Northern Ireland Assembly

Ad Hoc Committee on a Bill of Rights

# OFFICIAL REPORT (Hansard)

Briefing by Sir Stephen Irwin

17 December 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:**
Sir Stephen Irwin Lord Justice of Appeal, Retired

**The Chairperson (Ms Sheerin):** Sir Stephen, welcome to the Committee. Thank you very much for joining us and for the submission that you provided us with before coming. Do you want to begin your briefing?

**Sir Stephen Irwin (Lord Justice of Appeal, Retired):** Thank you very much. It is a pleasure to be with you. I am not going to repeat what I put in writing; I will just add a few points to flesh it out and put some emphasis to it. I listened with care to what Sir John Gillen said, and I watched and listened to the session with the Lord Chief Justice, Sir Declan Morgan. I am not doubting the use of law to make change. A good example came up this afternoon: the recommendation from Sir John's review that victims of sexual crime should be able to give their evidence in private. That is a change in the law that makes a real difference precisely because it is particular, explicit and clear. My concern is that, if you move away from what other speakers have called "granularity", there are all sorts of dangers that flow from that.

Let us begin with the nature of the rights that have been protected and, generally speaking, are protected under the European convention, the charter or any of the other instruments that are regularly the basis of litigation and decisions. Historically, the nature of the rights that are protected have been civil and political rights. They have involved the relationship of public authorities and the state with individuals and the freedom of action of individuals, or they have engaged with obligations of the state, which can be positive or negative, towards citizens with regard to prisons, the planning system or whatever it might be. Those are all specific. They are conflicts that arise out of a specific set of facts that they seek to resolve. It is the decisions of the courts in interpreting those constitutional rights, wherever they are expressed, that make the difference. The right is only any good to groups of individuals with common ground, or to individuals themselves, when there is a decision that spells out what it means. Aspirational rights seem to me to be a great idea in theory, but they carry very real risks. That was why I gave the focus that I did to the written paper.

Let me try to flesh it out with an example. Suppose you put an aspirational right in a constitutional instrument such as a bill of rights for good-quality housing, whatever the language might be. First, that is of no use unless it is entrenched. If it is not entrenched in the bill of rights so that it can be changed by a majority in a legislature at any time, it really lacks any constitutional force. Let us suppose that it is entrenched, as is often the case, with a 66% or 75% majority needed to change it. Then you have an election, and into the legislature comes a majority on a fiscally conservative platform. You immediately set up a potential or actual conflict between the constitutional right, which is entrenched, and the election result — the platform on which the Administration commanding the majority in that legislature has just been elected. What do you do about that? What do the courts do about that, if they have to grapple with it at all? A lobby, or a citizen, will be saying, "In the bill of rights it says, 'I must have more than I have got under the current Administration and the current approach to interpreting specific legislation'". The executive, whether it is in Northern Ireland or elsewhere, will be saying, "We have just been elected on a fiscally conservative basis, so we cannot put more money into", as I put it in the paper, "x at the cost of y; and you the courts, you the judge, are not in a position to say we should".

Therefore, you get to the crux of what I see as a major problem with aspirational rights in constitutional instruments. It is that the courts will be stuck between competing positions, one in the constitution and the other carrying the force of a recent election — of a mandate or legitimacy. Either the courts make a decision about that or they say, "It is not justiciable". If they say it is not justiciable, what is the point? As Sir John was saying, it has carried the implication to those affected that they have a right, which is entrenched in the constitutional position and must be acted on, but it cannot be, because the courts have said that it is not enforceable.

I wanted to have a word, following what Sir Declan Morgan said, to agree with him on one point that I think is important. If and when we depart from the European Union, and therefore depart from the ambit of the charter, the interpretation of the European Convention on Human Rights, which will continue to be a living instrument, undoubtedly in England and Wales and, I am perfectly sure, in Northern Ireland, looking to the implications and application of the European Convention will be done by looking at the decisions of the Luxembourg court interpreting the almost identical provisions in the charter. So, as an interpretive approach to the continuing constitutional document that will apply both in GB and Northern Ireland, I think that the Committee need have no fear that the courts are not going to look at decisions on interpreting essentially the same rights, expressed in essentially the same language.

I wanted to add a word on the question of the impact on the judiciary of the importing into a constitutional instrument of aspirational rights. I have developed that in the paper, and I will not repeat what I have said. Here, I agree with both Sir John Gillen and Sir Declan Morgan. Hitherto, the judiciary in Northern Ireland, and that in England and Wales, has stood up to the challenge of the expanded ambit in public law cases — judicial review cases — derived from the Human Rights Act 1998. However, that has been a process of applying rights of the kind I have described, dealing with obligations that exist between the state and the individual, and on particular facts. By definition, that process has been one of applying fact to existing law, yet the tension has been considerable. I had a very proud week several years ago, when on one day of the week, I was lauded on the front page of the 'Daily Mail' for a sentence I had passed and for my sentencing remarks, and, the following week, castigated in the leader of the 'Daily Mail' for a sentence that it did not like. We are all used to the notion that you cannot please anyone and that you should not try to. While we are left in the situation of applying specific rights on existing relationships between the state and the individual to particular facts, we will bear that burden and carry on.

If we are asked to interpret much more general things and to interpret aspirational rights, as I laid out in the paper, in such a way that it leads to a potential conflict between the legislature and the judiciary when the judiciary is interpreting a constitutional instrument, I depart from Sir John Gillen on one aspect of what he said. We might say, "That is not justiciable", in which case not merely is it pointless, but it sets up expectations and sets up an understanding in the public mind that that is now what will happen, and then it will not happen, because the judges say, "That is not justiciable". Think about the effect that that would have. The courts would immediately be in the position of people saying, "You have not defended the constitution". On the other hand, we might say, "Well, we will try", and then the judge will be drawn into attempting a judgement that will justify the constitutional right, which will be a lecture or a decision to the executive of the day, which will command a majority in the legislature, for not going beyond what the existing legislation stipulates. It is that difficulty that I have tried to address. In a way, it is a bit of a cop-out to say, "That is not justiciable". It is correct legally, but it is a hard thing to do, particularly at the margins, when you are faced with a constitutional instrument that has been recently passed and entrenched etc, and you say, "Sorry, it is no good to me, and it is no good to you,

the parties". There is a real danger in raising expectations. It is not merely that general or aspirational rights may not be effective but that they may be too vague to be effective and that they will involve conflict and difficulty for judges either way, and it also gives the public, the legislators and everyone the feeling that we have solved the problem when we will not have solved the problem. What we will have done is raise an expectation that will not be met.

I am a believer in rights. I have a long track record, before being a judge and as a judge, of implementing rights, and it is very important to emphasise that. I am not someone who thinks that the law cannot work, help or protect people, but throughout what you have heard from my distinguished colleagues, you have been hearing the word "granularity", and even though there may be an educative purpose in looking at general rights or aspirations, that is really the stuff of political debate. We should be making sure that the law is practicable and that we put it into practice and enforce it. That is the balance that works. Nobody was ever helped by a general declaration. As Sir John said, there have been general declarations time out of number for years and years and years, and they have a value on a global basis and a value in a political forum, but they are absolutely of no practical use to a litigant unless they have a legal hook that is justiciable, can be operated and can be the platform for change in a progressive way as, case by case, we develop what the law means in such a way that applies to others. I think that I have banged on enough.

**The Chairperson (Ms Sheerin):** Sir Stephen, thank you very much. You provided a very useful and succinct note. I thought that it was interestingly written. Your verbal presentation has helped to further colour in the detail. I want to ask you about two things that you said. One thing struck me. All along in this process, when we talk about the role of the legislator and the courts, I have regarded the bill of rights as being a set of standards to which Government must be held accountable. What you are basically saying is that, with a change in Government — maybe a Conservative Government come into power and they do not want to act according to those rights — you would end up with rights that are written into law being denied. My perception of that would be that, at that point, the courts would step in or the remedies would be used to ensure that the Government of the day, regardless of their ideological position, would be forced to act according to the delivery of those rights. Would that not be the case?

**Sir Stephen Irwin:** That is what I anticipated. A Government come in with a majority in the Assembly or Parliament, on a platform of saying, "We must reduce taxes", and the result is that the Administration, for example, reduces housing benefit. The result of that is that people are homeless to a greater degree, they are in poorer accommodation, or whatever, and they come to court and say, "This Government's change has been negative for my constitutional right to have access to reasonable accommodation for me and my family". What does the court do? The court either says, "That is not justiciable. We cannot help you. That is not our role", which is, essentially, the answer that you were getting from the Chief Justice and, implicitly, from Sir John Gillen. If you do not have that, the court says, "Well, what do we do about this dispute? If we are going to try to reach a conclusion, are we, the judges, going to say that the platform on which the Government have just been elected does not matter, and that, although they were elected on a fiscally conservative platform to reduce taxes and reduce housing benefit as a consequence, we say to them that the constitutional right to better housing and, therefore, access to more funding for housing trumps that? Therefore, I, the judge, am telling them that they cannot do in office what they were elected to do."

**The Chairperson (Ms Sheerin):** I suppose that, at that point, I would say two things. One is that a Government should not act to lower anyone's standard of living, and two is that we have looked at other worldwide models; for example, progressive realisation in the South African model. At that point, a Government would have to show that they had taken steps to try to fulfil their obligations to those rights and not damage anyone's standard of living. I imagine that, in the scenario that you have set there, a future or prospective Government are promising people that they are going to lower taxes, but they are not saying that, "Whilst we are cutting taxes, we are also going to cut housing benefit for people who are in need". What I am saying is that, if people knew that, they might not elect said Government.

**Sir Stephen Irwin:** Therefore, are you saying that the judge should intervene, and say that, "When you, the Government, achieved your majority, you did not tell people that lowering taxes would result in lowering housing benefit" —

**The Chairperson (Ms Sheerin):** Yes.

**Sir Stephen Irwin:** — "and, therefore, we are going to stop you doing it"? You immediately put the judge in the position of saying that their political platform, on which they were elected, is not legitimate.

**The Chairperson (Ms Sheerin):** Surely, that would be the case in that scenario.

**Sir Stephen Irwin:** You are saying that it would be the case in every scenario because that conflict would arise if the incoming Government, on a political platform, were to do something that the judge was drawn to saying was inconsistent with a constitutional right. That means that you would need to change the constitution every time you wanted to change political direction. You have an inherent conflict.

**The Chairperson (Ms Sheerin):** That is the role of the judge in that instance, then; to ensure that the Government are held to account.

**Sir Stephen Irwin:** But the Government are being held to account on the grounds of an aspirational right which is in direct conflict with the political platform that has just achieved a majority.

**The Chairperson (Ms Sheerin):** Yes, but, as you conceded, that political platform left out a key detail.

**Sir Stephen Irwin:** No: you put that scenario to me. What I am saying is that —

**The Chairperson (Ms Sheerin):** Well, you created it.

**Sir Stephen Irwin:** — even if you accept that premise, and that the political platform of the incoming Government emphasised, as they all do, the goodies and not the cost — they always do that — and if you might rationally take the view that it was done to an illegitimate degree, you still put the judge in the position of saying that those who have just been elected should not do what they were elected to do. That politicises the whole process.

**The Chairperson (Ms Sheerin):** I would interpret it differently. I would say that the judge in that instance is telling the Government that they must do according to the law, the constitution and the bill of rights, that is enacted. Rather than say that they cannot do what they said they were going to do in lowering taxes, I would say that they cannot do what they did not say that they were going to do in lowering housing benefit to people who are in need of housing assistance.

**Sir Stephen Irwin:** Then, you get drawn to the second stage. Let us even assume that you get that far. I gave the example, or set up the problem, in the paper. The Government come in with a majority on the platform of lowering taxes. The judge says, "Right, people have a constitutional right to good housing. Therefore, you cannot lower housing benefit". The Government say, "Well, if we do not lower housing benefit, we will have to lower the funding to schools". Is there a constitutional right to a good education? Is that affected by lowering the funding to schools? Then, what about the right to decent medical treatment or access to health treatment? You end up with a judge being asked to invoke one constitutional right in that box. At the same time, there are other constitutional rights of a similar aspirational nature. If the Government are defeated on that one, because Shelter is the organisation that stimulated the legal action, are the Child Poverty Action Group (CPAG) or some of the health bodies to be brought in as parties, because the implication is that, if the Government were elected with a majority in the legislature on a tax-cutting platform, if they do not cut them here, they will have to cut them there?

Is the judge, in the end, to adjudicate between the competing demands for funding? We are not equipped to do that, never mind the politicisation of the judiciary. We are not equipped to do that; it is not the function of the judge, because it would draw the judge, if it were an honest-minded process, into comparing the funding demands within the Budget, having to give evidence about the future tax yield, being put in the same position as the Government, facing all the competing demands, and then reaching a decision that, properly speaking, is to be left only to a Government with all that information and controls at their demand. Never mind, even, the challenge to the legitimacy of the incoming Government with the majority of the legislature; you end up putting a judge in the position of making political decisions. *[Inaudible.]*

**The Chairperson (Ms Sheerin):** All that the judge is doing in that instance is forcing a Government —

**Sir Stephen Irwin:** I am sorry: your voice is fading. Can you repeat that last bit?

**The Chairperson (Ms Sheerin):** I do not know whether there is feedback at our side.

I am saying that all that the judge is doing in the initial scenario that you set out is asking the Government to act in accordance with the bill of rights or the right to housing. All that they are doing is holding the Government to account with regard to a right. We could put all these things in the context that "To have A means that you cannot have B". What we are trying to do is have as much as possible with the resources that are available to us. If the role of the judges is to hold the Government to account and to ensure that the Government does not break the law, while the law states that people should have a right to housing where they need it, then I cannot see what the problem is with the judge asking the Government to act in accordance with that.

**Sir Stephen Irwin:** The aspiration or general right is so general that unless it becomes, as my predecessor said, "granular", you will end up moving from a general principle — indeed, a number of general principles that will compete — and you will end up telling an incoming Government that has a majority in the legislature, "You can't implement your electoral platform".

**The Chairperson (Ms Sheerin):** So then —.

**Sir Stephen Irwin:** I sense that we are going around and around, and I am sorry about that; it might be my fault.

**The Chairperson (Ms Sheerin):** Sorry, Sir Stephen. From what you had said in your initial presentation, I got the impression, from your written presentation and what you have said, that you think that there are always going to be those scenarios, and rather than trying to solve any of these issues, we would be better without trying to create a bill of rights. Whereas my —

**Sir Stephen Irwin:** Yes, I am saying that.

**The Chairperson (Ms Sheerin):** — instinct is that we should delve into it and try to come up with a very specific set of rights. We should aspire to have the best possible society, and, by that sort of judgement, we should try to have a bill of rights that caters for all of these things to allow for people to have access to housing, healthcare, of whatever the case may be, if they need it.

**Sir Stephen Irwin:** That is what I was saying at the beginning today. I am not against law; I am all in favour of law, but if you think about housing, health or education then the way to do it is to say, "We are revising the Housing Act so that the standards in the housing Act 2021 will be as follows; and in the education Act 2021, the particular obligations of the incoming Government will be as follows". That carries the legitimacy of the legislature today. It is specific and granular, and then the judge does not need to worry about whether there is a competition between x and y because the judge is interpreting the housing Act, which is the current law. That is what all of my predecessors have meant when saying that you need granular provisions that then become justiciable and effective. The incoming Government that brings in such legislation that changes things will either succeed in reducing those rights in the housing legislation, or *[Inaudible.]* The judge is only called on to interpret specific law that is law, derived from the Assembly, Parliament or whatever it might be, or, very often, regulations, which is the point that I was making.

I do not know whether you realise the scale. About 30 or 40 Acts of Parliament and 4,500 regulations are passed a year. That is really where legislation lies, and the Executive drafts that for the most part, rather than the legislature. However, it is approved by the legislature so the judge can deal with it. Whether it is legislation on housing, keeping bees or whatever it might be, you have something specific and something that you know is legitimate, that is derived from the authority of the legislature, and you can apply it to the facts without all of this stuff that runs the risk of raising expectations that cannot be fulfilled or places the judges into a position where they will either say that it is not justiciable and it is no use, or they will deal with it but not be able to do it properly.

**The Chairperson (Ms Sheerin):** We are going to agree to disagree, as I see issues with that; it is about the accountability measure. With what you are suggesting, with a five-year term of any particular Government, if there is something that did not like that their predecessor had put in legislation, then they could change it. In that instance, the judges are holding a Government to account for something that they had created rather than for a rights-based approach. I look at what the human rights organisations are saying and the sectoral groups and the people who represent those who are in

rights deficits, and that would be where I would try to take guidance. Thank you very much, Sir Stephen, I am going to pass now to the Deputy Chair.

**Mr Nesbitt:** Chair, thank you. Good afternoon, Sir Stephen and thank you for your engagement.

**Sir Stephen Irwin:** You are welcome.

**Mr Nesbitt:** I am enjoying this. Could I take it that you would agree with Sir John Gillen that the danger for us to avoid is producing a document that, as he described it, would be, "a forlorn tribute to the principle of compromise"?

**Sir Stephen Irwin:** That is a very vivid phrase, and I do agree.

**Mr Nesbitt:** He also said, I believe, that not only we could but we should have a document in two halves, with a preamble, which would be aspirational, and then a set of very firm, granular rights. Are you in agreement with that?

**Sir Stephen Irwin:** I am in agreement that there is no harm in a general declaration of rights if you also have granular legislation. I question whether you need to or should have granular legislation in a bill of rights, because it dates. Look at the position in America, where I think it is the fourth amendment, the one that deals with bearing arms.

**Mr Stalford:** It is the second amendment.

**Sir Stephen Irwin:** Because it is a specific provision, but is in the constitution, it has made it phenomenally difficult to deal with arms control, much more so than had that been a piece of legislation which could then be amended with changing social conditions. For me, I am going to object to a general statement of the rights of man, but they proliferate; they are all over the place. Enshrining them in a bill of rights carries risks with it. What I look to is good law.

**Mr Nesbitt:** OK, if I can come back to this idea of the tension between the political outlook of a legislature and a bill of rights, you used the example of an aspirational right to housing. Let us say that it is couched in words such as, "Everybody is entitled to quality housing, appropriate to their needs". That would be an aspirational right which would be developed through progressive realisation and the use of maximum resources available. Yeah?

**Sir Stephen Irwin:** Maybe, or you might find that the courts would say that that is such a vague formulation that it means nothing.

**Mr Nesbitt:** OK. Let us say that it is "maximum resources available", and in comes a fiscally conservative Government. Surely it is absolutely proper for them to say that the maximum resources available, which was X, is now X minus. The courts internationally, as I understand it, will not take a view on budgetary matters.

**Sir Stephen Irwin:** The courts internationally have said that they will not. That is one of the key principles of something being non-justiciable. I was trying to grapple with the prospect that, because it was a constitutional measure, the courts would be asked to do that. Now, either the courts say, "It is not justiciable; we are not doing that", which is what Sir Declan and Sir John have said, but even if you did, what is the court then going to do? Is the court going to say that in order to see whether X minus one is all that now can be given towards the fulfilment of this right, it needs to know all the secret and voluminous information to see what it would mean to Y if we stick to X, not X minus one.

**Mr Nesbitt:** Just a thought, Sir Stephen. If we were to have that kind of two-part bill of rights, and the second part was justiciable because it was specific but the first part — the preamble — was more aspirational, would it be possible to conclude the writing of the preamble with, "These rights are not justiciable"?

**Sir Stephen Irwin:** Justiciable. You could certainly do that, but then what is the point of them?

**Mr Nesbitt:** It is more of a political statement that —. We are talking here about a four- or five-party coalition after every election in Northern Ireland, so it could be a coming together to make a common

declaration. That would be "motherhood and apple pie", arguably, saying that we strive for a society that is fair, peaceful, prosperous and concepts like that. I think that it has a political value. I accept that it has no legal value.

**Sir Stephen Irwin:** Well, I do not mind a political declaration if that is what everybody knows it is. I suppose, therefore, the risks that I see coming from aspirational rights in a bill of rights are reduced if is stated or understood that those general declarations are not justiciable. That resolves some of the problem, but the point is this: does it not also let everybody off the hook?

You could have that declaration of general rights and a statement or an understanding that it is not justiciable, but we have done that.

**Mr Nesbitt:** OK.

**Sir Stephen Irwin:** What you really need is good law.

**Mr Nesbitt:** Yes, *[Inaudible.]*

**Sir Stephen Irwin:** You need good law that is legitimate law, that everyone sees is legitimate, and that is critically dependent on the legitimacy of the legislature that passes the law not to undermine it because it puts it in conflict, or potential conflict, with something else.

**Mr Nesbitt:** The other area that I would like to touch on briefly is the politicisation of the judiciary and the fear of that. I am going to resist asking you which of the two editions of 'The Daily Mail' you preferred, if either, but I will go to this point: is there a danger that if judges are seen to be having a huge impact on a legislature through a bill of rights and their interpretation of it, that we get to the stage where judges are subjected to the same regime as Supreme Court judges in the United States, that you have to come to the Northern Ireland Assembly and be agreed upon after cross-examination?

**Sir Stephen Irwin:** That would be a big loss. If you were to have a written constitution where the judiciary was interpreting it in that way, that would be a natural consequence over time. People would be saying and people in the political sphere would be saying that these judges can tell us what to do. They can defeat the attempts at altered legislation by a properly elected Government by reference to a constitutional doctrine, so we need to know who they are, what their views are, what their attitudes are.

That is what happens in the States and that was part of the design from the beginning, but it is absolutely not what has happened in Britain, Ireland or Northern Ireland. Yet there are other examples, more pertinent and closer to home. Look at what is happening in Poland, where the constitutional court, essentially has had almost all the judges flung out by an incoming Government and replaced by people who are politically placed judges. That is a terribly detrimental step precisely because there was a constitutional court with which the incoming Law and Justice Party disagreed. Even in the UK, two inquiries were recently announced by the Home Secretary: one into judicial review and one into the workings of the Human Rights Act. Those follow on from real tension between the Government and the decisions of the courts, particularly on immigration and asylum law.

There has been quite a development of academic thinking, if you like, about whether judicial review and the power of judges through judicial review has gone too far, and that is without having aspirational rights interpreted by the judiciary. That is derived from the existing amplification of judicial decisions, based on the Human Rights Act. I do not regret any of that. I am absolutely with Sir Declan and Sir John. The Human Rights Act has been an advance and judges have stood up to the Government. We have all done what we should do, but it has been misunderstood and it now, certainly in Poland but also in the UK, has become a bit of a target.

There is a legal provision — I forget where it is to be found — in the immigration Acts in England and Wales, which sets out to tell the courts how to interpret article 8 of the European Convention in application for asylum claims and in immigration cases. This is legislation, instigated by the Government, interfering with what had been the judicially-developed interpretive approach to the convention, and that is a confusion of the categories.

**Mr Nesbitt:** That is a very useful, Sir Stephen, thank you very much. Thank you, Chair.

**Mr Stalford:** Thank you very much for your evidence so far, Sir Stephen.

The 1977 Constitution of the Soviet Union guaranteed freedom of speech, freedom of the press, freedom of assembly, freedom of religion, freedom of artistic expression, freedom of family, and health protections. I do not think that anyone could seriously contend that the people living behind the Iron Curtain actually enjoyed those rights. No matter how utopian a vision someone might have, just putting it in a statement does not make it reality.

The concerns that you have expressed are concerns that I would share. If you go down the road of enshrining in law something that is, effectively, a programme for government, why bother having elections? We should just have an Administration rather than elections because we have now enshrined in law what the Government must do, and, in doing that, there is no wriggle room for the Government at all. You have touched on two important issues.

Thirdly, and this flows from what Mike said, if you allow for a bill of rights, which is, effectively, a constitution, do you see the danger of schools of thought emerging in the judiciary, as in the United States, where the originalists — people like former Justice Anthony Scillia — believe that the constitution should be interpreted as the authors intended and the non-originalists take the view that the Second Amendment, which you referenced, is an anachronism from the 18th century at a time when America faced the possibility of invasion by the Kingdom of Great Britain? Do you see the potential for schools of thought emerging within the legal profession if we go down the route of a written constitution?

**Sir Stephen Irwin:** Let us take the example of what I call the aspirational right and the issue of whether it is non-justiciable. Some unfortunate judge, and I do feel sorry for her or him, is going to have to be the first to interpret that question. That will be the subject of enormous academic comment and the subject of very considerable discussion and appeal. It is inevitable that, to some degree, there will be a difference of views as to where that line falls: this is just justiciable — just specific enough — or it is not.

The judiciary in the UK — GB and Northern Ireland — and the Republic has been very good at not being drawn into public comment. We do not talk about the cases that we have decided other than in a very general way. I think that that good tradition of not being drawn into public comment will continue. Over time, however, there must be some risk that judges would be identified as being more or less activist and more or less open to the conclusion that something is justiciable or is not. If you marry that up with the beginnings or the tendency to start selecting judges on the basis of their view, you are into a completely different era, and it is an era that would be very retrograde and would much reduce the confidence in the decision of judges. I cannot emphasise enough the importance of independence. Many of my colleagues, when they become judges, stop voting.

**Mr Stalford:** There have been a couple of attempts to draft a bill of rights. I participated in the first one. There was a body called the Bill of Rights Forum. One of the reasons why the attempt on that occasion failed was that activist groups used the process as a means of trying to get, through that avenue, what could not be achieved through votes in elections.

You have highlighted, again, the danger of that, and I fear that this process may be heading in a similar direction, whereby people see it as a means, almost like a Trojan Horse, to achieve what cannot constitute a majority at the ballot box, and, if we go down that road, I fear that, if you do the same thing over and over, you are going to get the same outcome.

I want to thank you for your contribution. The issues that you raise are not new. Those have been the issues throughout attempts at getting a bill of rights drafted for Northern Ireland.

**Ms Bradshaw:** Thank you very much; it has been very interesting. I want to pick up on Christopher's point that the Bill of Rights Forum was, in many ways, hoped for by the lobbyists and campaigners at that time to be about achieving things that they could not realise through elections. There were a very small number of issues like that, but a lot of the efforts that campaigners made at that time were more because they were frustrated by the slow pace of change in the Assembly.

I also wanted to pick up on your conversation with Emma. Would it be better for us to look at a bill of rights that was more focused on civil and political rights as opposed to socio-economic rights? If we had proper political reform and, notwithstanding the need for proper scrutiny, a faster system of addressing the rights of different interest groups, whether they are disability groups or women's

groups, through legislation and policy development, we could probably achieve what the society in Northern Ireland wants, as opposed to that being through an expansive bill of rights.

**Sir Stephen Irwin:** The first thing to say is that your question has a political answer and I am not a politician. It is a choice for politicians to make. My response is that, first, in my experiences of having been a lobbyist, if you like, in the civil rights sense, whatever you do, those who have focused on a particular set of problems and become involved in a focus group or a lobby group on them will almost never be satisfied by the political process, because it is one of reconciliation of competing interests and always ends in a compromise. That is just an observation.

If the aim is to educate and to set out broad objectives for progressive politics across a political divide, for me, the obvious thing to do would be to say, "We all agree with the Universal Declaration of Human Rights and we all subscribe to the European Convention. We believe in the values that are enshrined in the UN Declaration of the Rights of the Child". Pick out the existing international instruments and say, "We think that those represent what we would aspire to. Now, let's do our legislation with those things in mind".

That avoids the confusion. First, it avoids what seems to me to be, potentially, a waste of energy and time on recapitulating, in a Northern Ireland bill of rights, what is already out there by way of international formulations of perfectly valid aspiration. Then, we should say, "We agree with this and we agree with that; let's get down to doing good laws" — good laws that can be litigated and which will give rise to remedies. When you come to the specific laws, then, you will find, I suspect, that the lobby groups will not be bothered by the Universal Declaration of Human Rights. They will be looking at your draft housing law or your draft law on the rights of a child.

**Ms Bradshaw:** OK, thank you. Professor Dickson talked about codifying many of those international instruments and declarations into our bill of rights or single document here and not worrying so much about the socio-economic side. Is that what you were saying there; that you would just tie them into one document?

**Sir Stephen Irwin:** If you are intent on the bill of rights, that would be a good way of doing it, as long as you realise that those codified general declarations of rights will not be justiciable, because they are not. Furthermore, if you really want an enormous effort that ends up with something that is not justiciable, setting yourselves to codifying all those international instruments, which were themselves the result of endless negotiation at the UN or in the EU, boy, is that a job. If you are going to pay some lawyers to do that for you, there will be a lot of smiling faces in the Bar Library.

**Ms Bradshaw:** Yes. I suppose that I mean that more in the sense of not simplifying it but of distilling it down into one set of principles or laws in one document. That would be a guiding document that, to pick up on Sir Justice Gillen, we would use as an educational tool and something that would read across all our legislation and our lives. It would almost be a document that everybody in the country would get behind. That is why the Committee has talked at length about the need for a really strong preamble that sets the context.

**Sir Stephen Irwin:** If you are going to combine all those important international declarations and conventions in one document, first, with great respect, how will the Northern Ireland document be better than the content of all those things that have been the subject of all that work? Secondly, it would be an enormous enterprise. Thirdly, the result would be a set of values that are already enshrined elsewhere.

A foreword or political declaration by all the parties in the Assembly that states, "We all agree with the values that are enshrined in this, this and this are correct" could be done in three months. If you were to start to combine them, however clever the barristers in the Bar Library whom you hire will be, (a) there will be minor differences between the international instruments and the version that you produce and (b) it will not be the platform for any actual case that benefits any actual individual. Why not say, "We agree with the broad statements that already exist and want to implement those statements in our legislation"? Does that not —? I do not understand why that would not —.

**Ms Bradshaw:** I see the merit in that, but there is the potential for shifts in political composition in the Assembly and that might not make it quite as timeless. I appreciate your feedback. Thank you.

**Sir Stephen Irwin:** OK. I am sorry that I cannot be more specific than that.

**Mr O'Dowd:** Thank you for your presentation. The previous presentation suggested that the purpose of a Committee such as this one is to investigate ideas and to interrogate them. We want — some of us do — to find the best possible bill of rights that is workable and does what it says on the tin.

We have to look at the history of it. The bill of rights was committed to in the Good Friday Agreement, which was an agreement that helped our society to come out of conflict. It was transformational and a confirmation of a new beginning and society in which individuals had a stakehold in rights and protections — an enforceable stakehold. That brings us back to the question of how you can ensure enforceability and justiciability.

On the example of housing, I would maybe look at it in the broader sense. For instance, if a bill of rights was to say that an incoming Executive or future Executives should provide affordable and social housing for those who require it, and if a housing Minister provided housing for one section of society but not as much for another, it would show that that Minister had the resources but was using them unfairly. In those circumstances, surely it could be argued at court that the Minister was in breach of an aspirational right.

**Sir Stephen Irwin:** I am not sure that it could. I think that you would tackle that by saying that there was discrimination.

**Mr O'Dowd:** Yes, and a breach of a bill of rights.

**Sir Stephen Irwin:** I do not think that it would necessarily be a breach of a bill of rights, because the Minister would say that they were providing however many millions of pounds for housing. Your question is perfectly valid, but it is not a question of the provision of housing but of unequal provision between one group and another. That is a discrimination claim.

**Mr O'Dowd:** Yes, but the point that I am making is that it dismisses the argument that resources are the reason. A Minister could not say, "I do not have the resources". You could prove that they have them.

**Sir Stephen Irwin:** You could not prove that they have the resources. That is the point. The constitutional right would be used to say, "You have to use your resources properly towards this end". Unless the constitutional right is taken to the point where you say, "You need to spend more overall", and, once you get to that point, you are spending more overall on housing and less on other things, that is not justiciable.

**Mr O'Dowd:** No. If I, as housing Minister, am spending £60 million in zone A, and I spend only £10 million in zone B, there is an argument that I am not fulfilling my bill of rights obligation to provide housing for those in zone B.

**Sir Stephen Irwin:** I do not think that that would fly, legally. You would have to be saying, "You are spending £60 million over here and £10 million there, and that is not a rational application of your budget". That would be either irrational policy or discrimination, but it would not be affected by the constitutional right, because, in order to invoke that, you would have to say, "You are not spending enough overall".

**Mr O'Dowd:** It depends what the constitution says.

**Sir Stephen Irwin:** That is true, but, if you are talking about the right that you enshrined — the right to affordable social housing — it would be for everybody. That would be as a proportion of the budget.

**Mr O'Dowd:** All these things would have to be argued out in court, and clever barristers would be writing papers and arguing it out.

**Sir Stephen Irwin:** Again, we are back to the fundamental. Your illustration of the use of the right, as you formulated it, involves a budgetary question. That is classically non-justiciable, as the Chief Justice said. So, the judge would be saying, "This is not for me". If you tried to answer it in those terms, you would end up in saying, "You should be spending more on housing", despite your electoral platform.

**Mr O'Dowd:** The point that I am trying to make is that it could be shown, in certain circumstances, that, when you make a commitment in law to provide social and affordable housing, that all has to be within reason. That was shown in other international examples that I have heard of, particularly a case in South Africa. There, the constitution was challenged by an individual who required urgent treatment for a kidney disease, but the courts ruled that he did not have an automatic right to that treatment, and the individual died a few weeks later. It is quite a harrowing case. However, the law ruled as the law rules. There was no saying, "Hold on, that is not the purpose of that article in the bill of rights", and the gentleman did not get access.

The point that I am trying to make in my case is that, if you have resources, you have to use them in a fair and equitable manner. If you do not do that, you discriminate against citizens because of their ethnicity, religion or perceived political point of view. There is currently, of course, equality legislation that you could put this under. However, to go back to my original point, the purpose of a bill of rights is a new beginning in society, to protect minorities from the majority, and to ensure that everybody has a stakehold in society. That is the purpose of a bill of rights, in my mind.

**Sir Stephen Irwin:** I completely agree with the aim and the object, and I understand that that may be the purpose in your mind. My point is that I do not think that it is effective and you already have the tools. If you have a case where the resources are distributed unequally, you have the law to deal with that. You invoke the discrimination law. The danger of becoming entangled in a constitutional right is that it blurs the discrimination that you are really dealing with.

**Mr O'Dowd:** This is not a legal or political question, but does a bill of rights not set a change of attitude or help to set a change of attitude in society as society starts examining itself in a different way, because we will have, for want of a better term, a rule book against which we judge ourselves? We would be saying, "This is the society that we want". Some of it will be aspirational, and some of it will be subject to law, but we would be saying, "This is the sort of society that we want, and these are the principles upon which we live". The examples that you used earlier are quite valid in the sense that, if an Administration come in that are tied to budgetary cuts, they may come in and do that, but surely, if they want to do that against a certain set of legally enforceable principles, they would have to change those legally enforceable principles first and then move on to what they want to do. Does a bill of rights, in your opinion — you may not have an opinion on it — set a new standard for society?

**Sir Stephen Irwin:** That is not impossible, but the trouble is the expectation being loaded on it. Aside from all the difficulties about justiciability and the implication of what it would mean for judicial decision-making, of course, if you have a bill of rights that says, "We all agree that this is how we want to proceed", that will have an educative effect, but you can do that, because you are talking about a political consensus among everyone that we want to do the best we can to enshrine a standard of living and an approach that is equal, and so on and so forth. You can do that without a bill of rights. You can do that a lot more easily, it seems to me, and without the risks by everyone agreeing to adhere to this, that and the other existing declaration. We all agree, for example, on the rights enshrined in the European Convention on Human Rights, which did not exist at the time of the Good Friday Agreement. Sorry, it existed, but it was not important. If all the parties in Northern Ireland agree that they all want to implement the rights under the convention *[Inaudible]* fine, but I do not see how the process of getting a broad, general declaration in a Northern Ireland bill of rights really adds to that, and it has the downsides that I have tried to point out.

**Mr O'Dowd:** OK. Thank you.

**The Chairperson (Ms Sheerin):** Sir Stephen, thank you very much for your time this afternoon. We have taken up quite a bit of it with the questions after the presentation.

**Sir Stephen Irwin:** That is probably my fault.

**The Chairperson (Ms Sheerin):** The conversation and the back and forth is always useful, so thanks very much for your time. I will let you leave now. Happy Christmas.

**Sir Stephen Irwin:** Thank you very much indeed. Bye-bye.