The Committee on the Administration of Justice (CAJ)
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Winner of the 1998 Council of Europe Human Rights Prize

CAJ's Submission on the

Consultation Paper on

Legislation Against Terrorism

March 1999

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What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation which is affiliated to the International Federation of Human Rights (FIDH). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the right of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, and Extrajudicial, Summary and Arbitrary Executions, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, children's rights, gender equality, racism and discrimination.

Our membership is drawn from all sections of the community in Northern Ireland and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

CAJ was recently awarded the Council of Europe Human Rights Prize in recognition of our work in defence of rights in Northern Ireland. Previous recipients of the award have included Medecins Sans Frontieres, Raoul Wallenberg, Raul Alfonsin, Lech Walesa and the International Commission of Jurists.

The Need for Human Rights to be reflected in Anti-Terrorist Policy and Law

As a human rights organisation CAJ is naturally concerned to see that all law enforcement policies are founded on respect for human rights. Although some would suggest that human rights must be sacrificed in the fight against terrorism we would argue strongly that to do so undermines the state's moral authority. Protecting human rights gives all in society a sense of security and maintains trust in the agencies of the state. When such rights are not protected that sense of security and with it trust may be lost. As one leading commentator on anti-terrorist law has observed "the ultimate test of the success or failure of terrorism or counter-terrorism is the winning of public support" (Walker *The Prevention of Terrorism in British Law* (1986) p.7). Moreover the European Court has, on several occasions, indicated that while a state may be given greater leeway in responding to genuine terrorist threats it remains bound to act within the limitations imposed by the Convention. In the case of *Klass v Germany*, Series A No 28 (1978) for example, the Court stated

> *The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against terrorism, adopt whatever measures they deem appropriate*

We are therefore surprised to see so few references to international human rights standards in this consultation paper. A number of decisions of the European Court of Human Rights in relation to existing anti-terrorist law are referred to (though not the *Murray v United Kingdom* decision), but there are few references to the provisions of the Convention, or indeed of the International Covenant on Civil and Political Rights. Especially with the imminent arrival of the Human Rights Act we would have expected to see more frequent reference to Articles 6 and 8 of the Convention as standards against which anti-terrorist provisions would be measured. At a number of points we suggest that the proposals contained in this consultation document may be inconsistent with those provisions.

The Value of Specific Anti-Terrorist Law

CAJ views with some scepticism the claimed need for a specific anti-terrorist law. Much of what such laws normally deal with is already proscribed by the criminal law. Anti-terrorist law often only duplicates existing criminal law and criminal procedure. Most of what people are concerned by in the actions of those normally designated as "terrorists" – such as causing explosions, threatening or killing people – already constitute crimes. They are subject to prosecution with a full range of legal provisions to assist in the prevention of such crimes and the apprehension of those responsible for them. In so far as there is a wish to indicate public disapproval of violence directed against democratic institutions the proper forum for doing so is in sentencing those convicted of such offences rather than the expansion of the criminal law. Targeting the criminal law against a particular group of people, "the terrorists", rather than against particular conduct always carries the risk that people thought to be members of that group will be perceived as legitimately the objects of intervention regardless of what they have actually done. As Gearty and Kimbell observed "When we think of crimes we think of due process and justice as well as just deserts. When we think of terrorism, we think merely of evil and condemn all suspects by association" (*Terrorism and the Rule of Law* (1995) p.67). This risk is exacerbated when the definition of terrorism upon which such intervention is predicated is as vague as that offered here (to be discussed in more detail below). It seems to us that taking such a risk can only be justified on a limited number of grounds. These would include

1. *That people designated as "terrorists" are engaged in conduct which is not currently defined as criminal, but which ought to be.* - However this consultation paper does not call for the creation of any new offences, although it does seek to extend a number of offences which currently exist only in Northern Ireland to the United Kingdom as a whole. The rationale for doing so appears to be largely of a "just in case" rather than on the basis of a proven need.

2. *That the threat of serious violence from those designated as "terrorists" is significantly likely to occur and sufficiently great if it did occur that broader powers to prevent it occurring are required.* – This does appear to be part of Lord Lloyd's case but it is based on an assessment of the "terrorist threat" which we find to be largely speculative (to be discussed in more detail below). Even assuming, for the sake of argument, that this case is made out we would argue that prevention is better dealt with by better security and surveillance measures than by powers to search and arrest at an earlier stage than would be allowed in non-terrorist policing. More effective screening of baggage at airports seems to us to have played a greater role in reducing hijacking and the bombing of aircraft than broader arrest powers. At a number of points in Lord Lloyd's report the value of specific anti terrorist provisions is asserted without any specific supporting evidence. For example at paragraph 8.12 he indicates that "from what I have heard and what has been written by distinguished reviewers I have no doubts that the arrest power of Section 14 PTA has been of great value to the police", while at paragraph 10.21 he observes that no terrorists have actually been caught under the additional PTA powers introduced in 1994 but goes on to add that "a number have been intercepted by alert officers on patrol". However again there is little by way of specific examples of this. What is missing from the report is an assessment of the extent to which, especially in relation to non-Irish terrorism, the police might have been able to achieve exactly the same results without the use of PTA powers. The burden is on those who seek to use such powers to indicate their necessity. This, we would argue, Lord Lloyd's report, on which these proposals are largely based, fails to do.

3. *That those involved in "terrorist" offences prove more difficult to prosecute than people involved in other forms of criminal activity* – This has arguably been the main justification of anti-terrorist law in Northern Ireland over the past 30 years. Regardless of its merits in the past we would suggest that, in the absence of the sort of conflict prevalent in Northern Ireland for that period, it should be more rather than less easy to gather evidence about "terrorist" crimes. Such actions are usually regarded with particular revulsion by members of the public who are therefore likely to be eager to assist law enforcement authorities. In the absence of a lack of public co-operation arguments that "terrorists" prove especially difficult to prosecute rests largely on views about their ability to escape detection. However these are often speculative and even contradictory. For example at one point in his report Lord Lloyd indicates that one of the chief characteristics of terrorism is that "it is frequently perpetrated by well-trained, well-equipped and highly committed individuals acting on behalf of sophisticated and well-resourced organisations, often based overseas" (para 5.11(v)). However at another he asserts that perhaps the greatest threat comes from "some individuals with fanatical leanings or personal grievances" (para 1.24). One would doubt whether such individuals would prove particularly sophisticated when it comes to evading detection. Overall assertions about the ability of those engaged in terrorism to evade detection by normal police work are, like many of the assertions on which these proposals are based, excessively general. We have seen little evidence that those involved in political violence are, per se, better at escaping detection than those involved in other forms of criminal activity, for example tax evasion. Some no doubt are but there is more than a suspicion of the "evil genius" stereotype lurking behind the idea that this is true for all such perpetrators.

We are therefore not convinced that the case for specific anti-terrorist legislation has been made out. We have pointed out some circumstances in which it might be justified but concluded that these are not currently present. Against this we would observe that, on the basis of past experience, the introduction of anti-terrorist legislation could have the following negative consequences.

- It normally involves a weakening of human rights guarantees. Indeed the invocation of the word terrorism is normally synonymous with calls for such a weakening. As noted above there is almost a presumption in certain quarters that dealing with terrorism inevitably involves sacrificing certain human rights guarantees

- In addition to the formal weakening of human rights provisions that is normally a feature of anti-terrorist legislation, characterising an event as "terrorist" usually leads to similar informal effects. High profile trials of "terrorist" suspects, where media and security factors often endanger the fairness of trials, are a good example of this. The use of lethal force by the state also appears to be an area where once those targeted for intervention are defined as "terrorists" there is always the likelihood that concerns about the excessive use of force will be treated less seriously. Where terrorism is identified as emanating from a particular ethnic or religious group there is a strong risk that broad anti terrorist powers will be abused to erode the rights of all who are members of that group. Paddy Hillyard's excellent study of the use of the PTA in Britain to create a "Suspect Community" in respect of the Irish in Britain clearly demonstrates that this has happened in the past in the United Kingdom. While broad anti terrorist powers remain in existence there remains the risk that this could become the fate of another group who are identified as containing some terrorists within their midst.

- Describing a criminal group as "terrorist" may, in some cases, be to grant a group a level of coherence and organisation it does not actually possess. It may even play a role in creating such coherence. There is evidence this has occurred with far right extremist groups in the US. One recent study of prosecuting such extremists observed that it had served "to further unify the leadership of the extreme Right into an even tighter cohesive unit" and advocated a different approach

  > *An effort must be made to avoid elevating common criminals to an almost romantic status within the media and society as well. Members of extremist groups are often directly involved in a wide range of criminal activities. In many cases focusing on their racist rhetoric may actually help their recruitment efforts while hampering their prosecution by detracting from the criminality of their deeds*
  > (Mijares and Mullins "Prosecuting Domestic Terrorists: Some Recommendations" in Kushner ed. *The Future of Terrorism* (1998) 161)

The Extent of the "Terrorist Threat" post the Northern Ireland conflict.

It is the premise of the proposals contained in this paper that political violence associated with the Northern Ireland conflict has come to an end. Nevertheless the paper (and Lord Lloyd's report on which it is based) concludes that the threat from terrorism is sufficiently serious for there to be a need to retain and indeed expand a specific anti-terrorist law. We would question the validity of this conclusion. With regard to the number of actions identified as "terrorist" the evidence is that if anything these are decreasing rather than increasing in the United Kingdom. A 1996 answer to a Parliamentary Question indicated less than 50 such incidents (unrelated to Northern Irish affairs) in

the United Kingdom in the previous decade. Over half of these had occurred in the second half of the 1980s. For its analysis of the terrorist threat to the United Kingdom Lord Lloyd's report drew heavily on the study conducted by Professor Wilkinson, which forms Volume 2 of the Inquiry. However even this notes that the level of what it describes as "international" and "domestic non-Irish" terrorism has declined since the 1970s. When the Lockerbie bombing is removed from the figures the Consultation Paper itself acknowledges that only 26 people were killed in incidents resulting from "international terrorism" in the United Kingdom in the period 1976-98. This is just over one a year and is scarcely evidence of a major terrorist problem requiring highly restrictive legislation.

However current terrorism is not the only question. The paper raises the issue of whether anti terrorist law is justified because of the risk that if a terrorist attack occurs it is likely to be particularly deadly. This is a valid point but it appears to us that some standards of probability are appropriate when the continuation and extension of such restrictive laws is being contemplated. This we do not find in either Lord Lloyd's report or the Consultation Paper. Instead there is constant reference to the *possibility* of religious extremists using terrorist methods in Britain or the *possibility* of new groups springing up such as violent anti abortion activists as in the USA. Enormous stress is placed, both in the report and the consultation paper, on the 1995 attack on the Tokyo underground by the Aum Shrinikyo cult, as evidence that we are on the threshold of a new wave of religiously inspired terrorism. However this is just one example, which has not been followed by many similar events. Indeed it is arguable that state overreaction when dealing with extreme religious groups which has posed the more serious threat, witness the assault on the Waco compound. The risk of political or religious extremists resorting to chemical or nuclear weapons is arguably no greater than it was twenty years ago and in any case such threats may be better averted by improved regulation of the arms trade than by extension of the criminal law.

The Definition of Terrorism

Our concerns as to the desirability of retaining specialist anti-terrorist law are enhanced by the breadth of the new definition of terrorism proposed. The inclusion of "serious disruption" within the definition of "serious violence" is especially alarming. It creates the possibility that any form of direct action or civil disobedience (for example the disabling of aircraft as a protest against the arms trade or a sit in at a government building), can be characterised as "terrorist". The suspicion that a group is involved in such action may then justify the use of extensive search and arrest powers against their members. This is a disturbing widening of the criminal law and we are concerned that the consultation paper suggests that this widening has been deliberately adopted to bring groups such as animal rights protestors within the definition. Some such groups may well be engaged in illegal and dangerous activities. We share the view expressed by Lord Lloyd that violence from such groups is just as reprehensible as violence from "international terrorists". However we feel that it is conduct which is comfortably regulated by existing criminal law and policing. The possibility that such groups may escalate their activities cannot be a sound basis for such a drastic extension of the law. The sorts of activities the Consultation paper identifies as within this definition of "serious disruption"such as disabling a computer or water system, would already be criminal activities in themselves. The police already have adequate powers to conduct investigations where evidence of such activity exists. Neither the Lloyd report nor this consultation document demonstrates that existing powers are inadequate to prevent such actions occurring or to successfully prosecute those involved in them. CAJ has long been of the view that the EPA/PTA definition of Terrorism as the "use of violence for political ends" was too broad. However that at least did require that there was a suspicion of the use of violence to trigger the use of such powers.

Including "serious disruption" without the use of violence within the definition broadens it considerably and invites the security services to resume surveillance of all those groups, notably trade union and peace groups, which they have only recently foresworn, although this time under the more acceptable label of investigating "terrorism" rather than "subversion".

Northern Ireland Temporary Provisions

CAJ's position in relation to the maintenance of the emergency legal regime in Northern Ireland is clear. We believe that there is no emergency and any remaining threat can be dealt with under the ordinary law. Both the PTA and the EPA should be withdrawn. Indeed the maintenance of such legislation is arguably illegal under international human rights standards.

Whenever and wherever a state of emergency occurs human rights are fundamentally threatened. The existence of civil unrest or paramilitary violence does not automatically justify the application of emergency powers; they should only ever be enacted if unrest or violence necessitates those designated measures. Both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), state that 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 implement emergency powers. The UK is currently derogating from both of these treaties. In relation to the ECHR, its sole partner in derogation is Turkey. The UK's derogation under Article 15 of the Convention is unwarranted; there is no public emergency threatening the life of the nation.

Northern Ireland has been in an effective state of emergency since its inception. The Civil Authorities (Special Powers) Act was introduced in 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-five years more provisions of emergency legislation have been introduced, mainly by way of the EPA. The justification put forward by government for the emergency measures was that they were temporary powers necessitated by the public emergency posed by paramilitary violence.

It has been consistently argued that the situation in Northern Ireland warrants emergency legislation. CAJ were never persuaded by this argument, our analysis being that the use and abuse of such powers fuelled the conflict rather than assisting in its resolution. Nevertheless, regardless of the merits of this argument, at this moment in time, virtually all paramilitary groups have called a cease-fire, the process of prisoner releases has started and we appear to be on the verge of a new political dispensation. Despite this there has been little change to legislation that has been counterproductive, leading to the alienation of sections of the community and causing the erosion of the rule of law. Indeed in the wake of the Omagh atrocity the government hastily enacted further emergency legislation.

We strongly hold to the view that what is now needed in order to appropriately respond to the new political and security landscape is a commitment to a clear break with the past use and abuse of emergency powers. Not only have such powers been counter-productive but they have also polluted the legal system and respect for the administration of justice in Northern Ireland. The dual system which has been operated since the inception of the state means that the police, lawyers and the courts have never discharged their duties in a normal criminal justice system and more importantly citizens have never had access to a completely neutral and normal form of justice in which they could have complete faith. The Good Friday Agreement recognised the need for a new dispensation in Northern Ireland to be based on justice, respect for rights and equality. The most important aspect of such a society is the proper functioning of the rule of law. In order to begin to build confidence in the impartial application of the rule of law it is therefore vital that our legal

system should not continue to be polluted by the presence of emergency powers. A gradual and piecemeal withdrawal of such powers is not sufficient. Those who are charged with enforcing the law and dispensing justice must be left in no doubt that in future they must do so without having recourse to the "short-cuts" allowed by the PTA and EPA. Police and judicial behaviour which is open, transparent, and professional and which protects human rights is the only means by which support for the rule of law can be gained and sustained.

It is therefore our belief that there should be no special provisions for Northern Ireland in any future permanent counter-terrorist legislation. In the immediate future however, short of repeal of such legislation, there are a number of steps which the government could take to reflect the reality of a much reduced security threat.

Some involve the Diplock court system which the government rightly identify as being based on the report of Lord Diplock's report in 1972 which concluded that the jury system was no longer working, primarily because of jury intimidation and perverse verdicts. Little evidence was presented in the Diplock report of incidents of intimidation yet the government of the day chose to abandon one of the most fundamental protections for suspects under the common law without the benefit of empirical research. One of the problems with the current system has been the procedure for deciding which suspect gets a jury trial and which does not. The Consultation Paper describes the process whereby scheduled offences are certified out in order that the defendant then receives a jury trial. It has long been our view and that of others that a much preferable system would be for the Attorney General to certify offences in. In other words, all offences are presumed not to be politically motivated but in the event that they prove to be then the Attorney General directs those cases to go to the Diplock courts.

The Consultation Paper also addresses the issue of bail applications and the fact that for scheduled offences, only the High Court can grant bail. The government justify this distinction by saying that prior to its introduction magistrates' courts became crowded with individuals attempting to intimidate the court. If this was the case, one wonders why such individuals did not simply attend the High Court hearings in similar numbers. The issue of bail has become particularly problematic in recent years. There is of course no evidential burden on the prosecution in relation to bail applications so it is very often the case that the prosecution will simply allege that the accused is a member of a paramilitary group. In those circumstances the court will rarely grant bail and, as this is widely reported in the media, the life of the suspect if of course put in danger. This has led to a significant number of individuals being refused bail and spending long periods of time in custody on remand only to have their charges dropped because of lack of evidence. The simple reinstatement of the power of magistrates to grant bail will not remedy this situation. The courts generally must be much more reluctant to accept completely the allegation that someone is a member of a paramilitary organisation. The legislative presumption must also be in favour of bail being granted.

Other steps short of immediate repeal of the PTA and EPA include the closure of the holding centres, the withdrawal of the derogation from the ECHR, allowing solicitors to be present during all interrogations with their clients, and a significant reduction in the military presence in areas such as South Armagh and Tyrone, from where we continue to receive reports of extensive harassment. Consideration could be given to issuing instructions to military units that, pending the withdrawal of emergency legislation, they should cease using the stop and search powers.

Obviously we welcome the proposal to apply the PACE standard for the admission of confession evidence across the board.

Needless to say, given the above, we completely reject the notion that the powers outlined at 13.10-15 should be maintained in future legislation. We believe such powers have not been effective in combating paramilitarism but have simply fuelled alienation and resentment. Indeed a survey carried out on behalf of CAJ (Harrassment. It's part of life here...CAJ 1995) found that the very powers which are discussed in these sections create the "sites" at which extensive harassment takes place. In other words, many of the respondents to the CAJ survey reported that harassment took place at vehicle check points, in the street when stop and search powers were being exercised, or during house searches. Following publication of this survey we recommended that, given this finding, the necessity for such legislation be seriously questioned in that it created the sites for harassment but there was little evidence that it contributed to effective policing. That recommendation was made four months after the 1994 cease-fires came into effect. It is rather depressing that four years later we are faced with proposals to extend the life of such powers yet again.

Proscription powers and the Criminal Justice (Terrorism and Conspiracy) Act 1998

Proscription generally

The Consultation Paper makes a number of general comments about the efficacy and desirability of the proscription powers currently contained in the EPA and PTA. For instance the paper claims that the "indications are that the proscription provisions have made life significantly more difficult for the organisations to which they have been applied...Many activities by, or on behalf of, such groups are made more difficult by proscription, and that in itself aids the law enforcement effort in countering them" (paragraph 4.7). It would be interesting to be provided with the evidence upon which these statements are based and to be given examples of some of the activities which allegedly have been made more difficult. Clearly proscription has made it more difficult for such groups to meet publicly but this is not necessarily a good thing. Such enforced secrecy may have slowed internal debate in such organisations which ultimately led to the cease-fires. We believe that these kinds of powers discourage political activism at a time when individuals who have been involved in paramilitary activity are trying to move to non-violent politics.

The Consultation Paper is perhaps more honest about the official view of such powers when it suggests that they have symbolised "the community's abhorrence of the kind of violence that has blighted society there for over 30 years" (paragraph 4.7).

CAJ believe 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, 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 the current legislation i.e. "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 law. Related to this general point is the fact that no right of appeal to the courts is incorporated in the current provisions and the test in the section for the exercise of the proscription power is a subjective one, minimising the potential for judicial review.

Additionally we strongly object to the proposal to retain a permanent power to proscribe specifically Irish groups (para 4.10). This seems to be predicated on the claim, again unsubstantiated, that the powers have proved "fundamental to an effective response to the emergence of new terrorist groups" (para 4.10). The powers were not effective in responding to the threat from the Real IRA, or from the dissident loyalist groups. If the powers are to be kept and used they should apply not simply to Irish groups.

Indeed the government appear to be applying different tests to the need for retaining the general proscription powers and those in the Criminal Justice (Terrorism and Conspiracy) Act in that they

indicate their hope that when the time comes for the implementation of permanent counter-"terrorist" legislation arrives the threat from Irish groups will have reduced to such a level that the need to retain the new powers will have diminished. Therefore they will take a decision in relation to those powers at that time in light of the security situation. This does not apply to the general proscription powers which the government intends to retain.

We are concerned at the complete discretion given to Ministers of government to either proscribe or designate such groups. The Consultation Paper frankly makes reference to the fact that the government is concerned that it may be pressured to target organisation which it might not regard as "terrorist". The decision as to whether a group should or should not be on the proscribed or designated list should therefore be subject to judicial control and not simply be a matter of political expediency.

Criminal Justice (Terrorism and Conspiracy) Act 1998

CAJ is deeply concerned about the threat to respect for human rights posed by the Criminal Justice (Terrorism and Conspiracy) Act 1998 which the British government introduced in the wake of the Omagh atrocity.

It is undoubtedly incumbent upon governments to take steps to protect society from criminal acts and to bring those responsible to justice in the course of proceedings which meet international standards of fairness. Measures taken in the immediate wake of atrocities are rarely effective in achieving this goal. History has shown that they frequently lead to miscarriages of justice and undermine public confidence in the rule of law.

CAJ believe that the new legislation introduced in the wake of the Omagh atrocity is not only "draconian" but violates the government's human rights obligations under international law. Furthermore we believe that the proposals conflict with the soon to be enacted Human Rights Act which will incorporate the European Convention on Human Rights into British law. The maintenance of this legislation should not therefore in our opinion be open for discussion. The legislation should be repealed.

Changes to the right to remain silent, Sections 1 and 2

These provisions essentially involve a relaxation of the rules of evidence to make it easier to obtain convictions for membership of certain specified proscribed organisations. Section 1 of the Act provides that in future the word of a police officer of the rank of superintendent or above will be admissible evidence against a suspect charged with membership of a proscribed organisation. In addition, if the accused fails to mention either before being charged or on being charged, a fact which is material to the offence and which s/he could reasonably be expected to mention, then the court may draw inferences of guilt from the failure. While the Act makes clear that an accused will not be returned for trial, found to have a case to answer or convicted on the basis of the statement by the police *or* the inferences, the clear intention of this legislation is to allow one to corroborate the other.

We believe that these provisions are contrary to the right to be presumed innocent until proven guilty beyond a reasonable doubt, as recognised in Articles 14 (2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 (2) of the European Convention for the Protection

of Human Rights and Fundamental Freedoms (European Convention). These provisions also violate the right not to be compelled to testify against oneself or to confess guilt, as guaranteed by Article 14 (3) of the ICCPR.

Full respect of the right to silence is so fundamental that only a short time ago 120 states, including the UK, voted for the establishment of an international criminal court which would guarantee this right to persons suspected or accused of the worst crimes in the world: genocide, other crimes against humanity and war crimes. Similarly, the Rules of Procedure and Evidence of the International Tribunals for the former Yugoslavia and for Rwanda guarantee this fundamental right to persons suspected or accused of these crimes.

Sections 1 and 2 of the Criminal Justice (Terrorism and Conspiracy) Act unacceptably shift the burden of proof from the prosecution to the accused and they violate the right not to be compelled to incriminate oneself. This is unacceptable and could lead to the conviction of innocent persons.

In July 1995, the United Nations Human Rights Committee, (the body of experts which monitors the implementation of the ICCPR, concluded that "the provisions of the Criminal Justice and Public Order Act of 1994, which extended the legislation originally applicable in Northern Ireland, whereby inferences may be drawn from the silence of persons accused of crimes, violates various provisions in article 14 of the [ICCPR], despite the range of safeguards built into the legislation and the rules enacted thereunder." The Committee recommended that the UK bring its legislation into conformity with the Covenant.

Similarly, the European Court of Human Rights in its February 1996 judgement in Murray v. UK concluded that these provisions, coupled with the restrictions on access to legal advice, violated the European Convention.

While the Act makes clear that no convictions will arise from it unless the suspect first has the right to consult with his/her solicitor, the European Court of Human Rights stated that future judgements on cases involving adverse inferences being drawn from silence would depend on all of the circumstances of the case, "having particular regard to the situations where inferences may be drawn from silence, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation." (Murray v UK 1996)

The aim of this Act is to impose such a degree of compulsion on suspects that they are forced to answer questions put to them by the police. This could lead to situations where there is a considerable degree of compulsion on a person detained or charged, where the only evidence proffered is the suspicion of the police, and where the courts will attach significant weight to the inference drawn from the suspect's silence. In these circumstances we are concerned that the provisions will violate the ICCPR, the European Convention and the Human Rights Act.

While these provisions relate to membership of proscribed organisations, they are targeted against only certain proscribed groups. The groups which the Secretary of State has specified as being susceptible to the Act are the INLA, LVF, "real" IRA and Continuity IRA. Three of these groups have now declared cease-fires. While of course it is the intention of the framers of the legislaion that it should not be used against those from the mainstream paramilitary groups who are operating cease-fires, its use will be subject to the discretion of the RUC. Given the history of the RUC and its involvement in widespread and egregious violations of human rights, we are particularly concerned that this legislation is going to be entrusted to them.

Provisions allowing for the seizure of land, section 4

Section 4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 allows for the courts in Northern Ireland to order the seizure of property belonging to an accused person who has been convicted of membership offences under the Act. Any property or money may be seized if the court is satisfied that the accused had it in his/her possession or under his/her control at the time of the offence and it has been used in the furtherance of or in connection with the activities of the specified organisation or the court believes it may be so used if not forfeited.

While we are concerned at any provisions which introduce a punishment in addition to loss of liberty for a criminal offence, we also believe that certain safeguards should have been put in place. Section 4 (5) establishes that the standard of proof in relation to the forfeiture of such property is civil, that is, on the balance of probabilities. In other words, property can be seized if the courts feel it more likely than not that it may at some point in the future be used in connection with the activities of a specified organisation. We believe that this test is much too wide, particularly when one considers that there is no obligation on the courts to have regard to the impact of a forfeiture order on other individuals, for instance the children of the accused.

Conspiracy to commit Terrorist Offences Abroad: violations of the rights to freedom of expression and association, sections 5,6 and 7.

The Act also criminalises conspiracy to commit terrorist offences abroad. While we fully support the need to take measures to prevent atrocities such as those which have recently occurred, such measures must also be taken within the framework of respect for internationally protected human rights.

We are concerned that the legislation is drafted in such a manner that it fails to set out a recognisable criminal offence, with a clear definition of terrorist offences and specification of acts which would constitute conspiracy. Additionally, we believe that the provisions violate international law, including solemn treaty commitments of the United Kingdom under Articles 19 and 22 of the International Covenant on Civil and Political Rights and Articles 10 and 11 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, guaranteeing rights to freedom of expression and association.

Although Articles 10 and 11 of the European Convention permit state parties to limit the exercise of these freedoms when such limitations are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, such limitations must be narrowly construed so that they limit the exercise of these fundamental rights to the minimum extent necessary and for the shortest time possible. Similar limitations clauses in Articles 19 and 22 of the International Covenant on Civil and Political Rights must also be narrowly construed to ensure that the essence of these fundamental rights is not eviscerated in the name of such nebulous concepts as national security, territorial integrity and public safety.

POWERS OF ARREST

Under the criminal law if a person is to be arrested without a warrant there are a number of powers that can be invoked by the arresting officer to effect the arrest. The first is under the 'ordinary' criminal law, the Police and Criminal Evidence (Northern Ireland) Order 1989 which allows for arrest if there are reasonable grounds for suspecting that the person has committed, or is about to commit, an offence. This in itself, is a wide power of arrest the only limitation on it being that a reasonable suspicion must exist in relation to a specific offence. The other powers which may be invoked are contained in the Northern Ireland (Emergency Provisions) Act and the Prevention of Terrorism (Temporary Provisions) Act.

Section 18 Northern Ireland (Emergency Provisons) Act

The first power of arrest at issue under the EPA provides that a constable can arrest without warrant "any person who he 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."

NIO statistics show that since 1991 no-one has been arrested using the powers provided under this section. Its continued re-enactment was on the basis that it was the only power of arrest for the offence of membership of a proscribed organisation. Given that this power requires reasonable suspicion in relation to the commission or anticipated commission of a specific offence there would seem to be no need for its retention in that its remit is covered by the power contained in PACE. CAJ welcomes the stated intention in the consultation paper that this power will be repealed.

Section 19 Northern Ireland (Emergency Provisions) Act

Under section 19 any soldier on duty has the power to arrest without warrant and detain for not more than four hours a person who he has reason to suspect is committing, has committed or is about to commit **any** offence.

From this it is clear that soldiers have a wider power of arrest than even the RUC due to the fact that their power of arrest is not limited to those offences governed by the EPA. The government explains the need for such a wide ranging power as the fact that "a soldier's knowledge of the criminal law is not and can not be expected to be, as detailed as that of a police officer". This is a most worrying justification and where the consequence of the use of such a power by inexperienced personnel is deprivation of liberty is an incredible admission. The consultation paper further notes that such a power will be necessary for as long as the army is present in Northern Ireland.

The CAJ submits that it is inappropriate for army personnel to have such a power of arrest. In addition to an objection in principle to the section 19 power as noted above CAJ also notes that NIO statistics show that first, this power of arrest has been used less and less since 1987 (when it came into force in its present form) the most marked decrease being since 1994 and clearly coinciding with the reduction of army personnel on patrol. Statistics further show that while as many as 108 people have been arrested using this power in any one year the number of persons charged following such arrest has never exceeded the 1989 figure of 6, with one or no persons charged at all in 1990, 1992, 1993, 1994, 1995, 1996, and 1997. These figures would suggest that the very fears expressed above are being realised and that the existence of the wide section 19

power has lead to it being invoked where a greater knowledge of the criminal law might have recognised that an arrest was not justified.

Section 14 Prevention of Terrorism (Temporary Provisions) Act

The most widely used power of arrest under the emergency legislation is that under section 14 (1) of the Prevention of Terrorism (Temporary Provisions) Act and provides for the arrest of a person without warrant where a police officer has reasonable grounds for suspecting that s/he is

(a) guilty of certain offences under the PTA or under section 30 of the EPA or

(b) is or has been concerned in the commission, preparation or instigation of acts of terrorism other than domestic terrorism or

(c) is subject to an exclusion order

The government expressly accepts that the powers are wide and notes a number of the many concerns that have been expressed in this regard over the years.

The consultation paper notes that the government is not in possession of any evidence to show that the powers of arrest under section 14 are in any way abused. CAJ has been involved in monitoring the operation of this legislation since our creation and it is clear from government statistics that many more people are released without charge than are charged with offences following arrest under this section.

The most widely drawn and widely used power of arrest under the emergency legislation is that under section 14 (1) (b). Under this provision a person can simply be arrested because a police officer suspects that s/he is or has been involved in the commission, preparation or instigation of acts of terrorism without any requirement to specify the offence to which the suspicion is related, as is normally required. CAJ notes the principles which underlie the requirement to specify a reason for arrest as set out in the leading case of Christie v Leachinsky [1947] AC 573 where Viscount Simon noted that

> "This is for the obvious purpose of securing that a citizen who is prima facie entitled to personal freedom should know why for the time being his personal freedom is interfered with....And there are practical considerations as well as theory, to support the view I take. If the charge on suspicion of which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken, with the result that further inquiries may save him from the consequences of false accusation."

The consultation paper expressly states that section 14 (1) (b) is not a carte blanche to arrest and question anyone without good reason because the arresting officer must have reasonable grounds for his suspicion. While this is an accurate description of the statutory power, it is clear from statistics that many more people are released without charge than are charged with offences following arrest under this section. 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. This in itself, is, in our submission, a breach of Article 5 of the European Convention, not being a deprivation of liberty for one of the permitted purposes under Article 5. The situation where arrests are made for this purpose would, in our submission, be greatly alleviated by the introduction of a requirement to specify the particular offence to which the suspicion attaches.

Lord Lloyd has expressly noted that the power under section 14(1)(b) as it now stands would be in contravention of Article 5(1) (c) of the European Convention on Human Rights 'once a lasting peace has been established in Northern Ireland' para 8.13. His assessment is based on the fact that there is no specific offence of being concerned in the commission, preparation or instigation of acts of terrorism. Article 5 states that a person may only be deprived of his liberty in accordance with a procedure prescribed by law where, *inter alia*, s/he is lawfully arrested

> for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed *an offence* or when it is reasonably considered necessary to prevent his committing *an offence* or fleeing after having done so (emphasis added)

The government does not accept the submission that the Article 14(1)(b) power may be contrary to international human rights law. Given that no derogation has been entered in respect of this power it is misconceived to suggest that the power could only be challenged when there is a lasting peace in Northern Ireland, it is our submission that the section 14(1)(b) power is contrary to the European Convention on Human Rights now and has been since its introduction.

The only possible effective method of challenge to the lawfulness of an arrest under section 14(1)(b) is by way of application for writ of habeas corpus. This route is rarely taken and, given the broad nature of the power of arrest and the fact that there may be no information available to the detainee and/or his/her solicitor in relation to specific offences, it may be that they may not be in a position to mount such a challenge.

In addition there is, in practice, little or no opportunity for an effective challenge to the 'reasonableness' of an arresting officer's grounds for arrest even where a person has been charged with a specific offence. It is now settled law following judgments of a Divisional Court of the High Court in Northern Ireland in Re Kerr and Re Valente and Baker that a defendant is not entitled to receive or request information, by cross examination or otherwise, relating to the detail of any charges against the him/her before the committal stage of criminal proceedings. Thus at a first and subsequent remands the defendant's representative is not in a position to challenge the evidence against his/her client and thus the legality of his/her detention.

Once remanded, authority has also established that there is no possibility of an application for a writ of habeas corpus (McAleenan's case). Further, while the defendant may apply for bail, if refused s/he will require a change of circumstances to renew the application which, in any event, does not challenge the legality of the arrest and detention but merely determines whether conditions exist into which the defendant may be released.

Thus the wide power of arrest as it is used in practice is not, nor can it be, subject to rigorous challenge at any stage before committal and perhaps even trial, and there are no safeguards which can be invoked where a defendant or his/her legal representatives have concerns about the adequacy or even existence of the evidence against him/her which grounded the arrest and charge. This state of affairs becomes even more alarming when the average length of time spent in custody

on remand for scheduled offences is noted. Government statistics show that the average custodial waiting time between remand and committal in the first quarter of 1998 was 25.2 weeks.

CAJ has become concerned that, in an extension of the abuse of the wide ranging power of arrest provided for in section 14(1)(b), there have been a number of instances where charges have been laid and people kept in custody for a significant period of time, the charges eventually being withdrawn before the committal stage of proceedings is reached.

The fact that effective remedies do not exist with which to challenge the power of arrest contained in section 14(1)(b) further add to the arguments against its use and to the potential for its abuse. Again the lack of effective remedies in relation to what we submit is in breach of Article 5 of the European Convention is in itself a breach of Article 13 of the Convention.

Detention

Current powers allow for the detention of a suspect for up to seven days without him/her being brought before a judicial authority. The consultation paper rightly notes that this power has been the subject of applications under the European Convention on Human Rights. The seven day detention power has further been criticised by the UN Human Rights Committee and Committee Against Torture as well as the European Committee for the Prevention of Torture. The retention of the power necessitates derogation from the European Convention and the International Covenant on Civil and Political Rights on the grounds that an emergency situation threatening the life of the nation is in existence.

The discussion of any provisions for detention in the proposed anti-terrorist legislation in the consultation paper seems to be premised on the assumption that there will be provision for extending detention of suspects beyond a standard time. Given that assumption two main issues are addressed. The first relates to the mechanism by which any initial period of detention is extended. The second to the length of time by which detention can be extended.

Despite the widespread criticism of the seven day detention power government continues to justify it. The consultation paper maintains that any permanent anti-terrorism legislation should contain a similar power. Views have been invited on whether the maximum period of detention without charge should remain at seven days or whether it should be reduced to four days as suggested by Lord Lloyd in his report. CAJ most strongly advocates the abolition of the seven day detention power. Once again we advocate that all cases be treated on an equal footing and that those principles relating to detention of 'ordinary' criminals be applied equally to cases which have, until now, fallen under the remit of the emergency legislation. It is our submission that in order for any new power to conform with international law it must have as a minimum standard those times outlined in the jurisprudence of the European Court of Human Rights. We respectfully agree with Lord Lloyd in his assessment of the situation and adopt his recommendation that the period of detention be set at an absolute maximum of four days.

In relation to the mechanism by which detention can be extended the consultation paper states that the government is fully aware of and appreciates the arguments against maintaining a separate regime as opposed to the 'ordinary' criminal law. However, a separate regime is, in the government's opinion, what is needed and, as such, it proposes that a new mechanism be established to extend detention in such cases. CAJ does not accept that a separate regime is needed

and believes that the process employed under PACE is adequate and the fairest method of dealing with all applications for extension of time.

The three options canvassed as possible future mechanisms for extending time are as follows:

- applications be heard ex parte and in camera by a person specially appointed to hear such applications

- an independent commission made up of legally qualified personnel be created to examine and determine applications for extensions of detention in the three jurisdictions of England and Wales, Scotland and Northern Ireland. An inter partes oral hearing is proposed with the detainee represented by a person of his/her own choice. However, the proceedings could move ex parte were sensitive material to be considered. In that case the material would be considered in the absence of the detainee and his/her legal representative but a security cleared special advocate would be appointed to test the strength of the police case for extension.

- different arrangements in the three jurisdictions. The government's stated preference for Northern Ireland being the commission outlined above. Such a move, would, the government believes, allow for the withdrawal of the derogations to the ECHR and ICCPR.

While it is difficult to assess the desirability or otherwise of any proposal in its abstract form, CAJ can make a number of observations on these proposals. First, it is debatable whether the arrangements proposed would sufficiently conform with the Convention to allow for a withdrawal of the derogation. Secondly we do not agree that such a development would necessarily remove the cloak of secrecy and potential for abuse which surrounds the present system. Were the government to introduce the option of a Commission with inter partes oral hearings there is no guarantee that the option of moving to ex parte hearings with 'security cleared special advocates' would be the exception rather than the rule. Indeed in such cases it is more likely than not that the information to be considered will be of a sensitive nature and, where the decision is to be made by the Commission itself it is more likely than not that police would attempt to have such hearings on an ex parte basis.

CAJ are further concerned at the use of the term 'security cleared special advocates'. First it is not clear what this means or who these people are or would be i.e. practitioners who have been 'cleared' in advance or government appointed and employed career 'security cleared special advocates'. In terms of the independence of the legal profession the second option is clearly undesirable and CAJ questions the need for security clearance for those who are officers of the Supreme Court of Northern Ireland.

Secondly this would be a fundamental breach of the detainee's right to legal representation of his/her choice. In addition, there is no indication that such an advocate will even have an opportunity to consult with the person who s/he is intended to represent. Fourthly, the suggestion implicit in the use of such a term and the proposition that there is a need for such advocates is that a detainee's representative of choice may not be desirable for security reasons and should not be permitted to be present in such circumstances. Such a suggestion is both unjustified by any evidence and alarming in the present climate.

In essence what the government is suggesting is the extension of the old system with additional safeguards. In fact it is our submission that were permanent legislation to be enacted along these lines it would be in breach of the ECHR. CAJ is further concerned that the safeguards proposed in

the consultation paper may be of little practical benefit and not the effective procedures that are required in such cases.

Any mechanism for the extension of detention should be transparent and inter partes. The detainee should be allowed representation of his/her choice and the proper opportunity to challenge any submissions mounted against him/her.

ACCESS TO A SOLICITOR

There has been a raft of case law in the recent past relating to a detained person's right to have immediate access to his/her solicitor when detained under the emergency legislation and whether or not s/he has the right to have the solicitor present at interview. CAJ welcomes the intention stated in the consultation paper to propose that access to legal advice will include a right to have a solicitor present during police interviews, a move that will bring the situation in Northern Ireland into line with Great Britain. However we are concerned that the paper further proposes the continuation of the regime that allows for deferral of access to a solicitor in the initial stages of detention.

CAJ notes that access to a solicitor while in police custody has been described as a fundamental right of the citizen by the English Court of Appeal in R v Samuel [1988] 2 All ER 135. The effect of the denial of access to a solicitor in the initial stages of detention has also been considered by the European Court of Human Rights in the case of John Murray v UK 22 EHRR 29 which decided that

> The concept of fairness enshrined in Article 6 [ECHR] requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. `To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 (at page 67)

The United Nations' Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment state, at Principle 17, that

> A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

Principle 18 states that

> A detained person shall be entitled to communicate and consult with his legal counsel.
>
> The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

> Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

The United Nations' Basic Principles on the Role of Lawyers note that

> Adequate protection of the human rights and fundamental freedoms to which all persons are entitled...requires that all persons have effective access to legal services provided by an independent legal profession

In addition, the UN's Special Rapporteur on the Independence of Judges and Lawyers, in his report on a visit to Northern Ireland in 1997 made reference to this issue when he stated that

> The right to immediate access of counsel should be respected, and therefore, section 14 of the PTA should be amended to prohibit deferral of access.

Despite these, and other expressions of concern from international bodies such as the UN Human Rights Committee and Committee Against Torture the power to defer a detainee's access to his/her solicitor for the initial 48 hours of detention remains in force and, the consultation paper states, is still needed. This is despite the fact that the paper concedes "that access to a solicitor is rarely denied in Great Britain – certainly the government is not aware of any case in the last 2 years in which the power to delay access has been exercised." In addition statistics show that the number of deferrals in Northern Ireland has decreased dramatically since 1995.

CAJ's understanding of the justification for such an invasion into the fundamental rights of the citizen is that a solicitor may, unconsciously or otherwise, pass on information to others which will impede the investigation or prevention of crime or the apprehension, prosecution or conviction of offenders. CAJ notes in particular that there is no evidence that the fears expressed by the government and police in their justification of the existence of the powers have ever been realised. CAJ remains concerned the fears expressed reflect on the integrity of lawyers who are routinely involved in representing people who have been arrested and detained under the emergency legislation.

In addition, CAJ further points to the oppressive nature of detention in such conditions. It is our submission that the quality of the evidence obtained in this way must often be suspect. Indeed we submit that its use has in the past and may in the future adversely reflect on the entire criminal justice system.

POWERS TO STOP, QUESTION AND SEARCH

CAJ has had many concerns in relation to these powers, in particular that in their present form they were open to abuse. CAJ undertook a major research project on this very issue in 1994. 'Its Part of Life Here...' found (at page 198)

> "evidence of widespread and systematic harassment by the security forces in Northern Ireland. This evidence was reinforced by our supplementary qualitative research. Overall the research highlighted the specific problem of harassment of young people. It also suggested that there are continuing concerns about the prevalence of security force harassment in the Catholic community. Moreover

> the research identified increasing complaint of harassment in Protestant areas. Our research also identified a serious, if largely unacknowledged, problem of sexist harassment throughout the security forces. There were also problems with the harassment of other communities, particularly the minority ethnic and Gay and Lesbian communities. In short the research suggests that there is a very serious problem of harassment from the security forces in Northern Ireland"

Again, a number of pieces of legislation govern the various powers to stop, question and search that exist. The PACE (NI) Order 1989 empowers police officers to stop, detain and search any person if they have reasonable grounds for suspecting that they will find stolen or prohibited articles. Any such item may be seized and need not be returned. Procedurally, the officer must indicate the purpose of the proposed search and the reasons for making it. The subject of the search is also entitled to a written record of the search if s/he requests it within the next year.

Under section 20(6) of the Emergency Provisions Act any police officer can stop any person in any public place and search him/her for explosives, firearms, ammunition or wireless transmitters. Failure to stop when required to do so is an offence punishable by a fine of up to £2000.

Section 15(3) of the Prevention of Terrorism Act allows a constable to stop and search anyone whom s/he has the power to arrest under section 14 of the Act.

The same objections apply to the section 15 power as apply to the power to arrest outlined above. The government submits that "given the continuing threat to the United Kingdom and its interests from international and other forms of terrorism, the government believes that the...powers ...are still necessary". No further or more detailed explanation or justification for the formation of this view is provided. In our submission, the powers contained in PACE are adequate to cover any possible requirement to search that may arise and that more draconian powers, such as those contained in the EPA and PTA should be specifically justified. We apply the same arguments to the government's proposals to extend certain other powers to Northern Ireland. Again it is our submission that the right to move freely around the jurisdiction is a fundamental one and, with all such rights, it is imperative that it is curbed only to the extent which is absolutely necessary. In our respectful submission many of the proposals in this consultation paper seek to retain very wide powers without specific justification leaving the citizen with a set of very sharply curtailed basic rights.

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