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***CAJ submission to the Independent Review of
Parades and Marches***

October 1996

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A Submission from the Committee on the Administration of Justice to the Independent Review of Parades and Marches

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is unequivocally opposed to the use of violence for political ends. Its membership is drawn from across the whole community.

The Committee seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch, and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of interest are extensive and include prisons, policing, emergency laws, the criminal justice system, the use of lethal force, children's rights, gender equality, racism, religious discrimination, and advocacy for a Bill of Rights.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award.

CAJ and Parades

CAJ had observers at many of the controversial events during the course of the summer. In deciding to send observers, we had a number of objectives in mind. First and foremost, we wanted observers present so that the organisation would have available to it an independent and first-hand assessment of events. Secondly, we hoped that our very visible presence (teams were normally equipped with yellow fluorescent jackets and name badges) would make the police and others - whether marchers or demonstrators - aware of the importance accorded to ensuring that policing is carried out in an impartial and even-handed way vis-à-vis all the parties involved. Thirdly, this monitoring role might provide invaluable data for CAJ in drawing up recommendations about the policing of such events in future.

Accordingly, we sought to recruit observers from our own cross community membership, from other domestic and international human rights organisations, and

from experienced volunteers. Many of the observers, though resident here for the most part, were from outside Northern Ireland - from England, France, Germany, the Republic of Ireland, Switzerland, the Netherlands, and the US. Several observers had experience of observing abroad - for example in South Africa, Haiti and several countries in Europe. Many, though not all, were lawyers - practising solicitors or barristers, legal academics, and law students.

All observers were committed to the objectives of CAJ, that is the protection and promotion of human rights. In particular, they shared the concern of CAJ to ensure that the rights of both marchers and protesters were protected. Observers were accordingly positioned to watch policing from the perspectives of both the marchers and the protesters.

CAJ are convinced that respect for human rights and the rule of law provide a context for the resolution of the problems which annually beset Northern Ireland. We believe these matters should be of foremost concern to those charged with reviewing current arrangements. Unfortunately, the evidence which CAJ gathered through its observers points to the rule of law frequently being ignored during the events of the summer. The decision to allow the march at Drumcree in the face of threats of violence, the accompanying abdication of political responsibility on the part of the Secretary of State, the massive and disproportionate use of plastic bullets and the near curfew that was placed on the Ormeau Road have led us all to a situation where confidence in the fair and equitable administration of justice has been eroded to a point rarely seen before in twenty five years of conflict. In order that this be successfully addressed and to ensure that we are not subject to similar events again, we must develop mechanisms for dealing with the issue of contentious marches which respect the rights of everyone in Northern Ireland, and additionally we must ensure that the policing of such events is carried out in a manner designed to protect those rights not violate them.

It is in that context that this submission is made. CAJ believes that a genuinely independent decision making process is required to avoid a repetition of the events of the summer. Clearly the police will have a role to play in this process but of paramount importance to the success of such a project is that once decisions are made, they receive resolute political support from government.

CAJ are concerned that the current legislative provisions, and more particularly the manner in which they are applied, have become part of the problem. We intend to critique the current arrangements and then attempt to set the marching issue in the context of international human rights law, suggesting several principles that should inform any new arrangements. Finally we will enumerate some specific conclusions.

Public Order Legislation

The primary legislation governing the issue of parades in Northern Ireland is the Public Order (NI) Order 1987.

Article 3 of the Public Order Order requires the organisers of a parade to give the police at least seven days notice of the details of the event. These details include inter alia the date, time and route of the parade and the number of persons likely to take part. Although the notice provisions of the Order appear to remove the

possibility of spontaneous demonstrations, it is still possible to hold such a demonstration within the law if it is "not reasonably practicable" to give the normal notice.

Article 4(2) of the Order grants the police, in the form of a senior police officer, the power to impose conditions on a parade if he or she reasonably believes that it may lead to one of the following:

- * serious public disorder
- * serious damage to property
- * serious disruption to the life of the community; or
- * that its purpose is the intimidation of others with a view to compelling them not to do an act they have a right to do or to do an act they have a right not to do.

It is this power which has generally been used on the occasions when the police have chosen to re-route various parades during the course of the summer, most notably at Drumcree.

The Public Order Order also allows the Secretary of State to ban public processions or meetings in an area completely for up to three months. Article 5(1) gives the power to prohibit those meetings which are likely to:

- * cause serious public disorder
- * cause serious disruption to the life of the community, or
- * make undue demands upon the police or military forces.

Unlike the powers granted the police under the Order, the decision of the Secretary of State to ban a parade is not susceptible to effective judicial review, thus possibly conflicting with Articles 6 and 13 of the European Convention of Human Rights which effectively guarantee the right of access to the courts.

While decisions of the police under the Order are subject to review, this is often more nominal than substantive. There are two reasons to explain the relative ineffectiveness of judicial review in this context. Firstly, the courts have proved reluctant to interfere with operational decisions of the police and thus applications for judicial review of police decisions are rarely successful. The courts have indicated that they will not interfere with decisions on the part of the police unless they have ignored the relevant statutory criteria or arrived at a manifestly unreasonable conclusion. The courts have specifically stated that it is not their function to weigh the arguments on both sides to determine if a parade should proceed. Additionally, it appears to be policy on the part of the police to delay either making a decision on the re-routing of a parade or making it public until the last minute. While it may be that there are benign reasons for such a policy, allowing maximum time for mediators to reach an agreement for instance, it is our view that other factors outweigh the possible benefits that may accrue.

Waiting until the last minute before announcing whether a parade is to go ahead or not inevitably leads to an increase in tension and confusion both amongst marchers and those opposed to the march. It often appears that the police tactic is to wait until the last minute to determine who appears likely to cause the most disruption if the decision goes against them, in other words who can assemble the largest number of supporters. This is clearly not an appropriate way in which to exercise the powers afforded to the police in the Public Order Order and leads inexorably to debacles like

that at Drumcree and the attendant damage to the image of the police, and more importantly the damage caused to the notion of the rule of law.

A further significant aspect to the police reticence in announcing decisions is that those who disagree with the decision have in reality no recourse to the courts to challenge the decision.

Clearly, serious difficulties exist in relation to the public order legislation as it applies to controversial parades. Whatever about the wisdom of the use by the police of some of their powers in the legislation, it remains difficult to reconcile the dual roles of the police under the Order, both making the decisions in relation to routing or re-routing, and enforcing the decisions once taken. This has undoubtedly led to increased community anger being directed at the police. This is particularly so in a divided society such as Northern Ireland where significant sections of both communities have serious concerns about the police. Not surprisingly, it also appears to be a state of affairs with which the police themselves are not comfortable.

In our opinion, the public debate prompted by Drumcree about the extent to which, if at all, Sir Patrick Mayhew intervened in police operational decisions, somewhat misses the point. Should decisions of this nature, which have such a significant impact on the fabric of society in Northern Ireland, be taken on solely operational grounds? Surely, the decision should not be taken by the police but in consultation with them. Indeed the Public Order legislation appears, on one reading, to allow for non-operational reasons to be taken into account by giving the police the power to ban a march if its purpose is to intimidate.

The restriction of the debate to merely operational grounds and the apparent concentration of the police on the serious public disorder criterion in the legislation, leads to the type of problem which has already been touched upon, where those who appear able to muster the biggest crowd get their way. The police are thus encouraged to think in these terms as opposed to considering the disruption to the life of the community. More active consideration of this factor might also lead to the police reconsidering the wisdom or legality of imposing a near curfew on the community in the Lower Ormeau Road, and might engage everyone in a more helpful and constructive debate.

Marching and human rights

CAJ's reference point for the critique of domestic law and government actions is very often international human rights standards. By its membership of the United Nations, and its accession to various international instruments, the United Kingdom commits itself before world opinion to the upholding of basic minimum rights. The government is legally obliged to uphold these rights and should do all in its power to protect and promote the rights of all within its jurisdiction without distinction.

The normal starting point for direction from international law is consideration of the ***International Covenant on Civil and Political Rights***(ICCPR) and the ***European Convention of Human Rights*** (ECHR).

Article 12 of the ICCPR protects freedom of movement. Articles 18 and 19 guarantee the right to freedom of thought, religion and expression. Articles 21 and 22 guarantee

the right to freedom of assembly and association with others. These provisions are mirrored, almost verbatim, in the ECHR. Article 11 of the ECHR states that everyone has the right to freedom of peaceful assembly and to freedom of association with others. Article 10 asserts the right to freedom of expression and Article 9 protects the right to freedom of thought, conscience and religion, which includes the right to publicly manifest religion or belief. Article 2 of Protocol 4 to the Convention, which, although not ratified by the UK, still carries some force, guarantees the right to liberty of movement.

The rights to march, to organise peaceful demonstrations, to hold public meetings etc. all have their origin in the international protections afforded to freedom of expression, movement and association. Quite clearly, however, such rights are not absolute. The most cursory reading of the ICCPR and ECHR provisions will show that all of the above rights are limited in similar ways. While both Conventions assert that no restrictions should normally be placed on these rights, both also allow for the imposition of restrictions which 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 or morals or for the protection of the rights and freedoms of others"* (Article 11 of the ECHR).

However, it is also instructive to remember that the marches under scrutiny do not neatly fall into one category of right. Most parades by the Loyal Orders (using the term generically to describe the Orange Order, the Apprentice Boys and the Royal Black Institution) have a religious, cultural and political aspect. Protection for the rights of marchers is provided by the entrenched rights to freedom of religion, association and expression. As noted, these rights can be limited "for the protection of the rights and freedoms of others" - rights such as liberty of movement, privacy and family life, home and correspondence. Additionally, and more importantly, there is the growing body of minority rights articulated by the Organisation of Security and Co-operation in Europe (OSCE, previously the CSCE). The OSCE declarations make clear that minorities cannot be subjected to any form of discrimination. Effectively, the principles articulated by the OSCE guarantee parity of esteem for the minority community in Northern Ireland and equal access to rights as between the two communities.

The ***Copenhagen Declaration of 1990 of the CSCE*** states that *"This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all their legitimate interests and aspirations, political pluralism, social tolerance and the implementation of legal rules that place effective restraints on the abuse of governmental power...."*

".....the participating states will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms."

The states also undertake to: *"--- commit themselves to take appropriate and proportionate measures to protect persons or groups who may be subject to threats or acts of discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity, and to protect their property"*

The ***Report of the CSCE Meeting of Experts on National Minorities in Geneva in 1991*** emphasised *"that respect for human rights and fundamental freedoms must be*

*accorded on a non-discriminatory basis throughout society. In areas inhabited mainly by persons belonging to a national minority, the human rights and fundamental freedoms of persons belonging to that minority, of persons belonging to the majority population of the respective State, and of persons belonging to other national minorities residing in these areas, **will be equally protected** (emphasis added)."* Later in the same document, the States "*reconfirm the importance of adopting, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.*"

Further light is thrown on this subject by the **United Nations' Declaration on the Elimination of Intolerance and Discrimination Based on Religion**, Article 1 (3) of which states that "*Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*" Article 2 states that no one shall be subject to discrimination by any state, institution, group of persons, or person on the grounds of religion or other belief. "*Intolerance and discrimination based on religion or belief means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.*"

It is clear that marchers and residents' groups in Northern Ireland have sustainable arguments in international law to support their respective positions; the marchers can cite in their cause the ICCPR and the ECHR, residents can assert their rights to parity of esteem, non-discrimination and their right to freedom of movement under the ECHR and OSCE provisions. Quite clearly, in the context of the marching season, there is often a conflict between the exercise of these rights. For instance the exercise of the Orangeman's right to march through the Lower Ormeau Road on 12th July led to the violation of many of the residents' rights to freedom of movement. The problem, as always, is in the balancing of these rights.

The jurisprudence of the European human rights fora is helpful in providing us with some criteria by which to assess the competing rights involved. As Harris, O'Boyle and Warbrick point out¹, it is quite common for some rights to be interfered with in order to protect the rights of others. For instance, the right to a fair trial often by necessity limits the right to freedom of expression. However it is a generally recognised principle of international law that such limitations must be interpreted narrowly. There are a number of factors which influence interpretation of the limitations which the Convention allows regarding freedoms of association, expression and religion.²

These include:

- the importance of the protected right
- the need in a democratic society to promote tolerance and broad-mindedness

¹ Law of the European Convention on Human Rights, D.J. Harris, M.O'Boyle, C. Warbrick; Butterworths, 1995

² *ibid.*

- the weight and significance of the interests that the state is seeking to protect by interfering with the protected right
- the notion that the state must act proportionately in seeking to strike the correct balance between competing rights.

Recommendations

International law provides no easy answers. But its study does serve two useful functions. Firstly, it clarifies that there is a genuine conflict of rights here which has to be adjudicated fairly and impartially. Secondly, it provides some principles which should inform that decision making process.

- a. the right to freedom of assembly, expression and religion are all protected. These rights are subject to certain limitations, one of which is the need to protect the rights and freedoms of others. Accordingly, the “right to march” can be understood to flow from international human rights law, but it is not absolute.
- b. the government has a particular obligation to protect minority interests and defend them from threats, hostility or violence. However, unlike the aforementioned rights, there is little protection in international law for the argument that is sometimes made that there is a need for consent from the community through which the parade is passing.
- c. since all the protagonists have rights requiring protection, some process of balancing and accommodation of their respective rights is necessary, if and when they are found to be in conflict.
- d. all decisions about marching must reflect the key principle that everyone is equal before the law. It is clearly contrary to international law that one community has less rights than another to march where it chooses, whether that be to town centres, or into the heartland of the “other’s” community.
- e. the government processes instituted to adjudicate between competing claims of right, whether they be judicial or administrative, must give appropriate weight to all the factors mentioned above - i.e. the importance of the protected right, the need for tolerance and broad-mindedness, the weight and significance of the interests that the state is seeking to protect in interfering with the protected right, and the principle of proportionality.

CAJ's primary concern in this debate, as in all others, is that human rights are respected and protected. The application of the five principles outlined would assist in that regard. It is clear that the current arrangements, both legislative and operational, are failing in that key respect. Certain steps can be taken almost immediately that would begin to ameliorate the situation. The decision making powers of the police under the Public Order Order should be removed. They have shown themselves to be generally unwilling and incapable of performing this task. In light of the need for a balancing of conflicting rights which we have identified at c. and e. above, we believe that a genuinely independent body should be entrusted with the task of making decisions in relation to parades.

Those interested should be given the opportunity of making verbal or written submissions to the body. Applications concerning parades for the whole year should be made by a specified date considerably in advance of the main marching season in order to allow all decisions for a particular route to be made and announced publicly and in advance. This is to avoid some of the problems we have discussed above, to avoid the decision making process being reduced, as the public often believe it to be, to being dependent on which community it displeased last, and ensuring that the process reflects the principle of equality before the law (c. above).

Clearly the body will consult closely with the police and will listen to the operational advice of the police but the final decision of the body will be the determining factor. This is critical in order to avoid a repeat of the disaster at Drumcree. It is also vital that the decision is informed with the principles we have outlined above. For instance, the principle of proportionality and concern for the rights of others are two of the key factors that should influence decisions on the balancing of rights. Also, the right to march does not necessarily mean a right to march on a particular street on a particular day at a particular time. A concrete example of the influence of these factors would be that if a march could proceed down route X or Y but, by using route X could lead to the violation of the rights of other people, then clearly there will be particularly strong arguments that route Y should be used.

Additionally, imagination could be shown by the body in the conditions it could attach to parades it is allowing to proceed. For instance, using the powers that currently exist under the Public Order Order, while passing through a sensitive area, the marchers could be ordered to keep their banners and flags furled and bands could be forbidden from playing music. Marchers or bands displaying sectarian regalia or symbols associated with paramilitary groupings could be forbidden from entering certain areas unless the offending items were removed. These changes could help to ensure that the government fulfils its obligations under the provisions of the OSCE to protect minorities from threats or hostility. More generally, drawing on practise which we believe the police employ in Scotland and elsewhere, marches could be restricted to one side of the road, thereby allowing the rest of the community to go about their normal lives. The emphasis could therefore be not on ensuring the fullest expression of the integrity of the march but on minimising the disruption to the life of the rest of the community.

The decisions of the independent body and the Secretary of State's powers under the current legislation, if they are to be retained, should be made subject to judicial review.

Applications from each community should be treated on exactly the same basis. The lack of tradition on the part of marches from the minority community should not be used to undermine their legitimacy. Tradition per se is not a legitimising factor and, in the context of Northern Ireland, is simply a reflection of the historic balance of power that has existed between the two communities.

Consideration could be given to the introduction of an effective sanctions system to control the behaviour of those taking part in parades and protests. One of the main areas of concern surrounding the parades issue has been the allegations of sectarian behaviour on the part of marchers. This matter could be addressed by the independent body engaging observers to monitor the behaviour of marchers and protesters with the aid of video cameras. If evidence is gathered which suggests that marchers engaged in such behaviour then the body would impose sanctions on the

parade, including the option of banning the parade from that area in the future. The observers would also be able to confirm or deny if there was provocation from those protesting against the march.

Additionally, thought could be given to fining those organising the parade if marchers do not abide by the conditions imposed by the body when the parade was given permission to proceed.

Conclusions

The issue of marching has a disproportionate impact on the fabric of life in Northern Ireland. A repeat of the summer's events would further undermine the search for a just and lasting settlement in Northern Ireland. Like the wider conflict itself, we believe that this issue will not be resolved without the effective protection of human rights. It is imperative that whatever machinery is put in place to deal with marches gives concrete expression to the protection of human rights and to the principles that international law provides us with.

It is also necessary that the police carry out their tasks sensitively and that the independent body hold them accountable for the performance of the tasks assigned to them.

The decision making process must be open, fair and accountable. It must reflect the key principle that everyone is equal before the law and that the rule of law will apply to everyone, including the police, without fear or favour.

