



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

The Display of Flags, Symbols and Emblems in Northern Ireland





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September 2013
ISBN 978-1-909532-77-9

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Introduction

- 1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In this respect the Commission has published the following paper as a technical resource on the human rights engaged in forms of expression, including flags, symbols and emblems.
- 1.2 The Commission bases its position on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe and United Nations systems. The relevant international instruments in this context include;

Universal Declaration of Human Rights, 1948 (UDHR);
 European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];
 European Social Charter, 1961 (ESC) [UK Ratification 1962];
 United Nations Convention on the Elimination of all forms of Racial Discrimination, 1966 (CERD) [UK ratification 1969];
 International Covenant on Civil and Political Rights, 1966 (ICCPR) [UK ratification 1976];
 International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];
 United Nations Convention on the Elimination of Discrimination Against Women, 1979 (CEDAW) [UK ratification 1986];
 United Nations Convention on the Rights of the Child, 1989 (UNCRC) [UK ratification 1991];
 Framework Convention for the Protection of National Minorities, 1993 (FCNM) [UK ratification 1998];
 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005 [UK ratification 2007];
 United Nations Convention on the Rights of Persons with Disabilities, 2006 (CRPD) [UK ratification 2009].

- 1.3 In addition to these treaty standards there exists a body of 'soft law' developed by the United Nations and regional human rights bodies. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include;

United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992;
 UNESCO Declaration of Principles on Tolerance, 1995;
 ECRI General Policy Recommendation no.1 on combating racism, xenophobia, anti-Semitism and intolerance, 1996;¹

Committee of Ministers Recommendation on Hate Speech, 1997;²
United Nations Declaration on a Culture of Peace, 1999;³
UNESCO Universal Declaration on Cultural Diversity, 2001;
Durban Declaration and Programme of Action, 2001;⁴
Warsaw Declaration and Action Plan, 2005;
Faro Declaration on the Council of Europe's Strategy for Developing Intercultural Dialogue, 2005;⁵
ECRI Declaration on the use of Racist, Anti-Semitic and Xenophobic elements in Political Discourse, 2005;
Fribourg Declaration on Cultural Rights, 2007;
Council of Europe, White Paper on Intercultural Dialogue, 2008;⁶
OSCE Ljubljana Guidelines on Integration of Diverse Societies, 2012.

1.4 In relation to this paper the Commission also notes the following relevant European Union texts;

Resolution of the Council of the European Union on a European Agenda for Culture, 2007;⁷
Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the Work Plan for Culture 2011-2014.⁸

- 1.5 This paper has been drafted in order to provide assistance to those charged with decision making in relation to the display of flags, symbols or emblems in Northern Ireland.⁹ This may also include the development of policies relating to such displays. The paper is intended to act as a technical resource outlining relevant international human rights law ratified by the United Kingdom government and related jurisprudence.
- 1.6 All public authorities are subject to the obligations contained within these international treaties. In particular, the Commission recalls that Section 24(1) of the Northern Ireland Act 1998 requires that all acts of the Department are compatible with the ECHR. In addition, Section 26 of the Act requires compliance with international obligations.
- 1.7 It is important that the decision making process regarding the display of flags, symbols and emblems is grounded within the human rights framework. This sets out clearly the boundaries between protected exercises of rights and legitimate restrictions. The adoption of a human rights based approach to address situations when contentious issues emerge around the display of flags, symbols and emblems will assist in fostering an environment in which individuals and public authorities have greater regard for the rights of all.

² R (97) 20

³ A/RES/53/243A

⁴ A/CONF.189/12

⁵ DGIV/DC-FARO

⁶ CM(2008)30

⁷ OJ C 287

⁸ OJ C 325

⁹ For further information see, *Flag Flying: Briefing Paper on Human Rights Compliance and Commission Policy*, (NIHRC, 2011)

Applicable international human rights standards

The right to culture

- 2.1 The right to culture forms an intrinsic part of the human rights framework and is specifically protected by the ICESCR. Reference to cultural rights is also made in CERD, CEDAW, CRC and CRPD which each protect the right to participate in cultural life.
- 2.2 The ICESCR, Article 15(1)(a) recognises the right of everyone to take part in cultural life. The Committee on Economic, Social and Cultural Rights (CESCR) has commented that the concept of 'culture' encompasses;
- ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.*¹⁰
- 2.3 The CESCR has also recognised that the right to take part in cultural life is closely associated with the enjoyment of other rights.¹¹ It has recalled that, although consideration must be taken of national and regional peculiarities and historical, cultural and religious backgrounds, it is incumbent upon the State to protect and promote the full range of human rights standards protected under international law. Cultural diversity cannot be invoked to infringe upon other rights or to limit their scope.¹²
- 2.4 The CESCR has highlighted that all persons have the right to choose their own cultural identity and whether or not to belong to a community. This ensures that those wishing to take part in all forms of culture, whether in the majority or the minority, are protected in the same manner; free to express their identity and exercise their cultural practices without discrimination.¹³ Similarly, those who choose not to express their culture outwardly will be protected.
- 2.5 The CESCR has also referred specifically to minority groups and their right to;
- cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership.*¹⁴
- 2.6 The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities requires States to protect and promote the existence of and the identity of minorities.¹⁵ In order to do so the Declaration requires States 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.*¹⁶

¹⁰ UN Committee on Economic, Social and Cultural Rights, General Comment 21: Right of everyone to take part in cultural life (2009) E/C.12/GC/21, para 13

¹¹ *Ibid*, para 17

¹² *Ibid*, para 18

¹³ *Ibid*, para 49

¹⁴ *Ibid*, para 32

¹⁵ Article 1(1), United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

¹⁶ *Ibid*, Article 4(2)

- 2.7 The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions recalls that;

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.¹⁷

- 2.8 The Convention continues to note that “the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities.”¹⁸

Right to property

- 2.9 The Universal Declaration of Human Rights guarantees the right to property. It states:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Right to private and family life

- 2.10 The right to private life is protected by the ICCPR, Article 17 which states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

- 2.11 In General Comment 16, the UN Human Rights Committee has elaborated on the requirements of Article 17 stating:

Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.¹⁹

Freedom of expression

- 2.12 Freedom of expression forms the “foundation stone for every free and democratic society”²⁰ by protecting the holding and development of opinion and exchange of information.

¹⁷ Article 2.2, UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

¹⁸ *Ibid*, Article 2.3

¹⁹ UN Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), 08/04/1988, para 1

²⁰ UN Human Rights Committee, General Comment 34: Freedom of Expression (2011) UN Doc. CCPR/C/GC/34, para 1

- 2.13 The ICCPR, Article 19 states that;²¹
1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- 2.14 The right to freedom of expression protected by the ICCPR is subject to “special duties and responsibilities”²²; in recognition of the impact exercises of expression may have on others. As such, article 19 rights may be subject to restriction; which must be provided for in law and be necessary, for the respect of the rights or reputation of others, for the protection of national security or public order or of public health or morals.²³
- 2.15 The UN Human Rights Committee (HRC) has concluded that any restrictions of the right to freedom of expression must conform to the principle of proportionality, having taken account of the form of expression as well as the means of its dissemination.²⁴
- 2.16 The HRC has also held that article 19(2) protects, “all means of expression and the means of their dissemination”.²⁵ This is considered to include;²⁶ spoken, written and sign language and such non-verbal expression as images and objects of art.²⁷ Means of expression include books, newspapers,²⁸ pamphlets,²⁹ posters, banners,³⁰ dress and legal submissions.³¹ This includes all forms of audio-visual as well as electronic and internet-based modes of expression.
- 2.17 The HRC has stated that;
- the scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.³²
- 2.18 The ICCPR, article 20 states;
1. Any propaganda for war shall be prohibited by law.
 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.³³

²¹ See also UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) UN Doc. A/RES/36/55

²² Article 19(3), ICCPR

²³ *Ibid*

²⁴ UN Human Rights Committee, General Comment 34: Freedom of Expression (2011) UN Doc. CCPR/C/GC/34, para 34

²⁵ *Ibid*, para 12

²⁶ *Ibid*

²⁷ *Shin v. Republic of Korea*, communication No. 926/2000

²⁸ *Zundel v. Canada*, communication No. 1341/2005, 20 March 2007

²⁹ *Shchetoko et al. v. Belarus*, communication No. 1009/2001, 11 July 2006

³⁰ *Kivenmaa v. Finland*, communication No. 412/1990, 31 March 1994

³¹ *Fernando v. Sri Lanka*, communication No. 1189/2003

³² UN Human Rights Committee, General Comment 34: Freedom of Expression (2011) UN Doc. CCPR/C/GC/34, para 11

³³ UN Human Rights Committee, General Comment 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (1983) for consideration of the significance of Article 20

2.19 Article 20 imposes a requirement on States to prohibit hate speech through domestic law. The HRC has commented that;

prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3.³⁴

2.20 The UNCRC protects the child from all forms abuse and article 19 requires States to take;

all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence...³⁵

2.21 The Committee on the Rights of the Child (CRC) has defined mental violence as including “scaring, terrorizing and threatening; exploiting and corrupting”.³⁶ The State, therefore, is under an additional obligation to consider the rights of the child in the context of potentially harmful expressions.

2.22 The CRC has emphasised the importance of proactive and preventative measures in discharging obligations under article 19. One such means by which this can be done is by challenging attitudes which perpetuate the tolerance and condoning of violence in all its forms, including race, religion, ethnic or social origin.³⁷

Freedom of thought, conscience and religion

2.23 The ICCPR, Article 18 states;

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

2.24 As a qualified right, the right to freedom of thought, conscience and religion is subject to the limitations of article 18(3). Any interference with article 18 must be prescribed by law and be necessary to protect public safety, order, health, morals or the rights and freedoms of others.

2.25 In relation to the display of symbols as a component to the right to freedom of thought, conscience and religion, the HRC has interpreted worship as including the display of symbols.³⁸

2.26 The HRC has confirmed that a religion which is recognised as the state religion or whose followers comprise the majority of the population, cannot impair the enjoyment of other rights under the Covenant or in discrimination against other religions or non-believers.³⁹

³⁴ UN Human Rights Committee, General Comment 34: Freedom of Expression (2011) UN Doc. CCPR/C/GC/34, para 48

³⁵ Article 19, UNCRC

³⁶ UN Committee on the Rights of the Child, General Comment 13: The right of the child to freedom from all forms of violence (2011) UN Doc. CRC/C/GC/13, para 21(b)

³⁷ *Ibid*, para 47(a)(i)

³⁸ UN Human Rights Committee, General Comment 22: The right to freedom of thought, conscience and religion (1993) UN Doc. CCPR/C/21/Rev.1/Add.4, para 4

³⁹ *Ibid*, para 9

- 2.27 There is a degree of overlap between articles 18 and 19 of the ICCPR. The HRC has stated that a prohibition of displays of symbols on the grounds of lack of respect of religion is not compatible with the Covenant, except in the specific circumstances envisaged in article 20(2). Any such restrictions would be required to also satisfy the requirements of article 19.⁴⁰

Equality and non-discrimination

- 2.28 The ICCPR, article 26 states that;

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- 2.29 The ICCPR further provides a general prohibition on the abuse of rights under the Covenant. As such, the protection afforded by freedom of expression under the ICCPR cannot be invoked to undermine other Covenant rights. Article 5(1) states that;

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

- 2.30 The principle of non-discrimination is replicated under the ICESCR, CERD, CEDAW, CRC and CRPD.

- 2.31 The Durban Declaration and Programme of Action (DDPA) affirms that;

Dialogue among Civilizations constitutes a process to attain identification and promotion of common grounds among civilizations, recognition and promotion of the inherent dignity and of the equal rights of all human beings and respect for fundamental principles of justice; in this way, it can dispel notions of cultural superiority based on racism, racial discrimination, xenophobia and related intolerance, and facilitate the building of a reconciled world for the human family.⁴¹

Access to services

Health

- 2.32 The Right to Health is protected in numerous international treaties including the UDHR and the ICESCR. The UDHR, at Article 25(1) states that;

Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.

- 2.33 Similarly, according to the ICESCR, Article 12(1) states;

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

⁴⁰ UN Human Rights Committee, General Comment 34: Freedom of Expression (2011) UN Doc. CCPR/C/GC/34, para 48

⁴¹ Article 82, DDPA

2.34 To ensure compliance with its obligations regarding the right to health the Government must ensure that health facilities, goods and services are accessible to everyone without discrimination. This includes the requirement that “health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds,”⁴² and that “health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS.”⁴³

Leisure

2.35 Under the UNCRC, children have the right to leisure, recreational activities and participation in cultural life. Article 31 states that;

1. State Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

2.36 The CRC encourages States to consider the implications for the protection of rights under article 31 when developing policies in relation to access to public spaces for children, especially those who do not have facilities for play in the home.⁴⁴

2.37 The CRC recognises that there are environmental, physical and human factors which impact upon the enjoyment of these rights; for example violence or community unrest.⁴⁵ The Committee further recognises that hostility, violence and discrimination may cause barriers to children from indigenous or minority communities from engaging in their own cultural practices or participation in leisure or cultural activities alongside other children.⁴⁶

2.38 States are required to ensure that third parties do not interfere with the rights provided for under article 31. One such way that this can be done is to guarantee access for every child to all recreational, cultural and artistic environments which includes, inter alia, public spaces.⁴⁷

⁴² UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000) E/C.12/GC/14, para 12(b)(i)

⁴³ UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000) E/C.12/GC/14, para 12(b)(ii)

⁴⁴ UN Committee on the Rights of the Child, General Comment 17: The right of the child to rest, leisure, play, recreational activities, cultural life and the arts (2013) UN Doc. CRC/C/GC/17, para 26

⁴⁵ *Ibid*, paras 34-36

⁴⁶ *Ibid*, para 52

⁴⁷ *Ibid*, para 57

Tolerance, mutual respect and understanding

- 2.39 The theme of tolerance and respect is woven through all of the core international human rights treaties. Through its ratification of the CERD the United Kingdom government has undertaken;

to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups...⁴⁸

- 2.40 The UNESCO Declaration of Principles on Tolerance explains that;

Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience and belief... It is not only a moral duty; it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace.⁴⁹

- 2.41 The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions has among its objectives the creation of conditions for cultures to interact freely, to foster interculturalism and to promote respect for diversity. In order to do so States should;

provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services.⁵⁰

- 2.42 The United Nations Declaration on a Culture of Peace has concluded that;

A culture of peace is a set of values, attitudes, traditions and modes of behaviour and ways of life based on... Adherence to the principles of freedom, justice, democracy, tolerance, solidarity, cooperation, pluralism, cultural diversity, dialogue and understanding at all levels of society and among nations; and fostered by an enabling national and international environment conducive to peace.⁵¹

- 2.43 The Declaration has further explained that;

the fuller development of a culture of peace is integrally linked to... eliminating all forms of racism, racial discrimination, xenophobia and related intolerance; [and] advancing understanding, tolerance and solidarity among all civilizations, peoples and cultures, including towards ethnic, religious and linguistic minorities.⁵²

⁴⁸ Article 7, CERD

⁴⁹ Article 1.1, UNESCO Declaration of Principles on Tolerance

⁵⁰ Article 6, UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

⁵¹ Article 1(i), United Nations Declaration on a Culture of Peace

⁵² *Ibid*, Articles 3(l) and (m)

2.44 The UNESCO Universal Declaration on Cultural Diversity has stressed that in;

our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace.⁵³

Protection of minorities

2.45 The ICCPR, article 27, states that 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.

2.46 The HRC, in its general comment 23, has concluded that the:

enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.⁵⁴

2.47 The UNCRC makes provision for the protection of the rights of children belonging to minorities in respect of culture. Article 30 states that in;

those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

⁵³ Article 2, UNESCO Universal Declaration on Cultural Diversity

⁵⁴ UN Human Rights Committee, General Comment 23 on the Rights of Minorities (1994) CCPR/C/21/Rev.1/Add.5, para 3.2

Applicable regional human rights standards

- 3.1 This section includes those ECHR rights given further domestic effect through the Human Rights Act 1998.

Right to private and family life

- 3.2 The ECHR, article 8 states;
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
- 3.3 The ECHR does not recognise a substantive right to culture; however, the obligation to respect an individual's cultural identity and heritage has emerged from the jurisprudence under article 8. In light of the importance of cultural diversity, the Grand Chamber has recognised that article 8 protects the right to maintain a minority identity and to live one's private and family life in accordance with that tradition.
- 3.4 In *Chapman v. the United Kingdom*, the Chamber stated that;
- there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe to recognize the special needs of minorities and an obligation to protect their security, identity and lifestyle..., not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.⁵⁵
- 3.5 The Court has further discussed the importance of the protection of cultural heritage. For example, in *Gorzellik and Others v. Poland*, the Court noted that;
- pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.⁵⁶

Freedom of expression

- 3.6 The ECHR, article 10 states;
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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

⁵⁵ *Chapman v. the United Kingdom* [2001] ECHR 43, at 93

⁵⁶ *Gorzellik v. Poland* [2004] ECHR 72, at 92

2. 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 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.

3.7 In *Handyside v UK*, the ECt.HR ruled that article 10;

is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.⁵⁷

3.8 In this case the ECt.HR explained that a broad application of freedom of expression is necessary to meet “the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society””.⁵⁸

3.9 The ECt.HR has also discussed the right to freedom of expression regarding the display of flags and cultural symbols by private individuals. In *Fáber v. Hungary* the Court stated that;

the display of a symbol associated with a political movement or entity, like that of a flag, is capable of expressing identification with ideas or representing them and falls within the ambit of expression protected by Article 10 of the Convention.⁵⁹

3.10 As set out in paragraph 2 of article 10, the right to freedom of expression is not absolute; exercising the right “carries with it duties and responsibilities”. The right to freedom of expression may be restricted by the state under certain conditions. In this respect the ECHR has a wider scope for legitimate restriction, than the ICCPR, given the additional categories of preventing the disclosure of information received in confidence and maintaining the authority and impartiality of the judiciary.⁶⁰

3.11 The ECt.HR has adopted a three part test regarding the limiting of human rights. First, the interference must be prescribed by law. Second, the aim of the restriction must be legitimate. Finally, the limitation must be necessary in a democratic society.

3.12 The test of ‘necessity in a democratic society’ requires the Court to determine whether the interference corresponds to a “pressing social need” and whether it was “proportionate to the legitimate aim pursued.”⁶¹ In examining the legitimacy of the interference with the right to freedom of expression the Court must consider the content and the context of the expression in light of the case as a whole.⁶² The protection of the rights of others is a legitimate aim, in light of this the ECt.HR has noted that

⁵⁷ *Handyside v. the United Kingdom*, (1980) 1 EHRR 737, at 48

⁵⁸ *Ibid*; See also, for example, *Lehideux and Isorni v. France* (1998) 30 EHRR 665, at 55; *Mouvement Raïlien Suisse v Switzerland* [2012] ECHR 1598, at 48

⁵⁹ *Faber v Hungary* (2012) No. 40721/08, at 36

⁶⁰ Article 19(2), ECHR

⁶¹ For example, *Wingrove v. The United Kingdom* [1996] ECHR 60, at 53, *Aydin and Ors. v. Turkey*, No. 49197/06, 23196/07, 50242/08, 60912/08, 14871/09, 2013, at 48-49; *Lehideux and Isorni v. France* (1998) 30 EHRR 665, at 51; *Mouvement Raïlien Suisse v Switzerland* [2012] ECHR 1598, at 48; *Vejdeland v. Sweden* [2012] ECHR 242, at 51

⁶² *Lehideux and Isorni v. France* (1998) 30 EHRR 665, at 51; *Mouvement Raïlien Suisse v Switzerland* [2012] ECHR 1598, at 69; *Kania and Kittel v. Poland*, No.35105/04, 21 June 2011, at 41

it must be accepted that the need to protect [convention rights] may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”.⁶³

- 3.13 The duties placed on an individual when exercising the right to freedom of expression are particularly relevant where matters of ‘intimate personal convictions’ are affected. In the case of *Gunduz v Turkey* the ECt.HR stated;

as is borne out by the wording itself of Article 10 § 2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes “duties and responsibilities”. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.⁶⁴

- 3.14 In a similar vein, in *Vejdeland v Sweden* the ECt.HR accepted the Swedish Supreme Court’s position that one of the obligations accompanying the right to freedom of expression is “as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights.”⁶⁵ The expression at issue was found to have been “unnecessarily offensive.”⁶⁶

- 3.15 In deciding whether an action is necessary in a democratic society, the ECt.HR will afford the State a margin of appreciation. This margin is flexible depending on the rights at stake and the nature of the issues. In reference to the ‘margin of appreciation’, the ECt.HR in *Handyside v UK* stated, by;

reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.⁶⁷

- 3.16 The margin of appreciation afforded to the State in these circumstances often depends upon the nature of the expression. For example, there is little scope for restriction under article 10(2) in the context of political debate⁶⁸ or questions of public interest;⁶⁹ however, where the statement is gratuitously offensive to an object of veneration or liable to offend intimate personal convictions limits are permissible.⁷⁰ The obligation on the State to promote tolerance and mutual respect can, therefore, set limits to the free exercise of the freedom of expression.⁷¹

⁶³ *Chassagnou and Others v. France* (2000) 29 EHRR 615, at 113

⁶⁴ *Gunduz v Turkey* (2005) 41 EHRR 5, at 37

⁶⁵ *Vejdeland v. Sweden* [2012] ECHR 242, at 57

⁶⁶ *Ibid*

⁶⁷ *Handyside v. the United Kingdom*, (1980) 1 EHRR 737, at 48

⁶⁸ *Brasilier v. France* (2006) No.71343/01, at 41

⁶⁹ *Wingrove v. the United Kingdom* [1996] ECHR 60, at 58

⁷⁰ *Ibid*, at 52, 58; See also *Otto-Preminger-Institute* [1994] ECHR 26, at 47, 49

⁷¹ Wiater, P, *Intercultural Dialogue in the Framework of European Human Rights Protection*, Council of Europe Publishing, 2010, p. 80

- 3.17 The concept of a margin of appreciation goes hand in hand with the supervision of the ECt.HR. This supervision covers both the impugned legislation and the domestic court decisions applying it. The ECt.HR has therefore noted that it is “empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.”⁷²
- 3.18 When UK courts are considering the necessity of a restriction or a penalty they will refer to the judicial concept of ‘deference’, which has emerged post enactment of the Human Rights Act 1998.⁷³

Right to peaceful enjoyment of property

- 3.19 The ECHR, Article 1 of Protocol No. 1, guarantees the right to property. It states:
1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
 2. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
- 3.20 The right to property may be interfered with only where there is a legitimate objective in the public, or general, interest.⁷⁴ The ECt.HR has set a number of statements of principle concerning the justification of interference, the ECt.HR has stated:

the Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights... The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of Protocol No. 1].⁷⁵

Freedom of thought, conscience and religion

- 3.21 The ECHR, article 9 states;
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

⁷² *Aydin and Ors. v. Turkey*, No. 49197/06, 23196/07, 50242/08, 60912/08, 14871/09, 2013, at 48; *Lehideux and Isorni v. France (1998)* 30 EHRR 665, at 51; *Mouvement Raïlien Suisse v Switzerland* [2012] ECHR 1598, at 60

⁷³ Klug, Francesca (2003) Judicial deference under the Human Rights Act 1998 *European human rights law review*, (2) pp. 125-133. ISSN 1361-1526. See for example, *R v A* [2001] UKHL 25, at 58

⁷⁴ *James v. the United Kingdom* (1986) 8 EHRR 123, at 46

⁷⁵ *Sporrong and Lönnroth v. Sweden* [1984] ECHR 18, at 69

- 3.22 The overlap between this freedom and that of freedom of expression is clear. Expressions of cultural identity may stray into the realm of religious discourse and, therefore, both rights may be engaged simultaneously.
- 3.23 The ECt.HR has recognised that the co-existence of religions often requires restrictions upon article 9 in order “to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”.⁷⁶ The regulation of the place and type of manifestation of religious symbols has been considered justifiable to obtain peaceful co-existence.⁷⁷
- 3.24 The ECt.HR has further noted the role of the State in ensuring that competing groups, whether religious or political, tolerate each other.⁷⁸

Equality and non-discrimination

- 3.25 The ECHR, at article 14, prohibits discrimination with respect to the rights set forth in the Convention, it states:
- The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.**
- 3.26 In addition to the specific restrictions on Convention Rights, article 17 removes from the Convention’s protections activities or acts which attack the rights and freedoms set forth in the ECHR; it states that:
- Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.**
- 3.27 Pursuant to article 17, certain expressions are not entitled to the protection afforded under article 10. An expression which falls within the meaning of article 17 because it “is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination” is not protected under article 10.⁷⁹ For example, the ECt.HR has stated that the “negation or revision” of clearly established historical facts, such as the Holocaust, is removed from the protection of article 10 by article 17.⁸⁰
- 3.28 In its White Paper on Intercultural Dialogue, the Council of Europe noted that “the rules of a – real or imagined – ‘dominant culture’ cannot be used to justify discrimination, hate speech or any form of discrimination on grounds of religion, race, ethnic origin or other identity.”⁸¹

⁷⁶ *Kokkinakis v. Greece* [1993] ECHR 20, at 33; See also *Barankevich v. Russia* (2008) 47 EHRR 266, at 30

⁷⁷ *Refah Partisi and Others v. Turkey* [2003] ECHR 97, at 95

⁷⁸ *Leyla Sahin v. Turkey* [2005] ECHR 819, at 107

⁷⁹ *Norwood v. the United Kingdom* (2005) 40 EHRR SE 11, at 4; See also, *Gunduz v Turkey* (2005) 41 EHRR 5, at 40-1 and *Garaudy v. France*, No.65831/01

⁸⁰ *Lehideux and Isorni v. France* (1998) 30 EHRR 665, at 47

⁸¹ Council of Europe ‘White Paper on intercultural dialogue: “Living together as equals in dignity” (Strasbourg, 7 May, 2008). p.20

Access to services

Health

3.29 Article 11 of the European Social Charter provides for “[t]he right to protection of health” stating:

With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

1. To remove as far as possible the causes of ill-health;
2. To provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. To prevent as far as possible epidemic, endemic and other diseases.

3.30 The secretariat to the European Social Charter has published an information document on the right to health, stating that;

The system of health care must be accessible to the entire population. To that end, states should take as their main criterion for judging the success of health system reforms effective access to health care for all, without discrimination, as a basic human right.⁸²

Tolerance, mutual respect and understanding

3.31 Referring to the hallmarks of a ‘democratic society’, the ECt.HR has attached particular importance to pluralism, tolerance and broadmindedness. In that context, the ECt.HR has held that;

although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. . . . However, in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial. What is at stake here is the preservation of pluralism and the proper functioning of democracy, and the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.⁸³

3.32 As a signatory to the FCNM, the United Kingdom Government is required to;

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.⁸⁴

⁸² Secretariat to the European Social Charter, *The Right to Health and The European Social Charter* (2008), at II.B

⁸³ *Barankevich v. Russia* (2008) 47 EHRR 266, at 30; *Leyla Sahin v. Turkey* [2005] ECHR 819, at 108

⁸⁴ Article 6(1), FCNM

- 3.33 The FCNM further states that, in exercising the rights and freedoms under the 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 majorities.⁸⁵
- 3.34 The Commission notes that the Heads of State and Government of the Member States of the Council of Europe have committed to “systematically encourage intercultural and inter-faith dialogue, based on universal human rights, as a means of promoting awareness, understanding, reconciliation and tolerance, as well as preventing conflicts and ensuring integration and the cohesion of society.”⁸⁶
- 3.35 The Faro Declaration on the Council of Europe’s Strategy for Developing Intercultural Dialogue expressed the commitment to “encourage intercultural dialogue on the basis of universal human rights, as a means of promoting awareness, understanding, reconciliation, tolerance and respect for the other, of preventing conflicts and of ensuring an integrated and cohesive society.”⁸⁷
- 3.36 The Council of Europe white paper on intercultural dialogue noted that “racism, xenophobia, intolerance and all other forms of discrimination refuse the very idea of dialogue and represent a standing affront to it.”⁸⁸
- 3.37 Thus, the ECt.HR promotes intercultural dialogue through its jurisprudence, giving effect to the concept by promoting pluralism, tolerance and broadmindedness and protecting relevant rights. The right to freedom of expression and the right to freedom of thought, conscience and religion are two of the key ECHR rights related to intercultural dialogue.⁸⁹
- 3.38 In a similar vein the ECt.HR has recognised that historical and political factors may be relevant in the decisions made by state authorities in the application of various rights.⁹⁰
- 3.39 At the European Union level, “promotion of cultural diversity and intercultural dialogue”⁹¹ has been identified as a Strategic Objective of the European Agenda for Culture of the European Union. The Council of the European Union specified that this objective includes “promoting intercultural dialogue as a sustainable process contributing to European identity, citizenship and social cohesion, including by the development of the intercultural competences of citizens.”⁹²

⁸⁵ Article 20, FCNM

⁸⁶ Declaration and Action Plan of the Third Summit of the Council of Europe, Warsaw, 16-17 May 2005. The Committee of Ministers of the Council of Europe has noted that “[c]ultural diversity in Europe is manifested not only through recent migration but also through the legacy of the past which is a testimony of the historic presence of different cultures and religions.” ‘The religious dimension of intercultural dialogue’, Parliamentary Assembly Recommendation 1962 (2011) Reply adopted by the Committee of Ministers on 11 January 2012, para 12

⁸⁷ DGIV/DC-FARO (2005), 28 October 2005

⁸⁸ Council of Europe ‘White Paper on intercultural dialogue: “Living together as equals in dignity”’(Strasbourg, 7 May, 2008) p.21

⁸⁹ The main rights related to intercultural dialogue are: Freedom of Thought Conscience and Religion, Freedom of Expression and Freedom of association and assembly. See for example, Wiater, P, *Intercultural Dialogue in the Framework of European Human Rights Protection*, Council of Europe Publishing, 2010

⁹⁰ *Sedjić and Finci v. Bosnia and Herzegovina* [GC], at 38-56, nos. 27996/06 and 34836/06, 22 December 2009; *Lautsi and Others v. Italy* [2011] ECHR 2412, at 68; *Aydin and Ors. v. Turkey*, No. 49197/06, 23196/07, 50242/08, 60912/08, 14871/09, 2013, at 51

⁹¹ Resolution of the Council of the European Union on a European Agenda for Culture, 16 November 2007, 2007/c 287/01, para 2(a)

⁹² *Ibid.*, para 3(A)

- 3.40 The Advisory Committee on the FCNM explained that Article 15 of the Convention 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.⁹³
- 3.41 The Advisory Committee further noted that;
 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.⁹⁴

Protection of minorities

- 3.42 The FCNM, Article 5(1) states that;
 the Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.⁹⁵
- 3.43 The Office of the High Commissioner for Human Rights has explained, with respect to minorities under international law, that:
 In most instances a minority group will be a numerical minority, but in others a numerical majority may also find itself in a minority-like or non-dominant position... In some situations, a group which constitutes a majority in a State as a whole may be in a non-dominant position within a particular region of the State in question.⁹⁶
- 3.44 The Organisation for Security and Co-operation in Europe (OSCE) has produced a number of documents which refer to the rights of minorities in various sectors of public life.⁹⁷ The Ljubljana Guidelines on Integration of Diverse Societies ('the Guidelines') recognise the role of symbols in public life, recommending that;
 States should promote integration by respecting the claims and sensitivities of both minority and majority groups regarding the display and use of symbols in shared public space. While being mindful of freedom of expression, States should avoid the divisive use of symbols and discourage such displays by non-State actors. Where appropriate, opportunities to promote inclusive symbols should be sought.⁹⁸

⁹³ Advisory Committee on the Framework Convention for the Protection of National Minorities, 'Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs', 5 May 2008, ACFC/31DOC(2008)001, para 22

⁹⁴ *Ibid*

⁹⁵ See also, Article 4(2): "The Parties undertake to adopt, where necessary, 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. In this respect, they shall take due account of the specific conditions of those persons belonging to national minorities."

⁹⁶ UN OHCHR, *Minority Rights: International Standards and Guidance for Implementation* (2010) pp.2-3

⁹⁷ See for example, *Recommendations on Policing in Multi-Ethnic Societies*, 2006; *Guidelines on the Use of Minority Languages in the Broadcast Media*, 2003; *The Lund Recommendations on the Effective Participation of National Minorities in Public Life*, 1999; *The Oslo Recommendations regarding the Linguistic Rights of National Minorities*, 1998; *The Hague Recommendations Regarding the Education Rights of National Minorities*, 1996.

⁹⁸ Principle 50, *Ljubljana Guidelines on Integration of Diverse Societies*

3.45 The Guidelines recognise that the “inappropriate use of symbols can cause tensions and incidents that can escalate into conflict and intercommunity violence”.⁹⁹ In respect of flags and symbols displayed on local government buildings, it is suggested that States;

*should consider regulating such displays, based on principles of inclusiveness and good governance, achieving a balance between the reasonable interests of all groups in society.*¹⁰⁰

⁹⁹ *Ibid*, p.64

¹⁰⁰ *Ibid*

The Northern Ireland context

- 4.1 The Belfast (Good Friday) Agreement 1998 includes references to the display of cultural symbols and emblems as a particularly difficult issue, stating that;

All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes and the need in particular in creating new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division. Arrangements will be made to monitor this issue and consider what action might be required.¹⁰¹

- 4.2 As a matter of human rights law, symbols include flags.¹⁰² Cultural expressions are made by both public and private actors in a variety of settings. At times the organisation, individual or group responsible for a particular display are clearly identifiable, but in many cases they are unknown.

- 4.3 The impact of decisions regarding the flying of flags and display of cultural symbols has been recognised by the Government as far reaching and as having social and economic consequences.¹⁰³ Government initiatives have, in the past, considered the need to address the display of flags, symbols and emblems in Northern Ireland. In 2005, direct rule Ministers introduced the policy and strategic framework 'A Shared Future' which discussed the objectives of "freeing the public realm (including public property) from displays of sectarian aggression"¹⁰⁴ and "reclaiming shared space" through;

developing and protecting town and city centres as safe and welcoming places for people of all walks of life... creating safe and shared space for meeting, sharing, playing, working and living [and]... freeing the public realm from threat, aggression and intimidation while allowing for legitimate expression of cultural celebration.¹⁰⁵

- 4.4 A number of Government agencies have developed a 'Joint Protocol in Relation to the Display of Flags in Public Areas' (Joint Protocol) which recommends that "flag flying should be limited to particular times and particular dates".¹⁰⁶ Determining the legitimacy and limitations that may be legally imposed upon the display of flags, emblems and symbols is context dependent. The Joint Protocol recognises that flags, emblems and symbols may be used for many purposes including "celebrations of cultural identity, marking a festive event, sectarianism or intimidation, marking out of territory".¹⁰⁷

- 4.5 The consultation document on a Programme for Cohesion, Sharing and Integration (CSI), issued by the Office of the First Minister and deputy First Minister (OFMdFM) in 2011, identified "developing shared space" as a short term theme for action and "encouraging shared neighbourhoods," "reducing and eventually eliminating segregated services, and "cultural identity, including issues around flags and emblems, murals, bonfires, cultural expression, language and popular protest" as long term themes for action.¹⁰⁸

¹⁰¹ Belfast (Good Friday) Agreement, 1998, para 5

¹⁰² *Faber v. Hungary* (2012) No.40721/08, at 36

¹⁰³ A Shared Future, p. 19-20; Research into the financial cost of the Northern Ireland Divide, Deloitte, 2007, p.55 para 8.3.2

¹⁰⁴ A Shared Future, p. 18

¹⁰⁵ *Ibid*, p. 21

¹⁰⁶ PSNI, DSD, DRD (Roads Service), DoE (Planning Service), NIHE, OFMdFM 'Joint Protocol in Relation to the Display of Flags in Public Areas', page 44

¹⁰⁷ Joint Protocol in Relation to the Display of Flags in Public Areas, Appendix A; Flags and Emblems, Dominic Bryan and Gordon Gillespie, available at: <http://www.community-relations.org.uk/fs/doc/part-b-d-bryan-g-gill.pdf>, para 1.1; See also for example, *Re McClean* [2005] UKHL 46, at 11; *Duffy v Ulsterbus Ltd* [2007] NIFET 84_01, at 2.54 and 2.59; In *Re Farrell* [1999] NICA 7, at 31

¹⁰⁸ Programme for CSI consultation, pp. 8-9

- 4.6 The CSI also commits to “working with people in the community to remove threatening and divisive symbols such as paramilitary flags, racist and sectarian graffiti, paramilitary murals and territorial markers, where these are used in an attempt to intimidate.”¹⁰⁹
- 4.7 In its European Priorities 2012-2013 Implementation Plan, the Northern Ireland Executive’s objectives and targets included “by the end of March 2013, use of PEACE III funds to support the creation of shared spaces.”¹¹⁰
- 4.8 In May 2013, OFMdfM published *Together: Building a United Community Strategy (TBUC)* which outlines a vision of;
- a united community, based on equality of opportunity, the desirability of good relations and reconciliation - one which is strengthened by its diversity, where cultural expression is celebrated and embraced and where everyone can live, learn, work and socialise together, free from prejudice, hate and intolerance.**¹¹¹
- 4.9 The TBUC Strategy commits to establishing an All Party Group, with an independent chair, to address the issues of flags, symbols, emblems and related matters.¹¹² The All Party Group was established in July 2013.
- 4.10 The OFMDFM has commissioned a number of reports examining flags, symbols and emblems in Northern Ireland, which survey their form, content and how they are displayed.¹¹³ These reports have found that flags make-up the largest proportion of emblems displayed on the streets of Northern Ireland and that the majority of flags on display are attached to lampposts.¹¹⁴
- 4.11 It has been noted that the “meanings attached to particular symbols change over time and are dependent upon the context in which those symbols are used.”¹¹⁵
- 4.12 The particular context of a display can result in a flag, symbol or emblem demarcating territory or space as belonging to a particular community. In 2007 the Government commissioned research to examine the financial cost of the divide in Northern Ireland. This found that “[t]erritories are often demarcated with environmental symbols such as sectarian graffiti, murals or flags. This division and segregation is associated with a sense of fear and anxiety about entering areas and using public services deemed to belong to the ‘other’ community.”¹¹⁶

¹⁰⁹ Programme for CSI consultation, para 3.32

¹¹⁰ European Priorities 2012-13 Implementation Plan; Winning in Europe, Northern Ireland Executive, SC10.1, p18. See also, SC 10.2: “To pursue any competitive EU funding opportunities that arise during 2012-13 that are designed to reduce poverty, support social inclusion or combat discrimination and support projects in making applications.” p19. See also, European Priorities 2012-13; Winning in Europe, Northern Ireland Executive, p17. The Northern Ireland Executive has committed to “work to strengthen society so that it is more tolerant, inclusive and stable and permits progress in quality of life for everyone.”

¹¹¹ OFMdfM, *Together: Building a United Community Strategy* (2013) p.3

¹¹² *Ibid*, para 5.45

¹¹³ Bryan and Gillespie, *Transforming Conflict: Flags and Emblems* (2005, Belfast: Institute of Irish Studies); Bryan, Stevenson and Gillespie, *Flags Monitoring Project 2007 Report* (2008, Belfast: Office of the First Minister and Deputy First Minister, Northern Ireland); Bryan, Stevenson and Gillespie, *Flags monitoring Project 2008/2009: Interim Report Covering 2008, with Comparative Figures from 2007 and 2006* (2009, Belfast: Office of the First Minister and Deputy First Minister, Northern Ireland); Bryan, Stevenson and Gillespie, *The Public Display of Flags and Emblems in Northern Ireland* (2010, Belfast: Institute of Irish Studies); Bryan, Gillespie, Bell and Stevenson, *Public Displays of Flags and Emblems in Northern Ireland: Survey 2010* (2011, Belfast: Institute of Irish Studies)

¹¹⁴ Bryan, Gillespie, Bell and Stevenson, *Public Displays of Flags and Emblems in Northern Ireland: Survey 2010* (2011, Belfast: Institute of Irish Studies), pp. 8, 12 and 15

¹¹⁵ Bryan and Gillespie, *Transforming Conflict: Flags and Emblems* (2005, Belfast: Institute of Irish Studies), p. 13

¹¹⁶ Research into the financial cost of the Northern Ireland Divide, Deloitte, 2007, p. 18

4.13 As a symbol of sovereignty, the Union flag reflects the constitutional status of the jurisdiction, as freely determined by the people of Northern Ireland in accordance with the provisions set out in the Belfast (Good Friday) Agreement 1998¹¹⁷ and the Northern Ireland Act 1998.¹¹⁸ Discussions on flying the Union flag will in certain circumstances, by virtue of the constitutional status of Northern Ireland, be necessarily different from those which take place concerning other flags, symbols or emblems. Moreover, the UK Government has recognised that discussions of this sort will differ in Northern Ireland from other parts of the United Kingdom, stating in 2007 that;

*There are particular sensitivities in Northern Ireland. The flying of flags there is governed by the Flags Regulations (Northern Ireland) 2000. The Government believes that this is the most appropriate way to deal with the matter.*¹¹⁹

4.14 In this context, international human rights law requires “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 of national sovereignty of states.”¹²⁰

4.15 In Northern Ireland displays of flags, symbols and emblems are typically manifested in three scenarios.

4.16 First, displays by Government or other public authorities in, on and over public property. The State has particular responsibilities and duties to respect the rights of all members of society in respect of decisions regarding such displays.

4.17 Second, displays by private individuals or groups in public spaces and on public property. The legitimacy of parades, protests or processions and their regulation is not considered for the purpose of this paper. However, flags, symbols and emblems which are displayed at such events are included.

4.18 Third, displays by private individuals or groups on private property. Such displays enjoy the highest level of freedom, although whether they are inward or outward (public) facing will have a bearing on their regulation.

¹¹⁷ Section 2, para 1, Belfast (Good Friday) Agreement, 1998

¹¹⁸ Section 1, Northern Ireland Act 1998

¹¹⁹ Governance of Britain, 2007, CM 7170, p.58

¹²⁰ Preamble, FCNM

Government or other public authorities displaying flags, symbols or emblems in, on and over publicly owned buildings and property

- 5.1 In accordance with international human rights law an individual or group of individuals does not have the substantive right to have a flag flown or a symbol or emblem displayed on their behalf by a public authority. Cultural expressions including flags, symbols and emblems may nonetheless be facilitated by public bodies through displays in, on and over buildings and properties that are publicly owned.
- 5.2 Displays addressed in this section include flags, symbols, emblems and bunting, as well as publicly funded murals, signs and memorials. In addition to the Government or public authority considering human rights requirements when taking action to display or not to display flags, symbols and emblems on publicly owned property, the public authority must also consider these issues when making decisions regarding whether or not to provide funding for displays including memorials and murals. It is unlikely that the issue of illegal displays will be engaged in connection with displays by public authorities; however, this possibility should be considered as part of the decision making process, in particular when funding is provided, for example for memorials.

Though regulations exist regarding certain circumstances, there is no single legislative act that permits, or otherwise regulates, all displays of flags, symbols or emblems by Government or public authorities in, on and over publicly owned buildings and property. In decisions relating to the display of flags, symbols or emblems or the funding of such displays the domestic legal framework is central to understanding the restrictions which may lawfully be placed upon the enjoyment of qualified rights. Any such interference must be prescribed by law and so the following domestic framework delineates the scope for lawful restrictions. The appropriate legislation will depend on the nature of each situation.

Under the Flags (Northern Ireland) Order 2000, the Secretary of State for Northern Ireland has the power to make regulations regarding the flying of flags at government buildings.¹²¹ This applies only to buildings occupied “wholly or mainly” by “members of the Northern Ireland Civil Service” and not to local government.¹²²

In making such Regulations, the Secretary of State was required to have regard to the Belfast (Good Friday) Agreement “and the need in particular in creating new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division”.¹²³

The Flags Regulations (Northern Ireland) 2000 require that no flag should be flown from government buildings except where the Regulations require or permit it to be. The main exception is a requirement to fly the Union Flag from certain government buildings on designated days. Any amendment to the Regulations is subject to approval by the Westminster Parliament, not the Northern Ireland Assembly. The Secretary of State must however lay a draft of the Regulations before the Assembly, and the Assembly shall report the views expressed in the Assembly on the proposed regulations.¹²⁴

¹²¹ s.3(1), Flags (NI) Order 2000

¹²² *Ibid*, s.3(2)

¹²³ Belfast (Good Friday) Agreement, 1998, para 5; The Agreement further provides for “the right to freedom from sectarian harassment”, Rights, Safeguards and Equality of Opportunity, para 1

¹²⁴ s.4, Flags (NI) Order 2000

In accordance with section 75(1) of the Northern Ireland Act 1998 public authorities must promote equality of opportunity. Section 75(2) of the Northern Ireland Act 1998 imposes a similar duty on public authorities, including district councils, “[to] have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.”

The requirement under section 75(2), to have regard to the desirability of promoting good relations is a reflection in domestic law of the international human rights law standards requiring tolerance, mutual respect and understanding. The Equality Commission of Northern Ireland has explained that section 75(2);

requires public authorities to take a pro-active initiating approach to contributing to a shared society, rather than responding to the effects of a divided one... It means creating an ethos, a culture, of good relations, and recognising the need to promote good relations both within, and between, communities...¹²⁵ promoting good relations can also involve tackling difficult issues such as the display of aggressive and intimidating flags and emblems, and taking steps to create safe and shared public spaces in towns and cities, that can be accessed and used by all sections of all communities.¹²⁶

The Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended) further prohibits discrimination and harassment on the grounds of religious belief or political opinion by employers and service providers, including public authorities. The Fair Employment Code of Practice states that to promote equality of opportunity:

you should... promote a good and harmonious working environment and atmosphere in which no worker feels under threat or intimidated because of his or her religious belief or political opinion, e.g. prohibit the display of flags, emblems, posters... [etc]..., which are likely to give offence or cause apprehension among particular groups of employees.¹²⁷

The Police Emblems and Flags Regulations (Northern Ireland) 2002 specify that the Service Emblem is “the only emblem for the police which may be used on any equipment or property used for the purposes of the police or otherwise in connection with the police.”¹²⁸

- 5.3 In examining the rights engaged in relation to the Government or public authorities displaying flags, symbols or emblems in, on and over publicly owned buildings and property it is relevant to note that no rights are attributed to the Government or public authorities. However, the Government and public authorities, as duty bearers, have the responsibility to protect individuals’ rights.

¹²⁵ Equality Commission for Northern Ireland, Section 75 of the Northern Ireland Act 1998; Promoting Good Relations, A Guide for Public Authorities, October 2007, para 1.3

¹²⁶ *Ibid*, para 2.6

¹²⁷ S.5.22, Fair Employment in Northern Ireland, Code of Practice

¹²⁸ Ss. 3 and 4, Police Emblems and Flags Regulations (NI) 2002

Right to culture

- 5.4 The right to culture forms an intrinsic part of the human rights framework and is specifically protected by the ICESCR. Reference to cultural rights is also made in CERD, CEDAW, CRC and CRPD which each protect the right to participate in cultural life. A public authority does not have a right to culture; however, it has a duty not to impinge upon an individuals' right to culture and may facilitate the exercise of the right to culture through displays.

Right to private and family life

- 5.5 The ECHR does not recognise a substantive right to culture; however, the obligation to respect an individual's cultural identity and heritage has emerged from the jurisprudence under Article 8. The ECtHR has further discussed the importance of the protection of cultural heritage. A public authority does not have a right to private life, however, it has a duty not to impinge on individuals' right to private life and in so far as that right includes the right to culture it may facilitate the exercise of the right.

Freedom of expression

- 5.6 Freedom of expression forms the "foundation stone for every free and democratic society"¹²⁹ by protecting the holding and development of opinion and exchange of information. This right is protected in numerous international human rights treaties, including the ICCPR and the ECHR. A public authority does not have a right to freedom of expression; however, it has a duty to interfere with individuals' right to freedom of expression only in limited circumstances. It is unlikely that the right to freedom of expression will be engaged with regard to the Government or other public authorities displaying flags, symbols or emblems in, on and over publicly owned buildings and property.

Freedom of thought, conscience and religion

- 5.7 The ICCPR and ECHR protect the right to freedom of thought, conscience and religion, a fundamental right in the international human rights framework.
- 5.8 A public authority does not have a right to freedom of thought, conscience and religion; however, it may restrict individuals' rights in limited circumstances as prescribed by the treaties. In certain cases the government or public authority may facilitate the exercise of the right to freedom of thought, conscience and religion through displays.

Equality and non-discrimination

- 5.9 The principle of non-discrimination is a central tenet of international human rights law and is consequently protected by all the core UN treaties and the ECHR.

¹²⁹ UN Human Rights Committee, General Comment 34: Freedom of Expression (2011) UN Doc. CCPR/C/GC/34, para 1

- 5.10 In accordance with the Human Rights Act 1998, public authorities displaying flags, symbols or emblems in, on and over public property, must not do so in a manner that is discriminatory on grounds which include religion, political or other opinion, national or social origin, association with a national minority, or other status.¹³⁰ They are also under a statutory duty to promote equality of opportunity under s.75(1) of the Northern Ireland Act 1998. Nevertheless, it should be kept in mind that not every differentiation amounts to discrimination in human rights law.¹³¹
- 5.11 The significant role for public representatives in addressing intolerance and promoting respect has been emphasised in the Durban Programme of Action which underlined “the key role that politicians and political parties can play in combating racism, racial discrimination, xenophobia and related intolerance and encourage[d] political parties to take concrete steps to promote equality, solidarity and non-discrimination in society.”¹³²

Access to services

- 5.12 According to international human rights law, the Government is required to ensure access to services providing healthcare and leisure. The CESCR has explained that the right to health includes the requirement that “health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds,”¹³³ and “health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS.”¹³⁴
- 5.13 Where a decision is made by a government or public authority to display a flag, symbol or emblem in, on or over publicly owned buildings or property, or to provide funding for displays, the decision maker must consider the rights of the community, both in terms of those who live in the vicinity and those who travel in or through the area. For example, the potential for flags or memorials to be seen as territorial markers which indicate that an area ‘belongs’ to a certain community must be considered.¹³⁵

Tolerance, mutual respect and understanding

- 5.14 In accordance with international human rights law government and public representatives who make decisions regarding the display of expressions of culture are required to promote tolerance and mutual respect and to protect against harassment and intimidation in the decision to display or not to display expressions of culture such as flags, symbols and emblems.

¹³⁰ Article 14, ECHR

¹³¹ UN Human Rights Committee, General Comment 18: Non-discrimination (1989), para 13

¹³² Durban Programme of Action, para 115

¹³³ UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000) E/C.12/GC/14, para 12(b)(i)

¹³⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000) E/C.12/GC/14, para 12(b)(ii)

¹³⁵ Research into the financial cost of the Northern Ireland Divide, 2007, p. 18; see also Programme for Cohesion, Sharing and Integration, Consultation analysis, p. 35-45; Northern Ireland Life and Times Survey (2012)

- 5.15 In making decisions regarding the flying of flags and the display of cultural emblems on or in public buildings, public authorities are under a statutory duty to “have regard to desirability of promoting good relations between persons of different religious belief, political opinion or racial group”.¹³⁶ In this regard, decision makers should consider the jurisprudence of the ECt.HR. The ECt.HR has explained that the role of the authorities is not to remove the causes of tension but to ensure that competing groups tolerate one another.¹³⁷ Furthermore, “democracy does not simply mean that the views of a majority must always prevail.”¹³⁸ The rights of individuals who are affected by a decision should be considered and “a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”¹³⁹
- 5.16 In finding this balance it is essential that the views of all groups, both minorities and majorities, are considered and respected. It is important to note that a group which may constitute the majority in one area may constitute a minority in another part of the country and that this may change over time.¹⁴⁰
- 5.17 The ECt.HR has recognised that historical and political factors may be relevant factors when the state is making decisions regarding the protection or limitation of rights.¹⁴¹ The Court has further noted the need for compromise, which pluralism and democracy are based on, and has held, in the context of restrictions on political parties, that the limitation of some freedoms may be required in order to “guarantee greater stability of the country as a whole.”¹⁴²
- 5.18 The OSCE’s Ljubljana Guidelines on Integration of Diverse Societies recognise that the “inappropriate use of symbols can cause tensions and incidents that can escalate into conflict and intercommunity violence”.¹⁴³ In respect of flags and symbols displayed on local government buildings, it is suggested that States;
- should consider regulating such displays, based on principles of inclusiveness and good governance, achieving a balance between the reasonable interests of all groups in society.**¹⁴⁴
- 5.19 In light of the potential implications which the flying of flags and display of symbols and emblems on public property may have on securing a tolerant society underpinned by mutual respect and understanding it is important that public representatives make proactive efforts to ensure that human rights are protected. Thus, the UN Declaration on a Culture of Peace notes the “essential role” of Governments¹⁴⁵ and the “key role” of politicians in the promotion and strengthening of a culture of peace.¹⁴⁶

¹³⁶ S.75(2), Northern Ireland Act 1998

¹³⁷ *Agga v. Greece (No 2)* [2002] ECHR 676, at 60; *Leyla Sahin v. Turkey* [2005] ECHR 819, at 107

¹³⁸ See for example, *Chassagnou and Others v. France*, (2000) 29 EHRR 615, at 112; *Leyla Sahin v. Turkey* [2005] ECHR 819, at 108

¹³⁹ *Ibid*

¹⁴⁰ UN OHCHR, *Minority Rights: International Standards and Guidance for Implementation* (2010) pp.2-3

¹⁴¹ See also, *Zdanoka v. Latvia* [GC], no. 58278/00, ECHR 2006IV, at 33; *Sedjić and Finci v. Bosnia and Herzegovina* [GC], at 38-56, nos. 27996/06 and 34836/06, 22 December 2009; *Lautsi and Others v. Italy* [2011] ECHR 2412, at 68, *Aydın and Ors. v. Turkey*, No. 49197/06, 23196/07, 50242/08, 60912/08, 14871/09, 2013, at 51

¹⁴² *Refah Partisi and Others v. Turkey* [2003] ECHR 97, at 99; See also, *Leyla Sahin v. Turkey* [2005] ECHR 819, at 108; *Zdanoka v. Latvia* [GC], no. 58278/00, ECHR 2006IV, at 100

¹⁴³ OSCE, *Ljubljana Guidelines*, p.64

¹⁴⁴ *Ibid*

¹⁴⁵ Para 5, UN Declaration on a Culture of Peace

¹⁴⁶ *Ibid*, Article 8

- 5.20 Regulating the display of cultural expressions such as flags, symbols or emblems requires a delicate balancing act so as to ensure that the rights of all are protected and that the State discharges its duty to promote interculturalism through the promotion of tolerance, mutual respect and understanding.¹⁴⁷

Protection of minorities

- 5.21 International human rights law provides for the protection of minority rights in various treaties including the ICCPR, the UNCRC and the FCNM.
- 5.22 The OSCE's Ljubljana Guidelines on Integration of Diverse Societies provide specific guidance which should be followed by the Government or public authorities making decisions regarding displays. Pursuant to the Guidelines;

*States should promote integration by respecting the claims and sensitivities of both minority and majority groups regarding the display and use of symbols in shared public space. While being mindful of freedom of expression, States should avoid the divisive use of symbols and discourage such displays by non-State actors. Where appropriate, opportunities to promote inclusive symbols should be sought.*¹⁴⁸

Framework for decision making

- 5.23 When a decision maker is required to consider the erection or removal of a flag, symbol or emblem, it is essential that they comply with international human rights law and jurisprudence. The following checklist can assist in ensuring that relevant considerations are taken into account in the decision making process.
- i) Does the display constitute an illegality? If so, restrictions should be imposed.
 - ii) Are any human rights engaged? Consider the rights of the individual; responsibilities of the individual and public authority and the duties of the Government in relation to the following;
 - Right to culture
 - Right to private and family life
 - Freedom of expression
 - Freedom of thought, conscience and religion
 - Equality and non-discrimination
 - Access to services
 - Protection of minorities

¹⁴⁷ See for example the requirement of pluralism by the ECtHR in *Barankevich v. Russia* (2008) 47 EHRR 266, at 30; Article 6(1) FCNM

¹⁴⁸ Principle 50, Ljubljana Guidelines on Integration of Diverse Societies

- lii) Has consideration been given to balancing competing rights?
- iv) Will the decision impact upon tolerance, mutual respect and understanding?
- v) Are limitations/restrictions necessary?
 - Is the limitation prescribed by law?
 - Is the limitation to achieve a legitimate aim?
 - Is it necessary in a democratic society?
- iv) Is the limitation proportionate?

Private individuals or groups displaying flags, symbols or emblems in a public space

- 6.1 Flags, symbols and emblems are often expressions of an individual's cultural and national identity. In a public space they can be used as means of celebration and memorialisation. They may also at times be used as territorial markers and a method of intimidation and harassment. A wide range of possible scenarios exists under the category of private individuals displaying flags, symbols or emblems in the public space, including; national and other flags, bunting, symbols and emblems, painted kerbstones, arches, murals or signs, bonfires, memorials and items carried or displayed at public meetings, processions or protests.¹⁴⁹ To fall within the scope of this section the displays must be attached to or displayed over public property, roads or public fixtures such as lampposts.

There is no single legislative act that permits, or otherwise regulates, the display of flags, symbols or emblems by individuals or groups on public property in Northern Ireland. The criminal and civil law can be invoked where such displays impact upon public order, amount to harassment or hate speech or otherwise breach planning or roads regulations.

In decisions relating to the erection or removal of flags, symbols or emblems, the domestic legal framework is central to understanding the restrictions which may be lawfully placed upon the enjoyment of qualified rights. Any such interference must be prescribed by law and so the following domestic framework delineates the scope for lawful restrictions. The appropriate legislation will depend on the nature of each situation.

The Public Order (Northern Ireland) Order 1987 prohibits provocative conduct in a public place or at a public meeting or procession.¹⁵⁰ This includes the display of anything with the "intent to provoke a breach of the peace or by which a breach of the peace or public order is likely to be occasioned".¹⁵¹ Display of written material which is threatening, abusive or insulting is also prohibited if intended to stir up hatred or arouse fear; or is likely to do so.¹⁵²

Harassment is a criminal offence and may be prosecuted accordingly.¹⁵³ The Protection from Harassment (Northern Ireland) Order 1997 also provides civil injunctive relief where a person pursues a course of conduct which amounts to harassment.¹⁵⁴ Although there is no statutory definition of harassment, the Order confirms that it includes "alarming the person or causing the person distress"¹⁵⁵ and must occur on at least two occasions.¹⁵⁶

The Terrorism Act 2000 further makes it a criminal offence to wear an item of clothing, or display an article, in a public place, which arouses suspicion that an individual is a member of or a supporter of a proscribed organisation.¹⁵⁷

¹⁴⁹ This paper only concerns itself with flags, symbols or emblems carried at processions, parades or protests; it does not consider the legality or legitimacy of the events themselves.

¹⁵⁰ Article 19, Public Order (Northern Ireland) Order 1987

¹⁵¹ *Ibid*, Article 19(b)

¹⁵² *Ibid*, Article 9(1)

¹⁵³ Article 4, Protection from Harassment (Northern Ireland) Order 1997

¹⁵⁴ *Ibid*, Article 3

¹⁵⁵ *Ibid*, Article 2(2)

¹⁵⁶ *Ibid*, Article 2(3)

¹⁵⁷ Section 13(1), Terrorism Act 2000

Under planning legislation, the Department of the Environment regulates materials which it considers to be an advertisement. Under the Planning (Control of Advertisements) Regulations (Northern Ireland) 1992 (as amended), consent is required for such an advertisement. However, there exists an exemption for national flags of any country, provided that the flag is displayed on a single flagstaff and that it does not display any advertisement or subject matter additional to the design of the flag.¹⁵⁸

Local councils also have powers to require the removal of, or to remove graffiti which is detrimental or posters which contravene advertising regulations, under article 18(1) of the Local Government (Miscellaneous Provisions) Northern Ireland Order 1985.

The Roads (NI) Order 1993 permits the regulation of roads by the Department for Regional Development (DRD). The legislation empowers the DRD to regulate any advertisement, picture, letter, sign or mark which are on the surface of the road, tree or any other fixture pertaining to the roads.¹⁵⁹ Breach of these regulations is a criminal offence and the DRD retains the authority to remove the offending item and recover the costs of doing so.¹⁶⁰

The Roads (NI) Order 1993 also regulates the erection of arches or other such apparatus over or along a road. Such displays are unlawful unless consent from the DRD has been sought.¹⁶¹ Consent may be subject to conditions which may include the applicant having to; put in place insurance regarding the erection, produce a safety certificate and erect and remove the arch within a specified time period.¹⁶² The applicant will also be required to indemnify the DRD in relation to any claim in respect of injury, damage or loss arising out of the fixing, placing or presence of the apparatus.¹⁶³ Failure to adhere to the conditions may result in prosecution, the revocation of consent or the removal of the apparatus.¹⁶⁴

In carrying out their functions, public authorities are also under a statutory duty, pursuant to s.75(2) of the Northern Ireland Act 1998, to “have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.”

Right to culture

- 6.2 When cultural rights are invoked in respect of displays of, or restriction upon, flags, symbols or emblems it is incumbent upon the State to ensure that the exercise of these rights does not impact negatively upon the rights of others. Cultural rights are not absolute and where they infringe upon the rights of others cannot be protected to the exclusion of other rights. Careful consideration of the local historical and political sensitivities is required in order to balance the cultural rights of an individual or community against the general public as a whole.

¹⁵⁸ Schedule 2, Planning (Control of Advertisements) Regulations (NI) 1992

¹⁵⁹ Article 87, Roads (NI) Order 1993

¹⁶⁰ *Ibid*, Article 87(2)

¹⁶¹ *Ibid*, Article 73(1) and (2)

¹⁶² *Ibid*, Article 73(8)(a)-(c)

¹⁶³ *Ibid*, Article 83(9)

¹⁶⁴ *Ibid*, Article 73(10)-(11)

Right to private and family life

- 6.3 The engagement of the right to family and private life emerges from the impact that a flag, symbol or emblem in a public area may have upon an individual in their home. This may be relevant, for instance where displays are used to mark territory which has the potential to intimidate both residents and those from outside the community.¹⁶⁵

Freedom of expression

- 6.4 An individual's right to express themselves freely is engaged through the display of a flag, symbol or emblem. Where expression impacts upon the enjoyment of the rights of others, the State has discretion with regard to the imposition of restrictions. The competing rights of another individual or the community as a whole must be considered and balanced. The impact of the erection or removal of a flag, symbol or emblem must be considered alongside the motive behind the display. A display which may not be ostensibly offensive, may be considered offensive in certain circumstances.¹⁶⁶
- 6.5 Where expression amounts to hate speech, international law imposes an obligation to prohibit this form of speech by law. The UK courts have considered the application of Article 10 ECHR in relation to hate speech under public order legislation. The High Court held that "if the line between legitimate freedom of expression and a threat to public order has indeed been crossed, freedom of speech will not have been impaired by ruling out threatening, abusive or insulting speech".¹⁶⁷

Freedom of thought, conscience and religion

- 6.6 The display of symbols forms part of religious worship and so falls within the protection of the right to freedom of thought, conscience and religion. Freedom of thought, conscience and religion may be regulated where it is necessary to achieve peaceful co-existence.¹⁶⁸
- 6.7 Likewise, where expression impacts upon the enjoyment of religious freedom, it may be restricted if it crosses the boundary to be gratuitously or unwarrantably offensive to the extent it constitutes an assault on the rights of others.¹⁶⁹

Equality and non-discrimination

- 6.8 The principle of non-discrimination is a central tenet of international human rights law and is consequently protected by all the core UN treaties and the ECHR.
- 6.9 Public authorities are required to act in accordance with the ECHR by virtue of the HRA. Therefore, in respect of any decision taken to regulate the display of flags, symbols or emblems by private individuals or groups on public property either by permitting or restricting such displays, they must not discriminate on any of the prohibited grounds listed under Article 14 ECHR.

¹⁶⁵ Research into the financial cost of the Northern Ireland Divide, 2007, p. 18; see also Programme for Cohesion, Sharing and Integration, Consultation analysis, p. 35-45; Northern Ireland Life and Times Survey (2012)

¹⁶⁶ *Murphy v. Ireland* (2003) 38 EHRR 212, at 72

¹⁶⁷ *Munim Abdul and Others v. DPP* [2011] EWHC 247 (Admin), at 49 (vii)

¹⁶⁸ See for example, *Kokkinakis v. Greece* [1993] ECHR 20, at 33; *Barenkevich v. Russia* (2008) 47 EHRR 266, at 30; *Refah Partisi v. Turkey* [2003] ECHR 97, at 95

¹⁶⁹ *Wingrove v. the United Kingdom* [1996] ECHR 60, at 52 and 58; *Otto-Preminger-Institute* [1994] ECHR 26, at 49; *Vejdeland v. Sweden* [2012] ECHR 242, at 57

Access to services

- 6.10 The display of flags, symbols or emblems in a public space may act as a territorial marker or a method of harassment, irrespective of the intention behind its erection. The ECt.HR has noted that expression which is not, on its face, offensive, can be offensive in certain circumstances.¹⁷⁰ Consequently, when public authorities make decisions pertaining to the erection or removal of a flag, symbol or emblem, a broader discussion of the rights of those who live in the vicinity and those who travel in or through the area for purposes of accessing services is required. The existence of such displays may have an impact on individuals from other communities, acting as a form of intimidation which creates an access barrier to the area.¹⁷¹ This may have consequences for individuals accessing health care services and for children in accessing public recreational spaces,¹⁷² both of which are protected by international human rights law.

Tolerance, mutual respect and understanding

- 6.11 As can be seen through the ECt.HR judgements cited in this paper, the duty upon the State to ensure tolerance and mutual respect has become integrated into the jurisprudence of the ECt.HR. As such it must be given due regard when the state seeks to regulate, by permitting or restricting, displays of flags, symbols or emblems by private individuals in public places.¹⁷³
- 6.12 The diversity of political, religious and national groups in Northern Ireland makes the duty to promote tolerance, mutual respect and understanding an important factor when any action to restrict the freedom of cultural expression is considered. This duty is central to ensuring that the rights of all are equally protected. The particular political and historical context of Northern Ireland is another factor which demonstrates the importance of ensuring due regard for the various communities in the jurisdiction. Public authorities are also under a statutory duty to have due regard to the desirability of promoting good relations between persons of different religions, political opinion and race.¹⁷⁴
- 6.13 The potential for the display or failure to display cultural expressions such as flags, symbols or emblems to entrench territoriality and reignite historical tensions is a significant consideration which must not be overlooked. International and regional human rights standards make clear that it is permissible to place proportionate restrictions on the enjoyment of rights where the exercising of those rights infringes upon the rights of others.
- 6.14 The ECt.HR has also made clear that the role of the authorities is not to seek to eliminate the causes of tension but to ensure that competing groups tolerate one another.¹⁷⁵
- 6.15 International human rights law may in certain circumstances permit states to restrict the flying of flags or display of symbols or emblems by private individuals on public property where they are intended to act as territorial markers to exclude certain individuals or groups from certain areas. The ECt.HR

¹⁷⁰ *Murphy v. Ireland* (2003) 38 EHRR 212, at 72

¹⁷¹ Research into the financial cost of the Northern Ireland Divide, 2007, p. 18; see also Programme for Cohesion, Sharing and Integration, Consultation analysis, p. 35-45; Northern Ireland Life and Times Survey (2012)

¹⁷² UN Committee on the Rights of the Child, General Comment 17: The right of the child to rest, leisure, play, recreational activities, cultural life and the arts (2013) UN Doc. CRC/C/GC/17, para 57

¹⁷³ See for example, *Barenkevich v. Russia* (2008) 47 EHRR 266, at 30; *Leyla Sahin v. Turkey* [2005] ECHR 819, at 108

¹⁷⁴ s.75(2), Northern Ireland Act 1998

¹⁷⁵ *Agga v. Greece* (No 2) [2002] ECHR 676, at 60

noted that “the margin of appreciation afforded to domestic authorities in examining the necessity of a measure is broader” with regard to restrictions of expressions in the public sphere because the Government’s “acceptance of [such expression] could suggest that they are endorsing or at least tolerating, the opinions and conduct in question.”¹⁷⁶

Protection of minorities

- 6.16 When considering the regulation of the flying of flags and display of cultural symbols by individuals or groups the cultural rights of minority groups must be considered. Minority groups must be permitted to express their culture and the NI Executive and public authorities must ensure the cultural expressions of others does not infringe upon the cultural rights of minorities.¹⁷⁷
- 6.17 The protection of minority groups from intimidation and harassment is a consideration for public authorities in reaching decisions in respect of displays of cultural expression in public places by individuals and groups. The extent to which such displays impact upon other communities or minority cultures is a central consideration to ensure the protection of the rights of all. International human rights jurisprudence reinforces the fact that the protection of the cultural identity of a minority group is not prejudicial to national sovereignty.¹⁷⁸
- 6.18 A balancing exercise will be required in order to ensure the fair and proper protection of all minority groups, recognising that the views of the majority do not necessarily prevail.¹⁷⁹

Framework for decision making

- 6.19 When a decision maker is required to consider the erection or removal of a flag, symbol or emblem, it is essential that they comply with international human rights law and jurisprudence. The following checklist can assist in ensuring that relevant considerations are taken into account in the decision making process.
- i) Does the display constitute an illegality? If so, restrictions should be imposed.
 - ii) Are any human rights engaged? Consider the rights of the individual; responsibilities of the individual and public authority and the duties of the Government in relation to the following;
 - Right to culture
 - Right to private and family life
 - Freedom of expression
 - Freedom of thought, conscience and religion
 - Equality and non-discrimination
 - Access to services
 - Protection of minorities

¹⁷⁶ *Mouvement Raïlien Suisse v Switzerland* (2011) App No.16354/06, at 52

¹⁷⁷ Framework Convention on National Minorities

¹⁷⁸ UN Human Rights Committee, General Comment 23 on the Rights of Minorities (1994) CCPR/C/21/Rev.1/Add.5, para 3.2

¹⁷⁹ *Chassagnou and Others v. France* (2000) 29 EHRR 615, at 112

- iii) Has consideration been given to balancing competing rights?
- iv) Will the decision impact upon tolerance, mutual respect and understanding?
- v) Are limitations/restrictions necessary?
 - Is the limitation prescribed by law?
 - Is the limitation to achieve a legitimate aim?
 - Is it necessary in a democratic society?
- vi) Is the limitation proportionate?

Individuals or groups displaying flags, symbols or emblems on private property

- 7.1 An individual may seek to manifest his or her cultural identity by displaying a flag, symbol or emblem on their property. Flying a flag from or displaying a symbol or emblem at one's home is an exercise of freedom of expression. But this freedom may be subject to restrictions that are prescribed by law and intended to meet a legitimate aim in a proportionate manner. Certain forms of expression, such as hate speech, are not protected by the right to freedom of expression.¹⁸⁰ Issues falling within this category include; flags and bunting, cultural symbols and emblems, and murals both inside and outside the houses, other buildings or on private land.

There is no single legislative act that permits, or otherwise regulates, the display of flags, symbols or emblems by individuals or groups on private property in Northern Ireland. The criminal and civil law can be invoked where such displays impact upon public order, amount to harassment or hate speech or otherwise breach planning or roads regulations. In decisions relating to the erection or removal of flags, symbols or emblems, the domestic legal framework is central to understanding the restrictions which may be lawfully placed upon the enjoyment of qualified rights. Any such interference must be prescribed by law and so the following domestic framework delineates the scope for lawful restrictions. The appropriate legislation will depend on the nature of each situation.

An individual may be guilty of an offence under Public Order (NI) Order 1987, Article 9, if he or she in flying a flag or displaying a symbol or emblem intends to stir up hatred or arouse fear. This offence can be committed in public or private. However, where the display is inside a dwelling no offence may be committed provided the display is seen only by persons in the dwelling or another dwelling.¹⁸¹

The Protection from Harassment (Northern Ireland) Order 1997 prohibits conduct "which amounts to harassment of another" or which a person "knows or ought to know amounts to harassment of the other".¹⁸² Harassment for the purposes of this Order includes "alarming the person or causing the person distress".¹⁸³ The display of flags and cultural emblems may form part of a course of conduct that is prohibited.¹⁸⁴

The Terrorism Act s.12(1) makes it a criminal offence for a person to invite support for a proscribed organisation. Where it can be shown that an individual invites support for a proscribed organisation through flying a flag or displaying a cultural emblem they may be guilty of this offence.

Outside of the criminal law, an individual may need to obtain planning permission to erect a flag or cultural emblem on their property under the Planning (Control of Advertisements) Regulations (Northern Ireland) 1992. These Regulations introduce an exemption from the requirement for consent where the "national flag of any country" is flown, provided each flag is displayed on a single flagstaff and no additional subject matter is included.¹⁸⁵

¹⁸⁰ See Article 17, ECHR

¹⁸¹ Article 9(2), Public Order (NI) Order 1987

¹⁸² Article 3, Protection from Harassment (Northern Ireland) Order 1997

¹⁸³ *Ibid*

¹⁸⁴ Article 2(3) states that "For the purposes of this Order a "course of conduct" must involve conduct on at least two occasions and "conduct" includes speech".

¹⁸⁵ Schedule 2, Planning (Control of Advertisements) Regulations (NI) 1992

Right to culture

- 7.2 The right to culture is protected by the ICESCR, Article 15(1)(a). An individual may wish for their home or private property to reflect their cultural identity and may do so by displaying certain flags, symbols or emblems. In addition to displaying a flag, symbol or emblem individuals may erect signs or arches on, or attached to, the property. In addition to being a method of displaying the cultural identity of the owner of the property cultural expressions on private property may be a way of demonstrating the occupiers view on the cultural identity of the surrounding neighbourhood or area.

Right to property

- 7.3 An individual may seek to manifest his or her cultural identity by displaying a flag, symbol or emblem on their private property. The right to private property is protected by the ECHR, Article 1 of Protocol 1. An individual is entitled to have peaceful enjoyment of their private property. However public authorities may regulate the use of property in accordance with the general interest.
- 7.4 In certain circumstances displays may have been introduced by third parties with no consent from the owner of the property. In such a situation the State's duty to protect the right to property is engaged.

Right to private and family life

- 7.5 An individual has a right to respect for their private and family life, as protected under the ECHR, Article 8 and the ICCPR, Article 17. In circumstances where the State seeks to restrict the display of flags, symbols and emblems inside the home this will engage the right to private and family life as it will negatively impact on the ability of the individual or the family to live their personal life as they choose.¹⁸⁶
- 7.6 In certain circumstances, displays may have been introduced to a property by a third party with no consent from the owner of the property. In such a situation the State's duty to protect the right to privacy is engaged.

Freedom of expression

- 7.7 International human rights law countenances a greater facility to the State to restrict public as opposed to private expression.
- 7.8 Where an individual displays a flag or cultural emblem from their home, it will be visible to both those living in the area and to passers-by. As such there is greater potential for the display to impact negatively on the rights of others than if the display was on an internal wall. This will be a relevant consideration in determining if an interference with the right to freedom of expression is permissible and if so, whether it is proportionate having taken into consideration those who stand to be affected by the display.¹⁸⁷

¹⁸⁶ *Friedl v. Austria* [1995] ECHR 1, at 45

¹⁸⁷ *Murphy v. Ireland* (2003) 38 EHRR 212, at 69

- 7.9 The right to freedom of expression, even when exercised on private property, may be subject to formalities, conditions, restrictions or penalties.¹⁸⁸ These may be imposed when they are necessary to meet a number of aims, including for example, the prevention of disorder or crime. In contested environments the display of a particular flag or cultural emblem may create conflict and disorder. When regulating the freedom of expression the State will be required to consider whether on the basis of all available evidence, including the relevant historical and political factors, the formality, condition or restriction is necessary in a democratic society.¹⁸⁹ In certain cases a penalty for failure to comply may be provided for. As noted above, when the state takes an action which interferes with the right to freedom of expression, the interference must be proportionate.¹⁹⁰

Freedom of thought, conscience and religion

- 7.10 The right to freedom of thought, conscience and religion is protected by ICCPR, Article 18 and ECHR, Article 9. This includes the freedom to manifest one's religion or belief. The display of symbols may form part of the right to freedom of thought, conscience and religion as international human rights jurisprudence recognises that worship may include the display of symbols.¹⁹¹ Therefore the potential engagement of this right should be recognised when considering the regulation of individuals displaying flags or cultural emblems on their property.

Equality and non-discrimination

- 7.11 The principle of non-discrimination is a central tenet of international human rights law and is consequently protected by all the core UN treaties and the ECHR. In regulating or taking decisions regarding the right of individuals to display a flag or cultural emblem on their private property it is important that rules apply without discrimination.

Access to services

- 7.12 Individuals have a right to access certain services, for instance health care services; the corollary of this right is that the state has a positive obligation to provide such services in an accessible manner. In certain circumstances where essential services are located close to private property, the actions of the property owners may impact on the willingness of individuals to access the services offered. Research into the financial cost of the divide has shown that demarcations of territory influence the accessing of services.¹⁹² The Northern Ireland Life and Times survey has also tracked the issue of access to services, and the most recent report suggests that the problem is diminishing.¹⁹³ However, this is a factor which merits consideration by both those regulating the display of flags and cultural emblems and by the displayers.

¹⁸⁸ Article 8(2), ECHR

¹⁸⁹ Article 9, Public Order (NI) Order 1987

¹⁹⁰ *Vejdeland v. Sweden* [2012] ECHR 242, at 52 and 58; See also, *Stoll v. Switzerland*, no. 69698/01, ECHR 2007-V, at 101 and 153

¹⁹¹ UN Human Rights Committee, General Comment 22: The right to freedom of thought, conscience and religion (1993) UN Doc. CCPR/C/21/Rev.1/Add.4, para 4

¹⁹² Research into the financial cost of the Northern Ireland Divide, 2007, p. 18; see also Programme for Cohesion, Sharing and Integration, Consultation analysis, p. 35-45

¹⁹³ Northern Ireland Life and Times Survey (2012) - Less willing to shop in neighbourhoods with displays of loyalist flags or murals: 2006-38%, 2008-38%, 2010-43%, 2012-33% Less willing to shop in neighbourhoods with displays of republican flags or murals: 2006-43%, 2008-46%, 2010-49%, 2012-36%

Tolerance, mutual respect and understanding

- 7.13 International human rights law protects expressions that may cause offence,¹⁹⁴ but both the ICCPR and ECHR contain provisions which restrict the use of hate speech and other forms of expression that may be gratuitously offensive or unwarrantably offensive, constituting an assault on the rights of others.¹⁹⁵ Displays which seek to spread, incite or justify hatred based on intolerance do not enjoy the protection afforded by Article 10 ECHR as they are directed against the underlying values of the ECHR.¹⁹⁶
- 7.14 The case of *Norwood v. UK* relates to an individual who displayed, in the window of his first floor flat, a large poster with a photograph of the Twin Towers in flames and the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign.¹⁹⁷ The individual was prosecuted by the UK Government for an aggravated offence; he sought a declaration from the ECt.HR that his prosecution was an unjustified interference with the right to freedom of expression.¹⁹⁸ Referring to Article 17 ECHR, the ECt.HR considered that the poster amounted to a public expression of attack on all Muslims in the United Kingdom.¹⁹⁹ Such a general, attack against a religious group linking it to terrorism was in the Court’s view incompatible with the values guaranteed by the Convention, notably tolerance, social peace and non-discrimination. This case demonstrates that in dealing with hate speech the ECt.HR will follow normative principles inherent in the concepts of intercultural dialogue. In addition it demonstrates that physical manifestations are covered by hate speech.

Protection of minorities

- 7.15 The Government and public authorities are under a positive obligation to promote the conditions necessary for persons belonging to national minorities to maintain and develop their cultural identity.²⁰⁰ In circumstances where oppressive expressions of cultural identity by private owners hamper the maintenance or development of the cultural identity of a minority, decision makers will wish to consider whether certain proportionate limitations should be introduced. These are likely to be required only where the motives of those displaying cultural symbols or flags are oppressive.

Framework for decision making

- 7.16 When a decision maker is required to consider the erection or removal of a flag, symbol or emblem, it is essential that they comply with international human rights law and jurisprudence. The following checklist can assist in ensuring that relevant considerations are taken into account in the decision making process.

¹⁹⁴ *Handyside v. the United Kingdom* (1979-80) 1 EHRR 737, at 48

¹⁹⁵ See for example, *Otto-Preminger-Institute* [1994] ECHR 26, at 49; *Vejdeland v. Sweden* [2012] ECHR 242, at 57; *Wingrove v. the United Kingdom* [1996] ECHR 60, at 52

¹⁹⁶ *Gunduz v. Turkey* (2005) 41 EHRR 5, at 40

¹⁹⁷ *Norwood v. the United Kingdom* (2005) 40 EHRR SE 11, at 4

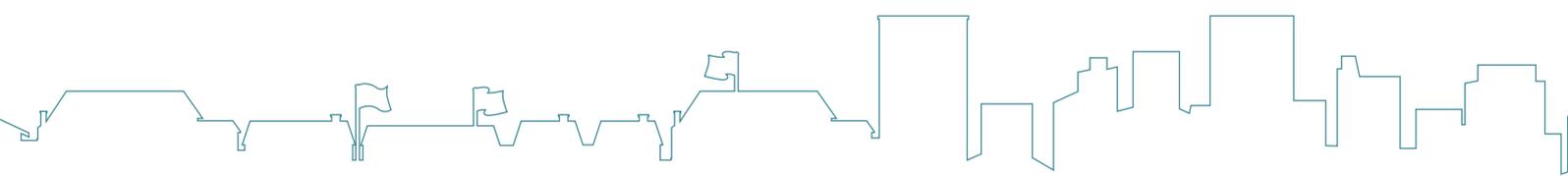
¹⁹⁸ *Ibid*

¹⁹⁹ *Ibid*

²⁰⁰ Framework Convention on National Minorities

- i) Does the display constitute an illegality? If so, restrictions should be imposed.
- ii) Are any human rights engaged? Consider the rights of the individual; responsibilities of the individual and public authority and the duties of the Government in relation to the following;
 - Right to culture
 - Right to peaceful enjoyment of property
 - Right to private and family life
 - Freedom of expression
 - Freedom of thought, conscience and religion
 - Equality and non-discrimination
 - Access to services
 - Protection of minorities
- iii) Has consideration been given to balancing competing rights?
- iv) Will the decision impact upon tolerance, mutual respect and understanding?
- v) Are limitations/restrictions necessary?
 - Is the limitation prescribed by law?
 - Is the limitation to achieve a legitimate aim?
 - Is it necessary in a democratic society?
- vi) Is the limitation proportionate?





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If you would like to know more about the work of the Commission, or any of the services we provide, please contact us.

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ISBN 978-1-909532-77-9



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