EMERGENCY LAWS

SUGGESTIONS FOR REFORM IN N. IRELAND

CAJ Pamphlet no. 5 September 1983

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BACKGROUND

This is a submission by the Committee on the Administration of Justice to the review by the Rt. Hon. Sir George Baker OBE of the Northern Ireland (Emergency Provisions) Act 1978. The terms of reference of the review are as follows: "Accepting that temporary emergency powers are necessary to combat sustained terrorist violence, and taking into account Lord Jellicoe's review of the working of the Prevention of Terrorism (Temporary Provisions) Act 1976 as it affects Northern Ireland, to examine the operation of the Northern Ireland (Emergency Provisions) Act 1978 in order to determine whether its provisions strike the right balance between the need on the one hand to maintain as fully as possible the liberties of the individual and on the other to provide the security forces and the courts with adequate powers to enable them to protect the public from current and foreseeable incidence of terrorist crime; and to report."

THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The C.A.J. is a broadly-based group which was set up after a conference in Belfast in June 1981 with the aim of striving to secure "the highest standards in the administration of justice in Northern Ireland by examining the operation of the current system, and promoting the discussion of alternatives." Its membership comprises community activists, social workers, rights workers, academics and practising lawyers. At present it operates through working groups on emergency laws, prison reform, and policing; it intends to establish groups on the problems of young people and on the workings of the magistrates' courts. Through publishing pamphlets such as this, and organising seminars and conferences, the C.A.J. seeks to raise the level of public debate and understanding on important social issues.

Membership costs, at a minimum, £2 per annum. Please inquire of the Secretary, the Committee on the Administration of Justice, c/o 7 Lower Crescent, Belfast BT7 1NR. Pamphlets Nos. 1 to 4 concern (1) proceedings of the June 1981 Conference, (2) emergency laws, (3) alternatives for dealing with complaints against the police, and (4) recommended new procedures for handling complaints against the police.

Committee on the Administration of Justice

Submission to the review by Sir George Baker of the Northern Ireland (Emergency Provisions) Act 1978 (the EPA).

Introduction

1. The effectiveness of this review is hampered by its restricted terms of reference: "Accepting that temporary emergency powers are necessary to combat sustained terrorist violence..." It could well be argued that experience has now shown that such emergency powers are not necessary - that on the contrary they are counter-productive, alienating and disproportionate to the problem. They have been quite useless to date in resolving Northern Ireland's on-going problems. The level of violence during 1981, when compared with that during the three previous years, bears witness to this.

2. Many ordinary citizens, of course, tend to believe that emergency powers are both inevitable and successful. But they are deluding themselves: the violence and dissension continue. The province needs reconciliation and consensus, whereas the EPA drives a wedge between the authorities and the people. Many in the Committee on the Administration of Justice would hesitate to grant the EPA any credibility by suggesting how it could be "improved", but we felt nevertheless that proposals for reform ought to be submitted.

3. Even accepting the review's limited terms of reference, it is arguable that the EPA is not an appropriate response to the call for temporary emergency powers. There are all sorts of other measures - within and without the law and order system - which might be a better response. Examples would be effective anti-discrimination agencies, imaginative job-creation and youth-training programmes, improved social and recreational facilities, and progressive educational policies. The Government should cease to pretend that the Northern Ireland problem can be solved purely by security methods. To resort automatically to a law and order response is to have a most short-sighted perception of what the real underlying problems are, as well as to display a worrying authoritarianism which plays straight into the hands of people supporting violence.

4. We would urge Sir George Baker to construe the terms of reference of his inquiry as liberally as possible; it should be close to a review of the whole situation in Northern Ireland rather than just a review of one piece of legislation. When weighing the maintenance of liberties against the provision of adequate security powers, Sir George should bear in mind that certain inalienable rights are involved too - the rights of the individual to freedom of movement, thought and expression, and the expectations which society as a whole is entitled to have as regards tolerance and compromise. It may be that the enactment of a Bill of Rights, as recommended by the Standing Advisory Commission on Human Rights, would be an appropriate make-weight to the enactment of special powers.

5. Certainly a review of the EPA must consider whether its provisions are consistent with the state's obligations under the European Convention on Human Rights. The existing derogations from that Convention, under Article 15, may now no longer be justified. Lord Jellicoe did not once mention the Convention in his report on the Prevention of Terrorism Act; such an omission would be even more inexcusable in the case of a review of the EPA.

Part I of the EPA (sections 1 to 10)

6. This Part deals with scheduled offences. It clearly indulges in overkill: it introduces into almost every single stage of the ordinary criminal process some special "emergency" provision. There can be no doubt that some at least of these special provisions could be dispensed with without causing the whole structure to collapse.

7. Section 1: In ordinary cases defendants can choose whether their committal proceedings should take the form of a preliminary investigation or a preliminary enquiry. Persons charged with scheduled offences can be ordered to undergo committal by preliminary enquiry. At a preliminary enquiry there is no obligation for witnesses to attend in person to present their evidence: their evidence can be read out. Cross-examination is therefore precluded. Why should scheduled offences be singled out for special treatment in this respect?

8. Section 2: In scheduled offences bail can only be granted, before a trial begins, by a High Court or Crown Court judge, not by a resident magistrate as in ordinary cases. (The only exception is when the defendant is a soldier!) This requirement can cause great inconvenience: High Court and Crown Court judges are not always readily available. In addition, it appears that even when bail is granted there is often several hours' delay before the necessary paperwork can be completed to allow the accused person to be released.

9. The section carries a presumption that bail must be refused unless the accused satisfies the judge of certain conditions. This, as we understand it, is the converse of the position in England. The bail hearings are very short, almost perfunctory, and little police evidence is submitted, which makes cross-examination useless. People have been refused bail on the grounds of a police allegation that they are members of a proscribed organisation, even though no such charge has been made against them. The rights of appeal against the refusal of bail have never, amazingly, been specified: section 2(4) simply says that whatever rights of appeal exist should remain available.

10. We recommend that the provisions of the English Bail Act 1976 should be extended to Northern Ireland and that no special provision should be made for scheduled offences. Application of the normal criteria should ensure that only in appropriate cases are persons remanded in custody. In these cases full reasons should always be supplied for the remand. In every case the judges should be more watchful that hearings are not repeatedly adjourned; some indulgence appears to be given to the prosecution to allow them time to gather more information about other suspects and other related incidents. The official Judicial Statistics prove that periods of remand are consistently much longer in scheduled cases than in non-scheduled cases.

11. Section 3: This is one of the few acceptable provisions in the Act, making legal aid more easily available in bail applications for scheduled offences. It remains anomalous, though, that such applications are still classified as civil rather than as criminal matters.

12. Sections 4 and 5: These allow the Secretary of State to direct places where 14, 15 and 16 year olds may be held in custody pending trial. The Committee on the Administration of Justice has heard of instances where such persons have been held in custody in the company of much older and obviously unsuitable adults. (See also comments on section 10). It is to be hoped that a more humane attitude is now being consistently adopted.

13. Section 6: Under this section all trials of scheduled offences must be held in Belfast, at the Crumlin Road Courthouse. It is to be doubted whether this requirement is still, if it ever was, necessary. It adds to the expense and inconvenience of trials and makes the visiting

of remand prisoners by their relatives difficult (when they are detained in Belfast and families live elsewhere). The Crumlin Road Courthouse is not, in any event, designed to put people at their ease; the seating accommodation is deplorable inadequate. In 1979 the Royal Commission on Legal Services drew attention to the overcrowded and uncomfortable conditions there: para.42.55.

14. Section 7: This is the section establishing Diplock courts. The Committee on the Administration of Justice believes that every effort ought to be made to restore jury trials in as many cases as possible: there is little that would do more to restore public confidence in the legal system. It is unproven whether the reason originally given for abolishing juries (the risk of perverse verdicts through bias or intimidation) is as valid as it was ten years ago. It is possible to argue that alterations could be made to the systems whereby jurors are selected and challenged - and protected - in a way that would make a return to jury trial entirely feasible. If all challenges could only be allowed for cause the danger of jury-packing would be much reduced. In recent years the concept of jury-vetting has gained acceptance in England and the Attorney-General has issued guidelines on the subject. It ought to be possible to display equal ingenuity in Northern Ireland.

15. Even if non-jury trials are retained for particularly severe cases, a lot needs to be done to make the Diplock court system more just. In the first place, there ought not to be a list of scheduled offences in the form as at present exists: a list of offences which in particular cases may be scheduled on the order of the Attorney-General would suffice. This would reverse the present situation, where applications have to be made in particular cases to de-schedule offences. Such applications are often unsuccessful. Of the 170 cases appearing before Diplock courts in the first three months of 1981, 69 (i.e. 41%) were of a non-political nature and should have been dealt with in the normal courts: see Walsh, The Diplock Process: Today and Tomorrow (paper delivered at a CAJ Conference, April 1982). Sections 7(3) and 7(4) compound this injustice by allowing non-scheduled offences to be tried in the same indictment as scheduled offences and by empowering judges to convict persons of non-scheduled offences even though they have been arraigned for scheduled offences.

16. Scheduled offences are listed in Schedule 4 to the 1978 Act. Ridiculously, only some of them can be de-scheduled by the Attorney-General. Thus, the offences of murder, manslaughter or assault occasioning actual bodily harm may be de-scheduled, but the offences of robbery and aggravated burglary - if an explosive or weapon of offence was used - cannot be de-scheduled; nor can the offences of riot, kidnapping or false imprisonment. Even when cases are de-scheduled this often happens at a stage in the proceedings when the authorities have already taken advantage of the special procedures applicable to scheduled cases. And there is no method of making the Attorney-General accountable for his decisions on de-scheduling offences; nor does the Act contain any helpful guidelines as to when an offence should be de-scheduled.

17. Clearly a radical overhaul of Schedule 4 is imperative. If non-jury trials are to be retained, they should be resorted to as infrequently as possible. The onus should therefore be on the Attorney-General to have to take action if he wishes a case to be tried without a jury and he should have to satisfy a High Court judge that this is really necessary. It is no answer to say that such matters, relating as they supposedly do to the security of the state, are in themselves non-justiciable and so can be considered only by the Executive - that is an argument for abandoning the use of the judiciary in all sorts of cases, which is unthinkable.

18. If the concept of scheduled offence is to remain in being, in whatever guise, the use of a single judge to try them is objectionable. Scheduled offences should be tried by a bench of three judges, and if the point is made that there are not enough judges to cope with this workload the reply should be that with the suggested change in the scheduling system there will in future be many fewer scheduled offences to be tried. Using a three-judge bench should make it less likely that individual judges would become case-hardened - within a small jurisdiction such as Northern Ireland this is a real possibility, and a dangerous one. It would not be necessary to restrict the benches to Supreme Court judges: county court judges, resident magistrates and their deputies could serve on the benches as well. If there really are not enough senior judges, one or two more should be appointed: there is already provision for six High Court judges, but only four have been appointed to date; at the moment there is no shortage of expertise at the Bar to fill these posts.

19. Resort to a three-judge bench would entail two further changes: (1) If a matter had to be resolved on a voir dire hearing (i.e. at a trial within a trial), such as the admissibility of a confession, a fourth judge should be appointed to deal with the issue. At the moment 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 he has already heard on the voir dire. It is impossible for him to dismiss from his mind the evidence which he is legally obliged to ignore. Using a different judge for the voir dire hearing is the only solution to this problem.

20. (2) It would no longer be necessary to allow for an automatic right of appeal to the Court of Appeal in scheduled cases. This right exists at the moment and appears to be almost invariably invoked, even in hopeless situations. To that extent Supreme Court judges are already used in benches of three to deal with scheduled cases almost as a matter of course. Appeals should in future be limited, as in ordinary cases, to those situations where there is a point of law in issue or where the leave of the Court of Appeal is granted. The further right to appeal to the House of Lords (in certain circumstances) should remain unaffected.

21. Section 8: This section, on confessions, needs to be completely altered. In the cases heard during the first three months of 1981, the defendant pleaded guilty in 87 per cent (see Walsh, op.cit.). The police alleged in 92.5 per cent of these cases that the defendant had made a confession, and in 83 per cent the resultant conviction was based wholly or substantially on the confession. Even when the cases where the defendant did not plead guilty are included, the police alleged a confession in 89 per cent of the total.

22. Section 8 makes a confession admissible provided it was not induced by torture or inhuman or degrading treatment. This permits the use of a certain amount of rough treatment, and of oppressive circumstances, which under the common law's test of voluntariness would render the confession inadmissible in evidence. The Committee on the Administration of Justice recognises the difficulties connected with the test of voluntariness. It believes that the test which was substituted therefor in clause 60 of the Police and Criminal Evidence Bill is to be preferred and that it should be introduced in Northern Ireland too. This would render inadmissible any confession obtained by oppression of the accused or in consequence of anything said or done which was likely to make the confession unreliable. This is in line with the proposals of the Criminal Law Revision Committee in 1972. We do not, however, approve of clause 60(4), which would allow evidence to be admitted to prove the truth or falsity of

the confession as an aid to deciding its admissibility.

23. A return to the ordinary exclusionary rules is desirable in order to normalise people's perceptions of how the law and order system operates in this province. Allegations of physical maltreatment in Castlereagh and Gough RUC stations are becoming infrequent, and most of the recommendations of the Bennett Committee of Inquiry on this matter have now been implemented; the reference in section 8 to torture etc. is therefore outmoded. The RUC's Code of Practice for interviewing suspects should be at least as protective of basic civil liberties as the proposed code for England under the Police and Criminal Evidence Bill; its scope at the moment cannot be assessed because it is not even published. The eventual code should include specific provision for sanctioning breaches of the code; mere internal disciplining is not always enough, so for serious breaches the sanction should be that evidence obtained as a result of the breach is inadmissible.

24. When deciding whether an alleged confession is reliable or not, a judge has to ask himself two questions: (1) was the confession in fact made? and (2) if made, was it truthful? The best evidence in relation to the first question would be a film and sound recording of the suspect's interrogation. We recommend that all interrogations be so recorded (not just covered on closed circuit cameras). As regards the second question, the judge should always address himself to whether or not the facts stated in the confession are corroborated by any other evidence. We recognise that corroborative evidence cannot be made an absolute prerequisite to the admissibility of all confessions, but we think that a statute ought to impose upon the judge the duty to take into account whether or not corroboration exists. The statute should also compel the judge to bear in mind whether or not the defendant had been given a statement of his rights and access to a solicitor at the time of the alleged confession.

25. A subsection should be added to section 8, as Lord Gardiner recommended in 1975 (Cmnd.5847), to make it clear that even if a confession is technically admissible the judge retains the right - and should consider its exercise - to exclude the evidence at his discretion if its probative value is outweighed by its prejudicial effect on the proceedings. This should be spelled out in order to banish doubts about the effect of the House of Lords' decision in R. v Sang on the existence of this judicial discretion. If it still exists - and before Sang the Northern Ireland judges were staunch defenders of its existence - it has not been used to the extent that, even on the law of averages, one would expect it to be.

26. This is an appropriate point at which to mention that the EPA does not contain any provision which would place a tighter control on the use of converted terrorists ("supergrasses"). This relatively new ploy by the security forces is, like so many others, bringing the legal system into disrepute. The Committee on the Administration of Justice would like to see it severely limited. At the very least a statute should provide that in such cases the judge should be extremely loath to rely on the uncorroborated evidence of such persons.

27. Section 9: This section makes a person guilty of certain offences unless he or she proves their innocence, and as such is unacceptable in principle. Proof of a negative (no knowledge or no control) is notoriously difficult. The section should be repealed in its entirety.

28. Section 10: Subsection (1) enables persons under 17 to be detained for guilt of scheduled offences in circumstances where they could not have been detained for guilt of non-scheduled offences. So the system for scheduled offences spills over even into the realm of

juvenile justice. The Committee on the Administration of Justice believes that the principles and policies at issue in cases involving persons under 17 are of such a different and special character that whatever alterations are made to the adult justice system in an "emergency" situation should not also be applied to the juvenile justice system. The "emergency" is not of such young people's own making and they ought not to be partially treated because of it. It is particularly important for the future of this part of the world that the young people are not alienated by what they perceive as a lack of care and consideration, or maybe even as victimisation.

Part II of the EPA (sections 11 to 20)

29. This Part deals with powers of arrest, detention, search and seizure, etc. It should be stressed, again, that just because emergency powers are taken on these matters it does not follow that consequential emergency powers are needed at other stages in the criminal process (and vice-versa). The Government should not assume that the arbitrary designation of a situation as an emergency justifies the introduction of a complete battery of special powers.

30. A basic preliminary point is that the provisions allowing for Executive detention for indefinite periods (section 12 and Schedule 1) should be deleted from the legislation altogether. It is completely unnecessary to have them in any way available to a Government as an emergency measure. The circumstances where resort would have to be had to such provisions without the fullest possible debate in Parliament are unimaginable. Leaving them there as they are, ready to be invoked if needed, does nothing to dispel society's distrust of the Executive.

31. Any recommendations concerning Part II of the EPA must take into account the Prevention of Terrorism (Temporary Provisions) Act 1976 (the PTA), and the report thereon by Lord Jellicoe in February 1983. In particular, section 12 of the PTA, on arrest and detention, is crucial. Lord Jellicoe proposed that s.12 should remain in force but that the Baker review should consider whether the arrest and detention powers under the EPA should remain in force as well. In doing so, we would all do well to be guided by two general propositions which Lord Jellicoe himself endorsed: (1) as a general rule no greater power should be used to achieve a given end if use of a lesser power can achieve the same end, and (2) the wider the terms in which a power is couched, the greater is the possibility of abuse and thus the greater the need for effective safeguards.

32. There are three arrest powers in the EPA:

s.11(1) Any constable may arrest without warrant any person whom he suspects of being a terrorist.

s.13(1) Any constable may arrest without warrant any person whom he suspects of committing, having committed or being about to commit a scheduled offence or an offence under this Act which is not a scheduled offence.

s.14(1) A member of Her Majesty's forces on duty may arrest without warrant, and detain for not more than four hours, a person whom he suspects of committing, having committed or being about to commit any offence.

For the sake of comparison, it is valuable to set out the arrest power in s.12 of the PTA as well as the ordinary arrest powers in section 2 of the Criminal Law Act (NI) 1967:

s.12(1) A constable may arrest without warrant a person whom he reasonably suspects to be-

(a) a person guilty of an offence under section 1, 9, 10 or 11 of this Act;
(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism;
(c) a person subject to an exclusion order.

s.2(2) Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an arrestable offence.

s.2(4) Where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence.

s.2(5) A constable may arrest without warrant any person who is, or whom he, with reasonable cause, suspects to be, about to commit an arrestable offence.

Persons arrested under s.11(1) can be detained for 3 days; those arrested under s.14(1) can be detained for 4 hours; those arrested under s.12(1) can be detained initially for 2 days and for a further 5 days on the say-so of the Secretary of State. Persons arrested under s.13(1) of the EPA or under s.2 of the Criminal Law Act can be detained for 24 hours but must be brought before a magistrates' court as soon as practicable thereafter and in any event not later than 48 hours after their arrest.

33. In the opinion of the Committee on the Administration of Justice, the ordinary powers of arrest and detention are adequate to deal with today's "emergency". If, as seems likely, s.12 of the PTA is to remain on the statute book, there is little need for the detention powers conferred by the EPA; s.14, in any case, cannot be justified as a means of gathering valuable information from arrested persons because the detention period (4 hours) is too short for that: it in fact operates in practice as a power of harrassment. The C.A.J. does not believe, however, that s.12 of the PTA should remain on the statute book in its present form: the permissible detention period is far too long and the lack of judicial review is deplorable. On the Government's reasoning, however, s.11 is redundant. This is borne out by the fact that the charge rate for arrests under the PTA is about 40 per cent, while the charge rate for arrests under the EPA is about 10 per cent.

34. The deeply objectionable features of ss.11 and 14 of the EPA are that (1) persons can be arrested on mere suspicion - there is no requirement that the suspicion be reasonable, and (2) persons can be arrested in connection with no specific offence. The first of these features must be removed. It is absolutely imperative in a free society that arresting authorities be accountable for their actions and the best way of ensuring this is to allow the courts the power to review the reasonableness of the exercise of arresting powers. This is a cardinal principle throughout public and administrative law. It is the greatest check on arbitrariness and vindictiveness.

35. The second feature ought also to be removed. It was this feature which rightly prompted such an outcry in England over the "sus" laws, which eventually had to be repealed. The PTA and the Criminal Law Act indicate that it is possible to frame laws that do not rely on such open-endedness. The concept of an arrestable offence (defined as any offence which carries a maximum sentence of 5 years or more) is a familiar and acceptable one, and the vast majority of scheduled offences, and offences under the EPA, would fall into that category.

36. In this context, moreover, it is right to point out how undesirable is the use of the words "terrorist" and "terrorism" in s.11 amd s.12. Terrorism is defined as "the use of violence for political ends". It is most unusual to find such a vague term in a criminal law statute and the

use of it is grist to the mill of those who argue that the British security forces are as guilty as anyone of using violence for political ends.

37. The Army should have no greater powers of arrest and detention than an ordinary citizen, except when those powers have been specifically delegated to the Army by the police for a limited time and/or purpose. Early morning arrests etc. by the Army have been provocative and unnecessary. At all times the Army should act only in support of and under the control of the police; the police service can provide greater continuity of personnel and of know-how than can the Army.

38. Even if a return to the ordinary powers of arrest and detention were not to be accepted, which would be regrettable, the new powers which were to have been introduced for England and Wales by the Police and Criminal Evidence Bill should (if the Bill is eventually enacted in that form) be extended to Northern Ireland in place of the emergency powers. It is to be noted that the new power to arrest for non-arrestable offences, under clause 17 of the Bill which fell with the last Parliament, is qualified by a reasonableness requirement. The Government, moreover, clearly thought that 36 hours was a long enough period for any person to be kept in detention before being brought before a full hearing of a magistrates' court (see Hansard, Feb 24 and March 1, cols. 930-68); even after such a hearing the total detention period was not to exceed 96 hours. In his report on the PTA, Lord Jellicoe stated that magistrates were not the right people to deal with the sort of case likely to arise in Northern Ireland - that they were better dealt with by the Executive. The Committee on the Administration of Justice cannot accept this. All resident magistrates in Northern Ireland are legally qualified, with at least seven years' practice as a barrister or solicitor behind them, and they are already deemed competent to deal with all sorts of other "sensitive" matters, including the preliminary committal proceedings in scheduled cases. Above all, as a matter of principle, detention is a judicial matter and not an Executive matter; we do not want internment by another name.

39. The 96 hour maximum detention period, with judicial review after 36 or 48 hours, should be more than adequate for the needs of the security forces. It is a fact that most information is gained from detainees during the third and fourth days of detention. In any event, the police already seem to be satisfied, in 19 out of 20 cases, with the 72 hour detention period rather than the 7 day period under the PTA (i.e. the arrest rate is 19 times greater under the EPA).

40. One of the unfortunate features of the EPA as a whole, as noted in para.4 above, is that, while it has plenty to say about powers and duties, it does not confer or confirm enough rights. One of the most important rights in this context is the right to legal assistance and yet nowhere is this right enshrined in legislation. It is not enough for it to be included in the preamble to the Judges' Rules or in the RUC's (unpublished) code of conduct for interviewing suspects: neither of these have the force of law, so that no remedy is available to an accused person if they are not observed. In this respect, again, clause 46(1) of the (former) Police and Criminal Evidence Bill is to be welcomed: it states that a person held in custody is entitled, if he so requests, to consult a solicitor privately at any time. In any new legislation the opportunity should also be taken to extend to Northern Ireland the right conferred by s.62 of the Criminal Law Act 1977, viz. the right to have one person informed of your arrest.

41. Two other important matters connected with arrest and detention are fingerprinting and photographing. At common law a person's consent is required for photographing by the police and a magistrates' court order is required (in the absence of consent) for fingerprinting. Under s.11(4)

of the EPA, the RUC can use force to require an arrested person to be fingerprinted and photographed. It must be stressed that such practices have an extremely alienating effect on those persons forced to undergo them. In 1982 the RUC procured a total of 15,794 fingerprint forms (not just under the EPA). Is such a level of fingerprinting in a jurisdiction of this size acceptable? The Committee on the Administration of Justice believes it is not. The order of a magistrates' court should be required, as in all ordinary cases at the moment. Or at the very least the order of a Justice of the Peace. We do not support the proposed change in the English law whereby the police and not the magistrates' courts should have the authority to order fingerprinting, but even the English proposal is preferable to the power under s.11(4) of the EPA because it grants the authority only to police officers of the rank of superintendent or above whereas the EPA grants it to officers of the rank of chief inspectors. The English proposal is also more defensible in that the authority exists only in a given number of situations, the most frequently recurring of which will be where the police officer has reasonable grounds for suspecting the involvement of the person in a criminal offence and fingerprinting would tend to confirm or disprove his involvement.

42. The power to photograph should exist only in those situations where the power to fingerprint also exists. Photographing is almost routine at the moment and yet there appears to be no explicit legal basis for it.

43. The EPA appends to the various powers of arrest correlative powers to enter and search for suspected persons: ss. 11(2), 13(2), 14(3) and 20. Given our recommendations on the powers of arrest, we think that these powers on entry and search should be amended accordingly. Again, it would be enough to rely on the ordinary law, which is enshrined in s.2(6) of the Criminal Law Act (NI) 1967: "For the purpose of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be". This subsection contains the "reasonable cause" qualification, which is absent from the powers in the EPA.

44. Section 17 of the EPA, concerning powers of entry to search for persons unlawfully detained, is unobjectionable. It provides a precedent for the conferment of powers on soldiers only to the extent that a commissioned officer authorises it, though in the view of the C.A.J. the authorisation should always have to come from the RUC.

45. Sections 18(1) and 19(3) of the EPA, concerning powers to stop individuals and traffic, should be curtailed. They should not be exercisable by the Army and they should be exercisable only with reasonable cause. The power in s.19(3) is, in any event, meant to be limited to situations where its exercise is immediately necessary for the preservation of the peace or the maintenance of order; it would appear that in practice this limitation is scarcely ever observed.

46. The remaining powers of stop, entry and search in the EPA should be exercisable only with reasonable cause or (for entry and search) whenever a warrant has been issued. The powers and safeguards proposed in the (former) Police and Criminal Evidence Bill would, once again, seem to be satisfactory substitutes for those at present in the EPA. Here, too, the powers should be exercisable by the Army only in situations where express delegation has been made by the RUC, and even then the police should be present, if possible, when the powers are being exercised.

Part III of the EPA (sections 21 to 26)

47. This Part deals with offences against public security and public order. The Committee believes that, with the exceptions of s.23 (training in use of firearms etc.) and s.24 (failure to disperse when required to

do so), all of the sections in this Part are dispensable. They are poorly drafted and rarely invoked; they therefore tend to bring the law into disrepute. In particular, the concept of a "proscribed" organisation is not one which lends itself to satisfactory legislation: the law can be easily evaded and can even serve to attract recruits to the organisations concerned.

48. We realise that a recommendation that organisations such as the IRA and the UVF should cease to be outlawed is bound to be a controversial one. In suggesting it we wish to stress that we in no way support the violence which such groups openly promote. There is obviously some psychological satisfaction to be gained from proscribing certain groups and it is a way for society to show its abhorrence for their modes of operation. But such factors are outweighed by the consideration that what ought to be illegal about such groups is not their beliefs or objectives as such, but rather the means they use to implement those beliefs and objectives. The fact is that existing criminal laws are perfectly adequate to deal with the sorts of means used: the laws on public order, incitement of hatred, broadcasting, conspiracy, and aiding and abetting could all be cited in this context. These should be sufficient outlets for the opprobrium of society and they have the added advantage of not making the groups in question conscious of being in any way "special".

Part IV of the EPA (sections 27 to 36)

49. Serious thought must be given to altering the mechanism for "renewing" the EPA, at present embodied in s.33(3). Lord Jellicoe recommended that the PTA be enacted for 5 years at a time, with annual renewals. We believe that for the EPA a system of annual re-enactment ought to be introduced. Any legislation which confers such exceptional powers - like the Finance Acts - must be reviewed in as much detail as possible every year. It must not remain on the statute book a moment longer than is absolutely necessary. Full annual re-enactment would allow for the Act to be significantly amended every year, rather than just renewed in whole or in part; it would also enable Parliament to have a wide-ranging debate on Northern Ireland, which at the moment happens all too rarely (and usually late at night when few MPs are in the Chamber).

Summary and Conclusion

50. The thrust of this submission by the Committee on the Administration of Justice has been that the emergency powers for Northern Ireland should be replaced to as large an extent as possible by the ordinary laws. Northern Ireland should not be made a special case as regards the criminal law. We look forward to the day when it will be possible to have a complete return to jury trial in Northern Ireland, but in the meantime we recognise that in some exceptional cases this would not be feasible. In those cases extra safeguards should be created to ensure that the defendants are guaranteed as fair a trial as they would have under the ordinary criminal process system. By and large it should be enough that special procedures exist for the actual trial process; interference with other stages in the criminal process system should be kept to an absolute minimum.

51. Our approach is in line with the Government's view that the legal system in Northern Ireland should be normalised as much as possible, so that attention may be given to solving the province's political, social and economic problems. There is no escaping the primacy of those issues. At the moment the British Government appears to be supporting a paradox: it wishes Northern Ireland to be seen as a normal part of the United Kingdom, with the terrorists being branded as ordinary criminals,

and yet it creates a panoply of special laws which help to de-stabilise the province and give a somewhat different status to the men of violence.

52. <u>There is an urgent need to restore trust within our society as a whole.</u> The continued deployment of the Army, not under the control of the police service, exacerbates the distrust. The policy of transferring primary responsibility for security to a police service should therefore be pursued - with attention given to reforming the accountability of this service - and greater note ought to be taken of the variety of the general public's perceptions of the law and order system - such as their views on police complaint procedures and on liaison between the police and local communities. At the moment, rightly or wrongly, the system is simply not trusted by large sections of the community. The law and order system ought not to be treated as something which is completely independent of other public services. Those who are involved in its administration (the police, the Director of Public Prosecutions, the Army, etc.) must be totally accountable for their activities. Authoritarianism should be avoided at all costs.

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