"THE IMPACT OF THE HUMAN RIGHTS ACT IN NORTHERN IRELAND"

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Reflections on the Human Rights Act (Civil & Political)

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We are a society in transition from Conflict to peace. This is a peace *process*, a movement toward peace and away from violence, and it is a process through which is woven a narrative of human rights.

In our post-Conflict society of transitional justice, ours is a state of exception in that its violent past determines its present and its future and the shadow of its past falls long.

- Our criminal justice system retains judge only courts for particular offences.
- Our judicial system retains the scars of Conflict when lawyers and judges were targets in the Conflict.
- The urban landscape and infrastructure, the peace walls and murals, reflect the past and the present, the concrete bunkered police stations, the water cannon, the armoured police vehicles and so forth.

And crucially from the perspective of a rights discourse, generally ours is a society of widespread economic and political disenfranchisement. These are aspects of the North of Ireland that politicians in Westminster are loathe to be reminded of. In Brussels and Luxembourg, the North of Ireland may appear at the margins, geographically, economically and politically but in Strasbourg, the North of Ireland has remained solidly at the forefront of much jurisprudential thinking regarding the responsibilities of individual member states and individual human rights.

Lawyers here, in addition to being under attack during the Conflict, were at the forefront in using the ECHR on behalf of our clients and fearless in taking cases against the British government to the ECtHR in Strasbourg resulting in landmark judgments including *McCann and Others v UK 1995, Jordan v UK, Kelly and Others v UK, McKerr and Others, v UK and Shanaghan v UK in 2001, McShane v UK in 2002 and Finucane v UK in 2003*.[1]

Therefore, in a sense, even during the Conflict, and most certainly post incorporation, the ECHR was an element of the narrative of rights discourse. Having being a signatory to the ECHR in 1950, Britain did not incorporate the Convention into domestic law through legislation until 2000 through the

[1] McCann and Others v UK (Application no. 18984/91) 27 September 1995
Hugh Jordan v. the United Kingdom (application number 24746/94) [2001] ECHR 327
Kelly & Others v. the United Kingdom (application number 30054/96 [2001] ECHR 328
McKerr v. the United Kingdom (application number 28883/95) [2001] ECHR 329
Shanaghan v the United Kingdom (application number 37715/97) [2001] ECHR 330
McShane v. United Kingdom (application number 43290/98) [2002] ECHR 469
Finucane v. the United Kingdom (application no. 29178/95) [2003] ECHR 328

Human Rights Act 1998, fulfilling a Labour Party manifesto pledge having been in the political hinterland since 1979.

With the advent of a Labour administration at Westminster proclaiming a commitment to human rights and peace in Northern Ireland it was unsurprising that human rights would become part of the Good Friday Agreement 1998.

The Agreement is express in its commitment to human rights. For example:

> "The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all."
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> "There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including … (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission"
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> "The participants believe it essential that policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices, and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms."[2]

The ECHR was regarded as so important that the Agreement also committed the Irish Government to incorporate the ECHR under the "equivalence" provisions.[3]

The Agreement, in addition to being overwhelmingly approved by referendum, in Ireland North and South, was also incorporated as a treaty between the UK and Ireland and lodged with the United Nations.[4] Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement which correspond to its competency.

Indeed paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement states:

"The British Government <u>will</u> complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency."

This commitment was given legislative effect through the Human Rights Act 1998.

A core point in the Good Friday Agreement is the word 'incorporate'. Section 2 of the Human Rights Act states: "Interpretation of Convention Rights" which in effect states that the Convention rights

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[2]: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

[3] "The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction." ibid

[4] UK Treaty Series no. 50 Cm 4705 - see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236111/8260.pdf

must be interpreted "taking account" of ECtHR jurisprudence and the positions of other Council of Europe institutions[5].

It is this section that requires UK courts to "take account" of ECtHR judgment (not follow them as binding precedent) and it is that link that the British government is explicitly committed to breaking, which can only be considered as a dangerous assault on the Peace Process.

To repeal the Human Rights Act, without replacing it with legislation that would reference both the text and jurisprudence of the ECHR and provide for UK courts to be able to take account of, and contribute to, that jurisprudence would without doubt breach the Good Friday Agreement and its supporting Treaty[6].

As reflected in the extracts above the Agreement also commits to safeguards to ensure the Northern Ireland Assembly or public authorities cannot infringe the ECHR. Removing this safeguard takes away a significant pillar of the human rights architecture both of the Agreement and society in the North of Ireland and threatens the whole basis of trust in the new institutions that has been developed since 1998 and as such a repeal of the Human Rights Act would be in contravention of an internationally endorsed peace accord.

The inherent legal benefits of the Human Rights Act were most recently summarised in an application for judicial review brought by the Northern Ireland Human Rights Commission on the law on the termination of pregnancy in here.[7] In this case the Commission sought a declaration of incompatibility as a 'victim' under s 72(2B) of the Northern Ireland Act 1998 which empowers it to take test cases in relation to human rights issues without having to fulfil the victim requirement in section7 of the HRA. The Court held that the Commission had the power to bring test cases and to challenge Convention compatibility with legislation pre-dating 1998.

The judgment considers the position of the Convention in this jurisdiction, with Judge Horner reflecting that:

"*[91] The Convention protects certain fundamental rights. The Court in Strasbourg made this clear to all those in Northern Ireland in 1982 when it ruled that the imposition of criminal sanctions on practising homosexuals infringed the Article 8 rights of Mr Dudgeon and others like him: see [1982] 4 EHRR 149. Despite this ruling Northern Ireland has not become a modern day Sodom and Gomorrah as some feared. Indeed the removal of these criminal sanctions allowed and allows practising homosexuals to grow up and live and work in Northern Ireland and to contribute to its society without fear of prosecution or discrimination.*

[92] When all the political parties signed up to the constitutional settlement which was enacted in the 1998 Act, they did so on the basis that one of the foundation stones of the new Northern Ireland was that its laws would be Convention compliant. This has had an effect on a number of different areas where there are strongly held religious and moral beliefs: e.g adoption – see Re G (Adoption: Unmarried Couple) [2008] UKHL 38.

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[5] (Section 2(1)) "http://www.legislation.gov.uk/ukpga/1998/42/section/2 "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

[6] See on this the commentary by CAJ:
http://www.caj.org.uk/files/2015/06/09/Fighting_the_Repeal_of_the_Human_Rights_Act.pdf

[7] The Northern Ireland Human Rights Commission's Application [2015] NIQB 96, 30 November 2015.

[93] There can be no doubt that the Convention necessarily has had the effect of making Northern Ireland a more tolerant and liberal society, one that is more pluralistic and broadminded. Whether this is a good thing is not a matter for the Court. But it is one of the Convention's objectives. The Convention does not require anyone to give up his or her deeply held beliefs on certain moral or religious matters. It just means that in respect of certain rights protected by the Convention one section of the community, whether in the majority or not, is no longer able to deny to others whether by the imposition of criminal sanctions or otherwise, the ability to enjoy those protected Convention rights."

Through the Human Rights Act, the courts here play an important democratic and balancing role, taking into account the practical realities and effects of power-sharing in the other organs of government: "*There can be no doubt that the Convention necessarily has had the effect of making Northern Ireland a more tolerant and liberal society, one that is more pluralistic and broadminded. Whether this is a good thing is not a matter for the Court. But it is one of the Convention's objectives."*

Tolerance, liberalism, pluralism and broadmindedness – protected through the ECHR by the Human Rights Act – are values which are core to a society in a process of transition from Conflict to Peace and should be guaranteed without threat or replacement by an ideological instrument bounded by restrictive covenants on rights and the imposition of responsibilities on individuals. To repeal the Human Rights Act and to diminish the effect of the ECHR here, at this moment, part of the UK – and the Island of Ireland, would be to step back from the process of Peace so hard fought for and so hard to maintain.

THE RISKS PREVALENT IN THE DILUTION OF A HUMAN RIGHTS ARCHITECTURE

"*The Terror Threat"* As we know from the experience during the Conflict when this jurisdiction was used as a testing ground for laws and policies in the counter-insurgency approach;

- Prevention of Terrorism Act,
- Diplock courts,
- internment and interrogation

In the years since 9/11 a new security agenda has ushered in a plethora of draconian measures to test the bounds of the Human Rights Act, which surely speak to the ever increased importance of maintaining safeguards to protect the citizen as a bulwark against the omnipotence of the State,

There is presently a hard edge to policing, be it through

- stop and search,
- surveillance under RIPA,
- the use of informers/CHIS,
- the tension between policing and National Security (and the Security Services),
- Public Interest Immunity applications,
- Closed Material Procedures,
- the return of the Supergrass,
- pre charge detention limits and so forth.

The State strives to protect on the grounds of National Security but its arguments to do so, do not often make good law – the repeal of the Human Rights Act would not only have political consequences for the constitutional arrangements under the Good Friday Agreement and the subsequent Agreements, but would also remove as a legislative mainstay in the tool box of those charged with representing the interests of those brought before the courts in these cloaked circumstances.

I would like to address two specific matters which highlight the ongoing need for the Human Rights Act as a core protection for the rights of the individual.

Pre-Eminence of National Security post Devolution of Justice to the Devolved Institutions.
With the devolution of policing and justice powers in respect of this jurisdiction to a local assembly in Belfast, in 2010, the framework of the pre-eminence of national security was enshrined and protected through a series of Memoranda of Understanding and written protocols, not legislation. Most notably, however, there is no statutory definition of national security.

"The term 'national security' is not specifically defined by UK or European law. It has been the policy of successive governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances"[8]

At the time of the devolution of policing and justice in April 2010, the British Government produced a protocol setting out 'Handling Arrangements for National Security Related Matters', and remarkably therein, sought to re-designate the entirety of the history of the previous 40 years of conflict as a national security matter.
"*The NIO will retain ownership and control of access to all pre-devolution records … DOJ officials will have no access to pre-devolution NIO records that relate to matters that remain the responsibility of the UK government, including records that relate to matters of national security*"[9]

The Protocol further set out that the UK Government will 'determine what information pertaining to national security can be shared and on what terms' with the devolved Minister of Justice[10] The Protocol is clear that it 'is not legally binding and does not give rise to legal obligations', yet it is a statement of policy intent to restrict the disclosure of information.

Similarly an NIO Memorandum of Understanding with the Policing Board on National Security Matters, made it clear that the Chief Constable would not answer Policing Board questions which 'indirectly touch upon' National Security matters if there is a risk of damage to the interests of this undefined concept.[11]

In December 2014 agreement was finally reached on legacy mechanisms; after previous attempts[12] to agree on how the past would be addressed had become log-jammed.

Significantly the Stormont House Agreement (SHA), a political agreement, included for the first time both governments as well as the parties to the devolved power sharing Executive.

Fundamental to this was that the Historical Investigations Unit (HIU) element, which the majority of families bereaved from across the community seek most, would be fully Article 2 complaint. This too included a public commitment by the UK government that they would provide full disclosure to the HIU.

However, as progress was made through the Stormont House Implementation Group (SHIG), which included the party leaders meeting weekly and when appropriate relevant agencies such as DOJ and the PSNI CC, the commitment to full disclosure appeared not to materialize.

The deliberate leaking of draft legislation that would ultimately put the legacy mechanisms on a statutory footing confirmed that the UK government had inserted a 'national security' veto effectively torpedoing the entire legacy section of the agreement.

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[8] www.mi5.gov.uk/about-us/what-we-do/protecting-national-security.htm
[9] Para 10 and 11 of NIO Protocol – see at Hansard WPQ 15th March 2010 : Column 254W
[10] NIO Protocol 'Handling Arrangements for National Security Related Matters' Annex A paragraphs 10-11
[11] The Policing You Don't See : Covert Policing and the Accountability Gap – CAJ 2012.
[12] Failed HET - Eames/Bradley - Haass/O'Sullivan

For their part the Irish government, through Minister Charlie Flanagan, described this as a '*smothering blanket*[13]*'* and that it was completely *'unacceptable'.*

In preliminary observations following a country visit to the jurisdiction the UN Special Rapporteur on Truth, Justice, Reparations & Non-Recurrence, Mr. Pablo de Greiff said[14],

'Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use "national security" as a blanket term. This ends up obscuring practices which retrospectively, it is often recognized (unfortunately, mostly privately), were not especially efficient means of furthering security. In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations.'

The Fresh Start Agreement[15] of 20th November 2015 however abandoned the legacy mechanisms; the core crux of this being the UK government's insistence of a 'national security' veto seeking to trump victims' rights to know the truth concerning the killing of their loved ones.

Key questions arise

- why won't the UK government provide full disclosure, in compliance with international obligations, having initially committed to doing so, and
- why would they have need to use a veto in killings carried out by non-state actors, as is the case currently concerning many of the 56 legacy inquests involving almost 100 deaths.

Indeed the European Commissioner for Human Rights, Nils Müznieks [16] noted as recently as last week, the fact that the European Convention on Human Rights has a particular resonance here, stating specifically with regards to National Security:

"I urge the UK government and other parties concerned to return to negotiations on mechanisms for dealing with the past in the Stormont House Agreement, including setting up the Historical Investigations Unit, as soon as possible. ***Disagreements over the national security veto concerning disclosure of information need to be resolved****."*

That this elusive and undefined concept was allowed to act as the catalyst to deny all victims of the conflict an article 2 compliant resolution to their cases, is a disgrace, but that the only legal concept, providing them with a modicum of hope, the Convention, is also under attack, is a Kafkaesque farce.

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[13] Irish News 27th November 2015

[14] In a speech delivered on November 18th as talks concluded for implementation of the SHA
Full statement of Preliminary Observations and Recommendations on the country visit to the UK:
http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E

[15] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf

[16] "Forthcoming reforms on Human Rights law must not weaken protection" – Nils Muznieks 22nd January 2016
http://www.coe.int/en/web/commissioner/-/uk-forthcoming-reforms-to-human-rights-law-must-not-weaken-protection

CLOSED MATERIAL PROCEDURE

An area of grave concern to lawyers concerned with the protection of human rights, is the recent growth of secret courts. Almost all criminal and civil matters are held in open court, which means that the press and public are entitled to be present, and where they might be excluded (for example where it is necessary to protect children) the impugned citizen and their legal representative are present to hear and challenge the evidence presented.

However Part 2 of the Justice and Security Act 2013, which came into effect in July 2013, introduced fundamental changes to British law, in any civil case involving national security by creating an extraordinary alternative to the Public Interest Immunity (PII[17]) procedure.

The 'Closed Material Procedure' (CMP), represents a *'carve out from basic principles of equality of arms and open justice'*[18] by allowing courts to consider any material, the disclosure of which would be "damaging to the interests of national security".

The shifting dynamic behind the legislation was the response to the MI5/MI6 involvement in 'War on Terror' practices such an 'extraordinary rendition' and orders for disclosure in civil cases, arising therefrom, most notably in the case of Binyam Mohamed[19], who was a victim of rendition.

The Justice and Security Green Paper cited the complex and long series of cases[20] concerning Binyam Mohamed[21] as a crucial event in the preservation of sensitive intelligence material. In February 2010, the Court of Appeal (CA) ordered that several paragraphs previously redacted from the Divisional Court judgment in 2008 should be restored and made part of the open hearing. On three separate occasions prior to the CA case the then Foreign Secretary of State, David Miliband signed PII certificates to supress publication of the paragraphs of a Divisional Court reasoning that they contained summarised interrogation techniques used by the CIA against Binyam Mohamed.

The radical significance of CMP's from a rule of law perspective cannot be over-estimated, however infrequently Parliament's intention is, that it be used. Indeed during the final debate in the House of Lords, Lord Brown, himself a retired Law Lord, and former Intelligence Services Commissioner, warned that the legislation involved such a:

"radical departure from the cardinal principle of open justice in civil proceedings, so sensitive an aspect of the court's processes, that everything that can possibly help minimise the number of occasions when the power is used, should be recognised."[22]

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[17] Public-interest immunity (PII) is a principle of English common law under which the English courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. This is an exception to the usual rule that all parties in litigation must disclose any evidence that is relevant to the proceedings. In making a PII order, the court has to balance the public interest in the administration of justice (which demands that relevant material is available to the parties to litigation) and the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging.

[18] Turning out the lights? The Justice and Security Act 2013 – Tom Hickman. . http://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/

[19] [2011] QB 218

[20] The case originated in the US in the case of Farhi Saeed Bin Mohammed v Barack Obama (Civil Action No. 05-1347 GK) 2009, where Binyam Mohamed sought disclosure of information necessary to assist his defence before a US Military Commission and in particular to show that the prosecution case consisted of evidence obtained through torture.

[21] R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.1) [2008] EWHC 2048 (Admin) [2009] 1 WLR 2579 and (No.2) [2009] EWHC 152 and 2549 (Admin) [2009] 1 WLR 2653 (Divisional Court) and [2010] EWCA Civ 65 and 158 [2011] QB 218 (Court of Appeal).

[22] House of Lords - 26th March 2013, Col 1032.

The intention of Parliament on review of Hansard was that this repressive anti-terror legislation, was the new world order response to the 'War on Terror'.

However the facts of the matter in practice are somewhat different to the lofty Parliamentary intentions, and as is often the case, repressive measures are often invoked immediately in this jurisdiction to preserve the interests of the State in concealing their involvement in murder and other crimes. It is a fact that there are only 14 applications pending before ALL courts in the United Kingdom, yet 7 such applications are pending in Belfast High Court, and NONE of them relate to the War on Terror. Indeed, the first such application for CMP in this jurisdiction was made in respect of a civil case taken by the parents of children, who were subjected to unlawful searches having been removed by armed police from a bus travelling from a republican commemoration in Dublin, back to Belfast, a circumstance, it should be noted, which did not involve the role of MI5/MI6 and the modern war on terror…

Notice that an application for a Closed Material Procedure will be applied for, was received in our office on 21st May 2014, by the Ministry of Defence in a civil case being taken by a lady, Margaret Keeley, who is suing the PSNI Chief Constable, the Ministry of Defence and Frederick Scappaticci, for the latter's arrest and detention of her in the 1990's whilst an agent of the MOD in the Internal Security unit of the IRA.

Mrs Keeley is seeking disclosure as to confirmation of her suspicion that Freddie Scappaticci was working as an agent of the State, whilst conducting her interrogation as an IRA officer into the circumstances of a perceived botched IRA operation, involving Mrs Keeley's husband, Peter. There has been widespread media speculation that Mr Scappaticci is an infamous army agent code-named Stakeknife, responsible for the infiltration of the IRA and murder of many IRA members, whilst in situ as the head of internal security. Indeed the concern, is that the authorities are feigning national security in circumstances where the actual agents are self-disclosed and publicly known, just to frustrate the litigation.

The full CMP hearing in Ms Keeley's case is listed for later this year, but whereas this is an application made by the Secretary of State, it has fallen to the Plaintiffs to cajole the determination of the applications to ensure justice is not further delayed, for example, the appropriate security logistic arrangements have not even been implemented yet, nor have the full team of Special Advocates required been appointed nor is there a secure safe location identified to store the documents, which was to have been resolved by October 2015, but still remains extant.

CONCLUSIONS

The proposed repeal of the Human Rights Act 1998 is a retrograde step of cataclysmic proportions, not only for those seeking truth recovery and accountability in accordance with Article 2 of the Convention but for all those concerned with open government and accountability.

It should be recalled that the Convention was drafted by British lawyers, some of whom prosecuted at the Nuremburg Trials, determined to spare Europe from the horrors of communism and fascism. Indeed one of the draftsmen of the Convention was David Maxwell Fyfe who was also a Conservative politician. When he worked on the European convention in the late 1940s, he and other European conservatives disposed of early drafts that mentioned the rights of workers, nor does it mention shelter or free education and healthcare. It is not a radical left wing, liberal document.

In a celebrated speech in 2009[23], the late Lord Bingham listed the liberties the European convention protects.

- The right not to be tortured or enslaved.
- The right to liberty and security of the person.
- The right to marry.
- The right to a fair trial.
- Freedom of thought, conscience and religion.
- Freedom of expression.
- Freedom of assembly and association.
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"Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any them un-British?"

It has been observed that such a step would set the clock back 50 years[24], and one can only consider the wolfish delight with which Russia, Turkey, Hungary and other authoritarian states will greet a repeal of the Human Rights Act. They will say that if Britain no longer enforces the European convention, why should they? It would appear that the current British Government considers that the rights of those bereaved as a result of its illegal policies, are trivial, superfluous and unnecessary.

[23] http://www.theguardian.com/commentisfree/2014/oct/04/tory-wreckers-out-destroy-human-rights
[24] www.theguardian.com/law/2014/oct/03/tory-plans-european-human-rights-convention-take-uk-back-50-years