

# Protecting Rights or Limiting Disorder? Freedom of Assembly and the Right to Protest

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The right to peaceful assembly is a fundamental human right but it has also proved to be one of the most challenging rights for the state to uphold and protect in Northern Ireland over the past fifty years. In part this is because public assemblies have often led to an increase in tensions between the two main communities, and parades and protests have in turn frequently resulted in rioting or clashes with the police. In turn the authorities have generally responded, through both law and policing, by focusing on the impact that some assemblies have on community relations and the potential for public disorder, rather than by drawing on international human rights standards and principles to provide a framework for protecting and regulating the right to assemble.<sup>1</sup>

Although parades and protests have largely been associated with tensions between members of the two main communities, they are not the only examples in which exercising the right to freedom of assembly has proved controversial and a challenge to the authorities. In the 1960s many of the protests organised as part of the campaign for equality and civil rights generated sometimes violent opposition, and the state and the police failed to respond adequately either to protect the rights of those protesting or to address their demands for equality, which led to an escalation of the tensions and the eruption of armed conflict.<sup>2</sup> More recently members of the loyalist community have protested since December 2012 over changes to the flying of the Union flag over Belfast's City Hall. Many of these protests have caused disruption and some have resulted in violence. While the protests evidence the continued importance of the right to protest, as a means of giving voice to those who believe they are not being heard or are being ignored, they also illustrate the challenges that public protests continue to place on the state and other authorities. In particular the current protests highlight some of the tensions that result from a regulatory system that

is focused primarily on trying to balance the competing rights of the different sections of the community, rather than implementing an overarching rights-based framework that can be applied to all public assemblies.

This paper discusses how the right to freedom of assembly has been addressed in Northern Ireland over recent years. It begins by outlining some of the core principles underpinning the right of assembly, before reviewing the different frameworks that have been adopted to manage the various forms of assembly and their associated tensions in Northern Ireland. Finally, it considers how human rights principles might be applied to inform understanding and practice in relation to the ongoing protests over flags.

### **Freedom of Assembly**

The right to freedom of peaceful assembly is included as a fundamental right within all the major international human rights instruments, including the European Convention on Human Rights (ECHR) which was ratified by the UK government in 1951 and entered into force in September 1953. Freedom of assembly includes the right to parade, process, march, demonstrate, rally, picket, protest and to participate in other forms of gathering in public space to voice opinions and express views collectively. The right to assemble is particularly important for minority and marginalised groups whose voices may otherwise not be heard or expressed in the mass media, nor reflected in the views of the mainstream political parties. Exercising the right to assemble and protest will often lead to unpopular, controversial and outrageous views being expressed, and people may be offended and challenged, but this is just one part of the wider process of debate and discussion that drives social change.

Public assemblies will almost inevitably lead to some level of disruption to the lives of others. Sometimes disruption may be the direct aim, if for example protesters attempt to confront opponents or to challenge assumptions, but often it is an indirect consequence of assembling people in a public space that is otherwise used for more mundane activities, such as shopping or traffic. But rather than seeing a protest as an exception or an inconvenience, they should be considered as a vital part of the democratic process and with as much claim on public space as pedestrians, car drivers and the business community. If protests are so constrained that they do not, or are not allowed to, impinge on or be heard by others then they are unlikely to have any impact, they become neutered and the exercising of a fundamental human right will be undermined.

The right to assembly is a key civil and political right, and as such the state has a positive obligation to protect and facilitate the exercise of the right.

However, the right to assemble is not an unlimited right. Rather it is a right that can be legitimately constrained by the state in certain circumstances. All international human rights instruments confirm that the right only extends to peaceful protest, there is no right to use physical violence as part of an assembly, and thus those who use physical force are not considered to be exercising a protected right. Article 11.2 of the ECHR sets out a number of other grounds in which the right to assemble may be limited:

‘No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others’.

Furthermore, while the ECHR affirms that the right to assemble applies to all without discrimination (Article 14), it also states that exercising a human right has to be done in a way that respects the rights of others, and one cannot invoke a right to do something that is deliberately designed to restrict other people’s rights (Article 17). Thus what begins by being expressed as a broad principle, ‘my right to assemble and protest’ for example, is not quite so simple in practice. As always there is a challenge to interpret when and in what context it is legitimate to impose restrictions and when it is the responsibility of the state to protect the right to assemble. The ECHR outlines rights as broad principles but cannot provide unequivocal direction for all cases; rather the principles always have to be interpreted and re-interpreted according to the particular local context.

The need to protect the right to assemble, while balancing the rights and interests of others and the desire to maintain public order, remains a constant challenge for the state. Furthermore, a state’s willingness to protect and facilitate the right to assemble, remains a key indicator of its general respect of human rights due to the way that the right to assemble is played out in the public sphere.

### **Regulating Parades and Protests**

Parading is a well established political, social and cultural practice in Northern Ireland, but the approach taken by the state to public assemblies has predominately focused on managing risks to disorder rather than protecting and facilitating rights. Although the right to parade has long been asserted as a civil and political right it has not until recently been formulated as such within the law. The absence of a written constitution in the United Kingdom has meant that there has been no formal statement of the rights of citizens and instead the

framework of the right to assemble has been developed through practice and common law. In Northern Ireland the practical regulation of parades, protests and other forms of public assembly has taken place through three broad legal frameworks since the state was established in 1921. Initially public assemblies were covered by emergency legislation; but this was replaced by public order legislation, introduced in 1951; and the public order legislation was in turn replaced by the Public Processions Act in 1998 and which in turn has led to a greater degree of focus on community relations issues in the regulation of assemblies.

From 1922 to 1951 the Special Powers Act was used to regulate parades and protests, and while loyal order parades flourished during this period, nationalist, republican and labour movement parades and commemorations were subject to numerous bans or physical interventions by the RUC in part due to threats of disorder and in part because they were seen as a threat to the state itself.<sup>3</sup> In 1951 the Public Order Act was introduced to bring Northern Irish practice in line with the rest of the UK.<sup>4</sup> Organisers of public processions were required to give 48 hours notice of an assembly, unless the event was 'customarily held along a particular route' in which case they were exempt from notification, while the police had the power to re-route any parades that threatened disorder. The public order legislation was reformed and police powers extended in 1970 in response to the civil rights protests and the beginning of the Troubles, and again in 1971 and 1981. Finally, following disorder associated with the signing of the Anglo-Irish Agreement in 1985, the government passed the Public Order (Northern Ireland) Order in 1987, which was based on English legislation introduced the previous year. This gave the police further powers to impose restrictions on parades or open air public meetings if there were concerns over public order, but also required the loyal orders to provide advance notification of their parades for the first time.<sup>5</sup> While the public order regime gradually imposed greater bureaucratic requirements on the organisers of parades, it is also notable that it eventually established a regime that treated all organisers of assemblies equally.

In the mid-1990s as nationalists and republicans began to organise protests against loyal order parades the RUC responded by deploying increasing resources so that they could intervene either to re-route the parade or to remove protesters depending on who could mobilise the biggest crowd and threat of disorder. In 1996 after more than a year of escalating protests and disorder the Secretary of State took the decision to ban an Apprentice Boys parade in Derry (the only such ban imposed during the current cycle of disputes over parades) and established the Independent Review of Parades and Marches. Their report<sup>6</sup> recommended removing the responsibility to make decisions over contentious

parades from the police and the creation of an independent Parades Commission to adjudicate in such situations.

The Parades Commission was formally given powers under the 1998 Public Processions Act, which required them to consider three main factors in determining whether restrictions should be imposed on a parade: the potential for public order; any potential for disruption to the life of the community; and any impact the parade might have on community relations. The North Report had highlighted the importance of the international human rights framework for regulating disputes over parades and, while there was no explicit reference to human rights or the ECHR in the Public Processions Act, they were subsequently reflected in the Parades Commission's *Guidelines*.<sup>7</sup> This document acknowledged the international standards, the importance of protecting the right to assemble, and also the responsibilities that come with exercising one's human rights. However, the bulk of the Guidelines focus on the need to mitigate the impact a public procession might have on others, and the determinations issued by the Commission have tended to rely on a standardised, general acknowledgement of human rights relating to freedom of assembly, rather than drawing on the growing body of jurisprudence from the European Court to explain or rationalise its decisions. Rather than develop a set of clear human rights based principles to explain its thinking the Commission has tended to focus very largely on the negative impact that a parade might have on community relations, and by extension on public order, with an expectation that disputes will be best resolved through dialogue, mediation and compromise, rather than through application of human rights principles.<sup>8</sup>

The current community relations focused approach to dealing with protests against parades has had some successes, most notably in Derry Londonderry where the Apprentice Boys have engaged in dialogue with nationalist and republicans over many years and this has resulted in a recognition of the right to parade on one hand and on the rights of other sections of the community on the other. As a result of the ongoing dialogue the Apprentice Boys have made changes to the time and format of their parades, and they have worked with the police and the business community to reduce the potential for disruption in the city centre. In response there are no longer any protests against the parade and the events take place in a more relaxed atmosphere than a few years ago. Similar approaches by the branches of the loyal orders, loyalist bands and by the organisers of Belfast Pride have resulted in localised agreements or compromises in a number of locations.

However, in a number of other areas one or other party to the dispute has refused to engage in dialogue or compromise has not proved possible and the

disputes have remained in a suspended but ultimately unresolved status.<sup>9</sup> For example, in Portadown the Orange Order applies each week to complete the parade from Drumcree Church along the Garvaghy Road into the town centre that they began in July 1997. This issue was highlighted in the *Interim Consultative Report* of the Strategic Review of Parading in 2008 and which recommended that the current approach to managing disputes over parades be replaced by a 'rights based approach' that would provide a 'means of ensuring consistent decision making in the regulation of public assemblies'<sup>10</sup> and which will 'create a situation where, over time, parades and assemblies in Northern Ireland can be regulated in the same way as they would be in any other European democracy'.<sup>11</sup> However, the recommendations of the Strategic Review body have not been acted on by the Executive.

### **Asserting Rights**

There is a general recognition among the loyal orders, residents and community groups, the police and others involved with parading and protesting that the right to parade and the right to protest are both covered by the right to freedom of peaceful assembly as set out in Article 11 of the ECHR. But there remains some considerable uncertainty and disagreement, beyond the core principles, of how the right might legitimately be exercised and what the boundaries and limitations are to the right of assembly. In large part this is due to the focus having been placed on mediating between two disputing communities, rather than establishing how the core principles might be defined and refined in practice. But in part it is also because the focus of attention has been on a relatively narrow form of assembly. Most attention in Northern Ireland has been on parades organised by the loyal orders rather than other forms of assembly and one consequence of the pragmatic community relations approach that has been developed over the past 15 years is that the key principles underpinning the right have not been explored or used to inform decisions. Thus when faced with a different form of assembly, which does not fit within the framework which has been designed to deal with either parades that generate inter-communal tensions, or assemblies that are largely compliant with the law, the state system struggles to adapt.

The apparent uncertainty over the limits of legitimate forms of assembly can be illustrated by reference to the protests that began in early December 2012 after Belfast City Council decided to restrict the flying of the Union flag over City Hall. The protests began on 3 December 2012, the night the council made their decision, and have continued in various form, scale and location since that time. Many felt that the Christmas holiday period would provide a natural break that would disrupt the protesters momentum, and there was some surprise when

the protests started up again in the New Year. And while there has been some decline in participation the protests have continued into March 2013.

The protesters have argued that they are simply exercising their right to protest in a variety of forms and locations; that the right to protest was a fundamental right in a democracy and that the diversity and longevity of the protests has simply reflected the scale of their anger. Others who are opposed to the scale and persistence of the protests, the associated rioting and/or the impact the protests have had on the business community generally acknowledged the right to protest, but struggled to articulate the legitimate boundaries of that right. In many instances the negative impact that the protests have had on the business community in parts of Belfast has been cited as a reason for stopping the protests, others have argued that the police have been too lenient in allowing protesters to hold parades that have not been notified to the Parades Commission or which block roads and disrupt evening traffic. In part the tentative responses to the protests by the PSNI and by the Parades Commission appear to have been due to uncertainties over institutional responsibility, and in part due to the fact that the current protests do not fall within established institutional experience, and in the absence of a community relations response, the default position has been to focus on public order rather than on human rights.

From a human rights perspective, the protests involve at least four distinct forms of activity and which might be considered to have differing degrees of legitimacy and protection as a means of exercising human rights.<sup>12</sup> The four forms are: the protests outside Belfast City Hall; the parades to City Hall; protests in residential areas that block main roads; and protests that have resulted in violence.

1. The protesters have held weekly gatherings each Saturday outside Belfast City Hall. These caused some level of disruption to trade and traffic for the hour or so that people are gathered in front of the building, but they have remained peaceful and, as there is no legal requirement to notify of a static protest, they are also lawful. Under the ECHR there is an expectation that the police should protect and facilitate such assemblies, and this has been the case in Belfast. There is nevertheless a grey area with regards to whether the protesters have a right to occupy the road in front of City Hall and thereby disrupt traffic or whether they should be confined to the footpath. Such decisions may have been included in a determination if the Parades Commission had issued one, or otherwise would be left to the police and be dependent on the number of people participating in the protest. When the protests resumed in

January 2013 they were initially allowed to occupy the roadway, but from Saturday 23 February with a smaller number of protesters attending the event the police confined them to the footpath and allowed the traffic to flow at the same time and thus finding a balance between the rights of the two groups.

2. Prior to assembling at City Hall many, but not all, of the protesters had gathered together at different locations around the city and walked into the city centre along various routes using the roadway. These were also peaceful events, at least on the outward route. Although there was no designated organiser of these various marches, there was some form of advance planning using social media, however as no-one took responsibility for organising the march or notified the Parades Commission of the intent to march, they may be considered as unlawful. The European Court of Human Rights (ECtHR) has addressed this issue from two perspectives: the importance of facilitating spontaneous assemblies and the balance between a right and legal regulation. In the days immediately following the Belfast City Council decision it would not have been unreasonable for people to organise spontaneous protests against the decision (the Public Processions Act allows for such assemblies) and the ECtHR has stated that such urgent responses should be facilitated by the authorities.<sup>13</sup> But, the argument for spontaneity will only stand for a short period of time, and after that there is an expectation of compliance with the legal requirement to notify.

The ECtHR has also stated that the police have a responsibility to protect and facilitate an assembly even if there has been no notification, and the event was therefore unlawful, provided the assembly remained peaceful.<sup>14</sup> The court noted that the requirement for notification can only be justified if it is designed to enable the state to put in place the necessary resources to minimise any disruption an assembly may cause or to protect those assembling, and that even if no formal notification has been given the authorities will often be aware of the assembly (as has been the case with flag protests) and will therefore be able to minimise any disruption it might cause.<sup>15</sup> Nevertheless, it remains the case that individuals who organise or who participate in an unlawful march will remain liable to subsequent prosecution.

3. There were also numerous and frequent protests across Belfast and other locations in Northern Ireland whereby small groups of protesters gathered to block roads at set times, often in a co-ordinated manner and during evening rush hour. The protests were generally advertised in advance on social media and lasted for a fixed time, and the police generally

facilitated such protests, while also monitoring the protesters' activities and diverting traffic. While City Hall may be considered as an appropriate location for protest, given that it was a council decision that was at the heart of the protests, there is less justification of a need to protest on main thoroughfares in predominately residential areas. The ECtHR has argued that while there is a right to protest, and this may cause some degree of disruption to the rights of others, this does not extend to deliberately blocking a road to obstruct other people from going about their routine business.<sup>16</sup> This appears to be exactly what many of these protests aimed to do, as is evidenced for example by the designation of the protests on Friday 11 January 2013 as 'Operation Standstill'.<sup>17</sup> Protests that deliberately set out to disrupt the rights of others would not necessarily be considered as a legitimate form of the right to assemble. The PSNI generally facilitated these road block protests, although whether this was due to uncertainty over the extent of the rights of protesters or to concern about the consequences of intervening or trying to disperse the protesters is unclear. However, increasing public disquiet at the repeated disruption appears to have been a factor in the protesters changing tactics at the end of January and advocating that people shift to holding white line pickets, which would allow traffic to continue to flow while the protesters expressed their views.

4. The very first of the flag protests on 3 December 2012 degenerated into violence, with protesters clashing with police and breaking into the grounds of City Hall. Similar patterns of behaviour occurred at various locations through December and into January as initially peaceful protests descended into rioting, attacks on the police and, on occasion, into sectarian violence. As has been noted above, the right to assemble and to protest is always a right to peaceful assembly and if participants in a protest or an assembly become violent then they are considered to be no longer exercising a legitimate right under the ECHR.

One other factor that needs to be considered with regards to how the state should respond to the protests is in relation to the sheer number and duration of the protests. The protests began in December 2012 and, at the time of writing, had been continuing for more than three and half months. Some have argued that the protests have gone on long enough and either the protesters should stop the protests or the police should intervene to stop them. This raises the question of whether there is a legitimate duration that might be placed on a protest. Can the police intervene simply because the protests have continued for a long time? The ECtHR has addressed the issue of the legitimate duration of a protest in a number of cases, but has been unwilling to give the type of definitive answer

that state authorities might desire. However, in the case of *Çiloğlu v Turkey*, perhaps the nearest parallel to the flag protests, it found that the authorities had not been unreasonable in finally intervening to disperse a weekly (and unlawful) protest, albeit one that had been continuing for more than three years.<sup>18</sup>

## **In Conclusion**

The flag protests illustrate some of the continuing tensions over the scope and scale of the right to assemble and protest. In part this has been highlighted by the uncertainty and tentativeness of the responses by the authorities to the protests. In many cases the limited police intervention, unless there was an outbreak of violence, may well have been due to a concern that any attempt to prevent or disperse a protest may have resulted in greater levels of disruption or violence, i.e. a public order response, rather than because the protesters were seen to be exercising their legitimate rights. But it could be argued that the failure, by the Parades Commission, the Department of Justice, the PSNI or any other authority, to clarify their understanding of the legitimate parameters of assembly and protest did create a sense of confusion on one hand, and of impunity on the other.

In part this may be a consequence of the way the debate over parades, which over the past thirteen years, has framed our understanding of the right to assemble and protest, since arguments about competing claims to rights have largely been considered through a community relations lens rather than from a human rights perspective. And, although at the time this approach represented some considerable improvement from when decisions over the right to assemble were made purely on public order grounds, it remains the case that Parades Commission's determinations seek to achieve a balance between competing claims of the two communities rather than trying to set out a clear set of principles that would serve as the basis for facilitating, protecting or limiting any type of assembly.

The flag protests have introduced a new dimension into the long running issue of clarifying the parameters of the right to protest in Northern Ireland and have highlighted some of the tensions that exist between a regulatory framework that is orientated towards mitigating inter-communal relation and one based on protecting human rights. These tensions are sure to be highlighted again, not least when the G8 Summit is held in Fermanagh in June 2013.

## Notes

<sup>1</sup> This paper draws on the findings of a research project entitled *Human Rights, Equality and Community Relations: Tensions and Connections* undertaken for the Community Relations Council.

<sup>2</sup> Bob Purdie (1990) *Politics in the Streets: The origins of the civil rights movement in Northern Ireland*. Belfast, Blackstaff Press.

<sup>3</sup> Neil Jarman and Dominic Bryan (1998) *From Riots to Rights: Nationalist Parades in the North of Ireland*. Coleraine, Centre for the Study of Conflict.

<sup>4</sup> Tom Hadden and Anne Donnelly (1997) *The Legal Control of Marches in Northern Ireland*. Belfast, Community Relations Council. Neil Jarman (1999) Regulating Rights and Managing Public Order: Parade Disputes and the Peace Process, 1995-98. *Fordham International Law Journal*, Vol. 22 No. 4, pp 1415-1439.

<sup>5</sup> Dominic Bryan, T.G. Fraser and Seamus Dunn (1994) *Political Rituals: Loyalist Parades in Portadown*. Coleraine, Centre for the Study of Conflict. Garvaghy Residents (1999) *Garvaghy: A Community Under Siege*. Belfast, Beyond the Pale.

<sup>6</sup> Independent Review of Parades and Marches (1997) Report. Belfast, The Stationery Office.

<sup>7</sup> The European Convention on Human Rights was incorporated into UK law with the introduction of the Human Rights Act 1998, which took effect from October 2000.

<sup>8</sup> See Michael Hamilton (2005) Freedom of Assembly, Consequential Harm and the Rule of Law: Liberty-limiting Principles in the Context of Transition. *Oxford Journal of Legal Studies*, Vol. 27, No 1, pp 75-100.

<sup>9</sup> Neil Jarman, Mary-Kathryn Rallings and John Bell (2009) *Local Accommodation: Effective Practice in Responding to Disputes over Parades*. Belfast, Institute for Conflict Research.

<sup>10</sup> Strategic Review of Parading in Northern Ireland (2008) *Interim Consultative Report*. Belfast, Page 20, 3.7(i)

<sup>11</sup> Strategic Review of Parading in Northern Ireland (2008) *Interim Consultative Report*. Belfast, Page 14, 2.3 (1)

<sup>12</sup> The interpretation of the legitimacy of the various forms of protest is based on OSCE/ODIHR (2010) *Guidelines on Freedom of Peaceful Assembly*. ODIHR, Warsaw

<sup>13</sup> Bukta v Hungary (2007) para 139.

<sup>14</sup> Oya Ataman v Turkey (2007) para 38

<sup>15</sup> Balcik and Others v Turkey (2007) para 50.

<sup>16</sup> G v The Federal Republic of Germany (1989)

<sup>17</sup> <http://www.guardian.co.uk/uk/2013/jan/11/belfast-operation-standstill-loyalist-union-flag>

<sup>18</sup> Affaire Çiloğlu et Autres v Turkey (2007) para 51.