

Panel of Parties from the Northern Ireland Executive
on
Parades, Select Commemorations and Related Protests;
Flags and Emblems; and Contending with the Past
Chaired by Richard Haass
31st October 2013

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Introduction

1. In order to make progress on the particular issues that the panel is required to consider, I believe that a wide perspective is required by all. While conscious of both the issues surrounding flags and parades and also the need for a wide perspective, I focus in this submission on the contribution that may be made by international law.

International treaties

2. The contents of two international treaties are considered relevant: the 'Framework Convention for the Protection of National Minorities' (ratified by the UK Government in January 1998); and, the Belfast/Good Friday Agreement (agreed at the multi-party talks on 10 April 1998 and subsequently approved by referenda of the peoples of the island of Ireland on 22 May 1998). The former treaty was drawn up by the Council of Europe, following a meeting of member States in Vienna in October 1993. It was, *"agreed that the national minorities which the upheavals of history have established in Europe had to be protected and respected as a contribution to peace and stability."*¹
3. And, at the opening of 'Equality House' a Government minister stated that, *"One of the most significant commitments within the Agreement was the promotion of equality and protection of basic rights and freedoms. They are fundamental to the creation of a tolerant and successful society."*²
4. Further, prior to the commencement of the multi-party talks reference was made - within the Irish context - to the international dimension. Professors Boyle, Campbell and Hadden stated, *"The substance of fundamental human rights is now determined by international agreement and there is an obligation on all States to protect them. To this extent the identification of the human rights to be protected is not a matter for bargaining between the parties to the peace process."*³
5. And, the Community Relations Council has had an important role in assisting to develop a more shared and tolerant community. Its former Chief Executive stated, *"The rule of law is not negotiable. Neither are equality and human rights."*⁴

¹ Framework Convention: Explanatory Report, background, paragraph 5 (1995).

² Jane Kennedy MP: Northern Ireland Office Minister, 15 January 2001.

³ Forum for Peace and Reconciliation, Dublin: 'The Protection of Human Rights in the context of Peace and reconciliation in Ireland'; Number Two, May 1996, page 2.

⁴ Duncan Morrow: Platform Article, Belfast Telegraph, 14 March 2009.

Background commentary

6. Much has been written and spoken by many regarding the issues under consideration by the Panel of Parties. The following represents a possible summary of these myriad views, focusing on views conveyed relatively recently by the two main parties.
7. Perhaps, a political commentator may provide an initial background perspective on what is required. Liam Clarke stated, *“We need an agreed approach on issues such as flags and cultural symbols, where decisions are taken on an objective basis - not totted up as tribal victories, or defeats.”* And, *“Above all, it should contain some more substance; and some pain for both the big parties. Leadership requires imagination and courage, not cautious calculation.”*⁵
8. From the DUP’s perspective, Peter Robinson stated that there has to be, *“respect, tolerance and understanding.”*⁶ He also commented, *“If people will not share a street or road, it is self-evident that more work is needed to ensure equality in the way that the concept of shared space is taken forward.”*⁷ Similar sentiments were echoed by the PUP, *“If republicans truly believe in the principles of inclusive citizenship, equality, social justice, and a shared future then let us see those values being extended to the Orange brethren of Ligoniel.”*⁸ Focusing on a wider perspective, Jeffrey Donaldson stated, *“Opinion polls have consistently shown in recent times that the majority of people, regardless of religious background, have resolved themselves of our constitutional position and want to see us making Northern Ireland work.”*⁹
9. From Sinn Fein’s perspective, Martin McGuinness stated, *“Change can be difficult. To some change can feel like a loss. But change based upon equality, mutual respect and parity of esteem is a win for us all.”*¹⁰ And Gerry Adams stated, *“The future has to be about persuasion and dialogue and equality.”*¹¹ Similar sentiments were expressed by Sinn Fein’s national chairperson, *“Fifteen years after the Good Friday Agreement, we must now agree the practical meaning of equality, respect and parity of esteem.”*¹² And, Belfast’s Lord Mayor expressed the view that, *“The correct title is Lord Mayor and you should treat people as you would wish to be treated.”*¹³

⁵ Liam Clarke, Political Editor: Belfast Telegraph, 1 February 2013 and 10 May 2013.

⁶ Peter Robinson MLA (First Minister): BBC Newline, 5 February 2013.

⁷ Peter Robinson MLA: ‘Letter from America’ and quoted by Alex Kane, Belfast Telegraph, 16 August 2013.

⁸ Winston Irvine: ‘My View’, Belfast telegraph, 29 July 2013.

⁹ Jeffrey Donaldson MP: Belfast Telegraph, 30 September 2013.

¹⁰ Martin McGuinness MLA (Deputy First Minister): Belfast Telegraph, 18 January 2013.

¹¹ Gerry Adams TD (Sinn Fein President): Platform Article, Belfast Telegraph, 6 June 2013.

¹² Declan Kearney (Sinn Fein Chairperson): Platform Article, Belfast Telegraph, 25 July 2013.

¹³ Mairtin O Muilleoir (Sinn Fein’s Lord Mayor of Belfast): Belfast Telegraph, 19 July 2013.

10. Some critical comments have recently been expressed. Theresa Villiers stated, *“The idea that British identity and culture can be defended by people who rap themselves in the Union Flag and attack police officers with bricks and blast bombs and ceremonial swords is grotesque.”*¹⁴ And, commenting on such attacks the chair of the NI Affairs Select Committee stated, *“They should not have to endure the attacks which they have suffered over the last few months. What would be unacceptable in, say, Manchester, or Birmingham, or London, must not be tolerated in Northern Ireland. There can be no double standards.”*¹⁵
11. And, Alex Kane stated, *“The very fact that Richard Haass has been dragged over from America to try and sort out a parades/flags/symbols deal that we have been incapable of doing for ourselves tells you everything we need to know. Which is, that we aren’t interested in equality or a shared future.”*¹⁶ Malachi O’Doherty stated, *“We have lost the run of ourselves... We don’t know how to be ordinary yet the clues are all around us... We don’t have ordinary politics; we have to have peace processing and a US envoy. This is pathetic.”*¹⁷

Summary position

12. The overall perspective seems clear: all articulate the wish for equality, tolerance, respect, parity of esteem; and, to be ‘ordinary’ and have ‘normal’ politics. However there is criticism, describing the present situation as grotesque and pathetic and questioning; do we really want to achieve a tolerant and shared society? Yet, there is both a statutory basis and also international treaties that can guide progress towards such a tolerant and stable society. None is negotiable nor should any form a basis for bargaining among the political leadership. ‘Cherry picking’ by any of the political parties could lead to continued lack of progress, lack of commitment and loss of necessary trust required to make progress. Thus, an objective basis is required to make progress. Do the above two international treaties provide such an objective basis and standard for progress? Put simply: they do! And, it is a challenging standard for both traditions within Northern Ireland.

¹⁴ Theresa Villiers MP (Secretary of State for Northern Ireland): Conservative Party Conference, 2 October 2013.

¹⁵ Laurence Robertson MP: Platform Article, Belfast Telegraph, 13 August 2013.

¹⁶ Alex Kane (commentator): Platform Article, Belfast Telegraph, 23 July 2013.

¹⁷ Malachi O’Doherty (commentator): ‘DebateNI’, Belfast Telegraph, 2 October 2013.

The Belfast/Good Friday Agreement (the Agreement)

13. Prior to the consideration of specific equality aspects within the Agreement, two general aspects perhaps are worth considering.
14. Firstly, the territorial 'claim' has/had been portrayed as an underlying problem preventing the development of normal politics both within Northern Ireland and also between the two parts of the island of Ireland. The then Irish Government's Foreign Minister stated, "*We should not forget that the North/South dimension was a key priority for this Government in the negotiations on the Good Friday Agreement, given that in endorsing the Agreement, we were also removing Articles 2 and 3 from our Constitution.*"¹⁸ Articles 2 and 3 of the Irish Constitution represented a, "*de jure claim to the territory of Northern Ireland.*"¹⁹ Under the terms of the Agreement this territorial claim was replaced by a declaration of will, namely, "*It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed in both jurisdictions in the island.*"²⁰
15. Unionism should be confident of its position within the United Kingdom and develop normal North/South co-operation, as demonstrated with the recent examples of cross-border health care. Also, there should be a lesser tendency by Unionism to feel the necessity to overtly demonstrate its 'Britishness' by, for example, its approach to both flag flying and also parading. This would help to promote greater harmony within the community compared with the present division and mindful of the position that symbols and emblems should be used, "*in a manner which promotes mutual respect rather than division.*"²¹ In the context of this paragraph, reference should be made to Jeffrey Donaldson's quotation in par. 8.
16. Secondly, by way of the Agreement the Westminster government demonstrated a changed attitude to international law with respect to Northern Ireland. It had stated, "*They will discuss and seek agreement with the relevant political parties in Northern Ireland as to what rights should be so specified and how they might best be further protected, having regard to each Government's overall responsibilities including its international*

¹⁸ Dermot Ahern TD: Statement to the Seanad, 2 February 2006.

¹⁹ Report submitted by Ireland pursuant to Article 25, paragraph 1, of the Framework Convention for the Protection of National Minorities, 13 November 2001 (under the heading of Art. 2, FCNM).

²⁰ The Agreement: Irish amendments to the Constitution, Article 2, 10 April 1998.

²¹ Ibid: 'Economic, Social and Cultural Issues', par. 5.

obligations.”²² However, as part of The Agreement, the UK Government agreed: *“to legislate as necessary to ensure the United Kingdom’s international obligations are met in respect of Northern Ireland.”*²³ This latter quotation represented a subtle change by the UK Government from merely *“having regard”* to international obligations. The Government should be held to account in its fulfilment of its international obligations. And, importantly, fulfilment of these obligations by all - in the context of good relations - would benefit all in Northern Ireland.

17. The Agreement endeavoured to address the complicated relationships: within Northern Ireland; between Northern Ireland and Ireland; and the overall relationships within the British/Irish isles. Consequently, because of these complications, the Agreement has been viewed as necessarily ambiguous: viewed by some as a ‘process’ and viewed by others as a ‘settlement’. If, or where, there is ambiguity recourse should be made to other international standards in order to provide a firm objective basis for fostering good relations.
18. In the opening ‘Declaration of Support’, the participants stated, *“We acknowledge the substantial differences between our continuing, and equally legitimate, political aspirations.”* [par. 5] Further, under the heading of ‘Constitutional Issues’ the participants endorsed, *“just and equal treatment for the identity, ethos and aspirations of both communities”* [par. 1 (v)] and, *“recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose ...”* [par. 1 (vi)]. Also, under the heading of ‘Rights Safeguards and Equality of Opportunity’ the parties reaffirmed their commitment to, *“the right to pursue democratically national and political aspirations; [and] the right to seek constitutional change by peaceful and legitimate means.”* [par. 1]; and, *“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.”* [par. 4].
19. With regard to a Bill of Rights, additional rights supplementary to the ECHR should be considered *“drawing as appropriate on international instruments and experience”* in order to *“reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem.”* [par.4]
20. Finally, under the heading of ‘Policing and Justice’ the participants believed (and also it should inform and underpin the development of a police service) that a unique opportunity existed to, *“recognise the full and*

²² A Framework for Agreement: 22 February 1995, ‘Protection of Rights’ par. 50.

²³ The Agreement: ‘Democratic Institutions in Northern Ireland’, par. 33 (b).

equal legitimacy and worth of the identities, senses of allegiance and ethos of all sections of the community in Northern Ireland.” [par. 1] To reflect this dimension, the Police Emblems and Flags Regulations (Northern Ireland) 2002 does not permit the PSNI to fly the Union Flag or any other national flag and should only fly the PSNI flag.

21. All of the above is against the backdrop that the participants endorse the commitment made by the British and Irish Governments to, *“recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland.”* [‘Constitutional Issues’, par. 1 (i)]
22. What is the impact of the above? The Agreement’s outworking, has fully addressed those with an aspiration for the political unification of the island of Ireland, including present citizenship. There is the right to pursue the political aspiration of Irish unity by being free to advocate constitutional change. Both the identity of residents and also the status of Northern Ireland are to be recognised, with equal treatment for all regarding identity. However further clarification of equality issues, such as minority rights and identity, could in turn help to address fully the potential to improve community relations. This clarification may be achieved by considering the second international treaty.

Framework Convention for the Protection of National Minorities (FCNM)

23. The Council of Europe and home of the ECHR, describes the FCNM as, *“one of the most comprehensive treaties designed to protect the rights of persons belonging to national minorities. Parties to the Convention undertake to promote the full and effective equality of persons belonging to minorities in all areas of economic, social, political and cultural life together with the conditions that will allow them to express, preserve and develop their culture and identity.”*²⁴ The FCNM does not contain a definition of ‘national minority’ as there is no general agreement among the Council of Europe’s member states. Each member state is left to decide which groups are to be covered by the FCNM. Also, individuals are free to decide whether or not they wish to be treated as belonging to a national minority. The UK Government has used the following definition, *“a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origins.”*²⁵ The UK Government includes Irish, Scots and Welsh in this definition.

²⁴ Council of Europe: Home Page COE > All files > Human Rights > National Minorities.

²⁵ First Report submitted by the United Kingdom: Part 1, par. 2 (1999). The definition is based on the Race Relations Act (1976).

24. A 'national minority' is generally viewed as a group of persons within a state who display distinctive ethnic, cultural, religious or linguistic characteristics and are motivated to preserve that which constitutes their common identity. The FCNM states that the Convention, *"is the first legally binding multilateral instrument devoted to the protection of national minorities in general."*²⁶ Hence, the FCNM's importance.
25. At the outset the FCNM stated, inter alia, that the member States and other signatories are: *"resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states."*²⁷
26. Among the Articles contained in the FCNM are: *"adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority"*[4]; *"maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage"* [5]; *"every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing"* [10]; and, *"create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social economic life and in public affairs, in particular those affecting them."* [15]
27. The FCNM also contains a section relating to provisions concerning its interpretation and application, namely; Articles 20 to 23. In particular, *"...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"*[20], and nothing in the FCNM *"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."* [21]
28. Articles 20 and 21 are restrictive as to the actions and behaviour of individuals. With equality/rights go also associated obligations. These restrictions are to enable the equality approach to be implemented, as stated in the substantive Section 2 of the FCNM (Articles 4 to 19).

²⁶ FCNM: General Considerations, Objectives of the Framework Convention.

²⁷ Ibid: Introduction.

29. Also, the Council of Europe's Advisory Committee reports on States' implementation of the FCNM. For example (within the first report in 2001 - under the implementation of Article 4 - and with reference to Northern Ireland) it reported: *"The Advisory Committee is aware that many housing estates in Northern Ireland are split along sectarian lines and that the same applies to schools ... and believes that the Government should explore further with the communities concerned how a more integrated approach to both housing and education could lead to strengthening relations between the two communities."*²⁸ Progress has been made since 2001 but - mindful of recent pronouncements - clearly more remains to be implemented, given that the main thrust of the FCNM is to create a settled community.
30. Reference has been made (par. 15 above) to the view that more requires to be done by Unionism. But what of Nationalism and Republicanism's contribution to good relations? Regarding Sinn Fein's non-participation in the workings of the Westminster parliament the following reason is given, *"Under our party constitution, Sinn Fein candidates in Westminster elections are pledged not to 'sit in, nor take part in, the proceedings of the Westminster parliament'. That is because we believe the Westminster parliament has no right to legislate for any part of Ireland."*²⁹ Does the out-working of this Sinn Fein position, including statements and publications by Sinn Fein government ministers, either recognise fully the territorial integrity (or legitimacy) of Northern Ireland (par. 21 above) or reflect fully the intention of Articles 20 and 21 of the FCNM?

Conclusion

31. Under both equality and human rights considerations; flying or not flying a particular flag, marching or not permitted to march a particular contentious route, sitting or not sitting in the Westminster parliament, are alone unlikely to breach any equality or human rights standards.
32. As with all, such actions, non-actions or statements must be considered with regards to motivation and context. Also, in context, considering both Nationalism and Republican's position and also Unionism's view of others' attitude to the Union Flag, respect for national legislation or recognition of Northern Ireland's legitimate status do not extend to 'embracing' the symbols of the state.

²⁸ Advisory Committee on the FCNM: 'Opinion on the United Kingdom, Adopted on 30 November 2001', par. 36.

²⁹ Caoimhghin O Caolain TD: Platform Article; Irish Times, 20 September 2005.

33. However, the jurisdiction within which the issues need addressed is legitimate by being both recognised and also respected in international law as a region of the United Kingdom called Northern Ireland.
34. Considering the contents of paragraphs 15, 21 and 30, together with the above concluding paragraphs (31 – 33), all (including the participating parties to the Panel) should reflect on their present positions. Consideration of these issues by the Panel of Parties may lead to some concluding recommendations by it or by its' Chairman, Dr Haass.

Dermot Nesbitt