REPORT ON THE WORKINGS

OF THE

EMERGENCY PROVISIONS ACT (1973) NORTHERN IRELAND

by Alfred Heijder
Professor of Criminal Law
University of Amsterdam

AMNESTY INTERNATIONAL
53 Theobald's Road
London WC1X 8SP

November 1974

I N T R O D U C T I O N

Amnesty International, in the context of its work for political prisoners throughout the world, has always pursued an active concern for those who are held for long periods of time without charge or trial. While appreciating the widely varying conditions which give rise to the use of detention without trial, it is a fundamental consideration of Amnesty International that such a measure represents a violation of any individual's basic human rights. With respect to Northern Ireland, this principle is reflected in the resolution passed by the International Council of Amnesty International at its September 1971 meeting in Luxembourg, which stated inter alia:

> " The International Council of Amnesty International
>
> EXPRESSES its deep concern at the situation in Northern Ireland which has resulted in the detention and subsequent internment of many persons without trial or charge.
>
> URGES the British Government to take immediate steps either to release or to bring to a fair and open trial those at present imprisoned. . ."

Many of "those at present imprisoned" were, in fact, released in the course of the following year. Some were not, however, and neither they nor the persons detained since the autumn of 1971 have been given a "fair and open trial"; nor, indeed, have those brought before the special courts established by the Emergency Provisions Act had a fair and open trial by the standards laid down in British Common Law.

Through its method of "adopting" and "investigating" the cases of prisoners who fall within its terms of reference, Amnesty International has been able to observe - at some distance - the effects in human terms of detention without trial. Amnesty groups appealing on behalf of individual detainees have contributed towards acquainting the British Government with the dimensions of Amnesty's concern. The scope of Amnesty group work, however, has been limited by the availability of information on specific cases and by the difficulties created by the detention procedure itself, which makes it virtually impossible to confirm or disprove the evidence the authorities may have against any prisoner and to distinguish those who might be genuine prisoners of conscience (persons imprisoned because of their political or religious beliefs who have not used or advocated the use of violence). Moreover, Amnesty felt that the problem of emergency legislation as such demanded an approach that was in accordance with the rule of law and took into account the specific context of Northern Ireland.

It was for these reasons that, following its meeting in February 1974, the International Executive Committee of Amnesty International asked me to undertake a study of the Emergency Provisions Act in Northern Ireland, with particular regard to detention procedures and the conditions under which detainees are held. When, later, the Secretary of State for Northern Ireland, Mr Merlyn Rees, appointed Lord Gardiner to chair a committee which would examine the Emergency Provisions Act and advise the Government on possible changes in that legislation, Amnesty International further decided that my report should be submitted to the Gardiner Committee for its consideration.

ARRANGEMENTS FOR THE MISSION AND SOURCES

In order to gain a preliminary perspective on the issues involved and the considerations and recommendations of various bodies who have made studies based on close experience of the workings of the Emergency Provisions Act in Northern Ireland, I found it necessary, as an outsider, to read some of the earlier submissions to the Gardiner Committee.

On 1st May 1974, I wrote to Mr Merlyn Rees asking if I might be permitted to visit the Maze Prison and to observe a Commission hearing as part of my brief. On 6th August, I received a letter from the Northern Ireland Office stating that, although visits to the Maze Prison were kept to a minimum for security reasons, I would, exceptionally, be allowed to visit the Prison. The Northern Ireland Office regretted that, because the law governing the Commissioners' proceedings stipulates that hearings must take place in private, it would not be possible to attend a Commission hearing. However, arrangements would be made for me to discuss Commission procedures with one of the Commissioners, Judge Sir Ian Lewis, with whom I had a meeting in London on 1st November.

On 22nd October, I received a letter from the Northern Ireland Office stating that, due to the disturbances of the previous week in the Maze Prison, the Secretary of State found it necessary to withdraw his agreement to allow me into the Prison. At the same time, it was suggested that I meet with Lord Donaldson, Minister of State for Northern Ireland with Special Responsibility for Prisons, and members of his staff.

On Monday, 28th October, I met with Lord Donaldson in Belfast. It was suggested at this meeting that I speak with representatives of the Royal Ulster Constabulary and the British Army. On Tuesday, 29th October, I met with Mr Newman, Deputy Chief Constable of the RUC, at Police Headquarters, Belfast, and with Mr Balmer, Civil Adviser to the GOC, at Army Headquarters, Lisburn.

During the meeting with Lord Donaldson, we discussed again the possibilities of interviewing individual detainees in the Maze Prison whose cases had been taken up by Amnesty International. On the third day of my visit, permission was given for me to visit the Maze Prison and to interview three detainees - Alex Murphy, aged 16, detained for 15 months; Noel Rooney, a student from the New University of Ulster, detained for 13 months; and Patrick McColgan, aged 21, detained since October 1971. The interview took place on 31st October, without supervision, in the Social Services wing of the Maze Prison, and lasted for approximately two hours, the three detainees being present together throughout this period.

My object was also to speak with as many lawyers as available to me in the four days of my visit and I am grateful for the opportunity to discuss detention procedures and the working of the Diplock Courts with solicitors and QC's in Belfast representing both sections of the community. I spoke as well with staff members of the Faculty of Law at the Queen's University, Belfast.

I am, finally, grateful for discussions I had with members of the public in Belfast, which have contributed to my impressions gained throughout my stay in Northern Ireland.

F I N D I N G S

I found widespread discontent in Northern Ireland with the actual operation of the existing emergency legislation. On a general level, it can be said that penal law in any of its varieties can never be expected to provide a solution to essentially political problems. The overriding consideration in any emergency legislation is, of course, security and the restoration of law and order. This in itself can only create the conditions under which normal standards of justice and respect for fundamental human rights may be restored. At the same time, however, I feel the executive authorities should themselves respect these fundamental freedoms as far as is reasonably possible by institutional means, lest the experience of Northern Ireland become the frightening first step in the destruction of human rights in any kind of political crisis.

While I discovered general agreement that an emergency situation does exist in Northern Ireland, serious criticism of the measures adopted to deal with that situation focussed on three main points :

- The use made by the police and the army of their powers to stop, interrogate and arrest (Sections 10, 11, 12 and 16 of the Northern Ireland Emergency Provisions Act) ;

- The working of the Diplock Courts ;

- The detention procedure.

I shall first summarise the results of my investigations with respect to each point and then list our corresponding recommendations.

I The social conditions under which the police normally operate have clearly been seriously altered in Northern Ireland. It is difficult in such a situation to strike a balance between the effectiveness of the operations of the security forces and the respect for fundamental human rights.

Under the Northern Ireland Emergency Provisions Act, unusual discretionary powers are given to the police and the army when they are operating in the areas for which they are responsible. This may well have been unavoidable in the prevailing circumstances. I appreciate the fact that some rules had to be formulated loosely, which in essence is contrary to the principle of legality. But at the same time, I consider, that being so, that institutionalised safeguards against abuse must be provided.

For example, I heard the allegation that the army harrasses without due cause sections of the population in the areas where they operate, by stopping, interrogating and searching at random. It could, however, be that, because the army patrols are not really rooted in their areas as an ordinary police force is, and because they carry out their duties in a situation where hostile feelings and a certain amount of social control and intimidation prevents individuals of the local community from volunteering information, they may find themselves lured into making a massive use of Section 16 only for intelligence purposes. This "taking the census" (as the local expression goes) is being experienced by sections of the population as simply a way of harrassing them. It gives additional reason to be hostile and silent. In predominantly police-patrolled areas, the RUC is likely to have more general and specific information coming from the usual police contacts. It is to be expected, therefore, that the RUC will not have to resort to massive screening operations in order to secure the information they need. This structural difference between the situation of the army and that of the police may well be at the root of the very widespread impression that the rules are not applied impartially to both the minority and the majority communities.

At the same time, it seems questionable whether the "intelligence use" of Section 16 is permitted by the law, since that Section relates the powers of the army in a restrictive way to an investigation of "any recent explosion or any other incident endangering life ...".

Another example is the use the police makes of its power under Section 10, in which no reference is made to any objective standard as to what constitutes a reasonable suspicion. Differences in interpretation of certain situations and differences in application of this Section are bound to occur. This in turn may give rise to complaints that separate standards of treatment are used with each sector of the population.

Recognising the grave problems with which the security forces are faced in Northern Ireland, and taking into account their difficulties in coping with potentially violent situations, I nonetheless feel that safeguards against indiscriminate use of their powers should be considered in any forthcoming legislative proposals.

A. I recommend that, after an arrest under Section 10 or 11 is made, the arrested person should be allowed prompt access to a solicitor of his own choice.

B. I recommend further the establishment of a complaints-machinery to look into all complaints made against the police and the army. The investigations now made under Section 13 of the Police Act (Northern Ireland) 1970 are carried out by members of the police force themselves (although not by members of the division against which the complaint has been made) and do not seem to be satisfactory in the eyes of a large part of the community. One possibility would be the creation of a special procedure whereby complaints are investigated and considered by a body whose independence of the regular security and police forces is ensured and which should report to the DPP, the Home Secretary and the complainant. (This system would be similar to one now used in The Netherlands.)

II I was told by some of our contacts that a considerable degree of perversity of verdicts in jury trials in Northern Ireland had in no way been substantiated or shown to be greater than what may be normal for any given jury system. On the other hand, I also heard it said that the institution of single-judge trials has, in fact, remedied the suspected bias in pre-Diplock jury decisions. In the light of such conflicting opinions, it seems regrettable that the Diplock courts, which in their structure and procedure have many features uncommon to normal standards of justice, were introduced without thorough previous research. I feel that the suspension of the external safeguard provided by the presence of a jury creates the risk that judges may become accustomed to the stereotyped stories defendants bring forward. It can under such circumstances become difficult to discern what is a fabricated defence and what constitutes an authentic plea of innocence. Several of the procedural alterations made under the emergency legislation, such as the shifting of the burden of proof and the admissability of hearsay evidence, may represent major deviations from common law, although analogous regulations can be found in continental penal law. As regards the admissability of statements and confessions, however, I feel that, in Section 6, Paragraph 2, two standards of rules are confused: one governing the treatment of suspected persons and offenders according to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the other pertaining to the inadmissability of confessions other than those made voluntarily.

A. I recommend that Article 6, Paragraph 2, be changed to be more restrictive with respect to what can be regarded as a voluntary statement or confession. Specifically, no statement or confession should be accepted as evidence unless made in the presence of a solicitor of the arrested person's choice. In any event, such statements and confessions should only be admissible on the basis of the Judge's Rules obtaining before the implementation of the Diplock recommendations.

B. I recommend - given the deviations from normal common law procedures in the Diplock courts - that these courts should be restructured so as to be composed of either three judges or a judge and two lay assessors. Such an improvement may well help to restore public confidence in the judicial system and may at the same time make the assessing of the reliability of evidence somewhat less cumbersome. The case for retention of the single judge in Diplock courts seems to be only the issue of manpower, the judiciary being already over-burdened in Northern Ireland. It is also argued that it would be difficult to select lay assessors acceptable from the point of view of impartiality, in the present circumstances.

However, my impression from discussions with members of the legal profession was that these difficulties are surmountable. The feeling of some solicitors was that there were numerous barristers (and possibly even solicitors) who could in the emergency situation serve as judges. They could serve as temporary judges, a precedent for which would be that of the National Insurance Tribunals. In the case of lay assessors, it was felt that Justices of the Peace were "reasonably representative" of the population (in view of the fact that Northern Ireland is such a small community). A precedent for lay assessors in the domestic system would be found in the juvenile courts, where three JP's act in this capacity, one trained in law. This system is not an uncommon one on the Continent.

III Internment without trial has been possible and has in fact been introduced several times in Northern Ireland under the Special Powers Act. Each time it has been received with hostility by parts of the Northern Ireland community.

Detention, as introduced in 1972, differs in some respects from the former procedures. The grounds for issuing detention orders are somewhat more tightly drawn and there are provisions for a quasi-judicial review of each case. Nevertheless, it is blatantly clear that the procedure does not meet the minimum requirements of Article 6 of the European Convention. The measure is an essentially executive one. This can be illustrated by the nature of the review hearing, in which the only point under consideration is not the behaviour of the detainee but whether or not his continued detention is necessary for the protection of the public. Here the Commissioner must depend heavily on the opinion of the security forces. Since the whole question is directly connected with the general situation in Northern Ireland, it might be argued that the answer is of a political rather than of a judicial nature. Another argument to establish the executive nature of detention is that the Secretary of State is entitled at any time to order the release of any person held either under an Interim Custody Order or a Detention Order. Since no grounds are specified for this power, this provision again links detention with the general political situation in Northern Ireland.

The role of the Commissioner can in theory be said to counterbalance the power of the Executive. I am, however, not convinced that, under the present procedures, this counterbalance is actually achieved. In normal circumstances, the reliability of witnesses is assessed in open court by cross-examination. The Commissioner hears evidence in camera and then has to rely solely on his own assessment of the reliability of the source. Since the source is usually an officer of the security forces, who states what an informer, whose identity (for security reasons) cannot be revealed, has told him, the Commissioner seems to have no other choice than to rely on the statements of the security forces.

From a judicial point of view, this situation is highly unsatisfactory, since the defendant cannot defend himself against charges, the evidence for which is given not in his or his counsel's presence but is only summarised by the Commissioner, who himself is restricted by security considerations.

It is unsatisfactory, too, in that the necessary vagueness inherent in such proceedings impedes the normal judicial control over police and army as concerns the manner in which they gather evidence. Since the Judge's Rules do not apply and the Commissioner largely decides his own rules of procedure, there seems to be no way to correct this vital point.

It might well be argued that the role of the judiciary is so restricted by the question of security that by and large this aspect of the procedures is contrary to the rule of law. Although I found no evidence that, given the limitations described, the Commissioners lowered their standards of justice, the whole detention procedure is in contradiction to normal standards, even in abnormal situations.

In addition to these basic points, I found it said that detention engenders so much distrust and hostility in large parts of the population that, in the long run, this in itself would render it counterproductive.

Furthermore, the conditions under which detainees are held in the Maze Prison must be taken into account. In my opinion, they fail in many respects to reach the level established by the UN Standard Minimum Rules for the Treatment of Offenders or the recommendations on the same subject adopted by the Committee of Ministers of the Council of Europe in 1973.

A. I therefore recommend the abolition of detention without trials. This might be accomplished by the DPP screening the evidence available on each detainee and bringing to court those serious cases which the Crown is able to prosecute. The courts should certainly, when it comes to a verdict and sentence, take into account the time spent in detention. All other detainees should be released.

B. Should this recommendation not be immediately possible, I recommend as a short term minimum improvement that, in view of the serious limitations which defendants face in their defence at the Commission hearing, and given the present situation in which the judiciary is the only guarantor of justice and civil liberties, the number of Commissioners hearing each case should be expanded to three; and that conditions at the Maze Prison should be improved as soon as possible to ensure that they at least comply with the Standard Minimum Rules for the Treatment of Prisoners. Immediate measures should be taken to alleviate the overcrowding, to restore the right to privacy to some extent, to provide for work and study facilities, and to separate the young from the adult detainees: conditions which prevailed at the Prison before the recent disturbances.

THE EUROPEAN CONVENTION

While a detailed examination of the implications, in the light of the European Convention, of the emergency legislation now in force in Northern Ireland is outside the scope of my brief, and has been done elsewhere, it would be impossible in the context of this report not to make reference to the legal obligations binding upon the British Government under the Convention. Article 15 gives any High Contracting Party the right "in time of war or other public emergency threatening the life of the nation" to derogate from its obligations "to the extent strictly required by the exigencies of the situation". There are thus at least two important qualifications attached to this right (apart from those laid down in Article 15, Paragraph 2), although member governments are only required to "keep the Secretary General of the Council of Europe fully informed of the measures which (they have) taken and the reasons therefor".

It is my opinion that, in the absence of specific criteria built into the Convention to define what constitutes a "public emergency threatening the life of the nation" and "the extent strictly required by the exigencies" of any given situation, there is a strong case for arguing that the consequences of the introduction of emergency legislation in Northern Ireland do go, with respect to some of the aspects mentioned above, beyond the exigencies of the situation.

While the several cases brought against the British Government alleging violations of the Convention are pending in Strasbourg, I am not in a position to deal with the complex problems involved. But I can express my doubt as to whether or not a Government should be able to derogate from its obligations according to Article 15 in an overall statement. It may well be that each and every measure infringing the Convention should be separately justified.

We should also be aware, as was considered in the Lawless Case (2. Yearbook, P.340) that it is in times of disturbance and danger, which may well have their source in political tension, that the guarantees of the Convention may assume their greatest importance.

C O N C L U S I O N

In conclusion, my recommendations are the following :

1. After an arrest under Section 10 or 11 of the Emergency Provisions Act is made, the arrested person should be allowed prompt access to a solicitor of his own choice (I, A., P.4 above).

2. A complaints-machinery should be established to look into all complaints made against the police and the army. A special procedure should be set up whereby complaints are investigated and considered by a body whose independence of the regular security and police forces is ensured and which should report to the DPP, the Home Secretary and the complainant (I, B, P.4 above).

3. Article 6, Paragraph 2, of the Emergency Provisions Act should be changed with respect to what can be regarded as a voluntary statement or confession; no statement or confession should be accepted as evidence unless made in the presence of a solicitor of the arrested person's choice. In any event, such statements and confessions should only be admissible on the basis of the Judge's Rules obtaining before the implementation of the Diplock recommendations (II, A., P.5 above).

4. The Diplock courts should be restructured so as to be composed of either three judges or a judge and two lay assessors (II, B., P.5 above).

5. Detention without trial should be abolished (III, A., P.6 above).

6. Conditions at the Maze Prison should be brought in line with the UN Standard Minimum Rules (III, B., P.6 above).

A short commentary on the Gardiner Report

The general tendency of the Gardiner Report can be welcomed as an honest effort to strike a fair balance between the maintenance of civil liberties and human rights on the one hand and the legitimate powers of the State on the other hand to infringe on those liberties and rights in the violent and tragic situation in Northern Ireland.

In my submission to the Gardiner Committee I stated that prison conditions, especially at the Maze Prison, are well below the minimum requirements of the U.N. Standard Minimum Rules for the Treatment of Offenders and the recommendation on the same subject adopted by the Committee of Ministers of the Council of Europe in Resolution (73)5. The members of the Gardiner Committee were appalled at certain aspects of the prison situation (p. 33). The criticism implied is worthy of a democratic government. Prison conditions should be amended without delay.

I note with satisfaction that the Report accepts the recommendation to set up - in view of the large powers of the security forces - an independent machinery to deal with complaints against the police. No doubt such procedures should be extended to deal with complaints against the Army as well. It is a pity, however, that the corroborant recommendation - to allow the arrested person prompt acess to a solicitor of his own choice - is not adopted by the Gardiner Committee.

Our suggestion to strengthen the Diplock Courts by composing them either of three judges or of one judge and two lay assessors, the Committee does not deem feasible. Since on page 44 of the Report a strong case is made against the single Commissioner in the detention procedure, the case of the Diplock judge may well be reconsidered.

The recommendations on Detention are rather timid. It is said that for various reasons detention cannot remain a long-term policy but that in the short-term it may be an effective means of containing violence (p. 43). Since detention without trial has now been in operation in Northern Ireland for nearly four years, the distinction between short term and long term is obviously of crucial importance. The Report states that a solution to the problems of Northern Ireland should be worked out in political terms (p. 7). The security needs which lead to detention are conditioned by the political situation. With some exaggeration one could say that detention covers up insufficient political measures. It would be a courageous and wise political decision to abolish detention.

Amstelveen, 11th February 1975

Prof. dr A Heijder.