Just News

CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Human Rights in Northern Ireland October 2013

Rollback: Whatever happened to objective need?

This month CAJ called on the Equality Commission to use its powers of investigation to ascertain if OFMDFM had breached its Equality Scheme. This follows reports on the investigative journalist website *The Detail* that the reasons for delays in paying out monies under the Social Investments Fund (SIF) were opposition to funding allocation on the basis of objective need. It was reported that the delays were due to 'tensions' that nationalist areas may receive more monies due to the more widespread levels of deprivation borne out from official statistics.

If this turns out to be the case it would reflect a broader worrying pattern of seeking to move away from the equalities concept of objective need which benefits the most disadvantaged in both main communities, as well as persons who are in neither. The argument has even been levied, at times on good relations grounds, that there should be a 'parity' approach to allocating anti-poverty funding or even public services to the two main communities on a 50:50 basis. Where inequality remains, such an approach would be incompatible with legislative obligations to promote equality of opportunity, and would perpetuate existing inequalities. It may also constitute discrimination in so far as it involves, across protected equality grounds, the removal of resources from those most in need to those in lesser need.

'Objective need' was the framework provided by the peace settlement. The Belfast / Good Friday Agreement committed to measures to combat unemployment on the basis of objective need. The St Andrews Agreement introduced a statutory duty on the Northern Ireland Executive (s28E NI Act 1998 as amended) to adopt a strategy to tackle poverty, social exclusion and patterns of deprivation on the basis of objective need. Recent enquiries by the Equality Coalition however have revealed that no such anti-poverty strategy *per se* has actually been adopted. OFMDFM in response has argued that the whole Programme for Government, and particular priority II which encompasses SIF and even the Economic Strategy, meet the legislative requirement for an anti-poverty strategy. This seems somewhat unlikely, but does prompt the question as to whether all policies under priority II will be based on objective need.

Housing is the policy field which has suffered most digression of late from objective need. The recent Participation and Practice of Rights (PPR) Equality Can't Wait report cites DSD's 'fundamental review of the social housing allocations policy'. The terms of reference for this Report were to consider opening up the social housing waiting list for persons with 'no demonstrated housing need' as well as redefining 'objective need' itself. The DSD 'housing-led approach to regeneration policy' also proposed moving away from objective need and proposed characteristics for choosing pilot areas which remarkably (with clear adverse impacts in the context of a divided society) included areas which have a 'decline in housing demand' and are in 'proximity' to places which actually have housing need. Such approaches mark a dangerous digression from the principles of objective need and equality of opportunity which should worry us all.

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Can the PSNI be independent?

Does the PSNI have the "Article 2" level of independence to investigate potentially unlawful killings where agents of the state may have been involved? This was the issue explored in a recent submission by CAJ to the Policing Board Historical Enquiries Team (HET) Working Group. The argument is summarised here but CAJ first noted that nothing in the submission *"should be taken to reflect negatively on the major strides taken in the accountability of policing here and the many sided attempts the PSNI has made to put human rights standards at the heart of its practice."*

The Jordan case outlined the need for independence in investigations saying that it was *"necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events...This means not only a lack of hierarchical or institutional connection but also a practical independence..."*

The question of whether the RUC is independent from the RUC is, up to a point, academic. The law requires any case in which the conduct of a police officer may have resulted in a death to be referred to the Police Ombudsman for investigation. There are, unfortunately, many cases where potential police breaches of law are only part of an investigation – namley cases in which police collusion has been alleged. The HET is not deemed an appropriate agency for investigating police officers but is permitted to investigate agents (informants) who were operating for the police and other state agencies. In historic cases, this has resulted in a "parallel" process where aspects of the same case have been dealt with by both OPONI and HET. The PSNI has refused on national security grounds to tell CAJ how many of these cases there have been.

There is one European Court case, *Breknell*, which stated that the Court was *"satisfied that the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources."* That one sentence was not elaborated on by the court and may be regarded as *obiter* in that the finding was not necessary, on the facts of the case, for the Court's conclusion. It has however, been officially quoted to endorse the view that the PSNI is independent of the RUC. However, there are other reasons why CAJ does not believe that one sentence can be interpreted as declaring the PSNI - all of it in all circumstances - as independent when it comes to investigating the RUC.

First, the standard refers to "persons," not institutions, so the PSNI as an institution cannot be inherently Article 2 compliant. Whether individual investigators or investigation managers are independent must be decided upon on a case by case basis by reference to individual biographies or perhaps individual opinions or behaviours.

Second, the Brecknell statement refers only to "institutional" distinctness, and it is not clear if that is supposed to include "hierarchical" distinctness or, indeed, what it actually means and whether it is correct. There is a good deal of evidence that contradicts the idea of institutional independence of the PSNI from the RUC. The legislation establishing the PSNI says it "incorporates" the RUC. Recently, the HMIC Report into HET spent a great deal of time examining whether the HET was independent from the PSNI – if the latter was anyway independent to the Article 2 standard, why would this matter? There is another aspect of institutional continuity between the RUC and the PSNI and that is the aspect of the latter taking responsibility for the former's actions. This was clearly seen in the Chief Constable's controversial response to the OPONI report on the McGurk's Bar bombing. In this the Chief Constable seemed not to accept the criticisms of the RUC commenting that *"other reports had reached different conclusions."* In general terms, the Chief Constable is regularly held legally responsible for the past actions of the RUC.

Third, it makes no reference to "practical independence" and CAJ believe that elements of the contemporary structure, personnel and behaviour of the PSNI vitiate the idea of "practical independence" from the RUC. The "rehiring scandal" showed that many former RUC Special Branch officers had been rehired to carry out sensitive roles. The HMIC report made it clear that "Staff in the PSNI intelligence branch, some of whom are former RUC special branch officers, are the gatekeepers for intelligence being passed to the HET..." and went on to say *"For this reason, it would be preferable to institute some independent procedure for guaranteeing that*

all relevant intelligence in every case is made available for the purposes of review, to ensure compliance with the Article 2 standard." So the HMIC is saying that, without this independent element, the PSNI Intelligence Branch, which provides evidence for all investigative elements, is not Article 2 compliant. The reality is that the independence of C3 intelligence branch, which is central to all historic cases, perhaps most particularly collusion cases, is fatally flawed by the involvement of former RUC Special Branch officers.

Evidence has also come to light that the PSNI personnel involved in trawling through the Stalker-Sampson archives in order to provide disclosure of material to inquests are former Special Branch officers. The Chief Coroner has questioned the Chief Constable's decision to use four ex-Special Branch Officers and one ex-RUC Intelligence Branch Officer to decide what information is disclosed to the inquests. PSNI lawyers responded negatively: *"It is not accepted that the Senior Coroner has power to direct inquiries to the Chief Constable in respect of his staff or the contractors he engages to assist in the discharge of his statutory functions."*

These investigations are not into insignificant matters but the alleged "shoot to kill" policies and collusion in the early eighties which resulted in the deaths of six young men. John Stalker is reported as saying: *"The Special Branch targeted the suspected terrorists, they briefed the officers, and after the shootings they removed the men, cars and guns for a private de-briefing before CID officers were allowed any access to these crucial matters."* Of course, the PSNI is not the investigating organisation here, it is the coronial process that is hoping to get to the bottom of hugely serious allegations, but it is the PSNI which is controlling the flow of information and through a structured process that could not begin to meet the Article 2 standard of independence.

CAJ takes the view that this evidence is sufficient to demonstrate beyond doubt that the PSNI, as presently constituted and staffed, not only lacks the practical independence necessary to investigate collusion cases but, to an extent at least, is knowingly compromising the independence of the inquest process.
It might be argued that, whatever about the RUC, the PSNI has no institutional connection with the British Army and therefore is competent to carry out investigations into killings in which soldiers may be implicated to Article 2 standards. That appears to be the view of the PSNI in that it is purporting to investigate prosecutorial possibilities in the Bloody Sunday case and has argued that it has an obligation to carry out Article 2 investigations into the 13 "RMP (Army) cases" which HET was criticised for in spite of opposition from the families involved.

There are two main objections to that position. First, during the conflict, there was extensive cooperation as well as some rivalry between state security agencies. To some extent at least members of the different security forces saw themselves as allies in a war against terrorism. If, as CAJ have shown, the PSNI is not independent from the RUC and ex-RUC Special Branch officers occupy strategic roles within it, it is hard to see how it could claim to be distinct from any of the security forces that cooperated so closely together and under a common direction.

Second, for the past eight years the PSNI has run a unit, the HET, which operated a policy in relation to cases involving the British Army which unlawfully and contrary to Article 2 distinguished between state and other perpetrators. Is it possible to have faith in the independence of a police service when it tolerated, and presumably supported, this unlawful policy which appeared to give special consideration to British soldiers? In this respect, in so far as the HMIC Report utterly condemned the policies of the HET they were also condemning the policies of the PSNI, or at least its Chief Constable.

The CAJ paper sought to bring together law and evidence relating to the independence of the PSNI in Article 2 terms if called upon to investigate killings where state agents may have been involved. CAJ's conclusion was that it does not have the requisite level of independence from any of the state security forces that were engaged in the conflict.

This conclusion points to the need, already argued by CAJ, for an independent, Article 2 compliant agency to investigate all cases of unresolved deaths arising out of the conflict.

Consortium calls for a Bill of Rights to express basic common values

This is an edited summary of the Human Rights Consortium's submission to the Haass All-Party Talks.

The Human Rights Consortium is a coalition of almost 200 civil society organisations that reflect the sectoral, geographic and religious diversity of Northern Ireland and provides a platform for these groups to work together to ensure a human rights compliant society and in particular a Bill of Rights for Northern Ireland.

Provision for a Bill of Rights was made in the 1998 Belfast Agreement and further commitments to deliver this element of the Agreement were made by the British Government in 2003 and 2007. The consociational model of power sharing envisaged in the Belfast Agreement, based on the D'Hondt system, was to be underpinned by a robust human rights and equality framework. Central to this vision was the concept of a Bill of Rights as one of the main checks and balances in the new Stormont system of governance. The Bill of Rights was included in the listed Strand One safeguards and legislative protections as a means of ensuring that decisions and legislation emerging from the new institutions were in accordance with its provisions and those of the ECHR.

The Bill of Rights could therefore have provided additional negative safeguards to ensure that no action was taken by the assembly to the detriment of either community while also setting a system of common values that elected representatives were duty bound to see protected and implemented. In the absence of agreement among our Executive on so many issues at present, the concept of a set of basic values that underpins and drives all of the Assembly and Executives work becomes more and more logical and the insights of the initial drafters of the Agreement clearer.

These common values (supplementary rights) were to reflect the particular circumstances of Northern Ireland and draw upon international experience. If we interpret *'particular circumstances'* as the issues which have historically divided or created tensions and inequalities between communities in Northern Ireland and *'international experience'* as including existing international and regional human rights protections, then a Bill of Rights could act as a mechanism for creating standards on those contentious issues that were rooted in international law, applied equally to everyone, were removed from local party politics and were representative of standards that could not be otherwise agreed between political parties in Northern Ireland.

How this applies to the current talks

The current talks process is rooted in the failure of our political process to be able to effectively deal with long running contentious issues in Northern Ireland. This failure is reflected in the talks through the issues of parades, flags, emblems and dealing with the past, but in reality it extends to many elements of governance in Northern Ireland. This failure is not in the practical day to day operation of our new institutions. It would be unfair and inaccurate to say that the current Executive is not technically functional or that the day to day business of government in Northern Ireland is not being carried out by a locally elected power sharing government. We are also currently enjoying the longest period of devolved government since the Belfast Agreement established the Stormont institutions with its Executive Ministries and Departments.

Rather, the failure is an inability to develop coherence as a coalition of executive parties on the contested or divisive issues that continue to hold back political progress in Northern Ireland. Our political system is based on the concept of power sharing between five very different political parties; different in background, political ideology, religion, social outlook, national identity, culture and much more. These differences continue to be reinforced by their respective constituent communities, who in many instances have become

deeply divided as an outcome of the conflict. Divisions are repeatedly emphasised and entrenched every time a contentious issue, anniversary or event arises and there is no agreed position or shared perspective.

Yet despite these difficulties, there is a recurring political and public expectation that those very same Executive Parties will be able to reach an agreed approach to Government and ensure the coherent administration of public life in Northern Ireland. Despite the work of local political parties to make the Stormont system more effective, how can this be a realistic expectation, without the outcome being disagreement or weak compromises? Asking five political parties to enter government, with nothing more than their political resolve as the basis for ensuring successful agreement and effectiveness, as part of relatively new institutions in a deeply divided, post conflict environment would seem at face value to be a recipe for gridlock at the very best.

It would be unreasonable to suggest that a Bill of Rights or any rights based approach might be a complete solution to the problems of forming a stable government out of disparate parties. What a Bill of Rights may do however is offer some form of agreed criteria for approaching difficult, contested legacy issues – those particular circumstances. It might also establish a common set of values/rights that parties could agree on collectively as priorities for protection and implementation. These values could be focused on addressing local circumstances, but informed by international practice – therefore transcending the local by using the international. This would allow local politicians to refer difficult issues to a process that goes beyond the normal community based responses, into a wider more nuanced framework that is reflective of the complexity of the problems being faced.

Clarity on Human Rights in NI

Very few rights exist in absolute terms and instead have to be balanced against the rights of others. Developing the awareness of this more complex understanding of rights in Northern Ireland could help address the unrealistic expectations that rights claimants have made around flags, parading and counter protests. Human Rights has been the language of choice on both sides of recent debates, but often those same rights claims have been expressed in a manner that suggests the exclusion of all other rights considerations, when in fact a balancing of competing rights is a more accurate reflection of the practical application of those human rights standards. Through establishing a Bill of Rights for Northern Ireland there is potential to enhance local understanding of existing international and regional human rights standards, the complexity of their practical application and the consideration and respect that individuals and communities should display for the rights of others.

In conclusion, fifteen years may have passed since the necessity of a Bill of Rights for Northern Ireland was finally outlined in our Peace Agreement but the passing of time has never diminished the necessity and urgency of implementing essential human rights protections. The overwhelming majority of people on both sides of the community in Northern Ireland have made their support for a Bill of Rights consistently and indisputably clear. The current all-Party talks process represents the latest opportunity to fulfill the commitment made to the people of Northern Ireland fifteen years ago. Our system of governance is in urgent need of a set of values that enables a more effective and cohesive form of power sharing. We therefore recommend and hope that the Panel of Parties participants, and the chairs of that process, make recommendations on delivering a Bill of Rights for Northern Ireland and the application of a rights based decision making framework to contested issues a top priority in your deliberations and report.

For further information on the Human rights Consortium's work see ***www.billofrightsni.org***.

Time to define 'sectarianism'

The 'Together: Building a United Community' Strategy (nee Shared Future and CSI) envisages legislation which will define 'sectarianism' in Northern Ireland in law, albeit this is caveated to appropriate consensus as to the wording of the definition. CAJ, in our submission to Haass (s418), agreed this was an important move given the present context of the term being regularly used by public authorities without official definition, or with restrictive or vague definitions which tend to defer to limited interpersonal manifestations of sectarianism (e.g. hate crimes) rather than defining sectarianism *per se*.

Take the PSNI definition of a sectarian incident, focusing on 'bigoted dislike or hatred' and the definition for the Together strategy itself focusing on 'threatening, abusive or insulting' actions on grounds of religious belief/political opinion. An attempt to include a definition in s37 of the Justice (Northern Ireland) Act 2011 (which prohibits chanting which is of a 'sectarian' nature at major sporting events) was scuppered in the Assembly. CAJ believes it is not sustainable to argue 'sectarianism' here is a unique phenomena, beyond definition and the starting point as ever is international instruments.

As referenced in our submission the primary treaty bodies dealing with anti-racism at United Nations and Council of Europe level (to which the UK is a party) have both stated that sectarianism in Northern Ireland should be treated as a specific form of racism. The UN Committee on the Elimination of all Forms of Racial Discrimination stated its position following representations from the Northern Ireland Human Rights Commission who had raised concerns that "policy presenting sectarianism as a concept entirely separate from racism problematically locates the phenomenon outside the well-developed discourse of commitments, analysis and practice reflected in international human rights law" and hence was not harnessing this framework to tackle sectarianism. The Commission has also stated "This does not mean that sectarianism should not continue to be individually named and singled out just as other particular forms of racism are, for example, anti-Semitism or Islamophobia" and the UN has emphasised that in tackling sectarianism care should be taken not to neglect tackling other forms of racism experienced by "vulnerable ethnic minority groups in Northern Ireland." It follows that it is both quite clear what sectarianism is,and that its definition should draw on such international standards. The benefit of this is that such standards also provide a tested framework in relation to address sectarianism.The UN International Convention on the Elimination of all forms of Racial Discrimination (ICERD) does not provide a definition of racism *per se* but defines 'racial discrimination'. Article 1 of the 1978 UN declaration on Race and Racial Prejudice does provide a lengthy definition of racism as: *Any theory which involves the claim that racial or ethnic groups are inherently superior or inferior, thus implying that some would be entitled to dominate or eliminate others, presumed to be inferior, or which bases value judgments on racial differentiation, has no scientific foundation and is contrary to the moral and ethical principles of humanity.*

It elaborates: *Racism includes racist ideologies, prejudiced attitudes, discriminatory behaviour, structural arrangements and institutionalized practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practice it, divides nations internally, impedes international co-operation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently, seriously disturbs international peace and security.*
The Council of Europe specialist body in the field, the European Commission Against Racism and Intolerance (ECRI) in its General Recommendation 7 on key elements of legislation against racism and racial discrimination, defines racism as follows: *"racism" shall mean the belief that a ground such as 'race', colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.*
As stated in our submission this definition could be drawn upon and tailored to define sectarianism in Northern Ireland for example as follows: *"Sectarianism" shall mean the belief that a ground such as religion, political opinion, language, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.*

Find the women

Review of 'Gender Politics in Transitional Justice' by Catherine O'Rourke*

Ellen Johnson Sirleaf, President of Liberia, pointed out that *'Women's contribution to the search for durable peace is remarkable, unparalleled – but most often overlooked'.*
In a closely argued book, Catherine O'Rourke tells us why. From the outset she poses the questions – What role do transitional justice processes play in determining outcomes for women in transitions from political violence? What is the impact of transitional justice processes on the human rights of women in states emerging from political violence? To what extent does international law determine the outcomes for women of domestic transitional justice processes? Is the role of women's movements and local gender politics determinative of how women's human rights fare in domestic processes of transitional justice? To this list, O'Rourke adds the question as to what strategies can effectively be pursued by feminist advocates, practitioners and women's movements to deliver progressive human rights outcomes for women in states undergoing domestic processes of transitional justice?

The study examines three case studies – Colombia, Chile and Northern Ireland – and despite very different circumstances notes how each of the three cases involved self-reliant states where the processes of transition were largely domestically driven. She does make the point, however, that in situations where international actors play a more significant role that the impact of transnational women's organisations can be more significant in challenging norms and proposing alternatives. Whether self-reliant, or more porous to external influences, O'Rourke presents a number of challenges to transitional justice processes where women can be typecast as secondary victims as compared to male political actors; where transitional justice rests on a highly gendered understanding of 'public' political violence as against an understanding of private harm; and where there can be disconnections between Human Rights advocates and the women's movement, with an emphasis on civil and political rights violations of largely male actors, to the general exclusion of women's rights and perspectives.

The book considers Justice, Truth, Reparations and Institutional Reform. In the current context of the Haass Commission O'Rourke argues a strong case against the 'gendered division of labour in dealing with the past in Northern Ireland'. She asserts – *'Through their involvement in the women's and victims' sector, women deal with the (private) material consequences of the conflict... deemed to be "apolitical"; men deal with the "political" consequences of the conflict (truth, prosecutions, public enquiries, police investigations). This gendered division of labour reinforces perceptions that truth constitutes a site of very limited potential feminist gains'.*
In short, the shadow of the centrality of armed patriarchy continues to dominate both in terms of narrative and influence, with the male presence being reinforced where the first objective of transitional justice is seen as facilitating the transition away from armed conflict and gross violations of human rights. Examples of feminist action to counter this dynamic are presented from Colombia and Chile, with only a limited range of initiatives being available from Northern Ireland.

O'Rourke concludes by imagining a feminist law of transitional justice. This is premised on the question – Is there a way for changes to legal norms and institutions in transitional justice that will help move away from a gendered and exclusionary focus on 'most serious harms' in order to account for the web of public and private harms that occur in violent and repressive societies? The book lays out how this can be achieved within the areas of Justice, Truth, Reparations and Institutional Reform. The resulting scenario ranges very far from the view of the old Republican activist who once told me that the priority was to build the house (i.e. achieve an united Ireland) before we can furnish it (i.e. talk about women's rights). O'Rourke provides an important challenge to both practitioners and theorists of peacemaking, peacebuilding and transitional justice.

Avila Kilmurray

**Gender Politics in Transitional Justice, Catherine O'Rourke (a GlassHouse book – Routledge Taylor & Francis Group,2013)*

Civil Liberties Diary - September

6 September

Lord Chief Justice Sir Declan Morgan has stated that individuals who do not qualify for publicly-funded legal aid but are on modest incomes and are selfrepresenting in court, with no formal legal advice. He warned that many of these people have never been in court before and may not do themselves justice. He spoke out against recommendations of cuts to civil legal aid.

12 September

UN Special Rapporteur on Housing Raquel Rolnik, has warned that social-housing tenants will have nowhere to go if the bedroom tax is introduced. She said that residents are concerned about having enough money for food if they are paying higher rents.

16 September

Education Minister John O'Dowd has announced the overhaul of assessment methods in schools, which were previously boycotted and criticised as unmanageable and unreliable by teachers. He has taken feedback from schools, teachers and unions and promised to make changes.

18 September

US special envoy Richard Haass has agreed in his mandate to focus on the issues of parades, flags and the past. He is in Belfast for three and a half months to create a consensus document dealing with these three issues.

23 September

A bill will be introduced to the Assembly which, if passed, will prosecute men who purchase sex rather than those who sell it.

26 September

A report by the OFMDFM found that one in five year-nine pupils has bullied another student and that almost a third of year-nine pupils were bullied in the two months preceding the report.

An independent inquiry is to be held into child sexual exploitation in Northern Ireland. 22 suspected victims between the ages of 13 and 18 have been identified and more than 30 people arrested. Most of the children targeted lived in residential care homes. The proposed remit of the inquiry includes 'examining the nature and extent of child sexual exploitation in Northern Ireland'.

27 September

An inspection of the Historical Enquiry Team's independent group of detectives, has raised serious concerns about the operation of the unit. As a result, the HET caseload and the speed with which cases are investigated will be reduced.

Compiled by Elizabeth Super from various newspapers

CAJ's AGM is taking place on Thursday, 28th November 2013.

All members welcome

Just News

Just News welcomes readers' news, views and comments.
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