

# **Mapping the Rollback? Human Rights Provisions of the Belfast/Good Friday Agreement 15 Years On**

**Conference organised by Queen's University, Belfast, University of Ulster  
Transitional Justice Institute and Committee on the Administration of Justice**

## **Human Rights and Equality Commitments 15 Years On The Irish Government's Compliance With Its Commitments**

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The signing of the Belfast/Good Friday Agreement produced a wave of euphoria in the Republic of Ireland as well as Northern Ireland. Most of it was probably relief at what people hoped was the definitive ending of the armed conflict, but there was also a hope and aspiration that the Agreement would lead to a fairer, more inclusive and human rights-based society across the whole island. And in the NGO and civil society community there was a hope that the introduction of new human rights protections, North and South, would be mutually reinforcing, with best practice in one jurisdiction raising standards in the other as well.

Perhaps it was our 'Northern Spring', with all the enthusiasm that greeted the 'Arab Spring' in more recent times. But in Ireland, as we know to our cost, spring is not always followed by summer. And so, I am afraid, it proved in the human rights field in the Republic.

So, what human rights reforms were promised in the Republic as part of the Agreement? And what has happened to those promises?

In the section of the Agreement entitled "*Rights, Safeguards and Equality of Opportunity*", and under the heading "*Comparable Steps by the Irish government*", the Dublin Government made a number of commitments so as to "*further strengthen the protection of human rights in its jurisdiction*".

Some of these were delivered on fairly quickly, like the introduction of equal status and enhanced employment equality legislation, which were needed to meet EU requirements in any event. The Irish Government also ratified the Council of Europe Framework Convention on National Minorities, which has proved a valuable instrument for supporting Travellers' rights. And they have taken some steps to recognise and include Unionist identity and the Orange Order.

But what I want to concentrate on is the other main commitments, where the record has been less impressive. They were to:

Consider incorporating the European Convention on Human Rights (ECHR) into domestic legislation;

Establish a Human Rights Commission and a Joint Committee with the Northern Ireland Human Rights Commission;

Ensure an equivalent level of human rights protection to that in Northern Ireland;

And, from the section of the Agreement on "*Security*", to

Review the Offences Against the State Act "*with a view to both reform and dispensing with those elements no longer required as circumstances permit*".

### **Incorporating the ECHR**

It took five years from the signing of the Agreement, and a good deal of lobbying and campaigning by bodies like the ICCL, the Law Society and the new Irish Human Rights Commission (IHRC) before the Republic incorporated the ECHR into its domestic law through the ECHR Act, 2003, which came into effect at the start of 2004.

The Act was modelled on the UK Human Rights Act, 1998 but with some significant differences. It specifically excluded the courts from the definition of public authorities which were required to act compatibly with the ECHR, and it had no procedure for fast-tracking changes in the law where a court had declared a provision of legislation incompatible with the Convention. In addition, it had no requirement for Ministers introducing legislation to state that the proposed legislation complied with the Convention.

There was also no Government-sponsored programme of education for lawyers, civil servants and others about the requirements of the Convention in the run-up to its introduction, as there had been in the UK. Perhaps partly as a result of this, litigation relying on the ECHR Act was slow to come before the courts and the first declaration of incompatibility with the ECHR was not made until October 2007 in the case of transgender woman Dr. Lydia Foy, who was represented by the organisation I work for, Free Legal Advice Centres (FLAC).

Today, five and a half years after the granting of the declaration and 20 years after Dr Foy's first application for a new birth certificate in her female gender, and despite promises by the present Government and its predecessor, there has been no change in the law and Dr Foy has still not got her birth certificate.

A number of other declarations of incompatibility were made subsequently in housing cases, some of which are under appeal and one of which has been upheld by the Supreme Court, but the law has not been changed in that area either, although it may be dealt with more quickly than Dr Foy's case because the housing cases involve changes in procedure rather than substantive change.

The long delay in bringing in the ECHR Act and the equally long delay in acting upon the first declaration of incompatibility suggest a basic lack of commitment and respect for the ECHR. And it is also at odds with the commitment to a new rights-based society for the

whole island, drawing upon the ECHR, which was central to the Rights and Equality section of the Agreement.

### **The Irish Human Rights Commission**

The Irish Government was also slower to set up a Human Rights Commission than the British Government had been in the North. The IHRC was not established until 2001 and then only after a major row when the Government initially failed to appoint a number of the people (myself included) who had been recommended by the Government-appointed selection committee.

The new Commission was underfunded from the beginning and did not achieve its full complement of 22 staff until about 2008, seven years after it was set up. It had a number of policy clashes with Government, notably in 2007, when it criticised the Government's failure to ensure that US aircraft re-fuelling at Shannon were not involved in the policy of extraordinary rendition, or the outsourcing of torture.

As soon as the first tremors of the financial crisis were felt in 2008, the Department of Justice, which was responsible for the funding of the IHRC and the Equality Authority, announced, without any consultation, discussion or planning, a merger of the IHRC, the Equality Authority and three other agencies (the Data Protection commissioner, the National Disability Authority and the Equality Tribunal).

The proposed merger was widely seen as punishment for the independence of the IHRC and the Equality Authority, which had also annoyed the Government by taking discrimination cases against state bodies. There was sufficient opposition at the time to stop the merger but in the 2009 Budget, the Department of Justice slashed the IHRC allocation by 32% and that of the Equality Authority by 43%, far beyond the average 10% cut imposed on most public bodies.

Since then, further, smaller budget cuts and a bar on recruiting new staff to fill vacancies have reduced both the IHRC and the Equality Authority to shadows of their former selves. The budgets of the two bodies have now been cut by about 40% for the IHRC and nearer 50% for the Authority, and the staff of the IHRC has been reduced to six from a peak of 22, while the staff of the Authority has been reduced to around 20 from a peak figure of 55. Neither body is in a position to carry out its full mandate and they are both struggling to keep their heads above water.

The Fine Gael and Labour Government which came to power in 2011 announced a new merger plan which they claimed would result in an 'enhanced' and 'strengthened' Human Rights and Equality Commission. However, when the terms of office of the boards of the two bodies came to an end in 2011 and early 2012, they were not replaced and the two bodies have been left in limbo for over a year while staff drifted away and there was no money to take any initiatives or even carry out their normal workload.

Finally, last week, the Minister for Justice announced the names of the members of the new Irish Human Rights and Equality Commission (IHREC), although the legislation to establish the new body has not yet been passed and the Chief Commissioner has yet to be appointed. And, in an echo of the past, there was also another, smaller controversy between the Minister or the Department of Justice and the selection committee that the Minister had appointed, when the Department objected that one of the persons recommended by the selection committee was ineligible for appointment.

The indications at the moment are that there will be no significant increase in funding for the new body and for that reason the new IHREC will be significantly weaker than the original bodies were five years ago. The reason for the running down of the human rights and equality structures by the current Government may no longer be the active hostility that appears to have motivated its predecessor, but there must be serious questions about the new Commission's ability to carry out its increased mandate and the clear implication is that the protection of human rights and equality comes fairly low down on this Government's list of priorities.

It is also evident that no serious thought was given to the commitment in the Agreement to "*establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland*". The remit of the new IHREC will be significantly different from that of the NIHRC and even though it may actually be enhanced, the terms of the Agreement would have required this development to at least be discussed with its Northern equivalent. And I can say, as a member of the Working Group which was tasked with drawing up details of the merger, that there appeared to have been very little consideration given to the position of the NIHRC or the Northern Ireland dimension beforehand.

### **The Joint Committee**

The Joint Committee of the two Human Rights Commissions was in some ways the institution most clearly linked with the concept of a common platform of human rights protections on the island, North and South. It was specifically described as "*a forum for consideration of human rights issues in the island of Ireland*".

Most of the subsequent discussion of the Joint Committee's role has been connected with the idea of a Charter of "*measures for the protection of the fundamental rights of everyone living in the island of Ireland*", but in the Agreement, the Charter is mentioned as only one of the matters that the Committee might discuss.

The Joint Committee began with considerable enthusiasm. It met once a month in the beginning and established sub-committees on racism, emergency legislation and on the proposed Charter of Rights. Unfortunately, however, both commissions were under-funded and under-staffed and pressure of work required for their domestic agendas meant that there was no capacity to service the Joint Committee and enable it to carry out research or take new initiatives.

For a period in 2008 the two governments provided some additional funding for the employment of a dedicated Joint Committee officer, who was, in fact, our Chair for this session, Brian Gormally. However, with the swingeing budget cuts in 2009, the funding was not renewed and from then on the only substantial work completed by the Committee was an Advice on the Charter of Rights published in 2011. And Joint Committee meetings became less and less frequent until they eventually petered out when the term of office of the IHRC Commissioners came to an end and they were not replaced.

The Charter of Rights itself fell victim to the UK Government's failure to establish the proposed Bill of Rights for Northern Ireland. With the NIHRC's detailed and painstaking Advice on the Bill of Rights effectively rejected, there was not much left for the Joint Committee to build on and it had to settle for an Advice which was essentially a listing of the existing human rights protections in force in each jurisdiction; a useful but modest contribution.

The effective failure of the Joint Committee was the responsibility of both governments, who showed no real interest in the one specifically all-island structure in the Rights and Equality section of the Agreement, and the one which was most clearly aimed at putting in place a common platform of rights that could be ensured to all the people of the island no matter what future political arrangements might be put in place.

### **The Offences Against the State Acts**

A committee was set up in 1999 to review the Offences Against the State Acts. It was heavily weighted towards the law enforcement agencies and the majority paid little attention to the parallel commitment by the UK Government in the Agreement to secure *"as early a return as possible to normal security arrangements ... and ... the removal of emergency powers in Northern Ireland"*. They showed no enthusiasm for dismantling the emergency laws in their jurisdiction.

The committee reported in 2002 and despite the much lower level of paramilitary violence in the Republic, the majority recommended keeping internment without trial on the statute book and the continued use of the non-jury Special Criminal Court. The Government in turn failed to implement even some minor reforms proposed by the committee.

Unfortunately, an opportunity was lost to begin dismantling emergency legislation in circumstances where it should have been a lot easier than in Northern Ireland. And in 2009, faced with an increase in organised crime, the Irish Government brought in new legislation to provide that alleged gangland crimes should be routinely tried in the Special Criminal Court without the need to prove a credible threat of jury intimidation and despite opposition from the IHRC.

## **An Equivalent Level of Protection of Human Rights**

The Agreement committed the Republic to "*ensure at least (my emphasis) an equivalent level of human rights protection as will pertain in Northern Ireland*". The level could be higher and then there would be an implied requirement for Northern Ireland to catch up. Unfortunately, that has rarely been the case.

We have already seen that the Republic's ECHR Act was weaker in certain respects than the UK's Human Rights Act. One of the weaker aspects was that there was no requirement for Ministers introducing legislation to certify that it would comply with the ECHR. That was perhaps symptomatic of the attitude prevailing in the Republic.

Despite the commitments in the Agreement to strengthen the protection of human rights in the Republic and provide an equivalent level of protection with Northern Ireland, there has been little evidence that during the drafting of legislation anyone has felt an obligation to check for compliance with the ECHR, and even less evidence that they have consciously tried to bring the legislation into line with some of the more enlightened provisions in the North.

In the area of Equality Law, for instance, there was no equivalent of the Section 75 duty requiring public bodies in Northern Ireland to have due regard to promoting equality when carrying out their functions, and no apparent interest in introducing such a duty, when it was called for by elements of civil society. The new legislation to set up the IHREC will now contain a weaker form of positive duty on public bodies than that in Northern Ireland, but even that duty had to be very hard fought for in the Working Group preparing for the merger.

## **Conclusion**

Despite the very broad popular support for the Agreement in the Republic and the enthusiasm, at least among the NGOs and in civil society generally, for the ideal of a common, and enhanced, human rights space throughout the island, successive governments in Dublin have paid little more than lip service to their human rights commitments under the Agreement.

It is hard to avoid the conclusion that high principles and lofty ideals were adopted, no doubt sincerely at the time, as part of a contribution to ending the conflict in Northern Ireland, but that when the conflict appeared to be over, they were largely confined to moth balls and normal politics resumed as before.

That may be a little too pessimistic, however. Commitments were given by the Irish Government in the Agreement. New institutions were established and however much they have been run down, they can be rebuilt again with determination and hard work. Legislation has been passed and we can try to make it work. And the commitment by the NGOs and civil society is still there, even if they are somewhat disillusioned.

This conference is a very welcome endeavour because the 15th anniversary of the Agreement

provides an opportunity to raise awareness about it once again and to lobby and campaign about unfinished business in the human rights area, North and South.

And, finally, there are two areas where there may be an opportunity to make some progress and reverse the negative trend of the last number of years. However, it will take very hard work by the human rights community and skilful and strategic use of litigation and of the international human rights mechanisms to secure change.

In the Lydia Foy case, Dr Foy has issued new legal proceedings seeking orders to compel the State to take action based on the declaration of incompatibility in her case and to grant her legal recognition. Her action should either lead to confirmation that declarations of incompatibility are an effective method of obtaining redress for violations of the European Convention on Human rights, or force a revamp of the ECHR Act to enable it to provide an effective remedy.

And, as we have seen, a new board is about to take office in order to set up the new, merged, IHREC. The board is a good one and draws extensively from the NGO community, but the two precursor bodies have been severely damaged by budget cuts, staff reduction, neglect for the last 18 months, and political interference over the years, facilitated by the fact that they were placed under the umbrella of the Department of Justice, probably the Government Department most likely to be the subject of complaints to human rights and equality bodies.

There is an opportunity now to revive the work of the two bodies in the form of the new Commission and, with that, to breathe new life into the Joint Committee with the NIHRC and into the concept of a new shared space of human rights protection for the whole island of Ireland.

But if the new IHREC is to succeed, it will require robust independence and an end to political interference, beginning with the appointment of the new Chief Commissioner, which should be done by the same independent selection committee that chose the Commission members. The new body needs to be taken out from under the umbrella of the Department of Justice and it will need a substantial increase in funding and in staffing to carry out its increased functions - or even to carry out the functions that were performed by its precursor bodies.

That may be a tall order, but it is essentially what the Irish Government committed itself to 15 years ago in the Belfast/Good Friday Agreement and it is time they delivered on that commitment.

**Michael Farrell**

**25 April 2013**

