



Northern Ireland
Assembly

Ad Hoc Committee on a Bill of Rights

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Administration of Justice

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that more if you wish. However, the focus of our evidence today will be on the future and how a human rights approach that is formalised in a bill of rights could bring focus, stability and direction to our path over the difficult and complex months and years ahead.

There can be no return to the old normal in 2021. Whatever happens about a Brexit deal, Northern Ireland will be in a unique situation on 1 January, and we will have to find home-grown solutions to new, arising problems. People are unlikely to accept a post-pandemic return to the old normal of an under-resourced Health and Social Care service, which is dependent on the work of the lowest paid and which fails the old, the poor and ethnic minorities. Are the devolved institutions to lurch from crisis to crisis, with long-term planning impossible? Will the failure to deal with the legacy of conflict continue to leak poison into society? Will we sleepwalk into a constitutional crisis that emphasises only division?

The alternative is a new normal that is based around a coherent and uniting set of principles. Human rights benefit everyone and cannot be used to oppress anyone. They are not an alternative to politics but give a unifying and coherent direction. Let us take, for example, the task of preparing a Programme for Government. If a human rights approach is adopted, it would be based on the principles of identifying the neediest members of society and remedying their situation, participation of those who are affected, equality and non-discrimination, transparency and accountability, and clear benchmarks. It would also be given direction with specific rights that are recognised in international law, such as the rights to health, education, housing, food, work and equal access to justice. A bill of rights would craft those into achievable and relevant laws for our particular circumstances. There is plenty of room for political debate and decision on the various ways in which the desired ends might be achieved. There is plenty of room for technical expertise and the input of those who will have to deliver what politicians decide. However, there will be a common unifying direction.

Where are we in the debate about a bill of rights? Very often, a human rights approach is derided and dismissed as naive, and the advantages of a realpolitik attitude are lauded instead. That implies deals and horse-trading, bribes and inducements, or oppression; the carrot-and-stick, zero-sum approach of the real world. In fact, that approach is uniquely unsuited to divided societies, where people have incompatible national aspirations and allegiances. In split societies like Northern Ireland, a zero-sum approach, where the only choices are supremacy or submission, leads inevitably to conflict. Where national aspiration is one of the interlocking, distinguishing features that determine identity, respect and fairness are a much more negotiable currency than carrot and stick.

Is there a consensus in the Assembly on a comprehensive bill of rights? Perhaps not. Is there a majority for it? Perhaps so. Whatever the position, this Committee has the responsibility to recommend the best way forward to its peers and to the UK Government. We urge that recommendation to be in favour of a workable, effective and comprehensive bill of rights. Thank you.

Dr Anne Smith (Committee on the Administration of Justice): Thank you, Brian. Is it OK if I come in, Chair?

The Chairperson (Ms Sheerin): Of course, Anne.

Dr Smith: Thanks. Good afternoon, everyone. I also thank you for the opportunity to give evidence. As Brian said, I am here wearing two hats: one as an executive member of the CAJ, and the other is that I am one half of a bill of rights project funded by the Joseph Rowntree Charitable Trust. I am working at Ulster University in the law school and the Transitional Justice Institute as a senior lecturer. The other half of that project is Professor Colin Harvey at Queen's University Belfast.

I will talk briefly about the project, because it is specifically referenced in the written evidence, as Brian pointed out. Before doing so, I want to say that it is great to see, for the first time in 14 years since the St Andrews Agreement, that there is now a formal process to take forward a bill of rights for Northern Ireland. The passing of a Northern Ireland bill of rights was an important part of the 1998 peace agreement, so it is welcome to see it back on the political agenda. We hope that our bill of rights project can feed into that political process.

I will talk briefly about our bill of rights project. As part of that project, we took the Human Rights Commission's advice that was submitted in 2008 and translated it into a draft model bill. I am showing it to you here. The reason we did that was very much as a practical approach. It was to say that this is how it could be done. We launched our draft model bill and asked for feedback. It is important to note that we acknowledged that the commission's advice was not unanimous, both within the commission,

at that time, and outside the commission. However, rather than starting off on a blank piece of paper and to respect the spirit and the commitment of the agreement, we concluded that the advice was a strong basis on which to proceed.

The feedback on the draft model bill highlighted, first, that the advice was submitted in 2008. We are living in a completely different world today. In 2008, we did not have Brexit, and we did not have COVID-19. The feedback highlighted that the advice needs to be updated.

Other feedback highlighted that there were certain areas that needed stronger protections. The following were highlighted, but it is certainly not limited to these specific areas: stronger provisions on children's rights; a stronger equality clause; the inclusion of refugee rights; stronger provisions in relation to women's rights, especially reproductive rights; and the inclusion of marriage equality for same-sex couples. Some of those major social issues have had notable success via the Westminster Parliament, but that does not mean that we do not need a bill of rights for Northern Ireland. A bill of rights supplements and complements existing legislation, provides an overarching framework and provides core safeguards.

The other area that was highlighted and was a constant theme in the feedback was Brexit. Professor Colm O'Cinneide highlighted, in his evidence, the serious challenges and concerns that Brexit poses in terms of human rights and equality protections. To bring my presentation to a close, I will mention that, as part of the project, a number of recommendations were put forward, one of which was that, in order to respect the 1998 peace agreement, legislation must be passed at Westminster, as that is the approach that is committed to in the agreement, and that there should be a recommendation of enactment based on an update of the Human Rights Commission's advice. While a bill of rights needs to be in Westminster legislation, a positive report from this Committee would be extremely helpful in convincing the UK Government to adhere to their responsibilities and obligations to bring forward a bill of rights for Northern Ireland.

The Chairperson (Ms Sheerin): Thank you both very much for your oral presentation and your written contribution.

Over the past number of weeks, we have had a conversation about the right to healthcare. There are different perspectives on that and how it could ever be fully achieved. The CAJ briefing paper refers to what happened last week. Much of the narrative, particularly in the media and on social media over the past weeks, has almost pitted health concerns against economy concerns. There are, obviously, health implications for any economic decision that is taken. How do you feel that a bill of rights would encourage a Government or Ministers of any jurisdiction to prioritise health concerns, particularly in the context of the current pandemic?

Mr Gormally: This kind of issue is in all our minds at the moment, particularly as we will all be faced with the task of rebuilding a health and social care service. The point of including a social right such as the right to health is about giving a direction. It is not about judges taking over policy. When you are talking about policy in terms of building hospitals, developing provision and so on, it is about prioritising the health needs of the people. Like all social and economic rights, it is subject to the principle of progressive realisation: we progressively realise, year-on-year, the attainment of the highest possible standard of physical and mental health. That is what a right to health means. It does not take away from politics, because the way in which you achieve the best standard of healthcare is, of course, a matter for political debate, and no court would interfere in the decisions arising out of that.

Where a court might interfere is in a case — I am not describing the events of last week — in which, for example, a political party wielded a veto for reasons entirely unconnected with health to block a mechanism that was designed to protect and increase health. That might very well fall foul of the principle of no regression and no backward movement in guaranteeing people's health. The briefing that we put out — maybe you have it; if not, we can certainly get it to you — is quite detailed. It describes the genesis of the St Andrews veto and the extent to which it is being used. As I said, we are not claiming that the exercise of the veto last week would have broken a bill of rights, but it may well have, because, if you have a direction towards achieving the highest standard attainable in healthcare and then, for unconnected reasons, that is blocked, that could easily fall foul of a bill of rights.

Dr Smith: May I add to what Brian said on the role of courts, which was also mentioned in the previous evidence session by Professor O'Cinneide? My opinion is that a bill of rights that lives only in a courtroom would not be a document worth having. A court should be used as a last resort. When

courts have to be involved, they should be regarded as an accountability mechanism. It is not about taking power away from elected representatives. As I mentioned in my briefing, bills of rights are there to provide core safeguards and to inform how power is exercised and how policies are designed.

The Chairperson (Ms Sheerin): Thank you both for that. I have another question. Towards the end of your presentation, you talked about the current constitutional flux and the conversations that are now happening because of Brexit, and people's inputs to that. You mentioned that a bill of rights, if it were to be created now in the context that the North is part of the UK, where nationalists are seen as a minority in the broader UK, would work as a protection for unionists who may then become a minority on a Thirty-two Counties basis, if we were to have a united Ireland. Can you expand on that?

Mr Gormally: In my view, we have to go back to the whole purpose of the peace agreement or the whole premise on which it was based. That was to deal with the constitutional question by saying that, at the moment, a majority of people want to retain the Union and a minority wants a united Ireland. If that changes, there will be a referendum. If a referendum votes for a united Ireland, that decision will be respected. That was the constitutional deal, but, in the meantime, the idea was to create a society in Northern Ireland that was based on human rights and equality. If you read the agreement, you cannot mistake that purpose. It was to create a society that could be shared and to which everybody could give allegiance on the basis of its fairness, if you like, rather than its national identity.

In those circumstances, the whole idea of a bill of rights, as part of the panoply of protections for rights and equality that the agreement constructed, would be to deal with any change in the constitutional status of this region as well as in maintaining its existing one. In other words, a bill of rights would, of course, be for everyone anyway, but the clear presumption would be that it would and should survive any change in the constitutional character of Northern Ireland.

We can develop that debate, and, if we are having conversations on the constitutional future, which seems very sensible, look at what other structures of the Good Friday Agreement should be retained were there to be a united Ireland. Without any question, a bill of rights would give a firm foundation to make sure that everybody would have their rights at least as firmly protected in the future as they are today.

Dr Smith: I listened to a discussion yesterday on the Constitutional Conversations Group. A bill of rights was raised in that context. As Brian says, it is important to get across the narrative that bills of rights and human rights are universal and are about the universality of human rights. They are for everyone. They are not just for one minority or for the majority: they are for everyone.

The Chairperson (Ms Sheerin): Yes, I think that that is key. It is not a zero-sum argument. We can improve people's rights without taking away from anyone else's rights.

Mr Nesbitt: Good afternoon, Brian and Anne, and thank you for your engagement.

Brian, you made a point about under-resourcing in the health service here, and I absolutely agree with you. I remember, 10 and more years ago, Michael McGimpsey, as Health Minister, making that point and being incredibly accurate about the money that was required for the health service over a two- or three-year period. It was measured in billions, and I think that he got it to within three decimal points. However, he did not get the money. I am with you on that. Do you also accept that there is an equal issue in that the health service is under-recalibrated to be fit for purpose?

Mr Gormally: I am not sure what you mean by "under-recalibrated".

Mr Nesbitt: I think that we all agree that, from the Bengoa report and, previously, the Donaldson report and all the rest of it, we need significant transformation.

Mr Gormally: Yes, indeed. There can be no question about that. If there ever was a question about it, the impact of COVID has demonstrated a lack; it has demonstrated the question of low pay, the lack of staff on a long-term basis, the poor getting sicker and the overall nature of inequality. It is quite right that the health service needs to be transformed and that it will need more resources. Among other things, it is about the willingness of the population — at least those who can afford it — to pay more in taxes to do that. However, we are arguing that, if you rebuild on the basis of there being a right to health, you have a series of principles, which I outlined — accountability, transparency, the involvement of patients and sick people in planning and so on — as well as the right to the highest

attainable standard of health and social care. If that is the guiding principle, other matters, such as MLAs saying that they want to make sure that a hospital stays in their constituency, are not the guiding principles of how this reconstruction goes forward. It is about a direction and a common purpose in going forward. As I said, there is plenty of room for debate — there always will be — on how you achieve that common purpose, but at least you get a decision-making process that prioritises health rather than any other extraneous issue.

Dr Smith: On resources, in the context of a bill of rights, it would be within the maximum available resources, which would mean looking at what the constraints on resources are. That is important. Brian talked about progressive realisation, non-regression and the concept that I just used, maximum available resources. There is guidance on what those mean. General comments from the Committee on Economic, Social and Cultural Rights provide clear guidance on what those phrases mean, and it is important that people know exactly what those phrases mean when they talk about them.

Mr Nesbitt: Maybe you can give us an indication of that because I am not aware of it, and, hopefully, we will look at it in more detail. However, if you are having an argument about maximum available resources, and the Health Minister is making the case — as Michael McGimpsey did — but the Education Minister is saying, "I need the resources for schools", and the Infrastructure Minister is saying, "I need the resources for roads", surely that can be resolved only through a political agreement.

Dr Smith: Yes. There will always be a balancing when it comes to rights, especially when there is an issue about resources. I do not have the general comments to hand, but the Committee on Economic, Social and Cultural Rights goes through what "maximum available resources" means. That would give an idea of how to balance resources and the budget.

Mr Nesbitt: I am sure that we will take a look at that, Anne. Thank you.

Could a bill of rights have affected how we have dealt with the pandemic, specifically the number of deaths?

Mr Gormally: It could have. In those circumstances, you would look at the priority of healthcare. I am sure that a Minister of Health, for example, gets bogged down in the details of management, governance and resourcing issues, how many beds there are, where can we put them and so on. The point is not to take that decision-making away from the Minister and colleagues but to say that, in all this, the guiding principle has to be: are we improving people's health choices? In those circumstances, if that had been gathered and prepared for, looking forward on the basis of exercises done on pandemics and so on, would we have had the same crisis over PPE? Would people have been discharged to care homes without being tested for COVID-19?

Some of those decisions could have gone either way at the time in the hypothetical situation in which we were working to a bill of rights, including things such as stopping other health treatments. If we had had, since the Good Friday Agreement, or even since 2008, a bill of rights with a right to healthcare, we would almost certainly have had a health service that was better and more fit for purpose than the one that was forced to confront the crisis of the pandemic.

Mr Nesbitt: Those comments are highly speculative, and I hope that you are not implying in any sense that anybody in charge of driving the health service, such as the Minister or the Chief Medical Officer, is anything but focused on improving people's health choices.

Mr Gormally: I am not suggesting that for a moment, and I think that I just said that. The point is: are we to rely on the goodwill of whoever is in a particular position at the moment, or are we, as a society, prepared to declare that people do have the right to the highest attainable standard of healthcare? If we do believe that —

Mr Nesbitt: Sorry to interrupt, Brian, but it is not about goodwill. It is about the professionalism of those people.

Mr Gormally: Yes, of course, but you cannot guarantee professionalism in every circumstance. What I am suggesting to you is that a bill of rights that includes that provision gives you the certainty that, whoever is in post, the priorities will be similar. That is not a criticism of anybody in any post at the moment. The job of Health Minister this year must be one of the most difficult jobs that anybody has

ever been asked to do. I feel for Robin Swann having to take the decisions and fight for other decisions in the Executive. It is a difficult job. What I am saying, though, is that, had we, as a society, expressed clearly our wish for this principle to be at the heart of all decision-making, his job would have been easier, and the health service would have been in a better position. I am convinced of that.

Miss McIlveen: Thank you for your presentation. In paragraph 10 of your briefing paper, you talk about the pandemic and say:

"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."

Could you expand on that, particularly your point about:

"forcing novel and disturbing policy responses"?

Mr Gormally: I do not think that anybody would have wished to impose the restrictions on society that the pandemic has made necessary, and they are disturbing, not least in terms of their impacts on the day-to-day human rights of our entire population. Just for the avoidance of doubt, we support those regulations. It is reasonable to restrict rights in the pursuit of public health, and, so long as those are proportionate, we are prepared to support them. We have been disturbed at some of the enforcement issues and how some of the legislation has been passed, and we have been public in those criticisms. The real point of that paragraph is, I think, obvious to everybody: the inequality in our society. People from minority ethnic backgrounds, for example, are getting sicker and dying more frequently than people who are not from such a background. That is a fact of life. The fact that poverty and overcrowding means that people get sicker and die more frequently has been clearly demonstrated by the pandemic. From a human rights perspective, it demonstrates that our rights were not adequately protected before, and it presents us with the imperative to make sure that our rights are better protected afterwards.

Miss McIlveen: Is this in response to what is happening in Northern Ireland, or is this more of an overview of what is happening in the broader UK or elsewhere? I am curious about the data on which you have based some of your comments.

Mr Gormally: It is, of course, a general statement. It does not purport to be an analysis of all the demographic data in Northern Ireland and the UK, but the broad figures are very clear. Obviously, you have the age factor. That is clearly to do with the nature of the disease. The fact that people from a minority ethnic background are dying more frequently is clearly not to do with anything genetic or the nature of the disease but is to do with living conditions. It is also clear that people from a poorer background are more likely to be infected, more likely to get sick and more likely to die. We can play around and delve into the statistics to get a more nuanced picture if you like, but the broad-brush evidence is clear that we are a deeply unequal society, that our rights are inadequately protected and that they should be better protected in the future.

Miss McIlveen: I guess that we did not ask for a thesis on this, but when you make statements like that, some evidence would be helpful, too.

You were critical, in your response to Mike, about an MLA who maybe wants to protect a service in their constituency. I am curious about, in your vision — your utopia — of how this should play out in the future, what role you see for politicians, because, clearly, in this rights-based-solutions position that you are taking, you are driving things towards the judges and taking them away from the politicians.

Mr Gormally: As Anne said, and will no doubt say again, we are not in favour of bringing every political decision into the courts, and that would not be the effect of a bill of rights. I know that you have heard evidence from Albie Sachs, amongst others. He talked about how social and economic rights work in a bill of rights in South Africa, and there is not over litigation in terms of policymaking there. The politicians still have a still have huge role to play, for good or bad. We saw in South Africa, as it happens, bad decision-making around the HIV epidemic. This is not a simple, zero-sum question of judges or politicians. It is not a matter of what you give to judges, you take away from politicians. It is about guiding principles and certain basic concepts, such as no regression, which means that you

do not go backwards when it comes to people's health unless forced to do so by an economic disaster or something like that.

As Anne has also said, we are only ever talking about doing what is possible using the maximum resources available. You cannot wish into existence a utopia, and what I am describing is hardly a utopia. Rather, it is a society trying to do the best thing and saying that it is trying to do it. We have focused very much on the right to health, and it is a good example. I think that, when we are talking about issues, we have to ask about the contrary position: why would anybody not want people to have the right to health? Are we simply to rely on what I described as goodwill, which Mike pulled me up on, or on the professionalism of people who get political posts? Or are we to say as a society that this is the direction that we want to go in, and only if you blatantly disregard that direction will you end up in court? I think that that is a right and proper way to organise a society.

Miss McIlveen: Thank you.

Dr Smith: Adding to that, and reiterating what I said earlier about the role of courts, they should be seen as the last resort when all of the other institutional safeguards have failed. When something does go to court, comparative experience shows that even courts that have the strong judicial power to set aside incompatible legislation often bat the ball back to Parliament and give it a year or so to amend the incompatibility to make it human rights-compliant. So, a type of dialogue is created between the three branches of government. It is not about taking power away from one branch and giving it to another branch. Bills of rights and the roles of courts should not be viewed as the judicialisation of politics because comparative experience shows that that is not what it is. Actually, some academics will say that courts have been far too deferential in their treatment.

Miss McIlveen: Thank you.

Mr Stalford: Thank you for your evidence thus far. I suggest that what happened last week was the defence of people's economic rights because, as you said in your presentation, the poorest people get the sickest and have been the most disproportionately affected by this. I suggest that, by enabling the poorest people to go to work, what happened was a move to protect not only their economic rights but their health rights.

Mr Gormally: I do not think that it is our role to second-guess the political choices that have been made around the Executive table, but, in any situation, you can have a conflict of rights. Let us take a completely different example: the right to protest, to march, is a fundamental right. If the police seal off a road to facilitate a march, they are also affecting the rights of people who live in the neighbouring houses and cannot get out of their houses and so on. While you have the article 10 right, the freedom of assembly, you also have the article 8 right, living a private life without interference. You have to go through a balancing exercise, and that requires you to say which is the most serious right and which is the biggest infringement. Are we talking about mild inconvenience compared with a serious exercise of a very basic right?

In those circumstances, you may argue that the only way in which you can improve people's levels of poverty or subsistence is by opening up all workplaces, pubs, bars and so on so that the economy, in an indefinite future, makes people wealthier and healthier. If that is the argument, it needs to be balanced against the health advice on imposing restrictions to prevent pandemic infection. It is not for me to say which of those is right. It is a balancing exercise. A veto, in those circumstances, is the abandonment of political compromise, but that is another matter.

Mr Stalford: I absolutely agree with you that there should be a right to freedom of assembly and procession. I do not know of any jurisdiction in the world that has a right not to be offended by other people doing that. Apparently, however, the law is structured that way in Northern Ireland.

Mr Gormally: I was referring to article 8 of the European Convention, which is the right to a private life, and that involves being able to move inside or outside your house. I was using that only as an example. I did not mean to characterise the nature of the parade.

Mr Stalford: Absolutely. I know that. You said that things end up in court only when "blatant" action takes place. However, what is blatant to you might not be blatant to me. Do you know what I mean? Your theme of balancing is absolutely right. So much of this stuff is about balance. However, do you

accept that what one person considers to be a blatant act of bad faith by government, others clearly do not, which becomes a matter for the courts to determine?

Mr Gormally: Blatant is, of course, a subjective term. However, if we had a law, it would be given legal effect, quite rightly. In the end, jurisprudence would say what kind of breach of the principle was sufficiently blatant to be justiciable. Yes, that would be a legal decision, and, yes, courts might have to decide that. However, once they decided it, everybody would know the criteria that you had to take into account in making these decisions. There is no suggestion that Ministers would be in and out of court any more than they are today. All Government decisions can be criticised or subject to the law. For example, the Assembly cannot pass in domestic law any law that is incompatible with the European Convention on Human Rights. If the Assembly purported to do that or, indeed, a Minister or a Department acted in contravention of the Human Rights Act, which enshrines the European Convention, they would end up in court. The bill of rights, of course, extends that principle further, but it does not mean, necessarily, that the Government would be in court any more often. People would know the principles and, through case law, how the law was being interpreted, which is the way in which our system of law works.

Mr Stalford: That is fine. Thank you.

Mr O'Dowd: I will follow on from Christopher's comments about the role of the courts versus the role of the elected representative. This has been a theme throughout the discussions in the Committee. I defend the role of the elected representative at all times. As Brian said, we are already subject to judicial review in the courts. Indeed, we have a very low bar here for access to judicial review. A Department therefore takes measures to ensure that its Minister is properly advised on all the rules and regulations that govern their authority. At times, however — I have faced judicial review several times — the interpretation of the law, policies and procedures, is open to contest, and, sometimes, the only way in which a community or a group in the community feels that that can be interrogated properly is through the courts, and the Minister has to go to court to defend their position. The judge will hear both sides and make a decision. I have to say that my legal team won all but one of my judicial reviews. A 0-0 draw on the last one eventually turned into a 1-0 win for me. Nobody wants to end up in court, but we, as elected representatives, have to recognise that power can be abused. It can be misinterpreted, but it can also be abused. There has to be a balance against the abuse of political power.

Many of the things that I wanted to touch on have already been discussed. I was interested in the issue of how — as we do not have a bill of rights in front of us, it is difficult to interpret — the pandemic would have been managed had a bill of rights been in place. Quite clearly, as has been stated, a higher percentage of those on lower incomes, those from socially deprived backgrounds and ethnic minorities are victims of the pandemic than other categories in our society. Could or would a bill of rights have been used to redirect government policy in that regard? I know that you have touched on that, but do you want to explore it any further? For instance, to the best of your knowledge, have jurisdictions that have a bill of rights used that bill to redirect government policy, or has it been shown to ensure that government policy has acted in such a way that it protects the minorities who are suffering the worst outcomes of the pandemic?

Mr Gormally: You have just put forward a brilliant idea for a research project on the differences in how the pandemic was handled by jurisdictions with a bill of rights. I really do not have that information. It is a long-term issue. It is not just about how the crisis was managed. It is about the nature of society and the long-term impact of equality and human rights being at the centre of policymaking.

You mentioned having judicial reviews against you. Back in 2015, the CAJ won a judicial review against the Executive on the question of an anti-poverty strategy. We took a judicial review because it had been in law since the St Andrews Agreement that there should be an anti-poverty strategy. We went to court and argued that there was not one. In response, Government lawyers argued, "Oh, well, there was this policy and that policy". The judge made a very strong statement about how a strategy had to have a beginning, a middle and an end, with benchmarks and so on. That is exactly the kind of issue that could go to court and, in that case, has been to court. It is analogous to the kind of issues that would arise under a bill of rights. What did the court say? It did not say, "You will have an anti-poverty strategy that says, 'This, this and this'". It said, "You will have an anti-poverty strategy. Now, please, go away and draft one". It was not therefore a question of laying down what should be in an anti-poverty strategy. We have our views about what a human rights-compliant anti-poverty strategy should look like: transparency, involving people, remedies for the poorest first and so on and so forth.

The court, however, does not say that. It simply says, "It is the law that you have to have a strategy. Please develop one". That is a good example of the way in which judicial review would operate under a bill of rights.

Mr O'Dowd: If we had an anti-poverty strategy, those who are facing the worst outcomes from the pandemic would be protected. Of course, the best way to protect low-paid workers is to make sure that they are not low paid. I look forward to all the people who advocate for low-paid workers joining the virtuous cause and ensuring that people are properly paid after the pandemic.

Dr Smith is looking to come in.

Dr Smith: I will be brief. It has been a mixed bag in comparative jurisdictions. As I mentioned earlier, some academics have argued that the courts have not gone far enough in their judgments. In some judgments, the implementation and enforcement of the courts' decision takes too long. In one example, it took so long that the applicant who brought the case to court had died. That is why this is so important: yes, courts have a role, but they should be seen as the last resort.

The purpose of a bill of rights is to inform how power is exercised. It is to inform and make sure that policies and legislation are human-rights compatible in the first instance to preclude the need to go to court, but, of course, that avenue will always be open to people who have to use the court as a last resort.

Mr O'Dowd: Is a bill of rights a constitution? Is it a type of constitution — the rule book — that Government play by? In my opinion, the two of you and Professor O'Conneide have framed it in such a way that a bill of rights allows for a society coming out of conflict to do so in a more stable way: it means not constantly picking at the sore of the conflict and having a rule book by which all sides know how they operate, regardless of who has the majority or who has the minority.

Finally, do bills of rights evolve? Have they evolved in the nations, states and societies that use them? Are they of such a nature that they can evolve easily over time?

Mr Gormally: Anne may be more able to answer the second part of that. Colm was quite right in saying that a bill of rights would be much more effective as a foundation document, if you like, of a peaceful Northern Ireland than what we are currently looking at, which is a cobbled together, piecemeal protocol, which, of course, is faced with the disruption of Brexit. In a layman's sense, you would call a bill of rights constitutional, in the sense of defining the nature of the society that we want to live in.

In a legal sense, in the British system, Parliament is always sovereign, so you cannot have a law that cannot be changed by Parliament. However, there are ways of entrenching law. The Human Rights Act is entrenched to the extent that you can amend it only very explicitly. You cannot amend it by implication — by passing a law that is incompatible with it. On the contrary, the law with which it is incompatible will be not struck down, necessarily, but a declaration of incompatibility will be made. To that extent, you could legally entrench a bill of rights. It would need to be passed at Westminster. Obviously, in the UK system of law, no written constitution is superior to Parliament. However, in every sense that matters, I agree with the characterisation of a bill of rights as being a constitution for this region.

Dr Smith: I will come in on the second part of your question, John. The very short and direct answer to your question is yes. For example, there have been several amendments to the Canadian Charter of Rights and Freedoms. Another example of how bills of rights have evolved is through the judicial interpretation of rights: the way in which rights are framed. I am looking at, for example, the equality provision. It would be drafted in a way that enabled it to reflect the current attitudes on a particular social issue. It is therefore very important that bills of rights can evolve with time; something that is set in stone will not last very long. The European Convention on Human Rights has been mentioned on several occasions — understandably so because most of its provisions have been incorporated into our domestic law — and it has been described as a living instrument and has also evolved. Yes, there are examples.

Mr O'Dowd: Thank you.

The Chairperson (Ms Sheerin): John's question was on international examples of a bill of rights and how they have been exercised during the response of Governments to the pandemic. Have you

looked at the Brazilian example? Brazil has a fairly high infection rate, but the families who were affected were able to argue that commitments made in the bill of rights had not been followed and use that as remedy.

Mr Gormally: Yes, I believe so. I am not an expert on the Brazilian situation. We have talked about it a little. It is difficult to comment without knowing the politics of another huge country, but Bolsonaro, a COVID sceptic, to put it nicely, is in charge of the country. Obviously, part of the result of that is a runaway epidemic. Legal recourse in these circumstances is unlikely to be fast enough to change things if you have a political executive determined not to fight the pandemic as recommended by health experts. Therefore, it is no panacea. We are not creating a utopia here, but, in the long term, a bill of rights would have a positive impact on society, its fairness and its ability to face crises.

Dr Smith: The reference to Brazil is in the written submission from the Equality Coalition and covers the right of the veto that was used last week. It just so happens that, when I read the draft of the submission, I said to Daniel, "There is so much scope there for an academic article". So, Daniel and I are going to expand on that, and when we have done more research on the situation in Brazil, we will be more than happy to give you a copy of that article. We talked about the article only yesterday, and it is at a very early stage.

The Chairperson (Ms Sheerin): Brilliant. Dr Smith and Brian, thank you very much for joining us this afternoon. We will let you go.

Mr Gormally: Thank you very much.

Dr Smith: Thank you.