

Many years on in Northern Ireland: the Diplock legacy

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The increased attention given to how states should respond in the wake of the “global war on terrorism” makes it an opportune time to re-focus attention on the strategies that have been deployed in the past to deal with civil disorder and terrorism. The Northern Ireland conflict can be a useful laboratory in this respect.¹ Tom Hadden has devoted considerable energy throughout his professional life to research and commentary on various aspects of the conflict. Much of this work is to be found in the pages of the *Fortnight* magazine which he helped to edit for many years. But it was in an extremely productive collaboration with Kevin Boyle and Paddy Hillyard that we find the most searching critique of the various strategies adopted by the Stormont and British governments in the early years of the conflict as it arose out of the civil rights movement and progressed into a full-scale emergency. The collaboration resulted in three influential publications, *Justice in Northern Ireland – A study in social confidence*, *The Law and State: The case of Northern Ireland* and *Ten Years on in Northern Ireland: The legal control of political violence*.²

Looking back now at a time when debate about responses to terrorism has broadened far beyond the confines of Northern Ireland,³ a number of observations can be made about this work. First of all, one is struck by the depth and sophistication of the analysis. Written from a civil libertarian standpoint with a view to influencing the course of events as they were happening, the work remains a magisterial case study on what happens to law when the state is challenged and its legitimacy is called into question. The study was

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1 See e.g. C Campbell, “Wars on Terror’ and vicarious hegemony: the UK, international law, and the Northern Ireland conflict” (2005) 54 *ICLQ* 321.

2 T Hadden and P Hillyard, *Justice in Northern Ireland – A study in social confidence* (London: Cobden Trust 1973); K Boyle, T Hadden and P Hillyard, *The Law and State: The case of Northern Ireland* (London: Martin Robertson 1973) (hereafter referred to as *Law and State*); *Ten Years On in Northern Ireland: The legal control of political violence* (London: Cobden Trust 1980) (hereafter referred to as *Ten Years On*).

3 A large literature has been building up: see O Gross, “Chaos and rules” (2003) 112 *Yale LJ* 1011; C R Sunstein, “Minimalism at war” (2004) *Supreme Court Review* 47; B Ackerman, “The emergency constitution” (2004) 113 *Yale LJ* 1029; D Dyzenhaus, *The Constitution of Law – Legality in a time of emergency* (Cambridge: Cambridge University Press 2006), O Gross and F Ní Aoláin, *Law in Times of Crisis – Emergency powers in theory and practice* (Cambridge: Cambridge University Press 2006); E Posner and A Vermeule, *Terror in the Balance: Security, liberty and the courts* (Oxford: Oxford University Press 2007).

informed by painstaking empirical investigation of the outcome of samples of cases and a survey of social attitudes, long before socio-legal empirical research and social attitude surveys had become fashionable in the legal academy and the world of social science.

Another observation that may be made is that the models that Boyle, Hadden and Hillyard used to describe the various strategies that may be pursued are as applicable today as they were then. Towards the end of *Ten Years On* they describe a war model, a detention model and a criminal prosecution model and illustrate how semblances of all three models could be evidenced at various stages of the conflict.⁴ Similar models may be used to characterise the responses that are to be seen to today's "war on terror".⁵ At their heart there is a tension between dealing with the conflict through war and other extra-legal means and dealing with it through the rule of law, what Boyle, Hadden and Hillyard characterised as a "security" response and a "due process" response.⁶

A third observation relates to the enduring nature of the non-jury Diplock courts which came to reflect the dominant security approach that the British adopted towards the conflict after the failings of internment without trial. These have outlasted the "troubles" and become an almost permanent feature of the anti-terrorist landscape in the post-conflict context of Northern Ireland today. The appointment of the Diplock Commission in 1972 represented the beginning of a new strategy which later became known as "criminalisation", whereby paramilitary offenders would be processed through the criminal courts rather than through extra-legal procedures.⁷ This strategy meant that the nature of the conflict between the IRA and the British government was re-cast by the British as a threat from criminals rather than a threat from political and military forces. But as Boyle, Hadden and Hillyard chronicle in their work, the policy got off to a bad start as the Diplock Commission failed to make a clear enough distinction between extra-judicial and judicial means of defeating violence. In their view, the Diplock Commission saw its task as one of remedying certain loopholes and inadequacies in the ordinary courts rather than improving the standards of justice being achieved in the courts.⁸ The twin-track policy it recommended of continuing detention without trial while trying to encourage the use of the criminal courts was never accepted by the nationalist population. The criminalisation policy ultimately failed and the Belfast Agreement which emerged in 1998 recognised the political aspect to the conflict by permitting the release of all prisoners convicted under the Diplock system.

Yet the Diplock system has not only survived the conflict, it has also survived the post-conflict process. At the time of the publication of a later study of the Diplock courts when Northern Ireland was entering a new phase of more relative peace, it was surmised that the non-jury Diplock trial system no longer carried the same air of permanence as it had during the years of the conflict.⁹ Calls had been made and still are made for the

4 Although the authors acknowledged that the British have always ruled out the adoption of a full-scale war model as a serious policy option, they considered that in the period between December 1977 and November 1978 the army appeared to experiment with a "shoot on sight" policy. See *Ten Years On*, n. 2 above, p. 101.

5 Cf. the various "accommodation models" described by Gross and Ni Aoláin, *Law in Times of Crisis*, n. 3 above. See most recently International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva: ICJ 2009).

6 *Law and State*, n. 2 above, p. 120.

7 For accounts of the "criminalisation" strategy, see *Ten Years On*, n. 2 above, pp. 31–2; T Hadden, K Boyle and C Campbell, "Emergency law in Northern Ireland: the context" in A Jennings (ed.), *Justice under Fire: The abuse of civil liberties in Northern Ireland* (London: Pluto Press 1988), pp. 8–10.

8 *Law and State*, n. 2 above, p. 95.

9 J Jackson and S Doran, *Judge without Jury: Diplock trials in the adversary system* (Oxford: Oxford University Press 1995), p. ix (hereafter referred to as *Judge without Jury*).

dismantling of the entire Diplock regime.¹⁰ Yet although political and legal institutions have been transformed in Northern Ireland as a result of the Belfast Agreement, the Diplock courts remain intact. This is not to say that considerable changes have not been made to the emergency regime in the pre-trial process. Many of the emergency procedures that operated in the interrogation room, including the special rules governing the admissibility of confessions, have disappeared and been replaced by “normal” procedures. The “scheduling” mechanism which determined whether cases were destined for Diplock trial has also been replaced by a greater presumption in favour of trial by jury.¹¹ But the non-jury system remains intact and, indeed, as a method of trial would seem to be growing in acceptance in neighbouring jurisdictions.¹²

This article seeks to explain the continuing survival of the Diplock system and the legacy that it has left as a means of defeating political violence and terrorism. It will be argued that, despite its inauspicious beginning, a combination of legal professional norms and ethics and exposure to international human rights norms prevented the trials from descending into a rubber stamp for security initiatives. A number of the reforms recommended by Boyle, Hadden and Hillyard have been brought into force but there continue to be defects in the manner in which cases are allocated for Diplock trial. The article first examines the Diplock solution and how the security response associated with it led to a series of security initiatives by the state that undermined due process. It next examines the responses that were made to these initiatives by the paramilitaries, the legal profession, the judiciary and human rights organisations. Finally, the article assesses the future of the Diplock courts as a method of combating terrorism and argues that the method of allocating cases to non-jury trial continues to exemplify the dominance of a security approach over a due process approach.

The Diplock solution

Until the establishment of the Diplock Commission, internment under the Special Powers Act which dated back to 1922 represented the primary method of dealing with terrorism in Northern Ireland. It was used periodically throughout the history of Northern Ireland by the devolved Northern Ireland Unionist government, most pervasively in 1971 when large numbers of republican suspects were interned in response to the growing campaign of violence mounted by the IRA.¹³ This strategy badly backfired, as it had the effect of escalating the violence, and when the British government took direct control of Northern Ireland affairs in March 1972 its initial objective was to phase out the system while seeking a political solution to the violence by negotiation with the IRA and loyalist groups.¹⁴ When

10 See S C Greer and A White, *Abolishing the Diplock Courts* (London: Cobden Trust 1986). Abolition has been called for by a number of human rights groups. See, most recently, British Irish Rights Watch, *Response to Government Consultation Paper on Retention of the Diplock Courts* (London: British Irish Rights Watch 2009).

11 The call for such a presumption to operate in the Diplock system was made repeatedly by various bodies throughout the operation of Diplock courts. See J Jackson and S Doran, “Diplock and the Presumption Against Jury Trial: a critique” (1992) *Criminal Law Review* 755. But it was not put into effect until 2007 with the passage of the Justice and Security (NI) Act 2007.

12 See Part 7 of the Criminal Justice Act 2003, which makes provision in England and Wales as well as in Northern Ireland for applications for certain fraud cases and cases where there is evidence of a real and present danger of jury tampering to be tried without a jury by judge alone. For commentary see S Doran, “Trial by judge alone” in *Montgomery and Ormerod on Fraud: Criminal law and procedure* (Oxford: Oxford University Press 2009), ch. C5.

13 For discussion of the internment process under the Civil Authorities (Special Powers) Act (NI) 1922, see J McGuffin, *Internment* (Tralee: Anvil Books 1973); D Lowry, “Internment in Northern Ireland” (1976) 8 *Toledo Law Review* 169; *Law and State*, n. 2 above, ch. 5.

14 P Taylor, *Brits: The war against the IRA* (London: Bloomsbury 2001), ch. 10.

a truce arranged with the IRA broke down it became clear that a strategy for dealing with political violence would have to be devised and the Diplock Commission was announced in October 1972 to consider “whether changes should be made in the administration of justice in order to deal more effectively with terrorism without using internment under the Special Powers Act”.¹⁵

The commission considered that there were serious obstacles in the way of obtaining convictions under the ordinary criminal process. The usual method of obtaining convictions under the adversarial criminal process is by relying on witnesses who testify openly against defendants but, in the context of political violence, the supply of witnesses can dry up because of the fear of intimidation. According to the commission, the only kind of case in which convictions could be obtained by the ordinary processes of criminal law were ones in which there was sufficient evidence against the accused from one or more of three sources: oral evidence of non-civilian witnesses whose protection could be more readily ensured; physical evidence such as finger prints; and an admissible confession. But there were problems with using these sources. Non-civilian witnesses could not easily be the direct source of information about paramilitary activity. Physical evidence was not always available and confessions under the common law were inadmissible unless they were given voluntarily by suspects, something that paramilitary suspects would not willingly provide. The difficulty in obtaining confessions under the common law had indeed been underlined by a decision of the Northern Ireland courts, shortly before the announcement of the Diplock Commission, which had excluded confessions in 1972 on the ground that they had been obtained in a detention centre set up officially to obtain information from persons who would be less than willing to give it.¹⁶ Admissions obtained in this way failed to qualify as voluntary statements. Finally, the Diplock Commission referred to the problem of retaining juries in the existing climate of violence. The commission was unable to point to real cases of jury intimidation but considered that the jury system was under strain and was likely to break down if it were not abolished in paramilitary trials.

Whilst considering that detention without trial was still necessary, the commission proceeded to make a number of recommendations which would enable more cases to be brought before the criminal courts without jettisoning the minimum requirements of Article 6 of the European Convention on Human Rights (ECHR). Firstly, to circumvent the technical rules as to the admissibility of statements which in the commission's view were hampering the course of justice and compelling the authorities to resort to detention instead of the courts, the commission recommended that the law be changed to allow for the admissibility of statements unless they had been obtained by torture, or inhuman or degrading treatment. Secondly, rules reversing the burden of proof in firearms cases and permitting the admissibility of witness statements in certain circumstances were recommended. Finally, trial by jury was to be replaced by trial by judge alone in cases involving scheduled offences.

Although these recommendations were intended to conform with minimum human rights standards, the emergency legislation which implemented them gave the green light for more coercive interrogation than would be acceptable under the voluntariness standard at common law.¹⁷ Moreover, the legislation contained a number of powers which replicated the old Special Powers Act enabling the police to arrest suspected “terrorists” and hold

15 HC Debs, vol. 855, 17 April 1973 (William Whitelaw, then Secretary of State for Northern Ireland). The commission reported in December 1972. See *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* Cmnd 5185 (London: HMSO 1972).

16 *R v Flynn and Leonard* [1972] NIJB (May).

17 See Northern Ireland (Emergency Provisions) Act 1973.

them for questioning up to 72 hours and, in later UK-wide legislation under the Prevention of Terrorism (Temporary Provisions) Act 1974, up to seven days with the approval of the Secretary of State. The security forces were able to switch from the use of internment towards bringing arrested persons before the courts after questioning. Specialised interrogation centres for interrogating terrorist suspects arrested on the basis of intelligence were established,¹⁸ one early in 1977 at Castlereagh and the other at Gough Army Barracks in Armagh in November 1977. It was here that suspects who were held incommunicado, without access to solicitors and friends or relatives, made the confessions which came before the Diplock courts.

Although this strategy produced more confessions, it became clear that they were obtained by ill-treatment. The procedures and practices of questioning and interrogation had been the centre of attention since 1971 when allegations of torture and brutality were made. These allegations were partially upheld in 1978 by the European Court of Human Rights when it ruled that various interrogation techniques amounted to “inhuman and degrading” treatment in breach of Article 3 of the European Convention, although not “torture”.¹⁹ The interrogation centre where this occurred was closed down in 1972 and various directives were issued stressing the need to avoid torture and inhuman or degrading treatment. The Diplock confessions test expressly prohibited such conduct but this did not stop allegations of ill treatment continuing to be made. Indeed the opening of the interrogation centres at Castlereagh and Gough coincided with a major increase in the number of complaints of ill-treatment made against the police – 180 in 1975, 384 in 1976, and 671 in 1977.²⁰ These complaints were backed up by the concerns of police medical doctors who made formal representations about the number of suspects who showed signs of physical ill treatment. In November 1977, Amnesty International carried out an investigation into a number of cases of alleged ill treatment and in June 1978 it reported that it believed that maltreatment of suspected terrorists had taken place with sufficient frequency to warrant the establishment of a public inquiry.²¹

Despite these allegations, large numbers of defendants were convicted on the basis of their confessions during this period.²² The courts have been criticised for not taking a more robust stance towards reliance on confession evidence, given the allegations of ill treatment.²³ But they were handicapped in at least three ways by the procedures within which they operated. Firstly, the more relaxed standard of admissibility imposed by Parliament limited their room for manoeuvre. The Court of Appeal made some efforts to tighten up this standard by holding that it prohibited any form of physical violence.²⁴ The courts also interpreted the legislation so as to preserve a discretion to exclude a confession that was strictly admissible under the standard. But there was a limit to how far this discretion could be exercised. It was stressed that the absence of voluntariness could not automatically warrant exclusion as this would subvert the will of Parliament.²⁵ The

18 P Taylor, *Beating the Terrorists?* (London: Penguin 1980), pp. 61–3.

19 *Ireland v UK* (1978–80) 2 EHRR 25.

20 Taylor, *Beating the Terrorists?*, n. 18 above, p. 81.

21 *Report of an Amnesty International Mission to Northern Ireland* (London: Amnesty International 1978).

22 See *Ten Years On*, n. 2 above, p. 76.

23 See D. Korff, *The Diplock Courts in Northern Ireland: A fair trial?* (Utrecht: Netherlands Institute of Human Rights: 1984), p. 78; C Walker, “The commodity of justice” (1999) 50 *NILQ* 164, at 168.

24 *R v O'Halloran* [1979] NI 45, at 47. Cf. *R v McCormick and others* [1977] NI 105. Parliament later changed the standard to state that any “violence or threat of violence” would render a confession inadmissible: see s. 11(2) of the Northern Ireland (Emergency Provisions) Act 1987.

25 *R v Tobill* [1974] NIJB (Mar), *R v McCormick* [1977] NI 105.

voluntariness rule had been supplemented in England by Judges' Rules, which laid down further safeguards including access to solicitors. These rules were formally adopted in Northern Ireland in October 1976 but their status remained unclear in the emergency regime and the courts did little to enforce them.²⁶

Apart from the legal standard itself, there was the difficulty of deciding who to believe when allegations of ill treatment were made by defendants and denied by the police. At the *voir dire* which was held to determine whether a confession should be admitted, suspects had to give evidence first and judges frequently had to decide between their evidence and that of the police, something they admitted was one of the most difficult issues they had to decide.²⁷ One of the difficulties was that it was often impossible to believe either the account of the police or the defendant. Defendants would often make allegations which were bizarre while the police claimed that they acted with such propriety that it was difficult to believe everything they said. As professional witnesses, the police were aided by their interview notes but this reduced the ability of judges to evaluate the credibility of their manner and demeanour in the witness box.²⁸

Thirdly, the absence of the jury meant that judges had to perform the two roles of deciding on admissibility and deciding on guilt. The presence of a jury would have meant that there was a clearer demarcation between the issue of the admissibility of the confession and the issue of its weight. But when both issues were decided by the same tribunal – the trial judge – they inevitably became “intertwined” at times.²⁹ This combination of role meant that judges could become privy very easily to inadmissible evidence such as evidence about the accused's record or information about the defendant as revealed by a co-accused's confession. In carrying out their fact-finding role, they could therefore be placed in a very difficult position of having to disregard evidence of guilt when it was their job to determine guilt or innocence. The combination of role also meant that judges were not only responsible for umpiring a contest between prosecution and defence but were also charged with being in the front line of maintaining law and order, as it was ultimately their responsibility to decide whom to convict and whom to acquit.³⁰

In this situation it was perhaps inevitable that judges would attract criticism. The judges were to face an even greater challenge to their role as independent dispensers of justice when faced with another security strategy – the use of “supergrasses”. Throughout the conflict, detention came to be used not just to obtain confessions but to gather intelligence, and intelligence gathering became a key reason for arresting persons and questioning paramilitary suspects.³¹ In addition, however, in the early 1980s, suspects who faced long prison sentences were offered various inducements including immunity, sums of money and a new identity in return for turning Queen's evidence and implicating members of proscribed organisations in court. Between November 1981 and November 1983, a total of almost 600 suspects were arrested on the evidence of 19 republicans and eight loyalist

26 D S Greer, “The admissibility of confessions under the Northern Ireland (Emergency Provisions) Act 1978” (1980) 31 *NILQ* 205, at 233; J Jackson, *Northern Ireland Supplement to Cross on Evidence* (Belfast: SLS Publications 1983), pp. 154–5.

27 *Judge without Jury*, n. 9 above, p. 218.

28 *Ibid.* p. 237.

29 *R v Brophy* [1980] 4 NIJB.

30 For discussion of this invidious role and how it has impacted on attitudes towards the judiciary, see S Doran and J Jackson, “The judicial role in criminal cases” in N Dawson, D Greer and P Ingram (eds), *One Hundred and Fifty Years of Irish Law* (Belfast: SLS Publications 1996), p. 69.

31 D P J Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (London: Cobden Trust 1983).

“supergrasses”.³² The fact that so many suspects were able to be picked up and remanded in custody awaiting trial meant that they were out of circulation. But for the strategy to be successful in the longer term they had to be convicted and this was where the Diplock courts were once again put in the forefront of a security strategy.³³

The supergrass strategy put the spotlight very directly on the judiciary. The use of confessions is not unknown in criminal trials, though they became excessively relied upon in the Diplock trials of the 1970s. By contrast, when the courts decide the fate of large numbers of persons on the uncorroborated evidence of self-confessed offenders who have been granted complete or partial immunity, they are presiding over a much more questionable strategy from a legal and moral point of view. Unlike the case of confessions where the courts were tied by express statutory provisions, the courts had greater freedom to decide what to do with supergrass evidence. At common law the trial judge was required to warn a jury about the dangers of relying on such evidence in the absence of corroboration. In the absence of a jury, judges were prepared at first to convict on the uncorroborated evidence of certain supergrasses. One judgment emphasised the separation of the judiciary from the executive and stressed the distinction between the use of uncorroborated accomplice evidence as a method of prosecution and its use as a method of conviction.³⁴ But judges’ willingness to convict on uncorroborated testimony led to criticism in an unofficial report into the trials in 1983 by Lord Gifford, who concluded that in handling the supergrass issue, the Diplock courts had behaved in a way which could not be justified by reference to traditional common law standards of fairness and due process.³⁵ The Court of Appeal later developed the jurisprudence to a position where the evidence of a supergrass was more dangerous than that of an ordinary accomplice with the result that the “sternest criteria” would have to be fulfilled before their evidence could provide the sole basis for conviction.³⁶ The result of this critical stance by the Court of Appeal seemed to put a halt to the supergrass strategy. To justify the heavy financial, policing and political costs, the strategy required a high conviction rate and when it became clear that the courts were no longer prepared to convict on uncorroborated evidence, the authorities had to revert to different strategies.

The supergrass era posed the most dramatic challenge to the legitimacy of the Diplock courts. After this, the authorities began to put greater reliance on forensic evidence and the courts aroused less controversy.³⁷ It has been argued that the absence of the jury resulted in an adversarial deficit for the accused both in terms of the pivotal position that the judge occupies in the course of the trial when there is no jury and in terms of the different attitude that judges take towards the enforcement of the criminal law.³⁸ Yet the record of the Diplock courts suggests that they never succumbed to becoming a mere rubber stamp for security strategies. Although the acquittal rate lagged behind that of juries, it has been

32 S Greer, *Supergrasses: Informers and anti-terrorist law enforcement in Northern Ireland* (London: Clarendon Press 1995), p. 57.

33 There is an extensive literature on the legal implications of the supergrass issue: see Greer, *Supergrasses*, n. 32 above; P Hillyard and J Percy-Smith, “Converting terrorists: the use of supergrasses in Northern Ireland” (1984) 11 *JLS* 335; D Bonner, “Combating terrorism: supergrass trials in Northern Ireland” (1988) 51 *MLR* 23; J Jackson, “The use of supergrasses as a method of prosecution in Northern Ireland” in *Standing Advisory Commission on Human Rights: Annual Report for 1983–1984* (London: HMSO 1984), p. 83.

34 *R v Gibney and others* (1983) 13 *NIJB* 7, at 8.

35 Lord Gifford, *Supergrasses: The Use of Accomplice Evidence in Northern Ireland* (London: Cobden Trust 1984), pp. 30–2.

36 *R v Crumley and others* (1986) 14 *NIJB* 44.

37 *Judge without Jury*, n. 9 above, pp. 93–4.

38 *Ibid.* ch. 10.

very difficult for critics to show that judges simply acquiesced in the prosecution evidence.³⁹ Even in the darkest hours of the Diplock courts during the confession era of the late 1970s and the supergrass era of the early 1980s the broad statistics do not show any dramatic drop in the acquittal rate.⁴⁰

When the authorities later on attempted to make it easier to obtain convictions by curtailing the right of silence in response to the “wall of silence” that the police were faced with,⁴¹ the courts resisted at the outset any temptation to use silence as means of bolstering weak prosecution cases. Research found that while judges were willing to use the legislation to draw what common-sense inferences they could from a defendant’s silence, in many cases where inferences were drawn they merely had the effect of “copper-fastening” an already strong forensic case.⁴² In those cases where the legislation was used to bring a case up to the required standard of proof, there was little evidence to suggest that judges were using it to fill a large evidential deficit in the prosecution case. To understand why Diplock trials did not succumb to the temptation to bow to the demands of security, we need to shift the focus away from the structural changes made to the criminal process towards the ideological forces that shaped the participants in the Diplock process.

Legitimacy and ideology in the Diplock process

With the deviations that the Diplock system imposed on the ordinary criminal process, it might have been thought that the courts would have suffered a serious crisis of legitimacy that would have incurred as much wrath on the part of politically motivated defendants as occurred in the prisons when prisoners were deprived of special category status.⁴³ At first it is true that a number of defendants refused to recognise the court and this defiant gesture certainly represented a challenge to the legitimacy of the court.⁴⁴ Just as the criminalisation policy was being officially launched, however, republican and loyalist defendants changed their stance of non-recognition and began to contest the charges against them. McEvoy explains this on the practical ground that a “long term armed struggle” needed as many volunteers outside prison as possible.⁴⁵ A number were resistant to plea-bargaining but it seemed that they were prepared to go along with the tactic of “adopting the evidence” which entailed pleading not guilty but accepting the case presented in the prosecution statements in return for a lighter sentence. These tactics, undoubtedly produced fruits for those given lighter sentences but such a pragmatic approach also helped to give some legitimacy to the Diplock regime, playing along with the rules of the game rather than refusing to play the game in the first place.

They were encouraged to take this stance by the lawyers who represented their cases. Once the paramilitary tactic of non-recognition changed to one of fighting cases, lawyers played an increasingly influential role. The barristers who appeared in the Diplock courts were well wedded to the traditionalist norms of the Bar such as the cab rank principle,

³⁹ *Judge without Jury*, n. 9 above, pp. 33–6.

⁴⁰ It is true that during the confession era of the late 1970s the acquittal rate dropped to 35 per cent from the norm of 50 per cent in the early 1970s: *Ten Years On*, n. 2 above, p. 61. But even these figures do not suggest a slavish adherence towards conviction.

⁴¹ See Criminal Evidence (NI) Order 1988.

⁴² J Jackson, M Wolfe and K Quinn, *Legislating against Silence: The Northern Ireland experience* (London: Northern Ireland Office 2000), ch. 6.

⁴³ For the importance of prisons as a site of struggle during the Northern Ireland conflict, see K McEvoy, *Resistance, Management and Release: Paramilitary imprisonment in Northern Ireland* (Oxford: Oxford University Press 2001).

⁴⁴ *Ten Years On*, n. 2 above, pp. 75–6.

⁴⁵ K McEvoy, “Law, struggle and political transformation in Northern Ireland” (2000) 27 *JLS* 542.

whereby barristers are expected to take the first brief which comes to them irrespective of where it comes from.⁴⁶ Accordingly, a number of barristers defended both republicans and loyalists and appeared for both prosecution and defence. This non-partisan representation on the part of the Bar had two effects. On the one hand, it again gave the Diplock courts a legitimacy that they might otherwise have lacked. On the other hand, it also prevented the courts becoming merely a tool in the hands of the prosecution. There was less scope for rhetoric and histrionics before a judge than a jury. The atmosphere seemed at times more akin to the calm and courteous proceedings that one sees in the appellate courts than to the more highly charged atmosphere of jury trials.⁴⁷ But this tranquillity in defence counsel's presentation belied a forensic struggle that demanded the most skilful advocacy in order to prevent judges becoming case-hardened.

At the same time, the judges also displayed a strong sense of independence in judging the hundreds of cases that came before them in the Diplock courts. It would be wrong to suggest that there have not been miscarriages of justice during the Diplock era.⁴⁸ Allegations of miscarriage have been made but these have never risen to the scale of those that afflicted the English courts in their attempt to deal with Irish republican violence.⁴⁹ We shall see that there has recently been a re-evaluation of the safety of a number of convictions arising out of the courts' reliance on confessions in the early years of the Diplock regime. But, for the most part, judges appear to have scrutinised cases as best as they could, aided by the skilful advocacy of lawyers appearing in the trials. Judges seemed determined to show that they brought an independent judgment to each case. Perhaps the best expression of this independent attitude is to be found in one of the supergrass cases where the Lord Chief Justice, Lord Lowry, made it clear what approach judges had to follow:⁵⁰

Amid the clash of arms the laws are silent: so *Cicero* exclaimed over 2000 years ago. During the greatest conflicts in our history Lord Atkin bravely ventured to contradict this assertion. Now too peace, order and society itself are under fire and constant attack and that is why we must remember Lord Atkin's famous dictum: In this country amid the clash of arms the laws are *not* silent. They may be changed, but they speak the same language in war as in peace. This war is being waged by organisations which style themselves armies and observe military procedures, but it has not invaded and will not be allowed to invade the courts. The rule of law has prevailed and will continue to prevail there.

This "rule of law" ideology seemed to play a part in preventing the Diplock courts descending into a mere tool of security strategy. Although judges were to say in a number of cases they had little doubt about the guilt of defendants, where the evidence pointed to a reasonable doubt they did acquit. Even when they were given the authority to use the

46 B Jorgensen, "Defending the Terrorists: Queens Counsel before the courts of Northern Ireland" (1982) 9 *JLS* 115.

47 *Judge without Jury*, n. 9 above, p. 207.

48 In 1995 it was estimated that there were 35 outstanding cases where there were serious doubts about the safety of the convictions: British Irish Rights Watch and the Centre for International and Comparative Human Rights Law, *Putting Wrongs to Right: Tackling miscarriages of justice in Northern Ireland and the Republic of Ireland* (1995). An informative discussion is to be found in B Dickson, "Miscarriages of Justice in Northern Ireland" in C Walker and K Starmer, *Miscarriages of Justice: A review of justice in error* (London: Blackstone Press 1999), p. 287.

49 It would be difficult to compete with the notoriety that has been given to cases such as the Birmingham Six, the Maguire Seven and the Guildford Four. The most notorious cases to have arisen in Northern Ireland have been the cases of the so-called UDR Four and Casement Trials. See respectively *R v Latimer, Hegan, Bell and Allen*, unreported, 29 July 1992, and Committee for the Administration of Justice, *The Casement Trials: A Case Study of the Right to a Fair Trial in Northern Ireland* (Belfast: CAJ 1992).

50 *R v Gibney and others* [1983] 13 NIJB 8.

silence of defendants against them to make up deficiencies in the prosecution evidence, they seemed reluctant to allow silence to be used in any dramatic way to make up the deficiencies. A number of factors appear to have reinforced this ideology. There was the high professionalism mentioned above that was brought to bear upon Diplock trials by senior advocates acting for both prosecution and defence. Elsewhere, Lord Lowry also spoke of the importance of public accountability.⁵¹ Judges were aware of the glare of publicity that surrounded many trials and they also had to produce written judgments which were scrutinised not just by appellate courts on appeal but, as he put it, by “well-informed and potentially hostile critics”.⁵²

Judicial application of the rule of law at trial fell short, however, of the kind of activist judging that would have been required to prevent abuses in the pre-trial stage of criminal proceedings. Judges displayed little willingness to criticise or curtail the emergency. They recognised that they had a discretion to exclude confessions strictly admissible under the emergency test but were consistently reluctant to give this much scope in view of the need to adhere to the will of Parliament.⁵³ They showed little inclination to apply the Judges’ Rules which remained dormant throughout the emergency regime, and even when suspects in the holding centres were given a right of access to legal advice in 1987 they showed little willingness to challenge police justifications for delaying access.⁵⁴ They also displayed little enthusiasm for playing an activist supervisory role over the interrogation process. They apparently blocked the use of judicial officers to review detentions under the Prevention of Terrorism Act which would have avoided the need for the UK government to derogate from the decision in *Brogan v UK*,⁵⁵ which effectively held that Article 5 of the ECHR required arrested persons to be brought before a judicial authority within four days of detention.⁵⁶

This rather compliant attitude towards the emergency legislation was also taken by the legal profession as a whole. Although certain groups of lawyers had some scruples about defending detainees before the detention hearings in the early 1970s,⁵⁷ few had any scruples about appearing before the Diplock courts. Unlike lawyers in other conflict situations, there has been little tradition of “radical lawyering” in Northern Ireland.⁵⁸ Nor has there ever been much public criticism of the Diplock courts on the part of lawyers. More remarkably, there was little public criticism of the ill treatment of suspects in the holding centres or of the fact that solicitors were regularly denied access to suspects held in police custody during the 1970s and 1980s, although the Law Society opposed a recommendation of the Independent Commissioner for the Holding Centres that a list of government-approved lawyers be granted access to the holding centres.⁵⁹ Even when controversial changes were made to the law, such as the silence changes, there was little debate within the profession. Some years earlier when similar changes were proposed for England and Wales,⁶⁰ the legal profession was so vociferous in its criticism that the proposals were dropped.

51 Lord Lowry, “National security and the rule of law” (1992) 26 *Israel LR* 117.

52 *Ibid.* p. 131.

53 *R v Tobin* (1974) NIJB (Mar), *R v McCormick* [1977] NI 105, *R v Dillon and Gorman* [1984] NI 292, *R v Cowan* [1987] 1 NIJB 15, *R v Howells* [1987] 5 NIJB 10.

54 E.g. *R v Harper* [1990] NI 28, *R v Cosgrove and Morgan* [1994] NI 182.

55 (1988) EHRR 117.

56 C Walker, *The Prevention of Terrorism in British Law* 2nd edn (Manchester: Manchester University Press 1992), ch. 6.

57 *Law and State*, n. 2 above, pp. 66–7.

58 S Livingstone, “And justice for all? The judiciary and the legal profession in transition” in C Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart Publishing 2001), pp. 131, 133.

59 See *First and Second Annual Reports of the Independent Commissioner for the Holding Centres* (1994, 1995).

60 Criminal Law Revision Committee, *Evidence (General)* Cmnd 4991 (London: HMSO 1972).

Criticism of the pre-trial process of interrogation came instead from human rights organisations which played an increasingly important role in monitoring the Diplock system. It will be recalled that the Diplock system was premised on the need to guarantee the minimum standards of the European Convention. Although these standards were not enshrined in UK law at the time the Diplock Commission reported, they were closely tied to the legitimacy of the criminalisation policy. When human rights organisations aided by the media uncovered human rights abuses in the interrogation centres in the 1970s, the government was forced to set up a judicial inquiry under Judge Bennett QC, which recommended certain safeguards aimed at preventing physical abuse.⁶¹ These fell far short, however, of what were to become known as the PACE rules introduced in England and Wales and later for “ordinary” non-emergency cases in Northern Ireland.⁶² Human rights organisations and foreign bar associations continued to voice concerns about the continuing use of the interrogation centres and the Diplock courts.⁶³ A crushing blow to the government’s criminalisation policy was delivered by the European Court of Human Rights in *Brogan* and although the UK’s derogation from this international obligation under Article 15 of the convention was subsequently upheld by the European Court,⁶⁴ this was an admission that the emergency could not be contained within minimal international protections.

The silence legislation provided further opportunity for human rights challenges. The legislation prompted solicitors to argue for access to their clients in the holding centres. The Bennett Committee had recommended that suspects arrested under the emergency legislation be given access to legal advice at least 48 hours after being in custody, but access was invariably denied during the first 48 hours in custody. Suspects were given a statutory right of access for the first time in 1987, albeit one that could be delayed on fairly broad grounds for up to 48 hours.⁶⁵ Figures from the Northern Ireland Office show that from that point on suspects increasingly asked for access to a legal adviser and it was quite common for access to be delayed.⁶⁶ A series of legal challenges were then made to these delays in access and although these were largely unsuccessful, they seemed to have the effect of dramatically reducing the number of delays.⁶⁷ Then in a landmark decision in 1996 the European Court of Human Rights ruled that in the context of the silence legislation where suspects had to face a “fundamental dilemma” between remaining silent and having inferences drawn against them or breaking their silence and risk prejudicing their defence, the concept of fairness enshrined in Article 6 of the ECHR required that the accused had the benefit of the assistance of a lawyer.⁶⁸

61 *Report of the Committee of the Inquiry into Police Interrogation Procedures in Northern Ireland* Cmnd 7497 (London: HMSO 1979).

62 Police and Criminal Evidence (NI) Order 1989.

63 See e.g. W E Hellerstein, R B McKay, P R Schlam, *Criminal Justice and Human Rights in Northern Ireland: A report to the Bar of the City of New York* (New York: Association of the Bar of the City of New York 1987); Amnesty International, *United Kingdom Summary of Human Rights Concerns* (London: Amnesty International 1995). In July 1995, the Human Rights Committee of the United Nations recommended that the Castlereagh holding centre be closed.

64 *Brannigan and McBride v UK* (1994) 17 EHRR 539.

65 Northern Ireland (Emergency Provisions) Act 1987, s. 15.

66 See Jackson et al, *Legislating against Silence*, n. 42 above, p. 116.

67 Between 1987 and 1991, for example, delays in access occurred in over 50 per cent of the cases where access was requested but in 1992 this had reduced to 26 per cent and by 1995–97 to under 10 per cent. See Jackson et al, *ibid.*

68 *Murray v UK* (1996) 22 EHRR 29.

After this decision, the focus shifted towards whether lawyers had a right to be actually present in the interview room. The Northern Ireland courts and the House of Lords fell back on the intent behind the emergency legislation, which was that the police should be able to create a situation in which a guilty man is more likely than he would otherwise be to unburden himself to questions and the presence of solicitors would make confessions much more unlikely.⁶⁹ Before these rulings came to be challenged before the European Court, however, the Chief Constable bowed to the demand that solicitors should be able to sit in during paramilitary suspect interviews in the same way as they may sit in during ordinary PACE interviews. The logic of the *Murray* case therefore ultimately prevailed, which is that where suspects are told that inferences may be drawn against them for refusing to answer questions, they need the protection of legal advice, and it made no sense to deprive them of this in the actual police interview where they need the protection most.

The effect of this human rights pressure was that procedures in the interrogation centres were brought gradually more into line with ordinary PACE procedures. But the price would seem to be that the procedures became more embedded within permanent counter-terrorist policy. In January 1996, the British government announced a major re-evaluation of the use of emergency laws with the intention of replacing the emergency laws with a single piece of anti-terrorist legislation to cover the whole of the United Kingdom. After this review reported,⁷⁰ the government enacted a new Terrorism Act in 2000 incorporating the provisions of the old Northern Ireland (Emergency Provisions) Acts and Prevention of Terrorism (Temporary Provisions) Acts. This Act provided a new framework that claimed to be consistent with the UK's human rights obligations which had been given prominence by the incorporation of the European Convention on Human Rights into UK law under the Human Rights Act 1998. Apart from providing for new detention codes which for the first time permitted legal advisers to sit in at police interviews and required interviews to be audio and video-recorded,⁷¹ one of the major changes in the Act was a new provision requiring judicial extension of detention after persons arrested on suspicion of acts of terrorism have been detained for longer than 48 hours.⁷² This obviated the need for the UK to continue to derogate from Article 5 of the ECHR. The result was that the entire emergency law system in Northern Ireland, now re-cast as a counter-terrorist system, could claim to be much more compatible with minimal human rights obligations. Although the Northern Ireland part of the Act including the Diplock courts was time-limited to five years and made subject to annual review and renewal, the fact that these provisions were integrated within a single piece of permanent counter-terrorist legislation covering the entire United Kingdom sent out a strong signal of normalisation. The gap between normal detention and emergency detention procedures was further narrowed in 2002 when the emergency test for the admissibility of confessions was abolished and the PACE test was applied to all cases.⁷³ At the same time, the period during which terrorist suspects may be

69 *Re Russell's Application* (1996) NI 311, *R v Chief Constable of the RUC, ex parte Begley* [1997] NI 275.

70 See Lord Lloyd, *Inquiry into Legislation against Terrorism* Cmnd 3420 (London: HMSO 1996).

71 See Code of Practice for the Detention, Treatment and Questioning of Persons Detained under the Terrorism Act 2000 and Code of Practice Governing the Video Recording with Sound of Police Interviews of Persons Detained under Section 41 and Sch. 7 of the Terrorism Act 2000 where the Interview takes place in a Police Station.

72 Terrorism Act 2000, Sch. 8, Part III.

73 Terrorism Act 2000 (Cessation of Effect of Section 76) Order 2002.

detained subject to judicial authorisation was steadily increased from seven days to 14 days in 2003 and up to 28 days in 2006.⁷⁴

The Diplock legacy

Although the Diplock system began with an emphasis on security rather than the rule of law, its most important legacy would seem to be that the criminal courts can provide a workable, reasonably proportionate and now largely human rights compliant solution to the threat of paramilitary violence and terrorism. Over the years, the gap between the Diplock procedures and those that operate in the ordinary courts has narrowed. This is not solely explicable on grounds of Diplock procedures becoming less security-oriented. Some of the security responses such as the curtailment of the right of silence that were adopted in the Diplock courts also made their way into the ordinary criminal process. At the same time the pendulum has swung quite considerably in favour of greater protection for suspects in the pre-trial process. Some of these changes go in the direction that Boyle, Hadden and Hillyard recommended in *Ten Years On*. In an effort to avoid the system of isolation and persistent questioning designed to break the will of suspects, which we have seen was a hallmark of the early Diplock procedures, they had suggested that pre-trial questioning be regulated by suspects appearing before a magistrate or as an alternative that suspects be questioned in the presence of a legal adviser. Although the idea of judicial oversight of interrogation has never taken hold, we have seen that modern procedures permit suspects access to a legal adviser during police interviews. Young suspects are also given access to an appropriate adult in the police station.

In recent years, the Criminal Cases Review Commission has referred a number of early Diplock cases to the Northern Ireland Court of Appeal and the court has quashed the convictions of a number of defendants who were under 18 at the time they made confessions after being questioned continuously in isolation.⁷⁵ In these cases, the court has applied the principle that where the only evidence against a defendant is an oral confession which is later retracted and it appears that such a confession was obtained in breach of rules prevailing at the time and in circumstances which denied him or her important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would seem to be at least a prima facie ground for doubting the safety of the conviction.⁷⁶ It has been suggested that consideration of the commission's Northern Ireland cases raises the question whether these cases represent the tip of an iceberg of wrongful convictions secured on the basis of coerced and unreliable confession evidence.⁷⁷ It may be that, as the number of cases referred by the Criminal Cases Review Commission escalates, there will be a fundamental re-evaluation of the Diplock regime. But the fact that the Court of Appeal is now quashing some of these earlier convictions in the light of modern standards of fairness is an illustration of the seriousness with which the courts are now prepared to scrutinise the fairness of the Diplock procedures. Part of this may be due to the different context in which cases are now scrutinised. It has been suggested that international courts are more prepared to scrutinise alleged human rights violations in post-conflict periods of

74 See Criminal Justice Act 2003, s. 306, and Terrorism Act 2006, s. 23. The Counter Terrorism Bill 2008–09, cl. 22 proposed to extend the maximum period of pre-charge detention still further to 42 days but the government withdrew this proposal. See further B Dickson, "Article 5 of the ECHR and 28-day detention of terrorist suspects", p. 231 of this Special Issue.

75 E.g. *R v Hanna and Hinds* [2005] NICA 36, *R v Adams (Robert)* [2006] NICA 6, *R v Mulbolland* [2006] NICA 32.

76 *R v Ashley King* [2000] 2 Cr App R 391.

77 L. Elks, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (London: Justice 2008), p. 301.

transition towards peace than in periods of war or intense conflict and it may be that domestic courts take a similar stance.⁷⁸ But it is also the case that the standards of fairness have themselves changed. The security forces still retain wide arrest powers in Northern Ireland and the periods during which arrested persons may be detained before charge are even longer than they were before. But suspects are now questioned under a very different regime from the one that was in place 10 years ago and the courts are prepared to apply a rigorous scrutiny towards applications for detention to be extended.⁷⁹

It has been argued here that this normalisation of the Diplock system is attributable to two factors – the ideology of those participants who were subject to it and operated within it and the ideology of human rights. Although the maltreatment of paramilitary suspects in the 1970s and the subsequent supergrass strategy in the early 1980s showed that the Diplock system was capable of succumbing to those intent on gaining convictions no matter what, ultimately the other protagonists in the Diplock system saved it from becoming totally discredited as a mere tool of anti-terrorist policy. In a sense then, the Diplock solution of devising a trial system which would deal with paramilitary offenders while keeping within minimum human rights norms worked because the protagonists made it work. Lawyers and judges were able to keep the trial system pure enough to withstand human rights challenges. But they were unable to prevent human rights abuses in the interview room. Maltreatment in the holding centres in the 1970s was not exposed and curtailed by the courts but by non-governmental human rights organisations. Similarly, it was the European Court of Human Rights, not the Northern Ireland courts, which ruled on the length of time suspects could be held in custody before being brought before a court and established the right of lawyers to have access to their clients in the detention centres, although the Northern Irish courts are now having recourse to these modern procedures in reversing convictions during the Diplock era.

Throughout the conflict, however, there was one set of protagonists that seemed at times to operate outside the rule of law and these were the security services. During the 1980s and 1990s security strategy switched from obtaining confessions and using supergrasses in court to infiltrating paramilitary organisations with informers. A clandestine “dirty war” took place that could result in defendants being exposed and brought to court for offences that informers brought to light. An elaborate system of disclosure was put in place under the Diplock system whereby a separate judge was appointed to deal with the disclosure of sensitive information arising in the course of the trial.⁸⁰ The prosecuting authorities were obliged to bring any sensitive relevant evidence before the disclosure judge in order that he or she might rule on whether there should be disclosure. The system depended, however, on full disclosure by the security services of all relevant evidence to the prosecuting authorities and there are examples of this failing to happen.⁸¹ This points to

78 Campbell, “Wars on terror”, n. 1 above.

79 See e.g. *In re Colin Duffy and others* [2009] NIQB 31.

80 See *R v Harper and Abity* [1994] NI 199, *R v McKeown* [2005] NI 301.

81 See the comments of Kerr LCJ in quashing the convictions of a number of defendants who were charged with kidnapping an informant: “It is now clear to us there was directly relevant material on the question whether a trial of the appellants should take place which had not been made available to the Director of Public Prosecutions when he decided that they should be prosecuted for the offences of which they were subsequently convicted.” *R v Morrison and others* [2009] NICA 1, para. 3.

the limitations of the courts when faced with security forces who are determined to circumvent the rule of law.⁸²

Now that relative peace has descended on Northern Ireland, there remains the question whether the Diplock solution of abolishing the jury remains a justifiable response to the present terrorist threat. With the cessation of violence and the enactment of a number of confidence-building measures designed to restore confidence in the criminal justice system in the wake of the Belfast Agreement and the recommendations of the Criminal Justice Review established by the Agreement, it might have been thought that the time would have been ripe for the abolition of the Diplock courts. The use of Diplock courts had declined significantly and in response to the Provisional IRA statement of July 2005 which announced an end to the armed campaign, the Secretary of State announced a programme of security normalisation on 1 August 2005. By this time much of the emergency legislation was being mainstreamed into UK-wide anti-terrorist legislation. There remained a risk of jury intimidation. But a provision in the Criminal Justice Act 2003 had already created a system of non-jury trial to deal with the risk of jury intimidation where there was a clear and present danger of jury tampering in any case and this has been extended to Northern Ireland.⁸³

In its consultation paper reviewing the replacement arrangements for the Diplock court system, however, the government considered that there was a continuing legacy of terrorism from dissident republican and loyalist paramilitaries and a continuing risk in a closely knit community such as Northern Ireland of intimidation and perverse verdicts.⁸⁴ The paper suggested that there should be a shift in favour of a presumption of jury trial but that the decision as to whether there should be a non-jury trial or not should lie with the prosecuting authorities as before, rather than with the trial judge, which is the case under the Criminal Justice Act legislation. Under s. 1 of the Justice and Security (NI) Act 2007, the Director of Public Prosecutions (DPP) for Northern Ireland may issue a certificate that any trial on indictment of a defendant be conducted without a jury if he or she suspects that one of a number of conditions is met and is satisfied that there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The relevant conditions extend beyond the involvement of paramilitary activity and include the fact that the offence was committed as a result of or in response to religious or political hostility. More worrying perhaps than the width of these conditions (they include a defendant being an "associate" of a member of a paramilitary organisation), is the fact that the DPP's decision cannot be questioned in any court of law except on the ground of dishonesty, bad faith or other exceptional circumstances, including, in particular, circumstances relating to lack of jurisdiction or error of law. It was originally proposed that no court could entertain proceedings for questioning the DPP's decision under any circumstances. The House of Commons and House of Lords Joint Committee on Human Rights objected that such an ouster raised rule of law concerns as it was an indispensable feature of the rule of law that there be a right of access to a court to challenge the legality of government action.⁸⁵ The government responded by introducing an amendment which now gives some limited scope for judicial review and the section is now made subject to s. 7(1) of the Human Rights Act 1998 which enables a claim to be made that a public authority has infringed a convention

82 The DPP has powers under s. 35(5) of the Justice (NI) Act 2002 to request the Chief Constable of the Police Service of Northern Ireland to obtain and provide information to the Director relating to any matter appearing to the Director to need investigation. S. 6 of the Justice (NI) Act 2004 also enables prosecutors to refer cases to the Police Ombudsman for investigation.

83 Criminal Justice Act 2003, s. 44. This provision was extended to Northern Ireland on 8 January 2007. See Crown Court (Amendment) Rules (NI) 2006.

84 Northern Ireland Office, *Replacement Arrangements for the Diplock Court System* (Belfast: NIO 2006).

85 Joint Committee on Human Rights, *Fifth Report* (2006–07) HL 46/HC 303.

right. The limited scope for judicial review that is now available may prevent defendants being placed in a “black hole” whereby any decision to submit them to Diplock procedures is outside the review of the court but it is submitted that they are still placed in a “grey hole” in the sense that considerable unreviewable discretion has been given to the DPP on the question, in particular, whether there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.⁸⁶

The government’s response to the Joint Human Rights Committee was to claim that to allow every decision of the DPP to be challenged would result in considerable delay and may lead to cases that are not safe to be tried before a jury having to be so tried because the intelligence on which the DPP’s decision is based could not be disclosed. The government purported to follow the decision of the High Court of Northern Ireland in *Shuker and others*⁸⁷ but in fact, as the Joint Committee pointed out, the court expressly rejected the argument that the Attorney General’s decision to certify scheduled offences for jury trial under the old emergency legislation was non-justiciable on the ground that it was frequently based on sensitive material. It is true that the grounds for concluding that one of the conditions for non-jury trial in the legislation is met and that the administration of justice may be impaired may well depend upon the content of sensitive material. Much security effort during the last years of the conflict was spent in infiltrating the ranks of paramilitary organisations through informers whose identity needed to be protected. But in other situations where sensitive information is relied upon it has been possible to impose a degree of judicial control. In his report to the government, the Independent Reviewer of Terrorism considered that any certification for non-jury trial by the prosecution authority should be subject to review by a High Court judge on the application of any defendant in the case.⁸⁸ A special advocate should be available for the hearing with rules of procedure similar to those used by the Special Immigration Appeals Commission (SIAC). The special advocate procedures employed by SIAC have been criticised on the ground that they do not enable persons fully to meet allegations against them based on closed material and they have recently been held to be incompatible with the standards of fairness required under Article 5(4) of the ECHR.⁸⁹ But they would be an improvement on the present Diplock procedures which do not envisage any meaningful scrutiny of whether the defendant’s case falls within the conditions prescribed for Diplock trial. Parliament should also consider legislation to introduce a more robust special advocate procedure which should also be available in the course of the trial where applications are made to disclosure judges for the non-disclosure of material favourable to the defence.

It has been claimed that fairness is a constantly evolving concept and that standards and perceptions of fairness may change from one century to another but also, sometimes, from one decade to another.⁹⁰ One of the reasons why the Diplock system has survived would seem to be because its procedures have been adjusted to take account of human

86 Dyzenhaus, *The Constitution of Law*, n. 3 above, p. 42, describes a legal grey hole as a legal space in which there are some legal constraints on executive action (it is not a lawless void) but they are so insubstantial that they pretty well permit government to do as it pleases.

87 *In re Shuker and others* [2004] NIQB 20.

88 Lord Carlile of Berriew QC, “Non-jury trial in Northern Ireland” in Northern Ireland Office, *Replacement Arrangements*, n. 84 above, Annex A. See also the recommendations of the *Report of the Committee to Review the Offences Against the State Acts 1939–98* (2002), paras 9.60–77 which examined the review of the decision of the DPP to refer cases to the Special Criminal Court in the Republic of Ireland.

89 See the criticisms in Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (2005), HC 323-1, chs 4 and 5 and *A v UK App No 3455/05*, 19 February 2009. See also *Secretary of State for the Home Department v AF (FC) and another* [2009] UKHL 28.

90 *R v H* [2004] 2 AC 134, para. 11.

rights norms over the years. If the system is to continue to retain its legitimacy as an alternative mode of trial to the jury, it will be important that its procedures are kept constantly under review. This would seem to apply as much to the procedures for determining whether such a mode of trial is necessary as to the procedures that are applied at trial. The Criminal Justice Act 2003 has exported the Diplock mode of trial to England and Wales in cases where there is a danger of jury tampering. Even if it is considered necessary to invoke this mode of trial on broader grounds in Northern Ireland than in the rest of the UK, the decision to do this in a particular case should be the subject of a full judicial determination accompanied by a robust special advocate procedure where sensitive information forms the basis of the prosecution's case for non-jury trial. Without this, the spectre of security considerations overriding the rule of law will continue to cast a shadow on the Diplock system.

