



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

The Assembly and Executive Reform (Assembly Opposition) Bill

Summary

The Commission advises the Committee that the cross-community vote mechanism of the NI Assembly engages ECHR, Article 3 of Protocol 1, taken in conjunction with Article 14. (para 28)

The Commission advises the Committee that the cross-community vote mechanism may be open to legal challenge under ECHR Article 3 of Protocol 1 taken in conjunction with Article 14. The Commission further advises that while it considers that the mechanism is compliant with the black-letter of the law in light of the “broad latitude to establish constitutional rules on the status of members of Parliament” given to the State, it questions whether the mechanism meets the spirit of the Convention taking account that the provisions of the ECHR are “living” to be interpreted in light of present day conditions. The Commission therefore advises the Committee that the Bill affords an opportunity to scrutinise the proportionality of the current cross community vote mechanism. Establishing a reasonable and objective justification requires continuous review. The Commission also advises the Committee that it should consider whether or not the proposed weighted majority voting mechanism is a more proportionate way of achieving the same aim which is ultimately directed at safeguarding community interests. (para 32)

The Commission advises the Committee that, on balance, it is unlikely that the cross-community voting mechanism would be

successfully argued to be based to a decisive extent on 'ethnicity'. However, the Commission advises the Committee that if the Assembly designations were to be interpreted as based on ethnicity then the cross-community consent mechanism would be accorded a heightened level of scrutiny. The ECtHR perceives that "no difference in treatment ...based...to a decisive extent on a person's ethnic origin is capable of being objectively justified". Accordingly the risk of violating ECHR, Article 14 taken in conjunction with Article 3 of Protocol 1 would be greater. (para 34)

Introduction

1. Pursuant to the Northern Ireland Act 1998, Section 69(4), the Northern Ireland Human Rights Commission (the Commission) is required to advise the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the Assembly and Executive Review Committee in response to a call for evidence relating to the Assembly and Executive Reform (Assembly Opposition) Bill (the Bill).
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:
 - The International Covenant on Civil and Political Rights (ICCPR)¹; and,
 - The Convention on the Elimination of Racial Discrimination (CERD).²
3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification and the provisions of the Northern Ireland Act 1998.³
4. In addition to the treaties, there exists a body of 'soft law' developed by the human rights bodies of the UN and CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:
 - CoE European Commission against Racism and Intolerance (ECRI) General Policy Recommendation 7.⁴

¹ Ratified by the UK in 1976.

² Ratified by the UK in 1969.

³ In addition, Section 26 (1) of the Northern Ireland Act 1998 provides that 'if the Secretary of State considers that any action proposed be taken by a Minister or Northern Ireland department would be incompatible with any international obligations...he may by order direct that the proposed action shall not be taken.' Section 24(1) states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'.

⁴ ECRI General Policy Recommendation 7: on national legislation to combat racism and racial discrimination (adopted on 13 December 2002).

5. The Commission limits the following advice to one provision within the Bill, namely the proposed replacement of cross community support with weighted majority voting. The Commission is of the view that the Bill's other provisions do not interfere with human rights law but pertain to the Assembly's democratic structures that can be legitimately reviewed by the elected representatives.

Schedule: Replacement of cross community support with weighted majority voting

i. The proposed measure

6. Clauses 13 and 14 of the Bill require the Assembly and Executive Review Committee to table a motion for debate requesting that the Secretary of State bring forward legislation to: (i) facilitate the establishment of an opposition; and (ii) reform the Assembly and Executive. The Schedule to the Bill suggests more detailed content of the 'Assembly and Executive Reform Motion'. One proposed reform is the replacement of the concepts of cross-community support and petitions of concern with weighted majority voting. The Bill states that,

a weighted majority vote mechanism means a mechanism providing that if -

- (a) 30 or more members request it, and
- (b) those requesting it are from three or more different political parties,

a vote must pass a weighted majority threshold.

7. Strand One of the Belfast (Good Friday) Agreement 1998 provides that members of the NI Assembly will register a designation of identity in order to monitor cross-community support in certain votes. There are three designation categories from which MLAs can choose: "unionist", "nationalist" and "other"; if an MLA does not designate, then he or she will be deemed designated as "other".⁵
8. The Northern Ireland Act 1998, Section 4(5) states that "cross-community support" means,

⁵ NI Assembly, Standing Order 3(7).

- (a) the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or
- (b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting.

9. There are a number of areas stipulated by the Northern Ireland Act 1998 where a cross-community vote is required such as on draft budgets and when amending standing orders.⁶ In other cases, the cross-community vote can be triggered by a 'petition of concern', which involves 30 MLAs expressing their concern about a matter.⁷ There is no formal restriction on the types of issues that may be subject to a petition of concern. The Belfast (Good Friday) Agreement did however conceive of the mechanism in the context of one of the "safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected".⁸ The only further guidance is that it is intended for "key decisions".⁹
10. The NI Assembly Research and Information Service has expressed that in the cross-community vote the "designated unionists and nationalists are more likely than the votes of others to have a determinative effect on the outcome".¹⁰
11. The Assembly and Executive Review Committee's review on petitions of concern, printed in March 2014, identifies that in the 2007-2011 mandate, 33 Petitions of Concern were tabled (20 Unionist and 13 Nationalist).¹¹ From the 2011 mandate up until April 2013, 16 petitions of concern had been tabled (7 Unionist; 9 Nationalist).¹² The review noted remarks by some MLAs and academics that the petition of concern has been used for purposes other than originally envisaged

⁶ Northern Ireland Act 1998, Sections 64 and 41(2) respectively.

⁷ Ibid., Section 42.

⁸ Belfast (Good Friday) Agreement 1998, Strand One, para 5

⁹ Ibid., para 5(d)(ii). This phrase is not defined.

¹⁰ NI Assembly (McCaffrey, R. and Moore, T.) 'Opposition, community designation and D'Hondt' in Assembly and Executive Review Committee, 'Review of Petitions of Concern' (25 March 2014), Report: NIA 166/11-15, p 185. See also, Schwartz, A., 'How unfair is cross-community consent? Voting power in the Northern Ireland Assembly' NILQ 61(4): 349-62 at 351.

¹¹ Ibid.

¹² NI Assembly (McCaffrey, R.), 'Additional Information on Petitions of Concern' (2 May 2013) in Assembly and Executive Review Committee, 'Review of Petitions of Concern' (25 March 2014), Report: NIA 166/11-15 p 199.

under the Belfast (Good Friday) Agreement, i.e. for purposes unrelated to protecting community specific rights of nationalists or unionists.¹³ The Commission observes that the most recent use of the petition of concern on 2 November 2015 was to defeat a motion on calling for legislation legalising same-sex marriage.¹⁴

ii. Human rights law

12. The ECHR, Article 3 of Protocol 1 requires States to,

hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

13. The European Court of Human Rights (ECtHR) has commented that this right is “crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.”¹⁵ “Freedom of political debate” has been determined to be particularly important to the foundation of any democracy¹⁶ and the presumption in the 21st century is in favour of inclusion.¹⁷

14. However, Article 3 of Protocol 1 is not an absolute right; because there are no express limitations contained within the right the Court has found that there is room for “implied limitations” and accorded a wide margin of appreciation to States in that sphere,¹⁸ for example when “establish[ing] constitutional rules on the status of members of parliament”.¹⁹ What is important according to the Court is that,

the conditions imposed on the rights to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate... In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not

¹³ Assembly and Executive Review Committee, ‘Review of Petitions of Concern’ (25 March 2014), Report: NIA 166/11-15, p 10-12.

¹⁴ NI Assembly, Official Report (Hansard), Vol 109, No 1 (2 November 2015), p 18.

¹⁵ *Ždanoka v. Latvia*, ECtHR, Application no. 58278/00 (16 March 2006), para 103.

¹⁶ *Yumak and Sadak v Turkey*, ECtHR, Application no. 10226/03 (8 July 2008), para 107.

¹⁷ *Brândușe v Romania*, ECtHR, Application no. 39951/08 (27 October 2015), para 44.

¹⁸ *Ždanoka v. Latvia*, ECtHR, Application no. 58278/00 (16 March 2006), para 103; *Tahirov v Azerbaijan*, ECtHR, Application no. 31953/11 (11 September 2015), para 54.

¹⁹ *Ibid.*, *Tahirov*, para 55.

run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.²⁰

15. In addition, the ECHR, Article 14 prohibits discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” in the enjoyment of the Convention rights. The Court defines discrimination as,

...treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".²¹

16. Before Article 14 is engaged therefore, the facts at issue must fall “within the ambit” of another Convention right. However, the application of Article 14 does not presuppose a breach of the provision to which it is attached and to that extent the Court has classed it as autonomous. Once an issue has been deemed to engage Article 14, the scope of the substantive right “extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols *require* each State to guarantee”.²² The Commission notes that unlike ECHR, Article 14, the ICCPR, Article 26 establishes a free standing prohibition on discrimination.

17. In seeking to establish whether or not a differential treatment has a reasonable and objective justification, the ECtHR has varied its level of scrutiny depending upon the protected ground in question. Most notably, the Court has taken a strict approach regarding discrimination on grounds of race, and what it has deemed the “related concept” of ethnicity, on the basis that such discrimination is “particularly egregious”.²³ According to the Court,

²⁰ *Ždanoka v. Latvia* [GC], no. 58278/00, § 131, ECHR 2006-IV, para 104.

²¹ *Sejdić and Finci v Bosnia and Herzegovina*, ECtHR, Applications nos. 27996/06 and 34836/06 (22 December 2009), para 42.

²² *Ibid.*, para 39 (italics added). See also, *Sommerfeld v. Germany*, ECtHR, Application no. 31871/96 (8 July 2003).

²³ *Ibid.*, *Sejdić*, para 43. See also, *Nachova and Others v Bulgaria*, ECtHR, Application No. 43577/98 and 43579/98 (6 July 2005), para 145.

no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.²⁴

18. In *Timishev v. Russia*, the Court stated that ethnicity,

has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.²⁵

19. The ECtHR is not alone in linking the concepts of nationality, ethnicity and race. ECRl defines 'racism' as,

the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.²⁶

20. Further, in its 2011 concluding observations on the UK, the UN Committee on the Elimination on Racial Discrimination invited the State to examine,

whether the legislative and policy framework for dealing with the situation in Northern Ireland could not benefit by being underpinned by the standards, duties and actions prescribed by the Convention and the Durban Declaration and Programme of Action on inter-sectionality between ethnic origin, religion and other forms of discrimination.²⁷

21. The Commission notes that in the latest State report on the CERD, the NI Executive has acknowledged the links between racism and sectarianism.²⁸

Sejdić and Finci v Bosnia and Herzegovina

²⁴ Ibid., *Sejdić*, para 44. Similarly, *Timishev v. Russia*, ECtHR, Application nos. 55762/00 and 55974/00 (13 December 2005), para 58.

²⁵ Ibid., *Timishev*, para. 55.

²⁶ ECRl, General Policy Recommendation 7: on national legislation to combat racism and racial discrimination (13 December 2002), p 5.

²⁷ CERD, 'Concluding observations on the UK' (14 September 2011), UN Doc. CERD/C/GBR/CO/18-20, para 20.

²⁸ UN Doc. CERD/C/GBR/21-23, 'Twenty-first to twenty-third periodic reports of the UK to the Committee on the Elimination of Racial Discrimination' (10 April 2015), para 42.

22. In the 2009 case of *Sejdić and Finci v Bosnia and Herzegovina*²⁹, the Court dealt with the issue of discrimination within the consociational system of Bosnia and Herzegovina, departing in the view of some academics from a previously more deferential approach.³⁰ In this regard, the Commission notes that the Court has often stated the “Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today”.³¹
23. In *Sejdić*, the Court determined that the ineligibility of Roma and Jewish persons to stand for election to Bosnia and Herzegovina’s second chamber was a violation of Article 3 of Protocol 1 taken in conjunction with Article 14. In Bosnia and Herzegovina, only persons who self-designated with one of the “constituent peoples” (i.e. Bosniaks, Croats and Serbs) could be elected to the House of Peoples; a main function of this chamber being the exercise of veto powers. The Court reasoned that such a system represented a differential on the basis of ethnicity which was not at the time of the judgment proportional to the aim of ensuring peace, considering three factors to be of relevance in this determination: (1) the positive developments towards peace since the relevant measure was first initiated; (2) the possibility that the power-sharing mechanism could be maintained without totally excluding the representatives of the ‘other’ communities; and (3) voluntary agreements made by Bosnia and Herzegovina with international bodies to review and revise its electoral legislation.³²
24. Finally, the *Sejdić* judgment includes an extract from an Opinion of the Vienna Commission, the Council of Europe’s advisory body on constitutional matters, on the “vital interests veto” which operates in the Bosnia and Herzegovina House of Peoples. In that chamber, a majority of Bosniac, of Croat, or of Serb delegates can declare a proposed decision destructive of a “vital interest” of their respective community. Once this happens, the proposed decision requires

²⁹ *Sejdić and Finci v Bosnia and Herzegovina*, ECtHR, Applications nos. 27996/06 and 34836/06 (22 December 2009).

³⁰ See, McCrudden, C. and O’Leary, B. ‘Courts and Consociations, or How Human Rights Courts May De-stabilise Power-sharing Settlements’ EJIL 24 (2013), 477-501.

³¹ *Bayatyan v Armenia*, ECtHR, Application no. 23459/03 (7 July 2011), para 102.

³² *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009, paras 47-50.

approval in the House of Peoples of the majority of Bosniac, of Croat, and of Serb delegates present and voting.

25. This extract does not form a binding part of the judgment, but denotes the perspective of an expert body influential to the ECtHR, on a procedure with comparable traits to the NI Assembly cross-community vote. The extract states:

The [Vienna] Commission is ... of the opinion that a precise and strict definition of vital interest in the Constitution is necessary. The main problem with veto powers is not their use but their preventive effect. Since all politicians involved are fully conscious of the existence of the possibility of a veto, an issue with respect to which a veto can be expected will not even be put to the vote. Due to the existence of the veto, a delegation taking a particularly intransigent position and refusing to compromise is in a strong position.

Under present conditions within Bosnia and Herzegovina, it seems unrealistic to ask for a complete abolition of the vital interest veto. The [Vienna] Commission nevertheless considers that it would be important and urgent to provide a clear definition of the vital interest in the text of the Constitution.... It should not be excessively broad but focus on rights of particular importance to the respective peoples, mainly in areas such as language, education and culture.³³

26. The Commission notes that there was no consideration given to how the vote of 'others' would be incorporated, if at all, into the vital interests veto upon others being eligible for election to the House of Peoples.

iii. Application of human rights law to proposed measure

27. When read in conjunction with Article 14, the NI Assembly cross-community voting mechanism "fall[s] within the ambit" of Article 3 of Protocol 1 because it concerns the levels of influence held by members of the directly elected legislature as a consequence of the differential in status between MLAs who designate as 'nationalist' or 'unionist' and those who designate as 'other'. In considering the applicability of

³³ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009, para 22.

Article 3 of Protocol 1 the Court emphasises the “effectiveness” of the rights to vote and stand for election and will apply a greater scope to the remit of Article 3 of Protocol 1 when read in conjunction with Article 14.

28. **The Commission advises the Committee that the cross-community vote mechanism of the NI Assembly engages ECHR, Article 3 of Protocol 1, taken in conjunction with Article 14.**
29. The protected ground through which the Court will read Article 14 is significant because of the different levels of scrutiny applied by the Court. The Commission notes that the unionist/nationalist/other designation falls under the protected ground of ‘political opinion’ and to be considered later, possibly also ‘nationality’, and most significantly ‘ethnicity’.
30. To avoid violating Article 3 of Protocol 1, taken in conjunction with Article 14, the differential treatment must have a reasonable and objective justification, which as mentioned, means pursuing a legitimate aim and being a proportionate means of achieving that aim. As implied by *Sejdić*, the Court considers ensuring peace to pursue a legitimate aim. The issue that requires greater consideration is whether the cross-community vote is a proportionate method of achieving that aim in Northern Ireland. While the Commission recalls that the Court accords a wide margin of appreciation to the State when interpreting Article 3 of Protocol 1, it also notes the increasing willingness to test the limitations of the concept in cases such as *Sejdić* and in Article 14 jurisprudence more generally.
31. In coming to a determination of proportionality on the protected ground of ‘political opinion’, the Commission advises the Committee that the Court is likely to take cognisance of the following non-exhaustive issues:
- (1) That any successful cross-community vote in the Assembly is “always, at least partially, derived from the consent of the majority”³⁴ and therefore inclusive of the ‘others’ on an equal basis to this extent (a less intrusive infringement on rights than occurred in *Sejdić*);

³⁴ Schwartz, A., ‘How unfair is cross-community consent? Voting power in the Northern Ireland Assembly’ NILQ 61(4): 349-62 at 357-8.

(2) That the cross-community support mechanism was put to the electorate in a referendum as part of the Belfast (Good Friday) Agreement (something noted as absent in the Bosnia and Herzegovina constitutional arrangements in *Sejdić*);

(3) To what extent Northern Ireland has progressed towards peace and stabilised since the introduction of the cross-community support mechanism (positive developments towards peace were a relevant factor in *Sejdić*). In this regard, the Commission notes that since the Belfast (Good Friday) Agreement, Northern Ireland's constitutional arrangements have been subject to a number of reviews such as at the State level (e.g. St. Andrew's Agreement 2006, Stormont House Agreement 2014), by the Assembly and Executive Review Committee (e.g. D'Hondt, Community Designation and Provisions for Opposition 2013; Petitions of Concern 2014), as well as the present review generated by the Bill;

(4) Whether or not the same aim can be achieved by less intrusive means (the availability of mechanisms of power-sharing which did not involve total exclusion of representatives from other communities was a relevant factor in *Sejdić*). The Commission notes that the proposal within the Bill requires that before a weighted majority vote mechanism is instituted, support must be derived from 30 MLAs from three or more parties and that the Committee has previously considered the possibility of restricting the use of petitions of concern to certain key areas, and/or introducing a qualified majority system. In this regard, the relevant NI Assembly research paper identifies at least one opinion that a qualified majority, with a sufficiently high threshold, "would still ensure that no decision could be taken against significant opposition in one of the two communities."³⁵ If this is the case, the Bill proposes a less restrictive means of achieving the same aim.

(5) Whether the mechanism actually achieves the legitimate aim. The Commission notes that despite no formal restriction of the use of the petition of concern which is used to trigger the cross community vote, it was envisaged as a "safeguard" within a peace agreement. As such,

³⁵ NI Assembly (McCaffrey, R. & Moore, T.) 'Research and Information Service Briefing Paper: Opposition, Community designation, and D'Hondt' (4 December 2012), paper NIAR 899-12 quoting Wolff, S. 'Between Stability and Collapse: Internal and External Dynamics of Postagreement Institution-building in Northern Ireland' in *The Global Review of Ethnopolitics*, Vol. 3, no. 1, September 2003, 8-21.

the petition of concern mechanism has been used for purposes seemingly unrelated to the protection of community interests.

32. **The Commission advises the Committee that the cross-community vote mechanism may be open to legal challenge under ECHR Article 3 of Protocol 1 taken in conjunction with Article 14. The Commission further advises that while it considers that the mechanism is compliant with the black-letter of the law in light of the “broad latitude to establish constitutional rules on the status of members of Parliament” given to the State, it questions whether the mechanism meets the spirit of the Convention taking account that the provisions of the ECHR are “living” to be interpreted in light of present day conditions. The Commission therefore advises the Committee that the Bill affords an opportunity to scrutinise the proportionality of the current cross community vote mechanism. Establishing a reasonable and objective justification requires continuous review. The Commission also advises the Committee that it should consider whether or not the proposed weighted majority voting mechanism is a more proportionate way of achieving the same aim which is ultimately directed at safeguarding community interests.**
33. The Commission notes that the ‘unionist/nationalist’ designations could also be considered to fall under the protected grounds of ‘nationality’ and ‘ethnicity’. As mentioned, the ECtHR applies a strict level of scrutiny to any differential based on ethnicity. The Commission recalls that in *Timishev* (above), the ECtHR deemed nationality to be a constituent element of ethnicity.³⁶ While it is also possible to link a number of the other markers outlined in *Timishev*, such as religious faith, shared language, or cultural and traditional origins and backgrounds to persons associating as unionist or nationalist, this attribution is not as clear cut. Identity in Northern Ireland is complex and beyond a simple classification of two community groups with shared objectives. For example, a recent survey suggest that 57% of persons from a Catholic background and 12% of persons from a Protestant background in Northern Ireland would like to see a United Ireland in their lifetime, with 29% of the Catholic grouping and 20% of

³⁶ See also, CoE/FRA, Handbook on European non-discrimination law (July 2010), p 104.

the Protestant grouping ticking 'don't know'.³⁷ Further, 21% of citizens identified as 'Northern Irish only' in the last census.³⁸

- 34. The Commission advises the Committee that, on balance, it is unlikely that the cross-community voting mechanism would be successfully argued to be based to a decisive extent on 'ethnicity'. However, the Commission advises the Committee that if the Assembly designations were to be interpreted as based on ethnicity then the cross-community consent mechanism would be accorded a heightened level of scrutiny. The ECtHR perceives that "no difference in treatment ...based...to a decisive extent on a person's ethnic origin is capable of being objectively justified". Accordingly the risk of violating ECHR, Article 14 taken in conjunction with Article 3 of Protocol 1 would be greater.**

³⁷ RTE/BBC NI Cross-Border Survey (2-16 October 2015), available at http://downloads.bbc.co.uk/tv/nolanshow/RTE_BBC_NI_Cross_Border_Survey.pdf.

³⁸ Nolan, P., *Northern Ireland Peace Monitoring Report: Number 3* (CRC: March 2014), p 24.