IN THE FULL GLARE OF ENGLISH POLITICS

Ireland, Inquiries and the British State

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Taking Foucault’s construction of ‘regimes of truth’ in advanced democratic societies as its starting point, this article reflects on three decades of formal investigation and public inquiry in the North of Ireland. Focusing particularly on the use and abuse of state power, it considers the reproduction of hegemonic and counter-hegemonic discourses and the processes through which they gain or are denied legitimacy. The Bloody Sunday Inquiry (BSI) has dominated media coverage, political commentary and popular discourse. But the recently published inquiries carried out by Canadian Judge Cory are crucial to an understanding of the operational relationships between state agencies and loyalist paramilitaries. While discussing the BSI in the context of previous UK government public inquiries, the article considers the significance of alternative, community-based, independent inquiries. Finally, the article evaluates the cases for and against a Truth Commission in the North of Ireland and the problems associated with a state-sponsored Commission as a forum for the political management of truth.

Introduction

A public inquiry is held when it is deemed that there are matters sufficient on the grounds of urgent public interest to warrant one. . . . Generally inquiries are about matters in which the state or its agents are believed to be involved either through acts of omission or commission. The value of an inquiry in terms of the society as a whole is that it seeks to locate where culpability lies and thus establish a basis on which society, through its democratic system, can set about rectifying identified faults. (Irish Government, quoted in Mullan 2000: 296)

This statement formed part of the Irish Government’s demand, submitted to the Northern Ireland Office, for a public inquiry into the murder of the human rights solicitor, Pat Finucane. It was repeated by Margaret Urwin, secretary to the Justice for the Forgotten Campaign, when she met with Irish Government officials in October 1999 to call for a public inquiry into the 1974 Dublin and Monaghan bombings. She argued forcefully that the Irish state’s failure to produce prosecutions and convictions had denied the bereaved ‘answers that help reconcile them with their loss’ (Mullan 2000: 297). She recognized the significance of ‘political reconciliation . . . to draw a line under the past’ but noted that without a public inquiry, ‘victims’ relatives will inevitably carry their burdens into everyone’s present . . . ’. Central to the ‘pursuit of certain cases’ was the ‘process of candour and truth’ (Mullan 2000).

In juxtaposing the Irish Government’s interpretation of the role of public inquiries into controversial cases involving state ‘agents’ and the bereaved’s need to secure ‘truth and justice’, Margaret Urwin raises three distinct but related issues regarding the political, legal and organizational accountability of advanced democratic state institu-
tions. First, government commissioned inquiries are ‘public’, therefore ‘open’, reflecting and responding to the ‘public interest’. Receiving extensive media coverage, they are in the full glare of the political process. Second, in terms of acts of ‘commission or omission’, they are concerned with ‘culpability’. In apportioning responsibility and inferring criminal or civil liability, their inquisitorial process is underpinned by adversarial purpose. Third, while the official line is to rectify ‘identified faults’, the bereaved and survivors seek truth and acknowledgement through full disclosure and explicit acceptance of responsibility.

Since the 1970s, there has been much written on the enigmatic relationship between coroners’ inquests or public inquiries into controversial deaths and criminal investigation and prosecution. It has been a debate not confined to the North of Ireland. Inevitably, if police investigations are found wanting or ‘insufficiency of evidence’ results in a failure to prosecute, a heavy burden is placed on inquisitorial processes, sometimes long after the event. Great expectations are laid at the door of public inquiries. Faith in state-sponsored and administered inquiries, however, assumes that in purpose and objective—above all else—they are intended to establish an aggregated truth through the uninhibited examination of all available evidence. Yet, as Stan Cohen (2001: 114) warns in his discussion of transitional democratic states, ‘official discourse is inevitably a mixture of blatant lies, half-truths, evasions, legalistic sophistries, ideological appeals and credible factual objections’. This reminds the truth-seeker to be wary of false promises made by government ministers—that even in advanced democratic states, with their ‘checks and balances’ supposedly fully developed, what is on offer might not be all that it appears.

This article presents a critical analysis of the social and political construction of official discourse, taking a sceptical view of the politics and mechanics of public inquiries. Precisely because public inquiries ‘are popularly perceived to be objective, politically independent and of high status’, generating an ‘aura of authority in the public consciousness’, they have the ‘capacity . . . to act as a convenient mechanism of legitimation for the state’ (Gilligan 2004: 18–19). While acknowledging and respecting the ‘need to know’ fuelling the resilience and determination of active campaigners for ‘full and independent’ public inquiries, the article explores their function in the context of political transition. Clearly, they ‘are not all responses to crisis situations’ and ‘can be effective information gatherers . . . can generate accountability . . . can escape their origins and have profoundly ‘destabilizing’ effects on governments’ (Brown 2004: 294). But the commissioning of public inquiries into the uses and abuses of state power, particularly involving physical force and coercion, requires historical and political location.

British state intervention in the North of Ireland cannot be considered in the same light as the application of its policies and laws within Britain. Since partition, and the formation of the Irish Free State, the six northern counties have experienced ‘exceptional’ state powers as the norm. Less obvious has been the regular use of such powers in the Irish Republic. The due process of the rule of law has been regularly suspended, internment without trial repeatedly used, paramilitary policing consolidated and military rule imposed. In this neo-colonialist context, the democratic process has been partial, weakened and suspended. In such circumstances, the line of acceptability regarding the state’s use of ‘reasonable’ or ‘necessary’ force in policing communities and interrogating detainees, the application of judicial authority in the courts and the conditions
of incarceration for political prisoners allowed greater discretion to state institutions and their agents. Constantly justified on the grounds of state security, the authoritarianism implicit within the liberal state was always explicit in the state’s intervention in the North of Ireland. Not only did this lead to differential and discriminatory policing by the then Royal Ulster Constabulary and the British army, but it also cultivated a culture of impunity which became institutionalized. It is against this backdrop that public inquiries in the North of Ireland have to be viewed and analysed. First, however, the politics of official inquiries within liberal democracies require some consideration.

**Democratic States, Public Inquiries and the Politics of ‘Truth’**

The criteria of ‘clear and present danger’ are often proposed in liberal democracies, but operation of the criteria is difficult and the assessment can never be certain. . . . Similar worries affect measures to protect liberal societies from threats posed by people who are thought dangerous because of political as well as criminal potential behaviour . . . internment and other forms of protection against suspected ‘enemies’ are at the margins of law, often on a murky border between criminal law and national security regulations where they lack transparency and accountability and barely respect the liberal ideals of due process protections, and separation of governing powers. (Hudson 2003: 35–36)

Barbara Hudson explores the ‘adequacy’ of liberal theories of justice in responding to the inexorable rise and consolidation of ‘risk politics’. She discusses the historical ‘preoccupation’ of liberal governance in regulating those considered threats to political stability, industrial expansionism and the ‘respectable’ working class. In this political and ideological construction of compliant, disciplined and responsible citizenship, ‘dangerousness’ has been an enduring and politically convenient label ‘attached to individuals as well as to classes and sub-groups’ (Hudson 2003: 35). Taken together, the ‘dangerous’ represents a collective ‘enemy within’. Meanwhile, massing at the border, a metaphor only in part, is the ‘enemy without’: the ‘illegal immigrant’, the ‘bogus asylum seeker’, the ‘international terrorist’.

In summarizing the ‘principle of equal liberty’ shared by most ‘versions of liberalism’, Hudson notes ‘inherent tensions . . . which cannot be resolved without the surrender of important values and insights’ (Hudson 2003: 37). These include ‘challenges . . . arising from the depth of difference in contemporary societies, with population movements making for cultural and religious differences of a degree unimagined by earlier writers on tolerance and diversity’. What this amounts to is a ‘radical fissured pluralism’. A key issue here, however, is whether ‘pluralism’ has ever been anything other than fissured.

The advanced democratic state is predicated on the recognition and political management of personal and social diversity. The resolution of interpersonal and social conflicts, through its regulatory mechanisms, reflects moral purpose as well as securing political stability. This assumes that all disputes can be resolved through the informal or formal administration of justice for the ‘common good’; that individuals, through reason, will adopt conciliatory and unselfish resolutions to conflict. The bottom line, however, is that the mutual accommodation of different ‘wills’, the fair resolution of ‘competing interests’ and the establishment of ‘universal justice’ cannot be achieved within the determining contexts of structural inequalities: class, poverty and unemployment; patriarchy, misogyny and homophobia; neo-colonialism, racism and sectarianism.
State institutions, whatever the claims made for them in liberal democracies, function to manage rather than eradicate structural inequalities and the conflicts to which they give rise. While there have been social, cultural and political shifts often resulting in significant changes in the lives of individuals, structural inequalities remain the primary defining contexts within advanced democratic states, whatever their claims to liberal governance.

Within advanced democratic states, authoritarianism is consolidated through the construction and use of formal mechanisms established to negotiate crises, incorporate criticism and reaffirm legitimacy. Invariably, however, the ‘state under pressure’ responds by mobilizing its considerable resources to reaffirm its authority, condemn its condemners and promote institutional interests, thereby deflecting political confrontation and managing social conflict. When state institutions and their employees are under scrutiny, the operation of official inquiries and processes of investigation and accountability constitute a terrain on which the ‘battle for truth’ is contested.

In a much debated passage, Foucault (1980: 131) asserts that truth:

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\ldots \text{is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its régime of truth, its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true. (Foucault 1980: 131)}
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For Foucault, truth cannot be conceived ‘outside power’ or ‘lacking in power’. It is not ‘the reward of free spirits, the child of protracted solitude, nor the privilege of those who have succeeded in liberating themselves’. For, while there is a ‘battle “for truth”’ (Foucault 1980: 132), there is a pre-eminent ‘political economy’ of truth ‘characterised by five important traits’. Truth ‘is centred on the form of scientific discourse and the institutions which produce it; it is subject to constant economic and political incitement . . . ; it is the object, under diverse forms, of immense diffusion and consumption . . . ; it is produced and transmitted under the control, dominant if not exclusive, of a few great political and economic apparatuses . . . ; it is the issue of whole political debate and social confrontation’ (Foucault 1980: 131–2).

Foucault’s early writings on truth and official discourse were criticized as over-deterministic, reducing ‘truth’ solely to the expression of institutional power. If ‘free spirits’ and independent thinking could not produce alternative truths, what constituted the foundations of dissent, opposition and resistance? Recognizing that ‘truth’ is not confined to imposition ‘from above’, i.e. it is not the prerogative of defining institutions and it carries multiple expressions in the micro and immediate worlds of social action, interaction and reaction, does not invalidate the proposition that the state has the capacity to impose its régime of truth on its citizens, particularly in those sites of intervention where state authority and political legitimacy are challenged. As Nils Christie (1981: 13) notes, the state establishes a ‘shield of words’ as an effective ‘means of disguising the character’ of its activities. Within the criminal justice process, for example, the ‘person to be punished’ becomes a ‘client’, the ‘prisoner’ becomes an ‘inmate’, a ‘cell’ becomes a ‘room’ and ‘solitary confinement’ becomes ‘single-room treatment’ (Christie 1981). What this achieves is the recasting of ‘crime control’ as a ‘clean, hygienic operation’ and the eradication of ‘pain and suffering from the text-books
and from the applied labels'. Yet, for the ‘experience of those suffering . . . they are just as they used to be: scared, ashamed, unhappy’ (Christie 1981).

Despite reconstructed vocabularies, the marginalization and exclusion, the reality of ‘otherness’, is painful and brutalizing. Hidden from view, the ‘power to classify . . . the purest of all deposits of professionalism’ (Cohen 1985: 196) remains intact, reinforced by its central location within the modern state. The power enjoyed by professional definers who politically manage the personal and social consequences of structural inequalities is not only the power to restrict or to negate. As Cohen (1985) states, it is ‘a form of creation’. He quotes Foucault: ‘ . . . the exercise of power itself creates and causes to emerge new objects of knowledge and accumulates new bodies of information’ (Cohen 1985). While accepting the diversity and relativity of power within personal and inter/intra-community relations, the administration of state power through its preferred professional agencies is profound and determining. Whatever the rhetoric of consent in advanced democratic societies, the reality of control dominates the lives of those who live on or close to the political and economic margins.

In its diverse forms, official discourse, ‘modes of argument that proclaim the state’s legal and administrative rationality’ (Burton and Carlen 1979: 48), is central to the administration of state power, the proclamation of political legitimacy and the imposition of formal authority. As responses to social and political conflict or to settling disputes generated by competing interests, official inquiries cannot be isolated from these processes. They are not beacons of impartiality, free from powerful political and economic interests. Yet, they have the appeal of the ‘people’s forum’, particularly when cast as ‘public’ inquiries. Inquiries are conducted at a range of levels. In-house parliamentary inquiries, select committee inquiries, health and safety inquiries and government department inquiries are permanent features of the political landscape. Many inquiries are controversial only in so far as they are established to resolve competing interests over the use of resources or the development of space. These would include inquiries into the expansion of nuclear energy or road networks, airports and so on. The ‘call’ for a public inquiry, however, is usually a response to acts or omissions involving state institutions, public bodies and their employees. They include the treatment of prisoners, prison security and prison protests, sexual and physical abuse of children in familial or care homes, medical care and negligence, transport and other disasters, the conduct of police investigations and miscarriages of justice.

Traditionally, public inquiries have been regarded as ‘democratic pluralism at work’ (Thomas 1982: 40). Within this process, the ‘neutral state operating by popular consent requires active illustrations of its commitment to heed public opinion’ (Thomas 1982: 42). Presented as exemplars of independent conflict resolution and a commitment to ‘truth’, official inquiries ‘stand apart from policies’ and find justification in the ‘principles of democratic pluralism’ (Thomas 1982). Christian (2002: 19) recognizes that public inquiries are not a ‘panacea’, but offer the opportunity ‘speedily and without delay’ to ‘ensure that management failings are exposed to public scrutiny’.

Yet, the political tension surrounding public inquiries becomes evident from the moment they are initiated. They are ‘triggered’ by ‘the need to restore public confidence in a service or organisation, or even government as a whole’ (Maclean 2001: 592) and are ‘set up to investigate specific matters defined in their terms of reference’ (Burton and Carlen 1979: 1). Put another way, terms of reference are selective, defining the boundaries and limiting the scope of inquiry. Usually chaired by judges or lawyers, assisted by
professional ‘experts’, they are investigative and inquisitorial rather than prosecutorial and adversarial. They are expected to establish and interpret ‘facts’, apportion responsibility, propose remedies and make recommendations. While the ‘great and the good’ chair and assist public inquiries, they are formally independent of direct political influence. They are drawn from mainstream public life and in background and political ideology, reflecting what Miliband (1969) famously regarded as a ‘coincidence of interests’. Their work is serviced, staffed and resourced by government departments, ‘plumbed into the ideological “ways of seeing” and political “ways of doing” that constitute the routine expressions of civil service practice’ (Scraton 2004: 49).

Burton and Carlen (1979) examined official inquiries ‘engendered as responses to specific problems raised by contentious events in the administration of judicious control incidents of wrongful imprisonment, illegal police authority, mass rioting, confrontation picketing and administrative internment . . .’. These events generated ‘crises in the popular confidence of the impartiality of legal state apparatuses’. They represented ‘crises of legitimacy’ undermining the ‘ideological social relations that reproduce dominant social conceptions of the essentially just nature of the politico–judicial structures of the state’ (1979). Commenting on the authoritarian populist response to these events, Hall et al. 1978: 319) conclude, ‘the construction of consent and the winning of legitimacy are . . . the normal and natural mechanisms of the liberal and post-liberal capitalist state’. For Burton and Carlen (1979: 13), the public inquiry is part of this normalization process—a ‘routine political tactic directed towards the legitimacy of institutions’.

The ‘task of inquiries into particular crises is to represent failure as temporary, or no failure at all, and to re-establish the image of administrative and legal coherence and rationality’ (Burton and Carlen 1979: 48). As public concern mounts, inquiries become instrumental in reaffirming ‘political and ideological hegemony’. Thomas (1982: 40) takes this argument further. He accepts that inquiries ‘defuse and delay embarrassing situations’ but also they constitute a ‘device for social control’. In discussing the ‘pedagogic task of discursive incorporation’ derived in the application of ‘bodies of knowledge’, Burton and Carlen (1979: 51) also consider the relationship between useful information and ‘strategies of social control’. This connects to ‘discourses of legitimacy’ through which the ‘state’s fractured image of administrative rationality and democratic legality’ is rebuilt. ‘Experts’ and their evidence are employed to renew faith in state institutions, their employees their policies and their practices. These are ‘discourses of confidence’ (Burton and Carlen 1979).

While public inquiries have the potential to reconcile disputes and resolve serious public issues, they are rarely free of political management or manipulation. As responses to ‘crises or profoundly controversial issues their capacity for thoroughness in evidence gathering and disclosure, for establishing responsibility and securing acknowledgement and for challenging institutional, structural determining contexts is questionable’ (Scraton 2004: 50). Official inquiries into events in the North of Ireland stand at the ‘sharp end of a continuum’ (Scraton 2004: 63), where the state’s interests, in the form of its police, military and security services are most in need of protection. Curiously ignored, in the main, by critical state theorists outside Ireland, the material war on the city streets and country lanes of the six counties has been historically matched by the propaganda war in political and media discourses. Just as it is inappropriate to perceive the use of military force and paramilitary policing, the passing emergency legislation, the enactment of special powers and the abandonment of trial by jury as
beyond the core business of the British state, so it is inaccurate to portray its authoritarian interventions as exceptional. While the manifestations of authoritarianism have been an occasional, and usually specifically directed, feature of state intervention in Britain, they have been persistent in the North of Ireland. State-sponsored official inquiries, particularly into alleged abuses of state power, cannot be disconnected from the political and ideological circumstances in which ‘exceptional’ measures were granted legitimacy and the authority of powerful institutions had to be protected. It is in this context, where the advanced democratic state has betrayed many of the fundamental principles of liberalism, that the public inquiry becomes the site of ‘war by other means’.

**British State Inquiries in Ireland**

Written in 1870, Jenny Marx’s conclusion suggests that rather than conceptualizing the emergent liberal democratic state as underpinned by authoritarianism, in Ireland—as with other manifestations of colonial governance—authoritarianism was the rule. Liberalism was the exception. This is clearly evident regarding emergency law. Molloy (1986: 8) notes that ‘in the first half-century after the Act of Union, Ireland was ruled by the ordinary law of the land for only five years’. There were ‘eighty-seven coercion measures in the first eighty-seven years of the nineteenth century’. Partition made little difference: ‘For all but four years or so of its 64-year existence, the independent Irish state has lived under some form of emergency legislation’ (Farrell 1986: 25). In the North, from the 1922 Civil Authorities (Special Powers) Act (NI) through to the 1986 Prevention of Terrorism (Temporary Provisions) Act (NI) and beyond, emergency law was normalized.

It is within this historical and political context that state-sponsored public inquiries should be situated. Their portrayal as part of the democratic process in action is questionable where authoritarian rule is the norm. In essence, the authoritarian state resists democratic scrutiny, allowing access to suit its agenda. In Ireland, British state inquiries were always highly politicized. In the 19th century, they were less likely to result from reasoned debate and rational decision making than political crises involving public disorder, imprisonment or insurrection. For example, there were periodic sectarian riots in Belfast in the latter half of the 19th century. The first occurred in 1857, leading to the 1857 Report of the Commissioners of Inquiry. The Commission concluded that the annual Orange celebration on 12 July was ‘plainly and unmistakably the originating cause of these riots’.

While there were political reasons for the establishment of public inquiries, they also served a specific political purpose: to manage rather than resolve problems of governance. Consider the treatment of Fenian prisoners. In 1865, Fenian organizer, Jeremiah O’Donovan Rossa, was sentenced to prison, where he experienced: hands cuffed behind his back for 35 days; kept naked day and night; solitary confinement; a diet of bread and water eaten off the floor like a dog (O’Donovan Rossa 1991). This caused a public outcry, particularly in US newspapers. Eventually, ‘embarrassed by the international
publicity’ (Curtis 1994: 83), the Prime Minister, Gladstone, agreed to a public inquiry into the treatment of Fenian prisoners. The 1871 Devon Commission confirmed the allegations, recommending: ‘The Royal mercy be extended to O’Donovan Rossa provided he shall depart out of the United Kingdom and remain out of it for twenty years.’ Rossa and 32 other Fenian prisoners were released.

Although the liberalism of the Devon Commission appears self-evident, politically it performed a more significant function for the British state than for beleaguered Fenian prisoners. Heatley and Tomlinson (1981: 243) conclude:

The importance of the Devon Commission lay not so much in its recognition of the political status of the Fenian prisoners as an issue—it could hardly do otherwise—nor in the fact that the government learnt some political lessons from the affair. Its real value was that it allowed the state to explore ways of dealing with Irish political protest which legitimated oppression as ‘a lawful custom’ in the full glare of English politics. Irrespective of their political motives, it was argued, the Fenians were still criminal law-breakers and their incarceration was therefore beyond question. This logic prevented the opening up of wider issues concerning the nature of the judiciary and the rule of law in Ireland.

This conclusion demonstrates the importance of official inquiries to British State rule in Ireland. Major and contentious questions about British administration in Ireland were sidelined, not through denial nor through secrecy, but ‘in the full glare of English politics’.

It is against this background that the role of contemporary inquiries in the North of Ireland should be assessed. Table 1 provides a comprehensive overview. While some inquiries have been civil, most have been linked inextricably to violent political conflict. In this context, although ‘civil’ inquiries might represent the legal fiction as forums for scrutiny and accountability, most inquiries inevitably were part of the battlefield. There is clear evidence that many inquiries were established and designed specifically as weapons of the state in an ongoing political war. Three, Scarman, Widgery and Saville, were commissioned under the 1921 Tribunals of Inquiry (Evidence) Act. Implicitly, the British state acknowledged that street disturbances and the killing of civil rights marchers were so severe as to warrant scrutiny. Other inquiries did not reflect government initiative but resulted from the campaigns of non-governmental organizations, pressure groups, relatives’ groups and others. The ongoing Saville Inquiry into Bloody Sunday was the outcome of three decades’ campaigning to overturn Widgery’s flawed conclusions. A similar campaign resulted in the Barron Inquiry (2003) into loyalist bombs in Dublin and Monaghan in 1974. Independent reports (see Amnesty International 1978) and public campaigns led to the establishment of the 1979 Bennett Inquiry. More recently, inquiries have been derived in political negotiations. The 1999 Patten Inquiry was one consequence of the Belfast (or Good Friday) Agreement. Cory’s reports (2003) were commissioned following a promise made to nationalists during negotiations to release a logjam in the peace process.

Most inquiries have focused on fashioning a legal response to political violence, whether in terms of establishing the office of Director of Public Prosecutions (McDermott) or establishing non-jury courts (Diplock). There has been a distinct focus on issues concerning the actions and omissions of the police and army. This was particularly true in the early days of the conflict. Policing returned as a key issue in the transition to a post-conflict situation. The Patten Commission (1999) recommended the radical restructuring of the Royal Ulster Constabulary (RUC). During this period, the trauma
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<th>Inquiry/tribunal</th>
<th>Purpose/outcome</th>
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<tr>
<td>McDermott, 1971</td>
<td>Interrogation techniques used during internment operation of August 1971 amount to 'ill-treatment', not brutality.</td>
<td>Cmnd 4823. <a href="http://cain.ulst.ac.uk/hmso/compton.htm">http://cain.ulst.ac.uk/hmso/compton.htm</a></td>
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<td>Compton, 1971</td>
<td>Follow on from Compton Report; looks at legality of interrogation techniques.</td>
<td>Cmnd 4901. <a href="http://cain.ulst.ac.uk/hmso/parker.htm">http://cain.ulst.ac.uk/hmso/parker.htm</a></td>
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<td>Parker, 1972</td>
<td>Bloody Sunday. While action of some soldiers bordered on reckless, many of those killed were involved in illegal activity; army did not over-react.</td>
<td>HC220. <a href="http://cain.ulst.ac.uk/hmso/widgery.htm">http://cain.ulst.ac.uk/hmso/widgery.htm</a></td>
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<td>Widgery, 1972</td>
<td>Violence and civil disturbances of August 1969. Concluded that loyalists were behind attack on nationalist Falls Road, and criticized B Specials as sectarian.</td>
<td>Cmnd 566. <a href="http://cain.ulst.ac.uk/hmso/scarman.htm">http://cain.ulst.ac.uk/hmso/scarman.htm</a></td>
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<td>Diplock, 1972</td>
<td>Internment to continue (because of difficulty of obtaining convictions due to intimidation); abolition of jury trial (because of potential Protestant bias); establishment of special courts (with amended rules of evidence); recommends replacement of Special Powers Act (realized in Emergency Provisions Act 1973).</td>
<td>Cmnd 5185. <a href="http://cain.ulst.ac.uk/hmso/diplock.htm">http://cain.ulst.ac.uk/hmso/diplock.htm</a></td>
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<td>Gardiner, 1975</td>
<td>Recommended that internment be phased out. Supports continued use of juryless courts. In effect, the beginning of 'criminalization' of politically motivated prisoners.</td>
<td>Cmnd 5847. <a href="http://cain.ulst.ac.uk/hmso/gardiner.htm">http://cain.ulst.ac.uk/hmso/gardiner.htm</a></td>
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<td>Bennett, 1979</td>
<td>Review of PTA. Among recommendations, that silence under interrogation continue to be considered as criminal offence.</td>
<td>Cmnd 7497. <a href="http://cain.ulst.ac.uk/hmso/bennett.htm">http://cain.ulst.ac.uk/hmso/bennett.htm</a></td>
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<td>Baker, 1984</td>
<td>Examined escape of 38 IRA prisoners in 1983. Recommended the red card system designed to prevent ‘high risk’ prisoners from staying on a wing for more than 10 days.</td>
<td>Cmnd 9222. <a href="http://www.bopcris.ac.uk/img1984/ref3815_1_1.html">http://www.bopcris.ac.uk/img1984/ref3815_1_1.html</a></td>
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<td>Samson, 1987</td>
<td>‘Completes’ Stalker’s investigation after Stalker was dismissed from investigation. Report never published.</td>
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<td>Stevens 1, 1990</td>
<td>To investigate collusion between British forces and loyalist paramilitaries.</td>
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<td>Stevens 2, 1994</td>
<td>To investigate the role of British agent, Brian Nelson, in the UDA.</td>
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<td>Narey, 1998</td>
<td>To investigate the murder of loyalist, Billy Wright (which took place in Maze</td>
<td>Published by Northern Ireland Office.</td>
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<td>Prison), and the escape of IRA prisoner, Liam Averill.</td>
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<td>Ramsbotham,</td>
<td>To report on the regime in Maze Prison following the incidents looked at by</td>
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<td>1998</td>
<td>Narey and the discovery of a 40-foot tunnel dug by IRA prisoners. Somewhat</td>
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<td>Stevens 3, 2003</td>
<td>To investigate collusion of British army and RUC in murders of Pat Finucane and</td>
<td>Unpublished, but see <a href="http://www.serve.com/pfc/pf/">http://www.serve.com/pfc/pf/</a></td>
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<td>Cory</td>
<td>To investigate six cases of possible collusion; recommended public inquiries in</td>
<td><a href="http://www.serve.com/pfc/">http://www.serve.com/pfc/</a> for reports on southern cases, and <a href="http://www.nio.gov.uk/">http://www.nio.gov.uk/</a> for reports on</td>
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<td>and Lady Gibson).</td>
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<td>army collusion with loyalist bombers and subsequent state cover-up.</td>
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<td>Saville, 2006</td>
<td>A new inquiry into the events of Bloody Sunday. Began hearings in March 2000</td>
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of Bloody Sunday was revisited through the Saville Inquiry. The actions of the security forces, in this case the RUC, were central to two inquiries that focused on shoot-to-kill operations in County Armagh in the 1980s—Stalker and Sampson. Collusion between the British army, RUC and loyalists has been a key issue in the three Stevens inquiries, Barron and Cory.

The Northern Ireland Prison Service, distinct from the England and Wales and Scotland Prison Services, has been the subject of three significant external inquiries over two decades. The Hennessey (1984), Narey (1998) and Ramsbotham (1998) Inquiries were chaired by senior personnel from within the England and Wales prison system. Hennessey and Ramsbotham were chief inspectors of prisons. The three inquiries dealt with escapes and attempted escapes, and Narey also considered the circumstances in which a loyalist prisoner was killed. It is both instructive and remarkable that while security issues were the focus of these inquiries, civil libertarian and human rights concerns regarding internment, brutality endured by prisoners, the suffering of prisoners during the no-wash protest and the death of ten prisoners on hunger strike did not result in special inquiries conducted by outside investigators.

Yet, the issue of imprisonment was never far away from the periodic reviews of special laws and emergency powers. Internment, interrogation, rules of evidence, proscription of named organizations, abolition of jury trials, political status and its replacement by criminalization underpinned nine Inquiries: Compton, Parker, Diplock, Gardiner, Shackleton, Bennett, Jellicoe, Baker and Colville. These Inquiries were established to justify derogation from the ‘normal’ rule of law. It was rare, even in the early 1970s, to provide watertight explanations justifying derogation. In recommending the removal of trial by jury, for example, Lord Diplock stated: ‘The threat of intimidation of witnesses which we have already described extends also to jurors, though not to the same extent’ (Cmd 5185, paragraph 36). This conclusion was not supported by hard data. When questioned in the House of Lords specifically about the absence of data, Diplock replied: ‘When I see a fire starting, and indeed we saw a fire starting then, I send for the fire brigade, not a statistician’ (cited in Greer and White 1990: 58). Similarly, the Jellicoe, Baker and Colville Inquiries assumed that derogation posed no problems for democratic state rule—that a slight amendment to the operation of emergency law was sufficient. Consider Baker’s terms of reference: ‘Accepting that temporary emergency powers are necessary to combat sustained terrorist violence . . . ’ (Cmd 9222: 1). Likewise, Jellicoe’s report begins: ‘Accepting the continuing need for legislating against terrorism . . . ’ (Cmd 8808: iv).

Inquiries established to review emergency legislation existed not as civil libertarian counterpoint to derogation from the rule of law, but as bureaucratic management once the political decision to derogate had been taken. Were inquiries outside this cluster also about state management of political conflict, or did they have the potential for civil libertarian challenges to the authoritarian state? Reflecting on the Cameron, Scarman, Widgery, Parker, Diplock and Gardiner Inquiries, Boyle et al. (1975: 126–30) concluded that they failed at four levels.

First, their terms of reference excluded broader issues. Widgery’s brief was already narrow: to examine the events of ‘Sunday 30 January which led to loss of life in connection with the procession in Londonderry on that day’. He interpreted it as excluding any consideration of the lead-up to the day, from the civil rights movement and its demands to the orders given to soldiers in relation to civil rights marches. This crucial
background information, which could and should have contextualized the atrocity or, more importantly, explored the existence of a policy to ‘teach’ the people of Derry ‘a lesson’, was ruled out in advance.

Second, conclusions did not meet the standards of an objective assessment (possible exceptions being Cameron and Scarman). For example, Compton dismissed allegations of British army physical brutality of people arrested in August 1971 by redefining ‘brutality’ as ‘ill treatment’. Baker refused to proscribe the Ulster Defence Association (UDA) on the grounds that: they did not claim responsibility for acts of terrorism (these are claimed under the banner of the UDA’s paramilitary wing, the Ulster Freedom Fighters); prescription would increase interest in the organization; a ban would be difficult to enforce; the UDA did not represent a threat to the nationalist population; a ban would drive those in the UDA who are involved in illegal activities underground.

Third, reports were frequently delayed, their impact ‘virtually nil in terms of restoring confidence in the impartiality of the RUC’ (Boyle et al. 1975: 128). Scarman, for example, was published three years after the events it was charged to investigate. Fourth, no actions followed when inquiries found that soldiers or police were culpable. Cameron and Scarman produced incontrovertible evidence of RUC involvement in the deaths of John Gallagher in Armagh in August 1969 and Samuel Devenny in Derry in April 1969, but no member of the RUC was prosecuted. Boyle et al. (1975: 129) conclude: ‘... the appointment of judges to chair what turned out to be essentially political inquiries blurred the distinction between executive and judicial functions, and had an adverse effect on public confidence in the impartial role of the latter.’

A more robust conclusion is possible. These inquiries were not established to restore public confidence in the impartiality of the rule of law within the North of Ireland, but rather to give that appearance to a British and international audience. The law was used for political ends. They narrowed the field of inquiry, avoided obvious and objective conclusions that might show state forces in a bad light, delayed reporting to mute the impact of negative criticism of the report and ensured that security force personnel would not be prosecuted or reprimanded for their actions. ‘Restoring public confidence’ in state authority presumes that confidence previously existed but had been eroded through inappropriate state actions; it is posited on state legitimacy. But, in circumstances where the state legitimacy was questioned or denied by a substantial proportion of the population, inquiries could not meet that ideal. As the state was ‘governing without consensus’ (Rose 1971), official inquiries functioned to provide a veneer of democratic process. They represented a calculated move by government, in consultation with powerful state institutions and the judiciary, to give the appearance of scrutiny while protecting state interests. For example, at a meeting with Prime Minister, Ted Heath, and Lord Chancellor, Hailsham, the day after Bloody Sunday, Lord Widgery was reminded that ‘we were in Northern Ireland fighting not only a military war but a propaganda one’ (Mullan 1997: 43).

John Stalker, then Deputy Chief Constable of Greater Manchester, investigated instances of police killing of republicans in County Armagh in 1982. If the expectation was that he would exonerate the RUC, he disabused this notion by mounting a principled investigation. He found fault with the RUC’s investigation of the murders and was critical of the Special Branch as a force within a force. About to interview the RUC Chief Constable and other senior officers, he was removed from the investigation and
faced disciplinary charges in Manchester that eventually were dismissed. That there have not been more ‘Stalkers’ speaks volumes of how the judges who have conducted inquiries in the North of Ireland went about their task. In the confrontation between professional, impartial investigation and political expedience, the latter triumphed. As Hegarty (2003: 1189) concludes, the tension has been between ‘state interests’ and ‘truth telling’, with the cards stacked in favour of the former. Given that, the solution seems obvious: inquiries independent of state interests.

The Elusive Quest for Independence

In the course of the conflict in Northern Ireland, public inquiries have not, so far, provided a proper means of making the State accountable for its actions. That they have not done so is not because the public inquiry is a deficient model, but because in the main, these were public inquiries that were controlled in their important aspects by those elements of the State that had an interest in preventing accountability. Put simply, these were not fully independent inquiries. (Hegarty 2003: 1189)

This begs the question of what constitutes independence. As discussed earlier, independence is claimed by the state by appointing a judge to chair the inquiry. The separation of powers provides the guarantee of impartiality. Further, in the North of Ireland, all official Inquiries, except McDermott, have been headed by British judges, thus strengthening the claim of independence—a fiction widely rejected in Ireland.

More recently, however, foreign judges have been introduced to conduct inquiries. Although the Bloody Sunday inquiry is headed by British judge, Lord Saville, he is assisted by Canadian judge, Sir Edward Somers, and New Zealand judge, William Hoyt. Judge Peter Cory, who recently carried out the investigations of six cases of alleged collusion, is Canadian. If personnel alone guaranteed impartiality and independence, such moves would be significant. However, the problem of inquiries for victims’ groups, civil libertarians and others in the Irish context relates to fundamental structural issues, such as state collusion and the abuse of lethal force. These issues ‘have undermined respect for the system of justice in Northern Ireland and for the rule of law’ (BIRW 2001), going to the heart of the state’s role in democratic societies. Consequently, victims’ groups and campaigners face significant and difficult policy choices. They can reject inquiries as state-friendly mechanisms whose criticisms, if any, assist and refine state repression. Alternatively, they can initiate their own inquiries. Or they can hold out for the ideal, demand greater independence and probe the state’s commitment to its democratic principles.

Each alternative has shortcomings. Rejecting formal inquiries denies the opportunity, however remote, to influence outcomes. But it does not rule out other mechanisms of calling the state to account. For example, four cases, involving the murders of ten IRA members by state forces and one loyalist victim, were brought jointly to the European Court of Human Rights. In a landmark judgment, the Court ruled that the British state’s failure to investigate properly these murders breached Article 2, the right to life (European Court 2001). Initially, the judgment appeared to open the floodgates for bringing a range of cases on identical grounds. These included state killings, collusion and killings of nationalists that had not been adequately investigated by the police. A subsequent House of Lords ruling, however, concluded that only incidents occurring
after the European Convention on Human Rights became part of British domestic law in 2002 could be admissible (House of Lords 2004).

Community-based inquiries offer an alternative. Early in the conflict, following a request by the Northern Ireland Civil Rights Movement, three lawyers—Tony Gifford from Britain, American Paul O’Dwyer and Albie Sachs from South Africa—conducted an inquiry into the deaths of Seamus Cusack and Desmond Beattie at the hands of the British army in Derry, July 1971 (Inquiry 1971). The New York-based International League for Human Rights, along with the National Council for Civil Liberties, held an inquiry into Bloody Sunday. Its findings contradicted Widgery (Dash 1972). In 1991, the Cullyhanna Justice Group, in association with the Irish National Congress, held a public inquiry, chaired by American judge, Andrew Somers, into the killing by British soldiers of local man, Fergal Caraher (Cullyhanna Justice Group 1991). Judge Somers was also involved in the locally run public inquiry into the murder by loyalists of Patrick Shanaghan in County Tyrone in 1991 (Castlederg/Aghyaran Justice Group 1996).

These inquiries found state interests culpable, in shooting dead innocent nationalists in Derry and Cullyhanna and in colluding with loyalists in murder in County Tyrone. A shortcoming of this alternative approach is that while confirming the community’s suspicions and fears, it cannot penetrate state institutions. Yet, the Gifford inquiry provided the foundation for a European Court case against the British Government brought by the Irish Government. The Cullyhanna Inquiry was key in the British State’s reluctant decision to prosecute two soldiers for the murder of Fergal Caraher. The soldiers were acquitted. The inquiry into British army collusion in the loyalist murder of Patrick Shanaghan ensured the case was selected as one of four mentioned above which were taken to the European Court of Human Rights.

Community-based inquiries could provide a model for independent inquiries. Two important elements were the involvement and *imprimatur* of the affected community and the appointment of international legal chairs outside the British state. These elements would constitute minimum standards should the third option—securing an independent official inquiry—be pursued. For official inquiries to have credibility and, therefore, legitimacy, they have to be more ‘victim’ oriented than state functioning. Their work must be directed towards justice rather than the political management of injustice. They should challenge rather than sustain régimes of truth.

*Beyond Saville: The ‘Truth Agenda’*

Pursuing the ‘ideal’, however, opens up the idealism debate: that the established ‘rule of law’ can ever deliver social justice where political exigency and state power are bound into the political management of structural inequalities. Yet, such ideals have powerful resonance for victims and campaigners committed to holding state agencies to account, regardless of how profoundly frustrating and demeaning is the experience. There have been systemic failures in holding adequate inquests, in prosecuting state personnel, in securing convictions and, on the rare occasions when convictions resulted, in securing appropriate sentences. Yet, still a residual faith remains in the capacity of the judicial system to deliver justice.

Campaigners for public inquiries are aware that achieving full disclosure, accessing all available evidence and gaining positive outcomes often constitute unrealistic objectives. For those who campaigned for the Saville Inquiry into Bloody Sunday, for example, it
has become remote and institutionalized—a lawyers’ forum rather than a testimony to community empowerment. Estimated to cost eventually £200 million (Kite 2003), its outcome may well offer both vindication to campaigners and solace for the state. Despite this, the Saville Inquiry stands as a repudiation of Widgery’s conclusions. Most importantly, in commissioning Saville, the British State conceded and acknowledged a key campaign demand: the victims of Bloody Sunday were unarmed civilians.

The spectre of the Saville Inquiry hangs over other current campaigns, not only in terms of cost, but also in terms of the thorny question of independence. While the campaign for a new inquiry into Bloody Sunday met with persistent political resistance, this dissipated once Saville was announced. The British Government appears prepared for the possibility that Saville will be critical. Politically, however, this can be accommodated. First, the inquiry is headed by a British judge. However he interprets his formal independence from the state, from the Government’s position, his criticisms will not be unreasonable. Second, the inquiry has taken a sanitized and legalistic form. Criticism of the state is likely to be tempered by criticism of other, non-state actors, including the IRA and the Northern Ireland Civil Rights Association. Third, over three decades have passed. Criticism of individuals will relate to those no longer alive or in power.

More recent demands for inquiries into the killing of lawyers Pat Finucane and Rosemary Nelson, of loyalist Billy Wright and of Robert Hamill (each murdered in the North), as well as Lord Judge Gibson and his wife, and RUC members Robert Buchanan and Harry Breen (each murdered in the South), were likewise resisted but, eventually, Judge Peter Cory was appointed to investigate the cases. He recommended official public inquiries in all cases. The British Government is committed to establishing inquiries into three of the cases in its jurisdiction and has announced that these inquiries will begin in autumn 2004 and will be conducted by senior or retired judges from outside the North of Ireland (see Dempster 2004). However, it claims it cannot proceed in the Finucane case, due to a criminal prosecution of one of the alleged killers.

To establish and sustain credibility, these official Inquiries will require autonomy and independence from British State interests, while maintaining a commitment to the interests of the bereaved. This is likely to be problematic, particularly in the case of Pat Finucane. His murder, in 1989, is closer in time than Bloody Sunday and goes to the heart of the dirty war operationalized by undercover police and army. It was a war sanctioned by officials still in office, in the police, army and political life. The Special Branch that thwarted Stalker, the ‘force within a force’ of which he complained, remains intact despite police reforms. The Ministry of Defence, ultimately responsible for the undercover army unit, the Force Research Unit (FRU)—involved in the murder of Pat Finucane—has actively resisted the Saville Inquiry. Just days before the inquiry sat, it destroyed 14 of the 19 army rifles fired on Bloody Sunday. The Saville team demanded the retention of the remaining five rifles, yet a further two were destroyed. All photographs taken on Bloody Sunday by ten military photographers were also destroyed (Rolston 2000: 9). Throughout the inquiry, the MOD has stalled proceedings by initiating judicial reviews. This represents a portent of the resistance future inquiries will face from powerful state interests.

The proliferation of demands for inquiries has brought a shift in the responses of Government and the police. Early in 2004, the Secretary of State for Northern Ireland, Paul Murphy, and the Chief Constable of the Police Service of Northern Ireland (PSNI), Hugh Orde, each called for a truth and reconciliation commission. This was a
surprising development given that previously this was an oppositional position. Victims’
groups, particularly republican, have examined processes in transitional societies and
concluded that a truth commission is one mechanism for holding the state accountable
for its part in human rights abuses. But this is not the logic of Murphy and Orde. Orde
views a commission as a means to rescuing the PSNI from multiple inquiries into what he
classifies ‘historic crimes’ and of ‘drawing a line’ under the past (cited in Brown 2003).
During a visit to South Africa, Murphy revealed that the proposed truth commission
would be a ‘forum for story telling’ (cited in Carroll 2004). This falls well short of a pro-
cess for establishing the political, legal and organizational accountability of state institu-
tions in the way searching truth commissions have attempted (Hayner 2001). Those
previously campaigning for inquiries, who might have supported a truth commission, are
sceptical. They view the Murphy–Orde agenda as a means whereby calls for thorough
inquiries, such as those recommended by Cory, can be deflected or subsumed.

A truth commission for Ireland would need to be independent of the British state and
would have an investigative role rather than being restricted to story-telling (see Eolas
2003). Its objectives would be truth, justice and acknowledgement, rather than reconcili-
ation. These are tall demands, likely to be resisted by elements within the British state.
The army, Special Branch, MI5 and MI6 will employ the ‘state security—public interest
defence in their collective refusal to cooperate with a commission of independent scru-
tiny. Thus, a truth commission in the North of Ireland could follow the well trodden path
of the official Inquiries discussed above, constituting no more than a façade of public
empowerment which, ultimately, fails to hold to account the power of the state. Like the
consummate magician, the state’s sleight of hand defies the full glare of the public gaze.

Postscript

In September 2004 the Secretary of State for Northern Ireland, Paul Murphy stated
that the ‘Government is determined that where there are allegations of collusion the
truth should emerge’. This included the Pat Finucane case. Following the conclusion
of the criminal prosecution in the case ‘steps should now be taken to enable the estab-
lishment of an inquiry’ uncovering ‘the full facts of what happened’ through ‘all the
powers and resources necessary’. To this end, and taking ‘into account the public inter-
est, including the requirements of national security, it will be necessary to hold the
inquiry on the basis of new legislation’ (Press Release, 23 September 2004). The Finu-
cane family and a range of civil liberties groups immediately expressed their profound
concerns regarding any restrictions on the ‘public’ nature of an inquiry.

The Inquiries Bill was met with profound and broad criticism regarding: lack of
accountability; tightened control of terms of reference; lack of independence and
transparency in appointments; government discretion over access, disclosure, proced-
ure and publication of evidence and reports. Coincidentally, former Conservative
minister, Michael Heseltine, stated to the Public Administration Committee that, ‘No
government wants inquiries. They are usually held in circumstances where the govern-
ment is in trouble, where it is felt that there is something to be found beneath the
bland spin-doctoring of national politics . . . if they have to have them . . . reach your con-
clusion and then choose your chairman’ (BBC Radio 4 Today 12 November 2004).

In March 2005 Judge Peter Cory rejected the proposed legislation on the grounds
that the UK Government was unfairly ‘chang[ing] the ground rules’. His initial report
‘certainly contemplated a true Public Inquiry’ in line with the 1921 Public Inquiries Act which ‘ensured . . . the security of the realm’. The new Act, passed in April 2005, ‘would make a meaningful inquiry impossible’ creating an ‘Alice in Wonderland situation’. He recommended that if invited all Canadian judges should ‘decline an appointment’ (Letter to Congressman Chris Smith, Head of US Congressional Committee). The Fears of the Pat Finucane family were exacerbated further when a UK Government representative told the Human Rights Commission in Geneva that a ‘large proportion’ of the inquiry ‘would probably have to be held in private’ (Belfast Telegraph 7 April 2005). As a consequence, the family of Pat Finucane, key witnesses to his murder, stated that they were ‘highly unlikely to take part in this inquiry’ concluding that the legislation demonstrated that the ‘defence of the realm was more important than publicly and independently inquiring into state run death squads’ (Written communication to the Department of Constitutional Affairs, 7 April 2005).

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