SUBMISSION TO THE NORTHERN IRELAND ASSEMBLY'S AD HOC BILL OF RIGHTS COMMITTEE

JEFFREY DUDGEON MBE

To inform the committee, and perhaps any wider audience, I am writing this submission in advance of giving oral evidence to the ad hoc Assembly committee on 11 February, alongside Lady Trimble.

We will be appearing in the second year of committee hearings after a large number of previous witnesses, the majority of whom have been lawyers and, in many cases, campaigners for a Northern Ireland Bill of Rights.

Much advice has been given in their evidence, often from people involved in the previous rounds of negotiations and discussions, some having been members of the Northern Ireland Human Rights Commission. How their views have developed and their ambitions narrowed is one of the most telling aspects of what some wrote and said. I deal with the matter below.

In one instance, witness advice was provided by a fellow member of the Ulster Unionist Party and former Minister, Dermott Nesbitt, who was actually involved in this issue at the 1997-98 Castle Buildings talks, and indeed previously.

His expertise on the Council of Europe's Framework Convention for the Protection of National Minorities, alone, is of particular value. It is legally binding in 47 European states (all except Belarus) and is an example of the protections already afforded to certain categories of persons and groups in Northern Ireland.

It is worth reminding members of the text in Articles 20 and 21 of the 1995 Convention and the preamble where the delicate balance between majorities and minorities is addressed –

"20: In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities.
21: Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States."

I come to this issue from both sides of the fence having been both a radical human rights campaigner and latterly a gradualist, a Unionist politician and someone who sees the dangers of judge-made law. I can therefore provide a deep and a long view, certainly one longer than most.

But for those in favour of a Bill of Rights there is one paramount question to be answered: Who appoints the judges who have to interpret the text? We know that has become a fierce dispute in the EU because of changed Polish rules on terms of office while the issue has recently flared up in the Republic when the popular mood was to dismiss a Supreme Court Judge over a suggested breach of Covid lockdown rules. For whatever reason, he refused to budge, leaving the state in a dilemma, as yet unresolved. We know also from the American Supreme Court just how political the process of appointments is.

Here, arguments are few but there is no doubt that, in the last decade, new choices have seemed to be reflective of changed outlooks, involving open attempts to diversify. This has led to clashes over Brexit as we know, and thus the powers of the Supreme Court. Moving ahead of, or around, public opinion carries problems in terms of incrementalist jurisprudence falling back especially in terms of judicial review. Yet it is not all a one way street, as the Ashers decision in the Supreme Court showed when progressive or collectivist Judges in

Belfast were pushed back by a unanimous decision overturning their decisions against Ashers Bakery.

My involvement goes in a sense back to 1975 when I started a case at the European Court of Human Rights (ECHR) at Strasbourg seeking to find the United Kingdom guilty of a breach of my Article 8 and Article 14 rights (private life and discrimination) in relation to the existence of criminal penalties in Northern Ireland for homosexual acts. The same laws had been repealed in England and Wales in 1967 but due, effectively, to devolution no change was possible here and indeed rejected.

After seven years and a finding in my favour in 1981 by a considerable majority of Strasbourg judges, but only on Article 8 the law was rapidly reformed the next year in Westminster. My lawyer at the time was Kevin Boyle of Queen's University whose name and work has cropped up in several submissions. In those years, I learnt a lot about the ECHR and its growing influence, also about the power and purpose of judges. In my case, the often strong personal views of judges, especially those in opposition, based on national, religious or political opinion were noticeable, as indeed they were amongst the Court officials.

This is not to mention the lawyers arguing for continued criminalisation who included Brian Kerr and Nicolas Bratza, both later to take on different roles.

Strasbourg at that time tended to allow states a greater margin of appreciation so that breaches were only found where there was some sort of middle European consensus about what might constitute one alongside a striking need for change. The existence of the criminal laws in Belfast here (up to life imprisonment) but not say in Birmingham was such a huge disparity within one country, it meant the case was destined to be a success. Our costs of £5,000 were raised through local efforts with a Gay News fund assisting greatly. Strasbourg only refunded two thirds of it. The lawyers worked largely pro bono.

In truth, London allowed the Court to effect the reform to avoid appearing to take sides, locally, on an issue they reckoned was equally opposed, as it was, by the Catholic and Protestant churches, and to take advantage of that unity. In this way, courts can be used by governments and the loser is democratic and parliamentary politics.

The judgment was a European first on the subject and a precedent followed in Cyprus and in time by Ireland, and one even quoted in the US Supreme Court in a Texas sodomy case.

It is remarkable that one of the authors of the Convention, Sir David Maxwell Fyfe, as Lord Kilmuir, desperately tried to resist homosexual decriminalisation in England prior to 1967 and would have turned in his Scottish grave had he known what he had unleashed. But that is the way of courts and lawyers and their constant probing attempts to widen and extend the effect of an original text through its jurisprudence.

Later I became perhaps more mainstream, and some twenty years ago joined the Ulster Unionist Party, becoming a Belfast City Councillor in 2014.

Probably because of my Strasbourg experience, I was chosen to become a member of the NIO's Bill of Rights Forum (2006-8) and later of the Haass Panel of Executive Parties dealing with Flags, Parading and the Past (2013-14).

In one respect, I can do no better than attach a letter sent to Panel chair, Richard Haass, in November 2013 explaining the issue of a Bill of Rights and its history. It told of the concerns most Unionists had with the concept, not least the dangers of trying to do politics through the courts by using human rights as a vehicle. Opposition to the courts effectively supplanting parliament used to be a concern of the left but is no longer.

An Ad-Hoc Assembly Committee will be established to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights, which are currently applicable and "that reflect the particular circumstances of Northern Ireland"; as well as reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

I have placed this Committee's remit from the January 2020 *New Deal New Approach* document as a reminder of what it actually says. Below is the relevant text of the 1998 Belfast Agreement.

The new Northern Ireland Human Rights Commission 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 key, repeated phrases are 'particular circumstances of Northern Ireland' qualified by 'mutual respect for the identity and ethos of both communities and parity of esteem'. Nobody can doubt that this was meant to be a double narrowing of what might ever appear in a Northern Ireland Bill of Rights.
Well you would be wrong. I and others have spent two decades arguing against those who said it does not mean what it says, rather it means the opposite: anything and everything is a 'particular circumstance'.
Here we hit a hugely important principle in law, and one that judges largely uphold – the text is paramount and even when interpretation is disputed you can't just assert it means something entirely different. Except that is what happened and what is again happening.
It is best exemplified in the evidence put before you on 5 November 2020 by Kevin Hanratty of the NI Human Rights Consortium in answer to a question from Mike Nesbitt.
I have highlighted the key phrases:

"There is an opportunity, but also a **danger, of being too restricted by the letter of the law and our interpretations around what that paragraph in the Good Friday Agreement says.** Processes like the Bill of Rights Forum —I know that Christopher Stalford was part of that conversation —wasted months talking about the interpretation and the various arguments around what we define as "particular circumstances". We make arguments that there are clear overlaps with social and economic rights with regard to our particular circumstances in Northern Ireland. There [Inaudible] and background research that can show evidence of that, but, again, if people want to interpret particular circumstances in a certain way, they will do so. **The danger is that we get drawn into debates about what particular words and phrases mean**, and that we overlook the opportunity that is presented by a bill of rights. We have largely, for the last 10 years, overlooked or not taken that opportunity."

Kevin, I know, is perfectly well intentioned but he is wrong. Worse, he is giving people false hope, and along with many learned ladies and gentleman, has for years been wasting much time and effort by asking for the impossible. Law means what it says, not what we decide it to mean. There is such a thing as truth.
At its simplest, the Committee is to consider, again, an add-on to the ECHR for the particular circumstances of Northern Ireland.
This was the job required of the Northern Ireland Human Rights Commission (NIHRC) and fulfilled to its satisfaction. Even if the advice offered was, quite properly, rejected by the Secretary of State, the job was still done. The Belfast Agreement was complied with.
Of course, the job done by NIHRC was out with the terms of the Agreement in that the Commission, after enormous effort, produced, in the words of a then Commissioner, an "All

Singing All Dancing" Bill of Rights, one that would have set Northern Ireland wildly apart from the rest of the UK in terms of justiciable rights.
Member of this Committee are well aware of the dangers in those proposals, dangers that are not necessarily the concern only of Unionists. However, as with most legal cases, in relation to precedent, one has to go back a step to at least the 1998 Belfast Agreement to see how what was set out there influenced what happened in the following two decades.
The answer is nothing, or next to nothing in terms of change. The blame for that if there is to be blame apportioned is on those who thought they could ignore the words in the Agreement and just do what they liked. Not a very attractive method when enforcement of any bill of rights has to be about interpretation and when it was just possible that a very limited Northern Ireland Bill could have seen the light of day. That is unlikely now, given the track record of proponents discrediting the Bill of Rights concept and the reality of current and often successful use of the courts to temper governmental and parliamentary decisions.
In the case of Professor Brice Dickson, our first NIHRC Chief Commissioner, he has written,

"Until I left the Commission I was firmly convinced that a broad-based Bill of Rights would be a great thing for Northern Ireland. Today, more than four years after leaving the Commission, I am not so sanguine" (May 2009).

Later in the *Belfast Telegraph*, on 12 December 2018, in response to a letter from human rights organisations he stated:

"I support such a call [for a Bill of Rights]. However I do wish it was not made on the back of the false claim that a Bill of Rights was a 'core promise' of the Good Friday Agreement (GFA). The truth is there was no such promise in the agreement let alone a core promise…Let's instead argue for a bill of rights based directly on the need to eliminate specific inequalities and injustices. That is a more honest approach to the issue."

He has said something similar to this Committee. Sadly that was not the view of the NIHRC when it produced reports, then, or under his successor Professor Monica McWilliams.
I and my UUP colleagues have been consistent and coherent in our attitudes from 1998 to date despite being told by Mr Dickson, "In my days at the Commission the unionist politicians hardly engaged with us at all. I had the impression that very few in the Ulster Unionist Party understood enough about the issues involved to be able to present a coherent position to the Commission."
Professor Dickson later reactivated his preference for individual rights over collective and constitutional rights. He also wrote of the NIO's Bill of Rights Forum:

"The Forum on a Bill of Rights was set up to fill the gap which some said had arisen in the Human Rights Commission's work to date on preparing its advice for the Secretary of State. It was meant to give the political parties a chance to sit together in a room, along with representatives of civil society, to thrash out an agreed way forward. There was speculation that the resulting report would be such a sacrosanct document that when the Human Rights Commission received it it might not want to change a jot of what was recommended for fear of upsetting the delicate compromise that had been struck after long negotiations. Alas, the Forum did not work out like that. Despite sterling efforts by its independent chair, Mr Chris Sidoti, those attending the Forum did not work in a spirit of give and take. The Forum's report is, as a result, a most disappointing document. The only positive thing that can be said of it is that it makes explicit, if crudely at times, the vast differences of opinion that exist on this topic between the political parties in Northern Ireland (and within civil society too)."

The 2006-8 Forum did not simply (as with NIHRC) wildly over-extend its remit, assisted I have to say by its Australian chairman Chris Sidoti, it managed to studiously avoid major issues of the time such as abortion and gay marriage. The reason for those omissions, especially abortion, tell of a certain bias, or fear, within the so-called human rights community.

I can especially recall it being stated at the Forum, magisterially, that abortion was a 'contentious' issue and should not be addressed.
That is all the more amazing when a subject, taboo in 2008, can be deemed by the same people to be an absolute requirement, hardly ten years later. That switch alone is something worthy of serious academic study. It tells us also that rights can very rapidly advance while a Bill's text can fall behind what elected representatives would later permit.
I instance two other areas where there was no willingness at the Forum to engage, let alone consider the real particular circumstances of Northern Ireland. They were parading and the segregation of schooling. Parading some felt was one of the few local rights or freedoms under discussion at the time that was not being dealt with. Similarly, the unique – in Europe – teacher exception from fair employment law, and that of sexual orientation not being designated under section 75 as it related to schools went undiscussed. Instead we dived into addressing the concept of 'progressive realisation', a means by judges to effectively eliminate parliamentary decision-making in socio-economic areas.
I am attaching a legal opinion from another member of the Bill of Right's Forum, Belfast solicitor, Neil Faris, which argued for a proper interpretation of the Agreement's remit and that 'both communities' does not mean 'all communities'. His two notes of October 2007 make the case far more effectively than I could. Sadly, his view was not followed.
Les Allamby and David Russell of NIHRC were earlier witnesses at the Committee. Les rightly accepted that the Belfast Agreement commitment to produce advice on a possible Bill of Rights had been met and, with the advice duly rejected by the NIO, it was essentially off the table.
He then argued for a Bill of Rights on its own merits, something NIHRC has general powers to recommend and pursue. His honesty is commendable. Indeed he should encourage his Commissioners to go down that path. It is their job, not the Assembly's, to pursue the option, initially, rather than return to the long and pointless debate based on the Belfast Agreement. Mr Russell, in answer to a Sinn Fein MLA's question, said socio-economic rights were already being achieved in court through the ECHR's Article 8, so the door for inclusion was open. I would argue in response – the ECHR exists why replicate it? Mr Allamby however said a Bill itself was the goal, not so much justiciability and enforcement. He also wanted an updated text from NIHRC's previous report, given the many changes since it was drafted.
Mention of the ECHR is especially apposite given the huge importance, it and the UK-wide Human Rights Act of 1999, increasingly have. A constant, living stream of judgments emerge from that nexus, many of Northern Ireland importance but having national effect.
In legacy matters, something of colossal significance in local judicial terms, the ECHR is invoked day and daily in calls for compliance with its various, often competing, Articles 2, 6, 8 and 10. We have a bill of rights already dealing with our particular circumstances.
I must again refer to statement by previous NIHRC Commissioners who failed to stem the one-sided demands of those who insisted on doing politics through human rights, but who came to see the light after retirement:

"A bill of rights might well have helped stabilise the peace process in the early 2000s. Today, alas, it would contribute little to intercommunal harmony. Unionists are not as willing as nationalists to see unelected judges (who are almost invariably rich old men) deciding on whether government policies adequately protect social and economic rights. And the Irish Government cannot be taken seriously when it supports the idea that such rights should be justiciable in the North, for it knows full well that it would not be able to match that position in the South, despite its duty to do so under the agreement."
(Brice Dickson, Irish Times, 23 December 2017)

and

"My view on that, as things have developed, is that we are getting on reasonably well without a bill of rights" (Professor Tom Hadden writing to this Committee, August 2020 bis).

He described himself as 'Mr Deliverability' in reference to what he privately said at the Commission. In truth nothing was delivered, at great cost.
That, there was another view in the next Commission was briefly revealed when Lady Daphne Trimble, as a minority report was suppressed, had to pen a public note of dissent on NIHRC's 2008 submission by Monica McWilliams to the Secretary of State.
It would therefore be welcome if this Committee decided to move on from this arid dispute.

[Two items, as mentioned, are attached to my submission, one a note of 12 November 2013 by myself to Richard Haass, and another solicitor Neil Faris's views dated October 2007 to the Bill of Rights Forum on what constitutes our 'particular circumstances'.]

Jeffrey Dudgeon

1 February 2021

BILL OF RIGHTS PROPOSAL

Note from Jeff Dudgeon (UUP Panel delegate) to Richard Haass panel chairman

Dear Richard,

You mentioned a Bill of Rights and the Northern Ireland Human Rights Commission (the Commission or NIHRC) at our two Panel meetings to date.

I pointed out initially that the Commission had never been a friend to Unionists. Indeed in its first manifestation, despite being required to be representative of opinion in Northern Ireland there wasn't a single politically engaged Unionist appointed, although Protestants of a non-unionist disposition were.

(This is a problem we have also faced with the Parades Commission. The NIO by using supposed 'competences' and a peculiar form of transparency ensures Unionists don't make the cut.)

You also perceptively stated at our second panel plenary that you had heard a number of calls for a Bill but didn't understand "if you had a Bill of Rights what would be different as a result".

I therefore thought it useful for you to be aware of the background to the calls for a Bill. I suspect you may not want to read any more history, but it is a good example of the danger of *bien pensant* thinking. It is also instructive in relation to current matters before us.

Firstly from the list of people and groups you have seen, I realise you will have been told many times that a Bill was promised in the 1998 Belfast Agreement.

It wasn't so promised.

The Commission (NIHRC) was simply tasked in the Agreement with a remit "*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*." [my emphasis]

NIHRC's first Commission wrote several extensive reports when trying to work-up the required advice but they did not meet with political or cross-community acceptance. The NIO then set up a Bill of Rights Forum (2006-8) composed of the five parties and a swathe of representatives from the 'community and voluntary' sector, under an Australian chairman. I was part of the UUP team.

The very specific remit about the principles of mutual respect and parity of esteem (as above) were disregarded in the Forum in favour of a drive to create the most extensive Bill possible, replete with new socio-economic and justiciable rights.

After two years discussion, no document was agreed, nor even the interpretation of the Belfast Agreement's remit. The Forum duly passed the matter on to the Commission with a report containing a myriad of proposals, the vast majority disputed by the UUP, DUP and indeed the Alliance party.

The Commission in its second formation then followed suit in 2010 with a similar proposal of 'an all-singing all-dancing Bill'. There were two dissenters, one being Lady Daphne Trimble of the UUP and the other Jonathon Bell of the DUP, but their opinions were not even allowed to be published. The vast majority of the NIHRC's recommendations were rejected by the then Labour Secretary of State, Shaun Woodward who said it had gone beyond its brief in the advice provided to him.

His Conservative successor, Owen Paterson MP, consulted on the NIHRC report. Eventually he said, that the previous government's view revealed deep divisions and a lack of consensus on a way forward adding that "it would be difficult for the government to make further progress on the issue without such consensus…A legislative consent motion must be passed by the Assembly in circumstances where the government intends to bring forward any legislation at Westminster like a bill of rights – which will have a significant impact on devolved policy. Many members of the Assembly clearly have reservations about a bill of rights and it appears unlikely that any motion could be successfully passed. Building consensus is therefore crucial and I will ask supporters of a bill of rights to focus their energies on engaging with those members who are sceptical."

Such division was revealed in a debate in the Northern Ireland Assembly with members voting by 46 votes to 42 against a motion calling for a 'robust, enforceable bill of rights'. Stephen Farry MLA, later an Alliance Party Minister, speaking earlier in the Assembly, had usefully explained on behalf of his party, "We are concerned about the focus on collective rights at the expense of individual rights, and we see the potential for further sectarian divisions to be institutionalised in this society. We also have some concerns about how far socio-economic rights will go. We support them in principle, but we support rights based on equality of access and equality of treatment, and we are wary of measures that go towards equality of outcome and actually interfere with the rights of the Assembly."

The human rights community or their political supporters made no effort at all to build the consensus that Paterson advised.

Indeed I think it critical that the Commission and the Forum totally failed in their duty to address the particular circumstances of Northern Ireland. They did minimal research, and entertained even less discussion, on the very matter they were obliged to examine and advise on – "Additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem."

Had they fulfilled their legal obligation, we might have been able to have moved forward on those very areas of parades, flags and the past which the Agreement left unaddressed, and that have required your presence amongst us. A word in that direction would certainly be welcome.

The answer to your pertinent question at the panel plenary as to what difference there would be if we had a Bill of Rights is, of course, not much in relation to the national or ethnic conflict here. More work for lawyers, yes, and effectively a new layer of (rival) government and bureaucracy. All for a population of 1.8 million.

This politics-through-human-rights approach is understandable given our politics are almost entirely about the ethnic conflict. Progressives here have no political outlet like the Labour Party and thus end up trying to work through law, and human rights law, in particular and well financed by Atlantic Philanthropies. A Bill would give considerable power to that group but set them at odds with elected Unionists, and eventually Nationalists.

The lack of the Labour Party (and indeed the Conservatives in a full form) stems from the bi-partisan decision at Westminster in 1921 to keep Northern Ireland out of British politics, putting it into a sort of ante-chamber, whose only function was to address the unresolvable (if shallow) ethnic difference in the province. Hence the periodic outbreaks of armed conflict.

The Bill of Rights debate is rarely explained in a UK context where the tide is actually going out on extending human rights legislation. Indeed the current political question is whether we should withdraw from the Convention entirely. This is occurring particularly over the issue of being prevented from deporting Islamist terrorists and having to give votes to prisoners.

Neither has the debate often been placed in the context of what was going on in 1998. Prior to that year, the UK did not have a Bill of Rights directly enforceable in the domestic courts. The matter was a point in discussion leading up to the Belfast Agreement which actually coincided with the UK-wide Human Rights Act (HRA) that incorporated the ECHR into domestic law. Unionists accepted the HRA as achieving the human rights commitments of the Belfast Agreement – but other parties and most local rights activists wish to go much further.

That is why there is continuing debate about a separate Bill for Northern Ireland (although no insistent public clamour for that, despite activists' claims). But the Unionist position is that the HRA, while it exists, duly fulfills all necessary human rights requirements. The desire of the activists is to circumvent the Assembly and Executive and use the courts to achieve 'reforms' from their agenda – knowing they cannot achieve wide party political support otherwise.

In essence, the call for a Bill of Rights although heavily supported by the SDLP and Sinn Fein is about a different politics, and could add little or nothing to the resolution of current issues. As you know, on judicial and police matters, even without a local Bill of Rights, there is an army of cases relating to the Past going before the courts and other investigative organs like the Police Ombudsman. He has some 170 pre-2000 RUC cases alone on the go.

On another topic, I was interested to hear your view of President Woodrow Wilson at our last plenary, particularly because I heard much the same opinion the weekend before at a lecture given by journalist academic Robert Schmuhl of Notre Dame at a conference on Roger Casement. This was in Tralee where I also gave a paper. I wonder is this a new or reopened aspect of the discussion around the 1st World War?

Best regards and until next week,

Jeff Dudgeon

12 November 2013

[redacted]

THE BILL OF RIGHTS FORUM FOR NORTHERN IRELAND

'Particular Circumstances'? - Paper 1

Prepared by Neil Faris, Solicitor, Belfast and member of the Bill of Rights Forum

12 October 2007

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 of 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

Prepared by Neil Faris, Solicitor, Belfast

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.