A Submission to the Royal Commission On Criminal Justice

From the Committee on the Administration of Justice, Belfast
November 1991

International and by Helsinki Watch. We ourselves have recently prepared a submission to the United Nations Committee Against Torture detailing allegations in approximately thirty cases which we hold information on (see enclosed). The allegations range from verbal abuse, threats, offers of inducements, slaps, punches, blows to the genital area, attacks on previous wounds and death threats. We are also aware that a number of clients allege that the police make derogatory remarks about their solicitors and on occasion go so far as to threaten the lives of solicitors. The Committee Against Torture paid particular attention to the circumstances in Northern Ireland and were highly critical of the lack of safeguards for detainees in Northern Ireland.

Of particular concern to us is the fact that not one of the complaints made in the last three years about alleged ill-treatment of detainees held under emergency legislation in Northern Ireland has been substantiated. Clearly the existing mechanisms for investigating complaints against the police are inadequate. In our pamphlet "Cause for Complaint" (enclosed) we outline the case for introducing an entirely independent system for investigating complaints against the police. Until such times as this is done the public can have little confidence in the present system.

We now turn to the substance of our submission.

Access to legal advice during detention

The right of access to legal advice is clearly regarded as an essential aspect of the right to a fair trial in criminal proceedings. It is enshrined in Articles 14 (3)(b) and 14 (3)(d) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights. Although the United Kingdom has no Bill of Rights Lord Diplock indicated in Haw Tau Tau v Public Prosecutor [1982] AC 136, 154 that denial of the right of the accused to legal representation at his trial would clearly nowadays be viewed as flouting fundamental rules of natural justice.

Increasingly it is being recognised that access to legal advice before being charged is equally important to ensure a fair trial. If someone has made incriminating statements that they would not have made if they had been properly appraised of their rights or the case against them it may prove very difficult for even the most able legal counsel to undo the damage. As the Guildford and Birmingham cases remind us all too well such statements may not be motivated by a desire to confess one's guilt. This fact is also being recognised in our legal codes. Section 58 of the Police and Criminal Evidence Act 1984 accepts that anyone arrested is entitled to consult a solicitor privately at any time. In Northern Ireland although the equivalent provision of the Police and Criminal Evidence Order does not apply to those arrested under anti terrorism legislation, section 45 of the Northern Ireland (Emergency Provisions) Act 1991 also ensures that anyone detained under the anti terrorism provisions and being held in police custody shall be entitled to consult a solicitor privately. Both of these provisions, however, are subject to significant exceptions. The CAJ considers that these exceptions are too broad and that they have been abused to defeat the aims of the legislation that a balance be maintained between the prosecution and defence at all stages of the criminal process.

Access to lawyers and the special conditions of Northern Ireland

Though access to lawyers is in general an important aspect of the right of fair trial certain particular aspects of the criminal process in anti terrorism legislation in Northern Ireland make

Introduction

The Committee on the Administration of Justice is an independent civil liberties organisation formed in 1981 to work for 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." It strives to ensure, that despite the "emergency" in Northern Ireland, international human rights standards are adhered to at all times. The membership of the organisation is drawn from both sections of the community and includes lawyers, academics, community workers, journalists and other interested people.

The Committee is disappointed that the terms of reference for the Royal Commission do not extend to Northern Ireland. Nevertheless, as we understand that the outcome of the Commission's deliberations will almost certainly impact on the criminal justice system in Northern Ireland we have decided to make a submission.

Our Committee is firmly opposed to all of the current emergency legislation in Northern Ireland and believes that the powers in the ordinary law are more than adequate. The onus is on those who call for emergency legislation to prove the need for divergence from the ordinary law; in most cases no such need has been demonstrated. CAJ would therefore like to see the scrapping of all emergency legislation but if this is not immediately attained then existing legislation should be altered so as to minimize the possibilities of abuse.

The substance of our submission will deal with three areas in particular:-

- Access to legal advice.
- Mechanisms for ensuring the fairness of pre-trial interrogations.
- The right to silence.

Before looking at these we feel it is important to highlight a number of more general concerns. As you are aware the Government has entered a notice of derogation in relation to the requirements under Article 5 of the European Convention so that it can continue to detain persons for up to 7 days without charge. The validity of the derogation itself is being challenged in the European Commission. It is in this context of a failure to meet basic international standards that we present our concerns.

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 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 this survey is now 10 years old, there appears little reason to believe there has been a significant change in the situation.

There has been a long history of allegations of ill-treatment of detainees in Northern Ireland. The European Court of Human Rights has in the past found that the Government were guilty of subjecting detainees to inhuman and degrading treatment. Unfortunately, in recent months, there is evidence of an upsurge in ill-treatment of detainees in police interrogation centres. Apart from the fact that a number of persons have won damages, or had charges against them thrown out of court, because of proven ill-treatment, there has also been an increase in the number of allegations of ill-treatment or harassment in the last year. This has been documented by Amnesty

Commission for Police Complaints, Amnesty International, Helsinki Watch and ourselves have all called for the introduction of video recording. These calls have been echoed by the United Nations Committee Against Torture which at its recent meeting in Geneva came down in favoour of video recording of interviews. Furthermore the lay visitors scheme does not extend to "emergency" detainees. Without such measures it becomes even more important to have a lawyer present as a check on unfair pressure or deception.

The final particular feature of anti terrorist legislation applies to the United Kingdom as a whole but is more frequently invoked in Northern Ireland. This is the power to detain someone in police custody for up to seven days, if authorised by the relevant Secretary of State, under the Prevention of Terrorism Act 1989. This provision was held to be in contravention of Article 5 (3) of the European Convention of Human Rights in **Brogan v United Kingdom**, the United Kingdom having subsequently decided to derogate from Article 5 in respect of this provision. Part of the justification for this seven day detention power is to give the police more time to interrogate a suspect but it clearly carries the risk that a combination of pressure and fatigue will lead someone to make a false admission.

Operation of the access provisions in Northern Ireland

Despite the fact that there is a right of access to a solicitor under section 45 of the Emergency Provisions Act this may be subject to delay for up to 48 hours on a number of grounds. These are if an officer of the rank of superintendent or above has reasonable grounds for believing that it:

- (a) will lead to interference with or harm to evidence connected with a scheduled offence or interference with or physical injury to any person
- (b) will lead to the alerting of any person suspected of having committed such an offence or not yet arrested for it
- (c) will hinder the recovery of any property obtained as a result of such an offence
- (d) will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism
- (e) by alerting any person, will make it more difficult
  (i) to prevent an act of terrorism
  (ii) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of acts of terrorism

The evidence is that this provision is regularly resorted to as, according to Northern Ireland Office figures, access has been delayed in over half (56%) of cases since the provision came in in 1987. Some solicitors report that it is their experience that access is routinely denied where someone is arrested under the anti terrorist provisions. In addition, when access is granted it is often before any allegations have been communicated to the detainee. It is not always out of the hearing of a police officer and access is never permitted during interrogation. Such an approach is difficult to explain. In R v Samuel [1988] 2 ALL ER 135, 143 Hodgson J, dealing with the equivalent provisions in the Police and Criminal Evidence Act, observed that to order a delay the police officer must make the judgement that a solicitor would either deliberately or inadvertently convey information about the accused to the accused's associate. He observed that generally solicitors were intelligent and professional people who were unlikely to convey

it even more important. Firstly, the standard governing the admissibility of confessions is a significant departure from the PACE standard. The present emergency test allows any written or oral statement by the accused to be admitted in evidence, provided that the defence does not bring forward **prima facie** evidence that the accused was subjected to "torture or 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."

"Human Rights in Northern Ireland", a recent report from Helsinki Watch, had this to say on the standard for the admissibility of confessions:-

> *"Helsinki Watch has concluded that the standard for admissibility of confessions in Diplock Courts in Northern Ireland permits the admission into evidence of unreliable confessions and violates the right of defendants to a fair trial. There is also a substantial question as to whether the EPA standard for admissibility of confessions meets the standard set in the International Covenant on Civil and Political Rights to which the UK is a signatory." (p.39)*

In addition while under Article 76 of the PACE order a judge has a discretion to exclude unfairly obtained evidence the judicial discretion in the Emergency Provisions Act appears to be more circumscribed to when "it is appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice". The emergency provisions are clearly designed to make it more difficult to exclude admissions. Hence the need for safeguards to ensure that those being interrogated do not make false admissions purely out of fear or pressure. Mistakes will be much more difficult to correct at trial. Although a number of recent cases in Great Britain have excluded confessions because the accused was unjustifiably denied access to their solicitor this has only occurred in one very recent case of **R v Gilgunn** in Northern Ireland. Indeed judges have not used their discretion even to exclude confessions of juveniles made after lengthy police questioning in which no solicitor was present (see D.P.J. Walsh "The Use and Abuse of Emergency Legislation", Cobden Trust 1983 pp 52-3).

Secondly, since the 1988 Criminal Evidence (Northern Ireland) Order significant inroads have been made into the right of silence in Northern Ireland. The Order sets out a number of circumstances in which inferences may be drawn from a person's silence during interrogation or at trial. Elsewhere in this submission the CAJ's substantive criticisms of this provision are set out. Our clear desire is that the law on this be changed. However while in force the provision has very significant implications for access to lawyers and the right to a fair trial. The caution police officers are now required to give to suspects in respect of what inferences may be drawn from their silence is lengthy and complex and many detainees may have difficulty in fully understanding it without the assistance of a lawyer. Judges have also expressed themselves as being unclear on the implications of the warning. The decision whether to speak or not is also something they will quite naturally desire their lawyer's advice on. Without such advice someone in police custody may for example unwisely decide to remain silent throughout and then, when their lawyer subsequently advises them that this was unwise and unnecessary, find themselves in great difficulty at trial.

The third problem is that there is no video recording or tape recording of interviews of suspects held under emergency legislation in Northern Ireland. This is in spite of the fact that the government-appointed Standing Advisory Commission on Human Rights, Lord Colville (who reviews the operation of emergency legislation on behalf of the government), the Independent

"contravention"). The involvement begins when the prosecution service (the "ministere public") requests a **juge d'instruction** to open a file on the case. As far as we are aware, this should be done as soon as the prosecution know that a "crime" has been committed. A **juge** may also be involved in the investigation of less serious offences ("delits" and "contraventions") if the prosecution service decides to refer the case, but there is no compulsion on it to do so. Once a **juge d'instruction** becomes seized of a case a tripartite relationship immediately develops: the police must do the bidding of the **juge** and the prosecution can ultimately rely only upon the information obtained by the **juge** during his or her examination of the case. An entirely different judge, or rather group of judges, will conduct the ultimate trial.

Creating a panel of senior investigating magistrates

The CAJ believes that in the English and Northern Irish criminal justice systems the creation of a buffer between the police force and the prosecution service could serve a useful function in preventing the police from having too great a control over what material is presented to the prosecution, and in what form. It is of course axiomatic that in any developed society a body of persons needs to be endowed with special investigative powers if criminal offences are to be prevented and detected, but it by no means follows that the power to decide when and how those powers should be exercised must always rest in the same body that carries out the prevention and detection. Indeed the importance of the powers - in terms of their potential effect on the rights and freedoms of ordinary citizens - is such that it makes sound sense for the police to be accountable to a separate body. Mechanisms must exist for ensuring that powers cannot be too easily abused and that when a person's liberty is at stake every effort is made to guarantee absolute impartiality and fairness in the procedures accompanying the exercise of the powers.

In view of the fact that the distinction between felonies and misdemeanours has long since been abandoned in English and Northern Irish law, and that the distinction between summary and indictable offences is becoming increasingly blurred (with the number of offences triable either way rising steadily), it may not be easy to identify the kinds of offences which should be treated as "crimes" are in France, that is, as offences which must be investigated only at the direction of a **juge d'instruction**. But the notion of a "serious arrestable offence" is already well known in our law, thanks to the Police and Criminal Evidence legislation. It is only for those offences, for example, that a person can be detained for up to 96 hours in police custody. It is also those offences, by and large, which, if charged against a police officer, require an investigation to be supervised by a member of the Police Complaints Authority (the Independent Commission for Police Complaints in Northern Ireland). We do not think that the use of such a category as a trigger for the involvement of an independent overseer or director of the police would lead to too frequent an involvement. In 1989 there was a grand total of 55,147 offences recorded by the RUC; only 6,325 (11%) could be said to fall into the serious category, being offences of violence against the person, sexual offences, armed robbery, arson, explosives offences and offences against the state (see **A Commentary on Northern Ireland Crime Statistics 1989**, Northern Ireland Office, Belfast HMSO, 1990, Table 2.1).

There has been criticism in France of the inexperience of some of the **juges d'instruction**. In England and Northern Ireland, therefore, we believe that the function should be given only to senior magistrates; they would need to be legally qualified (as all the Resident Magistrates already are in Northern Ireland) and to have served on the bench for a minimum of, say, five years. As in other matters, their decisions should be judicially reviewable. We believe that the primary function of the new examining magistrates should be to investigate all serious offences

such information inadvertently. The view that they would do so deliberately could only be made about individual solicitors rather than solicitors as a class. The Northern Irish case of R v Harper took a more restrictive view on the question of access to solicitors in Northern Ireland. The figures from Northern Ireland suggest that solicitors are being judged as a class and that the protection for the accused enshrined in the 1991 legislation is being systematically undermined. Recently the operation of this section has started to come under judicial scrutiny. In a recent decision R v Duffy judicial review of a delay was granted after the solicitor filed an affidavit that he would not discuss the case with anyone during the period in which a delay could have operated. However it is undesirable that solicitors should be required to do this in order to fulfill their duties to their clients. The presumption should rather be that they will not abuse their professional privilege unless the police have clear evidence to the contrary.

The CAJ feels that the right to consult with one's lawyer in private during police interrogation is an essential aspect of the right to a fair criminal process. We feel that the current legislative provisions do not sufficiently protect that right and that the operation of them in Northern Ireland has undermined the limited protection given. Therefore we feel that the legislation should be altered to guarantee a right of immediate access. Denial of this right should be a ground for excluding any admission made after the request was denied.

Especially in the present context of the right to silence legislation and the absence of video or audio recording we feel a detainee should have a right to have a lawyer present during questioning and that their waiver of this right should be valid only if witnessed by a solicitor.

Ensuring the fairness of pre-trial interrogations

In England, Wales and Northern Ireland the responsibility for investigating most criminal offences rests with the police. The Crown Prosecution Service and the DPP's Office have no power to conduct separate investigations. All they can do, if they think the case so merits after considering the dossier submitted by the police, is to require the police to carry out further investigations along certain tines. This strict division of labour means that the police are in a very strong position to "manage" the information they collect in such a way as to favour their own preferred version of what actually happened. If they have pre-conceptions about who was responsible for the crime in question, or if they make false assumptions about how the crime was committed, these will almost inevitably be displayed in the methods they use when conducting their investigations and presenting their findings.

In France, as in most other criminal justice systems in Western Europe, the investigation of crimes is in some cases made the responsibility not of the police but of an examining magistrate (juge d'instruction). These cases will be the most serious ones and represent only a small fraction of the total number of cases processed through the criminal courts each year. While the CAJ is aware of criticisms that have been made of the examining magistrate system in France, especially in recent years, it nevertheless believes that it displays some characteristics which, if introduced into the English or Northern Irish criminal justice systems, could go some way towards reducing the chances of an innocent person being wrongly convicted for a crime he or she did not commit.

In France, an examining magistrate must be involved in a case if the offence being investigated is a serious one (designated as a "crime" in the French Penal Code, as opposed to a "delit" or a

detention under PACE is quite low, both in England and in Northern Ireland, this would not impose an undue burden on the justice system. We think it is highly desirable that the duty to investigate should be separated in this fashion from the duty to consider whether a person needs to be further detained. Otherwise a conflict of interests might arise. In France there have been a number of cases where a suspect has been kept in custody, solely on the word of a juge d'instruction, for months or even years, a phenomenon which has rightly given rise to considerable criticism.

The current system for dealing with bail applications could also be retained. A person who is being kept in custody on the order of a judge should have the right at any time to apply to a different judge to have the custody order revoked on the ground that there has been a material change of circumstances. He or she should also be allowed to challenge any conditions attached to the offer of bail which are alleged to be unduly onerous.

Related reforms

The CAJ does not believe that the introduction of a new office of examining magistrate will by itself be enough to ensure that criminal investigations are more fairly conducted than they are at present. There needs in addition to be a range of reforms which will complement the new magistracy and help to ensure that the defects which have manifested themselves in the present system of police investigation do not reemerge. These reforms are as follows:

- All interviews between examining magistrates and persons who have been arrested or have volunteered to be interviewed should be conducted in the presence of the interviewee's solicitor (unless the interviewee signs a waiver of this requirement) and should be taped and video-recorded. The defence should have access to these recordings at all times.
- All interviewees should have an unencumbered right of silence when being questioned at any stage of the proceedings, both before and at the trial. It may well be the case that comparatively few accused persons currently seek to exercise a right of silence, but the existence of the right is, in our view, so fundamental to a criminal justice system supposedly based on the principle that the burden of proving a person's guilt beyond a reasonable doubt rests on the prosecution that it should in no way be impeded. Persons may have all sorts of reasons for choosing not to answer questions, most of them having nothing to do with the idea that they are trying to pretend they are innocent of any offence.
- A statutory rule should be introduced which prevents an accused person being convicted of a serious offence solely on the evidence constituted by his or her confession.
- An independent inspectorate for the forensic science laboratories which supply expert evidence for criminal trials should be created. This inspectorate should be empowered to conduct unannounced inspections of forensic laboratories, to check the reliability of testing methods used in the laboratories, to assess the competence of persons employed in the laboratories and to re-evaluate the results of forensic tests tendered in evidence in particular cases.

allegedly occurring in their area. They should be initially guided by the recommendations of the prosecuting authorities as to what leads to follow, but they should be under no constraints as to the matters they investigate beyond those recommendations. They do not need to be endowed with powers which exceed those already conferred upon the police when conducting investigations, and elsewhere we have argued that several of those existing powers, in both England and Northern Ireland, should be abolished. This applies in particular to the powers conferred by the Prevention of Terrorism and Emergency Provisions Acts.

The powers of the new magistracy

The powers which remain should be exercised by the examining magistrates in conformity with a statutory code of conduct enacted at the same time as the legislation creating their posts. This code should specify what is good practice in criminal investigations, e.g. a visit to the scene of the crime, the proper collection and verification of forensic evidence, and the avoidance of the publication of prejudicial information in advance of any arrest. Only the magistrate should have the power to authorise the arrest and subsequent detention of any person in connection with the investigation, or the search for and seizure of any evidence. Persons arrested should be questioned only by the magistrate, not by the police; the role of the police in these cases should be reduced to that of custodial body only.

We do not recommend that these new examining magistrates should be given the power, as they are in France, to issue a general order to the police requiring them to take all steps necessary to establish the truth in the case ("une commission rogatoire"). We believe that such a carte blanche would completely undermine the raison d'etre for the establishment of the examining magistrates in the first place. The magistrates will need to maintain very close contact with the police in order to be able to respond quickly to further requests from the police for authorisation to take further steps in the investigation. This probably means that persons who are appointed as examining magistrates will not at the same time be able to function as adjudicating magistrates in other cases. There will need to be additional magistrates, and deputy magistrates, appointed to take over the adjudicatory functions of the magistrates appointed as examining magistrates.

Just as the examining magistrates should not be compelled to conduct their investigations in the manner suggested by the police, so the prosecuting and defence authorities should have no right to have the magistrate take up a particular line of enquiry. We approve of the French rule whereby the magistrate must give reasons for refusing to comply with prosecution suggestions but we would extend this to defence submissions as well and would require the reasons always to be stated in writing. The availability of judicial review proceedings should be an incentive for the magistrates to consider the prosecution and defence suggestions very carefully.

Detention and Bail

Although the CAJ is not entirely happy with the way in which the Police and Criminal Evidence legislation is currently operating, it sees no need radically to alter the provisions therein on detention. It envisages the new magistracy system operating in tandem with the existing detention provisions. The requirement to seek warrants of further detention if the detainee is to be detained beyond the initial maximum period of 36 hours currently allowed should be retained. The application would be made on behalf of the examining magistrate not to another magistrate, as at present, but to a judge of the Supreme Court (who may be a district or county court judge appointed for the purpose). As the annual number of applications for warrants of further

corroborate somewhat limp prosecution identification evidence, which seems to us to be an extremely lamentable instance.

Whilst the Order has only really been in effect for two years we feel that it is already undermining existing standards of justice which are already inferior even to those in Great Britain, let alone international human rights standards. It must be emphasised that the abolition of the right to silence impacts even more severely upon a criminal justice system which has already been distorted and altered by "emergency" laws. Many suspects are held and interrogated under the Prevention of Terrorism Act which permits such detention without charge for up to 7 days. The CAJ has already objected to this power as in breach of the European Convention, a contention confirmed by the European Court in the Brogan case. The abolition of the right to silence simply exacerbates a situation where there is lengthy detention - often incommunicado without automatic and immediate access to legal advice. We are firmly opposed to the legislation here and strongly urge the Commission not to advocate change along similar lines in Great Britain. The law has been neither effective, in that it appears that "terrorist" suspects are still remaining silent, nor is it fair or just. The British legal system is an adversarial one - it is up to the prosecution to prove its case and it should not be a contest where the defence has one hand tied behind its back. That is simply not just. It would be highly ironic if a Royal Commission set up in the wake of a series of miscarriages of justice were to recommend changes which would make such miscarriages more likely.

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The right to silence

When the right to silence was - to all intents and purposes - abolished in Northern Ireland in 1988 the outcry was both loud and widespread. Everyone from the Law Society to the Standing Advisory Commission on Human Rights was critical of the decision, largely because it attacked a major cornerstone of the British judicial system - the presumption of innocence.

At the moment in England and Wales an accused person has the right to remain silent, either when questioned by the police or at trial and the judge should warn the jury against drawing any adverse inferences from that silence.

In Northern Ireland things are very different. In dealing with the Commission's two questions on the right to silence it is worth reflecting upon the state of the law and upon the judicial response to the change in the law.

Prior to the change in the law here the right to silence had already been undermined, in relation to scheduled offences. Under successive pieces of emergency legislation individuals are required to give certain information to the RUC and the British Army. If stopped and questioned, for example, a person must give information relating to identity and recent movements. Individuals are also required to pass on any information they have relating to scheduled offences or recent violent incidents. Failure to supply such information amounts to a criminal offence.

The changes in the law, contained in the Criminal Evidence (NI) Order 1988 amount to an abolition of the right to silence and apply equally to scheduled and non-scheduled offences. This is despite the then Secretary of State's assertions, inside Parliament and outside, that the impetus for the change came from what he alleged were persistent examples of "terrorist" suspects remaining silent whilst in custody. The Northern Irish legislation details four main instances in which the courts may draw "whatever inferences are proper from the fact that an accused person remained silent". These are:

- The legal ambush - this is where an accused person remains silent during questioning and then later, in court, produces an alibi, explanation etc.
- Where an accused person fails to explain certain substances or marks on his or her clothes.
- Where an accused person fails to explain his or her presence at a particular place.
- Where an accused person fails to testify at his or her trial.

It is the CAJ's view that these provisions constitute an extremely serious attack upon the presumption of innocence. It has been, and remains, our contention that the right to silence should be restored immediately and this view is shared by many here in Northern Ireland.

We are also very worried about the impact of the legislation since its introduction. Whilst it is true that at the outset the courts were highly cautious in their application of the new law, the courts have been increasingly willing to use the provisions of the Order to convict people. Cases range from circumstances where the court has warned defendants about their failure to testify at all or to answer particular questions whilst in the witness box to instances where the courts have used the Order to undermine or to diminish defence contentions. We are also aware of one particularly disturbing case where the trial judge used a defendant's complete silence to