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The History & Development of the Special Criminal Court: 1922 – 2005

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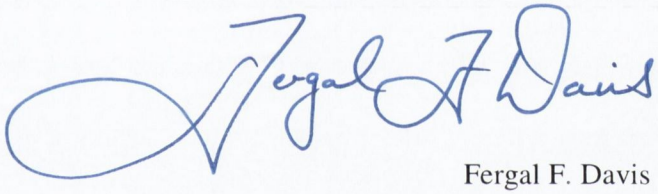

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If I have forgotten anyone I can only apologise. Although the help of everyone is greatly appreciated I alone claim responsibility for any and all errors contained within.

Fergal F. Davis

Table of Contents:

SUMMARY 13

ABBREVIATIONS 15

INTRODUCTION 17

CHAPTER 1 21

Trial by Jury 21

1.1 Trial by Jury Internationally 21

1.2 A Brief History of the Right to Trial by Jury 26

1.3 The 'Democratising' Effect 29

1.4 Jury Failure 32

1.5 The Issue of Jury Bias 37

1.6 Juries & Perverse Verdicts 42

1.7 A Mature Response 46

1.8 The Underlying Assumptions 52

CHAPTER 2 54

From Military Tribunals to the Special Criminal Court 54

2.1 The Birth of the Irish Free State 54

2.2 Anarchy and Civil War 57

2.3 The Constitutional Framework of the Irish Free State 60

2.4 The Civil War 61

2.5 A Riddle in the Sands 64

2.6 The Assassination of Kevin O'Higgins & The Public Safety Act, 1927 69

2.7 Article 2A – the Background 75

2.8 Article 2A – the Provisions 78

2.9 Article 2A – The Legal Challenges 80

2.10 Article 2A – the Political Challenges 84

2.11 Fianna Fáil in Government & Article 2A 88

2.12 Article 2A in Practice 92

2.13 Conclusions 95

CHAPTER 3 96

Constitutional Review & the Offences Against the State Act 96

3.1 The Constitution Review Group 1934 96

3.2Proposals on Jury Trial 99

3.3 The Review Group Proposals 101

3.4 Bunreacht na hÉireann and the 'Special Courts' 104

3.5 The Drafting of the Offences Against the State Act, 1939 109

3.6 The Legislation in brief 117

3.7 Conclusions 120

CHAPTER 4 **123**

The Emergency – 1939 to 1946 **123**

4.1 Neutrality, the I.R.A & the Threat From Abroad 123

4.2 The Government Moves Against the IRA 128

4.3 Internment, *The State (Burke) v. Lennon* & the Magazine Fort Raid 130

4.4 In re Article 26 and the Offences Against the State (Amendment) Bill, 1940 135

4.5 Placing the Supreme Court Judgment in Context 140

4.6 The Military Tribunal 147

4.7 In re McGrath & Harte & The State (Walsh) v. Lennon 151

4.8 In Time of War or Armed Rebellion 154

4.9 The Special Criminal Court, 1939 – 1946 156

4.10 The Procedures of the Special Criminal Court 160

4.11 The Emergency Concluded 165

CHAPTER 5 **169**

Whither the Special Criminal Court – 1946 to 1962? **169**

5.1 The Special Criminal Court & Economic Cases 170

5.2 Who Should Pay for the Special Criminal Court? 176

5.3 The 'Normalisation' of the Special Criminal Court 179

5.4 The Rebirth of the IRA 181

5.5 The Border Campaign 184

5.6 The Government Responds to the Border Campaign 186

5.7 Internment Without Trial – 1957 190

5.8 Internment Without Trial – a General Comment 195

5.9 Lawless v. Ireland 200

5.10 A Belated Entrance for the Special Criminal Court 205

5.11 The Paradox of the Special Criminal Court - 1946 – 1962 209

CHAPTER 6 **211**

1969 - 1972 Countdown to the Special Criminal Court **211**

6.1 The Troubles 212

6.2 The Arms Trial 213

6.3 Invasion, the U.N. & Internationalisation 214

6.4 Kidnap & Internment in 1970 221

6.5 Internment in the North 224

6.6 Bloody Sunday – Infection by the Northern Virus? 230

CHAPTER 7 **233**

The Re-Introduction of the Special Criminal Court **233**

7.1 Announcing the Special Criminal Court 234

7.2 A Different Special Criminal Court 236

7.3 Opposition to the Government's Measures 242

7.4 Diplock & the Beginnings of a Common Policy 243

7.5 Justifying the Abolition of the Jury 247

CHAPTER 8 **252**

The Special Criminal Court Under Review **252**

8.1 The Legislative Framework 252

8.2 Judicial Review of the Executive 255

8.3 The 'Organised Crime' Cases 265

8.4 Alternative Approaches Available to the Courts 274

8.5 Parliamentary Review of the Executive 290

8.6 Review of the Executive by the Supreme Court of Israel 291

8.7 Diplock & the Scheduling-in Proposal 299

8.8 The Human Rights Committee (HRC) 302

8.9 Review & the Special Criminal Court 307

CHAPTER 9 **310**

Recent Developments **310**

9.1 The Court of Criminal Appeal (CCA) 310

9.2 Recent Supergrass Trials 318

9.3 The Flexibility of the Special Criminal Court and the Threat of 'New Terrorism' 325

9.4 New Terrorism in the Irish Context 331

9.5 Conclusion 340

CHAPTER 10 342

Conclusion – The Special Criminal Court: 1922 – 2004 342

10.1 Justifying Interference with the Right to Trial by Jury 343

10.2 Non-Jury Trials During States of Emergency 346

10.3 Non-Jury Trials & Terrorism 352

10.4 Non-Jury Trials & Non-Subversive Cases 360

10.5 Final Conclusions 363

PRIMARY SOURCES 367

Constitutional Documents 368

Table of Statutes 369

Table of Cases 370

Archive File 375

Dáil Éireann Parliamentary Reports 377

SECONDARY SOURCES 378

APPENDICES

Appendix 1 - **400**

Department of an Taoiseach file S S9249 400

Appendix 2 - **402**

Department of an Taoiseach file S 8211 402

Appendix 3 **409**

PART I - Persons Sentenced in the District Courts 409

PART II - Persons Sentenced by the Special Criminal Court 411

LIST OF TABLES

Table 2.1 – Election Results 1932 **87**

Table 2.2 - Conviction Patterns of the Article 2A Tribunal **92**

Table 4.1 - Acquittals before the Military Court 1940 –1943 **155**

Table 4.2 – Number of Persons Persons Proceeded Against

& Classification of Offences 1939- 1946 **158**

Table 6.1 – Northern Ireland Internment Figures **228**

Summary

Synopsis

The Special Criminal Court has been a permanent feature of the Irish judicial system since May 1972. The history of the Court dates back to 1939. However, the Court established in 1939 evolved from previous courts and tribunals established under the Constitution of the Irish Free State. This thesis places the Special Criminal Court within its historical context. The Court's history is important since any understanding of the Court as it exists today must be informed by an understanding of the Court's development over the past sixty-five years; secondly, the history of the Court is, in and of itself, interesting. This thesis also seeks to place the Special Criminal Court in an international context. To that end reference is made to the experiences of other jurisdictions as well as the jurisprudence of the European Court of Human Rights and the United Nations' Human Rights Committee.

Methodology

The methodology employed was a traditional textual analysis. Use was made of a variety of Library Collections; relevant cases and statutes were examined; academic comment was referred to. Having established a broad picture extensive research was conducted in the Irish National Archives. On a few occasions the author contacted relevant organisations and individuals directly to seek advice and views – though no formal interviews were conducted.

Conclusions

The central conclusion is that the use of non-jury courts is legitimate. More specifically, the use of the Special Criminal Court in cases in which it has been determined that the ordinary courts are inadequate is a proportionate and legitimate response to terrorism and organised crime. The Offences Against the State Act, 1939 requires amendment to ensure the independence of the Court and to safeguard against potential future abuse. However, it can generally be said that the Special Criminal Court is an acceptable feature of the Irish Constitutional landscape.

Abbreviations

AG	Attorney General
Cmnd.	Command (as in Command Paper)
DPP	Director of Public Prosecutions
ECOSOC	The Economic & Social Council
EPA	Emergency Powers Act
EPO	Emergency Powers Order
FARC	Revolutionary Armed Forces of Columbia
GHQ	General Head Quarters
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant of Civil & Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IRA	Irish Republican Army
JI	Jemaah Islamiah
JRA	Japanese Red Army Faction
MAK	Maktab-al-Khidarrat
MIA	Missing in Action
MK	Member of the Knesset

NGO	Non-Governmental Organisation
OAS	Offences Against the State
POW	Prisoner of War
PSA	Public Safety Act
RIC	Royal Irish Constabulary
RUC	Royal Ulster Constabulary
SPA	Special Powers Act
TD	Teachta Dála (Member of the Irish Parliament)
UK	United Kingdom of Great Britain & Northern Ireland
UN	United Nations
US	United States (of America)

Introduction

The central controversy surrounding the Special Criminal Court is that it tries the most serious of offences without a jury. This is a deviation from the common law and constitutional norms of the Republic of Ireland. This requires justification. The importance of trial by jury will be examined from historical, legal and theoretical perspectives. Having outlined the issues surrounding trial by jury the thesis will move on to consider the development of non-jury trials in Ireland. Since the development of the Special Criminal Court did not occur in a vacuum it is important to first examine the development of its predecessors. As such the history of the Special Criminal Court which was established in 1939 can be traced back to the Irish Free State. The Constitutional provisions of the Irish Free State and the political pressures existing at that time will be examined. Two examples of non-jury trial will be considered in detail. Firstly, the proposals for non-jury trial under the Public Safety Act, 1927 will be considered. This model was never actually employed, but the drafting of the provisions as well as their draconian nature influenced the second example. On this occasion the Constituion (Special Powers) Tribunal established by Article 2A of the Irish Free State Constitution was actually put into force. This Tribunal was akin to the Public Safety Act, 1927 model in many respects. It similarly provided for trial before three members of the Defence Forces, without a jury. The legislation, which was in fact a constitutional amendment, attempted to exclude any appeal against the decision of the Tribunal to the Courts, although this provision was later ruled to be unconstitutional. Having examined these two forerunners to the Special Criminal Court, consideration will then be given to the attempts at drafting their replacement. The different approach adopted in the Offences Against the State

Act, 1939, which allows for the establishment of the Special Criminal Court, are subtle but significant. The Special Criminal Court is often seen as a continuation of the Article 2A Military Tribunal and, while members of the Defence Forces once staffed it, it did allow for judicial members. Indeed since 1972 the Court has been continuously staffed by members or former members of the judiciary, which is a welcome development. Furthermore the 1939 model insists that the ordinary rules of evidence shall apply before the Special Criminal Court and as a result the Court is most definitely preferable to its predecessors.

Having considered the background to the development of the Special Criminal Court, attention will turn to its operation. The Court has been utilised on three occasions: during World War II, referred to as 'the emergency' in Ireland, the Court was employed from 1939 to 1946; in response to the IRA 'Border Campaign' the Court was reactivated for a period of months between 1961 and 1962 and finally, and perhaps most significantly, the Court has been in permanent existence from 1972 to the current day. Each of these periods will be examined. The Court was introduced in 1939 as an attempt at combating the IRA in order to preserve the States' policy of neutrality. Within a short period of time, however, the Executive had agreed that in economic cases concerned with rationing trial by Special Criminal Court could also be employed. This use of the Court in cases of a non-subversive nature is highly significant when consideration is given to the current utilisation of the Court in organised crime and other non-subversive cases. The Court was not employed after 1946 although it was not formally dissolved and its members continued to receive remuneration. In 1961, in response to the ongoing border campaign, the Court was reactivated. During the emergency the Executive had employed a military tribunal

and internment without trial alongside the Special Criminal Court; likewise the first response to the outbreak of the border campaign was to introduce internment. Through internment the campaign was disrupted and it is said that as a campaign it was defeated by 1957; the Court was introduced in 1961, as a final measure, designed to prevent the campaign continuing any longer. Despite the fact that the Court was only sitting between 1961 and 1962, the period of 1946 to 1962 provides considerable insight into the Court's development.

The re-emergence of the Special Criminal Court in 1972 was to be the beginning of its longest and arguably most significant period of development. The political context within which the Court was re-established will be examined in some detail. The Court was first introduced as a response to the 'Troubles' in Northern Ireland. As such, it was justified on the basis of the terrorist threat. Unlike the border campaign of the 1950's, political violence in the late 1960's and early 1970's was to remain as a serious threat to security for some thirty years. In the 1950's internment was utilised in an effort to defeat the terrorist campaign as it had been during the emergency. By 1972 internment was no longer seen as a politically viable solution and, as such, the Government employed the Special Criminal Court more or less from the beginning. For the first time non-military members staffed the Court, although provision allowing for the use of members of the Defence Forces was retained and remains on the statute book to the present day. The recent history of the Court has seen its workload reduce, as a result of the peace-process in Northern Ireland terrorism is no longer as great a threat as it was. The Court has, however, been used in some cases of organised crime. This development will be considered in light of the Court's previous

use in non-subversive cases and in light of the threat posed by this type of criminal activity.

The Special Criminal Court will be evaluated with reference to human rights and constitutional norms prevailing in the Republic of Ireland. It will also be compared to alternative approaches to political violence which have been employed by the Irish Government, such as trial by military tribunal and internment without trial. Further comparison will be made to international alternatives. The basic consideration is as follows; although the right to jury trial is considered to be a significant protection for the accused in the trial process, are there circumstances in which that right can be restricted? If so do those circumstances extend to a terrorist threat and furthermore is the threat of terrorism experienced in Ireland comparable to the potential threat of organised crime? Finally, if it is accepted that interference with the right to trial by jury is justified in the present context, how acceptable a model is the Special Criminal Court and what, if any, reforms should be introduced? The Special Criminal Court has evolved from a military tribunal immune from judicial supervision into a criminal court which sits without a jury. The reasons for this development must be examined in order to evaluate the tolerability of such a development. The potential 'normalisation' of the Court will be discussed and conclusions as to its current and future use will be expounded.

Chapter 1

Trial by Jury

This thesis is primarily concerned with the evolution of the Special Criminal Court and the legitimacy of its use. In order to place that evolution in context it is necessary to begin by considering the role of trial by jury. In the adversarial, common law system trial by jury is the norm in serious cases and the abolition of trial by jury for defendants in trials related to a threat to security is therefore a deviation from this norm. As will be noted later, this fact was appreciated by the drafters of the Irish Constitution and as a result the Special Criminal Court can only be established when it is deemed that the 'ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order'.[1] At this stage it is important to appreciate that trial by Special Criminal Court can only be justified if interference with the right to trial by jury can be justified. As such, it is necessary to begin by considering the nature of the right to trial by jury.

1.1 Trial by Jury Internationally

While trial by jury is the norm in many parts of the common law world it is not the only trial process. Beyond the common law world variations upon trial by jury and exceptions to it are common. In the Netherlands criminal trials are conducted by three judges without a jury.[2] Spain employs a non-jury system and has a special court, the *Audiencia Nacional,* for cases involving 'crimes against the Crown, the high organs of the nation, or the government in the form of counterfeit and monetary

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[1] Bunreacht na hÉireann, Article 38.3.1°.

[2] *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998 and Related Matters,* (Dublin, 2002) paragraph 9.34 citing Charleton & McDermott. Hereinafter Committee to Review the OAS.

crimes, drug trafficking, food and drugs crimes... terrorism, extradition of prisoners...' and so forth.[3] This Court sits in Madrid and essentially removes the case from the *Audiencia Provincial*, thereby removing the case from the local to the national and, thus, reducing local involvement. Similarly, the Courts in France have accepted the use of non-jury courts in terrorist cases; in 1986 the Chirac Government introduced the *lois Pasqua* in which attempts were made to combat terrorism. 'The *loi* sought to create a non-jury court for terrorist offences of seven judges, rather than the normal three judges sitting with nine jurors. This was done to prevent jury intimidation'.[4] The *Counseil* recognised that the right to an unbiased court is part of due process but rejected the proposition that the removal of jury trial breached this principle; indeed they noted that 'since the independence of the of the ordinary judiciary is guaranteed by Article 64 of the [French] Constitution... judges themselves are seen as constituting a guarantee of this aspect of due process'.[5]

It is also significant that the International Military Tribunal, Nuremberg did not employ a jury. The Tribunal was composed of 4 members[6] appointed by the four signatories.[7] The presence of all four members, or their appointed alternates, was required in order to constitute a quorum.[8] The tribunal did not require a jury despite

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[3] Merino-Blanco, *The Spanish Legal System*, (London, 1996), 87.
[4] Bell, J. *French Constitutional Law* (Oxford: 1992), 315.
[5] *ibid,* 195.
[6] Article 2, *Charter of the International Military Tribunal,* <http://usa.usembassy.de/etexts/ga4-trials.htm> accessed 8 August 2005.
[7] The four Signatories being the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics. Article 1 *Charter of the International Military Tribunal.*
[8] Article 4, *Charter of the International Military Tribunal.*

the fact that it was trying the most serious of offences.[9] The International Tribunal, Nuremberg has been criticised as being an example of 'victors justice'. While Article 16 did give guarantees of a fair trial the issues addressed were largely procedural, focusing on means of ensuring that the defendant could understand the charges and proceedings.[10]

> It has been argued that the Tribunal cannot be regarded as a court in the true sense because, as its members represent the victorious Allied Nations, they must lack that impartiality which is an essential in all judicial procedure. According to this view only a court consisting of neutrals, or, at least, containing some neutral judges, could be considered to be a proper tribunal. As no man can be a judge in his own case, so no allied tribunal can be a judge in a case in which members of the enemy government or forces are on trial.[11]

These criticisms of the Tribunals independence are legitimate. If the Tribunal had employed a jury that might have increased its legitimacy. If, however, the Tribunal had employed judges drawn from neutral states rather than judges appointed by the

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[9] The Tribunal had jurisdiction to prosecute, crimes against peace, war crimes and crimes against humanity. Article 6, *Charter of the International Military Tribunal.*

[10] 'In order to ensure fair trial for the Defendants, the following procedure shall be followed:
(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at reasonable time before the Trial.
(b) During any preliminary examination or trial of a Defendant he will have the right to give any explanation relevant to the charges made against him.
(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
(d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.
(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.'
Article 16, *Charter of the International Military Tribunal.*

[11] Goodhart A.L., 'The Legality of the Nuremberg Trials' *Juridicial Review,* April 1946. See <http://www.nizkor.org/hweb/imt/> accessed on 8 August 2005.

victorious governments it would also have benefited from a higher level of legitimacy. The lack of legitimacy thus stemmed from the nature of the judicial appointments and not from the lack of a jury.

Since Nuremberg the International Criminal Tribunals for the Former Yugoslavia and Rwanda have been created and neither has employed trial by jury. Perhaps more significantly, the International Criminal Court (I.C.C.) provides for the prosecution of the most serious of offences before a panel of international jurists without a jury.[12] There is a significant difference between this new Court and that of the Tribunal at Nuremberg, that is that the I.C.C. employs a panel of international jurists rather than a panel appointed by the four Potsdam powers. The judges, therefore, benefit form a greater level of independence and as such the court can be said to be more legitimate. As such it can be said that although it has been stated that 'trial by jury is a cornerstone of the criminal justice system',[13] it is not necessarily indispensable.

At this point we have considered the willingness of other legal systems to interfere with the right to trial by jury. The willingness of European, Inquisitorial legal systems to abandon trial by jury does not necessarily justify the abandonment of trial by jury in a common law, adversarial setting. Furthermore, although International tribunals have been reluctant to employ trial by jury this could be due to the impracticality of selecting an international jury for an international trial. It is also possible that the lack of juries in international tribunals is simply an historic quirk –

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[12] Rome Statute of the International Criminal Court, 17 July 1998, Part IV. <http://www.un.org/law/icc/statute/romefra.htm> accessed on 4 August 2005.

[13] *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998 and Related Matters,* (Dublin, 2002), paragraph 9.88, hereinafter the Committee to Review the OAS.

Nuremberg did not employ a jury system and it has just been the norm since then not to employ juries. Therefore, it is important to realise that there is a considerable history of interference with the right to trial by jury within the common law. Cornish refers to a series of examples where it was felt necessary to remove the jury in order to guarantee justice.

> In places such as the first West African colonies, the jury was introduced for the whole populace, but such foreseeable obstacles to success as anti-African prejudices, inter-tribal partisanship and extensive bribery of jurors led to its abandonment in the later nineteenth century for civil cases, and to severe curtailment or supersession by trial with assessors in criminal cases.[14]

Furthermore, in 1958 the Law Commission of India recommended the removal of trial by jury due to bribery of jurors.[15] The state of Israel has also adopted a system of criminal trial which does not employ a jury. Here, lesser offences are tried by a single judge sitting alone while appeals and more serious offences are heard by a panel of three judges. Article 37 of the Courts Law [Consolidated Version], 5744 – 1984 states that trials concerning an offence that demands the death penalty or ten years imprisonment as punishment should be conducted by a panel of three judges. Moreover, Article 37(3) allows the President or Vice President of the District Court to order that any other issue be heard by three judges. This is particularly interesting for two reasons: firstly, Israel has adopted a common law, adversarial system and yet does not employ trial by jury; and the choice of three judges is based on a Talmudic

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[14] *ibid,* 15/16.
[15] *ibid,* 17.

source from the Pirkei Avot (Ethics of the Fathers).[16] Here it is stated that, 'Rabbi Yishmael... used to say: Do not act as a judge alone, for none judges alone except One...'.[17]

1.2 A Brief History of the Right to Trial by Jury

It is obvious, therefore, that trial by jury is not always internationally respected. The right to trial by jury within the legal tradition of Britain and Ireland should be considered. Juries began to be employed more frequently in England during the reign of Henry II. As Lord Justice Auld noted, trial by jury replaced

> trial by ordeal of fire or water. [This] jury consisted of 12 persons in the neighbourhood, *witnesses*, who swore to the truth of what they knew. It was not until much later that they emerged as a body of strangers to the case whose task was to decide it rationally upon evidence put before them.[18]

Thus, the jury began as an 'evidentiary and investigative rather than a decision making body'.[19] The shift to a jury system during the Middle Ages was caused not by an overwhelming desire to defend the individual against the excesses of the State but rather to increase speed and efficiency. It was associated with the trend away from proof by oath and ordeal, toward proof by investigation. For example, land disputes

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[16] '*Pirkei Avot* transmits the favourite moral advice and insights of the leading rabbinic scholars of different generations'. See Rabbi Telushkin J. *Jewish Literacy; the most important things to know about the Jewish religion, its people, and its history,* (New York: 2001), 526.

[17] Chapter 4, Verse 10. see Rabbi Scherman N. (translator) *The Complete Artscroll Siddur- Ashkenaz* (2nd ed) (New York: 2001), 567.

[18] Lord Justice Auld, *Review of the Criminal Courts of England & Wales,* (London: 2001), chapter 5, paragraph 7. See <http://www.criminal-courts-review.org.uk/ccr-00.htm> accessed 4 August 2005. Hereinafter The Auld Review.

[19] Lyon, *Constitutional History of the United Kingdom,* (London: 2003), 33.

tended to be lengthy, slow affairs; the ultimate decision in such cases rested with God who would decide the case through the ordeal of battle 'a judicial duel introduced by the Normans, through the Grand Assize of 1179, Henry gave the defendant in such actions the option of having the matter determined conclusively by a jury of 12 knights'.[20] This clearly illustrates the shift from trial by ordeal to trial by investigation. While, the early jury was utilised specifically for their local knowledge the function of the modern jury is to base their decision on the facts presented in court and not on personal knowledge or prejudices.[21]

The jury has developed greatly since the time of Henry II. In 1956 Lord Devlin proclaimed that,

> The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.[22]

Historically, this assertion can be easily challenged - rather than abolishing trial by jury it has been more convenient for any would-be tyrant to intimidate the jury. Thus, in 1535 a jury which declared the Bishop of Rochester guilty of treason said afterwards that they had been fearful 'for the safety of their goods and lives which

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[20] *ibid.*
[21] Cornish, *The Jury*, (London: 1968), 10.
[22] Devlin, *Trial by Jury,* (London: 1966), 164.

they were all well assured they would lose, in case they acquitted him'.[23] In Bushell's Case, in 1670, the jury failed to convict and was swiftly imprisoned by the trial judge who disagreed with their verdict; this power was removed shortly thereafter.[24] The fear of jury intimidation has been key to the introduction of the Special Criminal Court as we shall see in subsequent chapters. It is also worth noting that despite widespread belief to the contrary, there is no 'right' to trial by jury in England and Wales and the Magna Carta does not guarantee a right to trial by jury.[25] Therefore, there is no, historic right to trial by jury and the mere existence of the jury has not been capable of safeguarding liberty.

In 1768, William Blackstone famously declared that the jury was the bulwark of liberty,[26] but is such a position a truly accurate depiction of the role of the jury in law? Early examples of trial by jury are unrecognisable to the modern eye. Jury tampering by the authorities was common and the role of the jury has been altered dramatically, from that of informed witness to one of independent stranger. To state that 'the jury' is the light which shows that freedom lives, begs the question which jury? In conclusion therefore, juries do not, in and of themselves, guarantee a fair trial. We shall return to this point later in this chapter. For now it is appropriate to consider the greatest strength of the jury system – its democratising effect.

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[23] Cornish, *op cit,* 128.
[24] *ibid,* 129.
[25] The Auld Review, chapter 5, paragraph 7.
[26] Cornish, *op cit,* 126.

1.3 The 'Democratising' Effect

The current justification for trial by jury can be summed up as being that the jury, as an institution, incorporates a 'democratising' effect. Thus the belief has emerged that the jury should contain 'a representative cross-section of a community'.[27] In *de Búrca v. Attorney General*[28] the Supreme Court held that sections of the Juries Act, 1927, 'which excluded from jury service all those who were without a minimum rating qualification in respect of a house or land, and exempted women from service subject to an individual woman's right to apply to serve' were unconstitutional.[29] In a telling passage Henchy J. stated,

> ...it is incompatible with the necessary diffusion of rights and duties in a modern democratic society that important decisions such as voting, or jury verdicts involving life or liberty should be made by male citizens only. What is missing in decisions so made is not easy to define; but reason and experience show that such decisions are not calculated to lead to a sense of general acceptability, or to carry an acceptable degree of representativeness, or to have the necessary stamp of responsibility and involvement on the part of the community as a whole.[30]

Therefore, for Henchy J., at least, the role of the jury is to increase the legitimacy of verdicts through the involvement of a representative sample of the community.

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[27] Hogan & Whyte, *Kelly: The Irish Constitution,* (4th ed.) (Dublin: 2003), paragraph 6.5.393.
[28] [1976] IR, 38.
[29] Hogan & Whyte, *op cit*, paragraph 6.5.393.
[30] [1976] IR, 38, 77.

Lord Devlin is of a like mind to Henchy J, describing the jury as a 'little parliament'.[31] This view of the modern jury is key to the democratisation theory. It sees the jury as representing society at large in much the same way as parliament represent the people in a representative democracy. This argument is overly romantic. The ability of the jury to represent the public is derived from the randomness of its selection. This point was key in *de Búrca.* A jury should consist of '12 individuals chosen at random from the appropriate panel',[32] however the jury system consistently struggles to deliver this randomness. The Diplock Report in Northern Ireland identified the problem of partisan juries within the context of that sectarian conflict. At the time of the report 'the property qualifications for jury service [were] more likely to be possessed by Protestants than Catholics'[33] and, as such, the system contained an in-built bias in favour of the Protestant population. Such a system could not be described as representative. While it is possible to distinguish Northern Ireland as being an example of a dysfunctional jury system, research in England and Wales as recently as 1993 has also shown that women and non-whites remained under represented on juries in that jurisdiction.[34] The view of the random jury as democratically representative is open to question.

Despite these criticisms it must be conceded that the democratising effect of the jury remains an attractive argument. De Tocqueville summarises the position eloquently:

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[31] Devlin, *op cit,* 164.
[32] Lord Chief Justice's Practice Direction, see Thornton, "Trial by Jury: 50 Years of Change", [2004] *Criminal Law Review*, 119, 122.
[33] Lord Diplock, *Report of the Commission to consider the legal procedures to deal with terrorist activities in Northern Ireland,* Cmnd. 5185, (London, 1972), paragraph 36.
[34] Thornton, *op cit,* 121.

> Using juries for the suppression of crime appears to me the introduction of a predominately republican institution into government....
>
> The jury may be aristocratic or democratic according to the class which supplies the juries, but it always retains a republican character in that it entrusts the actual control of society into the hands of the ruled, or some of them, rather than into those of the rulers.[35]

For De Tocqueville the jury is an element of the sovereignty of the people,[36] significantly however, he is not overly interested in the judicial efficiency of the jury. He states 'I do not know whether juries are much use to litigants but I am sure that they are of great use to those who judge the case. They are... one of the most effective means available to society for educating the people'.[37] This argument might be summarised as advocating the educative rather than the democratising effect of the jury. Interestingly recent reforms in Japan appear to be predicated, in part at least, upon this argument. The Japanese have recently decided to introduce a form of mixed jury system in which jurors and judges will hear cases together. 'What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject'.[38] Such a view of the jury merits consideration.

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[35] De Tocqueville, *Democracy in America & Two Essays on America,* Bevan G.E. (translator), (London, 2003), 317/318.
[36] *ibid,* 319.
[37] *Ibid*, 321.
[38] Justice System Reform Council, see Bloom, "Jury Trials in Japan", (March 16, 2005), Boston College Law School Research Paper No. 66, see <http://ssrn.com/abstract+688185> accessed on 17 August 2005.

It is difficult to assess how tangible this educative effect is. After all a modern civilised state like the Netherlands has a strong functioning democracy without trial by jury. What is clear, however, is that this line of argument sees the jury as political rather than a judicial tool. Indeed De Tocqueville concedes that 'if it were a question of knowing how far the jury... serves the good administration of justice, I would admit that its usefulness could be challenged'.[39] If that position is accepted then the attractiveness of trial by jury rests on its involvement of the population in the administration of justice. This has the political advantage of increasing the legitimacy of decisions and of educating the citizenry through their empowerment. These are attractive arguments which cannot and should not be too readily dismissed.

1.4 Jury Failure

Despite the philosophical advantages of trial by jury one cannot ignore its judicial function. The primary role of the jury is not to involve the public or educate the citizenry it is to deliver justice. If it can succeed in providing justice while at the same time delivering these additional benefits then that is ideal. However, when trial by jury fails to secure the effective administration of justice one is forced to consider whether or not these benefits are outweighed by that failure. Later chapters will focus on the inability of the jury to deliver the effective administration of justice within the context of Irish terrorism and organised crime. As the central focus of the workload of the Special Criminal Court these issues will consume the bulk of this thesis. At this stage a number of current debates surrounding the ability of juries to deliver justice will be outlined. It will then be possible to begin the examination of the

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[39] De Tocqueville, *op cit,* 316.

history and development of the Special Criminal Court and by the end conclusions as to the acceptability of interfering with trial by jury in that setting will be possible.

In recent years a debate has emerged concerning the suitability of juries in complex trials. In particular academic comment has focused on the issue of the juries understanding of forensic evidence and the ability of trial by jury to cope with serious fraud cases. In the case of forensic science a perception has emerged that juries might be incapable of understanding the complex nature of the evidence presented. It seems logical to assume that jurors, randomly selected from the population at large, might have some difficulty interpreting and understanding scientific evidence. Research has found that juror's 'main impediment to understanding proceedings was the use of legal terminology'.[40] However, technical evidence also poses a problem as the following table illustrates:

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[40] Matthews, Hancock & Briggs, "Juror's Perceptions, Understanding, Confidence and Satisfaction in the Jury System: a study in six courts", Home Office Online Report 05/04, 37. See <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf> accessed on 22 August 2005.

Table 1.1- Jury Understanding[41]

Aspects difficult to understand	**Number of responses**
The legal terminology	43
Legal or factual information	16
Technical evidence	15
Information on the nature of the charges	12
The order of proceedings, the opening statements and address	8
Summing up	7
Use of exhibits, physical evidence, visual aids etc. (maps/photos)	4
Evidence	5
Total	110

While it appears clear that legal terminology and the legal aspects of the trial process pose the greatest difficulty for jurors it is worth noting that technical evidence was also problematic. It is also important to appreciate that this research was based upon the jurors own perceptions and the individual juror understanding was not objectively assessed. This approach is of questionable benefit since a juror may claim to

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[41] *ibid,* 37. In total this research is based on contacts with 361 jurors. The above table is based on responses to question 28 of the questionnaire. Question 28 begins with a filter: 'did you find any aspects of the trial difficult to understand?' If 'yes' the respondents are given the above list of options. It is unclear how many respondents answered 'yes' to the initial filter question. Therefore, while it is clear that question 28 elicited 110 responses it is unclear how many actual respondents account for the 110 responses. See Matthews, Hancock & Briggs, "Juror's Perceptions, Understanding, Confidence and Satisfaction in the Jury System: a study in six courts", Home Office Online Report 05/04, See appendix A, 82.

understand something of which they, in fact, have but little comprehension.[42] One difficulty in the field of forensic science concerns the issue of cross-examining experts. It has been suggested that any questioning of the reputation of a witness automatically damages their credibility in the eyes of the jury, even where such questioning is without basis.[43] In the absence of further research it is impossible to determine whether or not juries can cope with forensic science evidence. 'It is highly likely that the number of cases which depend on complex forensic evidence will increase...' as such it is important that research be conducted as a matter of urgency.[44] What can be said with certainty at this point is that any jury which is unable to understand the evidence placed before it is certainly incapable of delivering justice.[45]

The second area of recent controversy has surrounded serious fraud trials. The Auld Report has identified a series of problems associated with trial by jury in complex fraud trials. As with forensic science evidence, there are concerns about the ability of the jury to understand complicated evidence. However, further difficulties arise due to the length of these trials. It 'is not just a matter of expense and toil flowing from the use of procedures peculiar to jury trial in such difficult cases. The remorseless increase in the length of such trials over recent years has become a severe intrusion on jurors' working and private lives'.[46] The length of these trials 'has the effect of

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[42] House of Commons Science & Technology Committee, *Forensic Science on Trial, Seventh Report of Sessions 2004-05,* HC 96-1, (London: 2005), paragraph 165.
[43] *ibid,* paragraph 165.
[44] *ibid,* paragraph 167.
[45] It is also clear that the evidence placed before the jury must be of a high quality. In the field of expert scientific evidence cases exists where the jury has been given inaccurate or misleading evidence. Such evidence is in and of itself bad evidence and the jury, as an institution, cannot be held liable for that failure. For example recent cases in the UK surrounding convictions based on the evidence of Prof. Sir Roy Meadows, see House of Commons Science & Technology Committee, *Forensic Science on Trial, Seventh Report of Sessions 2004-05,* HC 96-1, (London: 2005), paragraph 168.
[46] The Auld Review, paragraph 173.

making juries even less representative of the community than they are already, since the court excuses many who would otherwise be able and willing to make short-term arrangements to do their civic duty'.[47] If juries are not representative then the benefits of trial by jury identified in *de Búrca* and by de Tocqueville no longer apply. Lord Justice Auld, therefore, recommended the abolition of trial by jury in such cases and advocated its replacement with 'as an alternative to trial by judge and jury in serious and complex fraud cases, the nominated trial judge should be empowered to direct trial by himself sitting with lay members or, where the defendant has opted for trial by judge alone, by himself alone'.[48] The merits or demerits of this proposal are not of interest here, however, it is interesting that both the Auld Review of 2001 and the earlier Roskill Report[49] published in 1986 advocated the removal of trial by jury in these cases.

The proposals to interfere with trial by jury in cases involving scientific evidence and those of a concerning complex and serious fraud are not uncontroversial. However, a pattern has emerged over the past number of years in which it is becoming clear that politicians and leading members of the judiciary are willing to think the unthinkable. It has become feasible to at least suggest that trial by jury be removed in some cases. The justification for such interference is that trial by jury is impractical for one reason or another and that these impracticalities are such that justice is being interfered with by the maintenance of the jury system. It has been noted that 'Auld's scepticism as to the attractiveness of jury trial... is not unique. It is timely and consistent when an

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[47] *ibid*, paragraph 181.
[48] *Ibid,* paragraph 206.
[49] Lord Roskill, *Fraud Trials Committee Report,* (London, 1986).

overall decline in the frequency of juries in other common law jurisdictions'.[50] For the purposes of this thesis it is not necessary to establish whether or not interference with trial by jury in the above situations is justified. It is merely necessary to highlight the growing willingness of government and the judiciary to consider such interference.

1.5 The Issue of Jury Bias

The single greatest difficulty in any analysis of trial by jury results from the fact that researchers are denied the right to question and interview jurors. As such it is impossible to accurately collect data on the reasoning, prejudices, understanding and so forth of jurors. The issue of jury bias is therefore very difficult to assess but it is worth noting on the basis that people have personal prejudices and therefore jurors, as people, will have personal prejudices. As was noted earlier the Diplock report identified the potential problem of bias within the context of sectarian violence in Northern Ireland. Since then Canadian researchers have identified four categories of bias: interest prejudice, where a juror may have a vested interest in a particular outcome; specific prejudice, where a juror may have a pre-existing opinion about the case in hand; generic prejudice, which arises when a jurors pre-existing opinion causes that juror to stereotype the defendant, victim or crime; and conformity prejudice, where the juror may feel pressure to conform to a particular view. These four categories can arise either as the result of an individual jurors pre-existing

[50] Corker, "Trying Fraud Cases Without Juries", (2002) *Criminal Law Review,* 283, 284.

opinions, interests or prejudices or as a result of their opinion about a given case, due to pre-trial publicity or some other factor.[51]

Article 6 of the European Convention on Human Rights (ECHR) demands that everyone is entitled to trial by an 'independent and impartial tribunal established by law'.[52] In *Sander v. the United Kingdom* the European Court of Human Rights stressed that 'a tribunal, including a jury, must be impartial',[53] therefore the issue of jury bias is one of fundamental importance and can directly impede the defendants right to a fair trial. The European Court has established a two part test for dealing with issues of bias. Firstly, 'there is a presumption that all tribunals are free from bias unless otherwise proven and secondly, once an allegation of bias is made it must be investigated unless it is "manifestly devoid of merit"'.[54] *Remli, Sander* and *Gregory*[55] all involved situations where one or more jurors were alleged to have displayed racist views. The ability of the Court to investigate such allegations of bias and the procedure to be followed in such instances has been laid down by the European Court of Human Rights, however, the significant factor is that the potential for such jury bias has been established.

DPP v. Haugh[56] focused upon the issue of pre-trial publicity and its potential effect on the defendants right to a fair trial. *Haugh* is a rather peculiar case in that it

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[51] Quinn, "Jury Bias and the European Convention on Human Rights: a well kept secret?", [2004] *Criminal Law Review,* 998, 999.
[52] European Convention on Human Rights, Article 6. See also *Holm v. Sweden* (1994) 18 EHRR 79 and the High Court of Australia decision in *Webb v. The Queen* (1993 - 1994) 181 CLR 41.
[53] (2001) 31 EHRR 44, paragraph 22.
[54] Quinn, *op cit,* 1001-1002, citing *Remli v. France* (1996) 22 EHRR 253, paragraph 48.
[55] *Gregory v. the United Kingdom* (1997) 25 EHRR 577.
[56] [2000] 1 IR 184..

involved the trial of a former Taoiseach, Charles Haughey and the pre-trial publicity arose from the publication of the report of the Moriarty Tribunal. Thus, this was not merely the kind of publicity which might surround any normal trial. Mr. Haughey was concerned that the publicity generated by the McCracken and Moriarty tribunals would prejudice his right to a fair trial.[57] In the cases of

> *D v. DPP*[58] and *Z v. DPP*[59]... the Supreme Court acknowledged that it would be naïve in modern society to hope to empanel a jury which had not heard anything about a case of considerable notoriety. However the mere fact that an offence had received significant publicity does not itself mean that the trial of that offence would be unfair.[60]

In *Haugh* the trial judge sought to alter the procedure in order to guarantee a fair trial.[61] Specifically, Judge Haugh, the trial Judge, sent a questionnaire to potential members of the jury.[62] In the view of the High Court the decision to alter the procedures by sending out a questionnaire was without jurisdiction,[63] furthermore, Carney J. saw no reason for establishing a special set of rules in this case. Such rules would in fact be offensive to the 'constitutional imperative that all citizens should be equal before the law'.[64] The conclusion in *Haugh* was that the trial Judge cannot alter the procedures due to the notoriety of the accused, rather the trial Judge must employ warnings and so forth during the course of the trial in order to ensure fair

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[57] O'Donnell, "The Jury on Trial: Reflections on DPP –v- Haugh", (July, 2000) *Bar Review,* 470.
[58] [1994] 2 IR 465.
[59] [1994] 2 IR 476.
[60] O'Donnell, *op cit,* 471.
[61] *ibid.*
[62] [2000] IEHC 178.
[63] [2000] 1 IR 184, 208.
[64] [2000] 1 IR 184, 194.

procedures.[65] Similarly, in the case of *Gregory* the European Court accepted that where the trial judge discussed the alleged racial bias with counsel and then delivered a strict warning to the jury he had discharged his duty.[66] However, in the case of *Sander,* the Court appears to have departed from its decision in *Gregory.* In *Sander* an allegation of bias was made by one juror. The trial judge told the jury of the complaint and reminded them of their oath. The next day the Judge received two letters: the first was from the entire jury denying any prejudice; the second from an individual juror admitting making racist jokes but denying racial prejudice. Under the circumstances, the European Court of Human Rights was of the opinion that although no evidence of subjective bias existed it could be argued that the second letter provided evidence of objective bias, as such it was held that the trial had breached Article 6.[67] *Haugh, Gregory* and *Sanders* confirm the complexity of determining how to respond to jury bias. The Irish and European case law makes it clear that Courts must react to allegations of or concerns about jury bias. Relying on the random selection process is insufficient. Therefore, while it is presumed that bias does not exist once an allegation of bias arises the Court must investigate that allegation and must act accordingly.

While the above cases provide some guidance which might help to alleviate the issue to jury bias, these measures are only effective if the alleged bias emerges before sentence. Where allegations of bias are made after the trial it is obviously not appropriate to issue a warning to the jury. The jurisprudence in such cases is somewhat unclear. The European Court of Human Rights has not directly considered

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[65] *ibid,* 474.
[66] Quinn, *op cit,* 1002.
[67] *ibid,* 1003.

the issue and the UK courts have failed to reach a conclusive decision.[68] In the conjoined appeals of *Conor* and *Mizra*[69] the House of Lords held that the rules governing secrecy of jury deliberations were compatible with the ECHR and that none of the defendants had received an unfair trial despite allegations of jury bias.[70] The dissenting judgment of Lord Steyn is illuminating. Lord Steyn posited two hypothetical scenarios: in the first it emerges after the verdict that a number of the jurors belonged to a neo-nazi group and advocated conviction on the basis that the defendant was a black immigrant; in the second the jurors refused to deliberate and reached their verdict by spinning a coin. Lord Steyn contended that such verdict would be perverse,[71] concluding that

> it would be an astonishing thing for the ECHR to hold... that a miscarriage of justice may be ignored in the interests of the general efficiency of the jury system. The terms of article 6(1) of the European Convention, the rights revolution, and 50 years of development of human rights law and practice, would suggest that such a view would be utterly indefensible.[72]

The rational behind Lord Steyn's view is that the jury is a judicial tribunal and is therefore bound by the same rules as all other judicial tribunals. He states that, 'A jury is not above the law. As a judicial tribunal it must comply with the requirements of article 6(1) of the European Convention on Human Rights'[73]. It is this view which distinguishes Lord Steyn from de Tocqueville.

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[68] For further discussion on this point see Quinn, *op cit,* 1004- 1006.
[69] [2004] 1 AC 1118.
[70] [2004] 1 AC 1118, 1119.
[71] [2004] 1 AC 1118, 1129.
[72] [2004] 1 AC 1118. 1136.
[73] [2004] 1 AC 1118, 11130.

It was noted earlier that for de Tocqueville the jury fulfils a political as well as a judicial function. This political function includes within it an educative effect. Such arguments are attractive and the involvement of the civil population in the judicial process can be argued to engender a sense of civic responsibility and might possibly increase the legitimacy of verdicts in the eyes of the general population. However, it was also noted that de Tocqueville was less sure of the judicial efficacxy of trial by jury. Lord Steyn does not object to the role of the jury, however, he also highlights its judicial function. As a judicial tribunal, Lord Steyn, correctly, argues that it must be bound by the same rules which govern all other judicial tribunals. Therefore, trial by jury, while delivering on its republican and political mandates, as per de Tocqueville, must also deliver a fair trial. In the exceptional circumstances here trial by jury fails to deliver a fair trial it must be open to review. As a result, Lord Steyn held in Conor and Mizra, that in those exceptional circumstances where the rules of secrecy surrounding trial by jury appear to impede the right to a fair trial those rules should be

This point is of great importance to this overall thesis. Trial by jury is a long established and 'hallowed' institution. However, its longevity and hallowedness do not guarantee that trial by jury is the most efficient means of providing a fair trial. In exceptional circumstances it is necessary to consider one key question – should we emphasise the right to trial buy jury even where we have good reason to suspect that it will lead to a miscarriage of justice? Or in other words, is trial by jury more important than the right to a fair trial?

1.6 Juries & Perverse Verdicts

A further complex and extremely interesting issue related to trial by jury involves the perverse verdict. As Lord Justice Auld has commented many 'fervently support what they regard as the right of the jury to ignore their duty to return a verdict according to the evidence and to acquit where they disapprove of the law or of the prosecution in

seeking to enforce it'.[74] This issue is clearly highlighted by the decision of the UK courts in *R v. Ponting.*[75] Ponting, a senior civil servant, leaked two documents to an MP, Mr. Dalyell. Mr. Ponting had drafted a response to Mr. Dalyell's Parliamentary questions about the sinking of the Belgrano. The Minister, Mr. Heseltine chose not to use these responses and instead sent his own brief replies. As a result Mr. Ponting took it upon himself to send the two documents to Mr. Dalyell.[76] The point of law in *Ponting* rested upon the definition of 'in the interests of the State' within the UK's Official Secrets Act, 1911.

> Clive Ponting admitted in court passing two official documents to Tom Dalyell but pleaded 'not guilty' to communicating them unlawfully. His defence was based on the ground that it was his duty 'in the interests of the State' to inform Parliament (via Tom Dalyell) because it had been misled about the Belgrano affair by Ministers.[77]

Significantly, the trial Judge directed the jury that the words 'interests of the State' referred to 'the policies of the State... at the time of the disclosure and [that] they [the jury] should not consider whether they agreed with the policies of the Government'.[78] Based on this direction it is clear that Ponting's defence would fail in law. However, the jury refused to return a verdict of guilty and Ponting was acquitted against the evidence. The case highlighted to absence of a public interest defence in the Official Secrets Acts 1911-1939 and became something of a cause celebre.

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[74] The Auld Review, paragraph 99.
[75] (1985) Central Criminal Court, 11 February.
[76] Thomas, "The British Official Secrets Acts 1911-1939 and the Ponting Case", (1986) *Criminal Law Review,* 491, 492.
[77] *ibid,* 497.
[78] *ibid.*

Lord Devlin supported the jury's right to dispense with the law in such circumstances by arguing that 'it as a protection against laws that the ordinary man might regard as "harsh and oppressive" and an insurance "that the criminal law will conform to the ordinary man's idea of what is fair and just"'.[79] If one emphasises the democratising effect of the jury then such a position might appear attractive. This power of the jury to dispense with unpopular or harsh law could be seen as the exercise of the democratic function by these twelve randomly selected individuals and would go toward Devlin's view of the jury as a 'little parliament'. However, Auld L.J. questions whether the jury has, in fact, any 'right' to dispense with the law in such a fashion. He argues that 'although juries may have the ability to dispense with or nullify the law, they have no right to do so', and notes that such action is contrary to their oath.[80] In *The People v. O'Shea*[81] Henchy J. considered this point. He asserted that

> both judges and legislators have accepted that while a jury, properly instructed by the trial judge, have no *right* to bring in a verdict for the accused which is against the evidence, yet they have the *power* to do so; and that the risks inherent in any efforts at controlling the exercise of that power would not be warranted. The use of the power to err in favour of the accused is left to the conscience of the jurors.[82]

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[79] The Auld Review, *op cit,* pargraph 99 citing Lord Devlin, *op cit,* 160.
[80] *ibid,* paragraph 101.
[81] [1982] IR 384.
[82] [1982] IR 384, 438.

Henchy J.'s position is along the same lines as that of Lord Devlin. He also sees the jury as fulfilling the role of a mini-parliament noting that 'what may seem to judges to be a perverse verdict of acquittal may represent the layman's rejection of a particualr law.... So it is that such verdicts have often led to reform of the criminal law'.[83] It appears clear that the jury does not possess the right to dispense with the law, however, they have retained the ability or power to do so. While there is certain attachment to this power the right to an individual jury to act as a mini-parliament must be questioned. The problematic nature of the dispensing power is highlighted when one considers the possibility of perverse convictions. While the right of the jury to acquit an individual because they do not agree with the law is one thing, few would support the right of the jury to convict a defendant in the absence of evidence. Furthermore, while some perverse acquittals have the attractive nature of being a 'blow for freedom' as in *Ponting* others might be based on less defensible jury prejudice.[84]

The apparent attractiveness of the perverse acquittal is recognised, however, it has no basis in law. It is a power which the jury has developed largely because the jury is never called upon to justify its decisions and therefore it can reach any decision, even one which appears at odds with the law. Furthermore, despite pronouncements to the contrary, it is an undemocratic right. Representative democracy operates on the basis that the public select representatives who then legislate and govern on their behalf. It is accepted that complicated issues surrounding low voter turn out, the party system and the complex nature of modern election manifestos may mean that the traditional

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[83] *ibid.*
[84] The Auld Review, *op cit,* pargraph 100.

view of representative democracy is somewhat unclear. However, with all its failings the difference between representative democracy and jury selection remains that in democractic elections the public have the opportunity to select their rulers. Those who rule derive their legitimacy from the selection process. The jury is randomly selected to act as a trier of fact and is not entitled to legislate. The fact that juries are made up of lay-people does not in and of itself qualify them to represent the public at large. The Boy Scouts, the Women's Institute and the Orange Order are all made up of lay people but that does not entitle them to legislate on behalf of the entire population. As a result the author respectfully concurs with Auld LJ in rejecting the right of the jury to deliver perverse verdicts.

1.7 A Mature Response

This chapter has sketched out aspects of the historical development of trial by jury and has established that there is an increasing willingness to interfere with that right. Furthermore, it is this author's contention that such interference is not necessarily problematic. While a number of jurisdictions operate without any jury system or with a mixed jury system the jury does possess certain attractive qualities which may go some way to explaining the recent adoption of trial by jury in Japan. As a result it is suggested that given its positive attributes and its hallowed place within the common law adversarial system the jury should be retained. However, this thesis will proceed on the understanding that although trial by jury should remain the norm in the majority of serious cases it can be acceptably removed in cases where it is unable to provide justice. This thesis, concerns the role and use of the Special Criminal Court and, as such, will focus upon the interference with the right to trial by jury in

emergency cases, more specifically, terrorist and organised crime cases. The justifiability of interfering with trial by jury in serious fraud cases or cases involving complex scientific evidence can be considered elsewhere, however, as a point of principle it will be assumed that interference with jury trial is acceptable in cases where due to some flaw in its character jury trial is incapable of delivering a fair trial. The forthcoming analysis will contribute to the argument in favour of limited interference with jury trial in the circumstances outlined.

As has been noted, the jury has been seen as a hallowed institution and much has been written about it. It is seen as the light which shows that freedom lives and so forth. While it has been argued that

> Most of the great pronouncements on constitutional liberty, from the eighteenth century onwards, have been the work of judges, either sitting in appellate courts or giving directions to juries. The assumption that political liberty at the present day depends upon the institution of the jury ... is in truth merely folklore.[85]

It is undeniable that civil libertarians tend to be protective of the right to trial by jury. This is possibly because civil libertarians tend to support the sort of egalitarian agenda which, in the eyes of de Tocqueville, is encapsulated by the jury. As a result, any attempt at limiting the right to trial by jury tends to be roundly criticised.[86] Indeed, it might be argued that 'the fate of the socialist-minded activist in modern democratic politics is that of the perpetual bemoaner, lamenting the reactionary zeal of the Right

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[85] The Auld Review, *op cit,* paragraph 102, citing Dr. Glanville Williams.
[86] This assertion, it is hoped, is a rather uncontroversial one.

or the betrayals of the governing Left, as the case may be'.[87] The difficulty with perpetual bemoaning is that it tends to be easy to ignore. Gearty argues that part of the difficulty arises from the fact that the phrase 'civil liberties' is over employed[88] and advocates a reassessment of the core values. 'The core of the subject lies in the protection of political freedom. Civil liberties is concerned with making representative democracy work'.[89] In such an analysis, civil liberties are seen as the right to vote and those rights which makes the exercise of that right meaningful, namely: the right to liberty; expression; association; and assembly.[90] Thus, civil liberties do not (necessarily) include the right to trial by jury, which is not a mechanism necessary in order to make representative democracy work, while the right to fair trial can be seen as a facet of the right to liberty. Therefore, emphasis should be placed on protection of the right to a fair trial rather than the retention of juries in all cases.

Since this thesis will focus on the curtailment of the right to trial by jury in emergency cases the question arises as to how to limit the exercise of emergency powers. There are two traditional controls on the Executive power, namely the Separation of Powers and Judicial Review. 'Both mechanisms aim to ensure that the national government exercises its powers responsibly – with sufficient vigour to meet the nation's challenges, but, without intruding on protected liberties'.[91] It is important to register at this stage that recognition is given to the State's right to defend itself, this point will

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[87] Gearty, "Reflections on Civil Liberties in an Age of Counterterrorism", (2003) 41 *Osgoode Hall Law Journal*, 185, 186.
[88] *ibid,* 187.
[89] *ibid,* 208.
[90] *ibid,* 193.
[91] Tushnet, "Replies: Controlling Executive Power in the War on Terrorism", (2005) 118 *Harvard Law Review,* 2673, 2673.

be considered in greater detail in subsequent chapters. Both of these mechanisms will be considered in detail in Chapter 8 which will examine the role of the Courts and the Legislature in reviewing Executive actions. At this stage two points are worth considering. Firstly, in the US context, a historicist analysis has identified a certain trend of 'social learning'. This thesis contends that

> the threat to civil liberties posed by government actions has diminished in successive wartime emergencies. We ratchet down our reaction to what we perceive to be a threat each time we observe what we think in retrospect were exaggerated reactions to threats. To take the obvious example, nothing on the scale of the Japanese internment has yet been proposed during the current situation.[92]

This analysis might also be said to apply to the Irish scenario. The gradual improvement from the Public Safety Act (PSA), 1929 to the Offences Against the State Act, (OAS) 1939 will be examined in Chapter 3. The 'social learning' thesis is problematic, however, since it merely involves an observation of previous behaviour. Tushnet accepts that he does not 'have any structural account of why there might be systematic tendencies towards this sort of learning'.[93] It is respectfully suggested, therefore, that while the social learning thesis provides and interesting observation which is worth bearing in mind while considering the historical analysis of the Special Criminal Court it will not be a theme to which this work will return.

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[92] Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime", (2003) *Wisconsin Law Review,* 273, 294/295.
[93] Tushnet, correspondence with the author, 31 August 2005.

The second point of interest concerns the debate surrounding the constitutionalisation of emergency powers. As will be considered in subsequent chapters the Special Criminal Court is constitutionally anticipated.[94] Such a method is not entirely uncontroversial.

> Constitutional provisions dealing with emergency powers place regimes of exception within the constitutional order. Constitutional provisions dealing with emergency powers provide a language of justification for the invocation of emergency powers, even though the precise language used in the constitution may be inapt for the occasion on which emergency powers are invoked.[95]

Thus incorporating emergency provisions into the constitution may offer justification or at least the language of legitimacy to the illegitimate. Such concerns will be set aside for two reasons. Firstly, as will be seen in Chapter 2, Irish experience suggests that it is better to bring the Executive under constitutional control that to free them from it. The PSA, 1929 and Article 2A acted as amendments to the Irish Free State Constitution. As such the Government was free in practice from constitutional considerations when drafting this legislation. The results were draconian. The OAS, 1939 was drafted within constitutional parameters and was a more considered and restrained piece of legislation.[96]

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[94] See in particular chapter 3.
[95] Tushnet (2003), *op cit*, 304.
[96] The drafting of the Offences Against the State Act, 1939 will be considered in detail in chapter 3.

The second reason for setting aside concerns surrounding constitutionalisation is that the alternatives are unclear. If one accepts that the State has an inherent right to protect itself from both internal and external threats then emergency measures will inevitably be necessary. Tushnet advocates the use of 'emergency powers outside the Constitution'.[97] It is contended that 'it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, then to have the actions rationalized away as consistent with the Constitution and thereby normalised'.[98] To the constitutional lawyer there is a certain attractiveness to this argument since it allows the Constitution to remain unsullied, standing head and shoulders about the Executive, while allowing the Executive to get on with the business of defending the State from threat. Problematically, however, this approach does appear to leave the Executive free from control.[99] On this point Tushnet contends that his 'argument is not that [the] approach leaves executive power uncontrolled; rather, the exercise of executive power is to be controlled, not by courts, but by legislatures and the people acting in their constitutional capacities'.[100] Such a provision is not that different to the UK Human Rights Act (HRA), 1998, s.4 of which provides the Courts with the power to make a declaration of incompatibility rather than granting them the power to declare legislation void and unconstitutional. S.4(6)(a) states that such a declaration 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given' and as such the impugned provision continues in force until Parliament or a Minister of the

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[97] *ibid,* 304.
[98] *ibid,* 305.
[99] Tushnet, correspondence with the author, 31 August 2005.
[100] *ibid.*

Crown[101] choose to alter it. This reliance on Parliament and public action to hold the Executive to account appears optimistic.[102] The UK HRA, 1998 is the result of peculiarly British sensitivities surrounding the Sovereignty of Parliament and the desire to maintain Parliamentary Supremacy. Allowing the Executive to act extra-constitutionally during an emergency and relying on Parliament, which in Parliamentary democracies such as Ireland, is normally controlled by the Executive is overly optimistic. The Courts require a controlling role.

1.8 The Underlying Assumptions

This chapter has sought to examine the role of trial by jury and to establish some of the underlying assumptions which will inform the rest of this thesis. Firstly, it is contended that the importance of trial by jury has been grossly exaggerated. The jury as an institution does not guarantee justice and it is not the light which shows that freedom lives. It is an institution, familiar in the adversarial, common law world, but in no way is it indispensable to a just and modern society. However, as an institution the jury has some strengths. Pointedly, by including the public in the decision making process it may increase the legitimacy of trial verdicts. Furthermore, de Tocqueville makes an attractive argument about the juries political and educative roles. The jury is, therefore, a generally useful and positive institution.

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[101] by means of s.10 of the HRA, 1998, a Minister may amend legislation which ahs been declared incompatible.

[102] The inherent weakness of relying upon the Dáil to hold the Executive in check arises from the fact that the Executive, by definition, has a majority in the Dáil and as such can usually control it. The control of the Executive by the Dáil is therefore dependent on members of the Government Parties voting against the Government. While this is not unheard of it is rare.

However, if we choose to re-examine the hierarchy of rights, and if we move away from the nostalgic view of the jury it becomes apparent that the right to a fair trial is of significantly greater importance than the right to trial by jury. As such it is contended, that other advantages aside, if the jury is incapable of fulfilling its primary function, namely if it is incapable of dispensing justice, then it should be replaced. The jury, like all other judicial tribunals, is bound by the requirements of Article 6 of the ECHR, if it is unable to fulfil those requirements it should be replaced by a body which is capable of fulfilling those requirements. This thesis will examine whether or Special Criminal Courts use has been and continues to be legitimate. The key question which will enable us to address that point is: does the Special Criminal Court act where the ordinary courts are incapable of administering justice? If the answer to that question is 'yes' then it can be contended that the Courts use is legitimate. Before that conclusion can be drawn a review of the history and development of the Special Criminal Court will be conducted.

Chapter 2

From Military Tribunals to the Special Criminal Court

The purpose of this Chapter is not only to place our understanding of the Court within a historical setting, but also to provide a deeper understanding of the Court itself. It will be obvious by the end of this chapter that not only was the Special Criminal Court not the first such court in Ireland, but it in fact inherited many of the traits of its predecessors. As such, it is not possible to fully appreciate the nature of the present Court unless we first understand where it came from. This chapter can be seen as both an attempted contextualization of the modern day Court and a brief review of its genealogy.

2.1 The Birth of the Irish Free State

The history of emergency legislation in Ireland is both interesting and lengthy. It is not possible to consider that history in any depth in this work, however that it exists must be noted. In a revealing passage Arthur Balfour declared that Cromwell's failure in Ireland was due to his reliance on coercion alone and he was determined not to repeat that mistake, stating, 'I shall be as relentless as Cromwell in enforcing obedience to the law, but, at the same time, I shall be as radical as any reformer in redressing grievances...'. In other words, 'contrary to popular belief the process of 'killing home rule with kindness' began with Arthur, not Gerald Balfour'.[103] It is interesting to note that Balfour saw Cromwell as an appropriate role model for dealing

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[103] Curtis, *Coercion & Conciliation in Ireland; 1880 – 1892: A Study in Conservative Unionism,* (London: 1963), 178/179.

with the Irish problem; it is also interesting that the process of addressing grievances was seen as an essential companion of any repression. This combination of coercion and conciliation is illustrated by the events of 1881. In that year

> the Land League was proclaimed illegal, meetings were broken up by the batons of the police, *habeas corpus* was suspended and over one thousand men were imprisoned, including Parnell, John Dillon (his chief lieutenant) and Michael Davitt; at the same time a more or less conciliatory Land Act was passed.[104]

A second trend, which was to be oft repeated, was the introduction of coercive legislation in response to an act or outrage. The use of repression was certainly a response to the violence of the Land Wars;[105] for example, in 1882 the murders of Lord Cavendish, the Chief Secretary and Mr. Burke, the Under-Secretary, in the Phoenix Park was the trigger for the introduction of the Crimes Act 1882. This Act gave considerable powers to the police, provided for detention without trial and allowed for juries to be replaced by commissions of judges in certain cases.[106] Although some were critical of the repressive legislation used in Ireland[107] it remained

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[104] Macardle, *The Irish Republic,* (London: 1968), 48.

[105] The Land Wars had been characterised by sectarian violence where Catholics boycotted farms and led violent assaults on landlords and Orange Emergency Committees attempted to provide 'emergency men', mostly from Ulster, to work on the boycotted properties. Comeford "The Land War & the Politics of Distress, 1877 – 82", in Vaughan (ed) *A New History of Ireland, VI, Ireland Under the Union, II, 1870 – 1921,* (Oxford: 1996), 46. It is said that Edward Carson, the Ulster Unionist leader, witnessed agrarian violence during the Land War and as a result he, 'knew how vulnerable unionists were outside the north-east corner of the island, and for him, therefore the essence of the matter was that the connection with Britain must never be broken'. Lyons, "The Developing Crisis, 1907 – 1914" in Vaughan, *op cit,* 130. This concern about Protestant vulnerability ensured that as Nationalist demands for Home Rule grew, Unionist opposition strengthened. Finally, on 24 and 25 April 1914 Ulster Unionists landed weapons at three harbours in Ulster and on 26 July 1914 the Irish Volunteers responded by landing arms at Howth. Lyons "The Developing Crisis, 1907 – 1914" in Vaughan *op cit,* 141.

[106] Macardle, *op cit,* 49.

[107] Joseph Chamberlain described the system of governance in Ireland as, '...a system which is founded on the bayonets of thirty thousand soldiers encamped permanently as in a hostile country. It is a system as completely centralised and bureaucratic as that with which Russia governs Poland, or as that

a fundamental part of Government policy. In April 1889 the Prime Minister, Lord Salisbury, referred to the need for '...a long spell of firmly and impartially administered law'[108] and such governmental responses were common,[109] indeed the Crimes Act, 1882 'was the fifty-seventh special Act for dealing with disaffection in Ireland passed since the [Act of Union, 1801]'.[110]

The effect of harsh Government responses may have been counterproductive. For example, although the Rising of 1916 did not appear to have immediate popular support, a mere two years later Sinn Féin, the party most closely associated with the Rising, was to attain 73 seats in the Westminster elections.[111] 'The executions, the heroic demeanour of the leaders, the fear of conscription and the dislike of 'England's War' made a dangerous mixture'.[112] That dangerous mixture assisted Sinn Féin in dramatically overtaking the Irish Parliamentary Party.[113] The growth of Sinn Féin was to be of great significance. The Sinn Féin candidates elected in 1918 refused to take their seats in Westminster and declared a Republic, describing themselves as Dáil Éireann. The two and a half years of violence which followed would become known as the War of Independence or Anglo-Irish War.[114] This conflict can be broken down into three phases. From 1919 into the early months of 1920 isolated

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which prevailed in Venice under the Austrian rule'. See Macardle, *op cit,* p49, citing Mr. Joseph Chamberlain at Holloway, 1885.

[108] *The Nation*, 27 April 1889 see, Mitchell & Ó'Snodaigh (eds) *Irish Political Documents: 1869 – 1916*, (Dublin: 1989), 76.

[109] for example see, The Irish Habeas Corpus Suspension Acts and Coercion Acts of 1797, 1803 and 1833, Kohn, *The Constitution of the Irish Free State,* (London: 1932), 138.

[110] Macardle, *op cit,* 49

[111] Lyons, "The New Nationalism, 1916 – 1918" in Vaughan, *op cit,* 239.

[112] Garvin, *The Evolution of Irish Nationalism,* (New York: 1981), 114.

[113] The Irish Parliamentary Party collapsed from 86 seats to six, while Sinn Féin had grown from seven to 73 seats. Lyons, "The New Nationalism, 1916 – 1918" in Vaughan, *op cit,* 239.

[114] Hachey, *Britain & Irish Separatism: From the Fenians to the Free State 1867/1922,* (Chicago: 1977), 259.

incidents which in time escalated in size and frequency occurred. This was followed, from March through December 1920 by a more intensive guerrilla-style campaign. The final period, January to July 1921, was one of truce and negotiation.[115] One of the responses of the British Government to the unrest in Ireland between January and July 1921 was to impose martial law. Her Majesty's Government chose to impose martial law in Munster and parts of Leinster. This resulted in two systems of law operating within miles of each other. Predictably, the army lacked control, because they were unable to prevent rebels moving in and out of the martial law areas.[116] The truce and negotiations referred to above, led to the Treaty which in turn provided for the creation of the Irish Free State. The pattern of guerrilla conflict followed by coercive legislation was to be maintained by the government of the Irish Free State.

2.2 Anarchy and Civil War

In 1922 Ireland was on the verge of anarchy. Nation building is always a difficult business, but in 1922,

> there was no State and organised forces. The provisional Government was simply eight young men in the City Hall standing amidst the ruins of one administration, with the foundations of another not yet laid, and with wild men screaming through the keyhole.[117]

At this stage the Free State had four main objectives. These were,

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[115] Hachey, *infra,* chapter 10.
[116] Curran, *The Birth of the Irish Free State 1921 – 1923,* (2nd print) (Alabama: The University of Alabama Press, 1981), 28.
[117] Garvin, *1922 The Birth of Irish Democracy,* (Dublin: 1996), 94, citing Kevin O'Higgins.

a) The reconstruction of the machinery of government,

b) The assertion of the status of the nation in the Commonwealth,

c) The regeneration of the nation's economy and,

d) 'the restoration... of a respect for law and order, the demonstration, *ruthless if need be,* that here at last was a government prepared to govern'.[118]

The fulfilment of these, none too modest, aims was severely hampered by the conditions of the time. As Cosgrave noted, at the time of the creation of the State there existed a brief window of opportunity. He said, 'last December Ireland was in a position of power and influence of great promise for the country. Foreign nation's expressed their appreciation of the settlement, and for a short period there was a boom in business. The actions of the opposition destroyed that boom'.[119] The outbreak of Civil War made the attainment of these goals even more distant.

The restoration of law and order, which is of most interest here, was problematic due to the national experience prior to the creation of the Free State. It has been suggested that one effect of British rule in Ireland, including the coercive legislation referred to earlier, was that the Irish had become indifferent, if not hostile, to government; as a result, it would take time to develop a sense of civic responsibility.[120] It should be remembered that only a short while before, on 10 April 1919, the President of Dáil

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[118] Lyons, *Ireland Since the Famine,* (London: 1971) 480.
[119] WT Cosgrave, Dáil Éireann, September 11, 1922, see McLoughlin (ed) *Great Irish Speeches of the Twentieth Century,* (Dublin: 1996) 121.
[120] C. Townshend, *Political Violence in Ireland: Government & Resistance Since 1948,* (Oxford: 1983) 365.

Éireann, Eamon de Valera declared that the then police force, the R.I.C.[121], was not an ordinary civil police force, but was in fact a military organisation which brutally enforced British rule. He urged the people of Ireland to ostracise members of the force in order that they 'be shown and made feel how base are the functions they perform and how vile is the position they occupy'.[122] The promotion of a policy of hostility toward the police before independence would ensure that it was difficult for any new State to guarantee public support for the police after independence. This task was even more difficult for the Free State because of the divisions which the Treaty and the creation of the Free State caused.

The Treaty brought about an end to the conflict with Britain but it was not universally welcomed. In many respects none of Ireland's dreams had been fulfilled,

> not the Gaelic League's Irish speaking nation, nor Yeats's literary-conscious people, nor the republic of the I.R.A., nor the worker's republic of Connolly, nor Griffith's economically self-sufficient dual monarchy, nor Redmond's home rule within an empire which the Irish had helped to build, nor Carson's United Kingdom.[123]

Opposition to the Treaty was evidenced by the split which it caused in the Dáil,[124] this opposition was to find more violent expression in the months ahead. It was noted earlier that W.T. Cosgrave was of the opinion that in December 1921 Ireland had a brief window of opportunity but that opportunity had been wasted by the opposition.

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[121] Royal Irish Constabulary.
[122] T.E. Hachey, *op cit,* 259.
[123] Donal McCartney, "From Parnell to Pearse" in T.W.Moody & F.X. Martin (eds) *The Course of Irish History* (Cork: 1967), 312.
[124] 64 to 57 in favour.

In his view the onward march of the nation was being thwarted by a handful of violent persons.[125] These violent persons - the same wild men who, in the words of O'Higgins, had been screaming at the door of City Hall - opposed the State and in June 1922 Civil War began.

2.3 The Constitutional Framework of the Irish Free State

It is appropriate at this juncture to outline the relevant Constitutional provisions so that an assessment of the government's later actions can be undertaken. 'Unlike democracies, which are subject to civil libertarian, humanitarian, and constitutional limitations, tyrannical regimes can employ the most brutal counter-measures against terrorists'.[126] The Irish Free State was struggling to establish a democracy and its Constitution could, at the very least, be described as 'liberal'. Of course 'no State, however liberal, has abandoned its residual power of suspending the rule of law in time of emergency',[127] but the Free State was severely restricted. Given Ireland's recent turbulent history it is noteworthy that the Constitution did not provide for any special courts, in fact Article 70 expressly provided that 'extraordinary courts shall not be established'. It seems likely that this was a response to the overuse of extraordinary powers, which had been resented by the population, during British rule. However, given the level of opposition to the new State such a provision appears somewhat optimistic if not legislatively naïve. In compensation Article 70 did allow for the extension of the jurisdiction of military courts over the civilian population during times of war or armed rebellion, but excluded such jurisdiction from any area

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[125] W.T. Cosgrave, Dáil Éireann, September 11, 1922, see McLoughlin (ed), *op cit,* 122.
[126] Dershowitz, *Why Terrorism Works: understanding the threat, responding to the challenge,* (Yale: 2002), 106.
[127] Kohn, *op cit*, 128.

'in which all civil courts are open or capable of being held...'.[128] The formula adopted in Articled 70 had been employed previously by the Courts of the United States. In *Ex parte Milligan* Davis J. stated that 'martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction'.[129] Chase C.J., in the same case, stated that military government was only acceptable 'in time of insurrection or invasion... within districts or localities where ordinary law no longer adequately secures public safety and private rights'.[130] Unfortunately, *Milligan* was not applied by the U.S. Supreme Court during World War II. In *Hirabayashi,*[131] Chief Justice Stone articulated a 'rule of reason' test. This test was far more accommodating and defined the military power as 'including any steps needed to wage war successfully'.[132] The restrictive Article 70 was to face a similar fate to the doctrine in *Milligan.* Indeed, the ineffectiveness of Article 70 in tackling the threat now faced by the Free State was to have a detrimental impact upon the development of the Constitution.

2.4 The Civil War

The circumstances which resulted in civil war and the response of the Government of the Irish Free State to it were outlined succinctly by Kevin O'Higgins in a speech to the Irish Society at Oxford University in 1924. He was of the opinion that when one considers that a,

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[128] Hogan & Whyte, *Kelly: The Irish Constitution*, (4th ed) (Dublin: 2003), paragraph 6.5.317.
[129] 71 US (4 Wall) 2, 127, see TenBroek, Barnhart & Matson, *Prejudice War & the Constitution: Causes & Consequences of the Evacuation of Japanese Americans in World War II,* (5th ed) (Berkeley: University of California Press: 1975), 230.
[130] 71 US (4 Wall) 2, 142, see TenBroek *et al, op cit,* 230.
[131] *Hirabayashi v. United States,* (1943) 320 U.S. 81.
[132] Rostow, "The Japanese American Cases – A Disaster", (1945) *Y.L.J.* Vol. 54, No. 3, 489, 524.

> Guerrilla territorial force, which had been the Irish Volunteers, was divided on the issue of the Treaty and... throughout the country, supplementing the frenzied eloquence of Mr. De Valera, the fair were inciting the brave to sanguinary wadings in defence of what was called 'the existing Republic'... the problem which confronted the Provisional Government emerges.... This new tyranny had to be met and smashed. The right of the people to found a State on the basis of the Treaty which had been signed by their plenipotentiaries and endorsed by their Parliament had to be vindicated beyond question.[133]

These challenges were certainly faced down by the Free State and Kevin O'Higgins would play a central role in that process.

The opening act of the Civil War was the occupation of the Four Courts by anti-Treaty forces. This was a serious affront to the Provisional Government.[134] Symbolically, the seizure of the Four Courts was designed to mirror the example of 1916.[135] It has been suggested that the leaders of the occupation would have stood a better chance had they 'preserved their freedom of manoeuvre instead of cooping

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[133] de Vere White, *Kevin O'Higgins: Strong Man in the Free State Government 1922 – 27 His Eventful Life and Mysterious Violent Death,* (Tralee: 1966), 100/101.

[134] Hogan, "Hugh Kennedy, the Childers Habeas Corpus Application and the Return to the Four Courts", in Costello (ed) *The Four Courts: 200 Years,* (Dublin: 1996), 178.

[135] C. Townshend, *op cit,* 137. It should be noted that one theory of the civil war suggests that it had in fact begun long before the seizure of the Four Courts. Fitzpatrick's research in IRA engagements in Co. Clare between 1919 and 1921 led him to conclude that GHQ had little or no control and that these actions were, in effect, land seizures. While Sinn Féin led a middle class struggle for national liberation, those in the poorer rural districts were engaged in a land struggle. These groups were enaged in a struggle against the 'Apparatus of the English State' which would survive independence rather than against English domination. As a result it is suggested that the Civil War in the West had begun before the truce, let alone the Treaty. For a more detailed analysis of this point see, C. Townshend, *op cit,* 370/371.

themselves up in the city centre'.[136] While this may have been true, it is irrefutable that the occupation of the Four Courts was highly disruptive; it resulted in the destruction of many documents and forced the Chief Justice to hear some cases in his own private residence.[137] The response of the Government was to grant extra-judicial powers to the military and this led to a position of great constitutional delicacy. Ironically, it is argued that by threatening the insecure basis of the state the anti-Treatyites ensured the Anglicisation of Irish politics. Collins was forced to borrow British artillery and O'Higgins resorted to English legal doctrine to assert civil control.[138] Furthermore, the fledgling state became indebted, financially, to Great Britain. Indeed as 'the Lord of the Treasury stated in the House of Commons on February 20th [1923], the Free State had made payments on account during the financial year amounting to approximately £1,000,000 for guns, arms, ammunition, aeroplanes, motor vehicles and other munitions of war handed over by the British Government'.[139] The political toll of the civil war was obvious in ideological and economic terms.

A situation of legal delicacy was caused by the fact that the Provisional Government was unsure if its Provisional status entitled it to those prerogative powers which had enabled its predecessor to act. As a result the Provisional Government adopted a two-pronged approach. It relied on the general power of executive authority to take exceptional measures to restore public order and it sought the sanction of the

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[136] Lee, *Ireland 1912 – 1985,Politics & Society,* (Cambridge: 1989), 63.
[137] Hogan, *op cit*, 179/183.
[138] Townshend, *op cit,* 373.
[139] Macardle, *op cit,* 763.

Provisional Parliament.[140] It is said that the Special Powers resolution of September 1922 granted the army more discretionary powers than the British proclamation of martial law. Furthermore, it is undeniable that these powers were abused by the army. The events of 7 March 1923 in Kerry provide some evidence of this abuse. On that day, nine prisoners were taken from Tralee prison to Ballyseedy Cross by soldiers of the Irish Free State. The prisoners were tied in a ring with an explosive mine in the centre; the mine was then detonated killing them all. On the same day five prisoners were taken from Killarney prison to Countess Bridge in similar circumstances. Again a mine was detonated by the soldiers killing four of the five. Tadhg Coffey survived. These gruesome reprisals were in response to the IRA killings of three Officers in Knocknagashel, Co. Kerry. The Officers had been killed by an exploding mine. [141] However, O'Higgin's defence of the Free State actions 'under the maxim *salus populi suprema lex* – "Ultimately all government is based on force, must meet force with greater force if it is to survive" – met with a public acceptance which no British government had obtained'.[142] Public acceptance was one thing however, the legal uncertainty referred to above guaranteed that these provisions would be challenged in the Courts.

2.5 A Riddle in the Sands

Erskine Childers was born in England, the son of an Irish mother. He spent much of his youth in Ireland and had gradually developed an interest in Irish politics. He owned and navigated the yacht which landed weapons for the Irish Volunteers in

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[140] Kohn, *op cit,* 143.
[141] Macardle, *op cit,* 765.
[142] C. Townshend, *op cit,* 373.

Howth. He was a member of the first Dáil and a signatory of the Treaty. He has been compared to Byron and La Fayette in that his adoption of the Irish cause was at times a sort of romantic adventure and it is fair to say that he was not universally trusted.[143] Importantly, although a signatory of the Treaty, Childers was an anti-Treatyite. He was arrested in Wicklow for carrying a loaded revolver and was sentenced to death by military tribunal.[144] It has been suggested that 'it did not occur to him that his capture in possession of a lethal weapon would rank as a capital charge, and that the military court would be bound to find him guilty, whether he chose to recognize its legality or not'.[145] The validity of this claim is difficult to assess, after all the first executions under the special powers had been carried out on November 17 1922. In that case four youths had been captured in Dublin carrying loaded revolvers and although they had shown 'no disposition to use...' the guns, they had been shot.[146] The case of Childers appears similar and whether it was expected or not he was sentenced by military tribunal to death.

Childers challenged the jurisdiction of the military tribunal before the Master of the Rolls. It will be recalled that Article 70 of the Constitution of the Free State allowed for the extension of military law to the civilian population during times of war or armed rebellion when the ordinary courts could not function. It will also be recalled that the measures under which Childers was tried were introduced by the Provisional Government and Parliament. In his judgment, the Master of the Rolls accepted that a

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[143] T. de Vere White, *op cit,* 60/61.
[144] *ibid,* 127/128.
[145] Boyle, *The Riddle of Erskine Childers,* (London: 1977), 299.
[146] de Vere White, *op cit,* 127.

state of war existed which made the functioning of the ordinary courts impossible and upheld the jurisdiction of the military tribunal. He stated that,

> An affidavit was filed on behalf of the Provisional Government showing the appalling condition to which the country has been brought – so appalling as to present a picture which might well describe the seat of great war between France and Germany. But if there was no affidavit at all, I would be bound to take judicial notice of the fact that for months this country has been enduring a state of war.[147]

This judgment had a number of consequences. It resulted in the execution of Childers.[148] It also resulted in the judicial acceptance that the nation was at war, although the comparison with the Great War may have been extreme. Finally, it confirmed the judicial acceptance of the extension of military law to civilian populations and the role of military tribunals in Irish law.

The establishment of the military tribunal in 1922 was to set an important precedent. While a Constitution which severely restricted the use of special trial procedures by the executive was being introduced, the Provisional Government was utilising the old tool of military tribunal. This contradiction must be viewed in light of the level of civil unrest. The tactics of the anti-Treatyites were designed to prevent the legislature and judiciary from functioning through intimidation and assassination. They sought to drive the land-owning classes from the country by arson and plunder and they

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[147] *R. (Childers) v. The Officer Commanding the Troops, Portobello Barracks, in the County of Dublin, and the Adjutant General of the Forces of the Irish Provisional Government* [1923] 1 IR 5, 13

[148] Childers was in fact executed while an appeal had been lodged against the decision of the Master of the Rolls. Hogan, *op cit,* 194.

attempted to destroy the nation's economy. In short, they wished to make the country ungovernable.[149] An illustration of these attempts occurred on 7 December 1922. On that day the IRA assassinated Seán Hales, a pro-Treaty TD, and wounded Pádraic Ó'Máille, the Deputy Speaker.[150] In such a climate it is not surprising that draconian measures were introduced and utilised.

> The Cabinet was called, and General Mulcahy, as Minister for Defence and the Army representative in the Government, asked that four Republicans who were in custody should be taken out and shot without trial as a deterrent to further assassinations of Deputies. When he had given his reasons, the majority of the Executive Council agreed.[151]

It is, perhaps, reassuring that there was some condemnation of the executions. Tom Johnson, the leader of the Labour Party and as such the *de facto* leader of the opposition, described the executions as murder, noting that the four had been in jail for months and had nothing to do with Hales' assassination. A stark illustration of the tragedy of Civil War is that one of those executed, Rory O'Connor, had been O'Higgins' best man a year earlier.[152]

> Opinions differ on whether the executions shortened the war, and thus saved innocent lives, or prolonged it by reinforcing the resolve of the anti-Treaty forces. There were no more

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[149] O'Sullivan, *The Irish Free State & its Senate,* (London: 1972), 99.
[150] T. de Vere White, *op cit,* 131.
[151] 'O'Higgins, upon whom the responsibility of this horrific deterrent is laid, was in fact the last but one to consent to it. He did so only after he heard Eoin MacNeill giving his agreement in the gravity of the crisis. The last to agree – and it took an amount of persuading – was Joseph McGrath'. This account is based on the diary of Patrick Hogan and the confirmation of Ernest Blythe. See T. de Vere White, *op cit,* 131.
[152] Curran, *op cit*, 265/266.

> assassinations of Dáil Deputies. But relatives of leading Treaty supporters, including an uncle of Cosgrave and the father of Kevin O'Higgins, Minister for Home Affairs, were murdered.[153]

In the words of Winston Churchill the members of the Government, '...although deeply troubled in their souls, were courageous and hot-blooded, and driven as they had been into a corner with their lives at stake – and much more than their lives, the cause they had conducted so far – they hit back with primordial freedom'.[154]

It has generally been accepted that 'in times of national danger, or in the interests of general public safety, necessary measure of precaution may be taken by the legislature to restrict... fundamental rights...'.[155] To that end the establishment of military tribunals was justified. The powers of a non-reviewable tribunal to sentence an accused to death may have been less acceptable. Certainly the execution of Childers while an appeal had been lodged against the decision of the Master of the Rolls,[156] and execution without trial of four leading republicans in what was officially described as an act of reprisal,[157] would appear intolerable. However, 'republican atrocities... had the effect of making people... indifferent to Free State ruthlessness and the electorate seem to have consented quietly to the executions'.[158] This complicity seems to have continued after the civil war, possibly because the public recognised that the 'menace of the renewal of civil war persisted so long as the

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[153] Lee, *op cit,* 67.
[154] *ibid.*
[155] *per* Hanna J. *The A.G. v. McBride* [1928] IR 451, 454.
[156] Hogan, *op cit,* 194.
[157] Campbell, *Emergency Law in Ireland, 1918 – 1925,* (Oxford: 1994), 166/167.
[158] Garvin (1996), *op cit*, 103.

Republican deputies refused to take their seats in the Dáil...'.[159] Draconian responses to civil unrest became the norm.

2.6 The Assassination of Kevin O'Higgins & The Public Safety Act, 1927

The Civil War can be said to have ended with a whimper. The IRA never formally surrendered and no arms decommissioning occurred.[160] Individual instances of violence frequently occurred. Between 1923 and 1924, for example, there were 738 cases of arson in Ireland.[161] The Government's response to incidents of unrest was predictable. In November 1926, following a series of raids upon Civic Guard Barracks, the Government sought extra powers and a Public Safety (Emergency Powers) Bill was introduced. It is noteworthy that Cosgrave stated that the Act was to be permanent in nature and would be activated only during times of emergency.[162] This model of a standing piece of legislation capable of activation when necessary was to be employed again in the future. One of the most striking examples of violence during the post Civil War period was the assassination of Kevin O'Higgins.

O'Higgins is one of the most significant, if at times underrated, figures in the history of the Free State. He was Vice-President, Minister for Justice and Minister for External Affairs in the Cosgrave administration.[163] He had led the Irish delegation to the Imperial Conference of 1926 and he helped pave the way for what would later

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[159] Gwynn, *The Irish Free State 1922 – 1927,* (London: 1928), 153.
[160] Garvin (1996), *op cit,* 121.
[161] Lee, *op cit*, 172.
[162] Gwynn, *op cit,* 154.
[163] Murphy, *Ireland in the Twentieth Century,* (Dublin: 1989) 70.

become the Statute of Westminster.[164] He had taken a hard line during the civil war and had, on one occasion, argued for executions in every county, since those in Dublin had only limited local impact.[165] After the Civil War he did not relax and took steps to obtain powers under the Public Safety Act, 1923.[166] He was assassinated on his way to Church on 10 July 1927.

The Government responded swiftly to the assassination of such an important figure. The Public Safety Act, 1927[167] was introduced. This draconian legislation decreed severe penalties for the membership of unlawful organisations, granted drastic search powers and provided for a special court which could impose death or life imprisonment for the unlawful possession of fire arms.[168] The Department of an Taoiseach files relating to the drafting of the 1927 Act are very interesting. In general terms the desire to impose severe penalties is obvious from the drafting process. For example, an early document has an initial suggestion of a maximum sentence of five years penal servitude for membership of an unlawful organisation. The figure of five is crossed out and the figure ten is substituted.[169] This initial draft also refers to a possible power of exile. It suggests that the Minister for Justice should have the power to order any person to depart from, and remain outside, the Free State.[170] This power appears to have caused much concern in the United Kingdom since it was

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[164] de Vere White, *op cit,* 219.
[165] Lee, *op cit*, 98.
[166] Lyons, *op cit,* 481.
[167] hereinafter PSA, 1927.
[168] *ibid,* 70.
[169] Department of An Taoiseach file S 5486, "Suggestions for a Bill towards more effectual Suppression of treasonable and seditious activities", paragraph. 3.
[170] *ibid,* paragraph. 7.

presumed that expelled individuals were bound to go there.[171] Perhaps the most interesting issue is that of the composition of the Court.

During the Civil War, the Executive employed military tribunal in an attempt to effectively tackle the threat posed by Irregular, or Anti-Treaty, Forces. Article 70 of the Constitution specifically prohibited the creation of Special Courts, although it did provide for the extension of military law to civilian populations in certain emergency situations. Early drafts of the PSA, 1927 proposed a Special Court to be set up consisting of three judges of the High Court sitting without a jury.[172] A later, more advanced version of the Bill in draft form includes a proposed Part IV which provides for the 'Establishment of Special Criminal Courts'. Section 22 of this draft is quoted in full since it is considered to be extremely instructive,

> 22. - (1) As soon as may be after every occasion on which this Part of this Act comes into force there shall be established by the Executive Council one or more tribunals (in this Part of the Act referred to as special courts) consisting of at the option of the Executive Council either –
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> (a) of three members of whom one shall be an ordinary Judge of the Supreme Court and two shall be Judges of the High Court, or

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[171] Department of an Taoiseach file S5486, "Letter of 2 November, 1927, signed LOVAT (for the Secretary of State)". The letter makes it clear that while the British Government is concerned by any such developments it does not want to interfere.

[172] Department of An Taoiseach file S 5486, "Suggestions for a Bill towards more effectual Suppression of treasonable and seditious activities", paragraph. 1

(b) of three members of whom one (who may or may not be an officer in the Defence Forces of Saorstát Éireann) shall be a person certified by the Attorney-General to have legal knowledge and experience and the others shall be officers of the Defence Forces not below the rank of commandant.[173]

This draft includes a number of talking points. Firstly, it provides for the establishment of Special Courts and uses the term Special Criminal Court. Secondly, the draft gives the Attorney-General, and thereby the Executive, a central role in selecting the members of the Court which may cause some concern *vis-à-vis* the separation of powers and the independence of the court. Finally, the draft continues the suggestion of ordinary members of the judiciary sitting as members of these courts. However, a later draft proposes the possibility of members of the Defence Forces sitting in judgment. This shifts the Court in the direction of military tribunal rather than special court. Perhaps, more significantly the word 'delete' is handwritten in the margin next to s.22(1)(a). This is the last reference to members of the judiciary sitting on the special courts. Later drafts simply delete s.22(1)(a) and replace it with a more compact s.22(1).[174] Cosgrave later admitted that at least two judges of the Supreme Court had informed him that they would relinquish their office if called

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[173] Department of An Taoiseach file S 5486, Public Safety Bill, 1927. Part IV.

[174] The later draft reads; '22.- (1) As soon as may be after every occasion on which this Part of this Act comes into force there shall be established by the Executive Council one or more tribunals (in the Part of this Act referred to as special courts) consisting of three or more members of whom one (who may or not be an officer in the Defence Forces of Saorstát Éireann) shall be a person certified by the Attorney-General to have legal knowledge and experience and the others shall be officers of the Defence Forces of Saorstát Éireann not below the rank of commandant'.

upon to act as a special court under the PSA, 1927.[175] This reluctance by members of the judiciary to sit on such a tribunal must have influenced the drafters.

The draconian nature of the Act is reinforced by a series of provisions which it is worth outlining. S.3 provided that any provisions of the Act which were repugnant to the Constitution would operate as amendments of the Constitution while the Act was in force.[176] This is an extraordinary measure. The effect of s.3 was that an ordinary piece of legislation could amend the Constitution despite the fact that the Long Title of the Act made no reference to it being an Act for the purposes of amending the Constitution. Furthermore, rather than amending a specific provision of the Constitution, s.3 operated as a 'catch-all' provision. As a result, it would be virtually impossible to know which Constitutional provisions had been amended and since the amendment only lasted for as long as the Act was in force the Constitution would be a permanent state of flux. The Act provided for the detention of children under the age of 16 'under such conditions as the Minister for Justice may direct...' and any such child was held at the pleasure of the Minister. The parent or guardian of any such child was also liable to a sentence of six months imprisonment.[177] Most seriously the Act granted extensive powers to the Special Courts but stated that,

> No appeal shall lie from any conviction, sentence, order or judgment of a special court and no special court shall be liable to

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[175] O'Sullivan, *op cit*, 261.
[176] Kohn, *op cit*, 153.
[177] s.8(1) The Public Safety Act, 1927.

be restrained in the execution of its powers under this Part of this Act by any other Court...[178]

Despite the draconian nature of the legislation the Government was convinced of its necessity and viewed it as a matter of some urgency. As a result the Bill was sent to the Governor General for his signature despite the fact that the usual seven day period between the passing of a Bill and its signing into law had not passed.[179]

The PSA, 1927 was repealed in 1928 and special courts were never actually established under the Act,[180] however it did provide the model for the later Article 2A. Indeed, many elements of the early drafts of the PSA, 1927 can be seen in the Offences Against the State Act, 1939. A second legislative response to the death of O'Higgins was contained in an Electoral Amendment Bill. The Bill was designed to combat the abstentionist policies of Fianna Fáil and Sinn Féin. Candidates for nomination were required to swear an affidavit to the effect that, upon election, they would take the Oath.[181] As a result, the main body of Republican, anti-Treaty Deputies decided to stand in elections and take their seats in the Dáil. On 10 August, 1927, Fianna Fáil declared that the oath was an 'empty political formula' and

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[178] s.25(5) The Public Safety Act, 1927.
[179] Department of An Taoiseach file S 5486, Letter dated 10 August 1927, to T.M. Healy Esq., K.C., Governor General of the Irish Free State, signed M, Secretary to the Executive Council.
[180] In fact it appears that the PSA, 1927 was not widely utilised. Seán McBride was certainly detained under suspicion of having been involved in the murder of O'Higgins, but it was established that he was out of the country on the day in question and he was eventually released. In February 1928, two 'middle-aged ladies' were arrested for distributing leaflets inciting the murder of the Governor General. The accused refused to recognise the Court and as such incurred 'such drastic penalties that the jury refused to convict'. It was the view of one contemporary commentator that the draconian nature of the Act prevented the successful prosecution. See Gwynn, *op cit,* 163.
[181] O'Sullivan, *op cit,* 215.

intimated that they would take the Oath.[182] 'The forty-three members of the Fianna Fáil Party took their seats in the Dáil on the 12th August 1927'.[183]

2.7 Article 2A – the Background

The period between 1928 and 1931 appears, at first glance, to have been a forward movement in the direction of Constitutionalism. The PSA, 1927 had been repealed and its most worrisome sections never implemented. Such a view masks many of the realities of the situation. Fianna Fáil were not exactly committed to the constitutional process. They were a 'slightly constitutional party' whose stated objective was to establish a Republic. Seán Lemass made it clear that they would attempt to achieve that objective by constitutional means but this was seen as a pragmatic and not a principled decision.[184] Furthermore, the facts show that even after Fianna Fáil chose the 'slightly constitutional' route, outrages continued.

Following the repeal of the PSA, 1927 'crimes and violence and intimidation – particularly of juries – began to increase'.[185] Illegal drilling occurred and a number of murders were committed. A table of murders said to 'arise directly or indirectly from political motives, labour disputes or rent agitation' from 1927 to 1931 is attached in

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[182] *ibid,* 216,217.
[183] *ibid,* 219.
[184] Lemass's remarks are open to misinterpretation. He did not imply that Fianna Fáil was ready to re-embrace violent means but he was rather circumspect in his comments stating, 'we have adopted the method of political agitation to achieve our end, because we believe, in the present circumstances, that method is best in the interests of the nation and of the Republican movement, and for no other reason...'. This should probably be seen as a political statement designed to keep Republican sympathies 'on-side', however it can hardly be described as a ringing endorsement of constitutional politics and it is undeniably ambiguous on the issue of a future return to violence. Clearly, the statement expresses the Fianna Fáil view that the Irish Free State was illegitimate. See, Dáil Éireann, *Parliamentary Debates*, March 21 1928, vol. 22, col. 1615, also see McLoughlin (ed), *op cit,* 144/145.
[185] Lyons, *op cit,* 497.

Appendix 1. This table includes a reference to the outcomes of each case - it will be noted that only one conviction is recorded. Furthermore, it is clear from the Comment column that these murders were largely associated with disrupting the organs of the State. Individuals were targeted because they gave evidence in Court, because they were suspected police agents or because they were active against the IRA. Richard Moore O'Farrell attempted to prevent a mob from tarring and feathering his father, a Land Agent, and was shot; Vice-Admiral Henry Boyle helped boys to join the British Navy and was shot; and the unfortunate Mrs. Frances McGoy died one week after the IRA blew up her house in revenge for her son giving information to the Police.[186] Upon introducing the legislation which was to provide for Article 2A President Cosgrave stated that,

> Political pressure in the Dáil,[187] combined with the fact that there had been an absence of serious political crime for a considerable period, induced the Government in December, 1928, to consent to repeal special legislation... and within two months of the repeal one witness (Armstrong) was murdered and a juror (White) was gravely wounded in Dublin.... This signalled the breakdown of the jury system...'.[188]

By 1931 the ordinary courts were no longer capable of dealing with the situation.[189] Finally, an interview by Frank Ryan of the IRA caused the Government to act. Ryan justified three killings and claimed the IRA was capable of more. Gerald Boland later

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[186] Department. of An Taoiseach, file S 9249, see Appendix 1.
[187] It is presumed that this refers to the new-found opposition in the form of Fianna Fáil.
[188] President W.T. Cosgrave, "Constitution (Amendment No. 17) Act, 1931. Summary of Opening Statement Made by the President in Dáil Éireann, on 14th October, 1931". Department of An Taoiseach file S 2267.
[189] Coogan, *De Valera: Long Fellow, Long Shadow,* (London: 1993), 409, a detailed, though not exhaustive, account of the level of unrest in the nation in 1931 is given by O'Sullivan, *op cit*, 258 – 260. The Statement of President Cosgrave, *ibid,* is also instructive.

claimed that it was this interview which caused the Department of Justice to advise Cosgrave to introduce military tribunals.[190]

A secondary reason for the introduction of Article 2A was a concern that Communist elements[191] were operating within the State. Cosgrave appears to have been equally concerned that the IRA had begun associating with a new organisation Saor Éire. Indeed, members of Saor Éire were said to have been trained in the Communist gospel in Soviet Russia and were presently attempting to pervert Irish youth. A Joint Pastoral letter was released referring to the dangers of Communist elements[192] and Cosgrave stated that,

> The situation which the present Act was intended to meet was definitely much more serious than that which we had to face after the murder of Mr. Kevin O'Higgins. Murder had become one of the normal and expected elements of the present situation, and the new teachings of communism which are accepted to a greater or lesser extent by these organisations had greatly increased the danger of the permanent perversion of the youth of the country.[193]

Given the importance of O'Higgins to the State, this reference is clear hyperbole however, it does give a sense of the gravity of the situation. These statements of concern were not mere propaganda for public consumption; the situation was serious enough for the Minister for Justice Fitzgerald-Kenny to tell the Chief Justice that 'the

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[190] Coogan, *op cit,* 409.
[191] The fear of the spread of Communism must be seen in light of the events in Russia 13 years earlier, the events unfolding in Spain at the time, coupled with the Conservative nature of both Irish society and the Cosgrave Government.
[192] Department of an Taoiseach file S 2267, "Joint Pastoral issued by His Eminence, Cardinal MacRory, and the Archbishops and Bishops of Ireland", (October 1931).
[193] Department of an Taoiseach file S 2267 Statement of President Cosgrave, *op cit.*

forces making for anarchy are stronger then men dream of...'.[194] As a result of these dangers to the State the Government responded by introducing fresh emergency legislation. That legislation, the Constitution (Amendment No.17) Act, 1931 would be known as Article 2A.

2.8 Article 2A – the Provisions

Like the PSA, 1927, the Constitution (Amendment No.17) Act, 1931 was an amendment to the Constitution. One of the unusual features of the PSA, 1927 was that the long title of the Act did not acknowledge the Act's role as an amendment upon the Constitution. Furthermore, the Act was capable of amending any section of the Constitution. In contrast, the Constitution (Amendment No.17) Act, 1931 was an identifiable amendment, namely the new Article 2A. It is notable that the original provision allowing for Constitutional amendment by means of ordinary legislation was due to expire in December 1930.

> On March 13, 1929 the Dáil debated the second stage of the Consitution (Amendment No. 16) Bill, 1928. The object of this Bill was to extend the eight year transitional period for a further eight years from December 1930 until December 1938. While the debate in the Dáil was perfunctory, the Bill subsequently passed all stages in the Seanad without debate.[195]

During this period amending the Constitution by way of ordinary legislation was not unusual and 25 acts were passed between 1923 and 1936 for that purpose. 'Virtually

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[194] Hogan, *op cit,* 214.
[195] Hogan, "A Desert Island Case Set in the Silver Sea, *The State (Ryan) v. Lennon* (1934)", in O'Dell (ed) *Leading Cases of the Twentieth Century,* (Dublin: 2000), 83, hereinafter Hogan (2000).

every page was cluttered with deletions, additions and amendments: forty-one of its eighty-three articles had been amended'.[196] However, a notable feature of Article 2A was that it was a remarkably detailed amendment. The Act contained 34 sections and an Appendix. It was in reality an elaborate anti-terrorism law.[197]

As with its predecessor, Article 2A provided that all subsequent Articles of the Constitution were to be construed in light of Article 2A and where any inconsistency arose 2A would prevail.[198] The Article provided for the creation of a five member military tribunal. This tribunal was granted considerable powers.[199] An example of the tribunals draconian powers is the power to impose any penalty, including death, greater than that provided for by law, if the Tribunal felt that such penalty was necessary or expedient.[200] These powers are especially severe given that the only appeal against a decision of the Tribunal was to the Executive and not the Courts.[201] This attempt to limit the right of appeal to the Courts was unsuccessful, however, it remains significant that the Legislature sought to include such an interference with the judicial role.[202] The legislation also granted extensive powers of arrest[203] and allowed the Executive to order the banning of any public meetings.[204] The Tribunal could also order the closing of any building for six months upon an application from the Garda

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[196] Farrell "From First Dáil Through Irish Free State", in Farrell (ed) *De Valera's Constitution & Ours,* (Dublin: 1988), 29/30.
[197] Hogan, "The Constitutional Review Group of 1934", in O'Muircheartaigh (ed) *Ireland in the Coming Times: Essays to Celebrate T.K. Whitakers 80 Years,* (Dublin: 1997), 345, hereinafter Hogan (1997).
[198] s. 2 Constitution (Amendment No.17) Act, 1931.
[199] s. 4(2) Constitution (Amendment No.17) Act, 1931.
[200] s. 7(1) Constitution (Amendment No.17) Act, 1931.
[201] s. 12(1) Constitution (Amendment No.17) Act, 1931.
[202] see *The State (O'Duffy) v. Bennett* [1935] IR 70; *The State (Hughes) v. Lennon* [1935] IR 128.
[203] s. 13 Constitution (Amendment No.17) Act, 1931.
[204] s. 24(1) Constitution (Amendment No.17) Act, 1931.

Siochána.[205] An Appendix to the Act covered crimes of a violent and subversive nature which could be tried by the Military Tribunal, however, members of the Executive Council were also granted the power to order the transfer of any trial to the military tribunal where to the best of the Minister's knowledge the offence was committed 'with the object of impairing or impeding the machinery of government or the administration of justice'.[206] The legislation, therefore, granted considerable powers both to the Executive and the Tribunal. In spite of any concerns on 20 October 1931 the Governor General duly appointed five members of the Defence Forces to the Tribunal and a notice of their appointment appeared in *Iris Oifiguil* on Friday 23 October. In an interesting aside a handwritten note asks 'whether the members of the Tribunal should be sworn before anybody and if so in what form?' The response is unequivocal; 'the Attorney General says "definitely no"'.[207] It seems that although the Executive felt introducing this extraordinary tribunal was necessary, they did not want to attract undue attention to it and as such avoided all pomp and ceremony.

2.9 Article 2A – The Legal Challenges

Given the nature of this Constitutional amendment it is unsurprising that it caused quite an amount of controversy. A serious challenge to the validity of the legislation came in the form of *The State (Ryan & Others) v. Lennon & Others.*[208] The Constitutionality of the Act was upheld however Chief Justice Kennedy, in a

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[205] s. 27 Constitution (Amendment No.17) Act, 1931.
[206] Appendix, Constitution (Amendment No.17) Act, 1931. See, Hogan & Whyte, *op cit,* paragraph 6.5.321.
[207] Signed 21.10.31, see Department. of an Taoiseach file S 2433.
[208] [1935] IR 170.

dissenting judgment, attacked the provision quite forcefully. The Chief Justice noted that the defenders of the Act had 'opened their argument by an apology and an appeal saying that they were in the unenviable and very difficult position of having to stand over an Act which was repellent to the instincts of every lawyer...'.[209] Having started in this manner he continued in a similar vein. The provisions of Article 2A were said to be, 'the antithesis of the rule of law, and are, within their scope, *the rule of anarchy*'.[210] In an often-quoted passage the Chief Justice concluded that,

> I find it impossible to reconcile as compatible with the Natural Law the vesting in three military servants of the Executive, power to impose as punishment for any offence within the indefinite, but certainly extensive, ambit of the Appendix, the penalty of death, whenever these three persons are of the opinion that it is expedient.[211]

The above passage identifies some of the most objectionable elements of the legislation. Firstly, the tribunal was extremely political in nature. It tried political offences, it was staffed by the Defence Forces (who are servants of the Executive) and the only appeal against its decisions was to the Executive. Secondly, it could impose the most severe penalty - that of death - in a wide variety of cases and solely because three Officers of the Defence Forces believed it to be expedient. For an amendment to the Constitution to attract such a damning verdict from the most senior Judge in the nation is, surely, close to being without precedent.

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[209] *ibid,* 194.
[210] *ibid,* 198, my emphasis.
[211] [1935] IR 170, 204/205.

The judgment of Kennedy C.J. has attracted much praise and has been cited internationally,[212] but it was a dissenting judgment. Ultimately, Article 2A was upheld by the Supreme Court and remained part of the Constitution of the Irish Free State for the next six years. Kennnedy C.J.'s dissent has been described as a magnificent but personal judicial response to the draconian nature of this Constitutional Amendment.[213] The judgments of the majority of the High Court and Supreme Court have attracted less fanfare but are, by definition, more reflective of the prevailing judicial attitude. The essential issue in *Ryan* was whether or not the Constitution had been validly amended. It was noted earlier that legislation such as the PSA, 1927 had been allowed to act as an amendment of the Constitution.

> The constitutionality of such legislation was upheld in a series of cases, chiefly on the remarkable ground that during the initial eight year period following the entry into force of the Constitution, any legislation enacted by the Oireachtas which was found to be in conflict with the Constitution had the effect, *ipso facto,* of amending that Constitution, whether on a permanent or a temporary basis.[214]

This approach relegates the Constitution to the status of ordinary legislation. It has been described as 'clearly wrong'.[215] Article 2A, however, was unlike the PSA, 1927, in that, although it acted as an amendment of the Constitution it did so expressly. As such the issue was somewhat more subtle. The validity of Article 2A rested, partly at least, on whether or not the Constitution (Amendment No. 16) Act, 1929 had validly

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[212] see the decision of the Indian Supreme Court in *Kesavandra v. State of Kerala* [1973] A.I.R. 1461 (S.C. India). Hogan (2000) *op cit*, 90.
[213] Hogan (2000), *op cit,* 95.
[214] *ibid,* 81. See *R. (Cooney) v. Clinton* [1935] I.R. 245 (decided in 1924 but belatedly reported) and *Attorney General v. McBride* [1928] I.R. 451.
[215] Hogan (2000), *op cit,* 89/90.

amended Article 50 to allow the Constitution to be amended by means of ordinary legislation for a further eight years. On this point the Supreme Court majority were correct to hold that the Oireachtas 'subject to the entrenched provisions safeguarded by the Treaty... had a full power of amendment of the Constitution by ordinary legislation.... It followed that as Article 50 did not fall within these entrenched provision, it itself could also be amended'.[216] Since Article 50 had been validly amended, the Oireachtas was free to amend the Constitution by means of Article 2A. As FitzGibbon J. stated in *Ryan*, 'the framers of our Constitution may have intended "to bind man down from mischief by the chains of the Constitution" but if they did, they defeated their object by handing him the key of the padlock in Article 50'.[217]

Perhaps the strength of the judgment of Kennedy C.J., makes it easy to sneer at the majority view as being weak. The language of FitzGibbon J. is certainly not lacking in veracity,[218] but it is possibly tempting to see the majority decision in *Ryan* as a sop to the Executive; such a position would be unjust. In *The State (O'Duffy) v. Bennett,* Hanna J. described Article 2A as 'a kind of intermittent martial law under the harmless name of a constitutional amendment'.[219] In *Ryan,* Murnaghan J. declared that Article 2A went 'far beyond anything having the semblance of legal procedure' and furthermore, the 'judicial mind is staggered at the very complete departure from legal methods in use in these courts'.[220] Vitally, the Courts were willing to prevent the attempts by the Oireachtas to rule out any right of appeal to the ordinary courts.[221] The only fair assessment is to say that the Courts were willing to review the

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[216] *ibid,* 90.
[217] [1935] IR 170, 234.
[218] Hogan (2000), *op cit,* 100.
[219] [1935] IR 70, 96.
[220] [1935] IR 170, 237/238. See Hogan (2000), *op cit*, 95.
[221] see *The State (O'Duffy) v. Bennett* [1935] IR 70, and *The State (Hughes) v. Lennon* [1935] IR 128.

Constitutionality of Legislation and were unwilling to allow the Executive 'have it all their own way' but that they were not, Kennedy C.J. aside, willing to engage in extreme judicial activism. The Courts were formalistic in their approach and acted correctly within the existing law.

2.10 Article 2A – the Political Challenges

The Courts and Chief Justice Kennedy were not the only critics of Article 2A, a number of letters of condemnation were received from the United States. The Gaelic Athletic Association of Greater New York, wrote to 'denounce the recent Coercion Act in Ireland [and] demand the release of all political prisoners in Irish and English prisons...' and a Mr. Kilroy of the Washington Street Improvement Corporation complained that,

> seven hundred and fifty years of British tyranny and papal hypocrisy has taught you no lesson. It has now come to the time when we as Irishmen owe an apology for the slanderous propaganda we have circulated, the hatred and prejudice we have nurtured against the British; for in all their history they were never guilty of enacting laws as inhuman as that which you have sponsored....[222]

The number of such similar complaints necessitated the preparation of a draft response and on 11 January 1932 the President gave his agreement to this draft.[223] Letters of

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[222] It is interesting, though unsurprising, that Article 2A was immediately associated with the earlier British Coercion Acts. It is, undeniably, a naïve reaction to the legislation. See Department. of an Taoiseach file S2267 which contains a series of such letters.

[223] see Department. of an Taoiseach file S2267, handwritten note to Mr. Keane signed and dated 31/12/31. The draft itself is numbered S 4469/17 (although it is included in file S 2267) and is dated

complaint from the American Diaspora are one thing, but the Government and Article 2A were to face much more serious and sustained assault from a source closer to home.

The Fianna Fáil Party and de Valera were also unhappy with the new legislation. This was predictable but nonetheless important. While de Valera and his colleagues had remained outside the Dáil the pro-Treaty parties were allowed to operate without exposing the weaknesses of the Constitution. When Fianna Fáil did enter the Dáil 'it was natural that they should want to exploit these weaknesses...'.[224] The extraordinary measures contained in Article 2A allowed scope for such criticism. When introducing the Bill to the Dáil, Cosgrave had made it clear that the provisions provided for were 'necessarily not merely for this Government, but for any Government that may be in power if the will of the majority is to prevail'.[225] Despite such assurances Fianna Fáil made their opposition to the provisions clear. The argument from a Fianna Fáil perspective was obvious; citizens 'had a right to dispute the legitimacy of the 1922 Constitution and, consequently, to withhold their allegiance...'.[226] After all, Fianna Fáil themselves as a 'slightly constitutional party' objected to the Treaty and the Constitution, which had never been voted on directly by the people. Their stated policy was to 'govern without coercion and they proposed to remove the Oath, because, in their opinion, it involved government by coercion'.[227]

December 1931. It refers to the inclusion of the President's Statement and the Joint Pastoral letter, both of which are included in file S 2267, with all such replies. One can only wonder how Mr. Kilroy, who criticised 'papal hypocrisy', must have reacted upon receiving the Joint Pastoral Statement.

[224] Lyons, *op cit,* 473.

[225] Coogan, *op cit,* 410.

[226] Fanning , "Mr. De Valera Drafts a Constitution," in Farrell (ed) *De Valera's Constitution and Ours,* (Dublin, 1988), 43.

[227] O'Sullivan, *op cit,* 294.

For a party whose official position was to increase the legitimacy of the State and oppose rule by coercion, attacking the new amendment was a ready-made policy.

It is important to remember, however, that Fianna Fáil also had less ideological reasons for opposing this measure. In terms of *real politik* the establishment of a new military tribunal, so close to a general election, was invaluable propaganda to Fianna Fáil. This was because,

> ...the IRA were of substantial benefit to de Valera in three ways: by actively campaigning for Fianna Fáil, by providing the occasion for an emotive 'Release the Prisoners' agitation, and by furnishing an invaluable election plank in the shape of the land annuities issue.[228]

The land annuities issue was relevant to the election of 1932, but is not of interest in terms of this project. The other two points impact directly on the Fianna Fáil policy of the time. To ensure IRA support Fianna Fáil had to take a stance against the military tribunal, which was, at that time, largely aimed against that organisation. Fianna Fáil, thus adopted a policy of 'the enemy of my enemy is my friend'.[229] In other words, since the IRA opposed the Cosgrave Government, Fianna Fáil were willing to align themselves, in private at least, with that group. Some leading members of the IRA were opposed to supporting Fianna Fáil. Michael Conway argued that despite his present stance de Valera would be as bad as the Cosgrave Government, he said, perceptively, 'he'll hang ye when he gets in'.[230] Furthermore, a

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[228] Coogan, *op cit,* 410.
[229] *ibid,* 413.
[230] On 21 July, 1936 Michael Conway was sentenced to death by the military tribunal, his sentence was commuted, by de Valera, to life imprisonment. However, as we will see later there was no such reprieve for the IRA. See Coogan, *op cit,* 480.

'Release the Prisoners' campaign which included a number of highly respected women with good political pedigrees bolstered the Fianna Fáil Party stance. These women included,

> the widow of the executed 1916 leader Major John MacBride, Maude Gonne, the woman Yeats loved; Helena Moloney, the trade unionist; Madame Despard, the socialist sister of Lord French, the former Lord Lieutenant; and Hannah Sheehy Skeffington, the widow of the pacifist who was murdered by a deranged British Officer in 1916.[231]

Such support was politically desirable during an election.

For all of these reasons Fianna Fáil opposed the introduction of Article 2A and the military tribunal. In the subsequent election Fianna Fáil was highly successful as the following table illustrates,[232]

Table 2.1

Party	*1932 Dáil seats won*	*Increase/Decrease in Party Support*
Fianna Fáil	72	+16
Cumman na nGaedheal	57	-9
Independents	11	-2
Labour	7	-3
Farmers Party	4	- 2
Independent Labour	2	No change

[231] *ibid,* 411.
[232] *ibid,* 433.

This result meant that, with Labour Party support, Fianna Fáil could form a Government. On 9 March 1932 de Valera was elected President of the Executive Council by a margin of 81 to 68.[233] The 'slightly constitutional party' was in power and 16 years of de Valera rule were ushered.

2.11 Fianna Fáil in Government & Article 2A

Following his election de Valera began to implement his party policies. He moved quickly to appease the IRA and suspend the detested Article 2A,

> Within hours of being appointed Frank Aiken and James Geoghegan, the Ministers for Defence and Justice respectively, were dispatched from Leinster House to the military prison at Arbour Hill. Every IRA man was visited in his cell.[234]

The following day all IRA prisoners were released.[235] Extracts from the Minutes of the Executive Council show that consideration was given to various categories of prisoner convicted by the Tribunal affecting some 25 individuals.[236] On 18 March the new Government went a step further and suspended Article 2A. This had the effect of dissolving the military tribunal, although de Valera did not accede to IRA demands that the Act be repealed.[237]

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[233] *ibid,* 437, 2 Independents also supported de Valera.
[234] *ibid,* 463.
[235] *ibid,* 463.
[236] Department. of An Taoiseach file S 2419, "Sgeul, Constitution (Special powers) Tribunal General Release of Prisoners" (March 1932).
[237] O'Sullivan, *op cit,* 19/20.

This process of suspending Article 2A went alongside a programme of Constitutional reform. De Valera removed what he saw as the objectionable elements of the Constitution. This was designed, in Fianna Fáil eyes, to increase the legitimacy of the State. To this end he introduced a Bill to remove the Oath of Allegiance to the British Crown on 20 April 1932.[238] De Valera hoped that by removing the oath and other issues he could convince the IRA to disband and recognise the will of the majority. However, on 12 March 1932 Maurice Twomey, Chief of Staff of the IRA wrote,

> Fianna Fáil declares its intention to chop off some imperial tentacles; every such achievement is of value and will be welcomed. Notwithstanding such concessions the Irish Republican Army must continue its work....[239]

This stance must have been a disappointment to de Valera although it had been predictable. O'Sullivan notes that the IRA had 'made it clear ad nauseam that they had no intention of recognising the Free State even if the Oath were removed'.[240] Despite these problems the republican vote had been 'nursed' by the release of all 97 IRA prisoners and the suspension of the 'Public Safety Act'.[241] Undoubtedly aware of this de Valera took the decision of announcing a 'snap' election on 2 January.[242] Fianna Fáil won an overall majority in that election; this allowed them to tackle the increasing problem of violence within the State.

It was noted above that the Article 2A was suspended in 1932, shortly after Fianna Fáil was first elected to Government. The contentious Article was, however, never

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[238] Coogan, *op cit,* 446.
[239] *ibid,* 463.
[240] O'Sullivan, *op cit,* 294.
[241] Lee, *op cit,* 177.
[242] Coogan, *op cit,* 455.

repealed. During the period after the 1932 election, violence again began to increase. De Valera and his Government were closely linked with the IRA during the period and his Government's 'leniency towards the IRA, coupled with the public's fear of the organisation, made the courts increasingly ineffective'.[243] In 1932, for example, a jury returned a verdict of 'not guilty' in the case of Gerald Dempsey, an IRA Officer. Dempsey had been charged with unlawful possession of firearms and ammunition. He had also failed to recognise the court. The Circuit Court Judge in the case made clear his contempt for the verdict and sentenced Dempsey to three months for failure to recognise the court. An Phoblacht demanded Dempsey's release and the Minister for Justice made such an order three days later.[244] In response to IRA activities, particularly their disruption of Cumman na nGaedheal political meetings, a new organisation was formed. This group began its history as the Army Comrades Association (ACA). By 1933 the ACA adopted a blue shirt as its uniform and the organisation became known as 'the Blueshirts'.[245] The organisation also adopted a straight arm 'Hitler Salute'.[246] It is generally accepted that the ACA's '...fundamental raison d'être was the belief that de Valera was allowing the IRA run riot'.[247] This view was not without foundation.

In August 1932 the IRA had occupied Donamon Castle Co. Roscommon for use as a weekend training camp.[248] In May 1933 approximately 60 armed men occupied a house in Ballinacarriga Co. Cork and carried out military exercises.[249] Other

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[243] *ibid,* 465.
[244] *ibid,* 465.
[245] O'Sullivan, *op cit,* 329.
[246] Coogan, *op cit,* 469.
[247] *ibid,* 466.
[248] O'Sullivan, *op cit,* 296.
[249] *ibid,* 328.

examples of such disruptive behaviour also exist. Since one of the main activities of the IRA during the period was the disruption of public meetings, and since one of the main objectives of the Blueshirts was to protect those meetings, violence between the organisations was inevitable and frequent. The country was, once again, descending into anarchy. De Valera's response to this increase in violence was interesting. Having condemned the Cosgrave Government for introducing Article 2A de Valera was quite willing to turn to that very same measure to tackle the situation. O'Duffy, the leader of the Blueshirts had announced a march on Leinster House. De Valera cited the fascistic elements of the Blueshirt movement and 'elected to believe that O'Duffy's march would be along Mussolini lines[250]... He banned the parade...'.[251] More importantly de Valera took this opportunity to reintroduce Article 2A. 'At 12.45am on the 12th August...[1933]...the Government promulgated an Order bringing Article 2A of the Constitution into force, thus virtually putting the country under martial law'.[252] This could be described as a 'u-turn' in policy for the Fianna Fáil party, but what is relevant is that, as of 23 August 1933,[253] Ireland, once again, had a military tribunal with extensive powers. The tribunal established in 1931, was suspended for a period between 1932 and 1933 and was reintroduced for the period 1933 to 1937.[254] A review of the tribunal's use during that final period will be detailed below.

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[250] In Italy, 'The Fascists' seizure of power... was preceded by the dramatic threat of a "March on Rome."' D. Elazar, *The Making of Facism, Class, State, and Counter-Revolution, Italy 1919-1922,* (London: 2001), 136.
[251] Coogan, *op cit,* 460/70.
[252] O'Sullivan, *op cit,* 333.
[253] Department. of An Taoiseach file S 2438.
[254] Hogan & Whyte, *op cit,* paragraph 6.5.321.

2.12 Article 2A in Practice

Following the 1933 election, and Fianna Fáil's increased mandate, and the reintroduction of the military tribunal and Article 2A, the Government began to move against illegal armies within the State. It is fair to say that de Valera began by moving forcefully against the Blueshirts and dealt with the IRA by stealth.[255] Reasons for this include the already noted links between the IRA and Fianna Fáil coupled with that Party's sympathy for the IRA stance. 'The bulk of cases heard before the Military Tribunal in 1934 related to the Blueshirts'.[256] In late 1933, violence between the Blueshirts and the IRA worsened and there was an increase in the Tribunals caseload.[257] The Tribunal had convicted 34 members of the IRA by the end of 1933, and the number of arrests and convictions increased during 1934.[258] The following table illustrates this point more clearly. The table shows the conviction patterns of the Tribunal, broken down by year and membership of the two relevant organisations.

Table 2.2[259]: -

	1934	1935	1936
IRA	*102*	*112*	*129*
Blueshirts	*349*	*74*	-

A bias against the Blueshirts is evident in 1934. By the end of 1934, however, the Blueshirts had essentially been defeated as a force and the Government began to move, warily, against the IRA. 'De Valera long hesitated, however, to declare the IRA illegal, until two particularly callous murders, of a woman and an old man, gave

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[255] Lee, *op cit,* 179.
[256] Manning, *The Blueshirts,* (Dublin: 1987), 130.
[257] Lee, *op cit,* 179.
[258] Manning, *op cit,* 129.
[259] Coogan, *op cit,* 479.

him the opportunity to ban the organisation in June 1936'.[260] On top of this in 1936 the IRA had begun a bombing campaign in Britain and Northern Ireland, which allowed the Fianna Fáil administration to move against that organisation.[261] Fianna Fáil must have been aware that a sizeable proportion of it's electoral support in 1932 and 1933 had been derived from the support of the IRA and the Party's stance on Article 2A. As a result of this the early operations of the Tribunal were largely directed against the Blueshirt movement, who were supporters of Cosgrave, and not the IRA. As IRA activities worsened and as the Blueshirt threat had been abated, the Fianna Fáil Party felt more confident in dealing with the threat from their own former comrades. Moreover, as has been noted, Fianna Fáil felt that by removing the Oath and other issues from the Constitution it had legitimated the State and as a result they had a right to protect this newly legitimated State from attack.

The provision of a military tribunal with extensive powers under the PSA, 1927 was never actually utilised. The military tribunal introduced under Article 2A, as has been noted, was regularly availed of. It should be noted at this stage that the Tribunal appears to have been used exclusively in the prosecution of those involved in violent disturbances. The cases of *Hughes* and *O'Duffy* have been referred to. It is important to recognise at this point that some lower level cases may also have been tried by the tribunal. On 25 May 1935, Deputy Fitzgerald Kenny raised the case of three Blueshirts in the Dáil. The men - Clifford, Sullivan and Quirke - had been charged with conspiracy to fire into the dwelling house of a Water Bailiff. Deputy Fitzgerald Kenny argued that the Minister for Justice had incorrectly issued a certificate that

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[260] Lee, *op cit,* 180.
[261] Fitzgibbon & Morrison, *The Life and Times of Eamon de Valera,* (Dublin: 1973), 118/19.

these men be tried by the tribunal. Due to the level of Executive control over the tribunal it is unsurprising that suggestions of political interference and bias were made. The Attorney General (AG) pointed out that the men could have been charged before the tribunal without a certificate, due to the use of firearms. Furthermore, the Attorney noted that Water Bailiffs are appointed by the Minister and that interference with them is punishable in the same manner as interference with a Police Officer. He also noted that Water Bailiffs had been 'beaten up previously'.[262] The episode is instructive because it shows distrust of the political nature of the tribunal. Furthermore it displays a certain presumption in favour of using the tribunal where firearms were involved. Finally, the evidence of ongoing attacks on Water Bailiffs is interesting as is the view of Water Bailiffs as servants of the State, of equivalence to the Police. An example of IRA activity is also instructive. The AG's files include a number of memoranda relating to an attack on a travelling cinema. On 18 September 1933, six armed men held up William Walsh's Travelling Cinema and made off with the film 'Gallipoli'.[263] It was recommended that the individuals involved in the raid should be tried by military tribunal. This was, at least in part, due to the use of fire arms,[264] however other events also seem to have played a role in the decision. Following the arrest of the six men accused of carrying out the raid, the 'Battallion Commandant, I.R.A.' led about 50 men to the local gaol demanding their release.

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[262] Attorney General's office, file 65/33, letter to Roinn and Uachtaráin, dated 26 May 1935, signed Priomh Aturnae.

[263] Presumably the subject matter of the film was considered to be overly 'British' and offensive by the Republicans. Although it might be somewhat disingenuous to describe such acts as part of Ireland's 'Cultural Revolution' when taken alongside incidents such as the murder of Vice-Admiral Henry Boyle, mentioned earlier, the symbolic significance of such an attack does become more apparent.

[264] Attorney General's office, file 65/33, letter dated 22/9/33, to Ch/Supt., Galway, signed Holland Fead Commissioner "C.S." This letter states that since Walsh, one member of the raid, carried a rifle every member of the party should be deemed to have been collectively in possessiomn of a firearm, this is due to the fact that Walsh carried the rifle and the others kept their hands in the pockets to suggest that they too were armed. The case was referred to the tribunal on 18 Octopber 1933 by Minister for Justice Patrick Rutledge.

The members of the procession were said to have carried banners with slogans such 'Why hesitate to join the I.R.A.'; 'Boycott British Goods'; and 'Break Connections with England'.[265] This incident again illustrates the fact that something which may appear trivial (the theft of a film reel) was in fact a political act with serious consequences. Therefore, in a similar fashion to the attacks on Water Bailiffs - the seriousness of which might not at first be entirely obvious - such incidents were calculated challenges to the authority of the State and could not be tolerated. Furthermore, the use of firearms in such incidents could be seen as indicative of the level of gun violence within society. As such, the use of the military tribunal in such cases appears justified.

2.13 Conclusions

It should now be obvious that the Irish Free State had considerable experience in the field of emergency powers and special courts. By 1937, de Valera was no longer satisfied with merely altering the Constitution of the Free State. A grander plan, involving a new, legitimate Constitution was envisaged. To facilitate this process a Constitutional Review was conducted. The results of this review will be considered in the next chapter. The influence of the PSA, 1927 and Article 2A on the Special Criminal Court which was to be established under the new Constitutional framework will also be outlined. Elements of these previous models of special court should be clear.

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[265] Attorney General's office, file 65/33, letter dated 27/9/33 to Commissioner "C.S." signed Sean O'Macain Supt. (J. Mackin) for C/Supt. On Inspn.

Chapter 3

Constitutional Review & the Offences Against the State Act

In the last chapter the development of non-jury, special courts under the constitutional framework of the Irish Free State was detailed. It was noted that when de Valera and Fianna Fáil came to power in 1932 they immediately introduced a series of Constitutional amendments designed to increase the legitimacy of the State as they saw it. These amendments ultimately lead to a greater project of constitutional reform. The development of the Offences Against the State Act, 1939[266] was a result of this process. This chapter will outline the impact of this process and explain the major provisions relating to Special Courts, it will also explain the relationship between these developments and the Free State models discussed earlier.

3.1 The Constitution Review Group 1934

The policy of constitutional reform adopted by the Fianna Fáil Government has been accurately described as one of 'piecemeal destruction'.[267] The Oath of Allegiance and all references to the British Crown, as well a few miscellaneous amendments, had been made. These amendments often had knock-on effects. For example, the Constitution (Amendment No. 27) Act, 1936 removed the Governor General for the Constitution.[268] This amendment had a significant impact upon Article 2A. Members of the military tribunal had been appointed by the Governor General acting on the

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[266] Hereinafter OAS, 1939.
[267] Fanning , "Mr. De Valera Drafts a Constitution," in Farrell (ed) *De Valera's Constitution and Ours,* (Dublin, 1988), 35.
[268] Coogan, *De Valera: Long Fellow,Long Shadow,* (London: 1993), 488.

advice of the Executive Council.[269] The abolition of the post of Governor General by the Constitution (Amendment No 27) Act, 1936 resulted in this power of appointment being transferred to the Executive Council.[270] Thus, the tribunal, which was already heavily controlled by the Executive, had even this fig leaf of independence removed. Up until this point reforms appear to have been taken on a fairly *ad hoc* basis. The aim had been to remove the features of the Free State Constitution considered objectionable by republicans. It was obvious that a more coherent approach was required. In 1934 a Constitution Review Group was established to consider the direction that future reforms might take. The Committee was made up of four senior civil servants: Stephen Roche, secretary at the Department of Justice; Michael McDunphy, assistant secretary, Department of the President of the Executive Council; John Hearne, legal adviser to the Department Of External Affairs; and Philip O'Donoghue, assistant to the Attorney General (AG).[271]

The Review Group was particularly interested in what provision should be made for emergency legislation. The Free State Constitution had stated clearly in Article 70 'extraordinary courts shall not be established'. Despite this categorical statement, the Free State had resorted to extraordinary courts, most notably the PSA, 1927, which was never implemented and Article 2A which was extensively utilised. It is, therefore, unsurprising that the old Article 70 approach was rejected. In fact a proposal that any new constitutional arrangement should include provision for a

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[269] s. 4(2) Article 2A.

[270] Department of an Taoiseach, file S 2437, memorandum headed "ROINN AN UACHTARAIN, Sgeul Constitution (Special powers) Tribunal. Appointments. Procedure File", dated 11.12.36.

[271] Hogan, "The Constitutional Review Group of 1934", in O'Muircheartaigh (ed) *Ireland in the Coming Times: Essays to Celebrate T.K. Whitakers 80 Years,* (Dublin: 1997), 345, hereinafter Hogan (1997).

special court seems to have been accepted from the off. The Department of an Taoiseach files show a few references to a statement made by the President of the Executive Council in which he said, 'it is necessary to ensure, in cases of real urgency and real public emergency, that an Executive would not be prevented from taking the action that might be considered necessary to safeguard public interests'.[272] This statement and the implication that Government will legitimately require special powers on occasion appears to have been generally agreed upon. Roche prepared an early note on Article 2A in which he made a series of interesting observations. McDunphy has annotated these notes with his own handwritten comments. The Department of Justice Secretary believed in strong government; The Assistant at the Department of the Executive was more wary, noting that strong government could be a 'real danger' and stating that 'something more than strength is required'.[273] Roche maintained forcefully that,

> ...with particular reference to Article 2A, I agree that, in form, that Article is grotesque as an Article of the Constitution. It must go. [McDunphy writes "I agree" in the margin] On the other hand, so long as we keep to the idea of a "normal" written Constitution, with all sorts of snags and pit falls for the Executive, we must have something, somewhere, on the lines of Article 2A.[274]

It is clear that even Roche, with his belief in 'strong government' recognised that Article 2A was flawed. Roche was seeking to create a system more acceptable than

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[272],Dáil Éireann, *Parliamentary Debates*, 26 April 1934, vol. 51 No. 6, Cols 2479-80, see Department of an Taoiseach file S 2979 Extract from Dáil Debates and Department of an Taoiseach file S 8211, Extract from Constitution Committee Report, 1934, paragraph 7.

[273] Department of an Taoiseach file S 2979, 'Inter-departmental Committee on the Consitution, Note with Special Reference to Article 2A', by Mr. Roche (Justice) signed and dated 16/6/34.

[274] *ibid.*

Article 2A but still powerful enough to be of use to the Executive. The 'snags and pitfalls' of a 'normal' Constitution are not specified but, given that Article 2A was intended not to be reviewed by the Courts, it may be that Roche was referring to the need of Judicial Review of emergency legislation. Perhaps, Roche felt this unduly hindered the Executive. The Group was to spend some time developing a suitable compromise between the need for constitutional legitimacy and the need to properly equip the Government in dealing with extremism.

3.2Proposals on Jury Trial

An examination of the files relating to the Review Group leads one to conclude that the group was thorough. The members appear to have taken their role seriously and it seems fair to say that they were willing to learn from the previous attempts at similar such legislation. Along with considering Article 2A the Group also made recommendations about Article 72. Article 72 stated,

> ...no person shall be tried on any criminal charges without a jury save in the case of charges in respect of minor offences triable before a Court of Summary Jurisdiction and in the case of charges for offences against military law triable by Court Martial or other Military Tribunal.[275]

Combined with Article 70, this effectively prevented civilian non-jury trial for all but the least serious offences and those covered by the type of emergency envisaged by Article 70. The Review Group saw this as insufficient and did not recommend Article 72 for inclusion in any new Constitution. The Group argued that 'with an Executive

[275] Article 72, Constitution of the Irish Free State.

dependent on, and responsible to, a parliament elected on full adult suffrage, and with Judges whose independence is guaranteed by the Constitution, which also forbid the setting up of "extraordinary Courts" the right to trial by jury has lost its original importance'.[276] This appears to be a reasoned objection to a system of trial by jury and forms a theoretically sound basis for an alternative proposal. However, no alternative was proposed. It was noted that if Article 72 was included in any future Constitution,

> (a) that the Article does not bind us to the present English system of requiring a jury of twelve and a unanimous verdict
>
> and
>
> (b) that when the Oireachtas has designated any particular offence as a "minor" offence, fit to be tried summarily, it shall not be open to a defendant to raise the point that the offence is so serious that it cannot reasonably be called a "minor" offence and that the law declaring it to be triable summarily is therefore ultra vires Article 72 and invalid.[277]

This conclusion prevents any suggestion that the Review Group was considering the theoretical importance of a jury system as against some form of Inquisitorial trial process. It is undeniable that the Review Group was dissatisfied with jury trials for some practical reason and as such were seeking 'loopholes'; thus the suggestion that 'jury trial' did not necessarily imply a jury of 12 with a unanimous verdict. The Group did not propose a radical alternative. They proposed justifications and

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[276] Department of an Taoiseach, file S 2979, "Constitution Committee, 1934. Copy of Report on Part I of the Terms of Reference (as signed 3rd July, 1934). Appendix C. Article 72, Observations of the Committee".
[277] *ibid.*

practical suggestions to allow the Government limit trial by jury. This shows a clear lack of faith in the jury system. Although there is no detailed analysis explaining the origins of this distrust, it must be seen in the light of the systems repeated failure to ensure justice. This distrust of the jury system, coupled with the acceptance that an improved Article 2A was required, would become the foundation for a proposal which would itself form the basis of the OAS, 1939.

3.3 The Review Group Proposals

The PSA, 1927 was an ordinary Act of Parliament which acted as an amendment of the Constitution whenever a clash between the Constitution and the Act occurred. Although amending the Constitution by way of ordinary legislation was not unusual, it was surprising that the PSA, 1927, made no reference in its Long Title to this substantial power. Article 2A was an improvement upon the PSA, 1927 model. It also acted as an amendment upon the Constitution, with all subsequent Articles interpreted in light of Article 2A. However, the title of the legislation providing for Article 2A did acknowledge its role as a Constitutional amendment. Although it was an improvement upon the PSA, 1927 the inclusion of such a detailed Constitutional amendment was not entirely satisfactory. Roche appears to have appreciated this.

The proposal of the Review Group is included in *Appendix 2*, a brief summary of the salient points shows an interesting, if at times convoluted, procedure. The proposal is broken down into Scheme A and Scheme B. Scheme A proposes that power should be provided in the Constitution allowing for the enactment of legislation to provide for trial by 'Special Courts' where it is certified by a Judge or Justice that such trial is

'in the interests of justice'. The Special Courts envisaged are to be similar to the Constitutional (Special Powers) Tribunal. Scheme B is a supplement to this. It is a substitution for Article 2A and would involve an article of the Constitution specifically authorising the Oireachtas to provide, by way of ordinary legislation, such measures as they saw fit 'to meet the requirements of any period during which the ordinary laws are not adequate'.[278] Importantly, Scheme B makes it clear that the legislation contemplated should 'state expressly that its object is to carry out the provisions of the said Article'.[279] Scheme A would be a permanent feature, while Scheme B would only be activated upon declaration of an emergency. Hogan explains that the 'Special Criminal Court would be the first step in curbing civil disorder and that the declaration of a State of emergency would be necessary in the final resort'.[280] The procedure for declaring a state of emergency is also explained.

Roche believed that the country required strong government which should not be 'hampered and humiliated' by the Courts and felt that on occasion it was desirable to have a 'responsible Executive to save the people from irresponsible Judges'.[281] Despite these misgivings the proposal for the declaration of a state of emergency suggested an interesting role for the judiciary. Under the proposals, initially suggested by Roche and accepted by McDunphy,[282] whenever the Executive Council

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[278] Department of an Taoiseach file S 8211, Extract from Constitution Committee Report, 1934, Appendix B, Emergency powers, Suggestions of the Committee, paragraphs 4 – 5.
[279] *ibid.*
[280] Hogan (1997), *op cit*, 347.
[281] the words 'irresponsible judges' are underlined by hand and a "?" has been written in the margin, as such it appears that McDunphy was unsure about this argument. Department of an Taoiseach file S 2979, 'Inter-departmental Committee on the Consitution, Note with Special Reference to Article 2A', by Mr. Roche (Justice) signed and dated 16/6/34.
[282] McDunphy has written 'prima facie that seems sound' next to the proposal signed McD 16/6/34. For the original proposal see Department of an Taoiseach file S 2979, 'Inter-departmental Committee

was of the opinion that it is desirable to do so, the senior available Judge of the High Court should be called upon to summon all Judges or Justices exercising criminal jurisdiction. This provision specifically excludes Judges of the High and Supreme Courts and all temporary Judges and Justices. The purpose of this gathering is to advise the Executive Council as to whether or not the state of the country is such that the ordinary laws are inadequate. If the assembled Judges and Justices affirm that the state is in such a condition then the Executive Council may by order declare all provisions of all emergency legislation to be in force.[283] Roche explained that the scheme was designed as such because de Valera was anxious for there to be some form of 'judicial, or at least non-political sanction for such a declaration'.[284] This is a considerable step forward since the previous models had not allowed for any form of appeal and since the Article 2A Tribunal had been appointed by the Executive Council with no reference to any outside body,[285] as such the desire to have non-political involvement in this process is to be welcomed. Roche also justifies this rather complicated process by explaining that,

> I have made the declaration of an "emergency period" contingent on the consent of those Judges and Justices who travel the country and deal with crime locally.... These Judges and Justices have a strong incentive to shift the burden of dealing with organised crime from their own shoulders, they see at close quarters the inadequacy of ordinary police and court methods in semi-revolutionary

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on the Consitution, Note with Special Reference to Article 2A', by Mr. Roche (Justice) signed and dated 16/6/34.

[283] Department of an Taoiseach file S 8211, Extract from Constitution Committee Report, 1934, Appendix B, Emergency powers, Suggestions of the Committee, paragraph 5(d) – (g).

[284] Department of an Taoiseach file S 2979, 'Inter-departmental Committee on the Consitution, Note with Special Reference to Article 2A', by Mr. Roche (Justice) signed and dated 16/6/34.

[285] following the abolition of the Governor General.

> periods, they even run definite personal risks, and they are in the main sensible decent men, so that I have some hope that in any real emergency they will not be obstructive.[286]

Although the introduction of some form of review is to be welcomed, a doubt about the judiciary persists. Those local Judges and Justices may be trusted because they operate at the coalface, and since they face a threat to their personal safety it is presumed they will be realistic when reaching their decision. Senior Judges are specifically excluded from the process. It does not seem too great a leap to suggest that Roche was fearful that these senior members of the Judiciary would 'hamper and humiliate' the Executive.

The proposals of the Committee are important for two main reasons. Firstly, it can be seen that they have been influenced by the early models adopted by the Free State - for example the necessity of a non-jury court has been recognised. However, the Group recognised the failings of the Free State Constitution and went about rectifying them. The lack of a non-political body to keep a check on the Executive was acknowledged. These proposals are a staging post between the provisions of the Irish Free State and the provisions to be adopted under the new Constitution.

3.4 Bunreacht na hÉireann and the 'Special Courts'

The Dáil approved the draft Constitution on 14 June and it was put before the people in a plebiscite in 1 July 1937. The new Constitution, Bunreacht na hÉireann, was

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[286] Department of an Taoiseach file S 2979, 'Inter-departmental Committee on the Consitution, Note with Special Reference to Article 2A', by Mr. Roche (Justice) signed and dated 16/6/34.

approved by a majority of the people, 685,105 in favour to 526,945 against.[287] If de Valera's previous reforms had been designed to increase the legitimacy of the State, he now felt that mission had been completed. As soon as the people of Ireland 'had established a State in accordance with their own wishes, those who tried by violent means to overthrow that State should be held here, as in other countries, to be guilty of the most terrible crime...'.[288] Therefore, since the people of Ireland had adopted this Constitution for themselves it was legitimate for the State to protect itself using all available means. There was, however, one problem: the acceptance of the new Constitution ensured that the 1922 Constitution was no longer active law. Therefore, Article 2A was no longer operative. This fact 'prompted anxious consideration in the Department of Justice'.[289] Since the need for an emergency measure had been acknowledged by the Review Group in 1934, it is unsurprising that the Department of Justice was anxious. What is surprising is that despite all this advance consideration, between the introduction of the new Constitution at the end of 1937 and the enactment of the Offences Against the State Act in June 1939, there was no statutory provision for any form of special court or military tribunal.[290]

The Review Group proposal of a two pronged approach was discussed in the previous section. The new Constitution was influenced by and adopted a modified version of these proposals. There are two Articles of the 1937 Constitution which are relevant to the issue of 'Special Courts'. Article 28.3.3° provides for a 'time of war or armed rebellion'. In such circumstances the Oireachtas is given broad freedom from

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[287] Coogan, *op cit,* 498.
[288] Fanning, *op ict*, 43, quoting de Valera.
[289] Lee, *Ireland in the Twentieth Century 1912 – 1985,* (Cambridge: 1989), 219.
[290] Hogan & Whyte, *Kelly: The Irish Constitution*, (4th ed) (Dublin: 2003), paragraph 6.5.324.

Constitutional restraint, as envisaged by the Review Group's Scheme B. The actual Article has abandoned the judicial assembly originally suggested and adopts the more efficient approach of allowing both Houses of the Oireachtas determine if such a situation exists. The Article states that, 'nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion...'.[291] This Article could, therefore, be used to establish a special court during a time of armed rebellion. This construction covers the extension of military law to civilian populations during times of extreme emergency. It is, in that respect, similar to Article 70 of the Free State Constitution and the U.S. case of *Ex parte Milligan*,[292] which allowed for the extension of military law to civilians during such times. It will be recalled that Article 70 provided that the jurisdiction of military courts could be extended to the civilian population during times of war or armed rebellion, however the Article explicitly excluded areas 'in which all civil courts are capable of being held'.[293] Unlike Article 70 the new Constitution was more flexible and complimented this Scheme with a further provision.

In a variation upon the suggested Scheme A, the new Constitution provided that 'special courts may be established by law... where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice...'.[294] This is the polar opposite to Article 70 of the

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[291] Bunreacht na hEireann, Article 28.3.3°, also referred to as the 1937 Constitution.
[292] 71 US (4 Wall) 2, 127, see TenBroek, Barnhart & Matson, *Prejudice War & the Constitution: Causes & Consequences of the Evacuation of Japanese Americans in World War II,* (5th ed) (Berkeley: University of California Press: 1975), 230.
[293] Hogan & Whyte, *op cit,* paragraph 6.5.317.
[294] Article 38.3.1°.

1922 Constitution, which explicitly prohibited extraordinary courts. Under the 1937 regime a 'time of war or armed rebellion' need not exist for a Special Court to be established. 'Article 38.3 of the Constitution... permits... the establishment by law of special courts quite independently of any declaration of emergency under Article 28.3.3°'.[295] Secondly, the 1937 formula does not necessitate military rule being applied to the civilian population. Article 70 only provided for one form of extraordinary tribunal and that was the extension of military law to the civilian population. Under Article 38.3, special courts could be established by law. Thirdly, under the 1922 Constitution, in order to establish special courts in 1927 and 1931 the legislature had to take the extraordinary step of amending the Constitution, with the result that they were capable of acting without any form of Constitutional control; the legislature was given the key to the padlock of Constitutional restraint. Amending the Constitution was not necessary under the 1937 model, as provision had already been made. The liberalism of the 1922 Constitution was commented upon earlier. Such liberalism, it is contended, had hampered the Oireachtas in tackling the serious threat posed by dissident groups and, in part, lead to the excesses of the 1927 and 1931 Acts. The 1937 Constitution was less liberal in that it provided for extraordinary courts independent of a state of emergency. However, it can be argued that the result was more desirable and ultimately contributed to a more stable political and constitutional environment. The State was granted the power to deal with subversive elements without imposing military rule and without resorting to some of the excesses of the previous models.

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[295] Hogan (1997), *op cit,* 352.

The 1937 Constitution, therefore, differed in many respects from the 1922 model. Despite this, the impetus for the introduction of emergency legislation remained the same. It will be recalled that after the Public Safety Act of 1927 was repealed in 1928, there was a noticeable increase in crimes of violence and intimidation. Likewise, between 1937 and 1939 no legislation regarding special courts existed. During this period the IRA laid down a series of challenges to the authority of the State. On 17 December 1938 a body styling itself 'Dáil Éireann' declared that it was transferring its powers to the Army Council of the IRA.[296] Such a declaration may appear insignificant and indeed it appears to have been largely ignored by the public. However, 'the hand-over meant that Russell was now entitled, as de Valera himself had once done, to claim that the authority of the national Parliament (the Dail) now lay outside that assembly'.[297] It was a symbolic challenge to the legitimacy of the Dáil and the State. The challenge was continued on 14 January 1939 when a formal letter signed Patrick Fleming 'on behalf of the Government & Army Council of Oglaigh na hÉireann (Irish Republican Army)' demanded the immediate withdrawal of all British troops from Ireland. Rather boldly the letter stated that 'a period of four days is sufficient notice for your Government to signify its intentions in the matter of the military evacuation and for the issue of your Declaration of Abdication in respect of our country'.[298] The IRA was purporting to set the foreign policy of the State. At another time the Government might have ignored such sabre rattling, however events were soon to take a far more serious turn. In 1939 the IRA began a bombing campaign on mainland Britain. One such bomb claimed the lives of 12 people in

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[296] Department of an Taoiseach, file S 10454 Annex, Extract From WOLFE TONE WEEKLY, Saturday, Secember 17, 1938. "I.R.A. Take Over the Government of the Republic".
[297] Coogan, *op cit,* 523.
[298] Department of an Taoiseach file S 10454 Annex, Copy/ OGLAIGH na hÉireann (Irish Republican Army), General headquarters DUBLIN, January 14 1939.

Coventry and injured over 50 others on 23 August of that year.[299] This was a time of growing international friction with Word War II[300] looming large on the horizon. In its letter, the IRA had stated that 'the Irish people have no cause of hostility to any European nation, even those nations whose natural development may bring them into conflict with British interests...'.[301] Under the circumstances, this could only be seen as a threat that the IRA might align itself with Britain's enemies. Further consideration will be given to the effect of IRA hostility toward Britain during WWII in the next chapter; at present it is important to note that the activities of the IRA were a cause for concern. Roche advised de Valera that 'a small country cannot afford to invite attacks from without by a seeming inability to keep order within its own territory...'.[302] This advice appears shrewd in light of the international circumstances. To this end and with the powers available under the new Constitution, the Department of Justice set about preparing a piece of permanent legislation designed to tackle the situation. The result was the Offences Against the State Act, 1939. 'In June 1939 the... Act was passed, the IRA was declared an illegal organisation and trial by military court replaced trial by jury'.[303] The new legislation drew heavily on the past models of 1927 and 1931 with some important differences.

3.5 The Drafting of the Offences Against the State Act, 1939

As was seen in the preceding section, Article 38.3 provided for the establishment of Special Courts. Article 38.3.2° stated that 'the constitution, powers, jurisdiction and

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[299] Coogan, *op cit,* 523.
[300] hereinafter WWII.
[301] Department of an Taoiseach file S 10454 Annex, Copy/ OGLAIGH na hÉireann (Irish Republican Army), General headquarters DUBLIN, January 14 1939.
[302] Lee, *op cit,* 220.
[303] Fitzgibbon & Morrison, *op cit,* 118/19.

procedure of such special courts shall be determined by law'. This scheme had the advantage of avoiding the problems associated with the PSA, 1927 which allowed ordinary legislation to act as an amendment upon the Constitution and the Constitution (Amendment No.17) Act, 1931 which inserted a detailed anti-terrorism Act, with Appendix, into the Constitution. The result of this new approach was that legislation was required to provide the Executive with the powers envisaged. The absence of any special court or tribunal was a cause for concern in the Department of Justice and from the time of the introduction of the new Constitution onward that Department appears to have been pushing for the preparation of the type of legislation envisaged by Article 38.3. Despite these concerns the rest of Cabinet does not appear to have been interested in the issue. A document concerning 'special courts' was circulated to members of the Executive Council at the meeting of 21 December 1937, however the topic was postponed to the next meeting.[304] This is striking since the memorandum states that whether or not the Executive decided to allow Article 2A lapse without a replacement in place, the Minister for Justice was of the opinion that it would be desirable to have a draft law for the establishment of a Special Criminal Court ready. Despite the existence of a draft Special Criminal Court Act, 1937[305] and Department of Justice concerns about not having any special tribunal in place, no action was taken and the State operated without special courts from 1937 to 1939.

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[304] Department of an Taoiseach, file S 10454, "To Each Member of the Executive Council – Establishment of a Special Criminal Court", Department of Justice, 25 October 1937.
[305] Department of an Taoiseach, file S 10454, "Suggested draft of an Act to provide for such special court as is mentioned in section 3 of Article 38 of the Constitution of Ireland". See Appendix 3.

The early drafts of 1937 did allow appeal from the Special Criminal Court to the Court of Criminal Appeal[306] and could only impose such penalties as were provided for by the ordinary law;[307] these are considerable improvements on the Free State prototypes. The draft continued the practice of staffing the Court with members of the Defence Forces and the panel was to be appointed by the President on the advice of the Government.[308] The draft proposes unanimous verdicts[309] and a court consisting of nine members.[310] The Parliamentary Draftsman expressed some concern about these provisions suggesting a court of five members for capital cases and three for ordinary cases. He also recommended that rather than having unanimous decisions it would be preferable to have the decisions of the court pronounced by the presiding member.[311] This would ensure that the members could reach a decision by majority but any dissent would not be revealed. This suggestion met with the approval of the AG and the Department of Justice.[312] The draft was, therefore, at a fairly advanced stage and was the subject of some consideration.

Throughout 1938, discussion continued about the need for special legislation. Various memoranda regarding the need for legislation providing for a Special Criminal Court exist and there was an awareness that such legislation might '...become urgent at any time and complicated legislation which may meet with

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[306] *ibid,* s.13.
[307] *ibid,* s.12.
[308] *ibid,* ss. 6 – 7.
[309] *ibid*, s. 9 (1).
[310] *ibid,* s. 6 (2).
[311] Department of an Taoiseach, file S 10454, "To Each Member of the Executive Council – Establishment of a Special Criminal Court", Department of Justice, 25 October 1937.
[312] *ibid.*

considerable opposition may be necessary'.[313] By 1939 the Government began to seriously consider the issue again. The activities of the IRA, discussed in the preceding section, go some way toward explaining why special courts were once again on the agenda. Roche suggested that the choice was between two courses of action; on the one hand to continually have strong powers available and thereby keep 'conspirators "on the run"' or to leave things as they were and deal with each crisis as it arose'. In a rather elaborate analogy he suggested that,

> ...it is as if we are dealing with an unruly lot of school-boys and had to choose between taking, and using, immediate and constant powers of supervision and correction or saying
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> > 'Go on your own ways: meet in the dormitories after lights-out; and form secret societies... get the school a bad name: we wont interfere until you actually set fire to the place or seriously hurt somebody; but then there will be floggings and expulsions'.[314]

This bizarre explanation does include some important points. Previous Governments introduced legislation as a reaction to some outrage; Roche was proposing that it would be wiser to have the legislation in place before things went wrong.

It is important to note that during the early stages the proposal was for a specific piece of legislation to provide for special courts. Other related, but separate, legislation

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[313] Department of an Taoiseach, file S 10454, Copied from file S. 10496, abinet Sub-Committee General, signed P. O'Cinneide, 16.2.38.
[314] Department of an Taoiseach, file S 10454 D, signed S. A. Roche, 8 March 1939.

such as a Treason Bill and Anti-Social Organisations Bill were also proposed.[315] By January 1939, it was suggested that the Special Courts Bill should be combined with the Anti-Social Organisations Bill.[316] The desire to combine the Bills stemmed from the view that 'it would be desirable to get as much of the controversial matter as possible into one Bill...' rather than spreading it out.[317] A draft of the new Offences Against the State Bill was presented to Cabinet on 10 February 1939.[318] It is interesting that despite the clear relationship of this new legislation to Article 2A, the Executive strongly wanted to avoid making any connection. Roche informed O'Muimhneachain that he was unsure whether an explanatory memorandum should be issued with the text of the Bill and was certain that if such a memorandum was attached 'such memorandum should not... go into details or refer at all to Article 2A of the old Constitution, but should be short and dedicated mainly to emphasising the fact that two parts of the Bill may never come into operation'.[319] This statement corroborates the view that the Government were anxious not to appear as though they were re-enacting Cosgrave's legislation.

> Roche was authorised to include as many of the Cosgrave provisions as he felt necessary. But he should adopt the device of actually repealing the relevant legislation, and only then should he

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[315] Department of an Taoiseach, file S 10454 A, "Memorandum for Government", Department of Justice, 19 January, 1939.
[316] Department of an Taoiseach, file S 10454 B, letter to Roche, signed M O'M dated 25adh Eanair, 1939 (25, January, 1939).
[317] Department of an Taoiseach, file S 10454 B, "Public Safety Legislation", signed S. Roche, 25 January, 1939.
[318] Department of an Taoiseach, file S 10454, "Extract from Cabinet Minutes, 10.2.39, Draft Offences Against the State Bill".
[319] Department of an Taoiseach, file S 10454, "Copy for M O'Muimhneachain" signed S.A.R. 24/2/1939.

> re-enact the substance of it, as far as required, while taking care to change the phraseology as far as possible.[320]

The use of this parliamentary sleight of hand has resulted in a cross over between parts of the relevant legislation. All three regimes allowed the Government to decide when such special provisions should be in force. The relevant sections are s.20(1) of the PSA 1927; s.1 of Article 2A; and s.35(1) of the OAS Act, 1939. Differences of language do occur, which may substantiate Lee's argument. In s.20(1) the Executive Council may make an order establishing non-jury courts when it 'is of opinion that it is necessary in order to secure the due administration of justice....' Article 2A uses similar language and empowers the Executive to make such an order when it 'is of opinion that circumstances exist which render it expedient...' that the relevant Parts be introduced. The 1939 Act uses an alternative formula. It essentially restates Article 38.3 of the Constitution. The Government, again, has the power to make an order when it 'is satisfied that the ordinary courts are inadequate to secure the effective administration of justice...'.[321] It would be difficult to assess which one of these formulae is the more stringent. What appears clear is that they all have similar effect and bar linguistic juggling, amount to the same thing.

Other sections are also of interest. It will be remembered that Article 2A attempted to prevent any appeal from the Tribunal to the ordinary courts of law.[322] The courts rejected this limitation and the decisions of the Tribunal were said to be open to

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[320] Lee, *op cit,* 221.
[321] s.35(1) The Offences Against the State Act, 1939.
[322] s.6(5) Constitution (Amendment No 17) Act, 1931.

review.[323] The drafters of the 1939 Act were aware of this and s.44(1) specifically allows for an appeal from the Special Criminal Court in two circumstances: firstly if the defendant obtains a certificate from the Special Criminal Court allowing them to appeal; and secondly if the Special Criminal Court refuses such a certificate the Court of Criminal Appeal may still grant them that right. Ultimately, therefore, an appeal was available from both the Article 2A Tribunal and the 1939 Court. The desirability of a route of appeal was noted by the AG in January, 1939. It was argued that,

> ...the provision of an appeal will tend to increase confidence in the findings of the Court. The view has been largely shared in this office that few, if any, of the late Tribunal's decisions on questions of fact would have been reversed by the Court of Criminal Appeal. The absence, however, of such appeal was frequently urged as a criticism of the late system.[324]

The inclusion of a right of appeal is welcomed, the effectiveness of that right will be considered in the forthcoming chapters[325]. Although both models were ultimately subject to judicial review, the fact that the OAS Act, 1939 provided for such a review at the outset and unlike Article 2A did not attempt any interference with the right to a judicial hearing, must be seen as a sign of positive development. This provision significantly adds to the legitimacy of the Court.

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[323] *The State (O'Duffy) v. Bennett* [1935] IR 70 and *The State (Hughes) v. Lennon* [1935] IR 128.
[324] Department of an Taoiseach, file S 10454 B, "Draft of Special Criminal Court Bill, Observations of the Attorney General's Office".
[325] In particular see chapter 9.1.

A further point of interest is the composition of the courts. The Article 2A Tribunal consisted entirely of members of the Defence Forces.[326] In contrast to this the 1927 Act provided that the tribunal should consist of three or more members, 'of whom at least one (who may be or may not be an officer of the Defence Forces...)' shall be certified as legally knowledgeable.[327] The Offences Against the State Act was more liberal. It provided for the appointment of members of the judiciary, barristers and solicitors of not less than seven years standing, or member of the Defence Forces.[328] Despite this provision for members of the judiciary to sit in the court in its early years, its staff were drawn entirely from the ranks of the military.[329] As a point of conjecture it is possible that Cosgrave's difficulties with the judiciary during the drafting of the PSA, 1927 may have been influential in this regard. It will be recalled that Cosgrave stated in 1931 that members of the Supreme Court had made clear their willingness to resign if they were asked to sit as a court under the 1927 Act.[330] This principled decision not to allow the political nature of the PSA, 1927 tarnish their judicial independence may have, in fact, discouraged the Executive from considering the appointment of Judges to the Article 2A Tribunal. As a result, by the time the OSA, 1939 was drafted, the appointment of members of the Defence Forces to such bodies had become the established practice. Therefore, rather than being regrettable that these servants of the Executive were staffing such an important Court, it is in fact commendable that provision was also made for the appointment of members of the Judiciary.

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[326] s.4(2) Constitution (Amendment No 17) Act, 1931.
[327] s.22(1) The Public Safety Act, 1927.
[328] s.39(3) The Offences Against the State Act, 1939.
[329] Hogan & Whyte, *op cit,* paragraph 6.5.335.
[330] O'Sullivan, *op cit,* 261.

3.6 The Legislation in brief

It is apparent that the OAS Act, 1939 was a considerable improvement over the PSA, 1927 and Article 2A. Despite these improvements the Act still provided for a considerable restriction upon the right to trial by jury. As such, the legitimacy of the Court depends upon the legitimacy of this restriction. The workings of the Court will be considered in detail over the coming chapters. As we have seen Lord Devlin famously, proclaimed that,

> The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.[331]

The OAS, 1939 combined with Article 38.3 of Bunreacht na hÉireann provides for the interference with the right to trial by jury and as such, in the view of Lord Devlin at least, paves the way for any would be tyrant. Without wishing to spoil the plot of this thesis, it should be apparent from chapter 1 that the author is of the opinion that the importance of trial by jury has been grossly overstated. The utility of trial by jury from a political and citizen education basis has been acknowledged, however, it is worth stating again that where trial by jury is, or is perceived as being, incapable of guaranteeing the right to a fair trial and delivering justice it is legitimate to set it aside in favour of a more robust trial process which is capable. The legislative provisions

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[331] Devlin, *Trial by Jury,* (London: 1966), 164.

will be outlined currently and subsequent chapters will examine the actual operation of the OAS, 1939. The potential for abuse by any would be tyrant should be considered as the history of the court is outlined.

As has been noted, the Government must issue a proclamation bringing Part V of the OAS, 1939 into force before the Special Criminal Court can be created. The jurisdiction of the Special Criminal Court is set down in s.43 of the Act where it is stated that 's Special Criminal Court shall have jurisdiction to try and to convict or acquit any person lawfully brought before that Court for trial under this Act'. Although the creation of the Special Criminal Court is anticipated by Article 38 of the Constitution the Court itself 'is a creature of statute and has no inherent jurisdiction of its own'.[332] The means of invoking the jurisdiction of the Court will be discussed in more detail in Chapter 8.1, but for now it is only necessary to point out that there are three means of invoking the jurisdiction of the Court: an accused can be charged directly before the Court; the accused may be returned for trial before the Special Criminal Court by the District Court; or the High Court may order that a case awaiting trial before the Central Criminal Court or Circuit Court should be transferred to the Special Criminal Court.[333] Although the Special Criminal Court is bound by the rules of evidence, practice and procedure of the Central Criminal Court[334] it does not possess the same jurisdiction as that Court. Its jurisdiction is regulated solely by statute, therefore, 'in the absence of appropriate statutory provisions, the Special Criminal Court is under no obligation to deliver a reasoned verdict,[335] had no power

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[332] Walsh, *Criminal Procedure,* (Dublin, 2002, 981.
[333] ss. 45 – 48 Offences Against the State Act, 1939. See Walsh, *op cit*, 981.
[334] S.41(4) Offences Against the State A, 1939.
[335] For a more detailed discussion of this point see Chapter 9.1

to return alternative verdicts and has no power to accept amendments rectifying errors in an indictment'.[336] There exists, therefore, a legislative lacuna between the practice and procedure of the Special Criminal Court and its jurisdiction.[337]

Before moving on to consider some of the other provisions of Part V of the OAS, 1939, it is worth noting at this point that the Act provides for the creation of multiple Special Criminal Courts.[338] This point was of mere academic interest until early 2005, however as a result of the creation of a extra Special Criminal Courts at that time it was necessary to amend the OAS, 1939. The Criminal Justice (Terrorist Offences) Act[339] 2005, s.53, amends s.49 of the OAS, 1939 by inserting ss.49(2) to 49(7). The purpose of these new sections is to facilitate the transfer of a case from one Special Criminal Court to another. A further interesting feature of the CJTOA, 2005 is that s.49 amends s.21 of the OAS, 1939 in order to create the new offence of rendering assistance, financial or otherwise, directly or indirectly, to an unlawful organisation.[340]

A few miscellaneous points of interest about the Court include the fact that it has considerable discretion over its day-to-day functions. For example, under the provisions of the OAS, 1939, the Court itself determines the time and place of its sitting.[341] According to the Special Criminal Court Rules the Registrar must give

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[336] Walsh, *op cit,* 1000/1001.
[337] *ibid.*
[338] s. 38(2) Offences Against the State Act, 1939.
[339] Hereinafter the CJTOA, 2005.
[340] S. 49 Criminal Justice (Terrorist Offences) Act, 2005
[341] s. 41(1) Offences Against the State Ac, 1939.

notice to all relevant parties of these details.[342] While the members of the Court are appointed the Court itself decides which of its members shall preside.[343] On a more important point Article 34.1 of the Constitution, which states that justice shall be administered in public, does not apply to the Special Criminal Court. However, Walsh notes that despite this the Court rarely sits *in camera*.[344] Finally, standing mute before the Court can result in one being found in contempt of court.[345] This situation is likely to arise where an accused refuses to recognise the authority or legitimacy of the Court. Given that the IRA purported to set the foreign policy of the State and refused to recognise its legitimacy, this provision was almost certainly directed against that organisation. Other provisions of the OAS, 1939 will be discussed in more detail where relevant, this section has merely outlined some of the provisions.

3.7 Conclusions

The establishment of special courts under the constitutional regime of Bunreacht na hÉireann was the result of much drafting and deliberation. Numerous drafts, two Articles of the Constitution and four Bills were all filtered down into one Act. However, the heritage of that Act is clear. The title 'Special Criminal Court' was used in a draft of the PSA, 1927. The composition of the Court and many of the procedures and technicalities relating to it are derived from earlier models. The very development of two Articles of the Constitution was a response to the failure of Article 70 and 72 of the old Constitution. While its family tree is obvious the OAS

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[342] The Offences Against the State Act, 1939 – 1972 Special Criminal Court Rules, 1975, Rule 5. See Walsh, *op cit,* 1002.
[343] The Offences Against the State Act, 1939 – 1972 Special Criminal Court Rules, 1975, Rule 6(1). See Walsh, *op cit,* 1002.
[344] Walsh, *op cit,* 1002.
[345] S. 51(3) Offences Against the State Act, 1939

Act, 1939 does differ considerably from its forerunners. It is, at times, all too easy to conceive of the OAS, Act 1939 as a continuation of the draconian powers encapsulated in the PSA, 1927 and Article 2A; that would be a mistake. The OAS Act, 1939 provided for a right of appeal to the ordinary courts. Admittedly the inclusion of such a right may have been due to the decisions of the Courts in O'Duffy and Hughes, but it was nonetheless a tremendous improvement upon the earlier experiments. The provision for ordinary members of the judiciary as members of the Special Criminal Court, although not immediately utilised, is also a welcome feature. Significantly, the 1939 legislation states clearly that,

> ...the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court.[346]

The practicalities of this measure will be considered in subsequent chapters. When considered in tandem with s.43(1)(a), which limits the jurisdiction of the Court to impose those sentences as are provided for by law, it becomes clear that the Special Criminal Court is a far more regularised Court than its predecessors. It is, in essence, as 'ordinary' a court as is possible and is, therefore, considerably less draconian than either the PSA, 1927 or Article 2A. Contrary to the statements of Blackstone and Lord Devlin the right to jury trial is no guarantee of justice and interferences with that right is no guarantee of tyranny. The OAS Act, 1939 went quite some distance in

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[346] s. 41(4) The Offenes Against the State Act, 1939.

improving upon the earlier models; its overall legitimacy will have to be considered in light of its practical application.

Despite the considerable improvements, outlined above, the OAS Act, 1939 was greeted by a howl of protests. A number of Local Authorities passed motions objecting to the Act: Tipperary, Ballyhaunis and Cork branches of 'the Old IRA' wrote to complain; the ICTU and Labour requested meetings to discuss the legislation; and bizarrely, the Committee of Managements of Co. Clare Mental Hospital and the Joint Committee of Management of Sligo Mental Hospital wrote letters of protest.[347] In 1931, those who wrote to protest against Article 2A were rewarded with a copy of a Joint Pastoral Letter.[348] No such action appears to have been taken in 1939. As in 1931, the protests were unsuccessful and the legislation was introduced. It is hoped that these chapters have allowed a clear understanding of why Part V of the OAS Act, 1939 took on its shape. The following chapters will examine the Special Criminal Court in operation.

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[347] Department of an Taoiseach, file S 11129.
[348] Department of an Taoiseach file S 2267, "Joint Pastoral issued by His Eminence, Cardinal MacRory, and the Archbishops and Bishops of Ireland", (October 1931).

Chapter 4

The Emergency – 1939 to 1946

The previous chapters have outlined the background to and drafting of the OAS, 1939. This chapter will consider the utilisation and development of the Special Criminal Court, during the period of 'the emergency', that is 1939 to 1946. Just as a complete understating of the Special Criminal Court was not possible without first understanding its predecessors, it is also true that to appreciate the development of the Court during this period other related emergency powers must also be considered. Ireland remained neutral during World War II (WWII) and the Government employed a number of measures to ensure the feasibility of this stance. This chapter will begin by outlining Government policy at the time as well as the perceived threat of the IRA coupled with that of the Axis and Allied nations. Having established the historical context, different legislative measures ranging from internment to the use of military tribunals will be discussed. With due regard to the context of the time and the alternative approaches available and utilised by the Government the operations of the Special Criminal Court and the attitude of the regular courts towards it will be explained. This should provide an interesting and comprehensive review of the Court during this period.

4.1 Neutrality, the I.R.A & the Threat From Abroad

The Irish Government declared a policy of neutrality from the outset of WWII. This policy was based on the belief that 'maintaining neutrality would both spare the

Twenty-six counties the horrors of war and demonstrate the state's sovereignty'.[349] It should be noted that this policy gained almost universal acceptance as the war progressed.[350] A successful policy of neutrality would not be easy to maintain since 'any apparent division within the country, and especially possible IRA support for the Nazis, might encourage German designs on Ireland or provoke a pre-emptive British strike'.[351] Nazi interest is evident by the fact that throughout the war Germany broadcast propaganda in English and Irish, to Ireland, employing a combination of Irish ex-patriots and Germans with a knowledge of Ireland and its culture.[352] In order to implement such a policy it was vital that the Government neutralise any and all internal threats. The IRA, with their anti-British sentiment, were an obvious source of concern but they were not alone. Any remaining Blueshirt elements, due to their fascist tendencies, might prove problematic and the '...tiny communist movement, whose contacts with Moscow had apparently been revitalised through the participation of its leading lights in the Spanish civil war...', could again be viewed with suspicion.[353] Although the fear of communist elements in Ireland had been exaggerated in the past,[354] in the context of the emergency it appears more believable. Ireland may not have been on the verge of a 'Workers Revolution' but German efforts to train and return Ryan and Russell to Ireland[355] lends credence to the opinion and

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[349] Coogan, *De Valera: Long Fellow, Long Shadow,* (London: 1993), 521.
[350] *ibid,* 521.
[351] Lee, *Ireland 1912 – 1985, Politics & Society,* (Cambridge: 1989), 221.
[352] most notably Francis Stuart. For a detailed account of German Propaganda Radio Broadcasts to Ireland see O'Donoghue D., *Hitler's Irish Voices, the Story of German Radio's Wartime Irish Service,* (Dublin, 1998).
[353] O'Halpin, *Defending Ireland: The Irish State & its Enemies Since 1922,* (Oxford: 1999), 200/201.
[354] for example when President Cosgrave introduced Article 2A he referred to the threat of Communism. See President W.T. Cosgrave, "Consitituion (Amendment No. 17) Act, 1931. Summary of Opening Statenment Made by the president in Dáil Éireann, on 14th October, 1931". Department of An Taoiseach file S 2267.
[355] Russell was trained in Berlin and Ryan was freed from a Spanish jail where he had been since the Spanish Civil War, upon his release he was brought to Berlin and reunited with Russell. An attempt to

lifts it above the usual 'Red Scare'. Interesting and all as the existence of other groups may have been, it is clear that the IRA posed the greatest risk and this shall be discussed presently.

As we have seen, a significant feature of the IRA was that it portrayed itself as representing the people of Ireland. Thus on December 8 1938 the seven remaining members of the Second Dáil, describing themselves as 'the Executive Council of Dail Eireann (sic), Government of the Republic', purported to 'delegate the authority reposed in... [them] ...to the Army Council'.[356] Following this in January, 1939, the newly 'empowered' IRA declared war on Britain.[357] This was a serious threat to the sovereignty of a neutral nation. The Taoiseach made his position clear when he stated that,

> ...the people who are assuming to act in the name of our people have not ever been elected by the Irish people in any election which they were free to go up for, if they chose to go up. They are usurping authority here, and they cannot be permitted to do so. The State must be in a position to defend itself against them.[358]

Thus the battle lines were drawn and clearly Fianna Fáil had moved on since the days when Seán Lemass had described them as a 'slightly constitutional party'[359] It is also

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return them to Ireland known as 'Operation Dove' was aborted when Russell died. Carroll, *Ireland in the War Years*, (Newton Abbot: 1975), 65.

[356] Department of an Taoiseach, file S 10454 Annex, Extract From WOLFE TONE WEEKLY, Saturday, Secember 17 1938. "I.R.A. Take Over the Government of the Republic".

[357] Department of an Taoiseach file S 10454 Annex, Copy/ OGLAIGH na hÉireann (Irish Republican Army), General headquarters DUBLIN, January 14, 1939.

[358] Dáil Éireann, *Parliamentary Debates*, 3 January 1940, vol. 78, col. 1358.

[359] Dáil Éireann, *Parliamentary Debates,* 21 March 1928, vol. 22, col. 1615, see McLoughlin (ed), *Great Irish Speeches of the Twentieth Century,* (Dublin: 1996), 144/145.

apparent that the Government was determined to act to prevent the IRA from jeopardising the security of the State. The threat posed by the IRA became all the more real when the IRA departed on a bombing campaign in Britain. From January 1939 on, the IRA had caused explosions in British factories, power stations and telephone exchanges. In July alone Britain suffered over one hundred explosions. 'The campaign reached its moral nadir back home with a bombing in the Irish country hotel where Prime Minister Neville Chamberlain's son Francis was spending a hunting holiday...'.[360] Britain would be unable to tolerate such outrages; as was previously noted, Roche had advised de Valera, 'a small country cannot afford to invite attacks from without by a seeming inability to keep order within its own territory...'.[361] If Ireland wanted to avoid a British attack it would have to ensure that it controlled its own subversive elements. As a result, 'having declared Irish neutrality, de Valera's major preoccupation was to neutralise the IRA who would naturally see in England's difficulty Ireland's opportunity'.[362]

Remnants of the Blueshirts, Communists and the IRA all threatened to destabilise Ireland's policy of neutrality. A British response to IRA outrages was also possible. The threat of unwanted German attentions also existed.

> Abwehr II[363]... specialised in sabotage operations against the enemy and so was especially interested in the potential offered by

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[360] Packard, *Neither Friend Nor Foe: The European Neutrals in World War II,* (New York: 1992), 114.
[361] Lee, *op cit,* 220.
[362] Carroll, *op cit*, 14.
[363] The German military secret service, see Carroll, *op cit,* 15.

IRA saboteurs for operations in Northern Ireland and to a lesser extent in Britain.[364]

Being aware of this threat de Valera warned that 'any attempt to co-opt "anti-British radical nationalist groups" (the IRA) to carry out espionage against Britain anywhere on the island including Ulster - would inevitably lead Éire into closer cooperation with Britain'.[365] Such warnings appear not to have gone unnoticed. Hempel, the Minister Plenipotentiary in Dublin, is said to have 'distrusted the organisation, convinced it presented a potential threat to de Valera's government and thus to Ireland's neutrality'.[366] Despite such reservations Germany did, in fact, conduct a number of operations in Ireland. These operations included the parachuting of Capt. Goertz into Ireland for the purpose of using the IRA in sabotage operations[367] and the plan to train and return Russell and Ryan.[368] Arguably the most alarming example was 'a crude plan for a German sea landing near Derry in Northern Ireland to be supported by an IRA force crossing the border from Co. Leitrim' which was unearthed by the Gárdaí in 1940.[369] It is clear, therefore, that the IRA posed a risk since they might, on their own, antagonise the British and spark an invasion; and their relations with Germany could compromise Irish neutrality.

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[364] *ibid,* 61.
[365] Packard, *op cit,* 111.
[366] *ibid,* 107/108.
[367] Carroll, *op cit,* 61.
[368] 'The ultimately aborted episode became the stuff of IRA legend with Russell teaming up with... Ryan, to sail a U-boat to Ireland'. See O'Donoghue D., *op cit,* 51.
[369] Carroll, *op cit,* 61.

4.2 The Government Moves Against the IRA

It was noted in a previous chapter that the Fianna Fáil Government's initial response to the IRA was somewhat lenient. As Minister for Justice, Ruttledge, stated in the Dáil,

> ...in 1932, when this Government was first elected, an amnesty was declared. In 1937, when the Constitution was passed, there was a similar position, a similar jail clearance. Then, over a technical case in the courts, on another occasion, I think some 34 prisoners were released.[370] We have tried to do everything possible to carry on as a Government with the least possible force....[371]

Although, in 1937 Seán MacBride, Chief of Staff of the IRA, had accepted the new Constitution and declared that the IRA had no further role,[372] the organisation continued its violent campaign. Just as signs of Government leniency were not rewarded in 1932, examples of mercy during the early stages of the emergency were also ignored. For example, when Patrick McGrath, a disabled veteran, went on hunger strike, de Valera relented and had him released.[373] McGrath was to survive however,

> ...the sequel was to be tragic and worse than de Valera feared.... A second hunger strike began some months later and two young men... died in consequence in April, 1940.... In the following

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[370] this appears to be a reference to *The State (Hughes) v. Lennon,* referred to in chapter 2.
[371] Dáil Éireann, *Parliamentary Debates,* 2 March 1939, vol. 74,col.s 1291/1292.
[372] Patterson, *The Politics of Illusion – A Political History of the IRA,* (London: 1997), 81.
[373] Lee, *op cit,* 222.

> August two detective officers were shot dead in arresting Patrick McGrath and Francis Harte. Both... were [later] executed. De Valera felt that six lives were lost because of his giving in when faced with McGrath's hunger-strike.[374]

Since the IRA posed a real threat to the security of the State and since leniency had failed to silence the organisation, the Government resolved not to show weakness again.

The Government employed a variety of tactics against the IRA during the period. These measures included internment, military tribunal, trial by Special Criminal Court and execution, all of which will be outlined below.

> In its resolve to defend the State, the cabinet had six IRA men executed during the war for the murder of servants of the State whose legitimacy they denied, allowed three to die on hunger strike, had more than 500 interned without trial, and had another 600 committed under the Offences Against the State Act.[375]

It would appear that the popularity of the policy of neutrality assisted the Government at this stage. As Lyons notes, 'it is doubtful whether the IRA, even if they had been more efficient or the Germans had paid them more attention could have achieved very much. The mood of the country was set on neutrality...'.[376] By 1943 the IRA had

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[374] The Earl of Longford & T.P. O'Neill, *Eamon De Valera,* (London: 1970), 357.
[375] Lee, *op cit,* 223.
[376] Lyons, *Ireland Since the Famine,* (London: 1973), 556.

been 'paralyzed'.[377] The success of the Irish Government in neutralising the IRA undoubtedly contributed to the Allied acceptance of the States neutrality.[378] In the following sections the methods employed by the Government will be discussed. This review will begin by considering the use of internment and military tribunal. Having outlined these alternatives, the Special Criminal Court will be examined.

4.3 Internment, *The State (Burke) v. Lennon*[379] & the Magazine Fort Raid

On 3 September 1939 a comprehensive Emergency Powers Act (EPA) was passed. Initially this Act excluded the internment of natural born Irish citizens, though this was later amended.[380] A further internment provision was contained in Part VI of the OAS, 1939. This provided that a Minister of State who was satisfied that 'any particular person is engaged in activities calculated to prejudice the preservation of the peace, order, or security of the State...' was empowered to issue a warrant for the arrest and detention of that person.[381] The importance of these two measures will become apparent, but it is important to understand that during the course of the war internment was a vital part of Government strategy. 'Upwards of 1,500 may have passed through... [the Curragh Internment Camp]... although the peak number held behind five rows of barbed wire, a deep trench and armed sentries, reached only 547 in March 1943'.[382] Given the importance of internment to Government policy, any

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[377] Packard, *op cit,* 329.
[378] O'Halpin, *op cit,* 200.
[379] [1940] IR 136.
[380] Hogan & Whyte, *Kelly, The Irish Constitution,* (Dublin: 2003), paragraph 7.4.182, footnote 375
[381] The Offence Against the State Act, 1939, s.55.
[382] MacEoin, *The IRA in the Twilight Years – 1923-1948,* (Dublin: 1997), v.

potential challenge to the legislation would be a matter of concern. The internment provisions were challenged in the celebrated case of the *The State (Burke) v. Lennon.*

As with *Childers* and *Hughes* before, the case of *Burke* was an application for *habeas corpus*. It is important for a number of reasons. Firstly, it was the first significant challenge to the constitutionality of legislation brought under the new Constitution.[383] Secondly, the case involved an unusual twist at the outset. The case was initially scheduled to be heard by Maguire P., O'Byrne and Gavan Dufyy JJ, however, counsel for the applicant objected, arguing that it was 'a fundamental right of a citizen bringing a *habeas corpus* application to select the judge before whom he would move his application'.[384] It has been suggested that counsel objected because they believed that the best chance of securing the release of their client was to make their application to Gavan Duffy J. alone since they believed that Maguire P. and O'Byrne J. would have outvoted him.[385] After some argument the case was heard by Gavan Duffy J. sitting alone. In light of the domestic and international circumstances and the fact that this was the first major constitutional challenge, Mr. Justice Gavan Duffy's judgment can be regarded as a *tour de force*.[386]

The decision in *Burke* was largely based on the view that in *satisfying* himself that a person was 'engaged in activities calculated to prejudice the preservation of the peace, order, or security of the State...' and in thereby ordering the arrest and detention of

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[383] as was noted by Gavan Duffy J. in his judgment. *The State (Burke) v. Lennon* [1940] IR 136, 143.
[384] Hogan, 'Offences Against the State (Amendment) Bill, 1940' (2000) 35, *Irish Jurist,* 238, 241. This article includes a detailed account of the proceedings and the case as a whole.
[385] *ibid,* 243.
[386] *ibid,* 244.

such a person, a Minister was acting in a judicial manner and was, therefore, *ultra vires* the Constitution. Importantly Justice Gavan Duffy accepted that the,

> ...legal position would be different were I concerned with a war measure, a law "expressed to be for securing the public safety and the preservation of the State in time of war" under Article 28; but I am not, for the Offences Against the State Act, 1939, is not such a law.[387]

It will be remembered that the Constitution Review Group of 1934 suggested a two-pronged approach to the provision of emergency legislation. Firstly, there was to be a piece of permanent legislation designed for when the ordinary courts were inadequate, but which could exist independent of a state of emergency. Secondly, emergency legislation could be introduced in circumstances of war or armed rebellion. At first glance it may appear that the judgment of Gavan Duffy J. is a criticism of that approach. After all the learned Judge of the High Court states that had the legislation been emergency legislation under Article 28 then he would not have found it to be unconstitutional. Despite this, it is contended that the approach of the Review Group and indeed Bunreacht na hÉireann is not fatally flawed. Rather it is the drafting of Part VI of the OAS, 1939 which causes the Minister to behave in a judicial manner. As a result of the wording of s.55 the detentions was declared unlawful and the release of Burke was ordered. These actions were not taken lightly. Justice Gavan Duffy stated that,

> ...any Judge of the High Court must regret interfering with Executive action at this time, when in fact the Government, with its

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[387] (1940) 74 *ILTR*, 36, 45.

> special knowledge, has officially declared that the ordinary courts are inadequate... but any such consideration is subsidiary to the right of the citizen under the Constitution to an order of habeas corpus....[388]

Burke and over 50 other prisoners interned under the same provision were released.[389] The impact of the case and the subsequent releases was to be considerable.

There were three main consequences arising from the decision in *Burke*. Firstly, Burke and 53 internees were released.[390] Secondly, on December 23 1939 the IRA raided the Magazine Fort in the Phoenix Park.[391] 1,084,000 rounds of ammunition were taken in the raid.[392] This was a considerable blow to the State at such a time although much of the ammunition was later recovered.[393] The importance of the event was twofold: it depleted the reserves of the Defence Forces in a time of war when munitions were already in short supply; and it gave the IRA a considerable propaganda boost.[394] Unsurprisingly, 'some of the persons just released were believed to be implicated'.[395] The link between the decision in *Burke* and the raid on the Magazine Fort was asserted and lead to an extraordinary attack by the Minister for Justice. Speaking in the Dáil he stated that 'I am satisfied that had it not been for the decision of the courts – I do not want to comment on the decision of the judge – that

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[388] *ibid*, 38.
[389] Kelly, *Fundamental Rights in the Irish Law & Constitution,* (2nd ed), (Dublin: 1967), 83.
[390] Carroll, *op cit,* 39.
[391] *ibid,* 39.
[392] Dáil Éireann, *Parliamentary Debates,* 3 January 1940, vol. 78, col. 1322.
[393] *ibid.*
[394] Hogan, *op cit,* 253.
[395] Kelly, *op cit,* 83.

raid would not have occurred...'.[396] This was a severe criticism of a court judgment by a member of the Executive and further illustrates the sensitivity surrounding the issue at the time. The Phoenix Park, Magazine Fort raid can be seen as the second consequence arising from the decision of the Court in *Burke*.

In light of the decision in *Burke*, the release of the internees and the raid on the Magazine Fort, it is hardly surprising that the final consequence of the judgment was a tightening of existing legislation and the enacting of new provisions to cover the internment of Irish citizens. The Constitution Review Group of 1934 had attempted to establish a Legislative and Constitutional framework which put emergency provisions in place before any emergency arose, however, despite these efforts Ireland was once again introducing emergency provisions as a response to an outrage. The *Irish Times* made its position clear when it argued 'it is obvious that the Government must have new powers to replace those of which it has been deprived by the courts.... The position is far too grave for constitutional or juridical niceties... there must be an end to all forms of playacting'.[397] The Government clearly agreed. In a strongly worded statement the Taoiseach announced that 'we want the powers we believed we had in the Act which was declared unconstitutional. We believe they are the powers best fitted to deal with the situation'.[398] The Government was, in fact, given these powers.

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[396] Dáil Éireann, *Parliamentary Debates,* 3 January 1940, vol. 78, col. 1323.
[397] *The Irish Times,* December 30, 1939, cited in Hogan, *op cit,* 253/254.
[398] Dáil Éireann, *Parliamentary Debates,* 3 January 1940, vol. 78, col. 1358.

4.4 In re Article 26 and the Offences Against the State (Amendment) Bill, 1940[399]

The Offences Against the State (Amendment) Act, 1940 was enacted. In a rather literal interpretation of Gavan Duffy J.'s judgment, the provisions were amended so that a Minister no longer had to be 'satisfied' he merely had to be 'of opinion' that 'any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State'.[400] This alteration was, in many respects, irrelevant since the rationale of the judgment of the High Court was based on the effect of the warrant and not on the state of mind of the Minister. Having been passed by both Houses of the Oireachtas the Bill was sent to the President for signing; the President exercised his powers under Article 26 and referred the Bill to the Supreme Court for a determination on its Constitutionality. On the same day as the Bill was passed *The Irish Press* reported that the President might refer the Bill to the Supreme Court.[401] 'This suggests that the Article 26 reference was part of a pre-arranged plan on the part of the Government whereby the Article 26 procedure would operate as a substitute form of an appeal from Gavan Duffy J.'s decision'.[402]

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[399] [1940] IR 470.
[400] Offences Against the State (Amendment) Act, 1940, s.4(1).
[401] Hogan, *op cit,* 254. Much of the information contained within this section has been gathered from the pages of this article. In it Dr. Hogan provides a wide-ranging and thorough review of the Courts proceedings, the historical context and the attitude of later Supreme Courts towards the judgment. It has been an invaluable resource.
[402] *ibid,* 255.

Presently, 'if a bill is pronounced valid on an Article 26 reference, the Constitution puts it beyond all future challenge before the Courts',[403] however this position is the result of the final Constitutional Amendment passed by means of ordinary legislation.[404] Significantly, the Supreme pronounced judgment in *In re Article 26 and the Offences Against the State (Amendment) Bill, 1940* on 8 February 1940 while the Constitutional Amendment of Article 26 was not signed into law until 31 May 1941.[405] The OAS (Amendment) Act, 1940 was not challenged during this potential lacuna since the statute was not in force and therefore no one with adequate standing existed.[406] From an academic viewpoint, a question surrounding the amendment exists: that is does the amendment have retrospective effect? If so, the OAS (Amendment) Act, 1940 is immune from all future Constitutional challenge. Iif not, it is still capable of being overturned. There does not appear to be any clear-cut answer to this question, though Doolan posits a series of arguments against the retrospective effect of the Amendment.[407] For the purposes of this work it is possible to continue while leaving the issue unresolved.

Whether the decision of the Supreme Court was to be eternally binding or not the situation was definitely grave. The Government, however, had reason to be confident.

> Given that the Supreme Court had never previously held any legislative measure to be unconstitutional, the Government must

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[403] Morgan, *Constitutional Law of Ireland,* (Dublin: 1985), 106.
[404] Doolan, *Lawless v. Ireland (1957 – 1961): The First Case Before the European Court of Human Rights, an international miscarriage of justice?* (Aldershot: 2001), 21.
[405] *ibid,* 22.
[406] *ibid,* 22.
[407] *ibid,* 21-24.

> surely have expected that the Bill would have had a relatively easy passage. This belief was probably reinforced by the fact that this was a war time measure and where the security implications of a finding against the Bill were plain to behold as witnessed by the calamitous aftermath of Gavan Duffy J.'s original ruling in the High Court.[408]

As if to fuel conspiracy theories, the Government was in a position to make an appointment to the Supreme Court before the hearing of this most important of cases. Ultimately, Byrne J. was nominated to succeed the retiring Johnston J. Hogan considers the possible interpretations of this appointment and concludes that 'Mr. de Valera appears to have been completely fair-minded regarding judicial appointments...'. As such, it would be unreasonable to suggest that any attempt at loading the Court had been made.[409] Further solace can be gleaned from the fact that the measure did not receive the easy passage that was expected but, importantly, it was found to be constitutional and the factors listed above may have been influential upon the Court in reaching that decision.

Article 26 demanded that the Court issue a single judgment in cases of this sort and that judgment was delivered by Sullivan C.J., however, the Chief Justice made it clear that the decision of the Court was a majority decision.[410] The judgment can be fairly described as positivist. The Court drew attention to the fact that, although internment

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[408] Hogan, *op cit,* 279.
[409] *ibid,* 260, see Hogan, *op cit,*258-260 for a detailed analysis of this point.
[410] This provision was later amended by the Second Amendment of the Constitution Act, 1941. See Hogan, *op cit*, 271.

measures had been employed by the Irish Free State, the 1937 Constitution did not explicitly prohibit internment without trial.[411] The tenor of this approach is that if the drafters of the Constitution intended to prevent internment without trial they would have done so expressly. The Court adopted an extremely worrying interpretation of personal liberty provisions of Article 40.3 1°. Here Sullivan C.J. stated that,

> ...this clause is not in respect of any particular citizen, or class of citizen, but extends to all of the citizens of the State and the duty of determining the extent to which the rights of any particular citizen, or class of citizens, can properly be harmonised with the rights of the citizens as a whole seems to us to be a matter peculiarly within the province of the Oireachtas....[412]

This deferential attitude toward Parliament was augmented by the Courts interpretation of Article 40.4.1°. Remarkably the Supreme Court was of the opinion that,

> ...the phrase 'in accordance with law'... means in accordance with the law as it exists at the time when the particular Article is invoked.... Accordingly, in our opinion, this Article cannot be relied on for the purposes of establishing the proposition that the Bill is repugnant to the Constitution – such repugnance must be established by reference to some other provision of the Constitution.[413]

This approach would have completely undermined the utility of the personal liberty provisions of the Constitution and has been described as an emphatic denial of any

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[411] *In re Article 26 and the Offences Against the State (Amendment) Bill, 1940* [1940] IR 470, 478.
[412] [1940] IR 470, 481.
[413] [1940] IR 475, 482.

natural law element within the provisions.[414] Fortunately, later Supreme Courts did not adopt this limiting approach.[415]

It will be remembered that Gavan Duffy J. had placed much emphasis on the point that, in satisfying himself that an individual was engaged in activities prejudicial to the security of the State, a Minister was usurping the judicial role. The Supreme Court was less impressed with such reasoning. Sullivan C.J. differentiated between a measure designed to punish, and a precautionary measure. Significantly, the Court concluded that the OAS (Amendment) Bill, 1940 did not purport to create a criminal offence and a system of punishment, but rather established a system of precautionary detention.[416] The House of Lords decision in *R. (Zadig) v. Halliday,*[417] which had created a similar differentiation, was cited approvingly. Moreover, the Court cited the Irish Free State case of *R. (O'Connell) v. Military Governor of Hare Park Camp.*[418] Here the similarity of the provisions under the Free State Constitution was referred to and the fact that internment provisions were upheld under that Constitution was cited as precedent. Hogan notes that, although the analysis of *O'Connell* is largely accurate, the strength of the authority may be questioned. Importantly, the decision in *O'Connell* concerned a temporary item of legislation and two of three judges appeared to doubt the Constitutionality of any permanent internment legislation. Furthermore, the Court of Appeal had held that it had no jurisdiction to question the validity of Irish Free State

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[414] Kelly, *op cit*, 814.
[415] Hogan, *op cit,* 267. This article provides a thorough and in-depth analysis of these points and provides an interesting review of the judgements of later Supreme Courts.
[416] [1940] IR 470, 479.
[417] [1917] AC 260.
[418] [1924] 2 IR 104.

legislation while the transitory eight year period was in operation.[419] In the final event the Supreme Court upheld the constitutionality of the OAS (Amendment) Bill, 1940.

4.5 Placing the Supreme Court Judgment in Context

The judgment of the Supreme Court was by no means the judicial *tour de force* of Gavan Duffy J. in *Burke*, but the historical context must be recognised. The Courts of the U.S. were to adopt a similarly accommodating view in the Japanese American Internment cases with less justification.[420] The Fifth Amendment of the Constitution of the United States of America (USA) enshrines the principle that no person shall be deprived of his liberty without due process. However, following Pearl Harbor restrictions were imposed on the liberty of citizens of Germany, Italy and Japan who were resident in the USA. Over the coming months those controls were used increasingly against Japanese nationals and Americans of Japanese extraction while they were relaxed for Germans and Italians.[421] President Roosevelt signed Executive Order 9906 on February 19 1942. The stated aim of the Order was to facilitate the war effort by providing protection against espionage and sabotage. To that end the Secretary of War, or any military commander he might choose, was authorised to 'prescribe military areas in such places and of such extent as he... may determine, from which any or all persons may be excluded...'.[422] The Order was supplemented

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[419] Hogan, *op cit*, 265/266.
[420] In Ireland the Oireachtas sought the power to intern those believed to be associated with a terrorist organisation which was placing the Government policy of neutrality at risk. Executive Order 9906 allowed for the internment of an entire group based solely on racial lines. See Rostow, "The Japanese American Cases – A Disaster", (1945) *Y.L.J.* Vol. 54, No. 3, 489.
[421] Ten Broek, Barnhart & Matson, *Prejudice War & the Constitution: Causes & Consequences of the Evacuation of Japanese Americans in World War II,* (5th ed), (Berkeley: 1975), 99.
[422] *ibid,* 112, citing Executive Order 9906.

by Public Law 503 which provided an enforcement mechanism.[423] Together these laws provided the basis for relocation from the West Coast and the subsequent internment of Japanese Americans.[424]

General De Witt, head of the Western Defence Command was ordered to implement the policy of Executive Order 9906 and he did so. In March 1942 a policy of encouraging Japanese Americans to relocate away from the West Coast was introduced. By early April exclusion orders were being issued which only applied to Japanese Americans and Japanese aliens. Individuals were excluded from the West Coast area and ordered to report to control stations. From here they were detained in camps organised by the War Relocation Authority (WRA).[425] Initially these camps were to provide temporary accommodation for those who had been unable to secure an alternative. However, that policy soon changed and detention in the camps was compulsory to facilitate 'loyalty examinations'. A determination of loyalty, surprisingly, did not guarantee freedom. 'Officials were required to ascertain that community sentiment was not unfavourable to the presence of such citizens before they were permitted to enter the community'.[426] Therefore, those individuals who had established their loyalty found that their release was dependent on public opinion.

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[423] Peter Irons, *Justice at War*, (Oxford: 1983), 7.
[424] see Prof. Rostow, "The Japanese American Cases – A Disaster", (1945) 54 Yale L. J., 489. This article provides an in-depth review of the Japanese American cases and the issues surrounding the relocation and internment of Japanese Americans. It has proven to be an invaluable resource and is all the more remarkable given that it was published in 1945.
[425] *ibid,* 498.
[426] *ibid,* 500.

The internment procedure was challenged, unsuccessfully, in a number of cases. If the Courts had held that the detentions were not validated by military necessity then the measure would have been unconstitutional. As has been noted in previous chapters, the U.S. Courts were not without precedent in determining this issue; in *Ex parte Milligan* Davis J. had established the principle that martial law could not exist in any area where the courts are open and carrying out their business in an unobstructed manner.[427] As a matter of fact, the ordinary courts were open and operating along the West Coast and although the nation was at war it was not a time of insurrection or invasion.[428] During the cases 'the strategy devised by the WRA lawyers depended on the argument that the "racial characteristics" of Japanese Americans predisposed them to the commission of subversive acts'.[429] This argument appears to have won favour with some of the judiciary. In the Seattle District Federal Court, Black J. 'raised the spectre of "fifth columnists... pretending loyalty to the land where they were born" but who might "become enemy soldiers overnight"'.[430] In *Hirabayashi*[431] the court considered two counts for which concurrent sentences had been imposed. The first count raised the legality of forced transportation and detention in a WRA camp. The second count concerned the legality of a breach of curfew. 'The Court considered the violation of the second count first, upheld the curfew order and the sentence imposed for violating it. Since the two sentences were concurrent, it said, there was no need to

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[427] 71 US (4 Wall) 2, 127, see TenBroek *et al, op cit,* 230.
[428] 'No Japanese submarines had been seen off the West Coast for many months. Midway was won; Libya, Tripolotania and Tunisia had been conquered... We had suffered no defeats since the fall of Tobruk in July 1942, and we had won a long series of preliminary victories.' Prof. Rostow, *op cit,* 502/503.
[429] Irons, *op cit,* 132.
[430] *ibid,* 113.
[431] *Hirabayashi v. United States*, (1943) 320 U.S. 81.

consider the conviction on the first count.'[432] In doing so the Court avoided the issue. The unwillingness of the judiciary to intervene ensured that it was 'not until the middle of 1946 – almost a year after the surrender of Japan in the wake of the Hiroshima and Nagasaki bombings that ushered in the atomic age – did the last residents of these dusty, barren camps return to their West Coast homes'.[433]

The internment of the Japanese American population of the West Coast has been described as the climax of a long history of anti-Asian racism.[434] On August 10 1936, three years before the outbreak of war in Europe and five years before American involvement in hostilities, President Roosevelt had suggested that the Japanese American community should be singled out for observation with a view to placing them in 'a concentration camp in the event of trouble'.[435] This clearly indicates that long before hostilities had erupted, those of Japanese ancestry were viewed with suspicion at the highest levels of the U.S. administration.

Following the events at Pearl Harbor the situation of Japanese Americans deteriorated rapidly. General DeWitt, the West Coast military commander, argued that,

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[432] Prof. Rostow, *op cit,* 504.
[433] Irons, *op cit,* 492.
[434] Robert Schaffer, "Opposition to Internment: Defending Japanese American Rights During World War II", Historian (Spring, 1999)
<http://www.findarticles.com/p/articles/mi_m2082/is_3_61/ai_55426755> accessed on 16 August 2004.
[435] He stated that, 'One obvious thought occurs to me – that every Japanese citizen or non citizen on the island of Oahu who meets these Japanese ships or has any connection with their officers or men should be secretly but definitely identified and his or her name placed on a special list of those who would be the first to be placed in a concentration camp in the event of trouble'. Peter Irons, *op cit*, 7.

> The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted.... It therefore follows that along the vital Pacific Coast over 112,000 potential enemies of Japanese extraction are at large.[436]

This passage is quoted at length since it provides a clear statement of the motive behind the removal of Japanese Americans from the West Coast by the General authorised to implement the policy. Like the WRA arguments before the Courts this view is based upon an assumption of racial characteristics inherent in the Japanese race. It is difficult to establish a rational basis for this opinion. Some factors seem to have been that: Japanese Americans tended to live near strategic sites such as harbours; they had been discriminated against in the past and it was suggested that this might have given rise to some resentment; and the Government of Japan operated a system of nationality which was seen as giving rise to 'dual citizenship', this was used to cast doubt on the loyalty of these individuals.[437] Some of these factors are more valid than others, for example the residence of Japanese Americans near strategic sites, but this hardly justified the wholesale internment of an entire race. Furthermore, Italian and German Americans were treated differently. Here again the words of General DeWitt are instructive. He stated that,

> ...you needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases.

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[436] TenBroek *et al, op cit,* 110.
[437] Prof. Rostow, *op cit,* 521.

> But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area – problems I don't want to have to worry about.[438]

This suggestion that the authorities could ascertain the loyalty of individual German or Italian citizens but would be unable to conduct such individual scrutiny in the case of Japanese Americans can only be described as racial prejudice.

It is important to realise that the threat of Japanese sabotage appears to have been grossly overestimated. The best point of comparison is the period between Pearl Harbor and the introduction of restrictions on the Japanese community. In the period immediately following Pearl Harbor known enemy sympathisers of Japanese and non-Japanese extraction were arrested. There were no reported incidents of sabotage by individuals of Japanese extraction in Hawaii or on the West Coast. By 1946 no resident of Japanese extraction had been convicted of sabotage or espionage.[439] One reason for this may have been that the authorities were capable of neutralising any such threat due to their excellent intelligence. In March 1941, nine months before Pearl Harbor, U.S. agents had seized a list of Japanese agents and sympathisers during a break-in at the Japanese consulate in Los Angeles.[440] As a result the intelligence agencies had broken the Japanese espionage ring before President Roosevelt signed

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[438] *ibid,* 532.
[439] *ibid,* 496/497.
[440] Irons, *op cit*, 22.

Executive Order 9906.[441] Despite this a programme of mass internment was introduced.[442]

Despite being in possession of excellent intelligence regarding the threat posed by Japanese espionage the authorities chose to intern an entire population rather than attempt to identify those who posed an actual risk. Therefore the action was racist and disproportionate. The control exercised over the Italian and German populations, coupled with the absence of an internment mechanism for Japanese Americans in Hawaii, illustrates that mass relocation and internment was not required. If the precedent of *ex parte Milligan* had been applied this outcome could have been avoided. The Civil Liberties Act, 1988 was signed into law on August 10 1988 by President Reagan. The Act acknowledges the injustice of relocation and internment and provides for restitution.[443] The compensation program concluded in 1999 following the payment of $1.6 billion to more than 82,250 persons of Japanese ancestry.[444]

The story of American internment is recounted since it provides an interesting contemporaneous comparative. The American model was racist and illegitimate in its application. Despite this the Courts of the USA were unwilling to interfere with an

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[441] *ibid,* 23.
[442] It seems likely that pubic opinion played a role in this. On February 15 1942, for example, *The Washington Post* declared that, 'the Japanese in California should be under armed guard to the last man and woman right now – and to hell with *habeas corpus* until the danger is over'. *ibid,* 61.
[443] Department of Justice, "Memorandum for Deval Patrick, Asst. Attorney General Civil Rights Division", (May 10, 1994), <http://www.usdoj.gov/olc/14815mem.htm> accessed on 16 August 2004.
[444] Department of Justice "Ten Year program to Compensate Japanese Americans Interned During World War II Closes its Doors", (February 19 1999), <http://www.usdoj.gov/opa/pr/1998/June/276.htm.html> accessed on 16 August 2004.

Executive involved in the prosecution of a war. The lack of judicial activism on behalf of the Irish Supreme Court was similarly accommodating toward the Executive but the result was less objectionable, since the Irish internment model was more tolerable. A further factor in the mind of the Supreme Court must have been the Magazine Fort Raid, which had been seen as a consequence of the decision in *Burke*. It is possible that, in such circumstances, the cooperative approach of the Court can be understood. In order to guarantee its position the Irish Government introduced an emergency piece of legislation, covered by Article 28.3.3°, providing for the internment of Irish citizens,[445] a category that had been excluded from the jurisdiction of the EPA, 1939.[446] It is important to recall that Gavan Duffy J. stated in his judgment that the position in *Burke* would have been different had he been dealing with an emergency provision. The Oireachtas appears to have taken note of this. As emergency legislation, this Act was immune from judicial review under Article 28.3.3°. The Government was now armed with two comprehensive internment powers. The Emergency Powers legislation was also used to provide for trial by Military Tribunal.

4.6 The Military Tribunal

The last chapter detailed the circumstances in which Special Courts could be established. Article 38.3.1° of the Constitution allows for the establishment of Special Criminal Courts 'where it may be determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice...'. The OSA, 1939 provides the legislative framework for this. However, as was noted in Chapter 2,

[445] The Emergency Powers (Amendment) Act, 1940.
[446] The Emergency Powers Act, 1939, s.2(k).

Article 28.3.3° gives the Government broad powers in 'time of war or armed rebellion'. This Article states that, 'nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purposes of securing the public safety and the preservation of the State in time of war or armed rebellion...'. As such, this Article was available to the Government if it wished to extend military rule to the civilian population during such a crisis. If the Government was of the opinion that the ordinary courts and the Special Criminal Court were not sufficient to cope with an emergency they had the authority to establish a further 'emergency' court. This is precisely what the Government did. De Valera explained the Government's position when he stated that the IRA,

> ...will not be allowed to continue their policy of sabotage.... The law will be enforced against them. If the present law is not sufficient, it will be strengthened; and in the last resort, if no other law will suffice, then the government will invoke the ultimate law – the safety of the people.[447]

In the circumstances the OSA, 1939 'was deemed to be inadequate to meet the menace of war in Europe in which the Irish Government was determined to keep Ireland neutral'.[448] As a result, the existence of the Special Criminal Court was augmented by a military tribunal.

It is, at first, difficult to identify the inadequacies of the Special Criminal Court which necessitated such a development. The members of the Court were, at the time, all

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[447] Fanning, "'The Rule of Order': Eamon de Valera & the IRA 1923 – 1940", in O'Carroll & Murphy (eds), *De Valera & His Times,* (Cork: 1983), 170.
[448] Fanning, *op cit,* 169.

Officers of the Defence Forces[449] and when the Military Tribunal was established it consisted of 'senior officers who were already members of the Special Criminal Court...'.[450] Indeed, looking at its membership, it is impossible to differentiate between the Constitution (Special Powers) Tribunal, established under Article 2A of the old Constitution, the Special Criminal Court and the Military Tribunal.[451] The advantage, from a Government standpoint, of the Military Tribunal was that it was not susceptible to Judicial Review. Article 28.3.3° ensured that the Tribunal could act free from Constitutional restraint. Unlike the Special Criminal Court, and earlier models, such as Article 2A,[452] discussed in the preceding chapters, there was no appeal from the decisions of this Tribunal.[453] This Military Tribunal would not be 'hampered and humiliated' by the courts.[454] The establishment of the Tribunal was provided for by the Emergency Powers (Amendment) (No.2) Act, 1940. S.2(5) of the parent act, the Emergency Powers Act, 1939 had expressly prohibited 'the making of provision for the trial by court martial of persons not being subject to military law'. However, the 1940 Act amended this and s.3 stated that 'the Government may by an order under s.2 of the Principle Act make provision for the trial, in summary manner, by commissioned officers of the Defence Forces...'.[455] The Military Court was established by the Emergency Powers (No. 41) Order, 1940.

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[449] Department of an Taoiseach, file S 11387B, "Memoranum for Government – Department of Defence", dated 3 November 1951.
[450] Hogan & Whyte, *op cit,* paragraph 6.5.351.
[451] Department of an Taoiseach, file S 11387B, paragraph 11(4).
[452] It will be recalled that initially there was an attempt to prevent appeal from the Constitution (Special Powers) Tribunal to the ordinary courts. However, in *The State (Hughes) v. Lennon* [1940] IR, 128, 142, the Court reaffirmed that that Tribunal was an inferior court subject to review.
[453] O'Halpin, *op cit,* 202.
[454] Department of an Taoiseach file S 2979, 'Inter-departmental Committee on the Consitution, Note with Special Reference to Article 2A', by Mr. Roche (Justice) signed and dated 16/6/34.
[455] Hogan & Whyte, *op cit,* paragraph 6.5.351.

It is fair to say that the EPA and the Military Court established by it have attracted more than their fair share of comment and criticism. The trial and punishment of offenders provided for were more stringent than the British equivalent upon which it was modelled,[456] and the Court itself has been described as 'curious and sinister';[457] when a brief examination of its operations are conducted it is not entirely difficult to understand why. A striking example can be found in the form of the Emergency Powers Orders (No.'s 41F and 139), 1941 which,

> Made huge inroads on the ordinary laws of evidence; unsigned statements, by persons who were not called to give evidence in Court, were admissible, and the Court, if it considered it "proper that it should not be bound by any rule of evidence, whether statutory or at common law", was not to be bound by any such rule.[458]

These are considerable deviations from the established laws of evidence and give a worrying amount of discretion to a Court staffed entirely by members of the Defence Forces. It is important to consider that the law has long distrusted *accomplice* evidence due to their perceived lack of credibility.[459] These Orders go even further and allow for *anonymous statements* with no requirement that the author of such statements stand over them in court. Two key cases will be used to illustrate the workings of this 'curious and sinister' beast.

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[456] Fanning, *op cit,* 168.
[457] Kelly, *op cit,* 274.
[458] Hogan & Whyte, *op cit,* paragraph 6.5.352.
[459] Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law,* 3rd ed, (Boston: 1940), vol. 17, 2056.

4.7 In re McGrath & Harte[460] & The State (Walsh) v. Lennon[461]

Patrick McGrath must have seemed like a source of unending trouble to Eamon de Valera. His hunger strike and release were commented upon earlier. McGrath was then involved in the murder of two Gardaí and was sentenced, by the Military Court, to death by shooting. The subsequent court case, *In re McGrath & Harte*, was the first case arising from a conviction before the Military Tribunal. Furthermore, it was Gavan Duffy J., of *Burke*, who granted a conditional order against the executions. However, he did so only because of the imminence of execution. He stated that he could not 'in a capital case, without seeing the text of the two vital Orders, make the grave assumptions against the condemned men involved in blindly taking for granted the contents of the two Orders as justifying the departure from the ordinary law'.[462] In *Burke,* Justice Gavan Duffy had displayed a degree of sympathy and a willingness to make unpopular decisions; in *McGrath & Harte*, however, he showed no such leniency. The Court rejected a series of technical arguments. Initially it was argued that the President had signed the first amendment to the Constitution contrary to Article 25. This Article provides that the President shall sign an amendment 'not earlier than the fifth and not later than the seventh day after the date on which the Bill shall have been presented to him'.[463] This argument was rejected as was the contention that the President had an obligation to consult the Council of State.[464] The Court, similarly, dismissed an argument based on the logic that the Emergency Powers (no. 41) Order, 1940 'could not operate in respect of offences alleged to have been committed before

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[460] [1941] IR, 68.
[461] [1942] IR, 112.
[462] [1941] IR, 68, 70.
[463] Bunreacht na hÉireann, Article 25.2.1°.
[464] [1941] IR, 68, 72.

the making of the Order...'.[465] The learned High Court Judge stated categorically, that Article 28 made it 'impossible for this Court to invalidate either the committal order or orders 41 and 41A...'.[466] This position was not surprising since, in *Burke*, he had noted that 'the legal position would be different were I concerned with a war measure... under Article 28...'.[467] When faced with such a situation Gavan Duffy J. was true to his word. McGrath and Harte were shot in Dublin, by firing squad, on 6 September 1940.[468]

The Emergency Powers Orders (No.'s 41F and 139), 1941, detailed above, were also central to the case of *Walsh.* It is the detail which provides the real points of interest in this case. The trial of the accused had begun in the Special Criminal Court when the prosecution entered a *nolle prosequi* against each of the accused.[469] At this point the Government made two Orders, namely Emergency Powers Orders (No.'s 41F and 139), 1941. Following the introduction of these Orders the trial of Walsh *et al* proceeded before the Military Court. As counsel for the prisoners noted, 'the procedure followed meant that if a criminal case in which the State was interested was at trial "the trial might be stopped and the law changed and the accused brought to trial under the altered law..."'.[470] Such a procedure is undoubtedly a cause for concern. Although the case established no new law as to the effect of entering a *nolle prosequi*, it is remarkable in that it was the first case where having entered a *nolle*

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[465] Kelly, *op cit,* 276, see also, Sullivan C.J. [1941] IR, 68, 77.
[466] [1941] IR, 68, 73.
[467] (1940) 74 *ILTR*, 36,45.
[468] Kelly *op cit,* 276 footnote.
[469] [1942] IR, 112, 112.
[470] Kelly, *op cit,* 277 footnote.

prosequi after the case had begun, the Attorney General (AG) then attempted to prosecute the same individuals on the same charge.[471]

The Courts recognised that the Orders in question were 'a radical departure from the recognised rules of procedure...'.[472] However, the Court felt it had no option but to uphold the convictions. The Executive was granted a wide discretion and Gavan Duffy J., who had been so strong-willed in *Burke* meekly stated that,

> ...in time of war or armed rebellion apprehension of judicial intervention may at some delicate moment hamper the legislative or executive authority when Government needs all the possible strength and freedom to steer the ship of State through the crisis, consequently the Constitution has placed in the hands of the Oireachtas, as law-giver, special authority to suspend judicial control over the other organs of government during any emergency...[473]

Given his earlier heroics this judgment may be a disappointment. However, as we have seen, such a position was, in fact, consistent with his approach in *Burke* and *In re McGrath & Harte.*

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[471] "Prosecution on the Same Charge After Entering a Nolle Prosequi, *The State (Walsh) v. Lennon*", (1942) 6 Journal of Criminal Law, 205.
[472] [1942] IR, 112, 118.
[473] *ibid,* 118.

4.8 In Time of War or Armed Rebellion

'Both the High Court and Supreme Court had no difficulty in holding that by virtue of Article 28.3.3° their jurisdiction to interfere with acts of Government or of the military court appointed by the Government under emergency legislation was completely ousted'.[474] Thus, the Government and its Military Court were free from judicial control and there was no possibility of another embarrassing *Burke* case. This unwillingness to interfere with the Executive during a time of war was by no means limited to the Irish judiciary. In *Hirabayashi*[475] the U.S. Courts were asked to consider the legality of a programme of detention of Japanese Americans. The case concerned two counts for which concurrent sentences had been imposed. The first count concerned the legality of forced transportation and detention in a War Relocation Authority camp. The second count concerned a breach of curfew. 'The Court considered the violation of the second count first, upheld the curfew order and the sentenced imposed for violating it. Since the two sentences were concurrent, it said, there was no need to consider the conviction on the first count'.[476] In adopting such an approach the Courts successfully avoided confronting the Executive over the issue of internment without trial of Japanese Americans. It could be argued that although the Irish judiciary was unwilling to interfere it was at least willing to openly consider the issues.

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[474] Kelly, *op cit,* 277.
[475] *Hirabayashi v. United States,* (1943) 320 U.S. 81.
[476] Rostow, "The Japanese American Cases – A Disaster", (1945) 54 Yale L. J., 489, 504. This article provides an in-depth review of the Japanese American cases and the issues surrounding the relocation and internment of Japanese Americans.

Unlike the Special Criminal Court which was bound by the criminal law,[477] the Military Court was free to act as it saw fit. Given this freedom from appeal and its exceptional powers, it is unsurprising that it achieved an impressive conviction rate as the following table illustrates

Table 4.1

Acquittals before the Military Court 1940 -1943[478]

Year	Number of Persons Tried	Number of Persons Found Not Guilty
1940	3	-
1941	4	2
1942	5	1
1943	1	1
Total	13	4

The relatively small numbers involved are noteworthy for two reasons: firstly they ensure that no firm statistical conclusions can be drawn; and secondly, they illustrate that, despite its considerable powers, the Military Court was not being widely utilised. In fact the Military Court sat for last time in 1943.[479] Despite being subject to the minor irritation of judicial review and an appeals mechanism, the Special Criminal Court appears to have been as capable of coping with the emergency as the Military Court. In 1943, for example, 106 people were tried before the Special Criminal Court

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[477] *The State (Walsh) v. Lennon,* [1942] IR, 112, 121.
[478] Dáil Éireann, *Parliamentary Debates,* 11 July 1946, vol. 102, col. 610.
[479] *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998 and Related Matters,* (Dublin: 2002), 58.

with only nine acquittals.[480] The operations of the Special Criminal Court will be discussed in the next section.

4.9 The Special Criminal Court, 1939 – 1946

When the then Minister for Justice, Ruttledge, introduced the Offences Against the State Bill, 1939, he made it clear that the measure was being sought in response to a subversive threat. Speaking in the Dáil he stated,

> ...as to the necessity for the Bill I do not think there is anybody in the House who is not conversant with things which have arisen in the recent past which showed the necessity for dealing with a situation such as we recognise has now arisen.... As Deputies are aware, a proclamation was issued, on 8th December last, by a certain body which purported to hand over what it maintained it held, that is, certain Government functions. It described itself as a Government and it purports, under that proclamation, to hand over to the Irish Republican Army, as they call it, those functions of Government. That is a position which the Government is not going to tolerate....[481]

This lengthy passage is cited since it provides an insight into the role envisaged for the Special Criminal Court. The OAS, 1939 is clearly portrayed as being a response to the threat to national security posed by the IRA proclamation. It is, therefore, reasonable to assume that its provisions would be directed against subversives. Indeed the Minister made it clear that the cases to be dealt with by the Special Criminal Court were

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[480] *ibid,* 609.
[481] Dáil Éireann, *Parliamentary Debates,* 8 February 1939, vol. 74, col. 90.

'offences that relate to armed intimidation and to violent means'.[482] The Court was not, however, directed solely against subversives.

Between 1939 and 1946 the Special Criminal Court handled a range of offences, from Black Marketeering to murder.[483] It is important to recall that the 'jurisdiction of the Special Criminal Court is restricted to the offences in relation to which the government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice...'.[484] In December 1942 the Taoiseach, Minister for Justice and Supplies and the AG,

> ...agreed in principle that grave breaches of the Emergency Powers Orders in Black Market cases or where such cases disclosed a deep seated conspiracy, the proceedings should be taken before the Special Criminal Court. As far as possible all other similar breaches of a less serious kind should be prosecuted in the District Court. The unsuitability of the Circuit Court for this type of case was appreciated.[485]

This raises a number of important points. Firstly, it is clear that following this meeting official policy was that the Special Criminal Court was a suitable venue for trials of a non-subversive nature, although the Dáil was never informed of this important shift in policy. It should be emphasised that the focus is on serious 'Black Market' cases but this is nonetheless a shift from the original position as outlined by Ruttledge. Secondly, the venues identified as suitable for 'Black Market' cases are the Special Criminal

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[482] Dáil Éireann, *Parliamentary Debates,* 2 March 1939, vol. 74, col. 1290.
[483] Kelly, *op cit,* 278.
[484] *The People (DPP) v. Quilligan* [1986] IR 495, 506, *per* Walsh J.
[485] Department of an Taoiseach, file S 13069, Attorney General's Office, Memo to Mr. M Moynihan, dated 22 December, 1942, signed P.P. O'Donoghue.

Court and District Court, the Circuit Court is specifically recognised as being unsuitable; the only explanation for this is a desire to avoid trial by jury.

Black market cases were to form the core of the Courts business. The author identified six cases tried before the Court during the period which were later appealed to the Court of Criminal Appeal.[486] Five of these cases relate to 'Black Market' trading. The offences range from the export of watches without a licence, in *The People (AG) v. Shribman & Samuels,*[487] to the sale and distribution of tea, flour and other commodities in *The People (AG) v. O'Conor & O'Reilly.*[488] In 1946, Minister for Justice, Boland, provided a more detailed account of the offences tried before the Special Criminal Court - these figures are set out below:

Table 4.2

Number of Persons Proceeded Against & Classification of Offences

1939- 23 October 1946[489]

Classification of Offence	No. of Persons	
	Proceeded Against	Convicted
A	42	34
B	158	141
C	42	39
Total	242	214

[486] This review involved an examination of Frewen, *Judgments of the Court of Criminal Appeal 1924 – 1978,* (Dublin: 1983).
[487] [1946] IR 431.
[488] Unreported Judgment 26 July 1943, see also Frewen, *op cit,* 42.
[489] Dáil Éireann, *Parliamentary Debates,* 23 October 1946, vol. 103, Table 1, col.s 163/164.

As the Minister explained, Class A consisted of 'security offences', including 'unlawful possession of a wireless transmitting apparatus, landing or disembarking at a place other than an approved seaport or airport, interference with the military or police, unauthorised possession of military information, etc'. The largest categories, Class B and Class C offences, could be described as 'Black Market' cases. Class B covered the breach of 'various Orders concerned with the maintenance of essential supplies and services...'. Particular reference is made to rationing offences. Class C offences consist of cases involving the unlawful trade of gold, currency, watches and similar items.[490]

Although the Court was established for the purpose of tackling a subversive threat, it soon evolved into a suitable venue for the prosecution of economic offences. To understand this it is important to consider that 'rationing was the essential method of alleviating the worst consequences of scarcity'.[491] In times of crisis the equitable distribution of scarce resources can be an important element in the maintenance of public order. Furthermore, although the files do not explicitily refer to this difficulty, the accepted unsuitability of the Circuit Court, and thereby trial by jury, may have been the result of difficulty in persuading juries to convict in such cases. In 1974 Robinson commented that the possibility that individuals not associated with unlawful organisations could be tried by this extraordinary court was a 'serious allegation, in that it amounts to an erosion of the right to trial by jury...'.[492] Serious and all as the allegation may be, it is clear that it has happened and that the possibility of such trials

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[490] *ibid,* 163.
[491] Murphy, *Ireland in the Twentieth Century,* (Dublin: 1989), 104.
[492] Robinson, *The Special Criminal Court,* (Dublin: 1974), 35.

were contemplated and approved by the Taoiseach, Minister for Justice and Supplies and the AG. As such, although the importance of tea and flour may not be entirely apparent at this remove, it may have been necessary to try such cases before the Special Criminal Court in order to 'secure the effective administration of justice'.[493]

4.10 The Procedures of the Special Criminal Court

A significant factor in the early development of the Special Criminal Court was its departure from the standard rules and the willingness of the ordinary courts to accommodate it. It has already been noted that the ordinary courts offered little resistance to the Military Court. Article 28.3.3° prevented such interference. The Special Criminal Court, on the other hand, was said to be 'bound by the criminal law...'.[494] Notwithstanding this the ordinary courts were very accommodating towards it. Examples of this accommodation include a number of cases where the uncorroborated evidence of an accomplice was admitted. Such evidence was produced in *The People (AG) v. Shribman & Samuels*[495] and in *The People (AG) v. Mazure.*[496] It has been noted that in the past 'judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material particular'.[497] Although juries did have the power to convict on the basis of uncorroborated accomplice evidence there exists a ' very strong, indeed, imperative, rule of practice that the Judge should warn the jury of the

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[493] Later chapters will return to the theme of the Courts use in non-subversive cases. For now it should be noted that this has been a point of controversy over the years and it is interesting that the issue first arose so early in the Courts development.
[494] *The State (Walsh) v. Lennon* [1942] IR 112, 121.
[495] [1946] IR 431.
[496] [1946] IR 448.
[497] Wigmore, *op cit,* 2056.

danger...'.[498] In the Special Criminal Court the Judge, a member of the Defence Forces without legal qualifications, would presumably, warn himself and his colleagues. Despite these difficulties the use of this evidence was sanctioned by the ordinary courts.

The case law displays an even more worrying feature than the fact that convictions were based on the uncorroborated testimony of an accomplice. In the *Mazure* case 'the only witness, Philip Kay, who gave evidence... not only was not corroborated, but was himself *awaiting sentence* for a similar offence to that with which the applicant was charged'.[499] The Court of Criminal Appeal recognised the importance of this extra factor. This feature was said to render 'it *more than usually dangerous* to act on this evidence'.[500] It has been argued that 'an accomplice against whom proceedings are pending must not, as a matter of practice, be called on behalf of the prosecution unless it is made plain that the proceedings will be discontinued'.[501] In *Mazure* the evidence of a convicted person who was awaiting sentence *was* called and despite the dangers of such evidence, which was apparent to the appeal court, the conviction was allowed to stand. The Court of Criminal Appeal stated that, 'it would have been wiser for the Special Criminal Court to have sentenced Kay before he gave his evidence in this case. No authority, however, has been cited to us to support the view that his evidence was inadmissible'.[502] In 2003 the evidence of David Rupert was central to the conviction of Michael McKevitt. Rupert's evidence was controversial because he 'was paid $1.25

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[498] *The People (AG) v. Duffy* [1931] IR 144, 149.
[499] [1946] IR 448, 449.
[500] *ibid.*
[501] Tapper, *Cross & Tapper on Evidence,* 8th ed, (London: 1995), 245.
[502] [1946] IR 448, 449.

million (£773,000) by the FBI'.[503] The issues are largely similar; the concern being that the evidence is unreliable since an incentive has been given. In Rupert's case he had been paid; in *Mazure,* the possibility of a reduced sentence in return for 'good' evidence existed. It is unsettling that such evidence was accepted by the Special Criminal Court and that the ordinary courts were willing to allow the conviction stand.[504]

Other procedural irregularities can also be identified. In *The People (AG) v. Kerins,*[505] the initial transcript to the proceedings provided to the Court of Criminal Appeal was incomplete. The missing sections concerned an address by the prosecution to the Court; this address was the subject of one of the defence grounds for appeal. The situation was later rectified. On the substantive issue of the address the appeal court appears to have been quite obliging. The court held that 'an address, delivered in such circumstances, was addressed to the Court as a tribunal of law…' not a tribunal of fact and as such the address was acceptable.[506] The difficulty here is that the three Judges constitute both the tribunal of fact and the tribunal of law, therefore applying rules designed for trial by jury to such circumstances can at times appear somewhat incongruous.

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[503] Harding, "The Butcher of Omagh Faces Life – Families Hail Real IRA Conviction", *The Daily Telegraph,* Thursday 7 August 2003, 1. This amount corresponds to approximately €1,035,000

[504] In McKevitt's case the payment had already been received which is somewhat preferable to the circumstances in *Mazure*. Further consideration will be given to the McKevitt trial in later chapters. It was merely raised here for the purpose of comparison.

[505] [1945] IR 339, 343/344.

[506] [1945] IR 339, 350.

A series of cases called the military nature of the court into question but to little avail. In *In re MacCurtain* it was pointed out that the Court 'sat in a military barracks and was composed solely of officers of the Defence Forces...'.[507] The argument was rejected. Gavan Duffy J. declared that,

> The fact that provisions is made for the setting up of Military Tribunals in another section of the Constitution... cannot fairly be used to cut down the express power which the Constitution gives to the Oireachtas to create Special Courts and prescribe their constitution by law....[508]

Chief Justice Sullivan went so far as to claim that, despite the similarity in personnel, the Special Criminal Court was 'a tribunal quite distinct from the Military Tribunal...'.[509] A variation on this theme also failed in *Kerins*. Here it was argued that the lack of legal training on the part of the Officers who constituted the Special Criminal Court meant that they might be swayed by the prosecutors address in a way that lawyers would not. The Court of Criminal Appeal was unimpressed. It stated,

> ...we would like to point out that the fact that the Court in this particular case was so composed is an accidental circumstance which cannot govern the matter. Under the Act, a Special Criminal Court may consist entirely of High Court Judges and the same ruling must apply to all Special Criminal Courts, however constituted.[510]

It is difficult to argue with the Court of Appeal in terms of the law. The OAS, 1939 does allow the Special Criminal Court to be constituted entirely of High Court Judges

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[507] [1941] IR 83, 83.
[508] *ibid,* 85/86.
[509] *ibid,* 90.
[510] [1945] IR 339, 350.

and the Constitution did allow the Oireachtas proscribe the make up of the Court. However, the judgment appears naïve in the extreme, to describe the make up of the Court as an accidental circumstance and the failure to acknowledge the realities of the situation are unfortunate.

There are examples of the ordinary courts being more stringent in their approach to the Special Criminal Court. In *The People (AG) v. Kennedy*[511] the Court of Criminal Appeal returned a more favourable verdict. The case involved a relatively technical argument concerning the status of Emergency Powers Orders. The Court held that these Orders did not possess the same authority in law as a statute and, therefore, it was necessary that they be proved in Court. Although copies of the Orders had been produced by the prosecution they had not been formally proved.[512] Furthermore, in asking that his client be acquitted at trial, Kennedy's solicitor had specifically pointed to the fact that the Orders had not been proved.[513] On the basis of this technical objection the conviction was set aside by the Court of Criminal Appeal and the Supreme Court refused to hear an appeal by the AG against the acquittal. There are a number of points of note in the case. Firstly, the appeal court was highly distinguished, consisting, as it did, of Chief Justice Sullivan, the President of the High Court, Maguire P., and Devitt J. Also, it appears that consideration was given to the fact that, although Kennedy was not represented by counsel at trial, his solicitor had raised the objection during the original hearing and, therefore, there had been no unreasonable delay on the

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[511] [1946] IR, 517.
[512] *ibid,* 517.
[513] *ibid,* 519.

part of the defence.[514] Finally, the Court noted that the Documentary Evidence Act, 1925 provided 'two very convenient methods of giving *prima facie* evidence...' in support of the Orders and it was considered regrettable that the prosecution had failed to employ these.[515] The case of *White*[516] concerned an appeal against a conviction for the murder of a Detective Garda. In *In re McGrath & Harte* the accused were sentenced to death by shooting. In *White,* the Court of Criminal Appeal overturned the conviction for murder on the facts, and substituted the lesser offence of manslaughter. A sentence of 12 years penal servitude was imposed. These cases are cited as evidence that the Special Criminal Court was not free from review and that the ordinary courts did, on occasion, overturn its decisions on appeal.[517]

4.11 The Emergency Concluded

Although the 'Emergency' officially continued until 1976[518] the Special Criminal Court sat for the last time, during this phase of its operations, in December 1946.[519] The period 1939 – 1946 was central to the development of the Special Criminal Court and its impact has had a profound effect on the present day institution.[520] It is clear that in

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[514] *ibid,* 519.
[515] *ibid,*521.
[516] *The People (AG) v. White* [1947 IR 247.
[517] It is interesting to note that judgments of the appeal courts in both *Kennedy* and *White* were delivered after the end of WWII. In *Kennedy* the Court of Criminal Appeal delivered its judgment on 21 December 1945 and the Supreme Court heard the case in January 1946. *White* was considered by the Court of Criminal Appeal in January and February of 1947 although the shooting of Detective Garda Mordant, for which White had been convicted, occurred in October 1942.
[518] *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998 and Related Matters,* (Dublin, 2002), 58 footnote.
[519] However, as we shall see in the next chapter, the Court was not in fact disestablished, which was to lead to some confusion. Department of an Taoiseach, file S11387 B, Department of Defence, "Memorandum For The Government. Members and Registrar of the Special Criminal Court", dated 3 November, 1951.
[520] In 1986, for example, the Courts used the precedent of the Black Market cases to justify the trial of an individual not associated with an unlawful organisation by the Special Criminal Court. See *The*

1939 the Court was introduced in response to a subversive threat to the State's sovereignty. However, by 1942 it was accepted policy to utilise the Court in cases unrelated to that threat. Procedurally the Court was wiling to bend the rules of evidence to the point where they were unrecognisable. The obvious incentive to a witness to lie was ignored and convictions were based on the uncorroborated testimony of an accomplice who was, himself, awaiting sentence. In *Shribman* the appeal court argued that 'it was not too much to assume that ... [the Special Criminal Court]... has a correct understanding of the legal position on this troublesome point',[521] and in doing so completely ignored the lack of legal expertise on the bench. Issues concerning the military nature of the Court were similarly dismissed despite the complicated dual function which the Court was asked to perform. The judgments in *Kennedy* and *White* did display an ability to impose some restrictions on the Court but this occurred towards the end of the emergency. Overall it would appear that the ordinary courts interfered as little as possible with the working of the Special Criminal Court.

Given the existence of broad powers of internment and a non-reviewable Military Tribunal where the Government and prosecutors could act in an unfettered manner, it is possibly disappointing the Courts were not more wary of the Special Criminal Court. Nevertheless that view ignores the reality of the situation in Ireland during the emergency. Neutrality was a difficult position to maintain and the Courts willingness to accept internment and military tribunals are to be seen in the context of a precarious international situation and the threat posed by the IRA. Economically the maintenance

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People (DPP) v. Quilligan [1986] IR 495. Further consideration shall be given to these issues in subsequent chapters.

[521] [1946] IR 431, 444.

of supplies during the war was difficult[522] and as such rationing offences were not as trivial as they may now appear. A further factor, which must have influenced the judiciary, were the consequences arising from the *Burke* case. An event such as that, so early in the emergency, would undoubtedly have had the effect of reducing a judiciary's willingness to interfere. The level of public support for neutrality and the public reaction of both *The Irish Times* and the Minister for Justice and Taoiseach to that decision can only have reinforced this. After the brave beginnings of Gavan Duffy J. in *Burke* it seems the Courts took a more muted and restrained view.

It was noted earlier that the Military Court handled a total of 13 cases and did not sit again after 1943. It is possible that the willingness of the ordinary courts to accommodate the Special Criminal Court and allow it carry on its duties relatively free from interference insured that the Government favoured this institution over the 'cruel and sinister' military court. It is pure speculation, but if the ordinary courts had engaged in a more robust examination of the Special Criminal Court they might have driven the Executive to pursue more trials before the Military Court. After all, the Executive was willing to utilise the Special Criminal Court for rationing offences. Such a 'normalisation' of emergency powers may have extended to the Military Court in different circumstances.

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[522] Coogan, *op cit,* 565.

The next chapter will consider the wilderness years of the Special Criminal Court, from 1946 to 1972. This period was largely characterised by inactivity but it still has much to teach about the current Court.

Chapter 5

Whither the Special Criminal Court – 1946 to 1962?

The Special Criminal Court has been employed on three occasions. Firstly, it was extensively utilised during the 'emergency', as was discussed in the last chapter. Most significantly, a Government Proclamation in 1972 created a Special Criminal Court which continues to exist to the present day - naturally this will be discussed in subsequent chapters. The Court also operated for a brief few months in 1961 and 1962. It is unsurprising that the major development of the Court occurred during its lengthier periods of service. However the years 1946 to 1962 betray some interesting features worthy of examination.

This chapter will begin by referring back to the Courts use in Black Market cases, as was discussed earlier. These cases are significant since they display a willingness to employ this exceptional measure in the economic arena. The reluctance of Government to disestablish the Court will be considered in this context. Attention will then be given to the resurgence of the IRA and the border campaign. The introduction of internment as a response to this campaign is noteworthy. The introduction of the Court in 1961 will be discussed. Finally the chapter will attempt to explain the effect that this period of inactivity has had on the development of the Special Criminal Court.

5.1 The Special Criminal Court & Economic Cases

In the previous chapter it was noted that when Minister for Justice, Ruttledge, introduced the Offences Against the State Bill, 1939 in Dáil Éireann he made it clear that the impetus behind the legislation was the subversive threat posed by the IRA.[523] Despite these assurances by December 1942, the Taoiseach, Minister for Justice and Supplies, and the Attorney General (AG), had,

> ...agreed in principle that grave breaches of the Emergency Powers Orders in Black Market cases or where such cases disclosed a deep seated conspiracy, the proceedings should be taken before the Special Criminal Court. As far as possible all other similar breaches of a less serious kind should be prosecuted in the District Court. The unsuitability of the Circuit Court for this type of case was appreciated.[524]

The clear reasoning behind such a decision was to avoid trial by jury; it is for that reason that the Circuit Court was considered unsuitable. A number of examples of the Courts use in Black Market cases were provided in the last chapter and it is not necessary to cover that ground again. It should be recalled that the use of the Court in such cases might be justified by the fact that maintaining the integrity of the rationing system was vital during a time of such scarcity. The Oireachtas had been assured by the Minister that the Court would only try '...offences that relate to armed intimidation and to violent means'.[525] As such it is a point of genuine concern that the right to trial by jury was limited in these cases without this point being referred back

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[523] Dáil Éireann, *Parliamentary Debates,* 8 February 1939, vol. 74, col. 90.
[524] Dept. of an Taoiseach, file S 13069, Attorney General's Office, Memorandum to Mr. M Moynihan, dated 22 December 1942, signed P.P. O'Donoghue.
[525] Dáil Éireann, *Parliamentary Debates,* 2 March 1939, vol. 74, col. 1290.

to the Oireachtas. Such concerns do not appear to have been raised at the time and the Court was to continue to play a role in the field of economics.

In April 1947 the Cabinet was informed that the Minister for Justice and Minister for Industry and Commerce were engaged in consultation concerning the future use of the Offences Against the State Act (OAS), 1939 and the Special Criminal Court. The inclusion of the Minister for Industry and Commerce confirms that the Government now viewed the Court as a suitable location for the prosecution of offences associated with rationing. In fact the Ministers were scrutinizing the possibility of,

> ...preparing legislation enabling offences, such as contraventions of the control and rationing of commodities, to be made scheduled offences for the purposes of Part V of the Offences Against the State Act, 1939, in circumstances and subject to a procedure to be specified, without a declaration that the ordinary courts are inadequate to secure the effective administration of justice....[526]

As a matter of fact, it had been possible, upon a declaration that the ordinary courts were inadequate, to prosecute individuals for breaches of the Emergency Power Orders and this had been the practice since 1942. The memorandum shows that Ministers were seeking to schedule these offences and thereby avoid having to make a declaration in each case. As such not only was the Special Criminal Court viewed as an appropriate location for such trials, the Government was considering a method of easing access to the Court in such instances. Rather than reducing the State's

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[526] Dept. of an Taoiseach, file S 14068, *Extract From Cabinet Minutes, G.C. 4/252, 25.4.1947, item 3,* Pr. Sec. M.I.& C., Finance, Justice advised 26/4/1947.

dependence upon the Special Criminal Court in such situations, the Government was, in effect, formalising the practice.

While the AG recognised the need for swift prosecutions and severe penalties in rationing cases, he nevertheless opposed the use of the Special Criminal Court. The AG pointed out that the 'basis of resort to the Special Criminal Court is that the ordinary courts are inadequate to secure the effective administration of justice...' and as such he suggested that 'the first cases... should be sent to the District Court with a request for a prompt hearing and that they should be prosecuted by Senior Counsel...' who would press for severe sentences. Indeed the AG argued that the 'injustice to the community' caused by such offences should be highlighted in order to ensure these severe penalties. Finally, it was recommended that only if the District Court displayed an unwillingness to respond to the situation should the Special Criminal Court be utilised. The AG was of the opinion that, 'conviction and severe sentences obtained in ordinary courts are less likely to be interfered with on appeal than convictions and sentences by the Special Criminal Court'.[527] This position would appear to be more acceptable than the Scheduling of such offences. After all, as is implicit from the advice of the AG, the option of Scheduling would remain available if the District Courts proved unwilling to impose severe sentences and the method of transferring cases, as had been adopted from 1942 onwards, would still be available if the need arose.

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[527] Dept of an Taoiseach, file S 14068, Department of the Attorney General, Dublin, to Mr. Wiliams, signed Cearbhall O Dalaigh, Ard-Aighne.

The advice of the AG appears to have been influential and by October there appears to have been a consensus that it would be 'undesirable, if not dangerous to avail of... [the OAS, 1939] provisions for dealing with economic offences'.[528] Despite the strength of such opinion a further reference to the legislation appears in November 1947. On this occasion the responsibility for the matter is placed squarely upon the shoulders of the Minister for Industry and Commerce. Reference is, again, made to the AG's view that use of the OAS, 1939 for dealing with economic offences was undesirable. The memorandum suggests that, in light of that advice, the Minister should reconsider the addition of the Control of Fuel Orders and Fuel Price Orders to the Schedule. The memorandum continues,

> ...if, however, the Minister considers that the existing practice in this regard should, nevertheless, be continued, he will no doubt, bring the view of the Attorney General on the matter to the notice of the Government in the next submission being made by him [your Department] to the Government containing a proposal to add contraventions of any such Order to the Schedule to the Act of 1939.[529]

It is clear, from the correspondence, that the Minister for Industry and Commerce was the driving force behind these moves to Schedule such offences. Following the strongly worded advice of the AG it appears that the rest of Government lost its appetite for these developments and the measure was dropped.

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[528] Dept of an Taoiseach, file S 14068, Runai, Roinn an Taoisigh, signed M. O Muinneadhaigh, 6 October 1947.
[529] Dept of an Taoiseach, file S 14068, An Runai, An Roinn Tionscail agus Trachtala, signed M. O Muimhneachain, 8 Deireadh Fomhair (November) 1947.

The Minister for Industry and Commerce's desire to employ the Special Criminal Court in economic cases must be placed in context. Firstly, the Special Criminal Court had been available for such trials during the emergency. Furthermore, thanks to the position of the Taoiseach, the AG and the Minister in 1942 there were controls on the nature of cases sent for trial before the Special Criminal Court. The vast majority of Black Market cases were handled by the District Court. In 1945, for example, the District Court had disposed of some 1,500 prosecutions for breaches of the Emergency Powers Acts, while the Special Criminal Court had dealt with 42.[530] It is arguable that if the Government felt it was necessary to continue to employ the Emergency Powers Orders then it should, also, continue to employ the same trial procedures.

The period after the end of World War II (WWII) was one of economic uncertainty. Although concerns that the mass return of Irish emigrants from Britain would spark social revolution never materialised, largely because 'British post–war reconstruction kept the potentially troublesome Irish emigrants in Britain...',[531] other examples of social unrest were evident. The post-war period saw bitter disputes between the Government and the Trade Union movement. Government refusal to meet the pay demands of national teachers resulted in a strike from March to October of 1946 and June 1947 was marked by a threatened strike at the country's flourmills. De Valera's handling of the flourmill dispute - meeting the leaders and so forth - has been described as flexible.[532] It should be noted, however, that on 16 May 1947 the

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[530] Dept of an Taoiseach, file S 13069, Roinn an Taoisigh, "Special Criminal Court, Trial of Offences against the Emergency Powers Acts", 26/6/46.
[531] Coogan, *De Valera: Long Fellow, Long Shadow,* (London: 1993), 631.
[532] *ibid,* 636.

Government decided 'as a matter of urgency' to amend the Protection of the Community (Special Powers) Act, 1926 in order to provide for 'the prohibition of a strike or lock-out of workers of any class; to prohibit any person from inciting, maintaining or subsidising such strike and to provide that, where a trade union is involved, a financial penalty may be imposed on the trade union funds'.[533] Such measures would have involved substantial interference with the right to assembly and would have greatly disrupted the trade union movement. This provision provides further evidence of the Government's willingness to consider imposing drastic restrictions upon citizens rights due to economic conditions within the State.

It is apparent that the serious economic situation which had necessitated the introduction of Emergency Powers Orders during WWII continued after the end of hostilities. As a result the Government continued to employ such Orders. Significantly, the Court had only ever been used in the most serious economic cases. In the absence of the Special Criminal Court those cases would have to be tried in the District Court since the Circuit Criminal Court had, for reasons outlined earlier, been considered unsuitable for such trials since 1942. Furthermore, de Valera's flexible approach during the flourmill dispute suggests that the Government was not anti-Union and was not engaged in any attempt at 'breaking' the Unions. As such, the Government's willingness to consider the introduction of extreme measures for dealing with strike action must be seen as indicative of the grave economic circumstances prevailing at the time. It is perhaps understandable, therefore, that the Minister for Industry and Commerce appears to have been frustrated by the continued

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[533] Attorney General's Office file 22/47, from Dept. of Industry and Commerce, to The Attorney General, signed (illegible), 17 May 1947.

need for rationing measures accompanied by the gradual erosion of enforcement mechanisms through the removal of the Special Criminal Court.

5.2 Who Should Pay for the Special Criminal Court?[534]

The last section focused on the Government's desire to engage the Special Criminal Court in Black Market cases. It is notable that the Government spent much of 1947 discussing that issue. The significance of this is that the Special Criminal Court did not sit after 1946, as was noted earlier. Since the possibility of employing the Court in economic cases was being considered in 1947 it seems obvious that the Government continued to view the Court as a living institution. It would appear that it was expected that the Court would, in fact, be called into practice again in the near future. Further support for this view can be seen in the fact that the members of the Special Criminal Court continued to receive remuneration. In fact the rates of remuneration to members of the Court were not reviewed until June 1948, a full 18 months after the Court last sat. As such the members of the Court were paid £450 a year from August 1939 to August 1948 and £150 a year after 1 August1948. The registrar of the Court was paid 7/6d a day, reduced in 1948 to 2/6d a day, when Commandant Felly, the Registrar of the Court, retired from the Armed Forces he agreed to continue acting as Registrar and received £100 per annum for his services.[535] These would appear to be substantial levels of payment for a Court which was not, in actual fact, functioning. Astonishingly, the Minister for Justice was of the

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[534] This section is based upon a 1951 memorandum. It was felt that the various points raised merited substantial consideration. A copy of the memorandum has been provided in the Appendix. Dept. of an Taoiseach file S 11387B, Dept. of Defence, 3 November 1951, "Memorandum for the Government, Members and Registrar of the Special Criminal Court".

[535] *ibid,* paragraph 5.

opinion that the members of the Court had been badly treated when their rates of remuneration, which were additional to their army salaries, were reduced.[536] Unsurprisingly the Minister for Finance disagreed.

A second interesting development arose from the Courts continued existence when some of its members retired. On 24 August 1939 the Government appointed the following members to the Special Criminal Court:

Colonel Francis Bennett

Colonel Daniel McKenna

Major John Vincent Joyce

Major Cornelius Whelan

Major Patrick Tuite

Colonel McKenna was later promoted to the rank of Chief of Staff and was, at his own request, removed from the Special Criminal Court. He was replaced by Major Felix Devlin on 29 January 1940.[537] Furthermore, Colonel Bennett was retired from the Forces on 2 September 1949 and his degree of disability was adjudged, for pension purposes, to be 100 *per cent*. Colonel Tuite retired, on the grounds of age in 1950.[538] The important factor was that, initially, the Government assumed that upon retiring an Officer ceased to be a member of the Court, since they were no longer qualified as per s.39(3) of the OAS, 1939.[539] In June 1950, however, the AG stated

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[536] *ibid,* paragraph 10.
[537] *ibid,* paragraph 3.
[538] *ibid,* paragraph 6.
[539] Offences Against the State Act, 1939, s. 39(3) states 'No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of

the opinion that the retired Officers were still members of the Special Criminal Court and, as such, the Minister was obliged to continue to pay them.[540] A debate as to the desirability of retaining the retired members of the Court ensued.[541] Attention was drawn to the fact that Colonel Bennett, who was now deemed a member of the Court, was also considered to have a 100 *per cent* disability. The situation was far from satisfactory.

Three separate views developed. It was already noted that the Minister for Justice was of the opinion that the members' salaries should not have been reduced in 1948. He was also of the opinion that the Court should be retained and he saw no reason why an Officer who retired should be removed from the Court.[542] The Ministry for Finance, naturally, opposed this view. The Minister felt it was undesirable to have non-military personnel as members of the Court, unless they satisfied the other criteria of s.39(3). The Minister expressed a particular objection to the retention of an ex-Officer who was in receipt of a disability pension.[543] The final view was that of the Minister for Defence. The Minister for Defence made an interesting observation,

> ...as all members and the registrar of the Court were officers of the Defence Forces, the expenses of the Court have... been borne on the Vote for defence. If it is decided that the Court, which is really part of the civic judiciary, should have non-military members, the

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the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant'.

[540] Dept. of an Taoiseach file S 11387B, Dept. of Defence, 3, November, 1951, "Memorandum for the Government, Members and Registrar of the Special Criminal Court", paragraph 8.

[541] *ibid,* paragraph 9.

[542] *ibid,* paragraph 12.

[543] *ibid,* paragraph 13.

> Minister for Defence considers that all matters affecting the Court should be taken over by the Department of Justice....[544]

There are a number of points to consider. Firstly, this was the first occasion that the Court, or any Court like it, had been staffed by non-military personnel. Admittedly this was not a cause for celebration, since, it resulted in unqualified individuals staffing such an important institution. Secondly, the view of Defence, namely that the Court was part of the Civic Jurisdiction, is important. Although this argument was advanced in order to transfer the cost of the Court to another Department, it does merit serious examination. After all, the association of the Court and Defence is a result, not only of its personnel, but also of its caseload. The Court was originally envisaged as trying those suspected of committing violent subversive offences. It is understandable that Defence might have a role in such cases. However, from 1942 onwards the Court became involved in economic as well as subversive cases. Indeed, 1947 was spent discussing the possibility of increasing the Courts use in Black Market cases. If the Court was going to be staffed by non-military personnel and trying non-subversive cases then the Minister for Defence could surely argue that Justice and Industry and Commerce were more logical paymasters.

5.3 The 'Normalisation' of the Special Criminal Court

At the risk of overstating a point, the Special Criminal Court was introduced as a means of tackling the subversive threat posed by the IRA. Within three years it was being utilised in economic cases. By 1947 the courts use in Black Market cases was so well established that Government considered a proposal to Schedule economic

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[544] *ibid,* paragraph 14.

offences. Significantly, the original impetus behind introducing the Court was said to have been removed by 1945; the Minister for Justice, Gerald Boland, had announced that the IRA was dead.[545] This can be described as a classic 'normalisation effect'. An emergency measure, introduced to deal with a specific threat is utilised over time against a different group until it becomes normal to use it in this altered fashion. This normalisation thesis is reinforced by the financial debate which arose in 1951. Some of the members of the Court were no longer active members of the Defence Forces and the Court was no longer hearing subversive cases, nor was it contemplated that it should hear subversive cases. Despite these factors, the Government did not disestablish the Court, instead it retained its members. The Department of Defence, rather than calling for the abolition of the Court, simply asserted that this emergency measure was in fact part of the Civic Jurisdiction and should, therefore, be paid for out of the Justice Vote. The impact of this 'normalisation' process will be considered in more depth later. It is interesting that when in 1986 the Supreme Court upheld the use of the OAS, 1939 in cases of a non-subversive character, it referred to the fact that, '...in the years during the late war and the years following it, the Special Criminal Court was frequently engaged in the trial of what were called "black market" cases'.[546] Thus, the Court's use in economic cases set a precedent which still resounds today.

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[545] Bowyer, Bell J. *The Secret Army, the IRA,* (3rd ed) (Dublin: 1989), 235, hereinafter Bell, Bowyer J. (1989).
[546] *The People (DPP) v. Quilligan* [1986] IR 495, *per* Walsh J.

5.4 The Rebirth of the IRA

The 1950's saw the re-emergence of the IRA. The reasons for this rebirth may be outlined briefly. The IRA had been declared dead in 1945, however, hard-line republicanism continued to exist. In 1947 a new party, Clann na Poblachta, secured two out of three seats in bye-elections held on 29 October.[547] The following year, 1948, that same party was to poll well and form part of the First Inter-Party Government.[548] 'Clann na Poblachta... presented itself as a seriously "republican" party, spiced up with a liberal dash of social and economic reform'.[549] The Party was described by the *Irish Times* as representing 'something new, although its declared policy is as old as Sinn Féin, and its economic programme scarcely deserves to be taken seriously'.[550] The founder and leader of the highly successful Clann na Poblachta was Seán MacBride, former Chief of Staff of the IRA, who, in 1937, had accepted the new Constitution and declared that the IRA had no further role.[551] Although MacBride, and Clann, were no longer associated in any way with the IRA they did represent a form of republicanism recognisable to that organisation. 'The initial success of Clann na Poblachta encouraged the remnants of the IRA... to equip themselves with a political arm by re-establishing the link with Sinn Féin – by taking over the moribund organisation'.[552] Thus the success of this Constitutional, yet 'serious' Republican Party, encouraged the IRA to reorganise Sinn Féin. This reorganisation preceded an IRA resurgence.[553] The link is established by Patterson

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[547] MacDermott E., *Clann na Poblachta,* (Cork, 1998), 52.
[548] Clann na Poblachta, gained ten seats and went on to form a coalition Government with Fine Gael, Clann na Talmhan, Labour, National Labour and eleven Independent TDs. MacDermott, E., *Clann na Poblachta,* (Cork, 1998), chapter 5, 64-67.
[549] MacDermott E., *op cit,* 102.
[550] *ibid,* 62.
[551] Patterson, *The Politics of Illusion – A Political History of the IRA,* (London: 1997), 81.
[552] *ibid,* 86.
[553] Murphy, *op cit,* 128.

who comments that, 'for many like... [Thomás]... MacGiolla, enthused and mobilised in 1949-50 and observing the lack of results from the campaign of the constitutional parties, membership of Sinn Féin was a natural progression, as was support for the armed assault on Northern Ireland'.[554] The first step in the rebuilding of the IRA was the reorganisation of Sinn Féin, however when that party failed to deliver a United Ireland it was predictable that further steps would be taken.

A further point in the development of the IRA was to arise from the policies of the newly elected Inter Party Government. It will be recalled that during the 1930's the de Valera Government went about the piecemeal destruction of the Free State Constitution. This approach was based on a policy of removing all elements which Fianna Fáil viewed as repugnant to Republicans. Ultimately this policy led to the replacement of the Free State Constitution by Bunreacht na hÉireann following a plebiscite in 1937. Unfortunately, and much to the frustration of de Valera, the IRA did not accept this new Constitution as legitimate and escalated their activities with a bombing campaign on mainland Britain. After de Valera's reforms of the Free State Constitution, including the External Relations Act, 1936 and even the adoption of the new Constitution in 1937, Ireland was left in a somewhat ambiguous constitutional position vis-à-vis Great Britain and the Commonwealth. This position, or more accurately lack of a position, was derisively referred to as the 'dictionary republic' and was generally felt to be unacceptable.[555] In similar fashion to Fianna Fáil in the 1930's, Fine Gael hoped that 'the adoption of a clearcut constitutional position might

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[554] Patterson, *op cit,* 88/89.
[555] Murphy, *op cit,* 125.

satisfy republicans and "take the gun out of politics"'.[556] Given the earlier rebuff to de Valera this position appears extraordinarily naïve.

Ignoring the lessons of history the Inter Party Government pursued a policy of repealing the External Relations Act, 1936 and declaring a Republic.[557] Shortly after the coming into force of the Republic of Ireland Act, 1948 Seán MacBride, the Minister for External Affairs, signed the Statute of the Council of Europe on behalf of Ireland.[558]

> Despite the enactment of the Republic of Ireland Act, 1948, which severed the last remaining constitutional and political link with Britain, and membership of the Council of Europe, which gave Ireland a voice in European affairs, the lull in IRA activities was merely a prelude to a resurgence of political violence.[559]

Ireland became a Republic when The Republic of Ireland Act, 1948 came into force on Easter Monday, 1949[560]; in response, the British Government guaranteed that 'in no event will Northern Ireland or any part thereof cease to be a part of His Majesty's dominions and of the United Kingdom without the consent of the parliament of

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[556] *ibid,* 125.

[557] In truth to say that the Government pursued a policy may be an overstatement. The Taoiseach, Costello while touring Canada announced that Ireland was to leave the Commonwealth. There is no record of the Cabinet having agreed in advance to that announcement and there is some dispute as to whether or not the Cabinet had, in fact, agreed to it. Furthermore it appears that he felt pressured into the announcement following an article in the *Sunday Independent* stating that the Government was about to repeal the 1936 Act. Some evidence exists to suggest that MacBride was behind the story in the *Sunday Independent*. For a more in depth analysis of the circumstances surrounding the declaration of a Republic see, MacDermott E. *op cit,* chapter 7.

[558] Doolan, *Lawless v Ireland (1957 – 1961): The First Case Before the European Court of Human Rights; An international miscarriage of justice?* (Aldershot: 2001), 2.

[559] *ibid,* 28, 29.

[560] Easter Monday is, of course, a significant day in Irish Republican calendar, associated as it is with the Proclamation of Easter Monday 1916. The choice of this day for the coming into force of the Republic Of Ireland Act, 1949, is further evidence of the Government's desire to portray this development as the natural conclusion of Republican desires.

Northern Ireland'. Finally, far from removing the gun this motivated the IRA to reorganise and ultimately to re-engage in hostilities. Essentially the declaration of a Republic and the resulting British guarantee finalised positions. Clann na Poblachta may have been a constitutional and republican Party within Government but, rather than bringing about a United Ireland, the policy of the Inter Party Government had, in fact, made this less likely. This was, surely, one of the failures of constitutional politics which led to a 'natural progression' from Sinn Féin membership to support for an armed assault on Northern Ireland.[561]

5.5 The Border Campaign

As with Mark Twain, reports of the passing of the IRA had been greatly exaggerated.[562] The organisation, as was noted above, had reorganised Sinn Féin; it had also engaged in a series of cross border raids. On 3 June 1951, for example, a raid was conducted on the Ebrington Territorial Barracks in Derry. A considerable haul of 20 Lee Enfield rifles, 20 Sten guns, two Brens, six BESA machine guns and ammunition was taken. Indeed the raid was so successful that the IRA had to release a statement to the press before the British Army and RUC were even aware of the events.[563] Between 1951 and 1954 the IRA conducted a series of similar raids, mainly focusing on British Army installations in Northern Ireland.[564] Despite these earlier raids the Border Campaign is considered to have begun in 1956. The

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[561] Patterson, *op cit,* 88/89.
[562] Mark Twain *New Journal* 2 June 1897. see Sherrin N. (ed) *The Oxford Dictionary of Humorous Quotataions,* (Oxford, 1995), 89 no. 19.
[563] Bell, Bowyer J. (1989) *op cit,* 250/251.
[564] for a detailed account of these events see Bell, Bowyer J. (1989), *op cit,* 253 to 273.

campaign was to last from 1956 to 1962. It is argued that 'within less than a year of its launch the border campaign had clearly failed... yet it dragged on...'.[565]

The Border Campaign was a source of serious disruption. It has been argued that the campaign did not truly disrupt normal life and as such did not constitue a 'threat to the life of the nation'. Indeed, the Lord Mayor of Dublin, at the time, stated that 'there has been for many years now a complete absence of public disorder, riots, civil commotion or other grave disturbances of the public peace arising out of political issues of any nature'.[566] The significance of such claims will be considered in more detail later; for the present it is important to recognise that not all commentators agree on the extent of the disruption. Put starkly, however, a total of six members of the RUC were murdered and a further 30 members of the RUC and Ulster Special Constabulary were injured in Northern Ireland between 1956 and 1962.[567] Department of Justice files reveal the level of disorder,

> Illegal meetings, parades, drilling and practice with arms, etc., went on frequently throughout 1956 but it was not until November that any serious incident took place involving the use of firearms or explosives in which 26-County activists were involved. Then an attempt was made to blow up the Gough Monument, Phoenix Park, and several British customs huts on the Border were blown up. A month later, (on December 12th)... a series of armed attacks

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[565] Patterson, *op cit*, 89.
[566] Doolan, *op cit,* 38.
[567] Hermon, Sir John, *Holding the Line: An Autobiography* (Dublin: 1997), 45.

on R.U.C. barracks and military posts, etc., in the Six Counties...

[were launched].[568]

The December 12 1956 raids referred to involved 150 men in attacks on ten targets.[569] 1957 saw some 340 incidents in Northern Ireland and was the busiest year of the Border Campaign.[570] The Brookeborough raid on January 1 1957, resulted in the deaths of Seán South and Feargal O'Hanlon who became republican martyrs within a week.[571] In the elections of 1957 Sinn Féin, contesting their first election since 1927, succeeded in winning four Dáil seats, which, in line with party policy, they refused to take.[572] The possibility that attacks would be launched on Northern Ireland from the South had been a source of real concern during the emergency. The reality of such attacks, during the 1950's, caused a great deal of tension between Britain and Ireland. The situation could not be allowed to deteriorate any further.[573]

5.6 The Government Responds to the Border Campaign

Although the IRA and likeminded republicans did not approve of Clann na Poblachta's approach, its continued existence was potentially beneficial. Clann's success had encouraged the IRA to reorganise Sinn Féin and the revitalisation of that party had led to a resurgence in the IRA itself. Furthermore, a sympathetic republican party in government might be worth its weight in (green, white and) gold. 'The

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[568] The words 'This was the work partly of "Saor Uladh", a Six-County body which was acting jointly with a "splinter group" of the I.R.A. from the 26-Counties...' and 'so called "Official I.R.A."' have been struck through in the original file. It is, however, an interesting recognition, both of the cross border cooperation which existed in Republican circles during the campaign, and of the split in the IRA. See Dept. for Justice, file JUS 8/1040 "Dáil Motion for release of Offences-Against-the-State-Prisoners, Notes for Minister's Speech" undated, though it appears to be from late 1957.

[569] Patterson, *op cit,* 91.

[570] Hermon, *op cit,* 37.

[571] Bell, Bowyer J.(1989), *op cit,* 299.

[572] Murphy, John A., *op cit,* 138.

[573] *ibid,* 300.

participation of Clann na Poblachta in "Free State" politics alienated republican sentiment while the presence of republicans in government made firm handling of the IRA difficult'.[574] The influence of Clann is evident from the fact that the Inter Party Government sought to play down the significance of IRA activity for a whole year. The events of 12 December 1956, however, forced the Government to react. On 6 January 1957 the Taoiseach, John A. Costello, promised that action would be taken against the IRA.[575] The Taoiseach stated that groups existed which were willing to defy the authority of the Government and the Dáil, these groups set Irishmen against Irishmen. For Costello, it was the Government's duty to protect the people from the 'evils which followed when men take the law into their own hands'.[576] Any such Government crackdown created a difficulty for Clann na Poblachta, since the association of Clann and republicanism made their position in Government untenable. Such links were not merely ideological. Liam Kelly, a Senator appointed by the Taoiseach at the behest of MacBride, was to lead the raid on the Roslea R.U.C. Barracks.[577] On 29 January 1957, MacBride and his party withdrew their support from the Inter Party Government.[578]

The general election of 1957 is one of the critical events in twentieth century Irish history. Although not directly relevant to this work, it is interesting that Clann na Poblachta suffered during the campaign and were essentially wiped out, losing two of their remaining three seats. Having burst onto the scene in 1946, seen by many as a

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[574] Murphy, *op cit*, 137.
[575] O'Leary, Cornelius, *Irish Elections 1918-1977, Parties, Voters & Proportional Representation,* (Dublin: 1979), 44.
[576] Doolan, *op cit,* 31.
[577] Coogan, *op cit,* 669. The Roslea raid took place on 27 January 1961 see Bell, Bowyer J.(1989), *op cit,* 331.
[578] O'Leary, *op cit*, 44.

possible source of rejuvenation on the Irish political landscape, they were gone within a decade.[579] Sinn Féin, as was noted earlier, secured four seats in their first election since 1927. This success can be attributed to the party's 'commitment to a radical social policy in a period of economic crisis as well as support for the border campaign'.[580] This combination of a radical social policy and republican values had been the cornerstone of the Clann na Poblachta manifesto ten years earlier; Sinn Féin, who had been reorganised following Clann's success, were now imitating that party's overall strategy. A significant difference between the parties was that Sinn Féin Deputies would not take their seats; a radical social policy is all the easier to propose when there is no possibility of having to implement it. O'Leary notes that the IRA campaign had aroused some sympathy with the electorate. As a result, 'both Fianna Fáil and Fine Gael tried to avoid the delicate problem of what policy to adopt in regard to the IRA after the election'.[581] In the end the significant victors were Fianna Fáil who, despite avoiding a definite policy on the Border Campaign, gained a total of 77 seats and an overall majority in Dáil Éireann.[582] The only question remaining was, how would they approach the IRA?

From January 1957 onwards, in an effort to thwart the IRA, attempts were made to prosecute individuals with membership of an unlawful organisation or failing to give an account of their movements. 'Regrettably, the maximum punishment for such offences was two years imprisonment on indictment, or six months in prison if – as often happened – they were treated as summary offences. They had, therefore, little,

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[579] Lee, *Ireland 1912-1985 Politics & Society*, (Cambridge: 1989), 327.
[580] *ibid,* 327.
[581] O'Leary, *op cit,* 44.
[582] Lee, *op cit,* 327.

if any, deterrent effect on committed IRA activists'.[583] On 20 March 1957, when the new Fianna Fáil administration,

> ...came into office there were 53 Offences-Against-the-State-prisoners under sentence in Mountjoy Prison... By the month of July, 1957 103 men had been committed by the District Court to serve terms of imprisonment, ranging from up to six months, for Offences-Against-the-State-activities.... 41 of these men had served their sentences, however, *and were again at large* and almost all were known to be making preparations to resume their activities. Within a month or so the sentences of all but 2 of the 62 men still serving sentences in Mountjoy would have expired.[584]

De Valera's new government, with a strong majority in the Dáil took firm action against the IRA[585] and on 5 July the Government issued a Proclamation bringing the OAS (Amendment) Act, 1940 into force allowing for the internment without trial of individuals.[586] Nearly 200 hundred were rounded up.[587] 'In the postwar years the only difference in the response of the Interparty and the Fianna Fáil governments to IRA provocation was that the latter proved firmer'.[588]

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[583] Harmon, *op cit,* 37.
[584] Dept. for Justice, file JUS 8/1040 "Dáil Motion for release of Offences-Against-the-State-Prisoners, Notes for Minister's Speech" undated.
[585] Murphy, *op cit,* 139.
[586] Dept. for Justice, file JUS 8/1040 "Dáil Motion for release of Offences-Against-the-State-Prisoners, Notes for Minister's Speech" undated.
[587] Patterson, *op cit,* 92.
[588] Bell, Bowyer J., *The Gun in Politics, An Analysis of Irish Political Conflict 1916 – 1986,* (Oxford, 1987), 221, hereinafter Bell, Bowyer J. (1987).

5.7 Internment Without Trial – 1957

The Government of Northern Ireland had introduced internment in January 1957.[589] De Valera's Government employed a similar measure and internment was employed in the Republic from 8 July 1957 to 11 March 1959. In total 206 individuals were interned in the South.[590] The initial internment sweep appears to have been well organised. It is said that 'on Saturday, July 6, Dublin seemed to be teeming with Special Branch men.... That evening the police swooped.... By Sunday morning, sixty-three Republicans had been picked up around the country'.[591] It is highly likely that intelligence gathered since January, when a policy of prosecutions for membership of an unlawful organisation had been employed, assisted the Gardaí at this stage. Overall, the policy of internment was a success. Although 'the Northern campaign was to continue nominally until 1962, the threat of violence had been effectively dealt with in the South by the end of 1957'.[592] If the purpose of internment was to reduce the levels of violence then it clearly had worked. There were 27 and 26 incidents in 1959 and 1960 respectively. These figures are comparable to the month of December 1956 alone, when 25 incidents occurred. In the busiest year of the campaign, 1957, there were 341 episodes.[593] From 1957 onwards the campaign was winding down.

Despite the success of internment in facing down the threat posed by the Border Campaign, questions regarding the policy remain. It is obvious that the Government

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[589] Harmon, *op cit,* 38.
[590] Dept. of an Taoiseach, file S.13785B, "Memorandum for the Government – Return for Dail and Seanad Under Section 9 of the Offences Against the State (Amendment) Act, 1940", 20 Samhain (November) 1959, paragraph 2.
[591] Bell, Bowyer J. (1989), *op cit,* 305.
[592] Murphy, *op cit,* 139.
[593] Bell, Bowyer J.(1989), *op cit,* 329.

had to take firm action against the IRA. However, the decision to introduce internment without trial in July, 1957 is problematic. Essentially, the leap was made from prosecutions before the District Court to internment without any intermediary steps. The decision is all the more remarkable given the alternatives that were available. On 28 July 1957 Gen. Seán MacEoin TD, a former Minister for Defence and Minister for Justice in the Inter Party Governments, made a speech criticising the new policy. He said,

> How long are we going to intern people? Will they repent while in confinement? The Minister for Lands is reported as saying that the Government "will be prepared to fill every jail and barracks in the State" in order to deal with these people. But I want to warn the Minister and the Government, that threats and internments are no solution to the problem.... Offenders should be tried in court and given a chance to defend themselves. Let them know the charge, and, if found guilty, let there be punishment to fit the crime.[594]

General MacEoin was a member of Fine Gael and a committed Pro-Treatyite; he was in no way a supporter of the IRA and its campaign. Therefore, his call for prosecutions is both significant and interesting.

The previous Government's policy of summary prosecutions on the relatively minor charges, such as membership of an unlawful organisation, was incapable of deterring the IRA due to the short sentences which were imposed. A return to any such policy

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[594] General MacEoin, at a public meeting after Mass in Granard and Abbeylara, Co. Longford, reported in *The Longford Leader,* 3 August 1957. see Dept. for Justice, file JUS 8/1040 "Dáil Motion for release of Offences-Against-the-State-Prisoners, Notes for Minister's Speech" undated.

would have been foolish in the extreme. The difficulties associated with this policy were compounded by legislative inadequacies. The majority of serious offences committed during the Border Campaign occurred outside the jurisdiction of the Republic of Ireland, in Northern Ireland, and at the time the law did not provide for the prosecution of a person found in the Republic for an offence committed elsewhere, as such it was not possible to convict individuals for offences which merited lengthier sentences.[595] As such the Circuit Court may have been of little utility. In any case the use of the Circuit Court and trial by jury in subversive cases had been problematic in the past, as was discussed in previous chapters, as such it would have been surprising in the extreme if the Executive had attempted to pursue a policy of trial before the Circuit Court.

The problem of inadequate deterrent would also have reduced the possibility of re-instigating trial before the District Court since that Court is limited in jurisdiction. Furthermore, the Department of Justice was suspicious 'that some members of the District Court judiciary harboured latent support for IRA activists'.[596]

> The single proven incident of such support was by District Justice Michael Lennon when he remarked, after a copy of Iris Oifigiuil was handed to Court showing that Part V of the Offences Against the State Act 1939 had been brought into force, that "this proclamation does not end with God save the King". The Government later requested, and received, the judge's resignation

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[595] Doolan, *op cit,* 37.
[596] *ibid,* 37.

> because his conduct was calculated to bring the law into contempt....[597]

The Department's suspicions contrast starkly with the recommendations of Roche to the Constitution Review Group of 1934.[598] It will be remembered that Roche wanted to grant District Justices and Circuit Court Judges a central role in the declaration of a state of emergency, believing that,

> These Judges and Justices have a strong incentive to shift the burden of dealing with organised crime from their own shoulders, they see at close quarters the inadequacy of ordinary police and court methods in semi-revolutionary periods, they even run definite personal risks, and they are in the main sensible decent men, so that I have some hope that in any real emergency they will not be obstructive.[599]

By 1957, suspicion had shifted from the senior to the more junior ranks of the Judiciary. In light of such suspicions it was highly unlikely that the District Court would be utilised.

It is, therefore, possible to discount the utilisation of the District and Circuit Courts. However, it remains difficult to understand why the Government chose to introduce internment without trial - a severe restriction upon a citizens liberty - rather than employing the Special Criminal Court. This is all the more remarkable given that the members of the Court were still being paid despite having not heard a case since

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[597] *ibid,* 45, fn 18.
[598] see chapter 3.
[599] Dept. of an Taoiseach file S 2979, 'Inter-departmental Committee on the Consitution, Note with Special Reference to Article 2A', by Mr. Roche (Justice) signed and dated 16/6/34.

1946. It is all the more noteworthy since the Government had, ten years previously, discussed its possible use in Black Market cases. Having considered the possibility of using the Court in the economic arena the Government does not appear to have engaged in any discussion about the possibility of utilising it against a substantial subversive threat. The author has been unable to locate any discussion of the Special Criminal Court's use in 1957. It is possible that the Government merely mimicked the policy of the Northern Executive. The introduction of internment there, in January, may have provided a ready model for Dublin. The legislation was in place and all it took was a Proclamation. The Special Criminal Court would not have required any proclamation since technically it had remained permanently in existence from 1939 but it would have required political explanation. It is also possible that the status of the Court may have been viewed with suspicion. The Government had initially presumed that retired members of the Defence Forces were no longer members of the Special Criminal Court. It is possible that the Government was nervous about the legal position of the Court's members but this could have been rectified by simply removing the old members and appointing new ones. That was, in fact, done in 1961 when the Courts vacancies were filled.[600]

A further consideration is that the Government had reason to fear the use of any public trials as a propaganda tool by the IRA. During earlier trials before the District Court defendants had taken the opportunity to express republican views from the dock. Typically, this involved stating the defendant's non-recognition of the Court. Doolan cites such an example from one of Gerard Lawless' trials. Lawless, who was

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[600] Robinson, *The Special Criminal Court,* (Dublin: 1974), 23.

later interned,[601] was arrested with a group of other men. In Court one of those men stated,

> As a soldier of the Irish Republican Army and as leader of these men here I do not wish to have any part in the proceedings of this Court...

the same individual later added,

> ...on behalf of my comrades and myself I wish to state that any arms and ammunition found on us were to be used against the British forces of occupation to bring about the re-unification of our country and no Irishman or woman of any political persuasion had anything to fear from us. We hold that it is legal to possess arms and also to believe it is the duty of every Irishman to bear arms in defence of his country.[602]

It is perhaps understandable that the Government wished to avoid such public pronouncements. For whatever reason, or combination of reasons, the Fianna Fáil administration preferred internment to any trial process.

5.8 Internment Without Trial – a General Comment

At this stage it is appropriate to consider the principled objections which exist toward a policy of internment. That there has been a lengthy debate about the universality of

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[601] Lawless subsequently challenged the internment regime before the European Court of Human Rights. This was, in fact the first case to heard by that Court. The case of *Lawless v. Ireland (no. 3),* (1979) 1 EHRR 1, will be considered later.
[602] Doolan, *op cit,* 30.

human rights is undeniable.[603] Cicero stated that 'true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting.... We cannot be freed from its obligations by senate or people...'.[604] Locke was of the opinion that the Law of Nature imposed an obligation on everyone and that 'no one ought to harm another in his life, health, liberty or possession'.[605] It is not possible to consider the universality of human rights in any detail at present, but if accepted, it is obvious that this theory places a heavy burden on our legal system.[606] Without further explanation it should be apparent that a fundamental component of human rights is the universality of the right to liberty. Support for this proposition can be extrapolated from the work of Hume. Hume insisted '...that for a judgment to be a moral one it must be made from a general, disinterested point of view stemming from a "sentiment common to all mankind"'.[607] On the basis of this theory, for the right to liberty to be universal it must, at the very least, be based on a view widely accepted. In this context it is important to note that a general right to liberty has been enunciated in a series of Bills of Rights.[608] A notable example is the U.S. Declaration of Independence,

> We hold these truths to be *self-evident,* that all men are created equal, that they are endowed by the Creator with certain

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[603] *passim,* Gewirth, *Reason & Morality,* (Chicago: 1978).
[604] Cicero, *De Re Publica,* see Lord Lloyd of Hampstead, *Introduction to Jurisprudence,* (4th ed), (London: Stevens, 1979), 108.
[605] Locke, *Civil Government,* see Lord Lloyd of Hampstead, *op cit,* 114.
[606] For further comment on this issue see, Gewirth, *op cit,* Dworkin, *Taking Rights Seriously,* (London: Duckworth, 1978), and John Rawls, *A Theory of Justice,* (Oxford: 1973) amongst others.
[607] Gewirth, *op cit,* 6.
[608] for example see, Article 6 *African Charter on Human and Peoples' Rights* (1981); Article 9.1, *International Covenant on Civil & Political Rights* (1966); Article 5.1 *European Convention for the Protection of Human Rights and Fundamental Freedom* (1953); Article 2(1) *Basic Law for the Federal Republic of Germany* (1949); Article 40.4.1°, *Bunreacht na hÉireann – The Irish Constitution* (1937), among others.

> unalienable rights, that among these are life, *liberty* and the pursuit of happiness.[609]

The concept is also referred to in the most fundamental rights documents. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states that, 'Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention...'.[610] The ICCPR is of particular importance since it is 'the most comprehensive and well established UN Treaty on civil and political rights...'[611] and it has received considerable international recognition.[612] Note also that Article 5 of the European Convention of Human Rights (ECHR) guarantees liberty and security of the person.[613] These texts are referred to due to their importance and to illustrate the nature of the right to liberty as a human right, with universal effect, which has been widely recognised and accepted.

The ICCPR secures the right to liberty and provides that anyone arrested or detained on a criminal charge must be brought promptly before a judicial authority.[614] These guarantees would appear to prohibit the detention of individuals without trial. Indeed some human rights advocates argue that the right to a fair trial is fundamental and should be guaranteed even in times of emergency.[615] However, a competing view exists which recognises that 'Constitutional states are... obligated to protect

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[609] *The United States Declaration of Independence,* Adopted in Congress July 4 1776.
[610] Article 9.1, *International Covenant on Civil & Political Rights* (1966).
[611] Joseph, Schultz & Castan, *The International Covenant on Civil & Political Rights: Cases, Materials & Commentary,* (Oxford: 2000), 4.
[612] As of 17 August 2004, there were 152 State Parties. See, <http:www.unhchr.ch/html/menu3/b/a_ccpr.htm> accessed 17 August 2004.
[613] 'Everyone has the right to liberty and security of person...' Article 5.1, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* (1953).
[614] Article 9, *International Covenant on Civil & Political Rights* (1966).
[615] see for example Amnesty International, "Israel/Occupied Territories, Administrative Detention: Despair, Uncertainty and Lack of Due process", (April 1997), 3.

themselves and their citizens against political violence, not only because it constitutes a challenge to the current constitutional order, but also because its persistence handicaps the process of reconstruction'.[616] This conflict between the need to uphold human rights and the need for states to protect themselves, and by extension their citizens, during times of national emergency is accommodated through the process of derogation.

The specific derogation clause within the ICCPR is Article 4. It states that,

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.[617]

This clause is quoted at length since it includes a number of interesting provisions. Firstly, it explicitly provides for limitations on the rights protected by the Covenant. However, such limitations may only be imposed during a 'time of public emergency which threatens the life of the nation'; the measures taken must be proportionate to the threat and must not be based on discriminatory grounds. Unfortunately the

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[616] Finn, *Constitutions in Crisis: Political Violence & the Rule of Law,* (Oxford: 1991), 84.
[617] Article 4.1, *International Covenant on Civil & Political Rights,* (1966). It should be noted that Article 4.2 states that 'No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision'. However this does not prohibit derogation from the relevant provisions of Article 9 and 14.

Human Rights Committee (HRC)[618] has not addressed the issue of Article 4 very often[619], however, in one important early decision the HRC did consider the issue of derogation.

In *Landinelli v. Uruguay*[620] the HRC examined the necessary ingredients for a 'public emergency'. The Government of Uruguay attempted to establish the existence of an emergency simply by stating that one existed. The Government cited the existence of a number of 'Institutional Acts'. Crucially 'however, no factual details were given.... The note confined itself to saying that the existence of the emergency situation was "a matter of universal knowledge"...'.[621] Thankfully, the Committee rejected this approach. The HRC stated that it required adequate information to enable itself to make an objective assessment of the emergency.[622] The Committee then considered the issue of proportionality and argued that,

> ...even on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what grounds could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been

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[618] The HRC has a number of distinct functions. Firstly, under Article 40 of the ICCPR it considers and studies national reports submitted by States parties on measures they have adopted to implement the rights guaranteed by the Covenant. Secondly, under Articles 41 and 42 an inter-State complaints procedure exists and finally, under the Optional Protocol the HRC may receive communications from persons under the jurisdiction of a State Party whose Covenant rights have been violated. For a detailed analysis of the role and function of the Human Rights Committee see, McGolderick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil & Political Rights,* (Oxford: 1991) chapter 2, pp 47 – 51.

[619] Joseph, Schultz & Castan, *op cit,* 624.

[620] Communication No. 34/1978, 8 April 1981.

[621] *ibid*, paragraph 8.2.

[622] *ibid,* paragraph 8.3.

candidates in the elections of 1966 and 1971, of any political right for a period for as long as 15 years.[623]

Despite the provisions of Article 4 the actions of the Government of Uruguay were considered to be inconsistent with the ICCPR. As a result of *Landinelli*, it seems clear that for a derogation to be valid a verifiable emergency must exist and the measures adopted must be proportionate.

The jurisprudence of the ICCPR is, obviously, not applicable to the situation in 1957, however, it is instructive. Essentially, even operating within the Human Rights 'norms' established under that document, internment without trial is acceptable in certain circumstances. However all actions must be proportionate and it is at this point that the question of Ireland's use of internment arises. Given the grave restriction on the right to liberty which internment involves and given the existence of an alternative trial process it would have been preferable to employ the Special Criminal Court than internment. The justifiability of the internment procedures was challenged in the celebrated *Lawless* case.

5.9 Lawless v. Ireland[624]

The ECHR was signed by the Minister for External Affairs, Seán MacBride, on behalf of Ireland on 4 November 1950.[625] Ireland's detention policy was subsequently

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[623] *ibid,* paragraph 8.4.
[624] *Lawless v. Ireland (no. 3),* (1979) 1 EHRR 1. The case was decided on July 1 1961 but was not reported until 1979.
[625] Doolan, *op cit,* 6. This text has provided interesting background material regarding the ECHR and in particular Ireland's position in relation to it. It has also proved to be an invaluable source of information regarding the *Lawless* case itself.

challenged by Gearóid Ó'Láighléis[626] on the basis that the internment procedures violated the ECHR. In an interesting twist Ó'Láighléis was represented by Seán MacBride; of course MacBride had represented many republican claimants throughout his career and as such his representation of Ó'Láighléis is not that remarkable. In summary, Ó'Láighléis was a member of the Irish army reserve, Forsa Cosanta Aitúil (FCA), who became involved in the IRA; he later joined the more violent IRA splinter group.[627] He appeared before the Courts on firearms charges and by 11 December 1956 he had been discharged from the Defence Forces.[628] On 11 July 1957, as he was about to board a boat to Britain, he was arrested on suspicion of being a member of an illegal organisation, under s.30 of the OAS, 1939.[629] The following day, the Minister for Justice issued a warrant under s.4 of the OAS (Amendment) Act, 1940, providing for the detention without trial of Gerard Richard Lawless.[630] These events set in motion a process which would transform Gearóid Ó'Láighléis from an activist in an IRA splinter group into Gerard Lawless, the first claimant to have a case heard before the European Court of Human Rights.

Although Ó'Láighléis always intended to seek redress under the ECHR[631] he began the challenge against his detention through the traditional process of an application for *habeas corpus* before the High Court. Such action was necessary for two reasons;

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[626] Ó'Láighléis was also known by the English language version of his name, that is, Gerard Lawless. It is the Irish version which was used in the domestic courts while Lawless was employed before the European Court of Human Rights. It might be thought that the translation to 'Lawless' was an auspicious beginning to the case.
[627] Doolan, *op cit,* 29.
[628] *ibid,* 30/31.
[629] *ibid,* 47. As Doolan comments, 'those involved in the saga must... have occasionally wished that the police on that fateful summer's day had literally missed the boat'.
[630] *ibid,* 49.
[631] Doolan, *op cit,* 49.

firstly, before any application may be made to the European Court of Human Rights all domestic remedies must be exhausted;[632] and secondly, the Court did not yet exist.

> The establishment of the Court, and the first election of members, could not take place until the jurisdiction of the Court had been accepted by eight States.... At the time Lawless submitted his claim, in November 1957, the jurisdiction of the Court had been recognised by only five States. Subsequently, this condition was fulfilled on 3 September 1958, which enabled the first election to take place on 21 January 1959.... The Court had to wait almost a year for a case, that of *Lawless v. Ireland,* to be referred to it.[633]

The attitude of the domestic courts was relatively straight forward and formalistic; Article 29.6 of the Constitution stipulated that 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.[634] Since the Convention had not, in fact, been incorporated by the Oireachtas its provisions could not overrule domestic legislation. As Davitt P. noted, 'if this principle were not to be observed it would follow that the Executive Government by means of an international agreement might, in certain circumstances, be able to exercise powers of legislation contrary to the letter and the spirit of the Constitution'.[635] Therefore, the issue was judged solely on the basis of the Irish Constitution and all arguments based upon the Convention were discounted. The OAS (Amendment) Act 1940 had been referred to the Supreme Court under Article 26. After that case had been heard Article 26 was amended to ensure that any

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[632] *ibid*, 49.
[633] Doolan, *op cit*, 9/10.
[634] Bunreacht na hÉireann, Article 29.6.
[635] *In re Ó'Láighléis* [1960] IR, 93, XXX.

legislation referred to the Supreme Court which is deemed to be Constitutional is immune from further Constitutional challenge. This amendment was introduced to ensure Constitutional certainty. Although such an interpretation attributes a level of retrospective effect to the amendment, it is widely accepted that the OAS (Amendment) Act, 1940 is immune from challenge.[636] The internment procedure was upheld by the domestic courts.

The ECHR has a derogation clause which is broadly similar to that of the ICCPR.[637] The Convention states that, 'in time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation...'.[638] Importantly, the position of the Irish Government vis-à-vis the Council of Europe at this point appears somewhat confused. *The Kerryman* lamented that the British Government had derogated from the Convention and had thereby shed its responsibilities under the ECHR. The paper's main concern, however, was that while,

> ...in normal circumstances, such British action might be expected to call forth bitter protests from our own representatives... the fact that the internment powers invoked in the territory of the Republic

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[636] Doolan, *op cit,* 22. see chapter 3.

[637] The origins of this clause are interesting. As Jaime Oraá notes, 'The first multinational treaty dealing with a wide range of human rights was the European Convention, which was signed in Rome in 1950 and came into force in 1953, while the ICCPR was signed in 1966 and entered into force ten years later. However, the drafting of the Covenant had started much earlier, in fact in 1947. At that time, the UK forwarded to the Drafting Committee (1st session) a proposal for an International Bill of Rights which already contained a derogation clause.... The European Convention then borrowed the derogation clause form the draft Covenant;...". Oraá, *Human Rights in States of Emergency in International law,* (Oxford: 1992), 7/8.

[638] Article 15.1, *European Convention for the Protection of Human Rights & Fundamental Freedoms,* (1953).

> clearly contravene the Human Rights Convention and that nobody is quite sure how we have contrived to "regularise" that situation with the Council of Europe, introduces a factor of very great complexity.[639]

It is difficult to ascertain whether the journalist was upset because the Irish Government had employed such measures; because the Government may have failed to derogate correctly from the ECHR; or because the situation prevented Irish representatives calling forth bitter protests upon Britain. What is clear, however, is that while Britain had fulfilled its international obligations, Ireland remained in a position of uncertainty.

In 1961 the European Court of Human Rights considered the circumstances of Ó'Láighléis and the Republic of Ireland's policy of internment. This was, as was noted earlier, the first case to be heard by the new European Court. The Court referred to the 'renewed outbreaks of IRA activity... in 1954 and 1956'.[640] Having outlined the situation the judgment concluded,

> In the general context of Article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional situation which affects the whole population and

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[639] *The Kerryman,* 19 October 1957, see Dept. for Justice file JUS 8/1040.
[640] *Lawless v. Ireland (no. 3),* (1979) 1 EHRR, 1, 18.

> constitutes a threat to the organised life of the community of which the State is composed.[641]

Therefore, in the specific context of IRA violence the majority of the Court held that the Republic of Ireland was entitled to derogate and employ a policy of internment. The European Court did not consider the alternatives available to the Irish parliament, namely the pre-existing and paid for Special Criminal Court.

5.10 A Belated Entrance for the Special Criminal Court

It was noted earlier that although 'the Northern campaign was to continue nominally until 1962 the threat of violence had been effectively dealt with in the South by the end of 1957'.[642] Internment without trial continued until 1959 and at that stage it was considered desirable to discontinue that policy. It is somewhat surprising, therefore, that 1961 saw the reintroduction, or reactivation, of the Special Criminal Court. The impetus behind the reintroduction of the Court would appear to be a desire to finally end the campaign. Bell argues that the Court was reintroduced because it appeared that the campaign was going to drag on into 1961.[643] The Roslea Barracks raid of 27 January 1961 certainly put the campaign back on the front pages[644] and the Government may have decided to act swiftly rather than waiting as it had done in the past. The successor to de Valera, as leader of Fiann Fáil and Taoiseach, Séan Lemass, was of the view that Northern Unionists needed to be attracted and not coerced into a United Ireland and this position influenced many of his policies.[645] This position

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[641] *ibid,* 31.
[642] Murphy, *op cit,* 139.
[643] Bell, Bowyer J. (1987), *op cit,* 221.
[644] Bell, Bowyer J. (1989), *op cit,* 331.
[645] Lee (ed), "Séan Lemass" in *Ireland 1945 –70,* (Dublin: 1979), 22.

surely encouraged him to crack down on the IRA before they got out of hand. Furthermore, it was Lemass as Minister for Supplies who had been so keen on utilising the Special Criminal Court in Black Market cases, he was therefore familiar with the body. On a more basic level this new stage in the Border Campaign did not result in a ground swell of support for Sinn Féin, in the general election of October, 1961 that party had a dismal showing and gained a mere three *per cent* of the vote.[646] Indeed when the Taoiseach referred to the reintroduction of the Court in Dáil Éireann he referred to the 'emphatic repudiation of those who supported' the campaign of violence across the border in the general election.[647]

For whatever reason, 'on November 23 the Irish Government reintroduced the Military Tribunals, so effective in the 1940's.... The Cabinet simply announced that the Tribunals were again functioning – in some cases with the same aged personnel'.[648] The 'Military Tribunals' referred to was, in fact, the Special Criminal Court; the use of military personnel was entirely consistent with that body's previous engagement; and the aged personnel had, of course, been retained for some time. Robinson is more accurate in noting that on 22 November three vacancies in the membership of the Court were filled and the Court sat again on 27 November 1961.[649] The simplicity of reintroducing the Court in 1961 once again begs the question, why was internment preferred in 1957? The statements of the Taoiseach only add to the confusion. The Taoiseach stated,

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[646] Bell, Bowyer, J. (1989), *op cit,* 332.
[647] Dáil Éireann, *Parliamentary Debates,* 23 November 1961, vol. 192, col. 838.
[648] Bell, Bowyer, J. (1989), *op cit,* 333.
[649] Robinson, *op cit,* 23.

> ...the bringing of offenders before the District Court does not permit of sentences being imposed appropriate to the gravity of the offences and may have occasioned some misunderstanding amongst those concerned with them as to the seriousness with which the Government view the position and their determination to deal with it.[650]

Consideration could be given to the fact that no mention of prosecution on indictment before a Jury in the Circuit Court was made. This was of course a possibility, but one assumes that the nature of the offences made that unsafe. What is fascinating is that the reasoning for introducing internment in 1957 was almost exactly the same as the argument advanced by the Taoiseach when announcing the reactivation of the Special Criminal Court. It is also interesting that, in almost a repetition of the words used in 1939, Lemass assured the Dáil that 'the only cases which will be brought before the Court will be those arising from this armed conspiracy of violence'.[651]

During its previous incarnation the Special Criminal Court was extensively utilised in cases of a non-subversive nature, that did not occur in 1961. The Court's role in dealing with subversive cases is revealing. On 15 February 1961, the then Minister for Justice, C.J. Haughey T.D., revealed the number of convictions under the OAS, 1939, the Firearms Act, 1925 and the Explosive Substances Act, 1883, 'where the evidence suggests these offences were connected with the activities of illegal organistions'.[652] The Minister's response was in tabular form and included the name

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[650] Dáil Éireann, *Parliamentary Debates,* 23 November 1961, vol. 192, col. 839.
[651] *ibid,* col 839.
[652] Dáil Éireann, *Parliamentary Debates,* 15 February 1962, vol. 108, col. 376.

of the individual, the offence and the sentence. Part I displays the convictions before the District Court. Unsurprisingly these individuals attracted the relatively light sentence of six months, overall sentences ranging from six to 12 months when account is taken of consecutive sentences. As Sir John Hermon noted, such sentences would not act as a deterrent.[653] Part II of the Ministers statement provides the same details for convictions before the Special Criminal Court. It is interesting to note that the most severe sentence imposed by the Special Criminal Court was five years. The preponderance of cases before both courts concern a 'failure to account for movements' and possession of ammunition.[654] It is interesting to note that the Special Criminal Court was imposing sentences of a similar severity to the District Court in most cases. It was, however, capable of imposing more severe penalties and that may have been its strength.

It might be supposed that the relatively light sentences imposed by both the District Court and the Special Criminal Court would have been insufficient to alter IRA policy. During its brief period in operation, between 1961 and 1962, 30 people were convicted by the Special Criminal Court, 'under an amnesty in 1962, 24 of these convicted persons were released'.[655] The truth is that the IRA campaign had been in steady decline since the introduction of internment, North and South, in 1957. The Special Criminal Court was the straw that broke the camel's back. On February 3... [1962]... the Army Council met again and formally and unanimously voted to end the campaign'.[656] The Border Campaign had been defeated. On 2 October 1962, the

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[653] Harmon, *op cit,* 37.
[654] Dáil Éireann, *Parliamentary Debates,* 15 February 1962, vol. 108, col. 377/380.
[655] Robinson, *op cit*, 24.
[656] Bell, Bowyer J., *op cit*, 334.

Special Criminal Court, which was first established in 1939, was finally disestablished by a Government Proclamation under Part V of the OAS, 1939.[657]

5.11 The Paradox of the Special Criminal Court - 1946 – 1962

The period of the emergency was one of great development for the new Constitution generally, and the Special Criminal Court in particular. Both institutions faced legal challenge; both had to operate in difficult circumstances. The Special Criminal Court became a venue not just for the IRA but for other offences which threatened the social fabric of the nation, such as Black Market cases. The period 1946 to 1962 at first appears to be a mere footnote in the Court's development. It did not sit for 15 years and was passed over in favour of internment. When it finally was introduced, toward the tail end of the Border Campaign, it presided over a mere 30 convictions, many of these being for the offence of 'refusing to account for movements' attracting a sentence of four to six months. However, the period 1946 to 1962 does, in fact, reveal much about the Court. Its use in economic cases was normalised, and this situation has many lessons for the Court today as it moves into the field of organised crime.[658] The Court had non-military personnel for a period - admittedly the Court did not sit during that period and it is true that the members were former members of the Defence Forces - but it is till worthy of note that this was the first Court of its kind in Ireland to be staffed by individuals who were not acting servants of the Executive. Perhaps the single biggest question arising from the period is why was internment introduced in 1957 when the Special Criminal Court was available? By reactivating the Court in 1961 with guarantees that it would only be used against violent

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[657] Robinson, *op cit,* 23.
[658] these issues will be discussed in subsequent chapters.

subversives, the Lemass Government ensured that the Court was re-associated with its 'core business'. That decision took the Court back to its roots as an institution for the prosecution of terrorists. Its use in 1961 paved the way for its introduction in 1972 in response to 'the Troubles'. That final, and most significant, period will be scrutinised in the next chapter.

Chapter 6

1969 - 1972 Countdown to the Special Criminal Court

There are a number of contenders in line for the title of 'most significant date in the history of the Special Criminal Court': the introduction of Article 2A, in 1931 provided the basis for the Court; the Offences Against the State (OAS) Act, 1939, the Constitution of 1937 or even the Constitution Review Group of 1934 all played a significant role in the development of the Court. However, 26 May 1972 has to be considered the odds-on favourite for the honour. On that day the Government issued a proclamation activating Part V of the OAS, 1939 which brought the Special Criminal Court back into existence.[659] That action heralded the longest period of employment in the Court's history; the Court established in 1972 continues to function to the present day. As a result no examination of the history of the Court would be complete without examining the factors which gave rise to the establishment of the Special Criminal Court. To that end, this chapter will examine the period of political turmoil which existed in and around 1972. The justifications provided for the introduction of the Court in 1972 should be borne in mind when consideration is given to the Court's development since then in later chapters.

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[659] Department of an Taoiseach, file 2003/16/93, Statement Issued by the Government Information Bureau, Issued as 4.55pm P O'S 26/5/72.

6.1 The Troubles[660]

It is difficult to establish the exact date on which the Northern Ireland 'Troubles' began.[661] Indeed some might even argue as to which century saw the beginning of the Irish 'troubles'.[662] But what is clear is that by 1969 the situation had deteriorated dramatically. In 1967 the Northern Ireland Civil Rights Association (NICRA) was formed. Within two years riots involving members of the NICRA and the police were frequent. Indeed rioting was so prevalent that on 6 May 1969 the Prime Minister of Northern Ireland 'announced an amnesty that covered most of the offences arising from the demonstrations, including charges against the RUC'.[663] On 15 August 1969 the first member of the IRA had died in the Troubles and by 6 February 1971 the first British soldier had been killed by the IRA.[664] Eventually over 3,000 people were to die as a result of political violence in Northern Ireland.[665] Events in Northern Ireland were to have profound impact upon the politics of the Irish Republic. Jack Lynch was elected Taoiseach on 6 November 1966[666] and his premiership was to be dogged by controversy associated with the Troubles. Ultimately the Lynch government would respond to the continued threat of violence from Northern Ireland by introducing the Special Criminal Court, but a number of alternative responses and a number of significant events occurred between 1969 and 1972.

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[660] It is not possible or desirable to conduct a review of the history of the Troubles here. Instead a number of key responses to the increasing violence in, and associated with, Northern Ireland will be examined. For a history of the Troubles see Bell, *The Irish Troubles: A Generation of Violence, 1967 – 1992,* (Dublin: 1993), Murphy, *Ireland in the Twentieth Century,* (Dublin: 1989) and others.

[661] Bloomfield, *We Will Remember, Report of the Northern Ireland Victims Commissioner,* (London: 1998) paragraph 2.1.

[662] In this context, for example, three dates from the 1600's are of great importance to Northern Irish Unionists. '1641 represents a time of betrayal and death, 1689 marks a famous siege, while 1690 is the date of a great military victory'. Brian Walker, *Dancing to History's Tune: History Myth & Politics in Northern Ireland,* (Belfast: 1996), 1.

[663] Bell, *The Irish Troubles: A Generation of Violence, 1967 – 1992,* (Dublin: 1993), 92.

[664] Bew & Gillespie, *op cit.*

[665] Bew & Gillespie *Northern Ireland: A Chronology of the Troubles 1968 – 1993,* (Dublin: 1993), v.

[666] Murphy, *op cit*, 151.

6.2 The Arms Trial

The incidents surrounding the 'arms crisis' are complicated and confused, involving claim and counter claim. What actually occurred is not entirely relevant to this body of work and has provided ample material for many books, pamphlets and discussions. For the purposes of this chapter a few salient facts are important. On 28 May 1970, two Ministers, '...Haughey and Blaney were arrested and charged with conspiracy to import arms and ammunition.'[667] This was a highly sensitive issue since it appeared that Ministers of the Irish government were involved in the illegal importation of arms to Northern Ireland. If nothing else had been alleged these charges would have been, in and of themselves, damaging to the Lynch government. To make matters worse Haughey always insisted '...that he acted only on the authority of the cabinet and of Lynch himself...'.[668] A 1971 Department of Finance Memorandum refers to the allegation that certain moneys paid, through the Irish Red Cross, to the Belfast Fund for the Relief of Distress was used in whole or in part to finance the purchase of arms.[669] Many believed that the crisis could not now be seen as the rogue actions of two or three Ministers but rather as official government policy. During the trial of the ex-Ministers it was alleged that the Fianna Fáil government had engaged in, '...some training for Six County people in the techniques of defensive street fighting'.[670] It is important to realise that the Ministers were acquitted on the charges. However, allegations that Ministers were involved in such activities were grave enough; the suggestion that those activities may have been Government sanctioned were frankly explosive. In relation to the re-establishment of the court the important factors are the

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[667] Lee, *Ireland 1912-1985 Politics & Society,* (Cambridge: 1989), 459.
[668] *ibid,* 460.
[669] Department of an Taoiseach 2003/26/1, Department of Finance 6 January 1971 Memorandum concerning "Northern Ireland Relief Expenditure (Grant-in-Aid) 1969/70".
[670] Boland, *The Rise & Decline of Fianna Fáil,* (Dublin: 1982), 31.

lack of focus in government policy at the time and the fact that these events confirm the acuteness of the predicament facing the State.

6.3 Invasion, the U.N. & Internationalisation

It may be surprising at this distance, but the Lynch Government appears to have considered the possibility of an armed response to the Troubles, at least in a 'Doomsday' scenario. Strangely, former Fianna Fáil Minister Gerald Boland, who had used internment and other measures against the IRA during the emergency, publicly stated in 1970 that, 'in the existing circumstances the Government should be training commando type groups to operate in support of the besieged nationalist community in the Six Counties.'[671] These comments are referred to since it might be expected that the introduction of internment or trial by Special Criminal Court would have been viewed as a more acceptable alternative to the quasi-invasion of Northern Ireland, but at the time a respected former Minister, who had once claimed to have defeated the IRA now felt it was appropriate to train commandos to operate in the North. In the interests of clarity it should be clear that Kevin Boland, a Government Minister at the time has stated categorically that 'at no time... was there the slightest suggestion of intervention by the army. The suggestion was that it was the merest prudence to put ourselves in a state of preparedness'.[672] This appears to put the point beyond any doubt, the Government was not planning an invasion but it felt it should be ready in case the circumstances dictated that such action was necessary. This begs the question: in what circumstances did the Lynch Government consider it would be

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[671] Boland, (1982) *op cit,* 31.
[672] Boland, *We Won't Stand (Idly) By,* (Dublin: 1973), 50.

necessary to invade Northern Ireland, thereby bringing itself into conflict with Britain? Boland explains that the Government,

> ...appreciated the fact that, while effective protection against the attackers[673] could be given in Derry, Newry and other Border towns, the people in Belfast and in isolated areas could be wiped out.... There was then completely unanimous realisation that there could be no suggestion of any crossing of the Border unless the situation was already so bad that no action of ours could make it worse – in other words unless we had Gibbon's[674] 'Doomsday Situation'.[675]

Kevin Boland's recollection is significant since, as an acting member of Government, he is capable of giving an insight into the thinking of the time. It is important to realise that Kevin Boland resigned from Jack Lynch's Government during the 'Arms Crisis' and his loyalty to the Government of the time is more than questionable; however the above comments are still of some value. The Government was concerned that a 'Doomsday' situation could arise and was preparing for it; this was no mere hypothetical worst case scenario, but rather it was an event worth considering and planning for. It is clear that the Government of the time felt that it was possible for the situation to deteriorate so much that invasion would be a proportionate response; it is difficult to imagine how bad things would have to be, but the Government was clearly capable of imagining such an outcome. Kevin Boland even states that consideration was given to recalling Irish Troops who were serving with

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[673] this is presumably a reference to Protestant, Loyalist militia such as the UDA.
[674] the then Minister for Defence.
[675] Boland, (1973) *op cit,* 50.

the United Nations in Cyprus.[676] The mere suggestion of such action gives an indication of the seriousness of the situation.

Along with considering possible responses to the Doomsday situation the Government also considered a number of possible methods of internationalising the conflict, that is placing the Northern Ireland Troubles on the global agenda. A Department of an Taoiseach memorandum from 1972 outlines the 'possibility of invoking the Geneva Convention (sic) against Britain for violence and torture of detainees'.[677] The memorandum continues that Mr. Seán Donlon of the Department for Foreign Affairs, stated that the Department had 'considered using the Convention but a difficulty arises in the lack of any convenient court or forum in which to prosecute the matter whereas the European Court of Human Rights is being availed of and is therefore more attractive'.[678] It is significant that, in its effort to bring the issue of Northern Ireland to the world stage, the Government was willing to classify the Northern Irish Troubles as being an 'armed conflict not of an international character' as per Common Article 3 of the Geneva Conventions. Furthermore, they were willing to utilise the fledgling European Court for Human Rights. This is part of a clear policy of internationalisation.

A further element of this policy of internationalisation can be seen in the government response to the negotiations surrounding the European Suppression of Terrorism.

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[676] *ibid,* 49/50.
[677] Department of an Taoiseach, file 2003/16/476, memorandum to Rúnaí Cúnta, dated 15 Márta (March) 1972.
[678] *ibid.* The reference here is to the Irish Government's attempts to oppose the British Government policy of internment in Northern Ireland. The policy of internment will be outlined later, for the time being the important factor is the willingness of the Irish Government to seek out a suitable international venue in which to oppose the British policy.

These negotiations arose following the adoption of a communiqué by the Foreign Ministers of the actual and acceding members of the European Economic Community. The communiqué called on all in attendance to act in concert in the fight against terrorism.[679] While most countries were said to view terrorism in light of events arising from the Arab-Israeli conflict, the Government was concerned that Britain 'may regard it as an opportunity to raise IRA activities'.[680] The document identifies a difficulty in promoting cooperation in tackling political violence, it states that 'as regards "political" offences and particularly as regards co-operation with the police in the North in the prosecution of such offences, it has been the policy that the giving of assistance would require special consideration and would be refused as a rule'.[681] This unwillingness to cooperate is extremely interesting and will be considered later. The document continues that,

> If the British seek to broaden the subject by raising the North and IRA activities... the Irish representative could say that the British have always argued against bringing the issue into the international arena. We, however, could allow the matter to be raised and then call for examination of the causes and of the methods adopted to deal with it. It would seem reasonable to suggest that if one seeks to condemn acts as terroristic, one must also seek to remove unjust conditions which give rise to such acts.[682]

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[679] Department of an Taoiseach 2003/16/580, "European Control of Terrorism" 18 September 1972. The communiqué was proposed by the Foreign Minister of West Germany and was a response to the terrorist attacks on the Munich Olympics.
[680] *ibid,* paragraph 4.
[681] *ibid*, paragraph 6.
[682] *ibid,* paragraph 9.

The approach of the Irish Government, once again, illustrates their desire to raise the issue of Northern Ireland in the international arena. Interestingly, implicit throughout the document is the view that while the actions of terrorists engaged in the Arab-Israeli conflict were suitable for discussion, the activities of the IRA were not.

The attempts of the Irish Government to differentiate between Irish terrorism and terrorism in the context of the Arab-Israeli conflict is not novel. Defining terrorism is a complex task and in a survey of leading academics 109 alternative definitions of terrorism were proposed.[683] Forging international agreement on what constitutes terrorism has proved to be extremely difficult; as recently as 1998 the Rome Conference which led to the Statute of the International Criminal Court rejected jurisdiction over the specific crime of terrorism.[684] One of the more generally supported definitions is the US State Department definition which states that 'the term terrorism means premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience...'.[685] This definition includes a number of the key criteria laid down by Schmid and Jongman which can be described as the gold standard of terrorism definitions.[686] This work is not concerned by the complex issues involved

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[683] Ganor, "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?" <http://www.ict.org.il/articles/define.htm> accessed 28 April 2003. For a detailed analysis of the issues involved in defining terrorism see Schmid & Jongman *Political Terrorism: A new guide to the actors, authors, concepts, data bases, theories and literature,* (Amsterdam, 1988), chapter 1. The authors provide a lengthy and comprehensive definition of terrorism and analysis of the terms employed.

[684] Robertson, *op cit,* p311.

[685] The US Government has employed this definition since 1983. See US Department of State, *Patterns of Global Terrorism 2003*, (Washington DC, 2004), xii. See <http://www.state.gov/s/ct/rls/pgtrpt/2003/> accessed 5 Spetember 2005.

[686] The definition provided by Schmid & Jongman is lengthy and complicated. It is not necessary to consider it in any detail here. Those interested should consult, Schmid & Jongman, *op cit,* 1.

in defining terrorism, however, the desire of the Irish government to distinguish between IRA violence and terrorism is interesting.

A number of methods can be employed to distinguish the actions of a group from terrorism. In a similar fashion to the Irish Government, President Hafez el-Assad of Syria stated, in 1986, that his government had always opposed terrorism 'but terrorism is one thing and a national struggle against occupation is another'.[687] Salah Khalef of the group Black September, which carried out the attack on the Munich Olympics in 1972, differentiated between terrorism, which he said he was opposed to, and revolutionary violence, which he claimed was acceptable.[688] The problem with such an approach is that it seeks to excuse terrorists by describing them as revolutionaries or national liberators. An example of the difficulties associated with such an approach is evidenced by the 1979 Convention Against Hostage Taking. This measure should have been relatively uncontroversial since the taking of civilian hostages is surely never acceptable. However, a clause was which inserted stating that the Convention did not apply in armed conflicts 'in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self determination...'.[689] It is a matter of grave concern that International Law formally recognises hostage taking as a legitimate tactic in these circumstances, circumstances which any terrorist is likely to claim are applicable to

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[687] Ganor, *op cit.*
[688] *ibid.*
[689] Article 12, UN International Convention Against the Taking of Hostages, (New York, 1979). <http://www,unodc.org/unodc/terrorism_convention_hostages.html> accessed 5 September 2005.

their own cause. In order to avoid such problematic outcomes an objective definition of terrorism is required, but as yet, none has been widely accepted.[690]

The final example of attempted internationalisation can be seen in the repeated references to the possibility of UN involvement in Northern Ireland. The Department for Foreign Affairs was of the view that the suspension of normal laws in Northern Ireland in 1971 would have benefited from a full scale U.N. debate on internment.[691] Deputy Dr. O'Connell asked the Taoiseach in 1972 if he would consider seeking British Government support for the setting up of an impartial peace-keeping force in Northern Ireland. The Taoiseach's response was very informative. He said, 'as the Deputy is aware, the consent of the British Government is necessary if a United Nations peace-keeping force is to operate in Northern Ireland. They have repeatedly refused to give their consent and I do not intend to pursue the matter with them at present'.[692] The Government had pursued a policy of attempting to involve the UN as an impartial peace-keeping force - they had pursued this policy with the British Government and had now abandoned that policy because they had failed to secure the necessary support of the British Government. There can be no clearer example of the policy of internationalisation.

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[690] For a detailed discussion on the need to define terrorism see Ganor, "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?" <http://www.ict.org.il/articles/define.htm> accessed 28 April 2003, Netanyahu, *Fighting Terrorism, how democracies can defeat the international terrorist network,* (New York: 2001), and most authoritatively Schmid & Jongman, *op cit.*
[691] Department of an Taoiseach, file 2003/16/476.
[692] Dáil Éireann, *Parliamentary Debates,* 15 June 1972, vol. 261, col. 1683.

6.4 Kidnap & Internment in 1970

History often provides minor sideshows which appear irrelevant until they are placed within a wider context. The Public Safety Act (PSA), 1927 provided for non-jury trial but such courts were never established. Despite this the PSA, 1927 is significant in that it provided the blueprint for all future non-jury Courts in Ireland.[693] Similarly, the announcement on 5 December 1970 that the Government of Ireland was bringing Part II of the OAS, 1940 into operation, thereby providing for internment without trial, may appear unimportant since actual internment was not introduced. Although the announcement did not, in fact, lead to the introduction of internment the incident does provide an interesting insight into the times, and a comparison with the announcement regarding the re-establishment of the Special Criminal Court in 1972 should prove to be quite fruitful.

One cannot help but be struck by the level of surprise the announcement caused. *The Irish Press* felt that the initial response to the announcement had to be one of 'surprise and puzzlement'. In the era of the Arms Trial all that is surprising is that the media could still be surprised. *The Irish Press* continued by reviewing the state of republicanism at the time and seemed certain that it was extremely weakened,

> It appears that the main IRA grouping is split between 'Provisionals' and 'Officials' and considerably weakened, so much so that the 'Officials' are rumoured to be considering a proposal to change their title to the 'Irish Citizens Army'. The Saor Eire group are also reported to be split and it is difficult to see where, on this

[693] see chapters 2 and 3.

> side of the Border, there is the strength to stage the sort of action which somebody in the Department of Justice is obviously worried about.[694]

On the next day *The Sunday Press* provided a review of Saor Éire. The paper commented that one body styling itself Saor Éire had merged with the Limerick Brigade of the Official IRA, while a second group had been formed in Cork, consisting of expelled IRA members. This group had disbanded and joined the Irish Communist Organisation.[695] The Saor Éire of the 1970's will be considered in greater detail in chapter 9. It is fair to say that it was not a homogenous organisation and lacked any central command structure.[696] Despite the weakened disorganised state of republicanism the authorities were concerned enough to take the extraordinary step of announcing the planned introduction of internment without trial.

It is also significant that the Government announcement referred to a serious and impending threat from extremists. When internment was last employed it was utilised as a *response* to the Border Campaign,[697] on this occasion it was being introduced *pre-emptively*. The following statement was issued to the media by the Taoiseach and Minister for Justice,

> Garda authorities have informed the Government that reliable information has come into their possession to the effect that a secret armed conspiracy exists in the country to kidnap one or

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[694] Dept of an Taoiseach, file 2001/61/7, *The Irish Press,* 5 December 1970.
[695] Dept of an Taoiseach, file 2001/61/7, *The Sunday Press*, 6 December 1970.
[696] O'Ruaric, "A Little Known Republican Militant Group: Saor Eire", *The Blanket,* 13 January 2005. <http://lark.phoblacht.net/lor1401051g.html> accessed on 2 August 2005.
[697] see chapter 5.

> more prominent persons. Connected with this conspiracy are plans to carry out armed bank robberies which the police believe may involve murders or attempted murders.[698]

The kidnap threat was said to have been directed against staff of the British Embassy.[699] The British Foreign Office commented that 'protection is being provided by the Irish police authorities and they must have their reasons'.[700] Implicit within this statement is a recognition that extra security was being provided and that the British Government accepted that it must have been necessary. In the absence of the actual intelligence it is impossible to review whether the threat was real or imagined. Either way the Government was clearly concerned.

There are three final points concerning the December 1970 internment announcement. Firstly, the announcement was made to the press. *The Irish Times* noted that,

> it is odd that Mr. Lynch should come to the news media to make his announcement. What was so pressing on Thursday that the Dail (sic) could not have been informed of the grave situation which the Taoiseach now announces? ...It may be that Mr. Lynch does not want his warning on the record of the Dail (sic). He may feel that the record carries enough for one year.[701]

The re-introduction of the Special Criminal Court two years later was similarly made through the media and not the Dáil. Secondly, the Government acted in accordance with its international obligations and informed the Secretary-General of the Council

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[698] Dept of an Taoiseach, file 2001/61/7, Official Statement, *The Irish Times,* 5 December 1970.
[699] Dept of an Taoiseach, file 2001/61/7, *The Irish Independent,* 5 December 1970.
[700] *ibid.*
[701] Dept of an Taoiseach, file 2001/61/7, *The Irish Times,* 5 December 1970.

of Europe of its desire to derogate from the European Convention for Human Rights.[702] This is surely evidence of the seriousness of the Government's resolve. Finally, it was suggested that the introduction of internment in the South would 'facilitate the introduction of similar measures in the North.... If this happened many areas of Belfast would be deprived of their defence against British Troops and Unionist extremists'.[703] This final point is interesting since internment was introduced in Northern Ireland and it was certainly not welcomed by the politicians or population of the Republic. The following section will examine the impact of internment North of the border.

6.5 Internment in the North

Internment was initially activated, by the Northern Ireland Parliament, under the Civil Authorities (Special Powers) Act (1922) (Northern Ireland) (SPA)[704] on August 9 1971. Regulation 12 of the SPA authorised the Minister for Home Affairs to issue an Internment Order against any person 'who is suspected of acting or having acted or being about act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland'.[705] The stated aim of internment in Northern Ireland was to detain active members of the IRA and to obtain more information about their activities and organisation, with a view to protecting the public.[706] Despite these laudable aims it is important to realise that 'the initial internment sweep on 9 August, 1971 was, militarily a complete failure. The IRA had

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[702] Dept of an Taoiseach, file 2001/61/7, Official Statement, *The Irish Times,* 5 December 1970.
[703] Dept of an Taoiseach, file 2001/61/7, "Internment Protests in Dublin", *The Irish Times,* 18 January 1971.
[704] hereinafter the SPA.
[705] Spjut, "Internment Without Trial in Northern Ireland 1971 – 1975: Ministerial Policy & Practice", (1986) 49 Modern Law Review, 712, 713, hereinafter Spjut 1.
[706] *ibid,* 715.

known of it for some time and as a result virtually every senior IRA man was billeted away from home. Of the 342 men arrested... 116 were released after 48 hours'.[707] The authorities North and South had made use of internment during the 1950's and it appears that the RUC acted upon information concerning those interned at that time; however, since then the IRA had split and it seems the authorities had little information about the new Provisional IRA.[708] This may go some way to explaining the initial lack of success.

Violence soared following the introduction of internment[709] and the British Government replaced the Northern Ireland Parliament with 'direct rule'.[710] The British Government continued to employ internment, however, the SPA was replaced by the new Detention of Terrorists (Northern Ireland) Order, 1972.[711] At the same time an independent inquiry was established to consider 'what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities...'.[712] Despite its mandate the Diplock Commission accepted the principle of internment. The report acknowledged that in the climate prevailing at the time, dangerous terrorists existed who could not be tried effectively in the courts. Internment was cited as the only

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[707] McGuffin, *Internment!* (Tralee:1973), 86.
[708] *ibid,* 715.
[709] 'Prior to internment there had been 34 deaths in 1971; between internment and the end of the year there were 139'. Patterson, *The Politics of Illusion- A Political History of the IRA*, (London: 1997), 151.
[710] The Northern Ireland Parliament was prorogued on March 16 1972. Spjut 1, *op cit*, 712.
[711] Hogan & Walker, *Political Violence & the Law in Ireland,* (Manchester: 1989), 86.
[712] Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, (1972) paragraph 1, hereinafter the Diplock Commission.

effective means of re-establishing order.[713] In light of these conclusions the internment procedure was translated from the 1972 Order into the Emergency Provisions Act, 1973.[714] Internment without trial operated between 1972 and 1975.[715] The end of internment was signalled in April 1974 and on 6 December 1975, 46 of the remaining detainees were released. A further 27 detainees were held on criminal charges, a move which pointed toward a new policy of 'criminalisation'.[716] This new policy sought 'to downplay the political character of Irish terrorism by emphasizing its criminality.... One consequence of this policy was... to rely instead upon modified versions of the criminal law to cope with terrorism'.[717]

The reaction of the Irish Government to internment must be seen as somewhat astonishing: they were opposed to it. In an of itself that was unsurprising but given that the Taoiseach and Minister for Justice had announced the introduction of internment in the Republic in December 1970, their opposition to its introduction in the North in August appears somewhat hypocritical. Indeed, as was noted earlier, the *Irish Times* referred to the possibility of the introduction of internment in the Republic facilitating the introduction of similar measures in the North.[718] Despite this the files

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[713] In a frank statement the report concluded that 'until the current terrorism by extremist organisations of both factions in Northern Ireland can be eradicated, there will continue to be some dangerous terrorists against whom it will not be possible to obtain convictions by any form of criminal trial.... The only hope of restoring the efficiency of criminal courts of law in Northern Ireland to deal with terrorist crimes is by using an extra-judicial process...'. *ibid,* paragraph 27.

[714] hereinafter the EPA, 1973. Hogan & Walker, *op cit,* 87.

[715] In 1975 The Gardiner Commission conducted a further review of internment. It was critical of the quasi-judicial role of the Commissioners and made a series of recommendations regarding the operation of internment. The recommendations formed the basis of the Emergency Provisions Act, 1975, however, this alternative system of internment was never actually implemented and therefore no discussion of it is necessary at present.

[716] Hogan & Walker, *op cit,* 92.

[717] Finn, *op cit,* 85.

[718] Dept of an Taoiseach, file 2001/61/7, "Internment Protests in Dublin", *The Irish Times,* 18 January 1971.

of 1972 refer repeatedly to the Taoiseach's abhorrence of internment.[719] It should be understood that the policy of internment in Northern Ireland was extremely unpopular. It lead to increased levels of violence in the North and was opposed in the Republic. This is, at least partly, because many believed the policy was implemented in a sectarian fashion. When internment was initially introduced arrests were confined to Catholics. Prime Minister Faulkner was to explain later that this was based on the view that there was no organised Protestant terrorist network and therefore internment was focused on IRA members.[720] The fact that internment was introduced by a Unionist Government and directed exclusively against Catholics gave rise to suspicion and distrust. This distrust was exacerbated by the early operation of the system. The perception that internment was being used against political opponents of unionism was rife.[721] There is some support for this view. The figures show that the number of Republican detainees continually exceeded Loyalists as the following table illustrates,

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[719] Department of an Taoiseach 2003/16/476 makes repeated reference to the Taosieach's abhorrence of internment.

[720] Wilson, *Ulster: Conflict & Consent,* (Oxford: 1989), 169.

[721] see McGuffin, *op cit,* 87 and Spjut "Executive Detention in Northern Ireland: The Gardiner Report and the Northern Ireland (Emergency Provisions) (Amendment) Act 1975", (1975) 10 Irish Jurist, 272, 275, hereinafter Spjut 2.

Table 6.1[722]

Northern Ireland Internment Figures

	Republicans			Loyalists			Total
Year Ending	Intake	Releases	Still Held	Intake	Releases	Still Held	
1971	783	129	651	-	-	-	651
1972	551	899	294	-	-	-	294
1973	448	191	547	64	17	47	594
1974	267	295	517	45	67	25	542
1975	11	529	-	-	25	-	-

Reasons for this apparent discrimination exist. Firstly, Loyalists were not as well organised as the IRA and as a result, proof of involvement in terrorism was more difficult to establish. Secondly, internment was implemented, largely, by the Army, who operated mainly in Republican areas. It has been stated that the police could have employed internment as well as prosecutions against Loyalists but did not - this might be seen as institutional bias.[723] However, it is not a clear example of sectarianism. It is apparent from this review that the legislation was not prejudicial, however, the operation may have been.

As part of the policy of internationalisation the Government sought to challenge the UK's internment policy before the European Court of Human Rights and the issue of internment in Northern Ireland was considered by the Court in 1978. The Court accepted that an emergency existed and upheld the right of the UK Government to

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[722] These figures are compiled from a Table in Hogan & Walker, *op cit*, 93.
[723] *ibid*, 94.

utilise a policy of internment. On the specific allegation of sectarianism the Court justified the difference in treatment. It is worth quoting the judgment because the Court noted that,

> There were profound differences between Loyalist and Republican terrorism.... The IRA, with its far more structured organisation, constituted a far more serious menace than the Loyalist terrorists.... [Also] it was as a general rule easier to institute criminal proceedings against Loyalist terrorists than against their Republican counterparts.... Accordingly although Loyalist terrorists were not extrajudicially deprived of their liberty, they do not appear to have been able to act with impunity.[724]

The allegation of sectarianism was a serious one and the acceptance by the Court that differing treatment did not imply discrimination is important. The facts, as accepted by the Court, show that the differing treatment was based on the different status of Loyalist and Republican paramilitaries, as such no discrimination contrary to Article 14 was established. Internment itself was held to be in violation of Article 5, however, as in the case of *Lawless v. Ireland*[725] it was recognised that derogation was permissible 'in times of war or other public emergency'. The Court concluded that the situation satisfied the conditions necessary for an emergency to be declared. As such the internment procedure was upheld.

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[724] *Republic of Ireland v. The United Kingdom* [1979] 2 E.H.R.R., 25, paragraph 228.
[725] *Lawless v. Ireland (no. 3),* (1979) 1 EHRR 1. See chapter 5.

6.6 Bloody Sunday – Infection by the Northern Virus?

A number of protest marches were organised in response to the introduction of internment in Northern Ireland. 'On 22 January 1972, a march took place to Magilligan Prison Camp in Derry.... It was a peaceful march supported by the sort of people who had come out in favour of civil rights, and by relatives of the interned.'[726] As the march approached the camp it was confronted by a squad from the First Paratroop Regiment who fired rubber bullets. This Regiment was '...only brought back to a sense of discipline when the N.C.O.s began wielding their batons fiercely on their own men.'[727] Eight days later, on Sunday 30 January, an incident occurred at a civil rights march in Derry which remains a source of controversy to the present day. This date became known as 'Bloody Sunday' and involved the shooting dead of 13 men, '...all apparently unarmed...' by the Parachute Regiment.[728] The controversy surrounding these events can be appreciated by the fact that two judicial inquiries have been commissioned to examine 'Bloody Sunday.' The Widgery Inquiry never satisfied the nationalist community of Derry[729] and as a result Lord Saville has been commissioned to conduct a new inquiry into the events.[730] The events leading up to and surrounding Bloody Sunday were of concern to the Irish Government, but they also incited the people of the Republic. Two days after Bloody Sunday a crowd marched in protest on the British Embassy in Dublin and the building was burned to the ground.[731] The burning of the embassy was an example of how Northern events could rock the Southern body politic and lead to public disorder in the Republic. The

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[726] Coogan, *The Troubles: Irelands Ordeal 1966 – 1995 and the Search for Peace,* (London: 1995).
[727] *ibid,* 134.
[728] Bew & Gillespie, *Northern Ireland: A Chronology of the Troubles 1968 – 1993,* (Dublin: 1993), 44.
[729] Kearney, "Bloody Sunday Soldiers 'Allowed to Change Stories,'" *The Sunday Times,* Sunday 8 August 1999.
[730] Walker, "The Commodity of Justice in States of Emergency," (1999) Northern Ireland Legal Quarterly, vol.50, no.2, 164, 170.
[731] Department of an Taoiseach 2003/26/6, Report of Superintendent B. Clinton.

mounting violence in Northern Ireland, the reaction of people in the Republic and the other events mentioned above ensured that the Lynch government had to take action if chaos was to be averted.

It is remarkable that the Lynch Government was not entirely destabilised by these events and was able to remain in power. Murphy notes that,

> ...the absence of any positive Dublin policy on the North became painfully evident. Lynch's dismissal of two cabinet ministers on suspicion of arms-running, the resignation of another minister and the setting up of a splinter party, Aontacht Éireann, the sensational arms trial of the ex-ministers, the James Bond like atmosphere of espionage and intrigue, the convulsions caused in the South by Bloody Sunday, January 1972 in Derry, the burning of the British Embassy in Dublin – all these earth-shaking events still left Jack Lynch and Fianna Fáil solidly in office.[732]

The ability of the Lynch Government to retain power seems to have had little to do with its ability to control the terrorist problem associated with Northern Ireland. Indeed in 1972 the then Minister for Justice, Mr. O'Malley, informed the Dáil that between 1 January and 31 May 1972, there were 172 bomb threats reported to the Garda Siochána as compared to 25 in the corresponding period in the previous year. It was the Minister's opinion that this increase was connected with '...activities in the northern part of the country.'[733] The events in Northern Ireland were having an impact on politics in the Republic. Lee comments that, 'the Northern virus inevitably

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[732] Murphy, *op cit*, 151.
[733] Dáil Éireann, *Parliamentary Debates,* 15 June 1972, vol. 261, col. 1762.

infected the Southern body politic. The wonder is that it infected it so little for so long.'[734] The relatively low impact seems to have been caused by a preoccupation in the Republic with domestic affairs and Ireland's bid to join the European Economic Community.[735] O'Mahony is of the view that economics took centre stage. He points out that, '...the performance of Dr. Garret Fitzgerald in a television debate with George Colley on the economy was undoubtedly influential,' in the election campaign of 1973.[736] During the 1973 campaign Fianna Fáil argued that it had succeeded,

> ...in keeping the Northern troubles from spilling over into the South.... But what concerned the southern electorate was not so much the trauma of the North as inflation and rising prices and the universal feeling that it was time for a change after sixteen years of rule by a party which showed many of the signs of an irritating complacency if not of arrogance.[737]

As a result, despite the extraordinary events of 1969 to 1972 it appears that it was the normal day-to-day issues which affected the political fortunes of the Jack Lynch and his Fianna Fáil Government.

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[734] Lee, *op cit*, 458.
[735] A referendum on membership of the then E.E.C. was held on 10 May 1972, 83% voted in favour of joining. Murphy, *op cit,* 150.
[736] O'Mahony, *Jack lynch, A Biography,* (Dublin: 1991), 107.
[737] Murphy, *op cit,* 152.

Chapter 7

The Re-Introduction of the Special Criminal Court

By 1972 it was painfully obvious that the Government needed to respond to the worsening situation. With rising tensions in Northern Ireland, increasing bomb threats on the Republic and its population, and some Dáil Deputies even concerned that the Baader Meinhof terrorist group was operating in Ireland[738] the Taoiseach, Mr. Lynch and Minister for Justice, Mr. O'Malley could not afford to delay any further. It has already been noted that during the increase in IRA activity in the 1950's the Government responded by introducing internment.[739] The same legislative provisions that had provided for internment at that time remained available to the Government in 1972. As has been pointed out, the Government of the United Kingdom had taken that route in 1971. Having flirted with the possibility introducing of internment in 1970[740] the Irish Government now rejected it as a solution to the problem.[741] It appears that internment was no longer a politically viable solution. In Northern Ireland 'the minority regarded internment as virtually an act of war and retaliated by withholding rents, rates and local taxes in a massive civil disobedience campaign...'.[742] The march on 'Bloody Sunday' had been in protest against internment and there was similar anti-internment sentiment in the Republic. Since internment had produced such a reaction in the North its introduction in the Republic would have been unwelcome and unpopular and was, therefore, not a realistic option.

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[738] Deputy Dr. O'Connell asked the Minister if he was, 'aware of the existence in Dublin of any members of the extreme militant Baader Meinhof group;....' The Minister dismissed the speculation. Dáil Éireann, *Parliamentary Debates,* 15 June 1972, vol. 261, col. 1763.
[739] See chapter 5.
[740] Department of an Taoiseach, file 2001/61/7, Official Statement, *The Irish Times,* 5 December 1970. See chapter 6.
[741] *The Irish Times,* "Special Criminal Courts Now Being Considered," Thursday, 25 May 1972, 6.
[742] Murphy, *op cit,* 167/8.

The Irish Times commented that, 'internment is abhorred by everyone and is hardly feasible even if the government were so minded'.[743] Internment was an unfeasible solution and so the government was forced to look at other options.

7.1 Announcing the Special Criminal Court

Given the importance of implementing the correct measure and the fact that the Government had taken three years to prepare a response, one might have expected that much debate would have surrounded the reintroduction of this provision. In reality it appears that the decision to establish the Court was taken rather hastily. As with the announcement of internment in 1970 the declaration that a Special Criminal Court was to be established appears to have been quite a shock. The idea of a Special Criminal Court was mooted in the Dáil only two days before the Court was re-established. On 24 May 1972 Minister O'Malley stated on the Dáil record that,

> The Taoiseach made it perfectly clear yesterday... that we had no intention of introducing military courts in this country, but in order that neither he nor I nor anybody else can be accused of misleading anyone, I want... to say that the Government do not rule out the possible introduction of special criminal courts, and in fact the Government have under active, and very active, consideration at this moment the question as to whether or not to introduce special criminal courts....[744]

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[743] *The Irish Times,* "Very Active Consideration," Editorial Comment, Thursday 25 May 1972, 11.
[744] Dáil Éireann, *Parliamentary Debates,* 24 May 1972, vol. 261, col.s 256/7.

The surprise of some Deputies was obvious. Deputy Cluskey inquired, '...what exactly a special criminal court is?' and Deputy Desmond asked, 'would this require legislation? You would have to bring in a Bill?'[745] Since the Offences Against the State Act, 1939 was still active the Government did not require legislation of any sort to reintroduce the Court and the Deputies lack of awareness of the measure can only be taken as evidence of the surprise nature of the move.

At this stage the measure was merely being mooted by the Minister. Press reporting at the time is most instructive. On 25 May the front page of *The Irish Times* informed the public that while,

> ...the announcement created the impression that the introduction was imminent... it was stated *most authoritatively* last night that the Government had not taken any decision yet on the matter and that such courts would *not be set up in the immediate future*.[746](my emphasis)

On Friday 26 May 1972 the same paper made it clear that there was 'no pressure from Britain to bring in the courts...' and it argued that the Government would be more than satisfied by the 'lack of any important public feeling against the announcement...'.[747] On the very same day, 26 May 1972 a proclamation was made by the Government bringing Part V of the Offences Against the State Act back into

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[745] Dáil Éireann, *Parliamentary Debates,* 24 May 1972, vol. 261, col. 257.
[746] McInerney, "Government Gets Plans For Special Courts Ready," *The Irish Times,* Thursday May 25, 1972, 1.
[747] *The Irish Times,* "Prisons Bill Signed by President," Friday 26 May, 1972, 5.

effect. Four days later, on 30 May 1972 a further Order was made establishing a Special Criminal Court and appointing Judges to sit on it.[748]

7.2 A Different Special Criminal Court

From the moment the re-establishment of the Court was first suggested in the Dáil it was clear that this Special Criminal Court would be unlike its predecessors. On 24 May 1972 Minister O'Malley stated quite categorically, 'if those special criminal courts are introduced, there will, be no military officers on them...'.[749] As has been noted in earlier chapters, previous emergency court models had been staffed by members of the Defence Forces, with the brief exception of a period in the 1950's when retired members of the Defence Forces continued as appointed members of the Special Criminal Court; importantly, however, the Court, did not sit during this period.[750] In 1972 the Government chose to appoint members of the Judiciary to the Court. The importance of appointing members of the Judiciary was emphasised repeatedly by the Government; for example in the 26 May 1972 statement, which had the effect of re-establishing the Court, the Taoiseach stated that the Government intended to '...appoint three members of the judiciary to constitute the court.'[751] The appointment of members of the Judiciary rather than members, or even retired members, of the Defence Forces must be seen as a positive development in the history of the court.

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[748] Robinson, *The Special Criminal Court,* (Dublin: 1974), 25/6.
[749] Dáil Éireann, *Parliamentary Debates,* 24 May 1972, vol. 261, col.256/7, 24 May 1972.
[750] See chapter 5.
[751] McInerney, "Special Court Now Established," *The Irish Times,* Saturday 27 May 1972, 1.

There had been a dramatic change in judicial opinion since the passing of the Public Safety Act of 1927. In chapter 2 it was noted that there had been considerable judicial unrest following the introduction of that Act. Indeed, as we have already seen, two members of the Supreme Court had informed the then Taoiseach, Mr. Cosgrave, that they would relinquish their office if they were called upon to act as a special court under that Act.[752] The differences between that legislation and the Offences Against the State Act have already been commented upon but it is interesting to note that no such objections seem to have been raised in 1972 and the appointment of judges to the Court went ahead.

> On the 30th of May, an Order was made establishing a Special Criminal Court and determining that the court would consist of three members, a Judge of the High Court, Mr. Justice Griffin; a Judge of the Circuit Court, Judge Conroy; and the President of the District Court, Mr. Justice Cathal O'Floinn.[753]

The appointment of members of the judiciary was a progressive move. Earlier Courts had always had the appearance of military tribunals due to their staff. On this occasion, however, no such accusation could be levelled at the Court.

Although the Government decided to appoint members of the judiciary to the Court, for the first time, it did not amend the legislation to prevent the appointment of non-judges. As has already been noted s.39(3) of the 1939 Act provides for the appointment of,

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[752] O'Sullivan, *The Irish Free State & its Senate,* (London: 1972), 261.
[753] Robinson, *op cit,* 25/26. Peadar O'Reilly an officer of the Circuit Court was appointed as the registrar of the Special Criminal Court. Department of an Taoiseach, 2003/16/93, "Draft of Government Minutes 30.5.72 – item 1".

> ...a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defences Forces not below the rank of commandant....[754]

The Government retains the power to appoint any of the above to the Court, although it should be stated that since 1972 all members of the court have been judges or former judge of the ordinary courts, 'moreover, since 1986, all members of the court have been actually serving judges'.[755] The independence of the members of the Court has been affirmed in *Eccles v. Ireland.*[756] S.39 provides that members of the Special Criminal Court shall be appointed and removable at will by the Government. The Minister for Finance is given the power to set the remuneration of the members of the Court as he sees proper. In *Eccles* it was alleged that this provision could allow for interference with the independence of the Court. Finlay C.J. stated that although, 'the Special Criminal Court does not attract the express guarantees of judicial independence contained in Article 35 of the Constitution, it does have, derived from the Constitution, a guarantee of independence in the carrying out of its functions'.[757] As such the judicial independence of the Court has been secured. Given the difficulty of the dual role, that is arbiter of fact and law, the independence of the Court could be furthered guaranteed by amending s. 39(3) to ensure that the law falls in line with the practice. In other words the legislation should exclude the appointment of all non-judges to the Court.

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[754] section 39(3) Offences Against the State Act, 1939.
[755] Hogan & Whyte, *Kelly: The Irish Constitution,*(4th ed) (Dublin: 2003), paragraph 6.5.335.
[756] [1985] IR 545.
[757] [1985] IR 545, 549.

The Government's stance on the appointment of judges to the Court should be viewed as an attempt to ensure that the Special Criminal Court was acceptable to the public. These attempts at ensuring the legitimacy of the Court appear to have been taken seriously. When Deputy Dr. Thornley referred to the Court as a '...three member judicial tribunal...' in the Dáil on 30 May 1972, the description was strongly rejected by the Minister for Justice. The Minister said, 'it is not a judicial tribunal. It is a court of law expressly provided for in the Constitution'.[758] The Minister also emphasised the point that, 'the ordinary laws of evidence will and must apply,' in the court.[759] The Government wanted to avoid any attempt to portray the Court as a military tribunal or sinister emergency power. Of course these assertions as to the normality of the Court were not uncontroversial; while the appointment of the members of the judiciary was to be welcomed one cannot avoid the fact that the Special Criminal Court is extraordinary. After all, the issue of the rules of evidence before the court had been a source of controversy during the emergency, as has already been commented upon.[760] The relevant section of the Act is s.41(4). It states that,

> the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, *so far as practicable*, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court.[761](my emphasis)

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[758] Dáil Éireann, *Parliamentary Debates,* 30 May 1972, vol. 261, col. 599.
[759] Dáil Éireann, *Parliamentary Debates,* 30 May 1972, vol. 261, col. 600.
[760] See chapter 4.
[761] s.41(4) The Offences Against the State Act, 1939.

This issue, regarding the applicability of the same rules of evidence before the Special Criminal Court, was also referred to in *The Irish Times*.[762]

It has been argued that the purpose of s.41(4) is to ensure that 'the Special Criminal Court will operate its jurisdiction according to the known pattern of the Central Criminal Court, and thus escape the hazards of the unknown and the uncertainty that would beset a new court...'.[763] It may thus be contended that by emphasising this provision, Government can assert that trial by Special Criminal Court is a limited and proportionate interference with the right to trial by jury and guarantees the rights of the accused. It has been noted, however, that,

> ...to some extent, the adaption of Central Criminal Court practice and procedure is effected by the Special Criminal Court rules.... [T]hese rules cover miscellaneous matters such as court sittings, access of members of the public and press, witnesses, extension of time and legal aid.[764]

Furthermore, the ordinary courts have accepted that, 'it is impracticable – indeed impossible – to import a rule... governing the conduct of jury trial by a non-jury court'.[765] This statement seems to accept that the rules applicable before the Special Criminal Court are not, in fact, the same as those applicable before the Central Criminal Court and therefore the rights of the accused are being affected. However, 'while some allowance must, admittedly, be made for the fact that a trial before the Special Criminal Court does not take place before a jury, s.41(4) should not be

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[762] McInerney, "Special Courts Now Established," *The Irish Times,* Saturday, 27 May 1972, 1.
[763] *The People (DPP) v. Rice* [1979] IR 15, 18.
[764] Hogan & Walker, *Political Violence & the Law in Ireland,* (Manchester: 1989), 230.
[765] *The People (DPP) v. McMahon* [1984] ILRM, 461, 467.

construed as abrogating fundamental principles...'.[766] The Special Criminal Court is restricted by the rules of the Central Criminal Court, but practical consideration is given to the fact that some alterations might be necessary given that the Court does not have a jury. It might be tempting to overemphasise the amount of latitude granted to the Special Criminal Court by s.41 and it appears reasonable to say that it allows merely for practical modifications rather than wholesale amendment. Indeed, there is authoritative support for the view that 'if legislation did... provide for special rules of evidence in the Special Criminal Court... such arrangements would be unconstitutional'.[767] As the OAS Review Group note, the decision in *Cox v. Ireland*[768] puts this matter beyond any doubt. In this case the Supreme Court held that s.34 of the OAS, 1939, which provided for the loss of office and pension for all public servants convicted of a scheduled offence before the Special Criminal Court, was unconstitutional.

> Having regard [to] the varying gravity of the range of scheduled offences and the fact that the operation of s 34 is triggered by the venue of the trial... which in turn is primarily selected by the fact that the offence is scheduled, the Court concluded that the section was invalid as "impermissibly wide and indiscriminate.[769]

By extension, if the Special Criminal Court cannot employ extra punitive measures based solely on its selection as a trial venue, it is highly unlikely that any special rules of evidence would be accepted.

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[766] Hogan & Walker, *op cit,* 231.
[767] *Report of the Committee to Review The Offences Against the State Acts, 1939 – 1998 and related matters,* (Dublin: 2002), paragraph 9.9, hereinafter Committee to Review the OAS.
[768] [1992] 2 IR 503.
[769] Hogan & Whyte, *op cit,* 586.

The Lynch Government emphasised the similarity of the rules of procedure and evidence applicable before the Special Criminal Court in an attempt to curb the level of criticism that could be legitimately levelled at the Court. With public feeling on the issue of the Northern Troubles palpably high in the wake of 'Bloody Sunday' the Government clearly attempted to ensure that its response was viewed as measured, proportionate and just. It is reasonable to suggest that this was the same motivation behind the decisions, not to introduce internment; to appoint members of the Judiciary to the Court for the first time; and to stress the lack of pressure from Britain in relation to the establishment of the Court.

7.3 Opposition to the Government's Measures

Although the Government may have quelled some opposition to the Special Criminal Court by underlining its normality, other legislative provisions were strongly condemned. Particular opposition was directed toward the Offences Against the State (Amendment) Act 1972. The controversy surrounded s.3(2) which states that, 'where an officer of the Garda Síochána, not below the rank of Chief Superintendent... states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member'. The Constitutionality of this provision was challenged over 20 years later in *O'Leary v. AG.*[770] Costello J. held that,

> ...s.3(2) of the 1972 Act merely made admissible in evidence in certain trials statements of belief which would otherwise be inadmissible; the court remained free to evaluate such evidence

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[770] [1993] IR 102.

> and was not required to convict in the absence of exculpatory evidence, so that the presumption of innocence still operated....[771]

In 1972, however, the provision was viewed with a deep suspicion. 38 academics of Trinity College Dublin, including Professor Mary Robinson, who would go on to write authoritatively on the subject of the Special Criminal Court,[772] lodged a letter of protest with the office of the Taoiseach.[773] In it they stated, 'we take particular exception to Section 3, which transfers the onus of proof to the accused and invests Chief Superintendents... with powers which are wholly repugnant...'.[774] 'Citizens for Civil Liberties' produced a memorandum on the Act, in which they described s.3 as being the heart of the Bill and objected to it in forceful terms.[775] In comparison to the outcry which greeted the introduction of internment in Northern Ireland, however, these objections to the 1972 Act and the muted response to the introduction of the Court must have been seen as a triumph for the Government. They had essentially succeeded in taking action against a subversive threat without inspiring a popular backlash.

7.4 Diplock & the Beginnings of a Common Policy

It has been noted that the Government of the United Kingdom had introduced internment to Northern Ireland at a time when the Irish Government felt unable to do so. This policy proved to be highly unpopular with the Nationalist population of Northern Ireland and led to a widespread campaign of civil disobedience. Indeed it

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[771] Hogan & Whyte, *Kelly, The Irish Constitution,* (4th ed) (Dublin: 2003), paragraph 7.5.211.
[772] Robinson, *op cit.*
[773] Department of an Taoiseach file, 2003/16/590.
[774] *ibid.*
[775] *ibid.*

has been argued that internment which had been introduced to '...stem the flow of violence had merely contributed to an intensification of the "troubles"'.[776] By 1972 the UK Government was seeking an alternative approach. The fact that an alternative to internment was being sought in Northern Ireland is not relevant to the development of the Special Criminal Court; however, the alternative adopted is interesting.

The haste with which the Special Criminal Court was introduced in Ireland has been commented on in previous sections of this chapter. When the Government of the UK came to consider alternative responses to the violence in Northern Ireland, it decided to establish a Commission to review the situation and propose measures suitable for the circumstances. Unlike the Lynch Government, the UK Government found this necessary since its legislative arsenal did not include a measure similar to the Offences Against the State Act, 1939. The establishment of a Commission had the advantage of providing a Report which could be studied later and commented upon. The Commission became known as the 'Diplock Commission' after its chairman Lord Diplock. One contemporary commentator suggested that the Lord Diplock's,

> ...recommendations have provided the main basis for the Northern Ireland (Emergency Provisions) Bill, which has strong claims to be considered the most Draconian measure to be put before Parliament at Westminster since the Emergency Powers (Defence) Act 1939.[777]

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[776] Jackson & Doran, *Judges Without Jury: Diplock Trial in the Adversary System,* (Oxford: 1995), 8
[777] Twining, "Emergency Powers & Criminal Process: The Diplock Report," [1973] Criminal Law Review, 406, 406/7.

The UK Government accepted the recommendations of the Diplock Commission on 20 December 1972.[778] The legislation, which was based on the Report, was entitled the Northern Ireland (Emergency Provisions) Act, 1973 and came into force on 25 July of that year. The central provision of the Act is that, 'a trial on indictment of a scheduled offence shall be conducted by the court without a jury'.[779] Therefore, by 1973 both jurisdictions had introduced trial without jury although the approach was different. The non-jury courts in Northern Ireland are widely referred to as 'Diplock Courts'. It is important to realise that 'the term 'Diplock court' is... misleading in so far as it suggests a special criminal court in a special courthouse.... In fact the single judge trials are heard in Belfast Crown Court...'.[780] Although the two regimes employ non-jury courts to tackle the problem of political violence, the Northern Ireland model simply utilises a division of the Crown Court to hear cases without a jury; it is not a separate court in the way that the Special Criminal Court is. A second difference in the approaches is that while the Special Criminal Court has trial by a panel of three judges the Diplock model involves trial by a single judge sitting alone. Despite these differences the models are similar in that they both provide for the trial of terrorist offences by non-jury courts.

A second feature common to these two court systems is the Scheduling of Offences. Both legislative regimes contain a list or 'schedule' of offences which are to be tried by these courts. It has been stated that, 'terrorist and security related offences are

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[778] Aitken, "New Laws Will Tighten Net on Terrorists," *The Guardian,* 21 December 1972, 1.
[779] Northern Ireland (Emergency Provisions) Act, 1973, s.2(1).
[780] Jackson & Doran, *op cit,* 9.

known as scheduled offences...'.[781] Essentially in the North the schedule creates 'a presumption against jury trial...'.[782] It does this due to the structure of the scheme whereby the Attorney General (AG) for Northern Ireland may schedule offences out of the Diplock system if he chooses. However until he takes that positive action these offences will be tried by a non-jury court. It is important to understand that the AG 'certifies out an offence if he is satisfied in the individual case that it was not terrorist or security related, although this test is not specified in statute'.[783] Therefore, the AG has a rather unfettered discretion in relation to the trying of these offences. The scheduling system in the Republic is similar in its operation. If the offence is scheduled then the case is transferred to the Special Criminal Court unless the Director of Public Prosecutions (DPP) directs otherwise, if it is not a scheduled offence it may still be transferred if the DPP certifies that the Ordinary Courts are inadequate.[784] The acceptability of this power has been questioned and a review of it has been called for.[785] It has been argued that in order to create a presumption in favour of jury trial this process should be reversed resulting in the AG certifying cases into the Diplock system, this would lead to the 'normalisation' of the jury system.[786] Robinson has made a similar argument in relation to the Special Criminal Court. She has stated that, 'to channel persons charged with purely criminal offences to the Special Criminal Court is to abolish trial by jury by the back door...'.[787] The 'Scheduling In' procedure, outlined above, will be discussed in more detail later when the reform of the Court's operation is considered.

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[781] Secretary of State for the Home Department & the Secretary of State for Northern Ireland, *Legislation Against Terrorism, CM 4178,* (London: 1998), paragraph 13.4, hereinafter CM 4178.
[782] Jackson, "Diplock & the Presumption Against Jury Trial: a critique," (1992) Criminal Law Review, 755, 755.
[783] CM 4178, *op cit,* paragraph 13.4.
[784] Hogan & Walker, *op cit,* 232, and Offences Against the State Act, 1939, s.45(2) and s.46(1).
[785] *ibid,* 238.
[786] Jackson, *op cit,* 764.
[787] Robinson, *op cit,* 35.

The comparability of the two regimes did not go unnoticed at the time.

> A source close to the Belfast brigade of the Provisional IRA dismissed the report as similar to Mr. Lynch's amendment to the Offences Against the State Act. "The only difference," he added, "is that the one in Dublin is written in Irish."[788]

On the same day the editorial in the normally liberal *The Guardian* newspaper commented that the Diplock report had 'followed Dublin in proposing trials without jury. In current circumstances this will probably be no great loss of protection to accused men'.[789] This would appear to be a significant example of a cross-border approach to the terrorist problem associated with the Northern Troubles, although it should be made clear that, there is no suggestion of co-operation between the Governments in the drafting of these legislative responses. The Irish model had been in existence since 1939 and there is no evidence to suggest that the UK was guided by the Republic. It would seem likely that the Diplock Commission examined the Irish legislation but there are enough differences between the approaches to show that the regimes were conceived independently of each other. What is interesting is that both governments chose a similar response to the problem.[790]

7.5 Justifying the Abolition of the Jury

In the adversarial system common to both Britain and Ireland trial by jury is the norm in serious cases and the abolition of trial by jury for defendants in trials related to a

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[788] Aitken, *op cit,* 1.
[789] Editorial, "Keeping Some Law in Ulster," *The Guardian,* 21 December 1972, 10.
[790] As was previously discussed in chapter 1, other Governments have also turned to the non-jury trial model when faced with terrorist problems. For example 'in Israel criminal cases are tried by a judge sitting alone or in the most serious cases by a panel of three judges.' See Jackson & Doran, *op cit,* 1/2.

threat to security is therefore a deviation from this norm. That fact was appreciated by the drafters of the Irish Constitution since the Special Criminal Court can only be established when it is deemed that the 'ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order'.[791] Both Governments had to justify their respective decisions to remove the right to trial by jury for certain, scheduled offences. Since the UK lacked any existing legislation it set up a commission to examine the issue. The Diplock Commission then reported that the best method to control the violence was the establishment of these courts and the government accepted that recommendation. The Commission has been criticised for not forwarding enough quantitative evidence to support its conclusions. In 1973, before the Northern Ireland (Emergency Provisions) Bill had been passed into law Prof. Twining stated that,

> ...the Commission adduced very little evidence, statistical or otherwise, in support of some of its main factual premises – for instance, that there is a real danger of a significant number of convictions or acquittals against the evidence by juries, that there is a serious risk of widespread intimidation of jurors as well as witnesses, or that the relatively liberal Northern Ireland provisions for granting bail were in fact being widely abused.[792]

The reason for this lack of evidence has been explained by others. It has been noted that, 'one problem with evaluating the jury system in the United Kingdom is that researchers are forbidden from examining what goes on in the jury room, with the

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[791] Bunreacht na hÉireann, Article 38.3.1°.
[792] Twining, *op cit,* 413.

result that we know very little about how juries actually operate'.[793] Therefore, the decision to remove the jury from these trials was taken in the belief that juries were unable to guarantee truthful results, however it is practically impossible to establish that that is, in fact, the case. The lack of quantitative evidence to support the findings of the Diplock Commission in Northern Ireland was highlighted by the existence of a public report which could be studied and commented upon. In the Republic no such report existed and, as a result, the criticism appears to have been somewhat more muted.

Under the Constitution and the Offences Against the State Act, 1939, the Government may introduce Special Criminal Courts when it is of the opinion that the ordinary courts are inadequate. This test appears clear enough; however, the Government was faced with the same difficulty that confronted the Diplock Commission. Deputy O'Leary raised the issue with the Minister for Justice in Dáil Éireann on 15 June 1972. The Deputy inquired as to whether the Minister would 'cite the cases on which the Government based their opinion that the ordinary courts are inadequate...'. Dr. Browne made a similar inquiry.[794] Unfortunately, though predictably, the Minister was unable to provide an adequate answer. He stated,

> I am precluded from referring to individual cases in which persons have been acquitted. I would, however, draw attention to the fact that, when a jury verdict has to be unanimous, each member of the jury that brings in a verdict of guilty is known to have supported the verdict and is thus a potential target for attack by associates of

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[793] Jackson & Doran, *op cit,* 4.
[794] Dáil Éireann, *Parliamentary Debates,* 15 June 1972, vol. 261, col.s 1764/1765.

> the convicted person. The possible threat of retaliation assumes new proportions when court-houses are picketed by persons in a barely-veiled atmosphere of intimidation.[795]

The Ministers reasoning is to be complemented. The existence of unanimous verdicts does make it obvious that every member of the jury supported a conviction. It is problematic, for the academic commentator, however, that the only evidence to support the view that jury intimidation was a problem in 1972 and was leading to wrongful acquittals is the conjecture of the Minister that such intimidation was occurring. When asked directly if there was any evidence of jury intimidation the Minister responded, 'One can, I think, fairly draw conclusions from verdicts that were brought in over a period of months'.[796] This appears to suggest that the Minister was unhappy with jury verdicts in some cases in the months preceding the reintroduction of the Court. It is difficult to accept this as adequate justification for the abolition of the right to trial by jury in serious security related cases.

It is important to understand that the reason behind the lack of evidence in support of the contention that juries were being intimidated is caused by the operation of the jury system. As Minister O'Malley stated, 'it is part of a juror's oath that he will not disclose anything connected with the case'.[797] Since it is impossible to ascertain the reasons behind a jury's verdict it is impossible to determine if intimidation played a role in that verdict. At this point reference should be made to the security situation pertaining in the State at the time. In previous sections of this chapter the difficulties

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[795] Dáil Éireann, *Parliamentary Debates,* 15 June 1972, vol. 261, col. 1765.
[796] *ibid.*
[797] Dáil Éireann, *Parliamentary Debates,* 15 June 1972, vol. 261, col. 1766.

faced by the Government were outlined. From 1969 onwards, violence was increasing in Northern Ireland. There were increasing numbers of bomb threats in the Republic and public disorder, as displayed by the burning of the British embassy, was a problem. The introduction of internment was not a politically viable solution and the Government instead chose to introduce Special Criminal Courts. Further evidence to support the view that juries may have suffered intimidation can be deduced from the 'declared intention of certain groups to embark on a policy of picketing the homes of members of the judiciary...'.[798] These statements caused the Government to schedule offences under s.7 of the Conspiracy and Protection of Property Act, 1875. It is, perhaps, reasonable to deduce that if groups were willing to picket the houses of judges in an effort to intimidate them then they would have been willing to intimidate jurors as well. Moreover, the introduction of the Special Criminal Court was made increasingly acceptable through the appointment of members of the judiciary to the Court rather than military personnel. In the circumstances of the time the decision to introduce the Court was justifiable. However, the problem with providing an adequate, research-based, justification remains. Without some quantitative based research which can objectively determine the level of jury intimidation it seems that the only justification which can ever be offered for introducing a court of this nature will remain shrouded in mystery.

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[798] Department of an Taoiseach, file 2003/116/93.

Chapter 8

The Special Criminal Court Under Review

The history of the Special Criminal Court provides an insight into how and why it has developed into the present day institution. This chapter will examine the ability and willingness of the ordinary Courts to conduct a Judicial Review of the Special Criminal Court and its workings. The emergency nature of the Court has resulted in a general unwillingness to interfere with the actions of the Executive vis-à-vis the Special Criminal Court; that is unfortunate. Perhaps the experience of Gavan Duffy J. and the Magazine Fort Raid[799] have cast a long shadow over the judiciary dissuading them from meddling in the affairs of State.

8.1 The Legislative Framework

The basis for the Special Criminal Court is to be found in Article 38.3 of Bunreacht na hÉireann which states that, 'Special Courts may be established by law for the trial of offences in cases where it may be determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order'. Part V of the Offences Against the State Act, (OAS) 1939, provides the legislative framework to give effect to this Constitutional provision. Section 35(2) of the Act lays down the mechanism by which Part V of the Act can be activated. Essentially s.35 restates the Article 38 test. The Act provides that the Government may publish a proclamation declaring that the it is satisfied that the ordinary Courts are inadequate and ordering that Part V be brought into force.

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[799] See Chapter 2.

The Government issued such a proclamation in May 1972. This proclamation, however, did not and cannot,

> ...of itself seise the Special Criminal Court with jurisdiction to try any particular offence. The offence in question must be scheduled by the Government under s.36 (1) of Part V (and where triable summarily, the necessary direction has been given under s.45 (1) of that part) or, alternatively, form the subject of a charge against an accused in respect of whose trial on such charge a certificate in writing has been issued by the Director of Public Prosecutions under ss.46, 47 or 48 of Part V.[800]

In fact Part V of the Act provides that the power to certify such issues vests in the Attorney General (AG); under s.3 (1) of the Prosecutions of Offences Act, 1974 these functions have been transferred to the Director of Public Prosecutions (DPP). The power to issue such certificates has resulted in there being a series of alternative routes via which a case can reach the Special Criminal Court; these will be examined individually.

(i) Charges before the District Court:

Where a person is charged before the District Court the case may be transferred for trial to the Special Criminal Court in four circumstances.

Scheduled offences are dealt with in one of the following two ways;

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[800] Pye, "Judicial Review of Discretionary Powers under Part V of the Offences Against the State Act 1939," (1985) 3 Irish Law Times, 65, 65.

(a) Section 45(1) sets down the procedure to be followed when the offence is a scheduled offence which the District Court has jurisdiction to deal with *summarily*, 'the District Justice must, if so requested, send the accused for trial before the Special Criminal Court'.[801]

(b) In the case of an *indictable* and scheduled offence where 'the District Justice finds that there is a case to answer following a preliminary examination, then s.45 (2) requires that the accused be transferred to the Special Criminal Court unless the DPP otherwise directs'.[802]

The regime is slightly different for non-scheduled offences.

(c) 'Section 46(1) provides that in the case of a non-scheduled offence which is triable *summarily*, then the District Court must send the accused for trial before the Special Criminal Court where the Director... certifies that the ordinary courts are inadequate to secure the effective administration of justice...'.[803]

(d) *Indictable* non-scheduled offences must be sent forward for trial before the Special Criminal Court following a preliminary examination where the DPP again certifies that the ordinary courts are inadequate.[804]

(ii) Transfer of Trials form the Circuit Court or Central Criminal Court:

If an accused has been returned for trial to the Circuit Court or Central Criminal Court the trial may be transferred to the Special Criminal Court. In such circumstances the DPP must again certify that the ordinary courts are inadequate. He must then apply to the High Court. 'Once the necessary certificate has been produced, it appears that the

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[801] Hogan & Walker, *Political Violence & the Law in Ireland,* (Manchester: 1989), 232.
[802] *ibid.*
[803] *ibid.*
[804] *ibid..*

High Court has no option but to accede to the request. Although s.48 is not frequently invoked, it has been held that the mandatory nature of the section does not infringe the separation of powers'.[805]

(iii) Cases Originating in the Special Criminal Court:

'The D.P.P. may... have a person charged directly before the Special Criminal Court with a scheduled offence, thereby eliminating the possibility of a preliminary examination in the District Court (see s.47 (1))'.[806] However, '...where non-scheduled offences are involved the requisite certificate as to the adequacy of the ordinary courts is necessary'.[807]

It is clear that the DPP is given a broad discretion in determining the trial venue for both scheduled and non-scheduled offences. A certificate as to the inadequacy of the ordinary courts can result in almost any trial being heard by the juryless Special Criminal Court. It is important, given the central position of the jury system within our body of law, to examine the limitations which have been placed on this discretion.

8.2 Judicial Review of the Executive

Due to the limitations it places on the right to jury trial, it is no surprise that the OAS has been the subject of much litigation. Much of that litigation has centred on the role of the AG (and more recently the DPP) in certifying that the ordinary courts are

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[805] *ibid*, see also *O'Reilly & Judge v. Director of Public Prosecutions* [1984] ILRM 224, 230.
[806] Pye, *op cit,* 66.
[807] Hogan & Walker, *op cit,* 232.

inadequate. The High Court and Supreme Court, however, have been slow to review the decision of the DPP. In chapter 4 an examination of the seminal case, *The State (Burke) v. Lennon*[808] was conducted. It was noted that the judgment of Gavan Duffy J. in the High Court was a *tour de force.*[809] It is fair to say that the remarkable feature of the judgment was the willingness of Gavan Duffy J. to review a piece of emergency legislation and determine that it was unconstitutional during wartime. In more recent times the ordinary courts have shown that they are less willing to review the actions of the Special Criminal Court than Justice Gavan Duffy was in the case of internment without trial.

Two key cases provide the jurisprudence in relation to the issue of the reviewability of the decision of the DPP to certify that the ordinary courts are inadequate. In the case of *Savage & McOwen v. DPP*[810] the plaintiff had been returned for trial by the District Court to the Special Criminal Court pursuant to a certificate of the DPP. The plaintiff argued that the opinion of the DPP which was the basis of the certificate issued under s.46 of the Act of 1939, 'could not have been reached on reasonable grounds or if reached on reasonable grounds was in error and was reached on insufficient grounds'.[811] Finlay P., in the High Court, took a very narrow view of the role of the Courts in reviewing the decision of the DPP. He stated that,

> The Courts... are of course concerned to ascertain as to whether in any particular case the Attorney General's certificate was valid in the sense that it was a certificate issuing from the Attorney General

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[808] [1940] IR 136.
[809] Hogan, "The Supreme Court and the Reference of the Offences Against the State (Amendment) Bill 1940", (2000) 35 Irish Jurist, 238, 244.
[810] [1982] 2 ILRM 385.
[811] [1982] 2 ILRM 385.

> and it would be concerned as to whether the Attorney General had reached an opinion as expressed in that certificate but it seems to me... that the opinion of the Attorney General is not reviewable by the courts.[812]

This view is extremely narrow. It suggests that unless the certificate is a forgery, or is purporting to express an opinion that the AG had not, in fact, reached, the certificate is immune from review. Furthermore, he established that the,

> ...right originally vested in the Attorney General and now vested in the DPP either positively in the case of a summary offence or negatively in the case of an indictable offence to decide that such persons should be tried by the Special Criminal Court. Again this section [s.45] does not appear to envisage any review by the courts...[813]

This judgment almost entirely excludes the possibility of judicial review of the opinion of the DPP that the ordinary courts are inadequate to hear a case, and thereby severely limits the right to jury trial.

The reasoning of Finlay P. was to be followed two years later by Carroll J. in *O'Reilly & Judge v. DPP.*[814] In this case the plaintiff based his claim on a number of points. It was argued that the right to jury trial is a positive right and as such there had to be a 'decisive process to take it away'; it was suggested that this could only be done by a member of the judiciary. It was also contended that the substitution of the DPP for

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[812] [1982] 2 ILRM 385, 388.
[813] [1982] 2 ILRM 385, 387.
[814] [1984] ILRM 224.

the AG was unconstitutional since the AG was a Constitutional officer, whereas the DPP was merely a civil servant. Perhaps the most interesting ground raised before the Court was that,

> The plaintiff is not in a position to investigate the grounds on which the DPP issued the certificate. Once the plaintiff has raised the issue whether there were any or any adequate or reasonable grounds for the issue of the certificate, the court is entitled to and should investigate the grounds on which the DPP issued the certificate. It was suggested that this should be akin to the supervision exercised by the courts over a claim of privilege by the Government. The plaintiff did not require that the grounds should be revealed in open court but did say there should be judicial supervision.[815]

This approach could be described as a compromise between the need for national security, and those of the accused to a fair trial.[816]

In relation to the need for judicial intervention in determining the trial venue and the constitutionality of substituting the DPP for the AG the Court was clear. Carroll J. referred to three earlier precedents[817] and concluded that the Supreme Court had already decided,

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[815] *O'Reilly & Judge v. DPP* [1984] ILRM 224, 227.

[816] The Offences Against the State Review Committee made a recommendation based on a similar form of reasoning in their 2002 report. See *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998 and Related Matters,* (Dublin: 2002), paragraph 9.60 – paragraph 9.77, hereinafter Committee to Review the OAS. The Committee recommended the adoption of a system of review by a serving Supreme Court Judge, see paragraph 9.76. The recommendations of the Committee will be considered in more detail later.

[817] namely, *In re MacCurtain* [1941] IR 83, *The State Bollard v. The Special Criminal Court,* High Court Unreported, 20 September 1972, and *In re the Criminal Law (Jurisdiction) Bill, 1975,* [1977] IR 129.

1. That the Constitution authorises the legislature to choose the method by which the question of the inadequacy of the courts is to be determined.
2. The determination does not have to be a judicial determination.
3. The legislature formerly chose the method of certification by the Attorney General.
4. The legislature has now chosen that it is to be the DPP who certifies.[818]

This approach effectively dismissed those issues and established, again, that the determination of venue was not a judicial function and that the role of the AG and now the DPP was constitutional and acceptable.

On the further question of reviewing the reasons of the DPP for issuing a certificate, the High Court referred to the judgment of Finlay P. in *Savage & McOwen v. DPP*.[819] In a lengthy passage worth quoting, Carroll J. approved of that decision and followed it. She went on to hold that,

> ...the revealing of information in open court under conditions in which persons are seeking to overthrow the established organs of the State would be a security impossibility.... The plaintiff does not in this case seek revelation in open court but does seek a private investigation by the court into the certificate of the DPP.

[818] [1984] ILRM 224, 228.
[819] [1982] 2 ILRM 385.

> Even though the Supreme Court in *re the Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129 at p.151 left open the question of the circumstances, if any in which the courts would be entitled to review *inter alia* a certificate by the DPP as to the inadequacy of the courts, I am of opinion, based on the terms of Article 38.3.1° of the Constitution and the authorities to date, that the opinion of the DPP is not reviewable by the courts, whether in open court or as a private investigation....
>
> The Oireachtas has determined the method under Article 38.3 by which the inadequacy of the ordinary courts is to be determined, i.e. the opinion of the DPP evidenced by his certificate. The courts do not have power to set that opinion aside, for to do so would be to substitute in a negative way their opinion as to the adequacy of the grounds on which the opinion was based.[820]

This statement will have to be examined, because it succinctly sums up the problems associated with review by the courts of the decision of the DPP.

The main difficulty involved in reviewing the decision of the DPP to certify that the ordinary courts are inadequate is that of national security. As Carroll J. points out, when parties are attempting to overthrow the State it may be impossible to reveal the reasons behind the decision of the DPP in open court. As Carroll J. also notes, however, the plaintiff was not seeking a review in open court. The Judge then

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[820] [1984] ILRM 224, 229.

referred to the decision of the Supreme Court in *In re the Criminal Law (Jurisdiction) Bill 1975*. On the issue of reviewing the decision of the DPP the Court stated that, 'it is not necessary in this case for the Court to express an opinion on the circumstances, if any, in which the Courts would be entitled to review any such proclamation, declaration or certificate - and it does not seek to do so.'[821] Therefore the issue of reviewing the decision of the DPP was left unresolved by the Supreme Court. Carroll J. was free to consider the issue herself and she referred to precedent and Article 38.3 and concluded that the decision of the DPP could not be reviewed either in open court or private session. The decision of Carroll J. like that of Finlay P. in *Savage & McOwen v. DPP* has been criticised.

The conclusions reached in the High Court by Finlay P. and Carroll J. have resulted in a situation whereby the decision of the DPP is immune from review. The recent case of *Eviston,*[822] which will be discussed later, has seen a decision of the DPP successfully challenged. However the majority of the case law has affirmed the position in *Savage & McOwen*. Barrington J. in the High Court, while considering a somewhat unrelated matter, stated that, 'it clearly would be impracticable and dangerous, in the circumstances envisaged by the Offences Against the State Act, to force the AG or the DPP to disclose in court the circumstances which had led him to the opinion that the ordinary courts were inadequate'.[823] The case of *The State*

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[821] *In re the Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129, XXX.

[822] *Eviston v. The D.P.P.* [2002] 3 IR 260. While this case did not concern the Special Criminal Court it is a rare example of the Appeal Courts granting a successful review of a decision of the Director of Public Prosecutions, as such it may provide precedent which could be applied to the decision to certify the ordinary courts inadequate. At the very least it confirms that the decisions of the Director of Public Prosecution can be reviewed by the Courts.

[823] *The State (Smith & Fox) v. The Governor of the Curragh Military Detention Barracks* [1980] ILRM 208, 211. This case concerned the Prison Act, 1972. Section 2(3) of that Act provided that a Minister could direct that a prisoner be transferred to military custody where he had certified that he was 'of the

(McCormack) v. The DPP[824] is also of interest. Again the facts of the case are not exactly comparable to the situation under consideration but the Court did make some interesting observations. This case arose from the Criminal Law (Jurisdiction) Act 1976, which was outlined earlier. The prosecutor had been returned for trial at Belfast Crown Court and wanted to opt for trial in the Republic. Therefore, he requested that the respondents issue a warrant for his arrest but the DPP refused to issue such a warrant. As such this case is unusual in that the respondent was seeking to force the DPP to issue a warrant for his arrest and unlike most of the other cases considered the prosecutor appears to have wished to be tried in the Special Criminal Court, rather than attempting to avoid that Court's jurisdiction. Barr J. in the High Court stated that,

> I respectfully concur with the reasoning of the President and the conclusions which he arrived at in *Savage & McOwen's* case that the Court has no power to review an opinion expressed by the Director in a certificate issued by him under s.46 (2) of the Act of 1939. It seems to me that his function in deciding whether or not to prosecute a particular person for allegedly having committed a criminal offence is no different.... Both functions are executive in nature....[825]

On appeal in the Supreme Court Finlay C.J. laid down the grounds on which a decision of the DPP could be reviewed stating that, 'If, of course, it can be

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opinion that prison accommodation or prison staff as insufficient to provide secure and reasonable conditions of custody...' As a result there are clear differences between the two cases, one concerns the reviewability of the DPP under the Offences Against the State Act, 1939; the other considers the role of a Minister. Barrington J.'s support of the decision in *Savage & McOwen* is, however, interesting.

[824] [1987] ILRM 225.

[825] *The State (McCormack) v. The DPP* [1987] ILRM 225, 232.

demonstrated that he reaches a decision *mala fides* or influenced by an improper motive or improper policy then his decision would be reviewable by a court.'[826] The difficulties associated with this approach were obvious. The 'Catch 22' was explained by Walsh J. when he commented that,

> As the defendants have chosen not to offer any evidence in this case the court does not know what are the reasons which warranted the DPP's conclusion.... Be that as it may there is nothing before this court from which it could be reasonably inferred that, the opinion was either perverse or inspired by improper motives.[827]

Since the DPP has given no indication of his reasons, the Court cannot determine if the opinion was based on *mala fides* or improper motive. Review of the decision of the DPP is virtually impossible.

Given the reluctance of the Courts to review the decision of the DPP to certify that the ordinary courts are inadequate, it is unsurprising that they have been even less willing to entertain the possibility of reviewing the decision of Government to maintain Part V of the OAS, 1939 in operation. In *In re the Criminal Law (Jurisdiction) Bill, 1975*[828] the Supreme Court appeared to leave the issue of review open. This Act also grew out of what the Supreme Court referred to as, 'the intercommunal violence and killing in Northern Ireland...'.[829] The Act provides that, 'when a person does in Northern Ireland an act which, if done in the State, would constitute an offence

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[826] *ibid*, 237.
[827] *ibid*, 238/9.
[828] [1977] IR 129.
[829] *In re the Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129, 142.

specified in the schedule of the bill, shall be guilty of an offence...'[830] as such the details of the Act are not of relevance to this study; however, it is relevant that the Supreme Court, during the course of their judgment in that case, confirmed that 'it was constitutional for the Oireachtas to have provided by the Act of 1939 that the question of the inadequacy of the ordinary courts should be determined by the Government or by a certificate of the Attorney General...'.[831] In *Savage & McOwen,*[832] discussed earlier, Finlay P. noted that the Oirechtas had vested the power to determine when special courts were required in the Government.[833] He further noted that there was a resultant right in Dáil Éireann to annul the Government's proclamation. He then argued that the Act '...did not vest in the courts ordinarily sitting any power as it seems to me either to decide that in any particular circumstances special courts were necessary or on the other hand that they had, under any circumstances, ceased to be necessary.'[834] Therefore, because the Act did not specifically provide for review Finlay P. rejected the possibility of reviewing the Government's decision that such Courts were necessary. Carroll J. reiterated this point in *O'Reilly & Judge;*[835] in a passage cited earlier, it was noted that,

> 1. The Constitution authorises the legislature to choose the method by which the question of the inadequacy of the courts is to be determined.

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[830] *ibid*, 143.
[831] *In re the Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129, XXX.
[832] *Savage & McOwen v. D.P.P.* [1982] 2 ILRM 385.
[833] Offences Against the State Act, 1939, s.35 (2).

[834] [1982] 2 ILRM 385, 386.
[835] *O'Reilly & Judge v. D.P.P.* [1982] ILRM 224.

2. The determination does not have to be a judicial determination.[836]

As a result of these decisions it is clear that the Courts are unwilling to engage in any form of review of the Government's decision to proclaim that the ordinary Courts are inadequate.

8.3 The 'Organised Crime' Cases

The Judiciary has maintained this limited approach toward review. In the 1990's a series of cases were presented where it was argued that since the cases had no connection with the terrorist threat emanating from Northern Ireland the Special Criminal Court was the incorrect trial venue. These cases could, for the sake of simplicity, be referred to as the 'organised crime cases'. The use of the Special Criminal Court in such instances is not all that remarkable when consideration is given to the European experience of anti-terror legislation. For example, the use of *pentiti*, a form of witness protection scheme in Italy was initially employed against the Red Brigades but was later utilised against the *mafia*;[837] and similarly, the Germen systems of *staatszeugen* (State's Witness) and *Kronzeuge* (Crown Witness) 'evolved out of earlier experiments in trials of those accused of terrorism'.[838] Fyfe and Sheptycki note that the German prosecution of the Baader-Meinhof group rested upon the testimony of a 'crown witness' - one Gerhard Muller, from the mid-1980's; this type of evidence was utilised in the prosecution of Neo-Nazi groups and having been

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[836] [1984] ILRM 224, 228.
[837] Fyfe & Sheptycki, "Facilitating Witness Co-operation in organised Crime Cases: an International Review", (Home Office: 2004) (Home Office On-line Report 27/05), 26. <http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr2705.pdf> accessed on 22 September 2005. 34.
[838] *ibid,* 36.

employed against both ends of the political spectrum it was adapted through the *Verbrechensbekämpfungesgestz* of October 1994 for use in cases involving organised crime.[839] As such, it is clear, that legislative measures which have been employed against terrorists in one context are often adapted for use in cases of organised crime.

With reference to the Irish experience, the first of the 'organised crime' cases to be considered is that of *Kavanagh*. Here the applicant was charged directly before the Special Criminal Court with the non-scheduled offence of false imprisonment following a certificate of the DPP under s.47(2) of the Act of 1939. The applicant sought a declaration that there was no reasonable basis for the opinion of the DPP to the effect that the ordinary courts were inadequate. In the High Court Laffoy J. stated that,

> The Director's certificate under s.47 (2), in my view, belongs to that category of decisions which the Supreme Court, on policy grounds, has held to be reviewable only to a limited extent and accordingly, in my view, on the authority of *State (McCormack) v Curran* and *H v. Director of Public Prosecutions* the Director's certificate is not reviewable in the absence of evidence of *mala fides* on the part of the Director or that he was influenced by improper motive or improper policy.[840]

That conclusion is not, in and of itself, surprising since it merely restates the test previously developed.

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[839] *ibid*, 36/37.
[840] *Kavanagh v. The Government of Ireland* [1996] 1 ILRM 133, 146/7.

The important theme of this case is that the applicant claimed that since he was not involved in a subversive organisation the venue was unsuitable. In relation to this Laffoy J. concluded that, 'The applicant did not adduce any evidence in support of his contention that the proclamation of 1972 was designed and intended to deal and only deal with cases arising from or reasonably connected with the conflict and troubles in Northern Ireland....'[841] Therefore, although the history surrounding the reintroduction of the Court in 1972, which has been outlined in preceding chapters, may have suggested that the Court was designed to deal with a terrorist threat, the High Court felt that it was not exclusively created for such purposes. As the Committee to Review the OAS noted the Government proclamation in 1972 establishing the Special Criminal Court did not expressly state that the Court was being created to tackle the threat emanating from Northern Ireland.[842] However, 'the original justification for the establishment of the... Court is commonly believed to be directly associated with the civil conflict in Northern Ireland'.[843] Such a belief is not without basis; on 23 June 1972 the Taoiseach, Mr. Lynch stated on RTE Radio,

> We want to make sure that we can continue to control any subversive activities here.... But these activities were, of course, related to the situation in the North of Ireland and as soon as that situation will have eased... then there wouldn't seem to be any need

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[841] *ibid*, 148.
[842] Committee to Review the OAS, *op cit,* paragraph 9.31.
[843] *ibid,* paragraph 9.32.

> for the continuation of the Special Courts and therefore we would have to look at the situation again.[844]

Interestingly, although the Taoiseach clearly justified the establishment of the Special Criminal Court by referring to the North, he expressly did not say that the Court would be disestablished once violent activities had ended. The Taoiseach appears to have left the door open for the continued use of the Court with the phrase, 'we would have to look at the situation again'. If the Courts were solely established for the purpose of tackling subversives then there would be no need for re-examination. Despite such nuances, it is clear that the Court was established to tackle the subversive threat although, as with its use during the emergency, politicians may have realised its utility in other situations from an early point.

Kavanagh had argued that he was not involved in terrorist crime, but the High Court would not review the decision of the Director on that basis. The case was appealed to the Supreme Court. Here the applicant again argued that the Government Order of 1972 was a response to the trouble associated with Northern Ireland,

> ...the appellant relied upon a representation alleged to have been made by the Irish Attorney General to the Human Rights Committee of the General Assembly of the United Nations and referred to in a paragraph from the Report of the Human Rights Committee dated 7 October 1993. The paragraph in question is paragraph 575 and reads as follows:

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[844] Department of an Taosieach, file 2003/16/93.

> 'With respect to the Special Criminal Court, the representative stressed that the court was needed to ensure the fundamental rights of citizens and protect democracy and the rule of law from the ongoing campaign related to the problem of Northern Ireland'.[845]

It is clear that the AG justified the continuing existence of the Special Criminal Court by reference to the ongoing terrorist threat. This case however, did not involve such a threat and the appellant argued that as such the Court's use in this case was unjustifiable. Barrington J. was unimpressed by this argument and referred to the accepted precedent as outlined in the preceding paragraphs. The Supreme Court held that,

> It is clear... that under our system the question of whether Special Criminal Courts should be established is a matter for the legislature and the question of whether the part of the Offences Against the States Act providing for the establishment of Special Criminal Courts should be brought into force or should cease to be in force is a matter for the Government.
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> Provided these powers have been exercised in a *bona fide* manner the ordinary courts have no function in relation to them. There is a certain logic in this as the question under consideration is the adequacy or otherwise of the ordinary courts....[846]

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[845] *Kavanagh v. The Government of Ireland* [1997] 1 ILRM 321, 326.
[846] *ibid*, 327/8.

The Supreme Court, therefore, rejected the submission that the 1972 Government proclamation only envisaged trial by Special Criminal Court in cases which concerned political violence. As was noted in chapter 4, the Special Criminal Court was used in trials of a non-subversive nature during World War II and as such there is precedent for this approach. Arguably, it was open to the Court to review the basis of the Director's decision in a case where no terrorist threat had been cited. In *Savage & McOwen* and *O'Reilly & Judge* the Court referred to the impossibility of review in cases where parties were seeking to undermine the organs of the state. In a case where no such organisation was alleged to be involved the Court may have felt it more proper to examine what *other* motive the Director may have had for choosing this trial venue. The Court, however, did not pursue that approach.

A further case of a similar nature was that of *DPP (Ward) v. The Special Criminal Court & the DPP.*[847] Here the High Court offered a justification for the use of the Special Criminal Court in a case where terrorist involvement was not alleged. Carney J. pointed out that in the modern age,

> An Garda Síochána as well as having to deal with crime in its traditional forms now has in addition to deal with organised crime. Those engaged in such crime require a wall of silence to surround their activities and believe that its maintenance is necessary for their protection. They have at their disposal the resources including

[847] [1998] IEHC 48; [1999] 1 IR 60.

> money and firearms to maintain this wall of silence and will resort to any means including murder in furtherance of this objective.[848]

Such an organisation, it could be argued, poses as much of a threat of jury intimidation as a terrorist organisation. The UK Home Office has also commented that 'in conducting their operations organised criminals frequently resort to extreme violence, intimidation and corruption.... Organised crime groups and terrorist groups have many similarities in their ways of operating'.[849] If such a motive had inspired the decision of the DPP to certify the ordinary courts as inadequate it is difficult to see how that could not be upheld. Unfortunately, the DPP was not obliged to state this as his reason. In their dissent to the Report of the Committee to Review the OAS, Justice Hederman, Professor Binchy and Professor Walsh note that 'no other common law jurisdiction has come to the conclusion that the risk of jury intimidation warrants non-jury trial...'.[850] They also comment that 'while Ireland... has experienced the growth of organised crime in recent years, it is not plausible to suggest that, in contrast to other common law jurisdictions such as the United States of America, England and Australia, Irish social conditions are so perilous as to warrant dispensing with jury trial'.[851] It is respectfully suggested that this argument underestimates the importance of two points. Firstly, the existence of the Special Criminal Court prior to the emergence of the threat of organised crime coupled with its proven track record in the fight against terrorism, meant that it was logical for the Irish authorities to utilise it. As was noted earlier, authorities in Germany and Italy have also adapted anti-

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[848] [1998] IEHC 48, paragraph 1.
[849] The Home Office, *One Step Ahead; a 21st Century Strategy to Defeat Organised Crime*, Cm 6167, presented to Parliament March 2004, 7.
[850] Committee to Review the OAS, *op cit*, paragraph 9.93.
[851] *ibid.*

terror measures to combat organised crime.[852] Secondly, the comparison to the United States, England and Australia ignores the difference in population between these jurisdictions. Economies of scale operate in these larger jurisdictions which make it easier to maintain the anonymity of a jury. Disappearing unnoticed for the course of a criminal trial is more difficult in Ireland; a point which is recognised by the dissenting members of the Committee.[853] Therefore, it is not this author's contention that only cases of a terrorist nature should be tried before the Special Criminal Court. However, it is felt that while in terrorist cases the Court may feel that the reason for the decision of the DPP is obvious, in other cases such as *Kavanagh* and *Ward* the Courts should satisfy themselves that a reasonable basis for the transfer of trials to this venue exist. This issue concerned Robinson who commented that, 'to channel persons charged with purely criminal offences to the Special Criminal Court is to abolish trial by jury by the back door...'.[854] Meaningful review would address the concerns expressed by Robinson and perhaps, in light of the decision in *Eviston*, such review will be possible in the future.

The above review of the case law allows a number of conclusions to be drawn. It is clear that the superior courts are slow to review the decision of the Director to transfer cases from the ordinary courts to the Special Criminal Court. This reluctance is based on a number of factors. A separation of powers argument has been used. In relation to this reference is made to the Article 38.3 of the Constitution which gives the Government and Dáil Éireann the power to determine if and when such Courts are necessary, and to establish a procedure for the creation of these Courts. It has been

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[852] as was noted earlier. See Fyfe & Sheptycki, *op cit*, 27.
[853] Committee to Review the OAS, *op cit*, paragraph 9.95.
[854] Robinson, *The Special Criminal Court* (Dublin: 1974) 35.

commented that, 'in some cases an immunity from judicial review may be regarded as having been implicitly conferred by the Constitution.'[855] As a result, it has been argued that the ordinary courts have no role in reviewing this decision. Furthermore, it has been established that for policy reasons it would be impracticable to enquire into the reasons for the Director's certificate. Unless *mala fides* or improper motive are established no such review will be undertaken. However, since the Director is not obliged to give reasons for his decision, either in open court or private session, it is difficult, if not impossible, to establish that such improper motive existed. The 'organised crime' cases show that even where a terrorist threat was not cited, the ordinary courts were willing to accept that the Director had reached a proper decision without evidence to support that stance. Carney J. did offer a possible justification for the use of the Court in these cases but an explanation from the DPP is still unavailable. A well informed and reliable source has informed the author, confidentially, that the current Director of Public Prosecution has instigated a subtle change in policy and that he is generally not in favour of trying cases of an 'organised crime' nature before the Special Criminal Court. As a result, there has been a drop in the number of organised crime cases being referred to the Court. While welcoming any such development it remains important to note that the restrictive interpretation by the Courts of their role in reviewing the decision of the Director, to certify the ordinary courts inadequate, is still a point of some considerable concern.

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[855] Hogan & Morgan, *Administrative Law in Ireland,* (Dublin: 1998), 686.

8.4 Alternative Approaches Available to the Courts

It is clear from the above section that the main case law related to the issue of reviewing the decision of the DPP to send an accused forward for trial before the Special Criminal Court are those of *Savage & McOwen* and *Judge & O'Reilly*. Almost immediately following those decisions, criticism of the approach taken in the High Court appeared. Particular emphasis had been made during those judgments on the security implications of revealing such information in open court and on the executive nature of the decision. However as Byrne noted,

> The decision of the Supreme Court in *Murphy v. Dublin Corporation* established that where a privilege is claimed by the executive regarding a piece of evidence required by the judiciary, and the privilege is based on that evidence being classified by the executive as sensitive from a security point of view, the courts may examine the material *in camera*....[856]

Significantly, in *O'Reilly & Judge* the applicant had made a similar proposal.[857] The case of *Murphy v. Dublin Corporation* is of a limited interest. The case was a civil and not a criminal matter and Walsh J. stated in the Supreme Court that as a result of this difference, 'the court has not to review the considerations which might arise if in the course of a criminal prosecution an effort was made to obtain the disclosure...' of certain documents.[858] As a result this decision may be distinguished from the circumstances of interest here. However, Walsh J. also noted that,

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[856] Byrne, "Judicial Reviewability of a Prosecutorial Discretion" (1981) 16 Irish Jurist, 86.
[857] *O'Reilly & Judge* [1984] ILRM, 224, 227.
[858] *Murphy v. Corporation of Dublin* [1972] IR 215, 233.

> It is clear that, when the vital interests of the State (such as the security of the State) may be adversely affected by disclosure or production of a document, greater harm may be caused by ordering rather than by refusing disclosure or production of a document. In such a case the courts would refuse the order but would do so at their own decision.[859]

Indeed Walsh J. was clear that although the Courts might rarely disagree with the executive, they should not accept 'without question the judgement of the Minister'.[860] This is a very different approach to that later taken by the Courts when dealing with review of the Director's certificate. This difference in approach may be explained by the different circumstances of the cases, namely that *Murphy* was a civil law matter and that the Offences Against the State Act, 1939 is an extraordinary piece of legislation designed to curtail the activities of an organisation seeking the overthrow of the State. Despite these differences an increased willingness on the part of the Courts to review the decision would be welcome and an approach more akin to that in *Murphy* than that in *Savage* would allow at least a more meaningful if limited appraisal. In order the facilitate such a review the Committee to Review the OAS recommended that independent counsel could be employed to argue before the High Court, sitting *in camera* on behalf of the applicant. This proposal would allow the High Court examine the material and avoid the accused gaining access to the sensitive material; furthermore, it would ensure that counsel for the accused would not be in possession of information which they were not at liberty to disclose to their client.[861]

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[859] *ibid*, 234.
[860] *ibid*, 236
[861] Committee to Review the OAS, *op cit*, paragraph 9.65.

Following the decision in *Judge & O'Reilly* it was noted that judicial review merely questions whether the DPP was acting *intra* or *ultra vires.* 'This means that, unless the court found that there was *no* evidence on which the D.P.P. could have based his opinion, which triggers the referral of non-scheduled offences to the Special Criminal Court, it would still be possible for a valid opinion to be informed by him.'[862] Therefore, even if review were allowed it would be restricted and as long as there was some evidence supporting the opinion, the certificate could stand. Such evidence might include that referred to by Carney J. in *Ward's* case as to the danger inherit in organised crime cases.[863] Indeed, Byrne notes that the Courts are often willing to refer to possible justifications for the decision of the Director. As he comments,

> In *State (Littlejohn) v. Governor of Mountjoy Prison,* the Supreme Court took the view that in exercising the power under the 1939 Act it was permissible to take account of the difference between a judge sentencing alone in the ordinary courts and the anonymity of three judges reaching a decision in the Special Criminal Court. Speaking for the Court Henchy J. stated they were 'not entitled to speculate as to the grounds on which' the discretion was exercised, but that it was sufficient for the Court to support the sentencing basis where this was the only possible ground for its exercise.[864]

Although the Court did not seek a reason from the Director it was willing to accept that the sentencing issue was valid and was the only reason on which the Director

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[862] Byrne, "The Director of Public Prosecution's Power to Refer Cases to the Special Criminal Court," (1984) 6 DULJ 177, 179.
[863] *DPP (Ward) v. Special Criminal Court,* [1998] IEHC, 48, cited above.
[864] Byrne, "The Director of Public Prosecution's Power to Refer Cases to the Special Criminal Court," (1984) 6 DULJ 177, 179.

could have based his decision. This is a form of *de facto* review and would surely benefit from actual review.

It has also been noted that the argument forwarded in *Savage* and later in *O'Reilly,* as to the separation of powers and Article 38.3, namely that the power regarding Special Criminal Courts is vested in the Oireachtas who have delegated some of that authority to the Government may not preclude review. Pye refers to the common law presumption in favour of reviewability. Only clear words precluding review can remove this right.[865] However, as Pye also notes 'the courts have not always been consistent in the application of this common law doctrine, particularly where legislation designed to cope with an emergency falls to be interpreted'.[866] As a result of this it may be more useful to consider issues surrounding a claim of privilege by the executive in Irish law. The issue of privilege has been discussed in light of the *Murphy* decision above. Other cases of a similar nature may be more useful. In the *State (Lynch) v. Cooney* the Supreme Court held that 'it could review an opinion of the Minister of Posts and Telegraphs reached under s.31(1) of The Broadcasting Authority Act, 1960, as amended, that "the broadcasting of a particular matter or any matter of a particular class would be likely to promote, or incite to, crime or would tend to undermine the authority of the State"'.[867] The case concerned an Order made by the Minister to the effect that the broadcasting authority should refrain from

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[865] Pye "Judicial Review of Discretionary Powers Under Part V of the Offences Against the State Act 1939," (1985) 3 Irish Law Times, 65, 67.
[866] *ibid.*
[867] Pye, *op cit*, 69.

broadcasting material 'made by or on behalf of, or inviting support for, the Sinn Féin organisation.'[868] O'Hanlon J. stated forcefully in the High Court that he,

> ...was not aware of any case where the use of the expression 'is of opinion' has admitted of judicial review with regard to the reasonableness of the decision made. The decision of the Supreme Court in *In re the Offences Against the State (Amendment) Bill, 1940* would appear to be conclusive against any such interpretation.[869]

If such an approach were to remain, the possibility of review would be unlikely. However, the Supreme Court took an unexpected approach. In the course of the Supreme Court judgment Chief Justice O'Higgins stated,

> ...in the opinion of this Court the learned trial judge was mistaken in his conclusion. While the opinion of the former Supreme Court, expressed in 1940 and in 1957, reflected what was then current judicial orthodoxy, judicial thinking has since undergone a change. Decisions given in recent years show that the power of the Courts to subject the exercise of administrative powers to judicial review is seen as having a wider reach than that delimited by those decisions of 1940 and 1957. In particular, it has been established by this Court in *McDonald v. Bórd na gCon* an *East Donegal Co-operative v. The Attorney General* that the correct approach in considering such questions is first of all to construe the statute. If the statute lends itself to more than one construction... there is a presumption

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[868] *The State (Lynch) v. Cooney* [1982] IR 337, 337.
[869] *ibid*, 347.

> that the Oireachtas... intended only the constitutional construction.[870]

This is important for a number of reasons. Firstly it overturned the decision of the Court in *In re the Offences Against the State (Amendment) Bill 1940*, and secondly it permitted review of an executive decision in a case concerning an emergency provision. A curtailment of the right to free speech for the Sinn Féin organisation and its members under the Broadcasting Authority Act, 1960 may be based on the same or similar information that caused the Director to issue a certificate under the Offences Against the State Act, 1939.[871] Both potentially involve security considerations, therefore if one is reviewable why not both? It should also be remembered, from previous chapters, that the decision in *In re the Offences Against the State (Amendment) Bill, 1940* concerned the operation of internment without trial. Since the Supreme Court was willing to overrule that decision then it is possible that a review of the Director's certificate might be possible. After all 'there are more security type problems connected with the operation of the internment powers under this legislative scheme than with the D.P.P.'s venue choice power'.[872] The decisions in *Murphy* and *Lynch* provide evidence that review of an executive decision can occur and that even in cases of a security nature such review might be possible.

Further support for the view that the ordinary courts have a role to play in limiting the discretion of the DPP in relation to the selection of a trial venue can be found. The case of *Eccles v. Ireland* is instructive and shall be considered in more detail. At this

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[870] *ibid*, 360.
[871] Pye *op cit*, 70.
[872] Byrne, "The Director of Public Prosecution's Power to Refer Cases to the Special Criminal Court," (1984) 6 DULJ 177, 181.

stage, however, some salient features are relevant. The case concerned a challenge of the independence of the members of the Special Criminal Court. The plaintiff argued that the tribunal did not enjoy the appropriate level of independence largely because of the method of appointment of members of the Court.[873] Chief Justice Finlay stated the case succinctly when he said,

> The contention of the plaintiffs is that the terms of s.39 (2) are, as a matter of law, to be interpreted as meaning that the Government could exercise an *unfettered* power to interfere with the proceedings and decisions of the Special Criminal Court by terminating the appointment of its members for the reason only that their decisions did not favour the interests of the Executive.... This Court rejects these submissions as being incorrect in law.[874](my emphasis)

The Chief Justice went on to explain how and why the Government did not have an unfettered discretion,

> The judgment of this Court in *East Donegal Co-operatvie Livestock Marts Ltd. v. Attorney General* [1970] IR 314 at p.341 of the report; states as follows:
>
> > At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or

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[873] see *Eccles v. Ireland* [1986] ILRM 343 and s.39 Offences Against the State Act,1939.
[874] *Eccles v. Ireland* [1986] ILRM 343, 350.

> prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the courts.
>
> This principle applies to the powers granted to the Government and to the Minister respectively, by these subsections. If either of these authorities were to seek to exercise its power in a manner capable of interfering with the judicial independence of the court in the trial of persons charged before it would be attempting to frustrate the Constitutional rights of persons accused before that court to a trial in due course of law. Any such attempt would be prevented and corrected by the courts established under the Constitution.[875]

It is clear, therefore, that Finlay C.J. felt that in the above circumstances executive discretion was open to review. These circumstances are similar to those under consideration since they involve the same court and therefore the same security implications. Despite the fact that the Supreme Court concluded that s.39 of the Act of 1939 was not repugnant to the Constitution, their willingness to review the Government actions display a belief that such issues can be reviewed despite Article 38.3.

A more recent, but unconnected, case is relevant since it shows the willingness of the Courts to review Government and Executive actions despite concerns about the

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[875] *ibid*, 351.

separation of powers. The facts of *DB v. Minister for Justice*[876] are unrelated to the Special Criminal Court. Here the applicant was a minor in need of secure accommodation. The applicant said, 'that whilst the High Court has made declarations concerning the obligations of the State towards young people with these special needs, the Minister of Health has failed to take timeous and effective steps to meet those needs.'[877] Kelly J., citing Ó'Dáilaigh C.J. in *State (Quinn) v. Ryan,*[878] argued that the Constitution was designed to provide substantive fundamental rights. He concluded by saying, 'it is said that this Court does not have any entitlement to become involved in what was called matters of policy. I am by no means persuaded that this is so. If such an intervention were required in order for this Court to carry out its duties under the Constitution... then, in my view, it would be open to it to do so.'[879] The consequences of this judgment were that the High Court directed the Minister to provide funds for the development of secure accommodation for DB and others in similar circumstances. This was a direct intervention in what would usually be considered a policy role of Government. Although this case was not an emergency case, in the usual meaning of that phrase, it is interesting that the Court was willing to interfere with the discretion of the Minister to such an extent in the course of protecting individual rights. *DB* was overturned in *D (T) v. Minister for Education.*[880] Keane C.J. noted that,

> The Ministers in the present case, in determining that particular resources should be allocated to the building and staffing of the units which are now the subject of the order, were beyond argument

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[876] [1999] 1 ILRM 93.
[877] *DB v. Minister for Justice* [1999] 1 ILRM 93, 96.
[878] [1965] IR 70, 122.
[879] *DB v. Minister for Justice* [1999] 1 ILRM 93, 103.
[880] [2001] IESC 86.

> exercising the executive power of the State on behalf of the Government as a whole. The monies required to provide and staff the units can only be made available to the Ministers by Dail Eireann under the appropriation machinery prescribed under Article 17.2 and then only on the recommendation of the Government.[881]

As such he, and the majority of the Supreme Court,[882] concluded that the decision in *DB* was an unjust interference with the separation of powers. If a fraction of the level of judicial activism displayed in *DB* was brought to bear on the issue of reviewing the decision of the Director to certify the ordinary courts inadequate, such review would be possible. The decision of the Supreme Court might be distinguished as concerning the expenditure of public funds which would not be the case in relation to the decision of the DPP.

Perhaps most significantly, in *Eviston*[883] the Courts revealed a willingness to review the decision of the DPP as to whether or not it was proper to proceed with a prosecution. If review of such a decision is possible then review of the decision to certify the ordinary courts inadequate might also be available. The case concerned a fatal motor accident. On 28 June 1998 Linda Eviston had a puncture which she was unable to change. Two men volunteered to change the wheel and shortly afterwards Eviston crashed into another car resulting in the death of Tony Moynihan. Eviston co-operated with the subsequent investigation and it was determined that the

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[881] [2001] IESC 86, 74.
[882] with Denham J. dissenting. [2001] IESC 86, 164.
[883] *Eviston v. The Director of Public Prosecutions* [2002] 3 IR, 260.

replacement wheel had suddenly deflated causing the crash.[884] The Office of the DPP considered the case and determined that there should be no prosecution.[885] Following these events the father of the deceased wrote to the DPP stating, 'I have personally contacted the Minister John O'Donoghue in relation to this matter in the hope that he can use his good office to assist us in this most distressing matter' and appealing for the decision to be reconsidered.[886] As a matter of fact the DPP did reconsider the issue and proceedings against Eviston began. The decision to change opinion was challenged before the High Court and later the Supreme Court. Kearns J. in the High Court noted that,

> ...the courts in Ireland have shown considerable reluctance to apply the normal standards of judicial review to prosecutorial decisions,

concluding that,

> ...in a nutshell, it has been held that in decisions to prosecute or not to prosecute, the court can only intervene by way of judicial review where it is demonstrated that the respondent in making his decision did so *mala fide* or was influenced by an improper motive or was influenced by an improper purpose or had abdicated his functions...

furthermore, reasons do not have to be given for any decision.[887] This, as we have seen, is an accurate summation of the previous case law in the area. In the current instance, however, the High Court was willing to depart from the previous orthodoxy. Kearns J. stated that,

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[884] [2002] 3 IR 260, 264.
[885] [2002] 3 IR 260, 265.
[886] [2002] 3 IR 260, 266.
[887] [2002] 3 IR 260, 269/270.

> ...this case is not about a decision to prosecute or not to prosecute. It is about the reversal or unmaking of such a decision in particular circumstances.... The court cannot refrain from an assessment of those reasons and the circumstances in which the decision to reverse was made, always bearing in mind that it should only intervene on rare occasions and allow the respondent the widest possible margin of appreciation.[888]

Kearns J. then applied a test similar to the famous test in *Wednesbury* stating that 'no sensible person who applied his mind to the matters to be decided by the respondent could have arrived at the decision which he did'.[889] Significantly, Kearns J. was adamant that he was not stating that the Director had acted with *mala fides* or any form of improper motive.[890] In other words he was not applying the test which had been laid down in previous cases. Kearns J. had left the door open to effective judicial review of the decisions of the DPP; the decision of the High Court in *Eviston* allows review of a decision based upon the merits. However, it should be acknowledged that a high barrier remains, since Kearns J. applied a *Wednesbury*[891] type of test: namely the decision maker must reach a decision which no sensible (or in the case of *Wednesbury*, reasonable) decision maker would have reached. Despite the high barrier, the significance of such a decision required clarification and an appeal to the Supreme Court was to be expected.

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[888] [2002] 3 IR 260, 276/277.
[889] [2002] 3 IR 260, 277.
[890] [2002] 3 IR 260, 277.
[891] *Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation* [1947] 2 All ER 680.

Not unlike dissenting judgments, significant High Court decisions are of academic interest, but little practical importance, if they are overturned upon appeal. The Supreme Court, in *Eviston*, however did not overrule Kearns J., although they did clarify a number of issues and in doing so probably lessened the impact of the case. Keane C.J. considered the specific circumstances of the case and concluded that Kearns J. had erred in the High Court when he had concluded that the decision of the Director was irrational.[892] Importantly, however, the Chief Justice noted that although,

> it was undoubtedly open to the respondent in this case, as in any other case, to review his earlier decision and to arrive at a different conclusion, even in the absence of any new evidence.... The distinguishing feature in this case is the communication by the respondent of a decision not to prosecute the person concerned.... I am satisfied that the decision of the respondent was *prima facie* reviewable by the High Court on the ground that fair procedures had not been observed.[893]

As a result, the Supreme Court affirmed the decision of the High Court while adopting a different form of reasoning to justify the decision. Even McGuinness J., who dissented from the majority decision, commented that,

> ...whilst I believe Kearns J. was incorrect on the particular grounds on which he granted the relief sought and I am unconvinced by the

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[892] [2002] 3 IR 260, 296.
[893] [2002] 3 IR 260, 298.

more extensive argument made in this court in support of his order,

I confess to a sense of relief that my views have not prevailed.[894]

Despite the misgivings of McGuinness J., review of the decisions of the Director now appear possible, although the extent to which this would inform a decision in a case concerning a piece of emergency legislation such as the Offences Against the State Act, 1939 remains to be seen.

The Supreme Court decision is intriguing. The grounds for review adopted by Kearns J. in the High Court allowed for a limited form of review of the decision of the DPP; the test proposed would set a high barrier for any future review of a decision of the Director but would nonetheless have provided some form of meaningful judicial review. The Supreme Court was unwilling to apply this test, but instead adopted the approach of protecting 'fair procedures'; it is possible that future argument will centre on whether or not 'fair procedures' include a duty to give reasons which up until now, as we have seen, has been resisted. In the High Court, it was noted that 'the practice of the D.P.P. is not to give reasons for his decisions not to initiate or to proceed with prosecutions. Casey has suggested that if judged by the broad standards of fairness, openness, accountability and efficiency, the Irish prosecution system is found wanting'.[895] It is not inconceivable that such a shift in emphasis, over time, might allow the procedures of the Director to be challenged. The Supreme Court has certainly broadened the scope of judicial review of the decisions of the Director and may have broadened them significantly.

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[894] [2002] 3 IR 260, 303.
[895] [2002] 3 IR 260, 271. Citing McDermot P. *Res Judicata & Double Jeopardy* (Dublin: 1999) paragraph 22.22.

The above case law and comment provide evidence that review of the DPP's discretion is possible. The decision in *Murphy* provides an outline for the Courts in dealing with matters of Executive privilege. *Lynch* and *Eccles* show that in cases of national security review is still possible. *DB* is a display of how far the Courts have been willing to go in attempting to limit the discretion of the Executive in other arenas. It has been stated repeatedly during the course of this work that in the field of emergency legislation such as the Offences Against the State Act, 1939, the Courts must balance the rights of the accused against the needs of national security.

> It is widely held in liberal democratic countries that the traditional institutions of adjudication, the courts need to be independent of, and insulated from, politics in order to perform their function properly.... That is not to say that... the actions of the courts do not form part of the process of government. What it does mean is that efforts are made to enable the courts to function in an autonomous way in performing their duty of saying what the law is, even if this involves restraining governments themselves.[896]

There is an increased need for caution when the courts are asked to restrain the Government in cases involving State security. The Government may be better placed to assess the danger facing the State; however, the limited nature of judicial review does not necessitate the endangering of State security. In *Judge & O'Reilly* Carroll J. noted that the applicants did not seek review in open court. Despite this she rejected the possibility of review. Stating that review in open Court would be a security

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[896] Chubb,*The Constitution & Constitutional Change in Ireland,* (Dublin: 1978) 37.

impossibility the learned judge went on to dismiss even private review. In cases where the accused succeeded in rebutting the presumption in favour of the certificates' validity, the onus of supporting the certificate would fall on the DPP. As Pye notes in some cases this might cause the DPP 'to forego establishing his opinion's validity rather than put in evidence security sensitive information...'.[897] Alternatively, the evidence, 'could form the subject matter of a private examination by the presiding judge himself to determine whether the D.P.P. had discharged the onus of proving his opinion's validity'.[898] It is true that, 'such a judicial determination in private of a substantive issue (as distinct from a procedural one concerning a claim of executive privilege or the admissibility of evidence in respect of an important State interest) would, no doubt, be novel...'.[899] However a novel approach like this, though somewhat unsatisfactory would be preferable to blind trust in the Director's good faith. The Committee to Review the OAS proposal allowing for an *in camera* hearing with independent counsel would appear to create an ideal compromise between the competing interests of national security and justice for the accused. This proposal combined with the decision in *Eviston* allows some scope for the development of judicial review of the decisions of the DPP, including the decision to certify the ordinary courts inadequate. A private investigation might not provide the accused with the right to view the files and rebutt the evidence within them, since national security would be compromised by such an examination. However, it is contended that a private investigation ensures a greater level of protection for the accused and guarantees a judicial role in supervising the exercise of the Director's discretion.

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[897] Pye, *op cit,* 70.
[898] *ibid,* 71.
[899] *ibid.*

8.5 Parliamentary Review of the Executive

It is apparent that the Courts are unwilling to interfere with the Executive in relation to the existence or operation of the Special Criminal Court. However, s.35(5) of the OAS, 1939 provides that Dáil Éireann may annul the Government proclamation. Indeed, the Courts have referred to the role of the legislature in determining these issues.[900] Despite the fact that the Courts have been unwilling to exercise their jurisdiction; and despite the fact that the state of emergency under Article 28.3.3° was ended by the Houses of the Oireachtas in February 1995;[901] the Dáil has not considered any resolution to rescind the Government Proclamation of 1972.[902] This is regrettable. It is true that annual reviews involving the Department of Justice, Equality and Law Reform, the AG, the DPP and the Gardaí were conducted in 1997, 1998, 1999 and 2000. These reviews established the continuing necessity of the Special Criminal Court.[903] Welcome and all as such a review might be, it is no substitute for Parliamentary supervision of the Executive arm of State. Furthermore, it appears that there have been no subsequent reviews since the publication of the Report of the Committee to Review the OAS.[904] The Committee to Review the OAS recommended that a sunset clause be included in the OAS Acts requiring a positive

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[900] *O'Reilly & Judge* [1984] ILRM 224, 228.
[901] Committee to Review the OAS, *op cit,* paragraph 4.40.
[902] *ibid,* paragraph 6.42.
[903] *ibid,* paragraph 9.28.
[904] In correspondence with the author in June 2004, David Walker, of the Security & Northern Ireland Division, Department of Justice, Equality & Law Reform, informed the author that annual reviews had occurred between 1997 and 2000. 'In 2001, it was decided to defer the review pending the report of the recommendations of the Committee to Review the Offences Against the State Acts 1939-98. The final report of the Committee was published in August 2002... and its recommendations, including those pertaining to the Special Criminal Court, are currently under consideration'. It would appear that following the deferral of the annual review mechanism in 2001, it has not been reactivated.

resolution to be passed by both Houses of the Oireachtas.[905] Such a measure would ensure regular Parliamentary examination of the issues surrounding the Special Criminal Court. A further benefit of such a procedure is that it requires regular assessment on the record of the Dáil concerning the workload and use of the Court. This would help to avoid the normalisation of the Court; since Dáil Éireann would have to debate the continued necessity of the Court on a regular basis it would be impossible to ignore the fact that the Court is unusual, extraordinary and in many respects an emergency measure. It is contended that, in the absence of meaningful judicial review, such parliamentary review becomes all the more vital.

8.6 Review of the Executive by the Supreme Court of Israel

The example of Israel is considered to be instructive since that nation has faced both interior and exterior threats for most of its history and its Executive has responded through the use of emergency powers legislation.

> During its forty-eight year existence, Israel has gone to war seven times with its neighbors. It has also had to counter incessant threats of hostilities and terrorist attacks perpetrated by countries hostile to it, or organizations aimed at its destruction and replacement by a different political entity. Under such circumstances, Israel has developed a high level of war preparedness....[906]

In relation to this study an examination of Israel is useful since the existence of a real and sustained emergency is undeniable and therefore the reaction of Israel's Appellate

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[905] *ibid,* paragraph 9.43.
[906] Hofnung, *Democracy Law & National Security in Israel,* (Aldershot: 1996), 2.

Courts can be compared to the reaction of the Irish Courts when called upon to review Executive actions in emergency situations. An area of particular interest is that of 'Administrative Detention,' which could adequately be described as Israel's model of internment without trial. In this section we may begin by outlining, briefly, the legislative background to administrative detention and then consider the reaction of the Israeli Supreme Court in the 'bargaining chip' cases. This reaction and that of the Irish Courts can then be contrasted.

Unlike Ireland, Israel does not have a written Constitution, instead it has a series of Basic Laws which are developing into something akin to a Constitutional code. In relation to administrative detention the relevant Basic Law is Basic Law: Human Dignity and Liberty of 1992 which states that,

s.5 'There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner.'

s.12 'This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding when a state of emergency exists, by virtue of a declaration under section 9 of the Law & Administration Ordinance, 5708 – 1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than required.'[907]

Administrative Detention has existed at different times throughout the state of Israel's existence but this Basic Law was only introduced in 1992. What is clear from a

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[907] Zamir & Zysblat, *Public Law in Israel,* (Oxford: 1996) For the full text of Basic Law: Human Dignity & Liberty see pages 154 to 156.

reading of the Basic Law is that like Bunreacht na hÉireann it provides a right, in s.5, and then limits that right in a later section, namely s.12. Section 12, however, provides the circumstances during which deviation from the Basic Law is permissible, that is when a state of emergency has been declared. Again it is clear that 'finding the balance between security needs and adherence to the rule of law is central to any democracy under threat'.[908] As early as 1949 the High Court of Israel had stated that 'while it is true that state security, which requires detaining an individual, is no less important than the need to preserve civil rights, whenever it is possible to achieve both aims, one should not ignore one or the other'.[909] Indeed this point was recognised during the Knesset[910] debate introducing the Emergency Powers (Detention) Law of 1979. During the course of that debate speakers recognised the deviation from the rule of law involved in allowing detention without trial. David Glass, Chairman of the Knesset Constitution, Law & Justice Committee recognised this but argued that administrative detention was necessary as a last resort. Meir Vilner argued that,

> Israel had been in a state of continuous emergency ever since its establishment. Thus his party proposed... that rather than being in effect during emergencies... the law should come into effect only when Israel was involved in actual war and only after the Knesset had decided to put it into operation.[911]

This is interesting. The Special Criminal Court can be established whenever the Government is of opinion that the ordinary courts are inadequate, the existence of a

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[908] Hofnung, *op cit*, 1.
[909] *El Carbotliv v. Minister of Defense et al,* High Court 48[8] P.D. 2, 1949, 106 see Sharfman *Living Without a Constitution: Civil Rights in Israel,* (New York: 1993), 96.
[910] The Israeli Parliament. Members of the Knesset are referred to as MK's.
[911] Sharfman, *op cit*, 149.

state of emergency is not necessary. The Government felt that the ordinary courts were inadequate in 1972 and at that point Ireland was indeed in a state of emergency. However, when that official state of emergency ended, the Special Criminal Court was allowed to continue since the Government continued to deem it necessary.[912] In Israel the permanency of the state of emergency could also allow for the continuous employment of administrative detention and this is what Meir Vilner was fearful of in 1979. These concerns were largely ignored and the law of 1979 provides the framework for administrative detention in Israel. Two cases are of particular interest to this body of research and they shall be examined presently.

The role of judicial review is to protect and vindicate the rights of citizens against Executive abuse. A power such as internment without trial is a draconian one and any abuse of it would have a grave impact on the party detained. As a result it must be exercised carefully and reviewed frequently. In 1994 the Supreme Court of Israel heard a case involving the administrative detention of a number of Lebanese citizens who had been detained under the Act of 1979.

> The appellants argued against the validity of their detention. Their argument was, that holding them as a 'bargaining chip' in the negotiations with the various organizations for advancing the release of navigator Ron Arad does not fall within the framework of

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[912] Despite the fact that the Special Criminal Court can exist in the absence of a state of emergency, it is a matter of fact that a declared state of emergency existed in Ireland from 1939 to 1976, whereupon a fresh state of emergency was proclaimed which continued to operate up until 1995. See Committee to Review the OAS, *op cit*, paragraph 5.5 – paragraph 5.14. It should be noted that ' despite the absurdity of this state of affairs, the artificial maintenance of this declaration of emergency had no real practical consequences...'. *ibid,* paragrapgh 5.7.

'reasons of state security' which appear in Clause 2A of the State of Emergency Powers Law.[913]

The Executive argued that the detention of the Appellants was vital for advancing the release of Israeli Prisoners of War (POW's) and Missing in Actions (MIA's) who were being held by hostile states. Therefore, the respondents argued that the phrase 'state security' included the goal of achieving the release of Israeli POW's. Chief Justice Barak stated in the Court that administrative detention was the,

> ...fruit of the balance between two tendencies: one is granting the state appropriate means to defend itself in the face of organizations that pose a great danger, and against which there is no possibility of acting in the way of conducting a normal criminal trial; the second – guaranteeing, by means of judicial review, that the regime does not wrongfully or needlessly use the authorities that it was lawfully given....[914]

The learned Judge continued that 'once it has been proved that the continued detention of the Appellants contributes to the release of the MIA's, indeed the proper balance has been achieved in the framework of the Law, and the detention of the Appellant is valid'.[915] The Chief Justice showed an unwillingness to interfere with the role of the Executive despite the fact that those detained did not, themselves, pose a security risk.

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[913] *A.B. appellants v. Minister of Defense* Israeli Supreme Court, Administrative Detention Appeal 10/94, see <http://humrts.huji.ac.il/landau1.htm> accessed 15 November, 2000.
[914] *ibid.*
[915] *ibid.*

In the circumstances of a national emergency and given the sensitivity of seeking the release of POW's, the stance of the Chief Justice might be viewed as regrettable but not unexpected. Given those circumstances, the view of Dorner J. is all the more commendable. She dissented from the majority view and 'emphasized that [administrative detention] was directed to the detention of particular persons whose own conduct was damaging to state or public security'.[916] Dorner J. candidly noted that the Appellants were Lebanese citizens and that, 'eight of them are members of the Hizbollah organization. The other two are members of organizations that fight against Israel alongside Hizbollah'.[917] Given the background of the defendants, judicial understanding could only have been a surprise. Despite all of these factors Dorner J. could not concur with the ruling of Barak C.J.. She argued that, 'a fundamental principle of our system is that denying a person's freedom is limited to punitive reasons or to prevent a danger that derives from the person whose freedom it is proposed to deny'.[918] She cited Justice Minister Shmuel Tamir who, in introducing the 1979 Act to the Knesset stated that the Act,

> ...concerns... people from the center of terrorism and murder. They cannot be brought to trial in the normal judicial system due to evidence problems. And if the General Security Service learns, from a competent and official intelligence source which satisfies the Chief Justice of the District Court and on appeal – the Supreme Court, that a certain person – is at the center of the murder tendencies... would you set him free knowing that tomorrow another bomb might be placed in Zion Square or on Mughrabi Street

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[916] *ibid.*
[917] *ibid.*
[918] *ibid.*

> or in the heart of the Carmel or in remote settlements as the direct outcome of that persons activity?[919]

This statement explicitly recognises the role of the Courts in reviewing the administrative detention orders. Having examined the above, the learned Judge concluded that,

> ...the position of my colleague, Chief Justice Barak, leads to an interpretation of the law that permits the detention, for an unlimited period, of any person, as long as the detention entails a benefit, albeit indirect, for State security. Such sweeping and unlimited authority is not recognized even in the laws of war from the field of international law. I cannot recognize its existence according to Israeli law.[920]

This judgment, like that of Gavan Duffy J. on the same issue, is a *tour de force.* In recognising the circumstances pertaining in Israel but accepting the responsibility of the Court to keep the Executive in check, Dorner J. made a brave statement in favour of review of executive actions even in times of emergency.

If the decision of 1994 had been the final occasion on which the Israeli Supreme Court had ruled on the issue of administrative detention then it would not be a model example for the Irish Courts in dealing with the issue of Executive review. Despite the stance of Dorner J. the majority of the Court held that the detention was permissible under Israeli law. The example of Dorner J. and her unwillingness to

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[919] *ibid* quoting Justice Minister Shmuel Tamir.
[920] *ibid.*

grant wide powers of detention to the Executive could provide a model for the Irish Courts, but in the emergency pertaining the majority did not condemn this form of internment. In April 2000, however, the Supreme Court again examined the issue of administrative detention and the 'bargaining chip' precedents. In this re-examination the Supreme Court reversed its previous decision and announced that,

> ...the 1979 Emergency Prerogatives Law (Detention) does not grant the Defense Minister the authority to place a person in administrative detention if the person does not pose a threat to the security of the state. The court went further and decided that no danger to state security emanates from the eight Lebanese being held in administrative detention, and we must conclude from this that the state does not have the authority to continue to hold them in administrative detention.[921]

This decision did not receive universal approval. While Zehava Galon MK of the Meretz Party[922] welcomed the ruling, the Defense Ministry stated that, 'although the Prime Minister believes that Israel should continue to hold the detainees for a certain period, it will act in accordance with the Supreme Court ruling'.[923] Indeed, it was later stated that the Government intended introducing new legislation, 'to get around...' the Supreme Court decision.[924] The important issue from the perspective of this study is that the Israeli Supreme Court was willing to review the role of the

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[921] Izenberg, "Supreme Court Orders Lebanese Hostages Freed," *The Jerusalem Post,* Thursday, April 13 2000.

[922] a political party toward the left of the political spectrum. In December 2003 Meretz merged with two other parties of the left to form a new party YAHAD which means 'Together' but is also an abbreviation of 'Democratic Social Israel' in Hebrew.
<http://www.fact-index.com/m/me/meretz.html> accessed 30 July 2004.

[923] *ibid.*

[924] "Israel Seeks to Codify Detention of Hostages," *The Washington Post,* April 18 2000, see <http://washingtonpost.com/wp-dyn/articles/A37757-2000Apr18.htm> accessed 15 November 2000.

Executive in the implementation of an emergency piece of legislation of a highly sensitive nature. The Irish Courts have shown a limited willingness to do this, as we have seen above, however the Israeli Courts ruled that the detention of members of a terrorist organisation for the release of MIA's could not be justified, whereas the Irish Courts have been unwilling to introduce a meaningful examination of the reasons behind the DPP's decision to certify the ordinary courts inadequate in cases of a non-terrorist, non-subversive nature. It is suggested that a more pro-active approach, such as that of the Israeli Supreme Court in 2000 would better vindicate the rights of Irish citizens to jury trial.

8.7 Diplock & the Scheduling-in Proposal

The establishment of the 'Diplock' Courts in Northern Ireland and the similarity of the two procedures was noted in previous chapters. Unlike the Special Criminal Court, which is a separate institution established under the Constitution via the OAS, 1939 the Diplock Courts are a branch of the Belfast Crown Court.

> The term 'Diplock courts' is... misleading in so far as it suggests a special criminal court in a special courthouse where special judges deal with special kinds of cases. In fact the single judge trials are heard in Belfast Crown Court, in the same building in Crumlin Road where ordinary Crown Court jury trials continue to be held, and they are presided over by High Court and County Court judges who also conduct normal court business in Northern Ireland.[925]

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[925] Jackson & Doran, *Judge Without Jury: Diplock Trials in the Adversarial System,* (Oxford: 1995), 9.

Despite this difference the two legislative models are remarkable similar. Like the OAS, 1939 the legislation in Northern Ireland includes a Schedule of Offences. Scheduled Offences are described as 'terrorist and security offences...',[926] however, the schedule 'also includes several statutory offences, such as wounding with intent and causing grievous bodily harm; robbery and aggravated burglary; and arson and criminal damage'. [927] Naturally, many of these offences may be conducted by, or in the support of, terrorist organisations but they may also be committed in other non-subversive circumstances. As a result,

> ...built into the legislative scheme is a mechanism which is designed to redirect to jury trial those cases which the Diplock system was not meant to cater. The key figure in this process is the Attorney-General. By Note 1 of the Schedule he is given a discretion to certify that any scheduled offence which is subject to that Note is not to be treated as a scheduled offence and is therefore to be dealt with by jury trial....

However,

> there are no formally prescribed criteria governing the exercise of the Attorney-General's discretion....[928]

This discretion is wide-ranging and corresponds to the discretion of the Republic of Ireland's DPP discussed above.

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[926] Secretary of State for the Home Department & the Secretary of State for Northern Ireland, cm 4178, paragraph 13.4.
[927] Jackson & Doran "Diplock & the Presumption Against Jury Trial: a Critique," [1992] Crim. L.R. 755, 757.
[928] *ibid* 758.

The scheduling system has some identifiable problems. Jackson & Doran note that,

> the most obvious and enduring criticism of the scheduling system is that it operates in such a way as to draw too many "ordinary" cases within the Diplock net. Reference is often made to Walsh's survey of 111 cases tried in Diplock courts in 1980, from which the author concluded that around 40 *per cent* of the alleged offences had no observable connection with the emergency situation.[929]

A proposed solution to this problem is 'to establish a broad presumption in favour of jury trials by requiring the Attorney-General to certify in any particular case which has a connection with the emergency...'.[930] It has been contended that this would reverse the presumption in favour of jury trial and thereby normalise jury trial. 'Proponents concede that the actual numbers of cases going for trial in Diplock courts would probably not be dramatically reduced but the symbolic force of such a move ought not to be underestimated...'.[931]

The scheduling-in procedure appears to be compatible with the recommendations of the Committee to Review the OAS. Here the scheduled/non-scheduled distinction was felt to be unhelpful. The Group noted that the distinction did not provide a transparent means of assessing which cases were directed before the Court.[932] Indeed the Committee was of the opinion that the scheduling procedure might contravene Article 38.3 of the Constitution since it did not provide for a determination that the

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[929] *ibid* 759.
[930] *ibid*, 764.
[931] *ibid.*
[932] Committee to Review the OAS, *op cit,* paragraph 9.57.

ordinary courts were inadequate in each individual case.[933] As such the Committee recommended that the schedule be scrapped and replaced by a system whereby the DPP would have to certify in each case that the trial should be heard by the Special Criminal Court. This proposal corresponds to that of the scheduling-in proposal suggested by Jackson and Doran. While some members of the Committee were concerned that such a proposal might increase the remit of the Court, that view appears unsubstantiated. Under the procedure for non-scheduled offences in operation at present in the Republic of Ireland, there is a presumption in favour of jury trial which can be reversed by a certificate of the DPP, similar to the scheduling-in proposal of Jackson and Doran. As has been noted that system does not necessarily safeguard the accused. The scheduling-in procedure can only be valuable if the reasons for scheduling a case 'in' are reviewable by the Appellate Courts. If the ordinary courts remain unwilling to review that certificate, as in the case of non-scheduled offences, then extending that procedure to scheduled offences would be unlikely to achieve any substantive alteration in the practical consequences for an accused individual. The issue of reviewing the exercise of the DPP's discretion remains a central dilemma.

8.8 The Human Rights Committee (HRC)

The Human Rights Committee is an institution established under the International Covenant on Civil and Political Rights. It should be understood that the Committee,

> is not, strictly speaking, a United Nations organ. It is a treaty based organ created by the States parties to the Covenant.... Realistically,

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[933] *ibid,* pargraph 9.58.

> however, it must be recognized that in practice the HRC[934] is, in effect, in the position of a United Nations organ.... They are totally financed from the United Nations budget.... [and] ... the Annual Report of the HRC is submitted to the General Assembly, through ECOSOC.[935] In practice the Annual Report is considered in some detail by the Third Committee of the General Assembly.[936]

The HRC has a number of distinct functions. Firstly under Article 40 of the Covenant it considers and studies national reports submitted by States parties, '...on the measures they have adopted to give effect to the rights recognized in the Covenant...'.[937] Secondly, Articles 41 and 42 provide for an inter-State complaints procedure, and finally under the Optional Protocol the HRC may 'receive and consider communications from individuals subject to the jurisdiction of a State Party to the Protocol who claim to be victims of a violation of any of the rights set forth in the Covenant'.[938] The HRC has considered the issue of the Special Criminal Court on a number of occasions and some of those will be considered presently.

In the *Kavanagh* case, referred to earlier, the appellant relied on a submission made by the AG to the HRC. It was noted that in the Annual Report of 1993, 'with respect to the Special Criminal Court, the representative stressed that the court was needed to ensure the fundamental rights of citizens and protect democracy and the rule of law

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[934] Human Rights Committee.
[935] The Economic & Social Council.
[936] McGolderick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil & Political Rights,* (Oxford: 1994), 52/3.
[937] McGolderick, *op cit*, 50.
[938] *ibid*, 50/1.

from the ongoing campaign related to the problem of Northern Ireland'.[939] On that occasion the Irish Supreme Court was not swayed by the argument that since the AG had justified the Court's existence on the basis of the Northern problem the only grounds for the DPP issuing a certificate as to the inadequacy of the ordinary courts was if the case pertained to the problem emanating from Northern Ireland. The HRC did state that,

> ...it did not consider that the continued existence of [the Special Criminal Court]... is justified in the present circumstances. The measures referred to... are of a character that normally fall to be notified under article 4 of the Covenant. The Committee notes, however, that the State party has failed to inform other States parties of any state of emergency... as required under article 4, paragraph 3, of the Covenant.'[940]

It is clear from this statement that the HRC considers the deviation from the ordinary mode of trial central to the Special Criminal Court to be an emergency power. The Committee was critical of the Government's policy of continuing the Court's existence in the absence of such an emergency.

Perhaps most interestingly the HRC considered the *Kavanagh* case in 1998 under the third procedure outlined above. The Committee considered a number of issues arising from the case including an outline of the proceedings undertaken by Kavanagh in the

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[939] Report of the Human Rights Committee to the General Assembly of the United Nations, 7th of October 1993, paragraph 575, see *Kavanagh v. DPP* [1997] 1 *ILRM* 321, 326.
[940] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ireland. 03/08/93.* CCPR/C/79/Add.21. 3 August 1993, paragraph 11 see <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/10cef6e66dedc39e41256324003c32cc?Opendocument> accessed 9 September 2004.

Irish Courts. The 'author... [that is Mr. Kavanagh]... alleges to have been arbitrarily restrained and unequally treated in his procedural rights, since the DPP has not given any reasons or justification for his decision'.[941] He further complained that the decision of the DPP was,

> without any reason or justification and thereby violated the guarantee of Article 14, paragraph 1, to a public hearing. The State party's highest court... had held in *H v. Director of Public Prosecutions,*[942] that the DPP cannot be compelled to give reasons for the decision short of exceptional circumstances such as *mala fides* being shown. The author claims that a crucial decision in relation to his trial, namely the choice of procedure and forum, was made in secret and on the basis of considerations which were not revealed to him or to the public and which therefore were not open to any rebuttal.[943]

Furthermore it was argued that the Order of 1972 providing for the reintroduction of the Court was made in response to the increasing violence in Northern Ireland and not to deal with non-terrorist cases.[944] It could be said that the author brought the main issues under consideration in this chapter before the HRC for examination. Therefore, the decision of the HRC should be very instructive.

In response to these submissions, the State argued that there was a continuing threat to national security. Unlike in 1993 when it was contended that the basis of this threat

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[941] *Kavanagh v. Ireland* CCPR/C/71/D/819/1998, 26 April 2001, paragraph 4.1.
[942] [1994] 2 IR 589.
[943] *Kavanagh v. Ireland* CCPR/C/71/D/819/1998, 26 April 2001, paragraph 4.3.
[944] *ibid*, paragraph 4.4.

was the political violence emanating from the North, it was instead argued that there was a continuing threat to State security posed by the rise of organised crime and criminal gangs which could undermine the administration of justice and engage in jury intimidation.[945] The HRC considered all the arguments before it and concluded that trial before a venue other than the ordinary courts was not, in and of itself, a violation of the rights protected under the Covenant.[946] Specifically, the HRC was of the opinion that non-jury Courts were not, in and of themselves, a violation of the rights of the accused.[947] The main conclusion of the HRC, however, was unfavourable from a Government standpoint.

> The Committee regards it as problematic that, even assuming a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion..., and goes on to allow... any other offences also to be tried if the DPP considers the ordinary courts inadequate. No reasons are required to be given for the decision that the Special Criminal Court would be 'proper', or that the ordinary courts are 'inadequate', and no reaons for the decision in the particular case have been provided to the Committee. Moreover judicial review of the DPP's decision is effectively restricted to the most exceptional and virtually undemonstrable circumstances.[948]

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[945] *ibid*, paragraph 7.1.
[946] *ibid*, paragraph 10.1.
[947] Committee to Review the OAS, *op cit,* paragraph 9.62.
[948] *Kavanagh v. Ireland* CCPR/C/71/D/819/1998, 26 April 2001, paragraph 10.2.

As a result the Committee concluded that the author's rights under Article 26 had been violated. The decision of the HRC can be broken down into a number of points which have been the basis for the critique of the operation of the DPP's discretion. It was considered unreasonable that any offence, scheduled or not, could be directed for trial before the Special Criminal Court on the basis of a certificate from the Director. Furthermore, the lack of reasons given by the DPP for this decision was criticised. Finally, the unreviewability of the Director's certificate and reasons was felt to be in violation of the Covenant.

8.9 Review & the Special Criminal Court

This chapter began by providing an outline of the Constitutional and Legislative framework and then considered the interpretation of that framework by the Appellate Courts. It is clear that the view adopted by the Courts is quite narrow in its approach. The decision of the Director is only reviewable in cases where *mala fides* or improper motive are shown. Since the DPP is not obliged to provide any reasons for his decision it is very difficult to establish these grounds. A private examination of the issues was suggested but the High Court rejected the proposal; it is accepted that such a private examination of the evidence would be unusual and furthermore it is unlikely that the Courts would form a different view to that of the Director in many cases. However, such an examination would at least provide some degree of impartial review of the decision of the Director which would go further to vindicating the rights of citizens than the present unfettered discretion of the Director. The Committee to Review the OAS proposal that independent counsel be employed to present the argument before the High Court sitting *in camera* would avoid the security risks

associated with giving the accused access to sensitive security related material. An examination of the Israeli Supreme Court showed that even in emergency circumstances it is possible for a proactive judiciary to review Executive actions. It is suggested that a more active judiciary in Ireland could act in a similar manner. The Human Rights Committee has also been outspoken in its criticisms of the process. The HRC was particularly critical of the maintenance of what they viewed as an 'emergency power'. It further criticised the scope of the DPP's discretion and the narrow grounds on which it could be reviewed. These criticisms are in line with those of the author.

The scheduling-in proposal of Professors Jackson and Doran and the related Committee to Review the OAS proposal can be seen as a way of normalising jury trial in Ireland. The scheduling-in procedure would place the burden on the AG for Northern Ireland to justify the transfer of cases to the 'Diplock' Courts rather than the present presumption in favour of trial in that venue. However, the legislation in the Republic of Ireland already provides that non-scheduled offences may be transferred to the Special Criminal Court when the DPP certifies that the ordinary courts are inadequate. Since that decision has proved to be difficult to review it does not seem likely that a scheduling-in procedure for scheduled offences would be anything more than a symbolic, though nonetheless important, alteration. If, however, the Appellate Courts were to take a more liberal approach to the issue of review of an Executive decision in such cases, then the scheduling-in procedure might prove useful. On the presumption that a mechanism for reviewing the certificate of the DPP in non-scheduled offences were established this could be applied to scheduled offences under a scheduling-in process.

The most urgent reform in this area must be the provision of a review mechanism of the decision of the DPP. To date the judiciary has been unwilling to be pro-active in this regard. The provision of secure accommodation for juveniles is undoubtedly an Executive function, however the High Court felt that the Executive had failed in its duty and acted accordingly. It is respectfully submitted that the central role of the jury system in Irish law should also be protected. In order to vindicate that right the Appellate Courts must find a mechanism which provides for the effective review of the DPP discretion without compromising national security. A private review would appear the best option. This model is not ideal since it does not allow an accused to cross examine and review the evidence against him or her. However, it does ensure a limited amount of independent examination of the reasons of the DPP. At present many judges have hypothesised about the reasons for the certificate of the Director. This is somewhat unsatisfactory and a private review would appear more useful.

The need for regular Parliamentary review was also recognised. Such review would ensure that the Government's contention that a situation continued to prevail in which the ordinary courts are inadequate would face at least some test. Furthermore the necessity of debating the issue and placing it before both Houses of the Oireachtas would prevent the existence of the Court from being mistaken as somehow normal. In other words, Parliamentary debate has a role to play in preventing the 'normalisation' process.

Chapter 9

Recent Developments

This chapter will consider the effect of dissident republican violence on the development of the Special Criminal Court. Recent appeal decisions will be considered and the importance of the appeals mechanism will be highlighted. The ability of the Special Criminal Court to tackle new and emerging forms of terrorism will also be examined.

9.1 The Court of Criminal Appeal (CCA)

A significant difference between the Special Criminal Court and its predecessors is that the Special Criminal Court provides for a right of appeal to the regular courts.[949] The advantage of a right of appeal is that it adds to the legitimacy of the Court by ensuring that the ordinary, established and independent Courts have the ability to monitor the activities of this extraordinary court. In the last chapter consideration was given to the use of judicial review as a means of ensuring that the Special Criminal Court behaved in a just and fair fashion. The Courts were criticised for taking an overly lenient approach when dealing with the certificate of the DPP through judicial review proceedings. Some consideration will now be given to the role of the Courts in appeals from the Special Criminal Court.

In the case of *The People v. Madden*[950] O'Higgins C.J. reviewed the function of the CCA in proceedings arising from trial by Special Criminal Court noting that, 'in the

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[949] See s. 44, Offences Against the State Act, 1939. For further discussion of this point see chapter 3.
[950] [1977] IR 336.

appeals now before this Court, we have the transcripts of the rulings of the Special Criminal Court made in the course, and at the end, of the trial on questions of law and findings of facts...'.[951] These transcripts are required by law[952] and could be said to provide an extra protection for the defendant. Furthermore, at present the Special Criminal Court provides a reasoned judgment as a matter of practice[953] and a majority of the Committee to Review the OAS has recommended that this practice be placed on a statutory footing.[954] In the case of trial by jury one cannot determine with accuracy the reason behind a jury's decision to convict or acquit.[955] The Special Criminal Court's reasoned 'judgment... will set out the findings of fact and the inferences drawn from those facts.... The Court of Criminal Appeal will be able to examine the court's detailed findings of fact and inferences drawn from those facts when considering the soundness of the conviction'.[956] Such an examination would be impossible in cases of trial by jury. The Supreme Court took the issue of transcripts into account in *Madden* when determining the role of the appeal courts. O'Higgins C.J. concluded that,

> the function of this Court [is] to consider the conduct of the trial as disclosed in the stenographer's report to determine whether or not the trial was satisfactory in the sense of being conducted in a constitutional manner with fairness, to review so far as may be required any ruling on matters of law, to review so far as may be necessary the application of the rules of evidence as applied in the

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[951] [1977] IR 336, 340.
[952] The Offences Against the State Act, 1939 – 1972 Special Criminal Court Rules, 1975, Rule 25 and Rules of the Superior Courts, Order 86, Rule 14.
[953] Walsh, *Criminal Procedure,* (Dublin, 2002), 1010.
[954] Report of the Committee to Review the Offences Against the State Act, 1939 and Related Matters (Dublin, 2002), paragraphs 14.1 and 14.2
[955] Walsh, *op cit,* 1011.
[956] *ibid.*

> trial, and to consider whether any inferences of fact drawn by the court of trial can properly be supported by the evidence; but otherwise to adopt all findings of fact, subject to the admonitions in the passages cited above.[957]

As such the role of the CCA is limited to considering matters of law but it may also consider whether or not the evidence produced at the trial supports the inferences drawn by the court. Such an undertaking must be greatly assisted by the existence of the Court transcript and written verdict.

In the case of Liam Campbell[958], which will be consider in more detail later in this section, the accused was tried before the Special Criminal Court for membership of an unlawful organisation contrary to s.21 of the Offences Against the State Act (OAS), 1939. At the trial the defendant had not contested the evidence and the trial court 'noted that this approach had saved a considerable amount of court time and expense'.[959] Following his conviction Campbell sought leave to appeal on the sole ground that 'the court erred in holding that the Real IRA was a prescribed organisation...'.[960] The validity of this point will be examined later in this chapter, however, at present, the key point turns on the role of the CCA in such appeals. The CCA cited, with approval, the decision in *The People (DPP) v. Moloney*[961] where O'Flaherty J. stated that

> if an appeal is brought before this Court on a point that has not been canvassed at trial this Court will regard any person making such a

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[957] [1977] IR 336, 340.
[958] *The People (DPP) v. Campbell* [2005] IE CCA 27.
[959] *ibid.*
[960] *ibid.*
[961] *ex tempore,* Unpreported, Court of Criminal Appeal, 2 March, 1992).

> point as having an obligation to explain why it is sought to made on appeal when not made at the trial. That is not to say that if the essential justice of the case calls for its intervention we have an obligation to so intervene.

Thus, the CCA will be reluctant to hear an appeal based on grounds which were not argued at trial. In the case of *Campbell* the CCA concluded that the failure to raise the ground for appeal at trial

> was not an error or oversight but rather a strategic or tactical decision made by the appellants advisers who evidently decided that they might obtain a more lenient sentence for the appellant in the court of trial and perhaps thereafter succeed in persuading this Court that they should be allowed to raise a legal argument that was never made in the court below.[962]

Such a position appears reasonable. One cannot allow an individual secure a reduced sentence on the basis that they have saved the court time by not contesting evidence and then allow them to contest that evidence on appeal.[963] From the point of view of the role of the CCA it illustrates that the Court will take a necessarily strict view of its function and does not exercise its appeal function lightly.

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[962] *The People (DPP) v. Campbell* [2005] IE CCA, 27.

[963] There is a separate argument concerning the justness of allowing reduced sentences in such circumstances. From a Kantian perspective such an approach violates the principle of 'punishment as a categorical imperative' and is therefore highly objectionable. Such considerations are beyond the scope of this work but it will be asserted that plea and sentence bargaining of this sort is common place and appears to be accepted for practical, if not for philosophical, reasons. For a detailed examination of the these concepts see Christopher, "The Prosecutors Dilema: Bargains and Punishments", (2003) 72 *Fordham Law Review* 93; Brady "Just Deserts: Can a Retributivist Theory of Punishment be Justified?" (2004) 12 *Irish Student Law Review*, 86.

The decision of the CCA in *Murphy* also well illustrates that role of the Court well. Murphy was 'convicted of conspiracy to cause an explosion of a nature likely to endanger life'.[964] The explosion in question was the 15 August 1998 bombing of the market town of Omagh, Co. Tyrone. Murphy was said to have handed a number of mobile phones to dissident republican terrorists for the purpose of assisting them 'to move explosives to Northern Ireland for the purpose of bombing targets there'.[965] There were three key pieces of evidence in the case. Firstly, the accused made a series of admissions and Patrick Terence Morgan gave evidence to the effect that Murphy had borrowed his phone prior to the bombing; phone records from the Omagh and Banbridge bombings established a pattern of phone calls before the bombings; and the trial court considered Murphy's prior convictions for similar offences. On the issue of Murphy's prior convictions the CCA was unequivocal. The accused had not put his good character in evidence and the evidence did not fall into any of the exceptions provided by s.1(f) of the Criminal Justice Act, 1924. Indeed the 'fact' of Murphy's prior convictions was never proved in Court and the evidence was entirely inadmissible. The issue of the phone records was also relatively straight forward and the CCA determined that they were admissible. The interesting feature of the case concerns the admission of Murphy's admissions and the evidence of Morgan and it is here that the role of the CCA, and the exercise of that role, becomes clear.

Terence Patrick Morgan testified before the trial court to the effect that Murphy has borrowed his mobile on 14 August, 1998 claiming that his own mobile was not

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[964] *The People (DPP) v. Murphy* [2005] IE CCA 1.
[965] *ibid.*

functioning. However, as defence counsel were summing up their case on 11 January, 2002 it emerged that the prosecution had received a letter from a solicitor acting on behalf of Mr. Morgan in which, Morgan withdrew his evidence. Morgan gave fresh evidence to the Court in which he completely repudiated his earlier version of events claiming that Murphy had not asked for his phone but that he had mislaid it on Friday, 14 August and discovered it again the following Monday. He claimed that he had been induced to give his original evidence by police threats.[966] The Special Criminal Court held that Morgan's original testimony was consistent with the admissions of the accused and decided to accept as truthful Morgan's original evidence. It will be recalled that the in *The People v. Madden*[967] O'Higgins C.J. stated that the role of the appeal courts was 'to consider whether any inferences of fact drawn by the court of trial can properly be supported by the evidence; but otherwise to adopt all findings of fact'.[968] In line with this reasoning the CCA held that

> the question of credibility of the evidence given by Mr. Morgan, whether in its entirety or in respect of either of the conflicting accounts given by him, was a matter entirely within the competence of the trial court which had the opportunity of hearing and observing Mr. Morgan while he was giving evidence.[969]

Therefore, the CCA was unwilling to set aside the inferences drawn by the Special Criminal Court as to the credibility of Morgan's testimony.

The second issue of interest concerns the admissions made by Murphy while in custody. The accused was alleged to have made a number of incriminating

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[966] *ibid.*
[967] [1977] IR 336.
[968] [1977] IR 336, 340.
[969] *The People (DPP) v. Murphy* [2005] IE CCA 1.

statements which amounted to an admission on his part that he had passed the phones to Daly in order to assist him in moving explosives to Northern Ireland for the purpose of causing an explosion there. However, Electrostatic Detection Apparatus (ESDA) evidence established that the Garda notes of interviews conducted with Murphy had been altered. In particular, the original notes included a statement by Murphy that his wife's sister was Sheila Grew. Grew was known to have republican connections. As it happens, Sheila Grew was not, in fact, Murphy's wife's sister and defence counsel asked why he would say that she was. The inference drawn by the defence was that Murphy had said no such thing and as a result one could infer that if this fragment of the interview was a fabrication then the entire interview notes were a fabrication. The trial court held the evidence of two of the six Gardaí who had interviewed Murphy was inadmissible. The trial court then made an extraordinary assumption stating that

> Since... there is no evidence that the error made about Mrs. Murphy's relationship with Ms Grue (sic) and its wrongful inclusion in the original interview note was ever divulged by Gardaí Donnelly or Fahy to any other member of the investigation team either at a case conference or otherwise. It is more likely that Garda Donnelly having discovered the error would not wish to admit to serious misconduct and that he rectified it without the knowledge of other officers except his partner, Garda Fahy.... In the absence of evidence connecting other officers with Garda Donnelly's wrongdoing there is nothing to establish that it might

have percolated upwards or outwards and may have tainted the activities of other interrogators.[970]

This is a remarkable leap of faith and the CCA noted that 'there is absolutely no evidence to support the conclusion... that "the revised note was then restored to Garda Whelan's custody apparently without his knowledge"'.[971] The appeal court cited, with approval, the statement of Hutton LCJ in *Latimer*[972] to the effect that there can be no blanket policy in cases where police officers are found to have lied about some material piece of evidence.[973] In the final analysis the CCA was highly critical of the trial court. The court set aside the conviction as unsafe on the basis that the trial court had failed to bring the necessary level of critical analysis to the possibility of the contamination of evidence. The trial court was criticised for making 'findings as a matter of probability about the police evidence which were based on speculation and not on evidence'.[974]

The evaluation of the evidence in *Murphy* illustrates that the CCA is willing to set aside evidence where it is of the opinion that it is without basis and the court is willing to set aside conviction son that basis. Naturally, the appeal court recognises the fact that the trial court is better placed to determine the credibility of witnesses as in the case of Morgan's testimony, however, it does no shirk from its responsibility to dismiss evidence where such evidence is without basis. The review courts were

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[970] *ibid.*
[971] *ibid.* This statement by the Special Criminal Court is extremely accommodating toward the Gardaí. It is perhaps the closest Irish equivalent to Lord Denning's declaration in the case of the Birmingham 6 that 'If they won, it would mean that the police were guilty of perjury; that they were guilty of violence and threats; that the confessions were involuntary and improperly admitted in evidence; and that the convictions were erroneous.... That was such an appalling vista that every sensible person would say, "It cannot be right that these actions should go any further"'. Lord Denning MR, 17 January, 1980.
[972] *R v. Latimer, Hegan, Bell and Allen,* (29 July, 1992) Northern Ireland, Court of Appeal, 20.
[973] *The People (DPP) v. Murphy* [2005] IE CCA 1.
[974] *ibid.*

criticised in the previous chapter for being overly accommodating toward the Executive. It appears that the CCA is willing to exercise its jurisdiction in a meaningful fashion. This further highlights the importance of the right of appeal.

9.2 Recent Supergrass Trials

One of the most striking recent developments in trial by Special Criminal Court has been the emergence of a new breed of Irish 'supergrass'. The need to employ accomplice testimony in the context of terrorism and organised crime is not surprising. 'Given that one of the characteristics of organized crime is that the leaders typically operate through intermediaries, their guilt can rarely be proved by the testimony of victims, eyewitnesses or forensic evidence. Successful prosecution of organized crime leaders therefore normally requires the use of accomplice evidence'.[975] As was noted in chapter 4, David Rupert, an informer, gave evidence at the trial of Kevin McKevitt. The controversial nature of this evidence arose from the fact that Rupert had been paid some $1.25 million (€1,035,000). Similarly informer evidence has been employed in the series of trials of members of the gang accused of murdering journalist Veronica Guerin. This section will examine the use of such evidence in these cases.

Accomplice testimony has a long, if not always distinguished, history. 'For centuries the common law has facilitated those who have decided to betray their erstwhile partners in crime by testifying against them. Accomplices who have been induced to turn Queen's... evidence by the expectation of a reward have been regarded as

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[975] Fyfe & Sheptycki, *Facilitating Witness Co-operation in organised crime cases: an international review*, (Home Office Online Report 27/05), <http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr2705.pdf> accessed on 22 September 2005. 23. Hereinafter, *Facilitating Witness Co-operation.*.

competent witnesses at least since the seventeenth century...'.[976] A supergrass is merely an accomplice who turns Queen's evidence on a 'grand scale'.[977] The modern history of supergrass in England began on 23 December 1972 when Bertie Smalls was arrested. Smalls was a member of a number of gangs responsible for major bank robberies in London. According to the police, after a brief period he offered to name all his accomplices in exchange for his freedom.[978] The Irish experience of supergrass will forever be associated with a two year period between 1981 and 1983 when 25 supergrasses[979] facilitated the arrest of nearly 600 suspects in Northern Ireland.[980] The history of the supergrass evidence and its fall from grace, in Northern Ireland in particular, has been adequately reviewed elsewhere.[981]

In Irish law juries have the power to convict on the basis of uncorroborated accomplice evidence, however there exists a ' very strong, indeed, imperative, rule of practice that the Judge should warn the jury of the danger...' of so doing.[982] The danger of employing uncorroborated accomplice evidence arises from the fact that

> an accomplice is by definition involved in the offence. Therefore, he 'knows all the details of the crimes and will be able to relate them accurately'; in order to falsely implicate another person, an

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[976] Greer, 'Supergrass and the Legal System in Britain and Northern Ireland', (1986) 102 *The Law Quarterly Review,* p200.
[977] Bonner, 'Combatting Terrorism; Supergrass Trials in Northern Ireland', (1988) 51 *Modern Law Review,* p23.
[978] Greer, (1986), *op cit,* p222.
[979] Seven Loyalist, 18 Republican.
[980] Greer, 'The Rise and Fall of the Northern Ireland Supergrass System', (1987) *Criminal Law Review,* pp664-665.
[981] The work of Greer and Bonner, in particular should be considered.
[982] *The People (AG) v. Duffy* [1931] IR 144, 149.

accomplice 'only has to introduce him into the story which in its main essentials is true'.[983]

The accomplice is a self-confessed criminal with the almost unique ability to falsely implicate another in a convincing manner. The reliability of such witnesses is called into even greater question when one considers that they may have a strong personal motive to implicate others, this point will be considered later. A review of the recent Irish case law will help to illustrate these points.

Accomplice testimony has played a central role in three recent, highly siginificant recent cases.[984] These cases are sometimes collectively referred to as the Guerin prosecutions since the concerned prosecution of those accused of planning and committing the murder of, journalist, Veronica Guerin. The decision in *Ward* is particularly revealing. Importantly, all admissions made by Paul Ward while in custody were held to be inadmissible in evidence by the Special Criminal Court.[985] In essence, the accused had remained silent during interrogation. He was then visited by his girlfriend, Ms. Meehan who had been arrested under s. 30 of the OAS, Act 1939 and later by his mother. The Special Criminal Court noted that 'the coincidence that the accused's capitulation after more than 14 hours of silence during interrogations had occurred immediately after the visit by Ms. Meehan [was] a remarkable *volte face*

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[983] Egan, "The Emergence of the Supergrass – Exposing the Inadequacies of the Accomplice Corroboration Warning", (2004) 12 *Irish Student Law Review*, 133, 133.
[984] Namely, *DPP v Ward,* Special Criminal Court, 27 November 1998, [1998] IEHC 170; *DPP v. Meehan,* Special Criminal Court, 29 July 1999; and *DPP v. Gilligan,* Special Criminal Court, 15 March 2001. the issues surrounding supergrass testimony in these cases and in irish law in general, is examined in detail by Egan and Ingoldsby. See generally: Egan, "The Emergence of the Supergrass – Exposing the Inadequacies of the Accomplice Corroboration Warning", (2004) 12 *Irish Student Law Review*, 133; and Ingoldsby "Supergrass Testimony and Reasonable Doubt: an Examination of *DPP v. Ward*", (1999) *Trinity College Law Review.*
[985] *The People (DPP) v. Ward* [1998] IEHC 170.

which gives rise to unease and raises a series of pertinent questions'.[986] The Special Criminal Court was satisfied that these visits were a deliberate Garda ploy designed to induce the accused to testify.[987] The effect of, correctly, excluding the suspect admissions was that the only admissible evidence against Paul Ward was the testimony of one Charles Bowden 'an admitted accessory'.[988]

In assessing the credibility of Bowden[989] the trial court appears to have been very concerned by the status of the witness. The key issue before the Special Criminal Court was 'is he no more and no less than a self-confessed acco0mplice in the murder of Ms. Guerin or is he one of a category of accomplices as found in certain terrorist trials in the Diplock courts of Northern Ireland known as a supergrass...?'[990] This has been described as a two-category approach and has been criticised as being overly simplistic.[991] Furthermore, it is suggested that Bowden was wrongly classed by the trial court as being an ordinary accomplice rather than a supergrass.[992] The trial court acknowledged that Bowden was a 'self-serving, deeply avaricious and potential viscous criminal. On his own admission he is a liar and the court readily accepts that he would lie without hesitation and regardless of the consequences for others if he perceived it to be in his own interests to do so'.[993] Given such an assessment it appears strange that the court was willing to convict based solely on his uncorroborated testimony. Key to the courts acceptance of his testimony was the assertion that Bowden was an ordinary accomplice rather than a supergrass. Bowden

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[986] *ibid,* paragraph 7.
[987] *ibid,* paragraph 15.
[988] Ingoldsby, *op cit.*
[989] who also gave testimony in the *Gilligan* and *Meehan* prosecutions.
[990] *The People (DPP) v. Ward* [1998] IEHC 170, paragraph 24.
[991] Ingoldsby, *op cit.*
[992] *ibid.*
[993] *The People (DPP) v. Ward* [1998] IEHC 170, pargarph 29.

was the first witness in the State to be granted protection under the new Witness protection Scheme.[994] He was, it is respectfully contended wrongly classified as an orindary accomplice. Furthermore, the details of his witness protection programme were still being negotiated.[995] This added feature makes Bowden's testimony particularly unreliable. In chapter 4 consideration was given to the case of *Mazure*[996]. In that case the CCA held that the evidence of one Philip Kay was 'more than usually dangerous'[997] because he was an accomplice who at the time he testified against the accused was, himself, awaiting sentence on a similar charge. The added danger in such cases arises from the fact that the accomplice has an incentive to please the prosecuting authorities because they may believe that in so doing they increase the chances of securing a better deal for themselves. Given the courts assessment of the character of Charles Bowden it would undoubtedly have been wiser to exclude his testimony, at least until his own witness protection deal had been finalised. In fact, on appeal the CCA held that 'it was doubtful whether, in light of all the factors which would motivate liars such as Bowden, it would have been possible to reach a conclusion of guilt beyond a reasonable doubt'.[998]

Ingoldsby suggests that rather than adopting the strict categorical approach of *Ward,* the courts would be better off employing a 'scale of unreliability' test, which she argues has been utilised in Northern Ireland.[999] Such a scale is derived from the decision in *R v. Crumley*[1000] where it was recognised that supergrass testimony was

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[994] Ingoldsby, *op cit.*
[995] Egan, *op cit,* 140.
[996] [1946] IR 448.
[997] *ibid,* 449.
[998] *The People (DPP) v. Ward,* Court of Criminal Appeal, 14. See Egan, *op cit,* 141.
[999] Ingoldsby, *op cit.*
[1000] (1986) 7 *Northern Ireland Judicial Bulletin,* 1. See Ingoldsby, *op cit.*

even more dangerous than ordinary accomplice evidence. Furthermore, in the decision in *Meehan*[1001] the Special Criminal Court rejected the testimony of Bowden as unreliable.[1002] One very worrying feature of the Special Criminal Court decision in *Ward* is that the court concluded that Bowden's testimony had a 'strong ring of truth to it'.[1003] Egan notes that this is based on 'confirmatory' rather than 'corroboration'.[1004] In essence, as an admitted accomplice Bowden was in a position to describe the crime accurately and as such evidence which confirms his account is not surprising. For corroboration one requires evidence which actually supports the account of the witness in establishing the guilt of the accused. The CCA did over rule the Special Criminal Court in *Ward.* However, as Egan notes, the position of warnings in supergrass cases in Ireland remains somewhat confused. What is clear is that accomplice testimony should always be treated with suspicion. The circumstances of witness protection and supergrass merely add to that suspicion and in such situations the court must seek corroboration before a conviction can be said to be sound.

Parallel to these practical considerations some ethical concerns about witness protection schemes and supergrass testimony exist. These concerns arise because of the view that it is wrong to buy testimony through the proffering of immunity. The morality of granting immunity to a criminal in exchange for their evidence can be analysed from both a consequentialist and a retributivist standpoint.[1005]

[1001] *The People (DPP) Meehan,* Special Criminal Court, 29 July 1999.
[1002] Egan, *op cit,* 142.
[1003] *ibid.*
[1004] *ibid,* 143.
[1005] see Christopher, "The Prosecutors Dilema: Bargains and Punishments", (2003) 72 *Fordham Law Review* 93. This article has greatly influenced the author. It provides and in-depth and interesting analysis of the issues surrounding immunity clauses.

Consequentilists are utilitartian in outlook. The general defence of immunity clauses or other forms of bargain justice is utilitarian in nature. It is contended that in the absence of accomplice testimony prosecution would not be possible and as a result serious crime would go unpunished. As a result an accommodation must be reached which will encourage accomplices to testify. As a utilitarian school the consequentialists are of the view that punishment can only be justified if its good outweighs the harm it causes. Retributivists reject this utilitarian approach. They draw upon the writings of Kant and hold that 'punishment's consequences must not be the source of its justification because this would disrespect the offender by treating them as a mere means whose punishment is meant to benefit society. And even if no good consequences may be extracted from it, "punishment is a categorical imperative," or absolute duty'.[1006] Where punishment is the end in and of itself, it is clear that any form of immunity or bargain justice will violate this absolute duty. For Kant, 'it is patently unjust... to punish some offenders less because they are willing to cooperate in some way with the state'.[1007] It is clear that any form of bargain justice is, therefore, unacceptable from a retributivist standpoint. Ingoldsby notes that 'to exclude accomplice testimony would be to allow criminal gangs profit doubly from their secretive organisation'.[1008] As distasteful as it might appear the utilitarian approach is both internally consistent and capable of producing the best outcome, it is therefore preferable. The use of such evidence brings with it practical and ethical difficulties but these must be overcome in order to ensure that justice prevails. Perhaps more significantly, the Irish courts do not yet appear to have found the correct means of ensuring that such evidence is employed safely in all cases.

[1006] *ibid,* 119.
[1007] *ibid,* 120, citing George Fletcher.
[1008] Ingoldsby, *op cit.*

9.3 The Flexibility of the Special Criminal Court and the Threat of 'New Terrorism'

The Offences Against the State Act, 1939 is capable of operating without the need to declare a state of emergency, all that is required is a declaration that the ordinary courts are inadequate to secure the effective administration of justice. This flexibility has enabled the Executive to utilise the Special Criminal Court in a variety of different circumstances against a number of different threats and, as we have seen, this has led to much criticism of the Court. However, although this adaptability might be seen as a cause for concern it can also be seen as a valuable asset. Briefly, terrorism is changing form, and traditional anti-terror responses are, arguably, becoming increasingly less useful.

Ireland has, to date, been faced with the threat of a classic 'old' terrorist organisation, namely the IRA.[1009] The IRA is organised into a strict cell structure under the leadership of the Army Council.[1010]

> The cell has many variants, but the essential principle is simple and effective. Each is part of a hierarchy and is responsible to a single point of contact above. Within each cell, which is typically three to ten persons, a member may not even know all his or her compatriots.... The result is an organization which can act

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[1009] The phrases 'old' and 'new' are not entirely accurate but they are employed here for the sake of convenience.

[1010] United States Dept. of State, *Patterns of Global Terrorism 2002,* (Dept. of State Publication, April 2003), Appendix C, p 135, hereinafter *Patterns of Global Terrorism 2002.*

> decisively and quickly. Also such an organization cannot easily be 'rolled up' by security forces....[1011]

From the point of view of the terrorist organisation such a structure has many advantages; from the point of view of the lawmaker the important factor is that such a group is hierarchical. The cell structure demands organisation; it requires a leadership to direct the various cells who then operate independently but often toward a common purpose. As a result it is possible to target the organisation as a unit.

'New' terrorism lacks the organisation of groups like the IRA. A shift has occurred and a new threat has emerged as a result of that shift. A significant development in recent years is the increased 'involvement in terrorism by non-government groups, individuals and, often, "non-group-groups" of individuals who come together for the purpose of committing a terrorist act and then separate'.[1012] It is this shift away from organised terrorist groups with identifiable names and cell structures towards a more post-modern terrorism that needs to be considered and legislated for. Such a form of terrorism is better conceived of as involving 'networks' rather than cells or groups. 'A network is a set of independently active nodes... interconnected by communication pathways. It is a distributed rather than a hierarchical system that can be formal and explicit, or informal and implicit, as long as it is united by common interests and understandings'.[1013] Networks have the advantage of being capable of sustaining 'nodal loss' due to their 'mutating structure'.[1014] Originally such networks

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[1011] Harmon C., *Terrorism Today,* (London, 2000), 98.
[1012] Anderson "International Terrorism & International Cooperation" in *Countering Suicide Terrorism: An International Conference*, (Herzilya, 2001), 52.
[1013] The Cambridge Security Seminar, *A new Security Paradigm: a seminar record,* (Cambridge, 2004), 30/31.
[1014] *ibid*, 29.

were restricted geographically but the internet has allowed networks to operate globally.[1015] A number of groups and non-groups will be examined in order to illustrate this new terrorism before consideration will turn to the necessary responses to it.

The most infamous terrorist group operating in the world today is undoubtedly Al-Qaeda. However, the nature of Al-Qaeda is disputed. Al-Qaeda suicide hijackers carried out the infamous attacks on the World Trade Centre, New York City, the Pentagon Washington DC and Shanksville Pennsylvania on 11 September 2001; it directed the attack on the USS Cole in the port of Aden, Yemen on 12 December 2000 and conducted the US Embassy bombings in Nairobi, Kenya and Tanzania in August 1998.[1016] That Al-Qaeda carried out these attacks is relatively undisputed, however, the nature of the group is the source of some considerable debate. It has been suggested that there are essentially two Al-Qaedas, the pre- and post- 2001 models. According to this theory 'Al-Qaeda remains a useful term to describe bin Laden, his close associates and the infrastructure created in Afghanistan between 1996 and 2001'. That organisation was effectively demolished by the invasion of Afghanistan and the removal of the Taliban.[1017] Alternatively, the US State Department is of the opinion that 'Al-Qaida has cells worldwide', it recognises that the organisation was based in Afghanistan until its removal and states that it has since 'dispersed in small groups across South Asia, Southeast Asia, and the Middle

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[1015] *ibid,* 32.
[1016] *Patterns of Global Terrorism 2002,* 119.
[1017] Burke, "Al-Qaeda – a meaningless label" *The Observer*, January 12, 2003, <http://www.observer.co.uk/Print/0,38584581540,00.html> accessed 20 April 2003.

East'.[1018] While it appears clear that the group was an organisation before the overthrow of the Taliban, it does not appear to have retained that organisational structure. Burke argues that Al-Qaeda should be conceived of 'as an ideology, an agenda and a way of seeing the world...'.[1019] The conception of Al-Qaeda in these terms is supported by a review of the history of the group. Osama bin Ladin developed an organised resistance movement in Afghanistan with the aim of repelling the invading forces of the Soviet Union. To that end he was involved in the establishment of the Maktab-al-Khidarnat (MAK) group which set up an organised conscription service and brought Muslims to Afghanistan for training and fighting. By 1988, bin Ladin split from MAK and formed Al-Qaeda. By 1998 bin Ladin had announced the formation of a new group the 'Islamic World Front for the struggle against the Jews and the Crusaders'. This organisation can accurately be described as an umbrella group for Islamic Extremists.[1020] It is clear from this development that Al-Qaeda began life as an organised militia, MAK, and grew into a terrorist organisation based in Afghanistan. The World Front allowed Al-Qaeda to develop further into 'a multi-national support group which funds and orchestrates the activities of Islamic militants worldwide'.[1021] It is in this sense that Al-Qaeda is an ideology or agenda.

It might appear that the lack of an organised structure would weaken a terrorist group, however, that is not the case. An examination of Al-Qaeda activities before and after 2001 should allow a greater understanding of the threat posed by 'new' terrorism. In

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[1018] *Patterns of Global Terrorism 2002,* 119.
[1019] Burke, "Terror's Myriad Faces", *The Observer,* May 18 2003, <http://www. guardian.co.uk/Print/0,3858,4671444,00.html> accessed 19 May 2003.
[1020] www.ict.org.il accessed 25 September 2003.
[1021] *ibid.*

late 1999, Mohammed al-Tubaiti travelled to Afghanistan and requested a 'martyrdom mission' from Al-Qaeda. Al-Turbaiti was told to come back when he had his own plan and that it would then be evaluated. He went to Morocco and recruited individuals to his cause, and then he returned to Afghanistan and presented his scheme, at which point he was given money and sent back to Morocco.[1022] The story of Mohammed Al-Turbaiti illustrates an important point; even before Al-Qaeda was expelled from Afghanistan, the organisation operated by providing support and facilitating the activities of others. The removal of its Afghan base has increased the need for Al-Qaeda to operate in such a fashion. The group Jemaah Islamiah (JI) provides a more than adequate example of the post-Afghanistan model. JI was responsible for the Bali bombings on 12 October 2002.[1023] It has been described as a 'regional Islamic militant network linked to al-Qa'eda'.[1024] The use of the phrase 'network' when referring to JI is interesting since it implicitly recognises that the group is not quite an organisation. The State Department notes that 'along with raising its own funds, the JI receives money and logistic assistance from Middle Eastern and South Asian contacts, NGOs, and other groups, including al-Qaida'.[1025] It seems obvious that Al-Qaeda is continuing to play a role in international terrorism but that its new role is more in the field of consultancy and logistics. This development has not reduced its deadly capability.

[1022]Burke, "Terror's Myriad Faces", *The Observer,* May 18, 2003, <http://www.guardian.co.uk/Print/0,3858,4671444,00.html> accessed 19 May 2003.
[1023] *Patterns of Global Terrorism 2002*, *op cit,* 110.
[1024] Spillius, "Bali Bomber Greets Death Sentence With Thumbs-Up", *The Daily Telegraph*, August 8 2003, 1.
[1025] *Patterns of Global Terrorism 2002,* 111.

When considering this new form of deconstructed terrorist organisation it would be unwise to overstate the novelty of the approach. Terrorist organisations have a long history of cooperation and support for each other. The arrest of Niall Connolly, Martin McCauley and Jim Monaghan in Bogota on 11 August 2001, suggested a link between the IRA and FARC;[1026] prior to that the Japanese Red Army, (JRA) had carried out a number of actions on behalf of or in support of other groups.[1027] The outstanding feature of the new threat is not just the willingness to share information and logistical support, but rather it is the loosening of organisational ties. An examination of domestic terrorism in the U.S. should help to further explain the significance of this development. The 'Freedom Club' posted parcel bombs which maimed and murdered scientists and others whom the Freedom Club accused of damaging the environment. The significant factor is that the Freedom Club as a terrorist organisation consisted of one member, Theodore Kaczynski.[1028] Other ideologies are also employing the internet to spread their message. The American neo-fascist Milton John Kleim Jr has suggested that 'USENET[1029] offers enormous opportunity for the Aryan resistance to disseminate our message...'.[1030] It seems logical to suggest that neo-fascist terrorists would be willing to share logistical information with other, likeminded, individuals. Harmon notes that 'organizationally, the classic cell structure and hierarchy still predominate, but so too flourish their

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[1026] Stanage, "Justice Denied", *Magill*, August 2003, p 26. Since then the 'Columbia Three' have been convicted by a Columbian court, they then fled Columbia and are currently residing in Ireland. A statement from the Office of an Tánaiste, states that consideration is being given to the possibility of the three serving their sentences in Ireland. No extradition treaty exists between Ireland and Columbia and no extradition request had been made at the time of publication. See <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6F4MJX-ga> accessed 5 September 2005.

[1027] *Patterns of Global Terrorism 2002,* 137.

[1028] Harmon, *op cit,* 10.

[1029] 'USENET is a collection of user-submitted notes or messages on various subjects that are posted to servers on a worldwide network'.
<http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci213262,00.html>
accessed 10 September 2004.

[1030] Harmon, *op cit,* 49.

opposites, found in the American militias, ecoterrorists, or autonomous Islamic extremist groups where decentralisation may be the prized key'.[1031]

Terrorism has significantly altered since the Vietnam War when the North Vietnamese organised and controlled the National Liberation Front for South Vietnam.[1032] Although cell based organisations continue to exist and even dominate the terrorist landscape, a new breed of group has emerged. Al-Qaeda is no longer an organisation in the usual sense and has grown into a consultancy group. The activities of Jemaah Islamiah provide a chilling illustration of how effective this terrorist outsourcing can be. The American experience of Kaczynski acting as a lone terrorist amply illustrate the ability of a lone individual to wreak havoc. The American militia's and neo-fascist's willingness to share information allows for a new, decentralised form of terrorism which requires a new legislative approach.

9.4 New Terrorism in the Irish Context

It would be alarmist in the extreme to suggest that Al-Qaeda pose a significant theat to the Republic of Ireland. As a small, largely neutral state, Ireland can probably assume that it remains off the Islamic terrorists radar. However, the concept of 'new' terrorism remains highly relevant to Ireland. Historically, Ireland has been to the forefront of these developments. The organisation Saor Éire has been mentioned previously in this work. That group had operated in the early part of the 1930's and

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[1031] *ibid,* 124.
[1032] *ibid,* 58.

had been seen as a communist threat at that time.[1033] Saor Éire re-emerged in the 1960's when it was involved in a series of bank raids and finally in 1975 it made a number of threats against members of the Irish Republican Socialist Party (IRSP) and the Official IRA 'when both organisations were engaged in a feud in Belfast'.[1034] Despite its activities in 1975 Saor Éire had effectively disbanded in 1973.[1035] A contemporary description of the organisation is fascinating.

> Saor Éire was not a homogenous organisation. It has no centralised military command, let alone a common political leadership. It was a loose alliance of diverse groups which on occasion co-operated together in joint actions and used the umbrella name Saor Éire. Needless to say. the criminal element used the name as a cover for their own exploits.[1036]

Thus Saor Éire fits into any definition of new terrorism. A further point of interest is that the lack of a coherent ideology was perceived as allowing a 'criminal element' exploit the groups name. Despite the fact that Saor Éire began life in the 1960's as a Trotskyite group with links to the Fourth International its 'concentration on bank robberies meant that gangsters on the fringes of the Republican movement were soon playing a leading role in the organization at the expense of the more politically orientated members'.[1037] This issue of 'criminality' is interesting and further

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[1033] see chapter 2.7.
[1034] <http://cain.ulst.ac.uk/othelem/organ/sorgan.htm> accessed on 2 August 2005.
[1035] 'While Saor Eire had been formed to struggle against imperialism... "during the last two years, owing to political weaknesses ...undesirable elements have been able to operate around its fringes and carry out actions ... which had nothing in common with the stated objectives of that organisation".' O'Ruaric, "A Little Known Republican Military Group: Saor Eire", *The Blanket,* 13 January 2005. <http://lark.phoblacht.net/lor1401051g.html> accessed on 2 August 2005, quoting a statement issued by Saor Éire prisoners in Portlaoise jail on 18 May 1973.
[1036] "Militatnts Leave Saor Éire" (June 1973), *The Plough*, vol. 2, no.2. See <http://lark.phoblacht.net/lor1401051g.html > accessed 2 August 2005.
[1037] *ibid.*

highlights the difficulties in distinguishing between 'pure' terrorism and organised crime.

The emergence of dissident republican groups opposed to the current Northern Ireland peace process provide contemporary models of new Irish terrorism. Irish Republicanism has always been prone to splits. In the 1920's the divide was between Treatyites and Die-Hards; the 1960's saw the Official and Provisional IRA split and the Northern Ireland peace process of the 1990's witnessed the emergence of a veritable alphabet soup of paramilitary organisations.[1038] The Continuity IRA (CIRA) and Real or True IRA (RIRA) are examples of groups which are structurally more akin to the 'new' terrorism model. The RIRA is a group of some 100 to 200 members and emerged in 1998 as the armed wing of the 32 County Sovereignty Movement. It opposes the Northern Ireland peace process and has been linked to the Omagh bombing of 1998.[1039] The CIRA was formed in 1994 as the paramilitary wing of Republican Sinn Féin, it is smaller than the RIRA and is suspected of having cooperated with the larger RIRA.[1040] The common feature of these groups is that they are splinters from the Provisional IRA and contain hardcore elements which reject the IRA's involvement in the peace process. The groups are linked by their common ideology. The RIRA and CIRA can cooperate because they share an ideology and the lack of a strict hierarchical structure means that cooperation is possible without concerns about organisational coherence or status.

[1038] The Continuity IRA, the Real IRA, on the republican and the Red Hand Defenders on the loyalist side have emerged as dissident groups opposed to the peace process.
[1039] *Patterns of Global Terrorism 2002*, *op cit,* 120.
[1040] *ibid,* 132.

The issue of dissident republicanism poses some immediate problems for Irish legislators. The OAS, 1939 was drafted with the original IRA in mind. It was a direct response to the transfer of power from the remaining members of the Second Dáil to the 'Army Council' of the IRA.[1041] As a result the OAS relies on the proscription model of counter-terrorism. Arguably this model was never very well suited to Loyalist terrorism which tended to be less organised, a point which is supported by the fact that only the IRA and INLA were ever officially proscribed in Ireland. As new networks emerge from the shadows of the PIRA with, hitherto, unheard of titles the legislator must respond in one of two ways. Either, it must quickly, but reactively proscribe all new organisations or it must find an alternative method to the traditional proscription model. The problem is that if a new group emerges with a new title then membership of that organisation will not be an offence. Furthermore, it is unlikely that organisations will declare their intention to commit offences, therefore, the first we hear of any new organisation is after it has committed its first act. Clearly, the act of terrorism will constitute and offence but membership of the organisation cannot yet be an offence. As a result the proscription approach can only ever be reactive. There are two possible solutions to this problem. Firstly, and most satisfactorily, the legislator could attempt to define terrorism along the lines of Schmid & Jongman.[1042] As was discussed in chapter 6 any such attempts would be difficult but not impossible. The UK Terrorism Act, 2000, s.1 offers an attempted definition of terror which focuses on the use or threat of serious violence 'designed to influence the government or to intimidate the public or a section of the public'[1043] and 'for the

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[1041] See chapter 3.4
[1042] Schmid & Jongman, *Political Terrorism: a new guide to actors, authors, concepts, data bases, theories and literature,* (Amsterdam, 1988) chapter 1.
[1043] s.1(1)(b) UK Terrorism Act, 2000.

purpose of advancing a political, religious or ideological cause'.[1044] Recently, the Dáil has attempted to define terrorism through the Criminal Justice (Terrorism Offences) Act, 2005.[1045] This legislation incorporates the EU Council's 13 June 2002, Framework Decision on Combating Terrorism.[1046] The legislation defines terrorist activity as including an act committed in or outside the State which

> is committed with the intention of –
>
> (i) seriously intimidating a population,
>
> (ii) unduly compelling a government or international organisation to perform or abstain from performing an act, or
>
> (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or international organisation.

This appears to be a useful working definition and its implementation and interpretation by the courts will have to be monitored before any overall conclusion on its utility will be possible. The alternative approach to defining terrorism is to utilise the current list of proscribed organisations and argue that the new organisation is covered by the ban on certain existing organisations.

The issue of dissident republicanism has been directly addressed by the Courts. In *Murphy*[1047] one issue considered by the CCA concerned the legality of Murphy's

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[1044] s.1(1)(c) UK Terrorism Act, 2000.
[1045] Hereinafter the CJTO Act, 2005
[1046] s.4 Criminal Justice (Terrorism Offences) Act, 2005.
[1047] *The People (DPP) v. Murphy* [2005] IE CCA 1.

arrest. The Gardaí believed that Murphy was a member of the CIRA, while the arresting officer believed, in error, that he was a member of RIRA. The Court held that, 'this error, if error it be, seems to us...to be of no significance having regard to the courts findings that both organisations were terrorist organisations within the generic concept of IRA or Óglaigh na hÉireann'.[1048] The CCA and Special Criminal Court both clearly accept that the phrase IRA can be construed as including the CIRA and RIRA. Thus, although not formally proscribed these organisations find themselves proscribed because they are 'within the generic concept of IRA'. This issue was addressed in more detail by the decision in *Campbell*[1049]. Campbell was convicted by the Special Criminal Court of membership of an 'unlawful organisation, to wit: an organisation styling itself the Irish Republican Army'.[1050] During police questioning the accused had repeatedly denied membership of such an organisation. Following his conviction an appeal was lodged, the sole ground for appeal being that 'the court had erred in holding that the Real IRA was a prescribed (sic) organisation within the terms of a suppression Order published pursuant to s.19 of the Offences Against the State Act, 1939'.[1051] In previous hearings the Special Criminal Court ruled that

> labels such as 'official', 'provisional', 'continuity' or 'real' are irrelevant.... The so-called "Real IRA" are on all fours with the original IRA as it existed in 1939 in terms of its philosophy, objectives and structure and members of that group are within the ambit of the Suppression Order of 1939. [1052]

[1048] *ibid,* judgment of Kearns J.
[1049] *The People (DPP) v. Campbell* [2005] IE CCA 27.
[1050] *ibid.*
[1051] *ibid.*
[1052] *ibid.*

The CCA upheld that ruling on 19 December 2003. Thus, so far, the approach of the Irish Court has been to assume that these dissident groups are in fact covered by the proscription of the IRA. The logic of the Special Criminal Court is in many ways supported by the fact that these dissident groups retain the title IRA but with the addition of a prefix. Indeed the use of the title IRA is presumably desirable since it provides these groups with a link to the history of that older organisation, which they presumably see as legitimising their actions. While such an approach may be suitable for dissident organisations which 'are on all fours with the original IRA' the case would be more complicated if an alternative title were employed. It is respectfully suggested that a more long-term strategy is required. The definition of terrorist activity contained within s.4 of the CJTO Act, 2005 may form the basis of that new long term strategy since the activities of the RIRA would surely be covered by that defintion.

A further difficulty with the proscription model surrounds the issue of de-proscription. What should be done with a group which no longer poses a threat. Saor Éire remains proscribed, in the UK, despite the fact that it has not been active since the 1970's.[1053] This issue is particularly pertinent when consideration is given to the current IRA ceasefire and proposed acts of decommissioning. In *The Kurdish Workers' Party*[1054] case, the High Court of England and Wales considered the proscription of three organisations. Most relevant was the ongoing proscription of the PKK.[1055] This group had been involved in terrorist activities since 1984 but had been on ceasefire since 1999 when its leader Abdullah Ocalan had been captured and convicted by the

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[1053] Schedule 2, The Terrorism Act 2000.
[1054] *R v. Secretary of State for the Home Department, ex parte the Kurdistan Workers' Party & others,* [2002] EWHC 644.
[1055] Kurdistan Workers' Party.

Turkish authorities.[1056] The Secretary of State refused an application to have the organisation de-proscribed on the basis that

> the organisation retains its capacity for terrorist acts and has not renounced terrorism. He is aware furthermore of recent statements made by the organisation's Presidential Council and individual members of that Council hinting at a return to armed conflict. On the basis of these declarations, and other information available to him, such as knowledge of fundraising on behalf of the organisation in the United Kingdom, the Home Secretary remains satisfied that as an organisation the PKK is 'concerned in terrorism' as defined by the Terrorism Act 2000.[1057]

Therefore, the organisation remained a terrorist organisation while not being actively engaged in terrorism. However, the substantive issue appears to have been influenced by the fact that the PKK retained the ability to engage in terrorism and had hinted that it might re-engage in such actions.

On 28 July, 2005 the IRA declared that

> the leadership of Óglaigh na hÉireann has formally ordered an end to the armed campaign.... All IRA units have been ordered to dump arms. All volunteers have been instructed to assist the development of purely political and democratic programmes through exclusively peaceful means. Volunteers must not engage in any other activities whatsoever.[1058]

[1056] *ibid,* paragraph 38.
[1057] *ibid,* paragraph 39.
[1058] <http://news.bbc.co.uk/1/hi/northern_ireland/4724599.stm> accessed on 7 September 2005.

The Minister for Justice has made it clear that the IRA will remain illegal stating that the 'constitution of the IRA was treasonable to the Irish State'.[1059] However, if we employ the reasoning of *Kurdish Workers' Party,* it is logical to assume that if the IRA were to alter and become a solely social or political movement committed to a United Socialist Republic of Ireland then at some stage it would have to be de-proscribed. While s.20 of the OAS, 1939 provides for a right of appeal against a Suppression Order, declaring an organisation to be unlawful, the Act states that such an appeal must be brought within thirty days of the publication of the Order in *Iris Oifigiúil.*[1060] As such the current legislation does not provide a means by which a current member of the IRA could appeal against the existing Suppression Order. It has been recommended that this thirty-day restriction should be removed.[1061] If the IRA was de-proscribed the Courts could no longer rely on the logic that the RIRA and CIRA were on 'all fours with the original IRA' since that organisation would no longer be proscribed. The difficulty with removing an organisation from the list of proscribed organisations is that the title is then available for use again. Saor Éire does not pose a risk and has not posed a risk for some time, but the UK government is clearly wary of de-proscribing it. Presumably part of the basis of that fear is that a dissident republican group would choose to adopt the title and with it a readymade organisational history.

[1059] <http://www.rte.ie/news/2005/0828/mcdowellm.html> accessed on 7 September 2005.
[1060] Offences Against the State Act, 1939 s.20(1).
[1061] Report of the Committee to Review the Offences Against the State Act, 1939 and Related Matters (Dublin, 2002), paragraph 6.38.

9.5 Conclusion

In the previous chapter the review courts were criticised for not adopting a more critical approach in relation to the ability of the DPP to certify the ordinary courts inadequate. It is clear from the recent history of the Court that the CCA is willing to carry out its appeal function in a critical fashion. While the CCA respects the trial courts unique ability to determine the credibility of witnesses and so forth it has been willing to overrule the Special Criminal Court on appeal in line with the decision in *Madden*. It is assisted in this process by the fact that the non-jury Special Criminal Court produces a written transcript of the trial and a reasoned, written judgment. Indeed in *Ward* the CCA concluded that the error of the Special Criminal Court in relying upon the uncorroborated testimony of Bowden 'might not be detected' in the situation of trial by jury'.[1062] Others doubt the efficacy of the court issuing a warning to itself in non-jury cases,[1063] however, a distinction should be drawn between these two points. There are certainly some reasons for concern when a court issues a warning to itself. These rules were implemented with a jury in mind and in the absence of a jury they appear somewhat farcical. However, the point made by the CCA remains a valid one. While an error by a jury might go undetected, because we are unable to delve into the reasons behind a jury's decision an error by a non-jury court which produces transcripts and a written judgment is capable of being examined and will, therefore, be easier to detect.

The emergence of the new supergrass trials is a point of concern. Egan and Ingoldsby rightly identify some difficulties with the operation of corroboration warnings in the

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[1062] *The People (DPP) v. Ward,* Court of Criminal Appeal, 22 March 2002, 15. See Egan, *op cit,* 141.
[1063] Egan, *op cit,* 141, footnote 60.

Guerin cases. The courts need to adopt a consistent approach and it Ingoldsby's scale of credibility appears a plausible solution. It would allow the credibility of each witness to be considered without recourse to the overly strict categorical approach. The ethical concerns about witness protection schemes and bargain justice are better considered elsewhere, however, this thesis assumes that there is a role for such systems of bargain justice within the Irish legal system and justifies those systems on a utilitarian basis.

Finally, the Special Criminal Court is capable of responding to new and emerging forms of terrorism. While Al-Qaeda may not pose a threat to the Republic of Ireland dissident republicanism does and the flexibility of the OAS, 1939 in allowing the Court to be established whenever the ordinary courts are inadequate ensures that it is capable of responding to organised and terrorist threats. It can be employed in the prosecution of terrorist organisations, whether proscribed or not and can effectively be employed against networks and other forms of decentralised non-group terrorists in the future. Unlike the proscription model of anti-terrorism it is capable of responding to the emerging threat without relying on a loose or stretched definitions of the term 'organisations within the generic concept of IRA or Óglaigh na hÉireann'.[1064] The recent history of the Special Criminal Court, therefore, gives rise to some cause for concern but also much to be relatively pleased about.

[1064] *ibid,* judgment of Kearns J.

Chapter 10

Conclusion – The Special Criminal Court: 1922 – 2004

> The Tribunal[1065] was clearly established for the purpose of dealing more effectively than the ordinary courts... are capable of dealing with an extraordinary situation which makes the ordinary administration of justice peculiarly difficult. Consequently the Tribunal is a practical compromise between military efficiency and the ordinary desirable methods of administering justice. Such a compromise is naturally distasteful – extremely distasteful – but the Legislature has recognised that it may be necessitated by circumstances.... The alternative to such a compromise would doubtless be something more unwelcome.[1066]

Meredith J.'s description of the Constitution (Special Powers) Tribunal is undoubtedly accurate and could, without much difficulty, be applied to the Special Criminal Court. Indeed it is arguable that all emergency powers involve this distasteful compromise. In the realm of special powers the choice faced by the three branches of Government is often should a right such as the right to trial by jury, *habeas corpus,* or liberty be protected in circumstances where protecting that right places all other liberties at risk. As President Lincoln asked rhetorically upon abolishing the right to *habeas corpus* during the American Civil War, 'are all laws but one to go unexecuted, and government itself go to pieces lest that one be

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[1065] That is the Constitution (Special Powers) Tribunal established by the Constitution (Amendment No. 17) Act, 1931 also known as Article 2A, see chapter 2.
[1066] *The State (Hughes) v. Lennon & Others* [1935] IR 128, 148.

violated?'.[1067] The Special Criminal Court is a distasteful compromise; but it is a Constitutional compromise between the desire to maintain the right to trial by jury in the majority of cases with the need to deliver the effective administration of justice.

10.1 Justifying Interference with the Right to Trial by Jury

Article 38 of Bunreacht na hÉireann explicitly provides for trial by jury as the normal legal process save in particular circumstances. Those circumstances include: summary trial for minor offences;[1068] military trial in cases of war or armed rebellion;[1069] and finally, and for the purposes of this thesis most significantly, Article 38.3.1° states 'Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order'. As such, although trial by jury is the Constitutional norm, restrictions upon that right are provided for; this is in stark contrast with Article 70 of the Irish Free State Constitution which expressly prohibited the establishment of 'extraordinary courts'.

chapter 1 considered the development of trial by jury and its significance within the legal order. The modern jury is expected to decide upon the facts presented in court and to avoid basing their decision on personal prejudices. However, the early jury

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[1067] Katyal & Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals" (2002) 111 Yale L.J. 101, 115.
[1068] Article 38.2 Bunreacht na hÉireann.
[1069] Article 38.4 Bunreacht na hÉireann.

was utilised specifically for their local knowledge.[1070] Therefore the jury has undergone significant development over the centuries. Although it is now seen, in William Blackstone's words, as the bulwark of liberty,[1071] as an institution its history belies a far more sinister past. In the middle ages intimidation of juries by the judiciary was, at the very least, an occasional problem.[1072] It is clear, therefore, that the existence of a jury is no guarantee of justice, however it would be trite not to recognise that the jury has grown in stature since the time of *Bushells Case* in 1670 and has become a significantly more independent institution.

As has already been noted, the current justification for trial by jury can be summed up as being that the jury, as an institution, incorporates a 'democratising' effect. Thus the belief has emerged that the jury should contain 'a representative cross-section of a community'.[1073] It was on this basis that the Supreme Court held, in *de Búrca v. Attorney General*[1074] that sections of the Juries Act, 1927, 'which excluded from jury service all those who were without a minimum rating qualification in respect of a house or land, and exempted women from service subject to an individual woman's right to apply to serve' were unconstitutional.[1075] The Supreme Court held that the role of the jury is to increase the legitimacy of verdicts through the involvement of a representative sample of the community. The Special Criminal Court, by its very nature, constitutes a substantial interference with the right to trial by jury and the justification for such interference must be weighed against this democratising effect.

[1070] Cornish, *The Jury*, (London: 1968), 10.
[1071] *ibid,* 126.
[1072] *ibid,* 128/129.
[1073] Hogan & Whyte, *Kelly: The Irish Constitution,* (4th ed.) (Dublin: 2003), paragraph 6.5.393.
[1074] [1976] IR, 38.
[1075] Hogan & Whyte, *op cit*, paragraph 6.5.393.

It is important to consider that although trial by jury is the norm in many parts of the Common Law world it is not the only trial process. As was noted in previous chapters, the legal systems of the Netherlands and Israel, for example, do not employ trial by jury. Spain employs a non-jury system and has a special court, the *Audiencia Nacional,* for cases involving 'crimes against the Crown, the high organs of the nation, or the government in the form of counterfeit and monetary crimes, drug trafficking, food and drugs crimes... terrorism, extradition of prisoners...' and so forth.[1076] Similarly, the Courts in France have accepted the use of non-jury courts in terrorist cases; in 1986 the Chirac Government introduced the *lois Pasqua* in which attempts were made to combat terrorism. In that jurisdiction, as we have seen, the *Counseil* recognised that the removal of jury trial did not interfere with the right to an unbiased court. Tellingly, that court held that the independence of the judiciary was itself a guarantee of an impartial tribunal.[1077] Perhaps most significantly, the International Criminal Court provides for the prosecution of the most serious of offences before a panel of international jurists without a jury. As such it can be said that although it has been stated that 'trial by jury is a cornerstone of the criminal justice system',[1078] it is not necessarily so indispensable. To be clear, the abolition of the jury is not being proposed; the jury has a long tradition within the Common Law tradition and it has, by and large, proved to be a positive development. The absence of a jury does not, in and of itself, indicate a lack of justice.

[1076] Merino-Blanco, *The Spanish Legal System*, (London, 1996) 87.
[1077] *ibid,* 195.
[1078] *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998 and Related Matters,* (Dublin, 2002), paragraph 9.88, hereinafter the Committee to Review the OAS.

The role of the jury as interposing an independent body between the State and the accused is to be welcomed, however, given that the right to a fair trial can be secured without a jury the question remains. The importance of community involvement and the legitimating effect of that involvement must be balanced against the supposed threat to justice posed by trial by jury in emergencies. If the justification for trial by jury is largely political, *as per* De Tocqueville, then it should be maintained only so long as it is also capable of fulfilling its primary, judicial role. At this juncture it is contended that, important and all as the involvement of the community in the judicial process might be under normal conditions, circumstances do exist in which the interference with such rights is justifiable.

The Special Criminal Court has been employed in three main circumstances, namely; during states of emergency, such as World War II; during times of terrorist threat not amounting to a state of emergency; and to counter the threat posed by non-subversive organised crime. The legitimacy of the courts use in each of these circumstances will now be considered.

10.2 Non-Jury Trials During States of Emergency

As was noted in the preceding section Article 38.4 of Bunreacht na hÉireann provides for military trial in cases of war or armed rebellion.[1079] Indeed although Article 70 of the Constitution of the Irish Free State expressly prohibited the establishment of 'extraordinary courts'; this might be seen as a response to the overuse of coercive

[1079] Article 38.4 Bunreacht na hÉireann.

legislation under British rule[1080] and an attempt at establishing a form of Government by consent. Although Article 70 did provide for the extension of military rule over the civilian population during times of war it excluded any such jurisdiction from areas where the civil courts were open or capable of being kept open.[1081] Similarly, as has already been noted in chapter 2, the United States Supreme Court in *Ex parte Milligan* declared that, 'martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction'.[1082] However, Chase C.J., in the same case, stated that military government was acceptable 'in time of insurrection or invasion... within districts or localities where ordinary law no longer adequately secures public safety and private rights'.[1083] Military Tribunals were established in Ireland during the emergency, as was noted in chapter 3. Here the de Valera Government stated subversive organisations would,

> ...not be allowed to continue their policy of sabotage.... The law will be enforced against them. If the present law is not sufficient, it will be strengthened; and in the last resort, if no other law will suffice, then the government will invoke the ultimate law – the safety of the people.[1084]

[1080] The 19th century saw the emergence of a pattern of introducing emergency legislation, namely Coercion Acts, as a response to some violent outrage; for example the Crimes Act 1882 was a legislative response to the murder, in the Phoenix Park, of Lord Cavendish, the Chief Secretary and Mr. Burke, the Under-Secretary. This legislation allowed for the removal of juries and their replacement with a commission of judges in some circumstances. See, D. Macardle, *The Irish Republic*, (London: 1998), 49.

[1081] Hogan & Whyte, *Kelly: The Irish Constitution,* (Dublin, 1994), 639/640.

[1082] 71 US (4 Wall) 2, 127, see TenBroek, Barnhart & Matson, *Prejudice War & the Constitution: Causes & Consequences of the Evacuation of Japanese Americans in World War II,* (5th ed) (Berkeley: University of California Press: 1975), 230.

[1083] 71 US (4 Wall) 2, 142, see TenBroek *et al, op cit,* 230.

[1084] Fanning, "'The Rule of Order': Eamon de Valera & the IRA 1923 – 1940", in O'Carroll & Murphy (eds), *De Valera & His Times,* (Cork: 1983), 170.

As a result the Special Criminal Court was augmented by trial by Military Tribunal. This 'curious and sinister' court[1085] made huge inroads into the ordinary laws of evidence through the Emergency Powers Orders (No.'s 41F and 139), 1941, as was noted earlier. The legitimacy of these Tribunals is questionable; given the existence of the Special Criminal Court which at the time was staffed by the same personnel as the Military Tribunal, it seems that the only advantage of the Military Tribunals was their ability to circumvent the ordinary rules of evidence. The circumstances leading to the establishment of the Tribunals were examined in chapter 4 and it is fair to say that in maintaining a policy of neutrality the Irish Government was in an extremely difficult position. However these Tribunals were a regrettable feature of wartime policy. Importantly, however, it is clear that non-jury trial has, undoubtedly, been accepted in limited circumstances.

The Special Criminal Court is not a military tribunal, a point which is only reinforced by the fact that the Government chose to reinforce the Special Criminal Court through the establishment of the Military Tribunal during the emergency. The irrefutable fact remains that if the extension of martial law and military tribunals is acceptable in some circumstances then the extension of trial by Special Criminal Court would also be acceptable since the latter is a lesser infringement of rights, involving as it does greater independence from the Executive than the Military Tribunal.[1086] The relationship between the Special Criminal Court and military tribunals is threefold: firstly, both involve non-jury trial; secondly, the predecessors of the Special Criminal Court and the early Special Criminal Courts were, as we have seen, staffed by military

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[1085] Kelly, *Fundamental Rights in the Irish Law & Constitution,* (2nd ed), (Dublin: 1967), 274.
[1086] This point will be returned to but it is important to stress at this stage that the Special Criminal Court is not being equated with trial by military tribunal.

officers; finally the Special Criminal Court was augmented by Military Tribunal during the Emergency.

Controversy surrounding military tribunals has recently resurfaced due to President Bush's Military Order of 13 November 2001 which 'directed the Secretary of Defence to create military tribunals and to take into custody at once anyone the President names as subject to the Order'.[1087] One of the main criticisms of this Order is that 'military officers... lack the insulation [from the Executive branch of Government] of Article III judges, being wholly dependent on the discretion of their military superiors for promotions and indeed for their livelihood. Furthermore, the Order does not guarantee an appeal from any conviction or sentence to judges independent of the executive branch'.[1088] This tribunal is, in this respect, similar to the Article 2A military tribunal established by The Constitution (Amendment No.17) Act, 1931 which, as was noted earlier, unsuccessfully attempted to prevent appeals to the ordinary courts.[1089] Despite these criticisms Katyal and Tribe appear to accept that 'in a time of declared war, or in a place where no form of justice can be administered', military tribunals can be acceptable.[1090] Indeed their main contention is that,

> ...the Constitution sets up a structure whereby the concurrence of all three branches is normally needed in order to authorize a decisive departure from the legal status quo.... But in the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution's text, structure, and logic demand

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[1087] Ktyal & Tribe, *op cit,* 102/103.
[1088] *ibid,* 104.
[1089] See *The State (O'Duffy) v. Bennett* [1935] IR 70; *The State (Hughes) v. Lennon* [1935] IR 128.
[1090] Katyal & Tribe, *op cit,* 101.

> approval by Congress if life, liberty, or property are to be significantly curtailed or abridged.[1091]

In support of this contention the *Steel Seizure Case* is cited. In that case President Truman claimed that the necessities of the Korean War, a military conflict but crucially not a declared war, were so grave as to justify the President exercising his powers as Commander-in-Chief to take control of steel mills. The Supreme Court rejected the President's argument with Justice Black declaring that seizing the mills was 'a job for the Nation's lawmakers, not for its military authorities...'.[1092] As such the main criticism of the recent military tribunals in the United States is not that military tribunals are *per se* unacceptable, but rather that the means by which these military tribunals have been established is unacceptable; it is a matter of process not form.

The use of further emergency power in the form of internment without trial during the emergency and again as a response to the Border Campaign of the 1950's was examined in chapters 4 and 5. It should be obvious that detention without trial is a more substantial interference with individual freedoms than trial by Special Criminal Court. It is, at this point, instructive to refer back to the International Covenant on Civil and Political Rights (ICCPR) which is said to be 'the most comprehensive and well established UN Treaty on civil and political rights...'[1093] and the European Convention of Human Rights (ECHR). As has already been noted Ireland is a party to both the Covenant and Convention. Both documents secure the right to a fair trial;

[1091] *ibid,* 108.
[1092] *ibid,* 115.
[1093] Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil & Political Rights: Cases, Materials & Commentary,* (Oxford: Oxford University Press, 2000), 4.

Article 14, ICCPR provides for the right to a fair and public hearing and Article 6, ECHR provides similar guarantees. However, the Human Rights Committee in *Landinelli v. Uruguay*[1094] and the European Court of Human Rights in *Lawless v. Ireland*[1095] have accepted the concept of a proportionality test. Such a test accepts the proportionate interference with the rights guaranteed. It is respectfully contended that if circumstances exist in which the detention of individuals without trial can be said to be proportionate then it would appear likely that a trial procedure before a modified, but independent Court could also be proportionate. Furthermore, since the ECHR accepted that the threat posed by the Border Campaign of the 1950's constituted a grave enough threat to Irish security to justify internment without trial then the more serious threat faced during the emergency and the 'Troubles' must surely justify the use of Special Criminal Courts.

The Constitutional framework of Bunreacht na hÉireann and the jurisprudence of the United States Supreme Court permit the use of military tribunals during times of emergency. The ICCPR and ECHR both include derogation clauses which clearly provide for proportionate deviation from the normal standards of the criminal justice system 'in time of public emergency which threatens the life of the nation'.[1096] *Lawless* recognised that internment without trial was a proportionate response to the threat then faced by the Irish state. Trial by Special Criminal Court incorporates an appeal to the ordinary courts and since 1972 a court comprised of three members of the judiciary. Since trial by military tribunal and internment without trial are an

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[1094] Communication No. 34/1978, 8 April 1981.
[1095] *Lawless v. Ireland (no. 3),* (1979) 1 EHRR. The case was decided on July 1 1961 but was not reported until 1979.
[1096] Article 4.1, *International Covenant on Civil & Political Rights,* (1966).

acceptable and proportionate response to times of emergency then trial by Special Criminal Court must be all the more acceptable.

10.3 Non-Jury Trials & Terrorism

The main focus of the Special Criminal Court has been as a weapon in the ongoing Irish struggle with terrorism. Although it was employed duing the 'emergency' and although cases of a non-subversive nature have been tried before it, its 'core business' has always been in combating terrorism. The establishment of the Court in 1939 was a direct response to IRA activities. Ruttledge, the then Minister for Justice stated in the Dáil that,

> As Deputies are aware, a proclamation was issued, on 8th December last, by a certain body which purported to hand over what it maintained it held, that is, certain Government functions. It described itself as a Government and it purports, under that proclamation, to hand over to the Irish Republican Army, as they call it, those functions of Government. That is a position which the Government is not going to tolerate....[1097]

Although the Government's main response to the Border Campaign of the 1950's was to utilise its powers of internment without trial, on November 23 1961 the Court was reintroduced. Finally, in 1972, the Court was re-established and this Court continues to exist. Laffoy J. has commented that no evidence exists to suggest that the Special Criminal Court was established in 1972 solely to deal with terrorist cases.[1098]

[1097] Dáil Éireann, *Parliamentary Debates,* 8 February 1939, vol. 74, col. 90.
[1098] *Kavanagh v. The Government of Ireland* [1996] 1 ILRM 133, 148.

However, as has previously been noted, 'the original justification for the establishment of the... Court is commonly believed to be directly associated with the civil conflict in Northern Ireland',[1099] and when justifying the Court's establishment on RTÉ Radio the Taoiseach, Mr. Lynch stated 'we want to make sure that we can continue to control any subversive activities here.... But these activities were, of course, related to the situation in the North of Ireland...'.[1100] It is, therefore, important to consider the legitimacy of employing this model of non-jury trial in such instances.

Legislatively, as we have seen, the Offences Against the State Act, 1939 provides for the establishment of Special Criminal Court whenever the ordinary courts are deemed to be inadequate. At various times, since 1922, the Irish State has faced serious threats to its legitimacy; these have included civil war, the assassination of a significant member of Government, persistent jury intimidation and rising levels of illegal drilling, a terrorist organisation seeking to usurp the right to set foreign policy during a time of international conflict, that same terrorist organisation conducting terrorist attacks in Northern Ireland and using the Republic as a base, the arms trial, and an ongoing campaign of terrorist violence. Chapters 2 to 7 have detailed these terrorist threats. It should be clear that these activities have periodically posed a serious risk to the life of the nation. The jurisprudence of the ECHR in *Lawless,* considered in the preceding section, recognises the right of Government to resort to special powers where there is a threat to the life of the nation, short of a situation of all-out war. The acceptance of the use of internment during the 1950's and again in

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[1099] Committee to Review the OAS, *op cit,* paragraph 9.32.
[1100] Department of an Taosieach, file 2003/16/93.

Ireland v. The United Kingdom[1101] in the 1970's provides ample justification for the use of the Special Criminal Court to combat a terrorist threat; once again if internment can be seen as a legitimate response then how much more acceptable is trial by Special Criminal Court? It is therefore, respectfully, contended that the legitimacy of trial by Special Criminal Court in circumstances involving a terrorist threat has been established; this view would appear in line with the Diplock Commission and international jurisprudence.

A difficulty exists when one moves from the general to the specific; in other words, that trial by Special Criminal Court can be legitimate is clear, however, specifically when such trial is legitimate is more problematic. The majority view of the recent Committee to Review the Offences Against the State Acts was 'of the view that the security risk is sufficiently high to justify the retention of the Court' on the grounds of terrorism alone.[1102] They were also of the view that this issue should be kept under review.[1103] However, a significant dissenting opinion was expressed by, amongst others, the Chairman of the review group. This dissenting group felt that the 'case in favour of the continued existence of the Special Criminal Court has not been made'.[1104] Despite their misgivings the dissenters recognise the possible necessity of such measures in certain circumstances; for example Professor Walsh in his personal dissent states that,

> I can accept that from time to time exceptional measures will be needed to combat threats to the stability of the State and its

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[1101] [1979] 2 E.H.R.R., 25.
[1102] Committee to Review the OAS, *op cit,* 9.29.
[1103] *ibid*, paragraph 9.39.
[1104] *ibid,* paragraph 9.89.

> institutions. I am firmly of the view however, that the nature of such measures and their inherent potential to be used as powerful instruments to crush political opposition, trade union activity, the promulgation of unconventional views are such that they must be framed in very clear and precise terms.[1105]

The concerns expressed by the minority are significant and their views cannot simply be dismissed. The potential misuse of any emergency power is grounds for concerns and it should be recalled that previous Governments have been willing to employ special powers in the most alarming ways. In chapter 5 it was noted that on 16 May 1947, the Government decided 'as a matter of urgency' to amend the Protection of the Community (Special Powers) Act, 1926 in order to provide for 'the prohibition of a strike or lock-out of workers of any class; to prohibit any person from inciting, maintaining or subsidising such strike and to provide that, where a trade union is involved, a financial penalty may be imposed on the trade union funds'.[1106] Furthermore, in April 1947 Ministers specifically considered amending the Offences Against the State Act, 1939 in order to enable,

> ...offences, such as contraventions of the control and rationing of commodities, to be made scheduled offences for the purposes of Part V of the Offences Against the State Act, 1939, in circumstances and subject to a procedure to be specified, without a declaration that

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[1105] Committee to Review the OAS, *op cit.* "General Dissenting Views of Professor Dermot Walsh", 275.

[1106] Attorney General's Office file 22/47, from Dept. of Industry and Commerce, to The Attorney General, signed (illegible), 17 May 1947.

> the ordinary courts are inadequate to secure the effective administration of justice....[1107]

The purpose of these changes was to avoid having to make the required declaration that the ordinary courts were inadequate. As such, history shows us that the potential for abuse of these powers does exist.

There are three main responses to these concerns. Firstly, although the Government considered amending the Schedule in 1947, an act which would have given rise to concern and would have clearly signalled the 'normalisation' of the court, they did not in fact do so. This is because the Attorney General objected and noted that it would be better not to take such steps since, 'conviction and severe sentences obtained in ordinary courts are less likely to be interfered with on appeal than convictions and sentences by the Special Criminal Court'.[1108] Therefore, despite the severe economic conditions prevailing in 1947 the Government did not, in fact, abuse its power. However, the 'trust me' approach is hardly an acceptable line of jurisprudential reasoning.[1109] In this respect further reassurance is required and that reassurance should be available in the form of adequate and real review by the Courts, the beginnings of which can be seen with *Eviston*[1110] and which would be strengthened by

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[1107] Dept. of an Taoiseach, file S 14068, *Extract From Cabinet Minutes, G.C. 4/252, 25.4.1947, item 3,* Pr. Sec. M.I.& C., Finance, Justice advised 26/4/1947.
[1108] Dept of an Taoiseach, file S 14068, Department of the Attorney General, Dublin, to Mr. Wiliams, signed Cearbhall O Dalaigh, Ard-Aighne.
[1109] As Katyal & Tribe note in the context of the U.S. Attorney General's assurance that military tribunals would be conducted in public except where the urgent requirements of national security prevented them from being so held, 'it is, to be sure, nice to have White House Counsel's personal guarantee that this is so, but "trust me" has never been enough for the American people when their rights have been at stake'. Katyal & Tribe, *op cit*, 105 footnote.
[1110] [2002] 3 IR, 260, see chapter 8.

the recommendations of the Committee to Review the OAS.[1111] Furthermore, annual review of the use of the Special Criminal Court by the Oireachtas would allow scrutiny of the Court's. This would help avoid potential misuse.[1112] Furthermore, it was noted in chapter 9 that the ordinary courts have been willing to exercise their jurisdiction in a critical fashion when hearing cases on appeal from the Special Criminal Court. This factor combined with the protections afforded by adequate review mechanisms would go some way to alleviating the concerns of the minority but, crucially, would maintain the existence of this Court and allow it to face down the continuing threat, as perceived by the majority of the Committee.

The final response to the minority concerns stems from their outlook on the importance of trial by jury. The dissenting opinion is largely based on the premise that,

> ...trial by jury is the cornerstone of the criminal justice system. It ensures that the innocence or guilt of a person charged with an offence is determined by twelve randomly chosen members of the community, each of whom brings to the process the benefit of his or her life-experience and individual perspective.[1113]

Once again, no evidence is adduced to support this contention. Indeed the minority note that the Special Criminal Court is advantageous since 'the risk of possible jury intimidation is reduced; the members of the Court can be relied on not to be swayed

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[1111] See Chapter 7, the Committee to Review the OAS proposed review of the decision of the Director of Public Prosecutions, to send a case for trial before the Special Criminal Court, by a judge of the Supreme Court. Committee to Review the OAS, *op cit*, paragraph 9.76.
[1112] See chapter 8.
[1113] Committee to Review the OAS, *op cit*, paragraph 9.88.

by political views from convicting where the offence was politically inspired; and the prospects of conviction may be considered more likely...'[1114]. However, it is asserted that 'jury trial is valuable, in spite of its inconvenience, because of deeper values relating to a liberal democracy'.[1115] These values are not identified and the previous sections of this chapter, along with commentary in chapter 1, have established that it is possible to conduct a fair trial, in line with the principles of liberal democracy, in the absence of a jury. Given the evidence in support of the view that jury intimidation by terrorists and others[1116] has occurred it would seem wise to adopt a means of trial which avoids such complications.

The trial of four men for the murder of Mr. More O'Ferrall in 1935 provides some insight into the history of jury intimidation in Ireland. O'Sullivan gives a detailed account of the trial.

> Four men were arrested in connection with the Edgeworthstown crime and charged with murder. They were not brought before the Military Tribunal, but before the Dublin Criminal Court, the case being tried before the Hon. Mr. Justice Johnston and a jury. All the accused pleaded not guilty. After lasting nearly a fortnight, the trial ended on the 12th July 1935, the foreman of the jury intimated that there was no possibility of agreement, the jury were discharged.... A second trial began on the 2nd December 1935, before the Hon. Mr. Justice Meredith and a fresh jury. The case for the prosecution

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[1114] *ibid,* paragraph 9.90.
[1115] *ibid.*
[1116] see for example Ó'Donnchadha, "Witness Intimidation – Criminal Justice in Crisis?" (2004) *Cork On-line Law Review,* VI at <http://colr.ucc.ie/2004vi.html> accessed on 29 June 2005.

> occupied a week, and when it had concluded the foreman of the jury informed the judge that the jury wished to deliver its verdict. The judge said that 'it seemed a very serious thing that they should come to a decision before hearing the accused, who were in the box that morning, and before the prosecution had an opportunity of cross-examining them'. He asked if the jury had considered that aspect of the case. The foreman replied that they had, a verdict of 'not guilty' was returned in regard to all four of the prisoners, and they were released.... The judge stated that 'he would like the jury to know that he quite understood the position they were in and that he agreed with their findings'.[1117]

Although it is impossible to prove, such unusual events point to jury intimidation. The impossibility of ascertaining the existence of jury intimidation was noted in chapter 7. Here the lack of empirical research to support the findings of the Diplock Commission was noted. Once again, however, the anecdotal evidence points to the existence of jury intimidation; Minister for Justice, O'Malley appears to have been convinced that jury intimidation was occurring, stating that 'one can, I think, fairly draw conclusions from verdicts that were brought in over a period of months'.[1118] Such evidence is far from conclusive and as it is possible to contend that the case for jury intimidation has been over-egged and that in the absence of such evidence one should not interfere with the right to trial by jury. This is the *Catch 22* of the Special Criminal Court; it is impossible to prove that such a threat exists and in its absence, the legitimacy of the Court may be questioned. On this point the author respectfully

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[1117] O'Sullivan D. *The Irish Free State and its Senate,* (London: 1940), 438.
[1118] Dáil Éireann, *Parliamentary Debates,* 15 June 1972, vol. 261, col. 1765.

concurs with the view of the majority of the Committee to Review the OAS and furthermore, contends that the importance of the right to jury trial can, and indeed has been, overstated. As such interference with the right is proportionate.

10.4 Non-Jury Trials & Non-Subversive Cases

The use of the Special Criminal Court in emergency situations is justifiable and by extension its use against a terrorist threat where an organisation threatens the society and the State is also Constitutionally, legislatively and theoretically justifiable. The most controversial aspect of the Court's use has been in the field of non-subversive cases. The Court has been utilised in this manner on a number of occasions. Chapter 5 detailed the Court's use in economic cases. These cases are closest to the 'emergency' scenario, since although not directly associated with a terrorist threat it was associated with maintaining order and the maintenance of supplies during an emergency. Thus, the courts use in Black Market cases during the 1940's can be understood. The legislative framework allows for the Court's use in such circumstances and although it is clear that the establishment of the Court was premised upon the existence of a terrorist threat the legislation did allow for its extension to other circumstances in which the ordinary courts were deemed to be inadequate. As was noted, although the use of a non-jury court in cases concerning the supply of flour might at this distance appear unjustifiable during the emergency the maintenance of supply of such an essential product can be explained. The modern equivalent of these cases are the organised crime cases which were examined in chapters 8 and 9.

The minority view of the Committee to Review the OAS was that although Ireland had experienced a growth in organised crime this was not comparable to the existence of organised crime in other jurisdictions, jurisdictions where no equivalent to the Special Criminal Court exists.[1119] The use of the Special Criminal Court in such cases could, therefore, be seen as either an overreaction on the behalf of the Irish Government or a 'normalisation' of the Court. In support of the view that the Special Criminal Court was an inappropriate venue for cases of a non-subversive nature the Human Rights Committee has expressed the view that the Special Criminal Court was an emergency power which could only be justified in emergency situations.[1120] The decision of the HRC in *Kavanagh v. Ireland*[1121] was also critical of the Court's use in such cases. These criticisms are undoubtedly a point of concern.

Chapter 8 examined this issue in some detail and a few salient points are worth re-iterating. It is not unusual for anti-terror measures to be adopted to the fight against organised crime. In Continental Europe the use of some forms of accomplice evidence, initially designed to combat terrorism have been adopted to fight organised crime groups.[1122] Such measures can be justified when consideration is given to the similarities between terrorists and organised criminals, similarities which have been noted by, among others, the United Kingdom's Home Office.[1123] Indeed, a majority

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[1119] Committee to Review the OAS, *op cit*, paragraph 9.93.
[1120] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ireland. 03/08/93.* CCPR/C/79/Add.21. 3 August 1993, paragraph 11, see <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/10cef6e66dedc39e41256324003c32cc?Opendocument> accessed 9 September 2004.
[1121] CCPR/C/71/D/819/1998, 26 April 2001, paragraph 4.4.
[1122] Fyfe & Sheptycki, "Facilitating Witness Co-operation in organised Crime Cases: an International Review", (Home Office On-line Report 27/05), 27. <http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr2705.pdf> accessed on 22 September 2005.
[1123] The Home Office, *One Step Ahead; a 21st Century Strategy to Defeat Organised Crime*, Cm 6167, presented to Parliament March 2004, 7.

of the Committee to Review the OAS 'was of the view that the threat posed by organised crime was sufficiently serious to justify the continuation of the Special Criminal Court...'.[1124] It should also be noted that the main criticism of the HRC in *Kavanagh* was that the decision of the Director of Public Prosecutions (DPP) to certify that the ordinary courts were inadequate was not open to review.[1125] Again, it is contended that the adoption of the recommendations of the Committee to Review the OAS would alleviate such difficulties.

The use of the Special Criminal Court in organised crime cases does give rise to concern that this exceptional measure is being normalised. Within this context it is tempting to see the Court's recent use in organised crimes cases as heralding a new era in the Court's evolution. Such an analysis is a gross over simplification. It is true that the Court was employed in a series of high-profile cases emerging from the murder of Veronica Guerin, however, it has not been over employed in such cases since then.[1126] For example during the recent Liam Keane murder trial despite difficulties surrounding witness and jury intimidation[1127] there was no attempt by the prosecuting authorities to transfer that trial to the Special Criminal Court. The fear of normalisation gives rise to two possible courses of action: firstly, the use of the Court in these cases could be abolished, with the attendant risk of jury intimidation and miscarriages of justice through acquittal; alternatively, reform of the procedure by which the DPP certifies the ordinary courts to be inadequate could be instituted.

[1124] Committee to Review the OAS, *op cit*, paragraph 9.37.
[1125] *Kavanagh v. Ireland* CCPR/C/71/D/819/1998, 26 April 2001, paragraph 10.2.
[1126] A reliable source has informed the author that there are no immediate plans to continue the Court's use in such cases.
[1127] "Keane Trial Adjourned over Jury Difficulties" < http://www.rte.ie/news/2003/1022/keane.html> accessed on 16 November, 2005.

Given this choice, the prudent course of action is to adopt a scheduling-in procedure whereby the Director must certify the ordinary courts inadequate in each individual case. This decision should then be capable of meaningful review, either on the basis of the new test developed in *Eviston* or, perhaps preferably, on the basis of review by a Supreme Court Judge as recommended by the Committee to Review the OAS. Furthermore, annual review by both Houses of the Oireachtas would ensure public scrutiny of the Court's use and would thereby prevent abuse. The combination of these reforms would result in the possibility of meaningful review for every case sent for trial before the Special Criminal Court while ensuring the Executive's ability to combat organised crime.

10.5 Final Conclusions

The Special Criminal Court is the result of an evolutionary process which began before the creation of the State. It is undeniably preferable to the PSA, 1927 and Article 2A. This is largely because these two models allowed for trial by members of the Defence Forces, lacked independence and were granted considerable and draconian powers. It is not great leap of logic to therefore conclude that trial by Special Criminal Court is also preferable to trial by military tribunal. Military Tribunals were employed during the emergency and unlike the Special Criminal Court they made huge inroads into the laws of evidence.[1128] Perhaps the Court has not received due credit for these evolutionary improvements. It is interesting to note that the U.S. has chosen to employ a system of trial by military tribunal in its current

[1128] Hogan & Whyte, *op cit,* paragraph 6.5.352.

war on terror.[1129] These commissions have attracted considerable criticism because they lack independent judicial review and provide for military trial of civilians and more disturbingly because the commissions place restrictions on the defendant's right to counsel.[1130] It is only fair to note that the Military Commissions established by President Bush are part of the US War on International Terror[1131] and the situation is not truly comparable to that pertaining in Ireland; the circumstances are, arguably at least, more akin to those surrounding 'the emergency' when Military Tribunals were established in Ireland. On a basic level, it can be said that assuming the OAS, 1939 is amended to remove the possible appointment of members of the Defence Forces to the Court, none of these allegations could be levelled at the Special Criminal Court; as such trial by Special Criminal Court is preferable to the current system employed by the Bush Administration.

The other alternative to trial by Special Criminal Court has been internment without trial. Such measures can be legitimate where a 'threat to the life of the nation exists' as was established in *Lawless v. Ireland.*[1132] The United Kingdom has adopted a form of detention without trial at present. This system, provided for under Part 4 of the Anti-Terror Crime and Security Act 2001 does not conform to a traditional concept of

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[1129] Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, S.4(a) states that 'any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death'. This Order was promulgated by President George W. Bush on 13 November 2001 as a legislative response to the events of 11 September 2001. <http://news.findlaw.com/hdocs/docs/terrorism/bushtribunalord111301.html> accessed 20 April 2004.

[1130] Human Rights Watch, "Military Commissions Shouldn't be Used: Pentagon Rules Shortchange Justice", (New York, 25 June 2003), <http://hrw.org/press/2003/06/us062503.htm> accessed 28 September 2005.

[1131] A thorough review of the US War on Terror is included in The United States Department of State *Patterns of Global Terrorism 2002*, (Publication 11038) (April 2003); <http://www.state.gov/s/ct/rls> accessed 20 April 2004.

[1132] *Lawless v. Ireland (no. 3),* (1979) 1 EHRR 1.

internment since it is designed to allow for the detention of foreign nationals who are suspected of being international terrorists, but who cannot be deported for one reason or another. This situation is not comparable to the Special Criminal Court since the Irish measure is a trial procedure, whereas the UK legislation concerns individuals who are incapable of being prosecuted within that jurisdiction. The UK approach has been controversial and it is fair to say that generally speaking a trial process, even a modified trial process, is preferable to any form of internment.

Trial systems that do not include a jury can and do function in a perfectly acceptable fashion in many parts of the World. The main justification for maintaining a system of trial by jury is that it involves the community in the decision and as such increases the likelihood of that decision being accepted by the community. Valuable as this communal element is, in circumstances where a juror is intimidated the overriding concern must be to ensure that justice is done. The difficulty in ascertaining the existence of jury intimidation makes this decision problematic. However, terrorist organisations possess the capabilities to intimidate jurors: for example, in November 2003 Kurdish protestors took a number of judges hostage in Istanbul;[1133] and the Real IRA allegedly threatened to kill the family of David Rupert who testified in the McKevitt trial.[1134] If terrorists are capable of such acts they are capable of intimidating a jury. The similarities between terrorists and organised criminals indicate that those groups might also possess such capabilities. Assessing this risk is

[1133] Zaman, "Police Free Hostage Judges" (filed, 19/11/2003) <www.telegaph.co.uk> accessed 13 August 2004.
[1134] Foggo D., "Real IRA Threatened to Kill Trial Witness's Family in US" (filed, 10/08/2003) <www.telegraph.co.uk> accessed on 13 August 2004.

difficult and clearly it requires constant review. However, that the link can exist is obvious.

It is contended that the risk of jury intimidation can exist in cases involving terrorists and organised crime; it is further contended that in such circumstances the interference with the right to trial by jury is acceptable. Minor amendments are required, but in the final analysis, the Offence Against the State Act, 1939 and the Special Criminal Court have served Ireland well and are capable of continuing to do so in light of the emerging threat of 'new' terrorism. Leaving those relatively minor and cosmetic amendments to one-side there remains only one principled objection to prosecution by Special Criminal Court: that is the absence of a jury. This thesis has firmly concluded that, while important, trial by jury is not indispensable. Others must explain why the right to trial by jury is so fundamental that it should be allowed to displace the right to a fair trial. This thesis is not a clarion call for the abolition of the jury system; it is a recognition of the fact that circumstances exist in which maintaining the right to trial by jury can be detrimental to the interests of justice. In such circumstances it is legitimate to interfere in a proportionate manner with that right. Emergency powers are often excessive; the Special Criminal Court may be an 'extremely distasteful compromise'; it is, however, a legitimate, proportionate and moderate response.

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Appendix 1

Department of an Taoiseach file S S9249[1135]

Murders since 1927 arising directly or indirectly from political motives, labour disputes or rent agitation. In no case has anybody been convicted.*

*[handwritten note] except in Egan's case, Conway has now been convicted

Year	Name & Description	Hour/Date/Place	How	Trial ?	Comment
1927	Kevin O'Higgins Min for Justice	12pm 10/7/27 Booterstown Co. Dublin	shot	No	-
1929	Albert H. Armstrong	7.15pm 20/2/29 Dublin	shot	No	Gave evidence in a case of tearing down a GB Flag
	Tim O'Sullivan Detective Officer	10.10pm 11/6/29 Clare	Opened Trap Mine	No	-
1931	Patrick J. Carroll Motor Driver	7pm 31/1/31 Crumlin Dublin	Bomb Exploded	No	Suspected of being a Police Agent
	John Curtin Superintendant Garda Siochana	10.20pm 20/3/31 Tipperary	Shot	No	Active Against Local IRA
	John Ryan Labourer	1.45pm 20/7/31 Tipperary	Shot	No	Suspected of being a Police Agent
1933	J. Patterson Railway Clerk	10.15am 1.2.33	Train derailed	No	Industrial Murder probably not directly intended but undoubtedly murder in law.
	J. McWilliams Engineer	"	"	"	"

[1135] The following is based on the author's transcript of the relevant file available in the National Archive of Ireland.

	Hugh Reilly (No Business)	5am 29/10/33	Beaten with sticks and guns	No	A "Blueshirt Martyr"
1934	Mrs Frances McGory	8pm 11/3/34 Dundalk	Death on 18/3/34 accelerated by a bomb explosion on 11/2/34	Yes. 5 men were charged before the Military Tribunal and were acquitted.	The IRA blew up the house in revenge for the son's giving police information: they didn't directly intend to murder the woman.
1935	Richard More O'Farrell Clerk	9pm 9/2/35 Edgeworthstown Co Longford	Shot	Yes. 4 men were put on trial but were acquitted.	The IRA intervened on the tenant's side in a rent dispute and sent an armed party to tar an feather father (Land Agent): son shot whilst struggling with attackers.
1936	Henry Boyle Sommerville Vice Admiral, British Navy.	9.30pm 24/3/36	Shot		Helped local boys to join British Navy.
	John Egan Labourer	11.20pm 26/4/36 Co. Waterford	Shot		Suspected of being a police agent (had joined the IRA and then left it.)

Appendix 2

Department of an Taoiseach file S 8211[1136]

Extract from Constitution Committee Report, 1934.

7. We have given special consideration to Article 2A, and in doing so we have borne in mind the statement made by you in the Dáil on Committee Stage of the Constitution (Amendment No. 24) Bill on 26th April last, column 2480, viz:

> "that it is necessary to ensure, in cases of real urgency and real public emergency, that an Executive would not be prevented from taking the action that might be considered necessary to safeguard public interests".

8. We are of opinion that Article 2A in its present form is not a proper one for retention in the Constitution. We suggest that it should be replaced by a simple Article which would enable the Oireachtas, by ordinary legislation, to empower an Executive to take any measure necessary to deal effectively with a state of public emergency not amounting to armed rebellion or state of war, including, when necessary, the temporary suspension of many Articles of the Constitution which under normal conditions are rightly regarded as fundamental.

9. We realise the great important of providing safeguards to prevent such drastic powers being resorted to except in the abnormal circumstances for which they are

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[1136] The following is based on the author's transcript of the relevant file available in the National Archive of Ireland.

designed, and at the same time to secure that an Executive which has real occasion to use them will not be in danger of finding its efforts to cope with a serios situation hampered or defeated by appeals to the Courts based on normal constitutional rights.

10. A suggested scheme which might meet the position is briefly outlined in Appendix B.

APPENDIX B.

EMERGENCY POWERS.

SUGGESTIONS OF THE COMMITTEE:

1. What may be regarded as the first serious phased in the development of a grave state of disorder throughout the country is the failure of the ordinary Courts, either through intimidation of jurors and/or witnesses, or lack of civic spirit on the part of either or both, to secure the conviction of a semi-political nature.

2. The resultant immunity of offenders from punishment leads inevitably to the spread of offences of this character, resulting sometimes in a serious situation with which the ordinary processes of law are unable to cope.

3. We are of opinion that the development of a situation of this nature could in most cases be arrested by the application of suitable measures in the early stages, and we think that, to this end, the Constitution should contain a permanent provision to supplement the operation of the ordinary Courts.

4. Our suggestion, which for convenient reference we call Scheme A. is as follows:-

SCHEME A.

(a) Power should be provided in the Constitution for the enactment of legislation to provide, as part of the permanent judicial machinery of the State, for the trial by Special Courts of persons accused of crime, in respect of whom the appropriate ordinary Judge or Justice certifies, at an stage of the proceedings, either on his own initiative, or on the application of the Attorney General, that it is desirable, in the interests of justice, that the trial should be removed to a special court set up under this scheme.

(b) The exact constitution and powers of these special courts would remain to be settled by legislation, but what we have in contemplation is something in the nature of the Constitution (Special Powers) Tribunal, with such changes as experience has shown to be desirable.

5. In addition to the Scheme A. outlined above, which may be regarded as a preventive measure, aimed at stopping, where possible, the development of

a state of public emergency, we consider it essential that the State should be in a position to deal effectively with such an emergency in the event of its occurring, and for that purpose, we suggest Scheme B. which is outlined hereunder.

SCHEME B.

(a) In substitution for the present Article 2A, a new Article should be inserted in the Constitution which would authorise the Oireachtas to provide by ordinary legislation such powers as the Oireachtas might consider necessary, (including power to suspend temporarily any Article of the Constitution), to meet the requirements of any period during which the ordinary laws are not adequate for the preservation of public order, such legislation to come into effect at the times and in the manner set out hereunder.

(b) The Article should provide that nothing in the Constitution or in any Act should be capable of being invoked or cited as invalidating anything in the Article or in any legislation enacted or any other action taken under it.

(c) All such legislation should, by way of title or preamble state expressly that's its object is to carry out the provisions of the said Article.

(d) The Article should provide that, if and whenever the Executive Council is of opinion that it is desirable so to do, they may request the president, or the senior available Judge, of the High Court (hereinafter called the summoning officer) to summon all Judges or Justices

exercising criminal jurisdiction, but not including Judges of the Supreme of High Court nor any person acting only as a temporary Judge or Justice, to meet at a stated place and time, (not being sooner than three days or later then seven days after the issue of such summons) for the purpose of advising the Executive Council as to whether the state of the country is such that the ordinary laws are not adequate for the preservation of public order.

(e) The said Judges shall meet accordingly under the Chairmanship of the summoning officer, and shall, after such discussion as they shall think fit, decide, by way of majority vote, on secret ballot, on the question referred to them by the Executive Council, and the summoning officer shall report to the Executive Council in writing (attested by the signatures of all present at the meeting) as to the result of the votes, without specifing [sic] the names or numbers or persons voting for or against.

(f) To provide against wilful abstention from the meeting the judges and justices, severe penalties, amounting if necessary to automatic removal from office, should be provided. In case of unavoidable absence, a certificate from the summoning officer setting out the reasons for such absence would be essential.

(g) If and whenever the Executive Council; receives from the summoning officer a report in the affirmative, they may by Order declare that the provisions of all such legislation as is mentioned in paragraph (a) above shall come into operation on a day which shall be appointed in

such order and the said provisions shall come into operation on such day.

(h) The Order of the Executive Council should, inter alia,

(1) cite that the report referred to in the preceding paragraph has been duly received;

(2) be so worded and operate as to summon the Dáil forthwith if not already in session;

(3) be published in Iris Oifigiuil not later then the day preceding the appointed day;

(4) be laid before the Dáil forthwith, and unless and until a resolution annulling such Order is passed by the Dáil within the next subsequent twenty-one days on which the Dáil has sat after such order is laid before it, such order shall have full force and effect, but no such resolution shall operate to prejudice the validity of anything previously done under such Order.

(i) The effect of the Order and the operation of all legislation brought into effect under it shall cease, without prejudice to anything done under it:

(a) six months after the appointed day, or

(b) on an earlier date named in an ad hoc Order, by the Executive Council, or

(c) on an earlier date named in an express resolution passed by Dáil Éireann for that purpose.

(j) If the Executive Council consider it is desirable that the period of six months should be extended, they may at any time, either during the

operation of the Order, or after its termination, take steps as provided in paragraph (d) et seq. above with a view to the making of a new Order to bring the scheme into operation for a further period.

6. With regard to the meeting of Judges and Justices provided for in paragraph (d) of Scheme B. above, our proposal to exclude the High Court and Supreme Court Judges is deliberate, on the grounds

(a) that their jurisdiction is in practice almost exclusively civil, that they function in Dublin only, and that they are accordingly not in the same position as District Justices and Circuit Court Judges to assess the general condition of the country from the point of view of maintenance of law and order;

that these judges may have to decide Constitutional questions arising out of the operation of the Article.

Appendix 3

PART I - Persons Sentenced in the District Courts[1137]

Name	Offence	Sentence
Peter Pringle	1. Possession of firearms and ammunition	6 months
	2. Refusal to account for movements	6 ,,
		(consecutive)
Malachy McGurran	1. Possession of firearms and ammunition	6 months
	2. Refusal to account for movements	6 ,,
		(consecutive)
Séamus McCann	1. Possession of ammunition	6 months
	2. Refusal to account for movements	6 ,,
		(consecutive)
Alphonsus Ryan	1. Refusal to account for movements	6 months
	2. Refusal to give name and address	3 ,,
		(consecutive)
William Folan	1. Possession of firearms and ammunition	6 months
	2. Refusal to account for movements	6 ,,
		(consecutive)
James Hayde	1. Possession of firearms and ammunition	6 months
	2. Refusal to account for movements	6 ,,
		(consecutive)
Patrick O'Regan	Refusal to account for movements	6 months

[1137] Dáil Éireann, *Parliamentary Debates,* 15 February 1962, vol. 193, col.s 377/378.

James Joseph Roche	1. Possession of firearms and ammunition	6 and 6 months (consecutive). Three other sentences of 6 months each concurrent with foregoing (12 months in all).
	2. Refusal to account for movements, (4 counts).	
Seán Tracey	1. Possession of firearms and ammunition	6 and 6 months (consecutive). Three other sentences of 6 months each concurrent with foregoing (12 months in all).
	2. Refusal to account for movements, (4 counts).	
Patrick Murphy	1. Refusal to account for movements	6 months
	2. Membership of unlawful organisation	3 ,,
	3. Possession of incriminating documents	3 ,,
		(concurrent)
Joseph Maguire	Refusal to account for movements	6 months
Lorcan Bergin	1. Possession of firearm	6 months
	2. Refusal to account for movements	6 ,,
		(concurrent)
Michael Murtagh	Refusal to account for movements, (2 counts).	6 and 6 months
		(concurrent)

PART II - Persons Sentenced by the Special Criminal Court[1138]

Name	Offence	Sentence
Cathal Goulding	Refusal to account for movements	6 months
Seán Cronin	Refusal to account for movements	6 months
Thomas Nixon	Refusal to account for movements	6 months
Éamon Thomas	Refusal to account for movements	4 months
Hugh Hutchinson	Refusal to account for movements	4 months
Éamon McNulty	Refusal to account for movements	4 months
Tomás MacGiolla	1. Refusal to account for movements	6 months
	2. Refusal to give information	6 ,,
		(concurrent)
Séamus Ó Doráin	Refusal to account for movements	6 months
Líam Mac Aogain	Refusal to account for movements	6 months
Líam Boylan	Refusal to account for movements	4 months
Séamus McCollum	1. Refusal to account for movements	6 months
	2. Refusal to give information	6 ,,
		(concurrent)
Patrick Mulcahy	1. Membership of unlawful organisation	12 months
	2. Possession of incriminating documents	4 ,,
	3. Refusal to account for movements and failing to give information (2 counts).	4 and 4 months (all concurrent)
Matthew Murray	1. Possession of firearms and ammunition	2 years
	2. Membership of unlawful organisation	2 years
	3. Possession of incriminating documents	6 months
	4. Refusal to account for movements	6 months
	5. Refusal to give information	6 months
		(concurrent)

[1138] Dáil Éireann, *Parliamentary Debates,* 15 February 1962, vol. 193, col.s 377/380.

Thomas O'Sullivan	1. Possession of firearms	2 years
	2. Membership of unlawful organisation	6 months
	3. Possession of incriminating documents	6 ,,
	4. Refusal to account for movements	6 ,,
	5. Failing to give information.	6 ,,
		(concurrent)
Walter Dunphy	1. Possession of ammunition with intent	4 years
	2. Possession of ammunition	18 months
	3. Refusal to account for movements	6 ,,
		(concurrent)
Denis O'Riordan	1. Possession of ammunition with intent	3 years
	2. Possession of ammunition	1 year
	3. Refusal to account for movements	4 months
		(concurrent)
Patrick Ryan	1. Refusal to account for movements	6 months
	2. Refusal to give information (2 counts)	6 and 6 months
		(all concurrent)
Thomas F. Smith	1. Refusal to account for movements	4 months
	2. Refusal to give information (2 counts)	6 and 6 months
		(all concurrent)
Patrick J. Tierney	1. Refusal to account for movements	6 months
	2. Refusal to give information (2 counts)	6 and 6 months
		(all concurrent)

Alphonsus Larkin	1. Possession of firearms and ammunition with intent.	7 years
	2. Possession of firearms and ammunition	12 months
		(concurrent)
Michael McEldowney	1. Possession of firearms and ammunition with intent.	8 years
	2. Possession of firearms and ammunition	12 months
		(concurrent)
Richard Nagle	1. Possession of firearms and ammunition with intent.	7 years
	2. Possession of firearms and ammunition	12 months
		(concurrent)
John J. McGirl	1. Carrying of ammunition	2 years
	2. Refusal to account for movements	6 months
		(concurrent)
John P. Mulvihill	Refusal to account for movements	4 months
Nicholas Swanton	Refusal to account for movements	4 months
Michael F. Hennessy	Refusal to account for movements	6 months
James McCabe	Refusal to account for movements	4 months
Richard Walsh	Refusal to account for movements	4 months
Peadar Doyle	1. Possession of firearms and ammunition with intent.	5 years
	2. Possession of firearms and ammunition	18 months
	3. Possession of explosive substance	5 years
		(concurrent)
Thomas O'Neill	1. Possession of firearms and ammunition with intent.	5 years
	2. Refusal to account for movements	4 months
		(concurrent)

NOTES:

(1) Possession (or carrying) of firearms (or ammunition), refers to possession or carrying without a firearm certificate, contrary to section 2 of the Firearms Act, 1925. Possession of firearms, etc. "with intent" refers to their possession:—

(a) with intent to endanger life or cause serious injury to property, or

(b) with intent to enable any other person by means of such firearms or ammunition to endanger life or cause serious injury to property,

contrary to section 15 of the Firearms Act, 1925.

381 382

(2) Refusal to account for movements or to give information refers to a refusal contrary to section 52 of the Offences Against the State Act, 1939.

(3) Refusal to give name and address refers to a refusal contrary to section 30 of the Offences Against the State Act, 1939.

(4) Membership of an unlawful organisation: this refers to section 21 of the Offences Against the State Act, 1939.

(5) Possession of incriminating documents: this refers to section 12 of the Offences Against the State Act, 1939.