



Northern Ireland
Assembly

Ad Hoc Committee on a Bill of Rights

OFFICIAL REPORT (Hansard)

Briefing by Professor Tom Hadden

8 October 2020

NORTHERN IRELAND ASSEMBLY

Ad Hoc Committee on a Bill of Rights

Briefing by Professor Tom Hadden

8 October 2020

Members present for all or part of the proceedings:

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

Witnesses:

Professor Tom Hadden Queen's University Belfast

The Chairperson (Ms Sheerin): Professor Hadden is joining us via StarLeaf. Professor Hadden, when you are ready, you may proceed with your briefing.

Professor Tom Hadden (Queen's University Belfast): I seem to be a bit out of focus, but, apart from that, it seems to be working. I am happy to assist the Committee in any way that I can. I will try to explain why what was a very sensible proposal in 1998 has caused so many problems and made so little progress. For me, the underlying problem has been a series of misunderstandings about what was intended. That is based on my involvement in the process for the best part of 20 years, along with my good colleague Professor Kevin Boyle, who, unfortunately, is no longer with us. This afternoon, my objective is to suggest how we might get back on track and what you may need to do if you really want to deliver what was intended. I have produced three simple points for you. They will come in a slightly different order from the order in the written presentation, but that does not matter.

Point 1 is that you need to understand what the provisions for a bill of rights intended. It was not intended to be a splendid new human rights bill that would set an example for the whole world; it was about creating a bill of constitutional rights for all the different peoples and communities in Northern Ireland, along with the incorporation of the European Convention on Human Rights. I will try to explain that in relation to what happened at a couple of meetings in Kells, in 1993 and 1994. Kevin Boyle and I approached the Standing Advisory Commission on Human Rights, saying that we really needed to get together with the parties to discuss what kind of a bill of rights would be appropriate. That was agreed, and there were two meetings: one in 1993; one in 1994. Technically, they were confidential. They were organised by the Standing Advisory Commission on Human Rights and went on for some time. If any of you are interested, I have a complete file — it is rather a fat file — of who was there, what papers were presented and my notes of who said what at the meetings.

From my point of view, and from Kevin Boyle's, a key document was a paper on what kind of add-ons there should be. The idea was that both the UK and Ireland would incorporate the European Convention on Human Rights. That was Kevin Boyle's primary concern. My concern was that there

should be add-ons to fill gaps in the European Convention, which did not really address the problems of Northern Ireland. I have appended that paper to the written version. In summary, the add-ons that we suggested were what kind of self-determination there should be; what kind of recognition of the two communities there should be; what kind of provisions there should be on education and language rights; and, on identity, the right to be British, Irish or both. All of those appeared in the Good Friday Agreement. The only one that did not was protection from emergency powers.

The follow-up to that, in which Kevin Boyle and I engaged, was, first, a book titled 'Northern Ireland: The Choice', in which we developed what we had said on the incorporation of the European Convention on Human Rights, plus some add-ons. Similarly, in our contributions to the *[Inaudible]* forum and to the Forum for Peace and Reconciliation in Dublin, we kept saying the same things.

Kevin Boyle was well connected with the Irish Government at all times, and he told me that he was told by his contacts there that, in the absence of any huge amount of discussion on what should be in a bill of rights — everyone was in favour of a bill of rights but there was very little discussion on what it should contain — the two Governments and Senator Mitchell went back to what we had written, and they adopted, more or less in the same words, what we had been arguing for. In my view, that is a good way to understand where that formulation of the particular circumstances of Northern Ireland came from. It was to do with things that were not covered by the European Convention on Human Rights but which would be particularly helpful and necessary in Northern Ireland, given its particular population and its particular historical background.

The second point is what international experience was to be relevant. This was not international experience of a more extensive bill of rights than was covered in the European Convention on Human Rights. It was not about what I used to call the all-singing, all-dancing model of human rights that would be better than that of anyone else in the world. It was about the rights needed in a divided society. At that time, there was a lot of discussion in our papers about other divided societies: places such as Canada, Belgium and Bosnia, all of which have constitutional bills of rights that address the particular circumstances of their populations. Almost all include provisions on language, education, the cultures of the peoples and the identity of the peoples.

The difficulty has been that successive commissioners in the Northern Ireland Human Rights Commission have ignored that aspect of the issue: a bill of constitutional rights for all of the peoples of a territory rather than just a bill of human rights for each individual. Both commissions, the first one, which I was involved in, under the leadership of Brice Dickson, and the second one, under the leadership of — I am sorry, her name has gone, but it will come.

Mr Nesbitt: Monica McWilliams.

Professor Hadden: Yes, Monica McWilliams. Sorry about that; I am getting old. The final draft of Monica McWilliams's version omitted everything that we had included in the first draft about the Irish language, for example, and integrated schools. The trend, as things developed within the Northern Ireland Human Rights Commission, and within the political parties, was away from the idea of a constitutional bill of rights for a divided society and towards, as much as they could possibly justify, developing human rights from across the world. That, I think, is a mistake.

The two Governments, on the other hand, had a much clearer idea of what the bill of rights was supposed to be. I have written it down. I will read into the record the terms of the British-Irish Agreement, which was attached to the Good Friday/Belfast Agreement. It provides for quite a limited set of rights to be guaranteed, whichever state has sovereignty over the territory, to be exercised:

"on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities;"

Going back to the point raised with Michael Potter, I ask the Committee to note that that covers all the people of Northern Ireland in the diversity of their identities and traditions. That is not just the two major communities. It includes everybody else, the people whom I usually call the people in between. For me, that is a very helpful summary of what the two Governments intended the proposed bill of rights to be about. It was to be the incorporation of the European Convention on Human Rights and these constitutional protections for all of the communities and peoples. That was my second point.

My third point is on the question of how we deliver the proposed bill of rights. Chris Sidoti, who was the chair of the political party discussion in, I think, 2007, commented afterwards, "Drafting a bill of rights is easy. The difficult bit is getting it adopted". When I was on the Northern Ireland Human Rights Commission, I used to think of myself as "Mr Deliverability". I was focusing on, "What can be delivered?". That has been lacking in the way that the drafts have been developed.

For a start, it was clear that the Northern Ireland Office was concerned about read-across. It was concerned that provisions should not be adopted in Northern Ireland that would be equally relevant in deprived parts of the rest of the UK. The Northern Ireland Office submitted a paper to the Kells meetings making precisely that point: it was not going to be helpful to propose provisions that could be read across to other parts of the United Kingdom because that was not what was intended. Similarly, in relation to the draft provisions that Brice Dickson's commission proposed, we got a prompt response from the Labour Government, from Des Browne, saying precisely that: far too much of what you are proposing is not relevant to the particular circumstances of Northern Ireland; it would be relevant to all other deprived parts of the United Kingdom and that was not what was intended.

The Irish Government have been less concerned about that, but they also have an obligation under the terms of the Good Friday/Belfast Agreement to adopt the same provisions in the Republic as would apply in Northern Ireland, and they have the same concerns about read-across. The issue is whether and to what extent the people in Northern Ireland are entitled to better and more extensive human rights than the rest of the people in Great Britain and the rest of the people in the Republic of Ireland. You might just think about the response of the politicians and the peoples in Great Britain and in the Republic to the idea that the people of Northern Ireland who have caused so much problem over the years should have rights that are so much better than those of everybody else. My view is that they would not think that that is viable politics or a very good idea.

I have a few thoughts for you on what needs to be done. Remember that the bill of rights is to be enacted by the Westminster Parliament and paralleled in the Republic. What matters is the view of the two Governments as to what the interpretation of the wording in the agreement is; not my particular interpretation or your particular interpretation. It is about the interpretation of the two Governments as to what they intended rather than being about looking at dictionaries or what other people have said about the proper interpretation. The two Governments are in charge of this process, and you should liaise with them on what they are prepared to accept, rather than developing your own ideas on what a nice bill would be.

To do that, it would be a good idea to engage with what the two Governments said in their British-Irish Agreement appended to the Good Friday Agreement. I read that out. It would be a good idea for you to attempt to work towards a text that reflects that agreement between the two Governments and what they have committed themselves to. That would be transferable in the event of a more formal provision for joint authority between the British and Irish Governments — at the moment, we have a kind of ad hoc joint authority; every time that things break down in the North, the two Governments rally round and knock heads together and reinstate the terms of the Good Friday Agreement — and/or, in the event of unification, the British-Irish Agreement refers specifically to whichever Government has sovereignty. Therefore, they, too, were thinking about the possibility of a transfer of authority from the UK to the Irish Republic.

That is all that I have to say. Look carefully at the terms of the British-Irish Agreement. Do not spend too much time arguing about the meaning of the "particular circumstances" and engage with the two Governments on what an appropriate development of those ideas might be, and then you might get somewhere.

That is enough for the time being.

The Chairperson (Ms Sheerin): Thank you very much, Professor. That was interesting and useful, just as your written submission was. You focused retrospectively on the intention at the time, but I want to ask you a question that brings it into the present day. Obviously, circumstances at the minute are quite different from what they were 22 and, even, 12 or 13 years ago. You said that a bill of rights at that time was to be ECHR-plus. What impact do you think that leaving the European Union has? Will there be gaps as a result?

Professor Hadden: None at all. The European Convention on Human Rights is nothing to do with the European Union. It is a Council of Europe provision. As long as the two Governments are bound by the European Convention on Human Rights, that is what matters. Leaving the European Union has little to do with it. The European Union has its own fundamental rights convention, but that is different.

The Chairperson (Ms Sheerin): Obviously, we are losing the charter rights but not the convention rights. You do not think that any gaps are created by leaving the EU?

Professor Hadden: Not in particular. The gaps are those that Kevin Boyle and many others and I identified back in the mid-1990s. There are gaps in the European Convention on Human Rights that need to be addressed in respect of a place like Northern Ireland, which is divided between two main communities and a lot of people in-between those two communities, as you discussed earlier.

The Chairperson (Ms Sheerin): Following on from that — I touched on this with Dr Potter — there is the focus on parity of esteem and the fact that the two big communities need to be treated with respect and as being the same. The Emma DeSouza case, which is referenced in Dr Potter's presentation, has demonstrated that, from the British Government's perspective, everyone here is viewed as British. We see citizenship rights and freedom of movement called into question now. It has been said that there will be "inevitable asymmetry" in that passport holders here could have different rights, depending on what their passport is. Are there gaps there that could be plugged?

Professor Hadden: Not for the people of Northern Ireland, because we have special rights to be British and Irish and both, so that issue is resolved insofar as the people are concerned. There are clearly economic implications to what is happening at the moment, in relation to where the border shall be between the UK and the Irish Republic and where we in Northern Ireland fit. However, that is not specifically an issue for the bill of rights.

The Chairperson (Ms Sheerin): There are, perhaps, economic implications that will apply. You could argue that there will be a disproportionate effect on the North compared with Britain. Emma DeSouza had to renounce British citizenship that she had never engaged in.

Professor Hadden: Are you referring to the case that has recently been discussed?

The Chairperson (Ms Sheerin): Yes.

Professor Hadden: I have no problem with that. It seems that the compromise that has been reached is, "Let's not spend too much time arguing about this. Everything is OK as it stands". That is, probably, the best solution.

The Chairperson (Ms Sheerin): OK. Thank you.

Mr Nesbitt: Hi, Professor. You were focusing on delivering what was intended, and you defined what was intended as a set of constitutional rights to be added on to the European convention. However, we must not forget that the eight little syllables that make up "particular circumstances" have fuelled a 22-year debate that is still live. You seem to suggest that we should not allow ourselves to be constrained by particular circumstances. I wonder how that impacts on how things might be viewed to have changed since 1998; for example, there is a greater focus amongst many people, particularly young people today, on environmental rights, which may not have been discussed at all 22 years ago. There is also the impact of the pandemic on health rights, particularly for people suffering from, for example, cancer, whose treatments may have been postponed because of COVID. What do you think?

Professor Hadden: I go back to what I said earlier: all those issues are, clearly, important, but they affect equally the people in the rest of the UK; in Scotland, Wales and England. They also affect the people of the Republic. There is no particular reason that a bill of rights for Northern Ireland should jump ahead of what is being promised or delivered for the rest of the people of these islands.

Mr Nesbitt: The DeSouza case seemed to bring into sharp focus a tension between identity and citizenship. As you say, the agreement is clear on identity: you self-define as British, Irish or both. Does that have an implication for citizenship? If we did something in a bill of rights in that territory, would it have a read-across or a repercussive potential?

Professor Hadden: Again, I go back to the terms of the British-Irish Agreement, which was appended to the Good Friday Agreement. As I said, it covers all the peoples of Northern Ireland in their different identities and cultures. I am not concerned about that. You should focus on the development of those words in the British-Irish Agreement rather than spending a huge amount of time on arguing about what the particular circumstances of Northern Ireland are. For me, it is quite clear what they are: we

have two main communities here and a lot of people in-between, and there is the potential for a change in the constitutional status of this particular piece of territory; it might become subject to joint authority, or it might become part of a united Ireland.

Mr Nesbitt: I have a final constitutional question that you might have an opinion on. Lord Empey, on my behalf, contacted the Home Office about Emma DeSouza. The then Minister of State Caroline Nokes responded to say that the British Nationality Act 1981, effectively, trumped the international 1998 Belfast/Good Friday Agreement.

Professor Hadden: My view on that is that the resolution that appears to have been reached is much more satisfactory. In other words, do not spend a huge amount of time arguing about this particular issue. Focus on developing rights for all the people of Northern Ireland rather than going back to UK legislation. I gather that the case has effectively been sidelined and that a satisfactory resolution has been reached.

Mr Nesbitt: Professor, thank you very much.

Miss McIlveen: Thank you very much for your presentation. It was very interesting. You quoted Chris Sidoti when he said that drafting is easy but the difficulty is getting it adopted. Yet, in your introduction, you said that there were always misunderstandings of what was intended. This has been a challenging process throughout, even in understanding what was intended. How do you go about building consensus on the value or purpose of a bill of rights when those who are supposed to know what it was intended to do cannot get it right?

Professor Hadden: Very good question. As I have tried to explain, my view is that what was intended was quite short and sweet. It is more or less summarised in the provisions of the British-Irish Agreement in the way that I have read out and explained. Arguments among human rights lawyers as to what would be an ideal bill of rights for Northern Ireland to set an example to the rest of the world are misguided because, as I have said, the people of the rest of the United Kingdom and the people of the South are unlikely to see that the people of Northern Ireland deserve better rights than they do.

Miss McIlveen: OK, but there is a challenge in Northern Ireland in the way that rights have been articulated. They have been politicised in a way that it makes it very difficult for another side to appreciate their value to themselves.

Professor Hadden: That is true. You politicians will know that there are disagreements on all these issues. My advice to you is to go back to what the two Governments wrote in their agreement and have continued to stress, particularly in the latest document that set up your Committee. They have said, "Go back to the terms of the agreement". I am suggesting that the best way of doing that is to look at precisely what the two Governments have committed themselves to in their treaty.

Miss McIlveen: OK. Thank you. We have had a number of international presentations. There has been a discussion on the practicalities and outworkings of a bill of rights. Have you given any consideration to the role of the judicial system and the type of remedies that would be appropriate for the Northern Ireland context?

Professor Hadden: I do not think that those would be very different from the provisions that are already in law in both the Republic and the United Kingdom through implementation of the European Convention on Human Rights. It seems to me that those have worked reasonably well. Why try to reinvent an entirely new structure for them? The point is that a bill of rights for Northern Ireland becomes part of the law of Northern Ireland in the same way that the European convention is now part of the law of the UK and the Irish Republic.

Miss McIlveen: OK. Thank you.

Mr Durkan: Thank you for the presentation, Professor Hadden, and thank you to colleagues for some of the interesting points that they raised. I know that you are keen that we do not waste more time — I do not even mean us as a Committee; it is maybe us as an Assembly or a society — making arguments over the nationality and citizenship issue. You said that that is resolved as far as people are concerned. The problem though is that it is not always resolved as far as policy is concerned.

You have worked in this field for a very long time. When you sat down all those years ago and were writing or envisaging what might be in a bill of rights here and how it should or could look, did you have any inkling that we would be here in 2020 and still not have a bill of rights? I am sure that you were not naive enough to think that this would not be problematic because, sadly, so much here is, and has been, problematic. Are you in a position to speculate on how you think that the absence of such a piece of work and our having a bill of rights has been to our detriment in the intervening period?

Professor Hadden: My view on that, as things have developed, is that we are getting on reasonably well without a bill of rights. The point of putting a bill of rights in the Good Friday Agreement was to give all the people in Northern Ireland — the two main communities and the people in-between — confidence that their respective communal and individual rights would be protected. In a sense, that is being delivered by the document that I keep referring to, which is the agreement between the two Governments. The fact that we have not managed to get agreement between the parties or the lawyers on the various human rights commissions is, to me, understandable but not that important.

We are getting on reasonably well as we are. It would be nice to have a bill of rights that did the job that was intended, particularly in the context that there may be a change of constitutional status at some time in the future. It would be helpful to have that written down in more detail than is provided in the British-Irish Agreement that I keep referring to. There is a job to be done to fill out what is referred to in that British-Irish Agreement, which, as I have said, deals with not just the two communities but all the people in their different identities. That would be helpful, but we are getting on reasonably well without it.

Mr Durkan: Thank you, Tom.

Mr O'Dowd: Thank you for the presentation. That was very interesting.

The Chairperson (Ms Sheerin): That is brilliant. Thank you very much, Professor.

Professor Hadden: Thank you. If there is anything further that I can help with, just ask. I might even draft you a bill if you ask me *[Laughter.]*

The Chairperson (Ms Sheerin): If we ask nicely enough. Thanks very much for your time this afternoon.

Professor Hadden: Thank you very much too.