NO EMERGENCY, NO EMERGENCY LAW

emergency legislation
related to northern ireland

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the case for repeal

CAJ

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PREFACE

The Executive Committee of the **Committee on the Administration of Justice** is grateful to the Emergency Laws Sub-group for producing this pamphlet. Emergency legislation was one of the issues which led to the establishment of the CAJ in 1981. It has been a consistent theme of the organisation that emergency legislation is not only wrong in itself but counter-productive in that it fuels the political conflict.

This publication has a long history. It's first outing was as a briefing paper for Parliamentarians during the passage in 1990 of the bill which led to the enactment of the **Northern Ireland (Emergency Provisions) Act 1991**. Unfortunately, the arguments made then remain compelling and relevant in the absence of any meaningful movement by the government. They have been up-dated and the **Prevention of Terrorism (Temporary Provisions) Act 1989**, which covers the whole of the UK, has also been assessed.

Following the ceasefires by the republican and loyalist paramilitary organisations in the autumn of 1994, the arguments made in 1990 have become even more unassailable.

We are grateful to all the people who were involved down the years in the production of this pamphlet: Michael Potter, Clodach McGrory, Mary O'Rawe, Jeanine Bucherer, Martin Wolfe, Colm Campbell, Brice Dickson, Angela Hegarty, Martin O'Brien, Liz Martin, Claire Oliver, Anne Marie Murray and Michael Ritchie.

We hope that there will be no further need for publications on emergency legislation related to Northern Ireland in the future.

CAJ Executive Committee
March 1995

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Chapter 1. INTRODUCTION

1.1 Protecting Human Rights

Experience all over the world has shown that human rights are especially under threat in situations of emergency. The **Committee on the Administration of Justice** (CAJ) believes that in precisely these situations vigilance against human rights abuses must be greatest.

The existence of civil unrest or paramilitary violence does not automatically justify the application of emergency powers; they should only be enacted if the unrest/violence necessitates additional measures. Under the **European Convention on Human Rights** (ECHR) there must be a public emergency threatening the life of the nation before the government can derogate from its human rights obligations in order to bring in emergency powers. Crucially, derogation is lawful only for the duration of such a public emergency.

CAJ has consistently called for the repeal of emergency legislation, believing that there has not been in Northern Ireland a "public emergency" warranting such legislation. This is not to deny that violent conflict has been ongoing - simply that ordinary law contained sufficient powers to deal with it. Moreover, CAJ has highlighted the counterproductive effects of the use and abuse of emergency legislation which became part and parcel of the cycle of violence in our community, contributing to the alienation of certain sections of the population and the erosion of the moral standing of the government.

The present conflict developed in the late 1960s escalating in the early 1970s. Paramilitary groups grew in strength in both the Protestant and Catholic communities waging campaigns of violence in Ireland, North and South, Britain and in Europe. The Stormont Government responded by utilising the **Civil Authorities (Special Powers) Act 1922**. After the fall of the Stormont Government and in the face of escalating political violence, the British Government in Westminster replaced the **Special Powers Act** with the **Northern Ireland (Emergency Provisions) Act 1973** (EPA). In reaction to the IRA's campaign in Britain, the **Prevention of Terrorism (Temporary Provisions) Act 1974** (PTA) was also enacted. During the ensuing twenty years more and more powers were enacted in the EPA. The justification put forward by the governments for the emergency measures was that they were temporary powers necessitated by the public emergency posed by paramilitary violence.

The last few months of 1994 witnessed fundamental and far-reaching developments with the cessation of violence by the Irish Republican Army (IRA) on 31st August 1994 and the Combined Loyalist Military Command on 16th October 1994. Both the Irish and British Governments are engaged in preliminary talks with the political representatives of these groups.

1.2 Outline

This pamphlet provides an overview of the history of "emergency" legislation before and after partition focusing on the development of the current EPA and many of the provisions of the PTA.

The counter-insurgency or containment model embodied in the EPA was based on the Report of the **Diplock Commission** in 1972. The "Diplock System" was designed to more easily facilitate the arrest, interrogation, prosecution and conviction of persons suspected of involvement in paramilitary activity who would be less likely to be convicted under the ordinary criminal justice system. The suspension and erosion of many civil liberties essential to ensure a fair system of criminal justice gives great cause for concern. The pamphlet will trace the incremental development of the powers contained in the EPA to the stage where a two-tier criminal justice system operates in Northern Ireland buttressed by an extra-ordinarily wide range of powers for the police, army and other authorities. In particular, the pamphlet will consider the "terrorist" offences which have been created (chapter 3), the powers of 'stop and search' and 'search and entry', (chapter 4 and 5) the process of arrest, detention and interrogation (chapter 6) and the Diplock courts (chapter 7). Chapter 8 covers a number of miscellaneous matters.

The **Prevention of Terrorism (Temporary Provisions) Act 1989** (PTA) is the current version of emergency legislation which applies to the whole of the United Kingdom and was first enacted in 1974. The PTA gives the authorities wide powers to deal with paramilitary finances, to examine people at ports and harbours, to expel people from either Britain or from the UK as a whole and to detain suspects for up to seven days. The legislation was rushed through Parliament in the aftermath of the Birmingham bombings in 1974 and has been modified and extended since. Once again this provides an example of legislation that is supposedly temporary but has become part of the fabric of the dual criminal justice system in operation in N. Ireland. In this document, we examine exclusion orders and the 7-day arrest power, emergency provisions which impact most widely on the community in Northern Ireland.

1.3 Should emergency law be renewed?

This pamphlet scrutinises emergency legislation currently in force. The commentary attempts to show how the emergency regime and particular emergency powers violate civil liberties.

In the first half of 1995, both the PTA and the EPA fall due for renewal by the Westminster Parliament. In the case of the former, this is a regular annual renewal. In terms of the EPA, it is time for a full 5-year review of the legislation. A full debate on the basis for the statute should therefore take place in Parliament.

On Tuesday 7th February, 1995, the Irish government formally ended the national emergency which had been in existence in that jurisdiction since 1939. Speaking in Dáil Eireann, Dick Spring, Tánaiste and Minister for Foreign Affairs said it was important for the British government to move on emergency law relating to Northern Ireland: "We hope that they will now consider whether they need, in the circumstances which now prevail, to maintain on the statute book legislation which has proved controversial but which was defended on the basis of the exigencies of the situation. The (Irish) Government believes that to repeal, or at least to limit substantially, many of these provisions would be helpful in strengthening support for the administration of justice, but would also make a considerable contribution to creating a climate conducive to agreement and political progress."[1]

It is for the British Government to show justification for emergency measures and to engage with arguments such as those presented in this document. While CAJ has always taken the view that there is neither necessity nor justification for the panoply of emergency measures relied on by the authorities, at the time of publication in early 1995, there is no emergency situation and there has been no paramilitary violence for almost six months.

The argument is simple:

NO EMERGENCY,

NO EMERGENCY LAW.

[1] **Irish Times**, 8th February 1995, p16.

Chapter 2. EMERGENCY POWERS PAST AND PRESENT

2.1 Historical Perspective

The spate of "Troubles" which recently came to a close in Northern Ireland began in 1968. The phenomenon of political violence is by no means novel in this part of the world. Indeed the history of the whole island has been dominated by political conflict and government coercion. It was in the 18th century that emergency law began to be used more frequently to maintain order in Ireland. Given the lack of officers willing and able to police Ireland, the British army was increasingly drafted into a law-enforcing and even administrative rôle. The Irish Parliament conferred extraordinary summary powers on magistrates and troops in the so-called Whiteboy Acts, which were employed against violent rural groups in the North, known as Oakboys and Steelboys. The powers were also used to suppress the United Irishmen in the 1790's. At this time, detention of suspects without trial, and trial by court-martial, were common.

Throughout the 19th century, there was ongoing agrarian violence and sporadic mass civil disobedience, especially in the South. The United Irishmen, under the Protestant Wolfe Tone, rebelled in 1798 and there were further revolts in 1803 (led by Robert Emmett), 1848 (the "Young Ireland " movement) and 1867 (the Fenian rising).

The British response to these events was a series of measures that were at times coercive and at times conciliatory. A police force was established along military lines and became the model on which many other police forces throughout the British Empire was based. The responsibility for taking prosecutions at assizes was given to Crown solicitors acting under the direction of the Attorney-General. Between 1800 and 1921, the government introduced no fewer than 105 Coercion Acts dealing with Ireland; between 1800 and 1900 a law suspending the operation of the provisions on **habeas corpus** (which prevented detention without charge) was introduced on four occasions, for periods totalling 11 years. The effect of such legislation, and the political implications of its enactment, are examined by Townshend in **Political Violence in Ireland** (1983). While he contends that "until the 1820's there was no marked difference, in nature or frequency, between emergency legislation in Ireland and in Britain" (p 55), he agrees that "a pattern of divergence became remarkable after the 1820s" (p 56).

Disturbances in Britain were dealt with under ordinary criminal law, whereas in Ireland

emergency legislation such as the **Suppression of Local Disturbances Act 1833** was passed. This Act allowed offences to be tried by court martial established under military procedures, supposedly to eliminate the possibility of intimidation in ordinary courts. There followed the **Peace Preservation Act 1870**, which empowered magistrates in Ireland, contrary to the ethos of English common law, to compel witnesses to testify during the investigation of a crime, before any trial.

The **Protection of Life and Property (Ireland) Act 1871** permitted arrest and detention without trial of persons reasonably suspected of being members of a secret society in the East of Ireland (the Ribbon Society, mainly in County Westmeath). A further example of such coercive legislation is provided by the **Prevention of Crimes (Ireland) Act 1882** passed just after the murder of the new Chief Secretary, Lord Cavendish, in Dublin. This allowed the suspension of jury trial in cases such as murder whenever the Lord Lieutenant indicated that a just and impartial trial could not be organised according to the ordinary course of law. In fact, there was such an outcry in Ireland over this power to suspend juries that it was never exercised; instead special juries consisting of the larger property owners were used, or the powers of summary trial were simply extended.

Coercive powers were further extended by the **Criminal Law and Procedure (Ireland) Act 1887**, which could be brought into force in parts, or in all of the country. It gave power to magistrates to interrogate witnesses in private, it allowed the Lord Lieutenant and Privy Council to declare any association unlawful, it widened the definition of intimidation and it provided for the transfer to another county of trials that would otherwise not be fair and impartial. This Act was only repealed in Northern Ireland in 1975.

Townshend believes that the passing of "rarified measures of repression" in the hope that "normality would reassert itself", established an important pattern for years to come. A more sinister perspective was provided by the English constitutional lawyer Albert Dicey. He believed, in Townshend's words, "that if the powers erratically and transiently granted by special legislation were built into the criminal law of both Ireland and England on a permanent basis, they would become much less contentious".

2.2 Northern Ireland, 1921 - 1972

There were abortive efforts to give Home Rule to Ireland at the end of the 19th century and immediately prior to the First World War, but eventually the **Government of Ireland Act 1920** provided for two Home Rule Parliaments in a partitioned island. Following the negotiation of the Treaty, the Government of Ireland Act had no effect in the South. That part of the island duly became the Irish Free State in 1922, though still within the British Commonwealth. In 1937 the present Constitution was adopted. The state remained neutral during the Second World War and in 1948 it left the

Commonwealth and became the Republic of Ireland.

In Northern Ireland, a local parliament was established in Belfast (exercising powers conferred on it by the 1920 Act and remaining subordinate to the Parliament at Westminster). Northern Ireland therefore remained part of the United Kingdom. By s. 1(2) of the **Ireland Act 1949** its constitutional position as part of the United Kingdom was guaranteed as long as the Parliament of Northern Ireland wanted it to be. The union is also guaranteed by s. 1 of the **Northern Ireland Constitution Act 1973**.

The Northern Ireland government in the face of political conflict passed the **Civil Authorities (Special Powers) Act (NI) 1922**. This was based upon the **Defence of the Realm Act 1914** and **The Restoration of Ireland Act 1921** (and the regulations made under these Acts) which the British had employed in response to the 'Troubles'. The 'Special Powers Act' was renewed annually until given a five-year life span in 1928 and made permanent in 1933. The provisions of this Act, and of the far-reaching regulations made under it, were so extensive that Mr Voester, the then Minister of Justice in South Africa, said, when he was introducing a new Coercion Bill, that he "would be willing to exchange all the legislation of that sort for one clause in the Northern Ireland Special Powers Act", the infamous s. 2(4).[2]

The Act gave a wide regulation-making power to the Minister of Home Affairs for Northern Ireland and s. 1 of the Act provided that the Minister or any officer of the local police (the RUC) to whom he had delegated the power, could "take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order according to and in the execution of this Act and the regulations". Over the years an extensive battery of powers was built up in the regulations. Typically, the Act and the regulations allowed for:

- arrests by the RUC of any individual without warrant and detention for up to 48 hours solely for the purpose of interrogation;
- internment without trial;
- entry by the RUC or the army without warrant into any home believed to be used or kept for any illegal purposes;
- orders from the RUC that any assembly of three or more persons should disperse if the RUC believed that the assembly might lead to a breach of the peace;
- the outlawing of organizations;
- prohibitions by the Minister of publication or distribution of any newspaper, periodical, book, or other printed matter;
- the imposition of curfews;
- orders from the Minister excluding the named person from all but the tiniest part of Northern Ireland;
- prohibitions on the holding of inquests into sudden deaths.

It has to be remembered that during the whole time when the Special Powers Act

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[2] S. 2(4) reads: *"If any person does any act of such a nature as to be caluculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be guilty of an offence against those regulations."*

remained in force (1922 - 1972) the Parliament of Northern Ireland was dominated by the Unionist Party, which supported the link with Britain. Until 1966, the associations which were outlawed under the Act were all nationalist. The repeal of the Act was one of the central demands of the civil rights campaigners who began to lobby for reform from the mid-1960's onwards. But because of the manner in which the emergency laws had been applied under Stormont whenever opposition to them was expressed in the form of calls for greater civil rights, this was construed by the authorities as an attack on the state itself. Increased emergency powers were utilised and in August 1969 the army was called in to assist the RUC. The violence escalated and in 1971 internment without trial was re-introduced as a response, it was claimed, to the renewed IRA campaign. In March 1972, the Stormont Parliament and government was abolished, to be replaced by "direct rule" from Westminster.

2.3 The Diplock System and the Evolution of the 1991 Act

In the same year in which direct rule was imposed, a commission chaired by Lord Diplock was appointed to consider "what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book otherwise than by internment by the Executive, individuals involved in terrorist activities. .".[3] Despite the fact that the Commission's examination of the Northern Ireland situation had been cursory and heavily dependent on the perceptions of the British army, the bulk of its recommendations were quickly implemented in the **Northern Ireland (Emergency Provisions) Act 1973** (EPA 1973).

This legislation finally repealed the Special Powers Act, but the appearance of progress was quite deceptive, since many of the earlier provisions were substantially re-enacted. Thus, the new legislation incorporated special powers to stop, search, arrest and detain; to intern without trial; to block roads and to ban organisations. Indeed the EPA went further than the Special Powers Act in that it provided for the establishment of "Diplock courts" - trials of "terrorist" offences by one judge sitting without a jury - and made statements admissible before such courts in circumstances in which they would have been excluded under the ordinary law.

From 1974 onwards, further special powers have also existed under the various Prevention of Terrorism Acts (PTA), which, unlike the EPA, have applied throughout the United Kingdom. The most recent of these is the **Prevention of Terrorism (Temporary Provisions) Act 1989,** which despite its title is permanently renewable. This legislation allows for detention for up to seven days, the banning of organizations, and the making of *exclusion orders* - in effect a system of internal exile. In addition special powers of interrogation at ports have been created, which have been very widely used against the Irish Community in Britain. In the **Brogan** case the extended detention powers in the Act were held to be in breach of the European Convention on

[3] Report of the **Commission to consider Legal Procedures to deal with Terrorist Activities in Northern Ireland**, para 1, Cmnd. 5185 (1972).

Human Rights. [4] In response the United Kingdom entered a derogation notice under Article 15 of the Convention (that is, the government has said it no longer considers itself bound by the Convention on this particular matter).[5]

In 1975 a further review of the EPA was concluded by the Gardiner Committee, and this led to the minor changes introduced by the **Northern Ireland (Emergency Provisions) (Amendment) Act 1975** (EPA 1975). 1978 saw a further Emergency Provisions Act (EPA 1978) in which the earlier legislation and certain other pieces of emergency legislation were consolidated.

The foregoing legislation was considered in the 1984 government-sponsored Baker Review, which took as its starting point "that temporary emergency powers are required to combat sustained terrorist violence". Baker's main recommendations can be summarised as follows:

1. The initial onus for opposing bail should be on the prosecution, bringing the position here closer to that under the **Bail Act 1976**
2. The remand period should be increased from 7 days to 28 or 30 days.
3. S. 8 of 1978 EPA should be re-drafted to amplify the judge's discretion to exclude confession evidence, and to include violence or threat of violence as reasons for disallowing such evidence.
4. The Diplock court system should remain, although he did accept that there was scope for a broader range of offence to be certified out (or "de-scheduled").
5. The repeal of the internment provisions.
6. An initial detention period not exceeding 48 hours, capable of extension, on verification from the Secretary of State, for periods up to 5 days in all.
7. Arrests without warrant should be supported by the constable's "reasonable suspicion" and not the subjective standard of s. 11 (1) and (3) of the 1978 Act. The objective test should also apply in the exercise of the power to enter and search premises to make an arrest, and in the use of police and army arrest powers.
8. The police complaints procedure required a major overhaul.
9. The stop and question procedure should remain with no requirement for "reasonable cause".
10. Emergency legislation should be subject to annual review, and should expire after 5 years. The paucity of statistics on the operation of the 1978 Act was acknowledged.

After years of deliberations, several of these recommendations, and certain other innovations, were incorporated in the **Northern Ireland (Emergency Provisions) Act 1987** (EPA 1987), which operated by amendment of, and in conjunction with, EPA 1978. In January 1990, further far-reaching, though "ordinary", police powers have been introduced under the **Police and Criminal Evidence (Northern Ireland) Order**

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[4] **Brogan et al v UK**, Eur. Ct., 29 November 1988.

[5] The derogation was challenged in the European case **Brannigan and McBride v. UK**. Unfortunately, in a decision which must have sung sweetly in the ears of national governments, the Court found that it was entirely up to those governments to decide what powers they need when faced with an "emergency threatening the life of the nation".

1989 (the PACE Order), some of the provisions of which are examined in this pamphlet. Important changes were also made to the centuries-old right to silence by the **Criminal Evidence (Northern Ireland) Order 1988** which gave prosecuting authorities increased opportunities of obtaining corroboration.

The government issued a non statutory 'Guide to the Emergency Powers' in 1990 designed to guide the police and army in their use and application of the EPA. Despite these developments, the powers contained in the EPA were regarded by the authorities as insufficient and, in 1991, the British Parliament consolidated and expanded the emergency regime by passing the **Northern Ireland (Emergency Provisions) Act 1991**.

The 1991 Act repealed EPA 1978 and EPA 1987 and replaced them for another five years. There are three main elements to the Act:

- re-enactment with minor modifications of the provisions of the earlier legislation;
- incorporation into the EPA of the provisions of the PTA which applied only to Northern Ireland; and
- the creation of certain new offences and powers.

Provisions implemented in the 1991 Act include a power enabling the security forces to examine documents found in the course of a search, an offence covering possession of items in suspicious circumstances, anti-racketeering provisions and the creation of a new post of Independent Assessor Of Military Complaints Procedures. These amendments to the EPA have not, however, altered the overall thrust of the legislation, which remains substantially the same as in 1973.

2.4 After the ceasefires

The 1991 Act will reach the end of its life in August 1996. However, most of the Act will lapse unless it is kept in force following parliamentary debate.

In the aftermath of the republican and loyalist ceasefires, it is to be hoped that the debate on renewal of emergency legislation will be deeper than is usually the case. A major assessment of the 1991 Emergency Provisions Act is necessary in the spring of 1995. It will be an opportunity for the British and Irish governments, the political parties and other interested groups to assess what is the best way to proceed.

As part of this reassessment process, John Rowe QC produced a review of the legislation which was published on 17 February 1995. However, the major part of the review predates the autumn 1994 ceasefires and therefore "do not take full account of the new situation...nor of the government's working assumption that the ceasefires are intended to be permanent".[6] He concludes that a new EPA is necessary with minor

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[6] "Review of the Northern Ireland (Emergency Provisions) Act 1991 by JJ Rowe QC", NIO, **Press Release**, 17 February 1995

modifications, except for the power to intern. As his deliberations have offered nothing new to the debate on whether emergency law is necessary, we have not referred to his new report in any depth.

There are three schools of thought on what to do with the EPA and PTA.

- The arsenal of emergency measures should unquestionably stay in place.
- The legislation should be allowed to fade away gradually over time.
- All emergency legislation should be repealed immediately given that the emergency which was the government's justification for emergency law is now over.

Only the final view squares with the UK's obligations under international law which states that emergency measures are valid only if they can be shown to be strictly necessary and proportionate to the scale of the emergency. As soon as the emergency abates, normal law must resume. Nothing short of this is in line with international law.

In his most recent work, **Report on the operation in 1994 of the Prevention of Terrorism (Temporary Provisions) Act 1989**,[7] Mr Rowe QC appears to favour the second course of action. In the conclusion to his report he recommends that the PTA should be renewed in full, "with every part as at present enacted". He goes on to say: "I do not ignore the facts of the ceasefire ..., and if events occur so that one or more of the provisions of the PTA is no longer necessary, section 27 (6) (b) can be used. Therefore my recommendation is that the Government should keep this section in mind during the coming year."[8] S. 27(6)(b) provides machinery to make an order that provisions of the PTA shall cease to have effect.

One may argue that Mr Rowe's work on the EPA was too far advanced to enable him to take account of the changed situation in Northern Ireland. The PTA review, however, displays little desire - or ability - to be either imaginative or mindful of international human rights law. On the contrary, Mr Rowe appears to be much impressed by his own logic allied with briefings from the security people he met during the course of his review: "Activity by terrorist (sic) groups has not stopped. And the working assumption of the Government,[9] in any event, does not require me to ignore the facts and reasoning I have set out."[10] Clearly the debate about emergency powers is unlikely to proceed very far with Mr Rowe responsible for assessing how they are operated. He declares, opposing the view that his proposals might be able to assist in entrenching the ceasefires, "I am not part of the peace process...".[11] CAJ heartily concurs.

That the emergency legislation is still in place 6 months after the ceasefire is totally unacceptable. In the years before the ceasefire, CAJ argued that such excessive state powers were unwarranted and counterproductive in the search for peace. This is because only those measures shown to be necessary and proportionate should be

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[7] John Rowe, **Report on the operation in 1994 of the Prevention of Terrorism (Temporary Provisions) Act 1989**, published on 17th February 1995.
[8] Ibid, p. 7.
[9] That the ceasefire is intended to be permanent.
[10] John Rowe, op. cit., p. 7.
[11] Ibid, p.2.

included in any provisions enacted to deal with the emergency. While CAJ never, in fact accepted the existence of an emergency, given that the government's own justification about the need to combat the "terrorist threat" has disappeared, emergency legislation must disappear also. There are adequate powers under ordinary legislation in the **Police and Criminal Evidence (NI) Order 1989** to cope with criminal activity. These should now be relied on. If there is no emergency, there should be no emergency law.

Chapter 3. CRIMINAL OFFENCES UNDER THE EPA AND PTA

3.1 Introduction

Persons accused of committing offences listed under schedule 3 of the Emergency Provisions Act are processed by the criminal justice system established by Diplock. There are a number of these scheduled offences contained in the EPA:

- Road Blocking Powers (s. 25)
- Proscription and related powers (ss 28, 29 and 33)
- Collecting information and Training (ss 31 and 32)
- Possession for "terrorist" purposes (s. 30)
- Directing the activities of "terrorist" organisations (s. 27)
- Racketeering provisions (ss 47 to 57)

Parallel offences and powers exist in the PTA in relation to:

- Proscription (ss 1, 2 and 3); and
- Racketeering (ss 9, 10, 11, 12 and 13).

3.2 Road Blocking Powers

S. 25(1) EPA empowers the Secretary of State to order that any road be closed or diverted. No grounds are specified for the exercise of these powers, which have been relied upon as the legal basis for the blocking of many roads along the border. Challenge before the courts is impossible, at least in the absence of bad faith. s. 25(2) makes it an offence to interfere with such closures. This is the legislation which was used summarily to close border roads and thoroughfares near RUC barracks.

These border road blockages have frequently been a great source of aggravation to the local population on both sides of the border, and the dislocation caused to community life has been immense. In particular, persons who own property on both sides of the border can be forced to take long detours to reach those parts of the property located on the other side of the border. Because of this, there have been sustained attempts by local people to nullify the effects of the road closures by constructing makeshift diversions around the obstacles used to effect the closure. These re-routing attempts,

which may not be illegal, have generated considerable friction between the police and the local population. However, to discourage re-routing and to effect the sealing of the border in certain areas three new offences were introduced in 1991 in respect of road closures:
1. A person who within 200 yards of a road closure executes bypass work commits an offence.
2. A person caught in possession of materials or equipment suitable for executing bypass work within 200 yards of a road closure is also guilty of an offence (unless s/he can demonstrate lawful authority or a reasonable excuse).
3. Any person who occupies land within 200 yards radius of a road closure is guilty of an offence if s/he "knowingly permits" the commission of an offence under s. 25(3)(a) on his land.

There are a number of problems in relation to this sub-section. Firstly, the ambiguous term 'bypass work' is not satisfactorily defined in s. 25. The three new offences are therefore fundamentally flawed. Secondly, these new offences extend the current offence in s. 25(2) to a radius of 200 yards. The law has been strengthened to counteract the ongoing border closure campaign. Previously bypass works were probably legal as long as an adjacent road closure had not been interfered with. The subsection is directed against such bypass works. However the proposal to prevent the execution of bypass works on private land presented the government with a problem if their new 200 yards radius policy was to be effectual. This led to subsection 3(b) which clearly interferes with an occupiers use of private land. For example must an occupier obtain lawful authority to construct private roads on his or her lands where a closure is within a 200 yards radius?

The third of the new offences in s. 25(3) where a person is guilty of an offence if he or she "knowingly permits on land occupied by him" activities directed towards to the execution of a bypass work raises a number of issues. To be guilty the occupier must be aware that such illegal activities directed towards the execution of bypass works are taking place on the land. The actual commission of offence presents more of a problem. An occupier in possession of such knowledge must "permit" the occurrence of illegal activities under s. 25(3) on his or her land.

One of the first gestures by the British government in the immediate aftermath of the republican ceasefire was to open first 16 and later all of the border roads closed under this legislation. Work is continuing on re-opening the roads. Clearly the authorities were aware how ineffective the closures were in disrupting paramilitary activity. One hopes too that they were aware of the extent to which the closures were resented by border communities. There may also have been a desire to defuse a concerted campaign of road openings which had created friction with the security forces.

- **The entire section is undesirable and unnecessary. S. 25 EPA 1991 should therefore be repealed.**

3.3 Proscription and Related Powers

The EPA and the PTA both empower Cabinet ministers to ban organisations connected with "terrorism". The two acts also create consequential offences. Under s. 28(3) EPA 1991 the Secretary of State is empowered to proscribe organizations "which appear to him (sic) to be concerned in terrorism or in promoting or encouraging it". Under this provision, several republican and loyalist paramilitary groups have been proscribed, most recently the Ulster Defence Association in 1993. The section was amended in EPA 1987, so that arranging a meeting of three or more persons to be addressed by a person belonging to a proscribed organization became an offence. Under s. 29, wearing clothes etc. which arouses *reasonable apprehension* that the wearer is a member or supporter of a proscribed organization is an imprisonable offence. Wearing hoods is also an imprisonable offence under s. 33. This was the power which lead to huge and controversial confrontations at funerals of members of paramilitary organisations.

S. 1 and 2, and Scedule 1 of the PTA confer similar powers of proscription to the British Home Secretary. In effect, the legislation extends the banning power to the rest of the UK. Interestingly, the only two organisations contained in the schedule are the Irish Republican Army and the Irish National Liberation Army. S. 2 PTA makes it an offence to be a member, to arrange meetings and to support proscribed organisations, while s. 3 outlaws "displays of support in public" for such organisations.

There are a number of reasons for suggesting that the proscription power, and the additional offences which flow from it should be repealed:

Firstly, there is the issue that, when groups engaged in politically-motivated violence are under consideration, what ought to be illegal about such groups are not their beliefs or objectives as such, but rather the means they use to implement these beliefs or objectives. Human rights law upholds freedom of association and the individual's right to hold opinions and beliefs. Any offence should relate specifically to criminal activity and must not be drawn so widely that it interferes with fundamental rights. It is CAJ's view that, while proscription may be regarded as a way of expressing abhorrence of violence, the correct way to express this abhorrence is by prosecution for crimes committed.

Secondly, the language used in s. 28(3) - "concerned in terrorism, or in promoting or encouraging it" - is vague. This opens the possibility that once such powers are in existence, they will be used not only against paramilitary groups actually engaged in violence, but also against open political parties or organisations which might be seen as associated with such groups. It is arguable that this is what happened when the UDA was proscribed. Such use (or abuse) of these powers would be a gross attack on freedom of association, a basic right in any democracy and one guaranteed by international conventions on human rights. Related to this general point is the fact that no right of appeal to the courts is incorporated in s. 28, and the test in the section for

the exercise of the proscription power is a subjective one, designed to minimise the extent of judicial review.

Thirdly, the provision criminalizing the organization of a meeting of three or more persons to be addressed by a member of a proscribed organization could hinder efforts at mediation and work for peace, and could thus contribute to the continuation of the violence.

Fourthly, Lord Colville[12] considered that the best argument for proscription powers to be their deterrent effect: "It has succeeded in preventing palpable demonstrations or parades on behalf of the proscribed organisations" (para.15.4). However a preferable approach for deterring military displays is illustrated by art. 21 of the **Public Order (NI) Order 1987** which provides that 'a person who in any public place or at any public meeting wears uniform signifying his (sic) association with any political organisation shall be guilty of an offence'. If sufficient powers are contained within the ordinary law, there is no need for supplementary emergency measures.

Finally, these kinds of powers discourage political activism at a time when individuals who have been involved in paramilitary activity are endeavouring to move to non-violent politics. Where particular organisations have declared and are maintaining a cessation of violence the proscriptions should be lifted to encourage open and democratic politics.

- **For all of these reasons, ss. 28, 29 and 33 EPA should be repealed. S. 1, 2 and 3 of the PTA should also be repealed.**

3.4 Collecting Information and Training

S. 31(a) EPA 1978 makes it an offence to "collect, record, publish, communicate or attempt to elicit any information with respect to any person to whom this paragraph applies which is of such a nature as is likely to be useful to terrorists". Those covered by the paragraph are police officers, soldiers, judges, court officials and prison officers. It is of some importance that the wording of this section is "likely to be useful to terrorists" rather than "for the purpose of terrorism". This wording means that the innocent collecting of information (for instance by a press photographer) could amount to a crime, if the information were thought to be "likely to be useful to terrorists", even though it was clearly not for the purposes of terrorism. A recent example of this process involves the prosecution of a Sinn Féin member in Derry who had in his possession monitoring forms to record the incidence of military and other security force activity following the ceasefires. This was part of an official campaign by Sinn Féin to monitor the extent of demilitarisation. The wide drafting of this section meant that this individual could be charged and remanded in custody despite such clearly peaceful activity. He was subsequently released on bail of £7,000.

[12] In his 1990 review of the EPA.

An additional problem with this section is that it reverses the onus of proof. A suspect must prove her/his innocence on the grounds of lawful authority or reasonable excuse.

- **Because of this potential to criminalize innocent behaviour, and the reversal of the onus of proof, s. 31 should be repealed.**

Under s. 32 it is a crime for any person to instruct or train another or to receive instruction or use of firearms or explosives. Any such training would almost certainly involve an offence under the ordinary law (e.g. unlawful possession of firearms).

- **S. 32 is superfluous and should therefore be repealed.**

3.5 Possession for "terrorist" purposes

In his 1990 report, Lord Colville recommended the creation of a new offence which could be described as "going equipped for acts of terrorism". This unfortunate recommendation was implemented in s. 30 of the EPA 1991. It appears that mere possession of certain household items (rubber gloves, kitchen scales and fishing line are mentioned), might in certain situations, be sufficient to prove guilt.

In fact section 30 goes further even than Lord Colville's proposal. His offence read "A person shall be guilty of an offence if, when not at his place of abode, he (sic) has with him any article for use in connection with acts of terrorism (sic)". This was derived from s. 25(1) of the **Theft Act 1968** which provides "a person shall be guilty of an offence if, when not at his (sic) place of abode, he (sic) has with him any article for use in the course of or in connection with any burglary, theft or cheat". This latter provision clearly incorporates an intentionality requirement i.e. it would be necessary to prove that a person intended to use the article in connection with the particular offence. Likewise under Lord Colville's draft, it would be necessary to prove that the person intended to use the article "in connection with acts of terrorism".

S. 30 however provides that: *"A person is guilty of an offence if he (sic) has any article in his possession in circumstances giving rise to a reasonable suspicion that the item is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland."*

Thus under s. 30 it would be unnecessary to prove any intent that the items were intended for the commission of acts of "terrorism" - mere proof of possession alone in certain circumstances would be sufficient. Consequently there exists the clear possibility of wrongful conviction. What s. 30 does is to reverse the burden of proof. Contrary to legal principles developed over the centuries, it is now for the accused under s. 30(2) to prove that he or she is innocent.

It is significant that s. 30 contains no requirement that the object in question be adapted

for the purposes of "terrorism". Were such a requirement incorporated, there would be a clear necessary link between the item in question and the commission of a crime. What items might be covered under the section? In order to answer this it is necessary to look at the definition of "terrorism" in s. 66. There the term is defined as "the use of violence for political ends" and includes the use of violence "for the purpose of putting the public or any section of the public in fear". Since any use of violence for political ends amounts to "terrorism", and virtually any item might be used in an act of violence, it is difficult to think of any item the possession of which might not fall foul of s. 30 in some circumstances.

The section is therefore wide open to abuse and when combined with the extensive powers to stop, search and question contained with the Act, could easily become a recipe for harassment. One effect of this proposed provision would be greatly to facilitate harassment at vehicle checkpoints. A possible scenario: a car is stopped by the Army and some fishing line is spotted on the seat. The driver insists on his legal rights and only provides such information as she is specifically obliged under the EPA to provide, whereupon she is threatened with being charged with 'going equipped for acts of terrorism' on the basis of the fishing line. Eventually, she is allowed to proceed only after having answered a mass of questions about family, friends etc. which she would ordinarily not have had to provide.

Likewise, were the suggestion to be extended to possession of material at home those held under house arrest during a search of a home could be similarly threatened on the basis of rubber gloves and kitchen scales found in the kitchen. It was probably to avoid this latter possibility that Colville drafted his offence so that it would only apply to a person "not at his (sic) place of abode". However, *no such requirement has been incorporated into s. 30.* Thus in this respect as well the clause goes further than Lord Colville had recommended. He did, however, suggest that his draft was "adaptable to possession of such items at home...if that would be a more modest alternative to, for example, bringing charges of conspiracy' (para. 2.9). But conspiracy charges are not brought in such circumstances in Northern Ireland, thus in practice the suggestion would amount to an extension of the law of conspiracy. Indeed it is of the nature of a conspiracy that two or more people must be involved, whereas the s. 30 offence could be committed by a person acting alone.

On the question of penalties as well, s. 30 goes beyond earlier recommendations. Colville refrained from stipulating exact penalties for his draft offence but recommended that "Probably the offence should be triable both ways and carry a modest maximum penalty even on indictment". s. 30 however carries a maximum penalty of ten years if tried on indictment, a sentence wholly disproportionate to the nature of the offence.

- **For these reasons s. 30 EPA should be repealed.**

3.6 Directing the activities of "terrorist" organisations

S. 27 EPA reads as follows: *'Any person who directs, at any level, the activities of an organization which is concerned in the commission of acts of terrorism is guilty of an offence and liable on conviction on indictment to imprisonment for life'.*

On reading this section, an immediate reaction is that such an offence is wholly unnecessary given both inchoate offences (such as attempts and conspiracy to commit crime) and the secondary party participation in a crime (aiding, abetting, counselling or procuring).

Once again it is worth remembering the definition of "terrorism" in s. 66 namely : *'the use of violence for political ends, (including) any use of violence for the purpose of putting the public or any section of the public in fear'*. Apparently any act of politically-motivated violence, however minor, can amount to 'terrorism'. For instance, the destruction of a cage by animal rights activists with the aim of freeing an animal amounts to 'terrorism' within the terms of the Act. One wonders whether this would include the use of excessive force by the security forces or debt collectors!

The section builds on this shaky foundation using layers of imprecise and ill-considered language. Firstly, it refers to an organisation which is 'concerned in the commission of acts of terrorism'. Crucially, it does not refer to a 'proscribed organisation' within the terms of s. 28. Thus, the section has the potential to cover the activities of many groups other than those, such as the IRA and UVF, which have long been proscribed. Animal rights groups engaged in the sorts of activities outlined above, would for example, come with this definition.

Secondly, there are problems with the phrase ' ... who directs at any level the activities. ..' The word 'directs' in this context is inherently ambiguous. Furthermore, it is not limited to 'directing' acts of 'terrorism' but covers any activity of an organisation coming within the terms of the section. It covers activities which are not, on the face of it unlawful, and which are carried out for groups other than proscribed organisations. The section is not limited to senior members of any such organisation since direction 'at any level' is covered.

Finally, since the power came into operation there have only been 2 prosecutions. In the first, a conviction for other offences is likely to have made the additional conviction for 'directing' something of a formality. The second case is pending and has caused widespread publicity both because of the individual involved and the nature of the evidence. It is clearly difficult for the authorities to bring charges for this offence.

- **For all these reasons s. 27 EPA should be repealed as soon as possible.**

3.7 EPA and PTA Racketeering Provisions

The EPA incorporates a number of provisions directed at the racketeering of paramilitary organisations. This is the statutory authority for a new strategy designed to undermine racketeering by paramilitary groups and to prevent the proceeds going to finance their activities. There are two sets of provisions: those relating to investigation (s. 57 and schedule 5) and those relating to confiscation (ss 47-56 and schedule 4).

Powers of Investigation: s. 57 and Schedule 5 EPA
This new section establishes special investigatory procedures relating to the funding of proscribed organisations. It is modelled upon powers contained in the **Criminal Justice Act 1987** (as amended by the **Criminal Justice Act 1988**) which relate to the powers of investigation of the Office of Serious Fraud. However, s. 57 contains few of the safeguards built into the Criminal Justice Act. It is instructive to specify the extent of the powers contained in this new provision and the paucity of safeguards in comparison with the Criminal Justice Act 1987.

The EPA definition of an investigation extends beyond the affairs of a specified person as is the case under s. 2(11) of the Criminal Justice Act 1987. s. 57 permits investigations into a range of situations particularly relating to funds obtained by illegal/terrorist organisations. Thus the nature of an investigation is much wider than under the Criminal Justice Act. The gift of the powers contained in Schedule 5 lies in the hands of the Secretary of State rather than the judiciary. Once they are granted no provision is made for supervision. This contrasts with the Criminal Justice Act 1987 which makes the Serious Fraud Officer accountable to the Attorney General. Moreover, the Secretary of State is empowered under paragraph 3(5) to issue search warrants, removing judicial control of the power in Northern Ireland. Once more the civil liberties of persons in Northern Ireland have been accorded less protection than those of citizens in the rest of the United Kingdom.

Generally there are fewer restrictions on disclosure under the EPA. Information obtained can be put to more uses under the EPA: for example it can be used in a prosecution for perjury. Moreover while statements made cannot be used in evidence against the makers, documents produced can be used in prosecutions. Thus a person could be forced to produce such documents thereby incriminating herself or himself. Another notable difference is the penalty provided for a failure to comply with the provisions without reasonable excuse. The maximum prison sentence under the Criminal Justice Act 1987 is 6 months whereas under s. 57 convictions can carry 5 years imprisonment.

Finally, s. 57 gives the Secretary of State power to appoint "authorised investigators". These "officials" are vouchsafed with authority to compel people to attend a "specified place either forthwith or at a specified time and answer questions...". The investigator can also require production of documents which can be copied or retained. It is not clear whether persons under investigation are permitted to have a lawyer present to

advise them during interviews with these individuals.

The width of these new powers and the lack of safeguards gives cause for concern. At the very least the same protections and safeguards under the **Criminal Justice Act 1987** should apply to Northern Ireland.

- **CAJ believes that sufficient powers already exist in the ordinary law and the provisions in s. 57 and schedule 5 EPA should be repealed.**

Powers of Confiscation: Ss 47-56 and schedule 4 EPA

A Diplock Court can order property to be confiscated from persons convicted of "terrorist" related activities who have profited from racketeering. A person is taken to have been engaged in 'terrorist-related activities' if he or she has committed two or more 'relevant offences' (i.e. certain scheduled offences): s. 49. When such a person is convicted, the court can make a 'confiscation order' if it is satisfied that he or she has 'benefited from terrorist-related activities'. An order will not be made if it would be "unfair and oppressive" so to do.

In deciding whether and by how much a defendant has benefited from "terrorist"-related activities the court is required to make certain assumptions: namely that property held by the defendant within a certain time-span represents the fruit of terrorist-related activities. Where such assumptions cannot be made a confiscation order may be imposed if the prosecution satisfies the court on the balance of probabilities.

In view of the sweeping powers in the **Criminal Justice (Confiscation) (Northern Ireland) Order 1990** the EPA clauses seem superfluous. That Order provides two sets of powers to confiscate the proceeds of crime: one applicable to drug-trafficking, the second to other forms of crime. In fact, all the offences covered by part III, other than those in part III of the PTA 1989, are also covered by the Order. The PTA in any case contains its own forfeiture.

The focus of the provisions is misplaced as they have been based on the misleading equation of organized drug trafficking crime with 'terrorist-type' crime. The anti-drugs legislation was based on the assumption that certain individuals would personally benefit from this kind of crime and hence provide a target for confiscation powers. However, 'terrorist-type' crime does not usually result in personal enrichment, and is not an appropriate target for forfeiture. Consequently assumptions which the courts might make under the Act could be ill-founded, and injustices may result.

- **For these reasons CAJ recommends that ss 47-56 and schedule 4 EPA should be repealed.**

PTA powers

Part III (ss 9 - 13) and Schedule 4 PTA relate to financial assistance for "terrorism" and

incorporate penalties and powers of forfeiture allowing the reclaiming of moneys or property intended for "terrorism". These powers apply to "terrorism" in relation to Northern Ireland (s. 9(3)(a)) and also "acts of terrorism of any other description except acts connected solely with the affairs of the United Kingdom" (s. 9(3)(b)).

A number of points are appropriate. Firstly, the PTA was enacted to deal with political violence in Britain associated with the Northern Ireland conflict. The equation of the Northern Ireland conflict with "international terrorism", while appropriate for government propaganda, is entirely misconceived. We have tried to show above that trying to equate drug-traffiking with politically-motivated forms of violence related to the Northern Ireland conflict fails to understand the problem. In the same way, it would be delusory to think that there is an exact equivalence between the phenomenon of international "terrorism" and politically-motivated forms of violence related to the Northern Ireland conflict. If the government feels that it wishes to have powers to deal with international "terrorism", then these powers should not be enacted under the cover of the PTA; there should be appropriate discussion and research prior to full parliamentary debate.

Secondly, the PTA is emergency legislation and was defended as such. It's official designation includes the words "temporary provisions" in parentheses.[13] The powers are supposed to be invoked for as brief a period as possible to deal with a specific emergency which "threatens the life of the nation". International terrorism hardly falls into this category. It is occasional and not usually targetted against British institutions. This is not to minimise to nature of the crimes involved or to argue that the authorities do not need powers to deal with them. But it is to insist that the PTA is not the place for such powers and that the government should not casually renew the legislation using this argument. Besides, the powers contained in the **Crminal Justice Act** mentioned above contain more than adequate powers.

Thirdly, and more specifically related to Part III PTA, a look at the relevant statistics shows that from 1984 to 1994, only 5 people have been charged with s. 9 offences. Of these 5, charges were dropped against 2 while the other 3 were found guilty. One received a suspended sentence and the other were sentenced to between 1 and 5 years.[14] It is hard to justify emergency legislation on the basis of these kinds of figures. Either the powers are necessary or they should be repealed.

- **Accordingly, Part III and Scedule 4 PTA should be repealed.**

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[13] **The Prevention of Terrorism (Temporary Provisions) Act.**

[14] Figures from **Home office Statistical Bulletin**, Issue 2/95, London, 17 February 1995, Table 5.

Chapter 4. STOP, QUESTION AND SEARCH POWERS

4.1 Introduction

This chapter examines two sets of powers which allow law-enforcement officials to stop people, ask them questions and search them. These are: the EPA powers exercised on the street by any soldier or police officer in Northern Ireland; and the PTA port and harbour powers which allow screening of those entering the UK or travelling between Britain and Ireland. These powers allow great scope for intelligence-gathering to the authorities.

Experience in many jurisdictions has shown that there can be little as damaging to police-community relations as the heavy-handed use of powers to stop, question and search prior to arrest. Moreover, once these powers are available, their use is almost invariably felt to be oppressive by some members of the community and in particular those sections against whom their use is targetted. What is claimed to be "fair enquiry" can easily seem like victimisation, and the more loosely drawn the power to stop, question and search is, the greater the ease by which "fair enquiry" can degenerate into deliberate harassment. These powers are wrong in principle and are unnecessary and counter-productive in use. The powers currently available to stop, question and search under emergency legislation go far beyond what has been supported even by advocates of such powers.

Lest supporters of these powers say that criticism of the powers is confined to small numbers of people innately hostile to the police, recent research shows that the powers are widely-disliked. In December 1994, CAJ published a report **"It's part of life here....": The Security Forces and Harassment in Northern Ireland**. This report, compiled by Dr Robbie McVeigh, was based on a survey of young people. Of those 26% of young people who had experienced the stop and search powers, 40% reported that they had been harassed. Thus, for the first time, a quantitative survey has provided empirical data confirming fears civil libertarians have had for many years. Similarly, recent reserach has documented people's expeience with respect to port and harbour powers.[15] These have particularly invidious effects on vulnerable categories of people such as prisoners' families who have to travel regularly from ireland to Britain.

New powers of stop and search are included at s. 13A, PTA by s. 81 of the **Criminal**

[15] Paddy Hillyard, **Suspect Community: People's experience of the Prevention of Terrorism Acts in Britain**, Pluto, 1993.

Justice and Public Order Act 1994.[16] This allows police officers to stop and search vehicles and persons "where it appears expedient to do so in order to prevent acts of terrorism (sic)". This appears to be a new formulation which reduces the "reasonable suspicion" test of ordinary legislation. The comments in this chapter are therefore applicable to this new power.

4.2 General Criticisms of Stop and Search Powers

It is a basic principle of the legal systems of these islands that sanctions should be imposed by the state only for the commission of specific offences. Related to this is the notion that the coercive powers of the state should be invoked only on reasonable suspicion of the commission of an offence. This is at the core of the "rule of law" principle. Powers such as those to stop and search without reasonable suspicion of the commission of an offence are clearly inconsistent with the rule of law. Even if based on reasonable suspicion such powers are unnecessary since arrest powers are available where serious offences are suspected.

In addition, powers of stop and search are counter-productive in two ways. Firstly, abuse of these powers, or use in a manner which is experienced as heavy-handed, leads to a lack of respect for the law, which in turn creates further difficulties for law enforcement. Secondly, conflict generated during the exercise of stop and search powers can lead to charges being brought for refusal by the person stopped to comply with the terms of the legislation. This may result in charges under the legislation creating the powers, or to more general charges of obstruction. In these cases, the stop and search powers effectively generate crime rather than helping to prevent or detect it. In short, more law can create less order.

4.3 The Powers in Northern Ireland

These criticisms apply particularly to Northern Ireland where the powers available under the EPA (see over) extend far beyond those permitted elsewhere. Indeed Northern Ireland, where the history of such provisions dates back to the **Special Powers Regulations** of 1922, provides a prime example of the dangers inherent in such powers. The provisions contrast sharply with the position under the ordinary law. The centuries-old common law provides no such general powers, and only very limited powers to stop and search, exercisable in narrowly defined circumstances, are available under normal statutory powers. The PACE Order provides more general powers (see over), but under that measure persons can be stopped and searched only on "reasonable suspicion".

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[16] John Rowe, **Report on the operation in 1994 of the Prevention of Terrorism (Temporary Provisions) Act 1989**, February 1995, Chapter 10.

The powers under the EPA are clearly open to criticism on several grounds. Firstly, unlike the PACE Order, the EPA allows for random searches without reasonable suspicion. S. 23(1) is exercisable without any suspicion at all; s. 19(6)(a) and s. 20(2) are exercisable without any prior suspicion. Such powers are a recipe for harassment. Moreover the randomness involved in their use is objectionable in principle. Many people have claimed that they were stopped by an Army patrol under s. 23(1) and allowed to proceed after a few minutes, only again to be stopped by another patrol shortly afterwards, and by yet another patrol shortly after that. Little contributes more to resentment than this type of behaviour, accompanied, as it is frequently claimed to be, by abusive language. This power appears also to be used to monitor people's movements.

Stop and search powers under Police and Criminal Evidence (NI) Order 1989

3. (1) A constable may exercise any power conferred by this Article:

(a) in any place to which at the time when he proposes to exercise the power the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission; or

(b) in any other place to which people have ready access at the time when he proposes to exercise the power but which is not a dwelling.

(2) Subject to paragraphs **(3)** to **(5)**, a constable

(a) may search

(i) any person or vehicle;

(ii) anything which is in or on a vehicle, for stolen or prohibited articles or any article to which paragraph (9) applies; and

(b) may detain a person or vehicle for the purpose of such a search.

(3) This Article does not give a constable power to search a person or vehicle or anything in or on a vehicle unless he has reasonable grounds for suspecting that he will find stolen or prohibited articles ....

A further problem with these measures arises from the fact that not only the police but, in the case of ss. 19(6) and 23(1), the Army may avail themselves of the powers. Many complaints of the abuse of stop and search powers are directed at searches made by the Army rather than the police. Having recognised the problem of harassment by members of army patrols, the government has in recent times taken modest steps to address the failures of the army complaints system. An Assessor of Military Complaints Procedures was appointed under EPA provision. Also, army patrols are now required to carry and distribute cards on request to facilitate the identification of patrols whose behaviour complainants wish to report. This latter exercise is flawed because there is an onus on the person who wishes to make the complaint to ask for the card from the

soldier or patrol about whom she or he wishes to complain.

Stop, question and search powers under Northern Ireland (Emergency Provisions) Act 1991

s. 19...(6) Any member of Her Majesty's forces on duty or any constable may

(a) stop any person in any public place and, with a view to exercising the powers conferred by subsection (7) below, search him for the purpose of ascertaining whether he has any munitions unlawfully with him or any transmitter with him; and

(b) with a view to exercising the said powers

(i) search any person not in a public place who he has reasonable grounds to suspect has any munitions unlawfully with him or any transmitter with him; and

(ii) search any person entering or found in a dwelling-house entered under subsection (2) above.

s. 23...(1) Any member of Her Majesty's forces on duty or any constable may stop any person for so long as is necessary in order to question him for the purpose of ascertaining

(a) that person's identity and movements;

(b) what he knows concerning any recent explosion or any other recent incident endangering life or concerning any person killed or injured in any such explosion or incident; or

(c) any one or more of the matters referred to in paragraphs (a) and (b) above.

(2) Any person who

(a) fails to stop when required to do so under this section, or

(b) refuses to answer, or fails to answer to the best of his knowledge and ability, any question addressed to him under this section, is guilty of an offence and liable on summary conviction to a fine ....

S. 19 fails to specify the nature and extent of any search. Under the PACE (NI) Order a person may not be required to remove any item of clothing in public other than an outer coat, jacket, headgear and gloves. CAJ has received complaints which detail searches involving the removal of shoes and socks in wet conditions. Some complaints involved the footwear being thrown away by searchers in order to increase discomfort and annoyance. The absence of a Code of Practice with detailed guidelines as to the manner in which such searches should be conducted and the fact that there is no requirement in the legislation for any record to be made of the reasons for and the manner of such searches combine to facilitate abuse.

S. 23 itself is complicated by the fact that the powers arising from it are not limited in their exercise to public places, they have been used to conduct "census taking operations", where the Army has gone from house to house listing the names of all the

occupants. Such exercises cause considerable aggravation and fear and were frowned upon in the 1984 Baker Review (para. 392). The general aggravation caused by s. 23 is increased by uncertainties over the exact requirements of the section. The general power of interrogation in relation to recent explosions etc. in s. 23(1)(b), is without any foundation in the ordinary law, and the power can be criticised because of its vagueness.

A further difficulty arises from the provision that the power to stop and question is exercisable in order to ascertain a person's "identity". There is no guidance as the nature and extent of the questions which may be asked to establish "identity". Almost invariably, persons who stopped under s. 23 are asked their date of birth. Many refuse, as this is considered an invasion of privacy. The Baker Review noted, in relation to the asking of this question that "...the Army accepts, there is no legal duty to answer" (para. 391). CAJ take the view that the army should only ask a person her or his name and address: as many people give further information such as their date of birth under the misapprehension that they are legally obliged to do so. Another source of friction in s. 23 is the reference to ascertaining movements. How precise need a description be and what periods can the inquiry relate to? Once more these powers are too vague and this can lead to unlawful intrusions into peoples' lives.

Such major departures from the ordinary law require compelling justification, and the onus lies on those who seek to diverge from normal standards. But a complete justification has not been forthcoming. The report of the Diplock Commission in 1972 made no mention of these powers, as such (except in the context of the 4 hour arrest power), though this omission can be considered to have been due to its particular terms of reference. The Gardiner Report (1975) offered no cogent justification, merely stating that: "Until the police are so accepted and reinforced by the minority community the Army will have to continue to carry out policing duties very much as at present"(para. 84.). The fact that police do not ordinarily have these powers was glossed over.

The necessity for the power to stop and question seems to have been accepted by Baker without any reasoned justification. It is only in relation to vehicle stops that some justification is advanced: *"Stopping and searching vehicles does not produce actual results - a scout car probably goes ahead of a carrier of arms or explosives - BUT (emphasis as in report) it disrupts movement, plans and makes transport of explosives more difficult or sometimes prevents it"* (para 390). Colville (1987) likewise justified the s. 23 power to stop solely in terms of vehicle stops: *"Check points are, however, generally accepted as being an inevitable feature of our emergency situation; they are thought by the Army and police to be an effective deterrent to the movement of weapons and explosives, and to terrorist operations"* (para 5.2.4.1).

There is a distinction here as well, however, between random vehicle checks and random stops of persons in the street. Justifications advanced for vehicle stops rely on the fact that cars can be used, and frequently are used, to carry large amounts of arms and explosives or indeed as car-bombs. The same justification cannot be advanced for random stopping of persons on no suspicion since the amount of material one

person can carry is very limited. If it is accepted that there is a need for powers to stop cars at random, it does not automatically follow that a need exists for powers to stop persons at random. In the PACE Order a clear distinction is made between these two types of stop.

In his 1990 Review, Colville sought to provide a blanket justification for EPA stop and search powers by asserting that a retreat to PACE powers 'would render the armed forces almost entirely impotent' (para. 2.14). At most this could provide merely a justification for equipping the Army with PACE powers, and falls a long way short of justifying the broad sweep of the powers in the EPA.

In the new circumstances that follow the loyalist and republican ceasefires, and as the visibility of the security forces gradually diminishes, it may be that the use of this power will dwindle. Nonetheless, as they stand now the stop and search provisions of the EPA violate the civil liberties of individuals in Northern Ireland by giving rise to invasive behaviour and potential and actual harassment. CAJ have received reports of intimidating and uneccesary use of these powers since the ceasefires. Some reports have stressed that more vigour has been used than was experienced before the ceasefires. The law does not provide safeguards such as a requirement of reasonable suspicion. Nor is there any requirement for a written record to be made of the search and for such record to be made available to the person stopped as there is in relation to similar provisions under the PACE (NI) Order 1989. As long as these provisions remain, harassment will continue to be sanctioned by the law.

- **It is clear from the above that the case for the draconian stop, question and search powers at ss 19(6) and 23 EPA has not been proven and should be repealed. Broad stop and search powers already exist under article 3 of the PACE Order. These should be relied on instead.**

4.4 The PTA Port and Harbour powers

S. 16 and Schedule 5 and 6 PTA create a system for the examination of persons arriving in or leaving Great Britain or Northern Ireland. Schedule 3 PTA, which governs PTA detentions, is also applicable to detentions carried out under s. 16. These powers are the foundation stone for the exercise of other PTA powers such as exclusion orders, arrest and 7 day detention.

Similar crticisms of the PTA Port and Harbour powers are appropriate to those made in relation to EPA powers above.

- They are widely drawn;
- They do not depend on the commission of an offence.
- They allow completely random checks of individuals.
- These can be carried out without any suspicion.
- The extent of questioning and searching rely solely on the discretion of the officer

exercising the power.

- A detention for the purposes of examination can last for 12 hours without any reasonable suspicion and written notice. 48 hours and thereafter be extended by the Home secretary for up to 7 days in all. This power can be exercised by a customs official, and immigration officer or a police officer. No warrant is required.

Apart from the fact that powers such as this are completely at odds with the legal framework of these islands, the greatest accusation against them is that they are in fact designed to facilitate intelligence-gathering against Irish nationals in general and against those under suspicion by the intelligence services in particular. Many may feel this is a necessary and acceptable dimension to what is described as "the fight against terrorism". However, there are a number points to be made.

Firstly, people who do not travel between the two islands have no experience of how these powers are exercised. They are a recipe for harassment and there are many stories where the powers are invoked because full co-operation is not given immediately. Indeed, failure to co-operate with an examination is an offence for which 57 people were charged between 1984 and 1994.[17] As recently as February 1995, Ms Anne Bradley and a colleague were detained in an airport in the British midlands after appearing on a TV show. Ms Bradley reported to CAJ that the officers made clear they were exercising the powers simply because Ms Bradley hadn't been adequately deferential.

Secondly, it is clear that the powers are used to generate a picture for the intelligence services of patterns of travel. The information gained of the individuals travelling, where they go, how long they stay there, who they travel with and so on has built up into a formidable picture of the Irish community in Britain and its relationship with people in Ireland. What exactly is done with this information, where it is stored, who has access to it and what will be done with it following the ceasefires are all unanswered questions. But it is not a correct use of the law and brings it into disrepute. It has especially created anger and frustration among people perceived to be members of the republican and loyalist communities. As such the powers have the contrary effect to that which is intended alienating people from the law and enforcement officials.

A particular group which is both vulnerable and harshly affected is the families of prisoners serving sentences in England. They are regarded as a suspect group and therefore receive close attention from examining officers. They have been frequently detained and thereby miss travel connections. The trauma of having to travel in order to keep contact with the imprisoned relative is thus exacerbated and intensified by the inconvenience and anxiety induced by the gratuitous and over-officious exercise of these powers. In this context it is particularly unfortunate that the Home Office is dragging its heels on the question of transferring those prisoners who request it back to Ireland.

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17 Op. cit., **Home Office Statistical Bulletin**, Table 5.

While even the British government acknowledge that the retention of these powers is harder to justify following the republican and loyalist ceasefires in autumn 1994, the argument is now being made that the powers are necessary to deal with international "terrorism". Furthermore, the retention of the powers is in danger of becoming intertwined with controversy about European intergration, common travel areas in Europe and Tory fears of unrestrained immigration.

The argument runs that, despite the powers of immigration officers under the **Immigration Act 1971**, if persons enter the country with their papers in order, then they cannot be stopped. Viscount Colville pointed out in his 1986 Report on the PTA that police officers would have "no right even to be present on port premises, let alone stop and talk to passengers, with a view to detecting terrorists (sic)" were it not for PTA provisions.[18] He went on to draw a distinction between the UK and other European legislation in this regard.

It must be emphasised, however, that the entire legislation contained in the PTA has been enacted as a temportary measure to deal with a specific "emergency". Furthermore the powers are primarily related to movement between Britain and Ireland and are therefore no longer necessary. If it is felt that sufficient powers to deal with the relatively new phenomenon of "international terrorism" do not exist under ordinary legislation, this should be discussed as a separate issue from emergency legislation related to Northern Ireland.

But an examination of control powers regarding entry at ports and harbours under ordinary legislation is instructive. There are three relevant texts which indicate the extensive powers available. These are the:

- **Immigration Act 1971**;
- **Immigration Rules 1994**, which came into force on 1 October 1994; and
- **Immigration (European Economic Area) Order 1994**, which came into force on 20 July 1994.

People seeking to enter the UK are divided into two groups: those who require permission or "leave" and those who do not: i.e. British citizens, Commonwealth citizens with the right of abode and nationals of the European Economic Area. Those who require leave must obtain a visa before travelling and the authorities can refuse to grant a visa if it is felt the applicant may be a threat to public security.

Having obtained a visa, a person who has entered the UK can be deported under s. 3(5)(b) of the **Immigration Act 1971** if the Immigration Authorities are satisfied that deportation is "conducive to the public good". Under paragraph 374 of the **Immigration Rules 1994** "conducive to the public good" includes the grounds of "national security" and "other reasons of a political nature". Where the Home Secretary makes a deportation order on the ground of national security, the subject of the order has only the right to appeal against the country of destination.

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[18] Para 5.2.

While nationals of the European Economic Area are entitled to enter the UK without leave, under the **Immigration (European Economic Area) Order 1994** the Home Secretary can refuse entry or deport such persons on grounds of "public policy, public security or public health".[19]

Given these wide provisions there are clearly adequate powers to enable the authorities to identify and, if necessary, exclude persons (excepting British citizens and Commonwealth citizens with the right of abode) who are suspected of involvement in international "terrorism". The powers contained within the PTA to stop and question people with a view to identifying whether the Home Secretary wishes to take further action are therefore superfluous.[20]

- **S. 16 and schedules 5 and 6 PTA should be repealed. The Home Office and immigration officials have extensive powers for identifying and refusing entry to people suspected of involvement in "international terrorism".**

19 Article 15(1).
20 See also Chapter 8.2 of this pamphlet on exclusion orders.

Chapter 5. SEARCH AND ENTRY POWERS

5.1 Introduction

The powers of search and entry under the EPA and their very similar predecessors, have long been a source of friction between the community on the one hand, and the RUC and the Army on the other. Complaints abound of random searching, and of the searching of entire rows of houses, of gratuitous damage, and of insulting behaviour. Householders have been arrested for allegedly obstructing officers in the execution of their duty. Particularly where searches are being conducted by the Army, it appears that those carrying out the search may have little knowledge of the legal basis of their activity - householders who query the search may be told that it is being carried out "in hot pursuit" - a term without a precise legal meaning in this context.

The general pattern seems to be that only a small percentage of searches under the EPA yield illicit material. The exact figure is not publicly known since details are not included in the official statistics. A widespread belief exists that, in many instances, search powers are used simply as a form of harassment. A further suspicion is that "blanket searches" of an area are conducted in order to disguise the fact that searchers have accurate intelligence relating to one or two of the houses searched. For the innocent, the searches are traumatic, induce feelings of insecurity and disrupt family life.

The section also examines the additional power to examine and remove documents found in the course of a search which was introduced in 1991.

5.2 Search and Entry Powers: s. 19 EPA

Ordinarily, searches of premises require the issuing of a warrant by judicial authority. In the PACE Order a justice of the peace is empowered to issue a warrant for the searching of premises where he or she is satisfied that there are reasonable grounds for believing that a serious arrestable offence has been committed and that there is material on the premises likely to be of substantial value to the investigation of the offence (art. 10). Searches without a warrant are allowed for:

- under article 19, a constable may enter and search any premises for the purpose of arresting a person for an arrestable offence, but only if he or she has reasonable

grounds for believing that the person being sought is on the premises;
- under article 20, a constable may enter and search "any premises occupied or controlled by a person who is under arrest for an arrestable offence".

These are extensive powers. However, the EPA powers remove *any* judicial element in the search process, thus leaving the matter entirely in the hands of the police and the army. This means that if a *policy* of blanket, or disruptive, searching is decided upon, there is little to stop that policy being put into effect. Under amendments introduced by EPA 1987, and retained in the 1991 EPA, powers of search in relation to dwelling houses were, in the main, made exercisable on "reasonable suspicion". This should have acted as a brake on such searches, but figures available indicate an increase. It should be emphasised that the accuracy of official statistics in this area is in some doubt as the figures were retrospectively revised downwards in 1989. But even on the revised figures it seems that the 1987 amendments have been a failure (see Table 1).

YEAR	BRITISH ARMY				RUC
	Occupied	Unoccupied	Derelict	Total	
1986	137	41	166	344	1818
1987	393	72	160	288	2474
1988	751	196	360	1307	4136
1989	725	177	207	1109	3027
1990	673	191	195	1059	3568
1991	737	166	154	1057	2961
1992	507	129	115	751	3415
1993	651	201	50	902	3264
1994 Jan - Aug	367	168	136	571	2705

Table 1: Searches of Premises under s. 19 EPA[21]

In 1987, army searches of occupied premises increased by 186%, only to increase again by 91% in 1988. The increases for the same periods in RUC s. 19 searches were 36% and 67% respectively. In 1989 searches were slightly down. While there has been a decrease since the high of 1990, nonetheless it is clear that overall, the number of house searches since the 1987 amendments has risen extraordinarily. When one examines also the amounts paid out in compensation, it is clear too that the level of damage inflicted during house searches has increased substantially. In 1987/88, the amount paid out under s. 28 EPA 78 was £578,599. The figure for payments under s. 28 and the equivalent of EPA 1991 - s. 63 - has risen substantially. The figure for the 9 months June to December 1993 was £2,825,884.[22] The figure for April - September 1994 was £917,319 even though this included the first month of the IRA ceasefire.[23]

Both these sets of figures suggest that control of search powers cannot be left in the hands of the RUC and the army. Instead, CAJ believes that the process should, as far

[21] Northern Ireland Information Service, **Statistics on Northern Ireland Emergency Legislation**, issued 6 February 1995.
[22] Op. cit., issued April 1994.
[23] Op. cit., issued 6 February 1995.

as possible, be placed under judicial control. For that reason, the search and entry powers in the EPA should be repealed leaving the law in this area to be governed by the PACE Order.

A number of issues which are relevant to the question of searches deserve attention. The first is that, under s. 19(4), where a search is being carried out under s. 19(1) or (2), the occupants of the house being searched may be required to stay in the house or in part of it for up to four hours. This period can be extended for another four hours by a police officer of the rank of superintendent or above. This is, in effect, a form of "house arrest", and can greatly increase the anxiety suffered by a family subjected to a s. 19 search, and add to feelings of harassment. This provision was first enacted as s. 21 PTA 1989. Its inclusion in the PTA followed a county court decision in **Oscar and Toner v. Chief Constable of the RUC and the Ministry of Defence** in December 1987, that detaining a family for four hours during a search constituted false imprisonment.

The provision may be in violation of Article 5 of the European Convention on Human Rights. Detaining someone in their home for up to eight hours as the clause envisages appears to be a form of house arrest and as such would appear to amount to a deprivation of liberty. There is an obligation to show reasonable suspicion of an offence under Article 5(1)(c) of the Convention in such a case. Following the **Brogan** decision, one would hope that there would be a desire to, at least, ensure that the EPA powers are in conformity with Convention standards.

Additional problems which people have reported to CAJ include concerns as to whether listening devices have been planted on the premises, offensive graffitti being left by the searchers and structural damage to houses.

- **The search power at s. 19 EPA should therefore be repealed. Search powers should be brought under judicial control and the judiciary trained in the implications of these powers *vis-á-vis* the ECHR.**

Under s. 12, the burden of proof is effectively reversed in cases in which a "proscribed article" is found during a search. Ordinarily, the burden of proving that the accused was knowingly in possession of the relevant article rests upon the prosecution. However, under s. 12, a person who was present in the premises when the house was searched and the object found, or who was an occupier or habitual user of the premises, can be convicted of possession of the article, unless the defendant can prove that she or he did not at that time know of its presence or, if they did know, had no control over it. Such an approach is quite alien to the normal workings of the criminal justice system.

- **CAJ therefore believes that s. 12 EPA should be repealed.**

5.3 The Examination and Removal of Documents

S. 22 EPA 1991 created a new and easily abused power in relation to the examination of documents uncovered during a search. Where any soldier (including, of course, a member of the RIR) or police officer is conducting a search he or she may, under s. 22 "examine any document or record found in the course of the search so far as is reasonably required for ascertaining whether it contains any such information as is mentioned in s. 31(1)(a) or (b)". s. 31 covers the unlawful collection of information on certain groups of persons.[24] Crucially, s. 22 does not require that the searcher have reasonable suspicion that information of the sort covered by s. 31 is contained in the document before she or he begins his examination.

S. 22(2) provides for a new power of seizure. Any document or record which "cannot be conveniently or thoroughly examined" on the premises may be removed. Impliedly, any document or record can now be removed as this requirement would be very easy to discharge. It appears that a member of the security forces need only state that she or he was in a hurry for "security reasons".

This section significantly increases the power of the security forces. Before 1991, items (excluding explosives, firearms, radio transmitters etc.) could only be seized and removed if there were reasonable grounds for believing that the items might be connected with "terrorist" activity. Under s. 22 however, records and documents may be seized without reasonable grounds: the item may be removed to allow time for the security forces to establish whether or not there are grounds for suspecting that it is being so used. This requirement could be easily discharged as subjective suspicion would probably be sufficient.

The section contains some limitations through the inclusion of a number of safeguards regulating the examination and seizure of material. Seized items may not be photographed or photocopied and they must be returned within four days maximum. Also a record must be made of any examination which is given to the person from whom the item was obtained. Despite these safeguards there remains the possibility that documents ostensibly seized in order to ascertain whether they contained any information of the sort covered by s. 31, would in fact be used as a source of low-level intelligence material on the group from which the documents were taken. Thus it may be that the reference to s. 31 is no more than a smoke screen for more of the 'low intensity' intelligence-gathering exercises which have been such a feature of Army operations since the 1970s. The section is still clearly open to abuse. While there may be a legitimate need to provide for the examination of documents, this should be done under judicial authority as in PACE.

Legal privilege has some protection under the legislation. However, documents may be examined to determine whether they attract legal privilege. This means that proof that the bearer or owner of the documents is a solicitor is not necessarily enough to prevent

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[24] See chapter 3 of this pamphlet.

a search. Furthermore, other relationships where privacy is vital, such as between ministers or priests and their parishioners, are not given any such protection.

- **The power at s. 22 EPA to examine and seize documents should be repealed.**

CAJ is also concerned about the innovation introduced in s. 19(3) EPA which stipulates that in searches of unoccupied premises, or in authorised searches of occupied premises, the soldiers or police officers conducting the search may be accompanied by "other persons". Who these other persons may be is not specified.

S. 24 provides a general power for the police or army to enter property or interfere with roads "if necessary for the preservation of peace or the maintenance of order". Under sub-section 2 with the authority of the Secretary of State police or army can take possession of any land or property, detain or destroy any property or "do any other act interfering with any public right or with any private rights of property". This is a vast power allowing the Secretary of State to do almost anything to private property with no accountability. Thus under the EPA property rights have virtually been negated. However under s. 63 compensation will generally be paid to persons whose property is interferred with. That such arbitrary powers exist is anathema. s. 24 should be repealed.

- **CAJ believes that the search and entry powers contained in PACE are adequate. EPA search and entry powers are oppressive and should be scrapped.**

Chapter 6. EPA AND PTA ARREST, INTERROGATION AND CONFESSIONS

6.1. Introduction

The way in which emergency powers of arrest and detention have been used in Northern Ireland, and the closely related issue of the special rules on the admissibility of confessions, have long been causes of major concern. At the time of the introduction of internment in 1971, a set of interrogation techniques was employed which were later held to constitute "inhuman and degrading treatment" by the European Court of Human Rights. [25] Then came the controversy surrounding the treatment of suspects during interrogation at Castlereagh and Gough detention centres in the mid-1970s, which led to critical reports by Amnesty International and by the government appointed Bennett Committee.[26] Amnesty International's Report for 1988 listed three cases of beatings of suspects in Northern Ireland.[27] More recently, in November 1991 the United Nation **Committee Against Torture** examined such allegations, in relation to the UK's adherence to the UN **Convention Against Torture**, and expressed grave concern at the regime governing emergency detention.[28] Most recently, in November 1994, the **European Committee for the Prevention of Torture** (CPT) concluded that emergency detainees were at "significant risk of psychological forms of ill-treatment" and on occasion interrogating officers resorted to physical ill-treatment.[29] The CPT found that Castlereagh was not suitable as a police station for detaining suspects.

This is an extraordinary and by no means exhaustive catalogue of authoritative international criticism. The response of the authorities has been slow and defensive, indicative of an underlying policy at odds with due process and the protection of the rights of suspects. It seems axiomatic that, if the criminal justice system is to be regarded as credible and legitimate, the security forces should be concerned to ensure that persons detained for questioning are treated with respect and not subjected to inhuman and degrading treatment. However, the persistent and short-sighted use of oppressive and violent interrogation techniques serves only to tarnish the process of

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[25] See **Ireland v United Kingdom** (1978) 2 **EHRR** 25.
[26] See Amnesty International, **Report of a Mission to Northern Ireland** (1978), and **Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland**, Cmnd 7479 (1979).
[27] See **Amnesty International Report** 1988, p.222.
[28] CAT/C/SR. 91 15 November 1991.
[29] CPT report, CPT/Inf (94)17.

justice and undermine public confidence in the rule of law.

Following the ceasefires, emergency detentions are still taking place. CAJ has received reports of ill-treatment and detentions which continue for longer than is necessary to deal with investigation of specific offences. This section examines the legal framework of arrest and detention under both the EPA and the PTA.

Prior to EPA 1987, the bulk of emergency arrests in Northern Ireland took place under s. 11 EPA 1978. This power was repealed in the 1987 Act, with the result that the RUC came to rely almost solely on the arrest and seven day detention power in the PTA, although some residual arrest powers still remain under the EPA. The two pieces of legislation are linked, however, in that persons detained under the "terrorism provisions" (including PTA powers) become, under the EPA, subject to special provisions governing access to solicitors and notification of arrest. A further factor relevant to the debate on detention and interrogation has been the attack on the right to silence incorporated in the **Criminal Evidence (Northern Ireland) Order 1988**. This allows inferences to be drawn from a person's silence in certain circumstances, and thus fundamentally alters the legal position of detainees. While this is not emergency legislation in name it operates with the rest of the emergency provisions severely to prejudice defendants who are tried in the Diplock Courts. Clearly this can make it easier to secure the conviction of persons against whom there is insufficient evidence apart from their silence.

The key factor characterising the Diplock process, though, remains the very heavy reliance on confessions. It is, therefore, with that question that this section is mainly concerned. Before examining the issue, attention will first be focused on the remaining arrest powers in the EPA and on the special provisions governing detained persons contained in the EPA.

6.2 Current Arrest Powers in the EPA

EPA 1991 re-enacts the two arrest powers at s. 17 and s. 18 (previously ss 13 and 14). These powers are limited to scheduled offences and offences under the EPA. These powers are used in conjunction with those in the Prevention of Terrorism Act, and most arrests are under the latter Act. S. 17 authorises any constable to arrest without warrant any person "who he (sic) has reasonable grounds to suspect is committing, has committed or is about to commit a scheduled offence or an offence under this Act which is not a scheduled offence". The necessity of this power can hardly be sustained given the paucity of arrests made under it: from 1991 to September 1994 no-one was arrested under s. 17.[30]

S. 18 permits any soldier who is on duty to arrest without warrant and detain for not

[30] Northern Ireland Information Service, **Statistics on Northern Ireland Emergency Legislation**, issued 6th February 1995.

more than four hours "a person who he (sic) has reasonable grounds to suspect is committing, has committed or is about to commit any offence". There is no exception for children. Three significant features of this provision deserve some comment. Firstly it empowers soldiers to arrest persons on suspicion of the commission of offences (e.g. drunk driving) which may have no connection with the conflict. Even arrests for trivial offences which would not ordinarily be arrestable (e.g. littering) appear to be authorised. Thus, the army is equipped with greater arrest powers than are available to the RUC. Such anomalous powers would require the clearest justification, yet there is little to suggest that any such justification has been shown to exist.

Secondly there is no requirement as there is under the ordinary law, that the arrested person - even if it is a child - should be told of the offence for which she or he is suspected. This is clearly an infringement of the individual's right to be informed of the nature and cause of the accusation against him or her laid down in Article 6 (3) (a) of the European Convention.

Finally, figures show that, from January to September 1994, only one person out of 53 arrested under this section was subsequently charged. In 1992 and 1993, not one of the 137 people arrested under this section has been charged. The corresponding figures for 1991 show that only 2 of the 108 people arrested were charged with "terrorist"-type offences.[31] These figures raise the suspicion of army harassment, with people being held, arrested and subsequently released for no lawful purpose.

Supporters of the s. 18 power might seek to defend it on the grounds of necessity and effectiveness. However, figures show that there has been a huge decline in the number of such arrests. In 1982 there were 1,288 arrests under s. 18; in 1993 there were 86; and from January to September 1994 there were 53. As already stated of all those arrested in 1993, not one was charged with a "terrorist"-type offence. This suggests that the power was no longer necessary even before the ceasefires of 1994. It seems that many persons were being detained without good reason and that this power exists simply as a means of gathering information.

- **Given the wide powers in the PACE Order, there is no justification for the retention of ss 17 and 18 EPA. They should therefore be repealed at once.**

6.3 Seven Day Arrest and Detention under the PTA

Extended police custody is provided for in s. 14 PTA 1989. S. 14(4) and (5) allow an initial period of detention of up to 48 hours, which can be extended for up to five days by order of the Secretary of State. The total detention period without being brought before a judge may therefore last 7 days.

Suspects detained under s. 14 are in a significantly worse position compared with

[31] Ibid.

persons held under the **Police and Criminal Evidence (NI) Order 1989** (PACE), the ordinary legislation. They are allowed to be held in custody for up to 7 days whereas the maximum under PACE is four days. The detainee is denied any form of due process in considering whether an extension should be granted. Unlike PACE no hearing takes place prior to the decision and the detainee is not granted any right to make representations or to consult with a lawyer. Power to extend detention orders is, therefore, wholly at the discretion of the Secretary of State.

According to the government seven day detention is indispensable to allow effective investigations in terms of interrogation, forensic testing and liaison with other police forces.[32] However, recent statistics referred to by the Committee for the Prevention of Torture (CPT) indicate that in the vast majority of cases detainees are released or charged within the first two days of custody.[33] The CPT asked whether there might not be scope for some reduction in the maximum period of police custody.[34] But, in its response, published in November 1994, the UK government replied that "any reduction in the permitted period of detention of terrorist suspects would greatly hinder police investigations into serious terrorist crime".[35]

However, the UK government has not shown that seven day detention has in fact increased the number of charges for scheduled offences.

While s. 14 PTA requires a reasonable suspicion that a person has been involved in the "commission, preparation or instigation of acts of terrorism", a high percentage (about 2/3) are released without charge. This raises the question whether most arrests are actually based on reasonable suspicion, or whether arrest powers are used mainly for intelligence gathering rather than apprehending those involved in criminal activity.[36] Moreover it is clear that the continued use of the seven day power and questioning of suspects in detention centres, when allied to the many allegations of physical and psychological abuse, continues to alienate sections of the community at a time when reconciliation should be the chief pursuit of the government.

The operation of s.14 cannot be seen outside the context of the conditions under which detainees are kept. The interrogation centres at Castlereagh, Gough Barracks in Armagh and Strand Road in Derry have gained a terrible reputation as places where strong arm tactics are routine. Furthermore, the conditions in Castlereagh, the main interrogation centre, have been condemned by all who have had access, including the Standing Advisory Commission on Human Rights and, most recently, the European Committee for the Prevention of Torture.[37] Concerns have been expressed at the lack of natural daylight, the failure to keep holding cells clean, the lack of clocks and any form of exercise, and the lack of access to radio or newspapers and other reading material. Such conditions, when added to the long periods of interrogation, are

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[32] Clive Walker, "The detention of suspected terrorists in the British Islands", **Legal Studies**, Vol.12, No. , p. 281.
[33] CPT report, CPT/Inf (94)17, p.34, cif.104.
[34] Ibid.
[35] **Response of the UK Government**, CPT/Inf (94)18, p.20, cif. 35.
[36] See Stephen Livingstone," A week is a long time in detention...", **NILQ**, Vol. 40, No. 3 1989, p 289.
[37] CPT, Op. cit.

extremely intimidating and could be said to amount to sensory deprivation.[38] The implications of this environment for the safety of confessions obtained in the interrogation centres is examined below. An additional factor which should be addressed is the fact that there is no statutory basis for the existence of the interrogation centres. International standards insist that places of detention should be governed and controlled by statute. Para. 40 of a draft **Body of Principles on the Right to a Fair Trial**, drawn up and presented to the UN **Sub-Commission on Prevention of Discrimination and the Protection of Minorities** in June 1994[39] states: "Detainees shall be housed in places *established by law* for that purpose and duly identified".

Seven day detention does not comply with international standards set out, for instance, in the ECHR and the ICCPR. By virtue of Art. 5(3) ECHR and Art. 9(3) ICCPR everyone arrested as a suspect in criminal proceedings must "be brought promptly before a judge or other officer authorized by law to exercise judicial power". This provision "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty" and is designed to protect against ill-treatment.

In ***Brogan v. UK***[40] the European Court of Human Rights found that a detention under the PTA for four days and six hours breached the ECHR. However, instead of repealing the then s. 12 PTA, the government entered a derogation under Art. 15 ECHR and similarly under Art. 4 ICCPR, to keep the 7 day detention power in place. These articles allow High Contracting Parties temporarily to suspend certain obligations during an emergency "threatening the life of the nation".

Subsequently, in ***Brannigan and McBride v. UK***,[41] the European Court accepted the existence of a state of emergency and, taking into account the government's wide margin of appreciation, it took the view that measures in place under the derogation (i.e. the seven day arrest power) were *"strictly required by the exigencies of the situation"*. While this decision caused wide dismay among the human rights community at the time, *"the nature of terrorist threat in Northern Ireland"* can no longer be invoked to justify the derogation since the ceasefires. In the absence of the "terrorist threat", seven day detention breaches international law. It is a matter of great concern that the UK government, in its report to UN Human Rights Committee last October "... *continues to believe that circumstances require that the derogation from the Covenant and the Convention be maintained"*. On the contrary, given the end of paramilitary violence, the derogation can no longer be valid under international law. It must be assumed to have lapsed.

The first PTA was enacted in a 24 hour period within 7 days of the Birmingham pub

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[38] See CAJ's **Submission to the UN Committee Against Torture**, November 1991 and **Allegations of Psychological Ill-treatment of Detainees held under Emergency Legislation in Northern Ireland**, February 1993.
[39] E/CN.4/Sub.2/1994/24.
[40] **Brogan and others v. UK**, Series A no. 145 - B, Strasbourg, 29 November 1988.
[41] **Brannigan and McBride v. UK**, 5/1992/350/423-424, Strasbourg, 26 May 1993.

bombings in 1974. Much more time has passed since the ceasefires, but emergency legislation remains in force.

- **It is not sufficient that s. 14 ceases to be applied, it needs to be repealed. In a democratic society the state cannot be allowed to keep its powers - just in case they might be needed - at the cost of individual freedom.**

An additional element in the debate has emerged recently with calls for the retention of the s. 14 PTA power to deal with "international terrorism". This is a development which has serious implications for the UK's reputation under international law. The legal developments in the **Brogan** and **Brannigan** cases have shown that detentions of more than 4 days and 6 hours contravene the **European Convention** and that the subsequent derogation rests for its legitimacy on the fact that an "emergency threatening the life of the nation" exists. It is inconceivable that the threat of international "terrorism" can be characterised thus. It is the nature of emergency law that it is enacted for a specific emergency with the powers designed to meet the threat. It is delusory to equate political violence arising from the Northern Ireland situation and international forms of "terrorism" which are essentially a matter for co-operation between different national law enforcement agencies and under the European Union. Other European countries have not enacted emergency legislation; the UK should not seek to retain the 7 day detention power under cover of international "terrorism" when its existence depends on violence related to Northern Ireland.

A look at recent statistics shows that, in any case, the power is not being used. In 1992 and 1993, out of only 27 people detained in connection with "international terrorism" only 5 detentions were extended beyond 48 hours. Only 6 of these 27 detentions resulted in deportation or charges. 4 people (2 each in 1992 and 1993) were charged with non-emergency offences and 2 people were removed under the **Immigration Act 1971**. In all these cases, therefore, action could have been taken against the individuals concerned whether or not the s. 14 power existed.

The power to detain for seven days is an extraordinarily severe piece of legislation. It was brought in for the purpose of dealing with the "emergency" related to Northern Ireland. Other legislation exists sufficient to deal with "international terrorism".[42] The s. 14 power should therefore be repealed.

6.4 Access to Legal Advice and Notification of Arrest

Legal Advice

S. 15 EPA 1987 for the first time provided a detainee with a right to contact a lawyer when arrested under emergency provisions. This provision is now contained in s. 45 of the 1991 Act. Such a right has been described as one of the most fundamental rights of the citizen and is particularly important to individuals who find themselves in the

[42] See also chapter 4.4 of this pamphlet on **Port and Harbour powers.**

unfamiliar and intimidating environment of a police interview room. The right becomes even more necessary for those facing 7 days in the interrogation centres. The right of access is absolute after 48 hours, but up to then it may be delayed by a police superintendent under s. 45(8) on a number of grounds (mainly relating to the superintendent having reasonable grounds to suspect exercising the right will lead to interference with evidence, or the alerting of someone suspected of but not arrested for, "terrorist" offences). In addition, and on the same grounds, an Assistant Chief Constable may insist that uniformed RUC members listen in on the interview.

Up until 1991, the majority of initial requests were delayed, despite the fact that the English Court of Appeal in **R v Samuel**[43] indicated (in dealing with rather similar PACE provisions) that the circumstances in which delay is permitted should be exceptional and must involve grounds for believing that the solicitor in question would deliberately or inadvertently do one of the things[44] referred to in the exceptions. By contrast, the figures show that deferral of access was routine. In 1991, 55% of requests were deferred; in 1990, 70% of requests were deferred. Since 1991 however, there have been a number of developments which have pushed the debate forward.

The section has generated both controversy and caselaw in the Northern Ireland courts. In **R v. Harper**[45] the court decided it was only necessary to show that the police reasonably believed access would impede their investigation. The judgement ran contrary to the line taken in **Samuel** that refusal should only be exceptional. In the case of, **McNearney**,[46] although the judge agreed with the less restrictive approach of the court in **Harper** on the ground that Northern Irish courts had to take account of the conflict. Thus the courts broadened the ambit of situations where access might be denied. On the other hand, **McNearney** was the first case where interim relief was granted preventing the police interviewing a detainee pending judicial review of the decision to prevent access.

In **Duffy**[47] the solicitor acting for the applicant lodged an undertaking that he would not communicate any matter arising from a consultation with his client to any person for the period of conditional access under section 45 thereby giving the police no cause for refusing access under s. 45(8). Hutton LCJ decided that where such an undertaking was given, and the sincerity and integrity of the solicitor had not been challenged, the RUC could not refuse access.

However it is of concern that the court should require solicitors to lodge depositions affirming their professional integrity. The police unease with the right of access suggests that disturbing assumptions about defence lawyers are being made.

In 1992, there was a concerted effort by the police to erode judicial protection of the

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43 See **R v Samuel** (1988) 2 **ALL ER** 135.
44 For example, alerting someone suspected of having committed a connected offence but not yet arrested.
45 See **R v Harper** 1990 4 **NIJB** 75.
46 A 1991 judicial review.
47 **Duffy** unreported High Court judgement 1991.

right of access by attempting to persuade the courts to refuse access even if an undertaking has been lodged by a solicitor. In **McKenna**[48] the police put forward the argument that access should be denied on the ground that the IRA might kidnap the solicitor who would be forced to release information against his will. This was a clear attempt to enable the police to circumvent **Duffy** and to deny access even if an undertaking has been lodged. While Nicholson J accepted the police argument, the Court of Appeal reversed his decision and rejected the argument. However, in **Kennaway**[49] the risk of kidnap and forced disclosure argument was accepted by the Court of Appeal although in this case the court took the view that there was no risk of a confession being wrongly made for lack of legal advice since the applicants had apparently been caught red-handed. In a strong dissenting judgement Shiel J refused to accept the existence of reasonable grounds for the police kidnap scenario stating that: *"there was no evidence that such a thing had happened in the past throughout the twenty years of the very grave civil disorder in (Northern Ireland) or to suggest that such a thing was likely to occur in the present case if the applicants' request for access to their solicitor was granted. For the INLA to kidnap a (solicitor or any member of his or her family) or to subject (a solicitor) to any form of duress or to attempt to do so would in all probability be self defeating as it could well result in the withdrawal from the INLA of all professional legal services by ....solicitors many of whom have in the finest tradition of their profession continued to represent terrorists* (sic) *from both sides of the community. Further I cannot see ... any solicitor having been prepared to give such an undertaking if he (sic) had considered there was any possibility or likelihood or such kidnap or duress occurring.....".*

The result of all these legal battles becomes clear from an examination of available statistics as well as discussion with members of the legal profession who attend detainees at the holding centres. In 1992, only 26% of requests for access to legal advice were deferred. In 1993, the figure had dropped to 14%. This trend continued in the first nine months of 1994 when access was denied in only 15% of cases. Solicitors informed CAJ in 1994 that the picture had changed remarkably in that routinely access was being allowed. Furthermore, solicitors were attending their clients a number of times each day. This has been a significant victory for the right of access to legal advice while still being less than that available under PACE where lawyers actually attend interviews to advise clients. It is also less beneficial than the situation which obtains under PTA arrests in Britain. There, lawyers routinely accompany clients during interviews because the detentions are governed by PACE Codes. This is a striking example of the way in which UK citizens in Northern Ireland have fewer legal protections than UK citizens across the water.

A footnote to this debate is the red herring contained in the first report of the **Independent Commissioner for the Holding Centres**, Sir Louis Blom-Cooper. This post, announced during the Committee stage of EPA 1991, was held up by the authorities as an important new safeguard for detainees. Sir Louis, however, included

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[48] **McKenna**,10 February 1992, **BNIL**, 54.
[49] A 1991 judicial review.

in his first report a bizarre scheme which would deprive detainees of their right to have the lawyer of their choice attending them in the interrogation centres. The plan was for a legal advice unit staffed by solicitors permanently at Castlereagh. This extraordinary proposal, when looked at in the context of developments outlined above appears to ensure what the RUC have wanted all along: that detainees are denied access to independent solicitors whom they know and trust.

The denial of access and proposed attack on the right to choose one's own solicitor run contrary to the **UN Basic Principles on the Role of Lawyers** adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and supported in General Assembly resolutions. [50] Paragraph 8 provides: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing of law enforcement officials. "

In relation to counsel of choice, paragraph 5 of the Principles provides: "Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest ..." The elaborations of the UN **Human Rights Committee** on this issue put the matter beyond dispute. "The Committee has ... indicated that the right to choose one's counsel must be available immediately upon detention. Members of the Committee disapproved of a State system whereby a suspected terrorist could have only a State-appointed defence attorney for the first five days of detention."[51]

A further issue which increases the importance of adequate access to legal advice is the virtual abrogation of the right of silence since the **Criminal Evidence (NI) Order 1988**. These changes have had considerable impact on how suspects should respond to police questions. The caution which is used is very hard to understand and it is oppressive to suspects to expect them to judge when it is in their best interests to speak and when it is not.[52]

A recent decision at the European Commission on Human Rights, **Murray v. UK**,[53] indicates that changes to the right of silence, when imposed in the absence of a legal adviser, amount to a breach of ECHR fair trial standards. It will be important to monitor whether the Court agrees with this interpretation. Already, however, the Commission's decision is a body blow to emergency interrogation procedures.

A further indication of the approach taken by international law is contained in the draft

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[50] 45/121 of 14 December 1990 and 45/166 of 18 December 1990.

[51] **Human Rights and Detention: A handbook of International Standards relating Pre-trial Detention**, UN Centre for Human Rights, p 22. The HRC opinion comes from the *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40), para 166 (Spain).*

[52] For a comprehensive examination of the way in which the attack on the right to silence has been interpreted, see report by CAJ and JUSTICE, **Right of Silence Debate: the Northern Ireland Experience**, May 1994.

[53] European Commission of Human Rights, **Murray v. UK**, Application No. 18731/91, 27 June 1994.

Body of Principles on the Right to a Fair Trial.[54] Paragraph 58(b) states: "Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent".

- **The EPA provisions hinder access to lawyers, can remove privacy and are in conflict with the UN Principles and other international law. They should be repealed. Sir Louis Blom-Cooper's proposals are ill-conceived and in contradiction to international norms. They should be ignored.**

Notification of Arrest

Another feature introduced by EPA 1987 was the qualified right given to persons detained under the "terrorism provisions" to have a friend or relative informed of his or her arrest. EPA 1991 retains this right at s. 44. The right, however, may be delayed for up to 48 hours on the authority of an RUC superintendent on certain specified grounds. This means that a person can disappear from circulation, with his or her relatives only learning two days later that he or she has been arrested. Such a practice of secret arrest cannot be tolerated in a society which claims to be democratic. The anxiety which such an occurrence could cause for the detainee's family can scarcely be exaggerated, and this reason alone should justify the granting of an absolute right to a detainee to have someone informed of his or her arrest.

There were no delays in 1989, 25 (or 8%) in 1990 and 89 (or 22%) in 1991. Because of this extraordinary jump in the number of such secret arrests, CAJ and other human right organisations began highlighting this disturbing trend to the authorities and the international human rights community. Members of the UN **Committee Against Torture** described the provisions, when used alongside deferral of access to legal advice, as detention "incommunicado, thereby creating conditions which might lead to abuses of authority by agents of the State."[55]

Since 1991, the upwards trend has thankfully been reversed. In 1992, only 32 (or 10%) requests were delayed and the figures for 1993 and 1994 (the first 9 months) were 27 (or 6%) and 20 (or 7.5%).[56]

- **However, s. 44 allowing incommunicado detention is a fundamental abuse of human rights and should be repealed.**

6.5 Recording of Interviews

After the Bennett inquiry, one of the safeguards introduced as a precaution against

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[54] Op. cit., E/CN.4/Sub.2/1994/24.
[55] Para 29, CAT/C/SR.91.
[56] All figures from **Northern Ireland Information Service**, op. cit., issued 6 February 1995.

police mistreatment of suspects was to have closed-circuit television monitoring of interrogations. The monitors are watched by another police officer in the detention centre but recordings are not made. Given the reduction in complaints of mistreatment since the mid 1970's it must be assumed that this measure (and those affording detainees more regular access to medical inspection), has had some effect. However, as the **habeas corpus** case of **Gillen v Chief Constable R.U.C.**[57] indicates, it has not proved entirely effective. The suspect, Mr Brian Gillen, was released after it was accepted that he had been beaten by police officers while in custody, yet the TV monitoring did not pick this up. Moreover, monitoring is of little help in resolving disputes about inducements, verbal abuse or oppressive questioning.

If Castlereagh and the other interrogation centres remain in use, video and audio tape-recording should be introduced immediately. Given the fact that video cameras are in place this would be a relatively simple move. The technology for this is already available and has been utilised by American and Canadian police forces for some time. Experiments are under way in connection with PACE detentions in England and Wales. The Standing Advisory Commission on Human Rights for Northern Ireland accepts the case for video recording.[58] In his 1990 review, Lord Colville also recommended that silent video tapes be kept, though he also suggested that experiments be conducted in Northern Ireland into audio recording summaries of interviews with 'suspected terrorists' (para 4.9). John Rowe, Colville's replacement advocated audio-recording in his 1993 review. Sir Louis Blom-Cooper[59], concluded in his first annual report that interviews should be electronically recorded. In the 1991 **Helsinki Watch** report, the organisation recommended both the video and audio taping of interviews. At the November 1991 U.N. **Committee Against Torture** hearing the government's arguments against such an introduction were described as "facile". Most recently, the **European Committee for the Prevention of Torture** found that the current closed circuit monitoring system is not a foolproof means of detecting ill-treatment. After examining the issue in great detail, the CPT recommends the introduction of electronic recording,[60] emphasising that sound recording is the only way of ensuring that psychological ill-treatment is not being practised. Similarly in January 1995, the UN **Committee on the Rights of the Child** found the current detention arrangements unsatisfactory as children arrested under the emergency legislation in Northern Ireland were not adequately protected.

The consensus amongst these disparate, and authoritative commentators, favours electronic recording. The government appointed Independent Commission for Police Complaints has called for video-recording and MPs from virtually all parties are now in favour of recording. However, the government remains stubbornly oppose. In the House of Commons on 24 May 1994, the most recent debate on emergency law, Sir Patrick Mayhew, the Secretary of State for Northern Ireland, reiterated the government position stating that: "in the circumstances of Northern Ireland, any electronic recording of interviews would inhibit still further the chances of lawfully obtaining information that

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[57] **In re Gillen's Application** (1988) 4 **BNIL** 35.
[58] See Standing Advisory Commission of Human Rights, **Fourteenth Report** H.C. 394 Annex B p78.
[59] The Independent Commissioner for the Holding Centres, see Chapter 6.11.
[60] CPT, op. cit., para 89.

would lead to the conviction of terrorists or to the saving of other people's lives".[61]

This quite clearly indicates that the fact that the major function of the interviews is the gathering of information rather than the investigation of offences. According to the police, electronic recording would interrupt the flow of information. While the RUC claim that such information is offered voluntarily, the suspicion must be that recording is opposed because it would show how detainees are pressurised.

A further consideration is that the interrogations in question are conducted under the seven day detention power in the PTA. This power depends for its validity in international law on the derogation which the British Government has entered to the European Convention on Human Rights. Measures taken under such derogations must be "strictly required by the exigencies of the situation" and must therefore be proportionate to the goal in question. One of the issues at which the European Court and Commission of Human Rights have looked in assessing proportionality has been the question of safeguards. Since the government's own reviewers of emergency legislation, Lord Colville and John Rowe, QC, have recommended video-taping, it should be considered a necessary safeguard, and one which the British Government should introduce if it is properly to meet the commitments which flow from the derogation it has entered.

The concern about ill-treatment and lack of safeguards has never been so widespread. Following the ceasefires, PTA arrests and detentions continue, albeit at a much reduced rate. Moreover, electronic recording already takes place under PACE.

- **CAJ believes that the discredited interrogation centres should be closed and all detentions and interviews pursued under the ordinary law.**

6.6 Confessions: Introduction

The importance of confessions to the emergency system of criminal justice in Northern Ireland is clear. In a 1981 study of the operation of emergency legislation, Dermot Walsh[62] found that confessions were involved in 89% of all scheduled offence cases. In 93% of cases where the accused pleaded guilty he or she had made a confession. Though current comparable figures are not available, and refinements in forensic science have presented additional evidence-gathering possibilities, the Prosecuting Authorities continue to rely heavily on confessions extracted from defendants. One major concern has been the use of oppressive treatment to obtain confessions. In 1991 CAJ interviewed persons, both adults and children, who had been interrogated by the RUC in Northern Ireland between May and September of that year. There were allegations of verbal abuse and the use of threats or threatening behaviour. There were also many allegations of physical ill-treatment including face slapping, punching

[61] See **Hansard**, 24 May 1994 at p 66.
[62] Walsh, **The Use and Abuse of Emergency Legislation in Northern Ireland** (Cobden Trust 1983).

and specific sexual harassment. Complaints came from men and women, adults and children. Thus there is evidence that the police continue to apply physical and mental pressure to obtain confessions.[63]

While incidents of physical ill-treatment appeared to decline markedly following the CAT hearings, CAJ has continued to receive worrying reports about severe psychological ill-treatment. Such allegations have formed the core of 2 prolonged court cases where young defendants, known collectively as the Beechmount 5 and the Ballymurphy 7, have fought to prove their confessions were extracted through ill-treatment. The most authoritative assessment of the capacity for ill-treatment was delivered by the **European Committee for the Prevention of Torture** which visited the interrogation centres in July 1993. The CPT commented that: "The sheer number of allegations of ill-treatment received, and their consistency as regards the types of ill-treatment employed and the authors of that ill-treatment (detective, as opposed to uniformed, officers) is striking." In the absence of electronic recording, "detective officers minded to resort to psychological forms of ill-treatment could therefore do so with virtual impunity".[64] The CPT's conclusion is damning:

> *"In the light of all the information at its disposal, the CPT has been led to conclude that persons arrested in Northern Ireland under the P.T.A. run a significant risk of psychological forms of ill-treatment during their detention at the holding centres and that, on occasion, resort may be had by detective officers to forms of physical ill-treatment."*[65]

Even more worrying is the fact that the CPT felt it had to recommend that "senior RUC officers deliver the clear message to their subordinates that resort to ill-treatment, whether physical or psychological, is not acceptable and will be the subject of severe sanctions. "[66] In other words, the culture in the interrogation centres is coercive and detectives feel they can coerce with impunity.

It is crucial to ensure that there are adequate safeguards against improper police conduct during interrogations and that the legal standard for the admissibility of confessions is sufficiently high to prevent people being convicted on the basis of confessions that are unreliable or have been obtained by undue pressure.

6.7 Admissibility of Confessions: the Current Legal Position

The legal position as regards the admissibility of confessions in scheduled offence trials is governed by s. 11 EPA. Thus the law is based on the recommendations of the Diplock Commission.[67] The Commission had concluded that the common law

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63 See CAJ, **Submission to the United Nations Committee against Torture**, November 1991.
64 CPT, op. cit., para 109.
65 Ibid., para 110.
66 Ibid., para 110.
67 Op. cit.

"voluntariness" test[68] was inappropriate to the circumstances of Northern Ireland. This test rendered a prisoner's confession admissible if it "has not been obtained from him (sic) by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression". The Commission felt that this test, and in particular its application in a number of Northern Irish cases, was hampering the course of justice with technical rules and compelling the authorities to resort to extra-judicial detention in a significant number of cases that would otherwise have been dealt with in a court of law. For instance in **R v Flynn and Leonard,**[69] Lowry LCJ took the view that confessions made in Holywood detention centre were obtained by oppression as "the interrogation set-up was officially organised and operated to obtain information from persons who would otherwise have been less willing to give it". Diplock concluded that a less stringent test would be appropriate in emergency conditions, given that other admissible evidence may be difficult to come by if witnesses fear intimidation.

As currently formulated the EPA test allows any written or oral statement by the accused to be admitted as evidence, provided that the defence does not bring forward **prima facie** evidence to show that the accused was subjected to "torture, to inhuman or degrading treatment, or to any violence or threat of violence (whether or not amounting to torture), in order to induce him (sic) to make the statement". If the defence does raise such evidence, then the prosecution must disprove it beyond reasonable doubt. The concept is taken from Article 3 of the **European Convention of Human Rights.** Within the Convention, however, the standard is a baseline, the most rudimentary articulation of a detained person's basic right not to be subjected to mis-treatment. It is not envisaged as playing a role in determining the admissibility of confessions in criminal trials.

If the presence of torture or inhuman or degrading treatment is established, and the prosecution does not disprove its existence to the requisite standard, the judge **must** exclude the statement from the evidence to be considered. There is also a judicial discretion (codified for the first time in EPA 1987) to exclude a confession where there has been no torture, degrading treatment or threat of violence, but where "it appears appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice".

6.8 Interpretation and Application of the Current Test

The judiciary has consistently shown a lamentable reluctance to exclude confessions on the ground that they have been obtained by torture, inhuman or degrading treatment. One issue that arose in some early cases was whether the law permitted *any* physical mistreatment of the accused. One judge mischievously suggested that "a

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[68] This test has been replaced by that in the **PACE (NI) Order 1989**, where the Prosecution are required to prove that admissions were not extracted by violence, the threat of violence or in consequence of anything said or done that was likely in the circumstances existing at the time, to render the confession *unreliable*. This is now the relevant standard for the ordinary criminal law in Northern Ireland.

[69] **NIJB**, 1972.

moderate degree of physical maltreatment" would not render a statement inadmissible,[70] forcing the then Lord Chief Justice to cast doubt on such a possibility.[71] This judicial shenanigans led to statutory amendment and the section now provides that any violence or threat of violence will be a ground for excluding a confession. The use of such violence is normally established by medical evidence. Where such evidence exists, and there is no convincing alternative explanation from the police of how such injuries were received, confessions have been excluded.

However, Article 3 of the **European Convention on Human Rights** (from which the torture, inhuman or degrading treatment standard comes) is not limited to physical mistreatment. It also includes conduct which causes severe mental suffering and humiliation. Attempts to invoke Art. 3 to challenge confessions have met with little success. Judges have, for example, found that lengthy questioning after repeated arrests did not constitute degrading treatment.[72] In one decision while the then Lord Chief Justice, Lord Lowry, indicated that the use of abusive language in a threatening manner by police officers during interrogation could render a confession inadmissible he decided that it did not in that case.[73] However it is clear that some other forms of non-physical treatment, for example questioning a prisoner after depriving him or her of food or sleep for long periods,[74] or where he or she is clearly ill, could come within the category of degrading treatment and render a confession inadmissible.

More attention has focused recently on the judge's discretion to exclude a confession in the interests of justice. The judiciary[75] asserted that this discretion still existed, despite the abolition of the "voluntariness" test, as long ago as 1973.[76] Parliament did not expressly reject it in the 1978 re-enactment of the EPA, and expressly codified it in the 1987 EPA (now s. 11 EPA 1991). Judges have been consistently reluctant to formulate exact grounds on which the discretion should be exercised but some guidance was given by Lord Justice MacDermott in the case of **R. v Cowan**.[77] There he rejected any suggestion that it might be exercised where a police officer had made an inducement (e.g. an offer of a lighter sentence or resettlement or financial support) which encouraged a suspect to confess (on the grounds that this would re-establish the voluntariness test Parliament had abolished), but he seemed prepared to apply it where the police had obtained a confession by a trick (e.g. by falsely telling the suspect that they had forensic evidence linking him or her with the crime). It has also been indicated that confessions obtained by threats may be excluded by the exercise of the discretion.[78] Breach of the guidelines on interrogation laid down by the Bennett inquiry will not **per se** be grounds for excluding a confession,[79] nor will breach of the guidelines issued by the Northern Ireland Office in July 1990, or of any codes of practice

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70 See McGonagle L.J. in **R v McCormick** (1977) N.I. 105.
71 See Lowry L.C.J. in **R v O'Halloran** (1979) N.I. 45.
72 **R v McGrath** (1980) N.I. 91.
73 See **R v Mullan** (1988) 10 NIJB 36.
74 See **Ireland v United Kingdom** (1978) 2 EHRR 25.
75 All judges in N. Ireland are men.
76 See **R v Corey** (1979) N.I. 49.
77 See **R v Cowan** (1987) 1 NIJB. 15.
78 See **R v Howells** (1987) 5 NIJB. 10.
79 See **R v Dillon and Gorman** (1984) N.I. 292.

authorised under ss 61 and 62 of the EPA.

The situation as regards lengthy and persistent questioning is rather unclear. Judges have on a number of occasions indicated that lengthy and persistent questioning, which leads a suspect to speak when she or he otherwise would have remained silent, will not be a ground for exercising the discretion to exclude, even though it might indicate that a confession would not be "voluntary" in the common law sense.[80] However, there have also been some cases where judges have concluded that lengthy questioning has been so oppressive as to make the suspect's mind "crumble" driving him or her to act against their will. In such situations the judges have exercised their discretion to exclude.[81] The difference between these two situations will not always be easy to spot, though rare will be the case where judges decide that questioning is sufficiently oppressive to justify exercising the discretion.

6.9 Assessment of the Present Test

Any assessment of the operation of the confession standard in Diplock courts must acknowledge, to begin with, that despite the lowering of the standard for the admissibility of confessions there have historically been very few claims of innocent people being convicted in Northern Ireland. There are a number of theories as to why this should be so. The authorities claim that it is because there have been no unsafe convictions. Others argue that there has been a culture in Northern Ireland which sees the legal system as so corrupt that wrongful conviction is par for the course. The prospect of getting sympathy for complaints was so slim - especially when confessions were the only evidence - that it was best just to do your time. This is in sharp contrast, for example, to many of the cases of Irish people wrongly convicted of "terrorist" offences before juries in Britain where confessions have been involved. In three of those cases, those of the Guildford Four, Birmingham Six and Judith Ward the confessions have now been discredited, and all eleven released.

By contrast, the Human Rights Committee of the City of New York Bar Association declared in its 1988 report on **Criminal Justice and Human Rights in Northern Ireland**[82] that despite regularly asking, it had not been referred to a single case of an alleged miscarriage of justice. More recently, in the early 1990s, a number of cases have renewed fears about reliance on confessions in the Diplock Court, particularly the case of the Armagh Four and the conviction of Timmons, Kelly and Kane in the wake of the Casement Park murders.

More fundamentally, there is a question as to whether anyone tried in a Diplock court receives a fair trial, given the fact that these are special courts without the safeguards

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[80] See **R v Howells** (1987) 5 **NIJB.** 10.
[81] See **R v Milne** (1978) **N.I.** 110. The suspect was interviewed by police for 39 of 72 hours in custody.
[82] **A report to the Association of the Bar of the City of New York**, by William Hellerstein, Robert McKay and Peter Schlam, New York, 1988.

applicable under ordinary law.

The law on the admissibility of confessions serves other purposes vitally important in a democratic society, notably ensuring that justice is not only done but seen to be done, that the criminal process only convicts people on evidence that has clearly been fairly acquired and the reliability of which is unquestioned, and that police officers have no incentive to engage in harsh, oppressive or underhand methods in interrogating those who at the time of the interrogation the law regards as innocent people (and who may well be innocent people).

Judged by these standards there is significant cause for concern with the EPA standard. As more claims of miscarriage of justice emerge, the public cannot be confident that justice is being seen to be done where someone is convicted purely on the basis of a confession after five or six days' questioning in police custody. Another scenario which would give cause for concern is the fact that the admissibility of confessions made by juveniles, without having a parent or solicitor present to look after their interests, is left entirely to the discretion of a trial judge.[83] Despite MacDermott L.J.'s views in **R v Cowan** that the abolition of the common law voluntariness standard meant that inducements were no longer improper behaviour for police officers, there must be unease with a situation whereby confessions produced after the police have offered someone an inducement are regarded as properly obtained evidence. The situation on the **voir dire**, (discussed further in the section below on Diplock trial) where a Diplock judge must rule on the admissibility of the confession before the trial and, if he or she rules it inadmissible, must direct herself or himself to ignore it when considering the evidence against the accused, also does little for public confidence in the administration of justice. Though a judge can rule himself or herself out of hearing the rest of the case, this discretion is rarely exercised. Of course, because in many of the cases the confession is the only evidence against the accused, once it is ruled out the case collapses.

There is significant doubt as to whether the present EPA confessions standard conforms to international legal standards for a fair trial. Professor Korff's study of Diplock courts for Amnesty International concluded:

> *"The institutionalised use in Northern Ireland of strong psychological pressure on suspects in order to induce them to confess appears to be in breach of at least Article 14 (3)(g) of the International Covenant on Civil and Political Rights."*[84]

Article 14 (3)(g), of the ICCPR, of which the U.K. is a signatory, protects the right not to be coerced into making a confession. Other international observers have also expressed unease about the EPA standard. The New York Bar Association Report commented on the EPA standard:

> *"Its existence stems from Lord Diplock's belief that the existing standard for admissibility was an impediment to convicting those charged with terrorist*

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83 See cases discussed in Walsh, op cit. at pp 52-3. Under **PACE (NI) Order 1989**, an appropriate adult must be present when a minor is interviewed.

84 See Korff, **"The Diplock Courts: A Fair Trial?"**, Amnesty International (1984) p.100.

offences. Acceptance, however, of such a premise does far more than accommodate to the exigencies of an emergency situation; it legitimises a standard of proof that is fundamentally inconsistent with basic tenets of fairness and increases the likelihood of the admissibility of unreliable confessions. "[85]

Ultimately the burden of proof, as with all other forms of emergency law, must be on those who seek to preserve the EPA confession standard. It is a fundamental principle of most democracies that any emergency provision should be temporary in character and should only be maintained where its necessity is clearly shown.

The Diplock Commission recommended the EPA admissibility standard in 1972 on the ground that the courts were throwing confessions out for breaches of "technical rules". Yet, given that interrogation practices around this time were the subject of proceedings in the European Court of Human Rights, what appeared to Lord Diplock as the utilisation of "technical rules" was more probably justifiable judicial concern for protecting citizen's rights.

Finally, one must consider what the effect has been of having the EPA standard for 22 years. There have been very clear costs in public confidence in the administration of justice resulting from recurrent concerns about the treatment of suspects during interrogation. To some extent the actions which have led to such concern may have been influenced by the EPA standard and the philosophy which underlies it, that obtaining a confession is the best way to secure a conviction and that police officers are entitled to use greater pressure on suspected "terrorists" than would be normally permissible to secure such a confession.

6.10 Alternatives to the EPA Standard

There is much to be said for a return to the common law voluntariness standard. Its protections against suspects being pressurised into making statements seemed adequately to balance the citizen's right to protection from harsh or arbitrary treatment and the public interest in the police being able to investigate crimes thoroughly. Diplock did not clearly argue against it as an appropriate standard for non-emergency conditions, and the Royal Commission on Criminal Procedure (whose report formed the basis of PACE) did so only on the ground that some of the judicial interpretations of what constituted an inducement (such as to render a confession involuntary) excluded what were clearly freely-offered confessions.

Restoring the common law standard would offer greater protection against oppressive questioning and require judges to take more seriously the notion that people detained and frequently questioned in a hostile manner for several days, often without access to a relative or solicitor for at least the first 48 hours, may make statements whose

[85] Op. cit., New York Bar Association Report, p 98.

reliability is doubtful.

Unfortunately, voluntariness is no longer the standard for admissibility for confessions in the "ordinary" law of as contained in the **PACE Order**. The PACE standard is contained in two provisions, article 74 (dealing specifically with confessions) and article 76 (dealing with the courts' general discretion to exclude unfairly obtained evidence). These provisions become operative in Northern Ireland in 1990. Similar provisions (sections 76 and 78 of the 1984 Act) have been operating in England and Wales since 1985, and their scope has been developed through case law there. While it is true that the case law in this area has not produced a great deal of clarity, Lord Colville certainly exaggerates when he avers in his 1990 report, that abandoning s. 8 EPA 1978 (now s. 11 EPA 1991) and relying only on PACE would 'set the police afloat, in their interrogations on a sea abounding in reefs and shoals'.[86]

Article 74 PACE allows a confession to be produced in evidence so long as the accused does not claim that it has been obtained by oppression, or "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him (sic) in consequence thereof". If the accused does produce such evidence, the prosecution must disprove the claim beyond reasonable doubt. "Oppression" is defined to "include torture, inhuman or degrading treatment and the use or threat of violence", but it is not defined solely by those things. The English Court of Appeal in the case of **R v Fulling**[87] stated that oppression meant "exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of suspects, inferiors etc. the imposition of unreasonable or unjust burdens". If followed in Northern Ireland, this would not be a particularly different test from that under the EPA or, at best, from the test employed by Northern Irish judges when exercising their discretion to exclude evidence.

The second part of the article 74 test, the protection against admission of unreliable confessions, would, however, afford greater protection to suspects in Northern Ireland than even the exercise of judicial discretion. For one thing, whereas to exercise the discretion in Northern Ireland judges require some evidence of police impropriety, it seems that unreliable confessions may be excluded under the English equivalent of Article 74 without there being any such impropriety.[88] The unreliability test is apparently designed to be context-related - to focus on what effect the thing that is said or done has on this particular defendant, and whether it is likely to have rendered any confession he or she made unreliable. Application of the test in Northern Irish scheduled cases might, for example, protect against the admission of confessions from juveniles questioned in the absence of parents or a solicitor. Such a development would be welcome.

Several cases in England have also suggested a role for article 76 of the PACE Order

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86 Para. 10.5.7.4.

87 See **R v Fulling** (1987) **2 ALL ER 65**, where a woman confessed after police officers told her that her lover was having an affair with the woman in the next cell.

88 See **R v Harvey** (1988) **Crim LR** 241.

in the confessions context. In a number of cases it has been invoked to challenge the admissibility of confessions made after a suspect was refused access to a solicitor, in breach of the Act and PACE Code of Practice provisions safeguarding a right of access to a solicitor. These challenges have succeeded, according to the views of one commentator,[89] where the police have deliberately refused access to the solicitor while being aware that they had no adequate grounds to refuse. Such a provision would be useful in Northern Ireland where, as has been pointed out above, despite a statutory right to see one's solicitor when arrested under the EPA, this has been resisted so strenuously by the RUC and, more recently, challenged by the Independent Commissioner for the Holding Centres.

Much greater protection would be available if PACE and the **PACE Code on Detention, Treatment and Questioning of Persons** applied to all cases. This Code provides detailed guidance on conditions of detention, access to legal advice, interrogation conditions (including requiring rest breaks) and what documentation must be kept. Although breach of the Code does not mean that a confession must be excluded, it is an important factor for a judge to bear in mind when considering defence applications based on articles 74 or 76.

It is too early to say whether the EPA Codes - only issued finally in 1994 - have made a great deal of difference to judicial interpretation of the admissibility standard. These were issued under s. 61 of EPA 1991, as a further attempt to convince the public that adequate safeguards against ill-treatment are in place for emergency detainees. It is to be hoped that these Codes will become redundant with the repeal of much, if not all, of the emergency legislation. Suspects will then have the protection of the PACE Codes as well as electronic-recording. In addition, because of the history of ill-treatment during police questioning in Northern Ireland, evidence obtained in breach of the PACE Codes should be inadmissible in any criminal trial. A strict judicial approach would influence the way interrogations are conducted. Otherwise the RUC will not be worried about breaching such rules.

The right of silence should also be restored by the repeal of the **Criminal Evidence (NI) Order 1988**. There has been much concern about the even greater scope given to judges in buttressing otherwise weak prosecution cases. From an early reticence, judges are drawing wider and wider inferences.[90] The legality of the changes to the right of silence are currently before the European Court in **Murray v. UK**. The changes, when taken along with the lack of legal advice, have already been found to breach the European Convention by the Commission.[91]

One further protection to ensure the reliability of convictions based on confessions is suggested by Scottish experience. There, a conviction may not be based on a confession alone but requires other supporting evidence. The introduction of a

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89 See Birch, "The PACE hots up: Confessions and confusions in the 1984 Act" (1989) **Crim LR** 109.
90 See JUSTICE and CAJ, **Right of Silence Debate: the Northern Ireland Experience**, May 1994.
91 European Commission of Human Rights, **Murray v. UK**, Application No. 18731/91, 27 June 1994. See also Chapter 7.10 of this pamphlet.

corroboration requirement into Northern Irish law might redirect the focus of police investigation from the present concentration on obtaining confession evidence, encouraging police to broaden their investigations to obtain other types of evidence in all cases. This would reduce the pressure surrounding interrogations and alleviate many of the problems highlighted elsewhere in this pamphlet.

To conclude, it is not just the differential standard in and of itself which is the problem. Rather, it is one more important cumulative element along with the removal of other safeguards the whole way through the process from detention and investigation to trial.

6.11 The Independent Commissioner for the Holding Centres

The Post of Independent Commissioner for the Holding Centres was created by the Secretary of State under the prerogative powers of the Crown. In 1992 Sir Louis Blom Cooper was appointed to this position. He has been regularly visiting detention centres since his appointment and reports annually to the Secretary of State on his findings.

CAJ welcomed this development although still of the opinion that the lay visitor scheme is a better form of independent monitoring, especially as it would be difficult for a prominent Englishman in this position to arrive in Northern Ireland unannounced and unexpected by the RUC. Some of Sir Louis's recommendations in his first report are to be commended, for example, that audio and video recording of interrogations be instituted. However, Sir Louis's scheme for attacking the right of access to one's own solicitor is lamentable. Moreover, the suggestions he has made on discovery of the electronic records show that his concerns are more in line with the military-security axis than the human rights of detainees.

It is to be hoped that, following the ceasefires in late 1994, the authorities will finally close the interrogation centres. The post of Independent Commissioner will therefore become redundant. The role of independent supervision of police stations by visiting should be handled by the lay visitors scheme.

6.12 Recommendations

- **The arrest powers contained in ss. 17 and 18 should be repealed.**
- **The arrest power at s. 14 PTA should be repealed. The UN and Council of Europe should be informed of the ending of the state of emergency giving rise to derogations from the ICCPR and the ECHR.**
- **All detentions should henceforth be carried out under PACE. This will guarantee electronic-recording of interviews and the presence of one's lawyer during questioning. Sir Louis Blom-Cooper's proposals concerning access to legal advice should ignored.**
- **Detained persons should henceforth have an automatic right to have a friend**

or relative informed immediately upon their arrest.

- The EPA confession standard should be repealed, leaving the PACE standard as the test in all cases. Breach of PACE Codes should render a confession inadmissible.
- A requirement should be introduced that a conviction cannot be sustained on confession evidence alone. Other supporting evidence should be required.
- The abandoning of emergency detention will allow the immediate closure of Castlereagh Interrogation Centre along with Gough barracks and Strand Road in Derry. The post of Independent Commissioner will therefore also become redundant.
- The Criminal Evidence (NI) Order 1988 should be repealed.

Chapter 7. DIPLOCK TRIAL

7.1 Introduction

The most radical innovation of EPA 1973 was the institution of trial of a schedule of offences by a single judge sitting without a jury - the "Diplock courts". At a stroke, one of the keystones of the common law system was removed. Ss 9 and 10 of the EPA 1991 perpetuate the Diplock system. CAJ believes that there was insufficient justification for the abolition of jury trial in 1973. In any case, many of the considerations which were relied upon then are no longer relevant. Such objections as remain to the restoration of jury trial can be met by the introduction of special measures for the protection of jurors. Trial by jury represents the last element of control that a lay-person exerts of the criminal justice system. If there is to be respect for and adherence to the law, it must be owned by society rather than a sphere populated only by lawyers.

Before examining this issue in detail, the stages in the Diplock process prior to the actual trial must be considered. At this point, some explanation of the technical language of the legal process may be of use to non-lawyers. Once a person is charged, he or she is brought before a magistrate. Unlike the position under the ordinary law, the magistrate under the EPA has no power to grant bail, with the result that the accused is invariably **remanded** (or ordered to be kept) in custody. She or he may then apply to a High Court judge for release on bail. If successful, the accused is released pending trial. If not, he or she will be kept in custody, and there will be further remand hearings. Then come **committal** proceedings, at which the evidence against the accused is made known. The magistrate who presides at this stage has power to throw out the case against the accused if she or he decides that the prosecution has not established a **prima facie** case, i.e. produced evidence which of itself would be sufficient to obtain a conviction. Generally, the case is not thrown out and the accused is **committed for trial** (i.e. sent for trial).

The next stage is the **arraignment** in the Crown Court, at which the accused is asked to plead guilty or not guilty. If he or she pleads guilty, the trial judge proceeds to sentencing. If the plea is "not guilty", the trial proper at Belfast Crown Court on the Crumlin Road proceeds. In the majority of cases defendants plead guilty. In many of those cases which are contested, the issue at stake is whether or not a confession is admissible. The procedure for deciding on admissibility is known as the **voir dire**. In effect, this is a trial within a trial, in which evidence is heard as to how the statement was obtained. The decision on admissibility rests solely with the trial judge.

Once the evidence in the case has been heard, the judge decides whether to convict or

to acquit, and, in the case of a conviction, she or he decides on what sentence should be imposed. Those convicted in the Diplock courts have an automatic right of appeal to the Court of Appeal.

7.2 "Scheduling"

The concept of "scheduling" is pivotal within the Northern Ireland criminal justice system. Those offences which pertain to the civil unrest form a special category and are listed in Schedule 1 of EPA 1991. Under s. 1 people charged with a "scheduled offence" are dealt with under the special set of rules and procedures contained in the EPA and outlined above. The lengthy list of scheduled offences includes murder, offences against the person, hijacking, robbing and many offences connected with firearms and explosives. In respect of more than half of the offences which have been scheduled, the Attorney-General (often in practice the office of the Director of Public Prosecutions) can certify that an offence is not to be treated as scheduled. This is known as "certifying out" or "de-scheduling". In such cases, the de-scheduled offences are tried in the ordinary manner unless they are included with charges which cannot be de-scheduled. In this latter case, all the charges are tried in the Diplock system.

Some offences cannot be de-scheduled, armed robbery being a prime example. Many robberies are committed solely for financial gain, political motivation being totally absent. There can be absolutely no justification for trying these cases in a Diplock court.

Another glaring example of the inadequacy of the concept of scheduling is in relation to offences under article 5 of the **Criminal Damage (NI) Order 1977** which clearly encompasses offences which would very often be carried out with no political motivation at all yet cannot be de-scheduled. Dermot Walsh found in his 1981 survey that approximately 40% of cases processed by the Diplock system were ordinary criminal cases. [92] That such persons are deprived of their common law right to trial by jury is a most unsatisfactory misuse of the Diplock system. Defendants in this 40% of cases are also deprived of their normal pre-trial rights, whether or not there case is subsequently de-scheduled. Additionally, there is no exception for children and young persons. There are treated in the same way as older defendants.

Whilst the number of offences that cannot be de-scheduled has been reduced (false imprisonment, kidnapping, offences under the **Firearms Act (NI) 1969** can now be de-scheduled), problems still remain in respect of robbery and certain other offences. Moreover, between 1987 and 1990 approximately 46% of applications for de-scheduling were refused, even though the defendants contended that they were not politically motivated.

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[92] Walsh, op. cit.

Whilst the Attorney-General is accountable to Parliament, there are no guidelines to which she or he must pay heed when considering applications. She or he does not have to explain or give reasons for any decision and the decision cannot be appealed. In fact, the prosecuting authorities have complete discretion with respect to de-certification. Many feel this practice shows a preference on the part of the prosecuting authorities towards processing *via* the Diplock system whenever possible. As long as trial procedures derogating from normal standards are in place, the aim should be to ensure that such procedures are invoked only in cases in which clear necessity can be shown to exist. Rather than there being a power to de-schedule some offences, a system of scheduling-in/certifying-in in respect of certain specified offences would be preferrable, with a right of judicial challenge in every case. There should be stringent proof of the necessity for "scheduling-in".

In his 1992 review Lord Colville stated that this can be easily amended under s. 1(3) which allows the Secretary of State to amend Parts I and II by order.

- **If the Diplock system remains, the onus should be on the Attorney General to show that trial by jury would be inappropriate in each and every case. This would require a system for scheduling-in to replace the current practice. However, in the view of CAJ there can be no further justification for depriving people of the right to ordinary trial procedures as the Diplock system falls short of what is required by international law.**

7.3 Bail

In England the **Bail Act 1976** creates a presumption in favour of bail. However in Northern Ireland, accused persons are placed in a much less favourable position. Persons charged with scheduled offences cannot be granted bail by a magistrate, and must apply to a High Court judge or the trial judge. Prior to EPA 1987 the judge was required not to grant bail in such cases unless he or she was satisfied that, if released, the accused would not interfere with witnesses or commit an offence. In effect, the burden was placed on the accused to satisfy the judge that these conditions would be met. Under the intended liberalisation introduced by the 1987 Act and now incorporated in s. 3 of EPA 1991 the position was altered so that a judge was granted a discretion to admit the accused to bail except where she or he was satisfied that there were substantial grounds for believing that the person would:

- fail to surrender to custody, or
- commit an offence while on bail, or
- interfere with any witness, or
- otherwise obstruct or attempt to obstruct the course of justice whether in relation to himself or in relation to any other person.

In exercising this discretion to grant bail, the Act provides that the judge shall have regard to certain considerations including the seriousness of the offence, the character

and "community ties" of the accused, the time spent in custody and the strength of the evidence.

The effect of these amendments has been to shift the onus of proof in bail applications towards the prosecution. While it might have been expected that the changes introduced in 1987 would have resulted in the more frequent granting of bail, the available evidence points in the opposite direction. The percentage of people charged with scheduled offences who are on bail at the time of trial has actually declined since the 1987 amendments and remains much lower than that obtaining in the case of those charged with non-scheduled offences (Table 2). Correspondingly, the percentage of bail applications granted in respect of persons charged with scheduled offences has declined overall (Table 3). These figures suggest that the 1987 amendments have been a failure, and that a re-appraisal is necessary. A provision similar to the English Bail Act should apply instead.

Year	Charged with scheduled Offences	Charged with non-scheduled Offences
1985	61%	84%
1986	64%	85%
1987	68%	85%
1988	47%	81%
1989	53%	82%
1990	55%	83%
1991	44%	85%
1992	51%	82%
1993	47%	81%
1994 Jan-Sept	40%	81%

Table 2: Percentage of Persons on Bail at Time of Trial [93]

Year	% Granted
1985	61%
1986	54%
1987	58%
1988	53%
1989	52%
1990	52%
1991	46%
1992	51%
1993	50%
1994 Jan-Sept	42%

Table 3: High Court Bail Applications in Respect of Persons Charged with Scheduled Offences[94]

A further point is that those charged with ordinary offences effectively have a right to appeal a refusal of bail to the High Court. Those charged with scheduled offences, on the other hand, can only make further applications where there has been a change of circumstances.

- **The special provisions of the EPA in relation to the granting of bail should therefore be repealed.**

[93] Source: Northern Ireland Information Service, **Statistics on Northern Ireland Emergency Legislation** issued 6 February 1995.
[94] Ibid.

7.4 Remand

Under s. 5 a person charged with a scheduled offence can be remanded in custody for 28 days. This followed Baker's conclusion that weekly remands (as provided for in the **Magistrates' Court (Northern Ireland) Order 1981**) were a waste of time and money. The effect of this change is to reduce the amount of judicial scrutiny of pre-trial detention, and thus to weaken a safeguard against improper treatment of unconvicted prisoners.

There can be no justification for the adverse discrimination which now exists between those charged with scheduled and non-scheduled offences. If anything, the very long delays which have been experienced in the past in bringing those charged with scheduled offences to trial would suggest that greater scrutiny is needed in such cases. Further factors strengthening this assertion are the restrictive rules on bail which apply and were examined above and the fact that, although the EPA permits the Secretary of State to establish time-limits on pre-trial proceedings, as yet, no such time-limits have been established.

A 1992 report[95] by Lord Colville into policy at Crumlin Road jail, the remand prison, highlighted the appalling delays which characterised the Diplock system. Colville quotes prisoners expectations of having to serve 18 months before trial.[96] So normal had this become that many people suspected the system had become a form of "internment by remand". Many felt that the police had become less worried about convictions than about keeping people off the streets. Colville recommended that a maximum of 9 months should be worked towards and called on the Secretary of State to make the requisite regulations under s. 8.[97]

Following Colville's report, the authorities appeared to have attempted to speed matters up. Apart from the appointment of one extra High Court judge, this was not satisfactorily done. CAJ is aware of cases where pressure was put on defendants rather than the prosecuting authorities. There were cases where judges attempted to force defendants to engage inexperienced counsel rather than wait for counsel of their choice. On the other hand, in CAJ's experience, there appeared to be no great effort by the prosecuting authorities to make papers available more speedily.

The authorities may argue that the change would be a logistical nightmare. However, while those in custody under ordinary law can refuse to be remanded for more than 7 days, in practice they rarely do so.

The recent news that Crumlin Road gaol is to be decommissioned is a welcome development. CAJ hopes that this happens as soon as possible. One of the difficulties with long remands related to the conditions under which people were held in Crumlin

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95 Viscount Colville, **The Operational Policy in Belfast prison for the Management of Paramilitary Prisoners from Opposing Factions**, HMSO, March 1992.
96 Ibid., para. 10.4.
97 Ibid., para. 10.8.

Road.

- **s. 5 EPA 1991 should have been repealed even before the ceasefires. It established a pattern and culture of lengthy remand. Weekly remands should be reverted to.**

7.5 Committal for Trial

The rights of Diplock defendants are also reduced in respect of Committal proceedings. In ordinary cases a defendant can opt for committal proceedings taking the form of a "preliminary investigation", in the course of which prosecution witnesses are required to give evidence on oath and are subject to cross-examination. This can provide the defence with a very useful opportunity to expose weaknesses in the prosecution case. In the case of those charged with scheduled offences, however, s. 2 provides that, where the prosecution so requests, the committal proceedings will not take the form of preliminary investigation, but instead will proceed by preliminary inquiry, unless the magistrate is of the opinion that in the interest of justice a preliminary investigation should be held. Where the preliminary inquiry procedure is used, witnesses do not give evidence in person; instead, written statements are submitted. This means that valuable opportunities for the defence may be lost. In addition, the presentation of written evidence might contain matters which are highly prejudicial to the accused. The authorities may argue that in practice most committal proceedings do take place by way of Preliminary Investigation, the right should be there for everyone.

The special provisions in s. 2 EPA (which were first introduced in EPA 1975) followed a recommendation of the Gardiner Committee. Gardiner's suggestion was that, as the accused frequently refused to recognise the court, it was difficult to say whether she or he objected to the prosecution's request for a preliminary investigation; hence the need to re-draft the applicable provisions. [98] Nowadays, however, it is very rare for an accused to refuse to recognise the court, yet the restriction on preliminary investigation remains.

This is a useful indication of the way in which emergency provisions can become normalised very quickly. Changed circumstances require repeal of emergency provisions. The ceasefires make the legislation redundant and should therefore be repealed.

- **s. 2 EPA provides another example of an unjustified discrimination against those charged with scheduled offences and should be repealed.**

S. 8 EPA empowers the Secretary of State to set time-limits for preliminary proceedings for scheduled offences. This reproduces an amendment introduced by

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[98] See **Gardiner Report**, para. 57.

EPA 1987. The intention was to cut down on the long delays which had been experienced at the pre-trial stage of the Diplock process. Particularly during the supergrass era, many felt that the system operated as a form of "internment by remand". Despite the fact that this power has been in existence since 1987, no time-limits have ever been set. In order to avoid the perpetuation of this unsatisfactory situation, s. 8 should have included a requirement that time-limits be set within a period of one year of the Acts coming into force.

Following the ceasefires it is to be hoped that the Diplock system will be abandoned. CAJ is not aware of complaints as to length of remand before jury trial and therefore, regulations such as those outlined in s. 8 would appear to be un-necessary.

7.6 Jury Trial And Diplock Courts: Introduction

The jury is the traditional and accepted decider of facts in serious criminal cases. It is the cornerstone around which the law of evidence and procedure has developed. Historically the jury has stood between the might of the state and the vulnerability of the individual, "the lamp that shows that freedom lives".[99] The distinctive feature of the jury system lies in the application of a "popular instead of a professional standard".[100]

The suspension of jury trial has many profound and detrimental effects on the trial of any person, not least because it places the entire trial in the hands of lawyers. As long as a single judge is satisfied beyond reasonable doubt that the defendant is guilty, there is a conviction, whereas normally at least 10 out of 12 jurors must be so convinced for a defendant to be convicted. The judge rules both on the admissibility of evidence and on the weight to be attached to the evidence she or he deems admissible, contrary to the traditional and important demarcation of these respective functions.

In the view of the Diplock Commission, trial by jury "was not practical in the case of terrorist (sic) trials in Northern Ireland", as juries were vulnerable to intimidation and prone to perversity in their verdicts. The Commission emphasised the "widespread fear" of intimidation when a Republican was on trial, jurors living in Catholic areas apparently the most fearful; "a frightened juror is a bad juror even though his (sic) own safety and that of his (sic) family may not actually be at risk".[101] The Commission found no hard evidence of intimidation of jurors, but cited witness intimidation to give substance to the argument.

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99 Devlin, **Trial by Jury**, Stevens (1956) p. 64.
100 Devlin, **The Judge**, Oxford University Press (1981) p. 176.
101 The **Diplock Report**, Para. 36.

7.7 A Critique of Diplock

The justifications advanced by Diplock for the abolition of jury trial are less than convincing, and the reasoning of the Commission in general, somewhat suspect. An "all or nothing" approach was taken: if there were problems with jury trial the solution was to abolish the jury. A more rational approach would have been to examine the options, and advocate a response which would have caused minimal distortion to the normal workings of the criminal justice system. This would have accorded with the general principle which should govern all emergency legislation: that the ordinary law should be departed from only to the extent that can be shown to be strictly necessary. When this approach is adopted, quite different solutions suggest themselves to the twin problems of perverse acquittals and jury intimidation identified by Diplock.

As regards the issue of perverse acquittals, it is true that a number of studies conducted in 1973 suggest that there was an identifiable difference in acquittal rates between Protestants and Catholics tried by jury in Belfast at that time. Jury service was then subject to a property qualification, with the result that juries tended to be predominantly Protestant, male and middle class. While this evidence might suggest that juries were biased in favour of Protestants, and thus provides some support for Diplock's viewpoint, it by no means proves the point. At that time, internment without trial was being widely used against nationalists against whom the evidence (if any) was weak, whereas loyalists were more likely to be channelled through the courts. This may have meant that a greater proportion of loyalists against whom there were weak cases were tried, ultimately resulting in higher acquittal rates for this group. It is worth pointing out that ethnic and racial disharmony in the USA has not led to the abolition of juries.

While jury bias appears to have been a problem in 1973, the position has been altered since then by the **Juries (Northern Ireland) Order 1974** which made virtually everyone in the North between 18 and 70, whose name appears on the electoral register, liable to serve on a jury. This means that juries in Northern Ireland (which continue to try non-scheduled cases), now reflect much more closely the composition of society as a whole depending, of course, on the geographical breadth of the area from which they are drawn.

Turning to the question of jury intimidation, as Greer and White[102] have pointed out, this has never been proven. No evidence has ever been produced beyond sketchy hearsay. Jury intimidation cannot necessarily by inferred from witness intimidation, and it is questionable whether talk of widespread fears was well founded. Even if it was, many of these fears could have been allayed by measures designed to enhance the protection of jurors. For example jurors could have been concealed from the public and each other: anonymous to all but the lawyers, the defendant, the Judge and a few court officials.[103] The process of summoning jurors to particular trials, and the layout of the

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[102] Greer S. and White A. **Abolishing the Diplock Courts**, London, 1986.

[103] Juror concealment resulted in the successful prosecution of mafia member John Gotti in New York in 1992.

courthouse could have been altered to achieve this anonymity.

Prior to the ceasefires, CAJ argued that a number of steps could have been taken to safeguard jurors from intimidation.[104] However, there can be no excuse for continuing to deny defendants the right to trial by jury. For centuries, the presence of jurors has been seen as a vital safeguard against overweening state power. Now, this safeguard must be restored. There should be an immediate return to jury trial for all offences committed after the ceasefire.

7.8 Judicial Case-hardening

There is another reason for the immediate restoration of jury trial: the evidence of judicial case-hardening. Between 1973 and 1979 the acquittal rate in contested Diplock cases fell by almost 50%. Boyle and Hillyard commented that "in the absence of juries, judges have become case-hardened and thus more ready to convict".[106] Baker acknowledged that as a result of the suspension of jury trial there was the possibility of judges becoming "prosecution minded".[107] Between 1974 and 1986 the acquittal rate of 33% in Diplock trials can be contrasted with the acquittal rate of 55% in jury trials over the same period. Between 1984 and 1994 there has been a steady decline in the acquittal rate in the Diplock courts excepting the anomalous year of 1989 (in which the figures were distorted by the collapse of the supergrass system which is referred to below) and 1992. The figures for 1993 and 1994 are an all time low of 29% and 24% respectively.

Year	%
1984	53%
1985	50%
1986	43%
1987	42%
1988	38%
1989	51%
1990	36%
1991	43%
1992	53%
1993	29%
1994 Jan-Sept	24%

Table 4: Percentage of Persons Pleading Not Guilty in the Diplock Courts and found Not Guilty[105]

The figures suggest that when left as arbiters of law and fact judges are prone to weary cynicism. Jurors come fresh to each trial whereas the judges in the Diplock courts are confronted with it every day. The accused's defence, therefore, would have a better chance of receiving a fair hearing from the jury.[108] Civil liberties should not be sacrificed to expediency in the administration of justice.

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104 For example: special measures by the Court Service to ensure the anonymity of jurors in scheduled cases; concealing jurors in scheduled offence cases from the public and each other; limiting the number of permissible peremptory challenges to three; ending the obligation to disclose whether a verdict was unanimous or by a majority; a sensitive approach to excusing jury service from people living in areas in which loyalist and republican paramilitaries wield considerable influence.

105 Northern Ireland Information Service, op. cit., issued 6 February 1995.

106 Boyle, Hadden & Hillyard, **Ten Years On** p.60.

107 **The Baker Report**, Cmnd 9222 Para 122-126.

108 Walsh, **The Use and Abuse of Emergency Legislation in Northern Ireland** p. 97.

7.9 The *Voir Dire*

Further problems with jury-less trial arise in connection with the *voir dire*. Where a defendant challenges the admissibility of an alleged confession, the judge will in normal cases decide the question of admissibility in the absence of the jury. This prevents the jury from hearing inadmissible evidence in the course of the *voir dire* which could prejudice their view of the case. In the absence of the jury, under s. 11(2) it is left to the judge to determine not only whether evidence is admissible but also the quality of the evidence.

However, it is completely unrealistic to expect a judge who has already dealt with such an issue, and perhaps held the confession to be inadmissible, to continue with the case unprejudiced by what has already been heard in the *voir dire*. It is impossible to ask a judge to dismiss from her or his mind the evidence which she or he is legally obliged to ignore. Whilst judges can presently discharge themselves if they feel they cannot properly continue the case, they may not be aware of their prejudice or that their view of the case may have been coloured by the *voir dire*. It is both unrealistic and unfair to the judges that it is purely a matter for their own discretion to assess their suitability to proceed with the case.

- **It is of vital importance that justice is seen to be done and therefore, until jury trials are reinstated, CAJ recommends that in all cases in which it is necessary to conduct a *voir dire* the defendant should have the right to have his or her case heard by another judge if he or she believes the judge has been prejudiced.**

7.10 Supergrasses and the Right to Silence

It is in the interests of justice that where accomplice evidence is the main evidence in a case the law should require corroboration before a defendant can be convicted. The controversial "supergrass system" operated from 1981 until 1985. It involved many persons who had been members of paramilitary organisations turning police informer and giving evidence against people with whom they alleged had been involved in paramilitary activities. Ultimately, all of those who were convicted on the uncorroborated evidence of a supergrass had their convictions overturned on appeal.

There were a number of unsatisfactory features in the supergrass system:

- Informers were encouraged to give evidence through deals with the police involving immunity from prosecution, reduced prison sentences in more comfortable conditions and new identities and new lives elsewhere. This amounts to inducement and, as such, was an alarming practice.

- The evidence was "accomplice evidence", which is traditionally regarded as dubious.

- Whilst it is possible to be convicted on the evidence of an accomplice without corroboration, judges traditionally warn the jury of the dangers involved in such a course. Northern Ireland judges were in the bizarre position of having to warn themselves of the dangers of convicting on uncorroborated accomplice evidence. That this practice does not work is shown by the fact that judges have to caution themselves in relation to other evidential matters - e.g. identification. The evidence of case-hardening suggested by the figures in Table 4 indicate that judges are not heeding these cautions.

- The system virtually amounted to "quasi-internment". Persons arrested and charged on informer evidence were held on remand for one or two years in many instances, and some were held even longer.

In order to guard against the resurrection of the supergrass system at any future date, there needs to be a statutory requirement of corroboration of accomplice evidence in all cases. In addition, this requirement should stipulate that merely for the accused to remain silent cannot of itself amount to such corroboration.

Such a scenario is possible following the **Criminal Evidence (NI) Order 1988**. In Colville's 1992 report the author strongly asserts that adverse inferences can and should be used as a source of evidence in determining guilt. However a conviction based on accomplice evidence together with an adverse inference - where a person who remains silent has his or her silence used to corroborate the evidence of a person involved in the crime - would be most unsafe and unsatisfactory.

Already there has been great concern about a number of Diplock convictions arising from the use of adverse inferences. The recent decision of the European Commission in **Murray** suggests that current law in this area, when operated in the absence of legal advice, contravenes European fair trial procedures. Moreover, the draft **Body of Principles on the Right to a Fair Trial**[109] gives a further indication of the approach of the international human rights community to the question of the right to silence. At paragraph 58(b) the draft Body of Principles states: "Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent". The defendant is already hugely disadvantaged by the Diplock process. Changes in the right of silence have simply increased the burden and weighed the scales more heavily towards the prosecuting authorities.

A further provision of the **Criminal Evidence (NI) Order 1988** is that it makes admissible written statements from those allegedly too scared to attend and face cross-examination. This gives the authorities further scope to obtain corroboration in dubious circumstances.

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109 Op. cit., E/CN.4/Sub.2/1994/24.

- **Because of the terrible precedent which arose during the supergrass years there needs to be a statutory requirement of corroboration of accomplice evidence in all cases. Furthermore, the right to silence should be restored in full.**

7.11 Loss of Remission

Ss 14 and 15 EPA follow almost exactly the wording of ss 22 and 23 PTA 1989. The effect of s.14 is that it limits the amount of remission available to prisoners sentenced to more than five years in jail for scheduled offences to one third of their sentence. S. 15 requires a court, on sending anyone to jail for a scheduled offence, to order them to serve any unexpired remission from a previous jail term of more than a year resulting from any offence. The government's apparent justification for these changes is that they bring the situation in Northern Ireland into line with that in Britain and that they are important to prevent the early release of large numbers of "experienced terrorists" who then return to active service. When the changes were introduced in PTA 1989, CAJ opposed them and pointed out that these two justifications did not stand up to scrutiny. We made similar points in 1991 when the provisions were effectively transferred to the EPA.

These measures create an entirely different system for remission in Northern Ireland The recent ceasefires completely transform the situation and we very much hope that the new circumstances will feature prominently in any discussion of these provisions. There has been a great deal of debate about the early release of prisoners and their re-integration into society. CAJ has called for a review of the sentences of everyone convicted under emergency legislation in Northern Ireland.

- **Ss 14 and 15 EPA should be repealed and the sentences of everyone convicted under emergency legislation in Northern Ireland should be reviewed.**

7.12 Diplock Trial: Recommendations

- **Jury trial should be restored as soon as possible and therefore ss 9 and 10 EPA 1991 should be repealed.**
- **If the government continues to rely on special courts for certain offences, a "scheduling-in" system should replace the current "scheduling-out" arrangements. The onus should be on the Attorney-General to show why jury trial is inappropriate in every case.**
- **The special provisions at s. 3 EPA 1991 in relation to the granting of bail should be repealed and provisions equivalent to the Bail Act 1976 should be**

applied to Northern Ireland.

- S. 5 EPA 1991, which permits 28 day remands, should be repealed.
- The provisions in s. 2 EPA 1991 which restrict recourse to a preliminary investigation should be repealed.
- It is of vital importance that justice is seen to be done and therefore, until jury trials are reinstated, CAJ recommends that in all cases in which it is necessary to conduct a *voir dire* the defendant should have the right to have his or her case heard by another judge if he or she believes the judge has been prejudiced.
- There should be a statutory requirement of corroboration of accomplice evidence in all cases. In addition, this requirement should stipulate that merely for the accused to remain silent cannot of itself amount to such corroboration.
- Ss 14 and 15 EPA, which change remission arrangements, should be repealed and the sentences of everyone convicted under emergency legislation in Northern Ireland should be reviewed.

Chapter 8. OTHER EMERGENCY POWERS

8.1 Internment

The word 'internment' is of special significance in Northern Ireland given its infamous implementation in August 1971 under the Special Powers Act and the disastrous aftermath. Owing to poor intelligence the army detained many people in 1971 who had played no part in the violence or para-military activity. The police subjected detainees to interrogation often comprising the use of the 'five techniques', later branded as 'torture' and 'inhuman and degrading treatment' by the European Commission on Human Rights and Court respectively. Also all those initially detained were members of the nationalist community. For these reasons internment was resented as oppressive and discriminatory. It proved counter-productive both in the short term - 23 people were killed in rioting and shooting during the 48 hours immediately following its introduction - and the long term as it alienated many and acted as a recruiting agent for paramilitary organisations both within the detention centres and without.

S. 34 and Schedule 3 EPA 1991 re-enact the internment system adopted in EPA 1975 following the proposals of the Gardiner Committee. This system has never been implemented as detention without trial was phased out during 1975. Nonetheless the powers remain on the statute book and could be implemented without prior parliamentary approval. If internment was introduced the Secretary of State would ultimately decide who is detained and for how long. She or he would be assisted by advisors who would compile reports on each detainee. Reviews, initially after one year and thereafter every six months, would be an executive matter: the judiciary would have no role.

Baker, Colville, the Standing Advisory Commission on Human Rights and, most recently, John Rowe QC[110] have all called for the removal of internment from the statute book. CAJ believes strongly that s. 34 should be repealed. Indefinite detention without charge or trial represents a complete abandonment of the rule of law and therefore has no place in a society which styles itself as liberal democratic. It is an admission of failure, not a recipe for success. Its credibility cannot be salvaged by the adoption of safeguards and internal reviews because resort to internment involves abandoning the very standards which might make such reviews meaningful.

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[110] Chapter 7, of **Review of the Northern Ireland (Emergency Provisions) Act 1991**, February 1995.

That it has not been used shows that the government has not considered the power to intern to be necessary even at the height of paramilitary activity characterised by incidents like the Shankill bombing and the Greysteel and Loughinisland shootings. If it is not considered necessary it should not be available. Every particularly serious "terrorist" incident tended to be followed by a ritual call for the reintroduction of internment. Its continued presence on the statute book was dangerous as it provided a facility for the government to make a knee jerk response to some event without its merits being considered by Parliament.

Those who argued for its retention insisted that with higher level of intelligence only 'known terrorists' would be targeted and the mistakes of 1971 would not be replicated. This is open to dispute, particularly given the experience of the Gulf War where the government hastily detained a number of persons whose detention was wholly inexplicable and unjustifiable - a grave breach of their civil liberties. Moreover within Northern Ireland the association of internment with the catastrophe of the early seventies has made s. 34 a poisoned chalice.

Thankfully, there has been a cessation of the violence which has characterised Northern Ireland for so long. The retention of the power to intern on the statute book would send a message to people on all sides of the community, who are seeking to give peaceful negotiations an opportunity, that coercion will be used if the process fails. This is an unhelpful approach.

The government's desire to retain the power appears to be based on the determination to intern any extremists who oppose any wide agreement that might be reached as a result of the current peace process. However, this would be to repeat the mistakes of history. Internment has always exacerbated divisions and laid down deep grievances for future conflict. If internment were introduced the scale of military operations required would undoubtedly lead to friction within the affected communities and could contribute to a higher level of violence. In any case, it has been shown that emergency measures can quickly be passed through Parliament if the occasion demands. A legislative procedure is the correct approach to such extreme measures as the power to intern without trial. When no longer necessary, it should be removed from statute.

- **Historically the use of internment has been disastrous. Its implementation would be widely resented. Moreover the nature of the power is such that there is no point in arguing for 'safeguards'. There can be no doubt that s. 34 and schedule 3 EPA 1991 must be repealed.**

8.2 Exclusion Orders[111]

"The exclusion order branded me a potential bomber and threat to the British Establishment. So I was taken in handcuffs to the ferry at Stranraer. The detectives

111 See also Chapter 4.4 of this pamphlet on Port and Harbour powers for a discussion on "ordinary" powers of deportation to deal with "international terrorism".

even stood on the quayside watching as the ship sailed. I was to be kept in exile in Northern Ireland. Though I was glad to be home, I felt I had been kicked in the teeth by the British Establishment. I hated them for this. How much abuse and state harassment does a person have to take?"[112]

Exclusion orders provide the British government with a system of internal exile, to be directed at those who are said to be involved in "terrorism" but against whom no offence has been proven. It is the government position that "exclusion...has materially contributed to public safety in the United Kingdom and...this could not have been achieved through the normal criminal system."[113] Exclusion orders were introduced in 1974 following the Birmingham bombings, and their use is now governed by Part II and Schedule 2 of the **Prevention of Terrorism (Temporary Provisions) Act 1989** (PTA). The exclusion order power can be considered among the most obnoxious of the battery of draconian measures assembled in the PTA. The strong reasons which support a repeal of this power have been rehearsed on numerous occasions; the end of political violence enhances the argument that exclusion orders are unnecessary and counter productive if the objective is a solution to Northern Ireland's problems.

The path to an exclusion order appears to begin with the collation of intelligence material by local police or the security services. This is eventually communicated to the Home Office where it will be considered by civil servants and a junior minister before the Secretary of State makes a final decision.[114]

The Secretary of State is asked to use the powers granted to him or her in Part II of the PTA "...in such a way as appears to him (sic) expedient to prevent acts of terrorism."[115] Generally, exclusion can proceed *where the Secretary of State is satisfied* that the person is, or has been concerned in "the commission, preparation or instigation of acts of terrorism."[116] The decision may be influenced by a wide range of information contained in the file from the police/intelligence services: the individual's criminal record, his or her attitude during police questioning, any statement made during questioning, any forensic evidence obtained, as well as details of the suspect's perceived political views and associations.

The nature of the power held by the Secretary of State almost invites abuse. The test adopted in the legislation is purely subjective, requiring only that the Secretary of State be satisfied in her or his own mind of "terrorist" involvement. The question of whether this suspicion is *reasonable* is wholly irrelevant. There is no necessity to provide reasons. Such broad terms present the danger that exclusion orders will be deployed against anyone supporting a political viewpoint which challenges the *status quo*, since

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[112] Personal testimony of *Patrick Lawlor*, published in **Just News**, Bulletin of the CAJ; Belfast, Vol. 5, No.1, January 1990. It clearly articulates the harshness of the exclusion process and the feelings of bewilderment suffered by its victims.
[113] Lord Jellicoe, **A review of the operation of the Prevention of Terrorism (Temporary Provisions) Act 1976**, para. 176, Cmnd. 8803, (HMSO, 1983).
[114] The British Home Secretary has the power to exclude persons from Britain, while the Secretary of State for Northern Ireland holds the power to exclude persons from Northern Ireland.
[115] PTA, s.4.
[116] PTA 1989, ss. 5(1)(a), 6(1)(a), 7(1)(a).

once an order has caught a suspect in its wide net, the language adopted leaves the decision virtually unchallengeable. The terms *"preparation"* and *"instigation"* are capable of such diverse definition as might allow for completely innocent activities to be swept into the Secretary of State's focus by an over-zealous security service.

Another use of the power of which CAJ is aware is as part of an effort to make persons suspected of involvement in paramilitary activity become informers for the security services, generally MI5 or Special Branch. A number of people have approached CAJ to say that they have been detained in England, Wales or Scotland and asked to co-operate in intelligence-gathering. When they have refused, they have had exclusion orders imposed on them.

Finally, exclusion orders have been used on occasions when people have walked free from an English court after being acquitted of charges or having convictions quashed on appeal. They have been re-arrested, served with an exclusion order and shipped back to Ireland.[117]

In practice, when a decision to exclude has been made, the suspect will be served with a notice at his or her place of detention.[118] The notice will inform the suspect that she or he is to be excluded from an area for a period of three years. A British citizen cannot be excluded from both of the areas created by the power at the same time, nor can a British citizen be excluded from an area in which she or he has been "ordinarily resident" for three or more years.[119] The suspect will also be informed that she or he may make written representations to the Secretary of State challenging the exclusion, and of the possibility of discussing the measure at an interview with an adviser appointed by the Secretary of State.[120]

The adviser does not afford the suspect a full and open inquiry into the circumstances behind the case; the suspect is only provided with cursory details of the evidence against him or her, ostensibly to protect security and intelligence sources. Since the suspect does not have the privilege of calling favourable witnesses or cross-examining informants, it is clear that the failure to state the case against him or her leads to formidable difficulties. Moreover, there is no automatic right to appear before the adviser with the aid of legal representation, nor to be told the grounds on which a challenge to the exclusion order succeeded or failed. Finally, the adviser is not obliged to disclose identity or credentials. Thus there is no indication whether they have legal training to be fulfilling such a quasi-legal role.

While the above flaws are important, the central weakness of the adviser system is that it cannot act as an independent review of the Secretary of State's decision. The adviser,

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117 Examples are the Winchester 3 from the Republic of Ireland and John Matthews from Derry.

118 A person may be detained for the purposes of exclusion for a period of 7 days under the detention power of s.14, or for an unlimited period by virtue of para. 7 of Schedule 2, PTA.

119 PTA(1989), ss 5(4)(a) and 6(4)(a).

120 PTA(1989), para. 3(1)(b) of Schedule 2. Representations must be made within 7 days of service of the notice of exclusion; this is extended to 14 days if the suspect consents to immediate removal, although in this case there can be no guarantee of obtaining a personal hearing with the adviser.

as well as being appointed by the Secretary of State, the original decision maker, cannot bind him or her to the conclusions of the review; he or she need only "reconsider" a decision in light of the adviser's findings. The idea that the adviser acts as some form of appeal mechanism is clearly unfounded.

The use of the exclusion order power has inevitably led to human rights abuses. The rights to travel,[121] to family life,[122] to a fair trial[123] and to freedom of expression[124] have all been undermined by the imposition of exclusion orders.

The argument that exclusion orders place obstacles in the way of the exercise of the right to travel is undeniable. A British citizen who is barred from travelling from one part of the United Kingdom to another might also legitimately complain that the exclusion process interferes with the exercise of full citizenship. The point is supported by the Standing Advisory Commission who have complained that exclusion is, "...inconsistent with the right of a citizen to reside and travel freely throughout the territory of the state of which he (sic) is a citizen."[125]

The interference with the right of persons to travel freely within the whole of the United Kingdom also effects the exercise of the right to family life. As was explained above, the definition of "ordinarily resident" is now 3 years as opposed to the position in 1974 when a person might have been excluded despite having lived in an area of Northern Ireland/Britain for up to 20 years. Nevertheless, a person may have established roots in England and perhaps even married within the 3 year limitation, and yet still find themselves in possession of a one way ticket back to Northern Ireland/Britain. Exclusion orders have also affected relationships between people excluded and their children and grandchildren who may have moved from Northern Ireland to live in Britain. Clearly, the power can still have unhappy consequences for family life and employment prospects.

If the system of exclusion is to have any legitimacy at all, and the above abuses do not present it in an attractive light, it must stand or fall on it being used for a proper purpose. It is suggested that the reason why the justice system is short circuited, with exclusion imposed in place of a criminal trial in which the evidence against the suspect might be tested, relates to the sensitivity of the information and/or the standard of evidence available.[126] It is argued that a drastic curtailment of liberty is a lesser evil than the probable risks to security if a "terrorist" suspect was allowed to roam freely throughout the country to plot murder and destruction.

The evidence is clear, however, that exclusion orders have not always been used for a proper purpose, even on the dubious standards set in the PTA. A number of persons have been deprived the opportunity to travel within the United Kingdom to articulate

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[121] **Universal Declaration on Human Rights**, Article 13.
[122] **European Convention on Human Rights**, Article 8.
[123] **European Convention on Human Rights**, Article 6.
[124] **European Convention on Human Rights**, Article 10.
[125] Standing Advisory Commission on Human Rights, **Annual Report 1985-86**, at Chapter 7, para. 1.
[126] Home Office Circular *27/89*.

their legitimately held political viewpoint. Nobody can have any doubt about the government's motivation in the cases that have come to light. Take the case of Gerry Adams, the President of Sinn Fein, for example. The exclusion order which was imposed on him and which labelled him a "suspected terrorist" was mysteriously lifted when he was elected as an MP for West Belfast. If the logic of the British government is followed, Mr. Adams must have been involved in "the commission, preparation or instigation of acts of terrorism" when the order was imposed, but must suddenly have severed those connections when he became an MP. Again, when he lost the West Belfast seat in the 1992 general election, Mr. Adams must have resumed his "terrorist" ways because he was again banned from travelling to Britain, but this was lifted in October 1994, two months after the announcement of the IRA ceasefire.

It is difficult to resist the conclusion that exclusion has, in some cases, been directed against those who articulate a political message in opposition to British government policy on Northern Ireland. The case of Mr. Adams is just one high profile example from a number of cases where it is clear that exclusion has formed a blunt but effective weapon for stifling political debate, and swaying the propaganda battle. The suggestion from one former Home Secretary that when imposing an exclusion order he was "concerned with gelignite, not with ideology,"[127] appears disingenuous in light of the evidence to the contrary.

As regards the right to a fair trial, two points are relevant. Firstly, exclusion orders have been imposed on people who have been found not guilty of any crime by a court of law. If proper jduicial procedures can find no reason to keep a person off the streets, executive *fiat* certainly has no legitimacy in this respect. Secondly, the process itself, which involves no right of appeal and failure to inform people of the charges against them, clearly breaches international fair trial standards.

An additional aspect of exclusion orders which causes anger in Northern Ireland is the fact that people considered unsafe by the government to walk the streets of Britain are adjudged fit for the streets of Northern Ireland. Either people are a security risk for the whole of the UK, in which case they should be tried in court to assess guilt, or they should be free to go anywhere they want in the UK. A court, not the Secretary of State's office, is the appropriate place to make such a decision.

On 17 February 1995, Sir Patrick Mayhew revoked the 10 exclusion orders for which he was responsible. He also indicated that the British Home Secretary is currently reviewing the 56 exclusion orders for which he is responsible.[128] There appears to have been a perceptible shift away from defence of exclusion orders in government circles, perhaps preparing the way for an abandonment of the power altogether. Despite this, John Rowe QC[129] recommends that the power to exclude be maintained.

The above discussion has proceeded on the basis that the use of exclusion orders has

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127 Roy Jenkins, M.P., **Hansard**, vol. 892, col. 1085, 19 May, 1975.
128 At the time of publication of this pamphlet.
129 In his **Review of the Operation in 1994 of the PTA**, published on 17 February 1995.

never been justifiable in principle. The evidence *against* exclusion orders has in the past been accepted by a British government appointee, Viscount Colville[130], despite the fact that his successor has regrettably moved away from this position. The argument in favour of abandoning the exclusion order power has been afforded fresh vigour with the ceasefire announcements by both republican and loyalist paramilitaries. Northern Ireland is enjoying an unprecedented violence-free period, and there is great hope that this can continue. The retention of powers such as this will hinder rather than nourish the maintenance of peace.

- **The power contained in Part II and Schedule 2 PTA should be repealed immediately. All existing exclusion orders - around 70 - should be rescinded for they serve no legitimate purpose.**

8.3 Control of Security Firms

Ss 17 to 24 EPA 1987 introduced for the first time powers governing the provision of security services by firms in Northern Ireland. These have been re-enacted ss 35-42 EPA 1991. The regulation of such firms cannot be considered as in itself objectionable. What is objectionable is, firstly, the general point that such regulation should be made within the framework of the EPA and secondly, the more specific issue of the particular provisions which have been adopted.

Those wishing to provide security services must now obtain a certificate from the Secretary of State. Under s. 37, the Secretary of State may refuse to issue a certificate only "where he (sic) is satisfied that an organisation falling within subsection (8) would be likely to benefit from the issue of the certificate". An organisation falls within subsection (8) if it is a proscribed organization or if it appears "closely associated with an organization which is for the time being such a proscribed organization". Thus a mechanism of control is built around the objectionable notion of a "proscribed organization". In addition, no right of appeal to the courts from a refusal by the Secretary of State is included in the provisions, and the test in s. 37(1) is a subjective one designed, as in the case of s. 28, to minimise the possibility of judicial review.

- **Ss 35 to 42 should be repealed and replaced with ordinary legislation governing the provision of security services, in which proper safeguards would be incorporated against possible abuse of ministerial power.**

8.4 The Independent Assessor of Military Complaints Procedures

As a result of sustained pressure for increased independent accountability given the

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130 Viscount Colville, **Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984**, at para. 11.6.1, Cmnd. 264, (HMSO, 1987), conceded that the exclusion power should not be renewed in 1988.

volume of complaints regarding harassment and abuses of civil rights by the security forces, s. 60 EPA - along with schedule 6 - was implemented. These provisions establish the Office of the Independent Assessor of Military Complaints Procedures in Northern Ireland. Mr David Hewitt, a solicitor from Belfast, was appointed at the end of 1992.

No-one who has served with "Her Majesty's Forces" in the last twenty years can be appointed as Independent Assessor. The appointment is for a period of three years. It is the job of the assessor to receive, investigate and respond to complaints in respect of the behaviour of soldiers serving in Northern Ireland. He or she is required to prepare an annual report which is published and laid before Parliament. She or he can also report to the Secretary of State about any matter which arises in the course of his or her duties. Unfortunately, there is no facility for independent *investigation* of complaints. This is still carried out by the RUC or internally by the army's own central Complaints Office HQ in Lisburn. It is not clear whether Mr Hewitt's role extends to the activities of military intelligence activities.

Mr Hewitt's first report was published in May 1994. Dr Robbie McVeigh described it as "refreshingly honest"[131] in its analysis of public perceptions of the complaints procedures. Mr Hewitt acknowledged that some may not report harassment because they believe that nothing will be done or that people are not aware of the available complaints mechanisms. He also concludes that people will be understandably cynical at the tiny number of substantiated complaints: 16 out of 606 or 2.6%. Such a recognition led Dr McVeigh to conclude that "The Assessor comes across as a fair-minded person, concerned to provide an equitable service".[132]

One hopes therefore that Mr Hewitt will consider the findings of Dr McVeigh's own research for the CAJ.[133] The conclusions concerning lack of reporting of complaints are particularly disturbing. Notwithstanding the ceasefire, there is much work to do in familiarising people - and especially young people - with available mechanisms for making complaints against members of the security forces.

CAJ believes that the only satisfactory way to address this issue is by way of investigative bodies independent of the security forces in whom the public can have some trust. It is to be hoped that Mr Hewitt will address this issue in his next report. Additionally, it is to be expected that the need for army complaints mechanisms will be reduced given the declining role of the army. In the meantime, however, CAJ continues to receive complaints about harassment and assault by soldiers.

- **The post of Independent Assessor of Military Complaints Procedures should be maintained as long as the army retains a policing role in Northern Ireland. In addition the Assessor's role should be extended to consider the best means of instituting independent investigations of complaints against the**

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131 **Just News**, CAJ, May 1994, p6.
132 Ibid.
133 See Dr R McVeigh, **Harassment: "It's part of life here...."**, CAJ, 1994.

army.

8.5 Codes of Practice

The Secretary of State is required under ss 61 and 62 EPA to make Codes of Practice on the application of emergency provisions for the guidance of police and army. While breach of any such codes does not give rise to civil or criminal proceedings, (apart from two provisions in respect of army personnel) internal disciplinary proceedings can be taken by the respective force. Moreover breaches can be taken into account in court proceedings.

The Codes were finally issued in 1994. As stated above[134] it is too early to say whether the Codes provide improved protection against ill-treatment. However, the Codes fall far short of providing adequate safeguards against potential abuse of the wide-ranging powers afforded to the police and army by the emergency legislation for a number of reasons. They apply only to detentions by the police and not to arrests by the army. Moreover they govern only detentions under the PTA and do not apply to other aspects of EPA powers.

Finally it is important to note that the Codes are less comprehensive than the PACE Codes of Practice with many of the protective provisions contained therein being excluded. It is unfortunately indicative that persons receive less protection under the EPA Codes in respect of the more draconian powers in the EPA. With the ending of the emergency which has been the government's justification for continued detention powers under the EPA, it is to be hoped that the relevant powers will be repealed and that the interrogation centres will be closed. Consequently, the requirement to issue Codes of Practice will become redundant. In any case, the PACE Codes are available and should henceforth apply to all detentions in Northern Ireland.

- **Ss 61 and 62 EPA are no longer required and should therefore be repealed.**

8.6 Regulation Making and Saving of Powers

S 58 EPA gives the Secretary of State power to make regulations "for promoting the preservation of the peace and the maintenance of order". Breaches of regulations may be punished by fines of up to £400 or by imprisonment for up to six months. This regulation-making power is in fact a legacy from the Special Powers Act, and is therefore an anachronism. Particularly given the unwillingness of the courts to strike down delegated legislative powers in the sphere of emergency legislation (by applying the test of *vires*).

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[134] See Chapter 6.9 of this pamphlet.

- **s. 58 EPA is open to abuse and should therefore be repealed.**

A further objectionable feature is incorporated in s. 70 EPA which relates to the saving of powers. Amongst other things, the section provides that "any power conferred by this Act shall not derogate from Her Majesty's prerogative or any powers exercisable apart from this Act by virtue of any rule of law or enactment". One intended effect of this provision is to leave unaffected the possible existence of common law or prerogative powers to impose martial law. Were it not for this provision, the very existence of the EPA could be held to prevent recourse to martial law. In 1921 the declaration of martial law in parts of Ireland was rejected by a judge, precisely because similar emergency powers were on the statute book.[135]

Rather than leave open the possibility for such draconian powers, an entrenched Bill of Rights should be implemented to ensure the protection of human rights.[136]

- **Rather than aiming to leave open the martial law option, what is needed is a constitutional mechanism to ensure that it can never be resorted to again. At the very least, s. 58 EPA should be repealed.**

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135 See **Egan v Macready**, 1921, **Irish Reports** 2.6.5. See also Chapter 3, Campbell, C., **Emergency Law in Ireland 1918-1925**, Clarendon Press, 1994.

136 For arguments concerning the benefit of a Bill of Rights, see CAJ, **Making Rights Count: Discussion, analysis and documentation of international charters of rights and their application to Northern Ireland**, 1990 and CAJ, **A Bill of Rights for Northern Ireland**, 1993.

Chapter 9. CONCLUSIONS

This pamphlet has examined the emergency regime still prevailing in Northern Ireland. CAJ's consistent conclusion has been that the powers and the application of the powers seriously undermine civil liberties and respect for the rule of law. The legislation should be repealed. These conclusions were arrived at long before the termination of paramilitary violence in the autumn of 1994. The political and security environment is now very different and our arguments have consequently been sharpened. If the authorities felt some justification for the emergency powers prior to the ceasefires, there can now be absolutely no justification for the emergency regime.

For the authorities, security considerations have been paramount over the last 25 years. In the absence of any coherent political strategy, the authorities have relied on security to deal with the conflict. Those who questioned this approach have tended to be dismissed as at best naive and at worst closet or armchair paramilitarists. However, in times of internal conflict emergency laws should only be relied on where the ordinary law is inadequate. Furthermore, only those measures which are strictly necessary and proportionate may be implemented.

Emergency legislation is only lawful under international law if these requirements are met. Given the existence of the ceasefires which have now lasted for six and four and a half months respectively, there is no longer ongoing violence to justify the continued imposition of emergency measures such as those in the EPA and PTA. The retention of emergency legislation in circumstances where there is no public emergency is illegal under international law. Failure to repeal such legislation when there is no "public emergency threatening the life of the nation" constitutes a fundamental breach of international law.

The onus lies on those who invoke emergency legislation to prove the need for divergence from the ordinary law. This pamphlet refutes arguments for the panoply of emergency measures, calls into question their legitimacy under the European Convention on Human Rights and the legality of their application by the Government, the RUC and the Army.

The British government may claim that the European Court's decision in **Brannigan and McBride v. UK** leaves it up to the national authorities to decide what level of violence constitutes a public emergency and what measures are therefore appropriate to deal with it. The authorities may also argue that the paramilitary organisations still exist hold large caches of arms and that therefore the emergency persists. However,

this argument is facile given the fact that the government has accepted that the cessation of violence is intended to be permanent, that troops have been gradually removed from some parts of Northern Ireland, that PTA arrests have declined dramatically and that border roads are being re-opened. The government knows that the emergency is over.

In the absence of paramilitary violence, the decision in Brannigan and McBride is of little continuing relevance. Other international scrutiny has been more critical of the emergency powers. Two United Nations bodies, the **Committee Against Torture** and the **Human Rights Committee**, have criticised aspects of the emergency law regime. Similarly, in November 1994, the **European Committee for the Prevention of Torture** raised many questions about emergency detention in Northern Ireland. The Committee's visit was carried out on an *ad hoc* basis, clearly indicating the Committee's deep unease with the situation in Northern Ireland. The tone of the UK government's response to the Committee's report smacks of blandness, generality and defensiveness rather than a willingness to engage in the substance of the Committee's questions. In January 1995, the UK government was questioned closely by the **UN Committee on the Rights of the Child** concerning the impact of emergency legislation on children in this jurisdiction.

International scrutiny continues. The UK government's report to the UN **Committee Against Torture** has been due for some months. In July 1995, the government is due to appear in front of the UN **Human Rights Committee** for an assessment of its implementation of the **International Covenant on Civil and Political Rights** in the UK. CAJ welcomes this pending public and international scrutiny and will be disappointed if the UK maintains the position contained in its report to the Human Rights Committee in October 1994 that no dismantling of the emergency regime is anticipated. The UK government indicated that continuing reliance on the derogation from the ICCPR concerning the PTA 7 day detention power was necessary. However, any attempt to retain and build emergency legislation into the "ordinary law" is contrary to international law and the concept and purpose of emergency law. It would be viewed with grave concern by civil libertarians.

Continued reliance on emergency powers is perhaps not surprising as those in charge of Northern Ireland have not, since 1925, at least, been prepared to try and govern without the assistance of extraordinarily wide powers. But CAJ fears that a delay in the repeal of emergency legislation could impact the wider political environment and the search for a political settlement. It will breed unnecessary suspicion and tension thereby jeopardising the ceasefire.

After the ceasefires, it is time for the authorities to respond by moving away from the coercion which emergency law exists to legitimate. The limited steps taken so far - such as opening roads and reducing the number of army patrols and so on - are welcome. The next logical step is the removal of the EPA and PTA.

The position in 1995 is simple: there is no paramilitary violence so there is no

emergency situation; emergency legislation should be repealed immediately:

NO EMERGENCY,

NO EMERGENCY LAW

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