Northern Ireland Assembly

Ad Hoc Committee on a Bill of Rights

# OFFICIAL REPORT (Hansard)

Briefing by Rt Hon Sir Declan Morgan, Lord Chief Justice of Northern Ireland

26 November 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)
Ms Paula Bradshaw
Mr Mark Durkan
Miss Michelle McIlveen
Mr Christopher Stalford
Mr John O'Dowd

**Witnesses:**

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|---|---|
| Sir Declan Morgan | Lord Chief Justice of Northern Ireland |
| Ms Mandy Kilpatrick | PPS to the Lord Chief Justice |

**The Chairperson (Ms Sheerin):** We will receive a briefing from Sir Declan Morgan, the Lord Chief Justice for the North. Sir Declan was called to the Bar in 1976 and had a distinguished career as both a junior counsel and senior counsel, prior to his appointment as a High Court judge in 2004. He has served as Lord Chief Justice since 2009.

At this point, I would like to welcome to the meeting the Lord Chief Justice, together with Mandy Kilpatrick, his principal private secretary. Declan, you can begin your briefing when you are ready. Thank you very much for joining us this afternoon. *[Long Pause.]* Hi, Mandy, can you hear us? *[Long Pause.]* OK, we will take our ease for a wee minute to sort this out.

*The Committee suspended at 2.05 pm and resumed at 2.11 pm.*

**The Chairperson (Ms Sheerin):** Apologies for the disruption; we had some technological issues. Sir Declan and Mandy, I welcome you to the meeting. Thank you very much for joining us this afternoon. When you are ready, you can begin your briefing.

**Rt Hon Sir Declan Morgan (Lord Chief Justice of Northern Ireland):** Yes, sure. I do not intend to take very long. Thank you very much for inviting me. As I understand it, the issue that you want to discuss is the justiciability of economic, social and cultural rights. I know that you have had the benefit of hearing from a number of other distinguished witnesses who have come before the Committee, and I am sure that they have been very helpful in explaining much of this to you. Therefore, some of what I say is probably well known to you.

The concept of a bill of rights has been established for a very, very long time indeed. In a sense, Magna Carta in 1215 is a classic example of a bill of rights in England. There was a further example of a bill of rights in England in 1689, which was, depending on your view, either about deposing a king

who was behaving badly or depriving a good king of his regnum. We then had another bill of rights that arose out of the War of Independence in the United States in 1789. All three, you will see, were as a result of major constitutional issues: one was a dispute between the barons and the king in 1215; one was a dispute over who should be king in 1689; and the other was about the establishment of the new United States of America. All those bills of rights focused on civil and political rights, and that remained largely the theme into the last century.

One sees that the European Convention on Human Rights (ECHR), which was ratified by the United Kingdom in 1950, is again a convention that is strictly based, in effect, on civil and political rights, with the possible exception of the protocol in relation to education. It was, however, around that time that the concept of what a bill of rights should contain started to change. One sees, therefore, that, in 1949, thanks to the work of Eleanor Roosevelt, the United Nations Declaration of Human Rights (UNDHR) was adopted by the United Nations. The declaration included rights such as the right to social security in article 22; the right to work and to free choice of employment in article 23; the right to rest and leisure — a much sought-after right, I have to say — in article 24; the right to a standard of living adequate for health and well-being in article 25; the right to education in article 26; and the right to freely participate in the cultural life of the community, to enjoy the arts, etc in article 27.

Those are much more in the nature of social and cultural rights.

The same can be seen in the constitution of India, which, as I am sure many of you will know, is the second-longest constitution in the world; therefore I am not going to attempt to read out the various rights that are protected in it. However, they include some social and cultural rights. The Indian Supreme Court has, in a sense, developed economic rights out of that. In litigation in the 90s, the Indian Supreme Court devised, out of the right to life, a right to health. That remains a matter of some controversy among jurists in India. It has also expanded the concept of the right to housing, although I think it of some importance, in relation to what the Committee is looking at, whether that has actually made a difference on the ground. That is a matter of some debate.

South Africa is another model of the involvement of the type of rights that we are talking about: economic, social and cultural rights. South Africa has a right to housing, including the right to due process with regard to court-ordered eviction and demolition; rights to food, water, healthcare and social assistance; a raft of children's rights; a right to education; a right to use the language of one's choice and to participate in the cultural life of one's choice; and a right of cultural, religious and linguistic communities to enjoy their culture, practise their religion, and use their language.

All those are enhanced by the preamble or recitals that accompany the constitution, and there is as well, of course, a series of recitals that act as a preamble to the United Nations Declaration of Human Rights.

Some of them, therefore, are assertions of rights that arise on the international plane, that is the United Nations and the European Court of Human Rights. Some on the national plane, such as India and South Africa, are as a result of constitutional arrangements that are being put in place or amended. In the United Kingdom, of course, we have no written constitution, but such rights can be inserted by legislation. The question is this: what impact do they have?

So far as the European Convention on Human Rights is concerned, although it is characterised at a somewhat high level, there is a sustained body of jurisprudence from the European Court that assists in the interpretation of what the rights actually deliver. The establishment of the court to both interpret and develop the rights is important in asserting that those rights were to be justiciable.

In the local environment, perhaps things are not quite so clear. I have tried to think of some examples of what was an indication of justiciability and what was not. My example is the Child Poverty Act 2010, which has implications for Northern Ireland. It became the subject of litigation in 2012 because the Act provided that, within two years, child poverty should be reduced. To do that, it provided various mechanisms, one of which was the establishment of a commission to advise those devising the policy that was to lead to progress.

The commission was never established by the Government, and there were criticisms of the analysis of progress. Eventually, it came before the courts. The courts found that the failure to establish the commission, which was, if you like, the granular piece in the statute, was unlawful. However, when it came to defining progress on addressing child poverty, the courts concluded that that was really a matter of political judgement and that it was not for the courts to intervene and that, therefore, the issue was not justiciable.

That is a feature of what I call target duties. In other words, you have legislation that defines in all sorts of ways that there has to be a health service and an education system, etc, but those are target duties that, although carrying political responsibilities and political implications, will not, of themselves, provide a justiciable basis because they lack the granularity that is a feature of what is justiciable.

Another example, although somewhat different, is the protection of victims, because, as you will see from some of the instruments that you have, no doubt, considered from time to time, the rights of victims is one of the issues included in many of the documents that go into economic, social and cultural rights.

In this jurisdiction we have dealt with that but in a different way. There is a Victim Charter, with which I am sure many of you will be familiar. It sets out extensive rights in relation to victims in terms of the information that has to be provided to them, the circumstances in which their views have to be taken into account, the making sure that in relation to decisions to prosecute there is communication, consideration and explanation, and various measures to be taken when the case goes to court and at trial.

Those are examples of what a victim could properly complain about in the courts. In other words, the courts would be able to say that those are the steps that the victim is entitled to expect, and if there has been a failure to provide them, the courts have to intervene and recognise that for the benefit of the victim. The courts cannot make it up if you simply have a right for victims in a bill of rights or similar instrument.

What I am really saying is that, in looking at justiciability, there needs to be sufficient granularity. Courts will also look at whether it is a political rather than a legal issue. That should perhaps inform the Committee's judgement about what it wants to do. What would a bill of rights for Northern Ireland actually seek to achieve, and how would the legislature want to see that held to account, either politically or through the courts? How much, if you like, discretionary judgement does the legislature want to put in the hands of the courts and how much political control does the legislature want to reserve for itself?

As I said, I intended to be brief. I hope that that has been helpful to some extent.

**The Chairperson (Ms Sheerin):** Chief Justice, thank you very much for that; it has indeed been helpful. You said that we had received a lot of evidence from a range of witnesses. I do not know whether you caught the evidence session that we had some weeks ago with Professor Chris McCrudden and Kevin Hanratty.

Professor McCrudden spoke about a range of methods and models that could be employed to prevent governments, where a bill of rights had been applied, from being constantly dragged before the courts. He talked about the Scottish example with a pre-legislative scrutiny body to scrutinise matters so that it would not get the length of JRs. How could something like that be employed to prevent a load of judicial reviews in the event of a bill of rights being created?

**Sir Declan Morgan:** Pre-legislative scrutiny is designed to ensure that there is clarity in relation to the provisions and that people know where they stand, and that is highly desirable.

My own view is that you are very lucky if you can predict all the ways in which those rights can come into play. Victims or applicants, and their lawyers, are clever, inventive people, and if there are issues that have not been picked up, they will be pursued by those who seek to get the benefit of them.

A clear, well-crafted document can certainly reduce the extent of judicial involvement. To be honest, however, I have not seen all that many of those recently.

**The Chairperson (Ms Sheerin):** You have raised concerns about the impact that the Internal Market Bill could have on the public's relationship with the law and the British Government's stated intention to break international law. You said in your presentation that a bill of rights was not a new concept and that oftentimes it arose out of new constitutional arrangements and when countries were granted or gained independence.

We are in the process of leaving the EU, and, effectively, there is constitutional change in Ireland as a result because the North will no longer be a member state of the EU, and that will have implications for

business owners, community groups and individuals, not least in the field of rights and the rights that people have access to.

I have asked witnesses how a bill of rights might address some of the rights gaps that we may see as a result of leaving the European Union and how the Committee might address that, given that the Committee's stated intention is to consider the creation of a bill of rights, considering 1998 and the impact of Brexit on our circumstances.

**Sir Declan Morgan:** So far as economic rights are concerned, since we do not know what the economic outcome will be of the arrangements that are ongoing, it is difficult to make a judgement on it.

The principal civil, social or political right in a sense likely to be affected if we are outside the EU is the lack of access to the Charter of Fundamental Rights. That will, I imagine, impact in certain limited ways having regard to the fact that the Human Rights Act still incorporates many relevant parts of the European Convention on Human Rights, and much of what is in the Charter of Fundamental Rights was taken and developed from the European Convention.

There is a strong relationship between the Court of Justice of the European Union and the European Court of Human Rights in discussion about ensuring that there is a common approach to civil and political rights. Where there may be some distinction is that the charter is quite specific on issues of data protection, and it provides a degree of granularity in relation to that that is perhaps not as apparent in the convention.

I suspect that, just as the convention is a living instrument that takes into account soft international law such as the United Nations Convention on the Rights of the Child, the Beijing rules in relation to young people, and the Convention on the Elimination of All Forms of Discrimination against Women, it is likely that the European Court of Human Rights will also be influenced in its approach to issues of data protection and related matters by taking into account, in a soft law way, the jurisprudence developed from the charter.

If that is right, so far as the civil and political rights that we enjoy at the moment are concerned, it seems to me that the impact may be limited. Whether that turns out to be right, who knows? Anybody who can predict any of this is way ahead of the posse. I can see the force of saying that if we are changing our relationship with Europe in a meaningful way, it makes sense to look at the pluses and minuses from the point of view of all sorts of rights.

**The Chairperson (Ms Sheerin):** Absolutely. Thank you very much, Chief Justice. I will pass you now to our Deputy Chair, Mike Nesbitt.

**Mr Nesbitt:** Sir Declan, good afternoon and thank you very much for engaging with the Committee. It is much appreciated.

**Sir Declan Morgan:** It is a great pleasure, Michael.

**Mr Nesbitt:** I wish to ask about two areas, Sir Declan. The first is your view on the public perception of the judiciary, particularly its independence, impartiality and integrity if it is being asked to adjudicate on the implementation of a bill of rights. There is an evidence base that shows that, when judicial rulings are given on political matters, the judiciary takes a hit. Probably the best example is the front cover of the 'Daily Mail' from November 2016, on which a headline screamed "ENEMIES OF THE PEOPLE", referring to the three High Court judges who said that Parliament was supreme with regard to article 50. How likely do you think that is and how damaging would you consider it to be to the judiciary?

**Sir Declan Morgan:** There is no doubt that headlines of the type that you referred to can be damaging to public confidence. I suppose that my answer is that, from the standing of the judiciary, it may be more important that the judiciary is seen to be able to speak truth to power. Nobody really disputes now that the decision that was the subject of that headline was absolutely right: that Parliament should be in control and that it is not for the Executive to start changing the law on their own, although it may take a bit of time for everybody to recognise that that is the case.

To some extent, judges would lose their reputation for integrity and independence if they were not prepared to deal with whatever Parliament has decided should be put before them. A lot of what I would call social issues have come before my court over the past 10 or 11 years as Chief Justice.

However, 10 or 11 years before that, they would never have come before us, and we would not have been asked to deal with them. They have made it difficult for the courts from time to time, but I do not think, in this jurisdiction anyway, that there has been a material impact on public confidence in the independence and integrity of the judiciary as a result.

**Mr Nesbitt:** Would it be fair to say that those sorts of headlines, although they are certainly not welcomed by the judiciary, have no actual impact on how you perform your functions?

**Sir Declan Morgan:** Yes. At the end of the day, we have to deal with the cases that come in front of us and we have to apply the law to them. We do not make the law up.

The scope of what we do has been changed markedly by the decision of the legislature to introduce the Human Rights Act 1998. That has caused us to have to deal with a raft of issues that were very new when the Act was introduced in 2000.

We have also had to deal with the consequences of those awkward issues in Parliament. Some of them came before our court and then went off to the Supreme Court to get resolved. That is what we are there for, however, and, even though it may be difficult, we have to get on with it and come out and ensure that we give decisions that are in accordance with law, because that, at the end of the day, is what is going to sustain our reputation.

**Mr Nesbitt:** Thank you very much, Sir Declan. That takes me to my second area, which is how comfortable you think that you and your colleagues would be adjudicating on a bill of rights. Although applying the law, as you said in your previous answer, is really about judging the facts as presented against the statute, if you are being asked to adjudicate on economic and social rights, which may be progressively realised through Ministers using maximum resources available, it might be argued that you are not being asked to adjudicate on facts but on opinions, and that is perhaps a less comfortable area for you. The final part of my question is this: if you are doing that, do you think that that would be best achieved through a specific court, like the Constitutional Court that South Africa has?

**Sir Declan Morgan:** First, your point about having to deal with particular provisions brings me back to my point about granularity. Judges are not there to decide how the Budget should be split up and how the Executive's resources should be applied among competing priorities. That is not our function, and we should not be asked to do it, and if we are asked to do it, we should decline. That is what non-justiciability is about. Were something of that sort put in front of us, the likelihood is that we would find it non-justiciable, because it is a political rather than a judicial matter.

Your point on the Constitutional Court is well made. As you will know, the South African Constitutional Court has a range of people from different backgrounds. You have academics, people from the community and lawyers, but the idea is that it is a court that represents the community. It is not designed to be a Court of Appeal or strictly some kind of interpreter of the law; rather, it is intended to act as a vehicle for social development. In some areas — for instance in the United States — the Supreme Court performs that function. In South Africa, the Constitutional Court is rather differently crafted, and that model is quite common in other jurisdictions as well.

Of course, you then have to figure out what scope you are going to give to the Constitutional Court. I can understand that things such as the preamble will inform the general approach that the Constitutional Court will take, but many of these things might have a lifespan. By that, I mean that 20 or 25 years might be entirely sufficient for the thinking about the need for a Constitutional Court in a society, particularly one that is developing, whereas several hundred years might be suitable in other cases. I think that one needs to be careful about that.

**Mr Nesbitt:** Sir Declan, thank you very much indeed.

**Ms Bradshaw:** Thank you very much, Sir Declan. My question is about the pressures on the court system in Northern Ireland. We know that it is already under serious pressure, not least with the COVID lockdown. What impact would an expansive bill of rights with socio-economic rights in it have on your workload?

**Sir Declan Morgan:** I would expect to be consulted on the detail as it emerged. We would have to have an operational input into what we could manage and what might require additional resource. It does not necessarily follow that a reassertion of rights would have that type of impact, but I find it difficult to see that economic rights are going to be easily made justiciable. For instance, if you are

looking at things such as the right to work, the right to housing and the right to health, none of those assertions, of themselves, is justiciable. What will become justiciable is their underpinning, because those rights should create political obligations rather than judicial obligations. It is the coming into play of those political obligations that should then form the granularity that would make it appropriate for the courts to become involved in whether the substance that was given to the right was being delivered. That is why, in the Child Poverty Act 2010 case, it was the failure to appoint a commission, which was a granular obligation, that led to the court being able to intervene.

It is certainly important to bear in mind what the impact on the courts would be. When the Human Rights Act came into force in 2000, the number of judges in the High Court was increased by two, which was about a 25% increase at that time. It was considered that the Act was likely to give rise to a substantial body of work, and, indeed, it did so.

**Ms Bradshaw:** Thank you. To follow up on that — you may have answered this already — today is Carers' Rights Day. My concern, going back to the Bill of Rights Forum, is that we would have raised expectations for separate sections of society that things would improve quite quickly for them. My husband is a carer for his 90-year-old father, so I understand the pressure that people who have a lot of caring responsibilities are under. How could a bill of rights support individual sections of society, such as carers, who are on their knees at the minute?

**Sir Declan Morgan:** You are right to be careful about the expectation that may be generated as a result of the establishment of a bill of rights. The point that I am trying to make is that, of itself, it may indicate a pathway, but it is unlikely to — in any immediate way, anyway — provide more than that.

Some of the documents that have generated litigation on rights have evolved over quite a long period. The European Convention on Human Rights was ratified in 1950 but trundled along at a modest pace for about 20 or 30 years before it started to pick up. It was as a result of the pick-up that people in the United Kingdom started to use it. Eventually, 50 years later, we put it into law, and it has continued to develop since then.

There is a potential problem here if you create a big bang, as it were, about a bill of rights that contains what are effectively a series of non-justiciable promises and you then do not provide the granularity in the legislative system to develop and deliver on those rights. Legislation takes a long time. It requires a great deal of thinking, and it will involve the apportionment of the available resources to the Executive. I would consider all of that very carefully.

**Mr Durkan:** Good afternoon, Sir Declan.

**Sir Declan Morgan:** Good afternoon, Mark.

**Mr Durkan:** Paula touched on the workload of the courts and the impact that a bill of rights might have on that. Ahead of a bill of rights, however, we have Brexit. You touched on this a wee bit in the briefing paper that you submitted. In your opinion, what impact will Brexit have on the justiciability and enforcement of rights here?

**Sir Declan Morgan:** As I have indicated, on civil and political rights, we might lose the protections that are given under the Charter of Fundamental Rights, which are governed by the Court of Justice of the European Union. It is the ultimate enforcement authority. Various other issues will affect much stuff in different ways. There is still discussion taking place about the European arrest warrant, for instance, which is a matter of safety. Procedures might be put in place to deal with that. I suspect that what will happen for the courts is that some of those things will give rise to problems. People will have different views about how the problems should be solved, and the matter will come before the courts. There is an expectation that, as Brexit comes to pass, problems will come to the fore and that the courts will be asked to deal with them.

Just before I came on this Zoom call today, I spent my second lunchtime participating in a seminar at a conference that will run over six days, organised by the Irish Centre for European Law. It is chaired by Queen's, and we are looking at all those things to see where problems are likely to lie. For the reasons that I have given, it does not necessarily follow that civil and political rights are going to be materially impacted on if, first, the European Convention stays in place and, secondly, convention law marches in pace with the jurisprudence of the Court of Justice of the European Union.

**Mr O'Dowd:** Good afternoon, Sir Declan, and thank you for your presentation and evidence so far.

**Sir Declan Morgan:** Good afternoon, John.

**Mr O'Dowd:** You are acutely aware that Departments and statutory agencies are already governed by a lengthy statute book, which leaves them open to judicial review. As you said, a number of socio-economic issues have appeared before the courts in recent times. I suspect that that is as much to do with the Executive and the Assembly being up and functioning as it does with anything else. Do you agree that, if Departments and others adhere to a proposed bill of rights, as they have to adhere to other statutory legislation, the work of the courts will be lessened, although there is always the prospect, as there should be, of judicial challenge?

**Sir Declan Morgan:** I would put it slightly differently. That may be right, but the question mark that I have in my head is over whether the production of an enhanced, or apparently enhanced, series of protections will create expectations that might prove difficult to deliver. The boundaries of what any bill of rights might offer will undoubtedly be tested, at least in the initial stages, to see to what extent the courts can assist through its interpretation and the appropriate application, as well as to consider the scope of what we, as the courts, should be looking at and what is a political matter for MLAs to sort out. There will therefore always be a process of testing at the initial stage. Once that is over, it may be that everybody will know where they stand; that we will be able to get rid of the judge over your shoulder, as they used to say in the 1980s; and that the systems will bed in. If that happens, it happens. If we need to get additional resource to do it, we will make the case for that, and if we find that we can do it within our existing resource, we will do it.

**Mr O'Dowd:** I am working on the basis that, if we get a bill of rights, the judicial challenge will come through a JR. It has been suggested and discussed in other areas that our bar for accessing a judicial review is lower than that in other parts of these islands. Is that something that you suggest we should look at?

**Sir Declan Morgan:** I do not believe that there is a distinction. We have a leave test, which, in principle, is broadly the same as that in other parts of the United Kingdom and, indeed, the Republic of Ireland. The notion that a judicial review is more easily achieved here is therefore not supported by the evidence. We have somewhere around 350 to 400 judicial reviews a year. It is not a colossal number. It requires at least one judge to be involved. It can get a lift when there are no other avenues for people to go down. That was the problem when the Executive were not sitting. There were a number of cases that we had to deal with during that time on issues that the Executive or the Assembly might well have sorted out for us without us having to do so, but I do not believe that there is evidence that there is something awry about the way in which judicial review is available in this jurisdiction.

**Mr O'Dowd:** OK. That is an interesting and very informative contribution to that debate. Do you envisage a role for a dispute resolution mechanism — a mediation mechanism — that perhaps would not require full court hearings? Would that be useful in this arena?

**Sir Declan Morgan:** We do that quite regularly. In a judicial review, you try to get the papers at an early stage, and the first thing that you will look to see is whether it looks like an issue that could benefit from some form of formal or informal attempt by the parties to resolve it. The cases regularly never come to fruition, because we are able to give a bit of encouragement. We do not quite act as mediators, but we send people off with a suggestion as to how they might start to approach the case, and we are reasonably successful in resolving a lot of those cases by agreement. That always means that there is much more likelihood of the result standing, because, if people have agreed the outcome, there is less likelihood of trouble down the line, as it were, if somebody does not like the judicial decision.

**Mr O'Dowd:** Finally, on where a bill of rights should be legislated for, do you think that it requires Westminster legislation, considering the wide gamut of treaties and agreements that we will be involving?

**Sir Declan Morgan:** I am not going to answer that.

**Mr O'Dowd:** I did not think that you would. *[Laughter.]*

**Sir Declan Morgan:** If it eventually comes to me, I will write a judgement about it. *[Laughter.]*

**The Chairperson (Ms Sheerin):** Thank you very much, Sir Declan, for joining us, and Mandy as well. Thanks for your patience throughout our hiccups at the start of the meeting.

**Sir Declan Morgan:** Thank you very much.