

Parades, flags protests and G8: a year of public order policing under the microscope

From the events of Ardoyne last July, the autumn parades which passed St Patricks Chapel on Belfast's Donegall Street, the flags protests in December, the forthcoming marching season and June's G8 summit in Fermanagh, 2012-13 is certainly going to be 12 months in which public order policing and the regulation of parades and protests are under the spotlight.

In addition to what has already taken place in 2012 and the first few months of 2013 the build up to G8 (and the numerous protests it has a habit of attracting) has begun in earnest. The Assembly has even taken forward an amendment to 17th century legislation (the Sunday Observance Act (Ireland) 1695) to allow Magistrates Courts to deal with summary offences for the first time on Sundays in presumed anticipation of having to process potentially large numbers of demonstrators and public order offences during the G8. The PSNI are looking to purchase surveillance drones. Drafting of thousands of extra police and hundreds of private security guards has begun. According to UTV interviews with senior police "security will also be on guard at ports and airports watching out for known offenders" which does raise the question of whether extensive 'counterterrorism' powers will be used and possibly abused at ports to deal with persons who are suspected of being disruptive protestors. There are also questions about who will be leading the inevitable intelligence gathering on protest groups as G8 will no doubt be considered a 'national security' matter and primacy for 'national security' covert policing in Northern Ireland sits with MI5 and not the PSNI.

In the build up to G8 meeting this issue of Just News will largely focus on the issues of parades, the policing of protests and the issue of flag flying, highlighting many of the matters which have been brought to CAJs attention in recent months, along with long-standing public order and assembly concerns we have raised for some time.

Inside this issue Michael Hamilton, Senior Lecturer in Public Protest Law at the University of East Anglia, discusses the potential implications on parades, protests and flags of the European Court of Human Rights decision in *Fáber v Hungary*, which dealt with the threshold question of what constitutes 'intimidation' in relation to symbolic displays.

In relation to protests and related public order Adrienne Reilly provides a summary of issues relating to the policing of the current protests. CAJ raised these issues recently with UN Special Rapporteur on Freedom of Peaceful Assembly & Association Mr. Maina Kiai, during his timely visit to Belfast in January.

In relation to the display of flags, Daniel Holder, building on an article posted on the Rights NI blog in December following the outbreak of the protests, highlights both the past and present manner in which the law, including human rights law, has regulated the display of flags here and the framework which was intended under the Northern Ireland Bill of Rights.

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Public assemblies, public order and human rights: CAJ evidence to the Special Rapporteur on Peaceful Assembly and Association Minai Kunai

Earlier this year the United Nations Special Rapporteur on Freedom of Peaceful Assembly and Association, Mr. Maina Kiai paid a timely visit to Belfast as part of his investigation mandate for the UK Report on Peaceful Assembly and Association due to be released in June 2013.

The visit came shortly after the outbreak of loyalist protests and related disorder in December 2012 following the decision by the elected body of Belfast City Council to reduce the number of days it flies the Union Flag to 'designated days'. In addition to the issues of the policing of protests, recent months have also seen related attacks on and threats directed at the police, Irish nationalist/Catholic areas and elected representatives.

CAJ attended a roundtable at the Northern Ireland Human Rights Commission brought together to address these matters and raised a number of issues of concern. These issues are informed mostly by our existing policy interests and public order challenges that have been brought to our attention over the past year.

Main Issues of Concern

Use of Plastic Bullets (AEP's – Attenuated Energy Projectile)

One of the consistent concerns CAJ has in relation to the policing of protests and public order situations, relates to the use of plastic bullets. CAJ has had a longstanding opposition to the use of these weapons. In the past, CAJ has demonstrated that plastic bullets were being used disproportionately against the Catholic community. In our report *Misrule of Law* into the policing of the events surrounding the Drumcree parade in 1996, we contrasted the 5,340 plastic bullets fired at mainly Catholic/nationalist protestors over three days of serious public disorder, with the 662 fired in three previous days of similar Protestant/ unionist disorder. The July 12th unrest in Ardoyne from 2010 to date has seen continued deployment of plastic bullets. In July 2010, 70 baton rounds were discharged, in July 2011 during unrest police fired up to 100 baton rounds. In June 2011 trouble in the nationalist Short Strand area resulted in 66 rounds being fired. However, on July 12 and 13 2012 during unrest in Ardoyne there was a considerable reduction in use of AEP's with six baton rounds discharged. More recently during the Union Flag protests and subsequent disorder plastic bullets were also discharged six times. While the last year has seen a considerable drop in the use of plastic bullets CAJ is concerned that with the recent protests, upcoming summer parades and G8 plastic bullets will be used, with the propensity to increased numbers.

CAJ firmly believes plastic bullets to be a lethal weapon and inappropriate to use in public order situations. At the roundtable with the Special Rapporteur we noted that the United Nations Committee Against Torture recommended as far back as 1998 that plastic bullet rounds be abolished as a means of riot control. We asked the Special Rapporteur to reiterate this recommendation and underscore its importance to contemporary public order regulation to the UK Government.

Use of Dogs

According to the PSNI Use of Force Statistics police dogs were used 21 times, five of which were during the period from 1 April to 20 September 2012. This shows an increase from the previous year when during

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the same period police dogs were used 11 times. Most recently dogs have been used during the Union Flag protests and CAJ has had complaints made in relation to the use of dogs, and have seen quite disturbing video footage in this regard where dogs are on long leashes and have attacked protestors. We are aware that representations have been made to the Police Ombudsman's office in this regard and we expressed our concerns to the Special Rapporteur. CAJ believes police dogs should only be used in accordance with the principles of proportionate and reasonable force.

Allegations of Gender Based Heavy Handed Policing

CAJ was also presented with allegations of gender based verbal abuse towards women during recent Union Flag protests as well as perceived gendered heavy handedness, with alleged physical baton attacks towards the small of women's backs and trailing of persons by their hair.

Legal (Un)Certainty: protests on the road

The issue of lack of legal certainty in permitting a protest to block a public road or footpath and precisely when police and prosecutors can or will take action against protestors was also raised with the Special Rapporteur. Clearly there will be circumstances when the police, further to the rights of freedom of assembly, should close roads to facilitate protests, particularly where there are significant numbers of protestors making confining protestors to the pavement unreasonable. There can also be circumstances where the rights of others will be engaged when their passage along roads or footways is obstructed by protests. At present however the article 20 of the Public Order (Northern Ireland) Order 1987 provides a widely drafted offence of 'obstructive sitting etc.' against persons who obstruct traffic or other lawful activity. There is a risk that this offence unless qualified by clear policy and practice could be used arbitrarily.

Legal regulation of parades

CAJ made reference to the ultimately inconclusive initiatives to reform the regulation of parades following the 2006 St Andrew's Agreement and 2010 Hillsborough Agreements. We commented that the independent body, the Parades Commission, has been retained. However, the decision-making legislation on parades (the Public Processions Act 1998) still does not explicitly reflect an ECHR-centred human rights framework and defers essentially to public order considerations. An ECHR centred framework, under provisions protecting the 'rights of others' could incorporate the Belfast/Good Friday Agreement provision 'for freedom from sectarian harassment'. Such a framework was envisaged by the Strategic Review of Parading which emerged as a product of the St Andrews and was to be built on by the Working Group on Parades which followed Hillsborough, but ultimately was not taken forward. CAJ highlighted to the Special Rapporteur that the present Public Processions Act does not currently reflect such an ECHR-centred framework.

More recently, given Saturday marches from East Belfast to the City Hall relating to the flags protests, the issue of unnotified parades has come to the forefront. Specifically they force the question of whether the Parades Commission can take decisions about such marches and when the PSNI can or will press charges under the 1998 Act in relation to them (as they have been against 150 persons – three of whom were Loyalists, in the last three years, according to figures given to the Policing Board). The Parades Commission has argued it cannot issue decisions against unnotified processions, however the legislative basis for this is not clear from its governing legislation. We are seeking clarification on the legislative standard.

Alongside this CAJ also addressed issues around persons assembling together and walking to and from a location of a static protest, which leads essentially to an unlawful procession and the potential for action to be taken against participants.

Harassment, Intimidation and 'Reprehensible Behaviour': Parades, Protests and Flag-Flying after *Fáber v Hungary* (2012)

The right to freedom from sectarian harassment – as articulated in the Belfast/Good Friday Agreement – has often been cited in the context of parading. Nonetheless, the point at which freedom of assembly (deserving of protection under Article 11 ECHR) ends, and harassment or intimidation begins (thus justifying restrictions on assemblies under Article 11(2) to protect the rights and freedoms of others) has been notoriously difficult to determine. This short note points to a 2012 judgment of the European Court of Human Rights that sheds light on the factors that the Parades Commission and PSNI ought to consider in this regard. Moreover, it urges the Parades Commission to explicitly address such factors in its decisions, given in particular the recent suggestion by the UN Special Rapporteur on the rights to Freedom of Peaceful Assembly and of Association, that the Commission could more clearly explain its determinations.

Restricting parades to protect the rights of others

In one case that reached the Strasbourg Court, the basis for restricting a particularly virulent protest in order to protect the rights of others was helpfully clarified. In the Holy Cross case of *P.F. and E.F. v UK* (2010) the European Court of Human Rights, in agreement with the House of Lords before it, held that the behaviour of the loyalist protesters reached the severity threshold of Article 3 ECHR (the right to freedom from inhuman and degrading treatment) because it (1) 'was premeditated', (2) 'continued for two months', (3) 'was designed to cause fear and distress' to (4) 'young children and their parents making their way to school', and (5) 'clearly resulted in considerable mental suffering'. While these factors may well be germane to future decisions by the Parades Commission or PSNI, they are of little help in relation to the specific issue of provocative symbolic displays which fall far short of this Article 3 threshold.

From insult to intimidation

The European Court of Human Rights' judgment in *Fáber v Hungary* (2012), drawing in part on the US cross-burning case of *Virginia v Black*, 2003, established a new threshold to determine whether provocative symbolic displays are deserving of protection under the Convention. The Court's judgment in *Fáber* goes further than its well-established position that Article 10 ECHR protects the expression of ideas "that offend, shock or disturb the State or any sector of the population" (*Handyside v UK*, 1976).

The Court has previously held that freedom to take part in a peaceful assembly cannot be restricted so long as the person concerned does not himself or herself commit a 'reprehensible act' (*Ezelin v France*, 1991). In *Fáber*, therefore, the Court had to determine whether the display of a provocative 'historical' flag (the Árpád-striped flag associated with the fascist 1944/45 Arrow Cross regime in Hungary) by a silent lone demonstrator, near a demonstration by the Hungarian Socialist Party, and at the site on the Danube embankment where large numbers of Jews had been killed during the Arrow Cross regime, constituted a 'reprehensible act'.

The arguments raised by the applicants are well-rehearsed in Northern Ireland – essentially, that the flag was a historical symbol and that there was no law that forbade its display. Drawing on its previous judgment in the 'Red Star' case of *Vajnai v Hungary*, 2008, the Court proceeded by arguing that given such multiple meanings ('both as a historical symbol and as a symbol reminiscent of the Arrow Cross regime'), 'it is only by a careful examination of the *context* in which offending expressions appear that one can draw a meaningful distinction between shocking and offensive expression which is protected ... and that which forfeits its right to tolerance in a democratic society'.

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While the flag was viewed as offensive, shocking, and even ‘fascist’, the European Court held that its “mere display” was not capable of disturbing public order as it was “neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons.” Finding a violation of Article 10 ECHR (read in the light of Article 11), the Court continued: “Ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need for the purposes of Article 10(2), especially in view of the fact that the flag in question has never been outlawed.” Nonetheless, the Court also acknowledged that restrictions might legitimately be imposed on demonstrations “to be held on a specific day of remembrance – which are offensive to the memory of the victims of totalitarianism who perished at a given site.” The Court stated:

“The need to protect the rights to honour of the murdered and the piety rights of their relatives may necessitate an interference with the right to freedom of expression, and it might be legitimate when the particular place and time of the otherwise protected expression unequivocally changes the meaning of a certain display.”

While one might critique the *Fáber* judgment by asking what location, if not the banks of the Danube, would unequivocally change the meaning of an Arrow Cross flag and thus give rise to a pressing social need to restrict its display, the judgment clearly establishes that a high threshold (namely, that of ‘intimidation’) must be overcome in order to justify restrictions on symbolic displays.

Does *Fáber* entail a policy shift?

The emphasis on intimidation in *Fáber* arguably nudges the ECHR jurisprudence closer to the level of protection afforded in the US to provocative speech. In this regard, it is worth recalling that the 1996-97 *Independent Review of Parades and Marches* (The North Review) received submissions from (amongst others) the Community Relations Council (CRC) and the then Standing Advisory Commission on Human Rights (SACHR) in relation to the policy approach which they believed ought to underpin the regulation of parades. Both bodies recognised the merits of a US model where freedom of expression is accorded the highest of priorities. Ultimately, though, the CRC felt that such an approach was “unrealistic at this moment in the history of Northern Ireland, given the on-going tensions.” Similarly, SACHR argued that: “In an ideal world, SACHR would support the United States approach which places a very high priority on the rights of peaceful assembly and free expression. The Commission considers, however that in a society divided in the way that Northern Ireland is, such an approach is not helpful and fails to balance the competing rights at stake.” More than fifteen years after the establishment of the Parades Commission, the Court’s judgment in *Fáber* requires re-evaluation – or at least, clarification – of the threshold currently being applied.

Addressing the UN Special Rapporteur’s critique

The *Fáber* judgment is also significant for another reason. It emphasizes the need to closely relate the factual specifics of particular cases to the rights arguments relied upon. On this basis, the Parades Commission should ask (and explain in its determinations) whether particular symbolic displays, aside from those already legally proscribed, either (1) intimidate others, (2) incite others to violence by instilling hatred against identifiable persons, or (3) are displayed at a particular place and time such as to unequivocally change the meaning of the display and so engage the rights of, for example, relatives of victims of political violence. Such an approach would go a long way to addressing the point made by the UN Special Rapporteur on Freedom of Peaceful Assembly and Association, Maina Kiai, following his visit to Northern Ireland in January. While supportive of the institution itself, the Special Rapporteur suggested that the Parades Commission ‘should provide better and clearer reasons for its decisions so that their rationale can be understood.’ Where relevant, therefore, the factors enumerated above should be addressed and weighted in the Commission’s explanation of its decisions. Doing so would help give meaning to otherwise abstract and legalistic human rights standards – those that the Commission routinely lists as being potentially relevant to its decisions, but rarely explains why they are (or are not) engaged in the specific circumstances.

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Flags, towards the Bill of Rights?

For those seeking a framework to resolve the present issues over Councils flying the Union Flag it may be worth recalling that a binding framework, based on an ‘equality of treatment’ duty on public authorities, had been intended within the long overdue Northern Ireland Bill of Rights. It is also worth recalling that national flags have been a heavily contested issue for all of Northern Ireland’s existence; indeed the events surrounding the RUC seizure of a Tricolour from the Lower Falls offices of the Republican Party in the mid-1960s against the backdrop of pressure from loyalist protests are often seen as a significant precursor to the “Troubles.” It is also worth recalling how the law has regulated flags in this jurisdiction as a reminder of how we got to the point whereby a Bill of Rights, provided for by the Belfast/Good Friday Agreement, was meant to, at least, provide a substantive legal framework within which the issue of public authorities flying flags would be addressed. The history is as follows.

The Stormont Parliament legislated to heavily regulate the display of flags by private individuals. In 1933 a regulation was issued under the Civil Authorities (Special Powers) Act which made it an offence to possess or display the Tricolour in a public place. Article 7 of the Irish Constitution of 1937 states that the national flag “is the tricolour of green, white and orange.” However, not everyone embraced the vision of the flags design to include both traditions and mutual respect between them – indeed Stormont notably referred to the flag under the special powers regulation as one consisting of three “stripes coloured respectively green, white and yellow.” The main context in which the regulation was enforced was RUC action to forcibly seize flags being carried on nationalist marches. The regulation did not enjoy plain sailing: it was successfully challenged on a technicality by an aggrieved nationalist MP in 1951 (presumably on the grounds that his flag was not yellow) and the Stormont Parliament, which had no legislative competence in international relations, ran into difficulties over banning the flag of another state which had been now been formally recognised by the UK.

In addition to fresh public order legislation, Stormont sought to resolve this through the Flags and Emblems (Display) Act (Northern Ireland) 1954, which made no attempt to describe the tricolour directly, but rather empowered the RUC to seize any “provocative emblem” (which explicitly included any flag other than the Union Flag) likely to cause a breach of the peace. The legislation also made it an offence to take down a Union Flag displayed anywhere other than your own property. It remained on the statute books until 1987. The 1998 Agreement guaranteed the incorporation of the ECHR, whose Article 10 provisions to protect freedom of expression, cover the display of flags and would make bans like the above untenable today, albeit where proportionate Article 10 rights can be restricted on grounds including public order and protecting the rights of others. Beyond this and planning law which, in theory, should prevent flags being hung on lampposts, the law today does not directly regulate the display of flags. There is, however, an interagency protocol which lists four reasons why flags are often displayed: the ‘celebration of cultural identity’, ‘marking of a festive event’, ‘sectarianism or intimidation’ or ‘marking out territory’, the latter two categories of which could engage the exemptions permitted under ECHR Article 10. Notably also in the context of employers displaying flags, including public authorities, limitations to prevent displays which could constitute sectarian harassment in the workplace are also now provided for under fair employment legislation.

Given the political control it enjoyed the Stormont Parliament appears not to have legislated to provide that public authorities fly the union flag (or indeed its own Ulster Banner which enjoyed official status from 1953 until the Northern Ireland Constitution Act 1973 ended the Parliament.) However the Union Flag had been flown all year by custom and practice. By the 1990’s however there was discussion on a framework to provide ‘parity of esteem’ for the two main communities. The origins of the ‘equality of treatment’ provision on national identity which were included in the Belfast/Good Friday Agreement appear to be in a review of the equality law framework for tackling religious and political discrimination in 1990 by the Human Rights Commission’s predecessor body, the Standing Advisory Commission on Human Rights (SACHR). This

Commission recommended that a duty be placed on public authorities “to ensure that their functions are carried out in such a way to ensure that members of both main sections of the community are granted equality of treatment and esteem.” SACHR also singled out the treatment of the Irish language as a ‘touchstone’ measure of whether the existence of two traditions was being treated seriously. In 1995 the Joint Declaration between the British and Irish Governments committed to principles that institutions should afford both communities satisfactory ‘political and symbolic expression’ and that future arrangements “...should respect the full and equal legitimacy and worth of the identity, sense of allegiance, aspiration and ethos of both the unionist and nationalist communities.” In the 1998 Agreement one of the rights the Human Rights Commission was to specifically advise on was “the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland”. The Human Rights Commission in its 2008 advice to Government recommended the incorporation of such a right in the Bill of Rights, adding a limitation clause in recognition of the rights of minority ethnic groups beyond the two communities. The controversial NIO response to the Commission’s advice is more ambiguous. On the one hand the incorporation of an ‘equality of treatment for identity and ethos’ provision is one of the few rights Government then appeared to then be willing to consider in a Bill of Rights. On the other there are also indications that the NIO by then thought the separate general ‘equality of opportunity’ duties on public authorities had gone far enough.

The ‘equality of treatment’ provisions envisaged in the Agreement for a Bill of Rights did not explicitly deal with flags, but would have at least provided a legal framework through which such issues were to be dealt with, along with other manifestations of identity. In its absence, the implications of the provisions in the Agreement for flags were tested at an early stage when nationalist ministers in the new Northern Ireland Assembly declined to fly the Union Flag over their departments. This led to the UK government introducing the Flags (Northern Ireland) Order 2000 and its subsequent regulations which obliged all government departments to fly the Union Flag on the ‘designated days’ it was flown on government buildings in Great Britain but not to fly it at any other time. The subsequent reforms to the police also led to the Police Emblems and Flags Regulations (Northern Ireland) 2002 which largely prevents the PSNI from flying any flag other than its own service flag. Differing interpretations of the implications of the Agreement emerged in debates on the flags regulations. Nationalists emphasised the Agreement’s provisions for equality of treatment and the ‘rigorous impartiality’ of the state arguing this could provide for no flags or two flags to represent both national identities (as in Scotland or Catalonia). Unionists emphasised the Agreement kept Northern Ireland within the UK and hence argued only the Union Flag should be flown to indicate the constitutional position of Northern Ireland. A Judicial Review of the regulations held they were compatible with the Agreement, in part as Government’s stated intention related to ‘achieving mutual respect for differing traditions by limiting the use of the flag.’ The regulations never extended to local Councils although some did ultimately adopt the approach of designated days, including, in December 2012, Belfast City Council.

Back to 2013 it is clear what the path that led to the framework provided for in the Agreement was. It also is worth noting also that in the context of shifting demographics the Bill of Rights provision was also framed to provide a long term framework regardless of which of the ‘two main communities’ is in the minority in the overall jurisdiction or in local government districts. The approach also does not necessarily mean a straight two flags, one flag or no flags debate, given that there are a broad range of cultural identity issues which the framework could deal with.

Civil Liberties Diary - February

1 February

Sir Jeremy Heywood, cabinet secretary to David Cameron, described the murder of Pat Finucane to be worse than anything alleged in Iraq or Afghanistan. He also suggested that the government should hold a full inquiry, as a previous administration had agreed to do.

4 February

The prison population of Northern Ireland is at its highest in thirty years, after the arrests of suspected loyalist rioters, charged with a range of public order offences. Already at 1,815, the figure is expected to increase in coming weeks. Prior to the early release of prisoners under the Agreement, there was an average of 1,630 prisoners in Northern Ireland prisons.

5 February

Belfast City Council voted to erect dual Irish/English language signs on four Belfast streets. To consider the motion, at least two-thirds of the residents on the street must be in favour of the sign. There was a large police presence as the vote took place but few protestors turned up.

After the Assembly voted against extending the National Crime Agency (NCA) to Northern Ireland disagreements remain between the Executive parties. As proposed, the NCA will help target criminals involved in human trafficking, drug smuggling, fuel fraud and cyber crime.

6 February

After a series of attacks, police have introduced special patrols around Catholic churches in Co. Antrim. At least four churches have been targeted with pipe bombs and bomb hoaxes.

8 February

The Policing Board has ordered a human rights review of recent public order incidents, including how they have handed the flag rioting. This review has been criticized as a 'waste of money' by DUP politicians, saying that officers are being 'strangled' by having to meet human rights commitments.

13 February

A £15 million computer system aimed at improving efficiency in paying supply bills and wages in the NHS has large technical and operational issues. These problems have resulted in delays of vital supplies for hospital wards.

The worst-off students in Northern Ireland will retain their £30 per week allowance. The scheme is intended to encourage students from low-income backgrounds to stay in school beyond age 16. Children from households with income of £20,500 or less will remain eligible for the allowance.

14 February

Department of Education figures show that more than 1,200 teachers have taken redundancy packages over the past three years. This number, approximately 7% of the work force, has amounted to more than one teacher leaving every day. This mass redundancy has led to concerns about rising class sizes and larger workloads placed on teachers.

18 February

Assistant Chief Constable Will Kerr has warned of a volatile marching season this year. Tensions, at an all-time high after months of loyalist flag protests, have led the police to believe that this will be an extremely difficult parading season.

21 February

A new victims' initiative, Pathways to Justice, has been launched to offer legal advice for those who may have a civil case they could take to court

over the murder of their relatives. The project will also assist family members in finding out how their loved one died, offering support to those affected and acting as a voice for the victims more generally.

22 February

A state inquiry into historical institutional child abuse in Northern Ireland will initially investigate 35 residential facilities. Of the 35 facilities, 15 are state-run children's homes, 13 institutions run by Catholic Church orders, 4 training schools or reformatories and 3 institutions run by Protestant denominations. The inquiry will not be confined to investigating allegations of sexual and physical abuse but will also examine other types of behaviour that can amount to abuse.

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Just News

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