

# **THE BILL OF RIGHTS FORUM FOR NORTHERN IRELAND**

## **‘Particular Circumstances’? - Paper 1**

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### Summary

The project for a Bill of Rights for Northern Ireland derives its validity from the Agreement reached at Multi-Party Talks on 10 April 1998. The Agreement set out the ‘terms of reference’ for the work on the Bill of Rights to be carried out by the Northern Ireland Human Rights Commission (‘the Human Rights Commission’).

So far debate at the Forum on the ‘particular circumstances of Northern Ireland’ has been in terms of choosing between a ‘broad’ interpretation and a ‘narrow’ interpretation of the meaning of the phrase. This Note suggests that this is the wrong approach.

I set the phrase in its proper context in the Agreement. This leads, I suggest, to the conclusion that in its proper context the phrase ‘particular circumstances of Northern Ireland’ cannot be divorced from, or read out of context from, the phrases ‘the principles of mutual respect for the identity and ethos of both communities and parity of esteem’ as they appear in the Agreement.

I suggest that it is simply not legitimate in law to read the phrase ‘both communities’ in the Agreement as ‘all the communities of Northern Ireland’. Of course, no reasonable person should argue that any wide ranging Bill of Rights should apply only to the ‘two communities’ and not to ‘all communities’ of Northern Ireland. But I suggest that this is not a necessary or proper outcome of the Bill of Rights project in the terms set out in the Agreement.

It follows that I believe that the Commission (and many others) have fundamentally misinterpreted the mandate given to the Commission by the Agreement. I explain this in more detail below.

It seems to me that this misinterpretation should be a matter of great concern to everyone in Northern Ireland. This Agreement is part of our ‘constitutional settlement’. As such it is a legal and constitutional document. No one is obliged to agree with everything contained in the Agreement. Indeed, is there anyone in Northern Ireland who is a fervent supporter of every provision of the Agreement?

But it is an important point for our future that we all abide by the terms of the Agreement as they are – not as we might wish them to be. To do otherwise would mean that we gift to any party or parties in power the right of ‘re-interpretation’ to suit their ends. Thus the constitutional protection for everyone in Northern Ireland contained in the Agreement and the other parts of our constitutional settlement could be frittered away. At least so it seems to me.

I suggest that the proper meaning of the Agreement is that the Commission is to investigate whether there are any additional rights which could assist us all in Northern Ireland in addressing the issues of conflict between the two communities in Northern Ireland.

That is a much more focused task than to create a comprehensive Bill of Rights for Northern Ireland. Indeed, it could well be the case that the Commission could conclude its enquiries with the view that there are no such particular additional rights which should be introduced.

In addition, if it were thought that there could be such new rights I am sure the Commission would seek to frame them in ways directed to conflict resolution in Northern Ireland rather than creating any special condition of privilege for the ‘two communities’

I recognise that my view will be very disappointing to all those who are committed to a full new Bill of Rights for Northern Ireland. But I do feel it is critical that we do not misuse the terms of the Agreement in pursuit of a project which, however legitimate it may be, does not derive its legitimate authority from the specific terms of the Agreement.

The terms of the 1998 Agreement

I first set out what the 1998 Agreement had to say about a Bill of Rights for Northern Ireland.

### **The text**

It is important to locate the text relating to the ‘Bill of Rights’ within the structure as a whole of the Agreement.

The relevant text is contained in Paragraph 4 of the Human Rights Sub Section of the Rights, Safeguards and Equality of Opportunity Section of the Agreement. .

I will be considering this in detail, as part of my thesis is that many, including the Human Rights Commission, have fundamentally misunderstood the text.

Of course we all know this text but I set it out here in full, if only for convenience:

“4. 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
- A clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.”

## **The meaning?**

I suggest there are elementary points to be drawn from this text – which should be uncontroversial:

- The Human Rights Commission is to be invited ‘to consult and to advise’. That does not lead to the conclusion that the Commission must draft a Bill of Rights. In essence the Commission is being tasked to do a ‘scoping report’ on the possibility and desirability (or not) of a Bill of Rights of the nature set out in the cited text
- If there is to be a Bill of Rights it is to be contained in Westminster legislation
- Any rights are to be supplementary to those contained in the European Convention of Human Rights. So any Bill of Rights is not to replace or supersede the Convention
- The rights to be considered in the scoping exercise should be those which ‘reflect the particular circumstances of Northern Ireland’. This has become a particularly contended phrase in the years since and still is to-day for our own discussions. Thus the Friday evening slot at the residential, so I discuss it further below

In its work on this the Commission is to draw as appropriate on international instruments and experience

Any additional rights are to reflect the following principles:

The principle of mutual respect for the identity and ethos of both communities  
The principle of parity of esteem

The additional rights so formed are – taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland

The issues for consideration by the Commission in its scoping exercise are to include:

“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

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

It is clear then that the Commission was not given an open field to draft a free standing Bill of Rights for Northern Ireland.

In summary, the Commission is to carry out a scoping exercise to see if there are any supplementary rights (to those contained in the ECHR) which will reflect the ‘particular circumstances of Northern Ireland’. Any such supplementary rights are to

reflect the principle of mutual respect for the identity and ethos of both communities and the principle of parity of esteem. Among the issues to be considered by the Commission are the possibility of a public sector statutory duty of respect for the identity and ethos of both communities on the basis of equality of treatment, a general right of protection against discrimination and a public and private sector duty of equality of opportunity.

I suggest that in the context of this text, and of the 1998 Agreement as a whole, there can be no doubt that the Commission in its scoping exercise was to direct its attention to rights and issues between and in respect of the ‘two communities’ in Northern Ireland.

It seems to me that it is simply not permissible to seek to re-scope the exercise as to one for a Bill of Rights for ‘all communities’ in Northern Ireland.

Of course, no reasonable person could contemplate any situation where any community in Northern Ireland was in a secondary position as to the protection of their rights, including the right to respect and esteem.

But, as the Agreement makes specifically clear, nothing is to be done to interfere with the rights as already protected by the European Convention on Human Rights. The Agreement is specifically directed at conflict resolution between the two communities. It appears to have received international approbation in that regard and is being now cited as a model to be considered by other areas of conflict in the world.

So in my view in this clause the participants were clearly considering the extent to which human rights provisions could help in this task of conflict resolution.

I will now consider this in some more detail in regard to specific phrases in the text:

- ‘the particular circumstances of Northern Ireland’
- ‘mutual respect for the identity and ethos of both communities and parity of esteem’.

### **The particular circumstances of Northern Ireland**

In its Update Paper of April 2004 the Human Rights Commission suggests that it is not possible to resolve differences of the meaning of this phrase –

“ . . . by any detailed analysis of the actual words used by those who negotiated this part of the Agreement. It seems likely they differed among themselves as to the intended meaning of the words.”

The Commission then refers to its consultation process which it says –

“ . . . has indicated that the preferred approach of the vast majority of those who have taken an interest in the matter is to adopt a Bill which covers not only the rights of particular concern to the two main communities but also those of other disadvantaged communities and individuals.”

So the Commission -

“ . . . prefers to focus attention on the kind of Bill that may best assist in ensuring lasting peace and stability in a divided and disadvantaged society that faces an uncertain constitutional future.”

But these are not permissible ways of approaching the task of interpreting the meaning of a legal and constitutional document such as the 1998 Agreement. When one approaches any legal or constitutional document to ascertain its meaning one must engage in any case of apparent difficulty in a detailed analysis of the intended meaning of the words. There are several permissible means of help available and these may include in appropriate cases the intentions of those who were involved in the drafting as available in authoritative sources.

But it seems to me that there is no canon of construction that permits a body such as the Human Rights Commission to adopt a meaning on the basis of either the preferred approach of ‘the vast majority of those who have taken an interest in the matter’ or on the basis of the Commission’s preferences for ‘ensuring lasting peace and stability’.

This is, with all respect to the Commission an abuse of the rule of law. When looking at the phrase ‘the particular circumstances of Northern Ireland’ as it appears in paragraph 4 of the Human Rights Sub Section of the Rights, Safeguards and Equality of Opportunity Section of the 1998 Agreement one must look at the phrase in its particular context in that particular Sub Section of the Agreement and in the context of the Agreement as a whole.

That in my view leads inevitably to the conclusion on the meaning which I have set out above.

Following on in the text, it will be seen that the rights supplementary to those in the European Convention on Human Rights (to reflect the particular circumstances of Northern Ireland) are, in the very next sentence of the Agreement, explained to be those which ‘reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem.’

This cannot lead to any proper conclusion other than that the ‘particular circumstances’ are those concerning the lack of mutual respect and parity of esteem as pertaining between both communities in and before 1998.

Had those who drafted, negotiated and then agreed or assented to the Agreement on 10 April 1998 intended to refer, for instance, to the particular economic and social conditions of deprivation in Northern Ireland and had they desired or intended that such be ‘reflected’ in the scoping of rights for any ‘Bill of Rights for Northern Ireland’ then it would have been entirely feasible to have included a specific provision to that effect.

None was included, leading to the conclusion that the ‘particular circumstances’ have to refer specifically and only in the circumstances to the constitutional and sectarian issues and tensions of Northern Ireland with which the Agreement is attempting to grapple.

· Mutual respect for the identity and ethos of both communities and parity of esteem

The Human Rights Commission in its Update Paper of April 2004 acknowledges that ‘parity of esteem (which they headline as ‘parity of esteem for the two communities’)

“ . . . is clearly one of the fundamental principles of the Agreement (and quite apart from the Agreement) an essential prerequisite for future peace and stability.”

But they go on to assert:

“ . . . from the start of its consultation the Commission has made it clear that international standards and common justice require that other ethnic and religious minority communities must also be protected. It has also been concerned not to institutionalise sectarian or communal divisions so that it can protect the rights and interests of those who wish to assert other or multiple identities which is also clearly prescribed in all the relevant international standards.”

They also make the point that their approaches on these matters have been clearly endorsed in opinion surveys carried out on their behalf.

But ‘parity of esteem’ is a concept indelibly, in the Northern Ireland context, linked to and concerning the recognition of the political rights of both communities in Northern Ireland and the right to express those rights in political institutions.

So one cannot wish ‘mutual respect’ and ‘parity of esteem’ for or between the two main communities in Northern Ireland into something, however admirable, as mutual respect or parity of esteem for all communities. It is not permissible to re-interpret either by reference to the Commission’s desires or by way of evidence from opinion surveys - however well grounded the surveys may be, and well intentioned and genuine those who participated in them.

As I have indicated, in law and morality every community in Northern Ireland is entitled to respect and esteem. But the Agreement is properly and specifically dealing with problems and issues for specific conflict resolution in Northern Ireland and the text is so to be read.

Is there then any other legal base for what the Commission proposes?

### **A separate statutory power - the views of Professor Stephen Livingstone**

In its Update the Human Rights Commission asserts that as well as having a duty to advise the Secretary of State on a Bill of Rights it has a duty imposed by section 69(3)(b) of the Northern Ireland Act 1998 to advise the Secretary of State and the Executive Committee on the legislative and other measures which ought to be taken to protect human rights on such occasions as the Commission thinks appropriate.

The inference apparently is that if there is deficiency in the terms of the Agreement to reach the result the Commission desires this can be simply remedied by reliance on the general power of said section 69(3)(b).

The late Professor Stephen Livingstone (still very much missed here and across the world) had considered this in a paper on the Bill of Rights project which he delivered at a Conference at Queen's University Belfast on 8 December 2001. He commented that it was tempting –

“ . . . to launch into a more general analysis of what sort of Bill of Rights might be most desirable for Northern Ireland, drawing upon contemporary international human rights standards. This indeed is arguably what the NIHRC has done, justifying the extent to which it steps outside the Agreement guidance by reference to its general power under section 69(3)(b) . . . . However, there are good reasons for striving to identify a meaning within the terms of the Agreement, not least because this is what all signatories to the Agreement committed themselves to and hence recommendations on a Bill of Rights which can be claimed to be in line with the Agreement's guidance should stand a better chance of achieving the political consensus necessary to ensure that they come to legislative fruition.”

I would respectfully agree with that, adding the comment that in legal terms the Commission in its Bill of Rights work is acting under section 69(7) of the Northern Ireland Act 1998. It is responding to a specific request from the Secretary of State for 'advice of the kind referred to in paragraph 4 of the Human Rights section of the Belfast Agreement'. So this is not just a matter of respect for the political will, important as that is, it is a legal matter of the proper observance by the Commission of a specific statutory provision.

Professor Livingstone suggested in his article that certain 'communal' rights could be reflected in the Bill of Rights:

“Such communal rights provide further reassurance that the 'identity and ethos' of the Unionist and Nationalist communities will be respected regardless of the working out of the legislative and executive arrangements. The obvious areas for such rights to focus on are issues of language, citizenship, flags, marches and education. The actual content of such rights will require delicate negotiation and will ultimately depend on what balance of rights is necessary to reassure each community of equal respect. In some cases it may simply involve giving 'constitutional' form to the status quo, in others a significant change. It will also be important that however such rights are formulated they do not infringe individual rights protected by the ECHR. . . .”

Professor Livingstone did go on to suggest that 'the content of the Bill of Rights is not exhausted by the need to provide such communal guarantees. He refers in support of this to the terms of paragraphs 1 and 3 of the Human Rights section of the Agreement.

In paragraph 1 of the Human Rights section the Parties to the Agreement 'affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community'. Then the parties 'against the background of the recent history of communal conflict' affirm a list of rights in particular (by no means a full list of rights).

Paragraph 3 sets out the basis of the statutory equality duty to be introduced by the British Government: which was enacted in section 75 of the Northern Ireland Act 1998.

As Professor Livingstone comments these provisions show 'an awareness of a broader human rights context' He goes on to suggest that:

“ . . . while both recent history and the text of the Agreement suggest a need to tie any provisions additional to the ECHR in a Bill of Rights to issues from the Northern Ireland conflict this does not mean that any such Bill of Rights should be a very narrow and limited document.”

I would agree with that and I hope there will be opportunity in the further work of the Forum to show how broad and encompassing a Bill of Rights in terms compliant with paragraph 4 of the Human Rights Section of the Agreement could be.

Professor Livingstone concluded on this issue that:

“Just as those crafting a Bill of Rights for the new South Africa saw the need for an extensive set of rights provisions in order to provide reassurance both that change had occurred and that the future would be one of equal treatment for all, so the NIHRC is likely to find that ‘the particular circumstances of Northern Ireland’ may require rather more than is offered in the ECHR.”

Of course, the drafters of the South African constitution did not have to grapple with the terms of paragraph 4 of the Human Rights section of our Agreement. As I have explained these tie consideration of any supplementary rights to those which reflect the principle of mutual respect for the identity and ethos of both communities and the principle of parity of esteem.

This seems to me to be a big enough canvas for us to do something really worthwhile and of potential significance in the area of communal rights – but it does not permit us to take the South African route of a new and complete Bill of Rights.

## **Conclusion**

I have made the case that we must all abide by the terms of the Agreement as they are, not as we, or some of us, might wish them to be.

But to my mind, in any case the actual terms of the Agreement should not be regarded as being negative to the promotion of human rights. I have pointed out that the Agreement is about conflict resolution. The past ten years have been a slow – how slow! – process of conflict resolution. Now, with the addition of the St Andrews Agreement, some more progress has been made.

But it would be rash or overly optimistic to assert that all problems have now been ‘sorted’. So to my mind the Bill of Rights provisions of the Agreement afford the opportunity of a valid and worthwhile exercise: an investigation to see if there are any additional human rights provisions which might take us all further forward towards conflict resolution or towards simply living together with mutual respect for conflicting beliefs, traditions and cultures.

I have heard Forum members, indeed our Chairman himself, hoping that we could do something that could become a world leader in human rights protection. I would share in that aspiration. But we should refocus on doing what the Agreement says should be done. If we do so we have an opportunity of contributing to conflict resolution here which, like the Agreement itself, might be of use and encouragement to people in conflict in other areas of the world.



# THE BILL OF RIGHTS FORUM FOR NORTHERN IRELAND

## 'Particular Circumstances'? - Paper 2

### A Further Note

29 October 2007

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#### **Introduction**

At the close of the Residential on Saturday afternoon 13 October Chris, as chair, invited us to submit our views on what were the particular rights affected by the particular circumstances of Northern Ireland. So this Note is in response to that invitation.

But it is in the context of the point (set out in my previous Note) that the additional rights to reflect the particular circumstances of Northern Ireland must be such as reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

There was some discussion of those principles at the Residential so I wish to address in particular in this Note how any additional rights must reflect these specific principles.

#### **Mutual Respect and Parity of Esteem**

Also in closing the Residential, Chris referred to one of the contributions from the (excellent) academic experts in the discussion on this issue. This was the thought that one cannot achieve parity of esteem for the 'two communities' without achieving parity of esteem for all communities in Northern Ireland.

As I said in my previous Note no one should contemplate circumstances where there would be a hierarchy of rights with communities other than the 'two communities' enjoying a lesser standard of rights protection than that claimed by the 'two communities'.

But I suggest that there is a misunderstanding here: the phrase 'parity of esteem' between the two communities in the particular and specific context of the Agreement has a distinct and discrete meaning from the phrase 'parity of esteem between all communities' as it may be understood in the general context apart from the Agreement.

So I will set out a little of the history of 'parity of esteem', as I understand it in the context of the Agreement.

#### **The origins**

In an important speech to the British-Irish Inter-Parliamentary Body on 9 October 2000 the Taoiseach, Mr Bertie Ahern, explained his thinking (and that of his government) on the matter. He referred back to the Report of *New Ireland Forum* published in May 1984 which stated:

“The validity of both the Nationalist and Unionist identities in Ireland must be accepted; both of these identities must have equally satisfactory, secure and durable, political, administrative and symbolic expression and identity”

He went on to say:

“I and my Government stand by that principle, and it is reflected in the Good Friday Agreement. Each community’s sense of their own identity is one of the building blocks of the Agreement, and was throughout all of the discussions.”

Mr Ahern went on to acknowledge that Sinn Fein were not a member of that Forum (nor, of course, were any of the Unionist parties).

But one can trace the process through succeeding years and events:

- the work of the *Forum for Peace and Reconciliation* in the years 1994 – 1996 to which Sinn Fein were party
- the talks and discussions which lead to the Agreement of 10 April 1998 in which at least some of the unionist parties directly participated
- the Agreement itself
- that the Agreement was endorsed by substantial majority votes in referendums in both parts of Ireland
- the further talks and discussions from 1998 onwards leading to the *St Andrews Agreement* of 13 October 2006 between the two governments but arising out of talks at which all the main unionist parties as well as the nationalist and republican parties participated
- the *Northern Ireland (St Andrews Agreement) Act 1996* leading to the restoration of devolved government to Northern Ireland

One could also go backwards and trace the development of the concept of parity of esteem through previous Reports, talks, discussions and inter-governmental statements. Significant documents in this context include the *Opsahl Report on Northern Ireland* of 1993, the *Downing Street Declaration* of 15 December 1993 and the *Frameworks Document* of 22 February 1995.

But it seems to me that Mr Ahern in his speech that I have cited above set out the essential elements of the particular meaning of ‘parity of esteem’ in the context of the Agreement.

### **The need then for a Northern Ireland Bill of Rights?**

Given that our task is bounded by the terms of the Agreement, are there then particular additional rights which reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem?

To quite an extent I do share the unease expressed by many that we should enshrine ‘two community’ rights in a Bill of Rights for Northern Ireland.

So in my view it would be quite legitimate for the Commission to take the view that there was no proper scope for a Bill of Rights for Northern Ireland to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem. Such

view would not in any way be undermining the importance of parity of esteem (as Mr Ahern said) as one of the building blocks of the Agreement.

The argument would be that the Agreement and the other constitutional documents for the future of Northern Ireland now stand and (almost) everyone is now participating in the government of Northern Ireland on that basis. So one could go on to the conclusion that no useful purpose would be served by an attempt to enshrine some of the principles from the Agreement in a Bill of Rights.

We as the Forum, if we came to such agreed conclusion, could properly give the Commission our agreed recommendation to such effect to inform the Commission's advice to the Government.

So, certainly, to my mind, that is a legitimate position which merits further debate in the Forum.

But my mind is not made up on the matter and I now set out an alternative view.

### **An ethical framework?**

I borrow this phrase from Dr Francesca Klug (with thanks) who commented that one of the issues for the *Human Rights Act* throughout the United Kingdom was that the ethical framework had not been set or debated with the ordinary public prior to the enactment of the legislation. So the Act is victim to the (unfair) accusation, in the tabloid press and elsewhere, that it is 'a charter for the unethical'.

In contrast, I would have thought that people everywhere throughout Europe would fully endorse the ethical foundations of the *European Convention on Human Rights*.

Is there then an argument for a Bill of Rights for Northern Ireland which gives an ethical underpinning in rights terms to the concepts of mutual respect and parity of esteem as they appear in the Agreement?

I would suggest that this merits further debate and I would be glad to contribute to and participate in such debate.

### **A list of rights?**

So I suggest that we should have further debate to see if there is any consensus that there are additional rights which reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

If there is an affirmative consensus on that, then secondly we would need to decide if there is an ethical framework for such rights: one which enhances them not just for the two communities but for everyone in Northern Ireland.

If the answer to both these questions is 'yes' then one comes (at last) to the question posed by Chris: what would be the list of such rights?

At this stage I would simply refer to the list proposed by Stephen Livingstone (as cited in my previous note) – issues of:

- language
- citizenship
- flags
- marches
- education

I would not regard that as a closed list but it is one which is I suggest correctly focused in terms of the Agreement – remembering always that the Agreement is not being prescriptive that there must be any such additional rights.

But I would suggest, and it seems to the views of some others in terms of recent emails, that the general and continuing debate may be more worthwhile for us at this stage.