and the impact of the conflict on the children, and not only the children who suffered during the conflict but those who have been suffering since, whether the impact was directly on their family, community or whatever it may be. In broad terms, how should we approach that in a bill of rights?

Baroness Kennedy: One thing that you should be thinking about is how we safeguard the future of those children. One of the biggest gifts that you can give to them, as well as loving them and trying to provide them with the care, nurture and education that they are so deserving of, is a bill of rights, because that is one of the ways in which you can secure the future for those, however they might identify.

I cannot speak for everybody in Northern Ireland, because, obviously, everybody is different. My children are by no means replicas of me, but something that I notice about them is that they really are not wanting to limit themselves in their friendships. Their friendships cross all divides and races, and they are highly tolerant of difference. Not only that but they are excited by and interested in difference.

The generation that is coming through in Northern Ireland will be no different from that anywhere else. The young are the people whom we should be making this bill of rights for, and when we have the conversations, I want us to have them with them, too. The young are those who really will build a better world, and we have to give them the tools with which they can do that.

I agree with what Albie said about a preamble. I always say that rights and the language of rights should be where law becomes poetry. It is where we should speak the language that talks to our hearts. Law is about regulating human relationships, between nations, yes, and our relationship with the state, but it is largely about human relations and our humanity, so we have to find ways that speak to people and not in the arid language that I had to learn when I was a student lawyer.

Human rights give us that. It is where we can speak to the better parts of ourselves. Whomever we are, wherever we are from, whatever our backgrounds, somehow we must embrace the fact that we are all the same.

Mr O'Dowd: Thank you very much.

The Chairperson (Ms Sheerin): Baroness, thank you very much for your presentation. It was really helpful and interesting. Again, apologies for the hold-up. Thank you very much for your time, and the same goes to Albie.