

# Ad Hoc Committee on Bill of Rights

## Northern Ireland Assembly

26<sup>th</sup> May 2020

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## **A. Introduction**

1. The agreement reached at the multi-party talks in Belfast on 10 April 1998 (titled 'The Agreement' or as called by many 'The Good Friday Agreement' though in law called 'The Belfast Agreement') stated in the opening section that there should be "*the protection and vindication of the human rights of all.*"<sup>1</sup> It is thus clear that the rights of the resident population within Northern Ireland are to be protected in both a reasonable and justifiable manner.
2. Yet consensus as to the rights to be protected has not been forthcoming. Community/political groupings and individuals, within the initial negotiation process and subsequently, have had different viewpoints as to the concept of the 'rights' to be protected. Professor Brice Dickson, then the first Chairperson of the Northern Ireland Human Rights Commission, wrote as follows:

In the case of Northern Ireland, the environment in which this holding to account takes place is politically very sensitive. We are all familiar with the phenomenon of politicians taking a view of human rights which happens to accord with their personal political persuasions rather than with a more independent analysis.<sup>2</sup>

3. Conscious of this quotation, this submission is an earnest endeavour to be grounded firmly on accepted international conventions and statutes, taking as the maxim that interpretation is based on the plain meaning of the language. I aim to be both objective and evidence based, using quotations extensively to reflect the attitudes of those involved in the process.

## **B. Context**

4. By way of background to the context, the Organisation for Security and Co-operation in Europe (OSCE) makes clear the requirements to ensure stability. For example, "*we shall continue to combat all manifestations of intolerance, and especially aggressive nationalism, racism, chauvinism, xenophobia and anti-semitism.*" And one of its principles is, "*respect for internationally recognised frontiers*"<sup>3</sup>
5. I participated in the negotiations (known as 'The Talks') that led to The Belfast Agreement and was the Ulster Unionist Party's (UUP) spokesperson on 'Equality and Human Rights'. In addition to the three main strands in 'The Talks' there was another strand entitled 'Cross-Strands Issues'. As agreed by the Procedural Motion on 24 September 1997, issues to be considered in this other strand included 'rights and safeguards'. I was the lead person for the UUP on this issue.
6. Many have articulated a perspective on the root cause of 'the Troubles'. Perhaps the following encapsulates a broadly based position:

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<sup>1</sup> The Belfast Agreement: 'The Agreement, Declaration of Support'; par. 2.

<sup>2</sup> Brice Dickson: Platform Article; Belfast Telegraph, 30 June 2004.

<sup>3</sup> OSCE: 'The Pact on Stability in Europe'; 'Declaration', Paris, 21-22 March 1995, pars. 4 and 7.

Fundamentally the Northern Ireland conundrum is one of conflicting national identities between those who believe themselves Irish and those who believe themselves British. There are religious, social, cultural, political and other dimensions to the problem but they are only dimensions of that central issue. <sup>4</sup>

7. More recently Senator George Mitchell stated:

Division over identity in Northern Ireland does remain a threat to the stability of the institutions and addressing those issues must be a clear commitment by all of the political parties and all the leaders in Northern Ireland. <sup>5</sup>

8. And the Belfast Telegraph stated *“if this is to be a shared space then respective identities must be respected.”*<sup>6</sup>

9. A key question: what rights require consideration regarding ‘identity’, given the above views of the problem, in order to provide the basis for a democratic, stable and peaceful society?

10. Sponsored by the Irish Government, a series of ‘Consultancy Studies’ relating to the political situation in Northern Ireland were published in 1996 by the ‘Forum for Peace and Reconciliation’. This Forum published several documents in view of their *“relevance to the peace process and the all-party negotiations.”*<sup>7</sup> This was against the background of elections in Northern Ireland in June 1996 to the ‘Northern Ireland Forum for Political Dialogue’ from whose membership came party negotiation teams to ‘The Talks’. The following refers to aspects of these publications.

11. Asbjorn Eide was described by the Dublin Forum as *“a leading international authority in the field of human rights...Director of the Norwegian Institute of Human Rights...long-serving member of the United Nations Sub Commission on the Prevention of Discrimination and Protection of Minorities, an expert body serving the UN Commission on Human Rights.”* <sup>8</sup> He commented as follows:

The sixth type of conflict, and often the most difficult one, arises when two groups, defining themselves as nations in an ethnic sense, conflict with each other over the same territory ...The claims of ethno-nationalists are the most difficult, since they constitute conflict over territory. Experience shows that there are almost no ethnically homogeneous States. Whichever ethnic group controls a given territory, there is likely to be one or more minorities who might consider themselves discriminated against or treated as second class citizens. Beyond claiming the traditional rights to preserve and develop their own identity, and to have parity of esteem with regard to identity, the preferred option of ethno-nationalists is to achieve a congruence between the State and the nation defined in ethnic terms. This may be expressed in claims of self-

<sup>4</sup> Austin Currie: (SDLP Minister in 1974 Executive); referenced in ‘Blurred Vision’, Cadogan Group, 1994.

<sup>5</sup> Senator George Mitchell (Chair of ‘The Talks’ that led to the Belfast Agreement): quotation of him speaking at a Conference (University of Ulster) on 14 May 2019 to consider the Report, ‘Sectarianism in Northern Ireland: A Review’; Belfast Telegraph, 15 May 2019.

<sup>6</sup> Belfast Telegraph: Editorial Viewpoint; 2 August 2019.

<sup>7</sup> Opening commentary to both of the Dublin Forum’s documents referred to in this submission.

<sup>8</sup> Asbjorn Eide: ‘A Review and Analysis of Constructive Approaches to Group Accommodation and Minority Protection in Divided or Multicultural Societies’; Forum for Peace and Reconciliation, Consultancy Studies Number Three, ‘Biographical Note’, July 1996, page 133.

determination, translated either into demands for independence for the particular territory in which they live, a merger with a neighbouring State, or autonomy for the area in which they live.<sup>9</sup>

12. Against the background of the last quotation, Asbjorn Eide commented further:

In November 1994 the Council of Europe adopted the Framework Convention on Minorities. The Convention is significant for two reasons. It is the first multilateral 'hard law' instrument devoted in its entirety to the protection of minorities, and it contains much more detailed provisions on such protection than any other international instrument...building as it does on the United Nations Minority Declaration and on the Copenhagen Document of the CSCE (now OSCE).<sup>10</sup>

13. Writing for the same Dublin Forum, Professors Boyle<sup>11</sup>, Campbell and Hadden commented, just prior to the NI Forum's Elections, as follows:

The substance of fundamental human rights is now determined by international agreement and there is an obligation on all States to protect them. To this extent the identification of the human rights to be protected is not a matter for bargaining between the parties to the peace process.<sup>12</sup>

14. They commented further:

In a divided society the effective recognition of communal rights and the development of a concept of parity of treatment and esteem may be as important to the maintenance of peace and stability as the recognition of individual rights. Any entrenched bill of rights for Northern Ireland or other parts of the United Kingdom or for Ireland as a whole should include provisions to ensure that communal rights are effectively guaranteed. The best approach may be to incorporate the major provisions of the European Framework Convention on the Protection of National Minorities into any new bill of rights leaving the detailed provisions to be worked out in ordinary legislation.<sup>13</sup>

15. The Community Relations Council has had an important role in assisting to develop a more shared and tolerant community in Northern Ireland. Its former Chief Executive stated: *"The rule of law is not negotiable. Neither are equality and human rights."*<sup>14</sup>

16. Prior to being elected to the 'NI Forum for Political Dialogue' and subsequently as a participant in 'The Talks', I was a member from 1990 of the 'Standing Advisory Commission on Human Rights' (SACHR). It provided human rights advice to the Government being dissolved and replaced by the Northern Ireland Human Rights Commission (NIHRC), under the Northern Ireland Act 1998. Through SACHR I was aware of the deliberations of the Dublin Forum and, after due consideration, agreed with its

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<sup>9</sup> Asbjorn Eide: Ibid; pages 33 and 35.

<sup>10</sup> Asbjorn Eide; Ibid; page 69.

<sup>11</sup> Kevin Boyle was a leading activist in the 1960's Northern Ireland Civil Rights movement.

<sup>12</sup> Kevin Boyle, Colm Campbell and Tom Hadden: 'The Protection of Human Rights in the Context of Peace and Reconciliation in Ireland'; Consultancy Studies Number Two, May 1996, page 2.

<sup>13</sup> Kevin Boyle, Colm Campbell and Tom Hadden: Ibid; page 6.

<sup>14</sup> Duncan Morrow: Platform Article, Belfast Telegraph, 14 March 2009.

principles as summarised above regarding group/communal rights (or minority protection). I was clear this required compromise from all sections of the community and also that these principles were a reflection of a wider international consensus. I articulated these views consistently, both publicly and also within 'The Talks' and remain of the same opinion today. One early example:

Were all participants in the Talks process to abide by the international consensus as to how to solve our problem of a divided society, progress would be made. Indeed it will only be by such a commitment on the part of all participants that progress will be made - and it could be made quickly. [Concluding] It will never be possible to find a widely acceptable solution to the problems of our divided society without a basis of agreed principles. These principles will have to be derived from international human rights law, which balances majority rights and secure borders with minority rights and democratic inclusion. Until these principles are publicly debated and widely agreed it is naïve to expect much progress from the political talks.<sup>15</sup>

17. And the Government was challenged, publicly and within 'The Talks', both to ratify the Council of Europe's Framework Convention for the Protection of National Minorities and to consider developing a Bill of Rights for Northern Ireland: My position was initially summarised as follows:

Firstly, the new Labour government has the key responsibility. It already has made proposals to incorporate into UK law the 'European Convention on Human Rights', which it views as a valuable step in protecting basic human rights. It needs to go further for Northern Ireland by ratifying and implementing the 1995 'Convention for the Protection of Minorities'. This could best be done by incorporation into a Bill of Rights for Northern Ireland. Both conventions, developed by the Council of Europe, conform to the 'European model' for solving the problems of a divided society. Since introduction in 1995, countries such as Estonia, Hungary, Romania and Slovakia have already ratified the convention: the question to London is; why are you delaying?<sup>16</sup>

18. Eventually in mid-January 1998, the UK Government ratified the Minority Convention and subsequently would be held to account for its implementation by way of regular monitoring procedures. At the time of ratification I commented:

Though largely unnoticed, this represents potentially the most significant development to help resolve our present difficulties. [Concluding] The new UK government has taken a first step towards following the true European model of reconciliation between different groups within a state. For the first time a UK government has seemingly recognised what is appropriate. All should accept these principles.<sup>17</sup>

19. However, in The Belfast Agreement there is minimum reference to the Minority Convention. Work still requires to be done in convincing both Governments and others of its importance in helping to provide a stable community at ease with its inherent diversity.

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<sup>15</sup> Dermot Nesbitt: 'Solutions lie with basic rights'; Belfast Telegraph, 19 September 1996.

<sup>16</sup> Dermot Nesbitt: 'Responsibilities and challenges facing positive unionism'; News Letter, 5 June 1997.

<sup>17</sup> Dermot Nesbitt: 'Minority protection pact will help us'; News Letter, 20 January 1998.

### **C. Framework Convention for the Protection of National Minorities (FCNM)**

20. The FCNM was drawn up in 1995 by the Council of Europe, following a meeting of member States in Vienna in October 1993. It stated: *“Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent [and thus need to] create appropriate conditions enabling them to express, preserve and develop their identity.”*<sup>18</sup>

21. The Council of Europe (home of the ‘Convention for the Protection of Human Rights and Fundamental Freedoms’, 1953) describes the FCNM as:

One of the most comprehensive treaties designed to protect the rights of persons belonging to national minorities. Parties to the Convention undertake to promote the full and effective equality of persons belonging to minorities in all areas of economic, social, political and cultural life together with the conditions that will allow them to express, preserve and develop their culture and identity.<sup>19</sup>

22. The FCNM does not contain a definition of ‘national minority’ as there is no general agreement among the Council of Europe’s member states. Each member state is left to decide which groups are to be covered by the FCNM. Also, individuals are free to decide whether or not they wish to be treated as belonging to a national minority. The UK Government has used the following definition, based on the Race Relations Act (1976), *“a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origins.”*<sup>20</sup> The UK Government includes Cornish, Irish, Scots and Welsh in this definition.

23. A ‘national minority’ is generally viewed as a group of persons within a state who display distinctive ethnic, cultural, religious or linguistic characteristics and are motivated to preserve that which constitutes their common identity.

24. At the outset the FCNM states that signatories to the Convention are:

Resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states.<sup>21</sup>

25. Among the Articles contained in the FCNM are *“adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority”*[4]; *“maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage”* [5]; *“every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing”* [10]; and, *“create the conditions*

<sup>18</sup> Council of Europe FCNM: Strasbourg, 1 February 1995, page 1.

<sup>19</sup> <https://www.coe.int/en/web/minorities/fcnm-leaflet>

<sup>20</sup> UK Government: ‘Report submitted by the UK pursuant to Article 25’; 26 July 1999, part 1, par. 2.

<sup>21</sup> Council of Europe FCNM: Ibid; page 1.

*necessary for the effective participation of persons belonging to national minorities in cultural, social economic life and in public affairs, in particular those affecting them.”*[15]

26. The FCNM also contains a section relating to provisions concerning its interpretation and application, namely; Articles 20 to 23. Importantly, Articles 20 and 21 are restrictive as to the actions of individuals. Thus, with rights go associated obligations. These restrictions are to enable the rights approach of the FCNM to be implemented, such as the above Articles. In particular, *“any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities”* [20], and *“Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.”*[21]
27. This ‘obligation’ dimension is not new when considering the political environment. Following the prorogation of the Northern Ireland Parliament in 1972, against a background of severe violence, the UK Government brought forward in 1973 proposals for progress in Northern Ireland. These proposals were the foundation for negotiations that led to the Sunningdale Communiqué in December 1973. A relevant reference, in the context of ‘A Charter of Human Rights’ and under the sub-heading ‘The requirement’, was as follows:

But this pattern of rights has to be matched by a balancing pattern of obligations...the right to equality of benefit and opportunity is incompatible with abstention, non-participation or avoidance of such communal obligations as paying, through taxation or otherwise, for public services available to all.<sup>22</sup>

28. The *“main aim”*<sup>23</sup> of the FCNM, while seeking to ensure the effective protection of national minorities, also stresses this is to occur within the rule of law and respect for territorial integrity. Generally, if you respect people, you have a good opinion of them or, at least, if you show respect for people’s wishes, rights, or customs, you avoid doing anything they would dislike or regard as wrong. From a legal perspective, in the Oxford Electronic Dictionary respect means that one agrees to recognise and abide by the legal position: respect for the legal position is not simply abiding by the law, which one must do. To ‘recognise’ involves acknowledging the existence, validity or legality of the position and acting accordingly.
29. The question of uniqueness of the Northern Ireland problem has arisen (see section **D**). When interviewed by William Crawley on BBC’s ‘Talkback’, he questioned me: *“You’re not seriously comparing the Nationalist people in Northern Ireland to the Slovak community in Hungary, are you?”*<sup>24</sup> Yet, in consideration of the Council of Europe’s last published opinion on Hungary<sup>25</sup>, regarding implementation of the FCNM, it refers - regarding the Slovak minority community in Hungary - to such aspects as: self-government, cultural aspects, broadcast television, public signage, schooling / education and trans frontier co-operation: issues perhaps not uncommon in Northern Ireland.

<sup>22</sup> HMSO: ‘Northern Ireland Constitutional Proposals’; Cmnd 5259, March 1973, par. 92, page 24.

<sup>23</sup> Council of Europe: ‘Explanatory Report to the FCNM’; Strasbourg, 1 February 1995, par. 28.

<sup>24</sup> BBC: ‘Talkback’; 20 July 2017.

<sup>25</sup> Advisory Committee on the FCNM: ‘Fourth Opinion on Hungary’; Strasbourg, 12 September 2016.

## **D. The United Kingdom and Irish Governments' Position**

30. By way of background to 'The Talks', the UK and Irish Governments published in 1995 the 'The Framework Documents', comprising two sections: 'A New Framework for Agreement' and 'A Framework for Accountable Government in Northern Ireland'. They referred to:

Guiding principles [Including] that any new political arrangements must be based on full respect for, and protection and expression of, the rights and identities of both traditions in Ireland and even-handedly afford both communities in Northern Ireland parity of esteem and treatment, including equality of opportunity. <sup>26</sup>

31. The Governments stated that their views represented:

A shared understanding between the British and Irish Governments to assist discussion and negotiation involving the Northern Ireland parties [Adding that] it was not a rigid blueprint to be imposed but both Governments believe it sets out a realistic and balanced framework for agreement. <sup>27</sup>

32. The UK Government indicated that *"the protection of rights will be of central significance for the achievement of a lasting settlement."* <sup>28</sup> Yet it was surprising that the UK Government, in considering the matter of the protection of rights and recognising it was a party to the FCNM, indicated that:

There may be some existing models for rights protection whose contents could be adapted for use in the Northern Ireland context [And that] the provisions of certain international instruments on human rights might contain elements which could be applied in a specific Northern Ireland context. <sup>29</sup>

33. At all times the UUP's response was clear and simple: *"We wish for the same rights and the same level of stability based on the same principles as are applied elsewhere in Europe."* <sup>30</sup> Eventually, by way of The Belfast Agreement, the UK Government demonstrated, at least in words, a changed attitude to international law with respect to Northern Ireland. Both Governments had stated initially:

They will discuss and seek agreement with the relevant political parties in Northern Ireland as to what rights should be so specified and how they might best be further protected, having regard to each Government's overall responsibilities including its international obligations. <sup>31</sup>

34. However, as part of The Belfast Agreement, the UK Government agreed *"to legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland."* <sup>32</sup> This latter quotation represented a subtle change by the UK

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<sup>26</sup> UK/Irish Governments: 'A New Framework for Agreement'; 22 February 1995, par. 10.

<sup>27</sup> UK/Irish Governments: Ibid; 'Introductory Comments' and par. 8.

<sup>28</sup> Northern Ireland Office: 'Rights and Safeguards: Paper by the British Government'; February 1998, par. 1.

<sup>29</sup> Northern Ireland Office: Ibid, par. 8.

<sup>30</sup> UUP: 'Rights: Principles of Government', paper submitted to 'The Talks', 2 March 1998.

<sup>31</sup> A Framework for Agreement: 'Protection of Rights'; 22 February 1995, par. 50.

<sup>32</sup> The Belfast Agreement: 'Strand One; Democratic Institutions in Northern Ireland', par. 33 (b).



Government from merely *“having regard”* to international obligations. The Government should be held to account in its fulfilment of its international obligations. And, importantly, fulfilment of these obligations by all - in the context of good relations - would benefit everyone in Northern Ireland.

35. Overall, both Governments seem clearly to have had, and unfortunately continue to have, an unacceptable ‘blind spot’ regarding relevant international norms. This ‘blind spot’ was based initially on a belief that they faced a unique problem. A former UK Prime Minister described Northern Ireland as *“unique”*.<sup>33</sup> Additionally, the UK Government stated: *“A key feature for discussion in the talks is the extent which there is a need to develop specific additional rights protections to deal with the unique problems of the divided community in Northern Ireland.”*<sup>34</sup>
36. Viewing the problem as unique blocks the mind from considering all aspects of the FCNM. This has the potential to cause continued instability, interspersed with periods of apparent stability.
37. Yet the assertion that the central problem is unique is not based on fact. The Council of Europe’s rationale for the FCNM is clear: *“Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent”*<sup>35</sup>, combined with its monitoring process, is testimony to that fact. (See par. 20 above) And, the FCNM’s related ‘Facts Sheet’ states: *“Virtually all European states have some population belonging to national minorities.”*<sup>36</sup> Also, see Eide’s comments: *“Experience shows that there are almost no ethnically homogeneous States. (See par. 11 above)*
38. Each of the 39 European countries<sup>37</sup> subject to the FCNM have their own particular characteristics but all are subject to the same FCNM template. Most Northern Ireland residents will likely not have heard of the FCNM, but one might suppose their general attitude is likely to be a reflection of its overall values. The UK Government, with direct responsibility for the application of human rights in Northern Ireland, has not reflected the full extent of these values, having viewed Northern Ireland - completely erroneously - as unique.
39. A greater knowledge and understanding of the issues involved is required and the Northern Ireland Assembly, via the Ad Hoc Committee on Bill of Rights, can and must play a vital role in ensuring confidence and trust is engendered regarding political progress towards a normal and stable society. It is essential that progress to a satisfactory conclusion is made and in a timely manner.

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<sup>33</sup> John Major: ‘A Framework for Accountable Government in Northern Ireland’, Foreword, February 1995.

<sup>34</sup> Northern Ireland Office: op. cit., par. 4.

<sup>35</sup> Council of Europe FCNM: op. cit., page 1.

<sup>36</sup> <https://www.coe.int/en/web/minorities/fcnm-factsheet>

<sup>37</sup> <https://www.coe.int/en/web/minorities/country-specific-monitoring>

## **E. Other viewpoints**

### **(i) The Northern Ireland Human Rights Commission (NIHRC)**

40. Following the endorsement of The Belfast Agreement by way of referenda on 22 May 1998, the new NIHRC was tasked with considering the scope for additional rights to the European Convention on Human Rights (ECHR) to reflect defined particular circumstances. The NIHRC published a brochure which stated the following:

The Convention does not provide any general protection for the cultural or other rights of distinctive communities or any specific guarantee that they will be granted parity of treatment and esteem. Rights of this kind are covered in the United Nations' Covenant on Economic, Social and Cultural Rights and in the European Framework Convention on the Rights of National Minorities.<sup>38</sup>

41. Yet, it stated further that:

It has chosen not to confine itself to advising on 'the scope for defining' the requisite rights but to advise on the rights themselves. [And] In so far as a narrow interpretation of paragraph 4 might be thought to rule out the recommendation of certain rights, the Commission is satisfied that it can properly rely on its general power under section 69(3)(b) of the Northern Ireland Act 1998 to make recommendations for the better protection of human rights in Northern Ireland.<sup>39</sup>

42. The Commission's thinking at the time was clear: let's take upon ourselves responsibilities beyond our Bill of Rights' clear remit in The Belfast Agreement by invoking an additional aspect of the NI Act 1998, in order to attempt to advise on wide-ranging aspects to a Bill of Rights "as the Commission thinks appropriate."<sup>40</sup>

43. Regarding this position, I commented to the 'Forum for Bill of Rights' (see Sub-section **(b)** below) the following:

The Commission's clearly articulated position, from a UUP's perspective, went beyond both the intention of The Belfast Agreement and also the law based on this Agreement. This Commission failed in its attempt to advise government on a Bill of Rights. A lesson must be learnt."<sup>41</sup>

44. Professor Brice Dickson (First Chairperson of the NIHRC) conveyed his experience in 2008 to a Westminster Committee.<sup>42</sup> Some relevant extracts are as follows:

(Q105) The Commission, when it first launched its campaign for a Bill of Rights in March 2000, thought that it would take between 18 months and two years. The Commission did succeed in producing its draft Bill of Rights within the 18 months deadline in September 2001, but that provoked such controversy amongst the politicians and others in Northern Ireland that the whole process got elongated. It has

<sup>38</sup> NIHRC: 'A Bill of Rights: your questions answered', undated.

<sup>39</sup> NIHRC: 'Making a Bill of Rights for Northern Ireland', September 2001, page 14.

<sup>40</sup> Northern Ireland Act 1998: Section 69(3) (b).

<sup>41</sup> Dermot Nesbitt: 'Bill of Rights for Northern Ireland, The particular Circumstances', 15 October 2007, page 8.

<sup>42</sup> House of Lords/Commons: 'A Bill of Rights for the UK?' Public evidence session, 28 January 2008.

taken much longer than I myself had hoped. At the end of the day there is only a certain limited number of options in this whole field and decisions need to be taken by those who have the political responsibility for taking them.

(Q107) I think the process is inevitably going to be political in any society, but in Northern Ireland, obviously, there was an extra dimension to the political nature of the controversy, not least because the Good Friday Agreement seems to suggest that whatever Bill of Rights is put in place for Northern Ireland (if one is put in place) there has to be a reciprocal protection of rights in the Republic of Ireland, and there are particular rights which, let us say, the Nationalists or the Unionists in Northern Ireland would be campaigning for, which inevitably provokes opposition from the other side, so there was that extra level of politicisation of the process in Northern Ireland.

(Q116) The former Commission went to great lengths to engage with as great a variety of people as possible...All that, I think, created a great head of steam in favour of the Bill of Rights which in the year 2001 was palpable in Northern Ireland, and to me that makes it all the more regrettable that the politicians at that point were not able to find a consensus position on what should be in the Bill of Rights.

(Q124) One of the complicating factors in the Good Friday Agreement is that it was agreed prior to the passing of the Human Rights Act and one of the commitments in the Agreement was to incorporate the European Convention on Human Rights which then happened a few months later. Some people in Northern Ireland therefore think that we already have a Bill of Rights; it is the Human Rights Act, but another bit of the Good Friday Agreement specifically says that the Bill of Rights for Northern Ireland is to have rights supplementary to those in the European Convention on Human Rights, and most of the work of the Human Rights Commission while I was there was focused on trying to identify the supplementary rights that there should be. We found there was a great variety of such rights that should be included, so whatever happens to the current process my own view is that it should build upon the Human Rights Act.

(Q125) If I could just add a supplementary point, I think what is important is that if certain rights, especially in the economic and social field, are to be protected by the Bill of Rights for Northern Ireland or for the UK, regard should be had to the fact that devolved administrations have responsibilities in those areas - education and health, for example, in the case of Northern Ireland, so it would be appropriate at the very least that the Assembly in Northern Ireland consciously debated the enactment of any such protection of rights that would have effect in Northern Ireland because that Assembly is going to have responsibility for ensuring that the requisite resources are put into protecting those rights. I am in favour of a national Bill of Rights that protects core rights but if the devolved administrations want to go further and protect additional rights for their part of the country then well and good.

45. Professor Tom Hadden (referred to previously together with Professors Boyle and Campbell) was a member of the initial NIHRC from 1999 to 2005. He subsequently

expressed his views <sup>43</sup> as to the lack of progress towards a Bill of Rights. Some extracts are as follows:

There is a curious omission of any mention of the Northern Ireland Bill of Rights in the programme for the Human Rights Commission's September Conference celebrating ten years of the Human Rights Act. Is this just a strategic cooling off following the NIO's hatchet job on the Commission's final advice or an acknowledgment that there is now no chance of securing any specific Northern Ireland Bill.

But the Human Rights Commission and the human rights community at large seriously misunderstood what was intended and agreed by the parties and the two governments in 1998. Instead of working on what was needed to guarantee the concerns of unionists, nationalists and the unaligned they convinced themselves that their job was to incorporate an up to date list of human rights for all.

When the NIHRC, initially led by Professor Brice Dickson, got to work on the project, however, most of its members thought they had a free hand in drafting a wide-ranging Bill of Rights. It started by setting up a series of working parties drawn from all main interest groups – communities, languages, children, criminal lawyers and the like. In the absence of any clear guidance, each naturally recommended maximum protection for its sector.

The British Government made this clear to the Commission in a letter from Des Brown in 2004 stating that the Commission had exceeded its remit, notably in respect of a wide range of social and economic rights which were not in reality any more relevant to the particular circumstances of Northern Ireland than in other deprived areas in Britain.

Instead of taking account of this serious division and clear signals from the British Government that it would only enact a Bill with cross communal support in the Assembly the newly appointed NIHRC, led by Professor Monica McWilliams, pressed ahead with a revised draft...

46. Professor Monica McWilliams, then Chief Commissioner of the NIHRC, expressed some views <sup>44</sup> about the future of human rights. Two such views were as follows:

Our work is based on securing the highest human rights standards. So, what else could have been expected from a Human Rights Commission except for proposals that would seek to enhance the human rights of people in Northern Ireland? We gave that advice on a Bill of Rights for Northern Ireland in December 2008. It is now time for the politicians to decide how the process is to be completed.

The Commission advised government that there should be a Bill of Rights, not as some kind of tick box exercise for the expediency of the Belfast (Good Friday) or St Andrews Agreements, but because we recognise it as an essential part of the peace process.

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<sup>43</sup> Tom Hadden: 'How the Bill was lost'; 'Fortnight', September 2010, pages 10 and 11.

<sup>44</sup> Monica McWilliams: Platform Article; Belfast Telegraph, 16 September 2010.

47. Regarding the first paragraph of the above quotation, it is interesting to note at the commencement of Chapter 4 (Effective Enforcement and Implementation) the Advice, states: *“This chapter explains the recommendations regarding enforcement and implementation of a Bill of Rights for Northern Ireland.”*<sup>45</sup> After referring to the Human Rights Act, reference is then made to The Belfast Agreement as follows (quoted precisely as contained in the Advice):

The Belfast (Good Friday) Agreement 1998 tasks the Commission with identifying “rights supplementary to those in the European Convention on Human Rights (ECHR) ... These additional rights ... – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland”.

48. Throughout the 189-page Advice, the phrase *“Supplementary protection to the European Convention on Human Rights”* is stated 96 times. This compares with *“mutual respect and parity of esteem”* (referencing the additional rights to be reflected in the Advice, as per The Belfast Agreement) being stated only 8 times. Though not a rigorous statistical analysis, it does indicate in a simple way the above distorted Advice’s phrasing regarding the contents of The Belfast Agreement. While I accept that the Advice quotes in full (page 8) the relevant section of The Belfast Agreement, its overwhelming content is a reflection of the above truncated and thus inaccurate description of The Belfast Agreement. It is accepted practice that in referencing quotations, the symbol “...” may be used on the understanding that by eliminating words within a quotation, it does not undermine the overall accurate meaning of the quotation, which is not the case just referenced.

49. Regarding the second paragraph of the above quotation by Professor McWilliams, I believe it is most disrespectful of the outcome contained in The Belfast Agreement that was in turn agreed by a large majority, via two referenda of the peoples of Ireland on 22 May 1998. It is a matter of complying with the wishes expressed by referenda and not viewing the implementation of the people’s clearly expressed wish as a mere “tick box” exercise.

50. Concerning the contents of the Advice, Professor Tom Hadden commented: *“It increased unionist opposition by refusing to allow its representatives on the Commission to explain their dissent or to submit a minority report.”*<sup>46</sup> A ‘Note of Dissent’ was separately issued, stating in relation to ‘Identity and Culture’: *“The remit has not been fulfilled.”*<sup>47</sup>

51. Finally, the NIHRC currently displays on its webpage its view regarding a Bill of Rights:

Under the terms of the Belfast (Good Friday) Agreement 1998, the Commission was asked to consult and advise on a Bill of Rights for Northern Ireland. It delivered advice to the Secretary of State for Northern Ireland on 10 December 2008. The form of a possible Bill of Rights has been debated vigorously, although very little progress has been made towards the adoption of the instrument. The ongoing delay is a matter of regret for the Commission, which continues to consider that the advice it delivered

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<sup>45</sup> NIHRC: ‘A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland’; 10 December 2008, page 137.

<sup>46</sup> Tom Hadden: op. cit., September 2010, page 11.

<sup>47</sup> Commissioner Daphne Trimble: ‘Note of Dissent to NIHRC’s advice to Secretary of State on Bill of Rights for Northern Ireland’, 10 December 2008, page 4.

constitutes a strong basis on which to proceed. It continues to support efforts for the adoption of a Bill of Rights for Northern Ireland.<sup>48</sup>

### (ii) Forum for Bill of Rights

52. A 'Forum for Bill of Rights' was established in 2006 (comprising 28 members with 14 representatives from civic society and 14 representatives from political parties) chaired by Chris Sidoti an Australian Human Rights Lawyer. It was to produce agreed recommendations to advise the NIHRC in accordance with its mandate as prescribed in The Belfast Agreement. A Report was presented in March 2008. I was one of the members of the UUP's delegation on the 'Forum' and the party's opening statement was as follows:

The Ulster Unionist Party has long advocated a Bill of Rights. In 1972 our Party proposed a "precise and comprehensive Bill of Rights". Throughout the 1980s and 1990s we urged that the ECHR be incorporated into United Kingdom law to protect fundamental rights and liberties. In 1998 we supported the drafting of rights supplemental to ECHR addressing the particular circumstances - described as "the principles of mutual respect for the identity and ethos of both communities and parity of esteem" - of Northern Ireland. And we recently reiterated our support for a Bill of Rights in the 'Preparation for Government Committee's Report on Rights, Safeguards, Equality Issues and Victims'.<sup>49</sup>

53. Overall, the UUP participated fully in all the deliberations of the Forum. I understood fully those members of the Forum who wished to consider a wider perspective. However, there was a limit to this understanding and I did not support 'mission creep' becoming, as it tended to do, 'mission gallop'. Support could not be given to the Forum's final report: a repeated mistake was a lesson not learnt.

### (iii) The Human Rights Consortium

54. The Consortium describes itself as follows: "*The Consortium is a broad alliance of civil society organisations from across all communities, sectors and areas of Northern Ireland who work together to help develop a human rights based society.*"<sup>50</sup>

55. It referred to the Belfast Agreement, answering its own posed question: what is the Bill of Rights for Northern Ireland?

Under the Belfast/Good Friday Agreement, the NI Human Rights Commission (NIHRC) was asked to consult with people in Northern Ireland and advise the Secretary of State on the scope for defining rights supplementary to the European Convention of Human Rights.

Such rights were to reflect the particular circumstances of Northern Ireland, and, taken together with the Convention, would constitute a Bill of Rights for Northern Ireland.<sup>51</sup>

<sup>48</sup> <https://www.nihrc.org/publication/category/Bill-of-Rights>

<sup>49</sup> UUP: 'Opening Statement', tabled at Forum meeting, 18 December 2006.

<sup>50</sup> <http://www.humanrightsconsortium.org/about-us/>

<sup>51</sup> Human Rights Consortium: 'Frequently Asked Questions', June 2005.

56. However, the Consortium failed in the above quotation to state the one clear and discrete sentence as to what The Belfast Agreement described were the supplementary rights in order to reflect Northern Ireland's particular circumstances, namely: *"These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland."* <sup>52</sup>
57. A further updated publication to the above was produced by the Consortium in 2007, asking the question: *"What does the 'particular circumstances' of Northern Ireland, as stated in the Good Friday Agreement, mean?"* <sup>53</sup>
58. In answer to this question, the Consortium addressed a wide-ranging set of circumstances that it believed should comprise a Bill of Rights. For example, it stated:

This is a society of great inequalities and divisions. As many as one in five people have a disability, racist attacks in Northern Ireland are on the rise, women earn on average 84% of a man's salary, catholic men are twice as likely to be unemployed as Protestant men, we have the highest rate of child poverty in the UK, and the infant mortality rate among Travellers is unacceptably high.

59. These are valid concerns for any society, but are they those that are to be addressed in a Bill of Rights according to the terms of The Belfast Agreement?

## **F. Commentary**

60. This submission endeavours to present an objective analysis of aspects related to a Bill of Rights. All agree that human rights are to be protected and must be addressed in the context of conflicting communal identities. A clear pathway was agreed in 1998 for securing a Bill of Rights and, as demonstrated by this submission, in the context that Northern Ireland is not unique. The approach to drafting a Bill of Rights should be firmly rooted in international law and, specifically, the FCNM. Yet to date both the UK and Irish Governments, local political parties and the media have displayed little or no interest in the FCNM.
61. Regrettably, for various reasons, several attempts in agreeing a Bill of Rights were unsuccessful and now the challenge has been passed to an Ad Hoc Committee of the Assembly, mindful that some who previously considered the issue blamed politicians for the lack of progress.
62. My views are clear. I have no desire to define cultural identity and associated rights in a restrictive manner. Importantly, I wish to base decisions on international law that follows practices in wider Europe. This takes any discussion away from 'local' arguments and provides a focus on what issues need to be addressed. It's that simple!
63. The meaning of the language describing the 'particular circumstances' is clear. The widening of the content of any deliberation has had a detrimental effect on the timescale

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<sup>52</sup> The Belfast Agreement: 'Rights Safeguards & Equality of Opportunity'; par. 4.

<sup>53</sup> Human Rights Consortium: 'Frequently Asked Questions', 2007, page 12.

and lack of outcome. I am conscious of those who hold strongly to the viewpoint that the consideration of a Bill of Rights for Northern Ireland offers an opportunity for a wider consideration and I do not doubt their sincerity.

64. I believe the vast majority wish to see a real, balanced and honourable accommodation between our two communities. The principles agreed by the Council of Europe are aimed at solving the problems of a community deeply divided along communal lines and based on historical experience of European conflicts. Real progress is possible, but for progress to be made it must be balanced. Only with balanced commitments from community leaders will the necessary progress be made.

65. The 'aspiration' dimension of the nationalist position has been fully reflected within the terms of The Belfast Agreement. In this context it is worth noting Asbjorn Eide's comment in relation to territorial integrity that "*group accommodation must be effected within the limits of existing territorial integrity of States unless all parties agree to a voluntary territorial change.*"<sup>54</sup>

66. The late Liam Clarke (then Political Editor, Belfast Telegraph) wrote perceptively regarding what politicians should seek to achieve, in the context of the attempt by Dr. Richard Haass (an American diplomat) to address communal issues via the 'Panel of Parties':

We need an agreed approach...where decisions are taken on an objective basis - not totted up as tribal victories, or defeats. [And] above all, it should contain some more substance; and some pain for both the big parties. Leadership requires imagination and courage, not cautious calculation.<sup>55</sup>

67. In my submission I cited other European examples in order to demonstrate the geographical spread. However, one needs go no further than Scotland or Wales to see the outworking of what would be an appropriate accommodation. Mindful of the above quotation regarding leadership there is much to be considered in, for example, how the Scottish National Party (a determined separatist party) respects the principles of international law.

68. Hopefully, I have made my position clear as to how to make progress. Thus, to present briefly another perspective, I refer to a clear and simple comment by the leader of Sinn Fein in Northern Ireland, Michelle O'Neill: "*There can be no alternative to respect and equality. There is no alternative to power-sharing and the Good Friday Agreement.*"<sup>56</sup> I agree with this approach in all its parts.

69. Yet today, I have an acute frustration with our present political situation that has lacked a clear, positive, balanced and pragmatic approach regarding the implementation of human rights. I have challenged publicly both local and national politicians and the media as to why the Council of Europe's international standards on human rights are being ignored. All political parties, in particular the dominant two Northern Ireland parties from each tradition, have a clear responsibility. Further, the UK Government has disregarded its

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<sup>54</sup> Asbjorn Eide: op. cit., page 70.

<sup>55</sup> Liam Clarke: Belfast Telegraph; 1 February 2013 and 10 May 2013.

<sup>56</sup> Michelle O'Neill: Platform Article; Belfast Telegraph, 23 February 2017.



obligations to the Council of Europe by failing to recognise the breadth of respect required in order to make progress on human rights.

70. In the above context, the Committee on the Administration of Justice (CAJ) lodged with the Council of Europe a recommendation regarding a Bill of Rights. It stated:

The Advisory Committee may wish to: reiterate the binding nature of the Framework Convention on public authorities; seek assurances the ECHR will not be disincorporated from NI Law, and for progress on the Bill of Rights for Northern Ireland as a manner of ensuring incorporation of FCNM provisions in the domestic legal order; advocate ministerial powers be exercised to ensure compliance with international obligations when required for the implementation of duties under the FCNM.<sup>57</sup>

71. Following this CAJ submission (and others) the Council of Europe, after due consideration, published its fourth and latest Opinion on 27 February 2017. Strangely, a Bill of Rights was not referenced in the Opinion. However, it referred, legitimately in the context of 2017, to an Irish Language Act in that it *“regrets that there has been little progress on the Irish Language Bill or a strategy for the development and enhancement of the Irish language.”*<sup>58</sup> In addition, under ‘Conclusions’ and the sub-heading ‘Recommendations for immediate action’, it referred to adopting appropriate legislation to protect and promote the Irish language, adding that *“the UK government should engage in a dialogue to create the political consensus needed for adopting legislation.”*<sup>59</sup>

72. One wonders why the avoidance of any reference to the FCNM and a Bill of Rights? Is it any wonder that the two Governments, local politicians and the media have not been stimulated to raise the matter of international standards and the FCNM? Following the same tone as the Council of Europe’s Opinion, immediate action regarding ‘dialogue’ is needed to create more than an Irish Language Act. In this environment, there is a clear challenge to the Assembly’s Ad Hoc Committee to fill the void.

## **Dermot Nesbitt**

<sup>57</sup> CAJ: ‘to Council of Europe Advisory Committee on FCNM on the 4th Report of the UK’; March 2016

<sup>58</sup> Council of Europe: ‘Fourth Opinion on the United Kingdom’; Strasbourg, 27 February 2017, page 33, par.103.

<sup>59</sup> Council of Europe: Ibid. page 49, par. 152.