

SIM SPECIAL



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Netherlands Institute of Human Rights
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l'Homme

The Diplock Courts in Northern Ireland: A Fair Trial?

An analysis of the law, based on a study
commissioned by Amnesty International

by Douwe Korff

SIM Special No. 3



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The following analysis of the non-jury ("Diplock") courts in Northern Ireland was prepared in 1982 by Dutch lawyer, Douwe Korff, as a commissioned study for Amnesty International.

The text reproduced here has been shortened slightly (for reasons of economy). Amnesty International submitted the full text of the study in 1983 to an official review, then in progress, of the legislation and procedures governing such courts, as background to a recommendation that the organization's concerns be taken into account.

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Preface

Since 1973, special, non-jury courts have been in operation in Northern Ireland to try persons suspected of terrorist offences; the so-called "Diplock" courts, named after the judge who headed the Commission which, in 1972 recommended that such courts be set up.

In 1982, Amnesty International (AI) had the law and procedures attending trials in the "Diplock" courts analysed by a Dutch lawyer, Douwe Korff*. The organization submitted this analysis to the UK government in December 1982 and to a government-appointed inquiry in August 1983. The analysis is here made public in full for the first time.

SIM has added to the study a brief Background Note concerning the emergency in Northern Ireland generally, and also providing information on certain developments since the writing of the analysis. An external AI Circular of February 1984, setting out the organization's continuing concerns regarding the criminal justice system in Northern Ireland, is attached as an appendix.

The AI analysis describes the impact of "emergency legislation" on the administration of justice in Northern Ireland in respect of terrorist suspects, having regard to both pre-trial proceedings and the trial stage. It does so by comparing the special provisions introduced by this "emergency legislation" and their practice with the ordinary rules and practice concerning criminal proceedings. Its author gives a detailed description of both systems, based upon legislation, case-law and legal opinion. Special attention is paid to the broad powers of arrest and detention by the police and the army; the rules pertaining to the questioning of suspects; pre-trial investigation of complaints; the trial itself in the "Diplock courts" as compared with ordinary (jury-) proceedings; the admissibility and weighing of evidence; and the reliability of confessions.

On the basis of this analysis the assessment is made that the effect of the "emergency legislation" on the administration of criminal justice in Northern Ireland means in many respects a departure from certain minimum requirements of the English system of criminal justice as identified, *inter alia*, by the Royal Commission on Criminal Procedure, and in some respects a departure from international standards for a fair trial; the latter especially where the practice of the pre-trial investigations and the impact thereof on the attitude of the judges is concerned, as well as the freedom from self-incrimination and the presumption of innocence.

Dissemination of the analysis and its conclusions may be of great use, both to those who are, in one way or another, involved in the administration of criminal justice in Northern Ireland, and to all those who share our concern for a fair administration of justice all over the world.

Professor P. van Dijk

Background note

N.B. This note is provided by SIM for the convenience of the general reader, at whom the analysis prepared for Amnesty International was not aimed. It is not part of that analysis, nor can it be regarded as reflecting that organization's views.

Emergency legislation has been a permanent feature of the law in Northern Ireland from its foundation; it was again invoked by the Northern Irish government to introduce internment in 1971. The British government, having suspended the Northern Irish government in March 1972, to replace it with "direct rule" from London, retained internment.

However, in September 1972 it appointed a commission, chaired by Lord Diplock, to consider

"what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organizations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities..." (*Diplock Report*, para 1)

The Diplock Commission treated its task as urgent. Having met for the first time on 20 October 1972, its report could already be presented to Parliament in December of that year. Yet it dealt with a vast topic, covering all aspects of the criminal justice process from arrest, through detention and interrogation; bail; the mode and conduct of the trial; the rules of evidence; to special measures to deal with young offenders. Based on the recommendations of the commission, the Northern Ireland (Emergency Provisions) Act 1973 (consolidated, with some amendments, in the present 1978 version of the Act) created a, *de facto*, parallel system of criminal justice applicable to terrorism-related offences. Persons suspected of involvement in terrorism can be arrested on less clear suspicion than can persons suspected of ordinary crimes; they can be detained longer and subjected to much more forceful questioning; they are less likely to be granted bail; have less opportunity to challenge the prosecution case in the pre-trial stage; and, most important, are denied their right to a jury trial and tried instead in special courts before a single judge, with different rules of evidence, in particular as regards confessions obtained as a result of "oppressive" questioning. At the same time, legal safeguards in the system are reduced, as are judicial supervision and control over the manner in which the security forces use their new, or extended, powers. These are the matters addressed in the attached analysis.

Lord Diplock, in making his recommendations had envisaged the non-jury courts to operate auxiliary to internment, and this was the initial situation. (see the *Summary of Conclusions* in the *Diplock Report*, para 7, under a-e). After the "Diplock" courts had been operating for just over a year, in 1974,

the Gardiner Committee reviewed "in the context of civil liberties and human rights" the anti-terrorist measures in Northern Ireland. The committee concluded that detention without trial (as internment had been re-named) could not remain as a long-term policy; although the committee did not feel able to recommend the immediate abolition of detention without trial, as a result of its consideration, detention without trial was phased out in the course of 1975 and has not been used since.

The committee also reviewed the operation of the "Diplock" courts during this first year of their existence, remarking:

"But for the fact that there is no jury, the non-jury courts are ordinary courts, sitting in public with variations in the law of evidence and procedure which, on the whole, are not major ones". (*Gardiner Report*, para 24).

The committee discussed the changed rules of evidence which allowed convictions in the "Diplock" courts to be based on "involuntary" confessions, and noted that the judges in the "Diplock" courts had retained a discretion to exclude confessions, even when legally admissible, if not to exclude them "would operate unfairly against the accused". The committee observed:

"We have been told that [the change in the law of evidence regarding confessions] has proved procedurally convenient and satisfactory; we have heard nothing to indicate that it has caused any miscarriage of justice; and, so long as the judicial discretion remains, we think the chances of [this change in the law] producing an unjust trial or an unjust verdict are remote." (*Gardiner Report*, para 50).

The committee therefore merely recommended that the existence of the judicial discretion to exclude evidence be confirmed by statute.

There were indeed few complaints about the outcome of trials in the "Diplock" courts at the time. However, two factors affected the situation shortly after.

First of all, while the committee was completing its report on the emergency legislation, the British Parliament passed the Prevention of Terrorism Act, granting police powers of arrest and detention for interrogation lasting up to a week. Although the committee stated that it had reviewed its findings in the light of the provisions of the Prevention of Terrorism Act, the effect of prolonged interrogation on the reliability of confessions - which subsequently became the crucial issue in the "Diplock" courts - was not considered.

Secondly, and probably even more important, the committee did not consider the effect of the abolition of detention without trial on the operation of the courts. For detention without trial to be ordered by the Executive, evidence had sufficed which could not stand up in a court of law: anonymous evidence by witnesses who were too afraid of reprisals by paramilitary organizations to testify in open court; intelligence evidence which, if disclosed, would compromise the source; hearsay evidence; or evidence by paid informers who could be discredited in cross-examination even if they had been

willing to testify in court. After detention without trial ended, people against whom the security forces had obtained such evidence, but no evidence which could be produced in court, could not, in the words of Lord Diplock's commission, be "brought to book" - unless they confessed during interrogation.

Thus, the ending of detention without trial, much though it was to be welcomed in itself, brought about a situation in which the obtaining of confessions is of crucial importance to the security forces in their efforts to "bring to book" suspected terrorists. This remains the case to this day; and it is with this context in mind that AI's analysis should be read.

In 1976 and 1977 the rules, regulations and safeguards surrounding interrogation proved ineffective to prevent the ill-treatment of suspects in police custody. Amnesty International, in its *Report of a Mission to Northern Ireland (28 March - 6 December 1977)*, published in 1978, concluded that such ill-treatment was sufficiently wide-spread to warrant a public inquiry to be held. The committee of inquiry into police interrogation procedures, chaired by Bennett J., which was subsequently appointed by the British government, confirmed that there were cases "in which injuries, whatever their precise cause, were not self-inflicted and were sustained in police custody". (*Bennett Report*, para 163).

In its 1978 report, AI had already raised the question of the admissibility in evidence of statements by persons subjected to interrogation in police stations in Northern Ireland, stating:

"The reduction of procedural safeguards regarding the admissibility of statements, the extension of the discretion of the single judge and the absence of a jury enhance the danger that statements obtained by maltreatment of suspects will be used as evidence in court". (p. 67)

However, the terms of the announcement of the appointment of the Bennett Committee specifically excluded from the scope of its inquiry another examination of the change in the law of evidence regarding confessions, or of the emergency legislation generally.

Apart from the Diplock-, Gardiner-, and Bennett- reports, AI's analysis also draws on the Shackleton- report, which reviewed the operation of the Prevention of Terrorism Act; and on the report by the Royal Commission on Criminal Procedure and its Research Studies; as well as on reports of academic research into the "Diplock" courts, carried out at Queen's University Belfast; and on other publications.

Finally, the AI analysis concerns mainly the risk of convicting people accused of serious (terrorist) crimes on the sole basis of uncorroborated confessions (allegedly) made during police interrogation, but contested by the accused in court as either never having been made or as false and having been obtained under duress. Although the practice of convicting accused on the basis of such confessions (which accounted for the overwhelming majority of contested cases at the time of writing of the analysis) continues to be widespread, a new feature of prosecution practice has arisen since. Apart from prosecutions based on (alleged) confessions, a large number of people have

been charged since early 1983 on the sole basis of testimony of former accomplices of the accused, so-called "supergrasses" (from the English slang word for informer, "grass").

Amnesty International's concerns in this respect are set out in a circular of 17 February 1984, attached as an appendix. Suffice it to say here that the issue of "supergrass" evidence in so far shows parallels to the issue of confession evidence as both regard the inherent lack of reliability of statements which are not made "voluntarily": confessions used in the "Diplock" courts are obtained as a result of strong psychological pressure during interrogation; "supergrass" testimony as a result of promises (of freedom from prosecution, or low sentences even for killings, and/or of money and a new identity). Without discussing the matter further here (for details, see *Supergrass, The Use of Accomplices Evidence in Northern Ireland*, Cobden Trust, London, 1984) it may be noted that the Northern Ireland Court of Appeal has recently ruled that with regard to "supergrass" testimony, corroboration of a "clear and compelling kind" is required before a conviction may be based on it. (ruling in the *McCormick*-case, Guardian 13 January 1984). This would appear to underline the conclusion reached in AI's analysis with regard to confession evidence: that confessions obtained as a result of oppressive questioning are *prima facie* unreliable and should not be a basis for conviction without corroboration.

No such conclusions are drawn, however, in the report by Sir George Baker, made public in April 1984. The English High Court judge, who was appointed by the British government to review the Northern Irish (Emergency Provision) Act on which the "Diplock" court system is based, and to whom Amnesty International submitted its analysis, said that a concrete case of wrongful conviction at trial had nowhere been presented to him. He therefore recommended only a few, relatively insignificant changes in "Diplock" court proceedings, mainly: that certain minor or non-terrorist offences be tried in the ordinary courts; that the number of defendants in joint "supergrass" cases be reduced; that police powers of arrest be (further) simplified and detention on the sole authority of the police be reduced from 72 to 48 hours (while retaining the possibility of prolonged detention of up to seven days on the authority of the Secretary of State); and that delays in bringing people to trial be reduced.

Sir George rejected arguments for a return to trial by jury or for trials in the "Diplock" courts to be presided over by a plurality of judges, recommending in stead that the present system be retained of such trials to be conducted by a single judge acting also as jury. He defended the use of "supergrasses".

Although the use of tape-recorders in police offices should, in Sir George's view, be considered, he made no firm recommendations in this respect. Nor are the rules on "admissibility" of confessions to be altered, or the rule that confessions may form the sole basis for a conviction without any further corroborative evidence.

Again without going into detail, it should be noted that Sir George's in-

quiry appears to have failed to address the crucial issue concerning the fairness of proceedings linked with the "Diplock" courts: the reliability of confessions obtained as a result of "forceful", "decisive" and "persistent" interrogation. The question that should be asked in this regard is not whether any people convicted in the "Diplock" courts can be shown to have been wrongly convicted and innocent, but whether it can be confidently said that the present rules and proceedings assure that people are only convicted if their guilt of the crimes of which they are accused is established beyond reasonable doubt. The fact that Sir George relies on the absence of proven wrongful convictions as an argument against change lends support to the conclusion reached in Amnesty International's analysis, that there are doubts about the adherence in the "Diplock" court system to the presumption of innocence in all cases.

Amnesty International's analysis therefore remains as relevant today as it was when it was written in 1982.

List of references

(with the abbreviated titles used in the analysis)

- Diplock Report:** Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, London, HMSO, December 1972, Cmnd. 5185.
- Gardiner Report:** Report of the Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland, London, HMSO, January 1975, Cmnd. 5847.
- Fisher Report:** Report of an inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Degg Road, London SE 6, London, HMSO, December 1977.
- Shackleton Report:** Review of the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976 by the Rt. Hon. Lord Shackleton, KG, OBE, London, HMSO, August 1978, Cmnd. 7324.
- Bennett Report:** Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland, London, HMSO, March 1979, Cmnd. 7497.
- RCCP Report:** The Royal Commission on Criminal Procedure: Report, London, HMSO, January 1981, Cmnd 8092.
with which was published:
Royal Commission on Criminal Procedure: Police Interrogation: The Psychological Approach. A Case Study of Current Practice. Research Studies No. 1 and No. 2, by Barrie Irving and Linden Hilgendorf, London, HMSO, 1980.
- Ten Years On:** Ten Years on in Northern Ireland: the legal control of political violence, by Kevin Boyle, Tom

Hadden and Paddy Hillyard, London, Cobden Trust, 1980.
Ten Years On is a follow-up study to:
Law and State: the case of Northern Ireland, by the same authors, Martin Robertson, 1975.

- Archbold:** Criminal Pleading, Evidence and Practice, 40th ed., London, 1979.
- ALL E R:** All England Reports (Law Reports)
- Cr App R:** Criminal Appeal Report (Law Reports)
- NI:** Northern Ireland Reports (Law Reports)

Report of an Amnesty International Mission to Northern Ireland (28 November - 6 December 1977), AI Index EUR 45/01/78, London, Amnesty International, 1978.

Amnesty International Report 1981 (Amnesty International Annual Report), London, Amnesty International, 1982.

The Prevention of Terrorism Act: the case for repeal, by Catherine Scorer and Patricia Hewitt, London, National Council for Civil Liberties, 1981.

Beating the terrorists? Interrogation in Omagh, Gough and Castlereagh, by Peter Taylor, Penguin Books, 1980.

Since the writing of the analysis the following have been published:

- Baker Report:** Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978 by the Rt Honourable Sir George Baker OBE, HMSO, April 1984, cmnd. 9222.

Supergrass, the use of accomplice evidence in Northern Ireland, Cobden Trust, London, 1984.

Introduction

This study contains an analysis of the law relating to trials in the non-jury "Diplock" courts in Northern Ireland - the courts set up in October 1973 on the basis of recommendations made by Lord Diplock. The courts have jurisdiction in cases of "scheduled offences", i.e. offences listed in a schedule (schedule 4) of the Northern Ireland (Emergency Provisions) Act, which established the courts. In the words of Lord Diplock, "scheduled offences" are "those crimes which are commonly committed at the present time by members of terrorist organizations".¹

Lord Gardiner, in his review of the anti-terrorist measures in Northern Ireland in 1974, said that,

"But for the fact that there is no jury, the non-jury courts are ordinary courts, sitting in public with variations in the law of evidence and procedure which, on the whole, are not major ones" (*Gardiner Report*, para 24).

It will be shown, however, that the emergency legislation has affected all stages of the criminal justice process, and some of these stages seriously. Defendants in the "Diplock" courts who contest their case may be convicted on the basis of confessions which could not form the basis of a conviction under ordinary rules. Often specific changes in legal provisions have an effect far beyond the immediate part of the law in which they are contained. This analysis therefore attempts to put such provisions, with their changes, in the context of the whole criminal justice system, to show these effects. It does so with reference to the ordinary criminal justice process as it applies in Northern Ireland. This system is broadly the same as the system in England, from which it is taken and on which, in many respects, it relies. Reference is therefore often made to English judicial precedents which apply fully to the Northern Irish system.

The English/Northern Irish system of criminal justice is an accusatorial, common-law system. The emphasis in the pre-trial stage is on establishing whether there is a case against the accused, rather than on examining all aspects of the case (as in inquisitorial systems). The powers of the police to detain suspects for questioning, which in ordinary circumstances are relatively limited, must be seen in this light, and in the light of the historical development of questioning by the police in English law: the police, who are responsible both for the investigation of crime and for the preparation of the prosecution, are independent from the executive as well as from the courts, and are not subject to independent, contemporaneous supervision. The impact of changes in the law on pre-trial procedures, including extended police powers, are discussed in Part I of the analysis.

The emphasis in the English criminal justice system as a whole is on the trial, in which prosecution and defence are meticulously ensured "equality of

arms" in presenting their case to the tribunal of fact. The setting by the judge of the legal framework for the "weighing" of evidence by the tribunal of fact is a crucial element in attaining fairness in English criminal proceedings. The effects of emergency legislation on the trial are discussed in Part II of the analysis. Part II also contains brief discussions of the possibilities, nature, and scope of appellate review of judgments in the "Diplock" courts, and of the complaints machinery.

In Part III the crucial issue in the "Diplock" courts, as it has emerged in the earlier parts, is singled out and discussed: the reliability of confessions obtained as a result of "forceful", "persistent" and "decisive" interrogation as the sole basis for convictions. The practice of the "Diplock" courts is contrasted with considerations brought up in the most recent authoritative, official review of English criminal procedure, carried out by the Royal Commission on Criminal Procedure on behalf of the British Government. The Royal Commission, in formulating its proposals for ensuring the reliability of confessions, and for evidentiary rules linked with the question of reliability, had before it the results of a study of the psychological effects of interrogation, to which reference is also made in this part of the analysis. Finally, the proceedings in the "Diplock" courts are assessed under international norms which set minimum standards for the fairness of trials.

PART I The pre-trial inquiries and proceedings

The determination of guilt or innocence of an accused on a criminal charge in a court of law cannot be seen separately from the inquiries and proceedings prior to the trial, since they both affect the fairness of the trial and the reliability of its outcome. No court of law can fairly assess the case against an accused unless in the pre-trial stage there are safeguards concerning the manner in which evidence is obtained against him. More than to any other part of the proceedings, this applies to the manner in which statements by the accused, in particular self-incriminating statements and confessions, are obtained in custody.

International attention on methods of interrogation by the security forces in Northern Ireland in the past decade has focussed on methods of interrogation amounting to torture and inhuman and degrading treatment, used by the army in 1971, and on physical maltreatment in the course of police questioning, widespread in 1976 and 1977.

The fairness and reliability of convictions in criminal trials (and with it the integrity of the entire criminal justice system) is not, however, ensured by the mere absence of physical maltreatment in the course of questioning. A higher norm is set both by basic requirements of the English system of criminal justice (which applies also in Northern Ireland) and by international instruments. These norms are further discussed in Part III of this analysis; in the meantime, this analysis of the law concerns, not only the extent to which the law and other, subordinate, rules guarantee the absence of physical maltreatment of persons detained for questioning, but beyond that, the extent to which these rules seek to ensure the *reliability* of evidence (confessions) obtained as a result of such questioning. Chapter 1 analyses the legal basis for arrest and detention for questioning under the emergency legislation, as compared with the ordinary law. It gives particular attention to the legal constraints on, and the extent of judicial control over, the exercise of emergency powers of arrest and detention, since the absence of safeguards against the arbitrary use of these powers in itself can lead to abuses affecting the criminal justice process as a whole. Chapter 2 analyses the framework for and rules relating to interrogation; and the manner in which the implementation of the rules is supervised. Chapter 3 deals with a number of other changes in the law regarding the pre-trial stage of the "Diplock" court system. The law regarding the trial in those courts itself is discussed in the second part of this analysis.

Chapter 1 The legal basis for arrest and detention for questioning

- (i) Ordinary Powers of Arrest
- (ii) Common Law Essentials for a Valid Arrest
- (iii) Detention for Questioning
- (iv) Special Powers of Arrest and Detention
- (v) Legal Constraints and Judicial Control (in re Martin Lynch)
- (vi) Special Powers of Arrest and Detention by the Army
- (vii) Conclusions

(i) Ordinary Powers of Arrest

The Royal Commission on Criminal Procedure observed:

"There is a lack of clarity and an uneasy and confused mixture of common law and statutory powers of arrest, the latter having grown piecemeal and without any consistent rationale" (*RCCP Report*, para 3.68). But although "(t)he law about the circumstances in which someone can be arrested ... is complicated ... in general only someone who has been seen to commit an offence or who can reasonably be suspected of committing an offence can be arrested" (*Ibid.*, para 3.70).

Briefly, the common law confers powers of arrest for dealing with breaches of the peace. Otherwise, arrests must be by virtue of a warrant issued by a magistrate, or without warrant on the basis of a specific statutory provision. The most commonly used statutory provisions for Northern Ireland are contained in section 2 of the Criminal Law Act (Northern Ireland) 1967 (the Northern Irish equivalent of the Criminal Law Act 1967, concerning England and Wales). These provisions confirm the above general statement about the law. In the words of Bennett J.:

"The two points to be noted about these provisions are, first, that the power of arrest arises only in respect of a specific offence either committed or suspected to have been committed or about to be committed, and, second, that the re-iteration of the requirement of 'reasonable cause' provides an objective element and pre-condition to the exercise of the power of arrest." *Bennett Report*, para 65).

It is therefore a fundamental principle of English law that people not suspected of a specific offence cannot be forced by means of arrest to assist the police, even if this would be helpful to the inquiries; they have a social and

moral duty to assist the police, but not a legal one. This principle is directly linked to the traditional view that the police should and is policing by consent (*RCCP Report*, para 3.90).

(ii) Common Law Essentials for a Valid Arrest

Where an arrest is made on a warrant, the law requires that the warrant should state the charge on which the arrest is made. The courts have developed a similar safeguard against arbitrary arrests without warrant: even when lawfully possible, for an arrest without warrant to be valid, certain 'common-law essentials' have to be met. These have been developed in the case of *Christie and another v Leachinsky* (1947) 1 All ER 567, and require that a person who is being arrested be told, at the time of the arrest, that he is being arrested and the *factual* basis for the suspicion on which the arrest is based. Lord Simons, delivering the judgement, said:

"First, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? It is to be remembered that the right of the constable in or out of uniform is, except for a circumstance irrelevant to the present discussion, the same as that of every other citizen. Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind unquestioning obedience is the law of tyrants and of slaves. It does not yet flourish on English soil. I would, therefore, submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested, and then, since the affairs of life seldom admit an absolute standard or an unqualified proposition, see whether any qualification is of necessity imposed on it. It is not an essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment, but this, and this only, is the qualification which I would impose on the general proposition. It leaves untouched the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the act for which he is arrested. ... **This is, I think, the fundamental principle, that a man is entitled to know what, in the apt words of Lawrence L. J are 'the facts alleged to constitute crime on his part'**" (*emphasis added*).

(iii) Detention for Questioning

Many of the legal principles and rules governing the criminal justice process stem from an earlier period (before the middle of the 19th century) when the law did not envisage questioning of suspects by the police. Arrests used to be: "the first step in a criminal proceeding against a suspected person on a charge which was supposed to be *judicially investigated*" (Scott, L.J. in *Christie v Leachinsky*; *emphasis added*).

In time, however, the investigative functions of the magistrates (other than at committal proceedings) disappeared. With the emergence of a modern police force, questioning by the police of arrested suspects developed in the course of this century within what might be called the legal vacuum between the moment when the minimum requirement for a lawful arrest (reasonable suspicion of involvement in a specific offence) exists, and the emergence (possibly as a result of questioning) of "enough evidence to prefer a charge" against the suspect, when the latter must be charged "without delay" and after which, as a rule, no further questioning is allowed (Principle (d) prefaced to, and Rule III (b) of the Judges' Rules, discussed below). On this rather narrow legal basis, the courts sanctioned questioning of suspects in detention by the police in order to dispel or confirm such reasonable suspicion as gave rise to the arrest (cf. Lord Devlin's opinion in the case of *Shaban Bin Hussein v Chong Fook Kam* (1969) 3 All ER 1626). The practice of police questioning has been further extended by means of the legal fiction that many people taken ("invited") to the police station are voluntarily "helping the police in their inquiries"; they are supposed not to be arrested even if they may be under the (often not unreasonable) impression that they are not free to leave.

In England and Wales, the ambiguous situation is further compounded by the uncertainty and lack of clarity of the law on the permitted period for which a suspect may be kept in police custody after arrest without being charged or brought before a court. In that jurisdiction persons arrested on suspicion of a "serious" offence must be brought before a magistrate's court "as soon as practicable"; those suspected of any other offence, within 24 hours (unless released earlier). The words "serious" and "as soon as practicable" have not been clearly defined (in practice). In the view of the Royal Commission on Criminal Procedure this "gives flexibility but produces uncertainty both for the police and the suspect" (para 3.98). In Northern Ireland, the requirement generally is that arrested persons must be brought before a magistrate within 48 hours.

(iv) Special Powers of Arrest and Detention

Special powers of arrest and detention are conferred upon the Northern Ireland police (the Royal Ulster Constabulary, RUC) by virtue of two statutes, the current versions of which are the Northern Ireland (Emergency Provisions) Act 1978 and the Prevention of Terrorism (Temporary Provisions) Act 1976. The Emergency Provisions Act also confers powers of arrest on members of the security forces; this will be discussed separately below. The police powers of arrest and detention under these two Acts are usually discussed together, but in view of their rather different origin, it is useful to consider them separately.

The *Northern Ireland (Emergency Provisions) Act 1973* (consolidated in the current 1978 Act) was based on the Diplock Report, which recommended the setting up of special courts (the "Diplock Courts", discussed below) to try those against whom evidence could be produced in a court of law

of their involvement in "those crimes which are commonly committed at the present time by members of terrorist organizations" (*Diplock Report*, para 6). Trial of suspected terrorists on charges of involvement in such "scheduled offences" was specifically seen as auxiliary to detention without trial (internment) and the powers granted by the Act must be viewed in that context.

Section 11 (1) of the current 1978 version of the Act provides that "[a]ny constable may arrest without warrant any person whom he suspects of being a terrorist".² A person so arrested may be detained for up to 72 hours.

The Bennett Report comments:

"...it is clear that these powers of arrest were designed to be used as the start of a procedure leading to questioning, followed by detention without judicial trial (formerly referred to as internment)" (para 66).

Section 13(1) of the current 1978 version of the Act provides that "[a]ny constable may arrest without warrant any person whom he suspects of committing, having committed or being about to commit a scheduled offence or an offence under this Act which is not a scheduled offence." Again, to quote the Bennett Report:

"It is to be noted that the power of arrest under section 13 arises in respect of a specific offence, but that the section does not grant any extension of the power to keep in custody following an arrest under this section, beyond the ordinary provision in Northern Ireland of 48 hours" (para 67).

Thus, the wider power of arrest and detention, based on a general suspicion, was linked with an extra-judicial process with a view to possible detention without trial, whereas arrests made on suspicion of involvement in specific offences, that is, in the prospect of criminal prosecution, were supposed to be subject to the ordinary time limit on police detention in Northern Ireland. It would appear to follow that in the absence of detention without trial the wider power should not be used. In fact, as the Bennett Report observes:

"...the powers of detention without trial under the consolidated Act have never been used, and comparable powers under earlier Acts have not been used since 1975. But the powers of arrest under section 11 continue to be used as the start of a procedure leading to questioning, and, possibly, the charging of the prisoner with a specific criminal offence for which he will be tried in a court of law" (para 66).

The *Prevention of Terrorism (Temporary Provisions) Act 1976* (consolidating the original 1974 version of the Act) provides in section 12 that a constable may arrest without warrant anyone whom he reasonably suspects to be "a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism", or whom he reasonably suspects to be guilty of certain offences created by the Act, related to terrorism.

The Act provides the police throughout the United Kingdom with powers to hold persons arrested under this section for questioning for up to 48 hours on their own authority, and, for a further five days, with the formal consent of the Home Secretary (in England and Wales) or of the Secretary of State for Northern Ireland (for that jurisdiction).

The (original) Prevention of Terrorism Act 1974 was passed by the United Kingdom Parliament with unprecedented haste following the bombing by the Provisional Irish Republican Army of two public houses in Birmingham on 21 November 1974, which resulted in the deaths of 21 people, with injuries to over 180 others (*Shackleton Report*, para 1ff).

The scope of this report being restricted to Northern Ireland, it is, nonetheless, important to note that the Prevention of Terrorism Act was passed to meet the threat of political violence in Northern Ireland spreading to Great Britain. It is clear from parliamentary debates that the Act was introduced and continued in operation with the situation in Great Britain in mind. In particular, it appears that no consideration was given to the effects of the extended powers of arrest, detention, and questioning on the operation of the rules of procedure and evidence in trials in the Diplock courts. The report on the review of the operation of the Act, carried out by Lord Shackleton in 1978, states, in the general chapter dealing with powers of arrest and detention: "The Judges' Rules and the related Administrative Directions on interrogation and the taking of statements apply to a person detained under the Act as they do to any person arrested under other powers" (Para 87).

However, the chapter of that report dealing with the application of the Act in Northern Ireland makes no mention of the fact that the rules of evidence in the Diplock Courts have been altered to nullify the sanction on which the Judges' Rules rest (see below, Chapter 2).

It can be concluded that prolonged detention for questioning in Northern Ireland beyond the ordinary time limit of 48 hours is based on two provisions, neither of which was introduced with the Diplock court system in mind: the relevant provision in the Emergency Provision Act, when introduced, envisaged proceedings leading to detention without trial, and the provision in the Prevention of Terrorism Act was passed in considerable haste with the situation in Great Britain in mind. Nor did any of the reviews of relevant legislation (Gardiner, Shackleton, Bennett) consider the effects of these provisions on the Diplock courts system.

(v) *Legal Constraints and Judicial Control* (in re *Martin Lynch*)

It would appear from this summary that there are a number of legal constraints upon the exercise by the police of the emergency powers of arrest and detention. Firstly, when an arrest must be based on "reasonable suspicion", this ought to provide, in Bennett J.'s words, "an objective element and pre-condition to the exercise of the power of arrest". This applies to arrests by the police under the Prevention of Terrorism Act (section 12) and under

the Emergency Provisions Act (section 13).

Secondly, it would appear that when there is a reasonable suspicion of someone's involvement in a specific (terrorist) offence, he/she ought to be arrested under section 13 of the Emergency Provisions Act; and where there is only a general suspicion of someone's involvement in terrorism, but there is no suspicion of any specific crime, the wide powers can be used.

Thirdly, it would appear that when there is a reasonable suspicion of involvement in a specific offence, the common-law essentials for a valid arrest apply.

Finally, and most important, it was thought until recently that successive arrests on the same suspicion were unlawful (in that sense, see *Report of an Amnesty International Mission to Northern Ireland (28 November - 6 December 1977)*, p. 68).

The ruling, on a *habeas corpus* application brought in June 1980 in re *Martin Henry Lynch* makes clear that in fact none of these constraints apply. The case dealt with the fact that, although suspected of involvement in a specific offence, Lynch was not arrested under section 13 of the Emergency Provisions Act; that he was consequently not told of which offence he was suspected, nor given the factual basis for suspicion; with the fact that Lynch was repeatedly arrested, in quick succession, on the same suspicion; and with denial of access to a solicitor or doctor.

The Lord Chief Justice for Northern Ireland established in that case the following points of law on the above points. Firstly, that the court need not probe the suspicion of the arresting officer beyond being informed, in that officer's affidavit, that his suspicion was based on his "existing knowledge and the information given to him" at the briefing he received before making the arrest (cited on p.4 of the ruling). In the Judge's view, "it would be perverse, on the affidavit evidence which is available, to deny the reasonableness of the *arresting constable's* suspicion" (p. 10 of the ruling - original emphasis). No "objective element" can be discerned in the test applied by the Lord Chief Justice.

Secondly, it is clear from the ruling that arrests under the wide powers are lawful also in cases where the arrested person is in fact suspected of a specific offence.

Indeed, thirdly, the Lord Chief Justice held that *because* "no specific crime need be suspected in order to ground a proper arrest under section 12 (1) (b)", persons arrested under this section, but who are suspected of a specific crime, also need not be informed of the specific acts of which they are suspected (pp. 8-9 of this ruling). The common law safeguards developed in *Christie v Leachinsky* therefore do not in practice apply to arrests made under the wide emergency powers - even as regards arrests based on suspicion of a specific offence.

The *Lynch* ruling thus validated the RUC policy, noted by Bennett J., "to arrest every suspect, even if caught in the act of committing a specific offence, under their powers either under section 11 of the 1978 Act or section 12 of the 1976 Act" (Para 70).

The lack of safeguards against the arbitrary use of police powers of arrest

and detention are the more disturbing in the light of the judge's ruling (on the central issue) that successive arrests on the same suspicion were not unlawful:

"[W]e can find nothing in section 11 of the 1978 Act or section 12 of the 1976 Act to place a fetter on the right to arrest first under one Act and then under the other, or indeed twice in quick succession under the same provision..."

The judge was "also reminded of" the *Carltona* case (1943) 2 All ER 560, in which it was held that the requisitioning of property in the second world war was not subject to judicial control (in the absence of proven bad faith). The Lord Chief Justice quoted this case as follows:

"It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so, it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion, if bona fide exercised, no court can interfere. All that the court can do is to see that the power which it is claimed to exercise, is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction" (pp. 14-15 of the ruling).

According to the Lord Chief Justice:

"This observation underlines the argument for the Crown that an unacceptable but ostensibly lawful exercise of the powers of arrest conferred by the 1976 and 1978 Acts would call for an executive rather than a judicial remedy" (p. 15 of the ruling).

Although in the Judge's opinion:

"In reality no such exercise could be alleged in the present case" (p. 15 of the ruling).

The ruling by the Lord Chief Justice also made clear that *habeas corpus* proceedings do not constitute a remedy against improper or even unlawful behaviour by the police during questioning. The relevant passage reads:

"[Defence counsel's] last point (ground 3) was that the applicant's detention, even if lawful to start with, became unlawful because of its conditions in that he continued to be detained in custody without being granted access to his solicitor or doctor. There is no authority to support this submission. **It seems to us that the treatment and conditions of detention accorded to a person lawfully detained do not**

touch on the lawfulness of that detention and do not therefore give rise to the remedy of habeas corpus. There is old authority for this which [prosecution counsel] brought to our notice and which we would respectfully follow.

Style 432 (1654) 82 ER 838 reports a case as follows:

"The Court was moved for a habeas corpus to remove a prisoner in Northampton Gaol, that was convicted of felony, and been burnt on the hand, upon an affidavit that the gaoler used him hardly. But Roll, Chief Justice answered, that it could not be, but they might either endict the gaoler, or bring an action against him."

And in *ex parte* William Cobbett (1848) 5 CB 418; 136 ER 940, the Court refused to grant a *habeas corpus* to a prisoner in custody on the ground that the keeper of the prison had improperly removed him to a part of the prison provided for prisoners of a particular class. Wilde, C.J., delivering judgment, said:

"This court has no power to interfere in the matter. The prisoner is in custody under process issuing out of the Court of Chancery. If the keeper of the Queen's prison is acting improperly in placing him in the particular part of the prison of which he complains, the ordinary means of redress for the wrong are open to him" (*Lynch*-ruling, pp. 15-16, emphasis added).

The specific point at issue in the *Lynch* case regarded denial of access to a solicitor and a doctor in the course of incommunicado detention. The Lord Chief Justice's statement of the law (emphasized in this quote) is not however in any way qualified and extends to all aspects of detention: no matter how badly a prisoner is treated, and no matter even if that treatment is as such unlawful, the remedy of *habeas corpus* is not available as long as the initial arrest was lawful and as long as the detention did not exceed the time limits laid down by the law. By accepting the 17th century case as legal precedent, the Lord Chief Justice makes clear that even ill-treatment of a prisoner does not give rise to *habeas corpus*.

In the absence of institutional judicial involvement in police questioning (below, Chapter 2(i)), and of other means of contemporaneous judicial review of police behaviour in the course of interrogation, the ruling that the treatment of prisoners does not affect the legality of their detention effectively absolves the courts from providing any form of immediate relief against abuse of prisoners' rights and indeed against attacks on their physical or mental integrity.

All other, *ex post facto*, remedies suffer from the obvious defect that they can no longer prevent or terminate wrongful arrests and detentions. But they are also ineffective in practice in that, other than in *habeas corpus* proceedings, they place the onus on the complainant to prove, at least on the balance of probability, that the challenged arrest or detention was unlawful³; for example that there was no "reasonable suspicion of involvement in terrorism". Given the vagueness of these terms, and the possibility of the police to claim that their suspicion was based on information which cannot be disclosed, this is virtually impossible in practice.

So long as the courts accept such a claim by the police without probing it, it will also be virtually impossible to prove bad faith on the part of the police - the final test which the courts have reserved for themselves. Although the ac-

ceptance of such a claim by the courts must of course be seen in the light of the very real danger to witnesses who give evidence to the police, this should not leave unnoticed that by not probing the alleged factual basis for an arrest and detention this final test too no longer constitutes effective judicial control over the exercise of police powers of arrest and detention.

(vi) *Special Powers of Arrest and Detention by the Army*

In ordinary circumstances, the army plays no role in the enforcement of the law vis-à-vis civilians. But in the emergency existing in Northern Ireland it has been assigned such a role, even if at present it is government policy that the RUC is again primarily responsible in this respect, with the army acting under the aegis of the police, in particular assisting them in effecting arrests under the special powers, described above. Following Lord Diplock's recommendations, however, there is also a special provision for arrest and detention by the army, acting independently of the police.

When the army was first assigned a role in law enforcement, the Northern Irish courts applied to arrests by soldiers the ordinary legal criteria for a valid arrest, requiring that the arrested person be informed, at the time of his arrest, of the fact that he is arrested and of the grounds for arrest, including the power under which the arrest is made. Lord Diplock considered:

"We are satisfied that this is a serious handicap to the security forces in performing their difficult and dangerous duty of protecting the life and property of innocent citizens in Northern Ireland. Reluctant though we are to propose any curtailment, however slight, of the liberty of any innocent man, we think it is justifiable to take the risk that occasionally a person who takes no part in terrorist activity and has no special knowledge about terrorist organizations should be detained for such short time as is needed to establish his identity, rather than that dangerous and guilty men should escape justice because of technical rules about arrest to which it is impracticable to conform in existing circumstances.

We accordingly recommend that steps should be taken by legislation

(1) to confer upon members of the armed services:

(a) Power to arrest without warrant and to remove to any police station or to any premises occupied by the armed forces any person suspected of having committed or being about to commit any offence, or having information about any offence committed or about to be committed by any other person; and

(b) Power to detain any such person in custody for a period of not more than four hours for the purpose of establishing his identity.

(2) It should be an offence to refuse to answer or to give a false or misleading answer to any question reasonably put for that purpose by a member of the armed forces or a police officer.

(3) Arrest and detention for up to four hours under the above powers should not be unlawful by reason of the fact that no reason was given or a wrong reason given for the arrest.

(4) A person arrested or detained under the above powers should be deemed to be in lawful custody, so as to make it an offence to resist arrest or to escape from cus-

tody or to aid or abet any person attempting to resist or to escape.

Nothing that we propose to simplify the formalities of arrest by members of the armed services should be understood as countenancing any relaxation of their common-law obligation to use no more than that amount of force that is reasonably necessary in all the circumstances to effect the arrest and hold the arrested person in custody. We contemplate that when the arrested person's identity has been established satisfactorily, he should be released unless wanted by the police either on suspicion of having himself committed an offence or for interrogation as a person suspected of having knowledge of any terrorist organization or activities. If it is intended to keep him in custody on either ground, he should be rearrested either by the military police or by a police officer and informed of the grounds for his further detention in custody. **Our proposal does not involve that questioning prior to re-arrest should be directed to any other purpose than establishing the identity of the person arrested.**" (paras 48 - 50, emphasis added).

The Northern Ireland (Emergency Provisions) Act 1978 provides, in section 14 (section 12 in the 1973 version of the Act):

"14. Powers of arrest of members of Her Majesty's forces

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

(2) A person effecting an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is effecting the arrest as a member of Her Majesty's forces.

(3)..."

The law is therefore silent as regards the purpose for which the army may exercise its powers of arrest; in practice, such arrests do not appear to be restricted to establishing someone's identity. On the other hand, although subsection (2) explicitly abrogates, for arrests made by the armed forces, the common-law essentials for a valid arrest developed in *Christie v Leachinsky*, an arrest not made on suspicion of a specific offence would appear to be unlawful.

However, the use in section 14 of the words "a person whom he suspects", rather than "a person reasonably suspected", in the English legal context, tends to remove from the test of the lawfulness of the arrest any objective element.

The army furthermore can claim that their suspicion was based on information which cannot be disclosed. In the *Lynch*-ruling, discussed above, the Lord Chief Justice accepted the *reasonableness* of a police officer's suspicion without probing the factual basis for that suspicion. In view of that ruling, it is clear that the courts would also not probe the factual basis of such a claim by the army beyond establishing the mere *existence* of a soldier's suspicion, which need not be reasonable or even based on fact. In view of the *Lynch*-ruling, it is furthermore clear that repeated arrests and detentions in

quick succession of the same person by the army under their emergency powers would not be held unlawful, unless bad faith could be proved by the complainant - something which, given the above consideration, is virtually impossible.

In practice, therefore, arrests and detentions by the army under the emergency powers must be regarded as unchallengeable, whether in *habeas corpus* or in *ex post facto* proceedings.

(vii) *Conclusions*

Prolonged detention for questioning in Northern Ireland beyond the ordinary time limit of 48 hours is based on two provisions, both introduced without consideration of their effect on the special "Diplock" court system: the relevant provision in the Northern Ireland (Emergency Provisions) Act, when introduced, was envisaged for use in proceedings leading to detention without trial (internment); and the Prevention of Terrorism (Temporary Provisions) Act, containing the other provision, was passed in considerable haste with the situation in Great Britain in mind, where the "Diplock" courts do not operate. Yet these two provisions form the basis on which virtually all police questioning of persons suspected of involvement in terrorism takes place.

The exercise by the police of these emergency powers of arrest and detention, although in theory subject to a number of legal constraints, is not in practice subject to effective judicial control:

- The courts do not probe the factual basis of such suspicion as gives rise to an arrest, even when the law requires that such suspicion must be "reasonable".
- Persons suspected of involvement in specific (terrorist) offences can nonetheless be arrested under powers of arrest intended for cases when there is only a general suspicion of involvement in terrorism; and such persons are consequently denied their common-law right to know the specific offences of which they are suspected. This practice has been accepted by the courts.
- The courts have also held that repeated arrests and detentions in quick succession of the same person on the same suspicion are not unlawful.
- Effectively, arrests and detentions by the police under the emergency powers are unchallengeable in *habeas corpus* proceedings.
- *Ex post facto* court proceedings equally do not provide an effective remedy in practice.

Arrests and detentions by the army under their emergency powers are subject to fewer legal constraints than those under police powers and, consequently, to less strict judicial control. As a result, and in view of the judicial attitude towards the exercise of police powers in the emergency, arrests and detentions by the army must be regarded as equally unchallengeable in practice, whether in *habeas corpus* or in *ex post facto* proceedings.

This justifies the conclusion, drawn by Amnesty International in its Am-

nesty International Report 1981 that:

"There was therefore no effective remedy against arbitrary use of the emergency powers of arrests and detention by the police - contrary to international law."

Furthermore, the courts in Northern Ireland have absolved themselves from providing immediate relief against ill-treatment of prisoners and presumably even against torture in custody.

Chapter 2 Interrogation

- (i) *Questioning in Ordinary Circumstances:*
 - *the framework*
 - *the rules*
- (ii) *Questioning of Terrorist Suspects:*
 - *the framework*
 - *the rules*
- (iii) *Supervision*
- (iv) *Conclusions*

It was clearly envisaged that interrogation of terrorist suspects would not only be more prolonged, but also of a more severe nature than ordinary questioning. The stated aim of interrogation is to obtain confessions. Lord Diplock's recommendations were aimed at removing legal obstacles which discouraged the police:

"...from creating, by means which do not involve physical violence, the threat of it or any other inhuman or degrading treatment, a situation in which a guilty man is more likely than he would otherwise have been to overcome his initial reluctance to speak and to unburden himself to his questioners." (*Diplock Report*, para 91).

Bennett J. agreed that "persistent, forceful questioning may be needed" to obtain a confession, which does "not imply the use of unlawful means." (para 37).

No separate institutional or legal framework has been developed to regulate police questioning of terrorist suspects, however, in spite of the different nature of such interrogations. Any analysis of the constraints on police questioning of terrorist suspects must therefore start with a discussion of the ordinary situation and its (acknowledged) defects.

(i) Questioning in Ordinary Circumstances

The Framework

Although the questioning of suspects is a departure from the original role of the police, they have maintained their constitutional independence from both the Executive and, apart from ordinary civil and criminal liability, from the courts. As the Note to the Judges' Rules (discussed below) points out:

"The Judges control the conduct of trials and the admission of evidence against persons on trial before them; they do not control or in any way initiate or supervise police activities or conduct."

Thus, as Sir Henry Fisher remarked:

"In England and Wales (unlike many other countries) no contemporaneous judicial control is exercised over the interrogation of suspects and others by the police or over the taking of statements." (*Fisher Report*, para 15.2).

Nor is the pre-trial investigation (including the questioning of suspects) subject to contemporaneous control by a quasi-judicial authority or authority otherwise independent from the police - such as a public prosecutor. In particular, the Director of Public Prosecutions does not fulfil this role.

In sum, no outside institutions exist to supervise police questioning contemporaneously.

The Rules

In these circumstances, clear and precise rules on questioning, allowing for close *ex post facto* control, would appear to be required. However, questioning having developed within a legal vacuum (above, chapter 1 (iii)), there are no specific rules of law governing the manner in which it is to be carried out, save that the police, like everybody else, are subject to the civil and criminal law of the land and can be sued, for example, for wrongful imprisonment, or prosecuted, for example, for assault.

It is only when statements made by a suspect in police detention are tendered in evidence in a subsequent trial that the main legal constraint on police questioning becomes operative:

"...it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression" (the so-called 'voluntariness rule', stated in principle (e) prefaced to the Judges' Rules discussed below).

Apart from ordinary civil and criminal liability, the 'voluntariness rule' is the only rule of law pertaining to the manner in which persons in police custody are treated.

The primary function of the principle as an exclusionary rule at the trial stage and its importance to attaining fairness in English criminal proceedings are discussed below (Chapter 4 and Part III). As regards the pre-trial stage, however, it obtains its direct importance from the fact that the judiciary have drawn up *within the principle* a set of guidelines called the Judges' Rules. The Judges' Rules do not themselves have the force of law, but explain to police officers engaged in the investigation of crime the conditions under which the courts would be likely to admit in evidence statements made by persons suspected of or charged with crime, and seek to ensure that any statement

tendered in evidence should be a purely voluntary statement and therefore admissible.

In their different versions in time, the Judges' Rules have gradually come to accept police questioning. Whereas earlier versions were very restrictive towards questioning (see *Fisher Report*, paras 15.10-12), the present Rules clearly accept the practice. Rule I states:

"1. When a police officer is trying to discover whether, or by whom, an offence has been committed, he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it."

The Rules set a limit to legitimate questioning, if read together with principle (d), prefaced to the Rules:

"That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;"

Following a charge, Rule III (b) becomes operative:

"It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimizing harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement."

Otherwise, the Rules mainly stipulate that suspects be cautioned at different stages of questioning; and prescribe the manner in which written statements made after caution should be taken. The cautions advise the suspect of his right to silence and inform him that what he says may be used as evidence.

To the Judges' Rules proper have been appended a number of "Administrative Directions", which are a statement of guidance for police officers, drawn up by the Home Office with the approval of the Judges. The current version of the *Judges' Rules and Administrative Directions* are contained in a (public) Home Office circular of that name of 1978.

The Administrative Directions concern such issues as the accuracy of taking down statements; the forms to be used; records of refreshments taken by a suspect, of cautions, and of charges; and interrogation of children and mentally handicapped persons. The most important Directions for the purpose of this analysis are:

"3. Comfort and refreshment.

Reasonable arrangements should be made for the comfort and refreshment of persons being questioned. Whenever practicable both the person being questioned or making a statement and the officers asking the questions or taking the statement should be seated."

and

"7. Facilities for defence

(a) A person in custody should be supplied on request with writing materials.

Provided that no hindrance is reasonably likely to be caused to the processes of investigation or the administration of justice:

(i) he should be allowed to speak on the telephone to his solicitor or to his friends;
(ii) his letters should be sent by post or otherwise with the least possible delay;

(iii) telegrams should be sent at once, at his own expense.

(b) Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices."

The latter Direction elaborates on principle (a) prefaced to the Judges' Rules,

"That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody, provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so".

The covering letter to the Judges' Rules and Administrative Directions, also published in the Home Office circular, states further that

"The Rules should constantly be borne in mind, as should the general principles which the Judges have set out before the Rules. But in addition to complying with the Rules, interrogating officers should always try to be fair to the person who is being questioned, and scrupulously avoid any method which could be regarded as in any way unfair or oppressive."

Apart from the Judges' Rules and Administrative Directions, Home Office circulars have been issued to chief officers of police, with the agreement of the Lord Chief Justice, dealing with interrogation and amplifying or defining the Administrative Directions (*Fisher Report*, para 15.2). In addition to the Judges' Rules, Administrative Directions, and Home Office circulars, there are for each police force a body of orders. Neither the Home Office circulars to chief police officers nor the force orders are publicly available. As Sir Henry Fisher remarked:

"It may appear strange that provisions which affect fundamental rights of individ-

ual citizens, and which in other countries are treated as legal or even (as in the USA) constitutional rights, should in England and Wales be governed by rules made by the Judges and by administrative directions which may be varied by the Executive at any time. It may seem strange that the consequence of a breach should be at the most to give a discretion to the judge to exclude evidence (and if a dictum in *R v. Prager* is right, maybe not even that, since the court there seemed to say that the Judges' Rules and Administrative Directions added nothing to the general rule that statements and answers to be admissible must be voluntary). It may seem strange that Home Office circulars which amplify or define the 1964 Administrative Directions should not have been given a circulation which ensured that they came to the knowledge of the legal profession, despite the fact that they may be capable of forming the basis of defence submissions and affecting the course of criminal trials. It may well seem strangest of all that (as appears from the evidence given at [Sir Henry's] Inquiry) some senior police officers and lawyers are not, even today, aware of one of the 1964 Administrative Directions, and admit frankly that it is not obeyed" (*Fisher Report*, para 15.5).

He adds:

"I venture to express the opinion that the balance between the effectiveness of police investigations and protection for the individual is important enough to be governed by law and that the consequences of a breach of the Rules should be clear and certain" (*Fisher Report*, para 15.7).

And indeed the Royal Commission on Criminal Procedure has recommended:

"that all aspects of the treatment of a suspect in custody, including the conduct of interviews, should be regulated by statute, which should bring up to date and extend the scope of the current provisions" (*RCCP Report*, para 5.12, summarizing para 4.115).

(ii) Questioning of Terrorist Suspects

The Framework

No separate institutional framework was set up for the questioning of terrorist suspects. As in ordinary law, therefore, no outside institutions exist to supervise police questioning contemporaneously (Bennett J.'s proposals for improved internal supervision by the police are discussed in section (iii) of this chapter).

The Rules

As was mentioned above, apart from ordinary civil and criminal liability, the only rule of law pertaining to the manner in which persons in police custody are treated is the "voluntariness rule". This rule is specifically abrogated in

terrorist cases, yet no other rules of law have been introduced to regulate the interrogation of terrorist suspects (other than the outlawing of torture, and inhuman and degrading treatment).

The status of non-legal rules, such as the *Judges' Rules and Administrative Directions*, has become quite unclear. Although in certain respects they are said still to apply, in others they have become irrelevant. Most important, as a result of the abolition of the "voluntariness rule" (within which they were construed), they have lost their coherence and sense as guiding principles for the questioning of suspects.

Although police regulations have a solely internal effect, they are the most detailed regulations in existence and have become of paramount importance now that the Judges' Rules and Administrative Directions have lost so much of their force. However, in response to an Amnesty International request for a copy of the *RUC Force Orders and Code*, the Northern Ireland Office wrote on 18 December 1981:

"The Force Orders and Code are confidential internal instructions which are not available for public inspection. Besides regulating the conditions in which prisoners are kept, they cover the whole range of police activities. We do not think it would be appropriate for this material to be made publicly available."

Nevertheless, the *Bennett Report* discusses extensively the regulations concerning the treatment of prisoners, in force at the time of his inquiry (see Chapter 6 of the *Bennett Report*). Although these regulations do not appear to distinguish between terrorist and ordinary suspects, they have clearly been drawn up with the situation in Northern Ireland in mind. With the changes introduced as a result of his report, Bennett J.'s summary is still generally applicable. As he points out,

"It is traditional in the police forces of the British Isles that responsibility for the custody and welfare of prisoners, and for dealing with their needs and request and for outside enquiries in relation to them, lies with the uniformed branch, while responsibility for questioning them lies with detective officers." (para 87).

Furthermore,

"...it is worth recalling a further matter of fact of general application to the questioning of prisoners in police forces in the British Isles: this is that the actual interview process is inviolate in the sense that interviews are conducted by a limited number of police officers out of the sight and hearing, not only of members of the public and the prisoner's friends and advisers, but also of other police officers. To a limited extent...the procedures in the RUC already depart helpfully from this general practice" (para 89).

The regulations were meticulous in all respects regarding the duties of uniformed officers, in particular as regards keeping precise and accurate records of every event that befell a prisoner whilst in custody (*Bennett Report*,

para 93). But, significantly, the *RUC Code*, and the standing orders for the interrogation centres, were

"...to a large extent silent regarding the detailed conduct to be observed specifically by interviewing officers" (para 99).

The general provisions which did apply directly to interviews included a duty on interviewing officers to keep records (also of complaints); special care for the mentally subnormal; as well as the requirement (further discussed below) that:

"...where it is anticipated that statements resulting from interviews will be used in evidence in subsequent criminal proceedings, such statements must be taken in accordance with legal requirements and the Judges' Rules" (para 101).

The Code further contained regulations which applied equally to all police officers, the most important of which were the regulations which prohibited ill-treatment (paras 102-103). The Code stated that a police officer must not subject a prisoner to any "degrading physical or mental ill-treatment"; that all reasonable comfort must be afforded to prisoners, in particular, that they be given adequate opportunity to sleep and that they should not be without food for long periods. The use of improper language was equally forbidden (paras 104-106). Furthermore, at the time of Bennett J.'s inquiry the RUC Code expanded on the rule that police officers have limited discretion to deny a suspect access to a solicitor in certain circumstances, although, in fact, solicitors were never allowed to see terrorist suspects in police custody (*Bennett Report*, para 122 and 123).

Within his brief Bennett J. made a number of recommendations. Before discussing these, it is important to note that the Bennett Committee did not investigate the fairness or efficacy of criminal proceedings in the Diplock Courts. The terms of the announcement of the appointment of the Committee specifically excluded from the scope of its inquiry another examination of the rules on the admissibility of statements in the Diplock Courts, or of the emergency legislation generally (para 3). It did, however, "review police practices and procedures in the interrogation of prisoners *so as to ensure so far as possible that ill-treatment of prisoners cannot take place.*" (para 20, emphasis added).

In other words, the Bennett proposals were aimed at preventing ill-treatment of suspects in custody, but not at producing conditions of interview that are conducive towards obtaining *reliable* statements.

Bennett J.'s recommendations concerned mainly improved supervision over the implementation of the rules for questioning, which will be discussed below. But his report also contained a number of recommendations which affected the rules themselves. The government accepted "the broad conclusions of the Committee" and "virtually" all its recommendations. On 2 July 1979, the Secretary of State for Northern Ireland gave some examples to the

House of Commons of amendments to Bennett J.'s recommendations. On the somewhat limited public material available, it would appear that the following can now be said about the rules for interrogation of persons arrested under the emergency legislation in Northern Ireland:

I GENERAL

— Interrogation continues to be carried out in private. Improved control by senior police officers through closed-circuit television (discussed below) is visual only; this "does not break the confidentiality of what is said in the interview room" (*Bennett Report*, para 227).

— Prisoners have an absolute right of access to a solicitor after 48 hours of detention, and, if detention is prolonged, after the next 48 hours.

— This absolute right is without prejudice to their common-law right of access at any time, subject to the limited discretion of the police to deny access if "unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice..." (Principle (c) prefaced to the Judges' Rules). Consultation should normally be within sight, but out of hearing, of police officers (as Bennett J. recommended), but the government has stated that "the interviews should be subject to monitoring by sight and sound", at least in cases (which the government thought would be few) "where it is considered necessary".

— Prisoners should be provided with a printed notice of their rights to keep for themselves.

II AS TO THE ARRANGEMENTS FOR INTERROGATION

— Interrogation sessions should go on no longer than the period between normal mealtimes and should not continue during mealtimes.

— Interrogation sessions should not commence or continue after midnight except for urgent operational reasons.

— Not more than two officers should be present at the interrogation of one prisoner at any one time.

— Not more than four teams of two officers should be concerned with interrogation of one prisoner. (Bennett J. here recommended a maximum of three teams of two officers.)

— Female prisoners should be interviewed by women officers.

III AS TO THE CONDUCT OF DETECTIVES DURING INTERROGATION

A new, separate Code of Conduct for interviewing officers has been introduced which forms a separate part of the RUC Code. This Code of Conduct, like the rest of the RUC Code, is secret, but would appear to include the following rules:

- A prohibition of assault and other unlawful use of force against prisoners.
- A prohibition of "degrading physical or mental ill-treatment". This should specifically include:
 - (a) any order or action requiring a prisoner to strip or expose himself or herself;
 - (b) any order or action requiring a prisoner to adopt or maintain any unnatural or humiliating posture;
 - (c) any order or action requiring a prisoner to carry out unnecessarily any physically exhausting or demanding action or to adopt or maintain any such stance;
 - (d) the use of obscenities, insults or insulting language about the prisoner, his family, friends or associates, his political beliefs, religion or race;
 - (e) the use of threats of physical force or of such things as being abandoned in a hostile area; and
 - (f) the use of threats of sexual assault or misbehaviour. (*Bennett Report*, para 180).
- A requirement for interviewing officers to identify themselves by name or number to the prisoner.

In sum, it would appear that any physical or mental ill-treatment of the kind described above is contrary to the RUC regulations. Other forms of pressure are, however, not proscribed. These are usually discussed only in their relation to the admissibility of statements, and this analysis will also consider them under that heading, below. But it is useful first to see what kind of questioning would appear to be allowed (or at least not forbidden) under the RUC Code.

Firstly, it is clear that "decisive", "persistent", "forceful" questioning is accepted practice and indeed commended by Lord Diplock and Bennett J., although Boyle *et al.* rightly remark that the right of silence of a prisoner subjected to such questioning "is implicitly if not formally denied" (*Ten Years On*, p. 36).

Secondly, the use of threats (other than of "physical force or of such things as being abandoned in a public area"); of promises; or of inducements would not appear to be anywhere specifically forbidden. In particular, the requirement that statements which are to be used in evidence must be taken "in accordance with legal requirements and the Judges' Rules" does not appear to constitute such a prohibition. That requirement would seem to relate only to the need to administer a formal caution to a suspect and not, in the legal con-

text of the Diplock Courts, to principle (e) *prefaced to* (i.e. not part of) the Judges' Rules, which states a legal principle which does not apply in those courts: it is no longer a "legal requirement" that a statement tendered in evidence shall have been "voluntary, in the sense that it has not been obtained ... by fear of prejudice, or hope of advantage, exercised or held out by a person in authority, or by oppression".

Such pressures could take a variety of forms: threats to prolong the detention; or to subject the person concerned to repeated arrests following release; threats to arrest relatives, including children of the suspect; promises to drop certain charges; or not to charge relatives, including children of the suspect; financial inducements; a combination of these. The promise not to arrest and/or prosecute relatives is a strong inducement, especially in cases where arms or explosives have been found on premises: the occupier and any person residing on, habitually using, or found on those premises at the time of the discovery are presumed to be in possession and therefore liable to prosecution. Although such a person may be able to discharge the onus placed upon him to prove that he "did not at that time know of its presence in the premises in question, or, if he did know, that he had no control over it" (section 9 of the Northern Ireland (Emergency Provisions) Act), the bringing of charges would almost certainly mean detention in prison pending proceedings for the relatives concerned.

(iii) Supervision

There is no contemporaneous judicial supervision over questioning (above, section (i)). Indeed, it is clear from the ruling *in re Martin Lynch* (above, Chapter 1 (v)) that the courts will not grant the writ of *habeas corpus* (the only form of immediate judicial relief) even against ill-treatment of suspects by the police. Bennett J., having rejected suggestions of independent contemporaneous supervision over police questioning, judicial or otherwise (*Bennett Report*, Chapter 11), therefore concentrates his proposals on measures for improved supervision of interrogation within the police force:

"the supervision and control of interrogation should not be given to any independent body of persons, but should remain in the hands of the police themselves" (para 203).

The allegations of ill-treatment which led to Bennett J.'s inquiry were only made against detective officers; it was not suggested that uniformed members of the RUC were involved in the ill-treatment. Bennett J. concluded:

"The integrity of the uniformed branch therefore seems to afford a solid foundation on which an effective system of supervision can be based" (para 205).

He added:

"No doubt part at least of the reason why allegations are not made against the un-

iformed branch is that they have no responsibility, and are known to have none, for the 'success' of interrogation, and no active involvement in interviews. This seems to us to be a feature well worth preserving" (para 206).

His proposals therefore build on the distinction between the duties of uniformed police officers on the one hand and detectives on the other.

"At present the uniformed chief inspector or inspector has overall responsibility for the well-being of prisoners outside the interview room, and for this purpose he has the collective aid of the staff under his command; while, inside the interview room, responsibility rests with the senior interviewing officer" (para 217).

That position is strengthened in Bennett J.'s proposals, in that he recommends:

- that interviews must take place in an interview room and nowhere else;
- that prisoners should be delivered to the interview room by uniformed officers, rather than collected by detective officers from outside their cells;
- that detective officers emerging from the interview room with the prisoner (in order, for example, to take his fingerprints) should be accompanied wherever they go by a uniformed officer;
- and that provisions should be made in the RUC Code to these effects.

So far Bennett J.'s proposals do not affect what happens inside the interview room. He said:

"It is our view that the existing position, whereby detective officers have responsibility for interviews and the uniformed staff stay outside, should basically be upheld. This is partly so that the distinction of functions between the two branches of the force may be maintained, but also because we are satisfied as a general matter that the efficiency of interviews would be impaired if persons with objects other than the promotion of dialogue between the interviewer and the suspect were present." (para 218).⁴

From this point, Bennett J. proposes to change the emphasis of the instructions to uniformed inspectors:

"The interviewer is not going to be helped by uniformed officers entering spasmodically, either, but to this extent we believe that efficiency must suffer as the price of reassurance.

We recommend that it should be made entirely plain to the uniformed inspectors that their responsibility for the welfare of prisoners extends to periods spent in an interview room. This should be done by means of both an amendment to the RUC Code and an addition to the standing orders for Castlereagh and Gough.

Satisfactory provision is already made in the RUC Code, in general terms, for any officer detecting a breach of the law or of force instructions to direct the member of the force concerned to desist, but **we recommend that it should be made explicitly clear, by means of an amendment to the Code, that if necessary he should enter**

the interview room for this purpose and stop the interview. This requirement should also apply to any breach of the code of conduct for interviewing officers which we have recommended in Chapter 10, and to any events within the interview room which seem to the observer to be reasonably likely to lead to a breach of the law or instructions. The part of the RUC Code which lays down the duties of the supervising inspector at present puts this matter in negative form, for it is stated that 'unless for good or sufficient cause, the inspector need not enter the interview room while an interview is in progress'. We recommend that the instructions to inspectors should be made positive in their emphasis; if errors are to be made, it is better that they should be errors of commission rather than omission. While the general understanding should be that the inspector should not enter unnecessarily, we doubt if it is necessary or desirable to emphasize this in formal instructions" (paras 218-220, original emphasis).

The responsibility of uniformed officers for the welfare of prisoners in interview rooms is to be made effective through extended measures of visual supervision. Bennett J. recommended that "spy-holes" should be installed in all rooms in police stations in Northern Ireland where interviews take place and where they were not already installed (para 222). Most important, however, given the serious limitations to the effectiveness of "spy-holes" (details of these limitations are given in para 221), he recommended

"that closed-circuit television cameras should be installed in all interview rooms in the police offices and police stations used for the interrogation of terrorist suspects and other persons arrested for scheduled offences." (para 224, original emphasis).

He added:

"What we have in mind is that the main monitoring screens should be sited in a room used by the chief inspector or inspector [members of the uniformed branch] for other purposes and that he should combine their use with his existing duties. Thus, when he was not on the corridor outside the interview rooms, he could watch the screens; or, when he was engaged elsewhere, he could appoint one of his staff to do so. Instant means of communication should be provided between officers watching the screens and those in the corridor. The screens should also be available to senior or detective officers in charge of interviews, who should use them frequently, and who might find them useful for general observation of the progress of interviews as well as for the detection of any misconduct; and they should be used also by any visiting senior officer.

In addition to assisting the chief inspector or inspector in immediate charge of the place where interrogation takes place, we believe that closed-circuit television would also offer enhanced opportunities for practical supervision by the Divisional Commander or sub-Divisional Commander, who could be provided with a single screen in their own rooms and the facility to select each interview room in turn for display. Although it is not to be supposed that they could spare very much time for watching systematically, we believe that such provision would be welcomed by seni-

or uniformed officers, who at present have a degree of responsibility for the conduct of interviews (which responsibility should in our view be re-affirmed), but who lack effective means for carrying this responsibility into effect. **We accordingly recommend that this facility should be provided to the senior uniformed officer normally working in each building or group of buildings where the interrogation of terrorist suspects takes place**, up to the level of chief superintendent. It could of course be further extended upwards to assistant chief constables and downwards to officers relieving the chief superintendent or superintendent in his absence, if desired." (paras 225-226, original emphasis).

Closed-circuit television for the monitoring of interviews has been introduced in the interrogation centres in Northern Ireland. Although complaints and allegations of physical ill-treatment had dropped sharply even before its introduction, closed-circuit television is an important safeguard against a recurrence of a practice of such ill-treatment.

It is important to note, however, the limitations of this monitoring. It is restricted to visual monitoring: no one can hear what is being said by the detectives or prisoner. Only police officers have access to the video-screens, and no recording is made.

It is difficult to assess the effect of Bennett J.'s proposals on the diligence with which uniformed officers carry out their supervision. Bennett J. said:

"Despite the 'clean bill of health' given to the uniformed branch, the fact has to be faced that none of our witnesses recalled a case in which a uniformed officer had actually seen ill-treatment occurring and had taken steps (as the RUC Code would require him to do) to make an immediate report of it, or had later acknowledged having witnessed ill-treatment in a statement to the Complaints and Discipline Branch of the RUC. The most that has happened, according to the evidence that we have heard, is that a chief inspector has opened the door of an interview room when he heard an unusual noise. It would not be right to conclude from this fact alone that supervision by uniformed officers has proved defective, but our view is that fully effective supervision demands a higher level of activity on the part of uniformed officers". (para 208).

Bennett J. therefore stresses the need for assiduity and persistence of the individual officer, the importance of strength of character and commitment to duty of uniformed staff and the 'essential' requirement that the uniformed chief inspector or inspector should continue to have immediate access to and support from his Divisional Commander or sub-Divisional Commander (paras 214 and 215).

Even if diligently carried out, however, visual supervision is largely restricted to detecting and stopping physical ill-treatment, the aim of Bennett J.'s recommendations. Threats, promises or the holding out of inducements are unlikely to be detected.

Bennett J. acknowledges that:

"The fact that in Northern Ireland so much reliance is placed on confession in-

creases the force of the argument that a reliable record is desirable" (para 199).

His proposals, nonetheless, "stop conclusively short of recommending video-recording" (para 231). One of his considerations was "the evidence of our police witnesses, and our own impression, ...that some suspects need to be allowed a certain room for manoeuvre in what story they tell afterwards if they are to be frank with the police at the time when they are interviewed" (para 201).

Whatever one thinks of this argument, it is clear that the increased supervision resulting from the Bennett proposals, while, if diligently applied, going some way towards preventing ill-treatment, does not otherwise affect the conditions of interrogation so as to ensure the reliability of confessions obtained as a result. In particular, this supervision cannot corroborate what was said during the interrogation, and in this respect does not add to the reliability of the record of the interrogation.

(iv) Conclusions

The interrogation of terrorist suspects is not only more prolonged than ordinary questioning, it is also of a different nature. Yet the institutional framework for ordinary questioning was retained, which does not provide for contemporaneous supervision independent of the police.

This increased internal supervision over interrogation by uniformed police officers is visual only and, while (if diligently applied) going some way towards preventing ill-treatment, does not otherwise affect the conditions of interrogation so as to ensure the reliability of confessions obtained as a result. In particular, this supervision cannot corroborate what was said during interrogation, and in this respect does not add to the reliability of the record of interrogation.

The only rule of law specifically pertaining to questioning of suspects (the "voluntariness rule") has been explicitly abrogated with regard to the interrogation of terrorist suspects. Although the direct effect of this change in the law regards the conduct of the trial, it has also removed the cohesion and sense from such subordinate rules for questioning as were specifically construed within the "voluntariness rule": the *Judges' Rules and Administrative Directions*.

Apart from being subject to the ordinary civil and criminal law, the main constraints on police interrogation are therefore found in internal regulations, which now include a Code of Conduct for interviewing officers. However, the detailed contents of the regulations, and of the Code of Conduct, are secret.

Although "degrading physical and mental ill-treatment" is forbidden, and now spelt out to some extent in the Code, it would appear from what is known about the rules that

— forceful, persistent questioning is allowed, which implicitly denies the prisoner his right to silence; and which would be regarded as "oppressive" in ordinary circumstances;

— statements may be induced by "fear of prejudice, or hope of advantage" held out by interviewing officers in the course of private interrogation sessions;

— access to a solicitor may still be denied for 48 hours and consultation may have to take place in the presence of a senior uniformed police officer, rather than within sight but out of hearing of the police.

This justifies the conclusion that the present rules on police questioning, while (if properly implemented) going some way towards preventing physical ill-treatment, do not contain safeguards to ensure the *prima facie* reliability of statements obtained as a result of interrogation. Neither the "voluntariness" nor the reliability of statements made to the police as a result of interrogation can therefore be taken for granted even when the interrogation was in full accordance with the law and with the rules and regulations applicable to such interrogations.

Chapter 3 From police interrogation to trial

If the police, after interrogation, believe to have sufficient evidence against a suspect of his involvement in an offence, they will charge him and bring him before a magistrate. In cases of scheduled offences, the purpose of this initial appearance before a magistrate is in practice restricted to providing the defendant with legal aid. An application for bail can subsequently be made to the High Court; if the defendant does not apply, or if bail is refused, he remains in custody. Some time later the police submit their file on the case to the Director of Public Prosecutions, who reviews the selection of charges preferred by the police in the light of evidence in the file. The accused is committed for trial in another appearance before the magistrate.

This process has been described in some detail by Boyle *et al.* (in their book *Ten Years On*) who also provide a statistical analysis, raising certain serious issues of a general nature, some of which are discussed in the main text of this report.

This process, and these issues, however, are not of very great impact to the concerns discussed here. For this reason, and for reasons of space, this chapter will therefore be restricted to simply stating the conclusions which in this respect can be drawn from the book of Boyle *et al.*⁵; followed by a brief discussion of an investigation of complaints about treatment in police custody, which is carried out in the pre-trial stage⁶.

The only practical function of the initial appearance before a magistrate in cases of scheduled offences is to ensure that the defendant knows of and exercises his right to legal aid. Bail cannot be granted, nor is there any real consideration of the evidence against the accused or of the charges (Boyle *et al.*, *op. cit.*, pp. 65-66).

Bail may only be granted on application to the High Court and is less readily available. Some juveniles have spent long periods in custody on remand on relatively minor charges (Boyle *et al.*, *op. cit.*, pp. 66-67).

Committal proceedings in cases of scheduled offences are more or less a formality. In practical terms they serve mainly to give formal notice to the defendant and his legal adviser of the charges and the evidence which they will have to face at the trial. Any effective opportunity for the defence to challenge the prosecution case at this stage has been eliminated. The magistrate too is not in a position to exercise any effective control over the prosecution at this stage (Boyle *et al.*, *op. cit.*, pp. 68-69).

Plea- and charge-bargaining takes place in the "Diplock" courts as in other British courts (Boyle *et al.*, *op. cit.*, pp. 69-70). Since it "pays" to plead guilty, in the sense that this is likely to lead to a lower sentence, there is a certain amount of pressure on those who made a confession as a result of interrogation to plead guilty, unless there is evidence that that confession was obtained as a result of ill-treatment.

Although the Director of Public Prosecution has been able to exercise a

valuable control over police prosecution practice and to ensure an even-handed approach in cases against Loyalists and Republicans (*Ten Years On*, p. 68), his office cannot be equated with that of the public procurator or investigating judge of inquisitorial systems, nor his review with that of these officials. This is important in view of a change in procedure for dealing with certain cases, noted by Bennett J.:

"The Director often finds himself in the position of having before him the case for consideration for the prosecution of an accused person for a scheduled offence, in which the principal evidence against the accused is his voluntary confession obtained during interrogation, when a complaint has been made by the accused alleging against the officer or officers who were concerned in the interrogation that he or they have assaulted or ill-treated him. Any such allegation by the accused is clearly most important as the obvious foundation for a submission based on section 8 of the 1978 Act that his confession is inadmissible. In order to assist him in dealing with this matter, the Director, in a special direction issued... on 15 February 1978 to the Chief Constable, requested that the evidence with regard to the treatment of any such person and the allegations made should be investigated, and that he be supplied with all the available information before giving his direction for prosecution or non-prosecution of the accused. **The purpose of this request is stated by the Director to be both to enable a decision to be reached as to whether a particular statement should be given in evidence on behalf of the Crown, and to enable counsel to be instructed properly for the conduct of the prosecution and, where appropriate, for counsel to advise with regard to the ability of the prosecution to discharge the burden of proof which lies upon the Crown under section 6(2) (now section 8(2)).**

This direction requires the investigating officer to make findings in his report about any injury sustained by the complainant while in police custody, and the cause of any such injury. Moreover, the direction provides: 'It is necessary to know from the outset the accused person's account of his treatment while in custody' and it goes on to request that the accused person be invited to provide a detailed statement of his evidence in support of his complaint or allegation. Proper provision is made for the accused to be made aware that he is under no obligation to give a statement, and, where the accused is represented by a solicitor, for the invitation to be made through the solicitor." (para 289, emphasis added)

The Chief Constable is bound to comply with the Director's request for information, but, such an investigation not being part of the ordinary pre-trial inquiries (see below), has to rely on a procedure not normally used to this end:

"The Director's request for evidence regarding the facts of the complainant's treatment and the complaint or allegation, and in particular his suggestion that the accused person should be invited to provide a detailed statement of his evidence in support of his complaint or allegation, in effect obliges the Chief Constable to commence the formal investigation of a complaint under the Police Act, since this is the only basis which his officers can have for an approach to the complainant at this stage." (*Bennett Report*, para 360)

As Bennett J. put it:

"the evidence sought to be obtained by the investigating officer about the complaint is also used ... for the purpose of considering the presentation of the Crown case in the prosecution of the complainant." (para 352).

in fact, pending proceedings against the complainant, this is the only purpose of the investigation; further consideration of the complaint is deferred until after the trial. ^ This contrasts with the situation in England and Wales, where the complaint is regarded as being in effect *sub judice* and where therefore both the investigations of and the adjudications on complaints are deferred until after the conclusion of proceedings against the complainant (with very rare exceptions) (*Bennett Report*, paras 290-291).

Bennett J. considered:

"Whether it is right in principle for the complaints procedure to be used for a purpose for which it was not intended." (para 361).

He could not, however, make a conclusive recommendation on this matter, because it was not within his terms of reference to advise on how the Director of Public Prosecutions should exercise his powers in relation to criminal proceedings. (para 362) ^.

The carrying out at this stage of a pre-trial investigation into the factual basis of (part of) the defence case, for the benefit of the Director of Public Prosecutions, ill accords with the latter's role in an accusatorial system, as described above. If properly conducted, it aims, not at discovering whether there is evidence against the accused, but at whether the evidence adduced by the accused in response is capable of undermining the prosecution evidence. In other words, all the circumstances of a particular aspect of the case are examined, but by an official who is involved in preparing the prosecution case within an accusatorial, rather than an inquisitorial, system. Bennett J. remarked:

"It may be said that the investigation of a complaint will consciously or unconsciously be influenced by the wish to support the Crown case against the complainant." (para 352).

He adds, elsewhere:

"We can understand the advantages from the Director's point of view of being informed as fully as possible on the evidence relevant to the issue of the admissibility of a statement before making his decision as to prosecution; **indeed the procedure, if successful, amounts to obtaining a preview of part at least of the accused person's defence.**" (para 361, emphasis added).

It is not surprising in the circumstances that "very often the attempt to ob-

tain a detailed statement from the accused person fails, because he is advised by his solicitor not to reveal his defence in this way" (para 361).

Bennett J. reported that between 1 July 1976 and 1 July 1978, "The Director of Public Prosecutions declined to prosecute in 7 cases (involving 11 persons) on the basis that he was not satisfied by the prosecution proofs in relation to section 6 of the 1973 Act." (para 156).

The Director's request of 15 February 1978 can have had little effect on those figures, given the delays prior to the Director's review of the police files. Later figures are not known. It is not possible, therefore, to establish the effect of the request in practice. There must, however, be considerable doubts about its value.

First of all, there is the natural reluctance of the defence to disclose their case to the prosecution before the trial, which hampers the investigation. But even when the Director is in a position to assess the evidence about a complaint, this assessment is a marginal one only: he will decline to prosecute if he is satisfied that the prosecution cannot discharge the onus placed upon it to prove beyond reasonable doubt that a statement was not obtained as a result of torture, or inhuman or degrading treatment. Presumably, this extends to cases in which there is clear evidence of ill-treatment (see Chapter 4). If the evidence of such treatment is less clear-cut, the matter will be left to the trial judge, as are other factors which might affect the reliability of a confession (see Chapters 4 and 5).

The investigation therefore does not contribute to the *prima facie* reliability of statements tendered in evidence in court and, the defence having no access to the investigation (other than being asked to make a statement to the investigating officer), it serves only to strengthen the prosecution's hand.

PART II The "Diplock" courts

A trial is a hearing of evidence within a framework of law, allowing for a "weighing" of that evidence by a tribunal of fact. English law distinguishes more clearly than many other legal systems between matters of law and matters of fact; and this distinction is underlined when the functions of the court are split between the judge as master of procedure and the jury as tribunal of fact. In ordinary law, all cases of serious crime (so called "indictable offences") are triable before a judge sitting with a jury.

The ordinary law sets a strict framework for the hearing of evidence, and it is the judge who ensures strict adherence to this framework: he rules on the "admissibility" of evidence; he is the umpire over the manner in which prosecution and defence present their case; he sums up the evidence and instructs the jury on the law as regards burden and standard of proof; etc.

The jury is the tribunal of fact, "weighing" the evidence presented to them within the framework set by the law. This involvement of ordinary citizens in the administration of justice is not only regarded as an important constitutional, democratic, principle, but equally as an important safeguard in ensuring the fairness of criminal proceedings (see below, Chapter 5).

Trials in the "Diplock" courts differ from ordinary proceedings in two important respects: owing to a major change in the law, the evidence which can lawfully be considered by the tribunal of fact in reaching its verdict can now include certain statements made by the accused which would be "inadmissible" in ordinary law. And the court itself sits without a jury: although most "scheduled" (i.e. terrorism-related) offences are, by their nature, serious, the (single) judge in the "Diplock" courts both rules on the law and "weighs" the evidence.

The effect of these two changes in the law will be discussed in the following chapters.

Before embarking upon this discussion, however, it is useful to note the different categories of cases that come before the "Diplock" courts, in terms of the attitude taken by the accused, since these categories are affected differently by these changes in the law. First of all, it must be noted that where an accused pleads guilty to the charges laid against him, the accusatorial system of criminal justice requires no further "weighing" of the evidence: such a plea, if accepted by the prosecution, suffices to convict. In such cases (which form the majority in the "Diplock" courts), the changes in the law discussed below do not affect the trial against the accused (although they may have affected his willingness to participate in plea- or charge-bargaining).

A (declining) number of other defendants, in particular Republicans, refuse to recognise the legitimacy of the court; they do not enter a plea and take no part in the proceedings. In such cases a plea of not guilty is formally entered on their behalf but, as Boyle *et al.* observed:

"since no defence is offered, a refusal to recognise the court amounts for practical

purposes to a plea of guilty, though the prosecution must, of course, bring some convincing evidence of guilt." (*Ten Years On*, p. 59)

Since neither the 'admissibility' nor the reliability of the evidence produced by the prosecution is challenged, the outcome of such cases is therefore also not in practice affected by the changes in the law.

There are also "partial pleas":

"cases in which the defendant pleads guilty to some, but not all of the charges against him, without securing the co-operation of the prosecution in withdrawing the remaining charges..."

In most of these [cases] the defendant was successful in the sense that the contested charges were either dropped or substituted by other less serious charges.

It seems likely that most of these cases involved an attempted charge-bargain which was offered by the defence but rejected by the prosecution." (*Ten Years On*, p. 75)

In cases where the defendant is convicted only of charges to which he pleads guilty, the outcome of the case is again not affected by the change in the law.

The most important category of cases for the purpose of this analysis are those in which the defendants pleaded not guilty to all the charges against them. As Boyle *et al.* observe:

"The most striking feature of the cases in which the defendant contested all charges, but was convicted on all or most of them, was the high proportion of alleged confessions. In at least three-quarters of the cases the defendants were alleged to have made a voluntary statement. In all but a few of these this was the only substantial evidence in the prosecution case, though there were a number of other cases in which there was also some indication that the defendant had been named by accomplices. The essence of the defence in many of these cases was clearly the inadmissibility of the alleged confession. In only about one-third of the cases for which full details of the initial prosecution cases were available to us did there appear to be strong independent evidence, by way of identification, fingerprints and the like, pointing to the guilt of the accused." (*Ten Years On*, pp. 76-77)

Furthermore, in about half the cases in the sample studied by Boyle *et al.* in which defendants were acquitted this appeared to have been the result of the rejection of alleged confessions. (*Ten Years On*, p. 77)

In contested cases in which an (alleged) confession is the only evidence against the accused, the changes in the law discussed below are therefore of crucial importance. Following the discussion of the effect of these changes in the law on trials in the 'Diplock' courts, the crucial issue of the reliability of confessions is discussed in the concluding part of this analysis.

Chapter 4 The "admissibility" of statements (allegedly) made to the police as evidence in court

(i) "Admissibility" in Ordinary Law

(ii) "Admissibility" in the "Diplock" Courts

(iii) Conclusions

English law has traditionally known rules which exclude certain evidence, and in particular certain statements by the accused, from the consideration of the tribunal of fact. The importance of these rules in setting the legal framework for the "weighing" of the evidence by the jury stems from the absence of strict legal or institutional safeguards operating at the time of police questioning. As was mentioned earlier, the main rules regarding the questioning of suspects (and certainly the only applicable rule of law) do not purport to protect suspects from oppressive questioning, but rather seek to protect accused persons from being convicted on the basis of statements obtained as a result of oppressive questioning. The procedural safeguard of exclusionary rules in English law therefore serves the same purpose as contemporaneous (institutional or procedural) safeguards attending police questioning in other legal systems: they seek to minimize the risk of unreliable (and in many legal systems also of unfairly obtained) statements becoming the basis for a conviction. The link between, in particular, the main exclusionary rule (the so-called "voluntariness-rule" discussed below) and reliability has been clearly stated by the Royal Commission on Criminal Procedure, even though, while this link is "in legal terms exact; in psychological terms it is uncertain, to say the least." (*RCCP Report*, para 4.73).

The question of the legal approach to reliability is further discussed in the concluding chapter of this analysis.

(i) "Admissibility" in Ordinary Law

The most important exclusionary rule in English law is the "voluntariness rule":

"It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

The onus is on the prosecution to prove beyond reasonable doubt that a statement was voluntary in this sense.

The circumstances that may constitute oppression are many, such as the length and number of interviews, the period in between, refreshments, etc.,

and may also depend on the characteristics of the person who makes the statement. (see Sachs J. in *R v Priestley* (1956) 51 Cr. App. Rep.1). The Court of Appeal has adopted the following description of "oppressive questioning" in *R v Prager* (1971) 56 Cr. App. Rep. 151,161:

"questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent."

The Northern Irish situation prior to the introduction of special legislation in this field has been summarized by Boyle *et al.* as follows:

"... the Northern Ireland judges continued to apply the established common law rules on the admissibility of confessions. During 1972 in a number of test cases the judges held that confessions obtained during prolonged interrogation were involuntary and therefore inadmissible.

In *R v Flynn and Leonard* the Lord Chief Justice described the detention centre at Holywood as 'a set-up officially organised and operated to obtain information... from persons who would otherwise have been less than willing to give it'; he went on to say that in general 'admissions made by persons under this type of interrogation in this setting will often fail to qualify as voluntary statements'. A substantial number of other prosecutions were abandoned by the Director of Public Prosecutions on the ground that confessions obtained in such circumstances were unlikely to be held admissible." (*Ten Years On*, p. 38).

Beyond applying the "voluntariness rule" as further defined above, the courts have a discretion to exclude evidence if its admission "would operate unfairly against the accused". The extent of this discretion is not quite clear, but would appear to cover in particular the exclusion of evidence of little probative value, which though technically admissible, would be disproportionately disadvantageous to the accused if admitted. It would appear that the discretion is used mainly to exclude character evidence in certain cases (cf Cross, *On Evidence*, 5th ed., pp. 29 ff).

(ii) "Admissibility" in the "Diplock" Courts

Although *R v Flynn and Leonard* (mentioned above) closely followed English precedents, such as *R v Prager*, Lord Diplock considered that in the circumstances such rulings were:

"hampering the course of justice in the case of terrorist crimes and compelling the authorities responsible for public order and safety to resort to detention in a significant number of cases which could otherwise be dealt with both effectively and fairly by trial in a court of law." (para. 87)

Lord Diplock considered:

"the draconian remedy, that all inculpatory admissions alleged to have been made by the accused should be 'admissible' in evidence, and that a court of law should confine its attention to the two questions relevant to the guilt of the accused, i.e. whether the alleged admission was in fact made and, if so, whether the circumstances in which it was made give any reason to suppose that the accused may have been inculcating himself falsely. The logic of this solution is that the function of a court of law is to determine whether the accused is truly guilty of the offence with which he is charged. Its function is not to discipline the police force, over which it has no direct powers of control, by the indirect method of letting a guilty man go free to commit further crimes against public order and safety. In the case of a hardened terrorist this is a likely result of this method of marking the court's disapproval of the behaviour of the police.

Nevertheless, we think that logic ought to yield to the consideration that the reputation of courts of justice would be sullied if they countenanced convictions on evidence obtained by methods which flout universally accepted standards of behaviour. We consider therefore that although the current technical rules, practice and judicial discretions as to the admissibility of confession ought to be suspended for the duration of the emergency in respect of Scheduled Offences, they should be replaced by a simple legislative provision that:

(1) Any inculpatory admission made by the accused may be given in evidence unless it is proved on a balance of probabilities that it was obtained by subjecting the accused to torture or to inhuman or degrading treatment; and

(2) The accused shall not be liable to be convicted on any inculpatory admission made by him and given in evidence if, after it has been given in evidence, it is similarly proved that it was obtained by subjecting him to torture or to inhuman or degrading treatment.

In recommending this exception to the admissibility of confessions we have adopted the wording of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is a simple concept, which we do not think the judiciary in Northern Ireland would find it difficult to apply in practice. It would not render inadmissible statements obtained as a result of building up a psychological atmosphere in which the initial desire of the person being questioned to remain silent is replaced by an urge to confide in the questioner, or statements preceded by promises of favours or indications of the consequences which might follow if the person questioned persisted in refusing to answer. Such matters, of course, might affect the reliability of the confession as establishing the guilt of the accused and should be fully investigated on that issue. They would not affect its initial admissibility in evidence unless they could be fairly regarded as so outrageous as to amount to torture or to inhuman or degrading treatment." (paras 88 - 90).

Consequently, the law on the admissibility of statements in evidence has been fundamentally altered in trials in the "Diplock" courts. Section 8 of the Northern Ireland (Emergency Provisions) Act 1978¹¹ provides:

"8. Admissions by persons charged with scheduled offences

(1) In any criminal proceedings for a scheduled offence, or two or more offences which are or include scheduled offences, a statement made by the accused may be given in evidence by the prosecution in so far as -

- (a) it is relevant to any matter in issue in the proceedings; and
- (b) it is not excluded by the court in pursuance of subsection (2) below.

(2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, *prima facie* evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained -

- (a) exclude the statement, or
 - (b) if the statement has been received in evidence, either -
 - (i) continue the trial disregarding the statement; or
 - (ii) direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible).
- (3) This section does not apply to a summary trial."

Somewhat different from Lord Diplock's proposal, the onus of proof for the defence is to adduce *prima facie* evidence that a statement was obtained as a result of torture, inhuman or degrading treatment. The crown can then rebut this only by proving *beyond reasonable doubt* that the statement was not so obtained. The latter is in line with the normal standard of proof required of the prosecution in *voir dire*¹² cases relating to confessions (see Cross, *On Evidence*, 4th ed., pp 64-65).

That section 8 serves explicitly to change both law and practice concerning the admissibility of statements was stated unequivocally by the Lord Chief Justice for Northern Ireland in *R v Corey and others* (judgement delivered on 6 December 1973):

"Accordingly, section 6(2) would merely be a statement of the obvious if it did not, in conjunction with section 6(1), render admissible much that previously must have been excluded. There is no need now to satisfy the judge that a statement is voluntary in the sometimes technical sense which that word has acquired in relation to criminal trials."

McGonigal L.J. in the leading case of *R v McCormick and others* (1977) NI 4 referred to the interpretation of the words "torture, inhuman and de-

grading treatment" by the organs of the European Convention on Human Rights and, construing the words in the section accordingly, concluded that statements would be lawfully admissible in evidence under this section even if the interviewing officer had used "a moderate degree of physical maltreatment" for the purpose of obtaining the statement (but see further below).

Irrespective of whether one accepts that the "technical" requirements of "voluntariness" have gone beyond minimizing the risk of unreliable statements being produced in court, it is clear that section 8 does not fulfil that basic function of the ordinary law on the admissibility of statements. As the Lord Chief Justice said in *R v McGrath* (1980) N.I. 91:

"The scheme of section 8 (1) is to abrogate the common law rule concerning the admissibility of statements, but the universal admissibility of relevant statements of the accused introduced by that subsection is then qualified by reference to the words taken from article 3 [of the European Convention on Human Rights], the object of which was to outlaw certain forms of conduct and not simply to obviate the admission of unreliable evidence. The same object may be attributed to section 8 (2), because, for example, it has nothing to say concerning the holding out of inducements (however great) to a suspect, although the latter course could tend strongly to destroy the reliability of a confession."

Therefore, even proof that a prisoner was subjected to torture, or to inhuman or degrading treatment does not suffice to exclude a statement, unless it is also proved that that treatment was meted out "in order to" induce the statement (*R. v. McCormick*); and that there was a certain amount of *mens rea* on the part of the person inflicting the treatment. To quote again the Lord Chief Justice in the *McGrath* case:

"Our view, therefore, is that section 8(2) is aimed at discouraging the deliberate infliction of suffering rather than contemplating the incidental effect on a suspect who becomes the victim of conduct which is not deliberately bad conduct."

In sum, the emergency legislation not only obviated the "technical" requirement of "voluntariness", but equally removed from the law on admissibility the basic function of minimizing the risk that unreliable statements are brought before the tribunal of fact. As was mentioned above (Chapter 2), the rules on interrogation also do not fulfil this function. As a result, for trials held in the "Diplock" courts, there are no binding rules of law at any stage of the criminal justice process to safeguard against the risk of unreliable confessions becoming the basis for a conviction: under the emergency legislation, if applied without mitigation, accused are only protected from being convicted on the basis of unreliable statement evidence by the care with which the tribunal of fact "weighs" the evidence, in particular the evidence about the manner in which a confession was obtained.

This was clearly the intention of Lord Diplock when he recommended that statements should only be inadmissible if obtained as a result of torture,

or inhuman or degrading treatment; and that not only the law and practice, but also judicial discretion as to the admissibility of confessions be suspended, with the result that statements would be brought before the tribunal of fact although their reliability could clearly be open to question (see paras 88-90 of the *Diplock Report*, quoted above).

Nonetheless, the courts in Northern Ireland have held that they have retained a certain discretion in this respect. This was stated by the Lord Chief Justice in *R v Corey* as follows:

"there is always a discretion, unless it is expressly removed, to exclude any admissible evidence on the ground that (by reason of any given circumstance) its prejudicial effect outweighs its probative value and that to admit the evidence would not be in the interest of justice."

McGonigal L.J., having interpreted section 8 (than section 6) in accordance with the European Convention on Human Rights as allowing "a moderate degree of physical maltreatment" (*R v McCormick*, cited above) went on to say:

"That does not mean however that these courts will tolerate or permit physical maltreatment of a lesser degree deliberately carried out for the purpose of, or which has the effect of, inducing a person interviewed to make a statement. Not only would such conduct amount to an assault and in itself be an offence under the ordinary criminal law but it would be repugnant to all principles of justice to allow such conduct to be used as a means towards an end, however desirable that end might be made to appear"

and pointed to the Judges' discretionary powers,

"which provide an extra-statutory control over the means by which statements are induced and obtained."

However,

"If he exercises his discretion without regard to section 6 he will in all probability exclude statements obtained in circumstances not considered by Parliament to warrant exclusion. It would indeed not be difficult to envisage cases of maltreatment falling short of section 6 conduct, which the trial judge could consider would be sufficient to justify the exercise of his discretion. The effect of the exercise of the discretion if unfettered by the existence of section 6 might be, therefore, to negate the effect of section 6 and under the guise of the discretionary power have the effect of reinstating the old common law test insofar as it depended on the proof of physical or mental maltreatment. In my opinion the judicial discretion should not be exercised so as to defeat the will of Parliament as expressed in the section. While I do not suggest its exercise should be excluded in a case of maltreatment falling short of section 6 conduct, it should only be exercised in such cases where failure to exercise it might create injustice by admitting a statement which though admissible under the section

and relevant on its face was *in itself*, and I underline the words, suspect by reason of the method by which it was obtained, and by that I do not mean only a method designed and adopted for the purpose of obtaining it, but a method as a result of which it was obtained. This would require consideration not only of the conduct itself but also, and since the effect of any conduct varies according to the individual receiving it, possibly equally important, its effect on the individual and whether, to use the words of the Commission Report already referred to, the maltreatment was such as to drive the individual to act against his will or conscience. It is within these guidelines that it appears to me the judicial discretion should be exercised in cases of physical maltreatment."

Bennett J., after discussing this case, observes:

"We have looked at reports of other cases to try to discover examples of the exercise of the courts' discretion which might provide a guide to interrogating officers and others as to what is permissible and what is not in the conduct of interrogation. Few of such rulings are fully reported. The reports appearing in the press are necessarily so condensed and selective that it is often difficult to discern precisely on what grounds a statement has been ruled inadmissible.

It is nevertheless clear that any statement which may have been obtained by the use of physical violence or ill-treatment would not be admitted. In less extreme cases, there is the difficulty that, because the principles on which the discretion will be exercised are so broadly stated and the facts of individual cases are so infinitely various, it is hard to predict what the judge's ruling will be. The courts have on occasion expressly refused invitations by counsel to define the circumstances in which the judicial discretion to exclude otherwise admissible evidence might be exercised, on the ground that each case depends on its own particular facts." (para 84).

And Boyle *et al.* state:

"In practice contested confessions have been excluded mainly where the judge has been satisfied by the medical evidence that there has been *physical maltreatment* and that that maltreatment was used in order to obtain a confession, that is that it was used by detectives before the confession was made. There have been a substantial number of such cases." (*Ten Years On*, p. 48, emphasis added).

Later on they state:

"...there was ample evidence of breaches of the Judges' Rules in the process of questioning, in that charges were delayed and questioning continued long after clear admissions of guilt had been made. There were also some examples in the written records of questioning of improper threats or inducements.

We are not aware of any case in which a statement has been held to be inadmissible merely on the ground of such breaches of the Judges' Rules. In a few cases judges have used their residual discretion to exclude statements obtained by trickery or

other improper practices. In one case in our sample the judge excluded an oral admission obtained from a defendant by a false claim by the detectives that 'they had ample evidence against him' and that there was a witness who could identify him, and after an assurance that what he said would not be written down and used in evidence; as there was no other evidence against him, the defendant was acquitted. In another trial in December 1979 the judge admitted a statement made by a 15 year old schoolboy who was attending a school for the mentally handicapped at the time of the interview, and who was assessed as having the mental age of a child of eight, though it was accepted that the administrative direction requiring the presence of a parent or relative in such a case had not been complied with." (*Ten Years On*, p. 49).

In *McGrath* the trial judge admitted a confession in evidence, although the accused (who had been arrested, detained and interrogated repeatedly) had told both his own and a police doctor that "he couldn't take any more interviewing."

It would appear that confessions apparently obtained as a result of physical maltreatment (falling short of torture, or inhuman or degrading treatment) are usually excluded from evidence by the judge in the exercise of his discretion. Beyond this, there are no clear principles to guide the judges on how to exercise their discretion. In practice, the judges do not appear to make consistent use of their discretion so as to exclude confessions the reliability of which is open to question on other grounds. Neither statements obtained as a result of repeated, prolonged and forceful questioning, nor statements obtained as a result of threats or promises are as a rule excluded.

Individual instances to the contrary appear to be the exception. The consequences of this policy will be discussed in the next chapter.

(iii) Conclusions

The law regarding the admissibility in evidence of statements made by a suspect in police custody has been fundamentally altered. Involuntary statements are legally admissible evidence, unless induced by torture, or by inhuman or degrading treatment. This change has not only obviated "technical" legal requirements, but has also removed from the law on admissibility the basic function of minimizing the risk that unreliable statements are brought before the tribunal of fact. The rules on interrogation also do not fulfil this function.

As a result, for trials held in the "Diplock" courts, there are no binding rules of law at any stage of the criminal justice process to safeguard against the risk of unreliable confessions becoming the basis for a conviction: under the emergency legislation, if applied without mitigation, accused are only protected from being convicted on the basis of unreliable statement evidence by the care with which the tribunal of fact "weighs" the evidence, in particular the evidence about the manner in which a confession was obtained.

Nonetheless (and contrary to Lord Diplock's proposals), the courts have retained a discretion to exclude evidence on the grounds that "its prejudicial

effect outweighs its probative value and that to admit the evidence would not be in the interests of justice".

It would appear that the courts usually exercise this discretion to exclude confessions apparently obtained as a result of physical maltreatment falling short of torture, inhuman or degrading treatment. Beyond this, there is no consistent judicial practice, but neither statements obtained as a result of repeated, prolonged and forceful questioning, nor statements obtained as a result of threats or promises are as a rule excluded.

Chapter 5 The "weighing" of the evidence

- (i) *Judge and Jury*
- (ii) *Admissibility and Reliability*
- (iii) *The Nature of the Evidence*
- (iv) *Conclusions*

(i) *Judge and Jury*

In ordinary proceedings, all persons accused of serious offences have the right to be tried by jury¹³. In constitutional terms, the participation of ordinary citizens in the administration of justice is regarded as an important expression of the democratic nature of the state; and the abolition of the jury consequently as a diminution of democracy. In criminal legal terms, the right to a trial by jury is considered an important safeguard in guaranteeing accused persons a fair trial. It shields the accused from abuse of the criminal justice system by the state, in that it takes away the ultimate decision on guilt or innocence from officers of the state, and places it in the hands of "peers" of the accused.¹⁴ In jury trials, the ultimate decision on guilt or innocence is not taken by officers of the law, of the state, but by ordinary people.

As a result, on certain issues (such as the factors determining the legal admissibility of a confession on the one hand, and its reliability on the other) this means that two distinct, legal and non-legal, decisions may have to be made.

The jury's "weighing" of the evidence not being a matter of law, their verdict need not state the reasons for their conclusions. There are nonetheless a number of important safeguards against subjective and arbitrary jury decisions.

First, the jury must take its assessment on the basis of admissible evidence, properly presented, and thus within a strict framework of law. The law on the admissibility of evidence ensures that certain kinds of evidence, in particular certain confessions, are altogether excluded from the jury's consideration. The rules of procedure at the trial seek to ensure that admissible evidence is fairly presented, in particular through examination and cross-examination of witnesses.

Following the hearing of evidence, the jury must be properly instructed as to the onus and standard of proof required for a conviction; ultimately, in criminal proceedings, the onus is on the prosecution to prove the guilt of the accused beyond reasonable doubt.

Secondly, the jury is required to reach its decision, if not by unanimity, then at least by a very high degree of consensus: not one man or woman, but

at least 10 out of a random group of 12 must agree on an accused's guilt before a verdict of "guilty" can be entered. This high degree of consensus required of a relatively large group of randomly chosen people is, in ordinary circumstances, a major safeguard against bias and prejudice or other subjective factors influencing the decision of the tribunal of fact and thereby ensures its objectivity.

An additional safeguard can be found in the duty of the judge to withdraw a case from the jury if, on the evidence produced, he is satisfied that the jury would not be justified in convicting the accused. All these safeguards operate in favour of the accused: certain kinds of relevant evidence, in particular statements, are excluded, e.g. because it is *prima facie* of doubtful reliability or of relatively little probative value (this fact is not altered by the argument, put forward by Lord Diplock, that the law on admissibility has moved beyond this test); not a simple majority, but at least 10 out of 12 jurors need to be convinced of the guilt of the accused, and the power of the judge to withdraw a case from the jury can only be exercised in favour of the accused.

At the same time, the jury system can break down in circumstances such as prevail in Northern Ireland, where bias and prejudice, but above all intimidation, can result in "perverse" jury verdicts.

Lord Diplock noted that the judges in Northern Ireland had been more ready than judges in England to withdraw a case from the jury if they had any doubt as to the guilt of the accused. Lord Diplock felt that,

"While the danger of perverse convictions by partisan juries can in practice be averted by the judge, though only at the risk of his assuming to himself the role of decider of fact, there is no corresponding safeguard in a jury trial against the danger of perverse acquittals. ...

... We think that matters have now reached a stage in Northern Ireland at which it would not be safe to continue to rely upon methods hitherto used for securing impartial trial by a jury of terrorist crimes...." (para 37).

He therefore recommended that for "scheduled" offences,¹⁵

"... trial by judge alone should take the place of trial by jury for the duration of the emergency" (para 38).

Trials in the "Diplock" courts are therefore held without a jury: Section 7 of the Northern Ireland (Emergency Provisions) Act 1978 (consolidating the original 1973 version, as amended in 1975) reads, in part:

"7. Mode of trial on indictment of scheduled offences

(1) A trial on indictment of a scheduled offence shall be conducted by the court without a jury.

(2) The court trying a scheduled offence on indictment under this section shall

have all the powers, authorities and jurisdiction which the court would have if it had been sitting with a jury, including power to determine any question and to make any finding which would, apart from this section, be required to be determined or made by a jury, and references in any enactment to a jury or the verdict or finding of a jury shall be construed accordingly in relation to a trial under this section."

In this respect, the position of the judges in the "Diplock" courts therefore resembles that of Magistrates, who try minor offences in summary proceedings, as well as more serious cases in which the accused has waived his right to a jury trial. (However, Magistrates cannot try the most serious of offences.)

Magistrates sit without a jury. As regards many issues of law, affecting the framework for the "weighing" of the evidence, the Clerk of the Magistrates court to some extent fulfils the role of master of procedure. On those issues, there is therefore still a duality of functions in spite of the absence of a jury. On other issues, such as the ruling on the admissibility of statements, the Magistrates themselves fulfil the function of both judge and jury. A Magistrates' court, however, is usually made up of a plurality of Magistrates so that the "weighing" of the evidence does not fall on the shoulders of one man or woman alone. That "weighing", moreover, takes place within the ordinary framework of the law (elucidated by the Clerk of the court), so that involuntary confessions cannot become the basis for a conviction. And although the safeguards attending a trial in a Magistrates' court may fall somewhat short of those attending trial by jury in the Crown Court, it must be realized that Magistrates have compulsory jurisdiction in minor cases only; and that even in cases of indictable offences tried by a Magistrates' court, the maximum sentencing power is 12 months only. Any accused charged with a serious offence retains the right to opt for a trial by jury in the Crown Court.

The single judges in the "Diplock" courts, by contrast, can and often do impose sentences of life imprisonment on the basis of confessions which would be inadmissible in a Magistrates' court (or any other ordinary court of law) as falling short of the legal requirement of "voluntariness".

(ii) Admissibility and Reliability

Professor Cross remarks that "trials within trials" (in which the "admissibility" of confessions are ruled upon), "are something of an unreality in cases tried before magistrates, because the question of admissibility has to be determined by the same tribunal as that which pronounces on liability." (Cross, *On Evidence*, 5th ed, p. 73)

This "unreality", however, stems from the fact that in Magistrates' courts the tribunal is supposed to pronounce on the reliability of a confession which that tribunal itself has already held to be purely "voluntary", and not obtained as a result of threats, promises or oppression. In the "Diplock" courts, by contrast, matters affecting the reliability of a confession no longer affect its initial admissibility. As was made clear above, neither the "voluntariness" nor the reliability of "admissible" confessions can be taken for granted in the

"Diplock" courts (see Chapter 4). In other words, matters which might affect the reliability of a confession (threats, promises, oppression) are, in law, supposed to be fully investigated *after* the ruling on the admissibility.

In fact, the "unreality" of such a secondary "weighing" of the evidence, noted by Professor Cross with regard to Magistrates' courts, can equally be noted in the "Diplock" courts: following extensive hearings on the "admissibility" of an (alleged) confession, covering fully the circumstances in which it was taken, there is no subsequent inquiry specifically to deal with the reliability of the confession.

No case has been brought to the author's attention where an accused was acquitted though his confession was ruled admissible. If such cases exist, they are extremely rare. Rather than addressing the question of reliability as a separate issue, the judges in the "Diplock" courts appear to subsume this task under the exercise of their discretion to exclude evidence, the admission of which would operate unfairly against the accused. When defence counsel submit that a statement is unreliable, they too tend to place the emphasis on a request that the court exercises its discretion to exclude the statement, rather than on the argument that the court should acquit because the statement is unreliable, irrespective of its admissibility (although the latter argument is usually not left out altogether).

However, as was observed above, there are no clear principles to guide the judge on how to exercise his discretion in cases where the factors affecting the reliability of a confession fall short of physical maltreatment. This, together with the fact that the judges in the "Diplock" courts sit alone, increases the risk that subjective factors come to influence the findings of fact - at least in cases where disputed confessions are the only real issue. Such subjective factors need not constitute bias on the part of the judge, but may include "case-hardening": the negative effect of constant involvement in the administration of justice on the detachment and objectivity of judges. Boyle *et al.* have provided convincing statistical evidence of "case-hardening" in the "Diplock" courts.

(iii) *The nature of the evidence*

It was noted in the introductory remarks of Part II that in the vast majority of cases in the "Diplock" courts the only substantial evidence against the accused consists of a confession allegedly made by the defendant to the police in the course of interrogation. As Boyle *et al.* observe:

"The overall nature of the evidence in most Diplock trials does have a significant impact on the nature of the proceedings... [T]he basis of the prosecution case in the vast majority of cases is either a formal written statement by the defendant or on oral admission during questioning. There are rarely any witnesses whose evidence relates directly to the guilt or innocence of the defendant. Most are called only to establish that the particular shooting or bombing or other incident actually took place. Such witnesses, whether civilian or members of the security forces, are merely taken through their written depositions in a routine manner. The statements or admission

by the defendant will then be produced. If the case is not contested the judge will convict and proceed directly to a consideration of any submission or evidence in mitigation before giving sentence. Such cases rarely last more than a few hours, unless there is a large number of charges or defendants. In contested cases the main issue is likely to be the admissibility and validity of the alleged confession or admission. The hearing of the evidence from all involved in the process of arrest and interrogation in what are termed 'statement fights' of this kind may take up to several weeks. But the focus of the proceedings is not on the alleged offences but on what happened in the police station." (*Ten Years On*, pp 58. - 59)

Bennett J. discussed the general difficulties of establishing what happened in the interrogation room in the context of the investigation of complaints; but the evidentiary problems facing the judges in "statement fights" in the "Diplock" courts are no different.¹⁶

Bennett J. observes:

"It has been alleged in the past that there has been a 'wall of silence' among detective officers who interrogate prisoners - in other words, a conspiracy to prevent the facts from coming out, extending to widespread refusals to make any statement to the officers investigating complaints. This is not the position today; we have come across no case in which an officer has refused a statement. The statements that are made, however, do not take the investigating officer very far. The evidence from police officers seems often to consist of short statements to the effect that the allegations are wholly denied (from detective officers who interrogate prisoners) or that nothing untoward was seen or heard (from uniformed officers)." (para 344).

The same can be said about the evidence given by police officers in the course of "statement fights". Bennett J. adds:

"Independent Witnesses

As matters stand, there are not likely to be independent witnesses to the events in question - witnesses, that is to say, who do not have a personal interest in the outcome of the investigation. ... [T]he detective officers and the prisoner are normally alone in the interview room, and their conversation cannot normally be overheard.

Thus, so far as any misconduct short of physical ill-treatment is concerned, there is little prospect at present of finding independent witnesses. As regards physical ill-treatment, there is perhaps a slightly greater possibility of finding witnesses, because other police officers may have heard a commotion or have looked through the 'spy-hole' at the critical moment. But no statement to this effect seems in fact to have been made to an investigating officer.

Other Evidence

In these circumstances, investigations resolve themselves into considering the word

of the complainant against the word of the police officers against whom the complaint is made, together with any circumstantial evidence that may be available by way of forensic examination of the interview room or medical examination of the prisoner. Although we are informed that forensic examinations are regularly carried out, they do not seem to yield a great amount of evidence. An enormous weight therefore hangs on medical evidence, although this can only be of value in cases in which the complaints are of physical oppression (and not necessarily in all of those, since an assault can take place without leaving marks).

Evidence from medical examination

A doctor may say, as a result of a medical examination, that the prisoner's condition is or is not consistent with his allegations. Even if injury is found, however, alternative explanations may be offered or inferred. The only alternative explanation most commonly advanced by the RUC is self-inflicted injury. An experienced doctor may be able in some cases, and to a higher degree of certainty, to distinguish this from injury resulting from assault, having regard to the nature, extent and site of injuries. In any case, many of the examples of self-inflicted injuries that have been mentioned to us - for example, swallowing foreign bodies or cutting wrists with knives - are clearly not of a nature to deceive a doctor into believing that an assault had taken place, but must be assumed to have had some other reason, such as halting the process of interrogation. In other cases, however, there may be room for doubt.

Results from investigations

For one or other of the reasons given above, or a combination of them, **most investigations of complaints are unsatisfying in the sense that they do not lead to a clear-cut result in terms of deciding whether the events complained of did or did not take place or whether particular officers were or were not responsible for them**" (paras 345 - 348, emphasis added).

It must be recalled that in spite of the increased supervision over interrogation following Bennett J.'s recommendations, there is still no corroboration of what is said during the interrogation.

Bennett J. emphasizes,

"that the standard of proof required in order to obtain a finding of guilt against a police officer, as against any other person, and whether in criminal or disciplinary proceedings, is proof beyond reasonable doubt" (para 348).

The absence of any successful criminal or disciplinary proceedings against police officers regarding maltreatment of suspects in custody is no doubt related to this.

In "statement fights", the onus as regards the "admissibility" of a confession under Section 8 of the Northern Ireland (Emergency Provisions) Act 1978 is on the defence to make a *prima facie* case of "torture, or inhuman or

degrading treatment"; the prosecution must then rebut this case beyond all reasonable doubt (see Chapter 4). Given the relative readiness of the "Diplock" courts to accept that the defence has made a *prima facie* case under Section 8, it is surprising, in view of the evidentiary difficulties noted above, how often these courts have accepted that the prosecution have discharged the onus of proof laid upon them to establish beyond reasonable doubt that such treatment did not occur. Moreover, the ultimate "weighing" of the evidence by the tribunal of fact in the "Diplock" courts is supposed to be covered by the normal, fundamental, rule of criminal law "in dubio pro reo", i.e. the judges in the "Diplock" courts, like juries or magistrates in ordinary courts, must acquit if there is any reasonable doubt about the guilt of the accused. But, again, it is surprising in view of the evidentiary difficulties noted by Bennett J., that in assessing the reliability of a confession (allegedly) made to the police in the course of interrogation, the judges in the "Diplock" courts so often find that the circumstances in which the confession was obtained, have been established with such clarity as to leave no doubt about the guilt of the accused. This, crucial, issue will be discussed in Part III of this analysis.

(iv) Conclusions

Trials in the "Diplock" courts are held without a jury; a judge, sitting alone, acts both as master of procedure and as tribunal of fact.

The law envisages an assessment of the reliability of confessions, independent of and subsequent to the judge's ruling on "admissibility". But in fact, rather than addressing the question of reliability separately, the judges in the "Diplock" courts appear to subsume this task under their rulings on the "admissibility" of confessions.

A similar practice has been noted in the Magistrates' courts (Cross, *On Evidence*). But whereas Magistrates apparently (and maybe not unreasonably) subsume their assessment on the reliability of a confession under their testing of its "voluntariness", the judges in the "Diplock" courts appear to subsume their assessment on the reliability of a confession under the exercise of their discretion to exclude evidence, the admission of which would operate unfairly against the accused.

However, as was observed above (Chapter 4), there are no clear principles to guide the judges on how to exercise this discretion in cases where the factors affecting the reliability of a confession fall short of physical maltreatment. The assessment of the reliability of confessions therefore takes place in a much less strict legal framework than is imposed on fact-finding in ordinary courts, including Magistrates' courts.

This, together with the fact that the judges in the "Diplock" courts sit alone (without either a jury or assessors), increases the risk that subjective factors come to influence the findings of fact - at least in cases where disputed confessions are the only real issue. Such subjective factors need not constitute bias on the part of the judge, but may include "case-hardening": the negative effect of constant involvement in the administration of justice on

the detachment and objectivity of judges.

Most of the defendants in the "Diplock" courts who protest their innocence by contesting their case are convicted on the basis of confessions (allegedly) made by them in the course of police interrogation. By convicting them on this basis, the judges in the "Diplock" courts imply that the circumstances in which confessions are obtained can be established with such clarity as to leave no doubt about either the admissibility or the reliability of those confessions. This is surprising in view of the evidentiary problems regarding what happened in the interrogation room, noted by Bennett J.

Chapter 6 Other adjudications

- (i) Appeals
- (ii) Complaints against the Police
- (iii) Conclusions

(i) Appeals

The Court of Appeal in Northern Ireland can hear appeals from trials in the "Diplock" courts as well as from trials in the ordinary criminal courts. There are two kinds of appeal: appeal against conviction and appeal against sentence. In ordinary law, an accused may appeal against his conviction on any ground which involves a question of law alone. Appeals against conviction on grounds of fact, or of mixed law and fact, require either a certificate by the trial judge or leave of appeal by the Court of Appeal. Appeals against sentence also require leave by the Court of Appeal.

The law regarding trials in the "Diplock" courts, however, grants virtually unlimited rights of appeal. Section 7 (6) of the Northern Ireland (Emergency Provisions) Act 1978 reads:

"A person convicted of any offence on a trial under this section without a jury may, notwithstanding anything in Section 8 of the Criminal Appeal (Northern Ireland) Act 1968, appeal to the Court of Criminal Appeal under that section -

(a) against his conviction, on any ground, without the leave of the Court of Criminal Appeal or a certificate of the judge of the court of trial: and

(b) against sentence passed on conviction, without that leave, unless the sentence is one fixed by law."

The reasons for which the Court of Appeal will uphold ("allow") an appeal from a "Diplock" court are the same as those regarding ordinary trials: if the appeal judges are of the opinion:

(a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory;

(b) that the judgement of the court of trial should be set aside on the ground of a wrong decision of any question of law; or

(c) that there was a "material irregularity" in the course of the trial.

The Court of Appeal may nonetheless dismiss an appeal if it considers that no miscarriage of justice has actually occurred. (Section 8 of the Criminal Appeal (Northern Ireland) Act 1968, the Northern Irish equivalent of section 2 of the Criminal Appeal Act, 1968, regarding England and Wales).

Within this framework there are a wide variety of grounds of appeal (see

Archbold, paras 913 - 923). Many of these grounds of appeal relate to the setting of the legal framework within which the tribunal of fact "weighs" the evidence (see above, Chapter 5), e.g. defects in the indictment; wrongful admission or exclusion of evidence; misdirection of the jury, "material irregularities" such as interruption by the judge making it impossible for defending counsel to present his defence fairly, or such as disclosure of previous convictions of the defendant to the jury; etc.

Other grounds of appeal of a more or less "technical" nature include the ground that the finding of a jury was ambiguous (e.g. if the jury have "negatived" by their finding the existence of some essential element of the offence charged); or questions as to the constitution of the jury or misconduct of one or more jurymen.

But there are also a number of grounds of appeal which extend beyond "technical" issues and which contain an element of review of the "weighing" of the evidence by the tribunal of fact. For instance, the ground of appeal that the judge wrongfully refused to withdraw a case from the jury implies an assessment of the weight of the evidence. This ground covers the case where the evidence adduced at the trial could not possibly prove the offence charged. But where there was evidence against the accused capable of proving his guilt of the offence in the indictment, the Court of Appeal will not allow the appeal on this ground. Seemingly wider is the test whether "under all circumstances of the case [the verdict] is unsafe or unsatisfactory". In applying this test the Appeal Court must "ask itself the subjective question whether it is content to allow the verdict to stand or whether lurking doubts cause it to wonder whether injustice has been done." (cf. *Archbold*, para 899). Such reviews are, however, in practice very limited in scope: thus, it is not a sufficient ground of appeal that the verdict is against the weight of the evidence; nor is it sufficient merely to show that the case against the appellant was a very weak one; nor is it enough that the members of the Court of Appeal feel some doubt as to the correctness of the verdict; nor that the judge of the court of trial has given a certificate on that ground; or that the trial judge certified that the jury's verdict was unreasonable. As the Court of Appeal once put it, that court *would never substitute its own opinion for that of the jury* (*Archbold*, para 920).

In all cases where the verdict relied on a real "weighing" of lawful, and properly presented, evidence, however limited (and in which no fresh evidence has cast doubts on the verdict), the Court of Appeal respects the findings by the tribunal of fact, if only because that tribunal had the opportunity, denied to the Court of Appeal, to see and hear witnesses being examined and cross-examined. "Admissible" (extra-judicial) confessions, being lawful and, if believed, sufficient proof of the guilt of the accused, are not subject to any particular scrutiny on appeal; the question of whether the confession was made, and if so, whether it was reliable, is a factual matter left to the jury.

It is also important to note that matters within the discretion of the trial judge do not afford grounds for appeal. It would appear that the decision by the trial judge on whether or not he should exercise his discretion to exclude otherwise admissible evidence because its admission would operate unfairly

against the accused, is not therefore subject to review on appeal (cf. *Archbold*, para 924, where five examples are given of judicial discretions not affording a ground of appeal, but the discretion to exclude evidence is not included in these examples).

As regards trials in the "Diplock" courts, the Court of Appeal in Northern Ireland will equally consider grounds of appeal which relate to the setting by the trial judge of the legal framework within which the tribunal of fact "weighed" the evidence. However, as was shown earlier, at least as regards statements made by the accused, this framework is much less strict in the "Diplock" courts. Consequently, whereas in ordinary proceedings the Court of Appeal would review whether the trial court, in ruling on the admissibility of a statement, had properly addressed the issue of the "voluntariness" of that statement, in reviewing a case from the "Diplock" courts the Appeal Court needs to assess only whether the trial judge had properly considered whether a confession was obtained as a result of "torture, or of inhuman or degrading treatment."

In the "Diplock" courts, the law in this respect has been somewhat mitigated by the exercise of judicial discretion (above, Chapter 4). Given the position that matters within the discretion of the trial judge do not appear to afford grounds of appeal, however, this aspect of rulings in the "Diplock" courts would appear to be excluded from consideration by the Court of Appeal.

Equally, in line with normal practice, the Court of Appeal's review would not appear to extend to the "weighing" of the evidence by the tribunal of fact, as long as it is clear that that tribunal (in the "Diplock" courts: the single judge) had before it admissible evidence legally capable of proving the guilt of the accused.

In practice the Court of Appeal may not always be so restrictive in its review; it certainly has not restricted its hearings to issues and evidence entirely within these limits. On the other hand, the author has not found any decision by the Court of Appeal clearly extending the scope of that court's review beyond what was stated above. Whatever the precise extent of the Court of Appeal's supervision, the following is clear as regards the crucial issue in the "Diplock" courts: the assessment of the reliability of a confession by the single judge in the "Diplock" courts is not tested on appeal, once it has been accepted by the Court of Appeal that the trial judge was correct in his interpretation of the words "torture, or inhuman or degrading treatment", and that he had at least considered whether to exercise his discretion to exclude the confession.

In certain circumstances, further appeal is possible from the Court of Appeal to the House of Lords, which constitutes the highest court in criminal matters in England and Wales, and Northern Ireland. In the virtual absence of any such appeals as regards cases from the "Diplock" courts however, this aspect of the law will not be discussed here. Suffice it to say that judicial respect for the sovereignty of Parliament enshrined in the (unwritten) constitution, and the absence of a Bill of Rights of supra-statutory standing, make clear statutory texts unimpeachable irrespective of their effect on human

rights such as the right to a fair trial. As to judicial interpretation, the judicial deference towards the Executive, such as is apparent from the ruling in the case of Martin Lynch (above, Chapter 1 (v)) merely follows English precedents from the second world war (see David Lowry, *Terrorism and Human Rights: counter-insurgency and necessity at common law*, in: Notre Dame Lawyer, October 1977). The chances of a successful appeal to the House of Lords are therefore slim. It is nonetheless regrettable that the highest domestic court has not been seized to rule on certain important issues of law and practice.

(ii) Complaints against the police

Where someone who has been questioned by the police complains of his treatment during interrogation, this complaint is investigated and adjudicated upon within a complex machinery, involving at least four different authorities: the Chief Constable, the Director of Public Prosecutions, the Police Complaints Board, and the Northern Ireland Police Authority. As was mentioned above, in England and Wales both the investigations of and the adjudications on such complaints are deferred until after any proceedings against the complainant, but in Northern Ireland the investigation has been brought forward for the benefit of the Director of Public Prosecutions in assessing the evidence against the complainant - a purpose for which it was not intended. Following this investigation, the complaints file rests with the Director of Public Prosecutions until after the proceedings against the complainant; apart from the initial investigation, the complaints machinery therefore does not affect trials in the "Diplock" courts. Without going into too much detail, some brief remarks will nonetheless be made.

There has been considerable doubt about the effectiveness of the complaints machinery in view of the absence of any action against police officers involved in the ill-treatment of detainees in the recent past: in spite of concern expressed at the time by medical officers working in the interrogation centres; in spite of *prima facie* evidence of ill-treatment as recorded by Amnesty International and by Bennett J.; in spite of considerable amounts having been paid as damages to victims by the police; and in spite of judicial findings against the police, no criminal or disciplinary sanctions have resulted against any police officer (*Bennett Report*, paras 159, 160, 163, 155, 157, 350, and 338). Bennett J. therefore dealt with the procedures in considerable detail (Parts IV and V of the *Bennett Report*). His proposals regarded mainly the introduction of a separate code of conduct and practice for interrogation (above, Chapter 2 (ii)); improved supervision by the uniformed branch of the RUC (Chapter 2 (iii)); and improved co-operation and exchange of information between the different authorities concerned. Bennett J. also re-emphasized the need for all involved to be diligent in the exercise of their functions.

It is impossible to assess to what extent the Bennett recommendations have increased the effectiveness of the complaints machinery in practice, in the absence of any significant numbers of complaints since his report -

more so, since many of his recommendations related to attitudes and approaches rather than rules and regulations, or, being of a purely internal nature, escape observation by outsiders. Suffice it to say that the effectiveness of the complaints machinery continues to stand or fall with the willingness of police officers from the uniformed branch of the RUC, if necessary, to give evidence against colleagues from the detective branch.

Civil proceedings have provided a limited measure of satisfaction to victims of ill-treatment in custody, in that sums of money have been paid to them by the police. When such payments were made in out-of-court settlements (as happened in most cases arising out of the 1976-1977 period), however, there is no judicial finding against the police, who do not formally acknowledge that there was any misbehaviour on their part - although, as Bennett J. said, "the inference from these settled claims is obvious." (para 155). This, together with the fact that civil proceedings often take years to conclude, and that no individual police officer need have been held liable, also reduces the effectiveness of the remedy in a sense wider than the individual case.

Even if fully effective, however, the scope of civil, criminal and disciplinary remedies is limited in that tests applied in such proceedings are restricted to the lawfulness or regularity of police behaviour. It is clearly assumed that "decisive", "forceful" and "persistent" questioning is, as such, lawful (*Bennett Report*, para 37) and does not therefore give rise to a remedy. The rules and regulations for interrogation also allow for questioning which could affect at least the reliability of a confession (Chapter 2 (ii)). The onus and standards of proof in proceedings on a complaint are furthermore less favourable to a complainant than the evidentiary rules relating to the "admissibility" and reliability of a confession are to an accused in a criminal trial - even in the "Diplock" courts. Consequently, the evidentiary problems relating to the circumstances of interrogation in which confessions were made, referred to in Chapter 5 as regards the assessment of the reliability of a confession, apply *a fortiori* to proceedings on a complaint.

Proceedings on complaints about interrogation therefore not only do not affect trials against the complainant in that adjudications on them are deferred until after the trial of the complainant; they also do not add to the testing of the reliability of confessions. The absence of successful complaints about interrogation, whether in civil, criminal or disciplinary proceedings, cannot be taken as an indication of the reliability of confessions which are the outcome of such interrogations, or of the soundness of convictions based on such confessions.

(iii) Conclusions

The law regarding trials in the "Diplock" courts grants virtually unlimited rights of appeal. The change in the law on the admissibility of statements in the "Diplock" courts, combined with the fact that appellate review does not extend to the exercise of discretion by the trial judge, has, however, substan-

tially reduced the extent of the Court of Appeal's supervision, in particular as regards confessions.

The assessment of the reliability of a confession by the single judge in the "Diplock" courts (acting as tribunal of fact) is not tested on appeal, once it is accepted by the Court of Appeal that the trial judge has properly addressed the issue of whether the confession was obtained as a result of "torture, or of inhuman or degrading treatment", and that he had considered whether to exercise his discretion to exclude the confession.

The chances of a successful appeal from the Court of Appeal to the House of Lords are slim. It is nonetheless regrettable that the highest domestic court has not been seized to rule on certain important issues of law and practice.

Proceedings on complaints about interrogation do not affect trials against the complainant. They also do not add to the testing of the reliability of a confession. The absence of successful complaints about interrogation cannot be taken as an indication of the fairness or soundness of proceedings in the "Diplock" courts.

PART III The assessment

Chapter 7 The crucial issue

(i) Reliability

(ii) The Royal Commission on Criminal Procedure

(i) Reliability

It has been shown in the first two parts of this analysis how the emergency legislation has affected every stage of the criminal justice process linked to the "Diplock" courts. The police and the army have been given extremely wide and *de facto* unchallengeable powers of arrest and detention. "Forceful", "decisive" and "persistent" interrogation is allowed, in which the right to silence is implicitly denied. Interrogation is not under effective (i.e. contemporaneous) judicial control; unlawful treatment of prisoners does not give rise to the remedy of *habeas corpus*. At no stage of the pre-trial proceedings has the defence any effective opportunity to challenge the prosecution case. The availability of bail is limited. At the trial, statements obtained by "oppressive" methods are admissible, as long as these methods did not amount to torture, or to inhuman or degrading treatment, or unless there is evidence of physical ill-treatment.

Trial by jury has been abolished: the single judge has taken over the function of the jury as tribunal of fact and "weighs" the evidence in a legal framework (set by himself) which is much less strict than in ordinary trials. In most cases the evidence against the accused consists solely of his own (alleged) confession made during police interrogation. In such cases, the "weighing" of the evidence is in fact subsumed under the judge's ruling on the admissibility of the confession: confessions, once admitted as evidence, are not in practice tested further on their reliability. The scope of appellate review is limited, at least as regards the crucial issues of the exercise of judicial discretion in ruling on the admissibility of a confession, and of the "weighing" of confessions by the judge acting as tribunal of fact.

A number of these aspects of the special system of criminal justice, such as the absence of safeguards against arbitrary arrests and detentions, and the non-availability of *habeas corpus* against unlawful treatment in custody, by themselves raise serious issues concerning human rights. **But the analysis of the law has shown that, for the purpose of determining the fairness of trials in the "Diplock" courts, the single most important issue regards the reliability of confessions obtained during interrogation.** As was shown above:

— the rules on interrogation are not aimed at obtaining reliable confessions and indeed allow for methods of interrogation which can seriously affect their reliability;

— the pre-trial investigation carried out on behalf of the Director of Public Prosecutions is not aimed at ensuring that only *prima facie* reliable confessions are tendered in evidence;

— the tests applied by the judges in the "Diplock" courts in ruling on the admissibility of confessions do not as a rule extend beyond ensuring that confessions tendered in evidence by the prosecution were not obtained as a result of physical ill-treatment;

— although these tests leave out many aspects of interrogation which can seriously affect the reliability of confessions, the courts in practice subsume their "weighing" of the reliability of a confession under their ruling on its admissibility.

The "Diplock" courts convict in the vast majority of cases in which a confession (allegedly) made by the accused in the course of police interrogation is the only evidence of his guilt, as long as there was no evidence that physical ill-treatment (or worse) was used to obtain that confession. In doing so, the courts implicitly assume the reliability of confessions obtained as a result of interrogation in which such treatment did not occur. It was already pointed out that it is surprising, in view of the evidentiary problems arising out of the private nature of interrogation, that the courts so often hold that it has been established beyond reasonable doubt that nothing untoward has occurred which might have affected the reliability of a confession.

But even if that is left aside, there must be serious doubt about the assumption that confessions obtained as a result of "forceful", "decisive" and "persistent" interrogation are reliable even if nothing untoward occurred.

Boyle *et al.* discuss the issue as follows:

"The purpose of modern interrogation, as was made clear by the Diplock Committee, is to break the suspect's will to resist and to induce him to co-operate with his interrogators. This can often be achieved, according to the psychological evidence, in a relatively short time by isolating the suspect from all contacts which would strengthen his will to resist, by increasing the level of stress and fatigue, and by creating a general sense of uncertainty. Some psychologists, notably William Sargant, have compared this process to the experimental neurosis produced by Pavlov in some of his dogs by varying positive and negative rewards for certain actions. Whatever the scientific explanation, it is clear that the conditions at Castlereagh and Gough Barracks, and to a lesser extent in other police stations, approximate closely to those generally regarded as likely to 'break' even the strongest wills. The suspect is isolated for at least three and perhaps up to seven days from all contact other than

with his interrogators and goalers. He experiences obvious stress, both from his natural fears about possible long-term imprisonment and from the widespread stories about beatings and torture inflicted on some suspects. He is likely to suffer increasing fatigue, not least from having been kept awake from very early in the morning of his initial arrest until late that night and from the difficulty of sleeping in such a strange environment. And he must face a long series of interviews with two or three teams of detectives who may well alternate their tactics to appear sometimes friendly and sometimes threatening. Even if there is no physical violence, the likelihood that suspects will do anything to please their captors, including making a false confession, clearly increases with the length of time they are required to undergo these combined pressures. Many of those released from Castlereagh and other interrogation centres have given convincing accounts of the sense of disorientation they have experienced. Even in the police records of interrogations there are occasional references to the difficulty that a suspect will have in 'holding out' for the full period of his detention as a ground for making an early confession. Some of those held under the Prevention of Terrorism Act were clearly threatened with having to undergo the full seven-day period if they did not co-operate.

The use of pressures of this kind might perhaps be thought by some to be justifiable if they helped to bring to justice those responsible for serious terrorist offences. The danger is that they may also result in false confessions. It has been established beyond reasonable doubt that there have been a number of wrongful convictions in Britain based on apparently voluntary confessions, as for instance in the Maxwell Confait case. There are no cases in Northern Ireland where it has been so clearly established that someone has been wrongly convicted on the basis of a false confession. But there have been a substantial number of cases in which serious doubts have been raised about the validity of confessions induced by prolonged interrogation."

The issue has been dealt with in the context of a major, official review of English criminal procedure, which raises points relevant to this analysis. This review, by the Royal Commission on Criminal Procedure, will therefore be discussed below, with particular reference to the issue of reliability.

(ii) *The Royal Commission on Criminal Procedure*

The Royal Commission on Criminal Procedure (RCCP) was appointed in February 1978.

"to examine, having regard both to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime, and taking into account also the need for the efficient and economical use of resources, whether changes are needed in England and Wales in

(i) the powers and duties of the police in respect of the investigation of criminal offences and the rights and duties of suspect and accused persons, including the means by which they are secured;

(ii) the process of and responsibility for the prosecution of criminal offences; and
(iii) such other features of criminal procedure and evidence as relate to the above;
and to make recommendations". (*Royal Warrant* of 3 February 1978, cited in the *RCCP Report*, page iv).

The Commission therefore reviewed the whole "process established by law, regulation and practice through which persons suspected of any crime are brought to trial", and observed in this context:

"In understanding the pre-trial procedure one important point must be made at the start. Although specifically directing enquiry to the pre-trial procedure, the Royal Commission's terms of reference do not, indeed cannot, exclude discussion of the trial, for in England and Wales it is the nature of the trial itself which largely determines the pre-trial procedure. This kind of criminal trial is in effect a contest between two sides, designed to provide an answer to a specific accusation and question, 'Is it established beyond reasonable doubt that the suspect has committed the offence with which he or she is accused?' This is called the 'accusatorial' (or 'adversarial') system in contrast to the 'inquisitorial' system, which places much more of the criminal investigation under the control of the courts, often by the appointment of a judge to direct it. Under the accusatorial procedure it is assumed that the relevant circumstances will have been investigated before the accused is brought before a court, and a trial then takes place which is set in motion by the accusation that the prosecution has seen fit to advance.

In England and Wales, therefore, the emphasis in pre-trial investigation, once a suspect has been identified, lies in discovering whether there is evidence that will support a prosecution of the suspect or cause him to be eliminated from the enquiry. **The prior investigation of a suspect by the police and the circumstances in which statements are made by him and produced in evidence at trial (and the rules that govern these matters) form part of the central core of the whole criminal process. Therefore, in understanding any one part, it is not just that the whole system has to form the context of discussion but that the accusatorial nature of the trial itself broadly dictates the nature of the pre-trial process.**" (*RCCP Report*, paras 1.6 - 1.7, emphasis added).

When subsequently the Commission discussed whether a person should be put under some pressure to answer questions, in that refusal to do so could be used as evidence against him, they remarked:

"Such a change could be regarded as acceptable only if, at a minimum, the suspect were to be provided at all stages of the investigation with full knowledge of his rights, complete information about the evidence available to the police at the time, and an exact understanding of the consequences of silence. But that could be done only if the critical phase of investigation, that is the phase at which silence could be used adversely to the accused, was to become more structured and formal than it is now; in effect, responsibility for and conduct of this phase of the investigation, close to

charge, would have become a quasi-judicial rather than a police function. That would seem to those of us who take this view to have radical consequences for the trial. **If an investigation were to be conducted in what would, in effect, be an inquisitorial mode, [the majority of the Commission] do not think that the present accusatorial system could remain.**" (*RCCP Report*, para 4.52, emphasis added).

It is impossible, within the scope of this analysis, to discuss the many important issues dealt with by the Commission. Suffice it to say that in many respects the emergency system of criminal justice linked with the "Diplock" courts departs from minimum requirements of the English accusatorial system as formulated by the Commission, to which the Commission in its own proposals allows no exceptions. This applies to the broadest principles of fairness, openness and workability formulated by the Commission (see *RCCP Report*, para 2.18 ff), e.g.:

"...if a suspect has a right he should be made aware of it. He should be able to exercise it, if he wishes, and waive it, if he wishes. If the right is to be withheld from him he should know not only that it is being withheld but why it is. If he is to be required to submit to a particular investigative procedure, he should be told under what power the requirement is made and how it can be enforced if he refuses. . . .

Decisions, to the extent that it is possible, should be explained to the suspect. They should also be written down, together with a narrative of the events while a person is in custody. They can then be available for the record, for inspection and, if need be, challenge by supervisory officers, by the suspect or his legal adviser, and by the courts." (*RCCP Report*, paras 2.19 and 2.20).

The "Diplock" system also departs from more specific requirements of the English system of criminal justice as formulated by the Commission, such as the principle that someone can only be arrested on reasonable suspicion of involvement in a criminal offence¹⁷; or that an arrested person must be informed of the factual basis for his arrest. All of these issues are worthy of consideration in the context of the "Diplock" court system.

However, this discussion of the Commission's proposals will be restricted to the (linked) issues of powers of detention for questioning; rules for questioning; admissibility of statements in court; and evidentiary rules relating to confessions.

The Commission formulated and expanded upon a "necessity principle" for detention (*RCCP Report*, para 3.76) and proposed that the need for detention be reviewed every six hours, with a maximum length of detention of 24 hours - with one exception:

"The exception to the requirement to release a suspect within 24 hours or to bring him before a court the next day will be for those suspected of grave offences. We accept that there are circumstances which prolong an investigation and delay charging beyond 24 hours (the need to check forensic evidence, for example); and where the police should not release the suspect, because for example, he is likely to abscond. Such cases are a small minority, but provision must be made for them if the police are

to be able to solve grave offences and bring persons accused of them before the courts. We consider, however, that the provision for detention beyond 24 hours uncharged can be justified only in respect of serious crimes, and that **not later than 24 hours after a person is brought into a police station under arrest there should be some form of outside check upon the way that the police are exercising their discretion to detain. We therefore propose that where a suspect has not been charged within 24 hours the police should be required to bring him before a magistrates' court sitting in private (as the person will not have been charged). Provision should be made for the suspect to be legally represented . . .**

The court should be empowered to authorise a further limited period in custody, to release on bail or to release unconditionally. In making that decision the court would use the same criteria as the police will be using to justify continuing detention upon arrest. The magistrates should be able to fix a period of not more than 24 hours in which the person should be charged or, if still uncharged, brought before them again. At any subsequent appearance they should have the same power but subject to a right of appeal". (*RCCP Report*, para 3.106, emphasis added)

When a magistrates' court is not available (e.g. on a Sunday), a solicitor is to be given access:

"The primary function of the visit will be to ensure that the suspect's welfare and interests are being attended to, thus bringing a measure of openness at this stage of the process. The visit by the solicitor would therefore not be to give legal advice, but he has the knowledge and experience to give it if requested. This visit would not remove the requirement for the suspect to be brought before a court on that or the next day, and we recommend that consideration should be given to providing facilities, particularly in cities, for magistrates' courts to sit on Sundays if required for this purpose." (*RCCP Report*, para 3.107).

As to supervision over questioning, the Commission remarked:

"We consider that what is the general practice needs to be reaffirmed, namely that, as soon as a suspect is brought into a police station under arrest, **accountable responsibility** for his welfare, for seeing that he is aware of his rights, for answering enquiries about his whereabouts and for decisions on his detention passes out of the hands of arresting or investigating officer and into the hands of another officer.

We take the view that where the number of suspects dealt with at a police station warrants it, there should be an officer whose sole responsibility should be for receiving, booking in, supervising and charging suspects. He should be of no less a rank than sergeant and should be of the uniformed branch. He should be responsible to the sub-divisional commander". (*RCCP Report*, para 3.112, emphasis added)

This proposal gains in importance in view of a further proposal by the Commission:

"The powers of arrest and the criteria restricting detention that we have proposed

should be set out in a single statute, and the various procedures surrounding them and for dealing with the treatment of persons in custody should be controlled by subordinate legislation. **Any failure by the police to meet these standards should occasion disciplinary review.**" (*RCCP Report*, para 3.123, emphasis added).

With regard to questioning itself, the Commission confirmed that an attempt to

"require a suspect to answer questions in relation to a suspicion that might as yet be unsubstantiated and unspecified . . . would in effect be subverting that principle of the accusatorial system itself (that it is the duty of the prosecution to prove the prisoner's guilt)" (*RCCP Report*, para 4.37 read together with para 4.35).

Extensive research was carried out on behalf of the Commission into the psychological aspects of interrogation. (Royal Commission on Criminal Procedure, Research Studies No. 1 and No. 2: Police Interrogation. The Psychological Approach. A case study of current practice. London, H.M.S.O. 1980). This research, which cannot here be discussed in detail, raises serious doubts about the reliability of confessions obtained as a result of interrogation, in particular if the display of authority by the interrogator is combined with such factors as isolation and/or fatigue, which impair a suspect's "decision-making performance". (case study, pp. 42-43). The researchers concluded that such impairment arises, "where interrogation takes place after midnight; when the suspect has lost more than 5 hours sleep; or when the interrogation continues for more than one hour without a break." (case study, p. 42).

The authority of the interrogation can make a suspect "obedient" in that it,

"predisposes the suspect to give up the responsibility of making the decision for himself in favour of acquiescing to the demands of his interrogator . . .

In the situation where the interrogator has formed a view of the possible guilt of the suspect, the risk of indirectly conveying important information about the crime and the part played by the suspect will be greater. If in such a case the suspect is both innocent and fully obedient, the risk of a false confession will also be high." (case study, p. 43).

The researchers argue from the psychological literature that,

"**in principle, false confessions can be elicited by the application to an innocent suspect of techniques which may also be successful in obtaining true confessions from the guilty, but the state of knowledge is not sufficient to assist in detecting false confessions when they have been obtained (assuming that there is no other evidence which casts doubt on their reliability)**". (case study, pp. 25-26, emphasis added).

This study carried out on behalf of the Royal Commission on Criminal Procedure with particular reference to English norms of criminal procedure (though drawing on and confirming international psychological research) must cast serious doubt on interrogation- and "Diplock" court-practice in Northern Ireland. Many of the features of interrogation, identified as affecting the reliability of confessions, are almost institutional parts of interrogation in Northern Ireland, e.g. isolation; fatigue; also the strong display of authority implicit in "forceful", "persistent" and "decisive" questioning. The revelation that the pressures which may cause guilty suspects to confess are no different from those which may compel innocent suspects to make a false confession, destroys the argument, put forward by Lord Diplock and at least implicitly accepted by Bennett J., that it is acceptable in the circumstances in Northern Ireland to put strong psychological pressure on suspects to confess, and to rely on such confessions to convict, even without corroboration.

The Commission considered the rules for the questioning of suspects with the benefit of the results of this study into the psychological aspects of interrogation. The Commission clearly linked "voluntariness" and reliability:

"The Judges' Rules are intended to give a framework for police conduct during interrogation. The presumption behind the Judges' Rules is that the circumstances of police questioning are of their very nature coercive, that this can affect the freedom of choice and judgement of the suspect (and his ability to exercise his right of silence), and that in consequence the reliability (the truth) of statements made in custody has to be most rigorously tested. This presumption finds its expression in the 'voluntariness' rule which is stated in paragraph (e) of the preamble to the Judges' Rules: 'It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression . . .'" (*RCCP Report*, para 4.68)

However, the "voluntariness" rule was felt to be unsatisfactory by the Commission in that the concept of "oppression", as developed by the courts, was considered so imprecise that the police cannot know when they are breaking the rule forbidding "oppressive questioning" (*RCCP Report*, paras 4.71 - 4.72). The Commission then stated:

"Another serious doubt about the validity of the rule seems to us to have emerged from our research. The criteria of 'fear of prejudice and hope of advantage' are of long standing in the judges' approach to determining the 'voluntariness' of a confession and, hence, its reliability. The link between involuntariness on these criteria and unreliability is in legal terms exact; in psychological terms it is uncertain, to say the least. The addition of oppression in the 1960s may bring the legal notion of involuntariness rather closer to the psychological interpretation of that term, but as we have pointed out the imprecision of that word makes it difficult to use as a guide for regu-

lating the conduct of interrogations. What our research suggests is that in psychological terms custody in itself and questioning in custody develop forces upon many suspects which, in Lord MacDermott's words, so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent. Those forces do not fall within the legal definition of factors that would render a confession involuntary and therefore unreliable. In other words, legal and psychological 'voluntariness' do not match. This taken together with the ineffectiveness of principle (e) of the Judges' Rules as a rule of conduct for the police, in our view puts in doubt the value of retaining the voluntariness rule.

But the way the police treat the suspect during his time in custody must be regulated and the police must have some guidance upon how interviews should be conducted. **The conditions of custody and questioning must be such as to give as much confidence as possible that confessions obtained by questioning in custody are reliable.** But there can never be certainty. And that places an enormous responsibility upon the police to check upon the details of confessions. We understand that this is good police practice now. We recommend that it should become general practice. Because of their familiarity with the conditions of custody the police may underestimate and, indeed, may not even fully understand the effect that custody has upon suspects. However we do not accept the suggestion that a person should never be convicted upon his confession alone uncorroborated by any other evidence. To do so would, unless the criteria for prosecution were changed, mean that those who were willing to confess and to plead guilty could not even be charged unless or until other evidence of their guilt had been secured. That has such considerable implications for the resource and organizational aspects of pre-trial procedure and for the right of the accused to a speedy disposal as to be altogether too drastic a way of removing the risk of false confessions. People do confess to offences and are convicted, sometimes on a plea of guilty, where there is no other material evidence. We do not consider that it would be in the interests of justice to introduce rules of evidence which would have the effect of precluding this. But when the evidence against the accused is his own confession, all concerned with a prosecution, the police, the prosecuting agency and the court, should, as a matter of practice, seek every means of checking the validity of that confession.

In order to secure that the maximum possible reliance for evidential purposes can be placed upon suspects' statements in all cases where they are made, what is required are workable and enforceable guidelines for the police, criteria that the courts can apply without a feat of imagination that sometimes defies belief, and a clear and enforceable statement of the rights and safeguards for the suspect in custody. In addition, police training on interviewing should be developed in ways which will not only improve their interview techniques but also bring home to them the powerful psychological forces that are at play upon the suspect and the dangers that are attendant upon these. If these requirements can be met.... we recommend that it should be left to the jury and magistrates to assess the reliability of confession evidence upon the facts presented to them." (*RCCP Report*, paras 4.73 - 4.75, emphasis added)

The Commission considered certain elements in the safeguarding of the

rights of suspects. These elements,

"may be put in terms of certain rights that should in all circumstances, or all but the most exceptional circumstances be accorded to the suspect in custody and of which he should be informed in writing and orally when he arrives at the police station: the right not to be held *incommunicado*, the right to legal advice, the right of particularly vulnerable people to special protection, the right to be fairly interviewed and to be properly cared for." (*RCCP Report*, para 4.77)

With regard to the right of access to legal advice, the Commission stated:

"What means can be devised for making effective as one of the principles for the conduct of pre-trial investigation the right to legal advice which is set out in the Judges' Rules? Let us be clear what this is. **It is the right to consult a lawyer privately, before or, if requested by the suspect, during a police interview.** It should not be dependent upon the suspect's happening to be aware that he has the right or upon his having his own solicitor or upon the convenience of the police. But it does not, should not and cannot mean that the suspect should be compelled to consult a lawyer or, having consulted one, to take the advice that is tendered. The suspect should be formally notified of his right and that should be a matter of record on the custody sheet. If he waives it that should likewise be recorded and he should be invited to sign the record. ...

If he wishes to exercise it and has no solicitor, some new arrangements will be necessary to make one available. **Unless there are pressing reasons to the contrary he should not be interviewed until he has consulted the solicitor of his choice.** ...

The right to legal advice as we have described it does not bring with it a right vested in the solicitor to be present during an interview. The right is that of the suspect. He may ask for and be afforded the facility to receive legal advice. He can take it or not as he pleases. **He may decide that he wants a solicitor to be present during interview and that he will not answer police questions without one. But that should be a matter for the suspect to decide.** The police will, no doubt, take it into account in deciding how to proceed. There may also be circumstances where they may wish a solicitor to be present, for example in the investigation of a highly complex fraud. We would suggest that the practice of having a solicitor present should be encouraged. If a solicitor is present at an interview, he should have no wider formal function than to offer the suspect advice if it is requested." (*RCCP Report*, paras 4.87 - 4.88, emphasis added)

The Commission envisages

"certain limited and exceptional circumstances when the interests of the suspect in this respect have to be subordinated to those of other individuals who may be at risk and, where particularly serious offences are involved, to those of the wider interests of the community. However, conferring the discretion to withhold access must not bring with it the risk that it will be used improperly. **In particular, we do not consider it sufficient justification for withholding access, that a solicitor may advise his client not to speak: that is the suspect's right.** Nor should the police refuse ac-

cess where secrecy is desirable but not imperative. The police could allow access but make the solicitor aware of their position and record that they have done so. If the solicitor behaved improperly, he could and should then be made subject to the disciplinary procedures of his profession. If there are, as the police assert, solicitors who are in collusion with criminals, they should be brought out into the open and removed from the profession.

Accordingly our general view is that the power to refuse access should be exercised only in exceptional cases. In the first place it should be limited to cases where the person in custody is suspected of a grave offence. Further, even in the case of such offences, the right should be withheld only where there are reasonable grounds to believe that the time taken to arrange for legal advice to be available will involve a risk of harm to persons or serious damage to property; or that giving access to a legal adviser may lead to one or more of the following:

- (a) evidence of the offence or offences under investigation will be interfered with;
 - (b) witnesses to those offences will be harmed or threatened;
 - (c) other persons suspected of committing those offences will be alerted;
- or
- (d) the recovery of the proceeds of those offences will be impeded.

Where the power to refuse access is exercised, it should be done only on the authority of a sub-divisional commander or above, and the grounds should be recorded on the custody sheet. These can be the subject of later review, for example by the inspectorate of constabulary, and the practice in the force could be brought to the attention of the police authority." (*RCCP Report*, paras 4.90 - 4.91, emphasis added).

The grounds for refusing access to a solicitor, mentioned above, do not often arise in the context of Northern Ireland: the large majority of arrests take place in dawn "swoops" which are all but secret to the public. Associates of the suspect will therefore be aware of the arrest. The risks of interference with evidence, harm or threats to witnesses, or impediments to the recovery of proceeds of offences will not in practice be reduced by refusing an arrested suspect access to legal advice.

The Commission, also having considered other elements in safeguarding the rights of suspects, developed a

"framework for ensuring that a suspect is aware of his rights while he is in custody and of the decisions that are being made about him and that the decisions are responsibly and accountably taken." (*RCCP Report*, para 4.109).

As was shown above, the Commission also made proposals for improving

the supervision of the treatment of detained suspects. The Commission then came to interrogation itself:

"For the actual conduct of questioning we need to replace the vagueness of the Judges' Rules with a set of instructions, which provide strengthened safeguards to the suspect and clear and workable guidelines for the police.

We call this a code of practice for the regulation of interviews and recommend that it should be contained in subordinate legislation subject to affirmative resolution of Parliament and made by the Home Secretary after consultation with the police, the judiciary and persons with the relevant expert medical and psychological experience. **The code of practice will be part of the general provisions governing the treatment of persons in custody that we have been developing. ... and it should be aimed at producing conditions of interview that minimise the risk of unreliable statements.** Its provisions will also amount to a statement of what is viewed as acceptable practice when the police have to interview those who are reasonably suspected in connection with an offence.

So, as well as the sanctions attached to its breach... it will carry an element of social and moral imperative. We do not propose spelling out in detail what its provisions should be, but we recommend that it should deal with the following matters: the right of access to legal advice, special treatment of juveniles and others, the modes of note taking, the taking of statements, and the use of tape recorders, and the giving of the cautions, ...; the existing provision of the Administrative Directions on the comfort and refreshment of persons being interviewed; and the length, timing and circumstances of questioning, which would be its main innovative feature.

The sort of provisions we have in mind should take realistic account of the pressures upon the police and upon suspects and should, therefore, have some degree of flexibility built into them, but **exercise of that flexibility should be only upon reasonable grounds and should be accountable.** We would suggest for consideration provisions that required an interview to be broken for brief refreshment and for meals after specified times; that precluded interviewing at night if the suspect had been interviewed for any substantial period in the day or immediately after a suspect had been woken up (it would be unrealistic to prohibit all interviews at night since if that were so a person arrested late in the evening might have to be held overnight); that prohibited questioning after a suspect had been held *incommunicado* beyond a specified period; that prevented interviewing persons substantially under the influence of drugs or alcohol; that precluded more than a specified number of officers being present at any one time; that set conditions of lighting, ventilation and seating for the interview room. As we say, these provisions will have to be worked out in detail by those with expert knowledge. What we have suggested is meant only to provide broad guidance as to the sorts of factors to be covered.

We have also considered whether the code of practice should attempt to regulate the content of questioning, that is to indicate what are permissible and impermissible tactics that the police may use in questioning. We take it for granted that there should be an explicit condemnation and prohibition of the use of violence or threats of viol-

ence or other harmful action, either to the suspect, his family or any other person with whom he has a connection. Further in recognition of the United Kingdom's international treaty obligations we think it would be proper for the code of practice also to contain a specific prohibition of torture or inhuman or degrading treatment (the words of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). Society should publicly express its total rejection of such behaviour by a police officer.

Apart from this, we have concluded that regulation of the nature of questioning is not, for a variety of reasons, practicable or desirable. The main problem lies with tactics aimed at producing confessions. First it is difficult to define the tactics in such a way as to make it precisely clear what is prohibited and what is not. For example if the use of bluff is considered undesirable, is that to be taken to cover only outright lies about the evidence that the police already have, or intentional failure to give the suspect full information about the position, or inadvertently doing so? This problem of definition is one of the defects of the existing criteria for determining voluntariness and one of the reasons we are suggesting it should be abandoned. Secondly, there is no point attempting to ban the explicit use of a particular tactic when its effect is implicit in the situation in which the suspect finds himself: for example prohibiting the explicit offering of bail as an inducement to confess when people in custody often perceive, without being told, that if they do confess they are more likely to be released. We prefer, then, rules whose breach can be clearly demonstrated both at the time and *ex post facto*. We also emphasise again the importance of training for the police not merely in the skills of interviewing, which we believe ought to be taught on a more systematic basis, but in the psychology of interviewing so that officers can be made more fully aware of its potential to produce false confessions as well as true ones.

Finally the code should repeat the existing provision in the Judges' Rules which place a limit on questioning about a particular offence. At present questioning, other than in exceptional circumstances, is not permitted after the suspect has been charged with that offence and a person must be charged when the police have sufficient evidence to do so. Witnesses to us have suggested that these provisions are unsatisfactory for two reasons. They can be circumvented and questioning can be prolonged by the police either making a holding charge on another offence or using the subjective element in judging the sufficiency of the evidence in order to delay charging. However we can see no fair or workable alternative. There must be some terminal point on questioning and the point of charge provides an event that is clearcut. The decision on whether there is sufficient evidence to charge cannot be made other than by the investigating officer on the basis of the evidence available to him. We consider that our proposals for accountable review of detention upon arrival at the police station after six hours, and after 24 hours will offer an adequate and independent safeguard against delayed charging and against the use of a holding charge to prolong questioning in custody." (*RCCP Report*, paras 4.109 - 4.114, emphasis added)

As to the form of the rules, the Commission considered that all aspects of the rules governing the treatment of suspects in custody should be made statutory (*RCCP Report*, para 4.116). As to methods for enforcing the rules, the

Commission welcomed the fact that the Government was discussing proposals that the investigation of the most serious complaints should be under the direction of someone having judicial experience. The Commission also discussed review by the courts. The most important issue for the purpose of this analysis concerns the rules regarding the exclusion of confessions as evidence in trials. The Commission said:

"The rationale behind the present law is that evidence of certain kinds is or may be so unreliable as to preclude its being heard by the jury; this is the so-called 'reliability principle' for exclusion." (*RCCP Report*, para 4.123, emphasis added).

The exclusionary rules are not based on a "disciplinary principle":

"English judges have not seen themselves as having that function of controlling improper police behaviour: their main concern has always been with the reliability of the evidence." (*RCCP Report*, para 4.124).

Having rejected an automatic exclusionary rule as a means of securing compliance with the proposed statutory rules, but also having stressed that **the right not to be subjected to prolonged questioning or to questioning after a long period held incommunicado are rights created in order to produce reliable evidence** (*RCCP Report*, para 4.130), the Commission developed its own proposals. The police, the Commission said,

"should know that if there was non-compliance, certain consequences will flow. Those consequences should depend on the purpose of the rule that has been breached.

We would distinguish between the provisions for the treatment of suspects in custody and for interviewing which deal with the prohibition on violence, threats of violence, torture or inhuman or degrading treatment, and those provisions which are designed to provide an environment for interviewing which conduces, to the extent possible in custody, to the suspect's answers to question being reliable, (that is those designed to replace the voluntariness rule).

In general, as we have said, we consider that the exclusion of evidence is not a satisfactory way of enforcing compliance with rules. However, **in order to mark the seriousness of any breach of the rule prohibiting violence, threats of violence, torture or inhuman or degrading treatment and society's abhorrence of such conduct, non-compliance with this prohibition should lead to the automatic exclusion of evidence so obtained.** Proof of non-compliance would be a matter for the judge or magistrates to decide on the facts.

But what should be the consequences of **other breaches of the rules** in relation to evidence subsequently obtained? For the reasons set out above a breach of the rules by the police should not, in the view of all but one of us, lead to total immunity for the suspect from prosecution and conviction or to the automatic exclusion of evidence. **But since reliability is the primary purpose of the code of practice for interviewing suspects, the reliability of confessions obtained in its breach must be open to ques-**

tion: and it would not therefore be right for statement evidence in breach of the code to be accepted uncritically and without comment by the criminal courts. The advocate for any accused who contests the truth of a confession alleged to have been made by him will have considerable scope for discrediting the evidence of that confession if it has been obtained when the provisions of the code have not been observed. But it should not fall simply to the defence to point out the unreliability. **The judge should point out to the jury or the magistrates be advised of the dangers involved in acting upon a statement whose reliability can be affected by breach of the code.** They should be informed that under pressure a person may make an incriminating statement that is not true, that the code has been introduced to control police behaviour and minimise the risk of an untrue statement being made and that if they are satisfied that a breach of the code has occurred, it can be dangerous to act upon any statement made: **accordingly, they should look for independent support for it, before relying upon it.** The effect of that warning would be that where a breach of the code has occurred, senior officers, and those responsible for advising on the prosecution, will need to consider the availability of other evidence before deciding whether it is proper to permit the prosecution to proceed. We think this will encourage what is already universally regarded as good police practice: namely that so far as is possible evidence from questioning should be checked and independent confirmation of its reliability should be sought." (*RCCP Report*, paras 4.131 - 4.133, emphasis added).

The Commission, in discussing the right of access to legal advice stated that

"the lack of legal advice does not of itself result in statements which are unreliable and should not automatically lead to their exclusion as evidence." (*RCCP Report*, para 4.92).

The right of access would, however, be contained in the rules for the treatment of suspects in custody which the Commission proposed. Statements made after denial of access contrary to the rules would therefore require corroboration. It may be recalled also that, where a suspect is not released after 24 hours, access to a lawyer and/or a court is to be obligatory.

Thus, the Royal Commission on Criminal Procedure has developed a much stricter framework for questioning than pertains in Northern Ireland and, what is crucially important, has linked this framework with the reliability of confessions, requiring corroboration of confessions obtained in breach of the rules, because such breaches raise doubts about their reliability. The Commission's proposals are controversial in certain respects in England, in that they actually extend police powers in that jurisdiction. But they provide an important yardstick for the special procedures in Northern Ireland, in particular where the reliability of confessions as the sole basis for convictions is concerned.

Clearly, the nature, length and conditions of interrogation in Northern Ireland are such as to fall far short of the rules envisaged by the Royal Com-

mission on Criminal Procedure as necessary to ensure, as far as possible, that confessions obtained by the police are reliable. By the standards of the Commission (set on the basis of extensive research into the psychological effects of interrogation), convictions based solely on confessions obtained as a result of such "persistent", "forceful" and "decisive" interrogations are not sound: under the Commission's proposals such confessions would require corroboration.

Whatever one may feel about changes in "technical" aspects of a criminal justice system, the most fundamental requirement for all such systems must surely be that convictions are sound, in that they are based on reliable evidence, properly tested. The English system of criminal justice contains safeguards, first to ensure that the nature, length and conditions of questioning are not such as to be likely to affect the reliability of a confession, and second to test the "voluntariness" of a statement before allowing it to come before the tribunal of fact. These safeguards are not mere "technical" and outdated aspects of the system - as Lord Diplock would have it. (Diplock Report, para 73ff). The Royal Commission on Criminal Procedure has re-affirmed that it is a fundamental requirement of the English system that it comprises rules for questioning aimed at ensuring the reliability of confessions as well as tests of the reliability of confessions prior to those being brought before the tribunal of fact. This fundamental requirement for the attainment of soundness, reliability and fairness of convictions has been abrogated in the "Diplock" system of criminal justice in Northern Ireland.

Certain aspects of the proposals by the Royal Commission are furthermore of interest in that, where the Commission suggests extending police powers, they also provide for improved safeguards against abuse. This applies in particular to the proposed judicial involvement in extended detention for questioning, with full provision for legal representation; to access to legal advice generally (also during interviews); and to "accountable responsibility" in that "any failure by the police to meet (the standards set for them) should occasion disciplinary review". The (*in camera*) appearance before the magistrate in the course of prolonged detention could also provide an opportunity for the contemporaneous judicial testing of the regularity of the treatment accorded to a detainee, for which there is at present no opportunity in Northern Ireland.

Chapter 8 International norms

The above analysis of the emergency legislation in Northern Ireland has shown that that legislation is defective in not providing effective, i.e. contemporaneous, judicial remedies against arbitrary arrest and detention; and against unlawful treatment of detainees. This raises serious questions about the extent to which the emergency legislation secures the internationally recognized rights to liberty and security of the person, and to freedom from arbitrary arrest and detention. However, the present discussion will be limited to international standards for a fair trial, leaving aside these wider issues, save insofar as they reflect directly on the fairness of trials.

The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, sets forth, *inter alia*, the following rights:

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11: 1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

The norms contained in the Universal Declaration of Human Rights have been developed into legally binding norms in, in particular, the (UN) International Covenant on Civil and Political Rights (1966) and in regional treaties such as the (Council of Europe) European Convention on Human Rights (1950) and the (Organization of American States) American Convention on Human Rights (1969).

The first two instruments are of particular relevance, since the United Kingdom is a State-Party to them. The last instrument, though not binding on the United Kingdom, is relevant because, being of a more recent date, it can be argued to reflect more developed legal thought on the relevant norms; it is therefore of persuasive importance in interpreting the earlier in-

struments. Of lesser status than the treaties, but again, as indicative of developing legal thought, of use in interpretation, are United Nations documents such as the Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Standard Minimum Rules for the Treatment of Prisoners; the Draft Principles on Freedom from Arbitrary Arrest and Detention; the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and documents such as Resolutions by the Parliamentary Assembly or the Committee of Ministers of the Council of Europe.

Mention could also be made of the Resolutions of the XIIIth International Penal Law Congress and of the United Nations Code of Conduct for Law Enforcement Officials. Apart from the brief remarks about the case-law concerning the European Convention on Human Rights, below, these documents cannot here be discussed in detail; they ought, however, to be taken into consideration in any review of the emergency legislation.

In times of emergency "threatening the life of the nation", the international human rights treaties allow for derogation by state-parties from some (not all) of their international obligations, including the obligation to afford everyone a fair trial in the determination of any criminal charge against him. Such derogations must be "to the extent strictly required by the exigencies of the situation" (*International Covenant on Civil and Political Rights*, Article 4; *European Convention on Human Rights*, Article 15; somewhat differently, *American Convention on Human Rights*, Article 27). This allows states in certain circumstances to introduce administrative detention without trial (internment), as the authorities did in Northern Ireland between 1971 and 1975. However, the United Kingdom Government (although it has declared that an emergency continues to exist in Northern Ireland) has always maintained that those convicted in the "Diplock" courts have been found guilty of crimes in fair proceedings. Indeed, Lord Diplock, in recommending the setting up of the courts, stressed that the changes he recommended fell within the minimum requirements of Article 6 of the European Convention on Human Rights, which lays down requirements for a fair trial (*Diplock Report*, paras 12 - 14).

The proceedings linked with trials in the "Diplock" courts may therefore be judged on their conformity with *minimum* international standards for a fair trial without taking into account the power of derogation in times of emergency.

In many respects, trials in the "Diplock" courts are in accordance with these fundamental principles safeguarding the right to a fair trial. The tribunals have been established by law; the proceedings are held in accordance with the law. The judges are independent from the executive and legally experienced; they are impartial at least in the sense that they deal even-handedly with defendants of different political and/or religious persuasions. The accused is informed before the trial of the accusations against him; he is afforded adequate time and facilities for the preparation of his defence, including legal assistance of his own choice from the moment he is charged. If

necessary, his defence lawyer will be paid from public funds. Custody on remand, by international standards, is not excessively long. At the trial, the defence has full procedural "equality of arms" with the prosecution: it can challenge prosecution evidence and cross-examine witnesses, and can call witnesses and evidence on its own behalf. The trial is public; the accused has a virtually unlimited right of appeal.

At the same time, the effects of the emergency legislation, referred to above put in question whether certain internationally recognized norms for a fair trial are adhered to in practice.

Thus, the "equality of arms" at the trial, though formally ensured, is fundamentally affected by a secret, inquisitorial, police inquiry which is not under effective judicial or quasi-judicial control. Confessions obtained at this stage often prejudice the defendant's case at the trial, as was shown above. The Royal Commission on Criminal Procedure remarked:

"If an investigation were to be carried out in what would, in effect, be an inquisitorial mode, [the majority of the Commission] do not think that the present accusatorial system could remain." (RCCP Report, para 4.52)

Indeed, all developed "inquisitorial" systems of criminal justice - apart from having introduced basically accusatorial trial procedures - comprise safeguards to ensure the objectivity and fairness of the pre-trial inquiries. This is not the place to set out the different safeguards in different national systems; suffice it to say that in different systems they can be of an administrative, a procedural and/or an evidentiary nature, and that they often include (at least for serious cases) a separate judicial pre-trial inquiry.

The existence of such a variety of safeguards serving the same aim - overall fairness - confirms the correctness of the approach taken in this respect by the organs of the European Convention on Human Rights. In assessing the fairness of criminal proceedings, the European Commission of Human Rights have held that, whereas the specific safeguards enumerated in Article 6.3 of the Convention apply, basically, only to the trial phase of criminal proceedings (after "charge"), the overall assessment of the fairness of a particular trial also covers aspects of pre-trial (pre-charge) proceedings to the extent that they may have prejudiced the fairness of the proceedings at trial.

This implies that the absence of safeguards for the upholding of a suspect's rights in the pre-trial phase may lead to unfairness in the trial phase of criminal proceedings.

It can therefore be argued, both on the basis of the general existence of safeguards in developed "inquisitorial" systems (different though those safeguards may be in different systems) and on the basis of the approach taken by the organs of the European Convention on Human Rights that if a criminal justice system comprises an inquisitorial pre-trial phase, that system shall also comprise safeguards against unfair prejudice to the suspect's case at that stage. The "Diplock" system is clearly deficient in this respect.

Boyle *et al.* have shown on the basis of extensive practical and statistical research that justice in the "Diplock" system has been affected by "case-

hardening" of judges (Boyle *et al.*, *op. cit.*, p.) This negative effect, if not on the impartiality, then nonetheless on the objectivity of trial judges, is not unrelated to the absence of safeguards in the pre-trial stage. As a result of this absence of safeguards the judges are often confronted with conflicting claims about the circumstances in which an (alleged) confession was obtained — claims which are uncorroborated with reliable evidence on either side. As Boyle *et al.* have shown, statistical evidence indicates that, in time, judges "harden" in dealing with allegations of irregularities, tending to accept police testimony that nothing untoward happened and thereby, in effect, shifting the burden of proof towards the accused.

Furthermore, the principle that release pending trial should be the norm is not adhered to; even though detention on remand is not, by international standards, excessively long, Boyle *et al.* and others have expressed concern about denial of bail and relatively long pre-trial detention in certain cases.

The most important questions regarding adherence to international norms, however, relate to the freedom from self-incrimination and to the presumption of innocence. The principle that a person who is the subject of a criminal investigation shall have the right not to be coerced into confessing is not stated explicitly in all human rights treaties; the European Convention on Human Rights, for instance, does not contain such an express provision. The principle is contained in the International Covenant on Civil and Political Rights, to which the United Kingdom is a party. Article 14.3 (g) of the Covenant provides that in the determination of any criminal charge against him, everyone shall be entitled:

"not to be compelled to testify against himself or to confess guilt."

The principle is also explicitly stated in Article 8.2 (g) of the American Convention on Human Rights. While not binding on the United Kingdom it has persuasive force, in particular in that it develops the above principle by adding, in Article 8.3:

"A confession of guilt by the accused shall be valid only if it is made without coercion of any kind".

Also persuasive in this respect is the fact that the principle that no one shall be convicted on the basis of a confession obtained under duress is also explicitly stated in such documents as the United Nations Draft Principles on Freedom from Arbitrary Arrest and Detention (Articles 24 and 25) and the United Nations Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Articles 19 and 23).

But even though it is not always explicitly stated, the right not to be coerced into making a confession, and the right not to be convicted on the basis of a confession obtained under duress can be said to be implicit in the right to a fair trial, pronounced by all international human rights instruments. The first right can be said to flow from the presumption of innocence: to require a

suspect to talk subverts the principle that it is the duty of the prosecution to prove the guilt of the accused - which is not only the "golden thread" running through English criminal justice (*RCCP Report*, para 4.35, quoting Lord Sankey), but also a general principle of criminal law, and an internationally recognized element of a fair trial, recognized equally in accusatorial and in developed inquisitorial systems of criminal justice. Furthermore, the equally fundamental (and equally widely recognized) principle that the guilt of the accused must be established beyond reasonable doubt implies a prohibition to convict on the basis of unreliable evidence, such as confessions obtained under duress. In the words of the Royal Commission on Criminal Procedure:

"It is not only that extreme means of attempting to extort confessions, for example the rack and thumbscrew... are abhorrent to any civilized society, but that they and other less awful, though not necessarily less potent, means of applying pressure to an accused person to speak do not necessarily produce speech or the truth." (*RCCP Report*, para 4.36)

The explicit inclusion, in such recent international treaties and documents as the American Convention on Human Rights, the Draft Principles on Freedom from Arbitrary Arrest and Detention, and the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, of the principle that confessions obtained under duress shall not form the basis of a conviction underlines the argument that that principle is an essential element in attaining fairness in criminal proceedings.

The institutionalized use in Northern Ireland of strong psychological pressure on suspects in order to induce them to confess appears to be in breach of at least Article 14.3 (g) of the International Covenant on Civil and Political Rights. Convictions based solely on contested confessions obtained under such duress furthermore raise doubts about the adherence by the "Diplock" courts to the presumption of innocence in all cases. These aspects of the "Diplock" court system therefore raise questions about the extent to which trials in the "Diplock" courts accord with international norms for a fair trial, contained in such international instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.

Summary of conclusions

For the purpose of determining the fairness of trials in the "Diplock" courts, the single most important issue concerns the reliability of confessions obtained during interrogation.

Results of a study carried out on behalf of the (English) Royal Commission on Criminal Procedure into psychological effects of interrogation, which drew on and confirmed international psychological research, must cast serious doubt on interrogation and "Diplock" court-practice in Northern Ireland. Many of the features of interrogation, identified in the study as affecting the reliability of confessions, are almost institutional parts of interrogation in Northern Ireland, e.g.: isolation; fatigue; also the strong display of authority implicit in "forceful", "persistent" and "decisive" questioning. The study revealed that the pressures which may cause guilty suspects to confess are no different from those which may compel innocent suspects to make a false confession.

This destroys the argument, put forward by Lord Diplock and at least implicitly accepted by Bennett J. that it is acceptable in the circumstances in Northern Ireland to base convictions in criminal courts solely on confessions obtained as a result of strong psychological pressure, without any corroborative evidence that they contain the truth.

The Royal Commission on Criminal Procedure, which, on behalf of the British Government, carried out the most authoritative recent review of English criminal procedure, has developed in its proposals a framework of rules for questioning linked with the reliability of confessions. Confessions obtained in breach of these rules would, in the Commission's proposals, require corroboration before a conviction could be based on them. Clearly, the nature, length and conditions of interrogation in Northern Ireland are such as to fall far short of the rules envisaged by the Royal Commission as necessary to ensure, as far as possible, that confessions obtained by the police are reliable. By the standards of the Commission (set on the basis of extensive research into the psychological effects of interrogation) convictions based solely on confessions obtained as a result of such "forceful", "persistent" and "decisive" questioning are not sound.

The Royal Commission on Criminal Procedure has re-affirmed that it is a fundamental requirement of the English system of criminal justice that it comprises rules for questioning, aimed at ensuring the reliability of confessions, as well as tests of the reliability of confessions prior to those confessions being brought before the tribunal of fact. This fundamental (English) requirement for the attainment of soundness, reliability and fairness of convictions has been abrogated in the "Diplock" system of criminal justice.

In many respects trials in the "Diplock" courts are in accordance with fundamental international principles safeguarding the right to a fair trial, but certain aspects of the proceedings raise doubts about their compliance with

international norms, e.g.: the absence of effective, i.e. contemporaneous, judicial remedies against arbitrary arrest and detention, and against unlawful treatment of detainees; the effect of a strongly inquisitorial pre-trial phase on the principle of "equality of arms"; the effect of case-hardening on the objectivity of judges; and the limited provisions for bail.

The most important questions regarding adherence to international norms for a fair trial, however, relate to the freedom from self-incrimination and the presumption of innocence. The right not to be coerced into making a confession is explicitly stated in Article 14 (3) (g) of the International Covenant on Civil and Political Rights, to which the United Kingdom is a party. It also flows from the presumption of innocence, contained in all human rights instruments. Furthermore, the equally fundamental (and internationally recognized) principle that the guilt of the accused must be established beyond reasonable doubt implies a prohibition to convict on the basis of unreliable evidence, such as confessions obtained under duress.

The institutionalized use in Northern Ireland of strong psychological pressure on suspects in order to induce them to confess appears to be in breach of at least Article 14 (3) (g) of the International Covenant on Civil and Political Rights. Convictions based solely on contested confessions obtained under such duress furthermore raise serious doubts about the adherence by the "Diplock" courts to the presumption of innocence in all cases. These aspects of the "Diplock" court system therefore raise questions about the extent to which trials in the "Diplock" courts accord with international norms for a fair trial, contained in such international instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.

FOOTNOTES

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(1) The schedule lists, *inter alia*: murder; manslaughter; riot; kidnapping; false imprisonment; serious assault; offences related to explosives, firearms, and petrol bombs, escape from prison and assisting in such escape; robbery with firearms; intimidation; hijacking; contributing towards terrorism; arson; damaging property or threatening to damage property; bomb hoaxes; as well as offences created under the Act, such as membership of proscribed organizations; unlawful collection of information of use to terrorists; and training in making or use of firearms or explosives. The list can be altered by Order of the Secretary of State for Northern Ireland.

(2) Section 31 of the Act gives the following definitions:

"terrorist" means a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organizing or training persons for the purpose of terrorism;"

and

"terrorism" means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."

(3) For a brief discussion of the *ex post facto* remedies against unlawful or irregular treatment during detention, see below, Chapter 6.

(4) Bennett J. rejects "the alternative arrangement under which a particular member of the uniformed staff might take responsibility for each prisoner individually, and throughout his detention" because "such responsibility would... have little meaning unless the designated officer accompanied the prisoner wherever he went, including the interview room." In his own proposals, however, the responsibility of the uniformed inspector for the welfare of prisoners equally extends to periods spent in an interview room.

(5) The report as submitted to Amnesty International, and as sent by them to Baker J., summarized and quoted at some length from the relevant parts of Boyle et al.'s work: *Ten Years On*, pp. 65-75.

(6) This investigation, and its limitations, were also set out in somewhat greater detail in Amnesty International's analysis as sent by them to Baker J. The relevant passages drew, in particular, on the Bennett Report, paras 289-291, 352, and 361-362.

(7) This section requires that, in cases in the "Diplock" courts where *prima facie* evidence has been adduced by the defence that a statement was obtained as a result of torture, inhuman or degrading treatment, the prosecution must rebut this *prima facie* evidence before the statement can be used as evidence. The Crown must establish the issue beyond reasonable doubt (see Chapter 4).

(8) The complaints procedure is briefly discussed in Chapter 6.

(9) In the same paragraph, Bennett J. concluded that "the present practice raises a serious issue concerning public confidence in the complaints procedure, which should be further examined." Note that Bennett J. was concerned with the effect of the change in procedure on the investigation of complaints, whereas this analysis deals with the effect of that change on the fairness of criminal proceedings against the complainant.

(10) Now section 8 of the 1978 Act. See footnote (7) and Chapter 4. In the same period statements made by 15 persons were ruled inadmissible in the "Diplock" courts.

(11) Previously section 6 of the Northern Ireland (Emergency Provisions) Act 1973 and therefore referred to in court judgements prior to 1978 as "section 6".

(12) *Voir dire* signifies a trial within a trial (held outside the presence of the jury) whose purpose is to determine the truth from two conflicting statements.

(13) In all but the most serious cases, an accused can waive his right to a jury trial and opt for a trial before magistrates. Some aspects of trials in Magistrates' courts are discussed below.

(14) A jury need not be empanelled if the accused pleads guilty, since in that case, in the English accusatorial system, there is no need for an assessment of evidence: such a plea, if accepted by the prosecution, suffices to convict.

(15) In cases of some "scheduled" offences (including murder), Lord Diplock recommended that trial without a jury should be subject to a certificate by the Director of Public Prosecutions. In the legislation based on the Diplock Report this was altered to a power by the Attorney-General for Northern Ireland to certify in any particular case that that case is not to be tried as a "scheduled" offence.

(16) For the onus and standard of proof in the different proceedings, see below.

(17) But note that the Commission proposed that in certain rare circumstances (such as murder on a train), "the police should be given a power to detain people... while names and addresses are obtained or a suspect identified or the matter otherwise resolved." (*RCCP Report*, para. 3.93).

APPENDIX I

SUMMARY OF AMNESTY INTERNATIONAL'S FINDINGS REGARDING THE SYSTEM OF CRIMINAL JUSTICE LINKED WITH THE "DIPLOCK" COURTS IN NORTHERN IRELAND

As submitted, with the above analysis, to the UK government in December 1982 and to the Baker inquiry in August 1983; and made public together with the AI Circular on the organization's concern regarding the criminal justice system in Northern Ireland (AI Circular EUR 45/01/84 of 17 February 1984), attached as Appendix II.

1. Salient Aspects of the System

Amnesty International has drawn the following basic conclusions regarding the study of the law and the practice of this system. Brief notes and references with respect to each conclusion have been included to indicate important considerations.

- (a) The police and the army have been given wide and in effect unchallengeable powers of arrest and detention.

The police may arrest without warrant, and detain for up to 72 hours, anyone whom they suspect of "being a terrorist", according to Northern Ireland (Emergency Provisions) Act 1978, s.11. The arrested person need not be suspected of any specific (scheduled) offence, nor is it specified that the suspicion must be reasonable or based on factual information. The army has similarly wide powers of arrest, though linked with more limited powers of detention. Arrests under s.12 of the Prevention of Terrorism (Temporary Provisions) Act 1976 must be based on "reasonable suspicion". Persons arrested under this section may, with the approval of the Secretary of State for Northern Ireland, be detained for up to seven days.

The courts do not probe for the basis of such suspicion as gave rise to an arrest and so arrests under all the above-mentioned powers are unchallengeable in practice.

There is also no judicial remedy against repeated arrests in quick succession of the same person on the same suspicion (ruling by the Lord Chief Justice for Northern Ireland in June 1980 on a *habeas corpus* application *in re Martin Lynch*).

- (b) "Forceful", "decisive" and "persistent" interrogation is allowed, in which the right to silence is implicitly denied.

The words "forceful", "decisive" and "persistent" were used by Bennett J. to describe the kind of interrogation used in Northern Ireland which, he said, "does not imply the use of unlawful means" (paragraphs 36 and 37 of *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland*, March 1979 - hereafter referred to as the *Bennett Report*; see also paragraphs 84 and 91 of *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, December 1972 - hereafter referred to as the *Diplock Report*).

It is clear from the Bennett Report and the 1972 Diplock Report that these forms of interrogation are specifically aimed at inducing prisoners to speak who without them would have stayed silent.

- (c) Interrogation is not under contemporaneous judicial control.

There is no institutional judicial involvement in police questioning. The Lord Chief Justice for Northern Ireland has further held that "the treatment and conditions of detention accorded to a person lawfully detained do not therefore give rise to the remedy of *habeas corpus*" (*in re Martin Lynch*).

It may be noted that the Royal Commission on Criminal Procedure recommended that the introduction in England of lawful detention for questioning beyond 24 hours should be linked to a hearing before magistrates (*Royal Commission on Criminal Procedure Report*, para. 3.106).

- (d) The opportunities for the defence effectively to challenge the prosecution case in the pre-trial proceedings have been substantially reduced.

Bail may be granted only by a High Court Judge, and a separate application must be made for this purpose, according to s.2 of the Northern Ireland (Emergency Provisions) Act 1978. The initial appearance before the magistrate serves mainly to provide the accused with legal assistance. Committal proceedings are dealt with mainly through a "preliminary enquiry" rather than the ordinary "preliminary investigation", according to s.1 of the Northern Ireland (Emergency Provisions) Act 1978. The preliminary enquiry gives a less searching examination than the preliminary investigation. If the accused complains of his treatment in custody, a pre-trial investigation is carried out into the complaint on behalf of the Director of Public Prosecution, but the defence has no access to this investigation, other than being asked to make a statement to the investigating police officer (*Bennett Report*, paras 289-292 and 359-362).

- (e) At the trial, statements obtained by "oppressive" methods are admissible, so long as their methods did not amount to torture, inhuman or degrading treatment; the courts also as a rule exclude statements in cases in which there was evidence of physical ill-treatment.

In ordinary law, involuntary statements must be excluded from evidence (principle (e) prefaced to the Judges' Rules). This includes statements obtained by "oppression", which was defined in *R v Prager* (1971) 56 Cr.App.Rep.151,161 as "something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary" (from *R v Priestly*, 1965, 51 Cr.App.Rep.1) and as "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hope (such as the hope of release) or fears or so excites the mind of the subject that his will crumbles when otherwise he would have stayed silent" (from a speech by Lord MacDermott in a speech to the Bentham Club in 1968).

In the "Diplock" courts, statements must be excluded only if it has been shown that they were obtained as a result of torture, inhuman or degrading treatment (s.8 of the Northern Ireland (Emergency Provisions) Act 1978). According to Bennett J. "it is nevertheless clear that any statement which may have been obtained by the use of physical violence or ill-treatment would not be admitted" (*Bennett Report*, para. 84). Otherwise, there is no clear or consistent practice, but it is clear that "forceful", "decisive" and "persistent" questioning is not as such ground for exclusion, even when it falls within the definition of "oppression" cited above and even though it may clearly affect the reliability of the confession (see *R v Corey and others* (1977) 6 December 1973, unreported; *R v McCormick and Others* (1977) N.I.4; *R v McGrath* (1980) N.I.91; *Diplock Report*, paras 88-90).

- (f) According to s.7 of the Northern Ireland (Emergency Provisions) Act 1978, trial in the "Diplock" courts is without jury. The single judge has taken over the functions of the jury as tribunal of fact and "weighs" the evidence in a legal framework which is much less strict than in ordinary trials.

The ordinary law sets a strict framework for the weighing of evidence by the jury, and the judge ensures strict adherence to the framework: he rules on the admissibility of evidence; is the umpire over the manner in which prosecution and defence present their case; sums up the evidence; and instructs the jury on the law as regards onus and standard of proof etc.

In the "Diplock" courts the changes in the rules on the admissibility of confession, together with the fact that the judge is both umpire over the proceedings and tribunal of fact, have substantially relaxed the legal

framework for the "weighing" of the evidence, and have thereby reduced safeguards against subjective factors influencing the findings of fact. Such subjective factors need not take the form of bias on the part of the judge, but may include "case-hardening", the negative effect of constant involvement in the administration of justice on the detachment and objectivity of judges.

- (g) In most cases the evidence against the accused consists wholly or mainly of a confession submitted by the prosecution as having been made by the accused during police interrogation.

Bennett J. was informed by the Director of Public Prosecutions that in the first six months of 1978 in 75-80% of cases for scheduled offences the prosecution case depended wholly or mainly on the confession of the accused (*Bennett Report*, para 30). This included both written and alleged verbal confessions.

- (h) In such cases, the "weighing" of the evidence is in fact subsumed under the judge's ruling on the admissibility of the confession: confessions, once admitted as evidence, are not in practice tested further on their reliability.

Matters which might affect the reliability of a confession (threats, promises, oppression) are, in law, supposed to be fully investigated after the ruling on the admissibility. In fact, there is no subsequent inquiry specifically to deal with the reliability of confessions, once they are admitted. No case has been brought to Amnesty International's attention where an accused was acquitted though his confession was ruled admissible. If such cases exist, they are extremely rare.

- (i) The scope of appellate review over "Diplock" court cases is limited, at least as regards the crucial issues of the exercise of judicial discretion in ruling on the admissibility of a confession, and of the "weighing" of confessions by the judge acting as tribunal of fact.

There is virtually unlimited right of appeal (s.7(6) of the Northern Ireland (Emergency Provisions) Act 1978). However, under normal procedure matters within the discretion of the trial judge do not afford grounds of appeal and appellate review over the "weighing" of the evidence by the tribunal of fact is very limited in scope.

In practice, the Court of Appeal in Northern Ireland has not always restricted hearings to issues which, on the basis of the law as normally applied, would afford grounds for appeal. On the other hand, Amnesty International has not found any decision by the Court of Appeal in Northern Ireland clearly extending the scope of that court's review beyond what was stated above. Whatever the precise extent of the Court

of Appeal's supervision, the following is clear as regards the crucial issue in the "Diplock" courts: the assessment of the reliability of a confession by the single judge in the "Diplock" courts is not tested on appeal, once it is accepted by the Court of Appeal that the trial judge was correct in his interpretation of the words: "torture, inhuman or degrading treatment", and that he had at least considered whether to exercise his discretion to exclude the confession.

2. The Reliability of Confessions

Having analysed the system, Amnesty International believes that, **for the purpose of determining the fairness of trials in the "Diplock" courts, the single most important issue regards the reliability of confessions obtained during interrogation.** In this respect, Amnesty International has established the following:

the police rules on interrogation allow for methods of interrogation which can seriously affect their reliability;

the pre-trial investigation carried out on behalf of the Director of Public Prosecutions is not aimed at ensuring that only *prima facie* reliable confessions are tendered in evidence;

the tests applied by the judges in the "Diplock" courts in ruling on the admissibility of confessions do not as a rule extend beyond ensuring that confessions were not obtained as a result of physical ill-treatment;

although these tests leave out many aspects of interrogation which can seriously affect the reliability of confessions, the courts in practice subsume their "weighing" of the reliability of a confession under their ruling on its admissibility.

The "Diplock" courts convict in the vast majority of cases in which a confession (allegedly) made by the accused in the course of police interrogation is the only evidence of his guilt, as long as there was no evidence that physical ill-treatment (or worse) was used to obtain that confession. It is surprising, in view of the evidentiary problems arising out of the private nature of interrogation (described in the *Bennett Report*, paragraphs 340-348), that the courts so often hold that it has been established beyond reasonable doubt that no such treatment occurred. Even if that is left aside, there must be serious doubt about any assumption that confessions obtained as a result of "forceful", "decisive" and "persistent" interrogation are reliable even if there was no physical ill-treatment.

3. The Royal Commission on Criminal Procedure

The issue of the reliability of confessions obtained as a result of interrogation

has been dealt with in the context of the review of English criminal procedure carried out by the Royal Commission on Criminal Procedure. Extensive research was carried out on behalf of the Commission into the psychological aspects of interrogation (Royal Commission on Criminal Procedure, Research Studies Nos. 1 and 2: *Police Interrogation, The Psychological Approach: A case study of current practice*, London, HMSO, 1980). This research raises serious doubts about the reliability of confessions obtained as a result of interrogation, in particular if the display of authority by the interrogator is combined with such factors as isolation and/or fatigue which impair a suspect's "decision-making performance" (see pp. 42-43 of the study). The researchers concluded that such impairment arises

"where interrogation takes place after midnight; where the suspect has lost more than five hours sleep; or when the interrogation continues for more than one hour without a break" (p. 42 of the study).

The authority of the interrogator can make a suspect "obedient" in that it

"predisposes the suspect to give up the responsibility of making the decision for himself in favour of acquiescing to the demands of his interrogator...

In the situation where the interrogator has formed a view of the possible guilt of the suspect, the risk of indirectly conveying important information about the crime and the part played by the suspect will be greater. If in such a case the suspect is both innocent and fully obedient, then the risk of a false confession will also be high" (p. 43 of the study).

The researchers argue from the psychological literature that

"in principle, false confessions can be elicited by the application to an innocent suspect of techniques which may also be successful in obtaining true confessions from the guilty, but the state of knowledge is not sufficient to assist in detecting false confessions when they have been obtained (assuming that there is no other evidence which casts doubt on their reliability)" (pp. 25-26 of the study).

This study carried out on behalf of the Royal Commission on Criminal Procedure with particular reference to English norms of criminal procedure (though drawing on and confirming international psychological research) must cast serious doubt on interrogation and "Diplock" court-practice in Northern Ireland. Many of the features of interrogation identified as affecting the reliability of confessions are almost institutional parts of interrogation in Northern Ireland, for example, isolation, fatigue and the strong display of authority implicit in "forceful", "persistent" and "decisive" questioning. The finding that the same pressures which may cause guilty suspects to confess may as well compel innocent suspects to make a false confession goes strongly against propositions made by Lord Diplock and at least implicitly accepted by Bennett J. that it is acceptable in the circumstances in Northern Ireland to put strong psychological pressure on suspects to confess and

to rely on such confessions to convict, even without corroboration.

The Commission considered the rules for the questioning of suspects with the benefit of the results of this study into the psychological effects of interrogation. The Commission developed a framework for questioning linked with the reliability of confessions and drew up rules for questioning aimed at ensuring, as far as possible, that confessions obtained by the police are reliable. Confessions obtained in breach of these rules would require corroboration (*Royal Commission on Criminal Procedure Report*, paragraphs 4.109 - 4.114 and 4.131 - 4.133). The nature, length and conditions of interrogation in Northern Ireland are such as to fall far short of the rules envisaged by the Royal Commission on Criminal Procedure as necessary to ensure, as far as possible, that confessions obtained by the police are reliable. By the standards of the Commission (set on the basis of extensive research into the psychological effects of interrogation), convictions based solely on confessions obtained as a result of "forceful", "decisive" and "persistent" interrogation are not sound: under the Commission's proposals such confession would require corroboration.

Changes in "technical" aspects of a criminal justice system aside, the most fundamental requirement for all such systems must be that convictions are sound, in that they are based on reliable evidence, properly tested. The English system of criminal justice contains safeguards, first to ensure that the nature, length and conditions of questioning are not such as to be likely to affect the reliability of a confession, and second to test the "voluntariness" of a statement before allowing it to come before the tribunal of fact. These safeguards are not mere "technical" and outdated aspects of the system, as Lord Diplock suggested (*Diplock Report*, paragraphs 59 and 73 ff.). The Royal Commission on Criminal Procedure has re-affirmed that it is a fundamental requirement of the English system that it comprises rules for questioning aimed at ensuring the reliability of confessions prior to their being brought before the tribunal of fact. This fundamental requirement for the attainment of soundness, reliability and fairness of convictions has been abrogated in the "Diplock" system of criminal justice in Northern Ireland.

4. International norms

Amnesty International is aware that, in times of emergency "threatening the life of the nation", the international human rights treaties allow for derogation by state-parties from some (not all) of their international obligations, including the obligation to afford everyone a fair trial in the determination of any criminal charge against him. Such derogations must be "to the extent strictly required by the exigencies of the situation" (*International Covenant on Civil and Political Rights*, article 4; *European Convention on Human Rights*, article 15; somewhat differently, *American Convention on Human Rights*, article 27). This allows states in certain circumstances to introduce administrative detention without trial (internment) as the authorities did in Northern Ireland between 1971 and 1975. However, the United Kingdom Government (although it has declared that an emergency continues to exist

in Northern Ireland) has always maintained that those convicted in the "Diplock" courts have been found guilty of crimes in fair proceedings. Indeed, Lord Diplock, in recommending the setting up of the courts, stressed that the changes he recommended fell within the minimum requirements of article 6 of the *European Convention on Human Rights*, which lays down requirements for a fair trial (*Diplock Report*, paragraphs 12-14).

The proceedings linked with trials in the "Diplock" courts may therefore be judged by *minimum* international standards for a fair trial.

The most important questions regarding adherence to international norms, for the purpose of Amnesty International's assessment, relate to the freedom from self-incrimination and to the presumption of innocence. The principle that someone who is the subject of a criminal investigation shall have the right not to be coerced into confessing is not stated explicitly in all human rights treaties; the *European Convention on Human Rights*, for instance, does not contain such a provision. The principle is contained in the *International Covenant on Civil and Political Rights*, to which the United Kingdom is party. (Article 14(3)(g) of the Covenant provides that in the determination of any criminal charge against him, everyone shall be entitled:

"not to be compelled to testify against himself or to confess guilt".

The principle is also explicitly stated in article 8(2)(g) of the *American Convention on Human Rights*, the most recent of the human rights treaties, which further develops the principle by adding, in article 8(3):

"A confession of guilt by the accused shall be valid only if it is made without coercion of any kind."

The principle that no-one shall be convicted on the basis of a confession obtained under duress is also explicitly stated in such documents as the (United Nations) *Draft Principles on Freedom from Arbitrary Arrest and Detention* (articles 24 and 25) and the (United Nations) *Draft Body of Principles for the Prosecution of All Persons under Any Form of Detention or Imprisonment* (articles 15 and 23).

Even though not always explicitly stated, the right not to be coerced into making a confession and the right not to be convicted on the basis of a confession obtained under duress can be said to be implicit in the right to a fair trial, pronounced by all international human rights instruments. The first right can be said to flow from the presumption of innocence: to require a suspect to talk subverts the principle that it is the duty of the prosecution to prove the guilt of the accused - which is not only the "golden thread" running through English criminal justice (Royal Commission on Criminal Procedure Report, paragraph 4.35, quoting Lord Sankey), but also a general principle of criminal law, and an internationally recognized norm for a fair trial, recognized equally in accusatorial and in developed inquisitorial systems of criminal justice. Furthermore, the equally fundamental (and equally widely recognized) principle that the guilt of the accused must be established beyond

reasonable doubt implies a prohibition to convict on the basis of unreliable evidence, such as confessions obtained under duress. In the words of the Royal Commission on Criminal Procedure:

"It is not only that extreme means of attempting to extort confessions, for example the rack and thumbscrew ... are abhorrent to any civilized society, but that they and other less awful, though not necessarily less potent, means of applying pressure to an accused person to speak do not necessarily produce speech or the truth." (*RCCP Report*, paragraph 4.36).

The explicit inclusion in such recent international treaties and documents as the *American Convention on Human Rights*, the *Draft Principles on Freedom from Arbitrary Arrest and Detention* and the *Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* of the principle that confessions obtained under duress shall not form the basis of a conviction underlines the argument that that principle is an essential element in attaining fairness in criminal proceedings.

The institutionalized use in Northern Ireland of strong psychological pressure on suspects in order to induce them to confess appears to be in breach of at least article 14(3)(g) of the *International Covenant on Civil and Political Rights*. Convictions based solely on contested confessions obtained under such duress furthermore raise doubts about the adherence by the "Diplock" courts to the presumption of innocence in all cases. These aspects of the "Diplock" courts system therefore raise questions about the extent to which trials in the "Diplock" courts accord with international norms for a fair trial, contained in such international instruments as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*.

London, December 1982.

APPENDIX II

AI INDEX: EUR 45/01/84

NORTHERN IRELAND: AMNESTY INTERNATIONAL'S CONCERNS REGARDING THE CRIMINAL JUSTICE SYSTEM

In August 1983 Amnesty International submitted material documenting its concerns about the so-called "Diplock Courts" in Northern Ireland to Sir George Baker, the English judge who is conducting an inquiry into the workings of the "Northern Ireland (Emergency Provisions) Act" of 1978.

Amnesty International submitted a detailed analysis of the legislation along with a summary of its concerns which it had submitted to the Secretary of State for Northern Ireland in December 1982.

In its submission, Amnesty International expressed concern that the proceedings in the "Diplock courts" might not conform to international standards for fair trial.

These courts were named after the judge who recommended in a 1972 inquiry that "terrorist" offences committed in Northern Ireland should be tried by senior judges sitting alone with no jury. None of those tried in this way have been adopted by Amnesty International as prisoners of conscience.

Furthermore, allegations that confessions were obtained as a result of physical ill-treatment had virtually stopped since Amnesty International's 1978 report on that subject and the subsequent confirmation of the organization's findings by a government-appointed committee of inquiry.

However, Amnesty International expressed concern about various issues connected with the fact that throughout the history of these courts, the great majority of those convicted had been convicted solely on the basis of confessions.

The police and army have wide powers to arrest people and detain them on suspicion for up to seven days. During the first two days people who have been arrested are held incommunicado without access to lawyers or relatives. The laws and police regulations permit the use of strong psychological pressure on suspects to induce them to confess. Even confessions obtained in this way may be admitted into evidence by the Diplock courts, although they would be excluded as "oppressive" by established standards in other courts in the United Kingdom.

By comparison with trials in ordinary courts in the United Kingdom, the fact that there is no jury, but only a judge, reduces the safeguards against such confessions being given too much weight.

These factors lead to the risk that people may be convicted and sentenced to imprisonment on the sole basis of confessions which, having been ob-

tained by oppressive methods, are not reliable

Appeal to higher courts does not overcome this deficiency since the appeal courts consider more the trial courts' application of the law than their assessment of the evidence.

In its submission to Sir George Baker, Amnesty International also raised the case of Michael Culbert, which it believes illustrates its concerns.

Michael Culbert, a social worker from Belfast, was arrested in 1978 and convicted in 1979 of murdering a policeman and membership of the Irish Republican Army. After his arrest he was interrogated for long periods but not physically ill-treated. He was alleged to have made a verbal (unsigned) confession, and this was the only evidence produced against him. He denied having made such a confession and maintained that at the time of the alleged confession he was completely disorientated as a result of continuous interrogation, lack of sleep and being made to stand for long periods during interrogation. (The police denied that he had been forced to stand.)

At his trial by a special court some months later in October 1979, the only issue was the admissibility of his alleged verbal confession.

The court held that the confession was admissible, convicted him of murder and membership of the Irish Republican Army, and sentenced him to life imprisonment.

Amnesty International, believing the case to raise fundamental issues of principle, sent an observer to his appeal hearing in January 1982. His appeal was turned down.

On 3 October 1983 Amnesty International wrote again to the United Kingdom Government expressing concern about the recent practice in Northern Ireland of bringing prosecutions solely or mainly on the basis of testimony of former accomplices of the accused.

During the past year about 300 people had been charged with or tried for crimes involving politically motivated violence on the basis of testimony by 20 individuals who were themselves implicated in such offences.

These former accomplices are known as "supergrasses", a term derived from "grass", a slang expression in the UK for informer.

The defendants have included alleged members of both Republican and Loyalist paramilitary organizations.

In its letter, Amnesty International asked the Secretary of State for Northern Ireland to ensure that this subject be included in the terms of reference of the inquiry into the operation of emergency legislation in Northern Ireland. Amnesty International sent a copy of its letter to the judge conducting that inquiry, Sir George Baker.

The organization said that it was against neither international standards nor the United Kingdom's laws for the testimony of accomplices to be admitted in evidence in criminal trials.

However, Amnesty International said, a number of features of prosecution practice in "supergrass cases" had emerged which, taken together, raised doubts about the quality of proof in such cases. These factors were:

- Many defendants were convicted solely on the basis of the uncorroborated testimony of former accomplices.

Although in English law the normal rules of evidence ruled out testimony obtained by "hope of advantage... held out by a person in authority", in some "supergrass" cases testimony had been admitted in evidence which was given by people who had themselves been offered immunity from prosecution for serious crimes.

- Some such witnesses had been in custody for long periods - well over a year - before the trial, so that the police had ample opportunity to influence the testimony unduly.

Whereas in normal trials judges were required to warn juries of the dangers of convicting defendants on the sole basis of such evidence, in the "Diplock courts" in Northern Ireland there were no juries - and so judges had to "warn" only themselves.

On 21 November 1983 the Secretary of State for Northern Ireland replied to Amnesty International's letter of 30 October. He referred Amnesty International to a recent statement by the Attorney General in Parliament outlining the criteria and safeguards employed by the authorities in cases like those described by Amnesty International. The Secretary of State also referred to the safeguard offered by the right of appeal against sentence to the higher courts. He told Amnesty International that witnesses, in custody or under police protection, were not subjected to police pressure and that their right to access to relatives, friends or lawyers were respected.

The inquiry by Sir George Baker was still in progress as of mid-February 1984.

The attached document (Appendix here included Appendix I-SIM) was part of the material submitted by Amnesty International to Sir George Baker in August 1983.

17 February 1984

This issue in the series SIM Specials contains an extensive analysis of the law pertaining to the Diplock Courts in Northern Ireland.
It is available from SIM at Hfl. 20,— plus postage.

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