

The Civil Service (Special Advisors) Bill: Democratic Implications and Considerations

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Introduction

The appointment of Mary McArdle as special advisor to the Minister of Culture, Arts and Leisure, Carál Ní Chuilín, in 2010 provoked a media storm that Jim Allister MLA has cited as the impetus behind the Civil Service (Special Advisors) Bill.¹ Although Mr Allister's preparation and support of the Bill has, in turn, created much debate, only a fraction of it has overtly considered what the Bill and the situation it seeks to address might mean for the Northern Irish polity. This paper seeks to draw out some of those considerations.

Democracy as Power-Sharing

Northern Ireland enjoys what is known in political science literature as consociationalist governance. This is a form that is common to many countries around the world in which power is shared between ethnic, national or religious communities.² Consociationalism is often defined against the winner-takes-all, first-past-the-post majoritarianism of Westminster as it is based on governmental posts being portioned out among political parties (in effect, power-division) and important decisions being made subject to a system of mutual vetoes. Although the Northern Irish system has been extolled as an exemplar of managing divided societies it has also given rise to periodic debates on the lack of an official opposition.

Because of its delicate balancing of communal division the system might also be seen to contain within it the persistent possibility of crisis, of which the McArdle appointment is one clear example. A consociational system fastens together otherwise polarised and segmented blocs and their elites within a single policy-making framework. Consensus on decision-making and implementation

¹ Official Report (Hansard) Committee for Finance and Personnel, 'Civil Service (Special Advisors) Bill: Briefing from Mr Jim Allister MLA. Available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2012-2013/September-2012/Civil-Service-Special-Advisers-Bill--Briefing-from-Mr-Jim-Allister-MLA/>.

² Adrian Guelke, *Politics in Deeply Divided Societies*. London: Polity, 2012, pp. 6-7.

becomes, paradoxically, the only option as agreement is created through a system of checks and balances (veto powers in particular) and a subsequent tampering of ethnic sentiments. Within this system politics becomes effectively de-politicised: the culture of openness, transparency and debate that is commonly understood to be the hallmark of politics becomes deferred through the procedural requirement to reach consensus – an inversion of Heaney’s ‘Whatever you say, say nothing’.³ The element of crisis contained within this arrangement is that it is impossible to suppress issues such as victimhood, truth recovery or the search for justice for ever and that cases such as that of McArdle will inevitably appear and recur.

Democracy and Representation

The question of how to deal with such appearances and recurrences goes therefore to the heart of any democracy. They constitute a fundamental dilemma over what the roles of politicians should be and how ordinary citizens are represented and re-presented by political elites.

In his contribution to the ‘Federalist Papers’ (the series of radical and revolutionary articles that envisioned a new democratic American republic), James Madison drew explicit links between political representation and popular participation. For Madison, the paradox of democratic government resides in the fact that it has to be simultaneously *for* the people and *of* the people. It must necessarily involve ordinary citizens and communities in the processes of governance, while also observing a system of checks and balances to ensure that one group does not exercise unfair, unjust or unethical sway over another: ‘To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed’.⁴

Madison’s point echoes in the oral evidence of Professor Brice Dickson to the Committee. Human rights law, in his opinion ‘would allow states a certain margin of appreciation’ in deciding on employability protocols for special advisors or ex-paramilitary prisoners. Professor Dickson and his colleagues Dr Rory O’Connell and Dr Anne Smith argued for an ‘individualised approach’ – a point

³ Seamus Heaney, “Whatever You Say Say Nothing.” In *New Selected Poems, 1966–1987*. London: Faber and Faber, 1990, pp. 78-80.

⁴ James Madison, ‘Number X: The Same Subject Continued’. In James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*. Harmondsworth: Penguin, 1987 [1788], p. 123.

that was reflected in the Human Rights Commission's interpretation of the treatment by the European Court of Human Rights on lustration and domestic restriction of employment rights.⁵ The Madisonian corollary to that proposition is the question of how to balance those individual rights with societal ones. Mr Mitchel McLaughlin MLA alluded to this in his response to Professor Dickson's arguments:

We have great sympathy with and sensitivity for the individuals who have been hurt as a result of the actions of others, but we also have an absolute duty to try to move beyond post-conflict into reconciliation processes such as truth recovery to deal with the fact that there are many victims in our community who have never had redress.⁶

The issue of how to move forward as a society, building a sound infrastructure for future generations while acknowledging the divisions, hurts, grievances and injustices of the past lies at the heart of the Bill. Although this involves issues of rights and issues of ethics, it is fundamentally a political question: it creates polarisation and debate and is, perhaps, ultimately unsolvable.⁷

Politics and Ethics

This is not to say the issue should be ignored, nor is it to indulge trite, sentimentalising of the notion that we should agree to disagree. In our view, the point deserves consideration, for it goes to the heart of what we perceive the Bill to be about: namely, the repudiation of a slide towards equivalency. What we mean by equivalency should be made clear: it involves the suggestion that there is no distinction between state killings and those of extra- or anti-state forces. Three points follow from this.

⁵ Northern Ireland Human Rights Commission, 'Submission on the Civil Service (Special Advisers) Bill 2012, paragraph 20. In the interests of precision, the Bill deals with employment rights rather than lustration *per se*.

⁶ Official Report (Hansard), Committee for Finance and Personnel, 'Civil Service (Special Advisers) Bill: Human Rights Issues, 21 November 2012. Available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2012-2013/November-20121/Civil-Service-Special-Advisers-Bill-Human-Rights-Issues/>.

⁷ Cillian McGrattan, 'Spectres of History: Nationalist Party Politics and Truth Recovery in Northern Ireland', *Political Studies*, Vol.60 (3): 455-473.

Firstly, there is the issue of accountability: despite the failings of the British state to persecute those culpable for heinous acts of murder and terror against individuals and whole sections of society, it is subject to the law. Mr McLaughlin and Sinn Féin implicitly recognise this in their calls for the state to admit to its actions. There results an immediate moral confusion. For, just as the state is accountable before the law (that is, before the legal process), the idea that loyalist and republican volunteers should also give evidence before an independent or international tribunal becomes mere rhetoric: those groups are unaccountable to anyone but their own codes of ethics, apart from outside coercion they are not under any compulsion to partake in a truth and reconciliation process. (The willingness of the Northern Irish political class to entertain ideas to the contrary speaks to the resilience of the central conceit of the Report of the Consultative Group on the Past that both state and anti-state actors could invest willingly in a 'Legacy Commission'.)⁸

Secondly, the consequence is not just moral confusion between the distinction between accountability (the law) and murder, there is also a political effect to equivalency: namely, that the state is accountable, paramilitaries are not. The effect is to weight the political process in favour of paramilitaries. This is not to say that the British and Irish states were not culpable of atrocious actions (and omissions). It is rather only to point out that the playing field becomes uneven through the application of an implicit system of double standards.

Thirdly, not all voices are equal. Contrary to Mr McLaughlin's otherwise laudable promotion of acknowledgement,⁹ 'understanding' is not synonymous with justice. In other words, some stories are more easily told than others and victims – namely, those marginalised and muted (if not silenced) through political violence – start from a point of disadvantage vis-à-vis their perpetrators. Equalising that disparity remains radically different from fostering an equivalence of experience. Within this understanding, acknowledgement and (uneasy) understanding fall short of redress or justice and may, through repeated reference, create a discursive framework that militates against actually achieving justice or uncovering the truth about what happened to victims.

⁸ Cillian McGrattan *Memory, Politics, Identity: Haunted by History*. Basingstoke: Palgrave Macmillan, 2013, pp. 12-17.

⁹ It is not that they would become friends or could completely set aside what happened, but, at a human level, people have acknowledged one another's dignity as well as the trauma and may have addressed, in a satisfactory way, their responsibility for that. Available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2012-2013/November-20121/Civil-Service-Special-Advisers-Bill-Ann-TraversCatherine-McCartney-Briefing/>, accessed on 7 December 2012.

Political Realities

The impulse to side-line ethical or political realities remains a key theme in submissions to the Committee. The essentially problematic nature of that impulse is that it is couched in benign, inclusivist language. The submissions of NIACRO and the loyalist and republican ex-(paramilitary) prisoners harness that language. Mr Pat Conway (NIACRO), for example, argued that ‘Our view is that [if] someone commits an offence, goes to court and is dealt with by due process [...] they are either found guilty or innocent’. He seemingly elides punishment with what he calls ‘the real world’: ‘In our view, there is no such thing, for example, as politically motivated rape’.¹⁰ Now, that this was the attitude of the South African Truth and Reconciliation Commission, which is often cited in relation to these ‘dealing with the past’ debates in Northern Ireland, says little for the political and moral reality of the ‘international norms’ that were alluded to in passing and directly within the legal briefings.¹¹

A more ambiguous area is that alluded to in Mr Michael Culbert’s testimony (on behalf of the republican ex-prisoner group Coiste na nIarchimí) who has argued before the Committee that ‘We either accept that we have moved forward and that we will make major efforts to be accepting of all aspects of our former society, or we do not, in which case we have second-class citizenship’.¹²

The political *effect* of this is to use the language of rights to press a factional agenda on to an entire society. As Ann Travers pointed out in her testimony, there is a demonstrable difference between society partaking in free and fair elections and people being returned who we may not like and them appointing individuals to public positions whom we may not like.¹³ It is politically loaded and it is morally offensive. The effect of the strategy of NIACRO, the ex-prisoner groupings and Sinn Féin of

¹⁰ Official Report (Hansard), Committee for Finance and Personnel, ‘Civil Service (Special Advisers) Bill: NIACRO Briefing’, 7 November 2012. Available at http://www.niassembly.gov.uk/Documents/Official-Reports/Finance_Personnel/2012-2013/121107_CivilServiceSpecialAdvisersBillNIACROBriefing.pdf.

¹¹ Fiona C Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa*. London: Pluto, 2003.

¹² Official Report (Hansard), Committee for Finance and Personnel, ‘Civil Service (Special Advisers) Bill: Coiste na nIarchimí/Tar Isteach Briefing’, 28 November 2012. Available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2012-2013/November-20121/Civil-Service-Special-Advisers-Bill-Coiste-na-nIarchimiTar-Isteach/>.

¹³ Official Report (Hansard), Committee for Finance and Personnel, ‘Civil Service (Special Advisers) Bill: Ann Travers/Catherine McCarthy Briefing’, 21 November 2012. Available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2012-2013/November-20121/Civil-Service-Special-Advisers-Bill-Ann-TraversCatherine-McCartney-Briefing/>.

conflating perpetrators who *choose* to carry out violent acts and victims who suffered those acts is to create an ethical aspic that serves only to confuse and obscure.

Politics and Democracy

It is imperative that political leaders remove that aspic rather than perpetuating it. However, it is our contention that the political context of this Bill will result in the latter rather than the former. In the first instance the proposer of the Bill remains an ‘outsider-figure’ within the Assembly: the fact that it was he and not one of the parties of government who has tried to tackle the anomalies that resulted from a previous review¹⁴ speaks to a willingness by those in power to abdicate responsibility when it comes to issues that go to the heart of where Northern Ireland stands as a political community.

Madison’s response to the question of balancing individual rights against the need to create a coherent, cohesive polity was straightforward: either the elite (what he referred to as the majority faction) contains itself or it is made ‘unable to concert and carry into effect schemes of oppression’.¹⁵ Sadly one of the things this Bill highlights is the fact that the predilection of certain factions within Northern Irish society to indulge in ethnic politics continues to oppress and re-traumatise individuals who suffered the effects of political violence. The willingness of other parties to vocalise disgust at one incident while turning a blind eye to or actively indulging in others is an indictment of our political class.

That the Bill is deemed necessary is in and of itself evidence of the moral confusion at the heart of Northern Irish society. The choreography surrounding its preparation and much of the debate it has spurred, in our eyes, only reproduces that confusion. Political leaders enjoy a role different from most of us in society – most people are expected to fulfil the roles they find themselves in, politically and economically, but this is precisely what political leaders need not and indeed should not do. They may question society and its frameworks, they may question their position within, and they may and must question what form society is taking and what values define it.

¹⁴ See Civil Service (Special Advisers) Bill: Explanatory and Financial Memorandum, paragraphs 7-8. Available at [http://www.niassembly.gov.uk/Documents/Legislation/Bills/Non-Executive%20Bills/Session-2011-12/Civil%20Service%20\(Special%20Advisers\)%20Bill%20EFM.pdf](http://www.niassembly.gov.uk/Documents/Legislation/Bills/Non-Executive%20Bills/Session-2011-12/Civil%20Service%20(Special%20Advisers)%20Bill%20EFM.pdf).

¹⁵ Madison, ‘Number X’, p. 126.