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"CRIMINALIZATION" AND THE DETENTION OF "POLITICAL PRISONERS" – AN IRISH PERSPECTIVE

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The contemporary crisis in the maintenance of civil order on both sides of the Irish border has initiated unique developments in the "system" of criminal justice within Ireland. The government of the Republic and the administration of the Province have responded to various attacks [1] on their legitimacy by relying on the controls of the criminal sanction, while radically altering the process through which that sanction is applied and accorded its full effect. While denying the political nature of the conflict, these governments have cloaked extraordinary social control measures in the authority of the rule of law. They would have us believe that by relying on the controls of criminal law rather than military force alone, violent challenges to their existence are not attacks on the substance of the state. But how they have fundamentally altered the face of the criminal sanction to propagate this myth of normality! And with each particular innovation, the broader workings of criminal law in Ireland are certainly (and perhaps insidiously) taking on a new significance for the state control function.

As common law jurisdictions, the "two Irelands" provide a unique example of the criminal sanction, as applied by the state, to control political dissent. The extraordinary measures recently enacted to deal with the perpetrators of violence and terrorism belie the assertion that these acts are simply criminal. With this in view, this article analyses the process of "criminalization" at various stages within the system of criminal justice in Ireland. The ramifications of this policy will receive comment as a natural, and arguably unavoidable coincidence of "criminalization." Finally, it is necessary to examine the conflict which underlies the strenuous application of the criminal sanction to activities which are made marginal, in terms of politics and crime. As an example of this conflict, and different attempts at its resolution, this article examines the detention of political prisoners in the Republic of Ireland.

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The "Troubles"

It is regularly argued by those close to the political ferment in Ireland at all levels that no true understanding of the conflict, the parties involved and the reaction of the state, can be had without an historical appreciation of the partition and all that has followed. With certain reservations I would agree. However, I would not concede that the unavoidable corollary of this is that any attempt to examine a particular feature of "the troubles" will unavoidably lead to misconception and oversimplification. An example of where a simple expository approach can expand one's understanding of the troubles lies in the question central to the nature of the problem in the North; why are Protestants killing Catholics and vice versa? To see the answer in purely religious terms is not only inaccurate but implies a blatant ignorance of Irish social structure. The relevance of religion to Irish society is itself unique. Yet the opposing factions are not bound together by religious dogma alone and their intransigence does not rest solely on religious differences, although these certainly play a part. The answer lies in the great social discrepancies that divide Catholic and Protestant communities. Economic deprivation, discrimination in the provision of housing and employment as well as unbalanced and unrepresentative political representation, are at the heart of the rupture. It is naive to view the resolution of conflict between the Irish communities in religious terms alone, as it is to vest one's faith in a simple irredentist argument.

Response to the Conflict

Understanding the nature of these problems, which in turn underlie the challenges to the legitimacy of the state on both sides of the Irish border, is not the central concern of this article. Rather, by concentrating on the criminal sanction, I will examine the principal strategies (or models) adopted by the state in response to such challenges.

The paramilitary groups responsible for terrorist activities, particularly in the North, work within what they perceive as a "war model," where their struggle is against an imposed and illegitimate state. They reject British authority and the mechanisms through which such authority is exercised. It does not necessarily follow that the state will also adopt a war model in response and this is currently not the case [2].

Since the 1930s, the two principal strategies for dealing with those involved in terrorist activities in Ireland have been internment and later "criminalization." Both the government of the Republic and the administration of the Province have used the army systematically to screen certain sec-

tions of the population and arrest and intern certain "suspects" for varying periods without trial [3]. The strategy is now universally agreed to have been a failure.

The model that is presently in favour has been actively promoted since the reactivation of the Special Criminal Court in the Republic in 1972 and the release of the last internee in the North in 1975. It rests on treating terrorists simply as criminals and processing them through the criminal courts. However, to do this "effectively," it has been necessary to radically modify the court system (and in some cases set up unique judicial institutions), to deal with those involved in anti-state activities.

In the North of Ireland the present strategy is based on the recommendations of a Commission of Enquiry under Lord Diplock [4], which was charged with the task of recommending arrangements for the administration of justice, to deal more effectively with terrorist organizations and their members. The Commission's recommendations both in relation to police powers and the trial process were extensive and involved radical departures from the ordinary criminal justice system, at that time operating throughout the Province. In summary it recommended:

a) that members of the armed forces should have the power to arrest without a warrant any person suspected of involvement in or having information about terrorist offences, and detain him for up to four hours for identification purposes. It is not necessary that the suspect be informed of the reasons for his arrest. The Commission also recommended that it should be an offence to refuse to answer or to give a false or misleading answer to any arresting officer [5].

These recommendations were broadly followed in the Emergency Provisions (Northern Ireland) Act, 1973. The Act also provided the police with the power to arrest any person suspected of being a terrorist and the right to detain him for up to 72 hours.

b) radical changes in the mode and conduct of the trial. To overcome the possibility that witnesses would be intimidated, or that "perverse acquittals" might be handed down by partisan juries, or even that certain admissions or confessions would not be admitted at the trial due to evidentiary restrictions, a new court system was proposed. It was recommended that jury trial be suspended for a large number of existing criminal offences that would be scheduled. It was also recommended that the rules of evidence be altered so as to reverse the onus of proof for firearms charges, and to allow for the admissibility of all confessions unless obtained by torture or cruel and degrading treatment [6].

Almost all the recommendations of the Diplock Commission could find counterparts already on the statute books in the Republic. The similarity is particularly marked when one compares the "Diplock Courts"

in the North with the Special Criminal Court in Dublin. The latter is a non-jury court, which entertains less rigid rules of evidence [7] and accepts a reversal of the onus of proof in certain circumstances [8]. Perhaps the most obvious difference between these two institutions is that the Special Court [9] presently sits with a bench of three judges, whereas its Northern counterpart is a single judge tribunal.

Consequences of the "Criminal Court Model"

> It is important to recognise some inevitable consequences of the use of the criminal court model whether in a pure, or modified form. The main argument in favour of this approach is that it is less likely to cause the kind of communal antagonism which internment and military security operations caused amongst Catholic communities in the period from 1971 to 1975. It is also more likely to increase the general level of social confidence in the institutions of the state. In this sense, reliance on the criminal court model is based on the hope that by keeping as close as possible to traditional standards of justice, support for terrorist organizations will wither away and they will eventually give up any hope of achieving their objectives by terrorist means. Long term success thus depends more on maintaining the consent of the population at large to the system of government than on the effectiveness of military suppression [10].

However, this rests on the presumption that the radical modifications to the criminal justice system can be or will continue to be viewed as legitimate and acceptable features of the "system of government." The question is not merely whether these modifications are justified in the circumstances or even whether they are likely to achieve their underlying objectives, but rather ". . . whether those modifications may become so 'normalized'; that the original objective of relying on the ordinary criminal processes will itself become unobtainable" [11].

There is an obvious contradiction in the state's attempt on the one hand to label the acts of "terrorists" in Ireland as purely criminal, while accepting the necessity that traditional legal guarantees must be dispensed with and new institutions created to impose the criminal sanction on such persons. By responding to the behaviour that they choose to define as criminal in such an extreme and unusual fashion, the state is reaffirming the unique nature of that behaviour. If we are meant to accept the British Prime Minister's conviction, that in respect of paramilitary violence in the North, "a crime, is a crime, is a crime," how can the peculiar processes for controlling these crimes be both explained and justified?

Prior to the enactment of the Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary Provisions) Act 1976, both Conservative and Labour Governments had conceded that the paramilitary violence in the Province was a sufficient threat to the safety of the state that emergency action, such as internment without trial, was introduced in an effort to defuse the danger. The unavoidable

consequence of this was that such behaviour was viewed by both sides as concomitant with a state of war. Although after 1974 there was little change in the nature of such paramilitary acts of "terrorism" or "subversion," the state chose to define them as simply being criminal. This incongruous process has come to be known within Ireland as "criminalization."

It is not essential to first resolve the hoary problem of whether the "anti-state" act itself is political or criminal (or somewhere between) in order to establish that the state, through criminalization, has confronted a dilemma. The very radical nature of the alterations to the criminal justice process is vivid evidence that, in reality, the state does not conceive of these acts in the same way that it does other crimes.

Leaving this contradiction aside, it is interesting to see how these "modifications" have overlapped into the wider administration of the criminal justice process. Obvious examples of this in each jurisdiction are the wider application of the expanded powers of arrest (as contained in the Emergency Powers Legislation for Northern Ireland), and the expansion of the jurisdiction of the Special Criminal Court in the Republic.

1. The arrest and detention powers, originally recommended by Diplock, were extended in the wake of the "Birmingham Bombings." *The Prevention of Terrorism Act, 1974* [12] brought the provisions to apply throughout the whole of the United Kingdom. For the first time in the peacetime history of Britain, statutory law provided for the arrest without a warrant of anyone whom a policeman "reasonably suspects to be concerned with the commission, preparation or instigation of acts of terrorism" or is guilty of any of a number of new offences under the Act. The Act provides for detention without arrest for up to 48 hours, but this may be extended with the consent of the Secretary of State for Northern Ireland, by a period not exceeding five days.

2. In the Republic of Ireland the Special Criminal Court was originally provided for in Part V of *Offences Against the State Act 1939* [13]. That Act scheduled a number of offences that could be brought before this Court. These offences are mainly concerned with firearms and explosive-related activities. However, s. 46 of the Act also empowers the Attorney General to refer any non-scheduled offence to the Special Criminal Court, where he is of the opinion that the ordinary courts are "inadequate to secure the effective administration of justice and the preservation of public peace and order."

The Special Criminal Courts have been traditionally viewed within the Republic as having a specific and limited jurisdiction to deal with terrorist and politically motivated acts of violence. It is the dangers for the general community inherent in these particular subversive activities that have al-

ways been used as the justification for a court that operates without the normal guarantees of other judicial institutions.

However, recently a great variety of "non political" and not apparently "subversive" matters have been heard before the Special Criminal Court. Almost all major armed robberies (particularly from banks), will be directed before the Special Criminal Court regardless of whether any political motive is apparent. The court now appears to be coming entrenched within the accepted panoply of judicial institutions in the Republic.

If the stated reason for the establishment of the Special Criminal Court was the inadequacy of the ordinary courts to administer justice and preserve the peace in certain "politically marginal" situations, then is it not a cause for concern when the particular justification for this judicial aberration is ignored? Perhaps the real problem lies in the fact that the inadequacy of the traditional court system only became apparent when the scope of the criminal justice process was widened to cover these more marginal challenges to public peace.

The Politics of the Criminal Sanction

Questions as to why the state has chosen this modified court system, while still emphasising due process, despite the obvious gap which exists between the rhetoric of "the rule of law" and the new procedures, can only be answered in political terms. The reliance on "criminalization" did not automatically, or necessarily, spring from the failure of internment.

In attempting to deal with the problem of widespread violence through the means of repressive force alone, the state risks its legitimacy with a large section of the community [14]. The adoption of the policy of criminalization was an attempt to reduce this risk.

This approach resembles the response of American courts to the race riots in the late 1960s. In describing this problem, Balbus writes,

> The rule of law, due process of law, or formal rationality, . . . sets definite constraints on the ability of political elites to dispose efficiently of collective violence, constraints which they can ignore only at the risk of endangering that long-run legitimacy and interest in surveying revolutionary potential. On the other hand, the immediate pressure to end the violence unavoidably dictates the serious abrogations of the principle of formal rationality and hence precisely the risk of delegitimation and maximisation of revolutionary potential [15].

Balbus identifies a number of advantages which may flow on from using the courts to deal with "politically marginal" violence. To begin with the courts may be able to influence the way in which the accused perceives his acts. By labelling their behaviour as a crime, the actor may come to believe that he is criminal.

> One of the central tenets of law is that crime is not an entity in fact, but an entity in law. Violent activities therefore have to be fitted into pre-defined categories in law. (In legal terms) the political character of motivations are irrelevant. The effectiveness of this process of course, will depend on the extent of political involvement and the ideological coherence of the participants [16].

The second advantage of the use of the courts is that it delegitimates the claims of the participants. However as we have seen, this virtually depends on whether the courts themselves, and the procedures that they adopt, are seen by the community as legitimate.

A third advantage of the criminalization strategy is to undermine alliances between participants. As long as the actors are seen as criminals, at least by the outside world, if not by their local community, then ideological sympathisers are less likely to give them support. Ironically, as Hillyard suggests, they are likely to concentrate on ensuring that the authorities "respect the suspect's rights" [17]. This tends to reinforce the strategy.

The use of the courts, therefore, to give effect to the process of criminalization, involves a depoliticization of the conflict. It attempts to turn a political conflict into a legal-factional conflict and as such is more consistent with the long run legitimacy of the state.

It is interesting that Balbus suggests the criminalization process may in fact weaken the state's position due to the obvious divergence between the rhetoric of legality and the challenges to the rule of law, in practice. He emphasises the "definite constraints" proferred by the rule of law, over the state's activities to control collective violence. Yet Balbus fails to develop the real distinction between the ideology of the rule of law and the structural features of its administration that run so contrary to its central tenets.

E.P. Thompson also seems too ready to invest confidence in the protective potential of the "rule of law," while under emphasising that in reality it is rarely (or at least very inadequately) realised. Perhaps it is too simplistic to view the imperfections and partiality of the law, as indicating its subordination to the functional requirements of socioeconomic interest groups. However, when the ideology of the rule of law can so clearly help to legitimise the state's suppression of collective violence and dissent, while not being translated into the functions of criminal justice at the centre of this control process, then the fraud must be exposed. In the Irish examples previously referred to, not only is the ideology subscribed to in the words of the state, rather than through its deeds, but in fact the administrative processes of the criminal sanction have been so modified as to overcome the "definite constraints" to which Balbus referred.

When talking of the role of the criminal law in eighteenth century England, Thompson observes that:

> Over and above its pliant and instrumental functions, it existed in its own right as ideology; as an ideology which not only served, in most respects, but which also legitimised class power [18].

It would be difficult to deny the legitimating power of such a sealed and self-contained ideology as the "rule of law." The governments of Ireland have been quick to recognise this. Yet investing such a reliance in this ideology, so flagrantly flouted in practice, they risk what Habermas has identified as a "crisis of legitimacy." His discussion of functionaries within the legal system continues as follows:

> . . . But these authorities are part of a system of authority which must be legitimized as a whole if pure legality is to be able to count as an indication of legitimacy. In a fascist regime for example, the legal form of administrative acts can at best have a masking function [19].

Yet as Habermas argues, this masking function is not enough to ensure any lasting claim to legitimacy:

> This means that the technical legal form alone, pure legality, will not be able to guarantee recognition in the long run, if the system of authority cannot be legitimated independently of the legal form of existing authority. . . Moreover the organisations which are responsible for making and applying the law are in no way legitimated by the *legality* of the modes of procedure (or vice versa) but likewise by general interpretation which supports the system of authority as a whole [Emphasis added].

In case of the state's use of the criminal sanction to control dissent in Ireland, legitimacy will not stand when the formal procedures of the criminal law do not fulfill their material claims to justice. This will not necessarily be generated under the new institutional conditions created by the state, irrespective of their "legality."

Perhaps, because of the clear distinction between the reality and the rhetoric of the rule of law as evidenced in the Irish examples, it is not difficult to simply represent criminal law as masking and mystifying the political reality of collective violence in this situation. Such laws do not have an "independent history and logic of evolution" [20] separate from the political conflict for which they were designed. This "mystification" may have little effect on the Catholic population of the North, but it is not at them to which it is primarily directed. It is the British electorate and the "patriots" in the United States who need to be so convinced.

Here we are not talking about excesses of judicial or executive discretion within the system of criminal justice. Nor are we faced with a conflict between arbitrary extra-legal power and the rule of law. Rather we are faced with audacious states which seem committed to institutionalise open contradictions between the function and ideology of the criminal sanction. Yet because of this obvious hypocrisy, it may not follow that since this

was of necessity so, ideology could turn necessity into advantage. As Thompson concedes "The essential precondition for the effectiveness of law in its function as ideology, is that it shall display an independence from gross manipulation, and shall seem to be just" [21].

Once again, in the context of the Irish struggle, the ideology of the rule of law is used by the state as more than a mask over ulterior injustice. The ideology loses its potential to mediate in and control injustice, when inequality, partially and selectivity are institutionalised "of necessity" within the legal process. Law as ideology then, is even without the merit of substituting for the use of unmitigated force. The state chooses to use this in tandem with the new forms of "criminal justice." With the ideology counting for little more than as a device for legitimacy, the formal rules and procedures of the law cannot provide what Thompson terms "a medium within which other social conflicts [can be] fought out" [22]. These Irish examples do not merely reveal the perpetual truth of the law: that it falls so far short of its rhetoric. They expose the manipulation of ideology in the situation of political repression. Therefore the state sees no need to dispense with the rule of law in order to defeat the challenges to its hegemony.

Detention of "Political Prisoners"

The hybrid administrative products of the criminalization process are not restricted to the trial situation. Once the act has been identified as criminal, and the participants have been convicted, then it is necessary that some environment exists within which the criminal sanction can be applied to its conclusions.

After 1972 and the riots in Mountjoy Prison in Dublin, the government of the Republic decided to detain all "subversive prisoners" in the one institution. To facilitate this, there was a change in the physical structure and internal regime of Portlaoise Prison to accommodate its purpose as the principal institution for the detention of "subversive" prisoners within the Republic. The prison was constantly under attack, both externally and from within, during the first half of the decade. As a result, the physical security of the prison was reinforced in the following ways:

1. Armed guards now patrol the perimeter walls day and night.
2. Barbed wire has been mounted extensively around the prison.
3. Perimeter security is further ensured by a military presence of both men and equipment.
4. On each segregated landing within the prison, officers of the Garda Siochana (police force) complement prison personnel as to internal security.

Perhaps the most interesting feature of these new developments was the way in which the three separate "forces" of state power – the military, the civil police, and the prison officers – have combined and been given joint responsibility for securing Portlaoise prison. This is a visible expression of the Republic's approach to the unique inmates within this institution. Rather than being denied, the political nature of their offences and their on-going politicality in prison gains de facto recognition by the permanent army presence at Portlaoise. This also shows the state's awareness that the direct association of the inmates with radical political organisations on the outside, who do not accept the criminality of their colleagues' actions, or the legitimacy of the government to punish them as such, poses an extreme and ever-present threat to the prison.

It might be suggested that the internal police presence within Portlaoise is a further affirmation of a problem that is not simply grounded in considerations of security. Were this so, the problem could be overcome by an increase in the number of prison officers on duty. The introduction of police into Portlaoise was as a result of emergency conditions, but their continued service within the gaol must have another explanation. It could be suggested that besides continued staffing pressures in country prisons, the partisan and all-pervasive influence of the Republican movement throughout Irish society might necessitate this arrangement as an answer to the question, "who guards the guards?"

Demands of Change

From 1973 the inmates of Portlaoise Prison were pressing for reform of the regime within the prison. These reforms centred on the following issues:

1. deprivation of free access to other prisoner's cells,
2. requirements to wear prison clothing,
3. lack of suitable visiting facilities,
4. absence of proper toilets,
5. lack of sufficient exercise opportunities.

Following the riot in December 1974, a number of prisoners refused to take food and liquids in support of these demands. The attitude of the authorities was intransigent.

> Many demands were made which if conceded, would have weakened security and led to the breakdown of good order and safe custody within the prison. Privileges were frequently abused and there was a general tendency to disregard prison rules and regulations [23].

This concern for security was reinforced only a short time later when a mass escape was attempted from without and within, involving the use of explosives in the recreation hall, and an assault on the outside wall, by a specially equipped "tank."

In 1976 the Visiting Committee conceded in its report that:

> regretfully the Committee had, on numerous occasions, to point out that because of the necessity for strict security in the prison it was not possible to have a regime as relaxed as in other prisons. It was obvious to us that the subversives' main grievance was the termination of free association in prison. When the subversives were first transferred to Portlaoise they enjoyed the privilege of free association and some people have argued that subversives in Irish prisons have always enjoyed this privilege. This we found to be so, but the subversives at the prison being able to associate freely among themselves, were capable of acting cohesively in a disruptive way and could take control of the prison at any time. . . . Consequently we agree that the prison authorities had little choice but to terminate free association. . . [24].

However, the demands for change continued. In March 1977 there was a further hunger strike. Twenty prisoners continued the strike for 46 days. The situation within the prison came under vocal attack from a number of sources within the community and from the press [25].

Over the next few years the special restrictions on facilities in Portlaoise, so often justified as necessary because of the continuing challenge to the security of the prison, were to undergo a liberalisation despite the continued threat posed by the custody of political prisoners.

The Change in Regime

Although the prison authorities denied that these were concessions to the hunger strikers' demands, considerable improvements were made during 1977 in the facilities for education and recreation within the prison. Inmates were also allowed to engage in craft work in their cells as a work alternative and the general conditions of cell life were upgraded [26].

Despite the government's denial that there were any political prisoners in the state at that time, the press argued that through the wide use of solitary confinement and the strict regime effected in Portlaoise when compared with other prisons, the government was de facto according these inmates special political status and, as a result, should treat them as being a special category. Even in more recent times the Department of Justice has not declared the political characteristics outright but it now represents the inmates of Portlaoise as unique [27]. It is this recognition of uniqueness that forms the basis for the Republican state's pragmatic solution to the custodial problems associated with the imprisonment of political prisoners.

Anyone attending Portlaoise prison today will view a quite peculiar organisational structure considerably different to anything which prevails in other maximum security institutions in Ireland. A journalist who recently visited Portlaoise made these observations:

> Maybe it is that the rumours of a secret deal on Portlaoise are in fact correct. Certainly the prisoners here have a very different set-up from the inmates of other prisons I have visited. The fact that the building is old, overcrowded and depressing, seems almost irrelevant for the moment [28].

Regarding the prison population in Portlaoise and their organisation, he continued:

> Portlaoise held 171 subversive prisoners when I visited. The Governor supplied the vital statistics: 106 Provisionals, (I.R.A.) 23 officials and I.R.S.P.'s (Irish Republican Socialist Party) and 42 non-aligned. . . 95% are Catholics, 43.86% are from the North (and the rest from the Republic). Each group is segregated on different landings: Provos on third and fourth, Officials (IRA) and IRSP's on the second and non-aligneds on the ground floor landing.

All prisoners in the Republic can wear their own clothes if they wish. This is usually the choice at Portlaoise. As for "freedom of association" within the prison at present, the inmates can associate at breakfast. This is unlike all other maximum security regimes in the Republic where the norm is that prisoners take all their meals alone in their cells. However, the concentration on security at Portlaoise has in no way been generally relaxed. Prisoners are not allowed to receive parcels from outside and no teaching staff are allowed to visit the gaol. However, the Department of Justice does provide advice to those inmates who wish to follow a course of study on their own. The various segregated groups within the gaol are also allowed to organise their own seminars and lectures on a diverse range of topics which have covered political/industrial relations, wages, "the origin of war," etc.

Despite the inadequacies which are ever present when a Victorian institution is used for the long term containment of a large prison population, Portlaoise has functioned relatively smoothly in recent years. Surely this cannot be explained by the improvement in prison conditions alone. The improvements are neither comprehensive or dramatic enough to radically restore order within a prison that had for so many years been subject to serious unrest. I would suggest that the answer lies in the administrators' recognition of inmate organisation and its utilisation to maintain order.

The Solution

In 1979 the Department of Justice stated that:

> The vast majority of the population of the prison (Portlaoise) however is unique in that it is capable of acting cohesively in an organised, disruptive and violent manner and, consequently, security restrictions could not be relaxed [29].

The prison authorities had long been aware of the unique organisational structure of the inmate groups in Portlaoise. However this organisation had only been recognised in terms of its potential threat to the security and good order of the prison. It was not until after the hunger strike in 1977, and the consequent negotiations that followed, that the clear chain of command which exists within the paramilitary groups was seen as functionally significant from the point of view of prison management. By the informal recognition of this paramilitary chain of command which internally structured each of the segregated groups, a process of dispute resolution evolved. The prison administration was aware of the discipline that gave strength to each inmate group. They had seen its effect when directed towards the disruption of the prison. Far more than "con law" or any "strong arm" code which may create a hierarchy within the normal secured institution, the paramilitary structure of the Portlaoise population provided both an ideological as well as functional solidarity that could not be ignored.

The pragmatic acceptance by the authorities of this paramilitary discipline hierarchy which structures the inmate groups within the prison appears to have fostered a communication system of some permanence and regularity. The Governor of Portlaoise has been quoted as saying: "We meet their O/C's every so often. Each group elect an O/C every three months and they come in here. We discuss grievances and problems. It generally works pretty well" [30].

It is the experience of many prison administrations that order within a gaol depends almost entirely on an effective communication process throughout all levels of the prison community. It is as essential that the Governor be immediately aware of a change in the mood of the prison as it is for inmates to be cognizant of, and to understand the rules on which the institution operates. Within all closed communities such as a prison an informal "pecking order" will develop alongside the imposed institutional order of the authorities. Such a power structure may be as well directed to the maintenance of group order as to the disruption of it. The utility of an inmate hierarchy will depend on the clarity of its structure and the extent to which its authority and legitimacy are accepted and subscribed to. On these criteria the paramilitary groups in Portlaoise are

examples of a powerful sub-order within the prison, comparable in potential to the authorised power structure. The instances of conflict between the inmates and officers in Portlaoise over the last decade give stark evidence of this. Once the prison authorities recognised this operation, its utility became apparent. This recognition may have emerged from conflict and the communication entered into as a fait accompli but it has developed through its successes into an institutionalised procedure for dispute resolution.

The amelioration of prison conditions in Portlaoise was not a direct result of a cycle of aggression and concession. The Department of Justice may be technically correct in its statement that the demands made by the various hunger strikers in Portlaoise were not conceded simply to resolve the individual disputes. However, if one examines the present situation, almost all prison conditions central to these demands have been improved to such an extent that a mechanism for compromise can succeed. While not publicly admitting to its recognition of the political status of prisoners in Portlaoise, the problems of order and security have been moderated by recognising their politicality in practice.

The conflict caused by "criminalization" in Ireland is exemplified in Portlaoise and the Maze prison in Belfast. It is there that the most incidental restrictions or the most minor concession can be viewed by either side as a challenge to their legitimacy.

Conclusion

There has been a noticeable movement in the administration of the criminal sanction since 1945 (in most common law jurisdictions) "from ideologies of extensive consent to those based more on the exceptional forms of domination based principally on law" [31]. As is clearly the case in both states of Ireland, the more militant political and economic struggle of certain groups within society, coupled with the pervasive weakness of the economic base, has made it virtually "impossible to manage the crisis 'politically' without an escalation of the use of forms of repressive state power" [32].

By the obsessive promotion of criminal law as the only appropriate basis for social control in terrorist situations, the governments in Ireland are constantly engaged in the transmission of arguments to the public, establishing the state's right to coercion. However, in so doing, the political cost of emphasising the ideology of legality greatly increases the political damage which a legitimacy crisis can create.

With each attempt by factions within the conflict to undermine or deny the legitimacy of the state, its law and legal functionaries, and its bureauc-

racy of justice administration, the state reacts by further relying on repressive power. Traditional institutions are transformed and new mechanisms are created for the purpose.

> Political hegemony is maintained not only through the monopolization of force but also through received representations that state force is obtained by right. Hegemony is partially achieved therefore by the articulation of legal-ideological practices on to politics. Legitimacy, the effect of the ideology of legality on the political, is founded on the fundamental claim of authority that politics is a science inscribed by law [33].

In addition, in its quest for legitimacy, the state must represent the law as a science, through the processes of its implementation. It is through the application of this neutral science, to uncertain issues of conflict, that the state can remove dissent and bolster its authority while at the same time denying the legitimacy of those who challenge it.

The state can emphasise its autonomy by relying on the independence of the criminal sanction. And even when the sanction is applied through unique and sometimes contradictory procedures, it is the law and not the political motivation behind it which infects all stages with legitimacy. The new state apparatuses are subsumed within the accepted administration of the criminal sanction and become defined as anything which contributes to social cohesion.

> Legality can create legitimation when, and only when, grounds can be produced to show that certain formal procedures fulfil certain material claims to justice under certain institutional boundary conditions [34].

When dealing with anti-state activities, the government and administration in the "two Irelands" have both developed new "formal procedures" that, while claiming to wear the same mantle of justice as other trial processes, are actually designed to ignore and replace some of these fundamental "boundary conditions." Therefore the legitimacy claimed by institutions such as the "Diplock Courts" and the Special Criminal Courts is not necessarily conferred simply because they claim to enforce criminal law. As Burton and Carlen rather facetiously comment, the changes in the procedural rules governing the normal administration of the criminal sanction (due process) "are jettisoned in the name of an idealized justice via however, a mode of argument that remains within the common-law discourse. The controls on the subject-who-is-supposed-to-know, turn out to be pragmatic licence" [35].

It is even argued by the state that the technical guarantees will inhibit the realisation of justice and, in common sense terms, their suspension can relocate the administration of justice once again within the proper tradition of criminal law. After it has been "demonstrated by the state

that the present condition of conflict no longer meshes with the common law rules we are witness to an evolutionary mutation: legal selection breaks through the technical constraints of the past environment to let justice adapt to the current ecology" [36].

Yet despite the dangers inherent in this legal mutant, the state returns to the rhetoric of the rule of law, to allay fears and criticism. We are told that such radical changes are essential "to secure the effective administration of justice and the preservation of public peace and order" [37].

We are assured that despite the sweeping discretionary powers of arrest vested in the armed forces, "they should not be understood as countenancing any relaxation of their common law obligations to use no more than that amount of force that is necessary in all circumstances to effect the arrest" [38].

It is the real influence and spread of these dangerous hybrids which should be a cause of great concern. If it has become easy for the state to refer to central protections inherent in the notion of due process, as "handicaps," and, in a stroke, to remove them, then what is to stop other such protections going the same way?

Notes

1 Since the original English annexation of Ireland in the sixteenth century, challenges against the legitimacy of the state in all its forms have been a feature of Irish political history. These have ranged from the withholding of agricultural rents, the sabotage of English cities, selective killings, industrial strikes and the withdrawal of services, allying with enemies of Britain in times of war, and examples of non co-operation in all aspects of public life.

It is to be remembered that such challenges continued after the British withdrawal on partition and following the creation of the "Free State." In the earliest days of the Republic, the conflict even degenerated into years of civil war. Tension between republican reunion sentiments held by most citizens of the Republic, and the more pragmatic actions of their various governments (particularly Finn Gael) is even now evidenced in outbreaks of dissent.

2 It is interesting to compare the actions of the British government in combating the threat of the IRA, since the mid seventies, with the "war model" approach adopted by De Velera's government in the early days of the Republic. The response of the Irish government at that time was to eradicate the vestiges of republican resistance by military force and this led to years of civil war.

3 For further details on this internment policy see Boyle, K., Hayden, T., and Hillyard, P. (1975), *Law and The State: The Case of Northern Ireland.* Oxford: Martin Robertson.

4 *Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland* (Diplock Report) Cmnd 5185, H.M.S.O., 1972.

5 These powers already existed in a similar form in the Republic. See *Offences Against the State (Amendment) Act, 1940.* Section 5. *Offences Against the State (Amendment) Act, 1972.* Section 5.

6 These recommendations were first enacted in the *Emergency Provisions (Northern Ireland) Act, 1973* and later re-enacted in 1978.

7 *N.B. Offences Against the State (Amendment) Act 1972,* Section 3, where it is established that a person will be proven to be a member of an "unlawful organization" (and as such guilty of a scheduled offence) simply on the basis of an oral statement from a senior police officer. The court may not go behind such a statement or enquire into its source.

8 The guilt of the accused, when charged with membership of an unlawful organization, may be inferred from his failure to answer any such allegation. *Offences against the State Act 1939,* Section 18 and 24.

9 For a more detailed account of the history, structure and jurisdiction of the Special Criminal Court see: Findlay, M. (1981), "1972 and Fundamental Changes in the Criminal Law of Ireland" *Crim. L.J.* 96; Robinson, M. (1974), *The Special Criminal Court.* Dublin: Trinity College Press.

10 Boyle, K., Haden, T. and Hillyard, P. (1979–1980) "Emergency Powers: Ten years on" *Fortnight* 174: 6.

11 Boyle, Hadden and Hillyard (1979), p. 6.

12 For a review of the Prevention of Terrorism Act see: *"Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts, 1974 and 1976".* cmnd 7324. H.M.S.O., 1978; National Council for Civil Liberties (1975), *"Prevention of Terrorism (Temporary Provisions) Act, 1974-A Report on the First Four Months"* London, N.C.C.L.; Rose-Smith, B. "Police Powers and Terrorism Legislation" in Hain, P. (1977), *Policing the Police* Vol. 1. London: John Calder.

13 The present court (with its civilian judge bench) was established by proclamation from the Dail (lower house, Irish Parliament) in 1972.

14 In the North, this group consisted of middle class Catholic families.

15 Balbus, I.D. (1973), *The Dialectics of Legal Repression.* New York: Russell Sage Foundation, p. 3.

16 Hillyard, P. (1980), "The State's Response to Terrorism: The Case of Northern Ireland" (unpublished paper) p. 17.

17 Hillyard (1980), p. 18.

18 Thompson, E.P. (1977), *Whigs and Hunters.* London: Peregrine.

19 Habermas, J. (1976), *Legitimation Crises.* London: Heinemann, p. 10.

20 Thompson, E.P. (1977), op. cit., p. 262.

21 Ibid., p. 263.

22 Ibid., p. 267.

23 Department of Justice (1975), *Annual Report on Prisons.* Dublin, p. 5.

24 Department of Justice (1976), *Annual Report on Prisons.* Dublin, p. 25.

25 See the letters reproduced in the Department of Justice (1977), Annual Report On Prisons, as well as the replies from the Visiting Committee which appear on pp. 39–53.

26 N.B. Dept. of Justice (1977) *Annual Report on Prisons.* Dublin, pp. 50, 51.

27 See Dept. of Justice (1979), *Annual Report on Prisons.* Dublin, p. 13.

28 Brady, C. (1980). "In the prisons – detained and constrained" *Irish Times* 19th November, p. 10.

29 Dept. of Justice (1979), *Annual Report on Prisons.* Dublin, p. 8.

30 *Irish Times,* 19th November, 1980, p. 10.

31 Burton and Carlen (1979), *Official Discourse.* London: Martin Robertson, p. 9.

32 Hall et al. (1978), *Policing the Crisis.* London: Macmillan, p. 30.

33 Burton and Carlen (1979), p. 38.

34 Habermas, J. (1976), *Legitimation Crisis.* p. 99.

35 Burton and Carlen (1979), p. 79.

36 Burton and Carlen (1979), pp. 81–82.

37 *Offences Against the State Act 1939 S. 35, 2* (Republic of Ireland).

38 *Diplock Report* (1973), Paragraph 50.