What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation, which is affiliated to the International Federation of Human Rights (IFHR). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the rights of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Human Rights Committee, the Committee Against Torture, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, Extra judicial, Summary and Arbitrary Executions, and Freedom of Opinion and Expression, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights, Human Rights Watch and the International Commission of Jurists.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, criminal justice, equality, and the protection of rights.

Our membership is drawn from all sections of the community in Northern Ireland and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

In 1998 CAJ was awarded the Council of Europe Human Rights Prize in recognition of our work to promote human rights in Northern Ireland.

Introduction

Since its inception CAJ has been critical of the United Kingdom government's reliance on emergency laws to deal with the conflict in Northern Ireland. We believed that those laws were wrong in themselves and also counter-productive in that they undermined respect for the rule of law and increased support for paramilitaries. We were pleased to see the commitment in the Good Friday Agreement on the part of the government that it would "make progress towards the objective of as early a return as possible to normal security arrangements in Northern Ireland consistent with the level of threat". In this context we welcomed the repeal of the Emergency Provisions Act and the Prevention of Terrorism (Temporary Provisions) Act but were disappointed to see that many of the provisions contained in these two Acts were replicated in Part VII to the Terrorism Act which applied only to Northern Ireland. Our view has been and remains that the situation in Northern Ireland does not warrant departure from normal due process standards.

While we recognise that the draft Civil Contingencies Bill aims to deal with threats which are much broader than terrorism we nevertheless feel that the example of the use and abuse of emergency laws in Northern Ireland is one which should be borne in mind when dealing with the Bill. It has been our experience that when the authorities are presented with additional powers, they will use them and when such powers are intended to be temporary in nature, they inevitably remain in force on a more permanent basis (for example the Prevention of Terrorism (*Temporary* Provisions) Act was passed in 1974 but was only repealed in 2000.

Our approach to the Bill is therefore not simply from a civil liberties perspective but from the perspective of a human rights organisation which has witnessed the corrosive impact of emergency legislation on the rule of law and on the various institutions it purportedly existed to protect.

CAJ recognises that the state has a right and indeed a duty to protect its citizens from harm. In that context we recognise that Part 1 of the Bill and the steps which may be taken to replicate this framework in Northern Ireland will enhance the effectiveness of

the response of the authorities to any emergency and we have no comment to make on those aspects of the Bill.

However, Part 2 of the Bill causes us grave concern.

The definition of emergency

The United Kingdom is bound by international human rights law. It has chosen to incorporate the European Convention on Human Rights into domestic law. The Convention includes a mechanism under article 15 whereby the State is allowed to derogate from some of the rights protected therein in the event that an emergency exists. Article 15 contains a definition of an emergency which is "war or other public emergency threatening the life of the nation". This is the standard which we believe both the Convention, and therefore the Human Rights Act, and international human rights law generally requires. We do not therefore see the justification for the very different definition of an emergency which is contained in Part 2 of the Bill, particularly as it quite clearly could justify the declaration of an emergency even in the context of an event or series of events which fall well short of an article 15 emergency. As the Joint Committee on Human Rights points out in its critique of the Bill,

"the powers could be deployed in response to strikes or works to rule (particularly in medical, educational or other essential services), political protests, computer hacking, a campaign against banking practices, interference with the statutory functions of any person or body, an outbreak of communicable disease, or protests against genetically modified crops, among many other events."

Declaration of a state of emergency

The broad definition of what may constitute a state of emergency is followed by the granting of very broad powers in terms of deciding when an emergency is about to, or has occurred. Two scenarios outlined in clauses 18 and 19 make provision for either

the Queen or, in the event of a royal proclamation causing delay, the relevant Secretary of State to make a declaration that an emergency has occurred or is about to do so. There is no explicit requirement that either be satisfied of this view on reasonable grounds. It is therefore highly unlikely that the decision to declare a state of emergency could in reality be subject to any effective challenge. CAJ have long been concerned that decisions to derogate from the European Convention on Human Rights have not been subject to sufficient judicial scrutiny by the European Court of Human Rights but nevertheless at least the Court has made clear that it will subject such decisions to scrutiny (Brannigan and McBride, Marshall v UK). Effectively excluding the jurisdiction of the domestic courts may well place the assertion that this Bill is compatible with the Convention in some jeopardy.

It is also relevant to note in this regard that one of the factors which the European Court took into account in determining that the UK's derogation under article 15 of the Convention was lawful in the Marshall case was the fact that Parliament had debated the relevant provision of the PTA and had voted to renew it. In the context of the declaration of an emergency under this Bill this, at least initially, will not happen.

Scope of Regulations

We are again very concerned that the drafting of the provisions in clause 21 provide very broad powers to those making regulations. Once again any limitations which apply are subjective (clause 21 (1) (a) for instance states that regulations "may make provision only if and in so far as the person making the regulations *thinks* it necessary for the purpose…).

In particular we are concerned at 21 (2) which allows regulations to make "any provision which the person making them thinks necessary for" a series of scenarios including extremely broad categories such as "protecting or restoring the performance of public functions". 21 (3) makes it clear that these regulations will make inroads into existing rights for instance, freedom of movement, property rights, or freedom of association. However, what is perhaps most worrying about 21 (3) is not the matters that are listed as being subject to interference by the regulations but those which

remain unlisted. 21 (3) (j) allows the regulations to "disapply or modify an enactment or a provision made under or by virtue of an enactment". This is a startling proposition which effectively grants to a Minister the power to repeal any provision of any previous Act of Parliament, including presumably the Human Rights Act. Given that this may well impact upon non-derogable rights contained in the Convention, the inclusion of this provision in the Bill again makes compliance with the Human Rights Act unlikely.

The government's intentions in this regard are of course made clear by clause 25 of the Bill which states that regulations made under the Bill are to be treated as primary legislation for the purposes of the Human Rights Act. The purpose of this clause is to further insulate action under the Bill from scrutiny from the courts. The government indicate in their consultation paper that they are yet to make a final decision on whether to include this clause in the Bill. In our view they should not. Its inclusion will in our view be a direct violation of article 13 of the Convention which guarantees a remedy to those whose Convention rights have been violated.

Duration

If the government proceed with this legislation we believe the declaration of an emergency and any regulations subsequent to it must lapse permanently after 30 days unless approved by Parliament.

Consultation with devolved administrations

We believe that if the government proceeds with this Bill, it should place an obligation on the Secretary of State to consult with the First and Deputy First Ministers in Northern Ireland before making regulations which may apply here given the severe impact such regulations will have on confidence in the rule of law in Northern Ireland and potentially on community relations.

Equality

We cannot understand why the only question asked in the Northern Ireland consultation document relating to equality is about Part 1 of the Bill. In our view the adoption of Part 2 would have serious equality implications and would require a full equality impact assessment to be carried out. While of course the government assert that previously existing emergency powers would have been applied equally to both nationalist and unionist communities, research conducted by CAJ would suggest otherwise. It is also of course likely to be the case that there are implications for other section 75 categories, for example race.

Conclusion

CAJ regards Part 2 of this Bill as containing a serious threat to human rights. We believe it is misconceived and should be reconsidered by government. In our opinion it is in several respects incompatible with the Human Rights Act and upsets the delicate constitutional balance established by that Act. It is also our contention that the government has in no way made out a case which would even begin to justify such an egregious piece of legislation.