

ACHIEVING OUR BILL OF RIGHTS?

Colin Harvey

Speech delivered at King's College London

22nd February 2010

Introduction

Good evening everyone. I am pleased to have this opportunity to talk to you about the Bill of Rights process in Northern Ireland, and discuss possible next steps. I would like to thank Professor Aileen McColgan and the School of Law at King's for making this event possible, and Maggie Beirne for chairing the session.

The Bill of Rights process has reached a significant moment. The Northern Ireland Office (NIO) is currently consulting on its response to the Human Rights Commission's final advice. This evening I would like (in a personal capacity only) to sketch the context for the debate, say something about the process, note substantive aspects of the Commission's advice, and then reflect on where we go from here.

Context

First, some context. Discussion of a Bill of Rights for Northern Ireland is decades old. Through the 60s, 70s, 80s, and 90s, the idea was there and persisted. People often meant and understood different things. For some, the incorporation of the European Convention on Human Rights might achieve the objective of advancing human rights protection, for others an additional next step would be required; a home-grown Bill of Rights. The notion did develop over time that a Bill of Rights for Northern Ireland might form part of any new constitutional arrangements. Most

political parties, and many others, viewed the concept of a Bill of Rights as a 'good thing'. The general context tended to be Northern Ireland specific, with violent conflict and ethno-national division (British-Irish) - and all the economic, social, political and cultural causes and consequences of conflict - providing an evident 'particular' backdrop requiring attention. Not the 'unique' circumstances of Northern Ireland (for there is little that is 'unique' about violent conflict and ethno-national division) but those 'particular circumstances' in the context of international and regional human rights developments and trends. The hope that as part of our peace process a Bill of Rights could emerge that was a model for others, and signalled a collective commitment to a principled new beginning for human rights protection.

Those decades of debate might be described as an extensive collective effort to promote the idea of a 'constitutional' Bill of Rights, as one part of a constructive agenda to create a new Northern Ireland. In other words, an attempt to map out the constitutional legacy we might leave to future generations: A Bill of Rights expressly for Northern Ireland as part of working our way together towards a genuinely shared and truly reconciled future.

The Bill of Rights Process

Second, the Northern Ireland Bill of Rights process. Although the process is decades old, real momentum and focus was generated by the Good Friday Agreement 1998. The Agreement provided a firm basis for the creation of a new Human Rights Commission (one that would be stronger than SACHR), and for the Bill of Rights process.

As is well known, the remit is set down in the Agreement. The exhaustive (and exhausting) debates often seem to neglect a basic point. If an independent statutory Human Rights Commission - in the constitutional context of the Good Friday Agreement and the Northern Ireland Act 1998 – is asked to provide advice on a Bill of Rights for Northern Ireland is anyone genuinely surprised that it approaches its task purposively (with agreed principles and an agreed methodology) and seeks to offer sound human rights advice reflecting Northern Ireland's particular circumstances and anchored in international instruments and experience? Is anyone who is familiar with human rights law, policy and practice honestly surprised by the interpretation of the remit and the final content of the Commission's advice?

The process was launched precisely 10 years ago next week (1 March 2000). The Commission produced a range of consultation materials, and with many others, attempted to promote a wide-ranging societal debate. When it became clear that the political parties needed to become more engaged, the Commission – with others – suggested the creation of a Bill of Rights Forum. The St Andrews Agreement 2006 provided the political basis for the establishment of a Forum of 28 members (14 political parties and 14 civil society). The Forum was chaired by Chris Sidoti, and reported in March 2008. Although the terms of reference referred to 'agreed recommendations', the final report opted to list its recommendations with levels of support indicated (cross-party disagreement on content remained evident). From March – December 2008 the Commission worked to finalise its advice. One innovation here was the publication of an agreed methodology in June 2008. The Commission handed over its final advice on 10th December 2008 –

international human rights day and the 60th Anniversary of the Universal Declaration of Human Rights. Thus a key milestone in the process was concluded. On 30th November 2009, the NIO published its consultation response with a deadline of 1st March 2010.

The Commission's Advice

Third, the Commission's advice. I have already mentioned the debate over remit. Whatever view is taken of that (and I have suggested above that the approach can be justified), none of its proposals would, or should, surprise anyone familiar with international, regional, or national human rights law *and* the particular circumstances of Northern Ireland.

The advice is worth reading in detail and in full – I will mention a few points. The Commission concluded that:

- Existing provisions of the ECHR could be supplemented, for example, the right to liberty and security of the person and the right to a fair trial.
- The Bill of Rights should respect the internationally recognised principle of the indivisibility, through the inclusion of justiciable social and economic rights (health, adequate standard of living, accommodation, work, and social security rights). The advice also includes environmental rights and a section of children's rights.
- A Bill of Rights for Northern Ireland should take care not to undermine existing guarantees and protections. For example, by ensuring that

provisions on equality, democratic rights, and identity were carefully crafted in order to 'do no harm'.

- A Bill of Rights should build on, and not undermine, the Human Rights Act 1998. By learning the 'human rights lessons' from its first ten years and ensuring it is not repealed in the process of enacting a new Bill of Rights.

- Oversight of a Bill of Rights was not merely for the courts. The Commission recommended the creation of a new Assembly Committee on Human Rights, as well as a periodic review mechanism, and a future role for the Commission itself.

The NIO response was published on 30th November 2009. It is widely viewed as a disappointing initial engagement with this significant constitutional enterprise. The NI Human Rights Commission has reacted to the NIO document. The five headings in its published response leave little room for doubt or ambiguity of its view: it demonstrates a lack of understanding of the purpose and functions of a Bill of Rights; failure to take appropriate account of international human rights standards; appears to be suggesting the lowering of existing human rights protections; inadequate consultation; and misrepresentations of the advice given by the Commission.

Next Steps?

What might the next steps be? How should this now be taken forward? The NIO consultation period ends next week. People have already used strong words in response to this consultation, and there is genuine and

widespread disappointment. People embarked on this profound constitutional enterprise in good faith because they wanted to leave a lasting and credible legacy for future generations. Not one that condemns us to repeat our awful past – but to help to nurture the shared future that so many talk about, but which remains so palpably absent. Many of the positive values of our best constitutional moments have simply been lost or neglected in the last decade. The right sort of Bill of Rights might help to remedy that (the wrong sort could make matters worse, of course).

What then might the next steps be? There is little sign that people will be willing to abandon a constitutional project that has spanned decades. The answer may be simple: following conclusion of the consultation period, a clear and public indication should be given by government of the next steps with a timescale. The starting point should be to design a Bill of Rights for Northern Ireland that respects and reflects the Commission's final advice, and takes full account of the various consultations that have taken place. Whatever political configuration emerges after the General Election, there is no reason why legislative progress cannot be made towards a Bill of Rights (Northern Ireland) Act. This need not await the outcome of consultations on a UK-wide instrument (there are already innovations in Northern Ireland - that is, of course, one logical result of both devolution and the peace process). It is perfectly possible to proceed with the Bill of Rights (Northern Ireland) Act in advance of longer-term constitutional developments. The basis for progress is now there – but not as currently envisaged in the initial NIO response.

In that overall legislative context, benchmarks, parameters and principles should be clarified by government for taking this work forward – including enhanced recognition of (and engagement with) the extensive work that has already been undertaken, confirmation that existing human rights and equality guarantees will be built upon (and not undermined), the centrality of international human rights standards in shaping a Bill of Rights, and an acceptance that the Northern Ireland process has an integrity of its own (this should not be merely submerged under a potentially extended discussion of a new UK-wide Bill of Rights and Responsibilities). If the foundations are firm, and principled benchmarks accepted, a Bill of Rights debate in Britain might even be a sensible and productive one – but after the last decade of hard work and constructive and carefully crafted proposals, it is not a credible excuse for further delay in Northern Ireland.

Many here will know, but it is worth re-stating: the offer of joining in with a wider - and emerging – new debate on rights and responsibilities in the UK may be unappealing (to put it mildly) to many, and the terms of that discussion can at times be intriguingly disrespectful of Northern Ireland's particular circumstances (just the thing that everyone claims to be trying to respect). I do hope that those who are promoting this new UK-wide process have fully thought through all the consequences for the delicate and fragile constitutional balances now in place in these islands. Whatever happens with that process, my point here tonight is that progress towards a Bill of Rights (Northern Ireland) Act remains possible, if it reflects and respects proposals which have already been carefully tailored to address Northern Ireland's circumstances.

To conclude: We still need a Bill of Rights for Northern Ireland. Not simply *any* Bill of Rights, but one that respects this profound constitutional enterprise, one which leaves a lasting and positive legacy for future generations. I still believe that a truly shared future in Northern Ireland depends on it. I still believe it is possible to achieve our Bill of Rights.