Gerard Hogan and Clive Walker

POLITICAL VIOLENCE AND THE LAW IN IRELAND

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PREFACE

The weight of history shapes not only political violence in Ireland but also commentaries thereupon. As a result, we are keenly aware that much has already been written on the subject (including various empirical surveys, both official and unofficial[1]) which we would not wish to duplicate. It is therefore appropriate to explain at the outset that this book is essentially a study of the legal codes against political violence in both Irish jurisdictions. Our focus is primarily upon municipal law, viz., the Northern Ireland (Emergency Provisions) Acts 1973–87 (universally known as the 'Emergency Provisions Acts') (Part II) and the Offences against the State Acts 1939–85 (Part III). Those aspects of international law, such as extradition, which exert some practical effect in Ireland will also be discussed (Part IV). Our aim throughout is basically didactic – to explain the measures and their impact. Polemic and partisanship are avoided as far as possible,[2] but political theories underlying both the violence and our critique are elucidated (Part I).

As for the legal setting, the text covering Northern Ireland was mainly the responsibility of the second-named author and must be seen in the light of his earlier publication, *The Prevention of Terrorism in British Law* (hereafter cited as *PTBL*).[3] Consequently, details of the Prevention of Terrorism (Temporary Provisions) Acts 1974–84 are not replicated in this book. The description of the position in the Republic (primarily the work of the first-named author) must, for its part, be read subject to that State's Constitution, as discussed elsewhere.[4] As will become evident, the styles of Parts II and III differ substantially mainly because of the greater corpus of relevant case law in the Republic and conversely, the welter of official studies in Northern Ireland.

The law is described in accordance with sources available to us on 31 December 1987, except that Part III and s. 12 of the Emergency Provisions Act 1987 are assumed to be in force.[5]

Gerard Hogan
Clive Walker

Notes

1 See especially: K. Boyle, T. Hadden and P. Hillyard, *Law and State: the Case of Northern Ireland* (1975), and *Ten Years On in Northern Ireland* (1980); D. P. J. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (1983).

2 As for place names and like issues of controversy, we adopt official titles. We have, however, for the sake of clarity, used the statutory description of Ireland, *viz.*, 'the Republic', as opposed to the official name, 'Ireland', contained in the Constitution of Ireland, 1937, Art. 4.

3 (1986) (Manchester University Press).

4 See especially: J. M. Kelly, *The Irish Constitution* (2nd edn, 1984) and Supplement (1987) (Jurist Publishing Co.); J. P. Casey, *Constitutional Law in Ireland* (1987).

5 Pt. III commences on 1 January 1988.

ADDITIONAL NOTES

These notes take account of important developments up to 29 July 1988

1 Pp. vi, 5, 35–6, 71–3. The Police (N.I.) Order, 1987 and related legislation is now in force (1988 S.R. Nos. 7–11) as is the Emergency Provisions Act, 1987 s. 12 (1988 S.I. No. 1105). The Criminal Injuries (Compensation) (N.I.) Order, 1988 replaces that of 1977.

2 Pp. 28, 30. Viscount Colville has reported on the operation in 1987 of the Prevention of Terrorism and Emergency Provisions Acts.

The Government's initial response to his annual and main (Cm. 264) reports on the Prevention of Terrorism Act (see H. C. Debs, vol. 127, col. 925, 16 February 1988) is to accept that the 'core controls' (mainly the special policing powers: cols. 926, 927) should become permanent but should be brought into force on a temporary, annual basis. This structure corresponds to parts of the Offences against the State Acts and to recommendations by the authors (but with no accompanying justificatory criteria expressed in the Act, nor improvements in the scrutinising machinery nor the unification of all special legislation).

Following Viscount Colville's annual report on the Emergency Provisions Acts, the Government has promised only to reconsider scheduling (see H. C. Debs, vol. 128, col. 474, 25 February 1988, col. 881, 1 March 1988).

3 Pp. 32–3. The SACHR (13th Annual Report, 1987–88 H. C. 298) has also reviewed the relevant legislation (Chs. 6, 7) and in addition reveals that the procedures for strip-searching have been slightly tightened and that the transfer of prisoners is now allowed when both prison departments are reasonable satisfied that the applicant will not cause disruption or prove to be an unacceptable risk (ch. 8).

4 P. 34. Recent decisions on the rights of relatives in inquests include: *In re Price's Application* [1986] 15 N.I.J.B. 84 (Q.B.D.); *In Re Breslin's Application* (1988) 2 B.N.I.L. n. 8 (Q.B.D.).

5 P. 39. The RUC's Code of Conduct has been 'published' in the House of Commons Library, and a version was disclosed by the Committee on the Administration of Justice (*Newsheet*, January 1988).

6 Pp. 47, 51–4. The appeals to the NI Court of Appeal and House of Lords in *Murray v. Ministry of Defence* have now been fully reported [1987] 3 N.I.J.B. 84 and [1988] 1 W.L.R. 692). The MOD was liable for a routine frisk search without good reason but had not otherwise committed an assault or false imprisonment. The following points are noteworthy (for fuller details, see Walker, 'Army arrest powers on parade' (forthcoming), N.I.L.Q.).

There had been a half-hour delay in giving the plaintiff reasons for her arrest. The explanation was that the soldiers had properly given priority to a search of the house in order to avoid resistance or the raising of the alarm (pp. 700–1). This excuse seems to be a development of the exception to *Christie v. Leachinsky* ([1947] A.C. 573) that reasons need not be provided if the arrestee himself makes that task practically impossible. Yet the alleged difficulties were not factually established,

for the corporal who made the arrest remained with the plaintiff throughout the half-hour. The true reason for delay was not the exigencies of the situation but to heighten the tension and surprise of the suspect just before her interrogation (Q.B.D. at p. 19).

As well as detaining the plaintiff, the soldiers also herded the other occupants of the house into one room. This common practice resulted in damages for false imprisonment in *Toner and Oscar v. Chief Constable of R.U.C. and M.O.D.* (1987, County Court, cited in Colville's Annual Report (1987) para. 5.2. 3.3). However, the House of Lords considered that the action was reasonably necessary to secure the peaceable arrest of the plaintiff and even had the effrontery to suggest that it was for the protection of the others (p. 700). This obiter remark should be doubted for the reasons given in the text.

In the course of the operation, the soldiers searched the house. Since the plaintiff was identified at the moment of entry, this search was not for the purpose of arresting her. The House of Lords upheld a right to search for occupants 'who are disposed to resist arrest ... to secure that the arrest should be peaceable' (p. 700). This interpretation unwisely encourages soldiers to look for trouble and was unnecessary in this case where the arrest had already occurred without demur.

The Court of Appeal proposed a neat, but unconvincing limitation on interrogations under s. 14, namely that once there is firm evidence of an arrestable offence, the suspect must be transferred to the police otherwise an offence of withholding information (Criminal Law Act (N.I.) 1967 s. 5) will be committed (p. 97). This succinct demarcation furthers police primacy but is unsupported by s. 5, which allows a 'reasonable time' for notification. Surely a period of no more than four hours while another investigative branch of the security forces exhausts its inquiries is reasonable.

7 Pp. 49, 63. The desire to make full use of DNA and other forensic techniques has resulted in two developments.

First, the NI Court of Appeal accepted in *R. v. Mulvenna* ((1988) 2 B.N.I.L. n. 14) that a hair sample could be taken at common law from an arrestee by passing a comb through his hair. This is an unconscionable extension to the powers granted by *Dillon v. O'Brien and Davis* ((1887) 16 Cox C.C. 245), which envisaged the taking of 'property' from a suspect rather than parts of his body. One wonders how forcefully the police will be allowed to loosen hairs.

Secondly, the Criminal Justice Bill 1987–88 new cl. 80 (H.C. Debs. vol. 135, col. 638, 16 June 1988) imports into Northern Ireland the powers to take 'intimate' and 'non-intimate' samples as in the Police and Criminal Evidence Act 1984 ss. 62, 63. This reform is one of the most worthwhile for many years, subject to two criticisms. One concerns the manner of introduction of cl. 80, which was at the Report Stage of the Bill and the day after six soldiers had been murdered in Lisburn. Both factors inevitably reduced scrutiny of the measure, as the Government presumably intended. The second criticism is that cl. 80 departs dangerously from the 1984 Act in two respects. The first is that mouth swabs are to be reclassified as 'non-intimate' and so can be taken without consent. Yet the prospect of a squad of policemen forcing a suspect to be still and to open his mouth is both an extremely intrusive search and a dangerous invitation to apply violence. At the very least, an independent observer should be present. The other departure from the 1984 Act is that samples may be taken from anyone arrested under the Prevention of Terrorism Act s. 12(1)(b) rather than just those held for serious arrestable offences. This extension is again unwise, but the fault lies more in s. 12 than cl. 80.

8 Pp. 65, 66, 69. The Stalker/Sampson Report into six lethal shootings in 1982 found evidence of conspiracy to pervert the course of justice and obstruction of the police investigation. Surprisingly, the Attorney General (with the concurrence of the DPP) announced that prosecutions would be contrary to the interests of the public and national security (H.C. Debs, vol. 126, col. 21, 25 January 1988). The Report found no evidence of homicide, and Stalker's autobiography claims only an 'inclination' rather than a 'policy' to shoot to kill (p. 253). Three further inquiries have followed:

- one by HM Inspectorate into organisational matters (H.C. Debs, vol. 126, col. 465, 28 January 1988);

- one by the Police Authority which declined to press disciplinary charges against senior officers (*The Times*, 30 June 1988, 2);
- one by Charles Kelly which resulted in disciplinary charges against twenty lower-ranking officers (*The Times*, 5 July 1988, 1).

Recent controversial shootings have included those of McAnespie (*The Times*, 24 February 1988, 1) and of McCann, Farrell, Savage in Gibraltar (*The Times*, 7 March 1988, 1). The release of Pte. Thain on parole also caused concern (*The Times*, 24 February 1988, 1).

One of the suggested solutions to these continuing problems, the Australian doctrine relating to excessive self-defence, has ironically been overturned as too complex for juries: *D.P.P. (Victoria) v. Zecevic* (1987) 71 A.L.R. 641.

9 P. 118. It was suggested in ex p. Lynch that the conditions of detention cannot undermine its lawfulness. This obiter remark was not followed in *re Gillen's Application* ((1988) 4 B.N.I.L. n. 35). The High Court held that *habeas corpus* could be granted if either there were conditions amounting to a serious assault or the purpose of the arrest was to assault in order to extract a confession.

The Criminal Justice Bill 1987–88 new cl. 72 (H.C. Debs, vol. 135, col. 610, 16 June 1988) establishes a new offence of torture. This will allow the UK to ratify the UN Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (Cmnd. 9593, 1985) and thus pave the way for outside inspections of persons in custody.

10 P. 126. The N.I. Court of Appeal's judgment in *R. v. Steenson* ([1986] 17 N.I.J.B. 36) confirms that uncorroborated 'supergrass' evidence (in this case from Harry Kirkpatrick) must be exceptionally credible and that any errors will tend to prevent the attainment of that standard.

11 P. 147. The threat of the Prevention of Terrorism Act s. 11 was used to obtain film footage of the attacks on two soldiers at a paramilitary funeral in Belfast (*The Times*, 21 March 1988, 1, 23 March, 1, 24 March, 1, 25 March, 2). A system of applications to circuit judges (as in the Police and Criminal Evidence Act 1984 Sch. 10) would be preferable.

12 P. 158. The Government has continued to berate the media whenever official views on Northern Ireland are contradicted, as they have been over the Gibraltar shootings. See *The Times*, 29 April 1988, 1, 30 April, 1, 5 May, 2, 6 May, 1, 7 May 1.

13 Pp. 158–9. For a fuller account of the treatment of Sinn Féin, see Walker, 'Political violence and democracy in Northern Ireland' (forthcoming) M.L.R.

14 Pp. 195–8. Further evidence that the courts are unwilling to interfere with the use by the police of their arrest powers under s. 30 of the Offences against the State Act 1939 in the investigation of non-subversive crime is provided by *The People (Director of Public Prosecutions) v. Howley*, Court of Criminal Appeal, 4 March 1988 and Supreme Court, 29 July 1988. Here the accused apparently made incriminating statements admitting the murder of one Miss Ormsby in May 1985 following his arrest under s. 30. The scheduled offence of which he was suspected was that of malicious damage. It was argued that the malicious damage offence in question – which concerned alleged cattle maiming in February 1984 – was so removed from the circumstances surrounding the murder that the arrest under s. 30 was invalid. There was, however, no dispute that the police had a serious and genuine interest in solving the malicious damage offence. Entries on the police file prior to the murder suggested that the accused be arrested under s. 30 in relation to the cattle maiming incident and, while in detention, the accused was frequently challenged about this incident. It was contended that the murder was the primary or predominant motive for the arrest, and that, in the circumstances, the legality of the arrest was thereby vitiated.

In the Court of Criminal Appeal, Finlay C. J. rejected the application of the primary motive test in the following terms (at pp. 13–14 of the judgment):

> If this Court were to apply the [primary motive] test it would ... be introducing two wholly new and unsupported principles into the consideration of this question. The first would be that the motive or intention

> of the arresting officer, as distinct from his *bona fides*, could be the determining factor for the rights of members of the Garda Síochána interrogating the rights of the person detained and the admissibility of evidence obtained from such interrogations. The second would be that a person who was arrested on a bona fide suspicion of the commission of a scheduled offence and detained under s. 30 of the Offences against the State Act would, if he were under suspicion for a significantly more serious crime at the same time, be in some way immune from questioning on that serious crime.

It is hard to see how the second conclusion follows from the premise. If the dominant motive of the policeman arresting the accused under s. 30 is to arrest for a scheduled offence, then the legality of the arrest is thereby established. Nor is it easy to accept that the dominant motive test is a new test in Irish law (see, e.g., *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297) or that it is a distinct test from that of *bona fides*. To say that one must query whether a scheduled offence was the dominant motive underlying a particular arrest under s. 30 is to say no more than that the statutory power must be used for the purpose for which it is conferred.

The Supreme Court unanimously affirmed the decision of the Court of Criminal Appeal. Walsh J. observed (at pp. 16–17) that *Quilligan* and *Walsh* decided that:

> When an arrest for a scheduled offence [is effected] under s. 30 of the Offences against the State Act, 1939, not only must the arresting Garda have the necessary suspicion concerning the particular offence in question, but that in fact there must be a genuine desire and intent to pursue the investigation of that offence and that the arrest and that the arrest must not simply be a colourable device to enable a person to be detained in pursuit of some other alleged offence. The decisions do not provide any basis for suggesting that where a person has been genuinely arrested for the purpose of investigating a scheduled offence, and when the arrest is not otherwise flawed, it must be established that there is a link between the two offences to maintain the lawfulness of the detention if in the course of the detention the detained person is questioned in respect of the other suspected offence, whether it be a scheduled offence or not.

Walsh J. had earlier agreed (at p. 14) that had the Chief Superintendent been deceived into making the extension order under s. 30(3) by being misled by the police conducting the investigation: 'So as, in effect, to be caused to entertain a suspicion as a result of what was said to him which the Gardaí making the representations did not themselves entertain, then the extension would not be lawful, as it would have been obtained fraudulently.' However, there had no such misrepresentation by the investigating Gardaí. Hederman J. added (at p. 8): 'A valid extention order [must] be made in good faith and for purposes which include the purpose of the original detention. That was the case here. The position might be wholly different if the extension had been made for purposes wholly different from the purposes of the original detention.'

The effect of the decision in *Howley* will mean that judicial review of arrests under s. 30 will be reduced to a minimum, thus continuing the trend of the *Quilligan* and *Walsh* (pp. 193–8). It is salutary to reflect on the countless debates in the Oireachtas on the Criminal Justice Act 1984. Eventually the Oireachtas decided to permit an arrest for an initial six-hour period where the offence in question carried a penalty of greater than five years' imprisonment. The decision in *Howley* effectively allows the police to by-pass these safeguards and use s. 30 for the purposes of routine criminal investigation. It underscores the irony of allowing six-hour detention under the 1984 Act only in the case of serious crime, while permitting forty-eight-hour detention for the most trivial of malicious damage offences.

For an analysis of the *Quilligan* and *Walsh* decisions, see McCutcheon, 'Arrest, investigation and Section 30' (1987) 9 D.U.L.J. 46.

15 Pp. 271–2. In *Clancy v. Ireland*, High Court, 4 May 1988, Barrington J. upheld the constitutionality of the Offences against the State (Amendment) Act 1985. In this case the Minister made an order under s. 2 of the Act whereby the Bank of Ireland in Navan was required to pay over some IR£1.75 million into the High Court. The plaintiffs claimed title to the monies, and alleged that the 1985 Act was unconstitutional. Barrington J. accepted that as the plaintiffs claimed beneficial title to the monies, it was not necessary for him to pronounce on the constitutionality of the suppression

and forfeiture provisions of ss. 18–22 of the Offences against the State Act 1939, as these solely relate to the property of illegal organisations.

Barrington J. also rejected the due process argument (at p. 11):

> The 1985 Act admittedly provides for the freezing of a bank account and the payment of the funds into the High Court without notice to the account holder, but it does not confiscate his property or deprive him of a fair hearing. He is entitled to claim the funds in the High Court and he is entitled to a fair hearing there though, admittedly, the onus is on him to establish his title. In the event of a mistake having been made there is provision for the payment of compensation.

He cited with approval the decision of the US Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.* 416 U.S. (1974) where the validity of a statutory provision authorising the seizure of a yacht carrying illegal drugs was upheld. Nor was Barrington J. impressed with the property rights argument, saying that the Act was 'a permissible delimitation of [the plaintiffs'] property rights in the interests of the common good'.

16 Pp. 213–14; 248–50, 253. In *The People (Director of Public Prosecutions) v. O'Leary*, Court of Criminal Appeal, 29 July 1988, the accused's conviction by the Special Criminal Court on charges of membership of an unlawful organisation (contrary to s. 21 of the 1939 Act) and possession of incriminating documents (s. 24) was affirmed. The Gardaí had acted on a search warrant issued under s. 29 of the 1939 Act and found 37 copies of a paramilitary poster in the appellant's home (see p. 259). McCarthy J. rejected the argument that the search of the home was in breach of Article 40.5, which guarantees that the dwelling shall not be entered, save 'in accordance with law'. The warrant complied with the requirements of s. 29, and the search was, thus, in accordance with law. Here there was proof that the relevant officer who authorised the search was satisfied that there were reasonable grounds within the meaning of the section to justify the issuing of warrant.

As far as the possession of incriminating documents charge was concerned, McCarthy J. said it was clear that the poster as described was an incriminating document within the meaning of s. 2 of the 1939 Act. It followed from s. 24 of the 1939 Act (see pp. 245–6 of the text) that this 'without more, was evidence until the contrary were proved, that he was a member of the IRA'. Barr J. had said in the Special Criminal Court that the accused's denial of membership of the IRA was rejected in favour of the evidence of a Chief Superintendent that the accused was, in fact, a member on the date alleged, adding that: 'The nature and content of the posters, the obvious purpose and the explanation of the accused that he had them in his possession for the purpose of disseminating them to the public amply corroborated the Chief Superintendent's opinion.' McCarthy J. concluded that there was nothing here to suggest that the Special Criminal Court misdirected itself on the relevant onus of proof and dismissed the appeal.

17 Pp. 227–9. In *McGlinchey v. Governor of Mountjoy Prison*, Divisional High Court, 14 December 1987, Lynch J. rejected the argument that as no person or body had been expressly empowered to establish the first Special Criminal Court, there was no power to do so. He said (at pp. 4–5):

> There is a fundamental rule in the construction of all written documents ... that the document should be construed so that it can take effect rather than it be left ineffectual and useless if such construction is reasonably open on a consideration of the document as a whole. The maxim, *ut res magis valeat quam pereat* applies. If the applicant's submissions are correct, Part V of Offences against the State Act, 1939, is wholly ineffective ... There is no doubt but that s. 38(1) could have been more felicitioulsly drafted so as to declare expressly by whom the Special Criminal Court which the sub-section declares should be established. I have no doubt at all, however, but that a necessary inference arises that the Government are given power to establish first Special Criminal Court following the making of the [requisite] proclamation, having regard to the mandatory terms of s. 38(1) that such Court should be established; the powers given to the Government by s. 38(2) to establish further courts and by s. 39(2) to appoint persons to be members of all or any such courts.

The Supreme Court dismissed an appeal by the applicant: *The Irish Times*, 21 July 1988. The applicant's only arguable complaint related to the composition of the Special Criminal Court which tried and convicted him. All three of the judges on the Court had retired in their respective capacities as judge of the High Court, Circuit and District Justice, although McMahon J. and Desmond J. were serving judges at the time of their appointment to the Special Criminal Court. Finlay C. J. said that at the time of appointment of two of the members of the Court, they were respectively members of the High Court and Circuit Court: 'At the time of the appointment of [retired District Justice Sheeran] he was a solicitor of not less than seven years standing. At the time of the trial, each of the persons was qualified under the 1939 Act.' This judgment not only affirms an earlier ruling of a Divisional High Court (see p. 239 of the text) but also accords with a previous decision of the Supreme Court on this point: *The State (Gallagher) v. Governor of Mountjoy Prison, The Irish Times*, 26 July 1983.

18 P. 268. The period for which the banning order made under s. 31 of the Broadcasting Authority Act, 1960 (Broadcasting Authority Act, 1960 (Section 31) Order, 1987 (S.I. No. 13 of 1987)) is to remain in force has been extended to 19 January 1989: see Broadcasting Authority Act, 1960 (Section 31)(No. 2) Order, 1987 (S.I. No. 337 of 1987).

19 P. 292. No order has yet been made under the Extradition (Amendment) Act 1987 s. 3.

20 Pp. 293–5. The operation of the Extradition (Amendment) Act 1987 has continued to pose problems, although it is now said to be operating satisfactorily: see the statement by the Minister for Justice at 382 *Dáil Debates* 1638–9 (23 June 1988). The Minister said:

> The Attorney General has made arrangements with the Attorney General [for England and Wales] under which the latter furnishes him, in each case, with information which he deems appropriate for the purpose of forming the opinion required of him by the [1987 Act]. I understand that this procedure is working satisfactorily.

The Minister continued by saying that warrants had been received in respect of ten persons since the coming into force of the 1987 Act on 14 December 1987. In six cases, the warrants have been endorsed for execution by the Garda Commissioner. One of these endorsed warrants was executed, but the District Court dismissed the extradition application. Warrants were withdrawn in three cases, and the remaining warrant was under consideration.

Considerable controversy followed the release of one Patrick McVeigh by the District Court on the ground that there was no satisfactory evidence that the person named in the warrant was the person who was before the Court: *The Irish Times*, 14 June 1988. In the subsequent Dáil debate on the issue (382 *Dáil Debates* 119–131, 14 June 1988) the Minister for Justice (Mr. G. Collins T.D.) was at pains to point out that the issue of identity was one which could have been taken at any time even before the enactment of the Extradition (Amendment) Act 1987. The Minister confirmed that the decision would be appealed to the High Court by way of case-stated.

The Government has stated that the present extradition procedures are under review and that it will consider the possibility of ensuring in any new legislation that extradition cases commence in either the Circuit Court or the High Court: see 382 *Dáil Debates* 1163–201; 1449–57; 2059–94 (21, 22 and 28 June 1988).

See also Campbell, 'Irish extradition developments' (1988) 39 N.I.L.Q. 191.

CONTENTS

PART I

Background

Background

The nature of political violence

Meaning

An explanation and typology of political violence has been provided in *PTBL*. As applied to Ireland, such conflict primarily arises as part of a campaign based on self-determination for the decolonisation[1] or separation of a distinct territory from the United Kingdom. In those contexts, the perpetrators assume the support of a majority or significant section of the Northern Ireland population. Thus, their principal objective is to influence the people and government of the 'parent' land, and this is achieved by an 'asset-to-liability' strategy.[2] Ultimately, the affected territory is to be depicted as a cancer which should be excised from the body politic, an operation which might be traumatic but which will at least leave extant the parent government. In summary, the increase or decrease in support for the campaign may, therefore, be taken as the basic measure of success or failure for rebels or governments, especially in Western democracies.[3]

Whilst it may be possible to outline a general conception of 'political violence', it is more difficult to find an authoritative and precise definition.[4] Nevertheless, the following statements appear in s.31(1) of the Emergency Provisions Act 1978:[5]

> 'terrorism' means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear;
>
> 'terrorist' means a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organising or training persons for the purpose of terrorism.[6]

These definitions are most unsatisfactory for three related reasons.

The first is that they are value-laden. The labelling of opponents as 'terrorists' carries, perhaps intentionally, pejorative overtones. For present purposes, it will be assumed that laws in Ireland against violent opposition are justified as necessary to preserve two democratically constituted states, but in the absence of reasoning on this matter, the more neutral term, 'political violence' will generally be preferred. Although this is, in truth, little more than an analytical restatement of 'terrorism', it does at least avoid some of its unargued nuances.

A second defect in s. 31 is that it oversimplifies in so far as it fails to hint that political violence may have diverse purposes and perpetrators. As for purposes, in addition to being a revolutionary tactic as described hitherto, political violence may have sub-revolutionary objectives, as when Loyalist groups attack others to influence a policy of the state rather than the state itself. As for perpetrators, it is important to realise that governments may on occasion resort to unlawful violence,[7] such as maltreatment of detainees and the killing of civilians without due cause.[8] Despite its wide-ranging terms, s. 31 is, by its context, designed to encompass mainly revolutionary and non-state sub-revolutionary political violence.

A third problem associated with s. 31 is vagueness. This point has been explained in *PTBL* with reference to the identical definition of 'terrorism' in s. 14(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984.[9] The main defects are as follows. First, 'violence' may be taken to imply some unlawful act and especially threats to, or endangerments of, personal safety. Other forms of criminality may be related logistically to a campaign of political violence, such as robberies to finance it, but the essence should be specified as violence to the person. Secondly, the reference to 'political ends' correctly emphasises that the violence is symbolic and instrumental. However, as noted previously, reference to political ends does not differentiate between revolutionary and sub-revolutionary, or state and non-state, terrorism.[10]

Two further problems relating to the obscurity of the drafting of s. 31 have been encountered in Northern Ireland. One arose in *McKee v. Chief Constable for Northern Ireland*.[11] In that case, a majority in the Northern Ireland Court of Appeal decided that the definition of 'terrorist' in s. 31(1) was narrower than the popular usage of the word and required that a person be engaged in some form of 'activity'.[12] What might count as 'activities' was not precisely defined, but it was conceded that the category was 'very wide and general'.[13] As a result, a 'terrorist' certainly includes one who plants a bomb or fires a gun for political ends. Equally, those directing, organising or training others for the purpose of terrorism are also expressly 'terrorists'. However, the Court of Appeal depicted as 'passive' involvement in terrorism (and thus not a 'terrorist' within s. 31(1)):[14] 'the person for example who is merely a member of a proscribed or para-military organisation, [or] one whose activity is no more than soliciting support for such organisation'.

As argued more fully elsewhere,[15] there may be good grounds for doubting the soundness of this decision. One is that it strains the natural meaning of being 'concerned in' an enterprise, which has usually been taken to require no more than 'having something to do with' an activity. Next, the interpretation produces some strange results. For example, certain offences within s. 21 of the Emergency Provisions Act 1978 (all of which are deemed 'passive') seem rather 'active', such as soliciting support for a proscribed organisation. Again, 'passive' membership via mere associations with other suspects was admitted as

relevant when internment was in operation under Schedule 1 of the 1973 Act, and this was surely proper, since the *raison d'être* of internment is to obviate the need to prove specific instances of more 'active' links. Finally, the interpretation ignores that even 'passive' involvement, such as membership, must in the absence of a confession be evidenced by activities in just the same way as for 'active' terrorism. Though the Court of Appeal's ruling was not expressly repudiated when the case reached the House of Lords, the latter hinted obiter that it was wrong and that s.31 should be viewed as 'wide' rather than 'narrow'.[16] The Baker Report likewise proposed that the decision be reversed by statute.[17] Surprisingly, the Emergency Provisions Act 1987 does not amend the definition of 'terrorist' directly, but changes in arrest powers have now drawn most of the sting out of *McKee's case*.

Another potential problem of interpretation may be illustrated by reference to recent cases under the Criminal Injuries (Compensation) (Northern Ireland) Order 1977.[18] Article 2(2) of the Order contains a definition of 'terrorism' which is identical to that in s.31(1) and has been interpreted as encompassing two distinct types of activities: violence for political ends and violence for the purpose of putting the public or a section of the public in fear. Assuming the same view is taken of s.31(1), there is a danger that the latter category may be too broad. For example, a youth joins in a riot because he finds it exciting and constructs a large cache of petrol bombs. This enterprise goes beyond violent hooliganism and might be designated 'terrorism' under the 1977 Order.[19] Both categories of activity seem likewise relevant under s.31, since it also deems 'any' violence to provoke public fear to be for a political end.

It may conceivably be possible to devise acceptable definitions of 'terrorism' and 'terrorist'. However, the prospects for success are dim and even the Baker Report could find no satisfactory alternatives.[20] In the light of these difficulties, the solution advanced in the Republic is instructive.[21] In that jurisdiction, there is no statutory definition of terrorism, and laws against political violence adopt a 'scheduled offence' approach in which provisions are shaped by the offences most likely to be committed in a campaign of political violence. This has the advantage not only of clarity but also of rendering the motives of those involved 'as irrelevant to the criminality of the acts of violence ... as are [their] scholastic careers or sporting prowess'.[22] This approach was adopted by the Diplock Report,[23] though for the rather lame reason that the IRA and like groups attract ordinary criminals and so are indistinguishable on political grounds. The report is reflected in Part I of the Emergency Provisions Act 1978, but references to 'terrorism' and 'terrorist' persist elsewhere.

Reference only to scheduled offences carries three main dangers. First, the relevant offences must be selected with restraint. The test might be whether the existing criminal laws or procedures are reasonably adequate to secure the administration of justice in relation to a specified offence in view of the organised and serious nature of that offence which is being regularly

perpetrated as part of a campaign against the public or any section thereof. This formula is designed to miss extraneous targets, such as criminal gangs, drug barons (whose crimes do not amount to a public campaign) or violent demonstrators (whose offences are often neither serious nor pre-planned). Secondly, while a depoliticised stance may be appropriate with regard to the law, this should not blind officialdom to the relevance of motivation to its social and economic reactions. A third problem is that political violence may be so serious and wide-ranging that measures of prevention are demanded which the essentially reactive criminal law may be unable to supply.

Counter-strategy

The outlines of a rational counter-strategy to political violence against democratic governments (assuming Ireland and United Kingdom to be such) may be deduced largely from the foregoing comments. There are two important aspects.

One is that cherished values such as democracy, the rule of law and human rights dictate that political violence be eradicated. It has been argued that this can most persuasively and legitimately be achieved by the prosecution of the perpetrators. In order to sustain prosecutions, intelligence-gathering facilities are vital, and it may also be necessary to amend the criminal justice system, though changes should be minimised otherwise the persuasiveness of its procedures will be lost.

As well as criminal and military responses, social, economic and political stances must be considered. Violence may be an inarticulate and unacceptable form of political discourse in a democracy but may emanate from some justifiable and hitherto overlooked grievance. Accordingly, there can be no purely military solution, nor can there be solely a political solution (short of total surrender), since to concede the demands of a violent minority may spark into action other groups or even the majority. As a result, democracies find it virtually impossible wholly to prevent or suppress political violence; instead, their task is one of control and reduction.

Political considerations must equally shape the responses of the criminal justice system.[24] Internationally, attention should be paid to agreements protecting human rights, the prime example being the European Convention on Human Rights.[25] Nationally, it is important to observe the traditions of the legal system, since 'special' measures may be viewed as unfair and politically tainted. Unlike in Northern Ireland, the basic values of the Republic are located in the Constitution. However, since derogation is allowed by Article 28.3.3. in times of emergency, supplementary guidance is useful in both jurisdictions. Therefore, a number of pragmatic principles may be adduced in order to maintain traditions as far as possible and also, when derogations are unavoidable, to mark them out as extraordinary and so avert any contamination of 'normal' laws.[26] These principles demand, for example, that special