

# 'EMERGENCY' JUSTICE

## The emergence of a second criminal justice system in Northern Ireland

### Introduction

The criminal justice system in Northern Ireland has always been closely modelled on that prevailing in England and Wales. For the most part, changes in the latter have been imported, sooner or later, into the former. Although there have been occasions when Northern Ireland has asserted its own distinct identity, these have never been sufficient to break the strong symmetry between the two jurisdictions in criminal justice matters. It is submitted, however, that this symmetry has been seriously distorted by the emergence, in Northern Ireland, of a second criminal justice process based on the emergency legislation.

Normally, it would be a contradiction in terms to talk about a criminal process based on emergency legislation. The essence of emergency legislation is that it is aimed at countering a temporary state of affairs which poses a serious threat to the stability of the State. It can impact upon individual elements of the criminal justice system by, for example, introducing sweeping police powers and/or restrictions on the right to trial in a court of law. However, such special measures usually lack the coherence and comprehensiveness necessary to qualify as a distinct criminal process. Even if they did, it is unlikely that they would remain in force for long enough to acquire the necessary recognition. Nevertheless, there are three features of the Northern Irish emergency legislation which suggest that it has managed to establish a second criminal process alongside the ordinary process.

### A Parallel criminal process

First, the emergency measures impact upon each stage of traditional criminal procedure in a manner which distinguishes them, both individually and collectively, from their counterparts in the ordinary law. At the investigation stage, for example, the police enjoy a whole range of summary powers which are much broader than those to which they are accustomed in the ordinary criminal process. These include powers to stop and question persons without suspi-

cion, and to arrest on reasonable suspicion of involvement in terrorism. Persons arrested under this power can be held in police custody without charge for seven days. During this period the rights of access to a solicitor and notification of relatives are severely limited. Where charges are preferred the prosecution can choose from offences newly created by the emergency legislation in addition to many offences already known to the law. These offences are listed in a schedule to the legislation, and are referred to as 'scheduled' offences.

An accused charged with a scheduled offence will be processed through the 'Diplock' Court system instead of the ordinary judicial process. The effect is profound. Remand periods can be up to 28 days at a time, and bail can be granted only by a High Court judge. The trial proper will be before a single judge sitting without a jury. The rules on the admissibility of evidence applicable to these proceedings have been relaxed to facilitate the use of confessions obtained under the special police interrogation regime. In addition, the burden of proof has been reversed for specific elements

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of some offences. At the post-conviction stage the accused enjoys an absolute right of appeal, in contrast with the ordinary process in which the accused must seek leave to appeal. Finally, where the accused is sentenced to imprisonment and retains his paramilitary links, he/she will be subject to a prison regime which differs in several respects from that applicable to ordinary criminals.

Clearly, an individual's passage through the criminal process can be affected by the emergency measures at every step of the way. The combined effect of these special provisions ensures that the accused who is routed through the 'emergency' criminal process will suffer a very different experience from the accused who is routed through the ordinary process. With the possible exception of the appeal provision, the ordinary process makes it more difficult for the State to hold on to the suspect the further he/she travels along the system,

whereas the 'emergency' process makes it progressively more difficult for the suspect to escape. This is reflected in a significantly lower rate of acquittal in the special 'Diplock' Court than in its ordinary counterpart, the Crown Court.<sup>1</sup>

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The fact that the 'emergency' process offers such a distinct route through the criminal justice system, in parallel to the ordinary route, is a significant indication that it may qualify as a separate process in its own right.

### Ordinary criminal jurisdiction

The second factor concerns the broad scope of the emergency legislation. It was introduced ostensibly for the narrow purpose of enabling the State to use the criminal justice system against organised paramilitary violence. From the outset, however, the legislation always had the potential to be applied across a much broader spectrum. For example, the police power to arrest on reasonable suspicion of involvement in terrorism has always had a substantial application beyond persons engaged in organised paramilitary violence. The fact that it is premised on a suspicion of involvement in terrorism as opposed to the commission of a specific criminal offence affords the police considerable leeway. They have taken advantage of this to arrest persons for no other reason than that they identify with certain political parties, live in particular localities, associate with 'known' terrorists or are related to such individuals. This liberal use of the power is reflected in the fact that over the past two decades the charging rate for such arrests has fluctuated between ten and twenty percent.

The jurisdiction of the 'Diplock' Court confirms that the 'emergency' procedure caters for a wide range of 'ordinary' criminal activity. Many of the scheduled offences such as: murder, manslaughter, wounding with intent and robbery are often committed in the course of ordinary criminal activity. Each person charged with any of these scheduled offences will be tried automatically in the 'Diplock' court unless the attor-

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ney-general de-schedules the offence in his or her case, in which event the accused will be re-routed through the ordinary courts. However, some scheduled offences, such as robbery with firearms, cannot be de-scheduled at all. Research in the early eighties revealed that almost 40% of the workload of the 'Diplock' court actually comprised robberies committed for 'ordinary' criminal purposes.<sup>2</sup> This 'ordinary' criminal jurisdiction is set to increase as a result of the recent inclusion of new scheduled offences such as re-opening border roads closed by the State and racketeering. While such offences undoubtedly are committed in pursuit of paramilitary objectives, they can also be committed for purposes totally unrelated to any paramilitary design. Racketeering, in particular, is established as a standard criminal offence in many other jurisdictions. By introducing it into Northern Ireland through the medium of the emergency legislation the State has given a strong signal that the 'emergency' criminal justice apparatus is appropriate for certain kinds of offence irrespective of the context in which they are committed. This capacity to cope with an increasing range of 'ordinary' crimes suggests that the emergency measures are maturing into a substantive criminal process capable of competing with the ordinary process.

## Longevity

The third factor relevant to this argument is the duration for which the emergency legislation has been in force. It was introduced initially for one year in 1973, but could be continued by order for one year at a time. That, of course, is what one would expect of exceptional measures which had been introduced and justified on the basis of an emergency. However, in 1978 it was re-enacted, incorporating intervening amendments, subject to a renewal requirement of six months at a time. It was renewed without a break until 1987 when it was heavily amended to take account of many of the recommendations made by Judge Baker in his review of the legislation. This amending legislation was given a lifespan of five years. Finally, both the 1978 and 1987 Acts have been replaced by the 1991 Act which is also to remain in force for a full five years. This 1991 version is much longer, more complex and sophisticated than any of its predecessors. There is every reason to believe that

1996 will not see the end of it.

The passage of time is not usually sufficient to elevate emergency criminal justice measures into an established criminal justice process. If, however, these measures offer an alternative route through the criminal justice system, parallel to the ordinary process, and if they have a criminal jurisdiction beyond that defined by the emergency, longevity will be an instrumental factor elevating them into a distinct criminal process.

## Conclusion

The emergence of a second criminal process based on the emergency legislation has significant implications for any attempt to draw comparisons between the operation of the 'ordinary' criminal justice process in Northern Ireland with that in other parts of the United Kingdom. Although the 'ordinary' process

continues to function, it must be recognised that some of its workload has been stolen by this alternative process. As this trend continues, increasing care will have to be taken in the interpretation of the criminal justice statistics coming out of Northern Ireland.

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## References

- 1 B Dickson Northern Ireland's Emergency Legislation-The Wrong Medicine? Public Law 1992, 592 at 607-610.
- 2 D.P.J. Walsh The Use and Abuse of Emergency Legislation in Northern Ireland (London: Cobden Trust, 1983) at pp. 80-82. Also, Dickson supra. at 604-606.

## Deaths due to the Security Situation 1969-1992

Year	RUC	RUCR	Army	UDR/ R. Irish*	Civilians†	Totals
1969	1	-	-	-	12	13
1970	2	-	-	-	23	25
1971	11	-	43	5	115	174
1972	14	3	103	26	321	467
1973	10	3	58	8	171	250
1974	12	3	28	7	166	216
1975	7	4	14	6	216	247
1976	13	10	14	15	245	297
1977	8	6	15	14	69	112
1978	4	6	14	7	50	81
1979	9	5	38	10	51	113
1980	3	6	8	9	50	76
1981	13	8	10	13	57	101
1982	8	4	21	7	57	97
1983	9	9	5	10	44	77
1984	7	2	9	10	36	64
1985	14	9	2	4	25	54
1986	10	2	4	8	37	61
1987	9	7	3	8	66	93
1988	4	2	21	12	54	93
1989	7	2	12	2	39	62
1990	7	5	7	8	49	76
1991	5	1	5	8	75	94
1992	2	1	4	2	76	85
<b>Totals</b>	<b>189</b>	<b>98</b>	<b>438</b>	<b>199</b>	<b>2,104</b>	<b>3,028</b>

† includes suspected terrorists.

\* On the 1.7.92 the Royal Irish Rangers and the Ulster Defence Regiment were amalgamated to form the Royal Irish Regiment. The 1992 figure relates to Royal Irish Regiment (Home Service) personnel only.

Source: RUC Chief Constable's Annual Report 1992