

What the Bill of Rights was intended to achieve for Northern Ireland

There are a number of important lessons to be learned from the failure of all those involved to produce the Bill of Rights for Northern Ireland promised in the Good Friday/Belfast Agreement.

One is the distinction between (a) what might be called a constitutional bill of rights designed to protect the different communities in a non-homogeneous state and (b) the protection of the human rights of all individuals. For Northern Ireland, as in some other cases, these were to be combined in a single document.

A second is the importance of focusing on who has the power to make the final decision on what a proposed bill should and should not contain, which in the case of Northern Ireland means the governments of both the United Kingdom and the Republic of Ireland.

A third is that the reference to ‘drawing on international experience’ should not have been restricted to the terms of internationally agreed human rights instruments but the experience of other multi-ethnic and divided societies.

This brief memorandum seeks to explain how the failure to understand these distinctions contributed to the problems over the Bill of Rights for Northern Ireland. It is based on my own involvement in various stages of the long-drawn out process of consulting, drafting by the Northern Ireland Human Rights Commission, and the responses of political parties and all the others involved.

1. The difference between a constitutional bill of rights and a human rights bill

The main focus of a constitutional bill of rights is usually to set out the rights and duties of the constituent areas or communities in a state, whether on a territorial or federal basis or by including specific protections for minority or indigenous peoples. These are often the result of lengthy negotiations between political and communal leaders. The main focus of a human rights bill is usually to reflect internationally agreed rights for all individuals or all minority or communal groups.

The provisions in the Good Friday/Belfast Agreement, as in many other examples, combine these two elements, notably by referring both to the incorporation of the European Convention on Human Rights (ECHR) and then

additional and more specific provisions to reflect the particular make-up and circumstances in Northern Ireland.

This formulation can be traced back to the discussions between representatives of the then ‘constitutional parties’ and human rights experts at two confidential meetings at Kells in County Antrim in 1993 and 1994 organised by the Standing Advisory Commission on Human Rights. The late Professor Kevin Boyle and I were invited to present papers outlining the advantages of incorporating the already agreed human rights provisions of the ECHR and suggesting what ‘add-ons’ should be considered for inclusion. The paper on these proposed ‘add-ons’ as appended, covered the following items: (i) the right of self-determination for the people of Northern Ireland; (ii) recognition and protection of the two communities; (iii) education and language rights; (iv) the right of individuals to be British or Irish; and (v) protection against the unjustified use of emergency powers. On each of these possible drafts were provided. Though no formal conclusions were reached at the Kells meetings, other than perhaps that any Bill of Rights would have to await a more general peace settlement, there appeared to be general consensus that this was the right approach.

The recommendation on the incorporation of the ECHR along with a few ‘add-ons’ was repeated in a number of our subsequent publications, notably *Northern Ireland: the Choice* (Penguin Books 1995) and our Research Study *The Protection of Human Rights in the Context of Peace and Reconciliation in Ireland* (1996) for the Forum for Peace and Reconciliation in Dublin. Professor Boyle informed me on a number of occasions that his contacts in the Irish governmental team had said that the formulation on the proposed Bill of Rights in the Agreement had been drawn from these various publications as there had been no detailed focus on the issue in the negotiations.

When the task of making recommendations on the Bill of Rights was handed over to the newly formed Northern Ireland Human Rights Commission, however, most of the Commissioners pursued a wider interpretation of their mandate and sought to secure popular rather than inter-governmental and political party support for a more wide-ranging set of human rights for all sectors of the community. I used to refer to this as the ‘all singing all dancing model’ which aimed to produce one of the best and most extensive bills of human rights in the world. The reference to the ‘particular circumstances of Northern Ireland’ was taken to justify anything that would guarantee better treatment for all sectors of the community affected economically or socially by the many years of conflict. The initial Chief Commissioner justified this as a

recommendation for other human rights protection not covered by the wording in the Agreement. The second set of Commissioners appointed in 2006 adopted what in my view was little more than a formulaic criterion that was designed to justify an equally extensive approach to a wide range of socio-economic rights covered in recent internationally agreed instruments. And by excluding any reference to the Irish language and integrated education they strayed further from the particular circumstances of Northern Ireland.

2. The failure to secure inter-governmental approval for these recommendations

In pursuing this approach successive Commissions failed to recognise that in reality it was for the two governments to decide on whether and in what form to adopt a specific Bill of Rights for Northern Ireland. This was explicit in the paragraph of the Agreement which stated that any Bill was to be enacted by the United Kingdom Government at Westminster. It was implicit in the additional provision that the Irish Government was to ensure equality of rights in both parts of Ireland, so that any rights enacted for Northern Ireland by the British Government would have to be enacted for the Republic. It was therefore clear that the Human Rights Commission would have to ensure that their recommendations would be acceptable to both governments.

From the outset it was clear that the British Government was concerned about any possible ‘read-across’ from general human rights provisions in Northern Ireland to other parts of the United Kingdom. This was set out clearly in the paper submitted by the Northern Ireland Office to the initial Kells meeting. It was also expressed very clearly in a letter in 2004 from Des Brown, the responsible Minister, to the initial Human Rights Commission in response to its preliminary draft, stating that a recommendation for any wide ranging socio-economic rights that were not in reality any more relevant in Northern Ireland than in other deprived areas in the rest of the United Kingdom, would fall outside the mandate of the Commission and would be unacceptable to the British Government. This was re-iterated in the summary rejection by the Northern Ireland Office of the final recommendations of the second Human Rights Commission in 2009, stating that all but two of its recommended provisions fell outside the terms of the Good Friday/Belfast Agreement. In my view successive Human Rights Commissions failed to engage directly and effectively with either government to ensure that their recommendations would be acceptable.

The political parties in Northern Ireland have found it equally difficult to agree on the proper purpose and content of the proposed Bill of Rights. In the Forum

set up in 2007 to review the way forward the unionist and nationalists representatives failed to reach any consensus on proposals to put to the two governments. As Chris Sidoti, the Australian chair of the Forum commented, it is relatively easy to put forward proposals for national bills of rights, the difficult part is to get them adopted. Like the successive Human Rights Commissions the parties failed to realise that agreement on joint proposals that kept close to the views of the two governments was essential to the enactment of the Bill. The same applies to the response of this Committee to the reiteration of the wording of the Agreement in the joint governmental *New Decade New Approach* document.

3. What international experience was most relevant

The successive Human Rights Commissions have focused almost exclusively on internationally agreed human rights provisions rather than on what form of Bill of Rights would help to guarantee peace and stability for Northern Ireland in the foreseeable future. In my view rather more attention should have been paid to examples of constitutional bills of rights in other divided societies, such as Belgium, Canada and Bosnia, and on a possible future change from exclusive UK sovereignty to potential joint UK/Irish sovereignty or Irish unification.

The two governments were clearly aware of this requirement. The terms of the British Irish Agreement attached to the Good Friday/Belfast Agreement provides for a limited set of rights to be guaranteed whichever state has sovereignty over the territory to be exercised ‘on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities’. It would have been helpful if the proposed Bill of Rights had focused on a more detailed formulation of reciprocal and transferable rights of this kind that could have given greater assurance to members of both main communities and also those who do not wish to be corralled in either of them that their language, educational and cultural rights would be similarly guaranteed in the event of any constitutional change.

In my view the proper role of a bill of individual and communal rights in a divided society like that of Northern Ireland is to facilitate peaceful and consensual change as the population balance changes over time, not to set an example to the wider world by the adoption of an exemplary range of

internationally recognised human rights. The failure of the Human Rights Commission to focus on this particular circumstance of the people(s) of Northern Ireland has been, in my view, the most significant missed opportunity that was provided under the Good Friday/Belfast Agreement. It could still be remedied if the two governments could step in and persuade the political parties and the Human Rights Commission to go back to the original conception outlined in the Good Friday/Belfast Agreement or failing that to develop the terms of their own Agreement given that the political parties and the Human Rights Commission have so far proved to be unable to do the job.

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