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Winner of the Council of Europe Human Rights Prize

CAJ's commentary on the

Northern Ireland Offences Bill

December 2005

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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 firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure 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 work 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 and the Council of Europe Human Rights Prize.

Northern Ireland Offences Bill

Commentary by the
Committee on the Administration of Justice (CAJ)
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Introduction

The Committee on the Administration of Justice is an independent cross community human rights group committed to upholding the highest standards of justice. We draw upon international human rights principles in determining our response to domestic legislation and policy initiatives.

Some time ago the organisation explored which of these principles would apply to any truth process established for Northern Ireland. The Northern Ireland Offences Bill – wrongly and misleadingly called the "on the runs" legislation - clearly deals with many more perpetrators than the 100-150 people who are thought to be on the run. Accordingly, without explicitly claiming to do so, this draft legislation is an attempt by government to comprehensively address the past. As such, it is deeply worrying, and is an initiative that parliamentarians should resist.

All legislation which is intended to "draw a line" (in the language of the Secretary of State for Northern Ireland) should, if it is to meet the standards of practice laid down in international human rights law, comply with the following principles –

- Independence
- Transparency
- Accountability
- Compliance with international human rights law & particularly article 2 of the European Convention on Human Rights.
- No blanket amnesty or impunity
- Voluntary process
- Wrong-doing should be acknowledged
- Integrity of the criminal justice system should be reinforced not undermined by any arrangements
- No hierarchy of victims should be created

Parliamentarians are encouraged to measure the legislation and any draft amendments during the passage of this legislation against these principles.

The legislation

As currently drafted, the legislation poses a number of problems. In particular, it addresses allegations of certain individual wrong-doing, rather than institutional culpability, and as such is only a very limited response to addressing the past. However, even as one of the building blocks in what might otherwise be a comprehensive response to the past, a number of human rights concerns must be raised.

Who does it apply to?

The first article sets out exactly which offences are meant to be captured by the provisions of this Act ie "(a) an offence ..committed before 10th April 1998 in connection with terrorism and the affairs of Northern Ireland (whether committed for terrorist purposes or not) or (b) an escape offence committed before that date in respect of an offence within paragraph (a)."

This very clearly therefore applies to what has become to be known in popular parlance as "on the runs" ie people, almost entirely republican, who are believed by the authorities to be guilty of offences committed in Northern Ireland but who have not been made fully amenable to the criminal justice system here. It equally clearly would appear not to apply to offences that have no link to the conflict – for example, violent domestic incidents, common assaults etc.

For some time, however, commentators were uncertain about the extent to which this legislation would apply to a much larger pool of people. It now seems clear that it is government's intention (however quietly voiced) that this legislation could apply to all the unsolved crimes of the Troubles. The estimated figures of possible qualifying candidates varies enormously; until now reference has frequently been made to more than 2100 unsolved murders in the Troubles, but the Historic Enquiries Team is intending to potentially re-investigate 3269 "Troubles-related deaths". While some perpetrators are responsible for multiple deaths, this still suggests that the legislation could apply to thousands rather than a few hundred perpetrators. It is also now obvious that government intends to treat state and non-state agents on a par.

The extent of the coverage of this legislative measure is important because it is necessary to understand how this Act will complement or run counter to other initiatives such as the work of the newly-established Historic Enquiries Team, and because the state has a particular international responsibility regarding the actions undertaken in its name by its agents.

Independence

The legislation as currently drafted is redolent with problems regarding its independence. The very measure derives from an initiative arising from political negotiations that were not subject to any external influence and are only now being subject to public and wider political examination. The draft legislation as it currently stands gives extensive powers to the Secretary of State to determine who is to be appointed to what positions, to determine issues of disclosure, and to determine issues of anonymity and subsequent publication of the findings.

Transparency

On the level of individual wrong-doing, the principle of transparency is only met in part. The individual must formally apply for consideration under the legislation and will be publicly adjudged guilty or innocent. It is not however clear on the face of the legislation how much the routine work of the Special Tribunals will take place in

public, and there are indeed opportunities for the Tribunals to act in private. Moreover, and very worryingly, the procedures laid down in the legislation allow for extensive deployment of "national security" considerations, which – in the case particularly of state agents – are subject to grave mis-use. Changes will need to be made to these provisions in the parliamentary debate if the alleged wrong-doing of state agents in particular is to be subject to proper scrutiny.

The legislation by focusing on individuals, clearly does not address the need for transparency in the wider sense of any institutional wrong-doing. It would be very damaging to the future protection of human rights if any wrong-doing on the part of the state were seen to be discharged by virtue of the fact that a number of individual state agents had engaged in this process.

Accountability

The extent to which the draft legislation requires sufficient accountability even for individual actions and inactions is likely to be a matter of heated parliamentary and public debate. There is a requirement in international law to hold people accountable, but no prescription as to how this must be done. CAJ thinks that it is quite possible that a system (as proposed by the current legislation) by which an alleged perpetrator is charged and (where found guilty), convicted, given a criminal record and sentenced, may well meet international human rights tests, since punishment by way of imprisonment does not appear to have been an essential demand in other jurisdictions.

There is however in international law a particular obligation on the state to hold its own agents to account. It is not clear whether the current draft would be considered sufficient to ensure state accountability, but certainly any move to give a 'privileged' position to state agents as opposed to non-state agents, as proposed in some of the draft amendments, would most definitely fall foul of international human rights standards. If parliament considers it improper or invidious to treat state and non-state agents in the same body of legislation, it should separate the two discussions. Any usage of a single piece of legislation to grant a kind of back-door impunity to state agents is likely to be extremely counter-productive.

Compliance with article 2 of the ECHR

The state has a range of duties to ensure that it complies with its positive and negative duties to uphold the right to life (article 2). It has a duty to protect civilians against violent attack, and one of the ways it proves its commitment to this duty is to effectively penalise and therefore dissuade those who might engage in violence.

Accordingly, if this current legislation is passed and individuals are found guilty of murder or serious harm but are released on license, it would be open to victims to take a case through the domestic courts and to Europe arguing that the state had reneged on its duties to uphold article 2 of the European Convention. It is impossible to speculate on the response of the European Court to specific cases that might be brought to its attention, both because the Court traditionally leaves extensive room for

discretion with individual states, and because it is difficult to assess how the Court would judge the state's claim that it had taken all appropriate steps to strike the right balance between the individual's rights to remedy and reparation, and the needs of society as a whole to end violent conflict.

The argument, however, is somewhat different in the case of state agents being accused of serious criminal activities. The state is considered in international human rights law to have a particular responsibility to effectively investigate crimes in which state agents took part or colluded, so the onus is on the state to prove that it is not seeking to cloak its criminal activities. The principles highlighted earlier regarding independence, transparency and accountability will all be scrutinised particularly closely in the procedures introduced to handle any allegation of wrong-doing by state agents.

Amnesty

The extent to which this legislation amounts to an "amnesty" or not, is already a matter for heated political debate. As noted earlier, some of the debate around this legislation is bound to be political – not merely party political, but also political in the sense that people will have different views about how best to move from violent conflict to peace. In human rights terms however, it seems clear that the provisions do not amount to a blanket amnesty, since everything short of actual time in prison occurs, as it would in any normal form of due process.

Voluntary process

There is an expectation in international law that victims retain the option of pursuing their case through the normal legal process if they so choose, and ought not be forced to take part in a truth and reconciliation process. Whilst not formally a "truth and reconciliation process", the passage of this legislation would beg the question as to whether any other form of truth-telling process would ever take place. As drafted, the legislation seems to be insisting that victims accept the route determined upon by the government and – to a large extent – even by the perpetrators, and there are explicit clauses in the legislation foreclosing any other legal avenues being explored by the victims. It is far from clear that this legislation places the victim centre-stage as is sometimes claimed on its behalf.

Wrong-doing should be acknowledged

As noted earlier, at best it is likely that individual wrong-doing is acknowledged, but there is to be no opportunity for looking at any institutional wrong-doing. Opinions may differ regarding the ways in which even individual wrong-doing is acknowledged but there are no hard-and-fast international human rights rules on this point.

Integrity of the criminal justice system

As Northern Ireland moves from an extraordinary period of 80+ years of emergency law to a more peaceful society, it is important that the integrity of the criminal justice system should be reinforced not undermined by any of these arrangements. Some concern has been expressed by commentators that the rule of law will be subverted because the judiciary are being directed by the executive and that this is inappropriate. CAJ believes, however, that the thrust of the legislation – with a focus on a case-by-case assessment of the evidence, convictions and sentencing – gives proper roles to both the legislators and to the judiciary. There are however a number of provisions in the current draft which retain excessive authority in the hands of the Secretary of State; these will definitely need to be amended if the integrity of the criminal justice system is to be upheld.

No hierarchy of victims should be created

While theoretically no hierarchy of victims is being created in this legislation, some problems do clearly arise. Firstly, there is the problem that victims who had seen perpetrators pass through the criminal justice system prior to the Agreement also saw those people punished by a certain length of imprisonment, but victims in future will have no such remedy or reparation offered them. All those families now relying on the Historic Enquiries Team to find the perpetrators will know that extensive efforts will result in no direct reparation. Secondly, victims of state abuses are likely to be very suspicious that this mechanism has been established deliberately to ensure that a few individuals shoulder the blame for what often appeared to be government policy.

Conclusions: the way forward

a) **Broader comprehensive framework for dealing with the past**

This legislation is likely to be made the target of a number of article 2 complaints to the domestic courts and possibly eventually European Court, both by victims of paramilitary actions, but even more likely by victims of state action. As such, it is unlikely to meet the supposed objectives of the measure, which is to bring some form of "closure" to the period of violent conflict. It is vital that this legislation be seen as part of a building block of measures that would allow victims, and society in general, to address the problems of the past. The state alone cannot initiate such a truth process, but it needs to work with others to create an independent system for truth recovery and reconciliation. Only in this way, will the full lessons of the past be learnt and as a society will we comply with the Agreement's stricture:

> *"We must never forget those who have died or been injured or their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all".*

It is particularly unfortunate that this legislation has been introduced in what looks like an opportunistic way. The genesis of the legislation supposedly lies in the early

release scheme negotiated at the time of the Agreement, but no provision was made at that time for state agents. Accordingly, the insertion of this category of beneficiaries, in what has been colloquially termed "on the runs" legislation, will be considered by many as little more than a sleight–of-hand trick. A number of the provisions in the legislation also work to the clear benefit of state agents – since police officers, army officers, and informers working with state agencies, are all more likely to be successful in calling upon the Secretary of State to exercise his or her authority on the grounds of the various "national security" exemption clauses. Any initiative to deal with the past must command wide public confidence across all of the communities in Northern Ireland – this text clearly does not do that.

b) **Specific measures**

CAJ is not certain that the legislation, however improved, could comply fully with article 2 of the European Convention, and avoid censure from the European Court. We are, however, able to comment on the following proposals for amendments that have been canvassed publicly:

- **The legislation, and some of the proposed amendments, seek to ensure that the provisions apply in a similar way to both state and non-state actors, yet the international human rights principles that apply are somewhat different. It would be more appropriate to disentangle these two debates.**

- **If the two issues are to continue to be addressed in the one piece of legislation, parliamentarians must bear in mind the particular responsibility of the state to hold its own agents to account, and must abide closely by the obligations created by article 2 of the European Convention. It would clearly be a violation of their international human rights commitments to give a privileged position to any such perpetrators.**

- **A time-limit to the operation of the legislation has been canvassed. This would seem in principle to be positive, but CAJ would argue that if any such a time-limit is agreed, it must be formulated so as not to undermine the important investigative work that is to be carried out by the Historic Enquiries Team.**

CAJ reiterates that any attempt at "closure" must be a widely-owned process to which everyone can lend their support. We do not believe that it is acceptable to deal with the past with some kind of sleight-of-hand. The draft legislation will clearly not secure widespread public confidence as it stands. Moreover, amendments that would bring to an end other initiatives to address the past – whether that be the proposal to suppress current or proposed Inquiries, or any deliberate or inadvertent undermining of the work of the Historic Enquiries Team – would run entirely counter to any serious cross-community effort at truth and reconciliation.