Briefing on Human Rights Issues and the ‘Decade of Anniversaries’

Background

1. The Community Relations Council (CRC) is developing a body of work relating to the marking of “a number of particularly important anniversaries which have shaped the sense of British and Irish identity in Northern Ireland in the 20th century”\(^1\) in the forthcoming period of 2011-2021. This briefing paper from the Northern Ireland Human Rights Commission (the Commission) advises on the human rights issues that may be raised in relation to these anniversary celebrations, including those organised by public authorities such as local councils. This briefing paper originated from a request for advice from the CRC.

Human rights considerations

2. The Commission has not developed a specific policy position on this area, so the present briefing draws on its work on related themes and on the relevant international human rights standards.

3. In relation to public authorities, the Commission, within its advice to the Government on the scope for a Bill of Rights for Northern Ireland, addressed the issue of equality of treatment

\(^1\) The CRC provides an indicative list in a May 2011 briefing paper which “includes the Ulster Covenant 2012, Titanic 2012, Plantation of Ulster 2013, First World War 2014, Somme and Easter Rising 2016, the Labour Movement, Universal Male and limited Women’s Suffrage 2018, Treaty of Versailles 2019, War of Independence 2019, Partition and Government of Ireland Act 2021 and the more [recent] 20th and 40th anniversaries of salient events within the troubles (Civil Rights 2018, outbreak of ‘the Troubles’ 2019, internment and hunger strikes) and indeed anniversaries of international significance”.
by public authorities of the Irish nationalist/British unionist communities. In the “identity and culture” section of the advice the Commission recommended:

Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.²

4. In the absence of a Bill of Rights, the advice given by the Commission reflects a framework of policy considerations which flow from existing human rights standards. In general terms there are two sets of human rights standards of immediate relevance.³ First, there is the framework relating to freedom of expression and assembly, whereby there is a duty on the state to facilitate the exercise of those freedoms and refrain from interference unless there is a compelling reason to do so, and then only in a manner prescribed by law and only to the extent necessary in a democratic society. Second, there is a range of positive duties accepted by the state that requires public authorities to promote pluralism and intercultural dialogue.

**Freedom of expression and assembly**

5. There is a duty on the state to respect freedom of expression and assembly. This is relevant to any group organising events to commemorate anniversaries. Gatherings such as parades, festivals, talks, wreath laying, etc. can attract the protection of the right to freedom of assembly as well as freedom of expression, and the latter can also cover the production of publications and other materials. There cannot be derived from freedom of expression any positive obligation on public authorities themselves to commemorate a particular

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² NIHRC (2008) A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, 10 December 2008. The ‘identity and cultural rights’ section of Chapter 3, p100, also includes provision for the protection of other minorities in addition to the two ‘main communities’.
³ Human rights instruments are mostly framed in terms of the rights of the individual person in relation to ‘the state’ (broadly defined, that is, any public authority). Most formulations of such rights fall into two categories: the rights of the person not to have wrongs done to him/her by the state (for example, the rights not to be tortured, arbitrarily arrested or deprived of life) and the rights of the person to have certain needs secured for him/her by the state (for example, the rights to food, access to health care, freedom of movement).
What it does mean is that public authorities should refrain from interfering with commemorations organised by others unless there is a compelling justification, compatible with human rights law, for them to do so. This could, for example, be to protect against sectarian expression or risks of public disorder.

6. Article 10(1) of the European Convention on Human Rights (ECHR) protects freedom of expression.\(^4\) There is a similar formulation under Article 11 which protects freedom of assembly and association. Protected freedom of expression includes material which may ‘offend’ others.\(^6\) There are circumstances, however, where such expression is not protected and restrictions can be justified or required. In this instance, key indicators include the contextual questions of intent (motivation) and impact of particular expression (including on a minority) rather than just the expression per se. Any restriction on Article 10 freedom of expression must be proportionate and justified under one of the ‘legitimate aims’ set out under Article 10(2).\(^7\) While this includes the risk of public disorder, protecting the ‘rights of others’ is also recognised as a legitimate aim.

7. The ‘rights of others’ does not refer to any rights that anyone may choose to assert that they have, but rather refer to ECHR rights and other human rights where there is an indisputable imperative for their inclusion, such as to protect people from sectarian or other racist expression. The key issue in the Northern Ireland context is likely to be whether any commemorations constitute an expression of sectarianism.

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\(^4\) That is to say, the concept of freedom of expression is inherently incapable of containing an obligation to express something.

\(^5\) Article 10(1): “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

\(^6\) There is no ‘right to be offended’ that can be derived from the ECHR. Article 10 protects expression which can shock, offend or disturb. Therefore, if the issue being dealt with is that persons are ‘offended’ by particular events, this would not be a legitimate basis for their restriction. It is, in fact, generally accepted that it is precisely those instances of expression that are unpopular and/or could cause offence that are most in need of, and (with certain limits) entitled to, protection under human rights law.

\(^7\) “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. 
Racist forms of expression, such as sectarian abuse, do not attract the protection of human rights standards. ECHR rights are to be interpreted in accordance with the broader binding human rights framework in relation to matters such as freedom of expression and minority rights. ECHR jurisprudence indicates that it is the motivation, intent and impact of the expression (rather than the expression per se) that may engage the ‘rights of others’, giving rise to duties under the ECHR to regulate in certain limited circumstances.

8. There are also duties on public authorities to act in a non-discriminatory manner in relation to freedom of expression. Restrictions on expression permitted by Article 10 need also to be adequately “prescribed by law”. This means that regulations or policy affecting the exercise of the rights should be made within the relevant body’s powers and should be clearly set out to avoid arbitrary application. The parameters for regulating expression and assembly and protecting against discrimination, including discriminatory harassment, are usually provided by legislation, with powers then delegated to the police and other public authorities to enforce.  

9. From the 1920s onwards, the Parliament of Northern Ireland enacted wide-ranging powers to restrict or ban particular forms of assembly and expression. These were often targeted at commemorations. Over half of the banning orders under special powers regulations related to republican 1916 Easter Rising commemorations. By contrast, there was no occasion when government directly prohibited a loyalist commemoration. Special powers bans on Easter Rising commemorations steadily increased from a targeted ban on one event in Belfast to a blanket ban on all commemorations anywhere in Northern Ireland for the whole of the Easter week. The RUC was also instructed to prevent the public sale of Easter lilies and to prosecute individuals found putting up

8 Further detail on the human rights framework for regulating expression and assembly can be found in Commission briefing papers on the issues of parading and flag flying.

9 Regulation 4 of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 granted the Home Affairs ministry power to ban public meetings and parades. There were over 90 such bans between1922-1950 [For a full list and further details see Donohue, Laura (1998) “Regulating Northern Ireland: The Special Powers Acts 1922-1972”, The Historical Journal 41(4) pp1089-1120]. Following repeal of special powers regulations the legislative basis for bans and restrictions was through the Public Order Act (Northern Ireland) 1951, itself based on the Public Order Act 1936 (in Great Britain) which had been introduced following fascist marches and counter protests in London.
posters connected with Easter Rising events.\(^{10}\) Also relevant to commemorations were specific powers that had the purpose and effect of outlawing the display of the Irish tricolour while protecting by law the display of the Union Flag.\(^{11}\)

10. Current law provides a different framework. The ECHR rights to freedom of expression and assembly are protected domestically by the Human Rights Act 1998, meaning that both the laws and the actions of public authorities must be compatible with the Convention.\(^{12}\) Legislation which could be used to restrict commemorations, providing it is done in a manner compatible with the ECHR, includes:

- **Parades:** Public Processions Act 1998 (as amended): powers to impose restrictions on public processions (including commemorative parades) are now vested in the independent Parades Commission. The Act permits restrictions due to factors such as the risk of public disorder and impact on relationships in the community a procession may cause.

- **Meetings:** part II of the Public Order (Northern Ireland) Order 1987 (as amended) empowers police to impose conditions on public meetings when they reasonably believe they could lead to serious disorder, damage or disruption.

- **Flags:** the Police Emblems and Flags Regulations (Northern Ireland) 2002 prevents the PSNI from flying the Union Flag, Tricolour etc. Regulations under the Flags (Northern Ireland) Order 2000 generally require that no flag should be flown on government department buildings; the main exception is a requirement to fly the Union Flag from government buildings on fifteen designated days. These regulations do not apply to district Councils.

- **Paramilitary uniforms/emblems:** the Terrorism Act 2000 makes it an offence to wear clothing or display any article which arouses reasonable suspicion that a person is a member or supporter of a ‘proscribed organisation’ such as the IRA or UVF.\(^{13}\)

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10 Donohue, 1998, as above.
11 Following a successful legal challenge (on a technicality) to special powers regulations which prevented the tricolour being carried at nationalist gatherings, the Flags and Emblems (Display) Act (Northern Ireland) Act 1954 made it an offence to ‘interfere’ with a union flag and empowered the prohibition and seizure of any ‘provocative emblem’, including other flags. This was repealed in 1987.
13 In the context of parading, but relevant to other commemorations, there has been discussion of the extent to which this could relate to persons wearing period costume and uniforms of the IRA, Cumann na mBan, Fianna na hÉireann, UVF etc. relating to the early 20th century rather than the most recent period of
- **Incitement to hatred:** the Public Order (Northern Ireland) Order 1987 (as amended) prohibits acts intended or likely to stir up hatred or arouse fear on sectarian and other grounds.

- **Sectarian harassment/discrimination:** the Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended) prohibits discrimination and harassment on sectarian grounds by employers and service providers, including public authorities. There are also duties on designated public authorities to promote equality of opportunity under section 75 of the Northern Ireland Act 1998.

11. There is no indication to date of any further legislative proposals to regulate commemorations.

12. Some regulatory interference occurs through policy decisions rather than legislative processes. For example, the European Court of Human Rights recently considered the Northern Ireland Prison Standing Orders which had prevented a prisoner wearing an Easter Lily.\(^\text{14}\)

13. The most likely source of challenge to public authorities (and in particular to district councils) relating to commemorations is the Fair Employment and Treatment Order (FETO). FETO could be used by persons arguing that public authorities are acting in a discriminatory manner, for example, in grant schemes or other funding for commemorations. Complaints that commemorations for particular events constitute ‘sectarian harassment’ of employees or service users may also be made. The Parades Commission will also deliver determinations on commemorative parades which may include restrictions.

14. The test for what is protected freedom of expression, and what can be considered ‘sectarian expression’ and hence can be restricted, is complex. It is highly unlikely that the mere conflict (see for example, views in *Strategic Review of Parading, The Views of Key Stakeholders* 2008, paras 3.21-3).\(^\text{14}\) In *Donaldson v UK* (application no. 56975/09, admissibility decision 25 January 2011), the Prison Service successfully argued that this was a legitimate restriction on freedom of expression further to the aim of preventing crime and disorder. The Court, noting that it was a narrow restriction on lilies as it only applied to serving prisoners in communal areas, agreed that the ban was proportionate. The applicant’s claim that the ban was discriminatory as it did not also apply to Remembrance Day poppies was also dismissed. In this instance, the Court deferred to guidance from the former Fair Employment Commission which differentiated between the poppy and the lily, and argued that the state had some discretion to make this determination. However, as the Easter lily becomes more ‘mainstream’, the argument equating the poppy and lily is likely to be increasingly made.
holding of a particular commemoration by a public authority could of itself be considered ‘sectarian harassment’. The threshold for determining what constitutes sectarian or other racist expression can be high, and questions of motivation, context and likely impact are the likely determinates in any challenges. For example, a panel discussion gathering different viewpoints on a particular anniversary is much less likely to engage such matters in the same way that a large scale officially organised commemorative rally with inflammatory remarks from the platform may do. While this relates to commemorations by public authorities, and challenges under FETO are against employers and service providers, a similar human rights framework applies in relation to events organised by independent groups; however, there are contextual differences between official events where there is effectively public ownership, and private events where there is a stronger onus on non-restriction. That said, this should not necessarily lead to public authorities, in the name of ‘even-handedness’, taking a blanket restriction approach, and determining for example that no community relations funding can be used for anniversary related events. Such a blanket restriction could itself be a disproportionate restriction on expression. An alternative approach is to ensure pluralism. This paper will now examine the human rights framework to that end.

Positive duties on public authorities

15. There are a number of positive duties which have been accepted by the UK in relation to promoting mutual respect and understanding. For example, under Article 6 of the Council of Europe Framework Convention for National Minorities (FCNM) the UK:

...shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

16. The FCNM also contains duties to adopt, where necessary, measures to promote full and effective equality between persons belonging to a national minority and the majority, including in all areas of cultural life (Article 4(2)). It also provides duties for states to, where appropriate, take education and research measures to foster knowledge of the
culture and history of national minorities and the majority (Article 12). In particular reference to issues affecting minorities, there are also duties under Article 15 for states to create conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life, and in public affairs. This has been interpreted as a duty to facilitate intercultural dialogue:

Article 15 is also intended to facilitate intercultural dialogue by making it possible for national minorities to be visible, have their voice heard and participate effectively in decision-making, including participation on issues of relevance to the society at large. In fact, dialogue should not be limited to representatives of the national minorities and the authorities, but it should be extended to all segments of society. The Framework Convention intends to provide persons belonging to national minorities with increased possibilities to participate in the mainstream society and at the same time for the majority population to become better acquainted with the culture, language and history of the national minorities, in a spirit of intercultural dialogue.\(^\text{15}\)

17. The Council of Europe has launched a much more detailed white paper on intercultural dialogue,\(^\text{16}\) and there are similar duties to promote understanding, tolerance and friendship among nations and ethnic groups under the UN International Covenant for the Elimination of Racial Discrimination.\(^\text{17}\)

18. There are therefore duties to promote understanding and tolerance of the heritage of different groups and hence expression of such heritage, provided that the said expression, as outlined earlier, is not sectarian or otherwise racist. The nearest comparable duty in domestic law on designated public authorities is the ‘good relations’ duty under Section 75(2) of the Northern Ireland Act 1998. However, the Act does not define ‘good relations’, and the Commission has in the past raised concerns when an interpretation of the ‘good relations’ duty has conflicted with human rights standards. Approaches that seek to restrict any expression deemed ‘divisive’ can, by neutralising what should be a


\(^{16}\) White Paper on Intercultural Dialogue, *Living Together As Equals in Dignity*, launched by the Council of Europe Ministers of Foreign Affairs at their 118\(^{th}\) Ministerial Session (Strasbourg, 7 May 2008).

\(^{17}\) Article 7.
diverse public space, effectively lead to a form of bland monoculturalism to the detriment of pluralism.

19. In Great Britain, the law defines that the equivalent duty to foster good relations involves “having due regard, in particular, to the need to... tackle prejudice, and... promote understanding”\(^\text{18}\). The definition promoted by the Equality Commission also stresses the promotion of respect and the importance of embracing diversity.\(^\text{19}\) The section 75 duty and other legislation must also be interpreted compatibly with the European Convention on Human Rights. Principles which can be drawn from the Convention include diversity and respect for minority rights, and that the duty of public authorities is “not to remove the cause of tension by eliminating pluralism, but to ensure the competing groups tolerate each other”.\(^\text{20}\)

20. The Commission has also been critical of approaches whereby ‘community consensus’ has been construed as a prerequisite to accessing rights. Where rights are concerned, most especially the rights of minorities, dependence on majority approval, or cross-community consensus is not an appropriate basis to conceptualise their protection. This general principle of minority rights is reflected in European Convention jurisprudence. In *Barankevich v Russia*, in the case of assemblies and expression by minorities, the Strasbourg Court recalled that its decisions in reference to the hallmarks of a democratic society had “attached particular importance to pluralism, tolerance and broadmindedness” and noted that “democracy does not simply mean that the views of the majority must always prevail”, emphasising the importance of a balance ensuring the proper treatment of minorities and avoiding abuse of a dominant position.\(^\text{21}\) Such principles are also relevant to commemorations.

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\(^{18}\) Equality Act 2010, Section 149(5).


\(^{21}\) *Barankevich v Russia* (app. no. 105119/03) (2007) ECHR 648, 30-31.
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