Just News

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Human rights safeguards must be implemented to re-establish Stormont

The 1998 Belfast/Good Friday Agreement was, in political science terms, a "consociational" political agreement between elite factions from two ethno-national cleavages (Nationalist and Unionist). The 'deal' between political factions was premised on the mutual exercise of executive and legislative power in our divided, post conflict setting being subject to a series of safeguards to prevent the abuse of power.

These safeguards were critical to the integrity of the deal, and absolutely essential to the maintenance of the rule of law. These safeguards were also intended to re-establish confidence in the fairness and transparency of the political system. Much has been written about the failures of the power-sharing arrangements in Northern Ireland, underscored by the acrimony that preceded and dominated our most recent elections.

Unfortunately, much less attention has been paid to broader abuse of procedural safeguards and the lack of commitment to precluding the abuse of power in the exercise of governmental functions. We maintain that the current breakdown is not singular but just one example of a cumulative lack of procedural enforcement of due process and transparency rules.

Procedural safeguards and the prevention of abuse had only a tentative foothold from the outset of the power-sharing arrangements. To give some examples, key provisions to ensure the fairness and equality of the political process, including the Bill of Rights were never implemented; the allocation of resources on the basis of objective need has been obstructed and the 'section 75' statutory equality duty is routinely sidestepped and rarely enforced. Back in late 2013, CAJ laid bare in our 'Mapping the Rollback' conference report the poor status of implementation and threat to the equality and rights provisions of the Good Friday/Belfast Agreement.

We warned then that the lack of formal requirements on equality and rights could undermine the integrity of the political process, and ultimately undermine its success. Some significant, recent events in Northern Ireland including the discredited 'ash for cash' scheme underscore the prescience of our positions.

Northern Ireland like many other divided societies (e.g. Bosnia) with power-sharing type governance arrangements faces a number of political risks.The greatest challenge for the rule of law in a deeply divided society dominated by political parties founded essentially on ethno-national identity is that resources will be filtered by political parties to those they consider as their 'own people'.

The identification of this insider "benefit" problem is not intended to endorse a 'two tribes' narrative of the conflict. Nor does it suggest a universal ideological pre-disposal to the pursuit of economic and political benefits to one's own political group over others.

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But as comparative practice in post-conflict, power-sharing contexts consistently reveals, political parties will indisputably feel some pressure to 'deliver' for their 'own' constituency.

Beyond ethnic division, there are other illiberal ways in which ethnically and religiously composed monoliths work. Specially, we think of the legal and political protection of LGBTQI+ communities and ethnic minorities. In some places, ethnic and religious blocks who are often at odds on many issues, surprisingly have much in common when it comes to denying the full extension of civil and human rights to historically marginal communities. The fault lines of their power-sharing system provides for a 'divvy up' in ways that are profoundly dis-advantageous to women and those of minority sexual orientation. The blocs not only enable the sharing of 'goodies' to the insider ethnic blocs, but actively operate to exclude the benefits to those who do not 'fit' in the monoliths.

Here in Northern Ireland, for example, the Good Friday/Belfast Agreement 'affirmed' the right of women to full and equal political participation in its text, but no mechanism has been established to try and make that commitment a reality. Here, the risks of men handing out goodies to other male controlled groups are real and all too familiar, illustrating how male elite blocks work in tandem to protects one another's patriarchal interests. The lesson is that power-sharing arrangements require equality and human rights guarantees if they are not to reflect the most reactionary common denominator. Even if one block is more progressive than the other, it only takes one to veto progress. Rights for those of minority sexual orientation here provides just one obvious example.

Failure to abide by the rules brought down Stormont

The Assembly collapsed in the mouth of the Renewable Heat Incentive scandal. While much has been written about the scandal, little attention has been paid to the systematic fault lines built into the power-sharing system that facilitate the production of such procedural irregularities. In parallel, the rights deficits and rule of law weaknesses in power-sharing were exposed by the battering of the power-sharing process itself, specifically when the Speaker decided to allow the First Minister, Arlene Foster, to bypass the joint nature of that office. The late deputy First Minister, Martin McGuiness' resignation letter and position that there would be no return to the status quo unless the full provisions of the Agreements were implemented, points to a broader problem of failing to implement and apply the safeguards within the Agreements. Only a deep commitment to proceduralism and rule of law saves power-sharing agreements from the worse excesses of political ideologies. Little of that rule commitment was in evidence as the Assembly collapsed.

Perhaps perversely, human rights advocates should welcome that these rule based issues that we have been pressing for some time have come back to the top of the political agenda. Rule adherence seems like a fairly pedantic lobbying point, but it is absolutely essential to maintaining the integrity of power sharing. In parallel, we now have to be vigilant that the prominence of rule-adherence does not plummet as any deal-making in the current post-election negotiations takes shape.

From a human rights perspective, equality and human rights principles provide a buffer against the risks of bias in resource allocation. These buffers are critically important in divided societies when there is a risk of resource allocation on the grounds of insider political discretion or reward. We argue that the principles that apply to 'fair employment' also apply to non-discrimination in the allocation of public funds to third parties. Specifically, there should be an open and transparent application process for public goods; decision-makers must not be partisan; there should be published objective and rationally based criteria for the distribution and receipt of public goods; and the opportunity to avail of public goods should not be promoted in a partisan manner. Nothing in this position, and particularly the latter two principles, prevents the targeting of disadvantaged (including single identity) groups, indeed such an approach is part and parcel of positive obligations and domesticated in the concept of objective need specifically.

Indirect discrimination is however engaged where criteria are skewed without objective basis to the benefit of a dominant group. We note that major elements of these principles are to be found reflected in the Ministerial Code and Equality Schemes – but are only effective to the extent they are applied and enforced.

Case studies: SIF, Housing, Community Halls and Irish language bursaries

The previous Executive's controversial Social Investments Fund (SIF) provides a particular case study to the claims we make here. Many of the questions about the fund have focused on alleged loyalist paramilitary links to particular recipients. We would underscore that this kind of analysis excludes the relevance of broader justice considerations, given the risk of funding criteria degenerating into 'political vetting'.

Our starting point from a human rights compliance perspective is rather focused on how the £80 million fund (plus a reported £13 million overspend) was allocated rather than who its recipients were. We acknowledge that SIF did have objective need criteria based on multiple deprivation measures. Although notably, such criteria appeared only to relate to where the project was geographically located rather than what kind of work was carried out by the scheme.

There was however no open and transparent application process, or indeed an application process at all for SIF. Projects were 'prioritised' by a number of local steering groups with political and other representatives. Whatever attention was paid to community background the 11-strong Belfast North group was initially established without a single woman being included in its representation. As previously covered in Just News, the entire fund's dispersal was held up when the then First Minister, Peter Robinson, reportedly would not sign off on the allocations to each Steering Group area on the basis of objective need.

CAJ asked the Equality Commission to use its powers of investigation into SIF at this point, but the Commission declined to do so. This unwillingness also points to another vulnerable point on the non-partisan, rule based enforcement of power-sharing, specifically the need for legally established watchdogs to do their utmost to enforce the rule of law consistently.

The Commission did however ultimately respond to CAJ's call to investigate the Department of Social Development (DSD) under Minister Nelson McCausland for systemically sidestepping the application of the duty to equality screening in relation to strategic housing policy. This included failing to apply equality screening to a 'pilot' housing-led regeneration programme. The subsequent investigation report revealed that the scheme had deliberately been set out to select areas on the basis of community 'parity' rather than objective need. This approach was facilitated by selection criteria that remarkably included areas which have a "decline in housing demand" and are in "proximity" to places that actually have housing need. The Commission ultimately signed off on DSD having abided by the recommendations in its report in October 2016. The Commission had made clear in the report that a public authority could not get out of its equality screening obligations by branding a policy decision as a 'pilot'. That very same month however the same department, now the Department of Communities, launched its Community Halls Minor Works 'Pilot' Programme.

Documents released under FoI reveal the decision to label the programme a 'pilot' seems to have been taken to evade needing the approval of the Department of Finance led by Minister Máirtín Ó Muilleoir. The then £500,000 fund was launched in an Orange hall by the Minister, Paul Givan, and First Minister Arlene Foster. By the time of the formal ministerial announcement – also in an Orange hall by Minister Givan in January 2017 of allocations from the fund, its resource had increased to £1.9million. The scheme was denounced by both nationalist parties as discriminatory in light of the vast majority of successful applications being from groups associated with the unionist community – including a high proportion of Orange halls.

Whilst media coverage focused on this locational aspect other unnamed disparities were at play. Specifically, when considered through a gender lens, the vast majority of successful organisations were male only or male led, drastically under representing women and women's organisations from funding from the scheme. No LGBT organizations appeared to benefit either – and there is nothing apparent in the funding documents to ensure funding recipients are welcome places for LGBT persons, despite the positive duty on public authorities to promote equality on grounds of sexual orientation. There was however in this instance an open application process against 'priority' criteria, published at the time the fund was opened. For example, the first of the criteria prioritises organisations that have been unable to attract other public or lottery funds.

Whether the criteria risked indirect discrimination would be a matter highlighted in the equality screening process. However, the Department 'forgot' to conduct equality screening on the policy and again sidestepped this due process requirement. It was only after CAJ challenged the Department, that it produce a tokenistic and flawed equality screening document, that overlooked any differential despite having been produced after the monies had been given out.

As well as the manner in which the fund was promoted, a key question relates to the rationale behind the criteria, whether they were devised to produce a particular funding outcome (a reward to specific communities and individuals) and if so whether there was an objective need reason for doing so to tackle an identified disadvantage. To this end CAJ sought the paper trail to determine how the criteria were arrived at, yet remarkably among the small number of heavily redacted documents provided none provide any clarity as to how the criteria were determined. Our broader point here is that the due process, procedural rightness problem is not simply a macro one, and not only a 'cash for ash' anomaly.

To illustrate this point again, a paper trail for how a formal resource allocation decision was arrived at has been a key issue in relation to decisions to obstruct the promotion of the Irish language. Protests and a legal challenge followed the Communities Ministers' decision on Christmas Eve to discontinue a £50,000 bursaries scheme to allow persons, including children, on low income to attend summer courses in the Donegal Gaeltacht. The controversial decision was ultimately reversed, but this does not preclude examination of why the original decision to cut the bursaries was taken, and whether it followed due process. In this instance, the Department confirmed it side-stepped the Equality Screening duty on the decision, and took over a week to come up with an explanation to us as to why it had done so. The Department also took over two months to respond to a freedom of information request by CAJ seeking a paper trail as to how the decision was made.

We only ultimately received a response from the Department after lodging an enforcement complaint with the Information Commissioner, and the response was limited to withholding all materials citing an exemption reliant on asserting that it was not in the public interest for the public to know on what basis the decision was taken. The Minister, for his part has insisted the decision was 'financial' and not 'political'.

Yet CAJ has previous experience of "reasons" given for Irish language decisions that have not turned out as they seemed. When we enquired as to why the NI Tourist Board had taken a decision to add a condition to its funding pot for tourism related signage and interpretation panels- namely that the signs be monolingual - the Board responded with vague assertions regarding 'visitor experience' and even at one point bizarrely implied that bilingual panels may constitute a road safety hazard.

A lengthy freedom of information battle however revealed a different picture, with the funding condition having been added in response to two Councils seeking funding for English-Irish signage on a walking trail, and in the context of the then Tourism Minister, Arlene Foster, directly intervening to 'instruct' the Board to enforce a monolingual rule.

Tellingly, the paper trail also revealed that after CAJ wrote to query the 'basis, scope and lawfulness' of the policy both the Board and the Department sought to pass the buck of responsibility for the policy to each other. The Board insisting it was operating on the basis of a 'Ministerial Direction' and the Department insisting it was not. The Department had also advised the Board to 'stand over' its approach but that it should not formalise it into a written policy.

These examples shine a painful light on the failure to implement and apply many of the safeguards envisaged under the Agreements for the governance of power in Northern Ireland. They underscore our essential point, that power-sharing can disintegrate into a political system that is understood as a means to 'reward' particular ethnic groups for their loyalty, identity or acquiesce in the political process. This occurs at the macro level but also happens in routine decisions on funding and priorities every day.

The repeated news of apparent unfairness in allocation of resources weakens public faith in the institutions and hence the peace process. The bulwark against illegitimate, unfair and procedurally flawed governance are firm human rights protections and a system wide commitment to procedural rules. This is a critical time to reassert the value of these rules, and to be wary of the deals that can be made to compromise them.

Prof. Fionnuala Ni Aolain and Daniel Holder

Protest and Human Rights 23 February, 2017

CAJ Deputy Director, Daniel Holder attended a meeting of Regional Experts on Social Protest and Human Rights in Washington DC on the 23 Febuary 2017 organised by the Inter-Amercian Commission on Human Rights (IACHR), and presided over by the IACHR Special Rapporteur for Freedom of Expression Edison Landza.

CAJ were invited to speak to a draft paper developed with the Open Society Foundations in relation to principles on the right to information in the context of social protest.

Members vote for CAJ to adopt human rights compliant position on reproductive rights

On 20 February 2017, CAJ members voted in an extraordinary general meeting to adopt the following resolution:

Given its extensive history of supporting non-discrimination, procedural rights and the equality of men and women as protected by international human rights law, CAJ supports the Trust Women Coalition Recognising that there are varied views in our organisation we take the position, consistent with international human rights law standards that women's rights to sexual and reproductive health are guaranteed by international treaties to which the United Kingdom is a party and extend to Northern Ireland. Our position is premised on the view that the current regulatory position in Northern Ireland is at variance with that of the United Kingdom as a whole, and undermines the dignity and non-discrimination rights of women and girls.

The Executive called this meeting as staff and executive committee members were in agreement that CAJ's previous 'non-position' on reproductive rights did not comply with developments in international human rights law. Furthermore, it was felt that in recent years, the non-position had impeded CAJ's ability to engage in areas within our expertise. Although the Executive is responsible for setting the policy agenda of the organisation, this meeting was called in keeping with a long-standing commitment to consult members if CAJ's position on reproductive rights was to change. The immediate impetus for the meeting was an invitation in late October 2016 for CAJ to join the NI Trust Women Coalition. This Coalition, which is in the process of being established, is led by Alliance for Choice and funded by the Joseph Rowntree Reform Trust. It builds on the #TrustWomen campaign from 2016 and it aims to facilitate a broad-based civil society coalition to campaign for abortion access in Northern Ireland - mainly human rights/women's/trade union groups. In endorsing the above resolution, members have authorised CAJ to support the work of this coalition, and it leaves open the possibility that CAJ may join the coalition in due course.

At the meeting, before members were asked to vote on the resolution, to inform the discussion, I provided an overview of the main developments in international human rights law with respect to reproductive rights. This overview drew on case law from the European Court of Human Rights with respect to the application of the principle of legal certainty to terminations of pregnancy. It also drew on General Comments issued by UN human rights monitoring bodies, particularly General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights. This document comprehensively and persuasively outlines the diverse ways in which repressive laws on reproductive rights can undermine women's right to health and in some cases violate their right to life and freedom from torture and inhuman and degrading treatment. The General Comment creates obligations for states with respect to sexual and reproductive health including liberalising restrictive abortion laws, guaranteeing women access to safe abortions services and post-abortion care, and respecting the right of women to make autonomous decisions about their sexual and reproductive health.

The presentation also highlighted that several UN human rights bodies have explicitly and repeatedly called upon the State to amend the law governing reproductive rights in Northern Ireland. These bodies have emphasised that abortion should be decriminalised; that it is discriminatory to refuse to provide abortion services in women living in one region of the United Kingdom; that this discrimination may be compounded for women who cannot afford to pay for travel and medical care in order to obtain an abortion in other parts of the United Kingdom; that Northern Irish legislation violates women's right to health; and that particular care needs to be given to the reproductive rights of girls.

The resolution was unanimously supported by the members who were present at the meeting or who voted by proxy. By adopting this motion, the members have addressed a gap in CAJ's work and ensured that the organisation is now able to address this important and sensitive issue in a human rights compliant manner.

Prof. Louise Mallinder

Unfinished Business – Update on the Finucane Case

Following the announcement by the then British PM David Cameron in October 2011 that his government intended not to honour the international commitment to grant a public inquiry into the circumstances surrounding the murder of Patrick Finucane, my family commenced judicial review proceedings against the British government.

The progress of the case attracted much media attention, not least due to disclosures that during governmental cabinet meetings the murder was described as "worse than anything that was alleged in Iraq or Afghanistan" and a "dark moment in the country's history".
On 26 June 2015, Mr. Justice Stephens delivered his ruling on our application for judicial review in Belfast High Court. In the opening paragraphs of his judgment, he said the following:

"[Geraldine Finucane] … was convinced from the beginning that servants or agents of the state were involved in the murder of her husband. The government has accepted that there was state involvement and has apologised for it. It is hard to express in forceful enough terms the appropriate response to the murder, the collusion associated with it, the failure to prevent the murder and the obstruction of some of the investigations into it. Individually and collectively they were abominations, which amounted to the most conspicuously bad, glaring and flagrant breach of the obligation of the state to protect the life of its citizen and to ensure the rule of law. There is and can be no attempt at justification."

Sadly, Mr. Justice Stephens concluded that the decision of the British Government was not unlawful and so he was unable to order an inquiry. We appealed this decision and on February 14th 2017, the Northern Ireland Court of Appeal delivered its judgment on our case for a public inquiry. Sadly, we were, once again, unsuccessful but there may yet be grounds for a further appeal, and our application is with the Supreme Court of the UK.
Where, then, does the case for a public inquiry into the murder of Pat Finucane rest? The courts have concluded that they cannot order an inquiry. The British Government has determined it will not hold one.
I do not think that the controversy surrounding the murder of Pat Finucane has been properly resolved.
I believe I am right in this, not just because of a broken promise by the British Government but because of the unanswered questions that arise from Pat's murder and the fact that no-one within the British establishment has ever been made accountable for it. We continue to receive the unwavering support from all areas of political and civic society, and as recently as last month the Irish Minister for Foreign Affairs spoke, on behalf of the Irish Government, of their continued support for a public inquiry.

Most of all, I believe I am right because of the unwavering support my family and I have had from the people of Belfast and beyond for the last twenty eight years.
We have been encouraged and supported and helped by so many people when the going got tough.
And the reason we keep going and can keep going, is because of all that help and support and because there are so many people who want us to. There are so many people, who, like us, want to find out the truth behind Pat's murder.
It is unfinished business for them. It is unfinished business for us. I want to know, **why**. I want to know, **how**. I want to know, **who**. I want to ask my own questions and I want to hear the answers for myself. I want to read the documents and understand the frameworks. Most of all, I want to be able to show them to the entire world so that everyone can know and learn what can be done by governments in the name of the people if we are not vigilant.

In a period of political uncertainty, the issues arising from our past remain unresolved for so many, yet the importance of the need for resolution has never been stronger. In the interests of building a society grounded in the international human rights standards espoused by CAJ, we must continue our focus in finally addressing our past to ensure it is never repeated.

John Finucane

Civil Liberties Diary - January / February

25th January
The UK Supreme Court rejected the government's bid to trigger negotiations on withdrawal from the EU, under Article 50, without gaining consent from Parliament. A case taken by a group of Stormont politicians was rejected by the Supreme Court. They argued that in their attempts to ensure that consent must also be given by the Northern Ireland Assembly.

27th January
A mother who was prosecuted for allegedly procuring abortion pills for her 15-year-old daughter has been granted permission by the High Court to challenge the decision to prosecute her. Lawyers for the mother and daughter may now seek a judicial review, claiming that it was inhuman to subject her to criminal proceedings.

28th January
An investigation by "The Detail" website has found that the department led by Communities Minister Paul Givan did not carry out a formal assessment of the impact of closing the Liofa Gaeltacht Bursary Scheme. This resulted in Mr Givan removing a £50,000 grant scheme for the Irish language, though the decision was later reversed.

1st February
Parliament confirmed the posthumous pardoning of thousands of gay and bisexual men convicted of sexual offences which are now abolished. The so-called "Turing's Law" took effect yesterday, pardoning those convicted of consensual same-sex relationships before these offences were abolished, and allowing those who are still living to apply to the Home Office to have historic offences removed.

2nd February
A Belfast resident has won a case at the UK Supreme Court concerning the failure of the police to prevent Union flag protests, some of which resulted in violence. The Court ruled that the police had the legal power to stop these protests and that the demonstrations had breached the plaintiff's right to private and family life.

7th February
Two women's rights groups have been granted intervener status in a High Court challenge to a new law which makes it illegal in Northern Ireland for men to pay for sex. SPACE International and Equality Now will present information on the impact of prostitution in the case brought by a sex worker who claims that criminalising her clients violates her human rights to privacy and freedom from discrimination.

DUP leader Arlene Foster has been criticised for saying her party would "never" agree to an Irish language act.

9th February
A woman from Coleraine has won a case in the Supreme Court challenging a decision that she was not automatically entitled to a "survivor's pension" after the death of her long-term partner, which she would have received had the couple been married. The Court recognised the high numbers of couples who cohabitate but do not marry in its decision.

13th February
Stormont's Department for Infrastructure has been revealed to have used the Regulatory and Investigatory Powers Act (RIPA) 132 times in the last 5 years. The controversial legislation allows the government to carry out surveillance and to access communications of private citizens, and was originally intended as an anti-terror measure. The Department has used RIPA to prevent fraudulent claims for personal injury compensation, as well as preventing crimes involving illegal taxis and buses.

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Just News

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