Legality of the current arrangements: equality and human rights issues

1. We did not include in our submission any discussion of the equality or human rights implications of the current, or possible future, arrangements. We have noted, however, that the Northern Ireland Affairs Committee, in its recent call for evidence, has asked specifically whether there are any equality and human rights considerations that should be brought to its attention. It might also be useful to this Committee, therefore, if I briefly touched on these issues. I am happy to clarify further the points I am about to make, if necessary. For obvious reasons, this part of our evidence is in my name only.

2. The general conclusion, before explaining why I reach this conclusion, is that the likelihood of equality law, or of human rights law, being the grounds for any successful challenge to the current arrangements is so negligible that the Committee would be justified in dismissing it. I shall concentrate on the implications of the European Convention on Human Rights for the current arrangements. There are two issues that we should distinguish.

3. The first is whether the mere requirement of parties to register as 'unionist', 'nationalist' or 'other', is itself a breach of human rights requirements, being a breach of Article 8 of the Convention, protecting 'private life', or Article 9, protecting freedom of religion. I am aware that a question was asked in the Assembly on the effect of recent ECtHR case law on monitoring in the fair employment context some years ago, which might be thought to raise somewhat equivalent issues.[1]

4. In my view, the relevant case law of the ECtHR poses no threat to the requirement on parties to choose a designation in the Assembly. The cases in which the European Court of Human Rights objected to requirements to disclose affiliations and identities all involved the forced disclosure of religious or 'ethnic' identities, and it is by no means clear that the Court would regard 'unionist', 'nationalist' or 'others' as ethnic classifications (although there is some possibility that they might).[2]

5. Even if the Court were to view designations as 'ethnic' classifications, the other elements of these cases comes into play. All the relevant cases in which claims have been successful on these grounds have involved individuals,[3] but the designation requirements for the Assembly relate to *parties*, not individuals. The party designations in the Assembly are *chosen*, based on self-identification, rather than imposed.[4] There can be no objection to the procedural fairness of the process of designation.[5] There are strong prudential justifications for the system,[6] as we set out in our Memorandum. It would, in short, be a dramatic departure from precedent were the Court to regard the Assembly designation requirements as by themselves contrary to the Convention, and my professional judgment is that they would not.

6. The second major issue is whether the other practices the Committee is considering would amount to a breach of Article 3 of Protocol 1 taken alone or in combination with Article 14. Article 3 of Protocol 1 protects the right to fair elections; Article 14 prohibits discrimination.

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[1] AQW 6552/10, Dr Stephen Farry (on the implications of *Ciubotaru v Moldova*, application no. 27138/04).
[2] *Sejdi´c v Finci v Bosnia and Herzegovina*, application nos. 27996/06 and 34836/06.
[3] The relevant case law includes the following cases: *Sinan Isik v Turkey*, application no. 21924/05; *Ciubotaru v Moldova, application no. 27138/04; Wasmuth v Germany, application no. 12884/03.*
[4] *Sinan Isik*, above
[5] *Ciubotaru*, above.
[6] *Wasmuth*, above.

7. As regards the arrangements for the appointment of the Executive, the legal position is straightforward. Article 3 of Protocol 1 does not apply to the formation of an Executive, only to the right to vote for and to be elected to the Assembly.[7] Article 14 does not apply, because it is not a stand-alone prohibition of discrimination; it would have to engage some other right; Article 3 of Protocol 1 seems to be the only possible candidate, and we have seen it does not apply. So there appears to be no legal basis for challenging the formation of the Executive under human rights law in this respect.[8] In any event, the system of proportional and sequential allocation of ministerial portfolios is difference blind; it does not, on its face, allocate on the basis of religion or ethnicity; nor does it, of course, exclude the "others" from gaining ministerial portfolios.

8. As regards the election of the First and Deputy First Minister, you will be aware that the 1998 Agreement specified that these posts would be held only by a designated unionist and a designated nationalist. The subsequent rule, agreed at St Andrews in 2006, changed that system. The post of First Minister is now awarded to the largest designation in the Assembly (whether nationalist, unionist or other), and the Deputy First Minister post is awarded to the second largest designation in the Assembly (whether nationalist, unionist or other). Therefore, the method now adopted, after St Andrews, is 'difference-blind', meaning that there is no prohibition on 'Others' being elected as First or Deputy First Minister.

9. As regards the arrangements requiring unionist and nationalist agreement to any important decision in the Assembly, by providing for qualified majority rules, we have already accepted that these have the effect of rendering the legislative votes of those self-designating as "others" less likely to be pivotal. Does this amount to a breach of Article 1 of Protocol 1 on the ground that the vote cast by a voter for a candidate of a party that will register as 'Others' is of less value in comparison with that of a voter voting for a unionist or nationalist candidate?

10. The answer to this question is more complicated because it is clear that Article 1 of Protocol 1 does apply, and therefore that Article 14 would apply as well, unlike in the context of the selection of the Executive or the First and Deputy First Ministers. It is also more complicated legally because of the decision of the ECtHR in *Sejdic and Finci v Bosnia*, in which aspects of the constitutional arrangements agreed at Dayton to settle the civil war in Bosnia were challenged. The decision of the Court was that constitutional prohibitions on "others", that is non-Constituent Peoples, from being able to stand for the upper-house of the Federal Parliament were contrary to the Convention in so far as they prevented a self-identified Jew or Roma, who did not wish to self-identify as one of the Constituent Peoples, from standing.[9]

11. The Northern Ireland arrangements would, nevertheless, survive any challenge on these grounds under the Convention. The main reason, again, is that the rules on designation are not based on 'ethnicity' or religion; they refer to national identification. Given that no 'suspect classification' (such as 'ethnicity' or religion) is used, requiring heightened scrutiny by the Court, the default rule applies. This is that electoral systems, the right to vote and the right to be elected, are all matters within national competence and expertise, to which the Court generally gives a wide margin of appreciation.[10] It is also

[7] *Sejdi´c and Finci*, above.
[8] The United Kingdom has not ratified Protocol 12 of the ECHR, which would create a stand-alone non-discrimination requirement.
[9] For a detailed discussion of this case and its implications, see Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (OUP, 2013).
[10] Dating back to *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1.

relevant that the Dayton agreement was never subject to democratic approval, unlike the Belfast-Good Friday Agreement.

12. In conclusion, whatever the merits or demerits of the existing arrangements on political, prudential, or ethical grounds, there is no good reason under equality or human rights law to depart from these arrangements.

Christopher McCrudden, 4th March 2013