

Discussion Paper for the Working Group on Culture, Identity and Language

Elizabeth Craig, 20 November 2007

Introduction

From what was discussed at the first meeting of the group that I attended on 15 November 2007, it appears that the primary focus so far has been on the Framework Convention for the Protection of National Minorities and relevant provisions of the UN Convention on the Rights of the Child. This discussion paper aims to highlight some of the issues that the group might want to consider before deciding how best to proceed. It will be recalled that the Good Friday Agreement (GFA) envisages '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.' It appears from the correspondence that I have had with other advisors that a range of approaches have been adopted within the various working groups. For some groups (eg the civil and political rights group), provisions of the ECHR that could be adapted to reflect the particular circumstances of Northern Ireland appear particularly relevant. For other groups it makes sense to refer more to the content of other human rights instruments. For example, it would be expected that the children and young people's group would refer extensively to the UN Convention on the Rights of the Child and that the economic and social and rights group would refer extensively to the International Covenant on Economic, Social and Cultural Rights. Such rights have now been included in a number of national constitutions (e.g. s. 26-28 of the South African Constitution) and it is therefore appropriate to draw on experiences in other jurisdictions. It is also clear that the consultation documents issued by the Northern Ireland Human Rights Commission (NIHRC) have provided a useful reference point for some groups. The paper starts by setting the Framework Convention in its wider international context before highlighting some of the issues that perhaps need to be addressed.

Language, Culture and Identity Issues: The Wider International Context

For a long time language, culture and identity issues were largely neglected by the international human rights community. The notable exception was the

inclusion of a minimal minority rights guarantee in Article 27 of the International Covenant on Civil and Political Rights 1966 (ICCPR):

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It was this provision which 'inspired' the later adoption by the UN General Assembly of a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992. The most important provisions of the Declaration are Articles 2 and 4. Whilst Article 2 sets out the rights of individuals belonging to minorities, Article 4 sets out the measures which the State should take to meet the objectives of the Declaration. These provisions include recognition of a right to effective participation, the right to establish and maintain associations and the right to establish and maintain contacts across frontiers. They also require States to take measures in the area of education (in particular in relation to mother tongue education and intercultural educational initiatives) and to 'take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.'

It will be noted that there is considerable overlap between the UN Minorities Declaration and the Framework Convention, which also addresses issues relating to intercultural education (Art 12), minority language education (Article 14) and effective participation (Art 15).¹ However, there are significant differences between the two instruments, most notably in relation to their intended scope of application. Whilst the UN Declaration is all-encompassing and refers to 'national or ethnic, religious and linguistic minorities', the Framework Convention was drafted specifically with national minorities in mind. The meaning of the term 'national minorities' is itself contested and the UK's approach is unusual in that it has chosen to apply the Framework Convention to 'racial groups' as defined under the Race Relations Act 1976. The Advisory Committee's recent opinion on the UK² provides a clear indication of the range of groups considered to be

¹ The drafters of both instruments were clearly influenced by the political commitments on minorities contained in the CSCE's Copenhagen Document of 1990.

² Extracts of the Advisory Committee's opinion have already been distributed.

covered with specific recommendations adopted relating to the Irish language, Ulster-Scots and ethnic minority communities as well as the Traveller population. The Committee has also made recommendations in relation to the further development of integrated approaches to housing and education in Northern Ireland.

There are other differences. For example, the Framework Convention recognises the right to self-identification in Article 3 (note that questions have been raised about the compatibility of fair employment legislation in Northern Ireland with Article 3) and the issue of involuntary assimilation is addressed Article 5. A particularly notable feature of the Framework Convention is the limited use of rights language. This was intentional on the part of the drafters, who were clear that the instrument contained 'mostly programme-type provisions setting out objectives which the Parties undertake to pursue' rather than 'directly applicable' rights³ (see, for example, the formulations used in Art 10(2), Art 11(3), Art 12, Art 14(2) and Art 15). Some of the provisions in the Framework Convention are merely adaptations of civil and political rights in the ECHR – e.g. Articles 7 and 8 on the right to freedom of thought, conscience and religion and Article 10 on the right to freedom of expression (with specific reference to the media). However, there are some new rights recognised. These relate to the use of minority languages in public and private (Art 10), names and signage (Art 11), transfrontier contacts and NGO participation (Art 16), the establishment of private educational institutions (Art 13) and to the learning of minority languages (Art 14(1)).

The European Charter for Regional or Minority Languages is another instrument that identifies a range of 'programme-type objectives' which States undertake to pursue. However, only the indigenous languages (Ulster-Scots and Irish in Northern Ireland) are protected under this treaty. There is nonetheless considerable overlap in the subject-matter of the two treaties. For example, undertakings accepted by the UK in relation to the Irish language cover education (Art 8), judicial authorities (Art 9), administrative authorities and public services (Art 10), media (Art 11), cultural activities and facilities (Art 12), economic and social life (Art 13) and transfrontier exchanges (Art 14).

The ECHR as the Starting Point

³ Explanatory Report to the Framework Convention, para 11.

It is clear from the Good Friday Agreement that it was intended that the NIHRC would advise on the scope of defining rights supplementary to those in the European Convention on Human Rights which, taken together with the ECHR, would constitute a Bill of Rights for Northern Ireland. Unlike the ICCPR, there is no minority rights provision in the ECHR. Nevertheless, minority issues are increasingly being addressed under Articles 8-11 (right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression and freedom of association) and under Article 2 of the First Protocol (right to education and parental rights in education) by the European Court of Human Rights. It is also perhaps interesting to note that many of the minority issues raised under the ICCPR (eg regarding bilingual signage and the funding of religious schools) have been considered in relation to the individual rights to freedom of expression and to non-discrimination rather than in relation to the minority rights guarantee in Article 27. It might therefore be useful to consider what gaps there currently are in the ECHR protection framework before drawing upon the content of other international instruments.

Issues Identified in the NIHRC's Earlier Consultations

Although the recommendations of the NIHRC on the content of a Bill of Rights for Northern Ireland were not well received in many quarters, there are nevertheless a number of lessons that can be learnt from the NIHRC's earlier consultations. This appears to have already been recognised to some extent by the culture, identity and language working group. For example, the Bill of Rights Culture and Identity Working Group decided that the additional rights should be conferred on individuals (as persons belonging to minorities) rather than on groups, that the term 'communities' was preferable to the term to 'minorities' and that there should be generic references to 'persons belonging to national, ethnic, religious, linguistic, cultural or other communities'. The overall consensus was that the Bill of Rights should substantively incorporate the Framework Convention but further discussion is perhaps needed on the potential implications of this.

The initial stance of the NIHRC itself was that the Bill of Rights should include some specific guarantees for the two communities along the lines of the commitments made in the GFA and that relevant provisions of the Framework Convention should be incorporated with a view to guaranteeing the rights of members of all communities.⁴ These included the right of individuals born in

⁴ NIHRC 'Making a Bill of Rights for Northern Ireland: consultation document – September 2001' S. 3.

Northern Ireland 'to identify themselves and be accepted as Irish or British citizens, or both, as they may so choose' and it was suggested that the Bill of Rights might also include a right to be nomadic or sedentary, right to choose to be treated or not to be treated as a member of a particular community and a general right to culture, religion and language based on a positive formulation of Article 27 of the ICCPR. In addition it was envisaged that Government bodies would adopt effective and appropriate measures to meet the objectives of Articles 4-6 of the Framework Convention (on equality, minority identity and tolerance).

The NIHRC's 2004 Consultation Document was different in a number of respects.⁵ To give effect to the references to parity of esteem in the GFA, it proposed in s. 3(2) that: 'The law of Northern Ireland shall ensure just and equal treatment for the identities and ethos of both main communities.' It also provided that 'The law of Northern Ireland shall guarantee the rights conferred on minorities, and on individual members of minorities, by the Framework Convention for the Protection of National Minorities.' The right to use flags, emblems, symbols and parades is specifically dealt with in s. 3(5), which provides that: 'Everyone in Northern Ireland has the right to express their culture except when such expression (a) promotes hatred, fear or intolerance, (b) constitutes a threat or act of violence, intimidation, harassment or discrimination, or (c) is contrary to internationally accepted human rights standard'. However, the right to self-identification was this time omitted.

The Commission's stance was largely influenced by comments it had received from three Council of Europe experts on certain aspects of a future Bill of Rights for Northern Ireland.⁶ For example, the view of the experts had been that the issue of self-identification would be best dealt outside of the context of the bill of rights project.⁷ Although the experts' view was also that the right to use flags and to hold parades or marches would be covered by Articles 10 and 11 of the ECHR, as interpreted by the European Court of Human Rights, they stressed that provisions stating that the ECHR rights include the right to display flags or to hold marches/parades could be included subject to the restriction clauses in the ECHR itself.⁸ The experts' views on the incorporation of the Framework Convention are also interesting in that they suggested that it might be more appropriate to stipulate that: 'The law of Northern Ireland shall give effect to the Framework

⁵ NIHRC 'Progressing a Bill of Rights: an update for Consultation – April 2004, S. 3

⁶ Council of Europe DG II (2004) 4

⁷ para 69.

⁸ para 27.

Convention for the Protection of National Minorities.⁹ It was noted that one possibility would be to give domestic effect to the Framework Convention through sectorial legislation or through a generic law on national minorities (as in many Central and Eastern European countries), particularly as questions remained over the Framework Convention's scope of application.¹⁰

It will be recalled that language rights and education rights were dealt with separately in the NIHRC's initial consultation documents. In relation to language rights the view of the Council of Europe experts was that it would be sufficient to provide that: 'Language rights will be protected through legislation to implement the commitments made under the Belfast (Good Friday) Agreement, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.'¹¹ The experts considered that the detail could then be expanded upon in future legislation.¹² However, the stance of the NIHRC in its 2004 consultation document was that certain rights should be included as a basic minimum (eg the right to communicate with any public body through an interpreter, translator or facilitator when necessary for purpose of accessing information or services essential to his or her life or security and the right to be educated in and through their language where there are substantial numbers of users and sufficient demand).¹³

The issue of education was discussed at the last meeting and the aims of education in Article 29(1)(c) of the UNCRC were considered by members of the working group to be particularly important in the context of Northern Ireland. The right to education is being addressed by other groups (the children and young people's group and the economic and social rights group) but it is possible that a similar formulation to that found in Article 29(1)(c) could be incorporated into the provisions on education. For this working group, perhaps the most significant of the NIHRC's early recommendations in relation to education was s 13(2), which provided that: 'The State shall ensure the right of parents to choose for their children education in schools with a particular religious ethos, education in integrated schools, education in Irish-medium schools or education specialising in the needs of children with disabilities, bearing in mind the best interests of the child and the competence of the child to decide for him-or herself in accordance with his or her age, maturity and understanding.'

⁹ para 55.

¹⁰ Paras 57-60.

¹¹ para 75

¹² para 70

¹³ Section 14

Questions to Consider

Having already identified a number of relevant international instruments, the group needs to decide how best to proceed and the following questions could provide a focus for our discussions at the next meeting:

- What language, culture and identity issues do you feel need to be addressed in a Bill of Rights that reflects the particular circumstances in Northern Ireland?
- To what extent were these issues addressed (satisfactorily or otherwise) in the NIHRC's consultation documents?
- To what extent might these issues be addressed under relevant individual rights provisions in the ECHR with textual amendments relevant to the particular circumstances of Northern Ireland?
- Do you want to include a reference to legislation to implement the commitments made under the Belfast (Good Friday) Agreement, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages'?
- What provisions of these instruments do you consider merit specific references in the Bill of Rights?

The group might also want to look at other constitutional documents to see what approach has been taken in other jurisdictions. For example, the South African Bill of Rights of 1996 contains only two provisions which specifically address the issue of language and culture (sections 30 and 31), whereas the Constitution of the Republic of Serbia, adopted only last year, contains a number of provisions on the rights of persons belonging to national minorities (Articles 75-81) – extracts reproduced below.

South African Constitution, Bill of Rights 1996

30. Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. Cultural, religious and linguistic communities

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
 - a. to enjoy their culture, practise their religion and use their language; and
 - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Constitution of the Republic of Serbia (2006)

3. Rights of Persons Belonging to National Minorities

Basic Provision

Article 75

Persons belonging to national minorities shall be guaranteed special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution.

Individual rights shall be exercised individually and collective rights in community with

others, in accordance with the Constitution, law and international treaties.

Persons belonging to national minorities shall take part in decision-making or decide independently on certain issues related to their culture, education, information

and official use of languages and script through their collective rights in accordance with

the law.

Persons belonging to national minorities may elect their national councils in order to exercise the right to self-governance in the field of culture, education, information

and official use of their language and script, in accordance with the law.

Prohibition of discrimination against national minorities

Article 76

Persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection.

Any discrimination on the grounds of affiliation to a national minority shall be prohibited.

Specific regulations and provisional measures which the Republic of Serbia may introduce in economic, social, cultural and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavourable living conditions which particularly affect them.

Equality in administering public affairs

Article 77

Members of national minorities shall have the right to participate in administering public affairs and assume public positions, under the same conditions as other citizens.

When taking up employment in state bodies, public services, bodies of autonomous province and local self-government units, the ethnic structure of population and appropriate representation of members of national minorities shall be taken into consideration.

Prohibition of forced assimilation

Article 78

Forced assimilation of members of national minorities shall be strictly prohibited.

Protection of members of national minorities from all activities directed towards their forced assimilation shall be regulated by the Law.

Undertaking measures, which would cause artificial changes in ethnic structure of population in areas where members of national minorities live traditionally and in large numbers, shall be strictly prohibited.

Right to preservation of specificity

Article 79

Members of national minorities shall have a right to: expression,

preservation, fostering, developing and public expression of national, ethnic, cultural, religious specificity; use of their symbols in public places; use of their language and script; have proceedings also conducted in their languages before state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units, in areas where they make a significant majority of population; education in their languages in public institutions and institutions of autonomous provinces; founding private educational institutions; use of their name and family name in their language; traditional local names, names of streets, settlements and topographic names also written in their languages, in areas where they make a significant majority of population; complete, timely and objective information in their language, including the right to expression, receiving, sending and exchange of information and ideas; establishing their own mass media, in accordance with the Law.

Under the Law and in accordance with the Constitution, additional rights of members of national minorities may be determined by provincial regulations.

Right to association and cooperation with compatriots

Article 80

Members of national minorities may found educational and cultural associations, which are funded voluntarily.

The Republic of Serbia shall acknowledge a specific role of educational and cultural associations of national minorities in their exercise of rights of members of national minorities.

Members of national minorities shall have a right to undisturbed relations and cooperation with their compatriots outside the territory of the Republic of Serbia.

Developing the spirit of tolerance

Article 81

In the field of education, culture and information, Serbia shall give impetus to the spirit of tolerance and intercultural dialogue and undertake efficient measures

for enhancement of mutual respect, understanding and cooperation among all people living on its territory, regardless of their ethnic, cultural, linguistic or religious identity.