

Ad Hoc Committee on Bill of Rights
Northern Ireland Assembly
(Follow-up Working Paper)
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A. Introduction

1. I have been motivated to submit this Working Paper regarding the Framework Convention for the Protection of National Minorities (FCNM) following comments made by Professor Brice Dickson, first Chairman of the Northern Ireland Human Rights Commission (NIHRC), in his submission to the Ad Hoc Committee, dated 22 November 2020. He indicated that my submission, dated 26 May 2020, regarding the FCNM was “*worthy of serious consideration*” (Par. 30). During the years since 1996, when I first advocated adoption of this Convention, I do not recall anyone making such a supportive comment.
2. While writing this Working Paper, I noted what Professor Peter Shirlow, Director at the University of Liverpool's Institute of Irish Studies and regular media commentator, wrote in the Belfast Telegraph on 11 January 2021: “*One side guffaws about Brexit as an opportunity to drive the end of partition, even as business people worry about their future and others their jobs; similarly, political unionism exercises a veto over language and equality rights in which the harm caused is not worth the points scored.*”
3. As a political unionist, I would not agree entirely with Professor Shirlow's comments; though they point to the fact that much requires to be addressed by all in this still divided society. Respect for equality, human rights and the territorial integrity of the State are salient aspects of international law that are relevant in order to address our problems.
4. In answer to a question during my oral presentation to the Ad Hoc Committee on 15 October 2020, I stated that there may be up to 30 relevant rights in the FCNM. The **Annex** to this Working Paper provides this list, demonstrating what should be involved in the process of considering ‘particular circumstances’ according to the 1998 Agreement.

B. Terms of Reference for the Ad Hoc Committee

5. The overall guiding principal is clear, as referenced in ‘New Decade, New Approach’ (January 2020). It states: “*The Ad-Hoc Committee will be established to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement...*” (Page 37, par. 5.26). It is worth repeating this intention as articulated at paragraph 4 of the 1998 Agreement.¹

The new Northern Ireland Human Rights Commission (see paragraph 5 below) will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. 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. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and

¹ The 1998 Agreement: ‘Rights Safeguards and Equality of Opportunity’, pages 16 & 17.

- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

6. Since there has been, and remains, an apparent non-agreement as to the intention of the above quotation I shall attempt to take this quotation, parse it into a clear syntax while both reflecting the view from today as to the expectation that was agreed in 1998 and also aiming to capture accurately and in full the quotation's meaning.

The Northern Ireland Human Rights Commission was invited to consult and advise on the scope for defining rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem in order to reflect the particular circumstances of Northern Ireland.

In consideration of this scope, the Commission was to draw as appropriate on international instruments and experience. Such rights, defined in Westminster legislation, were to be supplementary to those in the European Convention on Human Rights and together with it were to constitute a Bill of Rights for Northern Ireland.

Among the issues the Commission was to consider were: the formulation of a general obligation on government and public bodies to fully respect, on the basis of equality of treatment, the identity and ethos of both communities; and a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

C. Identity, Ethos and Parity of Esteem

7. Conscious of the thrust of the above, Identity, Ethos and Parity of Esteem are the central aspects to be considered regarding both communities, while it is accepted generally that morally all communities require parity of esteem and respect. The key aspect is 'Identity', while 'Ethos' and 'Parity of Esteem' follow from a consideration and understanding of the essential elements of one's 'Identity'.
8. In order to consider these aspects fully, the FCNM represents an appropriate basis. Asbjorn Eide² described the FCNM as significant since it was both the first multilateral 'hard law'³ instrument devoted in its entirety to the protection of minorities, and also it contains much more detailed provisions than any other international instrument.
9. The FCNM specifies the legal principles which States undertake to respect. However, because each State may have different issues to be resolved, a measure of discretion in the implementation is left to each State. According to the FCNM's 'Explanatory Report', this enables States: "*to take particular circumstances into account.*"⁴ This last quotation reflects the 1998 Agreement and is not, as some have implied, taken to mean unique circumstances applicable only to Northern Ireland.

² For more background detail, see paras. 11 and 12 of my written submission, dated 26 May 2020.

³ Ratifying States agree to an accountable process demonstrating their compliance.

⁴ Council of Europe: 'Explanatory Report to the FCNM'; Pars. 10 & 11, Page 3

10. The FCNM describes the central elements of one's 'Identity', namely; culture, language, education and religion.⁵ 'Ethos' can be described as the characteristics of a community and manifested by its attitudes and aspirations 'Parity of Esteem' refers to equal respect for the identity, ethos and aspirations of both communities. Overall, the meaning of the language describing the 'particular circumstances' is clear.
11. Regarding 'aspirations', the 1998 Agreement explains its meaning in the same section as guidance regarding a Bill of Rights.⁶ It states: "*the right to pursue democratically national and political aspirations*" and "*the right to seek constitutional change by peaceful and legitimate means.*" Aspirations are important and both communities' aspirations are equally legitimate, however they are legally different. Northern Ireland as part of the United Kingdom, is the legal position according to both international law and the 1998 Agreement, whereas the status of the aspiration regarding a united Ireland is that of a legitimate right to wish for a change in Northern Ireland's legal position. Following from this legal position, the FCNM requires respect,⁷ both in word and action, regarding Northern Ireland's constitutional position.
12. Since 1998, some have advocated a more expansive Bill of Rights than that contained in the 1998 Agreement. I do not doubt the sincerity of those who hold strongly to the viewpoint that the consideration of a Bill of Rights offers an opportunity for a wider consideration. However, that viewpoint provides no rationale to justify ignoring the law's demand as stated in the NI Act (1998). For example the NIHRC's 2008 submission, while advancing a wide-ranging Bill of Rights, recommended a minimalist approach to those aspects specifically contained in the 1998 Agreement and subsequently in law. The NIHRC did not apply the law as written and this is demonstrably clear. Further consideration of this problem will be addressed in **Section E** below: the problem is not unsurmountable.

D. Suggested Recommendations regarding 'Particular Circumstances'

13. This section focuses entirely on the 'particular circumstances', as described in the 1998 Agreement and contained in the FCNM. The narrative in this section may form a basis for discussion on any specific rights that would complement other rights in any agreed composition of a proposed Bill of Rights. I believe it represents a brief narrative while covering all relevant rights. The implementation / assessment of these rights would be the responsibility of public authorities (including the NI Assembly and local councils).

(i) Rights Regarding Culture

- a. Public authorities shall promote, where necessary, in all areas of cultural life, full and effective equality between persons belonging to the two communities - including freedom of peaceful assembly, association and expression - and shall refrain from policies or practices aimed at assimilation of a community against its will and shall protect the community from any action aimed at such assimilation. (Arts. 4, 5 & 7)

⁵ FCNM: Articles 5 and 6

⁶ The 1998 Agreement: Op Cit.

⁷ FCNM: Articles 20 and 21, together with "Explanatory Report to the FCNM", Articles 20 and 21, Page 13.

- b. Public authorities shall ensure that persons from either of the two communities are not discriminated against in their access to the media and shall adopt adequate measures in order to facilitate either community's access to the media. This does not preclude authorities from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises. These measures are in order to promote tolerance and permit cultural pluralism. (Art.9)
- c. Also, in the legal framework of sound radio and television broadcasting, public authorities shall ensure, as far as possible, that either of the two communities is granted the possibility of creating and using its own media. (Art. 9)
- d. Public authorities shall not hinder the creation and the use of printed media by persons belonging to either of the two communities. (Art.9)
- e. Public authorities undertake not to interfere with the right of either community: to establish and maintain free and peaceful contacts across the border, in particular with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage; and to participate in the activities of non-governmental organisations, both within Northern Ireland and across the island of Ireland. (Art. 17)
- f. As part of general all-island co-operation, public authorities shall endeavour to conclude, where necessary, bilateral agreements with Ireland in order to ensure the protection of persons belonging to the Irish community. (Art. 18)

(ii) Rights Regarding Usage of the Irish Language

- a. Freedom of expression and to receive and impart information and ideas regardless of frontiers (Art.9); freedom of use in private and in public, orally and in writing (Art. 10); and freedom to use as his / her surname and first names and also official recognition of them. (Art. 11)
- b. Where requested and a real need, public authorities shall ensure as far as possible its use in relations with the administrative authorities. (Art. 10)
- c. Freedom to display signs, inscriptions and other information of a private nature visible to the public. (Art. 11) In areas where there is sufficient demand, public authorities shall endeavour to display traditional local names, street names and other topographical indications intended for the public also in the Irish language. (Art. 11)
- d. Recognition that every person belonging to both communities has the right to learn the Irish language. (Art. 14) In areas where there is sufficient demand, public authorities shall endeavour to ensure, as far as possible and within the framework of their education systems, that both communities have adequate opportunities for being taught the Irish language or for receiving instruction in this language. (Art. 14)

(iii) Rights Regarding Education

- a. Public authorities undertake to promote equal opportunities for access to education at all levels for persons belonging to both communities (Art. 12) and including 'd.' above.

- b. Public authorities, where appropriate and in the fields of education and research, shall take measures to foster knowledge of the culture, history, language and religion of both communities. (Art. 12) In this context, public authorities shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of both communities. (Art 12)
- c. Within the framework of the education system, public authorities recognise that either community has the right to set up and to manage its own private educational and training establishments: exercise of this right shall not entail any financial obligation for the public authorities. (Art. 13)

(iv) Rights Regarding Religion

- a. Public authorities undertake to recognise that every person belonging to either community has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations. (Art. 8)

E. Wider Consideration

14. A key question needs addressed: can a compromise be found between the wider spectrum of rights - like the NIHRC's 2008 submission - and a more focused Bill of Rights, reflecting in particular the specific problems associated with our divided society, that was mandated by law in 1998? As I indicated in my oral submission to the Ad Hoc Committee (15 October 2020), I believe the answer is clearly 'yes'.
15. Importantly, I note that Professor Brice Dickson in his written submission to the Ad Hoc Committee (22 November 2020) advocates a more focused Bill of Rights that in turn would likely have wider acceptability and to leave the adoption of further rights to the political process within Northern Ireland. And an agreed position, as indicated by Dominic Grieve in his Minutes of Evidence (4 June 2020), would make it difficult for Westminster to reject any proposal. I support this compromise and balanced approach.
16. Also, Professor Tom Hadden in his Minutes of Evidence (8 October 2020) advocated that the Ad Hoc Committee engage with the British and Irish Governments as to the contents of a Bill of Rights. This was supported by Professor Brice Dickson (22 November 2020). In addition, I advocated during my oral presentation that the NIHRC should be involved in any future consideration.
17. The NIHRC could make a significant contribution towards progress by reaching a new position of "recognition reality". My position regarding the NIHRC was articulated during my oral presentation on 15 October 2020 to the Ad Hoc Committee and was minuted.
18. In order to secure the required balanced compromise, all key 'actors' need to reflect and in turn recognise the reality of what is required if progress is to be made and articulate accordingly, as to date some have done.

F. Concluding Comments

19. Overall, any agreed Bill of Rights would provide the basis by which a judgement can be made on not only new policies but also the outworking of existing policies. This would require also the consideration and assessment of supporting legislation. There is thus a clear necessity for an appropriate Bill of Rights.
20. I regret very much the delay in agreeing a proposed Bill of Rights. For example, I commented to the Ad Hoc Committee: *“There should be working together in teacher training, and there should be community collaboration so that people can understand each other. All of that is written in the framework convention.”* In this context, I received in early November the latest edition of QUB’s ‘The Graduate’. It contained an article regarding the ‘Centre for Shared Education’ that was established in 2012 under the Directorship of Professor Joanne Hughes. I didn’t know this Centre existed. It’s a pity we had not had a Bill of Rights many years ago that could have pointed out such issues for attention.
21. This Working Paper does not attempt to offer a way forward for all outstanding issues, merely a document that may assist the Ad Hoc Committee in some of its future deliberations. One outstanding issue: ‘New Decade, New Approach’ refers (Par. 24, page 49) to the UK Government’s commitment *“to recognise Ulster Scots as a national minority under the Framework Convention for the Protection of National Minorities.”*
22. Ulster Scots are recognised already within the dialogue between the UK Government and the Council of Europe’s Advisory Committee, the latter having responsibility for overseeing implementation of the FCNM. For example: thirteen years ago the Council of Europe’s opinion⁸ welcomed *“the Government’s commitment...to introduce an Irish language Act, and to develop strategies for enhancing and protecting the Ulster Scots language, heritage and culture.”* This demonstrates that a minority does not require to be formally recognised by the Council of Europe in order to be considered within the terms of the FCNM. This could involve recognition of ‘Ulster Scots’ and, for example, the section above, ‘Rights Regarding Usage of the Irish Language’, would need to be adjusted accordingly. Overall, issues in this context would need clarification.
23. A re-focus in the consideration of the contents of a Bill of Rights may contribute to the achievement of a reduction in societal tension. Also, this requires respect by all for the standards contained in international law.

Dermot Nesbitt

⁸ Second Opinion on the United Kingdom’, par. 21, page 6, Strasbourg, 26 October 2007

ANNEX

Framework Convention for the Protection of National Minorities

Relevant Rights regarding consideration of a Bill of Rights for Northern Ireland

1. Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited. (Art. 4)
2. Parties undertake to adopt, where necessary, 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. (Art. 4)
3. Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage. (Art. 5)
4. Without prejudice to measures taken in pursuance of their general integration policy, Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation. (Art. 5)
5. Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media. (Art.6)
6. Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity. (Art. 6)
7. Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion. (Art. 7)
8. Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations. (Art. 8)
9. Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. (Art.9)
10. Parties shall ensure, within the framework of their legal systems that persons belonging to a national minority are not discriminated against in their access to the media. (Art. 9)

11. Rights contained in pars. 9 & 10 above shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises. (Art. 9)
12. Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. (Art.9)
13. In the legal framework of sound radio and television broadcasting, Parties shall ensure, as far as possible...that persons belonging to national minorities are granted the possibility of creating and using their own media. (Art. 9)
14. In the Framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism. (Art. 9)
15. Parties undertake to recognise that 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. (Art. 10)
16. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities. (Art. 10)
17. Parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter. (Art. 10)
18. Parties undertake to recognise that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system. (Art. 11)
19. Parties undertake to recognise that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public. (Art. 11)
20. In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications. (Art. 11)

21. Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. (Art. 12)
22. In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. (Art 12)
23. Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities. (Art. 12)
24. Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments: exercise of this right shall not entail any financial obligation for the parties. (Art. 13)
25. Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language. (Art. 14)
26. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language. (Art. 14)
27. Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them. (Art. 15)
28. Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage. (Art. 17)
29. Parties undertake not to interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organisations, both at the national and international levels. (Art. 17)
30. Parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned and where relevant, Parties shall take measures to encourage transfrontier co-operation. (Art. 18)