

REPORT OF THE COMMITTEE

TO REVIEW

THE OFFENCES
AGAINST THE
STATE ACTS,
1939 - 1998

AND

RELATED MATTERS

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CHAPTER 1

INTRODUCTION

Establishment

- 1.1 On 10 April 1998 the participants in the multi-party negotiations in Belfast reached an agreement aimed at transforming life on the island of Ireland. The Good Friday Agreement, as it came to be known, was subsequently endorsed in a referendum of the people in both parts of Ireland on 22 May 1998.
- 1.2 The Agreement deals with all aspects of life in Northern Ireland and the relationships between both parts of the island of Ireland and between Britain and Ireland. In the section of the Agreement dealing with security issues, the parties noted that "the development of a peaceful environment on the basis of this agreement can and should mean a normalisation of security arrangements and practices". In particular, the Irish Government undertook in that section to "initiate a wide-ranging review of the Offences against the State Acts 1939 to 1985 with a view to both reform and dispensing with those elements no longer required as circumstances permit."
- 1.3 The Omagh atrocity on 15 August 1998 led to the enactment of the Offences against the State (Amendment) Act 1998, and this was subsequently included in the review.
- 1.4 In May 1999 the Committee to Review the Offences against the State Acts 1939 to 1998 was established under the chairmanship of the Honourable Mr. Justice Anthony J. Hederman. It was requested to examine all aspects of the Offences against the State Acts 1939 to 1998, taking into account:
 - (a) the view of the participants to the multi-party negotiations that the development of a peaceful environment on the basis of the Agreement they reached on 10 April 1998 can and should mean a normalisation of security arrangements and practices

(b) the threat posed by international terrorism and organised crime

(c) Ireland's obligations under international law.

The Committee was asked to report as soon as practicable.

1.5 The Committee comprised the following members:

The Honourable Mr. Justice Anthony J. Hederman (Chairman)

Mr. Richard Barrett,¹ Office of the Attorney General

Mr. John Biggar, Department of Foreign Affairs

Professor William Binchy, Fellow of Trinity College Dublin, Law School,
Trinity College, Dublin

Mr. Barry Donoghue, Office of the Director of Public Prosecutions

Mr. Michael Flahive,² Department of Justice, Equality and Law Reform

Dr. Gerard Hogan, Senior Counsel, Fellow of Trinity College Dublin, Law
School, Trinity College, Dublin

Mr. Eamon Leahy,³ Senior Counsel

Mr. Patrick J. Moran, former Deputy Commissioner, An Garda Síochána

Mr. Michael O'Donoghue, Department of Defence

Mr. Patrick O'Toole, Assistant Commissioner, Garda Síochána

Professor Dermot Walsh, Director, Centre for Criminal Justice, School of
Law, University of Limerick

Ms. Ann Whelan, Department of the Taoiseach

Mr. Eamon Saunders acted as Secretary to the Committee;

Ms. Lia O'Hegarty acted as the Committee's Legal Researcher.

Events of 11 September

¹ Mr Barrett has not signed the Report because he left the Committee in July, 2000 to take up a position abroad.

² Mr Flahive replaced Mr Martin Power as the representative of the Department of Justice, Equality and Law Reform in March 2000.

³ Mr Leahy has not signed the Report since his duties resulted in his unavoidable absence from meetings of the Committee.

- 1.6 The appalling terrorist atrocities in the United States of America on 11 September 2001, which cost the lives of thousands of people of many nationalities, including Irish citizens, took place as the Committee was in the process of finalising its report.
- 1.7 The Committee decided, after careful consideration, not to reopen the report to take account of the undoubtedly serious and far-reaching implications of these attacks for public safety and national security, notwithstanding that our terms of reference requested us to take into account, among other things, the threat posed by international terrorism.
- 1.8 The events of 11 September have drawn the international community together to formulate a comprehensive response to the new international threat represented by these terrorist attacks. One aspect of this response has been a range of proposals from international fora such as the United Nations and the European Union aimed at enhancing the capacity of member states to combat terrorism. Some of these proposals were still being elaborated as the report was being finalised, but it seems clear that they will involve significant change to the law on terrorism in Ireland. In the circumstances, it seemed right not to attempt to duplicate the national and international work already underway. It must be emphasised, therefore, that the recommendations must not be interpreted as in any way constituting the Committee's views on the adequacy of the law or on any legislative change that may be needed to combat the new international terrorist threat.

Submissions

- 1.9 The terms of reference were published in daily newspapers in Ireland and in Northern Ireland on 23 July 1999, and written submissions were invited from interested individuals and organisations. A total of fifteen written submissions were received. The Committee is grateful to all those who made submissions, a list of whom is set out in Appendix 1.
- 1.10 The Committee expresses its thanks to the Commissioner of the Garda Síochána and to Mr. Eamon Barnes, former Director of Public Prosecutions, for making oral submissions at the invitation of the Committee.

Consultations on human rights

1.11 The Committee's terms of reference required it to take into account Ireland's obligations under international law. Since these obligations derive principally from the European Convention on Human Rights and the International Covenant on Civil and Political Rights, the chairman and the legal researcher, acting on behalf of the Committee, visited the European Court of Human Rights and the Council of Europe in Strasbourg, and the Office of the United Nations High Commissioner for Human Rights in Geneva. The Committee is greatly indebted to these institutions and extends particular thanks to the following individuals:

- in the European Court of Human Rights: Judge John Hedigan, Ms. Anna Austin, Legal Advisor, and Mr. Laurence Early, Senior Lawyer
- in the Council of Europe: Mr. Walter Schwimmer, Secretary-General, Mr. Chris Kruger, Director General, Mr. Gerona Schokkenbroek, Head of Human Rights Section, Mr. Frederik Sundberg, Head of Section on Execution of Judgements, Mr. Mark Kelly, Head of Unit for the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and Ms. Ulrike Flodin-Janson, European Social Charter Section
- in the Office of the United Nations High Commissioner for Human Rights: Mr. Markus Schmidt, Ms. Nora Restrepo, Ms. Maria Munoz and Mr. Alfredo de Zayas.

1.12 The Committee thanks the Irish Permanent Representative to the Council of Europe, Ambassador Justin Harmon, and the Irish Permanent Representative to the United Nations Offices in Geneva, Ambassador Anne Anderson, for their assistance and hospitality in Strasbourg and Geneva.

1.13 In addition, the Secretary General and Deputy Secretary General of the Council of Europe nominated experts on the European Convention on Human Rights to meet with the Committee as a whole. Accordingly, the Committee organised a discussion day in Dublin, at which it heard the views of Mr. Mark Neville, Director of Human Rights, Council of Europe, Professor Stefan Trechsel, University of Zurich and former President of the European Commission on Human Rights, Mr. Egbert Myjer, Chief Advocate-General, Court of Appeal at Amsterdam, and Professor Mariavaleria del Tufo, Faculty of Law, University of Naples II. The Committee is very grateful to these experts for their assistance.

Consultations on terrorism and organised crime

- 1.14 Since the Committee's terms of reference also required it to take into account the threat posed by international terrorism and organised crime, the Chairman and the Legal Researcher visited the headquarters of EUROPOL in the Hague. There, they learnt of the role of EUROPOL, its assessment of the nature and scale of the threats posed by terrorism and organised crime to society in the European Union and of the response by EUROPOL to these threats. The Committee expresses its thanks to EUROPOL for its assistance, and in particular to Deputy Director Marotta, Mr. Kusters and Mr. Bishop of the Organised Crime and Terrorism Group, Mr. Robertson and Mr. Blair of the Crime Analysis Unit, and Mr. Mulschlegel of the Open Sources and Documentation Unit.
- 1.15 In addition to this information, throughout its deliberations the Committee had the benefit of appropriate briefing on the security situation from the Garda Síochána.

Work of Committee

- 1.16 The Committee met in plenary session on 36 occasions. In addition, because of the scale and complexity of the issues being examined, sub-committees were established to deal with constitutional matters, Anglo-Irish and international obligations, terrorism and organised crime, and drafting.
- 1.17 The Committee undertook a section by section review of the Offences against the State Acts, taking into account, in accordance with its terms of reference, the view that a peaceful environment should mean a normalisation of security arrangements and practices, the threat posed by international terrorism, and Ireland's obligations under international law. The objective of the Committee throughout was to frame a comprehensive set of recommendations which, if implemented, would result in revised legislation that would ensure a continuing capacity to respond to threats to the State and its institutions in a way which is balanced and proportionate and which in particular has regard to the rights of the individual.
- 1.18 The Committee strove, where possible, to reach unanimous conclusions to its deliberations, but the nature of the issues dealt with in the Acts,

together with the healthy diversity of background of its members, made it always likely that, on some issues at least, complete agreement on the way forward would not be possible. Where this happens in the report, the nature and extent of the differences of view are set out fully and fairly, so that all sides of the argument are available to the reader.

Special thanks

- 1.19 Finally, the Committee must say a special word of thanks to a small number of people whose contribution to this report was crucial.
- 1.20 Lia O'Hegarty, the Committee's Legal Researcher, brought to the Committee great expertise in researching, distilling and presenting information on the law in this and many other jurisdictions. Her contribution to the Committee's deliberations was invaluable.
- 1.21 Eamon Saunders, the Committee's Secretary, had the thankless task of organising every aspect of the work of the Committee and its sub-committees. It was an immense challenge, which his skill, commitment, patience and good humour enabled him to meet with distinction.
- 1.22 A special word of thanks must also go to the Committee's staff, Fiona Cullinan and Mairead McCarthy. Their tireless work in providing administrative support to the Committee was crucial and very much appreciated.

The Hon. Mr. Justice Anthony J. Hederman (Retired)

Professor William Binchy

Dr Gerard Hogan S.C.

Mr P.J. Moran

Professor Dermot Walsh

Mr. John Biggar

Mr Barry Donoghue

Mr. Michael Flahive

Mr Michael O'Donoghue

Mr Patrick O'Toole

Ms. Ann Whelan

CHAPTER 2

MAIN ISSUES IN A DEMOCRACY

Introduction

- 2.1 Emergency legislation, special courts and distinctive restrictions on liberty, are features of the response of many legal systems to threats to the security of the State. They are so widespread that it may be easy to proceed on the unreflective premise that there is a compelling moral argument in their support. Yet it is plain that great dangers for human rights arise in this area. Emergency legislation may be abused for pragmatic political purposes; special powers, introduced for special reasons, may continue to be used when those reasons no longer justify this, or for purposes extending beyond those that warranted their original introduction; and powers of detention or interrogation may be used cruelly or inhumanly upon innocent (or even guilty) people.
- 2.2 It is necessary to address, at the threshold of our analysis of the Offences Against the State legislation, the arguments for and against distinctive legal structures, rules and procedures to deal with the protection of the State.
- 2.3 Some of the wider aspects of the subject need not detain us. We are not concerned with such problematic questions as the entitlement of a State which lacks full democratic legitimacy to introduce draconian legal measures designed to ensure its perpetuation, or the need to ensure that a political minority is not treated as treasonable in its pressure for political change that would impact fundamentally on the structure of the State. Our discussion can proceed on the basis that it concerns a democratic State which has the support of the overwhelming majority of its citizens.
- 2.4 Let us also accept as axiomatic certain norms which will narrow our discussion. It is surely beyond argument in the present context that measures may legitimately be taken to ensure that civil society can flourish, rather than having a condition of anarchy where warlords and brigands are the only centres of power, and that measures may also be adopted to protect the security of the State from internal subversion or external attack. The difficult questions relate to the precise circumstances where this entitlement arises and

the extent (if at all) to which these measures may go beyond the laws and legal procedures of general application.

Endangerment of the security of the State

- 2.5 The security of the State can be endangered in a variety of ways. A military attack may be made upon its Defence Forces. Military secrets may be disclosed. An attack may be made on its physical infrastructure, communications systems or economic targets, such as factories. This attack may be indirect (though no less real on that account) as, for example, where a visitor from abroad to a centre of tourism is killed or injured, with the purpose of damaging the tourist economy. Activities ancillary or preparatory to these attacks may occur, such as the training of subversives in bomb-making skills or the importation of products with the intent of converting them into bombs. More insidiously, groups with subversive goals may engage in intimidatory conduct designed to induce social compliance or they may become involved in legitimate political or business activities where the undercurrent of subversive goals is known but deniable.
- 2.6 The latter consideration raises a further difficulty in terms of defining parameters. Certain political goals may involve radical structural transformations impacting on the continuity of the State. If political activity is shadowed by subversive activity which has an identical goal, questions naturally arise as to the extent to which the political activity can be severed legally from the subversive activity.

Protection of the administration of justice

- 2.7 The protection of the administration of justice from attack raises related, but not necessarily identical, concerns. In times of warfare or subversion, the administration of justice may be inhibited by physical attacks on members of the judiciary, lawyers, witnesses or jurors or damage to court buildings. Intimidation may be rife. A point worth noting here is that such attacks on the administration of justice can occur in circumstances where the security of the State is not otherwise threatened. An individual with a grievance, for example, may kill a judge (as has happened in a number of countries) or those involved in organised crime may intimidate jurors. It is true, of course, that in these cases damage to the administration of justice has, at least, an indirect impact on the security of the State, but it would be mistaken to proceed on the basis that an attack on the administration of justice for private purposes should necessarily be treated in the same way as a direct attack on

the security of the State. Conversely, it would seem equally mistaken to assume that, simply because conduct damaging to the administration of justice was inspired by some political motive, it has to be dealt with by some distinctive legal process, involving unique restrictions on the rights of the accused.

The human rights dimension

2.8 In addressing the question of the scope of offences against the State it is essential to have regard to the human rights dimension. One must confront, and attempt to reconcile, the conflict between the requirement to protect the state from subversion and the need to protect individual human rights - to life⁴, bodily integrity⁵, freedom of speech⁶, association⁷ and assembly⁸, for example.

2.9 Inevitably, some compromises have to be made. States of emergency, justifying derogations from human rights standards, have been described as “well-known institutions recognised in almost all systems of municipal law”.⁹ There are dangers associated with this institution. It has been observed that:

...in the last decades the gravest violations of fundamental human rights have occurred in the contexts of states of emergency. In these situations, States, using the emergency as an excuse, frequently deny the application of basic standards and take derogating measures which are excessive and in violation of international treaties on human rights.¹⁰

2.10 International conventions seek to place limits on the power of States in this context. Thus, Article 15 of the European Convention on Human Rights provides that:

⁴ Cf. Article 40.3 of the Constitution; Article 2 of the European Convention on Human Rights.

⁵ Cf. *Ryan v Attorney General* [1965] IR 294; Article 3 of the European Convention on Human Rights (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”).

⁶ Cf. Article 40.6.1⁰.i of the Constitution; Article 10 of the European Convention on Human Rights;

⁷ Cf. Article 40.6.1⁰ iii of the Constitution; Article 11 of the European Convention on Human Rights; A. Gutmann (ed) *Freedom of Association* (1998).

⁸ Cf. Article 40.6.1⁰ ii of the Constitution; Article 11 of the European Convention on Human Rights.

⁹ J. Oraá, *Human Rights in States of Emergency in International Law*, 7 (1992).

¹⁰ *Ibid.*, 1.

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that at such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision...¹¹

2.11 It has been observed that:

...a dilemma confronts all democratic societies with terrorist problems. Unlike the totalitarian or authoritarian government, which need brook no dissent whatsoever, the liberal democratic ideal of scrupulous adherence to the rule of law and generous tolerance of opposition helps make a terrorist problem possible in the first place. There is freedom of movement, little police surveillance, and a news media, driven by ratings, waiting to have its attention grabbed by the right story. The violent subversive that emerges from this atmosphere of relative *freedom* is more than willing to use these liberal sentiments in order better to destroy the very society that boasts of them. The temptation therefore is to clamp down, but by turning to repression democratic society hands the terrorists a victory of sorts: they have been noticed; they are on an equal footing with the enemy; above all, their assertion that society was not really free, previously scoffed at, appears to carry more weight. Before rushing to repression, furthermore, it is important correctly to identify why dissent has turned to violence and also to assess the level of danger posed by a terrorist group.¹²

2.12 The task facing the Committee has been one of respecting principles of justice in the context of delicate and complex social and political realities. The Committee has been conscious throughout of the need to produce recommendations that are in harmony with internal human rights norms. Many of these norms, of course, replicate those that underlie the Constitution.

¹¹See further R. Clayton & H. Tomlinson, *The Law of Human Rights*, paras 6.92 - 6.93 (2000), *Brogan v United Kingdom* (1988) 11 EHRR 117, *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539.

¹²Gearty, 'Political Violence and Civil Liberties', Chapter 5 of C. McCrudden & G. Chambers (eds.), *Individual Rights and the Law in Britain*, at 148 (1994)

Some are less protective of human rights, others more so. The present process of incorporation of the European Convention on Human Rights into Irish domestic law makes it necessary to engage in this process, but the Committee has not been motivated simply by that consideration. It has sought to take into account the norms reflected in other human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment and Punishment, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Elimination of All Forms of Racial Discrimination. It has, moreover, taken into account customary international law principles and non-treaty standards.¹³

Substantive Offences

- 2.13 In determining how the State may respond to the several types of conduct that imperil its security, important constitutional issues arise relating to substantive offences.
- 2.14 While we address the subject of substantive offences in greater detail in Chapter 6, it is important at this point to refer to the constitutional dimension. There can scarcely be debate that the State is entitled to prescribe offences relating to conduct of this nature. The protection of the security of the State is accepted, apparently without question, as a legitimate goal of the criminal law.
- 2.15 The precise scope of these offences is, however, more problematic. A particular offence might be criticised on one or more of a number of grounds which are explored below.

Offences conflicting with constitutionally protected entitlements

- 2.16 First, the offence could be considered to penalise conduct that ought not to fall under criminal sanction. The conduct might fall within the zone of distinct constitutional protection, for example, freedom of speech. A question will arise as to the point at which the constitutionally mandated goal of protecting the security of the State gives way to the constitutionally protected

¹³See Amnesty International Irish Section, *An Audit of Compliance with International Human Rights Standards 2000*, pp.16 - 17 (2001).

freedom of speech.¹⁴ Is advocacy of a political theory that countenances violence to overthrow the existing structure of the State eligible for criminal sanction? Is a statement of sympathy for the goal of the reunification of the country through the use of force eligible for criminal sanction if the speaker professes to make it clear that he or she is not actually advocating violence himself or herself?

- 2.17 Irish courts have yet to give definitive answers to these questions, but it is clear that the questions have a constitutional dimension. The precise resolution of questions such as these in the Irish context will of course depend on the existing provisions of the Constitution. The Committee has, however, taken a broader view which has regard, not merely to the Constitution, but also to international norms relating to freedom of speech.
- 2.18 It is easy to envisage other such norms that may come into conflict with legislation prescribing offences in regard to the security of the State. Freedom of assembly or association may be unduly compromised by an offence restricting peaceful demonstrations or marches. The point at which an offence becomes overbroad or disproportionate has not been fully clarified by our courts.
- 2.19 The right to liberty has been the subject of a reasonable corpus of litigation in Ireland. It is clear from *The People v O'Callaghan*¹⁵ and *Ryan v Director of Public Prosecutions*¹⁶ (subject, of course, to the changes brought about the constitutional amendment on bail¹⁷) that the State may not punish a person

¹⁴ See D. Kretzmer & F. Kershman Hazan (ed), *Freedom of Speech and Incitement Against Democracy* (2000).

¹⁵ [1966] IR 501.

¹⁶ [1989] IR 399.

¹⁷ The Sixteenth Amendment of the Constitution, which inserts Article 40.4.7 into the Constitution, to the following effect: "Provision may be made by law for the referral of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person". The Bail Act 1997, in section 2, authorises the court to refuse to grant bail if it is satisfied that this is reasonably considered necessary to prevent the commission of a serious offence by the accused.

In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*, [2000] 3 IR 360, the Court accepted as well founded the argument of counsel for the Attorney General that there is no necessary constitutional rule that detention cannot be lawful unless there is some system of recourse to a court to determine lawfulness and that "it depends on the circumstances and nature of the detention". The Court acknowledged, however, that "detention for the purposes of preventing a crime offends the important principle of the presumption of innocence..."

for conduct that is envisaged rather than actually performed; for conduct that the person may do rather than has already done. Under present law, a person may be convicted of a substantive offence or an attempt to commit it. Other ancillary roles such as incitement to commit the offence can also involve criminal liability. It is equally possible to convict a person in respect of conduct that is preparatory to or facilitates the commission of an offence. Thus, for example, possession of offensive weapons or instruments of forgery is an offence even though no one has been shot at or offered a forged note.

- 2.20 In the context of security of the State it is worth noting that an offence that seeks to punish conduct that is of a preparatory nature could run into difficulty, especially under the test laid down by the Supreme Court in *Ryan*. The Committee has taken this into account in its assessment of how the offences should be framed.

Specificity of definition of offences

- 2.21 A related constitutional issue concerns the specificity of the definition of offences. The Constitution requires that offences be defined in such a way that the citizen, in determining how to act, is able to assess with reasonable certainty whether a proposed course of conduct will contravene the criminal law. If the offence is of such vague or ill-defined parameters that this is not possible, it will offend the due process requirements of the Constitution.¹⁸
- 2.22 Offences against the security of the State are particularly prone to the risk of such lack of specificity. It is easy to see why this should be so. Offences against the person have a clear tangible object. Offences against property generally have a similarly tangible object. While it is true that the interests protected from attack can be intangible, the *mens rea* element is sufficiently clear to give reasonable definition to offences of this category. Offences against the security of the State can lack this specificity. This is because it is a matter of debate as to what range of conduct may properly be regarded as constituting a criminal interference with the security of the State. If an offence in this context is drafted in general terms, there will inevitably be a range of conduct, the lawlessness of which falls under a shadow of uncertainty. Whether the courts would be disposed to favour a strict test for determining the constitutional validity of the legislative provision may perhaps be doubted, but that is a matter of empirical prediction about judicial attitudes rather than one of analysis of the constitutional issue on its merits.

¹⁸ Cf. *King v. Attorney General* [1981] IR 233.

- 2.23 The problem of the risk of unconstitutional lack of specificity of definition may to some degree be mitigated by a policy of prescribing a series of specific offences relating to different acts. Even adopting this course, it is hard to see how the legislation can avoid including some general offences relating to conduct endangering the security of the State.
- 2.24 The Committee has examined the existing statutory provisions in the light of the constitutional considerations outlined above. Its recommendations in respect of the several aspects of the subject addressed in this report seek to pay due regard to these considerations.

CHAPTER 3

ANGLO-IRISH AND INTERNATIONAL COMMITMENTS

- 3.1 The terms of reference of the Committee require it to take full account of the State's international commitments, including those arising out of the Good Friday Agreement, in carrying out its review of the Offences against the State legislation. In the light of this specific requirement, the Committee has considered it necessary to provide an overview of the relevant commitments.
- 3.2 The original legislation was promulgated in 1939, before the very extensive codification and amplification of international law, relating both to the eradication of terrorism and the protection of human rights, which has been brought about through the Council of Europe (of which Ireland was a founding member in 1949), the United Nations (which Ireland joined in 1955) and, more recently, the European Union. Ireland's membership of these bodies has given rise to a number of obligations and commitments which may have a bearing on this review.
- 3.3 As already noted, a number of these commitments relate to the protection of human rights, including the rights of defendants in the criminal justice system. There are also various international commitments dealing with action against terrorism. Recent developments concerning co-operation in criminal matters at the level of the United Nations, the Council of Europe and the European Union are also relevant. These commitments set constraints and limitations on actions of the State, or conversely require the State to act in certain ways, and accordingly have a number of implications for the way in which the Offences against the State Acts and related legislation should be formulated and applied.
- 3.4 It should be noted that a number of the constraints and duties which arise from the State's international commitments are similar to, or complement, obligations imposed on the State by the Constitution, and these aspects are dealt with in greater detail under the relevant chapters.

The Good Friday Agreement

- 3.5 The Good Friday Agreement contains a number of provisions regarding human rights and security which are relevant to this review. In accordance with its commitments¹⁹ on human rights, the British Government has completed the incorporation of the European Convention on Human Rights (ECHR) into British and Northern Ireland law, and has established the Northern Ireland Human Rights Commission. Work continues on a Bill of Rights for Northern Ireland.
- 3.6 The Irish Government committed itself²⁰ to take steps to further strengthen the protection of human rights in its jurisdiction. The Government agreed to bring forward measures, drawn on the European Convention on Human Rights and other international legal instruments in the field of human rights, to strengthen and underpin the constitutional protection of human rights and to examine further the question of incorporation of the ECHR. The measures to be brought forward would ensure at least an equivalent level of protection of human rights as would pertain in Northern Ireland. The Government agreed to establish a Human Rights Commission, with a mandate and remit equivalent to that of the Northern Ireland Human Rights Commission. The Human Rights Commission Act was signed into law on 31 May 2000 and the Commission has been established.²¹ The European Convention on Human Rights Bill 2001, which will give effect in Irish law to the Convention, was published on 5 April 2001 and, at the time of writing, is in Committee Stage in the Dáil.
- 3.7 As agreed by the Governments, a British-Irish Inter-Governmental Conference has been established, which, among other issues, is intended to facilitate co-operation on security matters.²² This provides for a continuation of the extensive co-operation between the two Governments in the security field which has developed since the Anglo-Irish Agreement of 1985. The British Government has also undertaken a review of the criminal justice system in Northern Ireland,²³ the report of which included suggestions for the further enhancement of co-operation between criminal justice agencies on the island. The Justice (Northern Ireland) Bill, and a draft Implementation Plan for the review, are currently the subject of a public consultation process.

¹⁹Good Friday Agreement, Chapter on Rights, Safeguards and Equality of Opportunity, paras 2 to 8.

²⁰*Ibid.* para. 9.

²¹The Human Rights Commission (Amendment) Act 2001, which increased the membership of the Commission from 9 to 15, came into force on 25 July 2001.

²²Good Friday Agreement, Section on the British-Irish Inter-Governmental Conference, paragraph 6.

²³Good Friday Agreement, Chapter on Security, paragraph 2.

- 3.8 The Agreement also envisages as early a return as possible to normal security arrangements in Northern Ireland, including the removal of emergency powers there.²⁴ The Terrorism Act 2000, which came into force in February 2001, replaced the Prevention of Terrorism (PTA) and Emergency Powers (EPA) Acts. The new Act incorporates many of the provisions of the earlier legislation and places these on a permanent basis. However, its focus is on international terrorism (unlike the earlier Acts); notably, it no longer provides for internment.²⁵ In addition, it is intended that Section VII, which applies only to Northern Ireland and which retains many of the provisions of the EPA, will cease to have force after a period of five years.
- 3.9 The Irish Government agreed to undertake a wide-ranging review of the Offences against the State Acts, with a view to both reform and dispensing with those elements no longer required as circumstances permit.²⁶ This is the context for the work of the Committee.
- 3.10 Legislation has been passed in both jurisdictions to facilitate the early release of prisoners who are deemed to be qualifying prisoners, to facilitate the decommissioning of weapons, and to facilitate the location of the remains of disappeared persons.²⁷
- 3.11 Although it predates the Good Friday Agreement by more than twenty years, the Criminal Law (Jurisdiction) Act 1976 remains an important part of the framework of co-operation in this field between the Irish and British Governments. The Act allows for the prosecution in this jurisdiction of certain offences which are alleged to have taken place in Northern Ireland, and vice versa.
- 3.12 Part III of the Extradition Act 1965, as amended, is also relevant to this review. This allows for the “backing” by the Garda Síochána of warrants issued in the different jurisdictions within the United Kingdom, and for persons to be arrested for rendition (a form of extradition) to the requesting jurisdiction. This is a special bilateral arrangement between the two countries

²⁴Good Friday Agreement, Chapter on Security, paragraph 2.

²⁵This remains the situation following the adoption of the Anti-terrorism, Crime and Security Act 2001. While this legislation gives the Home Secretary enhanced powers of detention under relevant immigration legislation, it does not provide for internment in the generally understood sense of the term.

²⁶Good Friday Agreement, Chapter on Security, paragraph 5.

²⁷The relevant legislation in this jurisdiction consists of the Criminal Justice (Release of Prisoners) Act 1998; the Decommissioning Act 1997; and the Criminal Justice (Location of Victims' Remains) Act 1999.

(the United Kingdom has parallel legislation to the Irish 1965 Act). In both countries persons arrested on foot of such a backed warrant are brought before a judge and have opportunities to contest their rendition to the other country.²⁸

International Commitments: Human Rights and the Limits on State Action

3.13 International human rights law is of major relevance to this review, notably, but not exclusively, in the context of the protection of suspects or defendants in the criminal justice system. The main human rights at issue here include such rights as liberty, bodily integrity, the right to a fair trial, and equality of treatment before the law. While, traditionally, human rights law has concentrated on protection of the individual from oppression by the state, there is a growing body of opinion that the protection of certain human rights (such as the right to life) also imposes an obligation on a state to protect its citizens and other persons within its jurisdiction from the actions of non-state agents (such as racists or terrorists).

3.14 International human rights obligations binding on Ireland in areas which are relevant to the Offences against the State Acts come from three principal sources, as follows:

(i) Conventions sponsored by the Council of Europe

3.15 The most important of these is the European Convention on Human Rights and Fundamental Freedoms (and the Protocols thereto) and the case law built up since the early 1950s by the Court and Commission of Human Rights at Strasbourg.

3.16 Ireland ratified the Convention in 1953 and, together with its Protocols 1, 4 and 6 (ratified subsequently), it is applicable to the State at the level of international law. More and more the Convention is cited in Irish courts as indicative of human rights norms and has increasingly persuasive weight in that context. Furthermore, as already noted, the European Convention on Human Rights Bill 2001, which will give effect in domestic law to the Convention, was published on 5 April 2001.

3.17 With the ever-increasing importance of the decisions of the European Court of Human Rights, it is not surprising that the Irish courts have been increasingly willing to be influenced by the jurisprudence of that Court,²⁹

²⁸It is expected that these bilateral arrangements can be retained alongside the new European Arrest Warrants.

²⁹For the Irish case-law in Strasbourg, see O'Connell, "Review of cases from the Republic of

although instances of judicial scepticism regarding the status of these decisions may still be found.³⁰ In *Norris v. Attorney General*³¹ Henchy J. was among the first judges to admit of the "persuasive influence" of the European Court of Human Rights, but similar comments have now become very frequent.³² In *Desmond v. Glackin (No.1)*³³ O'Hanlon J. followed an earlier judgment of the European Court of Human Rights, saying that:

...the Convention itself is not a code of legal principles which are enforceable in the domestic courts ... but this does not prevent the judgment of the European Court [of Human Rights] from having a persuasive effect when considering the common law regarding contempt of court in the light of constitutional guarantees of freedom of expression contained in our Constitution of 1937.

3.18 More recently, the courts have stressed the overlap between particular constitutional provisions and individual Convention guarantees,³⁴ have

Ireland in Strasbourg over the Last Decade" (1995) *Irish Human Rights Yearbook 1*.

³⁰See, for example, the dicta of O'Higgins C.J. in *Norris v. Attorney General* [1984] IR 36 (unwillingness to follow the earlier decision of the European Court of Human Rights in *Dudgeon v. United Kingdom (1981) 4 EHRR*) and *WOR v. EH (Guardianship)* [1996] 2 IR 248 (unwillingness to follow the earlier decision of the European Court of Human Rights in *Keegan v. Ireland (1994) 18 EHRR 342*). In *Adams v. Director of Public Prosecutions*, High Court, 12 April 2000, the applicant, extradited to Ireland from the United Kingdom, sought to quash a certificate issued by the British Home Secretary waiving the specialty rule, thus permitting the applicant to be charged here with offences other than those in respect of which he had been extradited. It was conceded that, having regard to the decision of the Supreme Court in *Government of Canada v. Employment Appeals Tribunal* [1994] 2 IR 484, the Home Secretary could claim immunity. Kelly J. was then asked to adjourn the question of whether the British Home Secretary was entitled to rely on the doctrine of sovereign immunity pending the outcome of a determination of the European Court of Human Rights in three other cases dealing with the sovereign immunity issue. Kelly J. refused to take this course because the decisions of the European Court of Human Rights "even if favourable, [have] no direct effect in this State and cannot be seen to supplant the binding authority of the Supreme Court."

³¹[1984] IR 36.

³²See, for example, *Hanahoe v. District Judge Hussey* [1998] 3 IR 68 (where Kinlen J. said that decisions of the European Court of Human Rights were "not simply of persuasive authority", but that "in cases of doubt or where jurisprudence is not settled, the courts should have regard" to the European Convention of Human Rights).

³³[1993] 3 IR 1.

³⁴*Murphy v. Independent Radio and Television Commission* [1999] 1 IR 26 (comparing the right of free speech contained in Article 40.6.1 of the Constitution with Article 10 of the Convention); *Re Article 26 and the Planning and Development Bill* [2000] 2 IR 321 (comparing the constitutional protection of property rights with Article 1 of the 1st Protocol ECHR).

examined the implications for Irish law of particular decisions of the European Court of Human Rights,³⁵ and have even examined the constitutionality of a legislative measure by reference to the Convention itself.³⁶

3.19 The enforcement mechanism for the Convention is the European Court of Human Rights at Strasbourg which can entertain claims against the member states, including claims by individuals against the state of which they are citizens. The cases of *Lawless* (dealing with internment) and *Heaney and McGuinness* and *Quinn* (relating to Section 52) are of particular relevance to this review, and are dealt with in the appropriate chapters of this report.

3.20 The European Convention for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment (1987) is also of relevance in this context. Ireland ratified this Convention in 1988, and it came into force in the State on 1 February 1989. Under the Convention, a Committee of independent experts, one from each State Party, is mandated “to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons” from torture, inhuman or degrading treatment. The Committee makes regular visits to places of detention in member states, including Ireland, and publishes reports on these visits. The Committee has visited Ireland twice. Its reports may be accessed on the Council of Europe website.

(ii) Treaties and covenants originating within the United Nations system

3.21 The Universal Declaration of Human Rights, adopted in 1948, sets out in declaratory form the principal civil, political, social, cultural and economic rights. The Universal Declaration is a compelling moral and political statement of the rights of the individual, and is widely regarded as forming a fundamental part of customary international law. It is the foundation of the International Bill of Human Rights. However, most states would not regard it as imposing directly binding obligations on them.

3.22 The rights set out in the Universal Declaration have been elaborated and given binding force in a number of human rights conventions elaborated by the United Nations human rights mechanisms and adopted by the General Assembly.

³⁵See also *de Rossa v. Independent Newspapers* [1999] 4 IR 432 and *O'Brien v. Mirror Group Newspapers Ltd.* [2001] 1 IR 1, where the Court's analysis of the implications for Irish law of the earlier decision of the European Court of Human Rights in *Tolstoy v. United Kingdom* (1995) 20 EHRR.

³⁶*Re Article 26 and the Illegal Immigrants (Trafficking) Bill* [2000] 2 IR 360.

- 3.23 Within the context of this review, the most important of these is the International Covenant on Civil and Political Rights (ICCPR), which sets out in greater detail a number of the rights proclaimed in the Universal Declaration. The Covenant is binding on Ireland (which ratified it in 1989), although it does not form part of domestic law.
- 3.24 A Human Rights Committee monitors implementation of the Covenant by States Parties. The Committee examines periodic reports from the States Parties, and makes observations. Ireland was last examined in July 2000. The Committee's concluding observations³⁷ contain the following points relevant to the Offences against the State legislation:

3. Recalling its earlier comments, the Committee notes with satisfaction that the problems of terrorism have diminished and that, despite the problems experienced, the State party has maintained its democratic institutions and respect for the rule of law.

...

7. The Committee expresses satisfaction that the state of emergency declared in 1976 was ended in 1995 and that the Emergency Powers Act of 1976 has now lapsed.

...

15. The law establishing the Special Criminal Court does not specify clearly the cases which are to be assigned to that Court but leaves it to the broadly defined discretion of the Director of Public Prosecutions (DPP). The Committee is also concerned at the continuing operation of the Offences against the State Act, that the periods of detention without charge under the Act have been increased, that persons may be arrested on suspicion of being about to commit an offence, and that the majority of persons arrested are never charged with an offence. It is concerned that, in circumstances covered by the Act, failure to respond to questions may constitute evidence supporting the offence of belonging to a prohibited organization. The application of the Act raises problems of compatibility with articles 9 and 14, paragraph 3 (g), of the Covenant. The Committee regrets that legal assistance and advice may not be available until a person has been charged.

³⁷UN Document A/55/40, paras. 422-451.

16. Steps should be taken to end the jurisdiction of the Special Criminal Court and to ensure that all criminal procedures are brought into compliance with articles 9 and 14 of the Covenant.

- 3.25 Ireland is also a party to the First Optional Protocol to the Covenant and, as such, recognises the competence of the Committee to consider communications from individuals within the State's jurisdiction. In April 2001, in *Kavanagh v. Ireland*, the Committee gave its view that the State had failed to demonstrate that the decision to try the applicant before the Special Criminal Court was based on reasonable and objective grounds.³⁸
- 3.26 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) is also relevant when considering the international human rights framework. This is implemented in Irish law by means of the Criminal Justice (United Nations Convention against Torture) Act 2000.
- 3.27 Ireland is also a party to the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 4(b) of CERD obliges States parties *inter alia* to “declare illegal and prohibit organisations ... which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law”. The domestic legislation which deals with this obligation is the Prohibition of Incitement to Hatred Act 1989, and Part III of the Offences against the State Act 1939, in particular sections 18 (d) and (e). These make the necessary provision in Irish law to declare illegal and prohibit organisations which promote and incite racial discrimination, while Section 21 of the OASA 1939 renders membership of such organisations an offence.

(iii) Customary international law

- 3.28 There is a growing body of customary international law in the human rights field. This includes a recognition that the protection of human rights does not always fall within the internal affairs of a country, and that in certain circumstances the international community is entitled to intervene where human rights are perceived to be violated. This recognition has been accompanied by the establishment of “war crimes” tribunals to prosecute human rights violations in Rwanda and the former Yugoslavia, and, most recently, the International Criminal Court. However, in the area covered by our review, obligations having an origin in customary international law are

³⁸*Kavanagh v. Ireland* was discussed in detail in this Committee's Interim Report, sent to the Minister for Justice, Equality and Law Reform on 6 June 2001 (Chapter 9).

likely to coincide with rights set out in the conventions and covenants mentioned above.

3.29 The European Union is also becoming increasingly involved in the interpretation of human rights standards. This aspect is discussed in more detail in Part 5 (iii) of this chapter. Following the events of 11 September 2001, there has been an increased recognition, both within the European Union and among the international community of the severe threat which international terrorism poses to the enjoyment of human rights. This in turn has led the EU to lay greater emphasis on the need to eradicate terrorism and to adopt necessary measures towards this end. For instance, work is proceeding on framework decisions on terrorism and on a European arrest warrant.

Comparison of the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Constitution

3.30 Further detail is appropriate here on the content of both the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights. There is considerable overlap between the content of the rights protected under both instruments.

3.31 The elements of these two instruments most relevant to our review are

- The right to life (Art.2 ECHR, Art.6 ICCPR)³⁹
- The prohibition on torture or inhuman or degrading treatment or punishment (Art.3 ECHR, Art.7 ICCPR)
- The right to liberty and freedom from arbitrary arrest and detention (Art.5 ECHR, Art.9 ICCPR)
- The presumption of innocence and the right to a fair trial (Art.6 ECHR, Art.14 ICCPR) and the guarantee against self- incrimination (Art.14 ICCPR)
- The prohibition on retrospective criminal sanction (Art.7 ECHR, Art.15 ICCPR)
- The right of privacy and right to family life (Art.8 ECHR, Art.17 ICCPR)

³⁹This is mentioned for the sake of completeness, although the death penalty has now been abolished in the State.

- The right to freedom of expression and opinion (Art.10 ECHR, Art.19 ICCPR)
- The rights to freedom of peaceful assembly and to freedom of association (Art.11 ECHR, Arts.21 and 22 ICCPR)
- The right of dignity for persons deprived of their liberty (Art.10 ICCPR)
- The right of equality before the law (Art. 26 ICCPR and implicit in Art.14 ECHR).

3.32 These rights have also been guaranteed by the Constitution of Ireland, either expressly or implicitly. It may be useful to compare here the relevant constitutional provisions with the corresponding provisions of the European Convention.

Article 2 ECHR

3.33 Article 2 guarantees the right to life, with limited stated exceptions. Article 1 of the Sixth Protocol ECHR provides for the abolition of the death penalty, but Article 2 of the Sixth Protocol allows States to make provision for the death penalty in time of war or imminent threat of war.

3.34 Article 40.3.2 of the Constitution protects the right to life, but without any stated exceptions. Article 15.5.2 prevents the imposition of the death penalty and, by virtue of Article 28.3.3, the State may not derogate from this obligation under any circumstances, including time of war.

Article 3 ECHR

3.35 This guarantees that no one shall be subjected to torture or inhuman or degrading treatment. There is no similar express guarantee in the Irish Constitution, but the express protection of the “person” in Article 40.3.2 and the implied right to bodily integrity in Article 40.3.1 mean that “it is surely beyond argument” that the unenumerated personal rights protected by Article 40.3.1 include: “freedom from torture, and from inhuman and degrading treatment and punishment. Such a conclusion would seem inescapable, even if there had never been a European Convention on Human Rights, or if Ireland had never been a party to it.”⁴⁰

⁴⁰*The State (C.) v. Frawley* [1976] IR 365, 374, per Finlay P.

Article 4 ECHR

3.36 This guarantees that no one shall be held in slavery or be required to perform forced labour. There is no express guarantee in similar terms in the Irish Constitution, but these rights are already embraced in the guarantees regarding the protection of the person (Article 40.3.2) and personal liberty (Article 40.4.1).

Article 5 ECHR

3.37 Article 5 guarantees the right to personal liberty, save in certain stated cases. It also provides for speedy trial and the right to habeas corpus. Again, this traverses much of the ground covered in Article 40.4.1 (personal liberty) and Article 40.4.2 (habeas corpus).

Article 6 ECHR

3.38 This is a key provision guaranteeing, *inter alia*, a “fair and public hearing within a reasonable time by an independent and impartial tribunal”. Article 6(3) provides for certain minimum guarantees in respect of the trial of persons accused of criminal offences, including the presumption of innocence, the right to legal aid and the right to cross-examine witnesses.

3.39 Again, these provisions find an echo in Article 34.1 (administration of justice to be in public, save in such “special and limited cases as may be prescribed by law”); Article 38.1 (right to trial in due course of law, including the presumption of innocence)⁴¹ and Article 40.3.1 (right to fair procedures and to cross-examine).⁴²

Article 7 ECHR

3.40 This provides that no retroactive punishment can be imposed. Article 15.5 of the Constitution provides for a similar guarantee, save that (unlike Article 7) it does not expressly preclude retroactive legislation that provides for a heavier penalty to be imposed than the one that was applicable at the time the criminal offence was committed.

⁴¹*O'Leary v. Attorney General* [1995] 1 IR 254.

⁴²*Re Haughey* [1971] IR 217.

Article 8 ECHR

- 3.41 Article 8(1) ECHR provides that “Everyone has the right to respect for his private and family life, his home and his correspondence.”
- 3.42 There is some overlap between Article 8(1) ECHR and various provisions of the Constitution. Article 40.5 guarantees the inviolability of the dwelling. While there is no express protection of the privacy of correspondence and communication, this is embraced in the unenumerated privacy right contained in Article 40.3.1.⁴³ Article 41 protects the family, but it confines the protection to the family based on marriage.

Article 10 ECHR

- 3.43 Article 10 protects the right to free speech and the dissemination of opinion. These rights are also protected by Article 40.6.1 of the Constitution, although probably in more qualified terms.⁴⁴

Article 11 ECHR

- 3.44 Article 11 ECHR protects two distinct but complementary rights: the right of peaceable assembly and the right of freedom of association with others, including the right to form and join trade unions. The corresponding provisions of the Constitution seem unproblematic. Article 40.6.1.ii protects the right of peaceable assembly in terms which are very similar to Article 11 and Article 40.6.1.iii gives similar guarantees regarding the formation of “associations and unions”.

Derogation from international human rights instruments

- 3.45 Both ECHR (Art.15) and ICCPR (Art. 4) set strict conditions and limitations on the right of states to derogate from their obligations under these instruments. While not identically worded, the requirements are similar. Both instruments allow for derogations only if there is a “public emergency

⁴³*Kennedy v. Ireland* [1987] IR 587.

⁴⁴For recent judgments of the Supreme Court discussing the interaction between Article 40.6.1 of the Constitution and Article 10 ECHR, see *Irish Times Ltd. v. Murphy* [1998] 1 IR 359; *Murphy v. IRTC* [1999] 1 IR 12; *de Rossa v. Independent Newspapers Ltd.* [1999] 4 IR 432; *O'Brien v. Mirror Group Newspapers* [2001] 1 IR 1.

threatening the life of the nation”.⁴⁵ ICCPR further requires the existence of a public emergency to be officially proclaimed. Both instruments also limit permissible measures to those “strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the State’s] other obligations under international law.” Furthermore, ICCPR requires the measures not to involve discrimination on the grounds of race, colour, sex, language, religion or social origin.

3.46 The European Court of Human Rights has considered the question of derogations under Article 15 on a number of occasions, including the case of *Lawless v. Ireland*.⁴⁶ In 1996, it summarised its general approach as follows:

...The Court recalls that it falls to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the “extent strictly required by the exigencies” of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (see the *Brannigan and McBride v. the United Kingdom* judgment of 26 May 1993, Series A no. 258-B, pp. 49-50, para. 43).⁴⁷

3.47 The European Convention does not specifically require the proclamation of an emergency, but it does require that the State keep the Secretary-General of the Council of Europe fully informed of the measures taken and the reasons for so doing. However, the European Court has held that the State is not

⁴⁵ECHR refers to “time of war or other public emergency”.

⁴⁶For a detailed discussion of the *Lawless* case, see chapter 5, paragraphs 5.37 to 5.50.

⁴⁷Case of *Aksoy v. Turkey*, 1996, para. 68; para 43 of *Brannigan and McBride*, referred to in the quotation above, is couched in virtually identical terms.

obliged to promulgate within its territory the notice of derogation addressed to the Secretary-General.⁴⁸

- 3.48 In addition to these general rules circumscribing derogations, both ECHR and ICCPR list a number of provisions from which no derogation is allowed. The right to life, and the prohibitions on torture, slavery, and the retrospective creation of criminal offences are common to both instruments. ICCPR adds the prohibition on imprisonment for failure to fulfil a contractual obligation, the right of recognition before the law, and freedom of religion.
- 3.49 Both instruments allow limited restrictions on certain rights, including the right to freedom of expression and to freedom of association. The limitations are set out in more detail in ECHR. In general the only restrictions which may be permissible are those that are prescribed by law and are necessary in a democratic society for certain specific purposes. These purposes include (in the case of both these rights) the interests of national security or public safety and the prevention of disorder or crime.

International Commitments: Obligations to take measures against terrorism

- 3.50 The last thirty years have seen a series of statements and restatements by the international community of its obligation to take effective measures against terrorism.
- 3.51 The United Nations Charter itself does not make specific mention of terrorism, although Article 2, which sets out the principles of the Organisation, requires all members to refrain “from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”. In 1970, the General Assembly adopted the Declaration on Principles Governing Friendly Relations among States,⁴⁹ which was intended to set out the international consensus on the meaning and elaboration of the principles of the Charter. This provided that “Every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

⁴⁸Cf. *Lawless v. Ireland*, para. 47.

⁴⁹Contained in the Annex to Resolution 2625 (XXV) of the United Nations General Assembly, adopted without vote on 24 October 1970.

- 3.52 On 9 December 1994, the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism.⁵⁰ This reiterated member states' unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, and added that criminal acts intended or calculated to provoke a state of terror are in any circumstance unjustifiable, whatever considerations may be invoked to justify them. It repeated the duty on States to refrain from organising, instigating, assisting or participating in terrorist acts in territories of other States, and to ensure the apprehension and prosecution of perpetrators of terrorist acts.
- 3.53 Similarly, in 1995, the UN adopted a declaration on the occasion of its fiftieth anniversary which committed member states to "act together to defeat the threats to States and people posed by terrorism, in all its forms and manifestations, and transnational organized crime and the illicit trade in arms and the production and consumption of and trafficking in illicit drugs".⁵¹ A similar commitment is contained in the Millennium Declaration,⁵² in which states commit themselves to "take concerted action against international terrorism, and to accede as soon as possible to all the relevant international conventions".
- 3.54 While these and similar declarations represent a political consensus, they do not, however, of themselves impose direct obligations on states.
- 3.55 However, following the 11 September terrorist attacks against the United States, the Security Council adopted resolutions 1368 (2001)⁵³ and 1373 (2001).⁵⁴ Resolution 1373 is of particular significance since, for the first time, the Security Council has adopted a resolution on international terrorism under Chapter VII of the United Nations Charter, which makes its terms binding on all states. The emphasis in the resolution is on preventing and suppressing the financing of terrorists acts, but it also calls upon states to take a number of other measures to prevent terrorism, including becoming parties to the anti-terrorist conventions.

⁵⁰Contained in the Annex to General Assembly Resolution 49/60, adopted without a vote on 9 December 1994.

⁵¹General Assembly Resolution 50/6, adopted by acclamation on 24 October 1995.

⁵²General Assembly Resolution 55/2, adopted without a vote on 8 September 2000.

⁵³Adopted by the Security Council at its 4,370th meeting, on 12 September 2001.

⁵⁴Adopted by the Security Council at its 4,385th meeting, on 28 September 2001.

- 3.56 Despite these widespread and general condemnations of terrorism, there has until recently been a degree of uncertainty as to the exact extent of a state's obligations to combat terrorism. In part, this is because a generally accepted definition of what constitutes international terrorism has eluded the international community.
- 3.57 One reason for this is the conceptual difficulty of defining terrorism in such a way that it is distinguished from other violent crime. However, more particular difficulties have arisen in relation to actions which purport to be in pursuit of self-determination or independence. A significant number of states aim to ensure that the activities of groups whom they support are not prohibited or curtailed by international instruments, and look to the UN Charter's recognition of the right to self-determination to provide support for their position. A further matter of disagreement is the extent to which the activities of a state's armed forces (whether in peacetime or during an armed conflict) should fall within the scope of anti-terrorist conventions.
- 3.58 However, recent work in the Sixth Committee of the UN General Assembly has brought agreement on this issue substantially closer (see paragraph 3.64 below).

Main anti-terrorist conventions

- 3.59 There are twelve universal international instruments which are generally considered as being related to terrorism. In addition, one regional instrument, the European Convention for the Suppression of Terrorism, which was elaborated under the auspices of the Council of Europe, is of relevance to Ireland. The subject-matter of these thirteen conventions, together with their status as regards Ireland, is set out in Table 1.
- 3.60 Most of these conventions were drawn up in technical fora, notably the International Civil Aviation Organisation (ICAO). The approach was piecemeal, with each instrument dealing with a specific perceived need falling within the competence of the sponsoring organisation. It was only in 1997 that the United Nations General Assembly adopted the International Convention for the Suppression of Terrorist Bombings,⁵⁵ followed two years later by the International Convention for the Suppression of the Financing of Terrorism.⁵⁶

⁵⁵General Assembly Resolution 52/164, adopted on 15 December 1997.

⁵⁶General Assembly Resolution 54/109, adopted on 9 December 1999.

- 3.61 In most cases, states that are party to these instruments agree to criminalise a particular activity (such as aircraft hijacking or the taking of hostages) and to establish their jurisdiction over the offence. They also agree that the offence in question shall be extraditable and commit themselves to extradite or try persons accused of perpetrating the offence. Some of the instruments also require states to take action to prevent the offence in question.
- 3.62 The focus of the European Convention for the Suppression of Terrorism (Strasbourg, 27 January 1977) is somewhat different, in that it is intended to set limitations to the concept of a political offence. Instead of requiring states to criminalise certain acts, the parties to this convention agree that the terrorist offences set out in it shall not be considered political offences for the purpose of extradition proceedings.
- 3.63 Work on a Comprehensive Convention on International Terrorism is ongoing, and it is hoped that it will conclude by October 2002. As its name suggests, the effect of the Convention will be to create an international instrument to deal with general manifestations of international terrorism, and which will be complementary to the existing sectoral conventions. Central to this will be agreement on a general definition of terrorism. Although a number of important issues remain to be resolved, the discussions are close to reaching agreement on what constitutes international terrorism. As currently drafted, terrorism would be considered to encompass serious acts of violence against persons, places, property, infrastructure or the environment, where these acts are carried out with the aim of intimidating a population, or compelling a government to perform, or abstain from, an act.
- 3.64 While there seems to be widespread (if not yet general) agreement on this approach, a number of serious difficulties remain. Some states wish to exempt activities carried out in pursuit of the right to self-determination. At the same time, there is a divergence of views on how to treat the activities of military forces.
- 3.65 As indicated in Table 1 (p.45) Ireland has ratified six of the anti-terrorist conventions. In each case, specific legislation was introduced to ensure that our international obligations were met. It can be expected that a similar approach will be taken when Ireland ratifies other conventions. While the Offences against the State Acts deal with domestic terrorism and organised crime, they are not sufficient nor intended to deal with the international aspects of terrorism. The approach has been to introduce new laws when it

has been considered necessary, rather than to amend the existing legislation to comply with the instruments.

- 3.66 In addition to the legislation already mentioned, a number of the terrorist offences set out in conventions to which we are not yet party are already offences under Irish law. For instance, the murder of a head of state or a diplomat, dealt with in the Convention on Internationally Protected Persons (which Ireland has not yet ratified), already carries heavy penalties under the Criminal Justice Act 1990. Similarly, certain obligations arising out of the Hostage Convention (not ratified by Ireland) are subsumed in the European Convention on the Suppression of Terrorism (to which we are a party).
- 3.67 It is understood that the Government is to introduce legislative proposals to the Oireachtas to enable the State to ratify a number of other international anti-terrorist obligations. These will include the Conventions against the Taking of Hostages; for the Suppression of Terrorist Bombings; on the Prevention and Punishment of Crimes Against Internationally Protected Persons; and for the Suppression of the Financing of Terrorism. It is possible, that in so doing, the government will rely in part on existing legislation, including the Offences against the State Acts. But it is likely also to require the introduction of some new legislation. To the extent that this will happen, it will impinge on the need and desirability of changing the existing legislation.

Other relevant international obligations

- 3.68 Apart from the particular convention obligations enumerated above, there may be general obligations on Ireland arising from its international commitments to protect human rights which impose requirements ultimately of a security nature. These are not made explicit in the texts of human rights conventions, but could include the following:
- obligation on a state to protect its citizens from terrorist attacks
 - obligation to prevent acts of terrorism
 - obligation on states to prevent their territory from being used as a base for attacks on other states or territories
 - obligation to defend the democratic process.

- 3.69 These can be derived from the right to life (expressed in Art.2 ECHR and Art.6 ICCPR) and the obligation to defend the democratic process (implicit in those instruments). For example, the European Court of Human Rights has indicated that there may be a violation of the right to life where the authorities failed to take reasonable precautions against a real risk to a person's life from the criminal acts of another in cases where they knew, or should have known, of it.⁵⁷ The Court has also accepted that states were under an obligation to take measures, including effective deterrence, to ensure that individuals do not subject other individuals within the state to torture or inhuman or degrading treatment or punishment.⁵⁸
- 3.70 The Northern Ireland Criminal Justice Review Group in its report of March 2000, referred to this emerging theme of “the need for individuals to be protected against threats to their bodily integrity, liberty and dignity from wherever these may emanate”. This means that the state has an obligation to preserve life and, furthermore, “to have sufficient procedures in place to ensure law and order, to properly investigate crimes and bring offenders to justice”.⁵⁹

EU Obligations and Developments

- 3.71 Ireland’s criminal law and procedure is influenced both directly and indirectly by developments within the European Union. European Union activity in matters of criminal law and procedure has been felt most keenly in the general areas of police co-operation and organised crime.

Treaty background

- 3.72 Prior to the adoption of the Treaty on European Union (TEU) at Maastricht in 1994, the member states of the European Union had to rely generally on inter-governmental co-operation in order to take collective action on matters of criminal law and procedure. Title VI of the Maastricht Treaty, however, introduced provisions (generally referred to as the Third Pillar) which enabled European Union structures and processes to be used for the adoption and implementation of collective measures in matters of justice and home affairs. The Treaty of Amsterdam (1998) has strengthened these provisions significantly by: transferring a substantial portion of the Union's competence

⁵⁷ *Osman v UK*, (2000) 29 EHRR 245.

⁵⁸ *A v UK*, September 1997, unpublished, European Court of Human Rights.

⁵⁹ Review of the Criminal Justice System in Northern Ireland (HMSO, 2000), par. 3.4.

in justice and home affairs matters to the European Community (Title IV of EC Treaty); incorporating the Schengen⁶⁰ *acquis* into European Community and Union law; introducing new Union processes and measures for criminal law and police co-operation (Title VI of TEU); and making available the Union institutions and procedures for closer co-operation in justice and home affairs matters among individual member states (Title VII of TEU).

- 3.73 The net effect of these provisions is that the contents of Irish criminal law and procedure can be affected by European Union actions at four different levels, namely: the European Community, the European Union, inter-governmental co-operation under the Treaties, and pure inter-governmental co-operation among the fifteen member states.
- 3.74 The primary source of future European Union influence on Irish criminal law and procedure is probably to be found in Title VI of the Treaty on European Union. It sets out a basic set of principles which underpin co-operation in justice and home affairs. These stipulate that the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the member states in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia. This objective is to be achieved by preventing and combating crime, including organised crime and, in particular, terrorism, trafficking in persons, offences against children, illicit drug-trafficking, illicit arms-trafficking, corruption and fraud. Title VI goes on to set out in some detail how this objective is to be achieved through co-operation between national police forces, customs authorities and judicial authorities, as well as the approximation of national rules on criminal matters.
- 3.75 Several of the provisions in Title VI empower the Union institutions to adopt legislative measures which, *inter alia*, can impact upon domestic criminal law, policing and criminal procedure. These include framework decisions (which are like EC Directives without direct effect), decisions and common positions and conventions.

Conventions

EUROPOL

- 3.76 The EUROPOL Convention, which was ratified by all member states in 1998, provides a formal basis for police co-operation within the EU. The Europol Act 1997 gives effect in Irish law to this Convention.

⁶⁰ So called after the town in Luxemburg where the original agreement was signed in 1985.

- 3.77 The overall objective of EUROPOL is to improve the effectiveness of, and co-operation among, the police and law enforcement agencies in the member states in preventing and combating terrorism, unlawful drug-trafficking and other serious forms of international crime, the scale and organisation of which are such as to require a common approach by the member states affected. Its principal task is to assist police investigations in member states, primarily through the collation, analysis and exchange of intelligence. To this end, the Convention requires the establishment of a “national unit” in each member state. These national units function as the sole liaison bodies between EUROPOL and the national police agencies. In addition each national unit must second at least one of its members to the EUROPOL Headquarters at The Hague. Ireland's national unit is based at Garda Headquarters.
- 3.78 While EUROPOL does not impact directly on the contents of the Offences against the State legislation, it is one of a number of EU measures aimed at combating international terrorism and organised crime. Its original mandate covered terrorism, money-laundering, unlawful drug-trafficking, trafficking in radioactive and nuclear substances, trafficking in illegal immigrants, trade in human beings and motor vehicle crime. This mandate was subsequently extended to cover counterfeiting and forgery of the Euro, and can be extended further to cover a wide range of crimes, including offences against the person and property, as well as trafficking in arms, endangered animal and plant species, hormonal substances, growth promoters, cultural goods, antiquities and human organs.
- 3.79 It is also worth noting that the Amsterdam Treaty envisages, within five years of its entry into force, enhanced co-operation involving EUROPOL, to include, in particular, a role for it in facilitating and supporting specific investigative actions by national authorities, including operational actions of joint teams with representatives of EUROPOL in a support capacity.⁶¹

Schengen

- 3.80 The Schengen Agreement provide for a comprehensive series of measures in matters such as visa and asylum policies, police and security co-operation, judicial co-operation and assistance, and the development of a common information system in relation to the granting of visas and police co-operation.

⁶¹This is in addition to other provisions of the Treaty which lay a basis for operational co-operation between the relevant national authorities in the prevention, detection and investigation of criminal offences.

- 3.81 The Schengen Agreements actually originated outside the formal structures of the European Community. However, a Protocol to the Treaty of Amsterdam effectively brings these measures and their *acquis* into EU law.⁶² For the most part, these measures have been incorporated into Title VI of the Treaty on European Union, although certain provisions affecting the free movement of persons are incorporated into the Treaty of Rome.⁶³
- 3.82 Neither Ireland nor the United Kingdom are parties to the Schengen Agreements, but under the Amsterdam Treaty they enjoy a right to opt into these provisions in whole or in part. The United Kingdom has now formally joined certain parts of Schengen, while Ireland's application to opt into certain parts of Schengen has been submitted to the Council and is currently under consideration. Ireland's application does not extend to the provisions regarding internal border controls, nor to cross-border policing. Ireland's participation in the Schengen provisions will be subject to the prior approval of both Houses of the Oireachtas, in accordance with Article 29.4.6 of the Constitution.

Other instruments

- 3.83 In addition, there are a number of other EU measures aimed at promoting co-operation and mutual assistance between member states in the fight against organised crime and terrorism.⁶⁴ Of particular note in this context is the establishment of Eurojust, a body of national prosecutors from each member state. Its role is to facilitate co-ordination between the prosecuting authorities in relation to cross-border crime, including organised crime cases. Eurojust is currently established on a provisional basis,⁶⁵ and it is expected that a decision to put it on a more permanent footing will be adopted by the end of 2001.

⁶²See Council Decision 99/435 on the definition of the Schengen *acquis* and 99/438 establishing a Joint Supervisory Authority for Schengen.

⁶³See Council Decision 99/436 concerning the legal basis for the Schengen *acquis*.

⁶⁴See, for example: Joint Action 96/610 concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist co-operation between the Member States of the EU. Joint Action 96/747 concerning the creation and maintenance of specialised competences, skills and expertise in the fight against international organised crime, in order to facilitate law enforcement co-operation between the member states of the EU. Joint Action 97/372 for the refining of targeting criteria, selection methods and collection of customs and police information. Commission Decision 99/352, establishing the European Anti-fraud Office. Regulation 1073/99, expanding the remit of the European Anti-fraud Office.

⁶⁵Decision 00/799.

3.84 A number of conventions have been agreed between member states of the European Union which might be considered relevant to a consideration of Irish measures to combat international terrorism and organised crime. These include:

- Convention on the Protection of the European Communities' Financial Interests, and its Protocols
- Convention on the Use of Information Technology for Customs Purposes
- Convention relating to Extradition between the member states of the European Union
- Convention on Mutual Assistance in Criminal Matters between member states of the EU.

Secondary legislation

3.85 Currently, there is little EU secondary legislation which might be considered relevant to the Offences against the State legislation (and possible replacement measures). Perhaps the most relevant is Joint Action 98/733 on participation in criminal organisations. This Joint Action seeks to combat organised crime by requiring each member state to make it an offence for a person in its territory knowingly to take part in the commission by a criminal organisation of certain offences, or, alternatively, for a person in its territory to agree with others to commit such offences.

3.86 In addition, Directive 91/308 was adopted by the Community in order to render it more difficult for major criminals to take advantage of the free movement of capital provisions to launder the proceeds of their criminal activity. Ireland's obligations under this directive have been implemented primarily in the Criminal Justice Act 1994.

Action plans

3.87 The EU has adopted a number of programmes of action to be taken by the Union and the member states to combat organised crime and to implement the provisions of the Treaty of Amsterdam in the area of freedom, security and justice.

- 3.88 The first Action Plan on organised crime was adopted in 1997, and many of its aims have been translated into appropriate instruments at the EU and national levels, including a number of those discussed above.
- 3.89 The second Action Plan to combat organised crime was adopted in 2000 and builds upon its predecessor, with the aim of developing a coherent and integrated EU strategy to prevent and control organised crime. It includes detailed proposals for a refinement and strengthening of measures on: preventing the penetration of organised crime in the public and private sectors; the approximation of national criminal laws on organised crime, terrorism and drug-trafficking; the effective investigation of organised crime, with due respect to fundamental rights; developing the potential of Europol to become an effective tool in the prevention and control of organised crime; tracing, freezing, seizing and confiscating the proceeds of crime; strengthening co-operation between law enforcement and judicial authorities nationally and within the EU; and monitoring the implementation of the measures for the prevention and control of organised crime.
- 3.90 The Council and the Commission adopted an Action Plan on implementing the provisions of the Treaty of Amsterdam in the area of freedom, security and justice in 1999.⁶⁶ According to the Plan measures to be taken within two years of the entry into force of the Treaty of Amsterdam should:
- ... identify the behaviour in the field of organised crime, terrorism and drug-trafficking for which it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and penalties and, if necessary, elaborate measures accordingly; and examine the possibility to approximate, where necessary, national legislation on counterfeiting and fraud.
- 3.91 Within five years of the Treaty entering into force measures to be taken should:
- ... improve and approximate, where necessary, national provisions governing seizures and confiscation of the proceeds from crime ... and further elaborate measures establishing minimum rules relating to the constituent elements of behaviour and to penalties in all fields of organised crime, terrorism and drug-trafficking.

⁶⁶99/C 19/1.

3.92 The Action Plan also lays down a programme of measures to be taken in relation to police co-operation over periods of two years and five years respectively.

EU protection of human rights

3.93 The Treaty of Rome, as originally formulated, did not include specific protection for civil and political rights. However, the European Court of Justice has developed a measure of protection for such rights in its jurisprudence. In a succession of cases, it has declared that general principles of law, which are common to the legal systems of the member states, form part of Community law. These principles include protection for basic civil and political rights, in particular, the rights enshrined in the European Convention on Human Rights. This means that the European Court of Justice can strike down administrative or legislative action on the part of the Community institutions or Member State authorities which breach the fundamental rights of the individual in matters within the competence of the Community. As the scope of Community competence has broadened with successive amendments to the Treaty of Rome, so the potential impact of the Court's human rights jurisdiction has increased in importance.

3.94 The judicial activism of the European Court of Justice has been complemented at political level by the inclusion of statements in the Community and Union treaties emphasising the importance which the Community and Union attach to the protection of human rights. It was not until the Treaty of Amsterdam, however, that specific Treaty provision was introduced for the enforcement of human rights in Community matters. Article 6 of the Treaty stipulates that the Community is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Article 7 makes provision for the suspension of certain Treaty rights of a member state for a serious and persistent breach of these principles. However, these Articles are not of direct effect and, as such, cannot be enforced by the individual against the State in national courts.

3.95 The Charter of Fundamental Rights of the European Union was proclaimed in Nice on 7 December 2000. The rights recognised by it are drawn from a broad range of sources, including the Treaties, the ECHR, and the constitutional traditions and international obligations of member states. The Charter is a political declaration, and not a legally binding text. Its future status is one of the matters to be considered in the context of the future development of the European Union.

Table 1: Major International Anti-terrorism Instruments and their Status for Ireland

Title	Status	Implementing legislation in Ireland
Convention on Offences and Certain Other Acts Committed on Board Aircraft . Tokyo, 14 September 1963.	Ratified	Air Navigation and Transport Act 1973
Convention for the Suppression of Unlawful Seizure of Aircraft. The Hague, 16 December 1970.	Ratified	Air Navigation and Transport Act 1973
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Montreal, 23 September 1971.	Ratified	Air Navigation and Transport Act 1975
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Personnel. New York, 14 December 1973.		
European Convention for the Suppression of Terrorism . Strasbourg, 27 January 1977.	Ratified	Extradition (European Convention on the Suppression of Terrorism) Act 1987
Convention against the Taking of Hostages. New York, 17 December 1979.		
Convention on the Physical Protection of Nuclear Materials. Vienna 3 March 1980.	Ratified	Radiological Protection Act 1991
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, complementary to the Convention for the Suppression of Unlawful Acts against the Safety of Aircraft. Montreal 24 February 1988.	Ratified	Air Navigation and Transport Act 1988
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Rome 10 March 1988.		
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf. Rome 10 March 1988.		
Convention on the Marking of Plastic Explosives for the Purpose of Detection. Montreal 01 March 1991.		
International Convention for the Suppression of Terrorist Bombings. New York, 15 December 1997.	Signed	
International Convention for the Suppression of the Financing of Terrorism.. New York, 9 December 1999.	Signed	

CHAPTER 4

HISTORICAL BACKGROUND TO THE OFFENCES AGAINST THE STATE ACTS 1939-1998

The period from 1922 to 1931

- 4.1 The establishment of the Irish Free State in December 1922 was blighted by the outbreak of the Civil War in June 1922. Although the tragic conflict came to an end in April 1923, the political situation was still tense and unsettled. Despite the impressive guarantees contained in Article 6 (the right to personal liberty) and Article 70 (guaranteeing that no extraordinary courts shall be established) of the Irish Free State Constitution, the bitter nature of the Civil War, in which no quarter was given by either side, was such that it was almost inevitable that the Government would resort to such draconian measures as martial law and internment.
- 4.2 During the Civil War period the Army detained suspects pursuant to non-statutory common law powers and this practice was upheld by the High Court and the former Court of Appeal.⁶⁷ In legal terms, however, the Civil War came to an end on 31 July 1923 when the High Court ordered the release of certain prisoners who had been detained in Army custody, on the ground that a state of war no longer existed.⁶⁸ Immediately thereafter, the Oireachtas passed the first internment law, the Public Safety (Emergency Powers)(No.2) Act 1923. This was expressed to be a temporary provision which was due to expire in early 1924. The power of internment was then continued by further temporary legislation in 1924.⁶⁹ Although this legislation expired in early 1925, it was replaced the following year by the Public Safety (Emergency Powers) Act 1926. That legislation allowed the Government to make a proclamation of emergency and, following such proclamation, to provide for the introduction of internment. No such proclamation was ever made and the 1926 Act was itself repealed by the Offences against the State Act 1939.

⁶⁷*R. (Childers) v. Adjutant General of Provisional Forces* [1923] 1 IR 5; *R. (Johnstone) v. O'Sullivan* [1923] 2 IR 13. See, further, Hogan, "Hugh Kennedy, the Childers Habeas Corpus Application and the Return to the Four Courts" in Costello (ed.), *The Four Courts: Two Hundred Years* (Dublin, 1996) at 177.

⁶⁸*R. (O'Brien) v. Military Governor, North Dublin Union* [1924] 1 IR 32.

⁶⁹Public Safety (Powers of Arrest and Detention)(Temporary Provisions) Act 1924, s.1.

4.3 In July 1927, the stability of the fledgling State was further threatened by the assassination of the Minister for Justice, Kevin O'Higgins TD. The Oireachtas quickly responded with the Public Safety Act 1927. The key feature of this Act was to permit a District Judge, on the application of a Garda Superintendent, to order the detention of a suspect for seven days where, in the opinion of the Superintendent, there were

...grounds for suspecting such person of being or having being engaged or concerned in the commission of [certain scheduled] offences...and that his detention [was] necessary or desirable for the proper investigation of such offence, or any like Offence.⁷⁰

4.4 Section 16(3) gave a Government Minister power to extend this period of seven days by a further two months, but section 16(4) provided that any such person so detained would have to be either charged or released within three months from the date of his arrest. The Act expired in 1928.

Article 2A: the period from 1931 to 1937

4.5 In 1931 the Cumann na Gaedheal Government, concerned about the upsurge in paramilitary activity and fearful of the activities of left-wing republican sympathisers, introduced the Constitution (Amendment No. 17) Bill 1931 into the Oireachtas. This measure was hurriedly passed into law and it effected a far-reaching change to the Free State Constitution by inserting a new Article 2A at the commencement of that document. It is important to remember that during the entire period of the life of the Irish Free State from 1922 to 1937 the Constitution could be amended by ordinary legislation and there was no necessity for a referendum. That Constitution was amended on no less than 27 occasions between 1922 and 1936 and many far-reaching amendments, ranging from the abolition of the Seanad to the insertion of Article 2A, were effected during this period by means of ordinary legislation.

4.6 In reality, Article 2A, which was a precursor of the subsequent Offences against the State Act 1939, was inserted into the Constitution to make it invulnerable from constitutional challenge and to ensure that the rest of the Constitution was made subordinate to that provision. It should also be said that Article 2A contained aspects of draconian severity which were not subsequently replicated by the 1939 Act. The key feature of Article 2A was contained in Part II of Article 2A which established the Constitution (Special Powers) Tribunal. This Tribunal consisted of military officers with power to

⁷⁰Section 16(1).

impose such punishment as they saw expedient (including the death penalty) following conviction.

- 4.7 Article 2A was enacted in the face of bitter and strenuous opposition from Fianna Fáil. However, the constitutional amendment was duly enacted by the Oireachtas and it came into force by means of Government proclamation in October 1931 and the Military Tribunal (which consisted of Army officers) was duly established. However, Article 2A was suspended⁷¹ in March 1932 shortly after the Fianna Fáil Government came to power. This suspension proved to be only temporary. The re-emergence of low-level political violence and clashes between the Blueshirts and the IRA, persuaded the Government to reintroduce Article 2A in August 1933.⁷² By early 1936 any possible threat to the State democratic institutions which had been posed by the Blueshirts had largely petered out. A new threat, however, was posed by the IRA, and it was finally proscribed under Part IV of Article 2A in July 1936 following a series of shocking murders.⁷³ Although the Military Tribunal continued in operation until the coming into force of the new Constitution in December 1937 the work of that Tribunal declined dramatically from 1934 onwards as can be seen from official figures.⁷⁴
- 4.8 During the mid-1930s a series of important High Court and Supreme Court decisions clarified the powers and jurisdiction of the Military Tribunal. Thus, in *The State (O'Duffy) v. Bennett*,⁷⁵ the High Court held that the Tribunal was an inferior tribunal which was amenable to control by the High Courts by means of judicial review, the language of Article 2A, s.6, which had strongly

⁷¹Constitution (Suspension of Article 2A) Order 1932. As Kelly observed, *Fundamental Rights in Irish Law and Constitution* (Dublin, 1967) at 272: "This Order did not, of course, repeal the Constitution (Amendment No. 17) Act 1931, and it may be surmised that Mr. de Valera did not wish to deprive himself altogether of so powerful a weapon."

⁷²See O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at 332-335.

⁷³See generally, O'Sullivan, *op.cit.*, at 438-445.

⁷⁴ The then Minister for Justice (Mr. G. Boland TD) gave the following statistics in answer to a parliamentary question on 11 July 1946 (102 *Dáil Debates* at Cols. 609-610):

Year	Numbers tried by the Tribunal	Numbers. acquitted
1931	35	4
1932	23	4
1933	54	9
1934	494	48
1935	238	49
1936	141	12
1937	13	1

⁷⁵[1935] IR 70.

suggested the contrary, notwithstanding. This principle was reaffirmed in the important case of *The State (Hughes) v. Lennon*⁷⁶ where the High Court held that certain orders made by the Tribunal were invalid for failure to show jurisdiction on their face. Finally, in the celebrated case of *The State (Ryan) v. Lennon*⁷⁷ a majority of the Supreme Court rejected a challenge to the very basis of that Tribunal's jurisdiction, including the validity of Article 2A itself.

- 4.9 The unsatisfactory nature of the entire Article 2A system had been already acknowledged in official circles. In 1934 President de Valera had established a high-level civil service Committee to review the Constitution

...with a view to ascertaining what Articles should be regarded as fundamental on the ground that they safeguard democratic rights, and to make recommendations as to steps which should be taken to ensure that such Articles should not be capable of being altered by the ordinary processes of legislation.⁷⁸

- 4.10 The Constitution Committee quickly recognised that, in the words of the then Secretary of the Department of Justice, Stephen Roche, the form of Article 2A was “grotesque”; it set about examining other ways of dealing with the threats posed by paramilitary violence. One suggestion that was considered was that the bringing into operation of emergency laws would be contingent on the consent of the judiciary voting in secret ballot. This suggestion was made, in Roche's words, mainly

...because he gathered from the President [de Valera] that he was anxious for obvious and weighty reasons, to get some form of judicial, or at least non-political, sanction for such a declaration.

- 4.11 The Committee's working papers also disclose the first outline of what in the new Constitution of 1937 was to become the Special Criminal Court

...In addition and apart from “emergency” periods and “emergency” legislation, the proposed Article (or else an addendum to one of the “judicial power” Articles) should authorise the enactment of special

⁷⁶[1935] IR 128.

⁷⁷[1935] IR 170.

⁷⁸S. 2979. See generally, Hogan, “The Constitution Review Committee of 1934” in Ó Muirheartaigh (ed.), *Ireland in the Coming Times: Essays to Celebrate T.K. Whitaker's 80 Years* (Dublin, 1998).

legislation as part of our permanent judicial machinery for the trial by Special Courts of persons accused of crime, as regards whose trial the ordinary Judge or Justice certifies at any stage of the proceedings, that it is desirable in the interests of justice that the trial be removed to a Special Court.

As regards this last suggestion, we desire to point out, as against the obvious objections to Special Courts, that the ordinary Courts have been unable, in the past to deal effectively with certain forms of crime, and that there is perhaps no optimism to hope for any permanent improvement in that respect. The choice appears to lie therefore between the alternatives of:

- (a) allowing such forms of crime to go unpunished,
- (b) declaring a 'state of emergency' for the purpose of setting up a Special Court every time such crimes occur,
- (c) making permanent provision for a Special Court on the lines indicated...above.

As between these alternatives we recommend the last mentioned, mainly because we feel that its adoption will provide a remedy for outbreaks of disorder which would otherwise necessitate the formal declaration of a "state of emergency" with inevitable damage to the national credit.

- 4.12 The Report of the 1934 Constitution Review Committee proved to be hugely influential as far as the drafting of the new Constitution was concerned, and the imprint of this Report is clearly visible in both Article 28.3.3⁰ (dealing with declarations of emergency) and Article 38.3 (dealing with the Special Criminal Court).
- 4.13 The new Constitution came into force on 29 December 1937 following its approval by a referendum in July 1937. The drafters of the new Constitution evidently hoped that it would represent a fresh start so far as political violence and other features of public life was concerned. Article 48 of the Constitution brought to an end the Constitution of the Irish Free State, so that Article 2A and the Military Tribunal were no more.

The 1937 Constitution and the enactment of the Offences against the State Act 1939

4.14 The new Constitution was far more rigid than its 1922 predecessor, so that after a brief transitional period,⁷⁹ the new Constitution could thereafter be amended only by referendum. In addition to the new provisions dealing with states of emergency and the Special Criminal Court, the Constitution also made provision for legislation in relation to treason.⁸⁰ On the other hand, the new Constitution enhanced the power of judicial review; redefined the range of habeas corpus protection⁸¹ and carefully protected a more extensive range of personal rights, as compared with its predecessor.

4.15 While the then Minister for Justice (Mr. P.J. Rutledge TD) originally resisted as premature in May 1938 plans for the enactment of an Offences against the State Act⁸², the deteriorating domestic and political situation in the latter half of 1938 changed the situation entirely. By the time of the Munich crisis in September 1938 plans were already afoot for a declaration of emergency (and consequential legislation) in the event of a new European war.⁸³ By late 1938 “renewed IRA activity appeared imminent”⁸⁴ and this was coupled with the purported transfer of all legislative and executive powers - “Government of the Republic of Ireland” - from the remaining Anti-Treaty members of the Second Dáil to the “Army Council” of the IRA.⁸⁵

After an ultimatum to the British Government in January 1939, the IRA commenced a bombing campaign in Britain which lasted for the rest of that year. A few months earlier, the Department of the Taoiseach had instructed the Department of Justice to prepare, as a matter of urgency, permanent legislation dealing with the Special Criminal Court, unlawful organisations and treason.⁸⁶ The Offences against the State Bill 1939 was introduced into

⁷⁹By virtue of Article 51.1, the transitory period was to last for three years from the date the first President entered office. This took place on 25 June 1938, so that the transitory period ended on 25 June 1941.

⁸⁰Article 39.

⁸¹This was principally achieved via the Second Amendment of the Constitution Act 1941.

⁸²Department of Justice memorandum, 6 May 1938, S. 10454A.

⁸³Memorandum of 14 September 1938 from Attorney General’s Office (S. 84/25/39).

⁸⁴Lee, *Ireland, 1912-1985* (Cambridge, 1989) at 219.

⁸⁵Bowyer Bell, *The Secret Army - The IRA* (Poolbeg, 1998) at 154. The full text of the statement was published in *Wolfe Tone Weekly*, December 17, 1938 and was in turn set out in the speech of the Minister for Justice (Mr. P.J. Rutledge TD) when introducing the Second Stage of the Offences against the State Bill 1939 in the Dáil: see 74 *Dáil Debates* at 1285-6 (2 March 1939).

⁸⁶S 10454A, 20 November 1938.

the Dáil on 2 March 1939 and was signed by the President on 14 June 1939.⁸⁷ Immediately following its enactment, the Government made a suppression order pursuant to section 19 proscribing the IRA,⁸⁸ but no move was made at that stage to establish the Special Criminal Court or to introduce internment.

- 4.16 While some of the language and structure of the 1939 Act echoed that of Article 2A and, indeed, earlier legislation, there were, however, important changes, with most of these veering in a somewhat more liberal direction. It is interesting to note, however, that the then Secretary of the Department of Justice, Stephen Roche, had received express instructions from the Taoiseach in January 1939 that he should include as much of the contents of the former Article 2A in the new legislation as he felt was necessary, while taking care expressly to repeal all previous such legislation and changing the phraseology as far as possible.⁸⁹
- 4.17 There were, however, important differences between the 1939 Act and the former Article 2A. First, the Military Tribunal which functioned between 1931 and 1937 consisted only of members of the Defence Forces,⁹⁰ whereas Part V of the 1939 Act also envisages that judges, retired judges, barristers and solicitors might serve as members of the Special Criminal Court. While military officers served on the Special Criminal Court from 1939 to 1946 and from 1961 to 1962, since the Court was re-established in 1972 only judges or former judges⁹¹ have sat on that Court. Secondly, whereas Article 2A provided that there was to be no appeal from a decision of the Tribunal,⁹² persons convicted by the Special Criminal Court enjoy the same rights of appeal to the Court of Criminal Appeal as if convicted by the Central Criminal Court.⁹³ Thirdly, section 41 of the 1939 Act provides that the Special Criminal Court must follow the practice and procedure of the Central Criminal Court in relation to the trial of accused persons, whereas no similar safeguard was contained in Article 2A. In addition, one further critical change is that the Special Criminal Court enjoys no special powers in relation to the

⁸⁷Treason was dealt with in separate legislation and the Treason Act 1939 was signed by the President on 30 May 1939.

⁸⁸Unlawful Organisation (Suppression) Order (SR & O No. 162 of 1939).

⁸⁹S 10454B

⁹⁰Article 2A, section 4(2).

⁹¹Since 1986 the former practice of appointing retired judges to the Special Criminal Court has been discontinued.

⁹²Article 2A, section 6(5).

⁹³1939 Act, section 44.

sentencing of convicted persons. This is marked contrast to the provisions of section 7(1) of Article 2A which provided that:

...Whenever the Tribunal finds any person guilty of an offence mentioned in the Appendix to this Article, the Tribunal may, in lieu of the punishment provided by law (other than this Article) for such offence, sentence such person to suffer any greater punishment (including the penalty of death) if, in the opinion of the Tribunal, such greater punishment is necessary or expedient.

- 4.18 Part III of Article 2A had conferred special powers of arrest on members of the Garda Síochána and the Defence Forces. Many of these powers were precursors of the modern section 30 and section 52 of the 1939 Act, save that the power of detention was seventy-two hours, unlike the forty-eight-hour detention originally provided for by the 1939 Act.⁹⁴ Section 14(2) of Article 2A further provided that a statement by a Garda Inspector that he directed the suspect to be detained in custody for this seventy-two-hour period was to be “conclusive evidence” and “incapable of being rebutted or questioned by cross-examination”, but no such provision was contained in the 1939 Act.⁹⁵
- 4.19 Part IV dealt with unlawful organisations and it was in similar terms to the present provisions of sections 18-24 of the 1939 Act. Finally, Part V gave the Executive Council a number of miscellaneous provisions, including the power to proclaim public meetings⁹⁶ and to close buildings.⁹⁷

The Emergency Period 1939-1946

- 4.20 Following the outbreak of World War II on 2 September 1939, Article 28.3.3⁰ of the Constitution was amended by the First Amendment of the Constitution Act 1939. This amendment enabled the Houses of the Oireachtas to declare a state of emergency by extending the definition of “time of war” to include an

⁹⁴By virtue of section 10 of the Offences against the State (Amendment) Act 1998, the decision on whether to extend the time from forty-eight to seventy-two hours now rests with a judge of the District Court after a contested hearing.

⁹⁵A provision along the lines of section 14(2) of Article 2A would not nowadays survive constitutional challenge since it clearly interferes with the judicial power: see, for example, *Maher v. Attorney General* [1973] IR 140; *The State (McEldowney) v. Kelliher* [1983] IR 289.

⁹⁶Article 2A, section 24.

⁹⁷Article 2A, section 27.

“armed conflict” in which the State is not a participant but in respect of which the Houses of the Oireachtas “shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State.”

- 4.21 Both Houses then passed the appropriate declarations of emergency pursuant to Article 28.3.3⁰. On the following day, a wide-ranging Emergency Powers Act 1939 was enacted on foot of these declarations. While the legislation enacted under cover of Article 28.3.3⁰ was immune from constitutional challenge, such legislation lasted only for as long as those declarations of emergency were in force.⁹⁸ This was not true, of course of the Offences against the State Act 1939, which was (and is) not “emergency” legislation in this sense and was (and is) open to constitutional challenge in the ordinary way. Parallel with these developments, the Government activated Part V of the 1939 Act by establishing the Special Criminal Court⁹⁹ and by bringing Part VI, which provided for internment, into force.
- 4.22 The first test of this legislation came in *The State (Burke) v. Lennon*¹⁰⁰ in late November 1939 when the brother of a person interned under Part VI of the 1939 Act applied to the High Court for an order for his release pursuant to Article 40.4.2⁰ of the Constitution. In early December 1939 the High Court held that Part VI of the 1939 Act was unconstitutional in its entirety and directed that the internee be released. The State attempted to appeal that decision, but the Supreme Court held (in a decision which has subsequently been reversed)¹⁰¹ that no appeal lay from the granting of an order of habeas corpus. The Government felt that it had no option but to order the release of all internees. Shortly afterwards on 23 December 1939, the Magazine Fort at the Phoenix Park in Dublin, the Defence Forces’ main ammunition depot, was raided by the IRA in a military-style operation¹⁰² and the Government indicated that many of the released internees were among the chief suspects.¹⁰³

⁹⁸ Although the Emergency Powers Act 1939 was repealed in 1946, the declaration of emergency was itself, absurdly, to last until 1976.

⁹⁹ *Iris Oifigiúil*, 22 August 1939.

¹⁰⁰ [1940] IR 136.

¹⁰¹ *The State (Browne) v. Feran* [1967] IR 147.

¹⁰² Coogan, *The IRA* (HarperCollins, 1995) at 135-136.

¹⁰³ Thus, speaking in the Dáil on 3 January 1940, the then Minister for Justice (Mr. G. Boland TD) commented (78 *Dáil Debates* 54) that he was satisfied that “if it had not been for the decision of the courts. . . that raid would not have occurred.”

4.23 Not unnaturally, the Government regarded these developments with grave disquiet and alarm. A new Emergency Powers (Amendment) Act 1940 was speedily enacted to enable the Government to intern Irish citizens¹⁰⁴ and since this legislation (unlike Part VI of the 1939 Act) was enacted under cover of Article 28.3.3⁰, it was thereby immune from constitutional challenge. In addition, however, the Government introduced into the Dáil the Offences against the State (Amendment) Bill 1940. Subject to a few minor changes, the 1940 Bill was similar to the measure which had been found to be unconstitutional by the High Court a month earlier. Following the passage of the Bill through the Houses of the Oireachtas, it was referred by the President to the Supreme Court pursuant to Article 26 of the Constitution. A majority of the Supreme Court duly upheld the constitutionality of the Bill and it passed into law on 14 February 1940.¹⁰⁵

4.24 Although the Special Criminal Court functioned during the Emergency Period from 1939 until 1946, the Emergency Powers (Amendment)(No.2) Act 1940, which was again enacted under cover of Article 28.3.3⁰, thus conferring constitutional immunity, allowed the Government by order to make provision for the summary trial:

...by commissioned officers of the Defence Forces, of any person alleged to have committed any offence specified in such Order, and, in the case of the conviction of such person of such offence, for the imposition and the carrying out of the sentence of death and no appeal shall lie in respect of such conviction or sentence.

4.25 Such a Military Court was, in fact, established by Government Order¹⁰⁶ and it sat between 1940 and 1943. Despite the “frightening competence”¹⁰⁷ of that Court, the ordinary courts held that, in view of the fact that such legislation had been enacted under cover of Article 28.3.3⁰, they were powerless to intervene.¹⁰⁸ Shortly after the Emergency period ended in 1946, the Minister for Justice (Mr. G. Boland TD) made the following frank statement to the Dáil:

¹⁰⁴The Emergency Powers Act 1939 had earlier allowed for the internment of foreign citizens.

¹⁰⁵*Re Article 26 and the Offences against the State (Amendment) Bill 1940* [1940] IR 470. See generally, Hogan, “The Supreme Court and the Offences against the State (Amendment) Bill 1940” (2000) 35 *Irish Jurist* 238.

¹⁰⁶Emergency Powers (No. 41) Order 1940. (SR & O. No. 237 of 1940).

¹⁰⁷Kelly, *Fundamental Rights in the Irish Law and Constitution* (Dublin, 1967) at 275.

¹⁰⁸*Re McGrath and Harte* [1941] IR 88; *The State (Walsh) v. Lennon* [1942] IR 122.

This court was described outside as a terror court. I have no objection to its being so described. That is exactly what it was. It was a terror court, a court set up to meet terror in a drastic and summary manner in order to save this nation from the perils which threatened it at the time.”¹⁰⁹

- 4.26 While this Military Court last sat in 1943, the Special Criminal Court (which was also composed of officers of the Defence Forces but from whose decision an appeal lay to the Court of Criminal Appeal) functioned until 1946 and spent much of the last years of the Emergency trying black market cases.¹¹⁰ The Special Criminal Court was itself disestablished in 1946, and the rest of the emergency legislation was allowed to lapse.¹¹¹
- 4.27 In the end, Ireland survived unscathed during the World War II and preserved her neutrality to the end. There was obviously a legal and political price to be paid for this: ordinary civil liberties were curtailed on the premise of *salus populi suprema lex*. But many would argue that such a price was justified, especially given the nature of the internal security threat posed by the IRA in general and its active co-operation with Nazi agents in particular.

The IRA’s Border Campaign 1956-1962

- 4.28 The IRA resumed its paramilitary activities in December 1956 with its Border campaign which continued intermittently until it was called off in February 1962.¹¹² From the perspective of the 1939 Act, two principal legal developments occurred during this period.

¹⁰⁹ 101 *Dáil Debates* at Col. 1116. On 11 July 1946 the Minister subsequently gave the Dáil (see 102 *Dáil Debates* at Cols. 609-610) the following statistics in respect of the work of the Military Court:

Year	Number tried by the Military Court	Number acquitted
1940	3	-
1941	4	2
1942	5	1
1943	1	1

¹¹⁰ See, e.g., *The People v. O’Connor* 1 Frewen 42 (1943) where the defendants had been tried by the Special Criminal Court for offences arising out of the sale and distribution of tea and flour.

¹¹¹ Most absurdly, the actual state of emergency was allowed to continue for decades beyond the end of the World War II and was not terminated until 1976.

¹¹² Coogan, *op. cit.*, 297-329.

- 4.29 Internment was reintroduced by Government proclamation on 5 July 1957¹¹³ and this ultimately led to the celebrated *Lawless* case. Following his arrest and detention pursuant to Part II of the 1940 Act, the applicant, Gerard Lawless, challenged the legality of that detention. When that challenge failed before the Supreme Court,¹¹⁴ Lawless proceeded with a complaint against Ireland under the European Convention of Human Rights. This case ultimately came before the European Court of Human Rights, the first case to do so, and while the Court held that internment was contrary to the guarantee of personal liberty contained in Article 5 of the Convention, it also ruled that Ireland had validly derogated from these provisions under Article 15 of that Convention.¹¹⁵
- 4.30 The Special Criminal Court was re-established in November 1961 towards the end of the campaign and the then Taoiseach (Mr. Seán Lemass TD) assured the Dáil that the only cases that would be brought before the re-established Special Criminal Court would be:
- ...those arising from this armed conspiracy of violence. I hope that the special measures which the Government have now authorised will be effective in dealing with the situation, but if they do not prove to be so, the Government will not hesitate to take still further steps.¹¹⁶
- 4.31 By mid-February 1962 the Special Criminal Court had convicted some thirty persons, and this may indeed have been a factor inducing the IRA to call off the campaign.¹¹⁷ On 2 October 2 1962, some eight months after the IRA campaign had come to an end, the Government issued a proclamation by which Part V of the 1939 Act ceased once again to be in force. This was to be the last occasion on which the Special Criminal Court was to consist of military officers.

The Northern Ireland conflict 1970-1994

¹¹³*Iris Oifigiúil*, 8 July 1957.

¹¹⁴*Re O Láighleis* [1960] IR 93.

¹¹⁵See generally, Doolan, *Lawless v. Ireland (1957-1961): The First Case before the European Court of Human Rights* (Ashgate, 2001).

¹¹⁶192 *Dáil Debates* at Col. 839 (23 November 1961).

¹¹⁷As Coogan observed, *op.cit.*, (at 329) “[The Special Criminal Court] was composed of army officers and there was no doubt but that the Government...were determined to take the most drastic measures to scotch not only the campaign but also the IRA at the next possible opportunity. The IRA decided not to give that opportunity.”

- 4.32 The late 1960s saw the outbreak of civil disturbances which were to develop into a prolonged campaign of violent conflict between republican and loyalist paramilitaries and the State in Northern Ireland. This violence was to pose a significant security threat to this State throughout the period of this conflict. It must not be forgotten that eleven members of the Garda Síochána and one member of the Defence Forces were murdered by members of illegal organisations during this period.¹¹⁸ In addition, some thirty-three civilians were murdered on a single day in May 1974 in bombings which took place in Dublin and Monaghan.
- 4.33 From the standpoint of the Offences against the State Acts, there were several major developments during this period. In May 1972, the Government issued a proclamation re-establishing the Special Criminal Court,¹¹⁹ but on this occasion the Court consisted solely of judges or former judges.¹²⁰ The Government also made two orders scheduling a range of offences for the purposes of the 1939 Act.¹²¹ Later that year the Oireachtas enacted the Offences against the State (Amendment) Act 1972, the key feature of which was contained in section 3. This provided that the opinion of a Garda Superintendent that an accused was a member of an illegal organisation could be treated as evidence of this fact. In practice, however, the effect of this section was largely emasculated when the Court of Criminal Appeal subsequently indicated that the weight to be given to such opinion would be considerably undermined if the accused denied the membership charge on oath.¹²²
- 4.34 In September 1976, in the wake of the murder of the British Ambassador and an earlier explosion within the precincts of the Special Criminal Court, the Houses of the Oireachtas passed new resolutions declaring a state of emergency pursuant to Article 28.3.3⁰.¹²³ On this occasion the resolutions were expressed to arise “out of the armed conflict now taking place in Northern Ireland” and one important item of legislation, the Emergency

¹¹⁸The Garda Síochána Roll of Honour confirms that the deaths of eleven members were directly attributable to unlawful organisations in the period 1970 to 1994.

¹¹⁹*The Irish Times*, 27 May 1972.

¹²⁰In 1986 the practice of appointing former judges to the Special Criminal Court was itself discontinued.

¹²¹Offence against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972) and Offences against the State Acts 1939 (Scheduled Offences) Order (No.2) 1972 (SI No. 282 of 1972).

¹²²*The People v. Ferguson*, Court of Criminal Appeal, 31 October 1975.

¹²³292 *Dáil Debates* at Cols. 1-259; 85 *Seanad Debates* at Cols. 6-211 (31 August and 1 September 1976).

Powers Act 1976, was passed pursuant to these declarations. The 1976 Act was identical to the provisions of section 30 of the 1939 Act, save that it permitted the Gardaí to detain suspects for a period of up to seven days prior to charge.

- 4.35 While still in Bill form, the Act had been referred by the President to the Supreme Court pursuant to Article 26 of the Constitution for an adjudication as to its constitutionality. Although the Court upheld the Bill,¹²⁴ it did so only on the basis that the measure was immune from constitutional scrutiny for so long as the emergency resolutions were in force. In addition, the Court reserved the question of whether or not it could review the resolutions passed by the Oireachtas; it noted that there was a presumption in favour of the facts stated in those resolutions and found that this presumption had not been displaced. The Court nevertheless stressed that a suspect detained under section 2 of the 1976 Act retained all other constitutional rights and that the legality of his arrest would be vitiated if these rights were not respected.
- 4.36 The 1976 Act was not renewed by the Government in October 1977, but for so long as the Article 28.3.3⁰ resolutions of 1976 remained in force, the Act might have been, but was in fact not, reactivated by the Government by executive order. As we shall see, these resolutions were not rescinded until February 1995.
- 4.37 The 1980s were curiously uneventful so far as either legislative or judicial developments in this field were concerned. However, in 1985 the Offences against the State (Amendment) Act 1985 provided for the seizure of certain funds which were believed to be destined for the benefit of an illegal organisation.¹²⁵ In 1985 the Supreme Court also dismissed a challenge to the constitutionality of the establishment of the Special Criminal Court, saying that that Court enjoyed a constitutional guarantee of judicial independence which protected it against executive interference or the improper removal of any of its judges.¹²⁶
- 4.38 The 1990s witnessed a series of important challenges to the constitutionality of sections of the 1939 Act. In 1991 in *Cox v. Ireland*¹²⁷ the Supreme Court

¹²⁴*Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159. See generally, Gwynn Morgan, "The Emergency Powers Bill Reference I" (1978) 13 *Irish Jurist* 67; "The Emergency Powers Bill Reference II" (1979) 14 *Irish Jurist* 253.

¹²⁵The constitutionality of this legislation was upheld by the High Court in *Clancy v. Ireland* [1988] IR 326.

¹²⁶*Eccles v. Ireland* [1985] IR 545.

¹²⁷[1992] 2 IR 503.

held that section 34, which provided that all public servants convicted of scheduled offences by the Special Criminal Court automatically lost their positions and superannuation entitlements, constituted a disproportionate interference with the plaintiff's property rights, and was unconstitutional.

- 4.39 In *Heaney v. Ireland*¹²⁸ the Supreme Court upheld the constitutionality of section 52 (which required the suspect to give an account of his movements), saying that it was not a disproportionate interference with the suspect's constitutional rights, but it may be noted that in December 2000 the European Court of Human Rights held that section 52 was incompatible with Article 6 ECHR, saying that it denied the very essence of the protection against self-incrimination.¹²⁹

Developments since 1994

- 4.40 An IRA ceasefire came into effect on 31 August 1994. Although that cease-fire was broken with shocking incidents such as Canary Wharf bomb in February 1996 and although "unattributed" paramilitary killings, robberies, drug-dealing and "punishment beatings" still continued, the major paramilitary campaigns had nonetheless come to an end. The peace process ultimately led to the Good Friday Agreement of 1998. A significant security threat was nevertheless posed by dissident republican groups and loyalist paramilitaries.
- 4.41 In February 1995 the Houses of the Oireachtas rescinded the resolutions of emergency under Article 28.3.3⁰ which had been in force since 1976.¹³⁰ This was largely of symbolic importance, since the only law passed pursuant to these resolutions, the Emergency Powers Act 1976, had not been in force since October 1977.
- 4.42 In *Kavanagh v. Government of Ireland*¹³¹ the applicant challenged the continued operation of the Special Criminal Court in the post-ceasefire environment. The Supreme Court rejected that argument, saying that any

¹²⁸[1996] 1 IR 586.

¹²⁹*Heaney v. Ireland; Quinn v. Ireland* (2001) 33 EHRR 264. It is interesting to note that these were the first cases against Ireland involving a criminal conviction to come before the European Court of Human Rights since our accession to the individual petition jurisdiction of that Court in 1953.

¹³⁰448 *Dáil Debates* at Cols. 1538 -1587 (February 7, 1995) ; 141 *Seanad Debates* at Cols. 2013 - 2061 (February 16, 1995).

¹³¹[1996] 1 IR 321.

judgment as to the inadequacy of the ordinary courts to secure the effective administration of justice was essentially a political one which was susceptible to judicial review only in exceptional circumstances. The Court indicated, however, that the Government was under a duty to keep the necessity for the Court under review. Mr. Kavanagh subsequently took his complaint to the UN Human Rights Committee under the International Covenant on Civil and Political Rights.¹³² In April 2001 that Committee held that since Ireland had failed to demonstrate that the decision to try the applicant before the Special Criminal Court “was based upon reasonable and objective grounds”, it followed that the applicant’s right to equality before the law under Article 26 of the Covenant was thereby violated. At the time of writing, the Supreme Court had reserved judgment on this issue of whether or not this ruling of the Committee had any implications as far as the legality of Mr. Kavanagh’s conviction and sentence was concerned.

- 4.43 The other major development took place in the aftermath of the Omagh bomb in August 1998, the worst terrorist atrocity to have taken place during the course of the Northern Irish conflict. In the wake of this outrage, the Offences against the State (Amendment) Act 1998 was speedily enacted by the Oireachtas. This Act created certain new offences:¹³³; it curtailed the right to silence¹³⁴ and, perhaps, most significantly, it extended the period of time during which a suspect under section 30 could be detained from 48 hours to 72 hours.¹³⁵ However, unlike the extended detention which had been provided under section 2 of the Emergency Powers Act 1976, only the District Court could sanction the extension of the detention period from 48 hours to 72 hours and that only after a hearing in which both parties were entitled to be represented.

Conclusions

- 4.44 The nature of the threat to the democratic order posed by illegal organisations was such that the State was required to take appropriate legislative and other measures in response. The 1939 Act must also be seen in its historical context.

¹³²CCPR/C/71/D/819/1998.

¹³³For example, the new offences of directing an unlawful organisation (section 6) and the unlawful collection of information (section 8).

¹³⁴Sections 2 and 5.

¹³⁵Section 30(4) of the 1939 Act, as inserted by section 10 of the 1998 Act.

- 4.45 While it is true that some of the provisions of the 1939 Act were gravely illiberal (for example, the provisions of section 10(4) prohibiting the publication by the media of any statements “sent or contributed by an illegal organisation”) or are now offensive to modern standards of due process (for example, the provisions of section 39 permitting members of the Defence Forces to serve as judges of the Special Criminal Court) or were found to be unconstitutional¹³⁶ or contrary to the European Convention of Human Rights,¹³⁷ other provisions of that Act attempted to reach an accommodation with principles of due process and to ensure that the rule of law prevailed. Thus, for example, the provisions of sections 41 and 44 (which ensured respectively that the Special Criminal Court followed the practice and procedure of the Central Criminal Court and provided for a right of appeal to the Court of Criminal Appeal) represented a distinct advance on the draconian regime which had prevailed under the old Article 2A between 1931 and 1937.
- 4.46 As will be seen from the Committee’s detailed analysis of this legislation contained in succeeding chapters of this Report, it believes that what is now required in a modern environment is for the Oireachtas to repeal the existing Offences against the State Acts and to replace them with one single consolidated item of legislation containing significant reforms in respect of the statutory regime which has heretofore obtained. It is to a consideration of these questions that the Committee will now turn.

¹³⁶As happened to section 34: *Cox v. Ireland* [1992] 2 IR 503.

¹³⁷As was found in the case of section 52: *Heaney v. Ireland*; *Quinn v. Ireland* (2001) 33 EHRR 334.

CHAPTER 5

EMERGENCY POWERS AND INTERNMENT

Background

- 5.1 The Constitution of the Irish Free State contained no explicit provision whereby constitutional safeguards could be suspended or abridged under special circumstances. This meant that that Constitution was quite unsuited to deal with the legal difficulties generated by the Civil War and the political violence directed at the State and its institutions throughout the 1920s and the 1930s. During this period the Oireachtas resorted to a variety of legal stratagems to enable it to enact what it perceived as the necessary legislative measures to curb the actions of illegal organisations. The Public Safety Act 1927 purported to effect a temporary amendment of the Constitution should this prove necessary in order to validate extended detention. A few years later, the Constitution (Amendment No. 17) Act 1931 inserted a new Article 2A into that Constitution and this provision which, in reality, was an elaborate form of Public Safety Act took precedence over every subsequent provision of the Constitution.
- 5.2 The 1934 Constitution Review Committee recognised that these *ersatz* measures were quite unsatisfactory.¹³⁸ Between 1934 and 1937 various drafts of an emergency provisions clause that might be inserted in the new Constitution were explored, including a proposal by which the declaration of emergency would have to be sanctioned by a majority of the judiciary voting in secret ballot.¹³⁹
- 5.3 The Constitution of Ireland, 1937 made provision in Article 28.3.3⁰ for the declarations of emergency by both Houses of the Oireachtas and to provide for constitutional immunity for legislation enacted under cover of these declarations. Article 28.3.3⁰ of the Constitution now provides that:

Nothing in this Constitution other than Article 15.2.2⁰ shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of

¹³⁸Hogan, "The Constitution Review Committee of 1934" in Ó'Muircheartaigh, *Ireland in the Coming Times* (Dublin, 1997) at 342.

¹³⁹S. 2979. See Hogan, *loc.cit.*, at 350-351.

the State in time of war or armed rebellion, or to nullify any act done or purported to be done in time of war or armed rebellion. In this sub-section “time of war” includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and “time of war or armed rebellion” includes such time after the termination of any war, or of any armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist.

5.4 Article 28.3.3⁰ has been amended on three separate occasions. The First Amendment of the Constitution Act 1939 was enacted within days of the outbreak of World War II and it amended Article 28.3.3⁰ by adding an extended definition of “time of war” to include an armed conflict in which the State is not a participant. The Second Amendment of the Constitution Act 1941 further extended this definition of “time of war” to include a period of time after the armed conflict or armed rebellion has come to an end.¹⁴⁰ The

¹⁴⁰Interestingly, the 1940 Constitution Review Committee (S 11577A) examined another proposal which would have further extended the ambit of Article 28.3.3⁰ by making anti-terrorist legislation such as the Offences against the State Act 1939, immune from constitutional challenge:

The Committee recognise that, in the circumstances of this country, it is necessary to have a strong machinery for dealing effectively with the activities of treasonable conspiracies. Such machinery should not be hampered by being questioned on constitutional grounds, for the principle involved is nothing less than that the Constitution and the organs of government established thereunder shall be clothed with the power of self-protection and preservation and that the Constitution shall not be invoked to cause its own self-destruction. Moreover, those who by their acts and attitude proclaim themselves outlaws should not, on any ground of justice or equity or even commonsense, be accorded the benefit of the constitutional guarantees framed to protect the citizen who fulfils his fundamental political duty of fidelity to the Nation and loyalty to the State.

Accordingly, the Committee recommend that Article 28.3.3⁰ should be strengthened to protect from constitutional attack legislation designed to deal with conspiracies of violence against the State and they recommend the addition of words to that sub-section for that purpose.

This particular recommendation was, however, ultimately not proceeded with.

The 1940 Committee consisted of senior civil servants who had been asked to review the Constitution prior to the expiry of the transitional provisions in June 1941. During these transitional provisions, the Constitution could be amended by ordinary legislation, although

21st Amendment of the Constitution Act 2001 abolished the death penalty in all circumstances and thereby amended Article 28.3.3⁰ to ensure that the death penalty could not be reintroduced by legislation enacted under cover of these emergency resolutions.

Emergency resolutions

- 5.5 The Houses of the Oireachtas have twice passed the appropriate resolutions for the purposes of Article 28.3.3⁰.
- 5.6 The first set of resolutions were passed on 2 September 1939 immediately after the passage of the First Amendment of the Constitution Act 1939. On the following day, the Emergency Powers Act 1939 was duly enacted under cover of the Article 28.3.3⁰ resolutions. This comprehensive item of legislation, which was expressed to be for the purpose of “securing public safety and the preservation of the State in time of war”, continued in force until 1946 when it expired.¹⁴¹ Accordingly, by 1946 there was no longer any emergency legislation in force which depended for constitutional survival on the 1939 emergency resolutions.
- 5.7 Remarkably, however, the Article 28.3.3⁰ resolutions themselves were permitted to continue in force despite the end of World War II “and despite occasional protests at the absurdity of keeping the State in a condition of ‘emergency’ unrescinded until 1976.”¹⁴² Despite the absurdity of this state of affairs, the artificial maintenance of this declaration of emergency had no real practical consequences since, as we have just seen, the last emergency legislation had expired in 1946.¹⁴³

the President was entitled to insist on a referendum: see Article 51.2. The 1940 Committee’s recommendations formed the basis for the Second Amendment of the Constitution Act 1941. This Act effected some thirty separate amendments to the Constitution, which, for the most part, were mainly minor technical or linguistic amendments.

¹⁴¹Nine further items of legislation were enacted during this period. Many of them were enacted for a temporary period, but those that were still in force were also allowed to lapse in 1946.

¹⁴²Kelly, *The Irish Constitution* (3rd ed. by G. Hogan and G. Whyte, Dublin, 1994) at 239. Professor Kelly further referred to the fact that successive Taoisigh, in their replies to Dáil Questions in 1946, 1960, 1964, 1969 and 1971, justified the refusal to bring the state of emergency to an end. In Professor Kelly’s words “there were always reasons for not bringing it to an end”.

¹⁴³Cf. the comments of F.S.L. Lyons, *Ireland since the Famine* (London, 1972) (at 5454): “the ‘emergency’ which was declared when war broke out in 1939 is still legally in existence and no law-abiding citizen seems any the worse.”

- 5.8 In 1976, following the murder of British Ambassador and his secretary and the explosion at the Special Criminal Court, the Houses of the Oireachtas rescinded the 1939 resolutions and immediately passed fresh resolutions arising out of the civil conflict in Northern Ireland.¹⁴⁴ The Oireachtas enacted only one item of legislation under cover of those resolutions, namely the Emergency Powers Act 1976.
- 5.9 The 1976 Act permitted the seven-day detention of suspects without judicial supervision.¹⁴⁵ Prior to its enactment into law, the 1976 Act had been referred by the President to the Supreme Court in accordance with Article 26 of the Constitution: *see Re Article 26 and the Emergency Powers Bill, 1976*.¹⁴⁶ This Article 26 reference gave the Supreme Court an opportunity comprehensively to review the scope and effect of Article 28.3.3⁰.
- 5.10 The Court first accepted that there was a presumption in favour of the validity of Article 28.3.3⁰ resolutions and that this presumption had not been displaced in the present case. However, the Court reserved its position in regard to reviewing future resolutions and hinted that it had retained a jurisdiction to look behind the resolutions to examine whether or not the two Houses of the Oireachtas had been justified in passing them.¹⁴⁷
- 5.11 As far as the substantive issue of constitutionality presented by the Bill itself, the State had conceded that seven-day detention of that form would be inconsistent with the guarantee of personal liberty in Article 40.4.1⁰, so that the Bill was dependent on the emergency resolutions for its constitutional survival. The Supreme Court explained that its capacity to review Bills passed on foot of these resolutions was strictly limited:

When a Bill is validly referred to the Court under Article 26 the test of its repugnancy is what its effect and force will be if and when it

¹⁴⁴292 *Dáil Debates* 2-260; 85 *Seanad Debates* 5-212 (31 August to 1 September 1976).

¹⁴⁵Section 2 of the 1976 Act was drafted in similar terms to s. 30 of the Offences against the State Act 1939 by permitting arrest based on reasonable suspicion of having committed a scheduled offence. However, whereas s. 30 then permitted a maximum detention period of forty-eight hours, s. 2 of the 1976 Act permitted seven-day detention. The Offences against the State (Amendment) Act 1998 amended s.30 of the 1939 Act by permitting detention for up to seventy-two hours, but, unlike s.2 of the 1976 Act, only the District Court can extend the detention from forty-eight hours to seventy-two hours and then only by reference to certain statutory criteria.

¹⁴⁶[1977] IR 159. For a comprehensive account of the background to this reference and the legal issues which it raised, see Gwynn Morgan “The Emergency Powers Bill Reference I” (1978) 13 *Irish Jurist* 67; “The Emergency Powers Bill Reference II” (1979) 14 *Irish Jurist* 253.

¹⁴⁷ [1977] IR 159, 175-176, per O’Higgins C.J.

becomes law. Thus, in regard to a Bill which is to take effect as law under Article 28.3.3⁰, if it shown to the Court that the preliminary and procedural requirements for the passing of the Bill by both Houses of the Oireachtas have been complied with, it is *ipso facto*, because of the exemption given by Article 28.3.3⁰, incapable of being struck down on the ground of repugnancy to the Constitution or to any provision thereof.¹⁴⁸

5.12 However, the Court also stressed that when "...a law is saved from invalidity by Article 28.3.3⁰, the prohibition against invoking the Constitution in reference to it is only for the purpose of invalidating it. For every other purpose the Constitution may be invoked."¹⁴⁹

5.13 The Court indicated, for example, that if a suspect had been wrongfully denied access to legal advice or if his constitutional rights had been otherwise denied, the High Court might have to order the suspect's release pursuant to Article 40.4.2⁰.¹⁵⁰

5.14 The 1976 Act was allowed to lapse in October 1977 and, although seven-day detention under that Act might have been revived at any time by means of a fresh order by the Government pursuant to the 1976 Act, this never in fact occurred. The 1976 resolutions were, in turn, rescinded by both Houses of the Oireachtas in February 1995 in the wake of the IRA ceasefire.¹⁵¹

The recommendations of the Constitution Review Group

5.15 The possible reform of Article 28.3.3⁰ was most recently considered by the Constitution Review Group in 1996.¹⁵² The Review Group recommended that resolutions declaring an emergency should have effect for three years only, unless renewed by both Houses of the Oireachtas.¹⁵³ It further recommended that certain fundamental rights and liberties ought to be

¹⁴⁸ [1977] IR 159, 174.

¹⁴⁹ [1977] IR 159, 173.

¹⁵⁰This indeed occurred in a number of cases arising under s.2 of the 1976 Act: see, for example, *The State (Hoey) v. Garvey* [1978] IR 1.

¹⁵¹448 *Dáil Debates* at Cols. 1538-1587 (7 February 1995); 141 *Seanad Debates* at Cols. 2013-2061 (16 February 1995),

¹⁵²Pn. 2632.

¹⁵³At p.84. This echoes an earlier recommendation of the Report of the Committee on the Constitution (Pr. 9817, 1967), paras. 102 - 106. Cf. The provisions of Articles 55 and 116.2 of the Spanish Constitution of 1978 which (a) restrict the rights which may be abridged during the declaration of emergency and (b) limits the duration of the time of emergency: see generally Casey, *Constitutional Law in Ireland* (3rd ed. Dublin, 2000) at p. 181.

retained even during a state of emergency and that the Oireachtas should not be able to override such rights via legislation passed on foot of Article 28.3.3⁰ resolution.¹⁵⁴

Recommendation

- 5.16 The practical significance of Article 28.3.3⁰ to the work of this Committee is now relatively limited. While emergency resolutions were in force between 1939 to 1995, with the exception of one twelve-month period from October 1976 to October 1977, there has been no emergency legislation in force since 1946. Between 1976 and 1977, there was one item of legislation in force which was later allowed to lapse. There have been no emergency resolutions in force since 1995 and it would probably require a very marked deterioration in conditions prevailing on this island before the Houses of the Oireachtas would contemplate passing fresh Article 28.3.3⁰ resolutions.
- 5.17 *In these circumstances, the Committee can do no more than respectfully endorse the recommendations of the Constitution Review Group regarding the reform of Article 28.3.3⁰. While the Committee believes that the retention of Article 28.3.3⁰ is an unfortunate necessity, it nonetheless agrees that any such declaration of emergency should be limited to three years. The declaration of emergency would then expire, but, of course, it would be open to the Houses of the Oireachtas to pass a fresh declaration of emergency.*
- 5.18 *Moreover, the Committee considers that Article 28.3.3⁰ should be further amended so as to limit further the rights which might be abridged or curtailed by virtue of legislation enacted under cover of Article 28.3.3⁰. The latter approach would be very much in line with the attitude taken by both the European Convention of Human Rights (Article 15) and the International Covenant on Civil and Political Rights (Article 4) with regards to the limits of declarations of emergency and fundamental rights.*¹⁵⁵

¹⁵⁴The 21st Amendment of the Constitution Act 2001 might be said to represent a step in that direction in that (as thus amended) Article 28.3.3⁰ expressly forbids the Oireachtas from legislating for the death penalty even in circumstances covered by Article 28.3.3⁰.

¹⁵⁵Thus, for example, Article 15(1) ECHR provides that in the course of such emergency, a Contracting State “may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation” provided that such measures are not inconsistent “with its other obligations under international law”. Article 15(2) provides that such declarations of emergency may not derogate from the right to life (Article 2) (save in respect of deaths resulting from lawful acts of war); the prohibition on torture and inhuman or degrading treatment (Article 3); prohibition on slavery and forced labour (Article

Offences against the State (Amendment) Act 1940

- 5.19 Internment, or detention without trial, is provided for by Part II of the Offences against the State (Amendment) Act 1940. Part II comes into force if and when the Government makes and publishes a proclamation declaring that internment is necessary to secure the preservation of public peace and order, and it ceases to be in force when the Government makes and publishes a proclamation to that effect. Provision is also made for Dáil Éireann, at any time while Part II is in force on foot of a proclamation by the Government, to pass a resolution annulling that proclamation, whereupon Part II ceases to be in force.
- 5.20 Under Part II, a Minister of the Government may by warrant order the arrest and detention, in other words the internment, of any person who, in the opinion of the Minister, is engaged in activities that are prejudicial to the preservation of public peace and order or to the security of the State. Any such person may be arrested by a member of the Garda Síochána and detained in a prison or other place of detention prescribed for that purpose by regulations made under Part II. The release of a person detained in this way may be ordered at any time by a Minister of the Government if he or she thinks it proper.
- 5.21 Whenever Part II is in force, the Government is required to set up a Commission to review the detention of any person who requests this. The Commission must consist of three persons, two of whom have to be judges or former judges or barristers or solicitors, and one of whom must be an officer of the Defence Forces. The procedure is that any detained person may apply in writing to the Government to have the continuation of his or her detention considered by the Commission. Any such application is passed to the Commission, which then has to inquire into the grounds of detention and report to the Government. The person must be released from detention if the Commission reports that no reasonable grounds exist for the person's continued detention.
- 5.22 For as long as Part II is in force, the Government is required, at least every six months, to make a report to each House of the Oireachtas giving particulars of persons detained under the Act, persons in respect of whom the Commission has reported to the Government that no reasonable grounds exist for their continued detention, persons who were released upon a report by the

4) and the creation of retrospective penal sanctions (Article 7).

Commission, and persons who were released without a report by the Commission.

Background to the 1940 Act

5.23 The background to the enactment of the 1940 Act is complex.¹⁵⁶ Part VI of the Offences against the State Act 1939 originally contained provisions for internment, but this Part of the Act was declared to be unconstitutional by Gavan Duffy J. on 2 December 1939 in *The State (Burke) v. Lennon*¹⁵⁷ following an application for the release of the applicant in accordance with Article 40.4.2⁰ of the Constitution. Gavan Duffy J. took the view that internment was at odds with the Constitution's guarantees in respect of trial in due course of law (Article 38.1) and personal liberty (Article 40.4.1⁰):

As to personal liberty, it is one of the cardinal principles of the Constitution, proclaimed in the Preamble itself, that the dignity and freedom of the individual may be assured; Articles 40-44 of the Constitution set out the "Fundamental Rights" comprising personal rights, the imprescriptible rights of the family, the inalienable right and duty of parents to educate their children, the natural right to private property and freedom of conscience and religion. The fundamental personal rights, which are the personal rights of free men, include (Article 40) the right to equal protection of the law, the inviolability of the home, the rights of free speech, peaceable association and, in particular, the liberty of the person.... These rights are, of course, qualified, because under modern conditions the rights of the citizen must be subject to legal limitations, and absolute rights are unknown, or virtually unknown, in a democratic State. But in a significant clause of Article 40 the State guarantees in its laws to respect the personal rights of the citizen and, as far as practicable, to defend and vindicate them.... The right to personal liberty means much more than mere freedom from incarceration and carries with it necessarily the right of the citizen to enjoy the other fundamental rights, the right to live his life, subject, of course, to the law; and if a man is confined against his will, he has lost his personal liberty, whether the name given to the restraint be penal servitude, imprisonment, detention or internment... Habeas corpus is the direct security for the right to personal liberty, but a constitutional separation of powers and constitutional directions for

¹⁵⁶For a more detailed account of that background, see Hogan, "The Supreme Court and the Reference of the Offences against the State (Amendment) Bill, 1940" (2000) 35 *Irish Jurist* 238.

¹⁵⁷[1940] IR 136.

the administration of justice as an independent function of the State were necessary to make the remedy secure.¹⁵⁸

- 5.24 Gavan Duffy J. next drew attention to the separation of powers provisions of the Constitution and the mechanism provided for judicial review of legislation:

The architects of the Constitution were alive to the need for protecting the rights declared in the Constitution; accordingly, in Article 5, they characterised the State as a democratic State, in which (Article 6) all powers derive under God from the People and are to be exercised only by or on the authority of legislative, executive and judicial organs established by the Constitution; effect is given to the division of powers by Articles 15, 28 and 34 and 35. Laws in any respect repugnant to the Constitution are expressly forbidden and invalidated by Article 15 and, as a special safeguard, exclusive original jurisdiction in cases raising the constitutionality of any law assigned to the High Court, together with a veto, a matter of first importance, upon any statutory encroachment on the appellate jurisdiction of the Supreme Court in any such case (Article 34); the Supreme Court is thus made ultimate guardian of constitutional right.¹⁵⁹

- 5.25 The judge continued by referring in some detail to the provisions dealing with state of war and emergency (Article 28.3.3⁰) and the provisions dealing with trial of offences (Article 38). He then added:

Manifestly these penal jurisdictions are all contemplated as importing lawful restrictions under the Constitution upon personal liberty, and Article 40 must be read in the light of Article 38.... There is no provision enabling the Oireachtas or the Government to disregard the Constitution in any emergency short of war or armed rebellion. And the Constitution contains no express provision for any law endowing the Executive with powers of internment without trial.¹⁶⁰

- 5.26 It followed that, in his opinion, a law providing for internment was inconsistent with these guarantees:

¹⁵⁸[1940] IR 136, 144.

¹⁵⁹*Ibid.*

¹⁶⁰*Ibid.*, 145.

...a law for the internment of a citizen, without charge or hearing, outside the great protection of our criminal jurisprudence and outside even the special Courts, for activities calculated to prejudice the State, does not respect his right to personal liberty and does unjustly attack his person; in my view, such a law does not defend his right to personal liberty as far as practicable, first, because it does not bring him before a real Court and again because there is no impracticability in telling a suspect, before ordering his internment, what is alleged against him and hearing his answer, a course dictated by elementary justice.¹⁶¹

5.27 Gavan Duffy J. concluded by saying that:

The Constitution, with its most impressive Preamble, is the Charter of the Irish People and I will not whittle it away.... The right to personal liberty and the other principles which we are accustomed to summarise as the rule of law were most deliberately enshrined in a national Constitution, drawn up with the utmost care for a free people, and the power to intern on suspicion or without trial is fundamentally inconsistent with the rule of law as expressed in the terms of the Constitution. The legal position would be different, were I concerned with a war measure, a law “expressed to be for securing the public safety and the preservation of the State in time of war” under Article 28; but I am not, for the Offences against the State Act 1939, is not such a law.¹⁶²

5.28 Following the decision of Gavan Duffy J. releasing the applicant, the State sought to appeal this habeas corpus order to the Supreme Court, but that Court held that it had no jurisdiction to entertain an appeal in habeas corpus matters.¹⁶³ Following the failure of the Supreme Court to entertain the State’s appeal against Gavan Duffy J.’s decision, the Government concluded that it had no option but to release all the other prisoners who had been detained under Part VI of the 1939 Act, even though no formal application for habeas corpus appears to have been made by or on behalf of any other prisoner. This decision to release the other prisoners appears to have led to consequences which were potentially catastrophic.

5.29 On 23 December 1939, the Magazine Fort at Phoenix Park, the Defence Forces’ main ammunition depot, was raided by the IRA in a military-style

¹⁶¹[1940] IR 136, 154.

¹⁶²[1940] IR 136, 155-156.

¹⁶³*The State (Burke) v. Lennon* [1940] IR 136. The Supreme Court has since overruled this decision and it now hears appeals in habeas corpus matters: see *The State (Browne) v. Feran* [1967] IR 147.

operation and more than 1 million rounds of ammunition were stolen by over 50 men using four lorries. In the immediate post-Christmas period, an Army cordon was placed around Dublin and in surrounding areas and significant quantities of the stolen arsenal were recovered.¹⁶⁴

- 5.30 Faced with this alarming situation in the middle of a national emergency, the Government introduced the Offences against the State (Amendment) Bill 1940. This Bill substantially corresponded to Part VI of the 1939 Act, save that the new section 4(1) provided that such a detention order could be made only where the Minister was “of opinion” that the detainee was engaged in activities “prejudicial to the preservation of public peace and order or to the security of the State”: the Minister was no longer required to be “satisfied” in the manner required by Part VI. Following the passage of the Bill by both Houses of the Oireachtas, it was then submitted to the President, who duly referred the Bill to the Supreme Court under Article 26 of the Constitution. The Supreme Court upheld (by a majority) the constitutionality of the Bill.
- 5.31 Delivering the judgment of the Court, Sullivan C.J. rejected the contention, upon which Gavan Duffy J. had laid so much emphasis in *Burke*, that the 1940 Bill enabled the Minister to try the accused in respect of criminal offences in a manner contrary to Article 38.1 and that the detention thereby contemplated constituted a form of punishment in respect of a criminal offence:

In the opinion of this Court neither section 4 nor section 5 of the Bill creates or purports to create a criminal offence. The only essential preliminary to the exercise by a Minister of the powers contained in section 4 is that he should have formed opinions on the matters specifically mentioned in the section. The validity of such opinions is not a matter that could be questioned in any Court. Having formed such opinions, the Minister is entitled to make an order for detention: but this Court is of opinion that the detention is not in the nature of punishment, but is a precautionary measure taken for the purpose of preserving the public peace and order and the security of the State.¹⁶⁵

- 5.32 The Chief Justice also rejected the argument based on the personal liberty provisions of Article 40.4.1⁰ by saying:

The phrase “in accordance with law” is used in several Articles of the Constitution and we are of opinion that it means in accordance with the

¹⁶⁴*The Irish Times*, 26 December 1939 and *The Irish Times*, 28 December 1939.

¹⁶⁵[1940] IR 470, 479.

law as it exists at the time when the particular Article is invoked and sought to be applied. In this Article, it means the law as it exists at the time when the legality of the detention arises for determination. A person in custody is detained in accordance with the provisions of a statute duly passed by the Oireachtas; subject always to the qualification that such provisions are not repugnant to the Constitution or to any provision thereof. Accordingly, in our opinion, this Article cannot be relied on for the purposes of establishing the proposition that the Bill is repugnant to the Constitution - such repugnancy must be established by reference to some other provision of the Constitution.¹⁶⁶

- 5.33 On that basis, the constitutionality of the 1940 Bill was upheld and the Bill duly passed into law as the Offences against the State (Amendment) Act 1940. As a consequence, it enjoys immunity from further constitutional challenge.¹⁶⁷
- 5.34 Of course, it could be argued that this matter would be decided very much differently today. In *Re Article 26 and the Emergency Powers Bill, 1976*, for example, the Attorney General specifically asked the Supreme Court “to judge the Bill on the basis (with which the Court expressed no disagreement) that the seven-day arrest without trial, provided by the Bill, was unconstitutional unless saved by the emergency recital provided for by Article 28.3.3⁰.”¹⁶⁸
- 5.35 If seven-day detention is unconstitutional on this basis, then, *a fortiori* (and assuming the matter were *res integra*) internment without trial would not nowadays survive a similar constitutional challenge.
- 5.36 In the light of decisions such as the *Emergency Powers Bill* reference and *King v. Attorney General*,¹⁶⁹ it is certainly possible that, were the Court free to reconsider the matter, it would hold that indefinite detention without trial

¹⁶⁶[1940] IR 475, 482.

¹⁶⁷Although it has been argued that the reference in this case was not a valid one, on the basis that the Supreme Court which decided the matter was the “old” Supreme Court functioning under the transitory provisions of the Constitution, so that the 1940 decision is not protected from further challenge by the provisions of Article 34.3.3⁰: see Kelly, *The Irish Constitution* (3rd ed. by G. Hogan and G. Whyte, Dublin, 1994) at 494.

¹⁶⁸Kelly, *op. cit.*, 816.

¹⁶⁹[1981] IR 223. In this case, the Supreme Court held that key provisions of the Vagrancy Act 1824 were incompatible with the guarantee of personal liberty in Article 40.4.1⁰ and were thus unconstitutional.

and without judicial supervision would amount to a violation of Article 40.4.1⁰ and that, if such measures are to be resorted to, they would require the cover of measures enacted by the Oireachtas pursuant to Article 28.3.3⁰ following a declaration of emergency.

Challenge under the European Convention on Human Rights

5.37 In July 1957, following a number of sporadic acts of paramilitary violence, the Government made a proclamation under Part II of the 1940 Act bringing that Act into operation, thus activating the internment powers. One of the persons detained, Gerard Lawless, originally sought an order for his release under Article 40.4.2⁰ of the Constitution. While it was accepted that, by reasons of the provisions of Article 34.3.3⁰,¹⁷⁰ the constitutionality of the 1940 Act could not now be challenged, Mr. Lawless challenged his detention on the ground that it contravened Article 5 of the European Convention of Human Rights.¹⁷¹

5.38 The Supreme Court, however, held that since the Convention had not been made part of Irish domestic law, it could not give effect to that Convention:

The insuperable obstacle to importing the provisions of the Convention...into the domestic law of Ireland, if they be at variance with that law, is, however, the terms of the Constitution of Ireland. By Article 15.2.1⁰ of the Constitution it is provided that “the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.” Moreover, Article 29, the Article dealing with international law relations, provides at section 6 that “no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

The Oireachtas has not determined that the Convention...is to be part of the domestic law of the State, and, accordingly, this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law. No argument can prevail against the express command of section 6 of

¹⁷⁰“The Court is therefore bound to approach the consideration of this appeal on the basis that the Act is valid and incapable of being challenged as repugnant to the Constitution in these or any other proceedings”: In *Re Ó Laighléis* [1960] IR 93, 117, per Maguire C.J.

¹⁷¹For the background to the *Lawless* case, both before the Irish courts and the European Court of Human Rights, see Doolan, *Lawless v. Ireland (1957-1961): The First Case before the European Court of Human Rights* (Ashgate, 2001).

Article 29 of the Constitution before judges whose declared duty is it to uphold the Constitution and the laws. The Court accordingly cannot accept the idea that the primacy of domestic law is displaced by the State becoming a party to the Convention....¹⁷²

5.39 Lawless then brought a petition to the European Commission of Human Rights which in turn referred the matter to the European Court of Human Rights. As it happens, the decision of the European Court of Human Rights in *Lawless v. Ireland*¹⁷³ in July 1961 represented the first decision of that Court in respect of a petition brought by an individual citizen against his own State.

5.40 The Court first examined the question of whether Lawless's detention contravened Article 5(1)(c) ECHR. This provides that:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in the following cases and in accordance with a procedure prescribed by law....

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

5.41 The Court had no doubt but that the internment of suspects was precluded by Article 5(1)(c) of the Convention, since this clause permitted the deprivation of liberty only:

...when such deprivation is effected for the purpose of bringing the person arrested and detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person who is reasonably considered necessary to restrain from committing an offence, or a person whom it is reasonably necessary to restrain from absconding after having committed an offence.¹⁷⁴

¹⁷²[1960] IR 93, 125, per Maguire C.J.

¹⁷³1961 (1979-1980) 1 EHRR.

¹⁷⁴*Ibid.*, 27.

5.42 The Court added that this interpretation of Article 5 was fully:

...in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest. It must be pointed out in this connexion that, if the construction placed by the Court on the aforementioned provisions were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention. Such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention; therefore, the Court cannot deny Article 5(1)(c) and (3) the plain and natural meaning which follows both from the precise words used and from the impression created by their context.¹⁷⁵

5.43 The Court, therefore, unequivocally ruled that internment constituted a breach of Article 5 of the Convention.

5.44 The Court then considered whether or not Ireland had validly derogated from the Convention in accordance with Article 15. This provides in relevant part that:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law....

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

5.45 While the Court concluded that it could review any declarations of emergency promulgated in accordance with Article 15, it was satisfied that there then existed in Ireland “...an exceptional situation of crisis or emergency which

¹⁷⁵*Ibid.*, 28.

affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”¹⁷⁶

- 5.46 The Court concluded that a state of emergency was reasonably deduced by the Irish Government from a number of factors, including the “existence of a secret army engaged in unconstitutional activities and using violence to attain its purposes”; the fact that “this army was operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour” and the “steady and alarming increase in terrorist activities” during the latter half of 1956 and throughout the first half of 1957.¹⁷⁷
- 5.47 Moreover, the Court found that the measures taken were “strictly required by the exigencies of the situation”, since “the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland”; the internment system provided for in the 1940 Act contained appropriate safeguards and the Government had in any event offered to release all internees who gave an undertaking to respect the Constitution and the laws. The Court held that the notification to the Secretary-General of the bringing into force of the proclamation some 12 days after it had been made and the invocation of Article 15 in that notification constituted a valid derogation for the purposes of Article 15.
- 5.48 In the event, therefore, while the Court held that a system of internment would violate Article 5, it further ruled that Ireland had validly derogated in respect of this breach in accordance with Article 15 of the Convention.
- 5.49 The IRA called off its border campaign in early 1962 and shortly thereafter the Government declared that Part II of the 1940 Act had ceased to be in force. In a memorandum for Government, the Minister for Justice (Mr. C.J. Haughey TD) noted, that while the European Court had held that the Government “had not acted improperly in all the circumstances, nevertheless a feeling prevailed both at home and abroad that the powers of detention should not again be exercised except as a last resort and only where any other effective means of a less repugnant kind were not available.”¹⁷⁸
- 5.50 These considerations are, in the view of the Committee, at least as valid today as they were in 1962, and the full implications of internment, both national

¹⁷⁶*Ibid.*, 31.

¹⁷⁷See also *Brannigan and McBride v. United Kingdom* (1993) 17 EHRR 539, where the validity of a derogation in respect of Northern Ireland was upheld on similar grounds.

¹⁷⁸S. 13710. Quoted in Doolan, *op. cit.*, 220.

and international, would clearly have to be carefully weighed in the balance before any future reintroduction of internment could be considered.

International Covenant on Civil and Political Rights

5.51 Article 9 of the International Covenant on Civil and Political Rights also contains safeguards in relation to detention which are incompatible with internment, but Article 4 provides for derogation from the obligations under the Covenant in terms similar to the corresponding provision for derogation in the Convention on Human Rights. No Irish case on internment has arisen for consideration under the Covenant, because the Covenant entered into force in 1976 and was ratified by Ireland in 1989, whereas internment was last in force in Ireland in 1962.

Position in the UK

5.52 The Committee notes that the power of internment in Northern Ireland, which had existed in different forms since 1922, was abolished in 1998 by the Northern Ireland (Emergency Provisions) Act. It also notes that, in its Consultation Paper on Legislation Against Terrorism,¹⁷⁹ the UK Government stated that, although it recognised the reasons behind calls for the reintroduction of internment, it had no plans at present to reintroduce it. The Paper stated that the Government “does not rule out for all time the reintroduction of the power to intern, but the setting aside of the criminal law in favour of executive action could only be contemplated exceptionally where the Government were convinced that the measure was likely to prove effective [and where a derogation was entered under the European Convention on Human Rights].” As a consequence, the legislation which followed the Consultation Paper, the Terrorism Act 2000, contained no provision for internment.

Committee’s views on the use of Internment

5.53 The Committee are divided on the question of internment.

5.54 A minority of the Committee, The Hon. Mr Justice Hederman, Professor Binchy and Professor Walsh, regard internment as so fundamentally in breach of the most basic rights and freedoms inherent in a society based on the rule

¹⁷⁹ CM. 4178

of law that they can conceive of no circumstances in which the use of internment could be justified. They are of the view that the very notion of internment is contrary to the general ideals of the European Convention on Human Rights and the principles of an effective democracy.

5.55 The majority of the Committee, however, take a different view. These members do not agree that the use of internment must be ruled out as a matter of principle in all circumstances. Instead, they view internment as a measure which could, under appropriate conditions, constitute a legitimate, exceptional response to exceptional circumstances.

Committee's views on the use of the 1940 Act

5.56 A majority of the Committee are of the view that the Offences against the State (Amendment) Act, 1940 is unsatisfactory and are opposed to the use of this legislation as it stands. Most members of the majority are of the view that the 1940 Act should be radically reformed along the lines which will be canvassed presently in this Chapter.

5.57 One member of the majority, Dr Hogan, holds the view that a provision for internment should never be part of the corpus of ordinary statute law and that if the State is to resort to such methods, it should enact such a new law providing for internment for a strictly limited period in accordance with carefully drafted resolutions promulgated pursuant to the emergency powers provisions in Article 28.3.3^o of the Constitution. Any such law should provide for far greater safeguards and restrictions than those contained in the 1940 Act. In addition, he believes that any such legislation should be accompanied by a derogation which accords with Article 15 of the Convention and the notification to the Secretary-General should be made public.

5.58 A minority of members are not opposed to the use of the 1940 Act as it stands at present. They take the view that while recognising the case for reform, they do not believe that any deficiencies are such as to rule out its use in appropriate circumstances pending the introduction of such reform. They accept that provision for internment should not in normal circumstances form part of the ordinary law and also accept that the achievement of the normalisation of security arrangements and practices, an objective set out in the Committee's terms of reference, would involve the repeal of the 1940 Act. They are of the opinion, however, that the timing of such a repeal involves a further consideration, *viz.* an assessment of whether the security

situation has developed to a degree that would safely permit the repeal of the Act. This involves a judgement which is, in their view, not for this Committee to make.

- 5.59 These members emphasise the point that for as long as the 1940 Act does remain in place, however widely cast or discretionary the terms of the Act might appear to be, internment could be introduced only in circumstances where the Government could satisfy Dáil Éireann of its necessity, or suffer the annulment of the proclamation by a resolution of the Dáil. The Government would also have to satisfy the European Court of Human Rights that the derogation from the Convention which would have to be made in support of internment was justified.
- 5.60 They also recall that the constitutionality of the 1940 Act has been upheld by the Supreme Court;¹⁸⁰ that the use of these provisions was in the past accepted, in the *Lawless* case, by the European Court of Human Rights as justified under the terms of the derogation from the European Convention on Human Rights. Such derogation was validly made at the time by the Irish Government in accordance with the provisions of the Convention and the Court found that the internment system provided for in the 1940 Act contained appropriate safeguards.

Specific issues within the 1940 Act which the majority consider unsatisfactory

- 5.61 Even if internment was ever considered to be a necessary option its introduction should not result in Government Ministers being conferred with unnecessarily wide powers affecting the individual's fundamental right to liberty. If, therefore, the 1940 Act is to be retained, the majority of the Committee believes that it is essential that key features of this legislation should be significantly amended.
- 5.62 Part II of the 1940 Act empowers the Government to bring the internment provisions into effect by a proclamation declaring that they are necessary to secure the “preservation of public peace and order” and that “it is expedient that Part II should come into force immediately”. There are no specific preconditions for the issue of such a proclamation, nor does the Government have to declare itself satisfied about any matters before issuing such a proclamation. The wording of the relevant statutory provisions appears to leave little room for judicial review,¹⁸¹ and the only independent check on the

¹⁸⁰Notwithstanding the arguments made in relation to the finality of that decision.

¹⁸¹Of course, in the light of Supreme Court decisions such as *The State (Lynch) v. Cooney*

need to issue a proclamation is the power retained by Dáil Éireann to pass a resolution annulling such a proclamation.¹⁸²

- 5.63 Once a proclamation has been issued, it remains in force until the Government decides to issue a further proclamation declaring that it is over¹⁸³ or until the Dáil passes a resolution annulling the earlier proclamation.¹⁸⁴ There are no provisions in the legislation to indicate when it would be appropriate to issue a terminating proclamation or to adopt such a resolution. Nor are there any mandatory provisions for periodic review. Judicial review of a failure to issue a terminating proclamation or to adopt such a resolution also appears to be a difficult, although perhaps not entirely impossible, prospect.¹⁸⁵ The obligation on the Government to furnish information on persons detained under the 1940 Act¹⁸⁶ does not amount to a periodic review of the need to retain the Act in force. In effect the Government is placed in a position to exercise almost full control over the introduction and retention of the internment provisions in the 1940 Act.
- 5.64 Of even greater concern is the strong executive control over the operation of the internment provisions in individual cases. Any Minister of State (and not just the Minister for Justice, Equality and Law Reform) may issue a warrant for the arrest of a named individual.¹⁸⁷ The far-reaching nature of this power is reflected in the fact that a Minister needs only to be “of opinion” that the individual in question is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of

[1982] IR 337 and *Kavanagh v. Government of Ireland* [1996] 1 IR 321, judicial review of this decision would not be excluded. In the latter case the Supreme Court indicated that the analogous power of the Government under s. 35 of the Offences against the State Act 1939 to make a proclamation bringing Part V of the 1939 Act (i.e., the Special Criminal Court) was “essentially political” in nature. Keane J. nonetheless indicated (at 365-6) that a decision of this kind could “not be regarded as forever beyond the reach of judicial control” and that the courts retained a jurisdiction “to intervene to ensure that the exercise of these drastic powers to abridge the citizen's rights is not abused by the arm of government to which they have been entrusted”.

¹⁸²1940 Act, s. 3(4).

¹⁸³Section 3(3).

¹⁸⁴Section 3(4).

¹⁸⁵In the light of the Supreme Court's judgment in *Kavanagh v. Ireland*, judicial intervention might be appropriate if the Government failed to keep the necessity for the existence of a proclamation under review.

¹⁸⁶By virtue of s. 9 of the 1940 Act, the Government is required to supply full particulars to the Houses of the Oireachtas in respect of the persons detained under the Act and the nature of the recommendations (if any) of the Commission established to inquire into such detention.

¹⁸⁷Section 4(1).

the State. There is no requirement that the individual should be suspected of engaging in terrorism, organised crime or indeed in any criminal activity. It might be sufficient, for example, that a Minister were of the opinion that the individual in question is engaged in lawful political or trade union activities which, in the Minister's opinion, is causing public order problems or is undermining the security of the State, although in those circumstances the Minister's decision would presumably be liable to be quashed on judicial review.¹⁸⁸

5.65 The far-reaching nature of the arrest power is further reflected by the fact that its availability is not dependent on a reasonable suspicion. It is quite sufficient merely that a Minister holds a subjective opinion as to the existence of the relevant, loosely defined matters.¹⁸⁹ Moreover, it appears that he can form this opinion on the basis of information which has come into his or her possession from any source, no matter how disreputable or unreliable. There is no requirement that his subjective opinion should be based on information submitted on oath by a member of the Garda Síochána or by any other appropriate authority.

5.66 The full significance of a Minister's power to order the arrest of an individual by warrant, and the ease with which it can be exercised, are apparent from the fact that the arrested individual can be detained indefinitely in a prison or other place prescribed by regulations made by a Minister. In effect, such an individual is being detained indefinitely on the subjective suspicion and direction of a Minister. There are no secondary or independent checks or reviews before the indefinite detention commences. There are no mandatory filtering mechanisms to sift out those individuals whose indefinite detention without trial cannot be justified even under the terms of a Government proclamation under the 1940 Act.

5.67 Accordingly, it is difficult to avoid the conclusion that taken at its most extreme, it enables every Minister of State to take out of public circulation any individual whom he or she considers to pose a significant threat to public order. Against this background, one must therefore regard the 1940 Act as

¹⁸⁸See, e.g., the dicta of Henchy J. in *The State (Lynch) v. Cooney* [1982] IR 337 and those of Blayney J. in *Kiberd v. Hamilton* [1992] 2 IR 257.

¹⁸⁹Section 55 of the 1939 Act (which was declared unconstitutional in *The State (Burke) v. Lennon* [1940] IR 136) had originally used the words "Whenever a Minister of State is satisfied...." These words were replaced by the words "Whenever a Minister of State is of opinion.." In *The State (Lynch) v. Cooney* [1982] IR 337, 378 Henchy J. said that these latter words connoted "a laxer and more arbitrary level of ministerial assessment" than the corresponding words of s. 55 of the 1939 Act.

constituting a draconian interference with fundamental rights to liberty, due process, freedom of expression and freedom of association. The majority considers that the powers in question are inconsistent with the basic tenets of democracy and the rule of law, and it is inappropriate that a liberal democracy should retain them on its statute book in the twenty-first century.

- 5.68 The extent to which the 1940 Act subordinates the basic liberty of the individual to ministerial convenience is further reflected in the extent of ministerial control over the release from detention of an individual who has been arrested under ministerial warrant. There are only three methods through which the detained individual can be released.
- 5.69 The first arises where a Government Commission, provided for by section 8 of the 1940 Act, reports that there are no reasonable grounds for his or her continued detention. This is dealt with further below.
- 5.70 The second case is where a Minister of State may by writing under his hand order the release of any person detained under the 1940 Act.¹⁹⁰ Where a Minister exercises this power, the person in question must be released immediately. It follows that a Minister can authorise the arrest and place of detention of an individual and the same Minister can determine when that person is released and, *ipso facto*, how long that person is detained. All of this can be done without the need to resort to any independent commission or judicial process. Moreover, there is no prescription of the circumstances in which it would be proper for the Minister to order an individual's release.
- 5.71 The only restriction on the Minister's control over the liberty of a detained individual arises where the individual exercises his right to apply in writing to the Government to have the continuation of his or her detention considered. In this event, the Government must refer the matter "with all convenient speed" to a Commission¹⁹¹ which will inquire into it and report back to the Government. If the Commission reports that no reasonable grounds exist for the detention of such person, he or she must be released with all convenient speed.¹⁹²
- 5.72 Not only does this procedure fail to protect the individual against unjustified detention in the first place, it also falls very far short of what might reasonably be expected for the protection of the individual against the unjustified

¹⁹⁰1940 Act, s 9.

¹⁹¹1940 Act, s 8(2)(a).

¹⁹²1940 Act, s 8 (2)(d).

extension of his or her detention. The Commission cannot realistically be considered to be independent of Government, at least in the sense in which that term is nowadays understood, having regard, *inter alia*, to the case-law of the European Court of Human Rights. The Commission is appointed by the Government “as soon as conveniently may be” after the 1940 Act is brought into force.¹⁹³ The members of the Commission are appointed and are removable by the Government¹⁹⁴ and one of its members must be a member of the Defence Forces.¹⁹⁵

5.73 The weakness and lack of independence of the Commission as a safeguard for the individual against executive oppression are also reflected in the statutory provisions governing the Commission's *modus operandi*. There is no express requirement that the Commission will hold a fair hearing in which the individual is given details of the case against him and an opportunity to test the allegations against him before reaching a judicial decision on the justification for the individual's detention, although this would surely now be judicially implied, having regard to the presumption of constitutionality and the application of the principle of fair procedures as set out in the *East Donegal* case-law.¹⁹⁶

5.74 Instead, the Commission is merely required to conduct an inquiry into the grounds of the individual's detention.¹⁹⁷ Although the Minister for Justice is obliged to provide all relevant information and documentation relevant to the inquiry called for by the Commission¹⁹⁸ this would be subject to issues of privilege and State security. Certainly, there is no specific provision giving the Commission access to the detained individual or the power to call witnesses. However, in the seminal *Lawless* case, the Detention Commission (which was presided over by Judge Ó'Briain) held a hearing at which both sides were legally represented and at which the cross-examination of senior Gardaí was permitted over the objections of counsel for the Minister.¹⁹⁹ If such a hearing were ever to take place in a modern era, it is overwhelmingly likely that the procedures adopted would at least conform to these elementary requirements of fair procedures. Constitutional requirements of fair

¹⁹³1940 Act, s 8(1).

¹⁹⁴1940 Act, s 8 (2)(a).

¹⁹⁵1940 Act, s 8(2)(b).

¹⁹⁶*East Donegal Co-Operative Ltd. v. Attorney General* [1970] IR 317

¹⁹⁷1940 Act, s 8(2)(b).

¹⁹⁸1940 Act, s 8(2)(c).

¹⁹⁹See Doolan, *op. cit.*, at pp. 49-58

procedures²⁰⁰ also seem to dictate that the suspect would be entitled to legal aid at any such hearing.²⁰¹

- 5.75 A Commission report will result in the release of the individual in question only if it finds that no reasonable grounds exist for the continued detention. Read in the light of the provisions set out above, this is tantamount to the individual having positively to prove his innocence, without necessarily knowing the full details of the case against him.
- 5.76 A further unsatisfactory feature of the internment powers in the 1940 Act is the absence of provision for an independent body to carry out automatic reviews of each individual case at regular intervals. The most that the 1940 Act does in this regard is oblige the Government to submit a report at least every six months to each House of the Oireachtas.²⁰² These reports shall furnish particulars of persons detained under the 1940 Act, including those in respect of whom the Commission has made a report, and persons released. This, however, falls very far short of a periodic review of the justification for the continued detention of each individual.
- 5.77 Taking all these matters into account, the majority of the Committee is of the view that the procedures provided for in the 1940 Act fall short of what might be regarded as satisfactory safeguards, even in the rarest of situations where it is considered that detention without trial might be the lesser evil. The majority is of this opinion, despite the fact that in *Lawless v Ireland*²⁰³ the European Court of Human Rights held that the provisions of the 1940 Act were not disproportionate to the exigencies of the situation which had justified Ireland's derogation from certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1957. The Court's somewhat cursory assessment of the procedure provided for by the 1940 Act, coupled with a greater willingness on the part of the Court since the early nineteen sixties to scrutinise the proportionality of measures introduced in an emergency, are reason to believe that the 1940 Act

²⁰⁰The Commission, however, ruled that it reserved the right to act on information which was not disclosed to Lawless or his advisors: see Doolan *op. cit.*, at 51. This would not be constitutionally acceptable today: see for example, *Geraghty v. Minister for Local Government* (No.2) [1976] IR 153.

²⁰¹See for example, *Kirwan v. Minister for Justice* [1994] 2 IR 417 where Lardner J. held that a detainee in a mental hospital was entitled to legal aid to enable him make his case for release to an ad hoc Advisory Committee established by the Government.

²⁰²1940 Act, s 9.

²⁰³(1961) 1 EHRR 15.

would be subjected to much greater criticism if these issues were to come before the Court again.

Recommendation

Majority view to retain the possibility of internment

5.78 *The majority of the Committee, hold the view that the use of internment can not be ruled out as a matter of principle in all circumstances. They view internment as a measure which could, under appropriate conditions, constitute a legitimate, exceptional response to exceptional circumstances.*

5.79 *One member of the majority, Dr Hogan, holds the view that a provision for internment should never be part of the corpus of ordinary statute law and that if the State is to resort to such methods, it should enact such a new law providing for internment for a strictly limited period in accordance with carefully drafted resolutions promulgated pursuant to the emergency powers provisions in Article 28.3.3^o of the Constitution.*

Minority view to prohibit the use of internment

5.80 *A minority of the Committee, The Hon. Mr. Justice Anthony J Hederman, Professor William Binchy and Professor Dermot Walsh are of the firm opinion that internment should not be part of our legal system because it violates important human rights which should be cherished by a democratic society based on principles of respect for due process. The Constitution characterises the liberty of the citizen as a core value. Denial of liberty, based not on what that citizen has done but rather on an apprehension by the Executive of what the citizen may do in the future, deprives the citizen of due process. It constitutes punishment for conduct that has not occurred. It violates the separation of powers and denies the citizen access to justice through the Courts.*

Majority view to amend the 1940 Act

5.81 *If it is decided to retain the 1940 Act, a majority of the Committee is of the view that the procedures and safeguards contained within it should be thoroughly recast. In such circumstances, the majority recommends that any revised internment provision must provide that:*

- *Only the Minister for Justice, Equality and Law Reform (as opposed to any Minister of the Government) should be empowered to make an internment order.*
- *The test contained in section 4(1) of the 1940 Act should be replaced by a far more stringent test, so that the Minister could not be empowered to order the internment of any person unless satisfied that such person had engaged in or was imminently about to commit certain specified serious offences.*
- *The Government should be statutorily obliged to reconsider the necessity for the introduction of internment at regular intervals. If the Government was not satisfied that the maintenance in force of the internment provisions was essential to ensure the security of the State, then it should be obliged to end the operation of those provisions.*
- *Provision should be made for the regular review by independent third parties of the necessity for the operation of the internment provisions.*
- *The Detention Commission should enjoy fixity of tenure for a reasonable period of years and the members thereof should be removable only following the passage of resolutions to this effect by both Houses of the Oireachtas. It is also inappropriate that any member of the Defence Forces should be eligible to sit on the Commission.*
- *The Commission should be statutorily obliged to hold its hearings in public, save where exceptional circumstances justified an in camera hearing.*
- *The Commission should be statutorily obliged to follow constitutionally required modern principles of fair procedure. Express provision should be made for granting legal aid to suspects in detention.*

Minority view to retain the 1940 Act as it stands

5.82 *A minority of the Committee are not opposed to the use of the 1940 Act as it stands at present. They take the view that while recognising the case for reform, they do not believe that any deficiencies are such as to rule out its use in appropriate circumstances pending the introduction of such reform.*

Minority view to abolish the 1940 Act

5.83 *A minority of the Committee, The Hon. Mr. Justice Anthony J Hederman, Professor William Binchy and Professor Dermot Walsh, for the reasons expressed earlier, object to the use of internment and therefore recommend the abolition of the 1940 Act.*

CHAPTER 6

SUBSTANTIVE OFFENCES RELATING TO THE SECURITY OF THE STATE AND OTHER MISCELLANEOUS PROVISIONS

- 6.1 In this chapter we examine the existing substantive offences relating to the security of the State and make recommendations for reform. There has been little controversy about the substantive offences. A sensitive policy of prosecutory discretion has meant that the outer limits of potential criminal liability for these offences have not been established. Clearly there have to be some offences in this context and the existing ones have worked out in practice very satisfactorily.
- 6.2 The Committee considered the possible strategy of recommending no changes in relation to the offences but decided, for two reasons, not to take this course. First, the offences were prescribed over sixty years ago to respond to the perceived problems of that time. Since then, obviously, matters have changed. The process of communication of subversive ideas has been transformed. While it may have been practicable to control printers in 1939, it is less clearly possible to control the dissemination of information, or misinformation, today by mobile phone, fax, e-mail and the internet.
- 6.3 Secondly, political philosophy in the broad sense is not the same today as it was in 1939. Freedom of speech, even hurtful, untrue and dangerous speech, is regarded more positively. Hierarchical deference has given way to egalitarian norms, which are not sympathetic to the notion that those in positions of political power and responsibility should be immunised from harsh attack: The Ireland of 2002 is a different place, culturally, from the Ireland of sixty-two years ago. There is a strong argument that a committee charged with the task of recommending reform of the law relating to offences against the State should not ignore the changed realities.
- 6.4 The approach the Committee has adopted is to identify those offences in respect of which it can quickly be established that no change is recommended; similarly, those offences where modest changes are recommended; and then to examine specific offences which require detailed analysis and on which there are differing views.

Offences where no change is recommended

6.5 Certain offences specified in the Offences against the State Acts seem, beyond argument, to represent necessary and appropriately crafted sanctions on subversive conduct. They are as follows:

- Section 6 of the 1939 Act (usurpation of functions of government)
- Section 15 of the 1939 Act (unauthorised military exercises)

Offences where modest changes are recommended

6.6 Certain other existing offences appear to be satisfactory and defensible, subject to the inclusion of specific protection for persons engaging in industrial relations disputes. These are the following:

- Section 7 of the 1939 Act (obstruction of Government)
- Section 8 of the 1939 Act (obstructing the President)
- Section 9 of the 1939 Act (interference with military or other employees of the State)

6.7 With regard to sections 7 and 8, the Committee recommends that the word “unlawful” be inserted before “intimidation” in both sections 7(1) and section 8(1). The purpose of making this change is to ensure that lawful industrial relations actions should not be criminalised.

6.8 With regard to section 9, the Committee of Independent Experts of the Council of Europe, in its 16th Report on the implementation of the European Charter, referred to this section and noted that it had not been repealed. It commented that “in effect [it] provides that civil servants may be prosecuted for taking strike action”.²⁰⁴ Noting that it had “never been used”,²⁰⁵ the Committee expressed the wish to know how the section had been affected by the Industrial Relations Act 1990. The reply by Ireland was to the effect that while section 9 had not been repealed, it had been “overtaken”²⁰⁶ by later legislation, including the 1990 Act, which “is the main legislative reference point in this regard”.²⁰⁷

²⁰⁴Page 9 of the Report.

²⁰⁵*Ibid.*

²⁰⁶*Ibid.*

²⁰⁷*Ibid.*

- 6.9 The Committee is agreed that section 9(2) must be repealed or, at the very least, restricted to members of the Garda Síochána and Defence Forces. Again the reason for this recommendation is that lawful industrial action should not be an offence under the Act.
- 6.10 We now turn to consider certain specific offences where detailed analysis and discussion is required.

Unlawful Organisations

- 6.11 Part III of the 1939 Act deals with unlawful organisations. It would be possible to structure a code of offences against the State which does not include provisions on these lines. The offence of criminal conspiracy could serve to deal with person establishing unlawful organisations or becoming members of them. The Committee nonetheless is of the view that proscribing particular organisations has merit in demonstrating public disdain for their activities.

Section 18

- 6.12 On the basis that there will continue to be criminal legal sanctions against unlawful organisations, the Committee considers that certain changes should be made to the scope of the existing offences. First, regarding the definition in section 18 of an “unlawful organisation”, paragraphs (a), (b) and (c) appear to the Committee to be unproblematic, and the Committee accordingly recommends their retention. Paragraph (f) appears to the Committee to be inappropriate and out of harmony with the contemporary values as to the permissible scope of political speech and action. Accordingly, the Committee recommends its abolition.
- 6.13 Paragraphs (d) and, more particularly, (e) appear to the Committee to embrace certain conduct that should render an organisation unlawful, but the manner in which they are drafted seems to some degree over-inclusive. Paragraph (e) renders unlawful an organisation that advocates the attainment of lawful objects by non-criminal, albeit unlawful, means. This appears to include a breach of contract, for example. All organisations committing the tort of inducing a breach of contract appear to fall within the scope of Part III of the 1939 Act. Again, many of these will be trade unions. The Industrial Relations Act 1990, and its predecessor, the Trade Disputes Act 1906, give legal protection (and in the case of trade unions, immunity from tort liability) in relation to such conduct, yet Part III applies with all its awesome

implications. Paragraph (d) could prove problematic in industrial relations contexts or other quasi political disputes.

6.14 The Committee did not find it easy to decide upon how paragraphs (d) and (e) should be formulated, but concluded that they could be replaced with a single paragraph, in the following terms:

(d) engages in, promotes, encourages or advocates the commission of any criminal offence or the obstruction of, or interference with, the administration of justice or the enforcement of the law, with the purpose of undermining the authority of the State.

6.15 The additional requirement of proof that the purpose of engaging in the impugned conduct is to undermine the authority of the State ensures that the context must be a subversive one.

Sections 19 to 22

6.16 The power to proscribe unlawful organisations is contained in section 19, which provides that:

If and whenever the Government are of opinion that any particular organisation is an unlawful organisation, it shall be lawful for the Government by order....to declare that such organisation is an unlawful organisation and ought, in the public interest, to be suppressed.

6.17 The Government may “by order, whenever they so think proper, amend or revoke a suppression order²⁰⁸ and notice of the making of such an order is to be published in *Iris Oifigiúil*.²⁰⁹ The making of such a suppression order is declared to be:

...conclusive evidence for all purposes other than an application for a declaration of legality that the organisation to which it relates is an unlawful organisation within the meaning of this Act.²¹⁰

²⁰⁸Section 19(2).

²⁰⁹Section 19(3).

²¹⁰Section 19(4). In *Sloan v. Special Criminal Court* [1993] 3 IR 528 the High Court upheld the constitutionality of this sub-section. Costello J. (at 532) rejected the argument that section 19(4) impermissibly invades the judicial domain:

It seems to me that the Oireachtas, by the Act of 1939, established procedures by which an organisation could be declared an illegal organisation. Instead of declaring that membership of named organisations would be illegal, the Oireachtas provided that

6.18 Section 20 provides for declarations of legality. Section 20(1) permits any person claiming to be a member of an organisation which has been the subject of a suppression order to apply to the High Court for a declaration of legality within thirty days after the date of publication of the order in *Iris Oifigiúil*.

Section 20(2) provides that, where in respect of such an application, the High Court is satisfied that:

...the organisation to which such application relates is not an unlawful organisation, it shall be lawful for the High Court to make a declaration of legality in respect of such organisation.

6.19 Section 19(3) provides that the High Court shall not make a declaration of legality unless the applicant for such a declaration (or some other person) "gives evidence in support of the application and submits himself to cross-examination by counsel for the Attorney General."²¹¹

6.20 Two suppression orders have been made to date. The first was made in 1939 in respect of an organisation styling itself the "Irish Republican Army", otherwise "Oglaigh na hEireann"²¹²; the second was made in 1983 in respect of an organisation styling itself the "Irish National Liberation Army".²¹³

The power to suppress an organisation

membership of an illegal organisation which had been designated by the Government would be illegal. This provision of the Act is not, in my judgment, an impermissible infringement of the judicial power. If an order is made under the section then the justiciable dispute which may be before the court is whether an accused is a member of an illegal organisation and not whether the organisation itself is illegal.

With respect, it does not seem to the Committee that this case was correctly decided and it appears at odds with the earlier Supreme Court decision in *Maher v. Attorney General* [1973] IR 140. The effect of this sub-section is to prevent a person charged with membership of an illegal organisation demonstrating that the suppression order was invalid and seeks clearly to oust the jurisdiction of the High Court to determine a justiciable controversy, namely, whether or not a particular organisation is, in fact, an unlawful organisation.

²¹¹However, section 39(6) provides any evidence adduced by or on behalf of the applicant for a declaration may not subsequently be given in evidence against the applicant in any prosecution for the offence of being a member of the organisation to which such application relates.

²¹²Unlawful Organisation (Suppression) Order 1939 (SR & O No. 162 of 1939).

²¹³Unlawful Organisation (Suppression) Order 1983 (SI No. 7 of 1983).

- 6.21 While it is true that some jurisdictions, most notably Germany,²¹⁴ entrust this decision to the courts rather than to the executive, this is largely because of historic and political considerations specific to those jurisdictions.
- 6.22 What are the historic and political considerations specific to this jurisdiction? It is scarcely necessary for the Committee to set out the all too unpleasant facts: ever since the ending of the Civil War in 1923, successive Governments have been forced to deal with secretive and well-armed paramilitary organisations that have enforced a rigorous code of discipline on their members and supporters. Not merely has one of these organisations traditionally professed to regard itself as the legitimate government of the State, but these organisations reject the legitimacy of the State and, have repudiated ordinary democratic values.
- 6.23 It is true that mere rejection of the legitimacy of the State and the repudiation of democratic values would probably not in itself justify the imposition of a banning order.²¹⁵ But these organisations have gone much further: they usurped the functions of Dáil Éireann by purporting, without democratic authority, to declare war in the name of the Irish people and have engaged in a campaign of violence. Over the years these organisations have frequently resorted to murder, racketeering and intimidation. It is plain that the making of the two suppression orders in question was thoroughly justified, and the Committee sees no merit whatever in the suggestion that such banning orders are at odds with the right of association.²¹⁶ The organisations in question have

²¹⁴Article 21(2) of the German Constitution provides that:

Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

²¹⁵Although a ban on a political party which “had the intention of destroying the democratic and pluralistic order” would not contravene the guarantee of association contained in Article 11 ECHR: *OZDEP v. Turkey* (2001) 31 EHRR 27, para. C73. The German Constitutional Court has ruled that mere advocacy of the overthrow of the democratic order is not sufficient to justify the imposition of ban, but the situation is quite different where the party “has a fixed purpose constantly and resolutely to combat the free democratic order” and takes steps to implement this plan: *Communist Party* case 5 BVerf GE 85 (1956).

²¹⁶See, for example, the arguments of Walker, “Paramilitary displays and the PTA” (1992) *Juridical Review* 90. The European Court of Human Rights has noted that only “convincing and compelling reasons can justify restrictions on such [political] parties’ freedom of association”: see *United Communist Party of Turkey v. Turkey* (1998) 26 EHRR 121, para. 57; *Socialist Party v. Turkey* (1999) 27 EHRR 51; *OZDEP v. Turkey* (2001) EHRR 27. But judged by the standards applied by the European Court in the Turkish cases, the two bans imposed on illegal organisations under section 19 of the 1939 Act seem entirely justifiable by ECHR standards.

not been banned because they and their members advance particular views or because they reject the legitimacy of the State. Nor does the Committee believe that these organisations have been banned merely for what has been described as “presentational”²¹⁷ reasons, i.e. that such a ban “expresses the condemnation of the community and averts the danger of public outrage being expressed in public disorder”.²¹⁸ Rather, these organisations have been banned principally because they have constituted themselves as private armies which have usurped the authority of the State by engaging in paramilitary violence. No democratic State can afford to allow such a challenge to its authority to remain unchecked.

6.24 Against this background, the Committee believes it entirely appropriate that the decision to prescribe illegal organisations should continue to rest with the Government, subject always to a full right of appeal to the High Court. Any decision to proscribe an organisation must be based on a security and intelligence assessment, and it is the Government which is in the best position to make a judgment on the threat posed by such organisations. Moreover, there may well be pragmatic considerations which would justify a decision not to impose a ban on a particular organisation at a particular time,²¹⁹ and, here again, the Government is best placed to make that judgment.

Recommendation

6.25 *The decision to proscribe illegal organisations should continue to rest with the Government, subject always to a full right of appeal to the High Court.*

The power to ban foreign terrorist organisations

²¹⁷Report of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (London, 1983) Cm. 8803, para. 207.

²¹⁸Walker, "Briefing on the Terrorism Act 2000" (2000) 12 *Terrorism and Political Violence* 1, 16. The internal quotation is from another official British Report on the operation of the Northern Irish Emergency Powers Act: Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978 (London, 1984)(Cm. 9222) at para. 414.

²¹⁹For example, intelligence assessments may suggest that elements within a particular organisation may be about to abandon paramilitary violence and that imposing a banning order may simply play into the hands of extremists. Cf. the comments of Walker, "*Briefing on the Terrorism Act*" to the effect that proscription may prove counterproductive by increasing "the difficulties of infiltration and monitoring so as to achieve the criminalization of those members engaged in violence". But, again, it is the Government which is best placed to make a judgment of this sort.

- 6.26 As the Committee has noted elsewhere in its Report, the whole tenor of the Offences against the State Acts has heretofore been to focus on the activities of domestic paramilitary organisations. This, not unnaturally, was the principal concern of the drafters of the 1939 Act and, indeed, all subsequent amendments to that legislation, whether during the emergency period from 1939 to 1945 or during the Northern Ireland conflict itself from 1969 on.
- 6.27 This was, perhaps, especially true of section 18 (dealing with illegal organisations) and section 19 (suppression orders). Thus, for example, section 18(b) declares that an organisation which “advocates, encourages, or attempts the procuring by force, violence or other unconstitutional means of an alteration of the Constitution” shall be an illegal organisation. But there may well be foreign terrorist organisations that would not fall within this definition, given that the status of Ireland’s Constitution is irrelevant to them. Likewise, such organisations may not be concerned with treasonable activities directed against the State²²⁰ or even the maintenance of a military or armed force “in contravention of the Constitution or without constitutional authority”.²²¹
- 6.28 As it happens, this Report was largely completed before the events of 11 September 2001 took place. But even before these events, the Committee had formed the view that it would be necessary to expand the 1939 Act to ensure that, where appropriate, foreign terrorist groups would be brought within its ambit. In making this recommendation, the Committee is acutely aware of the difficulties in drafting a satisfactory definition of terrorism in this context.
- 6.29 Of course, in some instances, the 1939 Act already applies, irrespective of the character of the organisation to which a particular suspect may belong. Thus, for example, it is immaterial that a person detained under section 30 of the 1939 Act in respect of explosive offences belongs or does not belong to an illegal organisation. It is likewise immaterial that he is or may be a member of a para-military organisation which happens to be proscribed under section 18 or suppressed under section 19 or one which is not.
- 6.30 Nevertheless, the Committee is of the view that it would be appropriate that section 19 of the 1939 Act should be amended to ensure that the Government would have the power to make a suppression order in respect of foreign terrorist organisations.

²²⁰Section 18(a).

²²¹Section 18(c).

Recommendation

6.31 *The Committee is of the view that section 19 of the 1939 Act should be amended to ensure that the Government would have the power to make a suppression order in respect of foreign terrorist organisations.*

Notice of the making of a suppression order

6.32 At present, the structure of section 19 is such that a banning order may be made by the Government without notice to the organisation concerned, but any person affected by the making of the order may appeal within thirty days from the date of publication in *Iris Oifigiúil* to the High Court under section 20(1). This legislative structure presents due process issues, since the constitutional right to fair procedures normally requires advance notice of the making of an order of this kind.²²² It may, however, also be noted that fair procedures generally do not require advance notice if the order under challenge does not take effect prior to an appeal.²²³

6.33 Given the nature of the organisations that are likely to be the subject of a banning order and the circumstances in which such an order is likely to be made, the Committee does not think it appropriate that the Government should be required to give advance notice of the making of a suppression order. It seems incongruous if, for example, the Government were to be required to serve advance notice of the making of such an order on a paramilitary organisation. The Committee believes, instead, that the due process considerations can best be met by an amendment to section 20, which would provide that the banning order would not take permanent effect until the organisation affected had had an opportunity of appealing the decision to the High Court.

Recommendation

6.34 *Given the nature of the organisations that are likely to be the subject of a banning order and the circumstances in which such an order is likely to be made, the Committee does not think it appropriate that the Government should be required to give prior notice of the making of a suppression order. The Committee believes, instead, that the due process considerations can best be met by an amendment to section 20 which would provide that the banning order would not take permanent effect*

²²²See, for example, *Irish Family Planning Association Ltd. v. Ryan* [1979] IR 295.

²²³See, for example, *The State (McCann) v. Racing Board* [1983] ILRM 67 and *Gammell v. Dublin County Council* [1983] ILRM 413.

until the organisation in question had an opportunity of appealing the decision to the High Court.

The right of appeal

6.35 Section 20(1) provides for a right of appeal against the making of a banning order to the High Court. Such an application must be brought within thirty days of the publication of the order in the High Court.²²⁴ Section 20(2) provides that:

Where, on an application under [section 20(1)], the High Court, after hearing such evidence as may be adduced by the applicant or by the Attorney General, is satisfied that the organisation to which such application relates is not an unlawful organisation, it shall be lawful for the High Court to make a declaration of legality in respect of such organisation.

6.36 It seems that the onus remains on the applicant to establish the legality of the organisation. Moreover, the scope of the appeal to the High Court remains unclear, but recent authority suggests that the grounds for the exercise of appellate jurisdiction in cases of this kind are broadly comparable to the judicial review grounds of reasonableness, irrationality or error of law.²²⁵

6.37 The Committee considers that some aspects of the right of appeal are not satisfactory and it recommends the following changes.

- First, the right of appeal should not be confined (as it presently is) to thirty days within the publication of the making of the order in *Iris Oifigiúil*. The thirty-day rule is capable of working an injustice, especially where the nature of the banned organisation has changed over the years. Instead, the Committee considers that it ought to be open to any person affected by the banning order to exercise a right of appeal to the High Court at any time. To avoid the possible risk of a multiplicity of appeals and the relitigation

²²⁴It may be noted that, prior to the Terrorism Act 2000, the corresponding British provisions in the Prevention of Terrorism Acts did not provide for any such independent review. Section 5 of that Act provides for the establishment of the Proscribed Organisations Appeal Commission which can hear appeals against the making of banning orders by the British Home Secretary. The Commission cannot hear appeals on the merits, but instead must apply standard judicial review grounds (such as compliance with procedural fairness and rationality): see section 5(3) of the 2000 Act.

²²⁵See, e.g., *M. & J. Gleeson Ltd. v. Competition Authority* [1999] 1 ILRM 401; *Orange Communications Ltd. v. Director of Telecommunication Regulation (No.1)* [2000] 4 IR 136; *Orange Communications Ltd. v. Director of Telecommunication Regulation (No.2)* [2000] 4 IR 159.

of matters which have in substance already been adjudicated, consideration might be given to requiring a potential appellant to seek the leave of the High Court before commencing such an appeal, where the banning order has already been upheld in earlier proceedings.

- Secondly, section 20(2) should also make it clear that the High Court's jurisdiction is not confined to narrow, judicial review-type grounds of review.
- Finally, section 20 presently requires any appellant to give evidence in person and to submit to cross-examination. In practice, any appellant will have to lead evidence to show that the organisation in question ought not to have been banned. However, the present requirement of section 20 that the appellant give evidence in person seems unnecessarily restrictive and ought to be deleted.

Recommendations

6.38 *The Committee considers that aspects of the appeal procedure prescribed by section 20 are unsatisfactory. It accordingly recommends that:*

(a) the right of appeal should not be confined (as it presently is) to thirty days within the publication of the making of the order in Iris Oifigiúil.

(b) section 20(2) should make it clear that the High Court's jurisdiction is not confined to narrow, judicial review-type grounds of review.

(c) the present requirement of section 20 that the appellant give evidence in person is unnecessarily restrictive and ought to be deleted.

The onus of proof in such proceedings

6.39 The Committee considered a suggestion that section 20(2) ought to be amended to make it clear that the onus of proving the illegality of the organisation concerned should rest with the Government. While this would reverse the present rule, it might be argued that the banning of such an organisation is such a dramatic step that the onus should rest on the Government to positively establish such illegality. Moreover, it might be said

that the placing of the onus of proof on the Government provides a further safeguard against possible abuse.

6.40 On balance, however, the Committee felt that it could not endorse this suggestion. If the Committee's other recommendations are accepted, the scope of section 19 will be significantly reduced so that the Government will be entitled to ban only an organisation that is actively engaged in paramilitary activity. If the organisation in question is genuinely committed to democratic methods, this will be directly within its own knowledge and ought not to be difficult to demonstrate.

Recommendation

6.41 *No change is recommended in relation to the question of the burden of proof in such proceedings.*

Section 21

6.42 Section 21 makes it an offence for a person to be a member of an unlawful organisation. Subsection 3 makes it a good defence to show:

(a) that he did not know that such organisation was an unlawful organisation,

or

(b) that, as soon as reasonably possible after he became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he ceased to be a member thereof and disassociated himself therefrom.

6.43 It should be noted that section 6 of the 1998 Act makes it an offence, punishable with imprisonment for life, for a person to direct, at any level of its structure, the activities of an organisation in respect of which a suppression order has been made under section 19 of the 1939 Act.

6.44 It is clear that a person may be convicted under section 21, in contrast to section 6 of the 1998 Act, even where the unlawful organisation has not been the object of a suppression order under section 19. In practical reality, however, it is not likely that a prosecution would be taken before to the making of a suppression order.

- 6.45 The Committee has examined the question of whether or not membership of an unlawful organisation should continue to be an offence. A majority of the Committee is satisfied that it should. There is some division, however, as to whether or not the offence should be restricted to membership of an unlawful organisation which has been so declared. In favour of this restriction, it may be argued that there are difficulties in placing on people who contemplate becoming members of organisations the obligation of forming a judgement as to their unlawful character, under pain of being prosecuted for an offence. It is true that section 21(3) affords a defence to a person charged with the offence to show that he did not know that the organisation was an unlawful one. This imposition of the burden of proof onto the accused may be considered inappropriate and arguably violative of the constitutionally protected right of association. Moreover, it may fail to give adequate specificity to the scope of the offence in that a person reasonably assessing the character of a projected course of action - joining a particular organisation - might not be able to determine whether it would render him liable to be prosecuted if placed under a burden of proving his innocence.
- 6.46 On the other hand, there could be real problems with unlawful organisations, which have been suppressed, “reinventing” themselves, albeit with some modification. If the membership offence were consequent on suppression *de novo*, a lacuna would arise. Most members of the majority consider that this factor renders it imprudent to qualify the membership offence by making it consequent on the suppression of the organisation. Moreover, it may be that terrorist activity could occur where the organisation responsible was hitherto unknown to the authorities but whose aims and activities plainly come within the scope of section 18. It should also be noted that under the proposed definition of an unlawful organisation the prospect of a person stumbling unknowingly into membership is not very likely.
- 6.47 Section 21 does not define membership. Does this mean that the concept is impermissibly uncertain in its scope? The majority of the Committee does not consider that this is so. There must be an organisation of which the accused is a member. The concept of membership necessarily involves objectively provable conduct. While it is not essential that membership should require any particular formalities relating to application for membership and acceptance into membership or oath-taking, the concept implies participation either of this formal character or informally through conduct. It is true that in the latter case, a judgement would have to be made as to whether the degree of participation was sufficiently strong to warrant the characterisation of informal membership, but the criminal law contains several instances of liability for participation in wrongdoing where an

assessment of the intensity of that participation is required. Aiding and abetting an offence is a clear example.

- 6.48 A majority of the Committee also considers that the present offence, proscribed by section 21, should be supplemented by another offence, making criminal the knowingly rendering of assistance to an unlawful organisation in the performance or furtherance of an unlawful object. This is because there may be cases where individuals are closely associated with unlawful organisations and actively further their ends, but are not, or cannot be proven to be, members. The view of Professor Dermot Walsh, on the offence of membership, is contained in a general dissent on various issues at the end of the report.

Recommendation

- 6.49 *A majority of the Committee is satisfied that membership of an unlawful organisation should continue to be an offence. In addition, a majority of the Committee also considers that the present offence of membership, proscribed by section 21, should be supplemented by another offence, viz. “to knowingly render assistance to an unlawful organisation in the performance or furtherance of an unlawful object”.*
- 6.50 *The dissenting view of Professor Dermot Walsh in relation to the offence of membership of an unlawful organisation is set out at the end of the report.*

Use of opinion evidence and other special evidential rules

- 6.51 One of the difficulties associated with offences relating to membership of illegal organisations is the difficulty of proof. These organisations do not have membership lists or other external *indicia* by which membership can readily be proved. With a view to countering these difficulties, the Offences against the State Acts seek “to assist any prosecution under section 21 [of the 1939 Act] by providing certain evidential shortcuts”.²²⁶ Of course, this is a very common phenomenon, since when the Oireachtas creates new statutory offences, it often creates special statutory evidential rules and presumptions; the statute books are replete with instances of this kind. Nevertheless, since such rules and presumptions can sometimes operate in a manner that is contrary to the presumption of innocence or is otherwise arbitrary and unfair, it is appropriate that such rules should be the subject of careful scrutiny.

²²⁶Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester, 1989) at p. 248.

6.52 The special evidential rules provided for by the Offences against the State Acts are contained in sections 24 and 26 of the 1939 Act and in section 3 of the Offences against the State (Amendment) Act 1972. The Committee will now proceed to an examination of these rules in turn.

Section 24

6.53 The first of these evidential techniques is contained in section 24 of the 1939 Act. This section provides that in any prosecution under section 21, proof that

...an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such person was a member of the organisation at the time alleged in the said charge.²²⁷

6.54 This section has on occasion led to the conviction of persons charged with membership simply by reason of their possession of incriminating documents, even if on occasion these documents might be regarded as equivocal or where the accused has otherwise denied membership of an illegal organisation.²²⁸

6.55 However, in *O’Leary v. Attorney General*²²⁹ the Supreme Court clarified that section 24 did not affect any legal burden resting on the prosecution. Here the plaintiff had been charged with membership of an illegal organisation following the discovery of his possession of thirty seven copies of a poster showing the picture of a man in paramilitary uniform brandishing a rifle bearing the legend “IRA calls the shots”. At his trial in the Special Criminal Court the plaintiff accepted that he had the posters in his possession, but said that he had them in his capacity as a member of Sinn Féin and denied that he was a member of the IRA. The Special Criminal Court rejected his denial of membership and convicted him under section 21. His appeal was dismissed by the Court of Criminal Appeal.²³⁰

6.56 At this point the plaintiff challenged the constitutionality of section 24 on the ground that it effectively reversed the onus of proof. In the High Court,

²²⁷An “incriminating document” is defined by section 2 of the 1939 Act as meaning:

...a document of whatsoever date or bearing no date, issued by or emanating from an unlawful organisation or appearing to be so issued or so to emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of any unlawful organisation.

²²⁸See, e.g., *The People (Director of Public Prosecutions) v. O’Leary* (1988) 3 Frewen 163.

²²⁹[1995] 1 IR 254 (SC); [1993] 1 IR 102 (HC).

²³⁰*The People (Director of Public Prosecutions) v. O’Leary* (1988) 3 Frewen 163.

Costello J. held that the guarantee of the right to trial in due course of law contained in Article 38.1 meant that the legal burden of proof beyond reasonable doubt must always rest with the prosecution. However, Costello J. explained why he considered that the section did not infringe the plaintiff's constitutionally guaranteed rights:

...It is important to appreciate how the section is drafted. It provides that proof of possession by an accused of an incriminating document (that is one emanating from an unlawful organisation) "shall, without more, be evidence until the contrary is proved" that the accused in whose possession the document was found was a member of an unlawful organisation. But this does not impose an obligation on the accused to give evidence so as to avoid a conviction. This section, it seems to me, only shifts an evidential burden on to an accused to whom it is applied. An "incriminating document" is defined in the Act in very wide terms so that it would embrace, for example, a letter from the leader of an unlawful organisation to the accused as well as a propaganda leaflet or poster extolling the aims of an unlawful organisation. "Possession" in the Act is a wide concept and an accused could have in his "possession" an incriminating document in different circumstances; it could be when hidden under the floorboards of the house in which he was living or, at the other end of the scale, when distributed at a public meeting. *So, the nature of the incriminating document and the circumstances in which it is possessed may in some circumstances give rise to a very strong inference of the accused's association with an unlawful organisation whilst in others any such inference might be very slight. If it was intended that the court could not evaluate the evidence and that it "must" convict in the absence of exculpatory evidence I think the section would have been differently worded. As actually drafted it seems to me that the court may evaluate and assess the significance of the evidence of possession and if it has a reasonable doubt as to the accused's guilt of membership of an unlawful organisation it must dismiss the charge, even in the absence of exculpatory evidence.* If this is so then the section does not infringe an accused's right to the presumption of innocence.²³¹ (emphasis supplied)

This analysis was expressly approved on appeal by the Supreme Court.

6.57 The italicised words make it clear that all that section 24 does is to make the fact of possession of an incriminating document *evidence* of membership. It

²³¹[1993] 1 IR 102, 112.

clearly does not reverse the legal burden of proof beyond reasonable doubt, which remains at all times on the prosecution. Some of the confusion on this point probably derives from the use of the words “until the contrary is proved”. At first glance, this language may serve to create the impression that the legal burden of proof is shifted or that the Court *must* convict the accused unless he gives evidence which positively disproves the statutory inference which is drawn from the fact of possession. However, as *O’Leary* makes clear, this is not a correct reading of the section. In particular, it must be noted that the words “until the contrary is proved” come immediately after the words “shall, without more, be evidence”, i.e., that the fact of possession of incriminating documents shall be evidence of membership of an illegal organisation unless it is shown not to constitute such evidence.

6.58 The more fundamental question is whether or not there is a sufficiently rational link between the possession of an incriminating document and membership of an illegal organisation. Clearly there are some instances where the link would appear to be so strong that the transfer of the evidential burden would neither be unfair nor contrary to common sense.²³² On the other hand, it is easy to think of other instances where there is no rational link between the possession of an incriminating document and membership of an illegal organisation. Thus, for example, there is no reason to believe that just because a journalist is found in possession of a press release issued by an illegal organisation it may be inferred, in the absence of contrary evidence, that he or she was a member of an illegal organisation. Yet, this is the potential effect of section 24, which makes possession of such documentation evidence (in the absence of contrary proof) of such membership.

6.59 It is perfectly true that, as both the High Court and Supreme Court were anxious to stress in *O’Leary*, the courts are not bound by section 24 to draw such an inference²³³ and that they are perfectly free to weigh and evaluate such evidence. A majority of the Committee are of the view, however, that

²³²See, e.g., *The People (Director of Public Prosecutions) v. Treanor*, *The Irish Times*, 30 July 1980 (where the accused were convicted of membership of an illegal organisation where they had been found in possession of a document described as “Instructions for training officers, IRA”) and *The People (Director of Public Prosecutions) v. Carroll*, *The Irish Times*, 8 December 2001 (where documents containing information on home-made explosives and improvised mix were found in the accused’s bedroom). In this type of case, section 24 does no more than “give legal effect to an inference which it is [in any event] reasonable to draw from facts which the prosecution establish”. (*O’Leary v. Attorney General* [1993] 1 IR 102, 110, per Costello J.).

²³³In the example of the journalist in possession of a press release emanating from an unlawful organisation, this presumably would be an instance of where, in the words of Costello J. in *O’Leary*, “any such inference might be very slight”.

this only answers one objection to section 24 and, with respect, does not deal at all with the other fundamental objection, namely, that the Oireachtas has attempted to declare, on an admittedly presumptive basis, one thing to be evidence of another thing, when as a matter of ordinary experience and common sense this would often not be the case.²³⁴

- 6.60 The majority feel that, in part, the difficulty here is caused by the very wide definition of “incriminating document” in section 2 of the 1939 Act, so that, for example, it embraces statements and press releases purporting to emanate from an illegal organisation.²³⁵ If this definition was more tightly drawn so that it embraced the kind of documents which, as a matter of practical experience and common sense, only members of illegal organisations might reasonably be expected to have in their possession (such as training manuals), there could be no constitutional or other objection to the inference which section 24 allows to be drawn. On the other hand, if this very wide definition is retained, then section 24 should be recast so as to provide that possession of such documentation could be evidence of membership of an illegal organisation only where the possession was of such a kind as to give rise to a reasonable suspicion that the accused was a member of an unlawful organisation.
- 6.61 Two members of the Committee are of the view that section 24, as it has been interpreted by the Courts is a necessary and proportional evidential provision which seeks to deal with the special difficulties in proving membership of unlawful organisations. In particular, they disagree with the contention of the majority that the definition of “incriminating document” is too wide and that it should be more tightly drawn to embrace only documents which only members of unlawful organisations might be expected to have in their possession, such as training manuals. This contention, they feel, skips too lightly over the real definitional difficulties involved in any such distinction and, more fundamentally, takes insufficient account of the point emphasised by the courts, that the weight to be given to the evidential burden created by section 24 is a matter for the court in each case, and that while the nature and

²³⁴It may be noted in this regard that in *O’Leary*, Costello J. quoted with approved from the judgment of the US Supreme Court in *Leary v. United States* 395 US 5 (1969) where it was said that “...a statutory presumption cannot be [constitutionally] sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the other is arbitrary because of lack between the two in common experience.”

²³⁵Section 2 defines “incriminating document” as meaning “...a document of whatsoever date, or bearing no date, issued by or emanating from an unlawful organisation or appearing to be so issued or so to emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of an unlawful organisation.”

circumstances of possession may in some case give rise to a very strong inference, in others the inference will be very slight. It seems, therefore, to the minority that there is no reason to fear that section 24 is in any way likely to be used oppressively or unfairly against journalists or other persons (including of course, by the very nature of their job, members of An Garda Síochána) who although not members of unlawful organisations, may possess incriminating documents. On the contrary, in their view the courts have made it clear that they will, in each case, assess the significance and value of the evidence of possession. These members, therefore, believe that no change is required to section 24.

Recommendation

6.62 *The Committee recognises that, in the light of O’Leary section 24 merely shifts the evidential burden and does not at all affect the legal burden of proof, which must at all times rest with the prosecution.*

Majority view to amend Section 24

6.63 *A majority of the Committee nevertheless considers that section 24 is not entirely satisfactory as it stands, principally because it is easy to think of cases where it might have the effect of transferring the evidential burden to an accused in circumstances where it would be unfair to do so and also because it could readily have the effect of declaring, on an admittedly presumptive basis, one thing to be evidence of another thing, when as a matter of ordinary experience and common sense this would often not be the case. It accordingly recommends the deletion of section 24 in its present form.*

6.64 *The majority of the Committee suggest that section 24 might be re-cast so as to provide that possession of such documentation could only be evidence of membership of an illegal organisation where the possession was of such a kind as to give rise to a reasonable suspicion that the accused was a member of an unlawful organisation.*

Minority view to abolish Section 24

6.65 *Three members of the majority, The Chairman, Mr. Justice Hederman, Professor Binchy and Proferror Walsh, being opposed to artificial statutory inferences of this kind, are opposed to this suggested redrafting on the basis that the section itself is unnecessary because it goes no further than expressing, in statutory form, a process of inferential reasoning which a Court would be obliged to adopt in the absence of such a provision. Their views and recommendations are set out fully at page 155.*

Minority view to retain Section 24 as it stands

6.66 *A minority of the Committee consider that section 24 is satisfactory as it stands, on the basis that the courts have made it clear that they will assess the significance and value of evidence of possession in each case. Therefore, in their view, no change is required.*

Section 26

6.67 Section 26 of the 1939 Act provides that:

Where in any criminal proceedings the question whether a particular treasonable document, seditious document or incriminating document was or was not published by the accused (whether by himself or in concert with other persons or by arrangement between himself and other persons) is in issue and an officer of the Garda Síochána not below the rank of Chief Superintendent states on oath that he believes that such document was published (as the case may be) by the accused or by the accused in concert with other persons, such statement shall be evidence (until the accused denies on oath that he published such documents either himself or in concert or by arrangement as aforesaid) that the accused published such document as alleged in the said statement on oath of such officer.

6.68 Section 26 may be regarded in many ways as a precursor of the opinion evidence provisions of section 3(2) of the 1972 Act. There are two principal objections to section 26.

6.69 First, the language of the section may serve to create the impression that the burden shifts to an accused. But if one applies the *O'Leary* analysis to this section, it seems clear that all it does is to shift the evidential burden to an accused following the evidence of a Chief Superintendent. The court remains perfectly free to evaluate the evidence of the Chief Superintendent. Moreover, if the accused does not give evidence, the court is not obliged to convict.

6.70 The second objection is that section 26 purports to give evidential status and weight to something which may have no probative or evidential value at all. Since a similar objection arises in the case of the vastly more important section 3(2) of the 1972 Act, the Committee proposes to postpone its discussion of this issue until it has examined this sub-section.

Section 3 of the 1972 Act

6.71 Section 3 of the 1972 Act has three distinct features which the Committee proposes to consider in turn. Section 3(1)(a) provides that oral or written statements by an accused person implying or leading to a reasonable inference that he or she was a member of an unlawful organisation shall be evidence of that fact. Section 3(1)(a) and section 3(1)(b) provide that the conduct of an accused person implying or leading to a reasonable inference that he or she was a member of an unlawful organisation shall be evidence of that fact. Section 3(2) deals with the opinion evidence of a Chief Superintendent.

Section 3(1)(a): oral or written statements implying membership

6.72 Section 3(1)(a) provides in relevant part that:

Any statement made orally, in writing or otherwise...by an accused person implying or leading to a reasonable inference that he was at a material time a member of an unlawful organisation shall, in proceedings, under section 21 of the Act of 1939, be evidence that he was then such a member.

6.73 The Committee cannot see that this sub-section is objectionable from the point of view of principle. Even at common law, statements against interest of this kind are admissible by way of exception to the hearsay rule,²³⁶ and written or oral statements of this kind from an accused often constitute highly probative evidence.

Recommendation

6.74 *No change is required.*

Section 3(1)(a) and (b): conduct of an accused

6.75 Section 3(1)(a) provides in relevant part that:

...any conduct by an accused person implying or leading to a reasonable inference that he was at a material time a member of an unlawful organisation shall, in proceedings, under section 21 of the Act of 1939, be evidence that he was then such a member.

²³⁶See, for example, the comments of Law Reform Commission, *The Rule against Hearsay* LRC Working Paper No. 9 (1980) at p. 129:

At present one party to an action may give evidence of a statement made by or behalf of the other party which is adverse to the latter's case. Such statements, called admissions, may be proved both in civil and criminal cases. In the latter an admission may be sufficient to sustain a conviction.

6.76 “Conduct” is originally defined by section 3(1)(b) as including:

(i) movements, actions, activities or association on the part of the accused person,²³⁷ and

(ii) [an] omission by the accused person to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself conclusive.

6.77 The only occasion in which the word “conduct” in this context has been the subject of consideration by an appellate court appears to be *The People (Director of Public Prosecutions) v. McGurk*.²³⁸ In this case, the appellant had been charged with several other co-accused of membership of an illegal organisation and the prosecution relied on the opinion evidence tendered by a Chief Superintendent, together with the conduct of the accused at what appears to have been a paramilitary funeral. There was evidence that a large party of Gardaí had assembled to prevent any paramilitary displays or shooting over the coffin of the deceased. The Gardaí encountered the accused, along with some others, immediately before the arrival of the funeral cortege. The accused fled and ran across fields for some considerable distance to avoid being apprehended. At one stage, Mr. McGurk took up an apparent small arms firing position to deceive pursuing Gardaí and to slow their pursuit. Upon the arrest of the accused, the Gardaí discovered that they had plastic bags with them containing paramilitary type apparel.²³⁹ However, their evidence was that they were unaware of the contents of the plastic bags.

6.78 In the case of two other accused, the Special Criminal Court found that all that they had done was to carry the plastic bags, but that this did not amount to “conduct” sufficient to prove membership of an unlawful organisation within the meaning of section 3:

The court is satisfied that ‘conduct’ in that sense means, in the context of the facts of this case, performing an act relating to violence or the planning thereof to be carried out then or at some future time in the interests of or on behalf of a proscribed organisation. Mere assistance

²³⁷This extended definition of conduct was inserted by section 4 of the Offences against the State (Amendment) Act 1998.

²³⁸[1994] 2 IR 579.

²³⁹Described by O’Flaherty J. ([1994] 2 IR 579, 584) as including “military camouflage jackets and trousers, army web belts, black balaclavas and black woollen gloves”.

of the nature afforded by the accused to the IRA on the occasion in question falls short of “conduct” as contemplated by the legislature.²⁴⁰

6.79 However, the Special Criminal Court convicted Mr. McGurk on the membership charge based on his “conduct” in adopting the small arms firing position and in his efforts to resist arrest. However, the Court of Criminal Appeal set aside the conviction for the reasons thus explained by O’Flaherty J.:

As regards his conduct in taking up a small arms firing position, while this is consistent with some knowledge of firearms, it does not seem to be conduct that points with a degree of precision to membership of an unlawful organisation. The same would apply in relation to the applicant’s resisting his arrest. These two matters are equivocal; they might be the sort of conduct that a member of an unlawful organisation would engage in but in our judgment the “conduct” relied upon must have some connection with membership of an unlawful organisation so as to give rise to the reasonable inference, as the section requires, that he was a member of an unlawful organisation.²⁴¹

6.80 It is true that *McGurk* was decided before the definition of conduct in section 3(1)(b) was extended by section 4 of the 1998 Act to include “movements, actions, activities or associations” on the part of the accused person. Nevertheless, this does not affect the central conclusion of *McGurk*: namely, that the conduct must have some connection with membership of an unlawful organisation as to give rise to the reasonable inference that the accused was a member of that organisation.²⁴²

²⁴⁰Quoted by O’Flaherty J., [1994] 2 IR 579, 586-587.

²⁴¹[1994] 2 IR 579, 588.

²⁴²Indeed, well before the amendment of the word “conduct” by section 4 of the 1998 Act, this point had been made by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Cull* (1980) 2 *Frewen* 36 where Gannon J. said (at 41) that:

...proof of the unlawful membership of an illegal organisation should normally consist of statements by the accused or of conduct and actions of the accused of a nature which prima facie participate in or aid and support the activities of an organisation shown to be illegal.

In any event, however, even, it seems, without the benefit of these statutory evidential rules, the Special Criminal Court is free to draw its own inferences from the totality of the evidence. Thus, for example, in *The People (Director of Public Prosecutions) v. Carroll*, *The Irish Times*, 24 October 2001 the accused was a farmer who was found in possession of £2,000 sterling in cash, 40 cotton gloves and 100 feet of piping. While the Court said that the discovery of these items was individually “innocuous”, when viewed collectively together with the accused’s silence in the face of fifteen hours of interrogation, it concluded that the accused was a member of an unlawful organisation and convicted him accordingly.

- 6.81 As thus construed, section 3 (subject to the issue of newspaper reports which we shall presently consider) does no more than allow a court of trial to draw inferences as to membership from relevant circumstantial evidence. Moreover, as is clear from *McGurk*, the conduct in question must not be equivocal, but must clearly refer to the membership of the unlawful organisation. A majority of the Committee considers that this aspect of section 3, therefore, imports no arbitrary or contrived evidential rule, but seems merely to state in statutory form a rule of evidence which the court would presumably otherwise apply in the absence of this statutory provision. One member of the Committee objects to the inclusion of the word “association” in section 3(1)(b)(i), since it opens up the possibility of the accused being contaminated merely by the company he keeps, even if he is unaware that his companions are members of an unlawful organisation.
- 6.82 Different considerations apply in the case of the failure to deny published reports, which, by section 3(1)(b)(ii), is included in the definition of conduct. It is true that the failure to deny such reports might be regarded in some instances as probative (or, at least, corroborative) of actual membership, but this is far from universally true. The failure to deny the report might arise for any number of reasons, ranging from the evident implausibility of the newspaper account in question to a unwillingness to give currency to a report from an obscure source to general indifference. Moreover, just as with aspects of section 24, it seems unacceptable that the Oireachtas should artificially deem a certain state of affairs (i.e., the failure to deny published reports) to be evidence from which an inference of membership might be drawn when the reports themselves might be entirely valueless.²⁴³

Recommendation

- 6.83 *The definition of “conduct” in section 3(1)(b)(ii) should be deleted, so that the failure to deny published reports should not be regarded as*

²⁴³In this respect this feature of section 3(1)(b)(ii) seems at odds with the requirements of Article 6(2) ECHR. Thus, for example, in *Telfner v. Austria* (2002) 34 EHRR 207 the applicant was found guilty of a serious motoring offence involving his mother’s car. The applicant denied that he had driven the car on the evening in question, but made no further statement. In convicting the applicant the local courts relied heavily on a local police report to the effect that the applicant was the principal user of the car. The European Court concluded that this violated the applicant’s right to silence was protected by Article 6(2) ECHR since none of this constituted a case “against the applicant which would have called for an explanation from his part.” On this basis, it is equally objectionable to permit inferences to be drawn from the failure to deny newspaper reports, since this equally would not seem to constitute a case against the applicant calling for an explanation from his part.

evidence from which an inference as to membership of an unlawful organisation could be made by the court of trial.

Section 3(2): Opinion evidence by Chief Superintendent

6.84 Section 3(2) provides that:

Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.

6.85 *The People (Director of Public Prosecutions) v. Ferguson*²⁴⁴ is still the leading case in relation to the interpretation of this sub-section. Here the accused had been convicted by the Special Criminal Court of membership of an unlawful organisation following the giving of evidence by a Chief Superintendent under this sub-section, and the issue before the Court of Criminal Appeal was whether or not the Special Criminal Court was correct in convicting on the basis of that evidence alone.

6.86 Such evidence was held to be sufficient in the particular circumstances of this case, but O'Higgins C.J. noted:

With regard to an expression of belief, obviously the weight to be attached to it depends on a wide variety of matters; the person who expressed the belief, the circumstances in which it was expressed and, in particular, whether the expression of belief was challenged or not.

6.87 The Court observed that the accused had not denied the charge, for, if he had done so:

[The] value and cogency to be attached to the expression of the Chief Superintendent's belief would obviously be very much diminished. That did not take place in the present case and when an expression of belief was not denied when the opportunity to deny it was there; when the accused man did not give evidence in the face of an expression of belief by the Chief Superintendent, then obviously...the cogency and weight to be attached to that expression of belief was considerably enhanced.²⁴⁵

²⁴⁴Court of Criminal Appeal, 31 October 1975.

²⁴⁵See also *The People (Director of Public Prosecutions) v. Gannon*, *The Irish Times*, 1 June

- 6.88 The effect of section 3(2) was neutralised in the wake of *Ferguson* where, in practice, the Special Criminal Court acquitted defendants who had denied membership where the Chief Superintendent's opinion represented the only prosecution evidence.²⁴⁶ The Special Criminal Court also tended to acquit where the Chief Superintendent claimed privilege in respect of the sources of his belief. But section 21 convictions were secured in cases where membership had been denied on oath by the accused, even where the other supporting evidence might be regarded as equivocal.²⁴⁷
- 6.89 In *O'Leary v. Attorney General* the plaintiff had challenged the constitutionality of section 3(2)(in addition to his challenge to section 24) in the High Court on the ground that it violated the presumption of innocence, but this was rejected by Costello J.:

What this section does is to make admissible in evidence in certain trials statements of belief which would otherwise be inadmissible. The statement of belief it proffered at the trial becomes "evidence" by virtue of this section in the prosecution case against the accused. Like other evidence it has to be weighed and considered and the section cannot be construed as meaning that the court of trial *must* convict the accused in the absence of exculpatory evidence. The accused need not give evidence and he may ask the court to hold that the evidence does not establish beyond reasonable doubt that he is a member of an unlawful organisation. Should the court agree he must be acquitted.²⁴⁸

2001 where the accused was found guilty on the basis of the opinion of Chief Superintendent alone, with the Court noting that the accused "could have weakened the effect of such evidence by giving evidence in court but had declined to do so".

²⁴⁶Indeed, Robinson, *The Special Criminal Court* (Dublin, 1974) had earlier concluded (at 34), having surveyed the newspaper clippings of section 21 cases heard by the Special Criminal Court during the 1973-1974, period that:

It is now clear that if the accused either gives evidence himself, or makes an unsworn statement denying that he is a member of an unlawful organisation, then, despite the belief of the Chief Superintendent, the Special Criminal Court will give the accused the benefit of the doubt.

For a similar view, see Hogan and Walker, *op.cit.*, 249, 260.

²⁴⁷See, for example, *The People (Director of Public Prosecutions) v. O'Leary* (1988) 3 *Frewen* 163 (possession of poster bearing legend "IRA calls the shots"); *The People (Director of Public Prosecutions) v. McGurk* [1994] 2 IR 579 (running across fields to escape arrest at paramilitary funeral, reversed on appeal); *The People (Director of Public Prosecutions) v. Walsh*, *The Irish Times*, 14 April 1994 (possession of doggerel rhyme suggesting that the accused was member of an illegal organisation).

²⁴⁸[1993] 1 IR 102, 112

- 6.90 While the Committee, as a whole, respectfully agrees with this analysis of the sub-section so far as the presumption of innocence is concerned, it could be argued that it does not deal with one other fundamental objection to the opinion evidence provisions: namely, that the Oireachtas has given evidential status to an expression of opinion which may not merit that status. There is no requirement, for example, that the Chief Superintendent should have personal knowledge of the accused or that the opinion is based on material facts (such as conduct, movements or status) which tend to prove membership of the illegal organisation.
- 6.91 Indeed, it is the view of the majority that the opinion evidence rule appears to violate three established rules of evidence. First, while acknowledged experts are permitted to give evidence of opinion, their expertise must be established and their opinion is generally confined to scientific, medical, engineering and cognate matters, and the application of such knowledge to factual data, in accordance with established professional norms.²⁴⁹ Secondly, even experts, strictly speaking, are not allowed to give evidence on the ultimate issue, in this case whether or not the accused is a member of an illegal organisation, although this rule is often in practice ignored.²⁵⁰ Finally, the Chief Superintendent's opinion may be based on a mixture of hearsay and other inadmissible evidence which would not, in themselves, be admissible as evidence.²⁵¹
- 6.92 A minority of the Committee do not agree with the criticisms made of section 3(2) by the majority. In particular, they do not agree with the assertion that the fundamental objection to opinion evidence is that the Oireachtas has given evidential status to an expression of opinion which may not merit that status. The Courts have made clear, as evidenced in the quotations set out above, that the weight to be attached to an expression of belief depends on a wide variety of matters, including the person who expressed the belief, the

²⁴⁹But note the comments of Keane, *The Modern Law of Evidence* (London, 1996)(at 460) to the effect that “a police officer with qualifications and experience in accident investigation may give expert opinion evidence on how a road accident occurred”, quoting *R. v. Murphy* [1980] QB 434. But this is different from saying that the police officer may give expert evidence to the effect that, in his view, the accused is a member of an illegal organisation

²⁵⁰In *Director of Public Prosecutions v. A & BC Chewing Gum Ltd.* [1968] 1 QB 159 Lord Parker CJ noted that more and more inroads had been made into the rule against expert opinion evidence on ultimate issues and observed (at 164):

Those who practice in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and although technically the final question “Do you think that he was suffering from diminished responsibility” is inadmissible, it is allowed time and time again without any objection.

²⁵¹cf. the comments of Keane, *op.cit.*, (at 461): “The existence of facts upon which an expert's opinion is based must be proved by admissible evidence.”

circumstances in which it was expressed, and whether or not the expression of belief was challenged. Nor are the minority convinced by the majority's argument that the opinion evidence provisions violate established rules of evidence. These rules were established at common law to deal with evidential issues in general, whereas the opinion evidence provisions are specific, targeted provisions which must be assessed on their own merits. The mere fact that modern statutory provisions may depart from the common law in some respects is not, in itself, an argument against those provisions. Common law provisions, they feel, surely cannot be regarded as inviolable to the extent of preventing statutory reform and thereby fossilising the law in particular areas. This is particularly so in an area such as the law on evidence, where they feel that there is a strong case for arguing that statutory reform is needed.

Recommendation

Majority view to treat opinion evidence as corroborative

6.93 *The Committee recognises the practical difficulties in proving membership of a clandestine and illegal organisation. The Committee is divided as to the appropriate action to take in relation to this section. A majority, considers that section 3(2) of the 1972 Act (and, by extension, section 26 of the 1939 Act) is not entirely satisfactory as it stands. The majority is of the view that section 3(2), if it is to be retained, should further provide that no person should be convicted of the offence of membership solely on the basis of such opinion, but that such opinion might be treated by the courts as corroborative evidence in appropriate cases.*

6.94 *Beyond this the majority itself is divided. Most members of the majority, while recognising the theoretical evidential and other objections to the reception of such evidence, consider that it is essential that the sub-section should be retained. They are of the view that, by designating an officer of such senior rank as the person to give such evidence, the Oireachtas sought to create a mechanism whereby an authoritative opinion on the issue of membership could be tendered to the court. They point, moreover, to the fact that the Chief Superintendent can be cross-examined as to the basis of his opinion; that post-Ferguson a denial of membership on oath will invariably negate the force of the opinion evidence and that in the light of O'Leary, the sub-section merely serves to transfer an evidential burden and is not inconsistent with the presumption of innocence. Finally, if the majority's recommendations are accepted, a further safeguard will be that no person can be convicted solely on the basis of the opinion of the Chief Superintendent alone.*

- 6.95 *A minority disagrees. One member of this minority, Dr Hogan, considers that the essentially pragmatic justifications offered by the majority in respect of the retention of the sub-section are insufficient to surmount the constitutional and evidential objections to this sub-section which have already been outlined. Three other members, The Chairman Mr Justice Hederman, Professor Binchy and Professor Walsh, agree with this analysis, but go further and reiterate their objection to artificial rules of evidence such as those contained in this sub-section. Their views and recommendations on the issue are set out fully at page 155.*
- 6.96 *Some members agree with the analysis in so far as they feel that section 3(2) of the 1972 Act (and by extension section 26 of the 1939 Act) merely provide for the transfer of an evidential burden, and is not inconsistent with the presumption of innocence. They do not accept, however, that the case has been made out for the amendments proposed. There is no reason, in their view, why a senior Garda could not or should not, based on an assessment of Garda intelligence from a number of sources, including from Gardaí who personally know the individual in question, form a reasonable belief as to whether that person is a member of an unlawful organisation. Nor are they persuaded that opinion evidence should be corroborative only. In their view the courts have made it clear that they will, in each case, assess the value and weight to be attached to opinion evidence, taking account of all the circumstances. It follows, in the view of these members, that there should be no prohibition on the courts accepting opinion as evidence where the circumstances justify this.*

Forfeiture of assets following a banning order.

- 6.97 Section 22 provides for the civil forfeiture of all assets and property of an illegal organisation immediately following the imposition of the ban and the transfer of such assets to the Minister for Justice. In practice, this section seems ineffective and is, to all intents and purposes, unworkable. Moreover, the European Court of Human Rights has noted that such measures “may be taken only in the most serious cases”.²⁵² While it is also true that the constitutionality of civil forfeiture measures contained in the (now lapsed) Offences against the State (Amendment) Act 1985 has been upheld, this has been in the context of where the legislation contained special safeguards designed, *inter alia*, to compensate any innocent citizen who could establish

²⁵²*OZDEP v. Turkey* (2001) 31 EHRR 27, para. 45.

that his assets were improperly confiscated.²⁵³ In the absence of such safeguards, the constitutionality of section 22 seems somewhat more doubtful.

Recommendation

Majority view to abolish section 22

6.98 *For all these reasons a majority of the Committee does not think that it serves any useful purpose to retain section 22 and accordingly recommends its deletion.*

Minority view to retain section 22

6.99 *A minority while acknowledging the absence of an effective mechanism, together with appropriate safeguards, for giving effect to the forfeiture of assets of an unlawful organisation, do not agree that the provision should be deleted. In their view, it can hardly be argued that such assets ought not to be forfeited, bearing in mind the proposed narrowing of the definition of unlawful organisations which will effectively mean that only terrorist and para-military organisations will be covered. The solution instead, in their view, is to provide an effective mechanism for the recovery of such assets along the lines of the 1985 Act (or, indeed, the Proceeds of Crime Act 1996).*

Treason

6.100 Although strictly outside the terms of reference of the Committee, since the offence of treason is the subject of legislation (the Treason Act 1939) that does not fall within the Offences Against the State Act, the Committee considered it necessary to consider this offence and make recommendations in its regard.

6.101 Article 39 of the Constitution provides as follows:

Treason shall consist only in levying war against the State, or assisting any State or person or inciting or conspiring with any person to levy war against the State, or attempting by force of arms or other violent means to overthrow the organs of government established by this Constitution, or taking part or being concerned in any such attempt.

²⁵³*Clancy v. Ireland* [1988] IR 326. *Murphy v. Mitchell*, Supreme Court, 18 October, 2001.

- 6.102 The Treason Act 1939 merely recites the terms of Article 39 and the fact that, “in order that the said Article 39 may be fully effective, it is necessary that provision should be made by statute for the punishment of persons who commit or are accessories to the commission of treason”.
- 6.103 The Act goes on to provide in section 1(1) that every person who commits treason within the State is liable on conviction to suffer death, and in section 1(2) that every person who, being an Irish citizen or ordinarily resident within the State, commits treason outside the State is liable on conviction to suffer death. Section 1(4) prevents conviction on a charge of treason on the uncorroborated evidence of one witness. Section 2(1) makes it an offence to encourage, harbour or comfort any person whom one knows or has reasonable grounds for believing is engaged in committed treason. This is subject to a similar requirement as to corroboration: section 2(2).
- 6.104 Misprision of treason is an offence under section 3. The offence is drafted in such a way as to require everyone with knowledge that treason is “intended or proposed” to be committed or is being committed, to disclose this fact to the authorities.
- 6.105 The offence of treason has not caused controversy, probably because there have been no prosecutions for treason under the 1939 Act. It nonetheless is worth considering.

Recommendation

- 6.106 *The Committee is of the view that the distinction between citizens and non-citizens as regards their respective ranges of liability is not appropriate, particularly considering the breadth of the definition of Irish citizenship and the ease with which it is possible today to damage national security from outside the borders of the State.*
- 6.107 *As regards the question of whether misprision of treason should continue to be unlawful now that misprision of felony is no longer an offence, the Committee is of the view that there should be an offence of failure to inform the authorities about potential or actual treason, but that this offence should be premised on the absence of “lawful excuse or justification”,²⁵⁴ to allow for possible immunity in appropriate cases.*

Sedition

²⁵⁴cf. the Criminal Law Act 1976, section 8.

6.108 Article 40.6.⁰ⁱ of the Constitution provides that “[t]he publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law”. Sedition is an offence at common law. It consists in uttering seditious words, publishing seditious libels and conspiracy to do an act for the furtherance of a seditious intention.²⁵⁵

6.109 In *The Queen v McHugh*,²⁵⁶ O’Brien LCJ accepted as correct Stephen’s definition of “seditious intention” in his *Digest of the Criminal Law*. The complete definition (not all of which was there quoted) is as follows:

A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty’s subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst His Majesty’s subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty’s subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to secure their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty’s subjects, is not a seditious intention.

6.110 In English and Canadian decisions, the courts have held that there must be proof of incitement to violence for the purpose of disturbing constituted authority. The Law Reform Commission, in its *Consultation Paper on the Crime of Libel*, takes the view that this extra requirement is not part of Irish law. The Commission refers to the broad definition of offence of treason which is contained in Article 39 of the Constitution. It comments:

²⁵⁵Kenny’s *Outlines of Criminal Law*, para. 426(19th ed., 1966).

²⁵⁶[1901] 2 IR 569, at 578.

If the written publication of matter inciting to violent overthrow of constitutionally grounded organs of government is treason under our Constitution, it would seem that sedition is something else.²⁵⁷

6.111 Perhaps this conclusion does not necessarily follow from the overlap that would otherwise have to be acknowledged. The Law Reform Commission of Canada has identified just such an overlap in the Canadian legislation, but regards it as an instance of poor drafting.²⁵⁸

6.112 A question that arises is whether section 10(1) of the Offences against the State Act 1939 is a statutory rendition of the common law offence of seditious libel or prescribes an offence separate from it. It provides as follows:

It shall not be lawful to set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document

(a) which is or contains or includes an incriminating document, or

(b) which is or contains or includes a treasonable document, or

(c) which is or contains or includes a seditious document.

6.113 A seditious document is defined by section 2 as including:

(a) a document consisting of or containing matter calculated or tending to undermine the public order or the authority of the State, and

(b) a document which alleges, implies, or suggests or is calculated to suggest that the government functioning under the Constitution is not the lawful government of the State or that there is in existence in the State any body or organisation not functioning under the Constitution which is entitled to be recognised as being the government of the country, and

(c) a document which alleges, implies, or suggests or is calculated to suggest that the military forces maintained under the Constitution are not the lawful military forces of the State, or that there is in existence in the State a body or organisation not

²⁵⁷Law Reform Commission, *Consultation Paper on the Crime of Libel* (August 1991), para 83.

²⁵⁸Working Paper No. 49, *Crimes Against The State*, p.27(1986).

established and maintained by virtue of the Constitution which is entitled to be recognised as a military force, and

(d) a document in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation.

This definition does not contain any requirement that there be advocacy of violence.

6.114 The Defamation Act 1961, which contains detailed provisions regarding offences of criminal libel, does not refer to seditious libel. This has led to speculation that the 1961 Act was drafted on the assumption that section 10(1) of the 1939 Act represents a statutory encapsulation of, rather than supplement to, the common law offence of seditious libel.

6.115 It has been necessary for the Committee to consider what recommendations it should make in relation to sedition and the publication of seditious documents. First we considered the common law offence of sedition (on the assumption that it has not been implicitly abolished by section 10(1) of the 1939 Act).

6.116 There are strong arguments for recommending repeal of the offence. It is no longer part of the law in a number of other common law jurisdictions, and the Law Reform Commission of Canada recommend its repeal in the following terms:

The offence of sedition provides another example of an outdated and unprincipled law. The original aim of the crime of sedition was to forbid criticism and derision of political authority, and as Fitzjames Stephen pointed out, the offence was a natural concomitant of the once prevalent view that the governors of the State were wise and superior beings exercising a divine mandate and beyond the reproach of the common people. With the coming of age of parliamentary democracy in the nineteenth century, government could no longer be convinced as the infallible master of the people but as their servant, and subjects were seen to have a perfect right to criticise and even dismiss their government. Indeed it is essential to the health of a parliamentary democracy such as Canada that citizens have the right to criticize, debate and discuss political, economic and social matters in the freest possible manner. This has already been recognised by our courts and now the Canadian Charter of Right and Freedoms provides additional

guarantees of political freedom of expression. Is it not odd then that our Criminal Code still contains the offence of sedition which has as its very object the suppression of such freedom?²⁵⁹

- 6.117 In Ireland the constitutional protection of free speech is admittedly more qualified. Nonetheless, the idea that serious, *bona fide*, critique of the institutions of State, with no advocacy for violence, should involve criminal responsibility for sedition seems hard to justify. Perhaps that is an argument in favour of legislative clarification that the offence of sedition does indeed involve proof of such advocacy, but, if this is what is proposed, the reply may be that the offence of treason already captures such advocacy, so why, at this time, should a new duplication be proposed?
- 6.118 Moreover, so far as the administration of justice is concerned, scurrilous attacks on the judiciary constitute the offences of contempt of court and, in some instance, interference with the course of justice. The Law Reform Commission some years ago made detailed proposals for reform of contempt of court.
- 6.119 The Law Reform Commission, in its Report on Criminal Libel in 1991, recommended the abolition with replacement of the common law offence of seditious libel. In its *Consultation Paper on the Crime of Libel*, it stated its conclusion as follows:

We accept that in the area of sedition the absence of prosecution does not of itself indicate that the necessity for the offence is removed. However, we have a number of objections to the common law offence. Its ambit is unsettled and if it refers, as we have suggested, not to advocacy of violence but to matter which undermines the authority of the State, it is dangerously close to incompatibility with Article 40.6.1^o.i, which specifically refers to “rightful liberty of expression, including criticism of Government policy”. As an offence it has an unsavoury history of suppression of government criticism and has been used as a political muzzle.

Furthermore, the subject matter of the offence is now punishable in accordance with provisions of Irish legislation. Although this legislation leaves some definitional problems, and perhaps other difficulties which we have not addressed, it is preferable to the common law offence and must necessarily be read in the context of the Constitutional envisagement of treasonable and seditious matter.

²⁵⁹*Ibid.*

We are of the view that the common law offence is incompatible with the Constitutional guarantees of free speech and would require re-definition to become legitimate. This is unnecessary in the light of the existing provisions of Irish law dealing with seditious matter.²⁶⁰

6.120 As can be seen from this statement, one of the reasons why the Law Reform Commission considered it desirable to make its recommendations for abolition of the common law offence of sedition was that the matter was dealt with by section 10(1) of the 1939 Act.

Recommendation

6.121 *The Committee recommends the removal from the 1939 Act of references to a “seditious document”. The reasons for doing so are as follows:*

(i) The offence of treason (and, thus, the definition of “treasonable document” in section 2 of the Offences against the State Act 1939) already embraces sedition. There is no need for duplication; indeed, duplication is poor legal drafting.

(ii) Sedition without advocacy of violence is another word for a harsh critique of existing political structures. Stephen’s distinction between negative and positive criticism is impossible to draw in practice without entering into strongly political disputation. Courts should not be called on to engage in such a process.

(iii) The criteria contained in paragraphs (b), (c) and (d) of the definition of “seditious document” are too broad. Every newspaper editor has offended against paragraph (d). As regards paragraphs (b) and (c), scholarly debate about the legality of the provenance of existing political and constitutional structures should not be rendered criminal.

6.122 *The Oireachtas might, however, wish to preserve criterion (a) and the latter parts of criteria (b) and (c). If this were so, a new generic title other than “seditious document” might be preferred. The advantage would be to separate completely the publication of these documents from the offence of seditious libel (which it has been suggested should be abolished). The new generic title could be “subversive document” or simply “unlawful document”.*

²⁶⁰Law Reform Commission, *Consultation Paper on Crime of Libel* (August 1991), para 217.

Offences relating to documents

6.123 *The Committee is of the view that the offence relating to the printing of certain documents contained in sections 10, 11, 13 and 14 of the 1939 Act are overbroad, outdated in the modern era of the internet and effectively unenforceable. The committee recommends that they should be repealed. With regard to section 12, which makes it an offence to possess treasonable, seditious or incriminating documents, the Committee considers that the offence should be recast to lay an emphasis on the purpose underlying possession of the document. Possession of documents should be an offence only where it is part of a process of providing active support for, or advocating, advancing or furthering the activities of an unlawful organisation falling short of actual membership.*

Section 25 and the closure of buildings

6.124 Section 25(1)(as amended by section 4 of the Criminal Law Act 1976) permits a Chief Superintendent to direct the closure of any building for a period of 12 months where he is satisfied that a building “is being used or has been used for the purposes, direct or indirect, of an unlawful organisation”. Section 25(2) permits the closing order to be extended for a further twelve months, but section 25(6)(as inserted by section 4(b) of the Criminal Law Act 1976) provides that any such closing order shall not be in operation for more than three years. Section 25(3) permits any person “with an estate or interest in the building to which such closing order relates” to apply to the High Court to quash the order. Such an order may be set aside if the High Court “is satisfied having regard to all the circumstances of the case” that the making of such an order “was not reasonable”. Where a closing order is in force, then by section 25(4)(a) it is provided that “it shall not be lawful for any person to use or occupy the building to which such closing order relates or any part of such building”²⁶¹ and every person who uses or occupies the building in breach of the order is guilty of an offence carrying a maximum penalty of three months imprisonment.²⁶²

6.125 So far as the Committee can ascertain, there has been only one instance of where a closing order has been made. This was in respect of the Sinn Féin offices at Kevin Street, Dublin in the autumn of 1972. This prompted an application to the High Court under section 25(3) by the lessee of the

²⁶¹“Building” is defined by section 25(5) as including “part of a building and also all outhouses, yards and gardens within the curtilage of the building”.

²⁶²Section 25(4)(c).

building: see *Ó'Brádaigh v. Fanning*²⁶³ Kenny J. described the power to make a closing order as “sweeping” because “so long as a closing order is in force, no one can use the premises for any purpose”. The judge nonetheless affirmed the closing order because there was evidence that the premises had been used by persons who had been convicted in the past of membership of illegal organisations and by others who more recently had been convicted of firearms offences. In these circumstances, Kenny J. held that the Chief Superintendent could reasonably conclude that the premises were being used, directly or indirectly, for the purposes of an illegal organisation. In his view, the purposes referred to in section 25 included meetings and the exchange of information. Kenny J. acknowledged that there might be circumstances in which the making of an order would be unreasonable, for example where a few rooms of a large building (such as a hotel) had been used by the illegal organisation. Kenny J. found this not be the case here, since the evidence pointed to the fact that much of the building had been used for the purposes of an illegal organisation and that this user had not ceased at the time of the making of the order.

- 6.126 Given that section 25 has been used on only one occasion to date, and since to all intents and purposes the section has fallen into disuse, the Committee is of the view that on this ground alone the section ought to be repealed. As the Committee has made clear in its recommendations regarding other provisions of the 1939 Act (for example, section 10), there is little point in retaining on the statute books statutory provisions of this character where experience has shown that there is no prospect whatever that such provisions would be deployed.
- 6.127 However, quite apart from this particular consideration, the Committee is of the view that, as a matter of principle, the section is entirely unsatisfactory. It also considers that the compatibility of the section with either the Constitution or the European Convention of Human Rights is, at best, doubtful and for these reasons it concludes that the section ought to be repealed.
- 6.128 Among the unsatisfactory features are the following.
- First, it is not clear whether or not section 25 requires due notice to be given to the persons affected by the proposed closing order. The structure of the section suggests otherwise in that the contemplated remedy is to appeal to the High Court against the making of the closing order. But the constitutional obligation imposed on the State by Article 40.3.1⁰ seems to require that (save in cases of extreme urgency) advance notice must be

²⁶³*The Irish Times*, 25 November 1972.

given before such a drastic order interfering with property rights and other interests could be made.²⁶⁴ It is, of course, true that section 25(3) permits an appeal by the affected person to the High Court, but this is in the context of where the order must be confirmed unless the Court is satisfied that it is unreasonable. Again, it is unsatisfactory as a matter of principle that such a drastic order could be made (apparently without notice) and that in appellate proceedings the onus would rest on the person affected to have the order set aside. The normal rule in such comparable circumstances would be that due notice would be required to be given and that the person applying for the order would carry the burden of proof of demonstrating that the order ought to have been made.

- Secondly, the “sweeping” nature of the order radically affects not only the property rights of the persons affected, but could clearly severely prejudice their right to earn a livelihood (as protected by Article 40.3.1⁰). It is very difficult to see how such a section could withstand a constitutional challenge on these grounds in the light of the modern case-law.²⁶⁵ Moreover, any attempt to make such a closing order in respect of a private dwelling would be utterly at odds with the constitutional guarantees contained in Article 40.5.

Recommendation

6.129 *In the light of the foregoing, the Committee is of the view that section 25 should be repealed in its entirety.*

Section 28: Prohibition on meetings in the vicinity of the House of the Oireachtas

6.130 Official concerns about potentially threatening marches and processions outside the Houses of the Oireachtas has probably dated back to the foundation of the State. This was certainly a concern in the 1930s when the Government invoked its powers under the emergency provisions of the then Article 2A of the 1922 Constitution to ban a proposed march on the Dáil by the National Guard.²⁶⁶ This issue was also considered by the 1934 Constitution Review Committee which recommended that Article 9 (dealing

²⁶⁴See, for example, *O’Callaghan v. Commissioners of Public Works* [1985] ILRM 365; *TV3 Ltd. v. IRTC* [1994] 2 IR 455; *Ó Ceallaigh v. An Bord Altranais*, [2000] 4 IR 54.

²⁶⁵See, for example, *Blake v. Attorney General* [1982] IR 177; *Cox v. Ireland* [1992] 2 IR 503 and *Re Planning and Development Bill, 1999*, [2000] 3 IR 320.

²⁶⁶Manning, *The Blueshirts* (Dublin, 1970) at 82-80

with the right of assembly) of the 1922 Constitution be amended to make it clear that:

...laws may be passed, and police action taken, to prevent or control open-air meetings which might interfere with normal traffic or otherwise become a nuisance or danger to the general public. We understand that legislation on these lines has been delayed by reason of doubts as to whether such legislation could be validly enacted in view of the present wording of this Article.²⁶⁷

6.131 The Committee's recommendation was plainly acted on, since Article 40.6.1⁰.ii of the Constitution now provides by way of qualification of the right of citizens to assemble peaceably and without arms that:

Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

Section 28 of the 1939 Act must, therefore, be understood in this context.

6.132 Section 28(1) provides that:

It shall not be lawful for any public meeting to be held in, or any procession to pass along or through, any public street or unenclosed place which or any part of which is situate within one-half of a mile from any building in which both Houses or either Houses of the Oireachtas are or is sitting or about to sit if either:

an officer of the Garda Síochána not below the rank of Chief Superintendent has, by notice given to a person concerned in the holding or organisation of such meeting or procession or published in a manner reasonably calculated to come to the knowledge of the persons of such meeting or procession or published in a manner reasonably entitled to come to the knowledge of the persons so concerned, prohibited the holding of such meeting in or the passing of such procession or published in a manner reasonably calculated to come to the

²⁶⁷SPOS. 2979. See Hogan, "The Constitution Review Committee of 1934" in Ó'Muircheartaigh (ed.) *Ireland in the Coming Times: Essays to Celebrate T.K. Whitaker's 80 Years* (Dublin, 1997) 342, 354-365.

knowledge of such persons so concerned, prohibited the holding of such meeting in or the passing of such procession along or through any such public street or unenclosed place as aforesaid, or

a member of the Garda Síochána calls on the persons taking part in such meeting or procession to disperse.

- 6.133 By section 28(2), persons who either organise or take part in such prohibited meetings or who fail to disperse after being called upon to do so are guilty of an offence carrying a maximum penalty of three months' imprisonment and a £50 fine.
- 6.134 Despite the permission apparently granted by Article 40.6.1⁰.i, by modern standards, section 28 nonetheless seems to be impermissibly overbroad and it is probably unconstitutional in its present form. The whole purpose and context of Article 40.6.1⁰.i is to enable the prohibition and control of meetings and processions which seek to intimidate or threaten the proper functioning of parliamentary democracy. This provision was never intended to effect any unnecessary restriction on the constitutional rights of free speech and assembly. Yet section 28(1)(a) places almost no constraint on the power of a Chief Superintendent to ban a meeting; there is not even, for example, the necessity for the Chief Superintendent to have formed a reasonable suspicion that the organisers of the march intend to use violent or other unconstitutional methods. The same is true *a fortiori* of section 28(b). On the face of it, this section allows any member of the Gardaí to call upon the marchers to disperse and, *de facto*, ban the meeting, even if the meeting or march was perfectly peaceful.
- 6.135 In practice, all peaceful marches and processions in and around the precincts of Leinster House are allowed to proceed to the crash barriers just outside the entrance. It is understood that the Gardaí are of the view that the ordinary public order legislation (such as that contained in the Criminal Justice (Public Order) Act 1994) is broadly sufficient to deal with the occasional incident and fracas which sometimes occur. In the case of more serious and calculated attempts to subvert the democratic process (by, for example, attempting through violence to prevent Deputies and Senators from voting), the possibility of a prosecution under section 6 (usurping the functions of government) and section 7 (violent obstruction of government, including the legislative branch) of the 1939 Act always remains open.²⁶⁸

²⁶⁸cf. the reasoning of the Court of Criminal Appeal in *The People v. Kehoe* [1983] IR 136

6.136 In these circumstances, the Committee recommends that section 28 should be deleted in its entirety. It may be convenient nonetheless if new, tightly drawn legislation was enacted which sought to give the Gardaí particular powers of crowd control in the immediate vicinity of the Houses of the Oireachtas. Any such legislation ought to be much more narrowly drawn than the present section 28 and must generally be more accommodating of constitutional values, such as the right of free speech and peaceable assembly.

Recommendation

6.137 *Section 28 should be repealed in its entirety. The Committee acknowledges that, broadly speaking, the powers conferred by the Criminal Justice (Public Order) Act 1994 are sufficient to enable the Gardaí to deal with any minor incidents which occur on such marches. In the case of calculated and organised violence designed to frustrate the proper functioning of the Oireachtas, the possibility of a prosecution under section 6 or section 7 of the 1939 Act is always open.*

6138 *Nevertheless, the Committee is of the view that it would be preferable if new legislation were enacted to give the Gardaí particular powers of crowd control in the immediate vicinity of the Houses of the Oireachtas. Any such legislation ought, however, to be much more narrowly drawn than the present section 28. It ought to respect the substance of the constitutional rights secured by Article 40.6.1⁰ (as well as under Article 10 and Article 11 ECHR) and, in general, it ought be more accommodating of constitutional values, such as the right of free speech and peaceable assembly, than the existing section 28.*

6.139 *The Committee is further of the view that it might be preferable if such new legislative provisions were not contained in any re-cast version of the Offences against the State Acts legislation, but was instead contained in some other enactment.*

Section 29: Powers of search

6.140 Section 29(1) of the Offences against the State Act 1939, as inserted by section 5 of the Criminal Law Act 1976, permits a Superintendent of the Garda Síochána to issue a search warrant to a member of the Garda Síochána not below the rank of Sergeant where “he is satisfied” that there are reasonable grounds for believing that evidence relating to the “commission or intended commission” of an offence under the 1939 Act, or the Criminal Law Act 1976, or an offence which is a scheduled offence for the purposes of Part

V of the 1939 Act or evidence relating to the commission of treason, is to be found in any building or part of a building. Where a search warrant is so issued, section 29(2) permits the named member of the Garda Síochána, accompanied by other Gardaí or members of the Defence Forces to enter (if needs be by force) any building within one week of the date of the warrant and to “search it and any person found there” and to seize “anything found there or on such person”. Section 29(3) provides that any members of the Gardaí or the Defence Forces acting under the authority of such a search warrant may (a) demand the name and address of any person found where the search takes place and (b) arrest without warrant any persons who so refuses to give a name and address or “which the member with reasonable cause suspects to be false or misleading”.

6.141 There is no doubt but that the power to issue a warrant under section 29 is a vital weapon in the armoury of the Gardaí in their fight against the activities of illegal organisations. Thus, for example, many of the finds of illegal arms and explosives have resulted from the search of private lands authorised by means of a warrant issued under section 29. Given the utility and importance of this power, the Committee does not wish to make any recommendation that would undermine its effectiveness. Nevertheless, section 29, as presently drafted, raises some issues of principle which call for further consideration.

Should a section 29 warrant be issued only by a Court?

6.142 The Committee considers that it would be desirable for the legislature to introduce a maximum period within which a warrant should be executed or would otherwise lapse. The Committee has concluded and so recommends, that this period of time should be 24 hours. The Committee addressed the question whether it would be desirable to require that a warrant be issued only by a court in cases where the search of a private dwelling is envisioned. While some members of the Committee would favour this limitation in view of Article 46.5 of the Constitution and Article 8 of the European Convention of Human Rights, the Committee, on balance, does not consider that this additional limitation should form part of its recommendations on this section. Some members of the Committee consider that search warrants issued under the section should remain valid for 7 days.

Recommendation

6.143 *A majority of the Committee are of the view that the section should be amended to require that such a warrant should be executed within 24 hours or would otherwise lapse. It should be noted that by execution in this context the majority has in mind the actual entry into the dwelling,*

since it recognises that in some serious cases it would not be practicable to complete the search within this period. Some members consider, however, that such warrants should remain valid for seven days.

Should the Defence Forces enjoy a power of arrest under this section?

6.144 With the exception of certain maritime offences (where the Naval Service enjoys certain powers of arrest) and some other special instances, the power of arrest has been traditionally confined by statute to members of the Garda Síochána. The Committee does not believe that members of the Defence Forces – whose role and training in this regard is very different to that of the Garda Síochána – should be given a power of arrest unless there were special reasons which warranted the grant of this power. Whatever might have been the situation in the rather fraught circumstances of 1976, the Committee does not believe that present circumstances are such as would justify conferring such a power on members of the Defence Forces.

Should the power to search be confined to certain defined offences only?

6.145 The Committee considered a proposal whereby the power to search should be confined to certain predefined offences set out in the parent Act. It was suggested that the offences in question might comprise offences under the Explosive Substances Acts, firearms offences, and kidnapping. A majority of the Committee was not persuaded that such a change was necessary and concluded that the Government should continue to have the power to schedule offences for this particular purpose. This system not only offered the advantage of flexibility, but it was noted that if the Committee's recommendation in respect of the power to schedule under section 36 was to be accepted, it would mean that only offences carrying a penalty of more than five years' imprisonment could be scheduled. This recommendation would offer an additional safeguard, in that the power to search would be confined only to the more serious offences.

Directing an unlawful organisation

6.146 The offence of directing an unlawful organisation was first created by section 6 of the Offences against the State (Amendment) Act 1998. This provides that:

A person who directs, at any level of the organisation's structure, the activities of an organisation in respect of which a suppression order has been made under section 19 of the Act of 1939 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

6.147 One of the complaints that had been frequently voiced before the enactment of this section was that the 1939 Act in practice generally applied only to lower level members of illegal organisations and that those who were responsible for controlling, supervising and planning the tactics and strategy of such organisations could often arrange their affairs so as to stay just beyond the reach of the criminal law. Section 6 seeks to criminalise such activities which are clearly central to the working of any paramilitary organisation. It is not, however, clear what degree of involvement will be required to substantiate a charge of directing the activities of such an organisation, and the phrase “directs” is not itself defined by the Act.²⁶⁹ It may be that, given the multifarious circumstances in which a paramilitary organisation can be commanded and controlled, this is a phrase which defies exact definition.

6.148 At all events, the Committee is of the view that the offence should be retained. Although it is perhaps somewhat surprising that no such offence existed prior to the creation of the 1998 Act, the Committee is of the view that it is desirable that those shadowy figures who control, supervise and direct the actions of paramilitaries and illegal organisations should not remain beyond the reach of the law.

Recommendation

6.149 *No change is required.*

Unlawful possession of articles

6.150 Section 7 of the 1998 Act creates a new statutory offence, but the ambit of the offence created by this statutory provision is relatively limited and is confined to the possession or control of articles connected with the preparation of offences under the Explosive Substances Acts or the Firearms Acts.

6.151 Section 7(1) of the 1998 Act provides that:

A person shall be guilty of an offence if he or she has any article in his or possession or under his or her control in circumstances giving rise to a reasonable suspicion that the article is in his or her possession²⁷⁰ or

²⁶⁹It may be noted that the Minister for Justice (Mr. J. O'Donoghue TD) indicated that he thought that "evidence over and above that of membership of such an organisation would be called for": see 494 *Dáil Debates* at Col. 36 (1 September 1998).

²⁷⁰For an analysis of the concept of “possession” in this type of context, see *The People (Director of Public Prosecutions) v. Foley* [1995] 1 IR 267. In this case, the Court of Criminal Appeal held that the Special Criminal Court was entitled to infer in the absence of explanation that the accused had firearms in his possession in circumstances where guns

under his or her control for a purpose connected with the commission, preparation or instigation of an offence under the Explosive Substances Act, 1883, or the Firearms Acts, 1925 to 1990 which is for the time being a scheduled offence for the purposes of Part V of the Act of 1939.

6.152 Section 7(2) provides that:

It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his or her possession or under his or her control for any purpose specified in subsection (1).

6.153 Section 7(3) provides that a person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding ten years.

6.154 The Committee considers that such an offence is necessary, but has given consideration to whether section 7(2) needs to be recast in that, from one view, it appears to place some evidential burden on the defence. However, the Committee considers that the sub-section does no more than state the obvious, since, even if this sub-section did not exist, it would be always open to the defence to show that it did not have the articles in question in its possession or control.

Recommendation

6.155 *No change is required.*

Training in the making or use of firearms

6.156 Section 12(1) of the 1998 Act creates the new offence of training persons in the making or use of firearms or explosives:

A person who instructs or trains another or receives instruction or training in the making or use of firearms or explosives shall be guilty of an offence.

6.157 Section 12(2) provides that:

It shall be a defence for a person charged with an offence under this section to prove that the giving or receiving of instruction or training was done with lawful authority or that he or she had reasonable excuse for giving or receiving such instruction or training.

6.158 In passing, it may be observed that section 12(2) represents a typical “reverse-onus” provision. While the Oireachtas is constitutionally precluded from altering the legal burden of proof, which must always rest on the prosecution,²⁷¹ there can be no constitutional objection to a statutory provision which, where the activity in question is *prima facie* illegal:

...affords to an accused a particular defence of which he can avail if, but only if, he proves the material facts on the balance of probabilities.²⁷²

6.159 Section 12(3) provides that a person convicted under this section is liable to a fine or imprisonment for a term not exceeding ten years or both. Finally, the effect of section 12(4) is to provide that the section shall not apply to the Defence Forces or to the Gardai.

6.160 The Committee agrees that the unlawful training in or instruction of persons in the use of weaponry or explosives ought to remain a serious crime. The only question which troubled the Committee is whether or not it was fair or reasonable that the evidential burden of proving lawful or authority or reasonable excuse should lie with the defence. If, for example, *bona fide* members of a gun club were prosecuted under this section, the evidential onus of proving lawful authority or reasonable authority (e.g., production of firearms certificates) would rest with them.

6.161 On balance, the Committee does not recommend any change to this provision. For obvious reasons, in this State the possession and use of both firearms and explosives has long been strictly regulated and controlled. No one who has a legitimate use for firearms or explosives can be but aware of this fact. In those circumstances, it does not seem unreasonable or unfair that, for example, an instructor legitimately giving a person training in the use of firearms should be required to prove affirmatively that he did so under licence or that he had some other lawful authority or reasonable excuse therefor.

Recommendation

6.162 *No change is required.*

Section 8 of the 1998 Act: Information offences

²⁷¹*Hardy v. Ireland* [1994] 2 IR 550, 565, per Hederman J.; *O’Leary v. Attorney General* [1995] 1 IR 254, 263, per O’Flaherty J.

²⁷²*Hardy v. Ireland* [1994] 2 IR 550, 568, per Murphy J.

6.163 A new offence is created by section 8 of the 1998 Act. Section 8(1) creates the offence of the unlawful collection of information:

It shall be an offence for a person to collect, record or possess information which is of such a nature that it is likely to be useful in the commission by members of an unlawful organisation of serious offences generally or of any kind of serious offences.²⁷³

6.164 Section 8(2) provides that:

It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the information in question was not being collected or recorded by him or her, or in his or her possession, for the purpose of its being used in such commission of any serious offences or offences.

6.165 Section 8(3) provides that a person convicted under this section shall be liable to a fine or a term of imprisonment not exceeding ten years.

6.166 The Committee fully understands the thinking behind this section. It is perfectly understandable that the Oireachtas would thereby wish to deter persons who might otherwise seek to gather information at the behest of illegal organisations. There can be little sympathy with those who would, for example, deliberately gather information about the daily movements and routines of prominent persons with a view to facilitating their ultimate assassination.

6.167 However, the a majority of the Committee considers that this section is far too widely drawn. As things stand, persons as diverse as a journalist writing a profile of a politician; the publishers of a publication such as “*Who's Who*” and aeroplane enthusiasts might all find themselves technically in breach of section 8(1). In those circumstances they would find themselves obliged to discharge the evidential burden and to prove on the balance of activities that the information was being collected for legitimate and *bona fide* purposes.

6.168 The majority considers that this situation is unsatisfactory. Unlike the firearms and explosives training example²⁷⁴ contained in section 12 of the

²⁷³“Serious offence” is defined by section 8(4) as meaning any offence, which if committed by any person of full age and capacity, would be punishable by five years imprisonment or any greater punishment and is an offence that “involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage.”

²⁷⁴See the discussion above in relation to the offences created by section 12 of the 1998 Act.

1998 Act, the collection of such information is not *prima facie* illegal, but is, on the contrary, generally speaking, perfectly lawful and legitimate. This distinction is all important for a variety of reasons, not least because it is simply unfair for the Oireachtas to seek to transfer the evidential burden on to the accused where all that the prosecution has proved is simply that the accused has engaged in activity which is *prima facie* lawful.

6.169 The majority, accordingly, considers that this section is unsatisfactory as it stands and ought to be repealed. If it is thought necessary to replace this section with a new offence, then any such offence should be carefully drawn to ensure that the prosecution must prove that the information was knowingly collected for the purpose of assisting members of an illegal organisation to commit serious offences.

6.170 Two members of the Committee, while acknowledging the broad scope of the offence under section 8, strongly believe that the offence, or an offence along similar lines, is essential to combat the activities of terrorists and para-military organisations. They are of the view that any replacement offence, if there is to be a replacement, must address this particular type of terrorist activity in an effective manner. In this regard, they believe that the alternative wording suggested by the majority is problematical, requiring, as it would, proof that the information in question was knowingly collected for the purpose of assisting members of an unlawful organisation to commit serious offences, a burden of proof which would be difficult to discharge. One alternative possibility, which these members believe might balance concerns over the scope of the existing offence with the need to combat this type of terrorist activity, is for it to be made an offence for a person to collect, record or possess such information in circumstances giving rise to the reasonable inference that the collection, recording or possession was intended for use in the commission by members of an unlawful organisation of serious offences generally or of any kind of serious offences.

Recommendation

Majority view to repeal section 8 of the 1998 Act

6.171 ***A majority of the Committee are of the view that Section 8 of the 1998 is unsatisfactory as it stands and ought to be repealed. If it is thought necessary to replace this section with a new offence, then any such offence should be carefully drawn to ensure that the prosecution must prove that the information was knowingly collected for the purpose of assisting members of an illegal organisation to commit serious offences.***

Minority view to retain section 8 of the 1998 Act

6.172 **A minority, while acknowledging the broad scope of the offence as it stands, believe that the offence or another offence along similar lines is essential to combat the activities of terrorists and para-military organisations.**

Section 9 of the 1998 Act: Withholding information

6.173 Section 9 of the 1998 Act creates a new offence and provides that:

A person shall be guilty of an offence if he or she has information or believes might be of material assistance in

(a) preventing the commission by another person of a serious offence, or

(b) securing the apprehension, prosecution or conviction of any other person for a serious offence,²⁷⁵

and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

6.174 This section creates a new statutory offence of failing to disclose information without reasonable excuse. While there was a common law offence of misprision of felony, the ambit of this offence was always unclear. The Committee agrees that it is preferable that there should exist a modern statutory offence which traverses much of the ground hitherto covered by the offence of misprision of felony, and it does not consider it unfair that members of the public should commit an offence where in these circumstances they fail to assist the Gardaí in their law enforcement duties.

Recommendation

6.175 *No change is required. However, a dissenting view, in respect of this offence, held by Professor Dermot Walsh is set out at the end of the report.*

Statements constituting interference with the administration of justice

6.176 Section 4(1) of the 1972 Act created a new offence of making public statements constituting an interference with the course of justice. Section 4(1)(a) provides that:

²⁷⁵Section 9(3) provides that "serious offence" has the same meaning as in section 8.

Any public statement made orally, in writing or otherwise, or any meeting, procession or demonstration in public, that constitutes an interference with the course of justice shall be unlawful.

6.177 Section 4(1)(b) defines an "interference with the course of justice" in the following terms:

A statement, meeting, procession or demonstration shall be deemed to constitute an interference with the course of justice if it is intended, or is of such character as to be likely, directly or indirectly, to influence any court, person or authority concerned with the institution, conduct or defence of any civil or criminal proceedings (including a party or witness) as to whether or how the proceedings should be instituted, conducted, continued or defended, or as to what should be their outcome.

6.178 Section 4(2) provides that any person who makes a statement, or who organises, holds or takes part in any meeting, procession or demonstration, that is unlawful under this section shall be guilty of an offence for which the maximum penalty following conviction on indictment is five years' imprisonment and a £1,000 fine.²⁷⁶ Finally, section 4(3) provides that nothing in this section shall affect the law as to contempt of court. The Committee is not aware of any recent prosecutions under this section and it appears to have fallen into disuse.

6.179 The object of this section appears to have been designed to prevent the intimidation of judges, litigants and jurors and to prevent any interference with the administration of justice by overbearing demonstrations and public processions. Nevertheless, the Committee was struck by the very breadth of this section, and it seems difficult to see how it would survive a constitutional challenge in its present form. It seems plainly at odds with the right of free speech in Article 40.6.1⁰ (which, *inter alia*, guarantees, subject to public order and morality, "the right of citizens to express freely their convictions and opinions" and the right of peaceable assembly) and the right to communicate as guaranteed by Article 40.3.1⁰ and, for that matter, Article 10 ECHR. Taken at face value, section 4 would, for example, have rendered unlawful the public protests which took place at the time of *X* case in 1992. It also appears to mean that any participant in such a protest would have committed a criminal offence, even though the protest became unlawful only

²⁷⁶Or, following summary conviction, to twelve months' imprisonment and a fine not exceeding £200.

by reason of the words spoken by some other person at the demonstration in question. Any attempt to suppress such peaceful protests would be wholly contrary to the very essence of the rights of free speech, communication and peaceable assembly. On this basis, the section would surely fail the proportionality test articulated by the Supreme Court in respect of cases of this nature.²⁷⁷

6.180 The Committee does not thereby mean to suggest that marches designed to frighten, menace or intimidate litigants, jurors, prosecutors or judges (such as, for example, a crowd picketing the house of a judge immediately prior to the imposition of a sentence on a particular accused) should be beyond the reach of the law. However, if this was the true intention of the section, the language of the section goes much further and is far too broad in its reach.

Recommendation

6.181 *The Committee is of the view that section 4 of the 1972 Act is unsatisfactory as it stands. Given that the section as drafted is unlikely to survive constitutional challenge and has, in any event, fallen into disuse, the Committee recommends its repeal.*

6.182 *The law of contempt of court already provides sufficient protection for judges, jurors, litigants and other persons associated with the administration of justice. If it is nonetheless considered that special statutory protection is required, then the Committee recommends the introduction of a new and much more tightly drawn offence designed to protect litigants, jurors, prosecutors or judges from marches and processions which are designed to frighten, menace or intimidate.*

Section 34: Consequences of Conviction by the Special Criminal Court

6.183 Section 34(1) of the 1939 Act provided that where any public servant was convicted of a scheduled offence in the Special Criminal Court, such person “shall immediately on such conviction forfeit such office, employment, place or emolument” and the same “shall forthwith become and be vacant”. Section 34(2) provided that any such person so convicted of such offences by the Special Criminal Court should “immediately upon such conviction forfeit” all pension and superannuation allowances. Section 34(3) also provided that any such person convicted by the Special Criminal Court of such offences shall be disqualified “from holding, within seven years after the date of such conviction”, any such public service position.

²⁷⁷*Murphy v. Independent Radio and Television Commission* [1999] 1 IR 29.

6.184 In *Cox v. Ireland*²⁷⁸ the plaintiff schoolteacher was convicted by the Special Criminal Court of a scheduled offence and, accordingly, his teaching post was forfeited. The plaintiff claimed that the mandatory disqualification orders were both discriminatory and disproportionate in character, and, accordingly, that section 34 infringed both Article 40.1 and Article 40.3 of the Constitution. These propositions were accepted by the Supreme Court which held the section to be unconstitutional in its entirety.

6.185 Chief Justice Finlay held that the task of the Court was to determine whether a fair balance had been struck between the duty of the State to vindicate and protect constitutional rights and the State's duty to ensure the maintenance and stability of its own authority. He then drew attention to the anomalies produced by section 34: it did not apply to non-public servants; nor did it apply if the accused were convicted before the ordinary courts; and persons convicted of relatively trivial scheduled offences would nonetheless attract the drastic sanctions of section 34. Finlay C.J. continued:

A citizen charged with one of the less serious offences coming within a category scheduled...and tried for such offences by such Court and convicted, if he happens to be the holder of office or employment funded by the State, has no protection against the mandatory imposition of the forfeiture provisions contained in section 34. This is so even though he might be in a position to establish...the fact that his motive or intention in committing it, or the circumstances in which it was committed, bore no relation at all to any question of the maintenance of public peace and order or the authority and stability of the State...For these reasons...notwithstanding the fundamental interests of the State which the section seeks to protect, the provisions of section 34 of the Act of 1939 fail as far as practicable to protect the constitutional rights of the citizen and are, accordingly, impermissibly wide and indiscriminate".²⁷⁹

6.186 While the Court held that the section was unconstitutional and void *ab initio*, some years later the Supreme Court held in *McDonnell v. Ireland*²⁸⁰ that actions for damages for breaches of constitutional rights were governed by the Statute of Limitations 1957.

²⁷⁸[1992] 2 IR 503.

²⁷⁹*Ibid.*, 523-4.

²⁸⁰[1998] 1 IR 134.

- 6.187 In *McDonnell*, the plaintiff had been a civil servant working in the former Department of Posts and Telegraphs. He was convicted before the Special Criminal Court in 1934. Shortly after the Supreme Court decision in *Cox*, which declared that section 34 was unconstitutional he took his action for damages. On this occasion, the Court held that the plaintiff's action for breach of constitutional rights ought to have been brought within the six-year limitation period prescribed by the Statute of Limitations 1957 and was, in any event, barred by the doctrine of laches, i.e. prejudicial lapse of time.
- 6.188 The Committee notes that, since many of the public servants affected by section 34 were convicted in the 1970s and early 1980s, the decision in *Cox* in July 1991 may have come too late for them to take effective action by means of litigation. On the other hand, it is also worth observing that, almost by definition, most (if not all) of the public servants to whom section 34 applied were guilty of serious criminal offences and acts of disloyalty to the very State to which they had pledged their allegiance. As Barrington J. observed in *McDonnell*, the Government (or other employer, such as local authorities and health boards) would have been entitled, irrespective of the mandatory operation of section 34, to dismiss such civil servants from the public service.
- 6.189 In their submission to the Committee, Sinn Féin urged that the Committee should “recommend a special scheme of compensation for persons adversely affected by this unconstitutional section of the Offences against the State Acts.”²⁸¹ However, the Committee considers that a recommendation of this kind, which might possibly entail the spending of considerable sums of public money, falls outside its terms of reference.

Recommendation

- 6.190 *In the light of the decision of the Supreme Court in Cox v. Ireland holding section 34 to be unconstitutional, it should be repealed. The Government (and other employers of public servants, such as health boards) can adequately protect its interest by moving to dismiss employees who have been found guilty of serious criminal offences.*

²⁸¹At page 10 of their submission of October 1999.

**Views and recommendations of
The Hon. Mr Justice Anthony J. Hederman
Professor William Binchy and Professor Dermot Walsh
on the use of opinion evidence and other special evidential rules**

6.194 *We hold a different view from the majority in relation to certain aspects of this Chapter.*

Section 24 of the 1939 Act

6.195 *We agree with the majority that section 24 is unsatisfactory and should not be retained. However, in our view their proposal for a replacement of the section 24 involves a redundant statement in statutory form of a rule of evidence. We consider that the reformulation proposed goes no further than expressing, in statutory form, a process of inferential reasoning which a Court would be obliged to adopt in the absence of such a provision. If possession of a document is to shift the evidential burden onto the accused only “where the possession was of such a kind as to give rise to a reasonable suspicion that the accused was a member of an unlawful organisation”, there is no need to state this in statutory form since the inference will necessarily arise.*

Section 3(2) of the 1972 Act (by extension, section 26 of the 1939 Act)

6.196 *In our view this provision violates certain crucial principles of the law of evidence and should be repealed. The evidence which section 3(2) renders admissible is not evidence given by a recognised expert in a relevant field of scientific knowledge; it may be based on hearsay and otherwise inadmissible evidence; it addresses the ultimate issue of the guilt or innocence of the accused and in practice is not easy to challenge since its source will not normally be required to be identified. It is probable that section 3(2) would be held to be incompatible with Article 6 of the European Convention on Human Rights; it is possible that, even with the amendment proposed by the majority, it would still be found to violate Article 6, since the quantum of evidence adduced by the prosecution, independent of the opinion evidence, might be minuscule.*

6.197 *We see no merit in retaining section 26 of the 1939 Act. As has been noted earlier in the chapter, section 26 “purports to give evidential status and weight to something which may have no probative or evidential value at all”.*

CHAPTER 7

SECTION 30 POWERS OF ARREST AND DETENTION

Background to section 30

- 7.1 In 1922, at the date of the establishment of the Irish Free State, the power of the police to arrest and detain suspects for an extended period and to question them during such detention in respect of alleged offences was surprisingly unclear. Such uncertainties as existed were dispelled by a series of special statutes enacted in the aftermath of the Civil War, designed to permit extended detention of suspects for the purposes of interrogation. Thus, section 2(1) of the Public Safety (Emergency Power) (No.2) Act 1923 permitted detention for up to seven days, a period which was replicated by a number of other temporary items of legislation enacted in the mid- 1920s.
- 7.2 However, in the wake of the murder of the Minister for Justice, Kevin O’Higgins TD, in July 1927, the Public Safety Act 1927 was enacted. This was an altogether more draconian regime which permitted the detention of suspects in certain circumstances for up to three months, should a Minister so order. While this legislation lapsed in 1928, it was replaced in October 1931 by Part III of Article 2A of the 1922 Constitution, which provision was inserted by the Constitution (Amendment No. 17) Act 1931. Section 13 of Article 2A permitted members of the Garda Síochána and the Defence Forces to arrest any person whom they suspected of having committed any offence listed in the Appendix to Article 2A. By virtue of section 14, any person so arrested could be detained for a maximum of 72 hours.
- 7.3 Article 2A lapsed following the coming into force of the Constitution on 29 December 1937. New powers of arrest were, however, conferred on the Gardaí by section 30 of the Offences against the State Act 1939. While these powers were similar to those contained in the old Article 2A, the power of arrest was confined to members of the Garda Síochána; the list of offences scheduled by the Government tended to be shorter²⁸² and the maximum period of arrest was reduced to 48 hours.

²⁸²By virtue of section 36(1), the Government may by order declare that “offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of this Part of this Act.” The list of scheduled offences has varied from time to time.

- 7.4 In 1976, in the wake of the murder of the British Ambassador and a member of his diplomatic staff, the Oireachtas passed new emergency resolutions for the purposes of Article 28.3.3⁰ of the Constitution. The only legislation passed pursuant to these resolutions -- the Emergency Powers Act 1976 -- conferred powers in all material respects identical to section 30, save that it provided for seven-day detention. It bears remarking that the 1976 Act was passed under cover of these emergency resolutions and, in any event, it was allowed to lapse in October 1977. The emergency resolutions were themselves terminated by Dáil and Seanad resolutions in February 1995.
- 7.5 In 1998, in the wake of the Omagh bombing, the Oireachtas enacted the Offences against the State (Amendment) Act 1998. Section 10 of that Act amended section 30 so as to permit, subject to judicial supervision after 48 hours, a maximum of 72 hours, detention. However, by virtue of section 30(4A), the District Judge to whom the application is made for an extension can issue the warrant only if he or she “is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously”.

Constitutional challenges to section 30

- 7.6 The constitutionality of section 30 was unsuccessfully challenged in 1992 in *The People v. Quilligan (No.3)*,²⁸³ although, of course, the Court’s decision pertains only to the (then prevailing) 48-hour maximum detention period, nor did the Court have occasion to review other aspects of section 30, apart from this detention period. The principal aspect to the defendant’s challenge was that the personal right to liberty protected by Article 40.4.1⁰ was insufficiently guaranteed by the 48-hour detention period. They pointed to the fact that in the course of the reference to the Supreme Court, of the Emergency Powers Act 1976,²⁸⁴ the then Attorney General²⁸⁵ had asked the Court to rule on the constitutionality of the Bill²⁸⁶ on the basis that seven-day detention under the equivalent of section 30 would be unconstitutional in the absence of the emergency resolutions passed by both Houses of the Oireachtas under Article 28.3.3⁰. Of course, it must be stressed that the seven-day detention provided

²⁸³[1993] 2 IR 305.

²⁸⁴*Re Article 26 and the Emergency Powers Bill, 1976* [1977] IR 159.

²⁸⁵Declan Costello S.C., later judge of the High Court 1977-1994, President of the High Court 1995-1998.

²⁸⁶The Emergency Powers Bill 1976 was referred by President Ó Dalaigh to the Supreme Court under Article 26. It only became law once the Supreme Court had upheld the constitutionality of the Bill and it was thereupon signed into law by the President.

for by the 1976 Act did not have any element of judicial intervention. This is in contrast to the seven-day detention provided for under the Criminal Justice (Drug Trafficking) Act 1996 where an order of the District Court is required before the suspect can be detained beyond an initial 48 hour detention period.

- 7.7 In *Quilligan*, the Supreme Court, however, took the view that 48-hour detention was in an entirely different category from the type of seven-day detention provided for by the 1976 Act. The Court also drew attention to the following rights and safeguards which obtained in the case of a section 30 arrest: the right to be released if the arresting Garda did not have a bona fide and reasonable suspicion based on one of the grounds of arrest mentioned in the section; the right to be informed (if he did not already know) of the offence of which he was suspected; the right to legal and medical assistance; the right to remain silent; the right to the protection of the Judge's Rules in relation to this giving of cautions, and the abstention from cross-examination of a prisoner and the right not to be subject to oppressive questioning. The Court also stressed that the original period of detention could be extended only where a Chief Superintendent had the requisite bona fide suspicion which justified the original arrest and was satisfied that further detention was necessary for the purposes of the section. It was on this basis that the constitutionality of the 48-hour detention period was upheld.

The increasing use of section 30 from the 1970s onwards

- 7.8 A number of submissions made the point that the use of section 30 increased from 1972 onwards. However, this was in a context where the general powers of detention given to the Gardaí by the Oireachtas were seriously inadequate and where these omissions have been remedied only recently.²⁸⁷
- 7.9 It is also worth observing that the 1970s and the 1980s saw a significant increase in serious crime which was partly caused by the spill-over effect of the civil conflict in Northern Ireland into this State. Secondly, however, a series of judicial decisions exposed the legal frailty of a number of informal Garda practices which had evolved over the previous decades. In the absence of a general statutory power of arrest, the Gardaí frequently resorted to the practice of detaining suspects "for questioning." But in a series of cases decided in the late 1970s and early 1980s, the Court of Criminal Appeal and the Supreme Court held that this practice was illegal and "no more than a euphemism for false imprisonment".²⁸⁸ It followed that such detention

²⁸⁷Principally by the Criminal Justice Act 1984, s.4 (power to detain for up to 12 hours in respect of offences carrying a penalty of more than five years' imprisonment).

²⁸⁸*The People (DPP) v. Shaw* [1982] IR 1, 29 per Walsh J. The same point was made in *The*

constituted a violation of the suspect's constitutional right to liberty. This in turn meant that any confession evidence obtained by the Gardaí while the suspect was in such detention had to be excluded as having been obtained in breach of constitutional rights.²⁸⁹

7.10 These developments caused particular difficulties for the Gardaí. They could no longer resort to the practice of "holding for questioning", but yet there was then no statutory power of arrest and detention for serious crime such as murder and manslaughter. Although, for example, neither murder nor manslaughter were scheduled offences, in practice the Gardaí could, and often did, arrest persons suspected of such crimes under section 30 where scheduled offences were also involved. The 1980s saw a further series of cases in which the courts wrestled with the use of section 30 in such circumstances, but, by and large, the legality of this new practice was upheld by the Supreme Court.²⁹⁰

7.11 Many of the difficulties were obviated only with the coming into force of section 4 of the Criminal Justice Act 1984, in 1987. This conferred a general power of detention²⁹¹ on the Gardaí in respect of offences carrying a penalty of five years' imprisonment or more and authorised the detention of suspects for up to 12 hours prior to release or charge. This sequence of events was well summarised thus by Keane J. in *People v. Finnerty*²⁹²:

The common law also proceeded on the basis that the police had no right to detain a person whom they suspected of having committed a crime, for the purpose of questioning him. Their only right was to arrest him and to bring him before the appropriate court, there to be charged, as soon as practicable. Since, however, many people were unaware of their rights in this context and were not normally reminded of them, the practice, euphemistically described as 'assisting the police

People (DPP) v. O'Loughlin [1979] IR 85; *The People (DPP) v. Walsh* [1980] IR 294 and *The People (DPP) v. Higgins*, Supreme Court, 22 November 1985. For a discussion of this case-law, see generally Hogan and Walker, *Political Violence and the Law in Ireland* (1989) at 192-209.

²⁸⁹See, e.g., *People (DPP) v. O'Loughlin* [1979] IR 85; *People (DPP) v. Coffey* [1987] ILRM 727.

²⁹⁰See, for example, *People (DPP) v. Quilligan* [1986] IR 495; *People (DPP) v. Howley* [1989] ILRM 629; *People (DPP) v. Walsh* 3 Frewen 260.

²⁹¹In addition, of course, a statutory power of *arrest* in respect of offences carrying a penalty of five years' imprisonment is contained in the Criminal Law Act 1997, s. 4(3).

²⁹²[1999] 4 IR 364.

with their inquiries’, mutated into what was, in practice, if not in theory, a form of unlawful detention...²⁹³

7.12 Before to the Act of 1984, one major abridgement of the citizen’s rights in this regard had been effected in the form of the Offences against the State Acts, 1939 to 1972. While the provisions of that legislation were intended to afford the Gardaí specific powers in cases where the security of the State was threatened, they were routinely applied in cases of what came to be described as “ordinary crime”. Thus, the husband who killed his wife following the discharge of a firearm could not have been detained for questioning at common law on the ground that he was suspected of having committed the murder. He could, however, be detained under section 30 because he was suspected of having committed a firearms offence.

7.13 It was against this background that the Act of 1984 was enacted. The policy of the legislation was clear: to end the dubious practice of bringing people to the Garda station for the purpose of “assisting the Gardaí with their inquiries”, or in purported reliance on the legislation directed primarily at subversive crime, and to substitute therefor an express statutory regime under which the Gardaí would have the right to detain a person in custody for a specified period of six hours, which could be extended for a further six hours for the purpose of investigating serious crime. It included the right to question him concerning the crime, but the significant erosion of the suspected person’s rights at common law was balanced by the provision of express safeguards.

7.14 Nevertheless, concern has been expressed in some quarters about the manner in which the section 30 powers have been employed. Thus, for example, in its report on Ireland in July 2000, the UN Human Rights Committee was concerned that “the majority of persons arrested are never charged with an offence” and the figures from 1981 to 1986 bear this out.²⁹⁴

²⁹³ *Ibid.*, 377-378.

²⁹⁴ According to figures supplied by the Minister for Justice in written answers to parliamentary questions on 14 November 1986 (369 *Dáil Debates* at Col. 2562) and 31 March 1987 (371 *Dáil Debates* at Col. 714) the number of persons *arrested* and *charged* respectively in the years 1981 - 1986 was as follows:

Year	Arrested	Charged
1981	2,303	323
1982	2,308	256
1983	2,334	363
1984	2,216	374
1985	1,834	366
1986	2,387	484

- 7.15 This Committee, however, was unable to obtain reliable recent data on this point and it is understood that no such statistics are kept by official sources.²⁹⁵ On the assumption that the majority of persons arrested under section 30 are not charged with offences, the situation is somewhat more complex than it might appear.
- 7.16 By virtue of the Prosecution of Offences Act 1974, the Director of Public Prosecutions is an independent official who ultimately determines what (if any) charges will be preferred in serious cases. There will often be circumstances in which the Gardaí will entertain a reasonable suspicion that the person arrested under section 30 will have committed a scheduled offence, but where the Director will form the view that there is insufficient evidence to justify the proferment of a charge. In other cases, the Gardaí themselves, following the informal consultation which can take place with the Director of Public Prosecutions or his officials in cases of this kind, may determine that there is simply no evidence or insufficient evidence to justify a charge at the end of questioning following an arrest under section 30.
- 7.17 These considerations notwithstanding, the Committee acknowledges that concerns about a possible disparity between the number of persons arrested under section 30 and the number of persons subsequently charged persist in certain quarters. Without necessarily endorsing the analysis, the Committee nevertheless considered it appropriate to recommend the introduction of a further safeguard regarding section 30 detention so as to guard against the

²⁹⁵From answers given to Dáil questions, the Committee has obtained the following information regarding the number of persons *arrested* under section 30:

Year	Arrested	Year	Arrested	Year	Arrested
1971	26	1981	2,303	1991	3,860
1972	229	1982	2,308	1992	1,542
1973	271	1983	2,334	1993	922
1974	602	1984	2,216	1994	1,054
1975	607	1985	1,834	1995	937
1976	1,015	1986	2,387	1996	1,395
1977	1,144	1987	2,854	1997	1,168
1978	912	1988	1,938	1998	888
1979	1,431	1989	2,040	1999	740
1980	1,874	1990	1,837		

The 1999 figure was up to 31 October 1999. In each case, however, the parliamentary answer stated that the compilation of the number of persons who were subsequently *charged* with offences could only be at the cost “of a disproportionate amount of scarce Garda resources.”

possibility that these important powers of arrest and detention might be the subject of inappropriate application. To this end, the Committee draws attention to the provisions of section 4(4) of the Criminal Justice Act 1984 which provides that:

If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for suspecting that he has committed an offence to which this section applies, he shall be released from custody forthwith unless his detention is authorised apart from this Act.

7.18 The Committee considers that it would be appropriate that a similar provision ought to apply to detention under section 30, and it so recommends.

Recommendation

7.19 *In order to provide a further safeguard against the possibility that the powers of arrest and detention contained in section 30 might be misapplied, the Committee recommends that the Gardaí be placed under a statutory duty along the lines of section 4(4) of the Criminal Justice Act 1984 to release a suspect detained under section 30 if at any stage it becomes clear that there are no longer reasonable grounds for such continued detention.*

The necessity for extended detention

7.20 At common law, the purpose of an arrest was to ensure that the accused would be brought before the courts for the purpose of being charged: as we have just noted, the law did not permit the practice of “holding for questioning”.²⁹⁶ If this common law rule were to remain the norm the Gardaí would be effectively powerless to detain and question a suspect.

7.21 In a modern environment, the Committee does not believe that this is a realistic option so far as serious crime is concerned. It may be noted that, quite apart from section 30, the Oireachtas has taken steps to modify this common law rule. The Criminal Justice Act 1984, section 4 permits detention up to 12 hours in respect of offences carrying a penalty of five years or more, and the Criminal Justice (Drug Trafficking) Act 1996, section 2 permits judicially supervised detention for up to seven days.

²⁹⁶*People (Director of Public Prosecutions) v. O’Loughlin* [1979] IR 85; *People (Director of Public Prosecutions) v. Walsh* [1980] IR 294.

7.22 Most offences coming within the ambit of section 30 are both serious and complex. In many instances, inquiries will have to be carried out while the suspect is in detention and questioning may be contingent on the results of forensic investigations or the checking of alibis. All members of the Committee are agreed that *some period* of extended detention is necessary to deal with this sort of crime. There is, however, significant disagreement as to how long that period of time ought to be: opinion within the Committee ranges from 24 hours to 72 hours. This latter issue will be dealt with in more detail at 7.32 below.

The basis for the power of arrest

7.23 Section 30(1) provides that a member of the Garda Síochána may, *inter alia*, “without warrant stop, search, interrogate and arrest any person” whom he suspects has committed or is about to commit a scheduled offence for the purposes of Part V of the 1939 Act or an offence under the 1939 Act itself. In addition, section 30(1) provides that an arrest may be effected under this section where the Garda suspects that the person concerned is:

...carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects as being in the possession of information relating to the commission or intended commission of any such offence as aforesaid.

7.24 At present²⁹⁷ the scheduled offences are: offences under the Explosive Substances Act 1883; offences under the Firearms Acts 1924-1971 and offences under sections 6, 7, 8, 9 and 12 of the Offences against the State (Amendment) Act 1998.²⁹⁸ By virtue of section 37 of the 1939 Act, the following are also deemed to be scheduled offences:

...attempting or conspiring or inciting to commit or aiding or abetting the commission of, any such scheduled offence, shall itself be a scheduled offence...

²⁹⁷Offences under the Malicious Damage Act 1861 and under section 7 of the Conspiracy and Protection of Property Act 1875 were originally scheduled under the Offences against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972) and Offences against the State Act 1939 (Scheduled Offences)(No.2) Order 1972 (SI No. 282 of 1972). The Malicious Damage Act 1861 was largely repealed by the Criminal Damage Act 1991, and section 7 of the 1875 Act was repealed by section 31 of the Non-Fatal Offences against the Person Act 1997.

²⁹⁸Section 14(2) of the Offences against the State (Amendment) Act 1998 provides that each of the offences under sections 6 to 9 and 12 of the 1998 Act “shall be deemed to be a scheduled offence for the purposes of Part V of the Act of 1939”.

- 7.25 While the scheduling system has the great merit of flexibility, that very flexibility may well prove to be its undoing. The net effect of the scheduling power in section 36 is to give the Government the right to decide the category of offences which may trigger the powers of arrest and detention under section 30. In this regard, there must be a real danger that section 36 would be found to be unconstitutional on the ground that it effectively gives the Government a power to legislate, thus usurping the exclusive role of the Oireachtas assigned to it in this regard by Article 15.2.1⁰ of the Constitution.²⁹⁹
- 7.26 In any event, and quite irrespective of this possible constitutional infirmity, the Committee is of the view that the offences that trigger the application of the section 30 arrest powers ought to be determined by the Oireachtas itself by means of primary legislation.³⁰⁰ While the experience of scheduling has shown that it is more or less impossible to determine on an *a priori* basis the offences which are largely connected with subversive crime,³⁰¹ the Committee is nonetheless of the view that the Oireachtas should decide what offences ought to trigger these extended arrest and detention powers. In making that judgment, the Oireachtas will have to consider factors such as the connection between the offence in question and paramilitary crime and (if thought appropriate) organised crime; the seriousness of the offence; the inherent complexity of the offence and whether or not extended detention is necessary for the proper investigation of that crime. The Committee considers that any such list of offences should be tightly drawn with these considerations in mind and that the list of specified offences ought to be reviewed by the Oireachtas at regular intervals, preferably every three years. The Committee further believes that the majority of the offences which are scheduled at present by and large meet these criteria. This is certainly true of the offences arising under the Offences against the State Acts 1939-1998 themselves and offences arising under the Explosives Substances Act 1883; most, if not all, of the offences arising under the Firearms Acts 1924-2000 meet these criteria.

²⁹⁹See, for example, *McDaid v. Sheedy* [1991] 1 IR 1; *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 IR 26.

³⁰⁰Some members of the Committee consider that a requirement that the offences in question be set out in primary legislation is too rigid. Their view is that the objective of ensuring legislative control in respect of the offences to be so scheduled could be equally met if there was a requirement that the list of scheduled offences had to be approved in advance by both Houses of the Oireachtas.

³⁰¹See, for example, the extended discussion of this issue in the various judgments of the Supreme Court in *The People (Director of Public Prosecutions) v. Quilligan* [1986] IR 495.

- 7.27 The Committee examined a proposal to abandon the scheduled offence system in favour of a system which permitted the Gardaí to arrest pursuant to section 30 if they thought a particular offence had been committed by paramilitaries or by members of organised criminal gangs. While the proposal has some merit, the Committee felt that its complexities were such that it could not be recommended. Quite apart from the fact that there is no satisfactory definition of terrorism³⁰² or organised crime, a requirement on the Gardaí to have a reasonable suspicion that the offence was committed by paramilitaries or had organised crime involvement would add a new layer of complexity to the already tangled section 30 jurisprudence. Such a requirement, turning, as it does in part, on the possible motive for the crime, would be at odds with the need for legal certainty, could lead to new anomalies,³⁰³ and would be likely to lead to complex trials within a trial where the validity of the section 30 arrest would be determined.
- 7.28 As originally enacted, section 30(1) provided that the maximum period of detention was for an initial 24 hours, but such detention may “if an officer of the Garda Síochána not below the rank of Chief Superintendent so directs” be extended “for a further period of twenty-four hours”.³⁰⁴ However, this forty-eight-hour period can now itself be extended by means of court order to seventy-two hours under certain limited circumstances. Section 30(4) (as

³⁰²Note, however, the definition of terrorism contained in US Federal legislation, the Omnibus Counterterrorism Act 1995. This defines terrorism as meaning “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”, and “terrorist groups” is defined as meaning “any group practising, or which has significant subgroups which practice, international terrorism”. Likewise, the definition of terrorism contained in section 1 of the Terrorism Act 2000 in the United Kingdom may also be noted. Section 1 defines terrorism as actions involving serious violence or the threat of same which:

“(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.”

³⁰³Suppose, for example, that the Gardaí believed that persons carried out a bank robbery using firearms at the behest of an illegal organisation, but it transpired following the arrest of the suspects under section 30 that they had robbed the bank for their own purposes. Alternatively, suppose that the Gardaí believed that a particular person had been shot dead by a known paramilitary, but suspected that the killing had taken place for reasons of private revenge. In both examples it would be unclear whether the Gardaí would be entitled to arrest the suspects under section 30 of the 1939 Act (assuming it had been amended on the lines canvassed) or whether they would be confined to arresting the suspect under section 4 of the Criminal Justice Act 1984.

³⁰⁴Section 30(3).

inserted by section 10 of the Offences against the State (Amendment) Act 1998) now provides that:

(4) An officer of the Garda Síochána not below the rank of Superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under sub-section (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(4A.) On an application under subsection (4) of this section the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

- 7.29 Since the powers of detention under section 30 are longer than in the case of “ordinary” crimes, this can give rise to anomalies. Thus, if a person is suspected of having raped his victim and then having strangled her, he can be detained only for a maximum of 12 hours under section 4 of the Criminal Justice Act 1984. On the other hand, if a suspect is arrested in connection with relatively minor firearms offences, he could be detained under section 30 for 48 hours (extendable to 72 hours). The Committee also notes that the Criminal Justice (Drug Trafficking) Act 1996 allows for extended detention for up to seven days with provision for judicial intervention after the first 48 hours detention.
- 7.30 These anomalies are to some extent unsatisfactory and result in part from the fact that the number of scheduled offences is relatively limited and also in part because, at the time of the enactment of the 1939 Act, the common law powers of arrest of the Gardaí in respect of “ordinary crimes” were believed to be satisfactory. However, as we have already seen, by the mid-1980s, the effectiveness of these common law powers of arrest had been entirely eroded by a series of judicial decisions. There may be merit in the view that, to avoid existing and possibly future anomalies resulting from the scheduling system, the Gardaí should be given by statute a unified power of detention in respect of all serious offences.
- 7.31 On the other hand, it is equally clear that the Oireachtas has, as occasion required, made policy choices regarding the length of detention considered to

be appropriate in respect of certain crimes. No one suggests, for example, that just because section 2 of the Criminal Justice (Drug Trafficking) Act 1996 provides for seven days detention (albeit with judicial supervision) that the detention period for other serious offences should be extended to seven days in order to avoid potential anomalies. In any event, the Committee considered that its remit was confined solely to the Offences against the State Acts and it considered that it had no jurisdiction to make wider recommendations regarding criminal procedure in general.

The length of detention

7.32 Prior to the 1998 Act, the maximum period of detention was 48 hours. However, section 30(4) of the 1939 Act (as inserted by section 10 of the 1998 Act) now provides that the District Court may, following a hearing, order the extension of the detention period for a further 24 hours, i.e., up to a maximum of 72 hours. The Committee understands that these extended detention periods have been utilised on more than 56 occasions³⁰⁵ in the three years or so since the amendments came into force on 3 September 1998.

7.33 Contrary to the impression which may be given by some critics of the legislation³⁰⁶, this period of time does not seem excessively long by reference to maximum periods of detention permitted in other democratic countries.³⁰⁷

³⁰⁵This information is gleaned from the reports of the Minister for Justice laid before the Oireachtas pursuant to section 18(3) of the Offences against the State (Amendment) Act 1998. According to the Report of the Minister for Justice on the operation of the 1998 Act during the period from 29 May 2000 to 31 May 2001, the number of extension orders made during this period was 27:

9 persons in respect of whom orders were made were charged and 2 of these were convicted of an offence; the remaining [7] cases are before the courts. A number of other files have been submitted to the Law Officers for directions.

³⁰⁶The UN Human Rights Committee in its Report (July 2000) on the 2nd periodic report of Ireland under the UN Civil and Political Rights Covenant expressed concern that “the periods of detention without charge under the [1939] Act have been increased.” But this criticism fails to take into account the all-important fact that the decision to continue detention for a further 24 hours can be made only by a judge of the District Court, who must be satisfied that certain statutory criteria have been satisfied. Moreover, judged by this Committee’s own survey of the length of detention periods in other countries for persons suspected of serious offences, this detention period does not seem excessively long.

³⁰⁷In the United Kingdom, the Terrorism Act 2000 (which came into force on 19 February 2001) permits detention for up to 48 hours, but this may be extended by judicial authority for up to a further five days. The application to extend the period of detention may be made within six hours of the end of the original detention period, so that even where the extension is refused, the detained person may have been in police custody for a maximum of 54 hours. In Canada the maximum period of detention is 24 hours and under Australian federal law, the

Nor does it seem that the 48 hour detention period prior to any judicial involvement is problematic as far as Article 5(3) ECHR is concerned. That Article provides that:

Everyone arrested or detained in accordance with the provisions of Article 5(1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

7.34 In the leading decision of *Brogan v. United Kingdom*³⁰⁸ a number of suspects were arrested under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 and were detained in custody for periods ranging from four days and six hours to just over six days. The key question before the European Court of Human Rights was whether such detention periods in custody were compatible with the obligation to bring the suspect “promptly” before a court. The Court observed that:

...the scope for flexibility in interpreting and applying the notion of “promptness” is very limited. In the Court’s view, even the shortest of the four periods of detention [four days and six hours] falls outside the strict constraints as to time permitted by Article 5(3). To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word “promptly”. An interpretation to this effect would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court has thus to conclude that none of the applicants was either brought “promptly” before a judicial authority or released “promptly” following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the

maximum detention period is 4 hours, with the possibility of a judicially sanctioned extension for a further 8 hours. In France suspects may be detained for 48 hours if there are grounds for believing that the suspect will be charged (Article 63 Penal Code), but in terrorist cases the detention period may be extended for a further three days: Article 706 Penal Code. (The last two days’ detention must be judicially authorised.) In Germany the maximum period of detention under the Criminal Procedure Act is 24 hours. In Spain, Article 17.5 of the Constitution provides that a person may be detained for up to 72 hours before being brought before a judicial authority, but this period may be judicially extended for a further 48 hours.

³⁰⁸(1989) 11 EHRR 117.

community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3).³⁰⁹

- 7.35 While the Court accordingly concluded that a period in police custody of over four days without judicial supervision constituted a breach of Article 5(3), it does not seem that the two-day period prescribed under section 30 of the 1939 Act, as originally enacted, would prove problematic as far as the ECHR is concerned. The Committee does not consider that the amended version of section 30 presents any difficulties as far as Article 5(3) is concerned either, since that provision envisages that the suspect will be brought before a judicial authority with a view to either remand in custody or release i.e. precisely the regime in operation under the amended version of section 30.³¹⁰
- 7.36 Nevertheless, the Committee is of the view that prolonged periods of detention in police custody are undesirable. Even with the most elaborate of safeguards, experience has shown that the psychological and other pressures inherent in such detention increase with longer detention periods. Accordingly, any legislation providing for detention periods longer than 48 hours requires a particular justification.
- 7.37 As will next be seen, the Committee is evenly divided on the question of whether or not section 10 of the 1998 Act should be retained. Nevertheless, the Committee is conscious of the fact that any extension ordered under section 30(4A) can only be done by a District Court Judge on notice to both parties and that this fact alone provides a considerable safeguard. Moreover, the fact that extension orders have on occasion been refused by the District Court is evidence of the fact that the judicial involvement is no mere “rubber-stamping” formality.

Recommendation

- 7.38 ***The Committee is evenly divided on whether or not section 10 of the 1998 Act (which allows the District Court to order the extension of time within which persons arrested under section 30 of the 1939 Act may be detained) should be repealed.***

³⁰⁹*Ibid.*, 135-136.

³¹⁰In the United Kingdom, the 8th Schedule to the Terrorism Act 2000 requires judicial supervision before the 48 hour detention can be extended to seven days. This prompted the following observations from one noted commentator (Walker, “Briefing on the Terrorism Act 2000” (2000) 12 *Terrorism and Political Violence* 1, 20): “...the power to extend detentions beyond 48 hours for a total of up to seven days is to be vested in an independent judicial officer, so the problem which arose before the European Court of Human Rights in *Brogan and others v. United Kingdom* is now largely settled.”

- 7.39 *Some members of the Committee are of the view that the maximum period of detention in respect of persons detained under section 30 should be confined to 48 hours, i.e. the position which obtained prior to the 1998 Act. (Indeed, some members take the view that even this period of detention is too long). These members take the view that the extended detention cannot be justified by pointing to longer periods of detention permitted in other countries with different forms of criminal procedure or by demonstrating that such a proposal is neither unconstitutional nor contrary to the ECHR. They consider that it is necessary to demonstrate that the old 48-hour rule was not sufficient and that the increase to 72 hours has been necessary to secure reliable convictions (which accord with due process) against individuals in circumstances where such convictions could not have been obtained if only 48 hours detention was permitted. They do not believe that such a case has been made.*
- 7.40 *Other members of the Committee consider that the 72-hour detention period is not excessively long by international standards and that the judicial supervision by the District Court after 48 hours provides an adequate safeguard. They take the view that given the complexity of modern serious crime (which may often require trans-border and international inquiries), such an extended period of detention is often necessary.*

The power to interrogate under section 30

- 7.41 The opening lines of section 30(1) provide that a member of the Gardaí may “without warrant stop, search, interrogate and arrest any person”. The juxtaposition of the word “interrogate” before “arrest” suggests that this power is primarily designed to permit the Gardaí to question a potential suspect before deciding whether or not to effect an arrest. However, the Committee accepts that the use of the word “interrogate” in section 30(1) may convey the impression that the Gardaí have been given a general power to question suspects and that such suspects are thereby obliged to answer the questions posed. Heretofore, the existence of section 52 may also have served to reinforce this impression.
- 7.42 The Committee considers that the word “interrogate” is a rather old-fashioned and outdated word which may carry unfortunate connotations. Since there is, generally speaking, no obligation on a person to answer questions prior to arrest³¹¹ and because a Garda can always, in any event, ask any question

³¹¹There are some exceptions to this rule. Thus, by virtue of sections 15 and 16 of the Criminal

before making an arrest, the word “interrogate” seems to be otiose and can be safely deleted.

Recommendation

7.43 *The Committee recommends that the word “interrogate” be deleted from section 30(1).*

Power to detain persons suspected of having information

7.44 Section 30(1) also permits members of the Garda Síochána to arrest any person: “whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.”

7.45 The Committee was struck by the potential breadth of this provision. At face value, this provision appears to permit the arrest of totally innocent persons, simply because they might have witnessed events or chanced upon certain matters with the result that they came to be in possession of “information relating to the commission or intended commission” of either an offence under the 1939 Act or any scheduled offence. Thus, for example, it seems to permit the arrest of a law-abiding member of the public who happened to chance upon paramilitary drilling in a local wood. As thus construed, this power not only appears to give rise to constitutional issues, but there would also be a serious doubt about the compatibility of this aspect of section 30(1) with Article 5 ECHR.

7.46 In view of the likely incompatibility of this part of section 30(1) with Article 5 ECHR, the Committee is of the view that this sub-section ought not to be allowed to remain in its present form. However, as we have already noted, these particular powers are of importance to the Gardaí as a means of counteracting the activities of both paramilitary organisations and organised crime and the Committee is firmly of the view that these type of powers should be retained, albeit recast in a manner that is likely to be compatible with the ECHR.

Justice Act 1984, where a person is found in possession of firearms and goods in circumstances where the Gardaí have reasonable grounds for believing that the firearms were held illegally and the goods in question, the person in question is obliged to answer questions as to how he came to be in possession of the firearms or the goods. Failure to answer the questions posed is an offence, but the answer given in response to the questions is not admissible in any subsequent criminal prosecution.

7.47 While acknowledging the potential overbreadth of the existing powers of arrest under section 30(1), this sub-section has, in any event, been overtaken by the new offence contained in section 9(1) of the 1998 Act. This provides that:

A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in preventing the commission by any other person of a serious offence,³¹² or securing the apprehension, prosecution or conviction of any other person for a serious offence,

and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.³¹³

7.48 This section does not criminalise the mere possession of relevant information, but addresses the real mischief by making it an offence to fail without reasonable excuse to disclose same to the Garda Síochána as soon as it is practicable to do so. Moreover, section 9 of the 1998 Act is a scheduled offence for the purposes of the 1939 Act.³¹⁴

7.49 Accordingly, it follows that the Gardaí may arrest under section 30(1) where they have a reasonable suspicion that the suspect committed an offence under section 9. It seems to the Committee that these new provisions deal adequately with the problem at hand. Should the Gardaí effect a section 30 arrest on this basis, it will be because they have a reasonable suspicion that the suspect committed a particular scheduled offence, namely, section 9 of the 1998 Act. The Committee is therefore of the view that the powers to arrest persons in possession of information under section 30(1) are no longer necessary.

Recommendation

7.50 *Insofar as section 30(1) enables the Gardaí to arrest persons simply because they happen to have in their possession certain documents or*

³¹²By virtue of section 9(3), “serious offence” has the same meaning as in section 8 of the 1998 Act. By virtue of section 8, “serious offence” in effect means an offence involving personal violence or false imprisonment or a serious damage to property and carrying a penalty of more than five years’ imprisonment.

³¹³This offence carries a penalty of five years’ imprisonment (see section 9(2)) and is therefore an arrestable offence by reason of the Criminal Law Act 1997.

³¹⁴1998 Act, s. 14(1) and s. 14(2).

information relating to actual crimes or the intended commission of offences under the 1939 Act or scheduled offences, it is unsatisfactory and ought to be changed. However, because the Gardaí already have powers to arrest under section 30(1) persons who are reasonably suspected of having committed the scheduled offence under section 9 of the 1998 Act, the Committee is of the view that the power to arrest persons under section 30(1) because they are believed to be in possession of information is no longer necessary and should be deleted.

Power to arrest someone suspected of being about to commit an offence

7.51 Section 30(1) provides that a member of the Garda Síochána may arrest any person whom he suspects:

...of having committed or being about to commit or being or having being concerned in the commission of any offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act...

7.52 The references to “having committed” an offence or “being or having being concerned” in the commission of an offence are not problematic. However, it will be observed that, unlike other common law or statutory powers of arrest, section 30(1) confers a power to arrest someone who is suspected of being *about* to commit an offence. It is important here to draw the distinction (which, admittedly, is not always the easiest to draw in practice) between a criminal attempt on the one hand and an intention to commit a crime on the other. The former is a criminal offence in its own right, whereas the latter is not. As the Supreme Court indicated in *Attorney General v. Sullivan*³¹⁵ “mere preparation for the crime is not enough” and that it is necessary to go further and demonstrate that “they constituted acts sufficiently proximate to amount to attempts to commit the substantive offences.”³¹⁶

7.53 If it were the case that the Gardaí were given a general power of arrest in respect of conduct that was not criminal, this would be a matter for concern. It is true that the distinction between mere intention to commit a crime on the one hand and an attempt to commit a crime on the other is one which has frequently exercised the minds of textbook writers. However, the power of arrest under section 30(1) is not triggered by a mere inchoate intention to

³¹⁵[1964] IR 169.

³¹⁶[1964] IR 169, 195, per Walsh J. In *R v. White* [1910] 2 KB 124 the English Court of Criminal Appeal held that an act is proximate if it was the first of a series of similar acts intended to result cumulatively in the crime.

commit a crime: instead, the Gardaí must have a suspicion (which is not unreasonable) that the arrested person is “about to commit a crime”. Although there is no authoritative judicial determination as to the meaning of these words, the Committee considers that, to a very large extent, they overlap significantly with the law of attempt.

- 7.54 If, for example, the Gardaí intercept a would-be assassin just before he places a rifle on an already-assembled tripod, it would be hard to say that they did not have a reasonable suspicion justifying his arrest on the basis that he had either actually committed an offence under the Firearms Acts or that he had attempted to do so. Equally, however, the arrest could be justified under the present version of section 30(1) on the ground that the Gardaí have reasonable suspicion that the suspect is about to commit an offence.
- 7.55 Despite the fact that the Committee is of the view that the words “being about to commit” an offence overlap in large measure with the law on attempt (so that “about to commit” an offence is effectively synonymous with an attempt to commit an offence), there may be concerns that these powers might be used to justify the detention of persons in respect of conduct which is not criminal and which is not sufficiently proximate to any intended criminal act to constitute a criminal attempt. In these circumstances, the Committee recommend the deletion of the words “being about to commit” and their replacement with language largely drawn from Article 5(1)(c) ECHR. That Article permits the lawful arrest of a person for the purpose of bringing him before the competent legal authority:

...on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence...

- 7.56 The Committee did not feel that it could recommend directly employing the language of Article 5(1)(c) ECHR since such would actually *widen* the grounds on which a suspect might be arrested. Indeed, a statutory provision along the lines of Article 5(1)(c) ECHR might well encounter constitutional difficulties, given the manner in which the guarantee of personal liberty contained in Article 40.4.1⁰ of the Constitution has been judicially interpreted.³¹⁷ Accordingly, the Committee recommends that the Gardaí be given the power to effect an arrest “when it is reasonably considered necessary to prevent the imminent commission of an offence.” Such an amendment should help allay any residual fears concerning the scope of this

³¹⁷*People v. O’Callaghan* [1966] IR 501; *Director of Public Prosecutions v. Ryan* [1989] IR 399.

aspect of section 30 and ensures that the power of arrest is tied in to an even more stringent version of Article 5(1)(c) ECHR.

Recommendation

7.57 *Although the Committee considers that the power of the Gardaí to effect an arrest under section 30(1) on the basis that the person is about to commit an offence substantially overlaps with the law on criminal attempts, it nonetheless recommends the deletion of this phrase to allay any lingering concerns about the breadth of this aspect of section 30(1). Instead, the Committee recommends that the Gardaí be given the power to effect an arrest “when it is reasonably considered necessary to prevent the imminent commission of an offence.” Such an amendment would ensure that this aspect of the power of arrest in section 30(1) is tied in directly to an even more stringent version of Article 5(1)(c) ECHR.*

Right of an accused to have a solicitor present during section 30 detention

7.58 While the Supreme Court has repeatedly stressed that an accused person has a constitutional right of access to a solicitor while in pre-trial custody³¹⁸ (a right which, in any event, has also been provided by the Criminal Justice Act 1984, s.5 and to some extent supplemented by the Criminal Justice Act 1984 (Treatment of Persons in Custody of Garda Síochána) Regulations 1987),³¹⁹ doubts have been expressed in some quarters about the effectiveness of this vital right.³²⁰ The accused may not, for example, know any solicitor and, even if he does, the solicitor in question may, in any event, be uncontactable or unavailable. However, the Committee, however, notes with satisfaction that by virtue of a new administrative scheme which took effect on 14 February 2001, legal aid is now available for persons detained in police custody. Finally, the right of access itself is somewhat nebulous and vague and the courts have not yet fully clarified the extent to which a suspect is entitled to his or her solicitor during the course of his detention.

³¹⁸*People v. Healy* [1990] 2 IR 73.

³¹⁹S.I. No. 119 of 1987.

³²⁰See generally White, “The Confessional State: Police Interrogation in the Irish Republic” (2000) 10 *Irish Criminal Law Journal* 17. In its submission of October 1999, Amnesty International expressed concern that:

...people detained for criminal matters in Ireland are not entitled to have access to counsel during questioning. In addition, as a result of the fact that there is no provision for legal aid for lawyers to attend police stations, those people who are detained who are without sufficient means are often denied assistance of counsel throughout the investigation.

7.59 It is true that having access to a solicitor will generally be of assistance to the detained person since it enables him to be informed of his rights. As Finlay C.J. put it in *The People v. Healy*:³²¹

The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such a person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators.³²²

7.60 But despite the ringing endorsement of the right of access in *Healy*, the courts have not required or even permitted the presence of a solicitor during the course of interrogation. In *Barry v. Waldron*³²³ Carney J. refused to order the release the applicant, who had been detained under section 4 of the Criminal Justice Act 1984, when the Gardaí had declined to permit his solicitor to be present during interrogation. The applicant frankly acknowledged that he desired the presence of his solicitor for the duration of the twelve-hour detention period so that he could:

...continue with his formula of saying that he wanted to assert his right to silence and refuse to answer any questions and he would be supported...and maintained in that position by [his solicitor] for the statutory period of detention. If he did not have the support of an independent person, he would probably not be able to maintain such a

³²¹[1990] 2 IR 73.

³²²*Ibid.*, 81. Cf. the similar comments of the European Court of Human Rights in *Magee v. United Kingdom* (2001) 31 EHRR 822 on the question of whether the accused ought to have been denied access to a lawyer following his detention in Castlereagh Barracks in Northern Ireland:

The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his decision to remain silent. Having regard to these considerations, the Court is of opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of interrogation as a counterweight to the intimidating atmosphere specifically designed to sap his will and make him confide in his interrogators.

³²³High Court, 23 May 1996. Cf. the dictum of O’Flaherty J. in *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390, 396: “The solicitor is not entitled to be present at the [police] interviews.”

stance, which does require a considerable degree of strength against people who are trained in interrogation techniques. And let us not be frightened of the word “interrogation” because that is what it is all about and that is what the statute provides for.

- 7.61 On the question of whether or not any recommendation on this issue should be made, the Committee was divided. A number of members are of the view that the question of whether or not a suspect is entitled to have a solicitor present during the course of police questioning is one which falls to be considered in a wider context that goes beyond the remit of the Committee. They take the view that detention and questioning under the Offences against the State Acts do not give rise to special considerations which do not otherwise arise under the general criminal law.
- 7.62 While a majority of the Committee is of the view that the question does fall within the terms of reference, they are divided on this issue and do not make a recommendation on the wider question of whether or not the suspect is entitled to have a solicitor present during the course of police interviews. Some of this majority are of the view that, provided that *Healy*-type safeguards, in terms of access to a solicitor, are put in place there is no necessity to recommend that a solicitor should be present during questioning. Others take a different view and consider that, at the very least, immediate steps should be taken to move towards a regime whereby the presence of solicitors during the course of police interviews becomes the norm. Even these members recognised, however, that such a change might have to be made incrementally and that there would be practical difficulties (not least in terms of cost and time management) in arranging for a solicitor to be present for the duration of all interviews conducted during the course of a detention under section 30.
- 7.63 Nevertheless, the Committee as a whole is of the view that, consistent with its terms of reference, it can deal with one specific aspect of this wider issue in the special context of the inference-drawing provisions contained in sections 2 and 5 of the 1998 Act and (naturally) any recast version of section 52 of the 1939 Act.
- 7.64 As the Committee has noted in its discussion of the right to silence, it might be argued that one logical consequence of the European Court of Human Rights’ decision in *Murray v. United Kingdom*³²⁴ (and the subsequent case-law of that Court) is that no inference can properly or fairly be drawn from an accused’s silence before he has had an opportunity to take appropriate

³²⁴(1996) 23 EHRR 29.

legal advice as to the possible consequences of any failure to answer questions. In any event, the Committee considers that if inferences are to be drawn from an accused's silence, it is desirable that he would have had access to prior legal advice so that he can be independently advised as to his legal position and the consequences for him of failure to answer the questions posed. Accordingly, the Committee is of the view that no inferences should be drawn from a suspect's silence unless the suspect has had an adequate opportunity of consulting with and being advised by his solicitor.³²⁵

Recommendation

7.65 *While a majority of the Committee is of the view that the wider issue of the right of a suspect to have a solicitor present during the course of questioning while in Garda custody is within its terms of reference, for the reasons just mentioned the Committee does not make any recommendation in relation to this issue. It is nonetheless of the view that no inferences should be drawn from a suspect's silence unless the suspect has had an adequate opportunity of consulting with and being advised by his solicitor. Special provision would have to be made for circumstances amounting to force majeure, such as where the solicitor is unavailable or otherwise uncontactable.*

Power of arrest to be grounded on a reasonable suspicion

7.66 At present, section 30(1) simply enables the Garda to effect an arrest based on "suspicion"; there is no express statutory requirement to the effect that the suspicion must be a reasonable one. In view of the fact that in *People v. Quilligan*³²⁶ Walsh J. said that the requisite suspicion "must be bona fide held and not unreasonable",³²⁷ the Committee cannot, with respect, accept the assertions contained in a number of submissions to the effect that section 30 would violate Article 5(1) ECHR because it did not contain an express requirement to the effect that an arresting officer should have a reasonable suspicion. Having regard to the fact that the European Court of Human Rights would not go behind such an authoritative statement of domestic law,³²⁸ the

³²⁵Special provisions would have to be made for circumstances amounting to *force majeure*, such as, for example, where the solicitor could not be contacted or was unduly delayed.

³²⁶[1986] IR 495.

³²⁷*Ibid.*, 507. Walsh J. also pointed out that the suspicion of the arresting Garda under s. 30 was "not beyond judicial review", as illustrated by cases such as *The State (Trimbole) v. Governor of Mountjoy Prison* [1985] IR 550.

³²⁸See, for example, *Pine Valley Developments Ltd. v. Ireland* (1992) 14 EHRR 449.

Committee is of opinion that it is unlikely that section 30(1) would be found to be contrary to Article 5(1) on this ground.

- 7.67 Although it seems clear that the courts have interpreted section 30(1) as requiring that the requisite suspicion must be a “reasonable” one,³²⁹ the Committee is nevertheless of the view that to avoid any room for possible misunderstandings, it would be desirable if any recast version of this power of arrest expressly referred to “reasonable suspicion”.

Recommendation

- 7.68 *In order to remove any lingering doubts and any possible misunderstanding, the Committee recommends that section 30 should be amended to make it clear that the power of arrest must be grounded on the reasonable suspicion of the arresting member of the Gardaí.*
- 7.69 *The dissenting views of Profesor Dermot Walsh in relation to aspects of this chapter are set out in a general dissent at the end of the report.*

³²⁹*People v. Quilligan (No.1)* [1986] IR 495; *People v. Quilligan (No.3)* [1993] 2 IR 305.

CHAPTER 8

THE RIGHT TO SILENCE

Background

- 8.1 The privilege against self-incrimination was first generally recognised in the common law world during the course of the seventeenth century. The rule evolved as a result of popular revulsion against the excesses of the Court of Star Chamber, whereby all those who were charged with an offence were interrogated on oath. From this evolved the rule that the accused could not testify in a criminal case³³⁰ and the associated rule that no one could be obliged to jeopardise his life or liberty by answering questions on oath. By the eighteenth century the rule had become so central to all criminal proceedings that the privilege against self-incrimination was expressly protected by the fifth Amendment of the US Constitution which provides that “No person...shall be compelled in any criminal case to be a witness against himself.”
- 8.2 The modern era has seen the emergence of two divergent schools of thought on the privilege against self-incrimination. The first sees the privilege essentially as an “archaic and unjustifiable survival from the past”³³¹ and considers that the administration of justice in general and law enforcement in particular would be best served by giving the privilege a restrictive interpretation. Those who support this view reject the argument that any encroachment upon this right presents any dangers to the public at large.³³²

³³⁰ A rule which was abolished in Ireland as late as 1924: see Criminal Justice (Evidence) Act 1924, s. 1.

³³¹ *Istel Ltd. v. Tully* [1993] AC 45, 53, per Lord Templeman. The comments were, however, made in the context of the exercise of the privilege in civil proceedings.

³³² See, for example, the comments of O’Flaherty J. in *Heaney v. Ireland* [1996] 1 IR 580, 590: “...the innocent person has nothing to fear from giving an account of his or her movements.” But cf. the comments (at para. 49) of the European Court of Human Rights in *Averill v. United Kingdom* (2001) 31 EHRR 839:

While it may no doubt be expected in most cases that innocent persons would be willing to co-operate with the police in explaining that they were not involved in any

8.3 The other school of thought considers that the privilege against self-incrimination represents “a bastion of human freedom from oppression by the state.”³³³ As Murphy J. stated in *Pyneboard Pty. Ltd. v. Trade Practices Commission*:

The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigations. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination: it is society’s acceptance of the inviolability of human personality.³³⁴

8.4 In addition, adherents to this school of thought consider that any erosion of the privilege might present some risk to the innocent (especially the forgetful, the inarticulate and the socially vulnerable), so that these immunities “contribute to avoiding miscarriages of justice”.³³⁵

8.5 The Oireachtas has, generally speaking, sought to steer a *via media* between these two opposing schools, although, perhaps, inclining to the latter rather than the former school. While the privilege against self-incrimination is still generally respected by our law, there are numerous statutory provisions (leaving aside for a moment the provisions of the Offences against the State Acts) which to a greater or lesser extent tend to erode the privilege.³³⁶ And, while it is probably fair to say that there has been increasing political and other pressures in favour of curtailing the operation of the privilege, recent decisions of both the Supreme Court³³⁷ and the European Court of Human

suspected crime, there may be reasons why in a specific case an innocent person would not be prepared to do so. In particular, an innocent person may not wish to make any statement before he has had the opportunity to consult a lawyer.

³³³Cross & Tapper on *Evidence* (8th ed.)(1995) at p. 454.

³³⁴(1983) 152 CLR 328, 346.

³³⁵*Murray v. United Kingdom* (1996) 23 EHRR 29, para. 45.

³³⁶See, for example, Criminal Justice Act 1984, ss. 15-19; Bankruptcy Act 1988, s. 21(4) (this sub-section, however, provides that none of the answers “shall be admissible in evidence against him in any other proceedings, civil or criminal, except in the case of any criminal proceedings for perjury in respect of any such answer”); Criminal Justice (Drug Trafficking) Act 1996, s. 7 (inferences from failure to mention a particular fact).

³³⁷*Re Northern Irish Bank Ltd.* [1999] 3 IR 145; *People v. Finnerty* [1999] 4 IR 364.

Rights³³⁸ impose substantial limitations on the capacity of the Oireachtas to effect further abridgements of the right to silence.

The right to silence and the Offences against the State Acts

8.6 There are four separate provisions of the Offences against the State Acts 1939-1998 which encroach on the right to silence.³³⁹ We may first consider section 52 of the Offences against the State Act 1939, which enables a member of the Garda Síochána to question a person detained pursuant to Part IV of that Act (principally pursuant to the powers of arrest contained in section 30) and such person is required to give:

...a full account of such person's movements and actions during such specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under [the 1939 Act] or any scheduled offence.

8.7 Section 52(2) provides that any person who fails or refuses to give such account or information or gives false or misleading information is guilty of an offence carrying a penalty of six months' imprisonment. Section 13 of the Offences against the State (Amendment) Act 1998 now provides that section 52 shall not have effect in relation to any person detailed under that section unless:

...immediately before a demand is made of him or her under that subsection, he or she is informed in ordinary language by a member of the Garda Síochána of:

(a) the fact that the demand is being made under the section 52, and

(b) the consequences provided by that section for a failure or refusal to comply with such a demand or the giving of any account or information in purported compliance with such a demand which is false or misleading.

³³⁸*Funke v. France* (1993) 16 EHRR 297; *Murray v. United Kingdom* (1996) 22 EHRR 29; *Saunders v. United Kingdom* (1996) 23 EHRR 313; *Averill v. United Kingdom*, (2001) 31 EHRR 839; *IJL v. United Kingdom* (2001) 33 EHRR 225 and *Quinn v. Ireland, Heaney v. Ireland* (2001) 33 EHRR 334.

³³⁹See generally, Ryan, "The Decline and Fall of the Right to Silence" (1997) 7 *Irish Criminal Law Journal* 22.

- 8.8 It may be noted that section 52(1) has two distinct components: the obligation to give an account of one's movements and actions, but also the obligation to give all the information in one's possession regarding the commission or intended commission by another person of a scheduled offence. It is, of course, only the obligation to give an account of one's own movements that raises the issue of possible self-incrimination. The number of prosecutions under this section appears to have been relatively few, but it also seems that the section has nonetheless been of some assistance to the Gardaí in their crime detection efforts.
- 8.9 It is also worth noting that section 52(1) does not seem to be compatible with international human rights norms. Thus, leaving aside for a moment the provisions of Article 6 of the European Convention of Human Rights (which shall be examined presently), section 52(1) seems at odds with Article 14(3)(g) of the United Nations International Covenant on Civil and Political Rights (1967) which provides that an accused shall not "be compelled to testify against himself or to confess guilt".

Section 2 of the 1972 Act

- 8.10 Section 2 of the Offences against the State (Amendment) Act 1972 provides that where a member of the Gardaí:

(a) has reasonable grounds for believing that an offence which is for the time being a scheduled offence for the purposes of Part V of the Act of 1939 is being or was committed at any place,

(b) has reasonable grounds for believing that any person whom he finds at or near the place at the time of the commission of the offence or soon afterwards knows, or knew at the time, of its commission and

(c) informs the person of his belief aforesaid,

the member may demand of the person his name and address and an account of his movements and if the person fails or refuses to give the information or gives information which is false or misleading, he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding £200 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months or to both such fine and such imprisonment.

This section was enacted prior to the Criminal Justice Act 1984, and it now appears to have been largely overtaken by sections 18 and 19 of that Act.³⁴⁰ These sections enable the courts to draw inferences from a suspect's silence in circumstances which might reasonably call for an explanation. Unlike the inference-drawing provisions of sections 18 and 19 of the 1984 Act, section 2, in common with section 52 of the 1939 Act, makes it a criminal offence to fail to answer the question. It is clear from the Supreme Court's decision in *In re National Irish Banks Ltd.* that, in the light of guarantees contained in Article 38.1 of the Constitution, any statement made in pursuance to such statutory demand would be constitutionally inadmissible as evidence in a criminal prosecution. It is equally clear, in the light of the judgment of the European Court of Human Rights in *Quinn v. Ireland*,³⁴¹ that a statutory provision such as this, which criminalised a failure to answer a question, would on this ground alone be incompatible with Article 6 of the European Convention of Human Rights in the absence of this constitutional guarantee regarding the admission of evidence obtained pursuant to a statutory demand.

Sections 2 and 5 of the 1998 Act

8.11 Section 2(1) of the Offences against the State (Amendment) Act 1998 provides that where, in any prosecution of an accused in respect of membership of an unlawful organisation under section 21 of the 1939 Act, evidence is given that the accused:

...at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then.... the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of an offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.

8.12 Section 2(2) provides that section 2(1) shall not have effect unless an accused was told in ordinary language "when being questioned what the effect of such failure might be".

³⁴⁰Which are considered below at paras. 8.19 - 8.21 and 8.40 - 8.41.

³⁴¹(2001) 33 EHRR 334.

8.13 Section 5 is in similar terms. Section 5(1) provides that the section applies to any offence under the Offences against the State Acts or which is a scheduled offence thereunder or is an offence “arising out of the same set of facts” being an offence which, by virtue of any enactment, the accused may be “punished by imprisonment for a term of five years or by a more severe penalty”. Section 5(2) takes a slightly different approach than section 2(2) and provides that:

Where in any proceedings against a person for an offence to which this section applies evidence is given that the accused:

(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court...in determining whether the accused is guilty of the offence charged...may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to corroboration of any evidence in relation to which the failure is material, but a person shall not be convicted of an offence solely on an inference drawn from such a failure.³⁴²

8.14 It will be seen that, while the inference-drawing power is similar to that found in section 2(2), it is triggered by the failure of an accused to mention matters which he or she “could reasonably have been expected to mention” when so charged or informed of the likelihood of a prosecution. Section 5(3) provides that no inference may be drawn unless the suspect is told in ordinary language what the effect of failure to answer the question posed might be. In effect, the purpose of the inference-drawing provisions under section 5 of the 1998 Act is to permit the court (or jury, as the case may be) in appropriate cases to look with scepticism on an ambush defence, whereas the object of section is to

³⁴²This sub-section is practically identical to the provisions of the Criminal Justice (Drug Trafficking) Act 1996, s.7 and also mirrors the provisions of Article 3 of the Criminal Evidence (Northern Ireland) Order 1988.

allow for inferences to be drawn in circumstances where an explanation is (or, at least, may be) called for.

Recent case-law

- 8.15 In the first modern decision dealing with the right to silence, *The People (Director of Public Prosecutions) v. McGowan*,³⁴³ the Court of Criminal Appeal suggested that information which is lawfully obtained pursuant to section 52(1) was admissible in evidence in a subsequent prosecution for a different offence. The Court of Criminal Appeal did not, however, consider - and would have had no jurisdiction to consider - any question as to the constitutionality of this sub-section.
- 8.16 Prior to two recent Supreme Court decisions, there was an uncertainty as to whether or not this provision was unconstitutional and, even if it was not, whether *McGowan* had been correctly decided insofar as the Court of Criminal Appeal had ruled admissions obtained pursuant to a statutory demand under section 52(1) were admissible in evidence. In addition, the compatibility of these provisions with the European Convention of Human Rights was then regarded as an open question.
- 8.17 As far as the first question is concerned, the constitutionality of this provision was upheld by the Supreme Court in *Heaney v. Ireland*,³⁴⁴ with O'Flaherty J. reasoning that section 52 did not constitute a disproportionate interference with the right to free speech:

On the one hand, constitutional rights must be construed in such a way as to give life and reality to what is being guaranteed. On the other hand, the interest of the State in maintaining public order must be respected and protected. We must, therefore, ask ourselves whether the restriction which section 52 places on the right to silence is any greater than necessary having regard to the disorder against which the State is attempting to protect the public.... Of course, in this pursuit the constitutional rights of the citizen must be affected as little as possible. As already stated, the innocent person has nothing to fear from giving an account of his or her movements, even though on grounds of principle, or in the assertion of constitutional rights, such a person may wish to take a stand. However, the Court holds that the *prima facie* entitlement of citizens to take such a stand must yield to the right of the State to protect itself. *A fortiori*, the entitlement of

³⁴³[1979] IR 45.

³⁴⁴[1996] 1 IR 580.

those with something relevant to disclose concerning the commission of a crime to remain mute must be regarded as of a lesser order. The Court concludes that there is a proper proportionality between any infringement in the citizen's rights with the entitlement of the State to protect itself.³⁴⁵

8.18 The Court also reserved the question of whether *McGowan* had been correctly decided, but it proceeded to uphold the constitutionality of the sub-section without deciding what might be thought to be the most critical antecedent question bearing on the constitutional question, namely, whether statements obtained pursuant to section 52(1) were generally admissible in evidence. The reasoning in this case is widely regarded as unsatisfactory³⁴⁶ and it may be queried whether or not, in the light of the Supreme Court's decision in *Re National Irish Banks* and *The People v. Finnery*, the decision would now be followed. In any event, as we shall see, section 52 has been found by the European Court of Human Rights to be incompatible with Article 6(1) ECHR in the absence of the pre-*National Irish Banks* guarantees regarding the inadmissibility of evidence obtained prior to the statutory demand.

8.19 *Heaney* was subsequently applied by the Supreme Court in *Rock v. Ireland*,³⁴⁷ a case concerning the constitutionality of sections 18 and 19 of the Criminal Justice Act 1984. Section 18 permits a court of trial to draw inferences from an accused's failure to account for the presence of objects, substances, or marks on his person or clothing which the Garda effecting the arrest reasonably believes "may be attributable to the participation of the person arrested in the commission of the offence". Section 19 is in similar terms and permits inferences to be drawn from an accused's failure to account for his presence at a particular place "at or about the time the offence in respect of which he was arrested is alleged to have been committed". Both sections provide that the court:

...may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to corroboration of any evidence in relation to which the failure or refusal is material, but a person shall

³⁴⁵ *Ibid.*, 589 - 590.

³⁴⁶ See, e.g., McGrath, "The Right to Silence" in Byrne and Binchy (eds.), *Annual Review of Irish Law 1996* (Dublin 1997) at 329; Hogan, "The Right to Silence after *National Irish Banks* and *Finnerty*" (1999) 21 *Dublin University Law Journal* 176.

³⁴⁷ [1997] 3 IR 484.

not be convicted of an offence solely on an inference drawn from such failure or refusal.

8.20 These sections are of some importance in the present context, since the inference-drawing provisions contained in section 2(2) and section 5(20) of the 1998 Act are drafted in similar terms. Having noted that the decision in *Heaney* did not “automatically dispose of the issues in the case”, the Court nonetheless upheld the constitutionality of the provisions in question. Hamilton C.J. drew attention to the limitations inherent in the inference-drawing power:

In deciding what inferences may properly be drawn from the accused’s failure or refusal, the court is obliged to act in accordance with the principles of constitutional justice and, having regard to an accused person’s entitlement to a fair trial, must be regarded as being under a constitutional obligation to ensure no proper or unfair inferences are drawn or permitted to be drawn from such failure or refusal.... If inferences are properly drawn, such inferences amount to evidence only; they are not to be taken as proof. A person may not be convicted of an offence solely on the basis of inferences that may properly be drawn from his failure to account; such inferences may only be used as corroboration of any other evidence in relation to which the failure or refusal is material. The inferences drawn may be shaken in many ways, by cross-examination, by submission, by evidence or the circumstances of the case.³⁴⁸

8.21 The Chief Justice later observed that since only such inferences as “appear proper” could be drawn, this meant that a court “could refuse to allow an inference in circumstances where its prejudicial effect would wholly outweigh its probative value as evidence”.³⁴⁹ Against this background, the Court concluded that the legislation in question did not disproportionately interfere with the right to silence.³⁵⁰

8.22 A few months after *Heaney* was decided, different sentiments were expressed by the European Court of Human Rights regarding the importance of the right to silence. In *Saunders v. United Kingdom*³⁵¹ where it held that the

³⁴⁸*Ibid* 497-498.

³⁴⁹*Ibid.*, 501.

³⁵⁰The European Court of Human Rights would probably agree with this conclusion in the light of its reasoning in *Averill v. United Kingdom* (2001) 31 EHRR 839.

³⁵¹(1996) 23 EHRR 313 See also the companion case, *IJL v. United Kingdom* (2001) 33 EHRR 225 where the conviction of Saunders’s co-accused based on the use of evidence obtained

admission of evidence obtained pursuant to a statutory demand (in this case, demands made by a companies inspector pursuant to the UK Companies Acts) in a subsequent criminal trial constituted a breach of Article 6(1) ECHR. While the Court held that the application of the guarantees of Article 6(1) to investigative procedures of this kind would “unduly hamper the effective regulation in the public interest of complex financial and commercial activities”,³⁵² the issue as to whether or not such answers were admissible in evidence in a subsequent criminal prosecution was quite a separate matter. The Court held that the use of such statutorily-compelled answers constituted a denial of his rights under Article 6(1) ECHR:

The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.... Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of his rights.³⁵³

8.23 Just as importantly, perhaps, a few months before *Saunders* that Court had also held in *Murray v. United Kingdom*³⁵⁴ that the drawing of inferences from an accused’s silence during the pre-trial detention constituted a breach of Article 6(1) (the right to a fair trial) when read in conjunction with Article 6(3)(c) (the right to a lawyer). In that case, the applicant had been arrested under the (UK) Prevention of Terrorism (Temporary Provisions) Act 1989. Following his arrest he was cautioned under the Criminal Evidence (Northern Ireland) Order 1988 where he was informed that adverse inferences could be drawn at his trial if he elected to remain silent and to answer police questions. He was also denied access to legal advice for the first 48 hours of his detention. In finding the accused guilty of the offences in question (aiding and abetting false imprisonment), the trial judge made it clear that he had drawn adverse inferences from the accused’s failure to answer police questions and from the fact that the accused had not given evidence at his trial.

8.24 The European Court first explained the rationale behind the right to silence:

pursuant to a statutory demand was similarly held to be a breach of Article 6(1) .

³⁵²*Ibid.*, 337.

³⁵³*Ibid.*, 340.

³⁵⁴(1996) 22 EHRR 29. See also *Funke v. France* (1993) 16 EHRR 297 where criminal proceedings were brought against the applicant by the customs authorities in an attempt to compel him to provide evidence of offences he had allegedly committed. The European Court of Human Rights held that such a degree of compulsion was incompatible with Article 6 since, in effect, it destroyed the very essence of the privilege against self-incrimination.

Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6.³⁵⁵

8.25 The Court then continued by saying that:

On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of the "right to silence" that the question whether the right is absolute must be answered in the negative.³⁵⁶

8.26 The Court concluded that the drawing of the adverse inferences by the trial judge was not in itself a breach of Articles 6(1) and 6(2), since appropriate warnings were given as to the effect of remaining silent; that there was no evidence that the accused had failed to understand the importance of such warnings, and the inferences could be drawn only where a *prima facie* case had been shown against the accused.³⁵⁷ Nor were the inferences unfairly or unreasonably drawn:

³⁵⁵*Ibid.*, 60.

³⁵⁶*Ibid.*, 60-61.

³⁵⁷As the Court observed (at 62), the question in each case is whether or not the evidence adduced by the prosecution is sufficiently strong to require an answer:

The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused "calls" for an explanation which the accused ought to be in a position to give that a failure to give that explanation "may as a matter of common sense" allow the drawing of an inference that there is no explanation and that the accused is guilty. Conversely, if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt. In sum, it is only common sense inferences which the judge considers proper, in the light of the evidence against the

In the Court's view, having regard to the weight of the evidence against the applicant...the drawing of inferences from his refusal, at arrest during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances.... [T]he courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or conducted his defence, when evaluating the evidence in the case. It considers that, what distinguishes the drawing of inferences under the Order is that, in addition to the existence of specific safeguards mentioned above, it constitutes, as described by the Commission, "a formalised system which aims at allowing common sense implications to play an open role in the assessment of evidence". Nor can it be said against this background, that the drawing of reasonable inferences from the applicant's behaviour had the effect of so shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence.³⁵⁸

8.27 However, the Court continued by saying that the drawing of adverse inferences in circumstances where the accused had been denied access to a lawyer did violate the accused's rights under Article 6:

The Court is of opinion that the scheme contained in the [1988] Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes in this context that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning in a situation where the rights of the defence may

accused, that can be drawn under the Order.

³⁵⁸*Ibid.*, 63.

well be irretrievably prejudiced is, whatever the justification for such denial, incompatible with the rights of the accused under Article 6.³⁵⁹

- 8.28 The potential implications for Ireland of this important decision are diminished somewhat by reason of the fact that reasonable access to a solicitor during police custody is constitutionally guaranteed,³⁶⁰ and this right is, in any event, protected by statute.³⁶¹ This notwithstanding, the decision is still of considerable importance in as much as it places some (although somewhat imprecise) limitations on the entitlement of Contracting States to legislate for the drawing of adverse inferences from an accused's silence. It might also be argued that one logical consequence of *Murray* is that no inference can properly or fairly be drawn from an accused's silence before he or she has had an opportunity of taking appropriate legal advice as to the possible consequences of any failure to answer questions.
- 8.29 The importance of *Murray* is brought home by the more recent decision of the European Court in *Condrón v. United Kingdom*.³⁶² In this case, two heroin addicts were charged with supplying heroin after sachets of heroin were found in their flat. They were warned during a police interview that it might harm their defence if they omitted to mention anything which they later relied on in court. When asked to explain what they had been doing when they were observed by police handing items to a neighbour, they replied "No comment". At their trial the police interviews were admitted in evidence. However, the accused claimed that the drugs had been for their personal use and that the items they had handed to their neighbour had not been drugs. They maintained that they had not mentioned this at interview because their lawyer considered that they were suffering from withdrawal symptoms. The applicants were convicted by a jury and their appeal against conviction was dismissed.
- 8.30 The European Court concluded that the formula used by the trial judge did not adequately reflect the balance to be struck and that the convictions were in breach of Article 6(1). The Court explained that the principle in *Murray* was that "provided adequate safeguards are in put in place, an accused's silence, in situations which clearly call for an explanation, may be taken into account in assessing the persuasiveness of the evidence adduced by the prosecutions against him." Here the applicants put forward an explanation for their silence (namely, their lawyer's advice), but the judge left the jury free to draw

³⁵⁹ *Ibid.*, 67.

³⁶⁰ *People v. Healy* [1990] 2 IR 73.

³⁶¹ Criminal Justice Act 1984, s.5.

³⁶² (2001) 31 EHRR 1.

adverse inferences, even if satisfied that the explanation was plausible. This omission to give appropriate directions to the jury had not been remedied on appeal and was incompatible with the applicants' right to silence. In these circumstances there had been a violation of Article 6(1).

Averill v. United Kingdom

8.31 However, in *Averill v. United Kingdom*,³⁶³ a judgment delivered approximately one month after *Condron*, the Court also acknowledged that not every inference-drawing provision was incompatible with Article 6 ECHR. In this case the applicant had been convicted of a double murder in Northern Ireland. Following his arrest, he was questioned relentlessly over a seven-day period and was denied access to a lawyer during police interviews. Although he was warned that, pursuant to Article 3 of the Criminal Evidence (Northern Ireland) Order 1988,³⁶⁴ if he failed to mention during the interview any facts which he subsequently relied on during the course of the trial, adverse inferences might be drawn against him, he remained silent throughout the course of 37 interviews in seven days. He was also warned that adverse inferences might be drawn, pursuant to Article 5 of the 1988 Order,³⁶⁵ in respect of his failure to account for the presence of clothing fibres which were forensically linked to material found in a motor vehicle that had, allegedly, been used by the culprits. Again, the applicant remained silent. At the trial, the applicant led evidence in respect of a hitherto-undisclosed alibi, but a trial in the Diplock Court, Hutton L.C.J. drew adverse inferences against the accused under Articles 3 and 5 of the 1988 Order. The accused was duly convicted and the Northern Irish Court of Appeal subsequently upheld the conviction. MacDermott L.J. observed that:

In this case the significance of the forensic evidence could scarcely be more obvious and important. It called for the production of the appellant's explanation at the earliest moment. The failure to produce that explanation on a point of such obvious and immediate importance justified the drawing of a strong adverse inference against the appellant. When that failure went unexplained (save by reference to a policy [of distrust and non-co-operation with the RUC] which was neither justified nor elaborated upon by the [applicant]), the drawing of a strong adverse inference against him was virtually inevitable.

³⁶³(2001) 31 EHRR 839.

³⁶⁴This provision broadly corresponds to the provisions of section 5(2) of the Offences against the State (Amendment) Act 1998.

³⁶⁵This provision broadly corresponds to the provisions of sections 18 and 19 of the Criminal Justice Act 1984.

8.32 The European Court of Human Rights concluded that the drawing of adverse inferences in this circumstances did not violate Article 6(1) ECHR, but the denial of access to a lawyer during the first 24 hours of his detention was held to constitute a breach of Article 6(2) ECHR.

8.33 As far as the inference-drawing powers were concerned the Court concluded that in exercising these powers in the present case, Hutton L.C.J. had not exceeded “the limits of fairness” since he could properly have concluded that:

...when taxed in custody by questions as to his whereabouts at the material time or the presence of fibres on his hair and clothing, the applicant could have been expected to provide the police with explanations. It is to be noted that the applicant had been stopped by the police not far from the scene of the crime and had volunteered an explanation of his movements. However, he held his silence after being taken into custody. For the Court, the presence of incriminating fibres in the applicant’s hair and clothing called for an explanation from him. His failure to provide an explanation when questioned by the police at Gough Barracks could, as a matter of common sense, allow the drawing of an adverse inference that he had no explanation and was guilty, all the more so since he did have daily access to his lawyer after the first 24 hours of his interrogation when he was again questioned about these matters under caution. Moreover, the applicant did not contend at his trial that he remained silent on the strength of legal advice. His only explanation was that he did not co-operate with the Royal Ulster Constabulary for reasons of policy.... Quite apart from the consideration that the defence of policy sits ill with the fact that the appellant volunteered information to [the police] when stopped at a checkpoint soon after the [murders], it must be noted that the applicant was fully apprised of the implications of remaining silent and was therefore aware of the risks which a policy-based defence could entail for his trial.³⁶⁶

8.34 The Court accordingly concluded that the drawing of inferences did not violate Article 6(1) ECHR. However, the Court concluded that the denial of access to a lawyer in circumstances where adverse inferences could be drawn from his silence constituted a violation of Article 6(3)(c)ECHR:

...under the [1988] Order, an accused is confronted at the beginning of the police interrogation with a fundamental dilemma relating to his

³⁶⁶At para. 51.

defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of the interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation.³⁶⁷

- 8.35 The Court noted that adverse inferences were drawn from the accused's silence during his first 24 hours of detention at a time when access to a lawyer was refused. This was held to constitute a violation of Article 6(3)(c), taken in conjunction with Article 6(1), since "as a matter of fairness", access to a lawyer "should have been guaranteed to the applicant before his interrogation began".

Supreme Court decisions in National Irish Banks and Finnerty

- 8.36 Returning now to this jurisdiction: subsequent to the decisions in *Murray* and *Saunders*, in *Re National Irish Banks Ltd.*³⁶⁸ the Supreme Court, which doubtless had regard to the intervening judgments of the European Court, confirmed that evidence obtained pursuant to a statutory demand could not constitutionally be admitted in a subsequent criminal trial. This case concerned section 18 of the Companies Act 1990, which provided that statements made by any officer or agent of a company to inspectors appointed by the High Court "may be used in evidence against him". The issue thus arose as to whether or not any statements made by such persons were admissible in any subsequent criminal prosecution. The Supreme Court held that the use of compelled answers in a criminal prosecution violated Article 38.1 of the Constitution:

It is proper, therefore, to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession.³⁶⁹

- 8.37 The Court concluded that it was possible to read section 18 in a constitutional fashion by confining the admissibility of such statements to civil proceedings only. It followed that persons appearing before the inspectors could answer such questions as were posed by them pursuant to these statutory powers, in the knowledge that any such answers were inadmissible in evidence.

³⁶⁷At para. 59.

³⁶⁸[1999] 1 ILRM 191.

³⁶⁹*Ibid.*, 360 per Barrington J.

- 8.38 This gloss on *Heaney* is of enormous practical significance since it means that any statements obtained pursuant to a statutory demand under section 52 of the 1939 Act or under section 2 of the 1972 Act could never constitutionally be admitted in evidence against the accused in the course of a criminal prosecution. While this fact was readily acknowledged by the European Court of Human Rights in its judgment in *Quinn v. Ireland*, it was still not enough to envelop section 52 with sufficient safeguards to protect the section against a judicial finding that it was incompatible with Article 6 ECHR, at least as far as that law had been judicially interpreted on the issue of the admissibility of evidence prior to the decision in *National Irish Banks* in 1999.
- 8.39 The decision of the Supreme Court in *People v. Finnerty*³⁷⁰ also dealt with many of these critical issues. The accused in this case had been charged with rape. The complainant gave evidence that she had accompanied the accused as a passenger in a car where she was then brutally raped. The complainant was then cross-examined by the accused's counsel, who suggested that the entire allegations of rape were a fabrication and that the parties had had consensual sexual relations in the car. Beyond denying the allegation of rape and saying that the sexual relations had been consensual when first confronted with the charge, the accused had remained silent when detained by the Gardaí pursuant to section 4 of the Criminal Justice Act 1984. However, following this line of cross-examination of the complainant, the prosecution applied for, and were granted, leave to cross-examine the accused as to why he had not answered any questions during his time in Garda custody.
- 8.40 The Supreme Court quashed the conviction, holding that the accused could not constitutionally have been cross-examined as to the reasons he remained silent, at least in the absence of an express statutory abridgement of that right. As Keane J. put it, the right of the suspect in custody to remain silent:

...is also a constitutional right and the provisions of the 1984 Act must be construed accordingly. Absent any express statutory provisions entitling a court or jury to draw inferences from such silence, the conclusion follows inevitably that the right is left unaffected by the 1984 Act save in cases coming within sections 18 and 19 and must be upheld by the courts.”³⁷¹

³⁷⁰[2000] 1 ILRM 191.

³⁷¹*Ibid.*, 207. This reasoning very much anticipates the approach subsequently adopted by the European Court in *Condron*.

8.41 Sections 18 and 19 of the 1984 Act permit adverse inferences to be drawn from silence in the face of inherently suspicious circumstances, for example, failure to account for blood-stains on one's clothing.

The European Court of Human Rights and the Quinn and Heaney cases

8.42 In *Quinn*, the applicant had been arrested under section 30 in the aftermath of the murder of Detective Garda McCabe in Adare, Co. Limerick on suspicion of being a member of the IRA, contrary to section 21 of the 1939 Act. During the 48 hour detention period the applicant saw his solicitor on three occasions, but the solicitor did not attend the applicant's eight interviews with the Gardaí. Although the applicant had been cautioned that he was not obliged to say anything, he was later warned that failure to account for his movements would constitute an offence. The applicant denied any connection with the Adare events and indicated that he was in London when he heard the news of the murder. He otherwise refused to give an account of his movements, saying that he had been advised by his solicitor not to answer questions.

8.43 The applicant was subsequently charged in the District Court and convicted on one charge of failing to give an account of his movements and received a sentence of six months' imprisonment. The European Court held that this conviction was contrary to Article 6(1) ECHR (right to fair trial) and Article 6(2) ECHR (presumption of innocence).

8.44 In its judgment, the Court noted that in the companion *Heaney* case the Supreme Court had considered that:

...such protections minimised the risk of an accused wrongfully confessing to a crime and safeguarded against the possible abuse of the powers provided by section 52 of the 1939 Act. Important as they are, the Court is, however, of the view that such protections could only be relevant to the present complaints if they could effectively and sufficiently reduce the degree of compulsion imposed by section 52 of the 1939 Act to the extent that the essence of the rights at issue would not be impaired by that domestic provision. However, it is considered that the protections referred to by the Government could not have had this effect. The application of section 52 of the 1939 Act in an entirely lawful manner and in circumstances which conformed with all of the safeguards referred to above, could not alter the choice presented by section 52 of the 1939 Act: either the information requested was provided by the applicant or he faced potentially six months' imprisonment.

8.45 The European Court also laid considerable emphasis on the fact that at the date the applicant had been questioned under section 52 - July 1996 - the legal position regarding the admissibility of any statements made by an arrested person in a subsequent criminal prosecution was unclear and this was clarified only by the subsequent Supreme Court judgment in *National Irish Banks* in January 1999. The Court then concluded:

Given this uncertainty, the position in July 1996 as regards the later admission into evidence of section 52 statements could not have, in the Court's view, contributed to restoring the essence of the present applicant's right to silence and against self-incrimination guaranteed by Article 6 of the Convention.

The Court is not, therefore, called upon in the present case to consider the impact on the rights to silence or against self-incrimination of the direct or indirect use made in later proceedings against an accused of statements made pursuant to section 52 of the 1939 Act. Accordingly, the Court finds that the "degree of compulsion" imposed on the applicant by the application of section 52 of the 1939 Act with a view to compelling him to provide information relating to charges against him under that Act, in effect destroyed the very essence of his privilege against self-incrimination and his right to remain silent.

8.46 A similar conclusion was reached in the companion *Heaney* case.

8.47 It is of very great significance that both *Quinn* and *Heaney* were pre-*National Irish Banks* cases. In other words, the judgments in both *Quinn* and *Heaney* turn on the fact that, at the date of the convictions, it was unclear whether or not statements obtained pursuant to a statutory demand would have been subsequently admissible in evidence. What is, perhaps, less clear is what the European Court's attitude to section 52 would have been had the law been clarified at the relevant time so that the suspects understood that it would have been constitutionally impermissible for the prosecution to tender any statements made pursuant to section 52 demands in any subsequent criminal prosecution. If *Quinn* were subsequently interpreted - and it is not at all clear that it *ought* to be so interpreted - to mean that legislation *cannot* compel a suspect to answer a question *even though* such evidence cannot subsequently be used in a criminal prosecution, it would have far-reaching implications indeed, not least (so far as this State is concerned) for our system of company inspectors and tribunals of inquiry.³⁷² Indeed, had, for example, section 52

³⁷²Thus, for example, although section 21(4) of the Bankruptcy Act 1988 provides for

contained an express statement to the effect that any evidence obtained pursuant to such a statutory demand would be inadmissible in evidence in any subsequent criminal trial i.e., the effect of the subsequent guarantee in *National Irish Banks*, it is not clear that the European Court of Human Rights would have held that the section was contrary to Article 6(1) ECHR.

8.48 Despite these uncertainties concerning the precise ambit of the *Quinn* and *Heaney* judgments, the Committee nonetheless agrees that they effectively spell the death-knell for section 52, at least in its present form.

Conclusions

8.49 Summing up, therefore, it seems that the following principles can be drawn from this rather complex case-law:

- Admissions or statements obtained pursuant to a statutory demand under section 52 of the 1939 Act are inadmissible in evidence. If the Oireachtas sought to make such statements admissible in evidence, this would be unconstitutional: see *National Irish Banks*.
- Although the constitutionality of section 52(1) was upheld by the Supreme Court in *Heaney*, the reasoning in that case seems at odds with the later judgments in *National Irish Banks* and *Finnerty*. Moreover, in the light of the European Court's decision in *Quinn*, section 52 appears to have been found to be incompatible with Article 6(1) ECHR, although this reasoning rests in significant part on the fact that the events in that case took place before the decision in *National Irish Banks*.
- In both *Murray* and *Averill*, the European Court concluded that an accused is entitled to legal assistance at the pre-trial detention stage before any inferences from silence can properly be drawn. Of course, the Supreme Court has held that a detained suspect has a constitutional right to have reasonable access to a lawyer during this period: see *The People v. Healy*.³⁷³ To ensure compatibility with Article 6 ECHR, this right will

compulsory self-incrimination in certain circumstances, it contains the vital safeguard that none of the answers "shall be admissible in evidence against him in any other proceedings, civil or criminal, except in the case of any criminal proceedings for perjury in respect of any such answer". The US Supreme Court has held that this form of immunity (sometimes described as "transactional immunity") satisfies the requirements of the Fifth Amendment of US Constitution and is not unconstitutional: see, for example, *Kastigar v. United States* 406 US 441 (1972).

³⁷³[1990] 2 IR 53. See also *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390 and Breen and McEntee, "The Right to Silence after *Lavery v. Member in Charge, Carrickmacross Garda Station*" (1999) 5 *Bar Review* 6. In *Lavery* the applicant

have to be construed as permitting a person in detention access to a lawyer before any adverse inferences can subsequently be drawn from that person's silence.

- Given that the right to silence is constitutionally protected, express statutory language is required if that right is to be abridged and any abridgement of that right requires objective justification: see *The People v. Finnerty*.

The Committee's views regarding the right to silence

8.50 It may be helpful if the Committee were to set out its general views before proceeding directly to consider possible revisions of section 52 of the 1939 Act, section 2 of the 1972 Act and sections 2 and 5 of the 1998 Act.

8.51 The Committee is of opinion that any recommendations regarding section 52 (and, for that matter, the drawing of inferences and the right to silence generally) must respect these fundamental constitutional principles and have due regard to our international obligations. Accordingly, in making our recommendations, we are conscious that any legislation abridging or restricting the right to silence must, however, "protect the essence of the privilege against self-incrimination".³⁷⁴ It is, of course, correct to say that the right to silence, like, perhaps, any other legal right, is capable of abuse and, for this reason, there has been a legislative tendency over the last two decades to abridge and curtail this right. However, irrespective of constitutional constraints in particular and international legal obligations in general, there is a strong body of opinion which does not agree with the view that the right to silence should be significantly abridged. Many people find distasteful the suggestion that a suspect should be coerced into incriminating himself or herself. There is also a perceived risk that innocent persons will wrongly

had been arrested under section.30 of the Offences against the State Act 1939 after the 1998 Act had come into operation. He had been arrested early in the morning and his solicitor had spoken to him about the implications of the 1998 Act. When the solicitor arrived at the Garda station in the mid-afternoon, he sought access to certain Garda notes so that he could advise his client on the issue of adverse inferences. When this was refused, McGuinness J. made an order under Article 40.4 of the Constitution releasing the applicant on the basis that this refusal had rendered the continued detention unlawful. Her decision was, however, reversed by the Supreme Court on appeal, with O'Flaherty J. ruling that the failure to produce the notes did not of itself render the continued detention to be unlawful. While the some of the issues raised in *Murray* were, perhaps, in view in *Lavery*, the latter decision does not directly deal with right to silence issues.

³⁷⁴*Murray v. United Kingdom* (1996) 22 EHRR 29, 63.

incriminate themselves if they are obliged to answer questions under threat of legal sanction.

- 8.52 It has also been urged that, to some extent, statutory rules providing for the drawing of inferences could be viewed in some instances as unnecessary and in other cases as wholly artificial. As far as the former category is concerned, it may be questioned if the inference-drawing power adds anything to existing rules regarding circumstantial evidence. If, for example, a suspect emerges from a room containing the body of his victim with a blood-soaked knife in his possession, the failure of the defence to offer any rebutting evidence will weigh heavily with any court or jury considering whether or not to convict. In this type of case - with admittedly strong facts - the existence of section 19 of the Criminal Justice Act 1984 (which permits inferences to be drawn from an accused's failure to account for his presence at a particular place "at or about the time the offence in respect of which he was arrested is alleged to have been committed") seems to add little to the ordinary law relating to circumstantial evidence.
- 8.53 In other circumstances, the provision by statute of an inference-drawing power seems quite artificial. Thus, for example, by virtue of section 3(1)(b)(ii) of the 1972 Act (as inserted by section 4 of the 1998 Act) and section 2 of the 1998 Act, an adverse inference can be drawn from the failure of an accused to deny published reports that he was a member of an illegal organisation in order to corroborate other evidence of membership. This may lead to the court drawing a conclusion that it would otherwise not draw from such failure, whether by reason of the application of the ordinary rules of evidence or simply as a matter of plain common sense.
- 8.54 While the Committee acknowledge these considerations, a majority does not reject statutory inference-drawing powers as a matter of principle, although they do agree that it is important that such inference-drawing provisions should be carefully drawn. There is the further consideration that, in the light of the Supreme Court's decision in *Finnerty*, it appears that express statutory authority is required before an inference can be drawn in respect of the accused's exercise of his constitutional right to silence. It could not be said, therefore, that these inference-drawing provisions add nothing to the ordinary law of criminal evidence. Thus, for example, section 19 of the 1984 Act permits in appropriate cases a court or jury to draw inferences from the failure of an accused to explain his or her presence at the scene of a crime in circumstances where an explanation is reasonably called for. In the light of *Finnerty* and in the absence of such a provision, while there would still remain the circumstantial evidence of his or her presence, no adverse

inference could be drawn from the silence of an accused in the face of Garda questioning on this point. Section 19, therefore, enables matters to be taken into account which could not otherwise be taken into account.

8.55 On the other hand, a minority of the Committee, The Chairman Mr. Justice Anthony J. Hederman, Professor William Binchy and Professor Dermot Walsh consider that statutory inference-drawing powers either add little or nothing to the ordinary rules relating to circumstantial evidence and, where they go further, the very artificiality of such inference-drawing powers is in itself a ground for rejecting them. Their views are set out fully at paragraph 8.67.

Retention of Section 52 of the 1939 Act and Section 2 of the 1972 Act

8.56 It follows from the foregoing that the Committee is therefore opposed to the retention of section 52(1) of the 1939 Act and section 2 of the 1972 Act in their present form. As it happens, the Committee had arrived at this conclusion even before the European Court's decision in *Quinn v. Ireland* in December 2000, but, in any event, in the light of this decision, it is inconceivable that either section 52 or section 2 of the 1972 Act (which is in roughly similar terms) should be left on the statute books in their present form.

8.57 Beyond this the Committee is divided as to whether a recast section 52 should be replaced by an inference-drawing section. A majority is of the view that it would be more appropriate if legislation permitted a court of trial to draw the appropriate inferences from silence, *provided* that such legislation contained necessary safeguards for the protection of the suspect. These safeguards should include an explicit warning as to the likely implications of the failure to answer questions posed; the right of reasonable access to a lawyer during police custody and the failure to answer questions should be regarded as corroborative only. Some members consider that another solution to the difficulties thrown up in respect of section 52 of the 1939 Act (and, by extension, section 2 of the 1972 Act) by the *Quinn* and *Heaney* decisions is to amend the section by providing expressly that statements obtained pursuant to a statutory demand are inadmissible in any subsequent criminal prosecution. They consider that were the Oireachtas to provide for such "transaction immunity" in this fashion, then no constitutional or ECHR issues would thereby arise.

8.58 Moreover, it now seems clear, in the light of the European Court's decision in *Condrón* and (to some extent) in *Averill*, that adverse inferences could

properly be drawn only where the court is of opinion that the prosecution evidence is such that it reasonably calls for an explanation by the accused. Mere failure to answer a question should never in itself be regarded as evidence of guilt. Moreover, it is clear from *Averill* that inferences must not be drawn from silence before the accused has not otherwise had effective access to legal advice. In this regard the majority of the Committee respectfully agrees with the approach of the European Court in *Murray*, *Condrón* and *Averill* and believes that its recommendations are in harmony with the Strasbourg case-law.

- 8.59 A minority of the Committee, as set out above, are opposed to the inference-drawing powers as a matter of principle, since they consider that such provisions either add nothing to the ordinary rules relating to circumstantial evidence or, where they go further, they are objectionable on the ground of their very artificiality. Their views are set out full at paragraph 8.67.

Recommendation

8.60 *The Committee is unanimously of the view that section 52 of the 1939 Act and section 2 of the 1972 Act ought to be repealed.*

8.61 *A majority of the Committee is of the view that this section could be replaced with a section allowing inferences to be drawn from the accused's silence, provided, however, the following safeguards were included:*

- *An explicit warning as to the likely implications of the failure to answer questions posed must be given.*
- *The failure to answer questions should be regarded as corroborative only.*
- *Adverse inferences could only properly be drawn where the court is of opinion that the prosecution evidence is such that it reasonably calls for an explanation by the accused. Mere failure to answer a question should never in itself be regarded as evidence of guilt.*
- *The right of reasonable access to a lawyer during police custody.*

- *Inferences must not be drawn from silence before the accused has had effective access to legal advice.*

8.62 *The minority views and recommendations of The Hon. Mr Justice Anthony J. Hederman, Professor William Binchy and Professor Dermot Walsh, in relation to the use of inference-drawing provisions arising from the silence of the accused are set out at 8.68 to 8.71 below.*

Sections 2 and 5 of the 1998 Act

8.63 A majority of the Committee is of the view that these provisions should be retained. The language of these provisions is similar to sections 18 and 19 of the 1984 Act and, in the light of the Supreme Court's decisions in *Heaney* and especially in *Rock* and the European Court of Human Rights's decision in *Averill*, it seems that any constitutional challenge would be unlikely to be successful, nor would the section be found to be contrary to Article 6(1) ECHR. As was pointed out in *Rock*, the inference-drawing power in question is a limited one, and the court is by no means empowered to draw such an inference where, for example, it was of opinion that the prejudicial effect of such an inference would outweigh its probative value. Moreover, both section 2(2) and section 5(2) contain the essential safeguards necessary to protect the very essence of the right to silence, including the fact that the suspect must be warned in ordinary language of the possible effect of failure to answer, and the fact that such failure could only be corroborative of other evidence. An accused could never be convicted of an offence by virtue of the inference-drawing provisions of these sections merely because of his silence.

8.64 A minority is opposed to the retention of these provisions, principally because these inference-drawing powers seem wider than those envisaged as constitutionally permissible by the Supreme Court in *Finnerty* or than the European Court was prepared to allow in *Murray* and in *Condron*. In particular, both section 2(2) and section 5(2) seem to permit adverse inferences to be drawn even where there is no *prima facie* case or other set of circumstances which, as a matter of common sense, call for an explanation from the accused. In this respect, these provisions of the 1998 Act go further than sections 18 and 19 of the 1984 Act in as much as the operation of the latter provisions is confined to circumstances where, for example, the presence of marks or stains on a suspect's clothing is one which may fairly be deemed to call for an explanation from an accused. To that extent, *Rock* cannot be relied on as a direct authority in support of the constitutionality of either section 2(2) or section 5(2).

- 8.65 In addition, this minority considers that these provisions are capable of operating in a manner that is potentially unfair to an accused. Thus, for example, it is possible that an accused, placed in the unfamiliar and potentially hostile surroundings of Garda custody, may be confused or tongue-tied or may simply forget important matters which, in a calmer environment and on fuller, reflection he may wish to rely on.³⁷⁵ Yet, despite such extenuating circumstances, section 5(2) permits the court to draw adverse inferences from earlier silence.
- 8.66 A different minority agrees fully with these criticisms of section 2(2) and section 5(2), but, for the reasons already outlined above, are also opposed to such inference-drawing provisions as a matter of principle. Again, the views and recommendations of this minority are set out at paragraph 8.68.

Recommendation

Majority view to retain sections 2 and 5 of the 1998 Act

- 8.67 ***A majority of the Committee are of the view that sections 2 and 5 of the Offences against the State (Amendment) Act 1998 ought to be retained***

Minority views and recommendations in relation to the use of inference-drawing provisions arising from the silence of the accused

- 8.68 ***The Hon. Mr Justice Anthony J. Hederman, Professor William Binchy and Professor Dermot Walsh differ from the majority on the use in the legislation of inference-drawing provisions which have the effect of compromising the right to silence. In their view the right to silence is of crucial importance in a democracy. The task of proving a person's guilt should lie with the prosecution. If the prosecution cannot produce evidence that proves the case beyond a reasonable doubt, the accused should not be required to assist in his or her own conviction.***
- 8.69 ***In their view, inference-drawing provisions also carry the real risk of injustice in that they may result in mistaken assumptions of guilt. A***

³⁷⁵This would be especially true if the test of what the suspect might “reasonably have been expected to mention” at interview for the purposes of section 5(2) was held to be an objective test. This was the approach of Carswell J. in *R. v. Connolly*, Northern Ireland High Court, 5 June 1992:

I should not regard it as reasonable for a person being interviewed to fail to mention facts simply because he had been advised by his solicitor to remain silent. If that failure is objectively unreasonable, it does not in my view become reasonable merely because a solicitor gave his client ill-judged advice.

Such an approach, however, seems plainly at odds with the attitude subsequently adopted by the European Court of Human Rights in *Condron*.

person who is suspected of an offence may be confused; he or she may be fearful of other facts emerging, unconnected with the offence of which he or she is suspected, if full disclosure is given.

8.70 *The recent jurisprudence of the European Court of Human Rights indicates the difficulty that arises in formulating inference-drawing provisions in a manner that is consistent with the values of the Convention. In the view of these members, legislation relating to the questioning of an accused person should reflect the highest standards rather than merely seek to comply with the minimum requirements.*

8.71 *The minority, therefore, recommend the following:*

1. *The repeal of section 52 of the 1939 Act, section 2 of the 1972 Act and sections 2 and 5 of the 1998 Act;*
2. *The requirement, in respect of section 30 of the 1939 Act, that a suspect should be entitled to have access to advice from his or her solicitor and to the presence of the solicitor during the course of police interviews.*

CHAPTER 9

SPECIAL CRIMINAL COURT

Historical background

9.1 The drafters of the Constitution of the Irish Free State evidently thought that it would be possible to have trial by jury as the norm for all serious offences. Article 72 enshrined the right to jury trial save in respect of minor offences and in cases of charges triable by military law. Article 70 provided in relevant part that:

No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such Military Tribunals as may be authorised by law for dealing with military offences against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war or armed rebellion and for acts committed in time of war or armed rebellion and in accordance with the regulations to be prescribed by law.

9.2 The drafters' expectations proved in time to be hopelessly unrealistic. By 1931, a system of standing military tribunal with drastic powers - including the right to impose the death penalty in any case where the tribunal thought it expedient to do so, even if the offence of which the accused was found guilty did not so provide and from whose decisions no appeal lay - had been established following the insertion of Article 2A³⁷⁶ into the Constitution.³⁷⁷ Article 2A was, in reality, an elaborate form of Public Safety Act which had been inserted into the Constitution. This arrangement was widely perceived as unsatisfactory,³⁷⁸ but the 1934 Constitution Review Committee's

³⁷⁶This Article was inserted by means of ordinary legislation without a referendum. The constitutionality of this amendment was upheld by a majority of the Supreme Court in *The State (Ryan) v. Lennon* [1935] IR 170.

³⁷⁷The Government had originally hoped to have ordinary judges sitting in a non-jury court to try criminal cases, but two members of the Supreme Court informed the then President of the Executive Council (W.T. Cosgrave TD) that that they would resign rather than sit in such a court: see 40 *Dáil Debates* at 45 (14 October 1931).

³⁷⁸In a memorandum to the Constitution Review Committee of 1934, the then Secretary to the Department of Justice argued that:

With particular reference to Article 2A, I agree that *in form* that Article is grotesque as an Article of the Constitution. It must go. On the other hand, so long as we keep to the ideal of a 'normal' written Constitution, with all the sorts of snags and pit-falls for the Executive, we must have something, somewhere, on the lines of Article 2A.

recommendations³⁷⁹ contained the outline of what was ultimately to become Article 38.3 of the Constitution, permitting the establishment by law of the Special Criminal Court.

Constitutional provisions

9.3 Article 38.3 of the Constitution is in the following terms:

1. Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.
2. The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

9.4 Article 38.5 permits the trial without a jury of persons tried by the Special Criminal Court.

9.5 In addition, Article 38.6 provides that:

The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.

9.6 Although Articles 34 and 35 guarantee, *inter alia*, the public administration of justice by independent judges enjoying security of tenure and the existence of a right of appeal, the potentially sweeping effects of this exclusion have been diluted by the Supreme Court's decision in *Eccles v. Ireland*.³⁸⁰ In this case the Court held that, Article 38.6 notwithstanding, judges of the Special Criminal Court enjoyed a constitutional guarantee of independence derived from an accused's right to trial in due course of law as protected by Article 38.1 of the Constitution.

9.7 Part V of the Offences against the State Act 1939 provided for the establishment of the Special Criminal Court.³⁸¹ Section 35(1), reproducing the formula of Article 38.3.1, is in the following terms:

...if and whenever and so often the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this

³⁷⁹Hogan, "The Constitution Review Committee of 1934" in Ó'Muircheartaigh (ed.), *Ireland in the Coming Times: Essays to Celebrate T.K. Whitaker's 80 Years* (IPA, 1997) 342, 350-353.

³⁸⁰[1985] IR 545.

³⁸¹See generally, Kelly, *The Irish Constitution* (Dublin, 1994) at 639-656; Casey, *Constitutional Law in Ireland* (Dublin, 2000) at 327-331; Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester, 1989) at 227-244; Robinson, *The Special Criminal Court* (1974) and Charleton and McDermott, "Constitutional Aspects of Non-Jury Courts" (2000) 6 *Bar Review* 106 (Part I); 142 (Part II).

Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.

- 9.8 The Special Criminal Court sat between 1939 and 1946; 1961 and 1962 and from May 1972 to date. While earlier Special Criminal Courts were staffed by military officers, since 1972 only judges or former judges have sat on the Court and, indeed, since 1986, the almost invariable practice has been that only serving judges have sat. Unlike the former Article 2A regime, the Special Criminal Court is required by section 41(4) of the 1939 Act to follow “as far as practicable” the practice and procedure of the Central Criminal Court³⁸² and there is a right of appeal (subject to purely formal leave requirements) against conviction and sentence to the Court of Criminal Appeal.³⁸³
- 9.9 Contrary to what is sometimes asserted, the Special Criminal Court - bound as it is by the Constitution and the law and whose practice and procedure is statutorily assimilated to that of the Central Criminal Court - must and does apply the ordinary rules of evidence. If legislation did, in fact, provide for special rules of evidence in the Special Criminal Court, it is clear from the decision of the Supreme Court in *Cox v. Ireland*³⁸⁴ that such arrangements would be unconstitutional.

The right of the Director of Public Prosecutions to prosecute accused persons before the Special Criminal Court

- 9.10 Section 45(1) of the 1939 Act provides that in the case of a person who is charged in the District Court with a scheduled offence which that Court has jurisdiction to deal with summarily, whenever the Director of Public Prosecutions requests that such person be sent forward for trial to the Special Criminal Court, the District Judge shall send such person forward for trial before that Court.
- 9.11 Section 45(2) provides that in the case of a person charged with a scheduled offence which is also an indictable offence and the district judge decides to return that person for trial, such person shall be returned for trial to the Special Criminal Court unless the Director otherwise directs.
- 9.12 Section 46(1) and (2) contain corresponding provisions in respect of non-scheduled offences, save that they provide that such persons are to be tried in the ordinary courts unless the Director otherwise directs.
- 9.13 Section 47(1) enables the Director to direct that an accused be charged with a scheduled offence before the Special Criminal Court and section 47(2) enables the Director to prefer charges in respect of non-scheduled offences directly before that Court provided that the appropriate certificate is given.

³⁸² 1939 Act, s. 41(4).

³⁸³ 1939 Act, s. 44.

³⁸⁴ [1992] 2 IR 532.

- 9.14 Finally, section 48 completes the picture in that it provides for the automatic transfer of a trial pending before either the Circuit Court or the Central Criminal Court following an application by the Director, to the High Court.
- 9.15 Section 36(1) gives the Government power to schedule offences for as long as Part V of the Act is in force. The scheduled offences at present³⁸⁵ are the Explosives Substances Act 1883³⁸⁶; the Firearms Acts 1925 to 1971 and offences under the Offences against the State Act 1939³⁸⁷; and sections 6 to 9 and 12 of the Offences against the State (Amendment) Act 1998.³⁸⁸

Challenges to the operation of the Special Criminal Court

- 9.16 Ever since the Special Criminal Court was first established, its operation has been the subject of frequent - but unsuccessful - legal challenges. In *Re McCurtain*,³⁸⁹ the Supreme Court rejected the argument that the accused's trial by a Special Criminal Court consisting exclusively of army officers was unconstitutional since it was in reality a form of military tribunal of the sort contemplated by Article 38.4 and permissible in the case of civilians only in time of war or armed rebellion. Sullivan C.J. stressed that the actual composition of the Court was a matter for the Oireachtas by virtue of Article 38.3.2. The Court also rejected the argument that the powers given to the Government to establish the Court and to the Attorney General (now the Director of Public Prosecutions) to certify the inadequacy of the ordinary

³⁸⁵Offences under the Malicious Damage Act 1861 were scheduled in the Offences against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972). However, since most of the 1861 Act was repealed and replaced by the Criminal Damage Act 1991 and because only a small number of relatively minor offences remain under the 1861 Act, the practical significance of scheduling offences under the 1861 Act is nowadays rather slight. Likewise, the Offences against the State Act 1939 (Scheduled Offences) (No.2) Order 1972 (SI No. 282 of 1972) provided that section 7 of the Conspiracy and Protection of Property Act 1875 was a scheduled offence, but this statutory offence has now been repealed by section 31 of the Non-Fatal Offences against the Person Act 1997.

³⁸⁶Note that the original section 3 of this Act was amended by the substitution of a new section 3 by the Criminal Law (Jurisdiction) Act 1976. In *The State (Daly) v. Delap*, High Court, 30 June 1980 it was held that this amendment by substitution did not mean that section 3 of the 1883 Act ceased to be a scheduled offence for the purposes of the Offences against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972). This reasoning was subsequently approved by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Tuite* (1983) 2 Frewen 175.

³⁸⁷As so provided by the Offences against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972).

³⁸⁸As so provided by the Offences against the State (Amendment) Act 1998, s 14(2).

³⁸⁹[1941] IR 83.

courts amounted to the administration of justice by non-judicial personages, contrary to Article 34.³⁹⁰

- 9.17 A number of the submissions received by the Committee argued that in recent years an increasing number of persons charged with offences which were thought to have been the work of members of organised criminal groups found themselves facing trial before the Special Criminal Court, so extending the remit of the Court beyond its intended purpose. They did not dispute that organised crime is a serious problem, but argued that any developed system of criminal justice must be able to confront this problem and that to refer persons other than those charged with purely subversive criminal offences to the Special Criminal Court gave rise to concerns that a dual criminal justice system is now effectively in operation and that the constitutional right to jury trial is being thereby devalued.
- 9.18 Many submissions³⁹¹ were critical of the power of the Director of Public Prosecutions to direct that a person charged with a non-scheduled offence should be tried in the Special Criminal Court. They argue that the use of this power has resulted in the Special Criminal Court trying persons charged with such diverse offences as murder, receiving stolen goods, vehicle theft, the theft of computer parts and the possession of drugs for supply. Some submissions also argued that a system where an accused with no obvious paramilitary connections can be sent for trial to the Special Criminal Court is open to abuse, particularly since the Director does not reveal the reasons for issuing certificates, and there is no effective mechanism whereby the decisions of the Director may be reviewed.
- 9.19 In more recent times the Supreme Court has confirmed in two major decisions that, first, the operation of the 1939 Act is not necessarily confined to subversive cases and, secondly, that the decision of the Government to keep the Court in operation and that of the Director to send an accused for trial before the Special Criminal Court, while not beyond the reach of judicial control, is practically unreviewable. In *The People v. Quilligan (No.1)*,³⁹² the Supreme Court rejected the argument that the powers of arrest under section 30 were confined to subversive cases. Walsh J. noted that the Special Criminal Court was very frequently engaged in trying “black market” cases during and in the immediate aftermath of World War II. He then continued:

³⁹⁰This decision has been applied in a series of subsequent cases, see, for example, *The State (Bollard) v. Governor of Portlaoise Prison*, High Court, 4 December 1972.

³⁹¹For example, the submission of British Irish Rights Watch of 15 October 1999, at paras. 2.3 to 2.4; submission of the Irish Council for Civil Liberties of 6 October 1999, p.6.

³⁹²[1986] IR 485.

It is common knowledge, and, indeed, was discussed in the debates in the Oireachtas leading to the enactment of the 1939 Act that what was envisaged were cases or situations of a political nature where juries could be open to intimidation or threats of various types. However, a similar situation could well arise in types of cases far removed from what one could call “political type” offences. There could well be a grave situation in dealing with ordinary gangsterism or well financed...drug dealing or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or illegal interference, being prevented from doing justice.³⁹³

9.20 In *Kavanagh v. Ireland*³⁹⁴ the applicant had been charged with false imprisonment, robbery and firearms offences. The Director gave the appropriate certificate in respect of the non-scheduled offences and the applicant was charged directly before the Special Criminal Court. The applicant, however, first challenged the decision of the Government to maintain the Court in operation, claiming that the establishment of the Court was a direct consequence of the civil conflict in Northern Ireland³⁹⁵ and that, in the wake of the paramilitary ceasefires, the Government had a duty to keep the situation under review.

9.21 On this point, Barrington J. said that the affidavits filed on behalf of the Government indicated that it had kept the situation under review.³⁹⁶ Keane J. added that, while the decision to maintain the Special Criminal Court in operation was essentially a political one and, although the applicant had failed in the present case to discharge the onus of demonstrating that the Government’s decision in this regard was not factually justifiable, nevertheless:

³⁹³ *Ibid.*, 509-510.

³⁹⁴ [1996] 1 IR 321.

³⁹⁵ The applicant relied to this end on a statement made by the then Attorney General to the Human Rights Committee of the United Nations and referred to in the Committee’s Report (7 October 1993) at para. 575:

With respect to the Special Criminal Court, the representative stressed that the court was needed to ensure the fundamental rights of citizens and protect democracy and the rule of law from the ongoing campaign relating to the problem of Northern Ireland. The Special Criminal Court differed from ordinary courts only in two respects: there was no jury and that instead of one judge there were three judges. Otherwise the same rules of evidence applied and the decisions of the courts were subject to review by the Court of Criminal Appeal.

³⁹⁶ [1996] 1 IR 321, 359.

A decision of this nature taken by the Government...cannot be regarded as forever beyond the reach of judicial control...the powers conferred by Part V of the Act are indeed far-reaching and allow for the trial of persons on serious offences, not merely without a jury, but by tribunals composed of persons without any legal qualifications. Save in the exceptional circumstances envisaged by Article 28.3, the courts at all times retain their jurisdiction so as to ensure that the exercise of these drastic powers to abridge the citizen's rights is not abused by the arm of government to which they have been entrusted.³⁹⁷

- 9.22 The applicant also challenged the decision of the Director to grant the appropriate certificate in respect of the non-scheduled offences, contending that the “offences in respect of which he stood charged were ordinary crimes with no political or subversive connection”.³⁹⁸ Barrington J. first referred with approval to the earlier *dictum* of Walsh J. in *Quilligan* and then added:

All the offences in respect of which the applicant was charged are scheduled offences or offences in respect of which the Director of Public Prosecutions has issued a certificate under section 47(2) of the Act. Under these circumstances it avails the applicant nothing to submit that the offences in respect of which he has been charged are not of a “subversive” nature, for the issue involved is not the nature of the offences but the adequacy, in the opinion of the Government or the Director of Public Prosecutions, of the ordinary courts to secure the effective administration of justice in relation to them.³⁹⁹

- 9.23 The practical effects of this decision are, first, to render it all but impossible to mount a legal challenge to a decision of the Government to establish or maintain in force the Special Criminal Court (provided that this question is kept under review by the Government) and, secondly, to challenge a decision of the Director to direct that an accused face trial in that Court in respect of either a scheduled or a non-scheduled offence.⁴⁰⁰ This principle has been

³⁹⁷At 365-6.

³⁹⁸At 356, per Barrington J.

³⁹⁹At 358. Cf. the comments of Kearns J. in *Eviston v. Director of Public Prosecutions*, High Court, 26 January 2001: “The prosecutorial discretion is regarded as almost completely immune from judicial scrutiny except in extremely limited circumstances.” In *Kavanagh v. Ireland*, decision of the UN Human Rights Committee, 4 April 2001 (CCPR/C/71/D/819/1998), the Committee observed that judicial review of the Director's decisions “is effectively restricted to the most exceptional and virtually undemonstrable grounds”.

⁴⁰⁰Of course, by virtue of s. 35(5) of the 1939 Act, it is open to Dáil Éireann to annul “the proclamation [relating to the Special Criminal Court] by virtue of which this Part of this Act shall cease to be in force.”

confirmed in a series of decisions which preceded⁴⁰¹ and post-dated⁴⁰² the Supreme Court's decision in *Kavanagh*. One consequence of these decisions has been effectively to sanction the development of a prosecutorial practice of referring such cases to the Special Criminal Court, and that Court has been employed in recent years as a venue for the trial of persons charged with offences arising from the operation of organised crime, as opposed to offences committed by members of paramilitary groups.

The view of the UN Human Rights Committee

9.24 Following the decision of the Supreme Court, the applicant in *Kavanagh v. Ireland* applied to the UN Human Rights Committee and complained that the procedures adopted in the reference of his case to the Special Criminal Court violated his entitlement to equality before the law, as guaranteed by Article 26.1 of the International Covenant on Civil and Political Rights.⁴⁰³ The UN Committee upheld this complaint, observing that:

No reasons are required to be given for the decisions that the Special Criminal Court would be “proper” or that the ordinary courts are “inadequate”, and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.

The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based on reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under Article 26 to equality before the law and to equal protection of the law has been violated.

⁴⁰¹ *Savage v. Director of Public Prosecutions* [1982] ILRM 385; *O'Reilly v. Director of Public Prosecutions* [1984] ILRM 224; *Foley v. Director of Public Prosecutions*, *The Irish Times*, 25 September 1989.

⁴⁰² *Byrne & Dempsey v. Government of Ireland*, Supreme Court, 11 March 1999; *Gilligan v. Ireland* [2001] 1 ILRM 473. In the latter case, the Court refused the applicant leave to challenge by way of judicial review the 1972 proclamation establishing the Special Criminal Court, but indicated that he could do so in the ordinary way by means of the plenary summons. This decision thus appears to turn in part on the fact that there had been undue delay on the part of the applicant in seeking an order which would have had the effect of delaying a pending criminal trial. The Court nevertheless also appeared to reaffirm the decision in *Kavanagh* and the subsequent case-law.

⁴⁰³ 4 April 2001 (CCPR/C/71/D/819/1998).

- 9.25 The Committee will presently examine ways in which the view of the UN Committee can be complied with in order to ensure that, henceforth, persons are not tried before the Special Criminal Court “unless reasonable and objective criteria for the decision are provided”.

Retention of the Special Criminal Court

- 9.26 The workload of the Special Criminal Court has steadily declined since the mid-1970s. In 1973, 286 persons were charged with offences before that Court, but that figure had declined by 1995 to just 12. While 37 persons were charged in 1998 and although there also appears to be a small increase in that figure projected for the years 1999 and 2000, there is every reason to believe that such an increase will be temporary. Indeed, following the commencement of the operation of the Good Friday Agreement in December 1999, it may be expected that the workload of the Court will decline over the long term. At the same time, the possibility of a resurgence of violence caused by the operations of disaffected republican and loyalist paramilitary groupings cannot be discounted.
- 9.27 It should be noted, however, that case-load figures alone might give a slightly false impression, since many of the cases awaiting trial before the Court at present are likely to be difficult and lengthy and are cases where the accused have been charged with very serious offences. In many respects, it is the nature and seriousness of the cases coming before the Special Criminal Court, rather than the actual volume, which must be considered.
- 9.28 It is understood that, in the wake of the first IRA ceasefire and prior to the Supreme Court’s decision in *Kavanagh v. Ireland*⁴⁰⁴ (where the Court indicated that the necessity for the Special Criminal Court should be kept under review), the Government decided that such a review procedure should be put in place. Reviews took place in 1997, 1998, 1999 and 2000 and involved consultations with the Department of Justice, Equality and Law Reform, the Attorney General, the Director of Public Prosecutions and the Gardaí. In each review to date the continuing necessity for the Special Criminal Court was considered to be warranted on a number of grounds, including the continuing threat to the security of the State posed by subversive organisations and the ruthlessness of certain organised criminal gangs operating within the State. Concerns were also expressed that attempts might be made to interfere with juries or witnesses in some cases. In these circumstances, the view was taken that the ordinary courts were inadequate to

⁴⁰⁴[1996] 1 IR 321.

secure the effective administration of justice and the preservation of public peace and order.

- 9.29 As things stand, the issue as to whether the continued security threat from paramilitaries alone is presently sufficient to justify the continued operation in force of the Special Criminal Court must be considered. A majority of the Committee is of the view that the security risk is sufficiently high to justify the retention of the Court on this ground alone, albeit that they are also of the view that this issue should be kept under constant review. These members take the view that for so long as there is in existence a paramilitary threat to public peace and order, the need for the Special Criminal Court will probably remain. In this regard, they are of the view that comparisons with jury practice in the United States (where trials with anonymous juries often take place in sensitive cases) are essentially misplaced. Unlike a vast country with a huge population such as the United States, the small and dispersed nature of Irish society means that the risk of jury-tampering and intimidation will remain a significant one. This seems to be especially true of paramilitary groups, because they have demonstrated in the past (including the recent past) that they retain the power to wield a sinister influence in respect of certain communities; to discipline their members and supporters by the use of violence (including murder) and generally to intimidate and threaten witnesses. The majority of the Committee has little doubt but that such groups would have no hesitation in attempting to intimidate jurors and potential jurors if jury trial were to be restored in such cases.

Use of the Special Criminal Court to deal with organised crime

- 9.30 The other main justification for the continued existence of the Special Criminal Court is the very real threat posed by organised crime. If the Court were to be retained on this ground, it seems to give rise to two issues of principle.
- 9.31 First, it may be contended that this ground was not the original rationale for the establishment of the Special Criminal Court in its present phase of operation in May 1972. The reason for the establishment of the Court in 1972 is commonly believed to have been associated with the overspill in violence from the civil conflict in Northern Ireland. However, it may be noted that the Government statement announcing the establishment of the Special Criminal Court did not expressly state that this was the reason for the decision. Instead, the statement merely recorded that:

The Government are satisfied that this step is necessary on the grounds that the ordinary courts are inadequate at the present time to secure the effective administration of justice and the preservation of public peace and order.⁴⁰⁵

- 9.32 Nevertheless, given that the original justification for the establishment of the Special Criminal Court is commonly believed to be directly associated with the civil conflict in Northern Ireland, if the Government wishes to rely on the organised crime ground as justification for the maintenance of the Court in operation, it is arguable that this ought to be clearly and openly stated to the Houses of the Oireachtas.
- 9.33 Secondly, the argument for maintaining the Special Criminal Court to deal with cases of organised crime is contingent on the premise that the ordinary courts are inadequate to deal with such cases. Recent experience has shown that juries have been distinctly uncomfortable - and have been made to feel distinctly uncomfortable - in dealing with certain cases involving organised crime.
- 9.34 The Committee was under no illusions about the potential threat to the administration of justice posed by such organised criminals. As Charleton and McDermott have argued:

It is undesirable to deprive people of jury trials where it is their ordinary constitutional entitlement. However, in the case of armed gangs, be they subversive or not, who are determined not just to commit crime, but to set up structures to subvert the State and destroy the administration of justice as it applies to them, it seems to us that it is expecting too much to expect citizens to sit on juries and face the prospect of intimidation or trickery.... The extent to which [organised crime] can grow and dominate society, the arrogance of those involved with their gangs and their determination not to abide by any rules of decency and standards makes for us, at least, a reasonable case for the measured use of multi-judge, non-jury courts on an emergency basis. Nor should one forget that the European system of criminal trial does not employ a jury. The model in Holland, for example, involves a trial by three judges, a right of re-hearing on appeal by three High Court judges and finally an appeal on a point of law to the Dutch Supreme

⁴⁰⁵*The Irish Times*, 27 May 1972. It may be noted that in a subsequent Dáil question regarding the establishment of the Special Criminal Court, the Minister for Justice (Mr. D. O'Malley TD) declined to elaborate further on the reasons for the decision: see 261 *Dáil Debates* at Col. 599 (30 May 1972).

Court. Why is that system any less fair than the common law system of jury trial? ”⁴⁰⁶

- 9.35 In *Director of Public Prosecutions v. Special Criminal Court*⁴⁰⁷ Carney J. put it even more graphically:

Those engaged in [organised] crime require a wall of silence to surround their activities and believe that its maintenance is necessary for their protection. They have at their disposal the resources including money and firearms to maintain this wall of silence and will resort to any necessary means including murder to further this objective.⁴⁰⁸

- 9.36 Indeed, there have been instances in recent times where it appears that attempts have been made to tamper with juries in high-profile criminal trials in the ordinary courts.
- 9.37 A majority of the Committee was of the view that the threat posed by organised crime was sufficiently serious to justify the continuation of the Special Criminal Court on this ground alone. Individual members of the Committee expressed some concern that the Court was now being used for a purpose which was different from that for which it had been originally intended. To this end, it was suggested that it might be useful to draw on the experience of other common law jurisdictions whose criminal justice system had to confront problems posed by organised crime. Concern was also expressed that if the use of the Court to deal with organised crime were to be officially sanctioned, this would amount to a tacit admission that the Court was now to remain a more or less permanent feature of our system of criminal justice.

Recommendation

- 9.38 *A majority of the Committee is of the view that the threat posed by paramilitaries alone is sufficient to justify the retention of the Court. A majority of the Committee is also of the view that the threat posed by organised crime alone is also sufficient to justify the maintenance of the Special Criminal Court. On either or both grounds, therefore, a majority of the Committee is of opinion that the Court ought to be retained. This recommendation is, however, subject to two important qualifications.*

⁴⁰⁶Charleton and McDermott, *loc.cit.*, 141, 142.

⁴⁰⁷[1999] 1 IR 60.

⁴⁰⁸*Ibid.*, 63.

- 9.39 *First, the necessity for the Court must be kept under regular review. Secondly, the Oireachtas should enact as speedily as possible amending legislation which would, first, remove objectionable features of the 1939 Act so far as it concerns the Special Criminal Court (for example, the provisions permitting members of the Defence Forces to sit as judges of that Court) and, secondly, take steps to ensure that judges of the Court enjoy traditional guarantees in respect of tenure, salary and independence. The nature of these safeguards is discussed below.*
- 9.40 *The opportunity should also be taken at an appropriate time - in line with the recommendations of the Constitution Review Group - to seek to have Article 38.6 of the Constitution amended to provide that judges of the Special Criminal Court are brought expressly within the protections contained in Articles 34 and 35 of the Constitution, which protections apply to all other judges.*

Supervision of the necessity for the Special Criminal Court

- 9.41 Section 35(1) of the 1939 Act, which follows the language of Article 38.3.1 of the Constitution, provides that:

If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.

- 9.42 Section 35(5) of the 1939 Act provides that Dáil Éireann may by resolution annul such a proclamation. The Government established the Special Criminal Court by resolution in May 1972 and no motion to annul such a resolution has ever been considered by Dáil Éireann.
- 9.43 While the Committee is aware that annual reviews of the necessity for the Special Criminal Court have been conducted by the Government since 1997, it is of the opinion that, in addition, there ought to be parliamentary reviews at regular intervals and that the present open-ended arrangements regarding the continuing in operation of the Special Criminal Court are inherently unsatisfactory. It is, accordingly, of the view that if the operation of the Special Criminal Court is to be retained, this should be contingent on a positive resolution passed by both Houses of the Oireachtas continuing the Court in operation for a further specified period of years.

Recommendation

- 9.44 *The Committee is of the opinion that section 35 should be amended to ensure that any such resolution establishing the Special Criminal Court should automatically lapse unless it is positively affirmed by resolutions passed by both Houses of the Oireachtas at three-yearly intervals.⁴⁰⁹ Any such resolution should expressly set out the basis on which the Court is to be established or (as the case may be) continued in force. Any such legislation should also provide for a three-yearly report by the Government to the Oireachtas on the working of the Special Criminal Court and the necessity (if such be the case) for its continued existence.*

Composition and independence of the Court

- 9.45 Article 35 of the Constitution contains standard guarantees designed to protect the tenure of the judiciary and to ensure their independence. These include an express guarantee of judicial independence in the exercise of judicial functions “subject only to this Constitution and the law”;⁴¹⁰ a guarantee of non-removal from office except for “stated misbehaviour or incapacity” and then only on resolutions passed by Dáil Éireann and by Seanad Éireann⁴¹¹ and a guarantee that the remuneration of a judge “shall not be reduced during his continuation in office.”⁴¹²

- 9.46 However, Article 38.6 expressly provides that these guarantees do not apply to any court established under Article 38.3, i.e., the Special Criminal Court. Section 39(3) of the Offences against the State Act 1939 accordingly provides that:

No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court or a justice of the District Court, or a barrister of not less than seven years standing or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.

- 9.47 Section 39(4) permits the Minister for Finance to fix the remuneration and allowances to be paid to members of the Special Criminal Court, and section 39(5) enables the Government to remove members of the Court. In practice, the Government chooses a number of judges (who are generally experienced trial judges in criminal cases) from the High Court, Circuit Court and District Court to be judges of the Special Criminal Court. However, this method of appointment is open to criticism.

⁴⁰⁹In the view of the Committee, it would suffice if the review took place within three calendar years (e.g., January 2002 to December 2005), thus leaving the Government and the Oireachtas a certain flexibility regarding the date on which any such review or vote might take place.

⁴¹⁰Article 35.2.

⁴¹¹Article 35.4.

⁴¹²Article 35.5

9.48 The constitutionality of section 39 was challenged in *Eccles v. Ireland*⁴¹³ where the applicants had been convicted of capital murder by the Special Criminal Court. The contention was that section 39 was unconstitutional in that it allowed the Government to remove the judges of that Court at will and thus to deprive the Court of the benefit of the guarantees of judicial independence. While the Supreme Court acknowledged that Article 38.6 did not apply to the Special Criminal Court, Finlay C.J., relying on the presumption of constitutionality, said that it was incorrect in law to say, for example, that the power of the Minister for Finance to fix the remuneration of the members of the Court under section 39(3) extended to the power to refuse to pay such remuneration for the reason only that their decisions did not suit the executive. Finlay C.J. continued:

If [the executive were] to seek to exercise its power in a manner capable of interfering with the judicial independence of the Court in the trial of persons charged before it, it would be attempting to frustrate the constitutional right of persons charged before that court to trial in due course of law. Any such attempt would be prevented and corrected by the courts established under the Constitution. Whilst, therefore, the Special Criminal Court does not attract the express guarantees of judicial independence contained in Article 35, it does have, derived from the Constitution, a guarantee of independence in the carrying out of its functions.⁴¹⁴

9.49 Following this decision, the applicants unsuccessfully complained to the European Commission of Human Rights that the appointments system did not comply with the requirements of Article 6(1) of the European Convention of Human Rights which, *inter alia*, guarantees a hearing before “an independent and impartial tribunal”: see *Eccles, McPhillips & McShane v. Ireland*.⁴¹⁵ That decision was based, in part, on existing practice - no serving judge of the Court has ever been removed from that Court against his will - but it is questionable whether or not that decision of the Commission would now be followed by the new European Court of Human Rights. In this regard, it may be noted that the Scottish High Court of Justiciary has held that a judge who had no security of tenure and whose appointment was subject to annual renewal was not independent within the meaning of Article 6(1) ECHR: see *Starrs v. Ruxton, Procurator Fiscal, Linlithgow*.⁴¹⁶ Likewise in *Lauko v. Slovakia*⁴¹⁷ the Court found a violation of Article 6 where the adjudication of certain minor offences had been committed to local and district officials. The European Court observed that:

⁴¹³[1985] IR 545.

⁴¹⁴*Ibid.*, 549.

⁴¹⁵(1988) 59 DR 212.

⁴¹⁶(1999) SCCR 1052.

⁴¹⁷[1998] Reports, IV-2492.

...in order to determine whether a body can be considered ‘independent’ of the executive it is necessary to have regard to the manner of its appointment of its members and the duration of their terms of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

- 9.50 The appointment of those officials was in the hands of the executive and their status was that of salaried officials. As such, there were insufficient “guarantees against outside pressure” so that these bodies could not be judged independent for the purposes of Article 6(1) ECHR.
- 9.51 In this regard it should be noted that the Constitution Review Group was of the view that special courts should be brought within the ambit of Articles 34 and 35:

The provision in Article 38.6 which exempts special courts (as distinct from military courts) from the provisions of Articles 34 and 35 of the Constitution does not appear to be warranted. The proposal is that the phrase “section 3 or” should be deleted from that sub-section. This would have the result that special courts would function under the same constitutional regime as the ordinary courts with the exception, of course, of a jury.⁴¹⁸

- 9.52 This was also the view of the All-Party Oireachtas Committee on the Constitution in its 4th Report *The Courts and the Judiciary*.⁴¹⁹ This Committee respectfully agrees with these views and endorses the appropriateness of the suggested constitutional change. Of course, if this change were to be adopted, it would have the effect of rendering section 39 unconstitutional.
- 9.53 A majority of the Committee is also of the view that District Court Judges should continue to be eligible to sit as members of the Special Criminal Court. Such judges have considerable experience of sitting in criminal cases without a jury where they are required to form conclusions as to facts in general and with regard to the credibility of individual witnesses in particular.
- 9.54 A minority of the Committee disagrees with this conclusion. Without in any way wishing to reflect on the quality of District Court Judges, they observe that the judicial experience of District Court Judges is confined to summary trial. Such judges have no judicial experience of jury trial and trial on indictment. Given that the Special Criminal Court is required by s. 41(4) of

⁴¹⁸Pn. 2632 at 198.

⁴¹⁹Pn. 7831, at pp. 34-35.

the 1939 Act to follow “as far as practicable” the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court, a minority of the Committee is of opinion that it would be appropriate that members of the Court should have prior judicial experience of trial on indictment. These members also draw attention to the fact that the Special Criminal Court has a sentencing jurisdiction which far exceeds the constitutional limitations imposed on the District Court. They also expressed concerns that, given the hierarchical structure prevailing among the judiciary, there is a risk that such a disparity in judicial status might tend to inhibit District Judges from disagreeing with their more senior judicial colleagues.

Recommendations

9.55 *The Committee is of the view that section 39 requires to be overhauled in order to bring it into line with modern practice and Ireland’s international obligations. Specifically, the Committee is of the view that the present section 39 should be replaced since it contains provisions - for example, section 39(4) (which allows the Government to remove members of the Special Criminal Court at will) - which are manifestly inappropriate. It accordingly recommends that a recast section 39 should provide that:*

- *Only serving judges of the High Court, Circuit Court and District Court should be liable to serve as judges of the Special Criminal Court. This, in any event, is in line with practice since 1986.⁴²⁰*
- *The Government should no longer appoint particular High Court, Circuit Court or District Court judges to be judges of the Special Criminal Court. Instead, all serving members of the High Court, Circuit Court and District Court should be liable to serve as members of the Special Criminal Court.⁴²¹ The President of the High Court would act ex officio as President of that Court and, having consulted with the President of the Circuit Court and the President of the District Court, he or she would be exclusively responsible for the designation of which judges should sit on any particular case. Such arrangements would not only be more flexible than those which*

⁴²⁰Military officers have not served during the present phase of the Court’s existence from 1972 to date, but retired judges did serve between 1972 and 1986.

⁴²¹Special transitional arrangements would have to be made in respect of existing judges. No such judge could be compelled to sit on the Special Criminal Court unless he or she consented to so sitting.

currently prevail, but would also further underscore the independence of the Court.

- 9.56 *In addition, the Committee endorses the recommendation of the Constitution Review Group that Article 38.6 of the Constitution should be amended so as to provide that the traditional guarantees of independence and tenure contained in Articles 34 and 35 should apply to judges of the Special Criminal Court.*

Scheduled/non-scheduled offences distinction

- 9.57 *The Committee is of the view that the scheduled /non-scheduled distinction should no longer be retained, at least as far as the triggering of the jurisdiction of the Special Criminal Court is concerned. The Committee considers that this distinction does not provide a sufficiently clear and transparent basis for depriving an accused of the right to jury trial to which he or she is otherwise prima facie constitutionally entitled. The Committee is of the view that it would be preferable that any such decision would be based on the merits of the individual case, instead of some preconceived statutory assumption that persons charged with certain types of offences should be sent to the Special Criminal Court unless the Director of Public Prosecutions otherwise orders.*

- 9.58 Indeed, the Committee notes that it might well be argued that the present scheduling procedure does not accord with the requirements of Article 38.3 of the Constitution. This provision allows for the trial of offences in the Special Criminal Court “in cases where it may be determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order”. It could thus be contended that the constitutional jurisdiction to try an accused in the non-jury courts rests on an assessment *in that individual case* that the ordinary courts are inadequate and that these constitutional requirements are not satisfied by the scheduling of certain offences by the Oireachtas itself (as in the case of the 1998 Act) or in a manner permitted by the Oireachtas (as in the case of orders made under section 36 of the 1939 Act), since the very act of scheduling permits the trial of those very offences (unless the Director of Public Prosecution otherwise directs) without any consideration of the individual merits of the case at hand and whether or not the ordinary courts are inadequate *to try that particular case*.

- 9.59 Although some members of the Committee expressed concern that such a move would potentially widen the ambit of the Court, the fact remains that, as

things stand, the Director can ensure that the accused stands trial in the Special Criminal Court in respect of any offence, irrespective of whether it is presently scheduled or not. Moreover, the guiding principle in all such cases must remain the basic constitutional mandate of jury trial, save where it is determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in any given case. In addition, if the Committee's recommendations were to be accepted, there would be in existence a new review mechanism which would provide a further safeguard in respect of the Director's decision to charge.

Review of the decision of the Director of Public Prosecutions to refer cases to the Court

9.60 Many of the submissions to the Committee were critical of the fact that a decision of the Director of Public Prosecutions to direct a trial in the Special Criminal Court was effectively unreviewable.⁴²² Thus, the submission of the Law Society argued that:

...it is clearly discriminatory that two persons charged with the same type of offence, e.g., receiving stolen property or drug-dealing, should be tried by different courts, one with a jury and the other without. Even if such discrimination could be justified on any grounds absent a state of emergency, in order to comply with international standards the reasons for depriving the individual of the right to jury trial should be given in each particular case and that decision should be subject to review by some independent authority to which the accused person would be entitled to make representations.⁴²³

9.61 The Committee further notes that the present practice regarding prosecution choice of venue was the subject of unfavourable comment by the United Nations Human Rights Committee which expressed concern that:

The law establishing the Special Criminal Court does not specify clearly the cases which are to be assigned to that Court but leaves it to the broadly defined discretion of the Director of Public Prosecutions.⁴²⁴

⁴²²For example, the submission of the Irish Council for Civil Liberties of 15 October 1999; and the submission of Amnesty International of 30 October 1999 (requirement to show *mala fides* or improper motives amounts to "almost insurmountable burden for the defence in view of reports that the DPP has not routinely provided such reasons.")

⁴²³Submission of the Law Society of Ireland, 19 November 1999 at p. 10.

⁴²⁴At para. 13 of the Committee's Final Conclusions on the 2nd Periodic Report of Ireland (July 2000).

- 9.62 As we have already seen, a similar conclusion was reached by the UN Human Rights Committee in *Kavanagh v. Ireland*. It is important to add, of course, that in neither instance had the Committee a difficulty with the concept of non-jury courts as such, but only with the present mechanism for referring cases to it.
- 9.63 In addition, it has also been argued that the present arrangements are unsatisfactory in as much as (i) a citizen might, in effect, thereby be unfairly deprived of his constitutional right to jury trial and (ii) it violated the principle of “equality of arms”, i.e., it conferred a right to choice of venue on the prosecution, which was denied to the defence.
- 9.64 The Committee has taken note of these criticisms. Accordingly, it recommends that any decision of the Director of Public Prosecutions to send an accused for trial to that Court should be subject to a positive review mechanism. The Committee accordingly gave consideration to four types of possible review mechanisms.
- 9.65 In considering these four options the Committee believes that the independent counsel option might with advantage be employed in conjunction with any of them. Traditionally, in cases involving the disclosure of sensitive information from one party to another, the courts have been reluctant to impose conditions on the use of such information so as to prevent counsel revealing this information to their clients.⁴²⁵ In the context of a review of a decision of the prosecution to prosecute before the Special Criminal Court, it would be invidious if counsel for the accused became aware of information regarding their client which they were not at liberty to disclose to him.
- 9.66 If the independent counsel procedure were employed, the case against the choice of the Special Criminal Court as venue for the trial might be made by court-appointed independent counsel. Such counsel would represent the interests of the accused, although they would not act for him. Such counsel would be apprised of the material on which the prosecution sought to rely to justify the decision to prosecute before the Special Criminal Court. Having argued the case as legitimus contradictors of the prosecution’s position in

⁴²⁵See, e.g., *Burke v. Central Independent Television Plc* [1994] 2 IR 61, 80 (“an unprecedented and wholly undesirable breach in duty which counsel would owe to their client”; *R v. Davis* [1993] 1 WLR 613 (“...it would wholly undermine counsel’s relationship with his client if he were privy to issue in client but could reveal neither the discussion nor even the issues to his client”); *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 IR 60, 88 (“possibility that the lawyers for the [accused] might see the documents is not a feasibly compromise solution”).

camera before the High Court, they would have no further connection with the case. Such a procedure would go some distance towards meeting the legitimate concerns of the prosecution identified above, but would also provide an effective mechanism for the protection of the interests of the accused, without compromising the integrity or independence of the accused's own counsel.

Option 1: Review by the High Court following inter partes hearing

9.67 Under this proposal, any decision of the Director of Public Prosecutions to send an accused forward for trial in the Special Criminal Court would have to be approved by the High Court, following an inter partes hearing with prosecution and defence. The Court would have to be satisfied that there were valid grounds for such a decision in that there was a real or significant risk that the ordinary courts would be inadequate to deal with the case by reason of the threat of intimidation of actual or potential jurors.

9.68 In order to ensure that this review mechanism did not unduly delay the ultimate hearing of the trial, the Oireachtas might consider legislative measures such as requiring the High Court to give priority to any such application and restricting the right of appeal from any decision of the High Court on this matter to the Supreme Court.

9.69 The disadvantages with such a proposal would be that the prosecution might find itself coerced to reveal sensitive security information to the accused, his counsel and to the wider public and, moreover, many of the prosecution's concerns might not be susceptible of exact legal proof. These difficulties might be overcome in part if the High Court were given the jurisdiction to order that all or part of the hearing might be heard in camera if it considered that the interests of justice so required. Nevertheless, in the absence of an independent counsel procedure, the in camera hearing would not prevent this information coming to the attention of the accused or his own counsel.

Option 2: Application to the High Court ex parte, but in camera

9.70 Another possible manner of circumventing these possible difficulties would be to provide that the Director would be required to apply ex parte (i.e. without notice to the accused) to the High Court, sitting otherwise than in public, for an order approving the trial venue. In the absence of the independent counsel procedure, the Committee considered this option to be unsatisfactory, not least because the constitutional requirement of fair procedures seems to render any such proposal to be unconstitutional: if the

Oireachtas were to confer such powers on the High Court, “fair procedures” requires that both sides be present before any final order is made.

Option 3: Administrative review by a retired judge

9.71 The third proposal is that the decision of the Director of Public Prosecutions to send an accused for trial in the Special Criminal Court should be reviewed by a retired judge (or some other senior non-practising legal figure with the requisite experience) within a very short period thereafter. This review process might be in the nature of an administrative review in much the same way as the review mechanism under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.⁴²⁶ The retired judge would have access to the entire file and would have the right to pose questions to the Director and his staff regarding that decision. Unless the retired judge was satisfied that the Director’s decision “to try [the accused] before the Special Criminal Court was based upon reasonable and objective grounds” (adopting the language of the UN Human Rights Committee in *Kavanagh v. Ireland*), the Director would be obliged to apply to have the case re-transferred to the ordinary courts.

9.72 The disadvantage with such a proposal is that, while undoubtedly an improvement on present practice, some might argue that it is not sufficiently objective and transparent to meet the objections already discussed. It might also be contended that this suggestion amounts to the de facto administration of justice in private.

Option 4: Review by a judge of the Supreme Court

9.73 The fourth proposal would require the Director of Public Prosecutions within 28 days (or such further limited time as might be permitted) of the charging of an accused before the Special Criminal Court to submit to a serving member of the Supreme Court nominated by the Chief Justice both the decision to refer the case to the Special Criminal Court and the reasons which gave rise to that decision.

9.74 If the nominated Supreme Court judge were so satisfied, he or she could then issue a certificate indicating that the decision had been reviewed and that the Director’s decision to try the accused before the Special Criminal Court was based “upon reasonable and objective grounds” (again adopting the language of the UN Human Rights Committee). The certificate would then be produced in the Special Criminal Court before the date fixed for the trial. In the absence of such a certificate or in circumstances where the certificate was

⁴²⁶Save that in the case of the 1993 Act, the review is conducted by a serving High Court judge.

refused, the Special Criminal Court would have power to remand the accused to the ordinary courts if it saw fit. Provision might also be made for the Director to seek a certificate from a nominated Supreme Court judge in advance of the charging of an accused in the Special Criminal Court.

- 9.75 The disadvantages associated with this proposal are that the accused would still not have access to the information grounding the decision to refer the case to the Special Criminal Court. In addition, some might argue that this proposal entailed a serving member of the Supreme Court engaging in what amounted to “the administration of justice in private” without notice to the accused which would be open to objection. Here again, some of these potential difficulties might be mitigated through the use of an independent counsel procedure.

Recommendation

- 9.76 **The Committee recognises that the current arrangements have been subject to criticism. A majority of the Committee accordingly suggests that, while recognising that the present arrangements have worked reasonably well in practice, perhaps the fourth option - review by a serving Supreme Court judge, perhaps in conjunction with the independent counsel procedure - should be considered. If experience were to show that this option was unsatisfactory in practice, then, perhaps, at a later stage, other options might be considered.**
- 9.77 **The majority of the Committee is of the view that all the above options would meet the objections identified by the UN Human Rights Committee in *Kavanagh v. Ireland*. The objection of the UN Committee was not, of course, to the concept of non-jury trial as such. It rather considered that the absence of “reasonable and objective criteria” against which the transfer of the accused to the Special Criminal Court could be measured gave rise to a violation of the principle of equality before the law. A majority of the Committee believes that its proposals would meet these objections in as much as they would provide a mechanism whereby the existence of such grounds could be objectively assessed as far as any given case was concerned.**

Right of appeal from decisions of the Special Criminal Court

- 9.78 By virtue of section 44 of the 1939 Act, convictions and sentences of a Special Criminal Court are subject to an appeal to the Court of Criminal Appeal⁴²⁷ in the same way as convictions or sentences of the Central Criminal

⁴²⁷Should Part II of the Courts and Court Officers Act 1995 come into operation, this appellate

Court. In theory, just as with appellants from the Central Criminal Court, leave to appeal is required before such an appeal can be taken - such leave to be granted by either the court of trial or the Court of Criminal Appeal itself. In practice, however, all convicted persons enjoy a full right of appeal to the Court of Criminal Appeal,⁴²⁸ since even where (as is normal practice) leave to appeal is refused by the Special Criminal Court, the Court of Criminal Appeal invariably treats the application for leave as the hearing of the substantive appeal on the merits. In truth, the leave to appeal/appeal distinction is nowadays largely meaningless and is a hangover from a much earlier era when criminal appeals were still a novelty.⁴²⁹

9.79 At all events, this Committee considers it appropriate that persons convicted of serious crime should enjoy an untrammelled right of appeal against conviction and sentence.⁴³⁰ It consequently recommends the amendment of section 44 to ensure that persons convicted by the Special Criminal Court should have a full and unqualified right of appeal against conviction and sentence to the Court of Criminal Appeal without the necessity for prior leave to appeal.

9.80 A minority of the Committee, while recognising the arguments made for an unqualified right of appeal from decisions of the Special Criminal Court, believes that this issue is not unique to the Special Criminal Court. Instead, this minority considers that the issue of a right of appeal from conviction on indictment is one which is of general application and which does not solely or even peculiarly concern the Special Criminal Court and, as such, it does not fall to be considered by this Committee.

Recommendation

function would be transferred from the Court of Criminal Appeal to the Supreme Court.

⁴²⁸With the possibility of a further right of appeal by the appellant from decisions of the Court of Criminal Appeal to the Supreme Court if either the former Court or the Attorney General or the Director of Public Prosecutions grants leave to appeal: see Courts of Justice Act 1924, s.29. Such leave to appeal can be granted only where the point of law raised is of public importance and that it is desirable in the public interest that such leave be granted: see *The People v. Littlejohn* [1976-77] ILRM 147.

⁴²⁹There was no general right of appeal in respect of indictable crime prior to the establishment of the Court of Criminal Appeal by the Courts of Justice Act 1924.

⁴³⁰It may be noted that Article 2(1) of Protocol No. 7 ECHR (which Ireland has signed and recently ratified) provides that:

Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

9.81 *Section 44 of the 1939 Act should be amended to ensure that persons convicted by the Special Criminal Court should have a full right of appeal against conviction and sentence to the Court of Criminal Appeal without the necessity for prior leave to appeal.*

Requirement for unanimity

9.82 Section 40 provides that the
...determination of every question before a Special Criminal Court shall be according to the opinion of the members of such Special Criminal Court present at and taking part in such determination...

9.83 While a unanimity rule might not be practicable in respect of every determination of the Court, the Committee is nonetheless of the view that no person should be convicted unless there was unanimity on this particular issue on the part of the three-judge Court. Such a requirement is not an unreasonable one and it provides a further safeguard for the accused. In a case where a majority was of the view that the accused should be acquitted, then, of course, the verdict must be one of acquittal.

9.84 A minority of the Committee cannot agree with this recommendation which these members consider, with respect, to be more of an assertion of a view rather than a reasoned argument for change. This minority does not agree that the case for such a change has been made out by the majority.

Recommendation

9.85 *A majority of the Committee recommends that no person should be convicted by the Special Criminal Court unless there is unanimity on this issue on the part of the three judges trying the case. If all members of the Court cannot agree on this question, then the Court would have jurisdiction to order one further re-trial before a differently composed panel of that Court. If, following a re-trial, there was still a lack of unanimity, then the accused must be acquitted.*

Statutory requirement for written reasons

9.86 In practice, the Special Criminal Court will nowadays give a written judgment on all major issues coming before it. The Committee believes that it is important that a written judgment accompanies any decision to convict an accused. Not only is the giving of reasons nowadays regarded as an indispensable and constitutionally required feature of the proper administration of justice and the determination of legal rights,⁴³¹ the giving of

⁴³¹ See, for example, *The State (Daly) v. Minister for Agriculture* [1987] IR 165; *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] IR 51; *Breen v. Minister for Defence* [1994] 2 IR 34; *Ní Eili v. Environmental Protection Agency*, Supreme Court, July 31, 1999; *Orange Communications Ltd. v. Director of Telecommunication Regulations (No.2)* [2000] 4 IR 159.

such reasons in writing provides a basis by which the reasoning of the Court in arriving at its decision to convict the accused can be subject to the appropriate level of scrutiny by the Court of Criminal Appeal or the Supreme Court (as the case may be).

Recommendation

9.87 *Where the Special Criminal Court proposes to convict an accused of an offence, then it ought to be required to give its decision and the reasons therefor in writing.*

**Views and recommendations of
The Hon. Mr. Justice Anthony J. Hederman,
Professor William Binchy, Professor Dermot Walsh
on the Special Criminal Court**

- 9.88 *Trial by jury is a cornerstone of the criminal law system. It ensures that the innocence or guilt of a person charged with an offence is determined by twelve randomly chosen members of the community, each of whom brings to the process the benefit of his or her life-experience and individual perspective. Lord Devlin used somewhat colourful language when he observed that trial by jury is “the lamp which shows that freedom lives”. His insight is, however, important in emphasising the liberal democratic basis of jury trial.*
- 9.89 *We are of the view that the case in favour of the continued existence of the Special Criminal Court has not been made out. We are not here principally concerned with specific unacceptable aspects of the legislation relating to the court (such as the facility for retired judges to sit on the court or the power of the Director of Public Prosecutions to decide who is to be charged before the court). In our view, there is a more fundamental difficulty. We consider that the arguments adduced in support of the very existence of the court do not stand up to scrutiny in the light of constitutional values and human rights norms.*
- 9.90 *Before we deal with those arguments, some rather obvious facts may be acknowledged. Resort to the Special Criminal Court is highly convenient from the standpoint of the prosecution. The risk of possible jury intimidation is reduced; the members of the Court can be relied on not to be swayed by political views from convicting where the offence was politically inspired; and the prospects of conviction may be considered more likely, not because the members of the Court are unfair but because studies have consistently shown that non-jury courts have a higher conviction rate than courts with trial by jury.*
- 9.91 *The matter is not simply one of convenience, however, whether from the standpoint of the prosecution or from that of the administration of justice in general. If convenience were the predominant test, trial by jury for*

any offence would be abolished. Jury trial is valuable, in spite of its inconvenience, because of deeper values relating to a liberal democracy.

- 9.92 *If a pressing case for the necessity of a special criminal court could be made out, we naturally would heed it, but in our view no such case has been proffered. All that has been indicated is a belief, based on an assessment of the undoubtedly violent and intimidatory disposition of certain criminals, that these criminals might successfully intimidate juries if they or their associates were tried by jury.*
- 9.93 *In measuring the weight of this concern, it is worth noting that no other common law jurisdiction has come to the conclusion that the risk of jury intimidation warrants non-jury trial in a special criminal court. In Northern Ireland, but not in England, Wales or Scotland, there is, at present, a system of criminal trial involving judges without a jury: the “Diplock Courts”; it is our understanding that the British Government is committed to move as quickly as circumstances allow to jury trial for all offences. While Ireland unfortunately has experienced the growth of organised crime in recent years, it is not plausible to suggest that, in contrast to other common law jurisdictions such as the United States of America, England and Australia, Irish social conditions are so perilous as to warrant dispensing with jury trial. Few would suggest that had the 1939 Act not come into being in the context of concerns for subversion, legislation would have been enacted in recent years to dispense with jury trial for those suspected of organised crime.*
- 9.94 *With any system of jury trial, there will be the possibility of jury intimidation. That risk will be greater in some cases than others, but there is no evidence, from any jurisdiction, that the risk is of such proportions as to warrant dispensing with trial by jury. Other common law jurisdictions have not taken such a suggestion seriously.*
- 9.95 *There are many steps that can be taken to reduce the possibility of jury intimidation. Juries can be anonymous; they can be protected during the trial; they can even be located in a different place from where the trial is held, with communication by video link. It is true that in a small jurisdiction such as Ireland, anonymity is hard to secure, but if the jury are anonymous and at a secure and secret location, the risk of effective jury intimidation would not be very great. At some point, the theoretical risk of the possibility of jury intimidation becomes frankly implausible.*

9.96 *The existence of the Special Criminal Court can best be explained not by factually justified and specifically focused concerns relating to the risk of jury intimidation unique in the common law world, but by the desire to use strong means to put down violent, politically inspired crime. That desire is understandable but the means are, unfortunately, inconsistent with the values of a modern liberal democratic society and the protection of human rights. In our judgment, the best course is for Ireland to join all other common law countries with jury trial and dispense with the Special Criminal Court.*

9.97 *The minority also wishes to make the following important point:*

Even if non-jury trials were considered appropriate in certain circumstances, the Special Criminal Court is unacceptable to us, on the basis that the decision whether an individual forfeits his or her right to jury trial is made by the Director of Public Prosecutions on his own discretion, and with no reasons given - a position which is in practice unreviewable in most cases.

In finding this unacceptable, we do not wish to criticise in any way the Director of Public Prosecutions, who performs a most valuable independent role as a prosecuting officer on behalf of the People. Our concern springs from the fact that, in discharging that role, he represents one side of an adversarial process. As an active participant in that adversarial process, it is not just that he should be given powers relating to the trial of the accused which can detrimentally affect the interests of the accused. Even if these powers were to be exercised in good faith in all cases, they do not have the appearance of the impartial and objective protection of the right of accused persons to a fair trial.

It is worth noting that in the Kavanagh case, on 4 April 2001, the Human Rights Committee concluded that Ireland had failed to demonstrate that the Director of Public Prosecutions' election for trial before the Special Criminal Court had been based on reasonable and objective grounds and that accordingly there had been a violation of the equal protection of the law guaranteed by Article 26 of the International Covenant on Civil and Political Rights.

The majority has not proposed any acceptable reviewable mechanism or alternative decision-making process which would

cure this fundamental defect in the proper operation of the Special Criminal Court.

CHAPTER 10

OTHER POLICE POWERS AND PROCEDURES TO COMBAT TERRORISM AND ORGANISED CRIME

Introduction

- 10.1 Irish law does not offer a definition of terrorism or organised crime. Equally, there are no legislative measures dealing specifically and solely with them. Certain measures, such as the Offences against the State Acts 1939-1998 and the Criminal Justice (Drug Trafficking) Act, 1996, are associated primarily with terrorism and/or organised crime. Even though the powers and procedures set out in these Acts are not defined by reference to terrorism and organised crime, they can be used against any form of criminality where the necessary statutory prerequisites for their exercise are satisfied.⁴³² Indeed, it will be seen below that there is a wide range of common law and statutory provisions, quite separate from the Offences against the State Acts 1939-1998, which confer extensive powers on the police and the State and which can be used to combat terrorism, organised crime, as well as other forms of criminal activity. Some of the statutory measures have been enacted primarily in order to implement EU policy on combating organised crime.
- 10.2 The continued existence of the Offences against the State Acts 1939-1998, alongside the range of other police powers and procedures, creates a situation where the police will often have a choice over which measures to use in any individual situation. This choice can work both ways. Not only can the police use the non-Offences against the State measures to combat terrorism and organised crime, they will often be able to resort to the Offences against the State legislation to deal with “ordinary crime”. The availability of these measures must inform any assessment of which provisions of the Offences against the State legislation can be repealed. The following outline of relevant measures outside of the Offences against the State legislation identifies a range of these police powers which can be used against terrorism and organised crime, as well as the confiscation of assets procedure which was introduced essentially to combat organised crime. Where appropriate, the individual provisions are related to the relevant provisions in the Offences against the State legislation. Provisions which have been discussed fully in

⁴³²See, for example, the reasoning of the Supreme Court in *The People (DPP) v. Quilligan* [1986] IR 495.

other chapters, such as the inference-drawing provisions of sections 18 and 19 of the Criminal Justice Act, 1984,⁴³³ are not pursued further here.

Arrest and detention

- 10.3 Police powers of arrest and detention have expanded significantly since 1939. The old distinction between felonies and misdemeanours was abolished by the Criminal Law Act 1997 which introduced a general power of summary arrest for all offences which carry a possible prison sentence on conviction of five years or more.⁴³⁴ Many new statutory offences have also been created since 1939, carrying summary powers of arrest. Equally, there have been a number of statutory enactments conferring powers of summary arrest in respect of offences committed in certain specified circumstances.
- 10.4 The cumulative effect of these developments is that there are very few offences associated with terrorism or organised crime in respect of which a member of the Garda Síochána does not have a power of summary arrest independently of section 30 of the Offences against the State Act 1939. However, most of the arrest powers outside of the 1939 Act are available only where a member of the Garda Síochána has reasonable grounds to suspect that the individual is committing or has committed the offence in question. Section 30 is singular in that it permits a member to arrest someone whom he suspects is about to commit an offence. This may allow earlier intervention than might otherwise be the case under other arrest powers, although a majority of the Committee is not persuaded that in this respect the section 30 powers of arrest are appreciably greater than in cases where the Gardai effect an arrest on the ground that the suspect has attempted to commit a crime. Section 30 is also unusual in that it permits the arrest of someone merely on suspicion - which must not be unreasonable⁴³⁵ - that they have a document or information relating to a relevant crime.
- 10.5 The power to detain an arrested person without charge has been available in the “ordinary” law since 1987, when section 4 of the Criminal Justice Act 1984 came into effect. It permits the detention without charge of a person arrested summarily for an “arrestable offence”. An “arrestable offence” is defined as one for which a person could be sentenced on conviction for a period of five years or more; i.e. the same definition used in the Criminal Law Act 1997 which confers a general power of summary arrest in respect of such offences. A person detained under section 4 can be held without charge for

⁴³³Discussed in Chapter 8.

⁴³⁴Criminal Law Act 1997, s5.

⁴³⁵See *The people (DPP) v. Quilligan* [1986] IR 495, per Walsh J.

up to six hours, which can be extended for another six hours by a member of the Garda Síochána not below the rank of Superintendent. If a person is in police custody between midnight and 8 am, the station officer in charge may suspend the questioning for up to a maximum of 8 hours between midnight and 8 am where he is of the opinion that questioning should be suspended in order to afford the person reasonable time to rest and the person consents to such suspension. It follows that there are circumstances in which a person detained under section 4 of the 1984 Act can be detained for up to a maximum of 20 hours in police custody. Under section 30, by comparison, the maximum period of detention is 48 hours, although the detention period may be extended by a District Judge for a further 24 hours following a hearing at which both sides will have been represented.⁴³⁶

10.6 Detention without charge has been extended further in the “ordinary” law by section 2 of the Criminal Justice (Drug Trafficking) Act 1996. It provides for the detention of a person without charge where the person in question has been arrested for a drug-trafficking offence. The person may be detained in the first instance for up to 6 hours which may be extended for up to a further 18 hours by a member of the Garda Síochána not below the rank of Chief Superintendent. The detention may be extended by such an officer for a further period of up to 24 hours. There is provision for the detention to be further extended after a hearing by a Judge of the Circuit Court or a Judge of the District Court for periods of up to 72 hours and 48 hours respectively. The maximum period of detention under this provision must not exceed 7 days.⁴³⁷

10.7 Suspects detained under section 4 of the 1984 Act, section 2 of the 1996 Act and section 30 of the 1939 Act can all be fingerprinted, palmprinted and photographed.⁴³⁸ They are also protected by the same rules and regulations while in custody. These are to be found primarily in the Judges Rules, the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Stations) Regulations 1987⁴³⁹ and the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997.⁴⁴⁰ As of March 2002 the Committee understands that 171 interview rooms in 97 stations have been fitted out with the required equipment and that of these 151 are in use. However, many interviews of suspects in police custody are still not

⁴³⁶Section 30 (4B), as inserted by section 10 of the Offences against the State (Amendment) Act 1998.

⁴³⁷Section 2(7) of the 1996 Act.

⁴³⁸Section 6(1)(c) and (d) of the 1984 Act; section 5 of the 1996 Act and section 30 (5) of the 1939 Act.

⁴³⁹S.I. No. 119 of 1987.

⁴⁴⁰S.I. No. 74 of 1997

electronically recorded and, as yet, no independent empirical research has been carried out on the extent to which electronic recording of interviews has been used and the factors which influence its usage or non-usage.

Entry, search and seizure

- 10.8 Police powers of entry, search and seizure outside of section 29 of the Offences against the State Act 1939 are extensive. They are to be found primarily in a body of statutory provisions which has been built up in a piecemeal fashion over the past two centuries. Many of these enactments provide for the issue of search warrants in situations relevant to the activities of organised crime and terrorism. Examples include: firearms, explosives and chemical weapons; certain serious offences against the person (including kidnapping); controlled drugs and substances; unlawful presence of aliens and trafficking in illegal aliens; damage to property; stolen goods; fraud and forgery; business books and records; money-laundering; seizure of criminal assets; breach of censorship laws; breach of copyright and patents; immorality; wireless telegraphy; gaming; manufacture, consumption and sale of liquor; videos; and sexual offences.
- 10.9 Not all these powers are as extensive in every respect as section 29 of the Offences against the State Act. Nevertheless, some which are of particular relevance to organised crime and terrorism are very similar. The Misuse of Drugs Act 1977, for example, permits a Superintendent who has the requisite suspicion to issue a search warrant where the offence in question is a drug-trafficking offence and the circumstances are such that it would be impracticable to apply to a District Court Judge or a peace commissioner. The warrant authorises the named member (accompanied by such other members and persons as may be necessary) at any time or times within one month of the date of issue of the warrant, to enter (using force if necessary) the premises for the purpose of searching it and any person found there. It also authorises, in certain circumstances, the examination of any substance, article or thing found there and the inspection of any book, record or document.
- 10.10 Similarly, the Criminal Assets Bureau Act 1996 permits a Garda officer of the Criminal Assets Bureau not below the rank of Superintendent to issue a search warrant where he or she has the requisite suspicion and is satisfied that circumstances of urgency giving rise to the need for the immediate issue of the warrant would render it impracticable to apply to a District Court judge.⁴⁴¹ The warrant authorises a search of the place in question (which can be a

⁴⁴¹Criminal Assets Bureau Act 1996, section 14(3).

dwelling) and any person found there for evidence of or relating to criminal assets or proceeds. Entry under the warrant must be effected within one week of its date of issue.⁴⁴²

- 10.11 Another power worth noting in this context is that provided by the Official Secrets Act 1963. It enables a member of the Garda Síochána not below the rank of Chief Superintendent to issue a search warrant where he has the requisite suspicion and reasonable grounds for believing, that in the interests of the State, immediate action is necessary. The warrant authorises a member of the Garda Síochána and any other named person to enter the specified place, premises or vehicle for the purpose of searching it and any person found there and to seize any document or thing which the member reasonably believes to be evidence of or relating to any act or information prejudicial to the safety of the State. The entry and search must be effected within one week of the date of issue of the warrant.
- 10.12 Police powers of entry pursuant to a search warrant are supplemented at both common law and under statute by a range of powers of entry onto private property without a warrant. At common law a member of the Garda Síochána can effect an entry without a warrant into a dwelling without the consent of the occupier in order to protect the right to life of a person within the dwelling.⁴⁴³ The Oireachtas has also significantly enhanced police powers to enter and search premises without a warrant. These include premises where there are reasonable grounds to suspect that an offence concerned with one of the following is being committed: the possession of explosives and chemical weapons; the manufacture, distribution or use of animal remedies; drug-trafficking; moneylending; and the sale of liquor. A member of the Garda Síochána may also enter premises (including a dwelling) to effect an arrest in certain circumstances. Moreover, where a member effects a lawful arrest in any situation, he or she can search that person and the immediate vicinity in which the person was arrested.
- 10.13 In some situations the owner of a premises may be regarded as having given implied permission (which, of course, may be revoked) to a member of the Garda Síochána to come on to his premises to see to the enforcement of the law or to prevent a breach thereof.⁴⁴⁴ Prior suspicion is not normally a prerequisite for the exercise of any of these powers. Most are conferred by statute and relate to premises which are used for activities that are a potential

⁴⁴²Criminal Assets Bureau Act 1996, section 14(4).

⁴⁴³ *Director of Public Prosecutions v. Delany* [1997] 3 IR 453.

⁴⁴⁴ *Minister for Justice v. Wang Zhu Jie* [1993] 1 IR 426; *Director of Public Prosecutions v. Forbes* [1993] ILRM 817.

source of: criminal or terrorist activity, anti-social behaviour, danger to customers or employees and public health risks.

10.14 Section 9 of the Criminal Law Act 1976 confers an extensive power of seizure on gardaí who are exercising a lawful power to search a premises. It states that when a member of the Garda Síochána is carrying out a search under any power, whether conferred by statute or at common law, he or she may seize anything that he or she believes to be evidence of an offence. It does not matter that the power of search was confined to an offence which is totally unrelated to that associated with the suspected offence for which the goods were seized. Moreover, it does not matter that the search was being carried out under a warrant which specifically prescribed the goods to be seized. A member acting under this warrant will still be able to seize anything which he or she suspects to be evidence of any offence, even though it might have no connection with the goods or offence mentioned in the warrant. The fact that the member in question need only suspect, as opposed to reasonably suspect, that the goods seized are evidence of an offence (or any suspected offence) emphasises its exceptional scope.

10.15 It is also worth noting a few specific powers of seizure which are not associated with powers of entry and search and are not found in the Offences against the State legislation. They might be considered particularly relevant in combating organised crime and terrorism. The Criminal Justice Act 1994, for example, permits a member of the Garda Síochána to seize any cash being imported into or exported out of the State in excess of a prescribed amount, if he or she has reasonable grounds for suspecting that it represents the proceeds of any drug-trafficking or is for use in any drug-trafficking. Cash so seized can be detained for no longer than 48 hours, unless its further detention is authorised by a District Court Judge. A similar power to seize property in order to prevent it from being removed from the State is provided by the Proceeds of Crime Act 1996, while the National Monuments (Amendment) Act 1994 provides powers of seizure designed to protect archaeological sites and artefacts. These powers are all preventative in nature. They are clearly aimed at preserving the status quo until a perceived threat to an important public interest is investigated.

Stop, question, search and surveillance

Introduction

10.16 The investigation of terrorist and organised crime offences is enhanced by a range of police powers which can come into play independently of an arrest or an entry, search and seizure. For the purposes of this chapter, they are

classified as powers of stop, question, search and surveillance, and must be distinguished from the police and revenue powers associated with the confiscation of criminal assets, which are dealt with later.

Observation

10.17 It is firmly established that the Gardaí have a general responsibility for the prevention, investigation and detection of crime. To this end, they are free to maintain observation on individuals and places and to seek to put questions to anyone whom they believe might be able to assist their inquiries into criminal activity. They can keep a suspect under both overt and covert surveillance so long as this does not involve a trespass to property or to the person, and is not so oppressive as to amount to a constitutional invasion of the individual's constitutional right to privacy.⁴⁴⁵ Apart from the statutory provisions regulating postal and telecommunications intercepts, there is no legal regulation or restriction on the police use of high-tech listening, tailing or video-recording devices. It is worth noting, however, that evidence gathered by surveillance or investigation methods which are not unlawful in themselves may be excluded at trial if the court deems their use to be unfair in the particular circumstances.⁴⁴⁶

Power to demand information

10.18 In addition to his or her powers under sections 30 and 52 of the Offences against the State Act 1939 and section 2 of the Offences against the State (Amendment) Act 1972, a member of the Garda Síochána has a variety of powers which can be used to coerce the co-operation of a person with police inquiries. There are a number of situations in which a person can be compelled to answer certain questions when required to do so by a member of the Garda Síochána. The primary examples in the context of criminal investigations are to be found in the Criminal Justice Act 1984.

10.19 Under the Criminal Justice Act 1984 Act it is a criminal offence for a person to withhold information concerning the possession of firearms or stolen goods in certain circumstances.⁴⁴⁷ Where a member of the Garda Síochána finds a person in possession of a firearm or ammunition, has reasonable grounds for believing that the possession is contrary to the criminal law, and informs the person of his belief, he may require that person to give him any information as to how he came by the firearm or ammunition. This requirement can extend

⁴⁴⁵See, for example, *Kane v. Governor of Mountjoy Prison* [1983] IR 757.

⁴⁴⁶See, for example, *The People (Attorney General) v. O'Brien* [1965] IR 142

⁴⁴⁷Section 15 of the 1984 Act.

to any information as to previous dealings with the firearm or ammunition whether by the person concerned or by any other person. Moreover, it can cover not only information in the possession of the person concerned but also information which he can obtain by taking reasonable steps. If the person in possession fails or refuses, without reasonable excuse, to give the information or gives information that he knows to be false or misleading, he is guilty of an offence punishable on summary conviction by a fine not exceeding £1,000 or to imprisonment for up to twelve months or both. Criminal liability can attach under this provision only if the person concerned was told in ordinary language by a member of the Garda Síochána at the time he was asked for the information what the effect of the failure or refusal might be.

10.20 Evidence given by a person in compliance with a requirement made pursuant to this provision is statutorily inadmissible in evidence against that person or his or her spouse in any civil or criminal proceedings, apart from a prosecution for the actual offence created by the provision itself.⁴⁴⁸ It is also worth emphasising that this obligation to co-operate by answering the questions fully and truthfully is not confined to persons detained under section 4 of the 1984 Act. It is available in any situation where the member has reasonable grounds for believing that the possession of the firearm or ammunition is contrary to the criminal law. The person in possession need not be in police custody or even suspected of any criminal offence.

10.21 A member of the Garda Síochána can also demand information about stolen property in certain circumstances.⁴⁴⁹ For this to be available the member must first have reasonable grounds for believing that an offence consisting of the stealing, fraudulent conversion, embezzlement or unlawful obtaining or receiving of property has been committed. If the member finds a person in possession of property and has reasonable grounds for believing that it is or may include such property or the proceeds of such property or any part of the property or its proceeds, he may, after informing the person of his belief, require that person to give him an account of how he came by the property. If the person concerned fails or refuses to comply without a reasonable excuse, or if he gives information which he knows to be false or misleading, he will be guilty of an offence punishable on conviction by a fine not exceeding £1,000 or to imprisonment for a term not exceeding twelve months or both. However, criminal liability can attach only if, at the time the information was demanded, a member of the Garda Síochána told the person concerned what

⁴⁴⁸However, the Supreme Court ruled in *Re National Irish Banks Ltd.* [1999] 3 IR 145, the constitutional guarantee contained in Article 38.1 to trial in due course of law means that any evidence obtained pursuant to a statutory demand is constitutionally inadmissible in any subsequent prosecution.

⁴⁴⁹Criminal Justice Act 1984, section 16.

the effect of a failure or refusal to comply might be. As is the case with firearms, any information given by a person in compliance with a demand under these provisions is not admissible in evidence against him or his spouse in any civil or criminal proceedings, apart from proceedings for an offence under these provisions.

10.22 Given that possession of firearms and stolen goods will often feature in terrorist and organised crime activity, it is clear that these provisions have particular relevance to the police investigation of criminal offences associated with terrorism and organised crime.

10.23 There are a considerable number of statutory provisions, apart from section 30 of the 1939 Act, which allow a member of the Garda Síochána to stop a citizen for certain purposes. Some of these powers are very specific in that they are available only in narrowly defined circumstances, while others are much more general in their scope. Probably the most well known in practice is section 109(1) of the Road Traffic Act 1961 which compels a motorist to bring his vehicle to a halt when required by a member of the Garda Síochána and to keep it stationary for such period as is reasonable to enable the member to discharge his or her duties. Although it does not specifically impose an obligation on the motorist to answer questions it can provide an opportunity for the member to question motorists on a range of matters. A more far-reaching example is to be found in the National Monuments (Amendment) Act 1987.⁴⁵⁰ This stipulates that where a member of the Garda Síochána finds a person in possession of an archaeological object, and he reasonably suspects that an offence has been committed under the Act, he may require the person concerned to give an account of how he came to have the object. If he suspects that the person concerned has committed an offence, he can demand his name and address. In both situations the person concerned is under an obligation to co-operate, save, of course, that (as already noted) by virtue of the Supreme Court's decision in *Re National Irish Banks*⁴⁵¹ any such responses are constitutionally inadmissible in evidence.

10.24 These statutory provisions are complemented by common law developments. In *Director of Public Prosecutions (Stratford) v. Fagan*,⁴⁵² the Supreme Court ruled that a member of the Garda Síochána has a common law power to stop motorists at random in order to detect and prevent crime. This might be used, for example, in the vicinity of licensed premises at night to identify

⁴⁵⁰Section 20 (1) of the 1987 Act.

⁴⁵¹[1993] IR 145. In any event section 20(3) of the 1987 Act provides that any such answers are inadmissible in evidence.

⁴⁵²[1994] 3 IR 265.

drunk-drivers, or to check traffic using a particular route where a serious crime had been committed and it was possible that a car carrying the perpetrators would use that route. While the motorist must stop the vehicle so that the member can check that the occupants are not engaged in criminal activity, there is no obligation on the motorist or passengers to answer questions.

Stop and Search

10.25 The pattern of police powers to stop and search, short of arrest, follows that of demanding information outlined above, apart from the fact that the common law in these islands has yet to accept the notion of a limited police power to stop and search short of arrest. Prior to the enactment of section 30 of the 1939 Act (with its power to stop and search) there were a number of statutory powers of stop and search available to the police. More have been added since. For the most part, they are more precise in their scope and application than that provided by section 30. The major exception is section 8 of the Criminal Law Act 1976 which, in many respects, might be considered to be part of the Offences against the State legislation.

10.26 Unlike the section 30 power, the section 8 power arises initially in respect of a vehicle stop. It stipulates that a member of Garda Síochána, who with reasonable cause suspects that any one of a number of specified offences has been committed, is being committed or is about to be committed, may require a person to stop a vehicle with a view to ascertaining whether:

- (a) any person in or accompanying the vehicle has committed, is committing or is about to commit the offence, or
- (b) evidence relating to the commission or intended commission of the offence by any person is in the vehicle or on any person in or accompanying it.

10.27 Clearly, in the first instance, the member's power of search is confined to the vehicle. If, however, either before or after commencing the search, he or she suspects with reasonable cause that any one of the facts mentioned in (a) or (b) above exists, he or she may search any person in or accompanying the vehicle. The offences suspicion of which may trigger the search powers under section 8 are:

- (a) an offence under the Act of 1939 or an offence that is for the time being a scheduled offence for the purposes of Part V of that Act

- (b) an offence under section 2 or 3 of the Criminal Law (Jurisdiction) Act, 1976
- (c) murder, manslaughter [or an offence under section 18 of the Offences against the Person Act, 1861]⁴⁵³
- (d) an offence under section 23, 23A or 23B of the Larceny Act, 1916
- (e) an offence of malicious damage to property involving the use of fire or of any explosive substance (within the meaning of section 7(1)(e) of this Act
- (f) an offence under the Firearms Acts, 1925 to 1971
- (g) escape from lawful custody
- (h) an offence under section 11 of the Air Navigation and Transport Act, 1973, or under section 10 of the Criminal Law (Jurisdiction) Act, 1976
- (i) an offence under this Act
- (j) an offence under section 12(1) of the Firearms and Offensive Weapons Act, 1990; an offence under s.112(2) of the Road Traffic Act, 1961 (substituted by s.3(7) of the Road Traffic (Amendment) Act, 1984)(taking a vehicle without consent of the owner and without authority)
- (k) an offence under section 2 of the Illegal Immigrants (Trafficking) Act, 2000

10.28 A member of the Garda Síochána may use reasonable force in order to compel a person to comply with a requirement to stop a vehicle. Such force may include the placing of a barrier or other device in the path of vehicles.

10.29 Other police powers of stop and search which are relatively broad-based arise largely in the context of the enforcement of the customs laws, persons entering or leaving the State or persons in the area of a port or airport. More focused powers of stop and search are available in respect of specific criminal

⁴⁵³Section 18 has been abolished by the Schedule to the Non-Fatal Offences against the Person Act 1997.

offences. Typically, they will empower a member of the Garda Síochána, or other authorised official, to stop and search a person and/or a vehicle where he or she has reason to believe that the relevant criminal offence has been committed or is being committed. Examples of such offences and associated powers are to be found in the: Wildlife Act 1976, Misuse of Drugs Act 1977, the Explosive Substances Act 1875 and liquor legislation.

10.30 The primary example of a search power created to deal with a specific kind of offence, and which is of particular relevance to organised crime, is that provided by section 23 of the Misuse of Drugs Act 1977. It enables a member of the Garda Síochána to search any person whom he has reasonable cause to suspect is in possession of a controlled drug in breach of the Act. A prior arrest is not made a precondition for the exercise of this power. A member of the Garda Síochána may also stop and search any vehicle, vessel or aircraft where he suspects that such a drug may be found. A key point to note is that the availability of the section 23 power is not predicated on a prior stop. The search power is available irrespective of whether the person to be searched is stopped in public, is in a Garda station, is in his or her own home or is on property belonging to another. Where the relevant suspicion is present, the member is empowered simply to search the person concerned. A constitutional challenge to the power on the basis that it permits the detention and strip search of the individual short of arrest was rejected by the Supreme Court.⁴⁵⁴

Interception of Posts and Telecommunications

10.31 It is generally a criminal offence to intercept a telecommunications message transmitted by Eircom or to interfere with a postal packet addressed to another person. It is also an offence to possess certain listening devices without a licence. The Offences against the State legislation does not confer on gardaí any immunity from these offences in the context of criminal investigations. However, they can be authorised to intercept telecommunications messages or open postal packets in certain limited circumstances pursuant to the provisions of the Postal and Telecommunications Services Act 1983 and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.

10.32 Broadly speaking, these measures establish a statutory procedure whereby the Garda Commissioner can apply to the Minister for Justice, Equality and Law Reform for an authorisation for a telephone or postal intercept for the purposes of a criminal investigation or in the interests of the security of the

⁴⁵⁴*O'Callaghan v. Ireland* [1994] 1 IR 555.

State. Authorisation is issued in the form of a warrant permitting the relevant interception. There are a number of safeguards built into the procedure to protect against abuse.

10.33 Although this statutory scheme represents a very substantial attempt to regulate the state interception of communications, initially it did suffer from some serious omissions. Originally, it did not extend to the postal and telecommunications services provided to the public by bodies other than An Post and An Bord Telecom, however with the passing of the Postal and Telecommunications Services (Amendment) Act 1999 this anomaly has been corrected insofar as mobile phone operators are concerned. The position with respect to the interception of postal packets the position is clear - only those services operated by An Post are capable of lawful interception. Any attempt to apply to private courier companies the administrative warrant procedure, which the 1993 Act was designed to replace, would be likely to fall foul of Ireland's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

10.34 Also worth noting from the perspective of the individual's right to privacy is the fact that the regulatory scheme does not extend to the use of forms of state surveillance other than the interception of postal packets and telecommunications messages. It would not apply, for example, to a case where the police used special listening, optical, video or localisation devices in the course of a criminal investigation. The police are free to use these devices so long as the manner of their use in any individual case does not infringe the individual's legal or constitutional rights or provisions of the Wireless Telegraphy Acts.

Public order

10.35 There are a number of common law and statutory powers, outside of section 28 of the Offences against the State Act 1939, which the Garda authorities can use to deal with any actual or threatened public disorder or interference with the working of the Oireachtas arising from any procession or meeting in the vicinity of Leinster House. Unlike section 28, all of these powers are predicated on the occurrence or apprehension of some form of public disorder or breach of the peace. At common law a member of the Garda Síochána can arrest anyone who is committing a breach of the peace or who is engaged in behaviour which is likely to lead to a breach of the peace. Gardaí can use reasonable force to quell a breach of the peace.⁴⁵⁵

⁴⁵⁵Ryan and McGee, *The Irish Criminal Process* (Cork, 1983) at p.96.

10.36 The statutory powers are to be found primarily in the Criminal Justice (Public Order) Act 1994. This Act, *inter alia*, replaces the common law offences of riot, rout, unlawful assembly and affray with similar statutory offences and creates a number of new public order offences. The former are satisfied when a specified minimum number of persons gather together and use or threaten to use unlawful violence for a common purpose. The offences differ depending upon whether there are at least two, three or twelve persons in the gathering. The totally new offences include: disorderly conduct in a public place between midnight and 7 am, or at any time when having been requested by a member of the Garda Síochána to desist; using or engaging in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned; distributing or displaying in a public place any material which is threatening, abusive or obscene; and preventing or interrupting the free passage of any person or vehicle in a public place without lawful authority or reasonable excuse.⁴⁵⁶ There are also a number of offences pertaining to intoxication in a public place⁴⁵⁷ and trespassing on any building.⁴⁵⁸

10.37 These offences are clearly applicable to any procession or meeting in the vicinity of the Oireachtas which is posing a public order problem or otherwise causing alarm or serious inconvenience to members of the public. The 1994 Act also confers a number of powers on gardai to deal with persons who are engaging in these prohibited activities. A member of the Garda Síochána may arrest without warrant any person whom he or she finds committing one of the offences. If the member is of the opinion that one of the offences has been committed, he or she may demand the name and address of any person who he or she reasonably suspects of committing the offence. Failure to co-operate is an offence which carries a power of summary arrest. A member of the Garda Síochána may also issue a direction to any person whom he or she finds in a public place and suspects with reasonable cause to be committing one of these offences. A direction will require the person concerned either to desist from the unlawful activity or to leave the vicinity of the place in question in a peaceful or orderly manner. Such a direction can also be issued where the member reasonably suspects a person to be loitering in a public place without lawful authority or reasonable excuse and in a manner which gives rise to a reasonable apprehension for the safety of persons or property or for the maintenance of the public peace. The existence of these powers under the Criminal Justice (Public Order) Act 1994 to some

⁴⁵⁶Section 5 and 6 of the 1994 Act. The potentially wide ambit of these offences will doubtless be curtailed in practice, having regard to the Courts' obligation to protect the essence of the right of free speech in Article 40.6.1 of the Constitution.

⁴⁵⁷Section 4 of the 1994 Act.

⁴⁵⁸Section 13 of the 1994 Act.

extent supplement the provisions of section 28 of the 1939 Act and this is a matter to which the Committee proposes to have regard in its examination of the latter section.

Confiscation of criminal assets

Introduction

10.38 In 1996 the confiscation of criminal assets was adopted as a primary strategy to combat the growing threat from organised crime with the enactment of the Criminal Assets Bureau Act 1996, the Proceeds of Crime Act 1996 and the Disclosure of Certain Information for Taxation and other Purposes Act 1996. Confiscating criminal assets was not an entirely novel approach. There were already a range of provisions in Irish law providing for confiscation. For the most part, these were associated with the prosecution of or conviction for a specific criminal offence. Under the Misuse of Drugs Act 1977, for example, where a person is convicted of an offence under the Act, the court can order the forfeiture or destruction of anything which is shown to its satisfaction to be related to the commission of the offence.⁴⁵⁹ Similarly, the Illegal Immigrants (Trafficking) Act 2000 permits a court, where a person is convicted on indictment of an offence under the Act, to order the forfeiture of any vehicle used by that person in the commission of the offence.

10.39 The Criminal Justice Act 1994 goes much further than the Misuse of Drugs Act or the Illegal Immigrants (Trafficking) Act. Section 4 of this Act empowers the trial court, on the application of the DPP, to investigate the profit that a person convicted on indictment of a drug-trafficking offence has made from drug-trafficking. This can include profits from drug-trafficking for which the offender has not been convicted. Where a person is convicted of a non-drug-trafficking offence, the Court, on the application of the DPP, can order an investigation of the profit he or she has made from the crime in question. In either case, if the person fails to pay the confiscation order based on the resultant valuation, the DPP can apply to the High Court to have the individual imprisoned in default for the appropriate period specified in the table set out in the 1994 Act.⁴⁶⁰

10.40 The Criminal Justice Act 1994 also makes provision for the confiscation and forfeiture of the assets of persons charged with drug-trafficking or other serious crimes. Under this procedure, property can be restrained or frozen pending the criminal trial to ensure that it will be available in the event of a confiscation order being made subsequent to conviction. There is also

⁴⁵⁹Section 30(1) of the 1977 Act. See generally, *Bowes v. Devally* [1995] 1 IR 315.

⁴⁶⁰Criminal Justice Act 1994, section 19.

provision for the High Court to appoint a receiver over property in appropriate circumstances. This is available in association with both a restraint order and a confiscation order.⁴⁶¹

10.41 The Offences against the State (Amendment) Act 1985 introduced an approach which was not dependent on the initiation of criminal proceedings at all. Now lapsed, it provided for the seizure of bank funds in certain circumstances where the Minister for Justice, Equality and Law Reform was of the opinion that the funds were the property of an unlawful organisation. Associated criminal proceedings were not a prerequisite for such a seizure. The measures introduced in 1996 share with the 1985 measures this independence from associated criminal proceedings. However, the 1996 measures are unique in the manner and extent to which they rely on the civil, as distinct from the criminal, process to tackle criminal assets. They represent a fundamentally new approach to dealing with persons suspected of involvement in serious crime aimed at generating large profits.

10.42 The focus of the 1996 measures is the assets themselves, as distinct from the status of the person who has ownership or possession of them. So long as the assets have a value in excess of £10,000 and are either the proceeds of crime or have been acquired through the proceeds of the crime they are liable to restraint, seizure and disposal through a sophisticated civil process. It does not matter what form the assets take. Probably the most distinctive feature of the 1996 measures is the establishment of a multi-disciplinary body to take a proactive role in seeking out criminal assets and securing the necessary confiscation orders through the civil process. For the first time in the history of the State, this multi-disciplinary body, known as the Criminal Assets Bureau, combines the powers, resources and expertise of the Garda Síochána, the Revenue Commissioners and the Officers of the Minister for Social, Community and Family Affairs to tackle crime. Nor are their efforts confined to using the civil process to confiscate criminal assets. They can also seek to deprive criminals of the fruits of the criminal enterprise by subjecting them to tax assessments.

Criminal Assets Bureau

Composition

10.43 The Criminal Assets Bureau (CAB) is established as a body corporate by the Criminal Assets Bureau Act, 1996. The Act makes provision for the appointment of a Chief Bureau Officer, Bureau Officers and Bureau staff. The Chief Bureau Officer must be a Garda Chief Superintendent appointed

⁴⁶¹Criminal Justice Act 1994, section 26.

from time to time by the Garda Commissioner, who also enjoys a power of removal. The management and control of the CAB is vested in the Chief Bureau Officer, who is responsible to the Garda Commissioner for the performance of its functions. The other CAB officers are appointed by the Minister for Justice, Equality and Law Reform from members of the Garda Síochána, officers of the Revenue Commissioners, officers of the Minister for Social, Community and Family Affairs. The power to remove a bureau officer from his or her appointment to the Bureau vests in the Chief Bureau Officer, acting with the consent of the Garda Commissioner.

10.44 In addition to the Chief Bureau Officer and the Bureau Officers there is provision for the appointment of professional and technical staff (for example, accountants, computer technicians, chemists). The staff assist the Bureau officers in the performance of their powers and duties and work under the direction of the Chief Bureau Officer. They are removable at any time by the Garda Commissioner. There is separate provision for the appointment of a full-time Bureau legal officer.

Protection for Staff and Officers

10.45 The anonymity of Bureau staff and officers, apart from Garda officers, is specifically protected. The Act states that all reasonable care must be taken to ensure that their identity is not revealed.⁴⁶² This can extend to court proceedings. Where the officer or staff member is required to give evidence in any such proceedings, whether by affidavit, certificate or orally, the judge or (in relation to matters not before a Court) person in charge of the proceedings may, on the application of the Chief Bureau Officer, if satisfied that there are reasonable grounds in the public interest to do so, give such directions for the preservation of the anonymity of the officer or staff member as he or she thinks fit.⁴⁶³

10.46 The 1996 Act makes it a criminal offence to identify non-Garda Bureau officers, Bureau staff and their families. It is equally an offence to publish their addresses. The Act also introduces specific offences of assault, obstruction and intimidation with respect to officers, their staff and families.

Bureau Objectives and Functions

10.47 The Bureau's statutory objectives are to:

⁴⁶²Criminal Assets Bureau Act 1996, section 11.

⁴⁶³Criminal Assets Bureau Act 1996, section 10(7).

- identify assets which derive from criminal activity and to take steps to ensure that such assets are confiscated; to ensure that the proceeds of suspected criminal activity are subject to tax
- to investigate and determine any claim for social welfare benefit by any person engaged in criminal activity
- to investigate and determine any social welfare claim in respect of which officers of the Minister may be subject to threats or intimidation.⁴⁶⁴

10.48 These objectives are complemented by four statutory functions:

- the taking of all necessary actions, in accordance with police functions, for the purposes of the confiscation, restraint of use, freezing, preservation or seizure of assets deriving or suspected of deriving, directly or indirectly, from criminal activity
- the taking of all necessary actions under revenue legislation to ensure that the proceeds of crime or suspected criminal activity are subject to tax and that the revenue legislation is fully applied to such proceeds or activities
- the taking of all necessary actions under the social welfare legislation for the investigation and determination of any claim for social welfare benefit by any person engaged in criminal activity
- the taking of all necessary actions, at the request of the Minister for Social, Community and Family Affairs, to investigate and determine any claim in respect of welfare benefit where the Minister certifies that there are reasonable grounds for believing that, in the case of a particular investigation, officers of the Minister may be subject to threats or other forms of intimidation.⁴⁶⁵

Powers and Status of Bureau Officers

10.49 Apart from a power of entry, search and seizure under warrant, the 1996 measures do not confer specific powers on officers of the CAB. However, they do retain the powers vested in them by virtue of their status as members of the Garda Síochána, officers of the Revenue Commissioners or officers of the Minister for Social, Community and Family Affairs, as the case may be.

⁴⁶⁴Criminal Assets Bureau Act 1996, section 4.

⁴⁶⁵Criminal Assets Bureau Act 1996, section 5.

It is expected that they will use these powers in the service of the objectives and functions of the Bureau.

- 10.50 It is also worth noting that a Bureau officer may be accompanied or assisted in the exercise or performance of his or her powers or duties by such other persons as he or she considers necessary. Where this other person is also a Bureau officer, he or she shall have the powers and duties of the Bureau officer whom he or she is assisting. These additional powers are available for the purposes of that assistance only. It follows, for example, that a Bureau officer from the Revenue Commissioners who is assisting a Bureau officer from the Garda Síochána under these provisions will acquire the powers of a member of the Garda Síochána for the purposes of the assistance. The same, of course, applies in reverse if it is the officer from the Garda Síochána who is assisting the officer from the Revenue Commissioners.
- 10.51 When exercising their powers and discharging their duties on behalf of the Bureau, officers are required to function as a team. The Criminal Assets Bureau Act 1996 specifically states that their exercise or performance of any power or duty for the purposes of the Act shall be exercised or performed in the name of the Bureau. Moreover, a Bureau officer is under the direction and control of the Chief Bureau Officer when exercising or performing any powers or duties for the purposes of the Act. The Chief Bureau Officer also acquires those powers of direction and control to which Bureau officers were subject prior to their appointment as Bureau officers.
- 10.52 The combination of the Bureau's composition, management structures, objectives and the functions confirm that it is an inter-agency police force for tackling organised crime. The Garda Síochána, the Revenue Commissioners and the Minister for Social, Community and Family Affairs will pool their expertise, resources and competencies in targeting the assets of those suspected of being engaged in organised crime and those enjoying the benefit of such assets. The traditional police approach of securing convictions against the offenders has been complemented by a strategy that focuses on the wealth that is believed to derive, directly or indirectly, from organised crime. By combining the knowledge and skills of the Revenue Commissioners and the social welfare officers with those of the Garda Síochána, it will be easier to identify suspects who appear to be enjoying a lifestyle which grossly exceeds their publicly declared income and capital. The resources and competencies of all three services can then be used to ensure that the individuals in question are denied social welfare benefits to which they are not entitled, are taxed on their undeclared income and capital and, where appropriate, are deprived of

wealth which is suspected of deriving directly or indirectly from criminal activity.

Confiscation Procedure

10.53 The primary confiscation procedures are laid down in the Proceeds of Crime Act 1996 which makes provision for the granting of interim, interlocutory and disposal orders.

Interim Orders

10.54 The High Court can issue an interim order prohibiting the respondent, or any specified person, having notice of the order, from disposing of or otherwise dealing with specified property or diminishing its value during the period of 21 days from the date of the order. The application is heard *ex parte* and in private.⁴⁶⁶ The court may issue an order under these provisions where it is shown to its satisfaction that a person is in possession of the property concerned and that it constitutes, directly or indirectly, the proceeds of crime or was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes the proceeds of crime and the value of the property is not less than £10,000. The belief of a member of the Garda Síochána not below the rank of Chief Superintendent, or of an authorised officer of the CAB, is admissible as evidence of these matters when stated in an affidavit or in oral evidence.⁴⁶⁷

10.55 In the course of the application, or while an interim order is in force, the court may grant an application compelling the respondent to file information on his or her assets and income. Equally, once an interim order has issued the court may appoint a receiver to manage or deal with the property.

10.56 The net effect of the order is to ensure that the property in question is available for confiscation at a later date should that prove necessary. Its singular nature is emphasised by the ease with which it can be obtained, the potentially far-reaching scope of the order and the extent to which it encroaches on the property rights of the individual. There is provision for the respondent (or any person claiming an interest in the property) to challenge an order after the event. However, the onus will be on the individual to satisfy the court that the property, or any part of it, is not the proceeds of crime or that its value is less than £10,000. If the applicant succeeds, the court may vary or discharge the order.

⁴⁶⁶Proceeds of Crime Act 1996, section 2

⁴⁶⁷Proceeds of Crime Act 1996, section 8(1).

10.57 An interim order lapses automatically after 21 days unless an application for an interlocutory order is brought within that period.

Interlocutory Orders

10.58 The High Court can issue an interlocutory order where the applicant tenders admissible evidence to the effect that a person is in possession or control of property which constitutes the proceeds of crime and which has a value of not less than £10,000.⁴⁶⁸ Notice of the application must be given to the person or persons concerned unless the court is satisfied that it is not reasonably possible to ascertain their whereabouts.

10.59 A striking feature of this provision is that the case for an order can be made out simply by a member of the Garda Síochána not below the rank of Chief Superintendent or an authorised officer of the CAB, stating, either in an affidavit or in oral evidence, his or her belief that:

(i) the respondent is in possession or control of specified property and that the property constitutes directly or indirectly the proceeds of crime; or

(ii) that the respondent is in possession or control of specified property and that the property was acquired in whole or in part with or in connection with property that directly or indirectly constitutes the proceeds of crime; and

(iii) that the value of the property is not less than £10,000.

10.60 Where such evidence is placed before the court, it must grant the order unless the respondent introduces evidence to the contrary or the court is satisfied that there would be a serious risk of injustice.

10.61 As with the procedure for an interim order, an application can be made to the court for an order compelling the respondent to file an affidavit in the Central Office of the High Court specifying the property in his or her possession or control or his or her income or sources of income during such period as the court may specify. The period may not exceed ten years, ending on the date of the application. The significance of this provision is underlined by the fact that the respondent need not have been charged with, nor convicted of, a criminal offence for the obligation to arise.

⁴⁶⁸Proceeds of Crime Act 1996, section 3(1).

10.62 The interlocutory order has much the same effect on the property as an interim order, subject to the critical difference that it can last longer. Unless a person concerned establishes at some point that the property does not satisfy the criteria for an interlocutory order, the order will remain in force until the determination of an application for a disposal order. An application for a disposal order can be made only after an interlocutory order has been in force for at least seven years. The court, however, retains the power to vary the interlocutory order during this period. It may make orders enabling the respondent to discharge out of the property reasonable living or other necessary expenses and carry on a business, trade or profession to which any of the property relates.⁴⁶⁹ The court may also appoint a receiver at any time when an interlocutory (or an interim) order is in force. The receiver may be given such powers as the court thinks appropriate, including the power to take possession of the property to which the order relates and to manage or otherwise deal with it in accordance with the court's directions.

Disposal Orders

10.63 After an interlocutory order has been in force in respect of specified property for a period of at least seven years, an application can be made for a disposal order in relation to that property. The application is made to the High Court, with due notice to the respondent and other such persons as the court should order. The court must grant the disposal order unless it is shown to its satisfaction that the property is not the proceeds of crime. The Court cannot make the order if it is satisfied that there would be a serious risk of injustice. Any person claiming ownership of any of the property must be given an opportunity to show cause why a disposal order should not be made.

10.64 Once granted, the order deprives the respondent of his or her rights in the property, which automatically transfers to the Minister for Justice, Equality and Law Reform or such other person to whom the order relates. Where property vests in the Minister pursuant to these provisions, he can sell or otherwise dispose of it, and the proceeds of any such disposition (or moneys transferred to him) are for the benefit of the Exchequer.

10.65 There are provisions for the payment of compensation to persons who suffer loss as a result of orders being issued under these provisions in respect of property which does not constitute directly or indirectly the proceeds of crime or which was not acquired in whole or in part with or in connection with such property. Compensation can be awarded where the applicant shows, to the

⁴⁶⁹Proceeds of Crime Act 1996, section 4.

satisfaction of the court, that he or she is the owner of the property in question and that the order has been discharged or varied or has lapsed. Where compensation is awarded, it is paid by the Minister for Justice, Equality and Law Reform.⁴⁷⁰

Gathering the Evidence for an Order

10.65 Although the CAB is not the only authority which may seek interim, interlocutory and disposal orders under the 1996 Act, in practice it is the source of virtually all applications.

10.66 For the purpose of gathering the evidence necessary to sustain an application for any of the court orders Bureau Officers can exercise the powers vested in them by virtue of their status as members of the Garda Síochána or as officers of the Revenue Commissioners. In practice, Garda powers such as the powers of arrest and entry, search and seizure, as well as powers to access financial records are of particular importance in this context. The Criminal Assets Bureau Act 1996 provides an additional power of entry, search and seizure. It confers jurisdiction on a judge of the District Court to issue a warrant for the search of a specified place and any person found at that place.⁴⁷¹ The warrant may issue where the judge is satisfied after hearing evidence on oath from a Bureau Officer who is a member of the Garda Síochána, that there are reasonable grounds for suspecting that evidence of, or relating to, assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found at the specified place. The warrant is valid for seven days. In a situation of emergency, a Bureau officer who is a member of the Garda Síochána not below the rank of Superintendent may issue a search warrant. He can do this where he is satisfied that circumstances of urgency giving rise to the need for the immediate issue of the warrant would render it impracticable to apply to a judge of the District Court for the issue of a warrant.⁴⁷² A warrant issued under this emergency provision is valid for 24 hours.

Charging Criminal Assets to Tax

10.67 The Revenue Officers in the Bureau are empowered and obliged to charge to tax, profits or gains from an unlawful or unknown source and to deal with the assessment and collection of any tax following an investigation by the Bureau. The Disclosure of Certain Information for Taxation and other Purposes Act

⁴⁷⁰Proceeds of Crime Act 1996, section 16.

⁴⁷¹Proceeds of Crime Act 1996, section 14.

⁴⁷²Proceeds of Crime Act 1996, section 14(3).

1996 provides for the exchange of information between the Revenue Commissioners and the Garda Síochána in certain circumstances.

10.68 The CAB's application of the Revenue Acts has been extremely effective in depriving persons of the benefit of suspected criminal activity. Revenue officers in the CAB have benefited from the investigations, enquiries and information of the other two agencies represented in the Bureau. On the basis of this information, they have been able to raise substantial assessments on persons in possession of money or property who are suspected of having obtained the money or property from drug-trafficking or other criminal activity. Of particular importance in this context is the fact that where such assessments are challenged, the question of whether the profits or gains are the result of criminal activity must, by statute, be disregarded. Unless the person concerned can show that the money or property has been obtained from a lawful source, there is no answer to the tax assessment. The assessment becomes final and conclusive and the enforcement procedures available are being used by the CAB. In effect, the onus has moved from the authorities to the person in possession of income or capital to establish that the CAB's demands are not warranted.

Results

10.69 The CAB's latest annual report reveals that in 1999 alone it secured interim and interlocutory orders on property with a value of £15 million and £813,659 respectively. Tax and interest to a value of £13.5 million were demanded, while social welfare savings amounted to £596,729.

10.70 This brief survey of the range of police powers and confiscation procedures is not meant not to be comprehensive. It is an attempt merely to sketch out the general range of police powers and confiscation procedures which are available, in addition to those provided by the Offences against the State legislation, to combat terrorism and organised crime. Any assessment of the need to retain any or all of the provisions of the Offences against the State legislation must take account of the availability of these other powers and procedures.

10.71 Two members of the Committee, while acknowledging that this chapter contains much useful information on Garda powers in the investigation of offences, would emphasise that all such powers have, where relevant, been taken into account in the review of the provisions of the Offences against the

State Acts, and that any recommendation on the retention or an amendment of a provision in those Acts has been made in the knowledge of the existence of these other provisions (the members question the relevance to the investigation of terrorism and organised crime of a number of the powers cited in this chapter, such as powers under the Official Secrets Act, the National Monuments Act, the Wildlife Act and intoxicating liquor legislation).

- 10.72 As regards the contention that "police powers of entry, search and seizure outside of section 29 of the Offences against the State Act, 1939 are extensive", these members agree that such powers are extensive but only in a purely numerical sense, and disagree with the implication that they are comprehensive. Garda powers of search in respect of evidence of serious offences are, in their view, seriously inadequate in some respects and they point out that legislation is currently proposed to rectify this.
- 10.73 As regards section 9 of the Criminal Law Act, 1976, which permits a Garda exercising a lawful power of search in respect of an offence to seize anything which he or she believes to be evidence of another offence, the members question the characterisation of this power as "extensive" or as of "exceptional scope". On the contrary, the members believe that it would be difficult to justify a contrary situation where a Garda carrying out a search in respect of a particular offence would be unable to seize evidence of another offence which he or she comes across, no matter how serious the offence.

GENERAL DISSENTING VIEWS OF PROFESSOR DERMOT WALSH

I am unable to subscribe to the majority recommendations on several key provisions of the Offences against the State Acts and their assessment of when it is justified to resort to special measures to combat terrorism and organised crime. Generally, I feel that the majority's positions on these matters do not take sufficient cognisance of human rights norms and are not adequately supported by empirical data or persuasive argument. Accordingly, I join with the minority in recommending the repeal of the provisions on internment, the Special Criminal Court, adverse inferences, opinion evidence and other special evidential rules. Indeed, I would go further and recommend the repeal of section 30 and the abolition of the offences of withholding information and membership of an unlawful organisation. Before setting out my position on these provisions briefly, I should explain why I cannot subscribe fully to the majority's position on when it is justified to resort to emergency or special criminal justice measures in a democracy.

The majority is prepared to countenance the use of exceptional criminal justice measures against bodies and persons who are perceived as posing a threat to the established order in the State, even though they do not pursue their objectives directly through violent means. I have grave difficulties with this approach. I can accept that from time to time exceptional measures will be needed to combat threats to the stability of the State and its institutions. I am firmly of the view, however, that the nature of such measures and their inherent potential to be used as powerful instruments to crush political opposition, trade union activity, the promulgation of unconventional views are such that they must be framed in very clear and precise terms. Equally, their scope and application must be clearly limited to the identified threat. Otherwise they become insidious instruments through which a democratic State becomes intolerant of minority and unconventional views and resistant to democratic change.

It is my view that such measures are justified only in combating bodies and persons who resort to violence or other such unlawful means in order to pursue their political objectives, to terrorise sections of the population or to destabilise the State. Extending these measures to *bona fide*

political/community organisations who neither use nor incite others to use such methods is in my view unacceptable in a State which respects the fundamental tenets of democracy and human rights.

I hold this position in the full knowledge that there will be political/community groups that share the same goals as other bodies that unashamedly use violence to pursue their aims. Indeed, there may be historical links between the political/community groups and the bodies that resort to violence, and the former may even exude a degree of sympathy/understanding for the violent activities of the latter. Nevertheless, so long as a body does not resort to violence or other such unlawful activity or incite others to do so in order to pursue its agenda, I think that it is vitally important that it should not be suppressed or be seen as a legitimate target for exceptional criminal justice measures. The pursuit of an objective (such as the reunification of Ireland; the establishment of a socialist republic; reunification with the United Kingdom, withdrawal from the European Union; the establishment of an eco-state, or whatever) should never be seen as subversive in itself. Individuals or bodies who pursue such objectives should not be suppressed, unless they seek to achieve them by violence or other such unlawful activity, or incite others to do so.

There are too many contemporary and historical examples from around the world of States in which political/economic elites have used the cover of emergency or special measures to suppress the growth of opposition and of alternative views. For me, that is the greatest danger posed by such measures. Unless confined to very specific, objectively defined targets, they have a tendency to be used by the State, and by powerful forces or interests within the State, to pursue ulterior agendas. Under the guise of combating terrorism, they can end up causing more lasting damage to basic democratic values and the rule of law than the terrorists could ever hope to have achieved. My fear is that the majority have not been sufficiently conservative in defining the threat which warrants the use of exceptional criminal justice measures in post Good Friday Peace Agreement Ireland.

Section 30

In a society based on respect for human rights and civil liberties, a reasonable balance must be maintained between the individual's fundamental right to liberty and the police need to use arrest and detention for the effective investigation and detection of crime. Since section 30 constitutes a gross departure from the norms governing police powers of arrest and detention, it follows that its retention needs to be justified by very convincing arguments.

In my view the majority does not offer any empirical evidence or compelling justification why periods of detention for 72 hours (or even 48 hours) are necessary for such a broad range of offences when the norm is twelve hours. Comparisons with the few other jurisdictions cited reveal several in which the maximum period of detention without charge falls very far short of 72 hours. Those which equal or exceed 72 hours can be explained either as exceptional measures or as being located within criminal justice systems which differ in several material respects from the Irish system. Furthermore, empirical evidence from Northern Ireland and Britain suggests that most confessions are obtained from suspects within the first twelve hours of detention. This calls into question the justification for the retention of periods of detention which greatly exceed twelve hours. It is also worth bearing in mind that extended periods of detention in police custody heighten the risk that the detainee will suffer from anxiety and oppression, irrespective of whether or not he or she is actually subjected to oppressive treatment at the hands of one or more police officers. The legal and administrative safeguards cannot protect fully against this risk.

Even if a case can be made out for special powers of arrest and detention to combat terrorism and organised crime, the majority's recommendations will not ensure that the section 30 power is confined to persons suspected of involvement in such activities. Indeed, their recommendations do not even go far enough to ensure that it cannot be used against persons who are not genuinely suspected of active participation in the commission of any offence. Their recommendation with respect to the offence of withholding information (see below) will positively encourage the use of the power against persons who are merely suspected of having information about the commission of a relevant offence by others. Moreover, their recommendation with respect to the availability of section 30 to prevent the *imminent* commission of an offence ensures that the power can continue to be used against persons who are not committing and have not committed an offence. If the majority had settled for the availability of section 30 in respect of an *attempt* to commit a relevant offence, its position would at least have the merit of confining section 30 to suspicion of an actual criminal offence (since an attempt to commit a criminal offence is in itself a criminal offence). By going beyond this traditional standard, it has, in effect, recommended the continuation of section 30 as a power of preventative detention. In my view, they have not convincingly justified the need for this radical departure from the norm in respect of powers of arrest.

In summary, my position is that section 30 constitutes an excessive and unwarranted intrusion on the individual's fundamental right to liberty in a "normal" society based on respect for human rights. Even without section 30, the Garda Síochána are already very well provisioned with powers and procedures to combat the threat of terrorism and organised crime (see chapter 10). Just because they may find it convenient to resort to arrest and prolonged detention as a means of gathering intelligence that may prove useful in a criminal investigation, it does not follow that they should have such a power. A more reasonable balance needs to be struck between the requirements of effective criminal investigation and the individual's fundamental right to liberty. Extending police powers of arrest and prolonged detention to individuals who are not actually suspected of committing or having committed a serious criminal offence will push this balance too far in the direction of a police state.

I should emphasise that nothing I have said here should be interpreted, directly or indirectly, as a criticism of the Garda Síochána. Members of the Garda Síochána are fully entitled to use all lawful powers placed at their disposal in order to discharge their functions to the best of their ability. I am also very conscious of the huge price which members of the force have paid in terms of personal injuries and their very lives in seeking to combat the evils of terrorism and organised crime. I would be willing to recommend granting further exceptional powers of arrest and detention to members of the Garda Síochána in order to combat terrorism and organised crime if it was shown that such powers were no more than was necessary for the proper investigation of serious acts of violence associated with terrorism and organised crime, were confined to such offences, could be used only against persons reasonably suspected of such offences and were subject to measures which would minimise the scope for oppression and miscarriages of justice. I am not persuaded that the majority's position on section 30 fully satisfies these requirements.

Withholding Information

The offence of withholding information created by section 9 of the 1998 Act is, in my view, fundamentally objectionable in a society which seeks to strike a fair balance between the autonomy of the individual and the intrusive demands of the State. Just as the State should not use the criminal sanction to compel an individual to provide evidence against himself or herself in a criminal investigation, so also should it not use the criminal sanction to compel the individual's co-operation with a police investigation. I fully accept that citizens have responsibilities as well as rights and that citizens

should feel under a moral duty to assist the State in the prevention and detection of crime. It is also my view, however, that the enforcement of this moral duty through the full panoply of the criminal law constitutes both an improper use of the criminal law and an excessive encroachment on the autonomy of the individual.

The existence of the offence places the State in a position whereby it can coerce “innocent” individuals to co-operate with the criminal investigation of others for serious offences. The “innocent” individual can be arrested and detained for up to 72 hours and threatened with prosecution and a lengthy prison sentence if he or she fails without reasonable excuse to co-operate. In my view the State should not have the power to place an “innocent” individual in such an invidious position. Its use in the context of section 30, as recommended by the majority, is particularly objectionable. In effect, it criminalises an individual so as to ensure that he or she is amenable to arrest and detention under section 30 for the purpose of facilitating an investigation into a criminal offence which others are suspected of having committed.

Membership

It is my view that the offence of membership of an unlawful organisation, as defined in section 21 of the Offences against the State Act 1939, is unacceptable and unnecessary in a State based on respect for fundamental human rights and civil liberties. Not only does the offence infringe upon fundamental freedoms, such as association and expression, but it also appears to run contrary to certain basic principles of legality and due process in criminal matters.

The offence is defined by reference to the concept of an unlawful organisation. The statutory definition of the latter is so broad as to render it virtually impossible for the individual to predict with any accuracy whether certain forms of organised political or lobbying activities are safe. There is, for example, no definition of what is meant by an organisation. Is it necessary to have a constitution, formal title, admissions procedure, membership list, rules of procedure? Is it sufficient that two individuals come together with a view to minimising their tax liability by fair means or foul? The legislation does not address these matters.

The scope of some of the activities or objectives listed in paras (a) to (f) of section 18 is also exceptionally broad and vague. Even if these paragraphs are amended as recommended by the majority, the scope of the offence will still fall short of the clarity and precision which one is entitled to expect in the

definition of a criminal offence. Notwithstanding the decision of the Court of Criminal Appeal in *The People (DPP) v. James Cull* (2 Frewen 36), the special evidential provisions applicable to membership place the individual in the dilemma that a whole range of innocent and innocuous actions and associations on his or her part could be used as evidence to sustain a conviction for membership, even though he or she was not in fact a member of any unlawful organisation. The combined effect of these provisions is such that the individual will have difficulty in predicting whether or not his or her expression of personal opinion or exercise of the basic freedom of association will expose him or her to a criminal sanction for membership. Equally, it creates a situation where the scope and content of the criminal law is uncertain, and where the short description of an offence does not adequately convey the range of behaviour which is penalised by its provisions. The result is a serious breach of the basic principles of legality.

Generally the criminal sanction is reserved for the punishment of acts or omissions which must be outlawed in order to facilitate the proper functioning of society. In those rare situations where it is deemed necessary to punish a *state of being*, there will usually be an associated and readily identifiable physical manifestation of the *state of being* (for example, possession of an object, drunkenness). In the offence of membership, no such physical manifestation is necessary. There is no requirement for the individual to have gone through a prior act of initiation into the organisation, nor is there any requirement for the individual to proclaim himself or herself a member or for the organisation to claim him or her as a member, nor is there any requirement for the individual to be in possession of property belonging to the organisation or to participate in the activities of the organisation. It is sufficient for an individual simply *to be* a member of the organisation, and that *state of being* can be established on the basis of the “opinion” evidence of a Chief Superintendent. This comes very close to using the criminal law to punish someone for a virtual offence.

By punishing the mere condition or appearance of membership (as distinct from any act of joining or contributing to the activities of an organisation), we are coming dangerously close to using the criminal law to control how an individual defines himself or herself. This is a gross and unnecessary intrusion on the freedom of thought, the freedom of personal identity and the freedom of expression. No matter how objectionable the policies or activities of a particular organisation or group are to the majority, we should not resort to the criminal law to silence the voice of those who think otherwise.

It is desirable that the number and range of criminal offences should not proliferate more than is strictly necessary in the interests of the common good. Creating an offence of membership cannot be justified unless it is going to punish conduct that needs to be punished by the criminal law in the interests of the common good and which is not already proscribed by the criminal law. If it is the case (which has yet to be established) that the existing common law offences of aiding, abetting, counselling, procuring, conspiracy, incitement and attempt are insufficient to deal with positive contributions to the criminal activities of an unlawful organisation or any organised body, then the solution should be found in piecemeal and carefully constructed amendments or additions to these common law offences.

Conclusion

In conclusion, I would like to emphasise that nothing I have said in these paragraphs should be interpreted as a criticism of the Garda Síochána, the Prosecution Service or the Courts in this country for anything done in the past under the Offences against the State legislation. All three have demonstrated a commitment to the highest standards of justice throughout many difficult years. My perspective is based on the criminal justice values I feel should underpin a peaceful environment in which, as a result of the Good Friday Peace Agreement, security arrangements and practices are normalised. In such an environment, the standards underpinning the Offences against the State legislation should be replaced with standards that are more firmly rooted in due process, civil liberties and human rights.

APPENDIX 1

LIST OF SUBMISSIONS

SUBMISSIONS

Submissions received from Organisations

American Living History Society of Ireland, Republic of Ireland Section
Amnesty International
An Garda Síochána
British Irish RIGHTS WATCH
Department of Banking and Finance, University College Dublin
Irish Council for Civil Liberties
Law Society of Ireland
Sinn Féin
Sinn Féin, Thomas Ashe Cumann, Co. Cavan
The Table Campaign

Submissions received from individuals

Mr Donal Clancy, Dublin
Mr Noel Conway, United States of America
Mr Pat Doherty, Co. Donegal
Mr Stephen Kearney, Dublin
Mr Liam MacGarraidhe, Co Wexford
Mrs. Bridie Martin, Co. Cavan
Mr John Perry, Australia
Mr James Sheehan, Co. Kerry
Mr Frank Sutcliffe, Dublin
Mr Anselm J. Walsh, Co. Tipperary

APPENDIX 2

TABLE OF CASES

TABLE OF CASES

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Attorney General v. Sullivan [1964] IR 169	7.52
Averill v. United Kingdom (2001) EHRR	8.2, 8.21, 8.31
Barry v. Waldron, High Court, 23 May 1996	7.60
Blake v. Attorney General [1982] IR 177	6.128
Bowes v. Devally [1995] 1 IR 315	10.38
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Burke v. Central Independent Television Plc. [1994] 2 IR 61	9.65
Byrne & Dempsey v. Government of Ireland, Supreme Court, 11 March 1999	9.23
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Condron v. United Kingdom (2001) 31 EHRR	8.29
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de Rossa v. Independent Newspapers [1999] 4 IR 432	3.18
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Director of Public Prosecutions v. A & BC Chewing Gum Ltd. [1968] 1 QB 159	6.91
Director of Public Prosecutions v. Delaney [1997] 3 IR 453	10.12
Director of Public prosecutions v. Forbes [1993] ILRM 817	10.13
Director of Public Prosecutions v. The Special Criminal Court [1999] 1 IR 60	9.35, 9.65
Director of Public Prosecutions (Stratford) v. Fagan [1994] 3 IR 265	10.24
Dudgeon v. United Kingdom (1981) 4 EHRR	3.17
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Eccles, McPhillips & McShane v. Ireland (1988) 59 DR 212	9.49
Eviston v. Director of Public Prosecutions, High Court, 26 January 2001	9.22
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Gammell v. Dublin County Council [1983] ILRM 413	6.32
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Geraghty v. Minister for Local Government (No. 2) [1976] IR 153	5.74
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Hanahoe v. District Judge Hussey [1998] 3 IR 68	3.17
Hardy v. Ireland [1994] 2 IR 550	6.158
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Irish Family Planning Association Ltd. v. Ryan [1979] IR 295	6.32 IJL
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Kavanagh v. Ireland, UNHRC, 4 April 2001	9.24, 9.62, 9.77, 9.97
Keegan v. Ireland (1994) 18 EHRR 342	3.17
Kennedy v. Ireland [1987] IR 587	3.42
King v. Attorney General [1981] IR 223	5.36
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Laurentiu v. Minister for Justice, Equality and Law Reform [1999] 4 IR 26	7.25
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Norris v. Attorney General [1984] IR 36	3.17
Ní Eili v. Environmental Protection Agency, Supreme Court, 31 July, 1999	9.86
O'Brien v. Mirror Group Newspapers Ltd. [2001] 1 IR 1	3.18
O'Brádaigh v. Fanning, Irish Times, 25 November 1972	6.125
O'Callaghan v. Ireland [1994] 1 IR 555	10.30
O'Callaghan v. Commissioners of Public Works [1985] ILRM 365	6.128
O'Ceallaigh v. An Bórd Altranais, Supreme Court, 2000	6.128
O'Leary v. Attorney General [1995] 1 IR 254 (SC); [1993] 1 IR 102 (HC) ..	3.39, 6.55, 6.158
Orange Communications v. Director of Telecommunications Regulation (No 1) [2000] 4 IR	6.36, 9.86
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O'Reilly v. Director of Public Prosecutions [1984] ILRM 224	9.23
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Sloan v. The Special Criminal Court [1993] 3 IR 528	6.17	
Socialist Party v. Turkey (1999) 27 EHRR 51	6.23	
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People (DPP) v. Finnerty [2000] 1 ILRM 191	8.39, 8.49	The
People (DPP) v. Foley [1995] 1 IR 267	6.151	The
People (DPP) v. Gannon, Irish Times, 1 June 2001	6.87	The
People (DPP) v. Healy [1990] 2 IR 73.....	7.57, 7.58, 8.28, 8.49	The
People (DPP) v. Higgins Supreme Court, 22 November 1985	7.9	The
People (DPP) v. Howley [1989] ILRM.....	7.10	The
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People (DPP) v. O'Leary [1988] 3 Frewen 163	6.54, 6.55, 6.89	The
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People (DPP) v. Ryan [1989] IR399	7.56	The
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People (DPP) v. Treanor, Irish Times 30 July 1980	6.58	The
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People (DPP) v. Walsh, Irish Times, 14 April 1994	6.88	The
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Queen v. McHugh [1901] 21. R .569	6.109	The State
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Tolstoy v. United Kingdom (1995) 20 EHRR	3.18	
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APPENDIX 3

ACTS AS PROMULGATED

No. 13/1939	Offences Against the State Act 1939
No. 2/1940	Offences Against the State (Amendment) Act 1940
No. 26/1972	Offences Against the State (Amendment) Act 1972
No. 3/1985	Offences Against the State (Amendment) Act 1985
No. 39/1998	Offences Against the State (Amendment) Act 1998

Number 13 of 1939.

No. 13/1939: OFFENCES AGAINST THE STATE ACT, 1939.

AN ACT TO MAKE PROVISION IN RELATION TO ACTIONS AND CONDUCT CALCULATED TO UNDERMINE PUBLIC ORDER AND THE AUTHORITY OF THE STATE, AND FOR THAT PURPOSE TO PROVIDE FOR THE PUNISHMENT OF PERSONS GUILTY OF OFFENCES AGAINST THE STATE, TO REGULATE AND CONTROL IN THE PUBLIC INTEREST THE FORMATION OF ASSOCIATIONS, TO ESTABLISH SPECIAL CRIMINAL COURTS IN ACCORDANCE WITH ARTICLE 38 OF THE CONSTITUTION AND PROVIDE FOR THE CONSTITUTION, POWERS, JURISDICTION, AND PROCEDURE OF SUCH COURTS, TO REPEAL CERTAIN ENACTMENTS AND TO MAKE PROVISION GENERALLY IN RELATION TO MATTERS CONNECTED WITH THE MATTERS AFORESAID. [14th June, 1939].

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:—

PART I
PRELIMINARY AND GENERAL

1 Short title.

1.— This Act may be cited as the Offences against the State Act, 1939.

2 Definitions.

2.— In this Act—

the word "organisation" includes associations, societies, and other organisations or combinations of persons of whatsoever nature or kind, whether known or not known by a distinctive name;

the word "document" includes a book and also a newspaper, magazine, or other periodical publication, and also a pamphlet, leaflet, circular, or advertisement;

the expression "incriminating document" means a document of whatsoever date, or bearing no date, issued by or emanating from an unlawful organisation or appearing to be so issued or so to emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of an unlawful organisation;

the expression "treasonable document" includes a document which relates directly or indirectly to the commission of treason; the expression "seditious document" includes—

- (a) a document consisting of or containing matter calculated or tending to undermine the public order or the authority of the State, and
- (b) a document which alleges, implies, or suggests or is calculated to suggest that the government functioning under the Constitution is not the lawful government of the State or that there is in existence in the State any body or

organisation not functioning under the Constitution which is entitled to be recognised as being the government of the country, and

(c) a document which alleges, implies, or suggests or is calculated to suggest that the military forces maintained under the Constitution are not the lawful military forces of the State, or that there is in existence in the State a body or organisation not established and maintained by virtue of the Constitution which is entitled to be recognised as a military force, and

(d) a document in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation;

the word "offence" includes treason, felonies, misdemeanours, and statutory and other offences;

references to printing include every mode of representing or reproducing words in a visible form, and the word "print" and all cognate words shall be construed accordingly.

3 Exercise of powers by superintendents of the *Gárda Síochána*.

3.— Any power conferred by this Act on an officer of the *Gárda Síochána* not below the rank- of chief superintendent may be exercised by any superintendent of the *Gárda Síochána* who is authorised (in respect of any particular power or any particular case) in that behalf in writing by the Commissioner of the *Gárda Síochána*.

4 Expenses.

4.— The expenses incurred by any Minister of State in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

5 Repeals.

5.— The *Treasonable offences Act, 1925 (No. 18 of 1925)*, and the *Public Safety (Emergency Powers) Act, 1926 (No. 42 of 1926)*, are hereby repealed.

PART II OFFENSES AGAINST THE STATE

6 Usurpation of functions of government.

6.— (1) Every person who usurps or unlawfully exercises any function of government, whether by setting up, maintaining or taking part in any way in a body of persons purporting to be a government or a legislature but not authorised in that behalf by or under the Constitution, or by setting up, maintaining, or taking part in any way in a purported court or other tribunal not lawfully established, or by forming, maintaining, or being a member of an armed force or a purported police force not so authorised, or by any other action or conduct whatsoever, shall be guilty of felony and shall be liable on conviction thereof to suffer penal servitude for a term not exceeding ten years or to imprisonment for a term not exceeding two years.

(2) Every person who shall attempt to do any thing the doing of which is a felony under the foregoing sub-section of this section or who aids or abets or conspires with another person to do or attempt to do any such thing or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

7 Obstruction of government.

7.— (1) Every person who prevents or obstructs, or attempts or is concerned in an attempt to prevent or obstruct, by force of arms or other violent means or by any form of intimidation the carrying on of the government of the State or any branch (whether legislative, judicial, or executive) of the government of the State or the exercise or performance by any member of the legislature, the judiciary, or the executive or by any officer or employee (whether civil (including police) or military) of the State of any of his functions, powers, or duties shall be guilty of felony and shall be liable on conviction thereof to suffer penal servitude for a term not exceeding seven years or to imprisonment for a term not exceeding two years.

(2) Every person who aids or abets or conspires with another person to do any thing the doing of which is a felony under the foregoing sub-section of this section or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

8 Obstruction of the President.

8.— (1) Every person who prevents, or obstructs, or attempts or is concerned in an attempt to prevent or obstruct, by force of arms or other violent means or by any form of intimidation the exercise or performance by the President of any of his functions, powers, or duties shall be guilty of felony and shall be liable on conviction thereof to suffer penal servitude for a term not exceeding seven years or to imprisonment for a term not exceeding two years.

(2) Every person who aids or abets or conspires with another person to do any thing the doing of which is a felony under the foregoing sub-section of this section or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on, conviction thereof to imprisonment for a term not exceeding two years.

9 Interference with military or other employees of the State.

9.— (1) Every person who shall with intent to undermine public order or the authority of the State commit any act of violence against or of interference with a member of a lawfully established military or police force (whether such member is or is not on duty) or shall take away, injure, or otherwise interfere with the arms or equipment, or any part of the arms or equipment, of any such member shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

(2) Every person who shall incite or encourage any person employed in any capacity by the State to refuse, neglect, or omit (in a manner or to an extent calculated to dislocate the public service or a branch thereof) to perform his duty or shall incite or encourage any person so employed to be negligent or insubordinate (in such manner or to such extent as aforesaid) in the performance of his duty shall be guilty of a misdemeanour

and shall be liable on conviction thereof to imprisonment for a term not exceeding two years

(3) Every person who attempts to do anything the doing of which is a misdemeanour under either of the foregoing sub-sections of this section or who aids or abets or conspires with another person to do or attempt to do any such thing or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding twelve months.

10 Prohibition of printing, etc, certain documents.

10.— (1) It shall not be lawful to set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document—

- (a) which is or contains or includes an incriminating document, or
- (b) which is or contains or includes a treasonable document, or
- (c) which is or contains or includes a seditious document.

(2) In particular and without prejudice to the generality of the foregoing sub-section of this section, it shall not be lawful for any person to send or contribute to any newspaper or other periodical publication or for the proprietor of any newspaper or other periodical publication to publish in such newspaper or publication any letter, article, or communication which is sent or contributed or purports to be sent or contributed by or on behalf of an unlawful organisation or which is of such nature or character that the printing of it would be a contravention of the foregoing sub-section of this section.

(3) Every person who shall contravene either of the foregoing sub-sections of this section shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to a fine not exceeding one hundred pounds, or, at the discretion of the Court, to imprisonment for a term not exceeding six months or to both such fine and such imprisonment and also (in any case), if the Court so directs, to forfeit every copy in his possession of the document, newspaper, or publication in relation to which the offence, was committed and also (where the act constituting the offence was the setting up in type or the printing of a document) to forfeit, if the Court so directs, so much of the printing machinery in his possession as is specified in that behalf by the Court.

(4) Every person who unlawfully has in his possession a document which was printed or published in contravention of this section or a newspaper or other periodical publication containing a letter, article, or other communication published therein in contravention of this section shall, when so requested by a member of the *Gárda, Síochána*, deliver up to such member every copy in his possession of such document or of such newspaper or publication (as the case may be), and if he fails or refuses so to do he shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months and also, if the Court so directs, to forfeit every copy in his possession of the document, newspaper or publication in relation to which the offence was committed.

(5) Nothing in this section shall render unlawful the setting tip in type, printing, publishing, sending through the post, distributing, selling, offering for sale, or having possession of a document or a copy of a document which is published at the request or by permission of the Government or is published in the course or as part of a fair report of the proceedings in either House of the Oireachtas or in a court of justice or before any other court or tribunal lawfully exercising jurisdiction.

11 Foreign newspapers, etc, containing seditious or unlawful matter.

11.— (1) Whenever the Minister for Justice is of opinion, in respect of a newspaper or other periodical publication ordinarily printed outside the State, that a particular issue of such publication either is seditious contains any matter the publication of which is a contravention of this Act, the said Minister may by order, if he considers that it is in the public interest so to do, do either or both of the, following things, that is to say:—

(a) authorise members of the *Gárda Síochána* to seize and destroy all copies of the said issue of such publication wherever they may be found;

(b) prohibit the importation of any copy of any issue of such publication published within a specified period (not exceeding three months) after the publication of the said issue of such publication.

(2) The Minister for Justice may by order, whenever he thinks proper so to do, revoke or amend any order made by him under the foregoing sub-section of this section or any order (made 'by him under this sub-section) amending any such order.

(3) It shall not be lawful for any person to import any copy of an issue of a periodical publication the importation of which is prohibited by an order under this section, and all such copies shall be deemed to be included amongst the goods enumerated and described in the Table of Prohibitions and Restrictions Inwards annexed to section 42 of the Customs Consolidation Act, 1876, and the provisions of that Act (as amended or extended by subsequent Acts) relating to the importation of prohibited or restricted goods shall apply accordingly.

12 Possession of treasonable, seditious, or incriminating documents.

12.— (1) It shall not be lawful for any person to have any treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control.

(2) Every person who has a treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the Court, to imprisonment for a term not exceeding three mouths or to both such fine and such imprisonment.

(3) Where a person is charged with an offence under this section, it shall be a good defence to such charge for Such person to prove—

- (a) that he is an officer of the State and had possession or custody of the document in respect of which the offence is alleged to have been committed in the course of his duties as such officer, or
- (b) that he did not know that the said document was in his possession or on any lands or premises owned or occupied by him or under his control, or
- (c) that he did not know the nature or contents of the said document.

(4) Every person who has in his possession a treasonable document, seditious document, or incriminating document shall, when so requested by a member of the *Gárda Síochána*, deliver up to such member the said document and every copy thereof in his possession, and if he fails or refuses so to do he shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

(5) Where the proprietor or the editor or other chief officer of a newspaper or other periodical publication receives a document which appears to him to be a treasonable document, a seditious document, or an incriminating document and such document is not published in such newspaper or periodical publication, the following provisions shall have effect, that is to say:—

- (a) if such proprietor, editor, or chief officer is requested by a member of the *Gárda Síochána* to deliver up such document to such member, such proprietor, editor, or chief officer may, in lieu of so delivering up such document, destroy such document and every (if any) copy thereof in his possession in the presence and to the satisfaction of such member;
- (b) if such proprietor, editor, or chief officer destroys under the next preceding paragraph of this sub-section such document and every (if any) copy thereof in his possession or of his own motion destroys such document within twenty-four hours after receiving it and without having made any copy of it or permitted any such copy to be made, such destruction shall be a good defence to any charge against such proprietor, editor, or chief officer of an offence under any sub-section of this section in respect of such document and no civil or criminal action or other proceeding shall lie against such proprietor, editor, or chief officer on account of such destruction.

13 Provisions in respect of documents printed for reward.

13.— (1) Every person who shall print for reward any document shall do every of the following things, that is to say:—

- (a) at the time of or within twenty-four hours after printing such document, print or write on at least one copy of such document the name and address of the person for whom or on whose instructions such document was printed;

(b) retain, for six months from the date on which such document was printed, a copy of such document on which the said name and address is printed or written as aforesaid;

(c) on the request of a member of the *Gárda Síochána* at any time during the said period of six months, produce for the inspection of such member the said copy of such document so retained as aforesaid.

(2) Every person who shall print for reward any document and shall fail to comply in any respect with the foregoing sub-section of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof, in the case of a first such offence, to a fine not exceeding twenty-five pounds and, in the case of a second or any subsequent such offence, to a fine not exceeding fifty pounds.

(3) This section does not apply to any newspaper, magazine or other periodical publication which is printed by the proprietor thereof on his own premises.

14 Obligation to print printer's name and address on documents.

14.— (1) Every person who shall print for reward any document (other than a document to which this section does not apply) which he knows or has reason to believe is intended to be sold or distributed (whether to the public generally or to a restricted class or number of persons) or to be publicly or privately displayed shall, if such document consists only of one page or sheet printed on one side only, print his name and the address of his place of business on the front of such document and shall, in every other case, print the said name and address on the first or the last page of such document.

(2) Every person who shall contravene by act or omission the foregoing sub-section of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof, in the case of a first such offence, to a fine not exceeding twenty-five pounds and, in the case of a second or any subsequent such offence, to a fine not exceeding fifty pounds.

(3) This section does not apply to any of the following documents, that is to say:—

(a) currency notes, bank notes, bills of exchange, promissory notes, cheques, receipts and other financial or commercial documents,

(b) writs, orders, summonses, warrants, affidavits, and other documents for the purposes of or for use in any lawful court or tribunal,

(c) any document printed by order of the Government, either House of the *Oireachtas*, a Minister of State, or any officer of the State in the execution of his duties as such officer,

(d) any document which the Minister for Justice shall by order declare to be a document to which this section does not apply.

15 Unauthorised military exercises prohibited.

15.— (1) Save as authorised by a Minister of State under this section, and subject to the exceptions hereinafter mentioned, it shall not be lawful for any assembly of persons to practise or to train or drill themselves in or be trained or drilled in the use of arms or the performance of military exercises, evolutions, or manoeuvres nor for any persons to meet together or assemble for the purpose of so practising or training or drilling or being trained or drilled.

(2) A Minister of State may at his discretion by order, subject to such limitations, qualifications and conditions as he shall think fit to impose and shall express in the order, authorise the members of any organisation to meet together and do such one or more of the following things as shall be specified in such order, that is to say, to practise or train or drill themselves in or be trained or drilled in the use of arms or the performance of military exercises, evolutions, or manoeuvres.

(3) If any person is present at or takes part in or gives instruction to or trains or drills an assembly of persons who without or otherwise than in accordance with an authorisation, granted by a Minister of State under this section practise, or train or drill themselves in, or are trained or drilled in the use of arms or the performance of any military exercise, evolution, or manoeuvre or who without or otherwise than in accordance with such authorisation have assembled or met together for the purpose of so practising, or training or drilling or being trained or drilled, such person shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

(4) This section shall not apply to any assembly of members of any military or police force lawfully maintained by the Government.

(5) In any prosecution under this section the burden of proof that any act was authorised under this section shall lie on the person prosecuted.

16 Secret societies in army or police.

16.— (1) Every person who shall—

(a) form, organise, promote, or maintain any secret society amongst or consisting of or including members of any military or police force lawfully maintained by the Government, or

(b) attempt to form, organise, promote or maintain any such secret society, or

(c) take part, assist, or be concerned in any way in the formation, organisation, promotion, management, or maintenance of any such society, or

(d) induce, solicit, or assist any member of a military or police force lawfully maintained by the Government to join any secret society whatsoever,

shall be guilty of a misdemeanour and shall be liable on conviction thereof to suffer penal servitude for any term not exceeding five years or imprisonment for any term not exceeding two years.

(2) In this section the expression "secret society" means an association, society, or other body the members of which are required by the regulations thereof to take or enter into, or do in fact take or enter into, an oath, affirmation, declaration or agreement not to disclose the proceedings or some part of the proceedings of the association, society, or body.

17 Administering unlawful oaths.

17.— (1) Every person who shall administer or cause to be administered or take part in, be present at, or consent to the administering or taking in any form or manner of any oath, declaration, or engagement purporting or intended to bind the person taking the same to do all or any of the following things, that is to say:—

(a) to commit or to plan, contrive, promote, assist, or conceal the commission of any crime or any breach of the peace, or

(b) to join or become a member of or associated with any organisation having for its object or one of its objects the commission of any crime, or breach of the peace, or

(c) to abstain from disclosing or giving information of the existence or formation or proposed or intended formation of any such organisation, association, or other body as aforesaid or from informing or giving evidence against any member of or person concerned in the formation of any such organisation, association, or other body, or

(d) to abstain from disclosing or giving information of the Commission or intended or proposed commission of any crime, breach of the peace, or from informing or giving evidence against the person who committed such an act,

shall be guilty of a misdemeanour and shall be liable on conviction thereof to suffer imprisonment for any term not exceeding two years.

(2) Every person who shall take any such oath, declaration, or engagement as is mentioned in the foregoing sub-section shall be guilty of a misdemeanour and be liable on conviction thereof to suffer imprisonment for any term not exceeding two years unless he shall show—

(a) that he was compelled by force or duress to take such oath, declaration, or engagement (as the case may be), and

(b) that within four days after the taking, of such oath, declaration, or engagement, if not prevented by actual force or incapacitated by illness or other sufficient cause, or where so prevented or incapacitated then within four days after the cesser of the hindrance caused by such force, illness or other cause, he declared to an officer of the *Gárda Síochána* the fact of his having taken such oath, declaration, or engagement, and all the circumstances connected therewith and the names and descriptions of all persons concerned in the administering

thereof so far as such circumstances, names, and descriptions were known to him.

PART III UNLAWFUL ORGANISATION

18 Unlawful organisations.

18.— In order to regulate and control in the public interest the exercise of the constitutional right of citizens to form associations, it is hereby declared that any organisation which—

- (a) engages in, promotes, encourages, or advocates the commission of treason or any activity of a treasonable nature, or
- (b) advocates, encourages, or attempts the procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, or
- (c) raises or maintains or attempts to raise or maintain a military or armed force in contravention of the Constitution or without constitutional authority, or
- (d) engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law, or
- (e) engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means, or
- (f) promotes, encourages, or advocates the non-payment of moneys payable to the Central Fund or any other public fund or the non-payment of local taxation,

shall be an unlawful organisation within the meaning and for the purposes of this Act, and this Act shall apply and have effect in relation to such organisation accordingly.

19 Suppression orders.

19.— (1) If and whenever the Government are of opinion that any particular organisation is an unlawful organisation, it shall be lawful for the Government by order (in this Act referred to as a suppression order) to declare that such organisation is an unlawful organisation and ought, in the public interest, to be suppressed.

(2) The Government may by order, whenever they so think proper, amend or revoke a suppression order.

(3) Every suppression order shall be published in the *Iris Oifigiúil* as soon as conveniently may be after the making thereof

(4) A suppression order shall be conclusive evidence for an purposes other than an application for a declaration of legality that the organisation to which it relates is an unlawful organisation within the meaning of this Act.

20 Declaration of legality.

20.— (1) Any person (in this section referred to as the applicant) who claims to be a member of an organisation in respect of which a suppression order has been made may, at any time within thirty days after the publication of such order in the *Iris Oifigiúil*, apply to the High Court in a summary manner on notice to the Attorney-General for a declaration (in this Act referred to as a declaration of legality) that such organisation is not an unlawful organisation.

(2) Where, on an application under the foregoing sub-section of this section, the High Court, after hearing such evidence as may be adduced by the applicant or by the Attorney-General, is satisfied that the organisation to which such application relates is not an unlawful organisation, it shall be lawful for the High Court to make a declaration of legality in respect of such organisation.

(3) The High Court shall not make a declaration of legality unless the applicant for such declaration either—

(a) gives evidence in support of the application and submits himself to cross-examination by counsel for the Attorney-General, or

(b) satisfies the High Court that he is unable by reason of illness or other sufficient cause to give such evidence and adduces in support of the application the evidence of at least one person who submits himself to cross-examination by counsel for the Attorney-General.

(4) Whenever, on an application under this section, the High Court, or the Supreme Court on appeal from the High Court, makes a declaration of legality in respect of an organisation, the suppression order relating to such organisation shall forthwith become null and void, but without prejudice to the validity of anything previously done thereunder.

(5) Where the High Court makes a declaration of legality, it shall be lawful for that court, on the application of the Attorney-General, to suspend the operation of the next preceding sub-section of this section in respect of such declaration until the final determination of an appeal by the Attorney-General to the Supreme Court against such declaration, and if the High Court so suspends the said sub-section, the said sub-section shall only come into operation in respect of such declaration if and when the Supreme Court affirms the order of the High Court making such declaration.

(6) Whenever an application for a declaration of legality is made under this section and is refused by the High Court, or by the Supreme Court on appeal from the High Court, it shall not be lawful, in any prosecution of the applicant for the offence of being a member of the organisation to which such application relates, to give in evidence against the applicant any of the following matters, that is to say:—

- (a) the fact that he made the said application, or
- (b) any admission made by him or on his behalf for the purposes of or during the hearing of the said application, or
- (c) any statement made in the oral evidence given by him or on his behalf (whether on examination in chief, cross examination, or re-examination) at the hearing of the said application, or
- (d) any affidavit made by him or on his behalf for the purposes of the said application:

21 Prohibition of membership of an unlawful organisation.

21.— (1) It shall not be lawful for any person to be a member of an unlawful organisation.

(2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an offence under this section and shall—

- (a) on summary conviction thereof, be liable to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment, or
- (b) on conviction thereof on indictment, be liable to imprisonment for a term not exceeding two years.

(3) It shall be a good defence for a person charged with the offence under this section of being a member of an unlawful organisation, to show—

- (a) that he did not know that such organisation was an unlawful organisation, or
- (b) that, as soon as reasonably possible after he became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he ceased to be a member thereof and dissociated himself therefrom.

(4) Where an application has been made to the High Court for a declaration of legality in respect of an organisation no person who is, before the final determination of such application, charged with an offence under this section in relation to that organisation shall be brought to trial on such charge before such final determination, but a postponement of the said trial in pursuance of this sub-section shall not prevent the detention of such person in custody during the period of such postponement.

22 Provisions consequent upon the making of a suppression order.

22.— Immediately upon the making of a suppression order, the following provisions shall have effect in respect of the organisation to which such order relates, that is to say:—

- (a) all the property (whether real, chattel real, or personal and whether in possession or in action) of such organisation shall become and be forfeited to and vested in the Minister for Justice;
- (b) the said Minister shall take possession of all lands and premises which become forfeited to him under his section and the said Minister may cause all such things to be done by members of the *Gárda Síochána* as appear to him to be necessary or expedient for the purpose of such taking possession;
- (c) subject to the subsequent provisions of this section, it shall be lawful for the said Minister to sell or let, on such terms as he shall, with the sanction of the Minister for Finance, think proper, any lands or premises which become forfeited to him under this section or to use any such lands or premises for such government purposes as he shall, with the sanction aforesaid, think proper;
- (d) the Minister for Justice shall take possession of, recover, and get in all personal property which becomes forfeited to him under this section and may take such legal proceedings and other steps as shall appear to him to be necessary or expedient for that purpose;
- (e) subject to the subsequent provisions of this section, it shall be lawful for the said Minister to sell or otherwise realise, in such manner and upon such terms as he shall, with the sanction of the Minister for Finance, think proper, all personal property which becomes forfeited to him under this section;
- (f) the Minister for Justice shall pay into or dispose of for the benefit of the Exchequer, in accordance with the directions of the Minister for Finance, all money which becomes forfeited to him under this section and the net proceeds of every sale, letting, realisation, or other disposal of any other property which becomes so forfeited;
- (g) no property which becomes forfeited to the Minister for Justice under this section shall be sold, let, realised, or otherwise disposed of by him until the happening of whichever of the following events is applicable, that is to say:—
 - (i) if no application is made under this Act for a declaration of legality in respect of the said organisation within the time limited by this Act for the making of such application, the expiration of the time so limited,
 - (ii) if any such application is so made, the final determination of such application.

23 Provisions consequent upon the making of a declaration of legality.

23.— (1) Whenever a declaration of legality is made, the following provisions shall have effect, that is to say:—

(a) every person who is detained in custody charged with the offence of being a member of the organisation to which such declaration of legality relates shall forthwith be released from such custody;

(b) all the property of the said organisation which became forfeited to the Minister for Justice by virtue of this Act on the making of the suppression order in respect of the said organisation shall become and be the property of the said organisation and shall be delivered to the said organisation by the said Minister on demand.

(2) Where the High Court makes a declaration of legality, it shall be lawful for that court, on the application of the Attorney-General, to suspend the operation of the foregoing sub-section of this section in respect of such declaration until the final determination of an appeal by the Attorney-General to the Supreme Court against such declaration, and if the High Court so suspends the said sub-section, the said sub-section shall only come into operation in respect of such declaration if and when the Supreme Court affirms the order of the High Court making such declaration.

24 Proof of membership of an lawful organisation by possession of incriminating document.

24.— On the trial of a person charged with the offence of being a member of an unlawful organisation, Proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such person was a member of the said organisation at the time alleged in the said charge.

25 Closing of buildings.

25.— (1) Whenever an officer of the *Gárda Síochána* not below the rank of chief superintendent is satisfied that a building is being used or has been used in any way for the purposes, direct or indirect, of an unlawful organisation, such officer may make an order (in this section referred to as a closing order) that such building be closed for the period of three months from the date of such order.

(2) Whenever a closing order has been made an officer of the *Gárda Síochána* not below the rank of chief superintendent may—

(a) extend the operation of such closing order for a farther period not exceeding three months from the expiration of the period mentioned in such closing order;

(b) terminate the operation of such closing order.

(3) Whenever a closing order has been made or has been extended, any person having an estate or interest in the building to which such closing order relates may apply to the High Court, in a summary manner on notice to the Attorney-General, for such order as is hereinafter mentioned, and on such application the High Court, if it is satisfied that, having regard to all the circumstances of the case, the making or the extension (as the case may be) of such closing order was not reasonable, may make an order quashing such closing order or the said extension thereof, as the case may be.

(4) Whenever and so long as a closing order is in operation, the following provisions shall have effect, that is to say:—

(a) it shall not be lawful for any person to use or occupy the building to which such closing order relates or any part of such building;

(b) any member of the *Gárda Síochána* not below the rank of inspector may take all such steps as he shall consider necessary or expedient to prevent such building or any part thereof being used or occupied in contravention of this sub-section;

(c) every person who uses or occupies such building or any part of such building in contravention of this sub-section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

(5) In this section the word "building" includes a part of a building and also all outhouses, yards, and gardens within the curtilage of the building.

PART IV MISCELLANEOUS

26 Evidence of publication of treasonable, seditious or incriminating document.

26.— (1) Where in any criminal proceedings the question whether a particular treasonable document, seditious document, or incriminating document was or was not published by the accused (whether by himself or in concert with other persons or by arrangement between himself and other persons) is in issue and an officer of the *Gárda Síochána* not below the rank of chief superintendent states on oath that he believes that such document was published (as the case may be) by the accused or by the accused in concert with other persons or by arrangement between the accused and other persons, such statement shall be evidence (until the accused denies on oath that he published such document either himself or in concert or by arrangement as aforesaid) that the accused published such document as alleged in the said statement on oath of such officer.

27 Prohibition of certain public meetings.

27.— (1) It shall not be lawful to hold a public meeting which is held or purports to be held by or on behalf of or by arrangement or in concert with an unlawful organisation or which is held or purports to be held for the purpose of supporting, aiding, abetting, or encouraging an unlawful organisation or of advocating the support of an unlawful organisation.

(2) Whenever an officer of the *Gárda Síochána* not below the rank of chief superintendent is of opinion that the holding of a particular public meeting about to be

or proposed to be held would be a contravention of the next preceding sub-section of this section, it shall be lawful for such officer by notice given to a person concerned in the holding or organisation of such meeting or published in a manner reasonably calculated to come to the knowledge of the persons so concerned, to prohibit the holding of such meeting, and thereupon the holding of such meeting shall become and be unlawful.

(3) Whenever an officer of the *Gárda Síochána* gives any such notice as is mentioned in the next preceding sub-section of this section, any person claiming to be aggrieved by such notice may apply to the High Court in a summary manner on notice to the Attorney General for such order as is hereinafter mentioned and, upon the hearing of such application, the High Court if it so thinks proper, may make an order annulling such notice.

(4) Every person who organises or holds or attempts to organise or hold a public meeting the holding of which is a contravention of this section or who takes part or is concerned in the organising or the holding of any such meeting shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

(5) In this section the expression "public meeting" includes a procession and also includes (in addition to a meeting held in a public place or on unenclosed land) a meeting held in a building or on enclosed land to which the public are admitted, whether with or without payment.

28 Prohibition of meetings in the vicinity of the Oireachtas.

28.— (1) It shall not be lawful for any public meeting to be held in, or any procession to pass along or through, any public street or unenclosed place which or any part of which is situate within one-half of a mile from any building in which both Houses or either House of the Oireachtas are or is sitting or about to sit if either—

(a) an officer of the *Gárda Síochána* not below the rank of chief superintendent has, by notice given to a person concerned in the holding or organisation of such meeting or procession or published in a manner reasonably calculated to come to the knowledge of the persons so concerned, prohibited the holding of such meeting in or the passing of such procession along or through any such public street or unenclosed place as aforesaid, or

(b) a member of the *Gárda Síochána* calls on the persons taking part in such meeting or procession to disperse.

(2) Every person who—

(a) shall organise, hold, or take part in or attempt to organise, hold or take part in a public meeting or a procession in any such public street or unenclosed place as is mentioned in the foregoing sub-section of this section after such

meeting or procession has been prohibited by a notice under paragraph (a) of the said sub-section,

(b) shall hold or take part in or attempt to hold or take part in a public meeting or a procession in any such Public street or unenclosed place as aforesaid after a member of the *Gárda Síochána* has, under paragraph (b) of the said sub-section, called upon the persons taking part in such meeting or procession to disperse, or

(c) shall remain in or enter into any such public street or unenclosed space after being called upon to disperse as aforesaid,

shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

29 Search warrants in relation to the commission of offences under this Act or to treason.

29.— (1) Where an officer of the *Gárda Síochána*, not below the rank of chief superintendent is satisfied that there is reasonable ground for believing that documentary evidence of or relating to the commission or intended commission of an offence under any section or sub-section of this Act or any document relating directly or indirectly to the commission or intended commission of treason is to be found in any particular building or other place, the said officer may issue to a member of the *Gárda Síochána* not below the rank of inspector a search warrant in accordance with this section.

(2) A search warrant issued under this section shall be expressed and shall operate to authorise a member of the *Gárda Síochána* (not below the rank of inspector) named in such warrant together with such other persons (if any) as are named therein and any member of the *Gárda Síochána* to enter, within one week from the date of such warrant, and if necessary by the use of force, any building or other place named in such warrant and to search the said building or other place, and any person found therein, and to seize any document or thing found in such building or other place or on such person which such member reasonably believes to be evidence of or to relate directly or indirectly to the commission or intended commission of an offence under any section or sub-section of this Act or to the commission or intended commission of treason.

(3) A member of the *Gárda Síochána* acting under the authority of a search warrant issued under this section may—

(a) demand the name and address of any person found in the building or other place named in such warrant, and

(b) arrest without warrant any such person who refuses to give his name and address, or gives a false name or a false address.

(4) Any document seized under this section may be removed and retained for so long as the Minister for Justice thinks proper, and any other thing so seized may be removed

and retained for a period of one month from the date of its seizure, or; if proceedings are commenced within such period for an offence under any section or sub-section of this Act or for treason, until the conclusion of such proceedings, and thereafter the provisions of the Police (Property) Act, 1897, shall, subject to the provisions of this Act in relation to the forfeiture of certain property, apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the *Gárda Síochána* in the circumstances mentioned in that Act.

(5) Every person who obstructs or attempts to obstruct any member of the *Gárda Síochána* or any other person acting under the authority of a search warrant issued under this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

30 Arrest and detention of suspected persons.

30.— (1) A member of the *Gárda Síochána* (if he is not in uniform on production of 'his identification card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.

(2) Any member of the *Gárda Síochána* (if he is not in uniform on production of his identification card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding sub-section of this section, stop and search (if necessary by force) any vehicle or any ship, boat, or other vessel which he suspects to contain a person whom he is empowered by the said sub-section to arrest without warrant.

(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a *Gárda Síochána* station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the *Gárda Síochána* not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.

(4) A person detained under the next preceding sub-section of this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the *Gárda Síochána*, and shall, if not so charged or released, be released at the expiration of the detention authorised by the said sub-section.

(5) A member of the *Gárda Síochána* may do all or any of the following things in respect of a person detained under this section, that is to say:—

- (a) demand of such person his name and address;
- (b) search such person or cause him to be searched;
- (c) photograph such person or cause him to be photographed;
- (d) take, or cause to be taken, the fingerprints of such person.

(6) Every person who shall obstruct or impede the exercise in respect of him by a member of the *Gárda Síochána* of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address or shall give, in response to any such demand, a name or an address which is false or misleading shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.

31 Offences by bodies corporate.

31.— Where an offence under any section or sub-section of this Act is committed by a body corporate and is proved to have been so committed with the consent or approval of or to have been facilitated by any neglect on the part of, any director, manager, secretary, or other officer of such body corporate, such director, manager, secretary, or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly, whether such body corporate has or has not been proceeded, against in respect of the said offence.

32 Re-capture of escaped prisoners.

32.— (1) Whenever any person detained under this Act shall have escaped from such detention, such person may be arrested without warrant by any member of the *Gárda Síochána* and shall thereupon be returned in custody to the place from which he so escaped.

(2) Every person who shall aid or abet a person detained under this Act to escape from such detention or to avoid recapture after having so escaped shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

33 Remission etc, in respect of convictions by a Special Criminal Court.

33.— (1) Except in capital cases, the Government may, at their absolute discretion, at any time remit in whole or in part or modify (by way of mitigation only) or defer any punishment imposed by a Special Criminal Court.

(2) Whenever the Government remits in whole or in part or defers a punishment imposed by a Special Criminal Court, the Government may attach to such remittal or deferment such conditions (if any) as they may think proper.

(3) Whenever the Government defers under the next preceding sub-section of this section the whole or any part of a sentence of imprisonment, the person on whom such sentence was imposed shall be bound to serve such deferred sentence, or part of a

sentence, of imprisonment when the same comes into operation and may for that purpose be arrested without warrant.

34 Forfeiture and disqualifications on certain convictions by a Special Criminal Court.

34.— (1) Whenever a person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, holds at the time of such conviction an office or employment remunerated out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation, or in or under or as a paid member of a board or body established by or under statutory authority, such person shall immediately on such conviction forfeit such office, employment, place, or emolument and the same shall forthwith become and be vacant.

(2) Whenever a person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, is at the time of such conviction in receipt of a pension or superannuation allowance payable out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation, or the funds of a board or body established by or under statutory authority, such person shall immediately upon such conviction forfeit such pension or superannuation allowance and such pension or superannuation allowance shall forthwith cease to be payable.

(3) Every person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, shall be disqualified—

(a) for holding, within seven years after the date of such conviction, any office or employment remunerated out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation or in or under or as a paid member of a board or body established by or under statutory authority, and

(b) for being granted out of the Central Fund or any such moneys or the funds of any such board or body, at any time after the date of such conviction, any pension, superannuation allowance, or gratuity in respect wholly or partly of any service rendered or thing done by him before the date of such conviction, and

(c) for receiving at any time after such conviction any such pension, superannuation allowance, or gratuity as is mentioned in the next preceding paragraph of this section which was granted but not paid on or before the date of such conviction.

(4) Whenever a conviction which occasions by virtue of this section any forfeiture or disqualification is quashed or annulled or the convicted person is granted a free pardon such forfeiture or disqualification shall be annulled, in the case of a quashing or annulment, as from the date of the conviction and, in the case of a free pardon, as from the date of such pardon.

(5) The Government may, at their absolute discretion, remit, in whole or in part, any forfeiture or disqualification incurred under this section and restore or revive, in whole or in part, the subject of such forfeiture as from the date of such remission.

PART V SPECIAL CRIMINAL COURTS

35 Commencement and cesser of this Part of this Act.

35.— (1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.

(2) If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.

(3) Whenever the Government makes and publishes, under the next preceding sub-section of this section, such proclamation as is mentioned in that sub-section, this Part of this Act shall come into force forthwith.

(4) If at any time while this Part of this Act is in force the Government is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order, the Government shall make and publish a proclamation declaring that this Part of this Act shall cease to be in force, and thereupon this Part of this Act shall forthwith cease to be in force.

(5) It shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force, to pass a resolution annulling the proclamation by virtue of which this Part of this Act is then in force, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(6) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the *Iris Oifigiúil* and may also be published in any other manner which the Government shall think proper.

36 Schedule offences.

36.— (1) Whenever while this Part of this Act is in force the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of this Part of this Act.

(2) Whenever the Government has made under the foregoing sub-section of this section any such declaration as is authorised by that sub-section, every offence of the particular class or kind or under the particular enactment to which such declaration relates shall, until otherwise provided by an order under the next following sub-section of this section, be a scheduled offence for the purposes of this Part of this Act.

(3) Whenever the Government is satisfied that the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment which are for the time being scheduled offences for the purposes of this Part of this Act can be secured through the medium of the ordinary courts, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall, upon the making of such order, cease to be scheduled offences for the purposes of this Part of this Act.

37 Attempting, etc, to commit a scheduled offence.

37.— In addition to the offences which are, by virtue of an order made under the next preceding section, for the time being scheduled offences for the purposes of this Part of this Act, each of the following acts, that is to say, attempting or conspiring or inciting to commit, or aiding or abetting the commission of, any such scheduled offence shall itself be a scheduled offence for the said purposes.

38 Establishment of Special Criminal Courts.

38.— (1) As soon as may be after the coming into force of this Part of this Act, there shall be established for the purposes of this Part of this Act, a court which shall be styled and known and is in this Act referred to as a Special Criminal Court.

(2) The Government may, whenever they consider it necessary or desirable so to do, establish such additional number of courts for the purposes of this Part of this Act as they think fit, and each court so established shall also be styled and known and is in this Act referred to as a Special Criminal Court.

(3) Whenever two or more Special Criminal Courts are in existence under this Act, the Government may, if and so often as they so think fit, reduce the number of such Courts and for that purpose abolish such of those existing Courts as appear to the Government to be redundant.

39 Constitution of Special Criminal Courts.

39.— (1) Every Special Criminal Court established under this Part of this Act shall consist of such uneven number (not being less than three) of members as the Government shall, from time to time determine, and different numbers of members may be so fixed in respect of different Special Criminal Courts.

(2) Each member of a Special Criminal Court shall be appointed, and be removable at will, by the Government.

(3) No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a

barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.

(4) The Minister for Finance may pay to every member of a Special Criminal Court such (if any) remuneration and allowances as the said Minister may think proper, and different rates of remuneration and allowances may be so paid to different members of any such Court, or to the members of different such Courts.

(5) The Government may appoint such registrars for the purposes of any Special Criminal Court as they think proper, and every such registrar shall hold his office on such terms and conditions and shall receive such (if any) remuneration as the Minister for Finance shall from time to time direct.

40 Verdicts of Special Criminal Courts.

40.— (1) The determination of every question before a Special Criminal Court shall be according to the opinion of the majority of the members of such Special Criminal Court present at and taking part in such determination, but no member or officer of such Court shall disclose whether any such determination was or was not unanimous or, where such determination was not unanimous, the opinion of any individual member of such Court.

(2) Every decision of a Special Criminal Court shall be pronounced by such one member of the Court as the Court shall determine, and no other member of the Court shall pronounce or indicate his concurrence in or dissent from such decision.

41 Procedure of Special Criminal Courts.

41.— (1) Every Special Criminal Court shall have power, in its absolute discretion, to appoint the times and places of its sittings, and shall have control of its own procedure in all respects and, shall for that purpose make, with the concurrence of the Minister for Justice, rules regulating its practice and procedure and may in particular provide by such rules for the issuing of summonses, the procedure for bringing (in custody or on bail) persons before it for trial, the admission or exclusion of the public to or from its sittings, the enforcing of the attendance of witnesses, and the production of documents.

(2) A Special Criminal Court sitting for the purpose of the trial of a person, the making of any order, or the exercise of any other jurisdiction or function shall consist of an uneven number (not less than three) of members of such Court present at and taking part in such sitting.

(3) Subject and without prejudice to the provisions of the next preceding sub-section of this section, a Special Criminal Court may exercise any power, jurisdiction, or function notwithstanding one or more vacancies in the membership of such court.

(4) Subject to the provisions of this Act, the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court.

42 Authentication of orders of Special Criminal Courts.

42.— (1) Every order or other act of a Special Criminal Court shall be authenticated by the signature of a registrar of that Court.

(2) Every document which purports to be an order or other act of a Special Criminal Court and to be authenticated by the signature of a registrar of that Court shall be received in evidence in all Courts and be deemed to be an order or other act (as the case may require) of such Special Criminal Court without proof of the signature by which such order or act purports to be authenticated or that the person whose signature such signature purports to be was a registrar of the said Special Criminal Court.

43 Jurisdiction of Special Criminal Courts.

43.— (1) A Special Criminal Court shall have jurisdiction to try and to convict or acquit any person lawfully brought before that Court for trial under this Act, and shall also have the following ancillary jurisdictions, that is to say:—

- (a) jurisdiction to sentence every person convicted by that Court of any offence to suffer the punishment provided by law in, respect of such offence;
- (b) jurisdiction, in lieu of or in addition to making any other order in respect of a person, to require such person to enter into a recognisance before such Special Criminal Court or before a justice of the District Court, in such amount and with or without sureties as such Special Criminal Court shall direct, to keep the peace and be of good behaviour for such period as that Court shall specify;
- (c) jurisdiction to order the detention of and to detain in civil or military custody, or to admit to bail in such amount and with or without sureties as that Court shall direct, pending trial by that Court and during and after such trial until conviction or acquittal, any person sent, sent forward, transferred, or otherwise brought for trial by that Court;
- (d) power to administer oaths to witnesses;
- (e) jurisdiction and power to punish, in the same manner and in the like cases as the High Court, all persons whom such Special Criminal Court finds guilty of contempt of that Court or any member thereof, whether such contempt is or is not committed in the presence of that Court;
- (f) power, in relation to recognisances and bail bonds entered into before such Special Criminal Court, to estreat such recognisances and bail bonds in the like manner and in the like cases as the District Court estreats recognisances and bail bonds entered into before it.

(2) The provisions of this Part of this Act in relation to the carrying out of sentences of imprisonment pronounced by Special Criminal Courts and the regulations made under those provisions shall apply and have effect in relation to the carrying out of orders

made by Special Criminal Courts under the foregoing sub-section of this section for the detention of persons in custody, whether civil or military.

44 Appeal to Court of Criminal Appeal.

44.— (1) A person convicted by a Special Criminal Court of any offence or sentenced by a Special Criminal Court to suffer any punishment may appeal to the Court of Criminal Appeal from such conviction or sentence if, but only if, either he obtains from that Special Criminal Court a certificate that the case is a fit case for appeal or, where such Special Criminal Court refuses to grant such certificate, the Court of Criminal Appeal on appeal from such refusal grants to such person leave to appeal under this section.

(2) Sections 28 to 30 and sections 32 to 35 of the Courts of Justice Act, 1924 (No. 10 of 1924), and sections 5, 6, and 7 of the Courts of Justice Act, 1928 (No. 15 of 1928), shall apply and have effect in relation to appeals under this section in like manner as they apply and have effect in relation to appeals under section 31 of the Courts of Justice Act, 1924.

45 Proceedings in the District Court in relation to scheduled offences.

45.— (1) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests; send such person (in custody or on bail) for trial by a Special Criminal Court on such charge.

(2) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which is an indictable offence and such justice receives informations in relation to such charge and sends such person forward for trial on such charge, such justice shall (unless the Attorney-General otherwise directs) send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

46 Proceedings in the District Court in relation to non-scheduled offences.

46.— (1) Whenever a person is brought before a justice of the District Court charged with an offence which is not a scheduled offence and which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests and certifies in writing that the ordinary courts are in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, send such person (in custody or on bail) for trial by a Special Criminal Court on such charge.

(2) Whenever a person is brought before a justice of the District Court charged with an indictable offence which is not a scheduled offence and such justice receives informations in relation to such charge and sends such person forward for trial on such

charge, such justice shall, if an application in this behalf is made to him by or on behalf of the Attorney-General grounded on the certificate of the Attorney-General that the ordinary Courts are, in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

47 Charge before Special Criminal Court in lieu of District Court.

47.— (1) Whenever it is intended to charge a person with a scheduled offence, the Attorney-General may, if he so thinks proper, direct that such person shall, in lieu of being, charged with such offence before a justice of the District Court, be brought before a Special Criminal Court and there charged with such offence and, upon such direction being so given, such person shall be brought before a Special Criminal Court and shall be charged before that Court with such offence and shall be tried by such Court on such charge.

(2) Whenever it is intended to charge a person with an offence which is not a scheduled offence and the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, the foregoing sub-section of this section shall apply and have effect as if the offence with which such person is so intended to be charged were a scheduled offence.

(3) Whenever a person is required by this section to be brought before a Special Criminal Court and charged before that Court with such offence, it shall be lawful for such Special Criminal Court to issue a warrant for the arrest of such person and the bringing of him before such Court and, upon the issue of such warrant, it shall be lawful for such person to be arrested thereunder and brought in custody before such Court.

48 Transfer of trials from ordinary Courts to a Special Criminal Court.

48.— Whenever a person charged with an offence has been sent forward by a justice of the District Court for trial by the Central Criminal Court or the Circuit Court on such charge, then and in every such case the following provisions shall have effect, that is to say:—

(a) if the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, the Attorney-General shall cause an application, grounded on his said certificate, to be made on his behalf to the High Court for the transfer of the trial of such person on such charge to a Special Criminal Court, and on the hearing of such application the High Court shall make the order applied for, and

thereupon such person shall be deemed to have been sent forward to a Special Criminal Court for trial on such charge;

(b) whenever the High Court has made, under the next preceding paragraph of this sub-section, such order as is mentioned in that Paragraph, the following provisions shall have effect, that is to say:—

(i) a copy of such order shall be served on such person by a member of the *Gárda Síochána*,

(ii) a copy of such order shall be sent to the appropriate county registrar,

(iii) such person shall be brought before a Special Criminal Court for trial at such time and place as that Court shall direct,

(iv) if such person is in custody when such order is made, he may be detained in custody until brought before such Special Criminal Court for trial,

(v) if such person is at liberty on bail when such order is made, such bail shall be deemed to be for his attendance before a Special Criminal Court for trial at such time and place as that Court shall direct and, if he fails so to attend before the said Court, he shall be deemed to have broken his bail and his bail bond shall be estreated accordingly.

49 Selection of the Special Criminal Court by which a person is to be tried.

49.— Where a person is (in the case of an offence triable summarily) sent or (in the case of an indictable offence) sent forward by a justice of the District Court to a Special Criminal Court for trial or the trial of a person is transferred under this Act to a Special Criminal Court or a person is to be charged before and tried by a Special Criminal Court, such of the following, provisions as are applicable shall have effect, that is to say:—

(a) where a person is so sent or sent forward, the justice shall not specify the particular Special Criminal Court to which he sends or sends forward such person for trial;

(b) where the trial of a person is so transferred, the order effecting such transfer shall not specify the particular Special Criminal Court to which such trial is transferred;

(c) if only one Special Criminal Court is in existence under this Act at the time of such sending or sending forward or such transfer (as the case may be), such sending, sending forward, or transfer shall be deemed to be to such one Special Criminal Court;

(d) if only one Special Criminal Court is in existence under this Act when such person is to be so charged and tried, such person shall be charged before and tried by that Special Criminal Court;

(e) if two or more Special Criminal Courts are in existence under this Act at the time of such sending or sending forward or such transfer or such charging (as the case may be), it shall be lawful for the Attorney General to cause an application to be made on his behalf to such Special Criminal Court as he shall think proper for an order that such person be tried by or charged before and tried by that Court and thereupon the said Court shall make the order so applied for;

(f) upon the making of the order mentioned in the next preceding paragraph of this section, whichever of the following provisions is applicable shall have effect, that is to say:—

(i) such person shall be deemed to have been sent or sent forward for trial by the Special Criminal Court which made the said order and all persons concerned shall act accordingly, or

(ii) the trial of such person shall be deemed to have been transferred to the said Special Criminal Court and all persons concerned shall act accordingly, or

(iii) such person shall be charged before and tried by the said Special Criminal Court and all persons concerned shall act accordingly.

50 Orders and sentences of Special Criminal Courts.

50.— (1) Save as shall be otherwise provided by regulations made under this section, every order made or sentence pronounced by a Special Criminal Court shall be carried out by the authorities and officers by whom, and in the like manner as, a like order made or sentence pronounced by the Central Criminal Court is required by law to be carried out.

(2) Every order, conviction, and sentence made or pronounced by a Special Criminal Court shall have the like consequences in law as a like order, conviction, or sentence made or pronounced by the Central Criminal Court would have and, in particular, every order made and every sentence pronounced by a Special Criminal Court shall confer on the persons carrying out the same the like protections and immunities as are conferred by law on such persons when carrying out a like order made or a like sentence pronounced by the Central Criminal Court.

(3) The Minister for Justice may make regulations in relation to the carrying out of sentences of penal servitude or of imprisonment pronounced by Special Criminal Courts and the prisons and other places in which persons so sentenced shall be imprisoned and the maintenance and management of such places, and the said Minister may also, if he so thinks proper, make by writing under his hand such special provision as he shall think fit in relation to the carrying out of any such sentence in respect of any

particular individual, including transferring to military custody any particular individual so sentenced.

(4) The Minister for Defence may make regulations in relation to the places and the manner generally in which persons transferred to military custody under the next preceding sub-section of this section shall be kept in such custody, and the said Minister may also, if he so thinks proper, make by writing under his hand such special provision as he shall think fit in respect of the custody of any particular such person.

51 Standing mute of malice and refusal to plead etc.

51.— Whenever a person brought before a Special Criminal Court for trial stands mute when called upon to plead to the charge made against him, that Court shall hear such evidence (if any) relevant to the issue as to whether such person stands mute of malice or by the visitation of God as may then and there be adduced before it, and

(a) if that Court is satisfied on such evidence that such person is mute by the visitation of God, all such consequences shall ensue as would have ensued if such person had been found to be so mute by a Judge sitting in the Central Criminal Court, and

(b) if that Court is not so satisfied or if no such evidence is adduced, that Court shall direct a plea of "not guilty" to be entered for that person.

(2) Whenever a person brought, before a Special Criminal Court for trial fails or refuses in any way, other than standing mute, to plead to the charge made against him when called upon to do so, that Court shall (without prejudice to its powers under the next following sub-section of this section) direct a plea of "not guilty" to be entered for such person.

(3) Whenever a person at any stage of his trial before a Special Criminal Court by any act or omission refuses to recognise the authority or jurisdiction of that Court, or does any act (other than lawfully objecting in due form of law to the jurisdiction of that Court to try him) which, in the opinion of that Court, is equivalent to a refusal to recognise that Court, or the authority or jurisdiction thereof, such person shall be guilty of contempt of that Court and may be punished by that Court accordingly

52 Examination of detained persons.

52.— (1) Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the *Gárda Síochána* may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.

(2) If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the *Gárda Síochána*, fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or

misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.

53 Immunities of members, etc, of Special Criminal Courts.

53.— (1) No action, prosecution, or other proceeding, civil or criminal, shall lie against any member of a Special Criminal Court in respect of any order made, conviction or sentence pronounced, or other thing done by that Court or in respect of anything done by such member in the course of the performance of his duties or the exercise of his powers as a member of that Court or otherwise in his capacity as a member of that Court, whether such thing was or was not necessary to the performance of such duties or the exercise of such powers.

(2) No action or other proceeding for defamation shall lie against any person in respect of anything written or said by him in giving evidence, whether written or oral, before a Special Criminal Court or for use in proceedings before a Special Criminal Court.

(3) No action, prosecution, or other proceeding, civil or criminal, shall lie against any registrar, clerk, or servant of a Special Criminal Court in respect of anything done by him in the performance of his duties as such registrar, clerk, or servant, whether such thing was or was not necessary to the performance of such duties.

PART VI POWERS OF INTERNMENT

54 Commencement and cesser of this Part of this Act.

54.— (1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.

(2) If and whenever and so often as the Government makes and publishes a proclamation declaring that the powers conferred by this Part of this Act are necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act should come into force immediately, this Part of this Act shall come into force forthwith.

(3) If at any time while this Part of this Act is in force the Government makes and publishes a proclamation declaring that this Part of this Act shall cease to be in force, this Part of this Act shall forthwith cease to be in force.

(4) Whenever the Government has made and published a proclamation under the second sub-section of this section, it shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force by virtue of such proclamation, to pass a resolution annulling such proclamation, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(5) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the *Iris Oifigiúil* and may also be published in any other manner which the Government shall think proper.

55 Special powers of arrest and detention.

55.— (1) Whenever a Minister of State is satisfied that any particular person is engaged in activities calculated to prejudice the preservation of the peace, order, or security of the State, such Minister may by warrant under his hand order the arrest and detention of such person under this section.

(2) Any member of the *Gárda Síochána* may arrest without other warrant any person in respect of whom a warrant has been issued by a Minister of State under the foregoing sub-section of this section.

(3) Every person arrested under the next preceding sub-section of this section shall be detained in a prison or other place prescribed in that behalf by regulations made under this Part of this Act until this Part of this Act ceases to be in force or until he is released under the subsequent provisions of this Part of this Act, whichever first happens.

56 Powers of search, etc, of detained persons.

56.— (1) It shall be lawful for any member of the *Gárda Síochána* to do all or any of the following things in respect of any person who is arrested and detained under this Part of this Act, that is to say:—

- (a) to demand of such person his name and address;
- (b) to search such person or cause him to be searched;
- (c) to photograph such person or cause him to be photographed;
- (d) to take, or cause to be taken the finger-prints of such person.

(2) Every person who shall obstruct or impede the exercise in respect of him by a member of the *Gárda Síochána* of any of the powers conferred by the next preceding sub-section of this section or shall or refuse to give his name and address when demanded of him by a member of the *Gárda Síochána* under the said sub-section or shall give a name or an address which is false or misleading shall be guilty of a contravention of the regulations made under this Part of this Act in relation to the preservation of discipline and shall be dealt with accordingly.

57 Release of detained persons.

57.— A Minister of State may by writing under his hand, if and whenever he so thinks proper, order the release of any particular person who is for the time being detained under this Part of this Act, and thereupon such person shall forthwith be released from such detention.

58 Regulations in relation to places of detention.

58.— A Minister of State may by order make regulations for all or any of the following purposes, that is to say

- (a) prescribing the prisons, internment camps, and other places in which persons may be detained under this Part of this Act;
- (b) providing for the efficient management, sanitation, control, and guarding of such prisons, internment camps, and other places;
- (c) providing for the enforcement and preservation of discipline amongst the persons detained in any such prison, internment camp, or other place as aforesaid;
- (d) providing for the punishment of persons so detained who contravene the regulations;
- (e) prescribing or providing for any other matter or thing incidental or ancillary to the efficient detention of persons detained under this Part of this Act.

59 Commission for inquiring into detention.

59.— (1) As soon as conveniently may be after this Part of this Act comes into force, the Government shall set up a Commission (in this section referred to as the Commission) to perform the functions imposed upon the Commission by this section.

(2) The following provisions shall apply and have effect in relation to the Commission, that is to say—

- (a) the members of the Commission shall be appointed and be removable by the Government;
- (b) the Commission shall consist of three persons of whom one shall be a barrister or solicitor of not less than seven years standing or be or have been a judge of the Supreme Court, the High Court, or the Circuit Court or a justice of the District Court;
- (c) there may be paid out of moneys provided by the Oireachtas to any member of the Commission who is not in receipt of remuneration out of public funds such (if any) fees or remuneration as the Minister for Finance shall determine.

(3) Any person who is detained under this Part of this Act may apply in writing to the Government to have his said detention considered by the Commission, and upon such application being so made the following provisions shall have effect, that is to say:—

- (a) the Government shall forthwith refer the matter of such person's detention to the Commission;

(b) the Commission shall inquire into the grounds of such person's detention and shall, with all convenient speed, report thereon to the Government;

(c) the Minister for Justice shall furnish to the Commission such information and documents (relevant to the subject matter of such inquiry) in the possession or procurement of the Government or of any Minister of State as shall be called for by the Commission;

(d) if the Commission reports that no reasonable grounds exist for the detention of such person, such person shall within one week either be released or be charged according to law with an offence.

Number 2 of 1940.

OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1940.

AN ACT TO REPEAL PART VI OF THE OFFENCES AGAINST THE STATE ACT, 1939,
AND TO MAKE OTHER PROVISIONS IN RELATION TO THE DETENTION OF
CERTAIN PERSONS. [9th February, 1940.]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:—

**PART I
PRELIMINARY AND GENERAL**

1 Short title, construction, and collective citation.

1.— (1) This Act may be cited as the Offences Against the State (Amendment) Act, 1940.

(2) This Act shall be construed as one with the Offences Against the State Act, 1939 (No. 13 of 1939).

(3) The Offences Against the State Act, 1939, and this Act may be cited together as the Offences Against the State Acts, 1939 and 1940.

2 Repeal.

2.—Part VI of the Offences Against the State Act, 1939 (No. 13 of 1939), is hereby repealed.

**PART II
POWERS OF DETENTION**

3 Commencement and cesser of this Part of this Act.

3.— (1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.

(2) If and whenever and so often as the Government makes and publishes a proclamation declaring that the powers conferred by this Part of this Act are necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act should come into force immediately, this Part of this Act shall come into force forthwith.

(3) If at any time while this Part of this Act is in force the Government makes and publishes a proclamation declaring that this Part of this Act shall cease to be in force, this Part of this Act shall forthwith cease to be in force.

(4) Whenever the Government has made and published a proclamation under the second sub-section of this section, it shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force by virtue of such proclamation, to pass a resolution

annulling such proclamation, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(5) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the *Iris Oifigiúil* and may also be published in any other manner which the Government shall think proper.

4 Special powers of arrest and detention.

4.— (1) Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section.

(2) Any member of the *Gárda Síochána* may arrest without warrant any person in respect of whom a warrant has been issued by a Minister of State under the foregoing sub-section of this section.

(3) Every person arrested under the next preceding sub-section of this section shall be detained in a prison or other place prescribed in that behalf by regulations made under this Part of this Act until this Part of this Act ceases to be in force or until he is released under the subsequent provisions of this Part of this Act, whichever first happens.

(4) Whenever a person is detained under this section, there shall be furnished to such person, as soon as may be after he arrives at a prison or other place of detention prescribed in that behalf by regulations made under this Part of this Act, a copy of the warrant issued under this section in relation to such person and of the provisions of section 8 of this Act.

(5) Every warrant issued by a Minister of State under this section shall be in the form set out in the Schedule to this Act or in a form to the like effect.

5 Powers of search, etc., of detained persons.

5.— (1) It shall be lawful for any member of the *Gárda Síochána* to do all or any of the following things in respect of any person who is arrested and detained under this Part of this Act, that is to say:—

- (a) to demand of such person his name and address;
- (b) to search such person or cause him to be searched;
- (c) to photograph such person or cause him to be photographed;
- (d) to take, or cause to be taken the fingerprints of such person.

(2) Every person who shall obstruct or impede the exercise in respect of him by a member of the *Gárda Síochána* of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address when demanded of him by a member of the *Gárda Síochána* under the said sub-section or shall give a name or an address which is false or misleading shall be guilty of a contravention of the regulations made under this Part of this Act in relation to the preservation of discipline and shall be dealt with accordingly.

6 Release of detained persons.

6.— A Minister of State may by writing under his hand, if and whenever he so thinks proper, order the release of any particular person who is for the time being detained under this Part of this Act, and thereupon such person shall forthwith be released from such detention.

7 Regulations in relation to places of detention.

7.— (1) A Minister of State may by order make regulations for all or any of the following purposes, that is to say:—

- (a) prescribing the prisons, internment camps, and other places in which persons may be detained under this Part of this Act;
- (b) providing for the efficient management, sanitation, control, and guarding of such prisons, internment camps, and other places;
- (c) providing for the enforcement and preservation of discipline amongst the persons detained in any such prison, internment camp, or other place as aforesaid;
- (d) providing for the punishment of persons so detained who contravene the regulations;
- (e) prescribing or providing for any other matter or thing incidental or ancillary to the efficient detention of persons detained under this Part of this Act.

(2) Every regulation made under this section shall be laid before each House of the *Oireachtas* as soon as may be after it is made, and if a resolution annulling such regulation is passed by either House of the *Oireachtas* within the next subsequent twenty-one days on which such House has sat after such regulation is laid before it, such regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done under such regulation.

8 Commission for inquiring into detentions.

8.— (1) As soon as conveniently may be after this Part of this Act comes into force, the Government shall set up a Commission (in this section referred to as the Commission) to perform the functions imposed upon the Commission by this section.

(2) The following provisions shall apply and have effect in relation to the Commission, that is to say:—

- (a) the members of the Commission shall be appointed and be removable by the Government;
- (b) the Commission shall consist of three persons of whom one shall be a commissioned officer of the Defence Forces with not less than seven years' service and each of the others shall be a barrister or solicitor of not less than seven years' standing or be or have been a judge of the Supreme Court, the High Court, or the Circuit Court or a justice of the District Court;
- (c) there may be paid out of moneys provided by the Oireachtas to any member of the Commission such (if any) fees or remuneration as the Minister for Finance shall determine.

(3) Any person who is detained under this Part of this Act may apply in writing to the Government to have the continuation of his said detention considered by the Commission, and upon such application being so made the following provisions shall have effect, that is to say:—

- (a) the Government shall, with all convenient speed, refer the matter of the continuation of such person's detention to the Commission;
- (b) the Commission shall inquire into the grounds of such person's detention and shall, with all convenient speed, report thereon to the Government;
- (c) the Minister for Justice shall furnish to the Commission such information and documents (relevant to the subject-matter of such inquiry) in the possession or procurement of the Government or of any Minister of State as shall be called for by the Commission;
- (d) if the Commission reports that no reasonable grounds exist for the continued detention of such person, such person shall, with all convenient speed, be released.

9 Returns to be laid before each House of the Oireachtas.

9.— The Government shall once at least in every six months furnish to each House of the Oireachtas particulars of (a) persons detained under this Part of this Act, (b) persons in respect of whom the Commission has made a report to the Government, (c) persons in respect of whom the Commission has reported that no reasonable grounds exist for their continued detention, (d) persons who had been detained under this Part of this Act but who had been released on the report of the Commission, and (e) persons who had been detained under this Part of this Act but who had been released without a report of the Commission.

SCHEDULE

FORM OF WARRANT UNDER SECTION 4.
OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1940.

SECTION 4

In exercise of the powers conferred on me by section 4 of the Offences Against the State (Amendment) Act, 1940 (No. 2 of 1940), I....., Minister for, being of opinion that of is engaged in activities which, in my opinion, are prejudicial to the preservation of public peace and order (or to the security of the State), do by this warrant order the arrest and detention of the said..... under the said section 4.

Given under my Official Seal

this..... day of

19.....

.....

Minister for.....

Number 26 of 1972.

No. 26/1972: OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1972.

AN ACT TO AMEND AND EXTEND THE OFFENCES AGAINST THE STATE ACTS, 1939
AND 1940 [3rd December, 1972]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1 Definition.

1.— In this Act "the Act of 1939" means the Offences against the State Act, 1939.

2 Power to question found near place of commission of scheduled offence.

2.— Where a member of the Garda Síochána—

(a) has reasonable grounds for believing that an offence which is for the time being at scheduled offence for the purposes of Part V of the Act of 1939 is being or was committed at any place,

(b) has reasonable grounds for believing that any person whom he finds at or near the place at the time of the commission of the offence or soon afterwards knows, or knew at that time, of its commission, and

(c) informs the person of his belief as aforesaid,

the member may demand of the person his name and address and an account at his recent movements and, if the person fails or refuses to give the information or gives information that is false or misleading, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £200 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months or to both such fine and such, imprisonment.

3 Evidence of membership of unlawful organisation.

3.— (1) (a) Any statement made orally, in writing or otherwise, or any conduct, by an accused person implying or leading to a reasonable inference that he was at a material time a member of an unlawful organisation shall, in proceedings under section 21 of the Act of 1939, be evidence that he was then such a member.

(b) In paragraph (a) of this subsection "conduct" includes omission by the accused person to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself be conclusive.

(2) Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material

time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.

(3) Subsection (2) of this section shall be in force whenever and for so long only as Part V of the Act of 1939 is in force.

(4) Statements, meetings etc., constituting interference with the course of justice.

4.— (1) (a) Any public statement made orally, in writing or otherwise, or any meeting, procession or demonstration in public, that constitutes an interference with the course of justice shall be unlawful.

(b) A statement, meeting, procession or demonstration shall be deemed to constitute an interference with the course of justice if it is intended, or is of such a character as to be likely, directly or indirectly to influence any court, person or authority concerned with the institution, conduct or defence of any civil or criminal proceedings (including a party or witness) as to whether or how the proceedings should be instituted, conducted, continued or defended, or as to what should be their outcome.

(2) A person who makes any statement, or who organises, holds or takes part in any meeting, procession or demonstration, that is unlawful under this section shall be guilty of an offence and shall be liable—

(a) on summary conviction, to a fine not exceeding £200 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months or to both such fine and such imprisonment;

(b) on conviction on indictment, to a fine not exceeding £1,000 or to imprisonment for a term not exceeding five years or to both such fine and such imprisonment.

(3) Nothing in this section shall affect the law as to contempt of court.

5 Amendment of section 2 of Act of 1939.

5.— The definition of "document" in section 2 of the Act of 1939 is hereby amended by the insertion after "advertisement" of the following:

"and also—

(a) any map, plan, graph or drawing,

(b) any photograph,

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced there from, and

(d) any film, microfilm, negative, tape or ether device in which one or more visual images are embodied (whether with or without sounds or other data) so as to be capable (as aforesaid) of being reproduced therefrom and a reproduction or still reproduction of the image or

images embodied therein whether enlarged or not and whether with or without sounds or other data".

6 Short title, construction and collective citation.

6.— (1) This Act may be cited as the Offences against the State Act, 1972.

(2) The Offences against the State Acts, 1939 and 1940, and this Act shall be construed as one and may be cited together as the Offences against the State Acts, 1939 to 1972.

Number 3 of 1985.

No. 3/1985: OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1985.

ARRANGEMENT OF SECTIONS

Section

1. Definitions.
2. Payment of moneys of unlawful organisations into High Court.
3. Recovery by owner, in certain circumstances, of moneys paid into High Court under section 2.
4. Compensation for owner, in certain circumstances, where moneys are paid into High Court under section 2.
5. Evidence.
6. Immunity from proceedings.
7. Offences.
8. Meaning of "property of unlawful organisation" in this Act and sections 22 and 23 of Principal Act.
9. Short title and construction.

ACTS REFERRED TO

Central Bank Act, 1971 1971, No. 24
Offences against the State Act, 1939 1939, No. 13
Offences against the State Acts, 1939 to 1972.

No. 3/1985: OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1985

AN ACT TO AMEND AND EXTEND THE OFFENCES AGAINST THE STATE ACTS, 1939
to 1972. [19th February, 1985]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1 Definitions.

1.— (1) In this Act—

"bank" means the holder of a licence under the Central Bank Act, 1971, and the persons specified in section 7 (4) of that Act and any other financial institution;

"the Minister" means the Minister for Justice;

"the Principal Act" means the Offences Against the State Act, 1939.

(2) References in this Act to moneys held by a bank include references to shares in a building society of a depositor in the society.

2 Payment of moneys of unlawful organisations into High Court.

2.— (1) (a) On production to any bank of a document purporting to be signed by the Minister and bearing the seal of the Minister and stating—

(i) that, in the opinion of the Minister, moneys described in the document and held by the bank would, but for the operation of section 22 of the Principal Act, be the property of an unlawful organisation and that those moneys stand forfeited to and vested in the Minister by virtue of the said section 22, and

(ii) that the Minister requires the bank to pay those moneys, or so much of them as are held by the bank at the time of the production to it of the document, into the High Court on a specified day or not later than a specified day and, in the meantime, to refrain from doing any act or making any omission inconsistent with that requirement and to notify as soon as may be thereafter the person or persons in whose name or names the moneys are held by the bank of their payment into that Court,

the bank shall comply with the requirement

(b) Production of a document specified in paragraph (a) of this subsection to the chief officer or other person, by whatever name called, having charge of the management of the bank or to the manager, or an official of the bank acting as manager, of the branch of a bank into which the moneys concerned were, or are believed by the Minister to have been, paid shall be deemed for the purposes of that paragraph to be production of the document to the bank.

- (c) (i) Subject to subparagraph (ii) of this paragraph, paragraph (a) of this subsection shall remain in operation for the period of 3 months beginning on its commencement and shall then cease to be in operation
- (ii) The Government may, from time to time by order at any time when paragraph (a) of this subsection is in operation, continue that paragraph in operation for such further period not exceeding 3 months as may be specified in the order.
- (iii) The Government may from time to time by order, at any time when paragraph (a) of this subsection is not in operation, provide that that paragraph shall come into operation on such day as may be specified in the order and shall remain in operation for such period not exceeding 3 month as may be specified in the order, and that paragraph shall come into and remain in operation in accordance with the provisions of any such order.
- (iv) Every order under this paragraph shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 21 days on which that House has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

- (2) (a) If proceedings are not brought, under section 3 of this Act or otherwise, in relation to money paid into the High Court under this section or in respect of or arising out of any such payment within 6 months of the day on which the moneys were paid into that Court or if all such proceedings brought are dismissed—

- (i) the moneys shall not be paid out of the High Court otherwise than in accordance with subparagraph (ii) of this paragraph, and
- (ii) the Minister may, after the expiration of the period aforesaid of 6 months, apply ex parte to the High Court for an order directing that the moneys be paid to the Minister or into such account at such bank as the Minister may specify, and,

without prejudice to the right of any person under section 4 of this Act, the High Court shall make the order and the Minister shall cause a copy of the order to be sent to the Minister shall cause a copy of the order to be sent to the bank by whom the moneys were paid into that Court.

- (b) The reference in paragraph (a) of this subsection to the dismissal of proceedings includes a reference to the case where, following the decision of the Supreme Court in a case where there is an appeal in any such proceedings to that Court, the proceedings stand dismissed.

(c) Moneys paid pursuant to an order of the High Court under section 2 of this Act shall be paid into or disposed of for the benefit of the Exchequer in accordance with the directions of the Minister for Finance.

3 Recovery by owner, in certain circumstances, of moneys paid into High Court under section 2.

3.— (1) A person claiming to be an owner of moneys paid into the High Court pursuant to section 2 of this Act may, within 6 months of the day on which the moneys were paid into that Court, apply to that Court for an order directing that the moneys, together with such amount in respect of interest thereon as that Court considers reasonable, be paid to him and, if that Court is satisfied that section 22 of the Principal Act has not had effect in relation to the moneys and that the person is the owner of the moneys, it shall make the order aforesaid.

(2) The Minister shall be given notice of, and be entitled to be heard in, any proceedings under subsection (1) of this section.

4 Compensation for owner, in certain circumstances, where moneys are paid into High Court under section 2.

4.— (1) Where moneys paid into the High Court pursuant to section 2 of this Act are ordered by that Court under section 3 of this Act to be paid to any person, that Court may, on application to it under this subsection award to the person compensation payable by the Minister in respect of any loss incurred by him by reason of the payment of the moneys into and their retention in that Court under the said section 2.

(2) Where, on application to the High Court under this subsection, a person shows to the satisfaction of that Court—

(a) that moneys paid to the Minister under section 2 of this Act are not moneys in relation to which section 22 of the Principal Act has had effect, and

(b) that the person is the owner of the, moneys,

the High Court may—

(i) if it is of opinion that there are reasonable grounds for the failure of the person to make an application to that Court under section 3 of this Act in respect of the moneys within the time specified in that section, and

(ii) if the application under this subsection has been made within 6 years of the day on which the moneys were paid into that Court pursuant to section 2 of this Act,

award to the person compensation payable by the Minister in respect of any loss incurred by the person by reason of the payment of the moneys into and their retention in the High Court, and their payment to the Minister and retention by the State, under the said section 2.

(3) The Minister shall be given notice of, and be entitled to be heard in, any proceedings under this section.

5 Evidence.

5.— (1) Production to a court in any proceedings of a document signed by the Minister and stating that moneys described in the document that were held on a specified day by a specified bank would, but for the operation of section 22 of the Principal Act, have been the property of an unlawful organisation on that day shall be evidence that the moneys so described would, but for the operation of the said section 22, have been the property of an unlawful organisation on the day so specified.

(2) A document purporting to be a document of the Minister under subsection (1) of this section and to be signed by the Minister shall be deemed for the purposes of this section to be such a document and to be so signed unless the contrary is shown.

(3) On the application of any party to proceedings, under section 3 of this Act or otherwise, in relation to moneys paid into the High Court under section 2 of this Act by a bank or in respect of or arising out of any such payment, the court may order the bank or a specified officer of the bank to produce and prove to the court all or specified documents or records in the bank's possession or within its procurement that are relevant to the payment of the moneys or part of them into or out of the bank or to the opening, maintenance, operation or closing of any account at the bank in respect of the moneys or part of them.

6 Immunity from proceedings.

6.— No action or proceedings of any kind shall lie against a bank in any court in respect of—

(a) acts done by the bank in compliance with a requirement in a document produced to it pursuant to section 2 of this Act, or

(b) the non-payment by the bank of the moneys, or part thereof, to which the document relates, or other moneys in lieu of them, to the person (or a person authorised by him to receive them) who, but for the operation of section 22 of the Principal Act, would be the owner of the moneys.

7 Offences.

7.— (1) A bank that fails or refuses to comply with a requirement in a document under section 2 of this Act shall be guilty of an offence and shall be liable, on conviction on indictment, to a fine not exceeding £100,000.

(2) Where an offence committed by a bank under subsection (1) of this section is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any person who, when the offence was committed, was a director, member of the committee of management or other controlling authority of the bank concerned, or the chief officer or other person, by whatever name called, having charge of the management of the bank, or the secretary or other officer of the bank (including the manager of, or other official of the bank at, a

branch of the bank), that person shall also be deemed to have committed the offence and shall be liable—

(a) on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both the fine and the imprisonment, or

(b) on conviction on indictment, to a fine not exceeding £10,000 or, at the discretion of the court, to imprisonment for a term not exceeding 2 years or to both the fine and the imprisonment.

8 Meaning of "property of unlawful organisation" in this Act and sections 22 and 23 of Principal Act.

8.— (1) For the removal of doubt, it is hereby declared that section 22 of the Principal Act applies and always applied to property of an unlawful organisation acquired by it at any time while a suppression order under section 19 of that Act in respect of it is or was in force as well as to the property of the organisation immediately upon the making of the suppression order.

(2) Moneys held by any person for the use or benefit of, or for use for the purposes of, an unlawful organisation in respect of which a suppression order under section 19 of the Principal Act is in force shall be deemed, for the purposes of this Act and sections 22 and 23 of The Principal Act, to be the property of the organisation, and this Act and those sections shall apply and have effect accordingly.

9 Short title and construction.

9.— (1) This Act may be cited as the Offences against the State (Amendment) Act, 1985.

(2) The Offences against the State Acts, 1939 to 1972, and this Act shall be construed as one and may be cited together as the Offences against the State Acts, 1939 to 1985.

OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1998

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.
2. Membership of an unlawful organisation: inferences that may be drawn.
3. Notification of witnesses.
4. Amendment of section 3 of Offences against the State (Amendment) Act, 1972.
5. Inferences from failure of accused to mention particular facts.
6. Directing an unlawful organisation.
7. Possession of articles for purposes connected with certain offences.
8. Unlawful collection of information.
9. Withholding information.
10. Extension of period of detention under section 30 of Act of 1939.
11. Rearrest under section 30 of Act of 1939.
12. Training persons in the making or use of firearms, etc.
13. Provision in relation to section 52 of Act of 1939.
14. Offences under Act to be scheduled offences.
15. Penalties for certain offences.
16. Amendment of Schedule to Bail Act, 1997.
17. Forfeiture of property.
18. Duration of certain sections.
19. Short title, construction and collective citation.

ACTS REFERRED TO

Bail Act, 1997 1997, No. 16
Criminal Justice Act, 1984 1984, No. 22
Criminal Justice Act, 1994 1994, No. 15
Criminal Law (Jurisdiction) Act, 1976 1976, No. 14
Explosive Substances Act, 1883 46 & 47 Vict., c.3
Explosives Act, 1875 38 & 39 Vict., c.17
Firearms Act, 1925 1925, No. 17
Firearms Act, 1964 1964, No. 1
Firearms Acts, 1925 to 1990
Offences against the State Act, 1939 1939, No. 13
Offences against the State (Amendment) Act, 1972 1972, No. 26
Offences against the State Acts, 1939 to 1985

Number 39 of 1998

OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1998

AN ACT TO AMEND AND EXTEND THE OFFENCES AGAINST THE STATE ACTS, 1939 TO 1985, AND CERTAIN OTHER ENACTMENTS RELATING TO CRIMINAL LAW AND TO PROVIDE FOR RELATED MATTERS. [3rd September, 1998]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1. Interpretation.

1.— (1) In this Act—

"the Act of 1939" means the Offences against the State Act, 1939;

"the Acts" means the Offences against the State Acts, 1939 to 1998;

"explosive" means an explosive within the meaning of the Explosives Act, 1875, and any other substance or thing that is an explosive substance within the meaning of the Explosive Substances Act, 1883;

"firearm" has the same meaning as it has in the Firearms Acts, 1925 to 1990.

(2) A reference in this Act to a section is a reference to a section of this Act unless it is indicated that reference to some other enactment is intended.

(3) A reference in this Act to a subsection or paragraph is a reference to the subsection or paragraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended.

(4) A reference in this Act to any other enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended, extended or adapted by or under any subsequent enactment, including this Act.

2 Membership of an unlawful organisation: inferences that may be drawn.

2.— (1) Where in any proceedings against a person for an offence under section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.

(2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned what the effect of such a failure might be.

(3) Nothing in this section shall, in any proceedings—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could be properly drawn apart from this section.

(4) In this section—

(a) references to any question material to the investigation include references to any question requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period,

(b) references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly.

(5) This section shall not apply in relation to failure to answer a question if the failure occurred before the passing of this Act.

3 Notification of witnesses.

3.— (1) In proceedings for an offence under section 21 of the Act of 1939 the accused shall not without the leave of the court call any other person to give evidence on his or her behalf unless, before the end of the prescribed period, he or she gives notice of his or her intention to do so.

(2) Without prejudice to subsection (1), in any such proceedings the accused shall not without the leave of the court call any other person (in this section referred to as "the witness") to give such evidence unless—

(a) the notice under that subsection includes the name and address of the witness or, if the name or address is not known to the accused at the time he or she gives the notice, any information in his or her possession which might be of material assistance in finding the witness,

(b) if the name or the address is not included in that notice, the court is satisfied that the accused, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained,

(c) if the name or the address is not included in that notice, but the accused subsequently discovers the name or address or receives other information which

might be of material assistance in finding the witness, he or she gives notice forthwith of the name, address or other information, as the case may be, and

(d) if the accused is notified by or on behalf of the prosecution that the witness has not been traced by the name or at the address given, he or she gives notice forthwith of any such information which is then in his or her possession or, on subsequently receiving any such information, gives notice of it forthwith.

(3) The court shall not refuse leave under this section if it appears to the court that the accused was not informed of the requirements of this section—

(a) by the District Court when he or she was sent forward for trial, or

(b) by the trial court when, on being sent forward by the District Court for sentence, he or she changed his or her plea to one of not guilty, or

(c) where he or she was brought before a Special Criminal Court for trial under section 47 of the Act of 1939, by the Court when it fixed the date of trial.

(4) Any notice purporting to be given under this section on behalf of the accused by his or her solicitor shall, unless the contrary is proved, be deemed to be given with the authority of the accused.

(5) A notice under subsection (1) shall either be given in court during, or at the end of, the preliminary examination of the offence concerned or be given in writing to the solicitor for the prosecution, and a notice under paragraph (c) or (d) of subsection (2) shall be given in writing to that solicitor.

(6) A notice required by this section to be given to the solicitor for the prosecution may be given by delivering it to him or her or by leaving it at his or her office or by sending it to him or her by registered post at his or her office.

(7) In this section "the prescribed period" means—

(a) the period of 14 days from the end of the preliminary examination referred to in subsection (5), or

(b) where the accused waives a preliminary examination, the period of 14 days from the date of the waiver, or

(c) where the accused, on being sent forward for sentence, changes his or her plea to one of not guilty, the period of 14 days from the date on which he or she does so, or

(d) where the accused is brought before a Special Criminal Court for trial under section 47 of the Act of 1939, such period as is fixed by the Court when the Court fixes the date of trial.

(8) This section shall not apply in respect of any person whom the accused intends to call to give evidence on his or her behalf solely in relation to the matter of sentence in the event that the accused is convicted of the offence concerned.

(9) This section shall not apply in relation to proceedings referred to in subsection (1) commenced before the passing of this Act and for the purposes of this subsection proceedings referred to in subsection (1) are commenced when the accused is first brought before a court charged with the offence concerned or, as the case may be, is charged before a court with the offence concerned.

4 Amendment of section 3 of Offences against the State (Amendment) Act, 1972.

4.— Section 3 of the Offences against the State (Amendment) Act, 1972, is hereby amended by the substitution of the following paragraph for paragraph (b) of subsection (1):

- "(b) In paragraph (a) of this subsection 'conduct' includes—
- (i) movements, actions, activities or associations on the part of the accused person, and
 - (ii) omission by the accused person to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself be conclusive."

5 Inferences from failure of accused to mention particular facts.

5.— (1) This section applies to—

- (a) an offence under the Acts,
- (b) an offence that is for the time being a scheduled offence for the purposes of Part V of the Act of 1939,
- (c) an offence arising out of the same set of facts as an offence referred to in paragraph (a) or (b),

being an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of 5 years or by a more severe penalty.

(2) Where in any proceedings against a person for an offence to which this section applies evidence is given that the accused—

- (a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
- (b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure is material, but a person shall not be convicted of an offence solely on an inference drawn from such a failure.

(3) Subsection (2) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such a failure might be.

(4) Nothing in this section shall, in any proceedings—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section.

(5) This section shall not apply in relation to a failure to mention a fact if the failure occurred before the passing of this Act.

6 Directing an unlawful organisation.

6.— A person who directs, at any level of the organisation's structure, the activities of an organisation in respect of which a suppression order has been made under section 19 of the Act of 1939 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

7 Possession of articles for purposes connected with certain offences.

7.— (1) A person shall be guilty of an offence if he or she has any article in his or her possession or under his or her control in circumstances giving rise to a reasonable suspicion that the article is in his or her possession or under his or her control for a purpose connected with the commission, preparation or instigation of an offence under the Explosive Substances Act, 1883, or the Firearms Acts, 1925 to 1990, which is for the time being a scheduled offence for the purposes of Part V of the Act of 1939.

(2) It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his or her possession or under his or her control for any purpose specified in subsection (1).

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

(4) The reference in subsection (1) to an offence under an enactment referred to therein shall be deemed to include a reference to an act or omission done or made outside the State that would be an offence under such an enactment if done or made in the State.

8 Unlawful collection of information.

8.— (1) It shall be an offence for a person to collect, record or possess information which is of such a nature that it is likely to be useful in the commission by members of any unlawful organisation of serious offences generally or any particular kind of serious offence.

(2) It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the information in question was not being collected or recorded by him or her, or in his or her possession, for the purpose of its being used in such commission of any serious offence or offences.

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

(4) In this section—

"members of any unlawful organisation" includes members of such an organisation whose identities are unknown to the Garda Síochána;

"serious offence" means an offence which satisfies both of the following conditions:

- (a) it is an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of 5 years or by a more severe penalty, and
- (b) it is an offence that involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage,

and includes an act or omission done or made outside the State that would be a serious offence if done or made in the State.

9 Withholding information.

9.— (1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—

- (a) preventing the commission by any other person of a serious offence, or
- (b) securing the apprehension, prosecution or conviction of any other person for a serious offence,

and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding five years or both.

(3) In this section "serious offence" has the same meaning as it has in section 8.

10 Extension of period of detention under section 30 of Act of 1939.

10.— Section 30 of the Act of 1939 is hereby amended by the substitution of the following subsections for subsection (4):

"(4) An officer of the Garda Síochána not below the rank of superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(4A) On an application under subsection (4) of this section the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such

further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

(4B) On an application under subsection (4) of this section the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the officer of the Garda Síochána making the application.

(4C) A person detained under this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the Garda Síochána and shall, if not so charged or released, be released at the expiration of the period of detention authorised by or under subsection (3) of this section or, as the case may be, that subsection and subsection (4A) of this section."

11 Rearrest under section 30 of Act of 1939.

11.— The following section is hereby inserted after section 30 of the Act of 1939:

"30A. (1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this Act and is released without any charge having been made against him he shall not—

- (a) be arrested again for the same offence, or
- (b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed,

except under the authority of a warrant issued by a judge of the District Court who is satisfied on information supplied on oath by an officer of the Garda Síochána not below the rank of superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought.

(2) Section 30 of this Act, and, in particular, any powers conferred thereby, shall apply to or in respect of a person arrested in connection with an offence to which that section relates under a warrant issued pursuant to subsection (1) of this section as it applies to or in respect of a person to whom that section applies, with the following and any other necessary modifications:

- (a) the substitution of the following subsection for subsection (3):
'(3) Whenever a person is arrested under a warrant issued pursuant to section 30A(1) of this Act, he may be removed to and detained in custody in a Garda Síochána station, a prison or some other convenient place for a period of 24 hours from the time of his arrest.'
- (b) the deletion of subsections (4), (4A) and (4B), and
- (c) the addition of the following at the end of subsection (4C):
'or, in case the detention follows an arrest under a warrant issued pursuant to section 30A of this Act, by subsection (3) of this section as substituted by the said section 30A.'

(3) Notwithstanding subsection (1) of this section, a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith."

12 Training persons in the making or use of firearms, etc.

12.— (1) A person who instructs or trains another or receives instruction or training in the making or use of firearms or explosives shall be guilty of an offence.

(2) It shall be a defence for a person charged with an offence under this section to prove that the giving or receiving of such instruction or training was done with lawful authority or that he or she had reasonable excuse for giving or receiving such instruction or training.

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

(4) This section shall not apply to any assembly referred to in section 15(4) of the Act of 1939.

13 Provision in relation to section 52 of Act of 1939.

13.— Section 52 of the Act of 1939 shall not have effect in relation to a person referred to in subsection (1) thereof unless, immediately before a demand is made of him or her under that subsection, he or she is informed in ordinary language by a member of the Garda Síochána of—

- (a) the fact that the demand is being made under the said section 52, and
- (b) the consequences provided by that section for a failure or refusal to comply with such a demand or for the giving of any account or information in purported compliance with such a demand which is false or misleading.

14 Offences under Act to be scheduled offences.

14.— (1) It is hereby declared that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to each offence under sections 6 to 9 and 12.

(2) Each offence under sections 6 to 9 and 12 shall be deemed to be a scheduled offence for the purposes of Part V of the Act of 1939 as if an order had been made under section 36 of that Act in relation to it and subsection (3) of that section and section 37 of that Act shall apply to such an offence accordingly.

(3) Nothing in subsection (1) or (2) shall be construed as affecting, or limiting in any particular case, the exercise—

- (a) by the Government of any of its powers under any provision of section 35 or 36 of the Act of 1939,
- (b) by the Director of Public Prosecutions of his or her power under section 45(2) of the said Act to direct that a person not be sent forward for trial by the Special Criminal Court on a particular charge, or

(c) by the Government or the Director of Public Prosecutions of any other of its or his or her powers under Part V of the said Act or by any other person of his or her powers under the said Part.

15 Penalties for certain offences.

15.— (1) Section 15 of the Firearms Act, 1925, as amended by section 21(4) of the Criminal Law (Jurisdiction) Act, 1976, and section 14 of the Criminal Justice Act, 1984 (possessing firearm or ammunition with intent to endanger life or cause serious injury to property) is hereby amended by the substitution for "imprisonment for life" of "a fine or imprisonment for life or both".

(2) Section 27A(1) of the Firearms Act, 1964, inserted by section 8 of the Criminal Law (Jurisdiction) Act, 1976, and amended by section 14 of the Criminal Justice Act, 1984 (possession of firearm or ammunition in suspicious circumstances) is hereby amended by the substitution for "imprisonment for a term not exceeding ten years" of "a fine or imprisonment for a term not exceeding ten years or both".

(3) Section 3 of the Explosive Substances Act, 1883, inserted by section 4 of the Criminal Law (Jurisdiction) Act, 1976, is hereby amended by the substitution for "imprisonment for life" of "a fine or imprisonment for life or both".

(4) Section 4 of the Explosive Substances Act, 1883, is hereby amended by the deletion in subsection (1) of all the words from "of felony" to the end of that subsection and the substitution of "of an offence and shall be liable, on conviction on indictment, to a fine or imprisonment for a term not exceeding 14 years or both, and the explosive substance shall be forfeited."

16 Amendment of Schedule to Bail Act, 1997.

16.— The Schedule to the Bail Act, 1997, is hereby amended by the substitution for paragraph 25 of the following paragraph:
"25. Any offence under the Offences against the State Acts, 1939 to 1998."

17 Forfeiture of property.

17.— Section 61 of the Criminal Justice Act, 1994, is hereby amended—

(a) by the insertion of the following subsection after subsection (1):

"(1A) Where—

(a) a person has been convicted of an offence under section 3 or 4 of the Explosive Substances Act, 1883, section 15 of the Firearms Act, 1925, or section 27A of the Firearms Act, 1964, and

(b) a forfeiture order may be made in the case of that person by virtue of subsection (1) of this section in respect of property to which that subsection applies,

the court shall, subject to subsection (5) of this section, make the forfeiture order, unless, having regard to the matters mentioned in subsection (2) of this section and to the nature and degree of seriousness of the offence of which the person has been convicted, it is satisfied that there would be a serious risk of injustice if it made the order."

and

- (b) by the insertion of the following subsection after subsection (5):
"(5A) A court may, in making a forfeiture order, include such provisions in that order, or, as the case may require, may make an order supplemental to that order that contains such provisions, as appear to it to be necessary to protect any interest in the property, the subject of the forfeiture order, of a person other than the offender."

18 Duration of certain sections.

18.— (1) Each of the following sections, namely sections 2 to 12 and 14 and 17 shall, subject to subsection (2), cease to be in operation on and from the 30th day of June, 2000, unless a resolution has been passed by each House of the Oireachtas resolving that that section should continue in operation.

(2) A section referred to in subsection (1) may be continued in operation from time to time by a resolution passed by each House of the Oireachtas before its expiry for such period as may be specified in the resolutions.

(3) Before a resolution under this section in relation to a section specified in subsection (1) is passed by either House of the Oireachtas, the Minister for Justice, Equality and Law Reform shall prepare a report, and shall cause a copy of it to be laid before that House, of the operation of the section during the period beginning on the passing of this Act or, as may be appropriate, the date of the latest previous report under this subsection in relation to that section and ending not later than 21 days before the date of the moving of the resolution in that House.

(4) For the avoidance of doubt, any enactment the amendment of which is effected by a section of this Act that ceases to be in operation on and from the day referred to in subsection (1) or, as the case may be, the expiry of the period for which it is continued in operation under subsection (2) ("the expiry") shall, an and from that day or, as the case may be, the expiry, apply and have effect as it applied and had effect immediately before the passing of this Act but subject to any amendments made by any other Act of the Oireachtas after such passing.

19 Short title, construction and collective citation.

19.— (1) This Act may be cited as the Offences against the State (Amendment) Act, 1998.

(2) The Offences against the State Acts, 1939 to 1985, and this Act (other than sections 15 to 18) shall be construed together as one and may be cited together as the Offences against the State Acts, 1939 to 1998.

APPENDIX 4

STATUTORY INSTRUMENTS

No. 162/1939	Unlawful Organisation (Suppression) Order 1939
No. 339/1939	Offences against the State (Scheduled Offences) Order 1939
No. 343/1939	Offences against the State (Scheduled Offences) (No. 2) Order 1939
No. 334/1940	Offences against the State (Scheduled Offences) (No. 3) Order 1940
No. 142/1972	Offences against the States (Scheduled Offences) Order 1972
No. 282/1972	Offences against the State (Scheduled Offences) (No. 2) Order 1972
No. 7/1983	Unlawful Organisation (Suppression) Order 1983

STATUTORY RULES AND ORDERS.

No. 162/1939:

UNLAWFUL ORGANISATION (SUPPRESSION) ORDER, 1939.

WHEREAS it is enacted by Section 18 of the Offences against the State Act, 1939 (No. 13 of 1939), that an organisation which does any of certain things enumerated in that section shall be an unlawful organisation within the meaning and for the purposes of that Act :

AND WHEREAS it is enacted by sub-section (1) of Section 19 of the said Act that, if and whenever the Government are of opinion that any particular organisation is an unlawful organisation, it shall be lawful for the Government by order to declare that such organisation is an unlawful organisation and ought, in the public interest, to be suppressed :

AND WHEREAS the Government are of opinion that the organisation styling itself the Irish Republican Army (also the I.R.A. and Oglagh na hÉireann) is an unlawful organisation :

NOW, the Government, in exercise of the power conferred on them by sub-section (1) of Section 19 of the Offences against the State Act, 1939 (No. 13 of 1939), and of every and any other power them in this behalf enabling do hereby order as follows :—

1. This Order may be cited as the Unlawful Organisation (Suppression) Order, 1939.
2. It is hereby declared that the organisation styling itself the Irish Republican Army (also the I.R.A. and Oglagh na héireann) is an unlawful organisation and ought, in the public interest, to be suppressed.

Dublin.

This 23rd day of June, 1939.

STATUTORY RULES AND ORDERS.

1939. No. 339.

OFFENCES AGAINST THE STATE (SCHEDULED OFFENCES) ORDER, 1939.

WHEREAS it is enacted by sub-section (1) of section 36 of the Offences Against the State Act, 1939 (No. 13 of 1939), that whenever while Part V of the said Act is in force the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences under any particular enactment, the Government may by order declare that offences under that particular enactment shall be scheduled offences for the purposes of the said Part of the said Act :

AND WHEREAS Part V of the Offences Against the State Act, 1939, is in force :

AND WHEREAS the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences under the said Offences Against the State Act, 1939 :

NOW, the Government, in exercise of the powers conferred on them by section 36 of the Offences Against the State Act, 1939 (No. 13 of 1939), and of every and any other power them in this behalf enabling hereby order as follows :—

1. This Order may be cited as the Offences Against the State (Scheduled Offences) Order, 1939
2. It is hereby declared that offences under the Offences Against the State Act, 1939 (No. 13 of 1939), shall be scheduled offences for the purposes of Part V of that Act.

DUBLIN.

This 17th day of November, 1939.

STATUTORY RULES AND ORDERS.

1939. No. 343.

OFFENCES AGAINST THE STATE (SCHEDULED OFFENCES)

(No. 2) ORDER, 1939.

WHEREAS it is enacted by subsection (1) of section 36 of the Offences Against the State Act, 1939 (No. 13 of 1939), that whenever while Part V of the said Act is in force the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of the said Part of the said Act :

AND WHEREAS Part V of the Offences Against the State Act, 1939, is in force :

AND WHEREAS the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the offences specified in the Appendix hereto :

NOW, the Government, in exercise of the powers conferred on them by section 36 or the Offences Against the State Act, 1939 (No. 13 of 1939), and of every and any other power them in this behalf enabling, hereby order as follows :—

1. This Order may be cited as the Offences Against the State (Scheduled Offences) (No. 2) Order, 1939.
2. It is hereby declared that the offences specified in the Appendix hereto shall be scheduled offences for the purposes of Part V of the Offences Against the State Act, 1939 (No. 13 of 1939).

APPENDIX.

1. Unlawful assembly.
2. Any offence against the Malicious Damage Act, 1861.
3. An offence under section 7 of the Conspiracy and Protection of Property Act, 1875.
4. An offence under section 5 of the Emergency Powers Act, 1939 (No. 28 of 1939).

DUBLIN.

This 24th day of November, 1939.

S.I. No. 142 of 1972.

OFFENCES AGAINST THE STATE (SCHEDULED OFFENCES) ORDER, 1972.

WHEREAS it is enacted by section 36 (1) of the Offences against the State Act, 1939 (No. 13 of 1939), that whenever while Part V of the said Act is in force the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of the said Part of the said Act :

AND WHEREAS Part V of the Offences against the State Act, 1939, is in force :

AND WHEREAS the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the offences specified in the Appendix hereto :

NOW, the Government, in exercise of the powers conferred on them by section 36 of the Offences against the State Act, 1939 (No. 13 of 1939), hereby order as follows :

1. This Order may be cited as the Offences against the State (Scheduled Offences) Order, 1972.
2. It is hereby declared that the offences specified in the Appendix hereto shall be scheduled offences for the purposes of Part V of the Offences against the State Act, 1939 (No. 13 of 1939).

APPENDIX

1. Offences under the Malicious Damage Act, 1861.
2. Offences under the Explosive Substances Act, 1883.
3. Offences under the Firearms Acts, 1925 to 1971.
4. Offences under the Offences against the State Act, 1939.

GIVEN under the Official Seal of the Government, this 30th day of May, 1972.

SEÁN Ó LOINSIGH
Taoiseach.

S.I. No. 282 of 1972.

**OFFENCES AGAINST THE STATE (SCHEDULED OFFENCES)
(No. 2) ORDER, 1972.**

WHEREAS it is enacted by section 36 (1) of the Offences against the State Act, 1939(No. 13 of 1939), that whenever while Part V of the said Act is in force the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of the said Part of the said Act :

AND WHEREAS Part V of the Offences against the State Act, 1939, is in force :

AND WHEREAS the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the offences specified in the Appendix hereto :

NOW, the Government, in exercise of the powers conferred on them by section 36 of the Offences against the State Act, 1939 (No. 13 of 1939), hereby order as follows :

1. This Order may be cited as the Offences against the State (Scheduled Offences) (No. 2) Order, 1972.
2. It is hereby declared that the offences specified in the Appendix hereto shall be scheduled offences for the purposes of Part V of the Offences against the State Act, 1939 (No. 13 of 1939).

APPENDIX.

Offences under section 7 of the Conspiracy and Protection of Property Act, 1875.

GIVEN under the Official Seal of the Government, this 17th day of November, 1972.

SEÁN Ó LOINSIGH.
Taoiseach.

S.I. No. 7 of 1983.

UNLAWFUL ORGANISATION (SUPPRESSION) ORDER, 1983.

WHEREAS it is enacted by section 18 of the Offences against the State Act, 1939 (No. 13 of 1939), that an organisation which does any of certain things enumerated in that section shall be an unlawful organisation within the meaning and for the purposes of that Act:

AND WHEREAS it is enacted by section 19 (1) of the said Act that, if and whenever the Government are of opinion that any particular organisation is an unlawful organisation, it shall be lawful for the Government by order to declare that such organisation is an unlawful organisation and ought, in the public interest, to be suppressed:

AND WHEREAS the Government are of opinion that the organisation styling itself the Irish National Liberation Army (also the I.N.L.A.) is an unlawful organisation:

NOW, the Government, in exercise of the power conferred on them by section 19 (1) of the Offences Against the State Act, 1939, hereby order as follows:—

1. This Order may be cited as the Unlawful Organisation (Suppression) Order, 1983.
2. It is hereby declared that the organisation styling itself the Irish National Liberation Army (also the I.N.L.A.) is an unlawful organisation and ought, in the public interest, to be suppressed.

GIVEN under the Official Seal of the Government, this 5th day of January, 1983.

GARRET FITZGERALD,
Taoiseach.

EXPLANATORY NOTE.

This Order declares that the organisation styling itself the Irish National Liberation Army (also the I.N.L.A.) is an unlawful organisation.

APPENDIX 5

INFORMAL CONSOLIDATION OF LEGISLATION

OFFENCES AGAINST THE STATE ACT, 1939

ARRANGEMENT OF SECTIONS.

Preliminary and General.

Section.

1. Short title.
2. Definitions.
3. Exercise of powers by superintendents of the *Gárda Síochána*.
4. Expenses.
5. Repeals.

PART II.

OFFENCES AGAINST THE STATE.

6. Usurpation of functions of government.
7. Obstruction of government.
8. Obstruction of the President.
9. Interference with military or other employees of the State.

10. Prohibition of printing, etc., certain documents.
11. Foreign newspapers, etc., containing seditious or unlawful matter.
12. Possession of treasonable, seditious, or incriminating documents.
13. Provisions in respect of documents printed for reward.

14. Obligation to print printer's name and address on documents.
15. Unauthorised military exercises prohibited.
16. Secret societies in army or police.
17. Administering unlawful oaths.

PART III.

UNLAWFUL ORGANISATIONS.

18. Unlawful organisations.
19. Suppression orders.
20. Declarations of legality.
21. Prohibition of membership of an unlawful organisation.

22. Provisions consequent upon the making of a suppression order.
23. Provisions consequent upon the making of a declaration of legality.
24. Proof of membership of an unlawful organisation by possession of incriminating document.
25. Closing of buildings.

PART IV.

MISCELLANEOUS.

26. Evidence of publication of treasonable, seditious, or incriminating document.
27. Prohibition of certain public meetings.
28. Prohibition of meetings in the vicinity of the Oireachtas.
29. Search warrants in relation to the commission of offences under this Act or to treason.
30. Arrest and detention of suspected persons.
31. Offences by bodies corporate.
32. Re-capture of escaped prisoners.
33. Remission, etc., in respect of convictions by a Special Criminal Court.
34. Forfeitures and disqualifications on certain convictions by a Special Criminal Court.

PART V.

SPECIAL CRIMINAL COURTS.

35. Commencement and cesser of this Part of this Act.
36. Scheduled offences.
37. Attempting, etc., to commit a scheduled offence.
38. Establishment of Special Criminal Courts.
39. Constitution of Special Criminal Courts.
40. Verdicts of Special Criminal Courts.
41. Procedure of Special Criminal Courts.
42. Authentication of orders of Special Criminal Courts.

43. Jurisdiction of Special Criminal Courts.
44. Appeal to Court of Criminal Appeal.
45. Proceedings in the District Court in relation to scheduled offences.
46. Proceedings in the District Court in relation to non-scheduled offences.
47. Charge before Special Criminal Court in lieu of District Court.
48. Transfer of trials from ordinary Courts to a Special Criminal Court.
49. Selection of the Special Criminal Court by which a person is to be tried.
50. Orders and sentences of Special Criminal Courts.
51. Standing mute of malice and refusal to plead, etc.

52. Examination of detained persons.
53. Immunities of members, etc., of Special Criminal Courts.

PART VI.

POWERS OF INTERNMENT.

- 54. Commencement and cesser of this Part of this Act.*
- 55. Special powers of arrest and detention.*
- 56. Powers of search, etc., of detained persons.*
- 57. Release of detained persons.*
- 58. Regulations in relation to places of detention.*
- 59. Commission for inquiring into detentions.*

(Sections 54-59 inclusive repealed by 1940 Act)

ÉIRE

Number 13 of 1939

Offences Against the State Act, 1939.

AN ACT TO MAKE PROVISION IN RELATION TO ACTIONS AND CONDUCT CALCULATED TO UNDERMINE PUBLIC ORDER AND THE AUTHORITY OF THE STATE AND FOR THAT PURPOSE TO PROVIDE FOR THE PUNISHMENT OF PERSONS GUILTY OF OFFENCES AGAINST THE STATE, TO REGULATE AND CONTROL IN THE PUBLIC INTEREST THE FORMATION OF ASSOCIATIONS, TO ESTABLISH SPECIAL CRIMINAL COURTS IN ACCORDANCE WITH ARTICLE 38 OF THE CONSTITUTION AND PROVIDE FOR THE CONSTITUTION, POWERS, JURISDICTION, AND PROCEDURE OF SUCH COURTS, TO REPEAL CERTAIN ENACTMENTS AND TO MAKE PROVISION GENERALLY IN RELATION TO MATTERS CONNECTED WITH THE MATTERS AFORESAID. [14th June, 1939].

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

PART I.

Preliminary and General.

- 1.- This Act may be cited as the Offences against the State Act, 1939. Short title.
- 2.- In this Act - Definitions.
- the word "organisation" includes associations, societies, and other organisations or combinations of persons of whatsoever nature or kind, whether known or not known by a distinctive name;
- the word "document" includes a book and also a newspaper, magazine, or other periodical publication, and also a pamphlet, leaflet, circular or advertisement and also-
- (a) any map, plan, graph or drawing
- (b) any photograph,
- Added by
Section 5 of
1972 Act.*

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom, and

(d) any film, microfilm, negative, tape or other device in which one or more visual images are embodied (whether with or without sounds or other data) so as to be capable (as aforesaid) of being reproduced therefrom and a reproduction or still reproduction of the image or images embodied therein whether enlarged or not and whether with or without sounds or other data;

the expression "incriminating document" means a document of whatsoever date, or bearing no date, issued by or emanating from an unlawful organisation or appearing to be so issued or so to emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of an unlawful organisation;

the expression "treasonable document" includes a document which relates directly or indirectly to the commission of treason;

the expression "seditious document" includes-

(a) a document consisting of or containing matter calculated or tending to undermine the public order or the authority of the State, and

(b) a document which alleges, implies, or suggests or is calculated to suggest that the government functioning under the Constitution is not the lawful government of the State or that there is in existence in the State any body or organisation not functioning under the Constitution which is entitled to be recognised as being the government of the country, and

(c) a document which alleges, implies, or suggests or is calculated to suggest that the military forces maintained under the Constitution are not the lawful military forces of the State, or that there is in existence in the State a body or organisation not established and maintained by virtue of the Constitution which is entitled to be recognised as a military force, and

(d) a document in which words, abbreviations or symbols referable to a military body are used in referring to an unlawful organisation;

the word "offence" includes treason, felonies, misdemeanours, and statutory and other offences;

references to printing include every mode of representing or reproducing words in a visible form, and the word "print" and all cognate words shall be construed accordingly.

- 3.- Any power conferred by this Act on an officer of the *Gárda Síochána* not below the rank of chief superintendent may be exercised by any superintendent of the *Gárda Síochána* who is authorised (in respect of any particular power or any particular case) in that behalf in writing by the Commissioner of the *Gárda Síochána*. Exercise of powers by superintendent of the *Gárda Síochána*
- 4.- The expenses incurred by any Minister of State in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas. Expenses.
- 5.- The *Treasonable Offences Act, 1925 (No. 18 of 1925)*, and the *Public Safety (Emergency Powers) Act, 1926 (No. 42 of 1926)* are hereby repealed. Repeals.

PART II.

OFFENCES AGAINST THE STATE.

- 6.- (1) Every person who usurps or unlawfully exercises any function of government, whether by setting up, maintaining or taking part in any way in a body of persons purporting to be a government or a legislature but not authorised in that behalf by or under the Constitution, or by setting up, maintaining, or taking part in any way in a purported court or other tribunal not lawfully established, or by forming, maintaining, or being a member of an armed force or a purported police force not so authorised, or by any other action or conduct whatsoever, shall be guilty of felony and shall be liable on conviction thereof to imprisonment for a term not exceeding 20 years. Usurpation of functions of government. See sections 16 of No. 32 of 1976 and 25 of no. 39 of 1961
- Amended by section 2(1) of No. 32 of 1976.*
- (2) Every person who shall attempt to do any thing the doing of which is a felony under the foregoing sub-section of this section or who aids or abets or conspires with another person to do or attempt to do any such thing or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding 20 years. Amended by section 2(2) of No. 32 of 1976
- 7.- (1) Every person who prevents or obstructs, or attempts or is concerned in an attempt to prevent or obstruct, by force of arms or other violent means or by any form of intimidation the carrying on of the government of the State or any branch (whether legislative, judicial, or executive) of the government of the State or the exercise or performance by any member of the legislature, the judiciary, or the executive or by any officer or employee (whether civil (including police) or military) of the State of any of his functions, powers, or duties Obstruction of government. See section 25 of no. 39 of 1961

shall be guilty of felony and shall be liable on conviction thereof to imprisonment for a term not exceeding 20 years.

Amended by

*section 2(3) of
No. 32 of 1976.*

(2) Every person who aids or abets or conspires with another person to do any thing the doing of which is a felony under the foregoing sub-section of this section or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding 20 years.

Amended by

*section 2(4) of
No. 32 of 1976.*

8.- (1) Every person who prevents or obstructs, or attempts or is concerned in an attempt to prevent or obstruct, by force of arms or other violent means or by any form of intimidation the exercise or performance by the President of any of his functions, powers, or duties shall be guilty of felony and shall be liable on conviction thereof to suffer penal servitude for a term not exceeding seven years or to imprisonment for a term not exceeding two years.

Obstruction of
the President.
*See section 25
of no. 39 of
1961*

(2) Every person who aids or abets or conspires with another person to do any thing the doing of which is a felony under the foregoing sub-section of this section or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

9.- (1) Every person who shall with intent to undermine public order or the authority of the State commit any act of violence against or of interference with a member of a lawfully established military or police force (whether such member is or is not on duty) or shall take away, injure, or otherwise interfere with the arms or equipment, or any part of the arms or equipment, or any part of the arms or equipment, of any such member shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

Interference
with military
or other
employees of
the State.

(2) Every person who shall incite or encourage any person employed in any capacity by the State to refuse, neglect, or omit (in a manner or to an extent calculated to dislocate the public service or a branch thereof) to perform his duty or shall incite or encourage any person so employed to be negligent or insubordinate (in such manner or to such extent as aforesaid) in the performance of his duty shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

(3) Every person who attempts to do any thing the doing of which is a misdemeanour under either of the foregoing sub-sections of this section or who aids or abets or conspires with another person to do or attempt to do any such thing or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding twelve months.

10.- (1) It shall not be lawful to set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document- Prohibition of printing, etc certain documents.

(a) which is or contains or includes an incriminating document, or

(b) which is or contains or includes a treasonable document, or

(c) which is or contains or includes a seditious document.

(2) In particular and without prejudice to the generality of the foregoing sub-section of this section, it shall not be lawful for any person to send or contribute to any newspaper or other periodical publication or for the proprietor of any newspaper or other periodical publication to publish in such newspaper or publication any letter, article, or communication which is sent or contributed or purports to be sent or contributed by or on behalf of an unlawful organisation or which is of such nature or character that the printing of it would be a contravention of the foregoing sub-section of this section.

(3) Every person who shall contravene either of the foregoing sub-sections of this section shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to a fine not exceeding one hundred pounds, or, at the discretion of the Court, to imprisonment for a term not exceeding six months or to both such fine and such imprisonment and also (in any case), if the Court so directs, to forfeit every copy in his possession of the document, newspaper, or publication in relation to which the offence was committed and also (where the act constituting the offence was the setting up in type or the printing of a document) to forfeit, if the Court so directs, so much of the printing machinery in his possession as is specified in that behalf by the Court.

(4) Every person who unlawfully has in his possession a document which was printed or published in contravention of this section or a newspaper or other periodical publication containing a letter, article, or other communication published therein in contravention of this section shall, when so requested by a member of the *Gárda Síochána*, deliver up to such member every copy in his possession of such document or of such newspaper or publication (as the case may be), and if he fails or refuses so to do he shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months and also, if the Court so directs, to forfeit every copy in his possession of the document, newspaper or publication in relation to which the offence was committed.

(5) Nothing in this section shall render unlawful the setting up in type, printing, publishing, sending through the post, distributing, selling, offering for sale, or having possession of a document or a copy of a document which is published at the request or by permission of the Government or is published in the course or as part of a fair report of the proceedings in either House of the *Oireachtas* or in a court of justice or before any other court or tribunal lawfully exercising jurisdiction.

11.- (1) Whenever the Minister for Justice is of opinion, in respect of a newspaper or other periodical publication ordinarily printed outside the State, that a particular issue of such publication either is seditious or contains any matter the publication of which is a contravention of this Act, the said Minister may by order, if he considers that it is in the public interest so to do, do either or both of the following things, that is to say:-

Foreign newspapers, etc., containing seditious or unlawful matter.

(a) authorise members of the *Gárda Síochána* to seize and destroy all copies of the said issue of such publication wherever they may be found;

(b) prohibit the importation of any copy of any issue of such publication published within a specified period (not exceeding three months) after the publication of the said issue of such publication.

(2) The Minister for Justice may by order, whenever he thinks proper so to do, revoke or amend any order made by him under the foregoing sub-section of this section or any order (made by him under this sub-section) amending any such order.

(3) It shall not be lawful for any person to import any copy of an issue of a periodical publication the importation of which is prohibited by an order under this section.

Portion of sub-section deleted by section 13 of 1945 Act.

12.- (1) It shall not be lawful for any person to have any treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control.

treasonable,

Possession of seditious, or incriminating documents.

(2) Every person who has a treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the Court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

(3) Where a person is charged with an offence under this section, it shall be a good defence to such charge for such person to prove-

(a) that he is an officer of the State and had possession or custody of the document in respect of which the offence is alleged to have been committed in the course of his duties as such officer, or

- (b) that he did not know that the said document was in his possession or on any lands or premises owned or occupied by him or under his control, or
- (c) that he did not know the nature or contents of the said document.

(4) Every person who has in his possession a treasonable document, seditious document, or incriminating document shall, when so requested by a member of the *Gárda Síochána*, deliver up to such member the said document and every copy thereof in his possession, and if he fails or refuses so to do he shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

(5) Where the proprietor or the editor or other chief officer of a newspaper or other periodical publication receives a document which appears to him to be a treasonable document, a seditious document, or an incriminating document and such document is not published in such newspaper or periodical publication, the following provisions shall have effect, that is to say:-

- (a) if such proprietor, editor, or chief editor is requested by a member of the *Gárda Síochána* to deliver up such document to such member, such proprietor, editor, or chief officer may, in lieu of so delivering up such document, destroy such document and every (if any) copy thereof in his possession in the presence and to the satisfaction of such member;
- (b) if such proprietor, editor, or chief officer destroys under the next preceding paragraph of this subsection such document and every (if any) copy thereof in his possession or of his own motion destroys such document within twenty-four hours after receiving it and without having made any copy of it or permitted any such copy to be made, such destruction shall be a good defence to any charge against such proprietor, editor, or chief officer of an offence under any sub-section of this section in respect of such document and no civil or criminal action or other proceeding shall lie against such proprietor, editor, or chief officer on account of such destruction.

13.- (1) Every person who shall print for reward any document shall do every of the following things, that is to say:-

Provisions in respect of Documents printed for Reward.
See section 14 of No. 32 of 1976.

- (a) at the time of or within twenty-four hours after printing such document, print or write on at least one copy of such document the name and address of the person for whom or on whose instructions such document was printed;

(b) retain, for six months from the date on which such document was printed, a copy of such document on which the said name and address is printed or written as aforesaid;

(c) on the request of a member of the *Gárda Síochána* at any time during the said period of six months, produce for the inspection of such member the said copy of such document so retained as aforesaid.

(2) Every person who shall print for reward any document and shall fail to comply in any respect with the foregoing subsection of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof, in the case of a first such offence, to a fine not exceeding twenty-five pounds and, in the case of a second or any subsequent such offence, to a fine not exceeding fifty pounds.

(3) This section does not apply to any newspaper, magazine or other periodical publication which is printed by the proprietor thereof on his own premises.

- 14.- (1) Every person who shall print for reward any document (other than a document to which this section does not apply) which he knows or has reason to believe is intended to be sold or distributed (whether to the public generally or to a restricted class or number of persons) or to be publicly or privately displayed shall, if such document consists only of one page or sheet printed on one side only, print his name and the address of his place of business on the front of such document and shall, in every other case, print the said name and address on the first or the last page of such document.
- Obligation to print printer's name and address on documents
See section 14 of No. 1976.

32 of

(2) Every person who shall contravene by act or omission the foregoing sub-section of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof, in the case of a first such offence, to a fine not exceeding twenty-five pounds and, in the case of a second or any subsequent such offence, to a fine not exceeding fifty pounds.

(3) This section does not apply to any of the following documents, that is to say:-

(a) currency notes, bank notes, bills of exchange, promissory notes, cheques, receipts and other financial or commercial documents,

(b) writs, orders, summonses, warrants, affidavits, and other documents for the purposes of or for use in any lawful court or tribunal,

(c) any document printed by order of the Government, either House of the Oireachtas, a Minister of State, or any officer of the State in the execution of his duties as such officer,

(d) any document which the Minister for Justice shall by order declare to be a document to which this section does not apply.

15.- (1) Save as authorised by a Minister of State under this section, and subject to the exceptions hereinafter mentioned, it shall not be lawful for any assembly of persons to practise or to train or drill themselves in or be trained or drilled in the use of arms or the performance of military exercises, evolutions, or manoeuvres nor for any persons to meet together or assemble for the purpose of so practising or training or drilling or being trained or drilled.

Unauthorised
military
exercises
prohibited.

*See section 16
of No. 32 of
1976 .*

(2) A Minister of State may at his discretion by order, subject to such limitations, qualifications and conditions as he shall think fit to impose and shall express in the order, authorise the members of any organisation to meet together and do such one or more of the following things as shall be specified in such order, that is to say, to practise or train or drill themselves in or be trained or drilled in the use of arms or the performance of military exercises, evolutions, or manoeuvres.

(3) If any person is present at or takes part in or gives instruction to or trains or drills an assembly of persons who without or otherwise than in accordance with an authorisation granted by a Minister of State under this section practise, or train or drill themselves in, or are trained or drilled in the use of arms or the performance of any military exercise, evolutions, or manoeuvre or who without or otherwise than in accordance with such authorisation have assembled or met together for the purpose of so practising, or training or drilling or being trained or drilled, such person shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding 15 years.

Amended by

*section 2(5) of
No. 32 of 1976.*

(4) This section shall not apply to any assembly of members of any military or police force lawfully maintained by the Government.

*See section
12(4) of
1998 Act.*

(5) In any prosecution under this section the burden of proof that any act was authorised under this section shall lie on the person prosecuted.

16.- (1) Every person who shall-

Secret societies
in army or
police.

(a) form, organise, promote, or maintain any secret society amongst or consisting of or including members of any military or police force lawfully maintained by the Government, or

(b) attempt to form, organise, promote or maintain any such secret society, or

(c) take part, assist, or be concerned in any way in the formation, organisation, promotion, management, or maintenance of any such society, or

(d) induce, solicit, or assist any member of a military or police force lawfully maintained by the Government to join any secret society whatsoever,

shall be guilty of a misdemeanour and shall be liable on conviction thereof to suffer penal servitude for any term not exceeding five years or imprisonment for any term not exceeding two years.

(2) In this section the expression "secret society" means an association, society, or other body the members of which are required by the regulations thereof to take or enter into, or do in fact take or enter into, an oath, affirmation, declaration or agreement not to disclose the proceedings or some part of the proceedings of the association, society, or body.

17.- (1) Every person who shall administer or cause to be administered or take part in, be present at, or consent to the administering or taking in any form or manner of any oath, declaration, or engagement purporting or intended to bind the person taking the same to do all or any of the following things, that is to say:-

Administering
unlawful oaths.

(a) to commit or to plan, contrive, promote, assist, or conceal the commission of any crime or any breach of the peace, or

(b) to join or become a member of or associated with any organisation having for its object or one of its objects the commission of any crime, or breach of the peace, or

(c) to abstain from disclosing or giving information of the existence or formation or proposed or intended formation of any such organisation, association, or other body as aforesaid or from informing or giving evidence against any member of or person concerned in the formation of any such organisation, association, or other body, or

(d) to abstain from disclosing or giving information of the commission or intended or proposed commission of any crime, breach of the peace, or from informing or giving evidence against the person who committed such an act,

shall be guilty of a misdemeanour and shall be liable on conviction thereof to suffer imprisonment for any term not exceeding two years.

(2) Every person who shall take any such oath, declaration, or engagement as is mentioned in the foregoing sub-section shall be guilty of a misdemeanour and be liable on conviction thereof to suffer imprisonment for any term not exceeding two years unless he shall show-

(a) that he was compelled by force or duress to take such oath, declaration, or engagement (as the case may be), and

(b) that within four days after the taking of such oath, declaration, or engagement, if not prevented by actual force or incapacitated by illness or other sufficient cause, or where so prevented or incapacitated then within four days after the cesser of the hindrance caused by such force, illness or other cause, he declared to an officer of the *Gárda Síochána* the fact of his having taken such oath, declaration, or engagement, and all the circumstances connected therewith and the names and descriptions of all persons concerned in the administering thereof so far as such circumstances, names, and descriptions were known to him.

PART III

UNLAWFUL ORGANISATIONS

18.- In order to regulate and control in the public interest the exercise of the constitutional right of citizens to form associations, it is hereby declared that any organisation which-

Unlawful
organisations.

(a) engages in, promotes, encourages, or advocates the commission of treason or any activity of a treasonable nature, or

(b) advocates, encourages, or attempts the procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, or

(c) raises or maintains or attempts to raise or maintain a military or armed force in contravention of the Constitution or without constitutional authority, or

(d) engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law, or

(e) engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means, or

(f) promotes, encourages, or advocates the non-payment of moneys payable to the Central Fund or any other public fund or the non-payment of local taxation,

shall be an unlawful organisation within the meaning and for the purposes of this Act, and this Act shall apply and have effect in relation to such organisation accordingly.

- 19.-** (1) If and whenever the Government are of opinion that any particular organisation is an unlawful organisation, it shall be lawful for the Government by order (in this Act referred to as a suppression order) to declare that such organisation is an unlawful organisation and ought, in the public interest, to be suppressed. Suppression orders.

See section 8 of 1985 Act and section 6 of 1998 Act.
- (2) The Government may by order, whenever they so think proper, amend or revoke a suppression order.
- (3) Every suppression order shall be published in the *Iris Oifigiúil* as soon as conveniently may be after the making thereof.
- (4) A suppression order shall be conclusive evidence for all purposes other than an application for a declaration of legality that the organisation to which it relates is an unlawful organisation within the meaning of this Act.
- 20.-** (1) Any person (in this section referred to as the applicant) who claims to be a member of an organisation in respect of which a suppression order has been made may, at any time within thirty days after the publication of such order in the *Iris Oifigiúil*, apply to the High Court in a summary manner on notice to the Attorney-General for a declaration (in this Act referred to as a declaration of legality) that such organisation is not an unlawful organisation. *See section 3(1) of 1974 Act.*
Declarations of legality.
- (2) Where, on an application under the foregoing subsection of this section, the High Court, after hearing such evidence as may be adduced by the applicant or by the Attorney General, is satisfied that the organisation to which such application relates is not an unlawful organisation, it shall be lawful for the High Court to make a declaration of legality in respect of such organisation
- (3) The High Court shall not make a declaration of legality unless the applicant for such declaration either-

(a) gives evidence in support of the application and submits himself to cross-examination by counsel for the Attorney General, or

(b) satisfies the High Court that he is unable by reason of illness or other sufficient cause to give such evidence and adduces in support of the application the evidence of at least one person who submits himself to cross-examination by counsel for the Attorney-General.

(4) Whenever, on an application under this section, the High Court, or the Supreme Court on appeal from the High Court, makes a declaration of legality in respect of an organisation, the suppression order relating to such organisation shall forthwith become null and void, but without prejudice to the validity of anything previously done thereunder.

(5) Where the High Court makes a declaration of legality, it shall be lawful for that court, on the application of the Attorney-General, to suspend the operation of the next preceding sub-section of this section in respect of such declaration until the final determination of an appeal by the Attorney-General to the Supreme Court against such declaration, and if the High Court so suspends the said sub-section, the said sub-section shall only come into operation in respect of such declaration if and when the Supreme Court affirms the order of the High Court making such declaration.

(6) Whenever an application for a declaration of legality is made under this section and is refused by the High Court, or by the Supreme Court on appeal from the High Court, it shall not be lawful, in any prosecution of the applicant for the offence of being a member of the organisation to which such application relates, to give in evidence against the applicant any of the following matters, that is to say:-

(a) the fact that he made the said application, or

(b) any admission made by him or on his behalf for the purposes of or during the hearing of the said application, or

(c) any statement made in the oral evidence given by him or on his behalf (whether on examination in chief, cross-examination, or re-examination) at the hearing of the said application, or

(d) any affidavit made by him or on his behalf for the purposes of the said application.

21.- (1) It shall not be lawful for any person to be a member of an unlawful organisation.

Prohibition of membership of an unlawful organisation.

See section 3 of No. 26 of 1972 and sections 2 and 3 of 1998 Act.

(2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an offence under this section and shall -

(a) on summary conviction thereof, be liable to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment, or

*See section 16
of No. 32 of
1976.*

(b) on conviction thereof on indictment, be liable to imprisonment for a term not exceeding 7 years.

*Amended by
section 2(6)
of No. 32 of
1976.*

(3) It shall be a good defence for a person charged with the offence under this section of being a member of an unlawful organisation, to show-

(a) that he did not know that such organisation was an unlawful organisation, or

(b) that, as soon as reasonably possible after he became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he ceased to be a member thereof and dissociated himself therefrom.

(4) Where an application has been made to the High Court for a declaration of legality in respect of an organisation no person who is, before the final determination of such application, charged with an offence under this section in relation to that organisation shall be brought to trial on such charge before such final determination, but a postponement of the said trial in pursuance of this sub-section shall not prevent the detention of such person in custody during the period of such postponement.

22.- Immediately upon the making of a suppression order, the following provisions shall have effect in respect of the organisation to which such order relates, that is to say:-

*Provisions
consequent upon
the making of a
Suppression order.
See
sections 3, 4, 5, 6
and 8 of 1985
Act.*

(a) all the property (whether real, chattel real, or personal and whether in possession or in action) of such organisation shall become and be forfeited to and vested in the Minister for Justice;

(b) the said Minister shall take possession of all lands and premises which become forfeited to him under this section and the said Minister may cause all such things to be done by members of the *Gárda Síochána* as appear to him to be necessary or expedient for the purpose of such taking possession;

(c) subject to the subsequent provisions of this section, it shall be lawful for the said Minister to sell or let, on such terms as he shall, with the sanction of the Minister for Finance, think proper, any lands or premises which become forfeited to him under this section or to use any such lands or premises for such government purposes as he shall, with the sanction aforesaid, think proper;

(d) the Minister for Justice shall take possession of, recover, and get in all personal property which becomes forfeited to him under this section and may take such legal proceedings and other steps as shall appear to him to be necessary or expedient for that purpose;

(e) subject to the subsequent provisions of this section, it shall be lawful for the said Minister to sell or otherwise realise, in such manner and upon such terms as he shall, with the sanction of the Minister for Finance, think proper, all personal property which becomes forfeited to him under this section;

(f) the Minister for Justice shall pay into or dispose of for the benefit of the Exchequer, in accordance with the directions of the Minister for Finance, all money which becomes forfeited to him under this section and the net proceeds of every sale, letting, realisation, or other disposal of any other property which becomes so forfeited;

(g) no property which becomes forfeited to the Minister for Justice under this section shall be sold, let, realised, or otherwise disposed of by him until the happening of whichever of the following events is applicable, that is to say:-

(i) if no application is made under this Act for a declaration of legality in respect of the said organisation within the time limited by this Act for the making of such applications, the expiration of the time so limited,

(ii) if any such application is so made, the final determination of such application.

23.- (1) Whenever a declaration of legality is made, the following provisions shall have effect, that is to say:-

	Provisions
	consequent upon
	the making of a
	declaration of
	legality.
	<i>See section 8 of</i>
	<i>1985 Act.</i>

(a) every person who is detained in custody charged with the offence of being a member of the organisation to which such declaration of legality relates shall forthwith be released from such custody;

(b) all the property of the said organisation which became forfeited to the Minister for Justice by virtue of this Act on the making of the suppression order in respect of the said organisation shall become and be the property of the said organisation and shall be delivered to the said organisation by the said Minister on demand.

(2) Where the High Court makes a declaration of legality, it shall be lawful for that court, on the application of the Attorney-General, to suspend the operation of the foregoing sub-section of this section in respect of such declaration until the final determination of an appeal by the Attorney-General to the Supreme Court against such declaration, and if the High Court so suspends the said sub-section, the said sub-section shall only come into operation in respect of such declaration if and when the Supreme Court affirms the order of the High Court making such declaration.

See section 3(1) of 1974 Act.

24.- On the trial of a person charged with the offence of being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such person was a member of the said organisation at the time alleged in the said charge.

Proof of membership of an unlawful organisation by possession of incriminating document.

25. (1) Whenever an officer of the *Gárda Síochána* not below the rank of chief superintendent is satisfied that a building is being used or has been used in any way for the purposes, direct or indirect, of an unlawful organisation, such officer may make an order (in this section referred to as a closing order) that such building be closed for the period of 12 months from the date of such order.

Closing of buildings.

Amended by section 4 of No. 32 of 1976.

(2) Whenever a closing order has been made an officer of the *Gárda Síochána* not below the rank of chief superintendent may-

(a) extend the operation of such closing order for a further period not exceeding 12 months from the expiration of the period mentioned in such closing order;

Amended by section 4 of No. 32 of 1976.

(b) terminate the operation of such closing order.

(3) Whenever a closing order has been made or has been extended, any person having an estate or interest in the building to which such closing order relates may apply to the

High Court, in a summary manner on notice to the Attorney-General, for such order as is hereinafter mentioned,

See section 3(1)

and on such application the High Court, if it is satisfied that,

of 1974 Act.

having regard to all the circumstances of the case, the making

or the extension (as the case may be) of such closing order was not reasonable, may make an order quashing such closing order or the said extension thereof, as the case may be.

(4) Whenever and so long as a closing order is in operation, the following provisions shall have effect, that is to say:-

(a) it shall not be lawful for any person to use or occupy the building to which such closing order relates or any part of such building;

(b) any member of the *Gárda Síochána* not below the rank of inspector may take all such steps as he shall consider necessary or expedient to prevent such building or any part thereof being used or occupied in contravention of this sub-section;

(c) every person who uses or occupies such building or any part of such building in contravention of this sub-section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

(5) In this section the word "building" includes a part of a building and also all outhouses, yards and gardens within the curtilage of the building.

(6) Whenever a closing order has been extended, a member of the *Garda Síochána* not below the rank of chief superintendent may extend the operation of such closing order for a further period or periods each of which shall not exceed 12 months, but a closing order shall not be in operation for more than three years.

Inserted by section 4(b) of No. 32 of 1976.

PART IV

MISCELLANEOUS.

26.- Where in any criminal proceedings the question whether a particular treasonable document, seditious document, or incriminating document was or was not published by the accused (whether by himself or in concert with other persons or by arrangement between himself and other persons) is in issue and an officer of the *Gárda Síochána* not below the rank of chief superintendent states on oath that he believes

seditious or

Evidence of publication of treasonable, incriminating document.

that such document was published (as the case may be) by the accused or by the accused in concert with other persons, such statement shall be evidence (until the accused denies on oath that he published such document either himself or in concert or by arrangement as aforesaid) that the accused published such document as alleged in the said statement on oath of such officer.

27.- (1) It shall not be lawful to hold a public meeting which is held or purports to be held by or on behalf of or by arrangement or in concert with an unlawful organisation or which is held or purports to be held for the purpose of supporting, aiding, abetting, or encouraging an unlawful organisation or of advocating the support of an unlawful organisation.

Prohibition of certain public meetings.

See section 16 of No. 32 of 1976.

(2) Whenever an officer of the *Gárda Síochána* not below the rank of chief superintendent is of opinion that the holding of a particular public meeting about to be or proposed to be held would be a contravention of the next preceding sub-section of this section, it shall be lawful for such officer by notice given to a person concerned in the holding or organisation of such meeting or published in a manner reasonably calculated to come to the knowledge of the persons so concerned, to prohibit the holding of such meeting, and thereupon the holding of such meeting shall become and be unlawful.

(3) Whenever an officer of the *Gárda Síochána* gives any such notice as is mentioned in the next preceding sub-section of this section, any person claiming to be aggrieved by such notice may apply to the High Court in a summary manner on notice to the Attorney-General for such order as is hereinafter mentioned and, upon the hearing of such application, the High Court if it so thinks proper, may make an order annulling such notice.

See section 3(1) of 1974 Act.

(4) Every person who organises or holds or attempts to organise or hold a public meeting the holding of which is a contravention of this section or who takes part or is concerned in the organising or the holding of any such meeting shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding £500 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both such fine and such imprisonment .

Amended by Section 2(7) of No. 32 of 1976.

(5) In this section the expression "public meeting" includes a procession and also includes (in addition to a meeting held in a public place or on unenclosed land) a meeting held in a building or on enclosed land to which the public are admitted, whether with or without payment.

28.- (1) It shall not be lawful for any public meeting to be held in, or any procession to pass along or through, any public street or unenclosed place which or any part of which is situate within one-half of a mile from any building in which both Houses or either House of the Oireachtas are or is sitting or about to sit if either:-

Prohibition of meetings in the vicinity of the Oireachtas.

- (a) an officer of the *Gárda Síochána* not below the rank of chief superintendent has, by notice given to a person concerned in the holding or organisation of such meeting or procession or published in a manner reasonably calculated to come to the knowledge of the persons so concerned, prohibited the holding of such meeting in or the passing of such procession along or through any such public street or unenclosed place as aforesaid, or
- (b) a member of the *Gárda Síochána* calls on the persons taking part in such meeting or procession to disperse.

(2) Every person who-

- (a) shall organise, hold, or take part in or attempt to organise, hold, or take part in a public meeting or a procession in any public street or unenclosed place as is mentioned in the foregoing sub-section of this section after such meeting or procession has been prohibited by a notice under paragraph (a) of the said sub-section,
- (b) shall hold or take part in or attempt to hold or take part in a public meeting or a procession in any such public street or unenclosed place as aforesaid after a member of the *Gárda Síochána* has, under paragraph (b) of the said sub-section, called upon the persons taking part in such meeting or procession to disperse, or
- (c) shall remain in or enter into any such public street or unenclosed space after being called upon to disperse as aforesaid,

shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

29.- (1) Where a member of the *Gárda Síochána* not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence of or relating to the commission or intended commission of an offence under this Act or the Criminal Law Act, 1976, or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act, or evidence relating to the commission or intended commission of treason, is to be found in any building or part of a building or in any vehicle, vessel, aircraft or hovercraft or in any other place whatsoever, he may issue to a member of the *Gárda Síochána* not below the rank of sergeant a search warrant under this section in relation to such place. *Inserted by
No. 32 of 1976.*

(2) A search warrant under this section shall operate to authorise the member of the *Gárda Síochána* named in the warrant, accompanied by any members of the *Gárda*

Síochána or the Defence Forces, to enter, within one week from the date of the warrant, and if necessary by the use of force, any building or part of a building or any vehicle, vessel, aircraft or hovercraft or any other place named in the warrant, and to search it and any person found there, and to seize anything found there or on such person.

(3) A member of the Garda Síochána or the Defence Forces acting under the authority of a search warrant under this section may-

(a) demand the name and address of any person found where the search takes place, and

(b) arrest without warrant any such person who fails or refuses to give his name and address when demanded, or gives a name or address which is false or misleading or which the member with reasonable cause suspects to be false or misleading.

(4) Any person who obstructs or attempts to obstruct any member of the Garda Síochána or the Defence Forces acting under the authority of a search warrant under this section or who fails or refuses to give his name and address when demanded, or gives a name or address which is false or misleading, shall be guilty of an offence and shall be liable-

(a) on summary conviction, to a fine not exceeding £500 or to imprisonment for a term not exceeding 12 months, or to both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.

(5) Any reference in subsection (1) of this section to an offence includes a reference to attempting or conspiring to commit the offence.

30.- (1) A member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.

Arrest and detention of suspected persons.
See sections 1, 7 and 8 of No. 32 of 1976; section 4(10) of 1984 Act and regulation 7 of SI 119 of 1987 Act.

(2) Any member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding sub-section of this section, stop and search (if

necessary by force) any vehicle or any ship, boat, or other vessel which he suspects to contain a person whom he is empowered by the said sub-section to arrest without warrant.

(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a *Gárda Síochána* station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the *Gárda Síochána* not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.

(4) An officer of the *Garda Síochána* not below the rank of superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

*Amended by
section 10
1998 Act.*

(4A) On an application under subsection (4) of this section the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

(4B) On an application under subsection (4) of this section the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the officer of the *Garda Síochána* making the application.

(4C) A person detained under this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the *Garda Síochána* and shall, if not so charged or released, be released at the expiration of the period of detention authorised by or under subsection (3) of this section or, as the case may be, that subsection and subsection (4A) of this section.

(5) A member of the *Gárda Síochána* may do all or any of the following things in respect of a person detained under this section, that is to say:-

- (a) demand of such person his name and address;
- (b) search such person or cause him to be searched;
- (c) photograph such person or cause him to be photographed;
- (d) take, or cause to be taken, the fingerprints of such person.

(6) Every person who shall obstruct or impede the exercise in respect of him by a member of the *Gárda Síochána* of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address or shall give, in response to any such demand, a name or an address which is false or misleading

shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.

30A.- (1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this Act and is released without any charge having been made against him he shall not - Rearrest under section 30 of Act of 1939.

- (a) be arrested again for the same offence, or *Inserted by section 11 of 1998 Act.*
- (b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed,

except under the authority of a warrant issued by a judge of the District Court who is satisfied on information supplied on oath by an officer of the Garda Síochána not below the rank of superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought.

(2) Section 30 of this Act, and, in particular, any powers conferred thereby, shall apply to or in respect of a person arrested in connection with an offence to which that section relates under a warrant issued pursuant to subsection (1) of this section as it applies to or in respect of a person to whom that section applies, with the following and any other necessary modifications:

(a) the substitution of the following subsection for subsection (3):

'(3) Whenever a person is arrested under a warrant issued pursuant to section 30A(1) of this Act, he may be removed to and detained in custody in a Garda Síochána station, a prison or some other convenient place for a period of 24 hours from the time of his arrest.'

(b) the deletion of subsections (4), (4A) and (4B), and

(c) the addition of the following at the end of subsection (4C):

'or, in case the detention follows an arrest under a warrant issued pursuant to section 30A of this Act, by subsection (3) of this section as substituted by the said section 30A.'

(3) Notwithstanding subsection (1) of this section, a person to whom the subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith.

31.- Where an offence under any section or sub-section of this Act is committed by a body corporate and is proved to have been so *Offences by bodies*

committed with the consent or approval of, or to have been facilitated by any neglect on the part of, any director, manager, secretary, or other officer of such body corporate, such director, manager, secretary, or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly, whether such body corporate has or has not been proceeded against in respect of the said offence.

corporate.

32.- (1) Whenever any person detained under this Act shall have escaped from such detention, such person may be arrested without warrant by any member of the *Gárda Síochána* and shall thereupon be returned in custody to the place from which he so escaped.

Re-capture of escaped prisoners.

(2) Every person who shall aid or abet a person detained under this Act to escape from such detention or to avoid recapture after having so escaped shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months

33.- (1) Except in capital cases, the Government may, at their absolute discretion, at any time remit in whole or in part or modify (by way of mitigation only) or defer any punishment imposed by a Special Criminal Court.

Remission, etc., in respect of convictions by a Special Criminal Court.

(2) Whenever the Government remits in whole or in part or defers a punishment imposed by a Special Criminal Court, the Government may attach to such remittal or deferment such conditions (if any) as they may think proper.

(3) Whenever the Government defers under the next preceding sub-section of this section the whole or any part of a sentence of imprisonment, the person on whom such sentence was imposed shall be bound to serve such deferred sentence, or part of a sentence, of imprisonment when the same comes into operation and may for that purpose be arrested without warrant.

34.- (1) Whenever a person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, holds at the time of conviction an office or employment remunerated out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation, or in or under or as a paid member of a board or body established by or under statutory authority, such person shall

Forfeitures and disqualifications on certain such convictions by a Special Criminal Court.

(Cox v.

immediately on such conviction forfeit such office, employment, place, or emolument and the same shall forthwith become and be vacant.

Invalid

Ireland HC, SC, 1992, 2 IR 503)

(2) Whenever a person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, is at the time of such conviction in receipt of a pension or superannuation allowance payable out of the Central Fund or moneys provided by the Oireachtas or

moneys raised by local taxation, or the funds of a board or body established by or under statutory authority, such person shall immediately upon such conviction forfeit such pension or superannuation allowance and such pension or superannuation allowance shall forthwith cease to be payable.

(3) Every person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, shall be disqualified-

(a) for holding, within seven years after the date of such conviction, any office or employment remunerated out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation or in or under or as a paid member of a board or body established by or under statutory authority, and

(b) for being granted out of the Central Fund or any such moneys or the funds of any such board or body, at any time after the date of such conviction, any pension, superannuation allowance, or gratuity in respect wholly or partly of any service rendered or thing done by him before the date of such conviction, and

(c) for receiving at any time after such conviction any such pension, superannuation allowance, or gratuity as is mentioned in the next preceding paragraph of this section which was granted but not paid on or before the date of such conviction.

(4) Whenever a conviction which occasions by virtue of this section any forfeiture or disqualification is quashed or annulled or the convicted person is granted a free pardon such forfeiture or disqualification shall be annulled, in the case of a quashing or annulment, as from the date of the conviction and, in the case of a free pardon, as from the date of such pardon.

(5) The Government may, at their absolute discretion, remit, in whole or in part, any forfeiture or disqualification incurred under this section and restore or revive, in whole or in part, the subject of such forfeiture as from the date of such remission.

PART V.

SPECIAL CRIMINAL COURTS.

See section 2 of 1972 Act and sections 5, 7 and 14 of 1998 Act

35.- (1) This part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.

Commencement and cessor of this Part of this Act. *See section*

(2) If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.

(3) Whenever the Government makes and publishes, under the next preceding sub-section of this section, such proclamation as is mentioned in that sub-section, this Part of this Act shall come into force forthwith.

(4) If at any time while this Part of this Act is in force the Government is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order, the Government shall make and publish a proclamation declaring that this Part of this Act shall cease to be in force, and thereupon this Part of this Act shall forthwith cease to be in force.

(5) It shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force, to pass a resolution annulling the proclamation by virtue of which this Part of this Act is then in force, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(6) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the *Iris Oifigiúil* and may also be published in any other manner which the Government shall think proper.

36.- (1) Whenever while this Part of this Act is in force the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of this Part of this Act.

Scheduled
offences.
*See section 14
of 1998 Act.*

(2) Whenever the Government has made under the foregoing sub-section of this section any such declaration as is authorised by that sub-section, every offence of the particular class or kind or under the particular enactment to which such declaration relates shall, until otherwise provided by an order under the next following sub-section of this section, be a scheduled offence for the purposes of this Part of this Act.

(3) Whenever the Government is satisfied that the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment which are for the time being scheduled

offences for the purposes of this Part of this Act can be secured through the medium of the ordinary courts, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall, upon the making of such order, cease to be scheduled offences for the purposes of this Part of this Act.

- 37.-** In addition to the offences which are, by virtue of an order made under the next preceding section, for the time being scheduled offences for the purposes of this Part of this Act, each of the following acts, that is to say, attempting or conspiring or inciting to commit, or aiding or abetting the commission of, any such scheduled offence shall itself be a scheduled offence for the said purposes.
- Attempting, etc.,
to commit a
scheduled
offence.
*See section 14
of 1998
Act.*
- 38.-** (1) As soon as may be after the coming into force of this Part of this Act, there shall be established for the purposes of this Part of this Act, a court which shall be styled and known and is in this Act referred to as a Special Criminal Court.
- Establishment of
Special Criminal
Courts.
- (2) The Government may, whenever they consider it necessary or desirable so to do, establish such additional number of courts for the purposes of this Part of this Act as they think fit, and each court so established shall also be styled and known and is in this Act referred to as a Special Criminal Court.
- (3) Whenever two or more Special Criminal Courts are in existence under this Act, the Government may, if and so often as they so think fit, reduce the number of such Courts and for that purpose abolish such of those existing Courts as appear to the Government to be redundant.
- 39.-** (1) Every Special Criminal Court established under this Part of this Act shall consist of such uneven number (not being less than three) of members as the Government shall from time to time determine, and different numbers of members may be so fixed in respect of different Special Criminal Courts.
- Constitution of
Special Criminal
Courts.
- (2) Each member of a Special Criminal Court shall be appointed, and be removable at will, by the Government.
- (3) No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.
- (4) The Minister for Finance may pay to every member of a Special Criminal Court such (if any) remuneration and allowances as the said Minister may think proper, and different rates of remuneration and allowances may be so paid to different members of any such Court, or to the members of different such Courts.

(5) The Government may appoint such registrars for the purposes of any Special Criminal Court as they think proper, and every such registrar shall hold his office on such terms and conditions and shall receive such (if any) remuneration as the Minister for Finance shall from time to time direct.

40.- (1) The determination of every question before a Special Criminal Court shall be according to the opinion of the majority of the members of such Special Criminal Court present at and taking part in such determination, but no member or officer of such Court shall disclose whether any such determination was or was not unanimous or, where such determination was not unanimous, the opinion of any individual member of such Court.

Verdicts of
Special Criminal
Courts.

(2) Every decision of a Special Criminal Court shall be pronounced by such one member of the Court as the Court shall determine, and no other member of the Court shall pronounce or indicate his concurrence in or dissent from such decision.

41.- (1) Every Special Criminal Court shall have power, in its absolute discretion, to appoint the times and places of its sittings, and shall have control of its own procedure in all respects and, shall for that purpose make, with the concurrence of the Minister for Justice, rules regulating its practice and procedure and may in particular provide by such rules for the issuing of summonses, the procedure for bringing (in custody or on bail) persons before it for trial, the admission or exclusion of the public to or from its sittings, the enforcing of the attendance of witnesses, and the production of documents.

Procedures of
Special Criminal
Courts.

(2) A Special Criminal Court sitting for the purpose of the trial of a person, the making of any order, or the exercise of any other jurisdiction or function shall consist of an uneven number (not less than three) of members of such Court present at and taking part in such sitting.

(3) Subject and without prejudice to the provisions of the next preceding sub-section of this section, a Special Criminal Court may exercise any power, jurisdiction, or function notwithstanding one or more vacancies in the membership of such court.

(4) Subject to the provisions of this Act, the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court.

42.- (1) Every order or other act of a Special Criminal Court shall be authenticated by the signature of a registrar of that Court.

Authentication
of orders of
Special Criminal

Courts.

(2) Every document which purports to be an order or other act of a Special Criminal Court and to be authenticated by the signature of a registrar of that Court shall be received in evidence in all Courts and be deemed to be an order or other act (as the case

may require) of such Special Criminal Court without proof of the signature by which such order or act purports to be authenticated or that the person whose signature such signature purports to be was a registrar of the said Special Criminal Court.

43.- (1) A Special Criminal Court shall have jurisdiction to try and to convict or acquit any person lawfully brought before that Court for trial under this Act, and shall also have the following ancillary jurisdictions, that is to say:-

Jurisdiction of
Special Criminal
Courts.

(a) jurisdiction to sentence every person convicted by that Court of any offence to suffer the punishment provided by law in respect of such offence;

(b) jurisdiction, in lieu of or in addition to making any other order in respect of a person, to require such person to enter into a recognisance before such Special Criminal Court or before a justice of the District Court, in such amount and with or without sureties as such Special Criminal Court shall direct, to keep the peace and be of good behaviour for such period as that Court shall specify;

(c) jurisdiction to order the detention of and to detain in civil or military custody, or to admit to bail in such amount and with or without sureties as that Court shall direct, pending trial by that Court and during and after such trial until conviction or acquittal, any person sent, sent forward, transferred, or otherwise brought for trial by that Court;

(d) power to administer oaths to witnesses;

(e) jurisdiction and power to punish, in the same manner and in the like cases as the High Court, all persons whom such Special Criminal Court finds guilty of contempt of that Court or any member thereof, whether such contempt is or is not committed in the presence of that Court;

(f) power, in relation to recognisances and bail bonds entered into before such Special Criminal Court, to estreat such recognisances and bail bonds in the like manner and in the like cases as the District Court estreats recognisances and bail bonds entered into before it.

(2) The provisions of this Part of this Act in relation to the carrying out of sentences of imprisonment pronounced by Special Criminal Courts and the regulations made under those provisions shall apply and have effect in relation to the carrying out of orders made by Special Criminal Courts under the foregoing sub-section of this section for the detention of persons in custody, whether civil or military.

44.- (1) A person convicted by a Special Criminal Court of any offence or sentenced by a Special Criminal Court to suffer any punishment may appeal to the Court of Criminal Appeal from such conviction or sentence

Appeal to Court
of Criminal
Appeal.

if, but only if, either he obtains from that Special Criminal Court a certificate that the case is a fit case for appeal or, where such Special Criminal Court refuses to grant such certificate, the Court of Criminal Appeal on appeal from such refusal grants to such person leave to appeal under this section.

(2) Sections 32, 33 and 35 of the Courts of Justice Act, 1924 (No. 10 of 1924), sections 6 and 7 of the Courts of Justice Act, 1928 (No. 15 of 1928), section 12(1) of the Courts (Supplemental Provisions) Act, 1961 (No. 39 of 1961) and section 3 of the Criminal Procedure Act, 1993 (No. 40 of 1993) shall apply and have effect in relation to appeals under this section in like manner as they apply and have effect in relation to appeals under section 31 of the Courts of Justice Act, 1924.

Amended by section 12(3) of 1961 Act, section 3(8) of 1993 Act (error in drafting!) And section 3(3) of 1995 Act.

Section 5 of no. 15 of 1928 amended by Act of 1995.

45.- (1) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests, send such person (in custody or on bail) for trial by a Special Criminal Court on such charge.

Proceedings in the District Court in relation to Scheduled Offences.

See section 3(1) of 1974 Act and section 14(3) of 1998 Act.

(2) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which is an indictable offence and such justice receives informations in relation to such charge and sends such person forward for trial on such charge, such justice shall (unless the Attorney-General otherwise directs) send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

46.- (1) Whenever a person is brought before a justice of the District Court charged with an offence which is not a scheduled offence and which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests and certifies in writing that the ordinary courts are in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on

See section 3(1) of 1974 Act. Proceedings in the District Court in relation to non-scheduled

such charge, send such person (in custody or on bail) for trial by Special Criminal Court on such charge. offences.a

(2) Whenever a person is brought before a justice of the District Court charged with an indictable offence which is not a scheduled offence and such justice receives informations in relation to such charge and sends such person forward for trial on such charge, such justice shall, if an application in this behalf is made to him by or on behalf of the Attorney-General grounded on the certificate of the Attorney-General that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

47.- (1) Whenever it is intended to charge a person with a scheduled offence, the Attorney-General may, if he so thinks proper, direct that such person shall, in lieu of being charged with such offence before a justice of the District Court, be brought before a Special Criminal Court and there charged with such offence and, upon such direction being so given, such person shall be brought before a Special Criminal Court and shall be charged before that Court with such offence and shall be tried by such Court on such charge. *See section 3(1) of 1974 Act. And sections 3(3) and (7) of 1998 Act.*
Charge before
Special Criminal
Court in lieu of
District Court

(2) Whenever it is intended to charge a person with an offence which is not a scheduled offence and the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, the foregoing sub-section of this section shall apply and have effect as if the offence with which such person is so intended to be charged were a scheduled offence.

(3) Whenever a person is required by this section to be brought before a Special Criminal Court and charged before that Court with such offence, it shall be lawful for such Special Criminal Court to issue a warrant for the arrest of such person and the bringing of him before such Court and, upon the issue of such warrant, it shall be lawful for such person to be arrested thereunder and brought in custody before such Court.

48.- Whenever a person charged with an offence has been sent forward by a justice of the District Court for trial by the Central Criminal Court or the Circuit Court on such charge, then and in every such case the following provisions shall have effect, that is to say:- *See section 3(1) of 1974 Act.*
Transfer of
trials from
ordinary Courts
to a Special
Criminal Court.

(a) if the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, the Attorney-General shall cause an application, grounded on his said certificate, to be made on his behalf to the High Court for the transfer of the trial of such person on such charge to a Special Criminal Court, and on the hearing of such application the High Court shall make the order applied for, and thereupon such person shall be deemed to have been sent forward to a Special Criminal Court for trial on such charge;

(b) whenever the High Court has made, under the next preceding paragraph of this sub-section, such order as is mentioned in that paragraph, the following provisions shall have effect, that is to say:-

(i) a copy of such order shall be served on such person by a member of the *Gárda Síochána*,

(ii) a copy of such order shall be sent to the appropriate county registrar,

(iii) such person shall be brought before a Special Criminal Court for trial at such time and place as that Court shall direct,

(iv) if such person is in custody when such order is made, he may be detained in custody until brought before such Special Criminal Court for trial,

(v) if such person is at liberty on bail when such order is made, such bail shall be deemed to be for his attendance before a Special Criminal Court for trial at such time and place as that Court shall direct and, if he fails so to attend before the said Court, he shall be deemed to have broken his bail and his bail bond shall be estreated accordingly.

49.- Where a person is (in the case of an offence triable summarily) sent or (in the case of an indictable offence) sent forward by a justice of the District Court to a Special Criminal Court for trial or the trial of a person is transferred under this Act to a Special Criminal Court or a person is to be charged before and tried by a Special Criminal Court, such of the following provisions as are applicable shall have effect, that is to say:-

See section 3(1) of 1974 Act.
Selection of the Special Criminal Court by which a person is to be tried.

(a) where a person is so sent or sent forward, the justice shall not specify the particular Special Criminal Court to which he sends or sends forward such person for trial;

- (b) where the trial of a person is so transferred, the order effecting such transfer shall not specify the particular Special Criminal Court to which such trial is transferred;
- (c) if only one Special Criminal Court is in existence under this Act at the time of such sending or sending forward or such transfer (as the case may be), such sending, sending forward, or transfer shall be deemed to be to such one Special Criminal Court;
- (d) if only one Special Criminal Court is in existence under this Act when such person is to be so charged and tried, such person shall be charged before and tried by that Special Criminal Court;
- (e) if two or more Special Criminal Courts are in existence under this Act at the time of such sending or sending forward or such transfer or such charging (as the case may be), it shall be lawful for the Attorney-General to cause an application to be made on his behalf to such Special Criminal Court as he shall think proper for an order that such person be tried by or charged before and tried by that Court and thereupon the said Court shall make the order so applied for;
- (f) upon the making of the order mentioned in the next preceding paragraph of this section, whichever of the following provisions is applicable shall have effect, that is to say:-
 - (i) such person shall be deemed to have been sent or sent forward for trial by the Special Criminal Court which made the said order and all persons concerned shall act accordingly, or
 - (ii) the trial of such person shall be deemed to have been transferred to the said Special Criminal Court and all persons concerned shall act accordingly, or
 - (iii) such person shall be charged before and tried by the said Special Criminal Court and all persons concerned shall act accordingly.

50.- (1) Save as shall be otherwise provided by regulations made under this section, every order made or sentence pronounced by a Special Criminal Court shall be carried out by the authorities and officers by whom, and in the like manner as, a like order made or sentence pronounced by the Central Criminal Court is required by law to be carried out.

Orders and sentences of Special Criminal Courts.

(2) Every order, conviction, and sentence made or pronounced by a Special Criminal Court, shall have the like consequences in law as a like order, conviction, or sentence made or pronounced by the Central Criminal Court would have and, in particular, every order made and every sentence pronounced by a Special Criminal Court shall confer on the persons carrying out the same the like protections and immunities as are conferred

by law on such persons when carrying out a like order made or a like sentence pronounced by the Central Criminal Court.

(3) The Minister for Justice may make regulations in relation to the carrying out of sentences of penal servitude or of imprisonment pronounced by Special Criminal Courts and the prisons and other places in which persons so sentenced shall be imprisoned and the maintenance and management of such places, and the said Minister may also, if he so thinks proper, make by writing under his hand such special provision as he shall think fit in relation to the carrying out of any such sentence in respect of any particular individual, including transferring to military custody any particular individual so sentenced.

(4) The Minister for Defence may make regulations in relation to the places and the manner generally in which persons transferred to military custody under the next preceding sub-section of this section shall be kept in such custody, and the said Minister may also, if he so thinks proper, make by writing under his hand such special provision as he shall think fit in respect of the custody of any particular such person.

- 51.-** (1) Whenever a person brought before a Special Criminal Court for trial stands mute when called upon to plead to the charge made against him, that Court shall hear such evidence (if any) relevant to the issue as to whether such person stands mute of malice or by the visitation of God as may then and there be adduced before it, and
- Standing mute
of malice and
refusal to plead,
etc.
- (a) if that Court is satisfied on such evidence that such person is mute by the visitation of God, all such consequences shall ensue as would have ensued if such person had been found to be so mute by a Judge sitting in the Central Criminal Court, and
- (b) if that Court is not so satisfied or if no such evidence is adduced, that Court shall direct a plea of "not guilty" to be entered for that person.

(2) Whenever a person brought before a Special Criminal Court for trial fails or refuses in any way, other than standing mute, to plead to the charge made against him when called upon to do so, that Court shall (without prejudice to its powers under the next following sub-section of this section) direct a plea of "not guilty" to be entered for such person.

(3) Whenever a person at any stage of his trial before a Special Criminal Court by any act or omission refuses to recognise the authority or jurisdiction of that Court, or does any act (other than lawfully objecting in due form of law to the jurisdiction of that Court to try him) which, in the opinion of that Court, is equivalent to a refusal to recognise that Court, or the authority or jurisdiction thereof, such person shall be guilty of contempt of that Court and may be punished by that Court accordingly.

- 52.-** (1) Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the *Gárda Síochána* may demand of such person, at any time while he is so
- Examination
of detained
persons.

detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.

*See section 13
of 1998 Act.*

(2) If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the *Gárda Síochána*, fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.

53.- (1) No action, prosecution, or other proceeding, civil or criminal, shall lie against any member of a Special Criminal Court in respect of any order made, conviction or sentence pronounced, or other thing done by that Court or in respect of anything done by such member in the course of the performance of his duties or the exercise of his powers as a member of that Court or otherwise in his capacity as a member of that Court, whether such thing was or was not necessary to the performance of such duties or the exercise of such powers.

*Immunities of
members, etc.,
of Special
Criminal Courts.*

(2) No action or other proceeding for defamation shall lie against any person in respect of anything written or said by him in giving evidence, whether written or oral, before a Special Criminal Court or for use in proceedings before a Special Criminal Court.

(3) No action, prosecution, or other proceeding, civil or criminal, shall lie against any registrar, clerk, or servant of a Special Criminal Court in respect of anything done by him in the performance of his duties as such registrar, clerk or servant, whether such thing was or was not necessary to the performance of such duties.

PART VI.

POWERS OF INTERNMENT

Sections 54-59 inclusive repealed by 1940 Act

OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1940.

AN ACT TO REPEAL PART VI OF THE OFFENCES AGAINST THE STATE ACT, 1939,
AND TO MAKE OTHER PROVISIONS IN RELATION TO THE DETENTION OF
CERTAIN PERSONS
[9th February, 1940]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

PART I.

PRELIMINARY AND GENERAL.

- 1.- (1) This Act may be cited as the Offences Against the State (Amendment) Act, 1940. Short title,
Construction,
and collective
Citation.
- (2) This Act shall be construed as one with the Offences Against the State Act, 1939 (No. 13 of 1939).
- (3) The Offences Against the State Act, 1939, and this Act may be cited together as the Offences Against the State Acts, 1939 and 1940.
- 2.- *Part VI of the Offences Against the State Act, 1939 (No. 13 of 1939), is hereby repealed.* *Repeal.*

PART II.

POWERS OF DETENTION.

- 3.- (1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section. Commencement
and cesser of
this Part of this
Act.
- (2) If and whenever and so often as the Government makes and publishes a proclamation declaring that the powers conferred by this Part of this Act are necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act should come into force immediately, this Part of this Act shall come into force forthwith.
- (3) If at any time while this Part of this Act is in force the Government makes and publishes a proclamation declaring that this Part of this Act shall cease to be in force, this Part of this Act shall forthwith cease to be in force.
- (4) Whenever the Government has made and published a proclamation under the second sub-section of this section, it shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force by virtue of such proclamation, to pass a resolution annulling such proclamation, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(5) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the *Iris Oifigiúil* and may also be published in any other manner which the Government shall think proper.

4.- (1) Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, Minister may by warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section. Special powers of arrest and detention. such

(2) Any member of the *Gárda Síochána* may arrest without warrant any person in respect of whom a warrant has been issued by a Minister of State under the foregoing sub-section of this section.

(3) Every person arrested under the next preceding sub-section of this section shall be detained in a prison or other place prescribed in that behalf by regulations made under this Part of this Act until this Part of this Act ceases to be in force or until he is released under the subsequent provisions of this Part of this Act, whichever first happens

(4) Whenever a person is detained under this section, there shall be furnished to such person, as soon as may be after he arrives at a prison or other place of detention prescribed in that behalf by regulations made under this Part of this Act, a copy of the warrant issued under this section in relation to such person and of the provisions of section 8 of this Act.

(5) Every warrant issued by a Minister of State under this section shall be in the form set out in the schedule to this Act or in a form to the like effect.

5.- (1) It shall be lawful for any member of the *Gárda Síochána* to do all or any of the following things in respect of any person who is arrested and detained under this Part of this Act, that is to say:- Powers of search, etc., of detained Persons.

- (a) to demand of such person his name and address;
- (b) to search such person or cause him to be searched;
- (c) to photograph such person or cause him to be photographed;
- (d) to take, or cause to be taken the fingerprints of such person.

(2) Every person who shall obstruct or impede the exercise in respect of him by a member of the *Gárda Síochána* of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address when demanded of him by a member of the *Gárda Síochána* under the said sub-section or shall give a name or an address which is false or misleading shall be guilty of a contravention of the regulations made under this Part of this Act in relation to the preservation of discipline and shall be dealt with accordingly.

- 6.- A Minister of State may by writing under his hand, if and whenever he so thinks proper, order the release of any particular person who is for the time being detained under this Part of this Act, and thereupon such person shall forthwith be released from such detention. Release of detained persons.
- 7.- (1) A Minister of State may by order make regulations for all or any of the following purposes, that is to say:- Regulations in relation to places of Detention.
- (a) prescribing the prisons, internment camps, and other places in which persons may be detained under this Part of this Act;
 - (b) providing for the efficient management, sanitation, control, and guarding of such prisons, internment camps, and other places;
 - (c) providing for the enforcement and preservation of discipline amongst the persons detained in any such prison, internment camp, or other place as aforesaid;
 - (d) providing for the punishment of persons so detained who contravene the regulations;
 - (e) prescribing or providing for any other matter or thing incidental or ancillary to the efficient detention of persons detained under this Part of this Act.
- (2) Every regulation made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and if a resolution annulling such regulation is passed by either House of the Oireachtas within the next subsequent twenty-one days on which such House has sat after such regulation is laid before it, such regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done under such regulation.
- 8.- (1) As soon as conveniently may be after this Part of this Act comes into force, the Government shall set up a Commission (in this section referred to as the Commission) to perform the functions imposed upon the Commission by this section.
- (2) The following provisions shall apply and have effect in relation to the Commission, that is to say:-
- (a) the members of the Commission shall be appointed and be removable by the Government;
 - (b) the Commission shall consist of three persons of whom one shall be a commissioned officer of the Defence Forces with not less than seven years' service and each of the others shall be a barrister or solicitor of not less than seven years' standing or be or have been a judge of the

Supreme Court, the High Court, or the Circuit Court or a justice of the District Court;

(3) Any person who is detained under this Part of this Act may apply in writing to the Government to have the continuation of his said detention considered by the Commission, and upon such application being so made the following provisions shall have effect, that is to say:-

- (a) the Government shall, with all convenient speed, refer the matter of the continuation of such person's detention to the Commission;
- (b) the Commission shall inquire into the grounds of such person's detention and shall, with all convenient speed, report thereupon to the Government;
- (c) the Minister for Justice shall furnish to the Commission such information and documents (relevant to the subject-matter of such inquiry) in the possession or procurement of the Government or of any Minister of State as shall be called for by the Commission;
- (d) if the Commission reports that no reasonable grounds exist for the continued detention of such person, such person shall, with all convenient speed, be released.

9.- The Government shall once at least in every six months furnish to each House of the Oireachtas particulars of (a) persons detained under this Part of this Act, (b) persons in respect of whom the Commission has made a report to the Government, (c) persons in respect of whom the Commission has reported that no reasonable grounds exist for their continued detention, (d) persons who had been detained under this Part of this Act but who had been released on the report of the Commission, and (e) persons who had been detained under this Part of this Act but who had been released without a report of the Commission.

Returns to be
laid before each
House of the
Oireachtas.

SCHEDULE

FORM OF WARRANT UNDER SECTION 4

OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1940.

SECTION 4.

In exercise of the powers conferred on me by section 4 of the Offences Against the State (Amendment) Act, 1940 (No. 2 of 1940), I,,
Minister for, being of opinion that is
engaged in activities which, in my opinion, are prejudicial to the preservation of public

peace and order (*or* to the security of the State), do by this warrant order the arrest and detention of the said under the said section 4.

Given under my Official Seal this day
of 19.....
.....
Minister for