1-1984

Organised Resistance, Terrorism and Criminality in Ireland: The State's Construction of the Control Equation

Mark FINDLAY
Singapore Management University, markfindlay@smu.edu.sg

Published in Crime and Social Justice, 1984, No. 21/22, pp. 95-115.
http://www.jstor.org/stable/29766232

Organized Resistance, Terrorism, and Criminality in Ireland: The State's Construction of the Control Equation

Mark Findlay

Introduction

Despite the reality of partition that created "two Irelands," comparative analysis of the state's reactions to terrorism in the Province and in the Republic is rare. The struggle over reunification, which permeates society on both sides of the border, is usually viewed by the populist press not from the Irish viewpoint, but rather from the perspective of the British government. Given this bias, organized resistance—most notably in the North of Ireland—is represented as an assault on a majority-supported state. Because the legitimacy of the state under attack is rarely questioned, and the motivations for the resistance are over-simplified and misrepresented, the state's reaction to such terrorism escapes criticism, except in the most obvious instances.

By reducing opposition organized against the partition of Ireland to the particular conflict between certain paramilitary groups in the North and the British government, the broad social and political bases of the struggle are overlooked. Only if the centuries-long involvement of Britain in Irish affairs is appreciated[1] does the social inequality which exists in the Province gain its true significance. It is in this context that we must analyze the current turmoil in Ireland. The opposing paramilitary factions are not bound together by religious dogma, and their intransigence is not grounded in religious differences alone, although these certainly play a part. Religion has stood historically in Ireland as a social identifier (similar to the role of race and "color" in the U.S.). The lines of the conflict may appear to be rooted in

MARK FINDLAY currently works in the Department of the Attorney General and of Justice, Bureau of Crime Statistics and Research, Goodsell Building, 8-12 Chifley Square, Box 6, G.P.O., Sydney, New South Wales 2001, Australia. Prior to this he taught criminology at Trinity College in Dublin, Ireland.

religious divisions, but the essence of the struggle lies in the great social, economic, and political discrepancies which have existed between these groups ever since the British intervention into Ireland.[2]

Even more important to a balanced understanding of Irish paramilitary activity and the terrorism which emanates from it is a close examination of government efforts in the Republic and the Province to shore up their own legitimacy through repression of organized resistance to the partition. This article considers the ways in which the criminal sanction comes to be contorted by the counterinsurgency strategies of both states against paramilitary organizations which may command significant popular support. In so doing, I wish to touch on certain organizational hybrids which have been created to facilitate the "administration of criminal justice" in both states.

Struggle for Ideology

Before discussing any struggle between organized popular resistance groups and the Irish states, it is essential to appreciate the levels on which the struggle is waged. The press, we must keep in mind, concentrates on the functional features of the struggle (e.g., bombings, military intervention, internment, "hunger strikes," etc.), while avoiding the realization that the origins of such action are found in issues of ideology.

At the outset, there are definitional questions essential to a particular representation of the conflict, which obtain their meaning from the ideological base of the defining party. An example of this is the terrorist act itself. Prior to the cessation of internment in the North, the British government would have viewed the bombing of a public building in Belfast as an act of terrorism. Terrorism in this sense was seen as a violent assault on the "legitimate" government of the state. At that time, the British government did not choose to view a terrorist act as the manifestation of mindless anarchy. Through the nature of its response—the use of internment without trial and army operations for civil/social control—the government of the United Kingdom (U.K.) also implicitly accepted the "war model" motivation of the paramilitary forces.

After the policy shift in 1974 by the U.K. government (with the Labor Party in power), and the cessation of internment, the definition of the same terrorist act assumed different proportions. The government, then and now, has simply redefined all paramilitary violence as acts of criminality. Although the "legal" measures developed to counter such activity may appear to contradict this stance, the terrorists' acts are denied their political nature and are defined as common crime. Gradually this definition has been altered to the point that the character of this criminal behavior, in its peculiar degree of threat to the state at least, has been accepted as unique.

The paramilitaries, the authors of the terrorist act, conceive of it in terms of a war ideology. It is a means chosen to advance their cause, yet the motivation for their actions, and the sociopolitical environment within which they are committed, make the "criminal label" both simplistic and misleading. As acts of war against what they perceive to be an imposed and illegitimate

government, the resort to terrorist tactics is itself legitimized both for the actors and their supporters.

This example of "terrorism" makes clear how patterns of definition depend on the ideology from which they emerge. Nevertheless, the importance of ideology to the dynamics of the conflict extends far beyond the realm of definitions. As argued below, once it is accepted that it is the legitimacy of both Irish states which is under attack, then the ultimate goal comes into focus: the establishment of a new version of the legitimate and united Ireland, based on a fundamentally different ideology, as well as a transformation of ideologies.

The Crisis of Legitimacy

Since the creation of the Irish Free State and the partition of the North, all governments in Ireland have faced fundamental and often violent challenges to their legitimacy. Both the nature and perception of these challenges have altered over time. In the early days of De Valéra's government, the then *Taoiseach* (Prime Minister) accepted the war model of his one-time compatriots, the IRA, and proceeded to eradicate the vestiges of Republican resistance by military force. This led to years of civil war.

As mentioned earlier, the British government has also flirted with the "war model" response to challenges to its legitimacy. The governments of the Republic and the Province have countered such challenges through a reliance on the so-often unquestioned ideology of the rule of law. Reliance on a legal response to a challenge to the legitimacy of the state did not simply arise out of the failure of military intervention. In some respects, the exercise of the criminal sanction seems no more effective in controlling terrorism than was military intervention. However, it is not simply in terms of its deterrent influence that reliance on social control through the agencies of the law is now preferred. It is believed that the state, through a commitment to legal sanctions, will reinforce its legitimacy by associating its overt policies with the law, rather than with a less acceptable commitment to force.

Even those who criticize the ideology of the rule of law usually limit those criticisms to the methods (as well as the reality) of its application. E.P. Thompson (1977:262), for example, expresses confidence in the protective potential of the rule of law. He does so while at the same time remaining suspect of its "pliant and instrumental functions." However, when these often questionable functions are justified by an ideology which itself bears little relation to any of its manifestations, the critique must move into the realm of ideology. This is particularly necessary when this ideology is not only used to sanitize the application of the criminal sanction to politically marginal behavior, but also, by implication, to legitimize the state which relies on it.

Considering the importance of the rule of law to both sides in this legitimacy crisis, it is not difficult to understand the growing trend of governments and their enemies to adopt the language of ideology. However, this is done without assuming the minimal obligation of attempting to translate this

language into practice. Indeed, when we examine the mutations of criminal justice which have been developed as a part of Irish criminal law, it becomes apparent that the relevance of certain essential features of the ideology is actually denied.

The rule of law as applied through the criminal sanction to the control of organized resistance has two main intentions. First and most obvious is its functional objectives. The second is to gain authority through a claim over ideology. Yet as Habermas (1976:10) warns, this 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).

Even where the criminal sanction is put to new uses and imposed in a unique manner, continual failure to fulfill the material claims to the ideology of justice will mean its legitimacy cannot stand on the formality of the process alone. The institutional conditions created by the state to administer this "new justice" through "new" means will not be justified simply by their legality.

This masking function, therefore, carries with it certain risks for the legitimation crisis. These risks relate to the antecedent challenge to the ideology itself, where the division between reality and rhetoric becomes blatant. The more obviously divorced the ideology is from its various manifestations, the weaker is its masking function, due to the strain on the ideology itself.

However, the potency of the rule of law as it influences the control of political violence in Ireland remains resilient. It seems difficult to deny such a self-contained ideology as the rule of law, when even anachronistic images of it (such as the jury) seem to escape criticism at the level of ideology.[3] It is not the structure of the system of authority based on the rule of law, its legality, or its public acceptance alone which reinforces the legitimacy of the ideological base. Rather, it is the fact that concepts of justice have for so long relied on ideology for their definition in the community that the ideology has taken on an almost mystical significance.

It is this potential for mystification that is the second reason both parties to the challenge would wish to represent their respective actions and reactions as just and equitable. In this sense there is a struggle to lay best claim to the same ideology. For example, the paramilitaries in the North deny the justice, relevance, and even authenticity of the absolute claim to any exercise of the rule of law through the British courts. While the agencies of the criminal law attempt to "delegitimize" the motives of the paramilitaries by labeling their

actions as criminal, the would-be "criminals" deny the state's power to make any such determination and attack the institutions charged with implementing the criminal label. In addition, those responsible for organized resistance present the contrary definition of their terrorism to that section of the community from whence they draw their general support. Their success in gaining acceptance for their definition of the struggle (the violence of material conditions and counterviolence, state terrorism and the adoption of terrorist tactics) will depend on the success or failure of the state's efforts to undermine the alliance between these groups and their community.

With the prize of community consensus and support goes the potential to mystify the motives and purposes of particular actions. If the community concedes that the terrorists are little more than criminals, then the state can depoliticize the conflict. If the state is able to undermine the motives of organized resistance for a significant period of time, it may even influence the manner in which the terrorists perceive and represent their actions.

Once the opposition has been delegitimized, the state can then invest its own reactions to violent resistance with some sense of ideological purity. The rule of law, so claimed, can further legitimize and mystify the state's original position under the challenge, to the extent that the rationales and reason underlying the conflict, and even the limits of the conflict itself, become clouded and confused. This works to the advantage of the state: once any section of the community loses its understanding of ultimate goals, of what is being contested, then support for one particular side of the struggle (or opposition to the other) seems less tenable.

Therefore, in the context of the struggle for legitimacy in Ireland, the state in particular will use the ideology of the rule of law not solely to mask ulterior injustice, but further to mystify and confuse the reality of injustice, partiality, and selectivity in the eyes of the community. The situation becomes further obfuscated, as the opposite to the rule of law is institutionalized through new processes of criminal justice. In addition, the state does not choose to substitute the law for the exercise of force. Force and law are recognized as complementary for social control.

Where ideology counts for little more than as a device for legitimacy, the formal legal rules and procedures cannot provide what Thompson (1977:267) terms "a medium within which other social conflicts (can be) fought out." The Irish examples referred to earlier 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 a situation of political repression. The state sees no need to dispense with the rule of law in order to defeat the challenges to its hegemony.

The Criminal Sanction and the Rule of Law as Applied to Organized Resistance

Perhaps because of the clear distinction between the reality and the rhetoric of the rule of law as evidenced through the developments in Irish criminal justice over the last decade, it is not difficult to represent the criminal law as

masking and mystifying[4] the political reality of organized resistance. Yet it is not enough to see the process of criminalization as some simple dichotomy between the ideology of the rule of law and the practice of criminal justice.[5] 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 institutionalizing open contradictions between the function and ideology of the criminal sanction. Yet, because of this obvious hypocrisy, it may not follow that since this process of institutionalization was a necessity, ideology could turn necessity into advantage.

As Thompson (1977:263) 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.

McBarnett (1981) sees the analysis of law and ideology as far more fundamental than exposing and tracing the emergence of dichotomies. She states that many of these dichotomies may even be false. Accepting this, one needs to examine the nature and the role of the law itself, whether it be as written or administered.

> The vague notion of "due process" or "the law in books" in fact collapses two quite distinct aspects of law into one; the general principles around which the law is discussed—the rhetoric of justice—and the actual procedures and rules by which justice or legality are operationalised. The rhetoric used when justice is discussed resounds with high sounding principles, but does the law incorporate the rhetoric?

Once it is accepted that this cannot be merely assumed, it is the law itself and not simply the people who operate it which requires analysis. When examining the nature and role of the law itself, one is not so much interested in individual deviations from the ideology through the exercise of discretion. Nor is the focus of concern on what law enforcers should do and what the law should achieve. Rather, one will concentrate on issues concerned with "the politics of criminal justice," and not so much its operation.

Fairness and efficiency would not naturally result if the dichotomy between practice and existing law could be resolved. In the following series of examples I intend to illustrate how the Irish experience accords with McBarnett's conclusion that the law itself does not conform to the ideology of legality:

> . . . that in its substantive and procedural content it positively contradicts the precepts of due process and that consequently there is no fundamental conflict between the formal system of law and the informal practices of agencies such as the police and the courts (1978).

The recent legislative changes in Ireland, concerned with the application of the criminal sanction to politically marginal violence, positively confer and

affirm certain practices which are in direct conflict with the central tenets of the rule of law. They are not, as authors like Skolnick (1966) represent, deviations from the rule of law, abuses, or informal accommodations to the conflicting demands of law enforcement. Deviation from legality is institutionalized in the law itself.

Criminalizing Organized Resistance

> The rule of law, due process of law, or formal rationality,. . . sets (sic) 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 (Balbus, 1973:3).

By detailing examples of where such "abrogations" have developed, in both Irish jurisdictions, I hope to indicate the reliance placed by both states on an altered notion of the law, developed specifically for politically marginal challenges to the states' legitimacy. These examples will be broadly dealt with in the chronological order in which they may have influenced the administration of the criminal sanction.

Detention and Interrogation

In the North of Ireland the present strategy for the investigation and prosecution of terrorist offenses is based on the Report of the Commission of Enquiry under Lord Diplock (1972). The Commission's recommendations, both in relation to police powers and to the trial process, were extensive and involved radical departures from the ordinary criminal justice system operating throughout the Province at that time. Briefly, the report recommended that the Royal Ulster Constabulary and members of the armed forces should have power to arrest, without warrant, any person suspected of involvement in, or having information about, terrorist offenses, and to 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 be an offense to refuse to answer, or to give a false or misleading answer to, any arresting officer. Such powers already existed in a similar form in the Republic.[6]

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.

These arrest and detention powers, originally recommended by Diplock, were extended in the wake of the "Birmingham bombings." The Prevention

of Terrorism Act, 1974, brought the provisions to apply throughout the whole of the United Kingdom. For the first time in peace-time history of Britain, statute law provided for arrest without warrant of anyone whom a policeman "reasonably suspects to be concerned with the commission, preparation or instigation of acts of terrorism." 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, for a period not exceeding five days.

Prior to Diplock's report the governments of the Republic had invested the *Garda Siochana* (police) with wide discretion to detain and question suspected terrorists. Section 5, Subsection 1 of the Offenses Against the State (Amendment) Act, 1940, provided the police with powers to demand identifying information from detained persons and to search, photograph, and fingerprint these persons. Subsection 2 made any person who obstructed or impeded the exercise of these powers, or failed or refused to give such identifying information, guilty of a contravention of the regulations made under this part of the Act "in relation to the preservation of discipline."

The 1972 amending Act developed this theme. (This Act is discussed in detail in the following section of the article.) The police powers to require information were widened. The interrogating officer need only have "reasonable grounds" for believing that a scheduled offense had been committed in the vicinity, and that the person questioned knew of its commission, to justify questions as to identity and "recent movements." Failure or refusal to answer, or the provision of false or misleading information, would constitute an offense. Therefore, the police not only make discretionary decisions as to when such information could be required, but also what acts or omissions constitute an offense.

The general offense referred to in Section 4 of the 1972 Act has the potential to cover all facets of, and likely participants in, the criminal justice system. Due to the extensive ambit of "an interference with the course of justice" referred to in that section, the police and the prosecution have almost unlimited powers to charge and bring before the court anyone who acts in a manner which is "likely, directly or indirectly" to influence any individual associated with a civil or criminal matter before any court.

Arrest and Charge—New Offenses

In the Republic, Part III of the original Offenses Against the State Act, 1939, defined and prohibited membership in "unlawful organisations" (Section 24). However, it was not sufficient merely to create such an offense, the features of which were broad and general (Section 18) and hence difficult to prosecute. Section 24 was the only provision in the Act which specifically referred to proof requirements for the offense. If the accused was found to be in possession of an "incriminating document," that would be sufficient evidence of his membership. The defense of mistake or ignorance as to the illegal nature of the organization was not available to the defendant.

The 1972 Amendment substantially broadened the definition of what was

an illegal organization, and in so doing brought a large number of potential offenders within its scope. But this would be of little value to the state, unless the evidentiary and procedural difficulties involved in successfully prosecuting this offense were overcome. Evidence of such membership may come by inference or implication or be based on the "hearsay" statements of others. If an accused fails to deny such inference or implication, that omission may also act as evidence. The offense created under the 1939 Act is given effect through a reduction in the evidentiary requirements to establish the general features of the offense. Prior to the amendments enacted in 1972, it was a difficult offense to prove, and as a result, the criminal law could not be relied on by the state to deter membership in the proscribed organizations. The following changes in the law reveal the state's commitment to using the criminal justice process to regulate this type of behavior even if this requires fundamental compromises in the process itself, rather than conceding that legal prohibitions may be neither appropriate nor effective to control political dissent.

On November 26, 1972, a bomb exploded in a crowded cinema in Burgh Quay, Dublin, and as a result, 25 people were treated in hospitals for injuries they sustained. The text of the Offenses Against the State (Amendment) Act, 1972, was published on the following day. On November 29, the *Taoiseach* (Prime Minister), Mr. Lynch, rejected a compromise version of the Act, suggested by the opposition party. A government defeat was likely on the issue and, therefore, a general election would be imminent. December 1 saw explosions in the center of Dublin that killed two people and injured over 120 others. When the *Dáil* (lower house of Parliament) was informed of the bombings, *Fine Gael* (the major opposition party) withdrew its opposition to the bill, allowing it to pass all stages with only 24 members of the house opposing it. On the evening of Sunday, December 3, the final stage of the bill was rushed through the *Seanad* (upper house of Parliament). The Act is brief, comprising only six sections, the first and last being standard provisions relating to the Act's title. Section 5 amends the definition of "document" as defined in Section 2 of the 1939 Act, to include maps, graphs, photographs, disks, microfilms, etc., and other devices reflecting the technical advances of the intervening years.

It is Sections 2, 3, and 4 that have given cause for alarm both on the grounds of the wide discretionary powers which they create and confer, and the reversal of the traditional onus of proof. Section 2 confers powers on the *Garda* (police) to question persons near to the place of the commission of a scheduled offense, if they have "reasonable grounds" for believing such an offense has been committed and that the person questioned knew of its commission. The officer can demand of the person "his name and address and an account of his recent movements and if the person fails, or refuses to give the information or gives information that is false or misleading, he shall be guilty of an offense. . . ." (Section 40).

Section 3 is perhaps the most criticized of the Act's provisions. It deals

with evidence of membership in an "unlawful organization" as defined in the original Act.

Subsection 1 (a) is extremely broad in the net that it casts for actions which will comprise such evidence.

> Any statement made orally, in writing, or otherwise, or any conduct by an accused person, *implying or leading to a reasonable inference* that he was, at a material time a member of an unlawful organisation shall, in proceedings under Section 21 of the Act of 1939, *be evidence that he was then such a member* (emphasis added).

In this subsection "conduct" includes an omission by the accused person to deny published reports that he was a member of an unlawful organization, but the fact of such a denial shall not be conclusive.[7] One of the most widely used methods of establishing the offense of being a member of an illegal organization before the Special Criminal Court is enunciated in Subsection 2 of Section 3. Where it is the belief of a *Garda* (police) Chief Superintendent in giving evidence in proceedings relating to an offense under Section 21, that the accused was, at a material time, a member of an unlawful organization, the statement of such a belief shall be evidence that he was then such a member.

As Professor Robinson (1974) stated when discussing the Special Criminal Courts:

> This action was strongly criticised in the debates in both the *Dáil* and Senate and by commentators outside Leinster House. Various dangers were pointed out: in particular the fact that the way in which information is gathered by intelligence services in any country is open to error. To allow such information to be given the status of evidence and then to protect the witness from cross examination by allowing the *Garda* Superintendent to plead privilege—creates an extremely dangerous precedent which could undermine the democratic process. In effect this would not be a case of one man's word against another, but the case of a belief which was based on undivulged facts and derived from undivulged sources which could be at second or third hand, being set against another man's assertions.

In this manner the judiciary is excluded from ruling on the acceptability or validity of the evidence presented to it. Not only is the defendant, in the Special Criminal Court, precluded from trial by jury, but in cases brought under Section 21, the *Garda* Superintendent can be seen as having been conferred with de facto judicial powers in that his beliefs concerning the accused's membership in an illegal organization must go unchallenged to the court as incontrovertible evidence. Not even the bench can refuse to accept it.

Not only does Section 3 place the burden of proof squarely on the shoulders of the defense to deny the offense (the denial itself not conclusively discharging this burden), but it also waives normal rules of evidence such as those governing "hearsay," with respect to the beliefs of the *Garda* Superintendent.

Section 4 confers the widest discretion to charge persons with making statements or holding meetings, demonstrations, or processions that constitute "an interference with the course of justice." Therefore, organized opposition to the implementation of this statute could be seen as contravening this section even were it to be orderly and peaceful. Any of the above-mentioned statements or organized actions will be deemed to constitute an interference with the course of justice:

> If it is intended, or of such a character as to be likely, directly or indirectly to influence any court, person or authority concerned with the institution, conduct or defense of any civil or criminal proceedings (including a party or witness) as to whether or not the proceedings should be instituted, conducted, continued or defended, or as to what should be their outcome (Section 4 (1) (b)).

It would be difficult to imagine how a more all-encompassing definition of such a vague notion as "interference with the course of justice" could be drafted.

One of the principal justifications for the amendment to the Offenses Against the State Act was that previous legislation was not sufficient to deal with the situation of political unrest and terrorist attack as it existed in 1972. But this statement is surely belied by the figures of 112 convictions and 47 acquittals for scheduled offenses before the Special Criminal Court between May 30 and December 31, 1972 (Robinson, Appendix 2, 1976:38). It would be optimistic indeed for the state to envisage a more favorable conviction rate for most other charges. The Special Criminal Court appeared to be dealing most severely with scheduled offenses prior to the provisions of the 1972 amendment.

In its editorial *Hibernia* (Dec. 1, 1972: 3) made this criticism of the legislation:

> In his cleverly worded statement after the imposition of internment in Northern Ireland in August 1971, the Taoiseach said that "The introduction of internment without trial in the North, is deplorable evidence of the political poverty of the (Government's) policies." The proposed amendments to the Offenses Against the State Act are not just an instrument for employment against those who threaten the institution of the State. They represent a fundamental change in the law of the land.

Changes in the Nature of Trial Courts

Following Diplock's deliberations, radical changes in the mode and conduct of the trial occurred in the Province. 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 offenses which 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.[8]

Almost all the recommendations of the Diplock Commission with respect to the new criminal court process 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 and accepts a reversal of the onus of proof in certain circumstances. Perhaps the most obvious difference between these two institutions is that the Special Criminal Court presently sits with a bench of three judges, whereas its Northern counterpart is a single judge tribunal.

Unlike any other judicial body in the Republic, the Special Criminal Court was specifically designed to deal with a particularly narrow category of scheduled offenses. Over the years, however, this restriction has to some extent been interpreted flexibly so that almost all major property crimes with violence (whether politically motivated or not) may be placed before the Special Criminal Court. In terms of the original concept of the court's interest, the behavior of the accused who are brought before it should possess some threat to the political existence of the state.

On May 26, 1972, the government signed a proclamation under Part V of the Offenses Against the State Act, 1939, reconstituting Special Criminal Courts to deal with offenses scheduled under the Act. Section 35, Subsection 2 identifies the conditions which will influence the government in its decision to publish such a proclamation:

> If or whenever or so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid.

No details were given by the government as to why or how it saw the existing courts as being inadequate. Vague suggestions had been made in the *Dáil* about the intimidation of juries, but specific cases were not referred to. It was hoped that the existence of the Special Criminal Court would speed up prosecutions that were expected to increase with the government's stepped-up initiatives against illegal organizations.

Four days after the proclamation had been published, three judges were named to constitute the Court. This was a departure from previous special courts that had been exclusively made up of military personnel.

> Also on 30th May, the Government issued the First Order, scheduling the offenses already noted for the purpose of Part V, and in

November 1972 the Second Order was made adding to the list of offenses under Section 7 of the Conspiracy and Protection of Property Act 1875. Meanwhile on 4th August 1972 the Government had made an Order increasing the membership of the Special Criminal Court to seven (Robinson, 1974: 26).

The powers, jurisdiction, and procedures of the Special Criminal Court are examined in Part V of the 1939 Act. The most novel of these are as follows:

1) Section 45 of the 1939 Act provides first that where a person is brought before a District Justice charged with a scheduled offense, and the offense is one which the justice has jurisdiction to dispose of summarily, the District Justice, if the Attorney General so requests, will send such a person to the Special Criminal Court for trial.

If the person is brought before a District Justice on an indictable charge which is scheduled and the District Justice receives information in relation to it, then he must send such a person forward for trial to the Special Criminal Court unless the Attorney General directs otherwise.

When the offense charged before the District Justice is not a scheduled one and the Attorney General wants it tried before the Special Criminal Court, he must certify in writing that the ordinary courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of a public peace and order in relation to the trial of such persons on such a charge (Section 46).

The district court may be by-passed completely in relation to all offenses whether scheduled or not. Section 47 lays down the procedure through which this may be achieved. The accused may be charged before the Special Criminal Court, at the direction of the Attorney General, or warrants may be issued from this court for his arrest and retention in custody.

2) Under Section 34 of the 1939 Act, a conviction by the Special Criminal Court on a scheduled offense will mean that where the defendant is a civil servant, he will immediately forfeit his office, all pension and superannuation privileges, and be disqualified from holding public employment for seven years.

3) Parliamentary control of the Special Criminal Courts is minimal. The government has complete discretion in choosing to implement Part V of the 1939 Act allowing it to establish the Special Criminal Courts. The proclamation was issued without reference to the *Oireachtas* (Parliament). The government is not required to state reasons for the conclusion that the ordinary courts are inadequate. As a consequence, it is difficult to envisage the possibility of the *Dáil* (lower house) exercising its power to pass a resolution annulling such a proclamation, in the absence of a requirement on the government to disclose its reasons in the first place. There was no time limit placed on the functioning of the particular Special Criminal Court when established and therefore the *Oireachtas* does not have a mandatory opportunity to review the workings and continued need for the Court, after the lapse of a certain period of time.

4) Perhaps the most radical aspect of the new Court is created by Section 40. The determination of every question before the Court, including the verdict, shall be according to the majority of the members of the bench. Therefore, a jury has no place in the fact-finding process of the Special Criminal Court, and trial by jury is no longer a constitutional right with respect to defendants appearing before such a Court.

Nature of the Trial Process

On this point, because of the detailed departures from the normal features of criminal court processes, I will concentrate on the situation as it exists in the Republic. Most of these innovations have their counterparts in the laws of the Province.

1) Onus of Proof: One of the central presumptions on which the adversary system of criminal justice is based is that a man shall be seen as innocent until proven guilty. By inferring an accused's guilt from his failure to answer an accusation (an accusation of which he may not be aware or in a position to deny), the Special Criminal Courts are accepting an accusatorial conclusion. The defendant is not simply faced with the normal evidentiary burden in reply to the prosecution case, but he is forced to deny his guilt, before such a case is established, beyond reasonable doubt. His omission so to deny is the "evidence" on which the offense is founded.

2) Right to Silence: It is a generally accepted rule of evidence that if an accused fails to give evidence or does not deny allegations laid against him, such silence cannot be construed as an admission of the case alleged by the state. It may not constitute a separate item of evidence and cannot amount to corroboration. The very worst assumption which may follow from the accused's silence can merely go to strengthen the inference to be drawn from the prosecutor's evidence.

How, then, can such an absence of denial form evidence on which a charge of membership in an illegal organization will succeed?

3) Hearsay Evidence: Perhaps the more usual way for the evidence to be adduced that the accused is a member of an illegal organization is by a senior police officer declaring his belief that this is the case. This belief may be based on information from another informant or from a police intelligence source. However the information is gathered, it may be subject to error, but because of its privileged status may not be tested under cross-examination.Therefore it is extraordinary not only that the rule against the admission of hearsay evidence should be ignored or abrogated, but also that such evidence should form the basis of the offense against the accused in a form which cannot be challenged by him and need not have its source divulged even to the bench.

4) Abolition of Jury Trial: In a country where trial by jury for major criminal offenses is enshrined as a constitutional right,[9] it is a radical departure to establish a tribunal, devoid of a jury, as the arbiter of fact within the criminal justice process.

The justification for such a departure is that it attempts to overcome the

intimidation, both physical and emotional, which may be directed towards jurors by the agents of the accused, such as members of the organization with which it is alleged he is associated. Both the legislature and the judiciary had expressed concern that such intimidation had resulted in a reluctance on the part of the public to come forward with evidence in support of prosecutions for offenses against the state, as well as some trepidation among prospective jurors regarding the consequences of their being openly associated with a verdict against the accused.

Critics of the Special Criminal Court declare that the abolition of the jury is an overreaction to fears of the perversion of justice caused by the intimidation of jurors; intimidation that has not been adequately established in practice. A more cynical justification for doing away with the jury is that the state fears that public empathy with the aims and motives of the accused who appear before the Special Criminal Courts will lead to lenient verdicts, and that the best way to ensure a high conviction rate is to transfer the decision regarding guilt into the hands of the judiciary.

Whether one is convinced that the number of occasions a jury brings in a verdict which differs from the views of the judge are substantial or minimal in practice, the symbolic effect of removing the jury as the final arbiter of fact, and instead conferring this responsibility on the judiciary, is significant not only for public confidence in the decision-making process of the criminal trial, but also in the way it weakens the judiciary's postures toward impartiality and objectivity. No longer can the judiciary merely be seen as imposing the just punishment of society as a matter of course, once presented with the determination of guilt. The judge is now implicated in setting the battle of "facts," as well as seeing that the law is adhered to and reinforced.

Non-Civilian Custody

In the early 1970s in the North, terrorists were detained principally in internment camps. In fact, internment without trial became one of the cornerstones of the British antiterrorist strategy during the years in which the government accepted the war model. Even after the building of the Maze Prison, those persons imprisoned for terrorist offenses prior to the opening of the Maze were allowed to remain in the camps outside, under conditions very much comparable to those which existed for military prisoners of war in Europe during World War II.

In the Republic in 1972, prisoners who were admitted members of the Provisional IRA took over the central section of Mountjoy Prison and released many of their fellow prisoners from the wings. Several hours later troops armed with riot equipment and CS gas moved into the prison to restore order. The following day approximately 200 prisoners were removed from riot-damaged Mountjoy and dispersed to other penal institutions throughout the state, including the military detention barracks at the Curragh Military Camp, one of the principal army training installations in the Republic.

The day after, two bombs exploded in a Dublin department store and a

travel agent's office. More devices were found in other city stores. On Tuesday, Mr. Lynch (the *Taoiseach* at the time) announced the government's intention to strengthen the laws against illegal organizations. A step towards that goal was evidenced on May 23, when the *Dáil* passed the second stage of the Prisons Bill.

Quite simply the new Act was to amend and extend earlier prison legislation by empowering the Minister for Justice to:

> direct the transfer to military custody, of such of the persons aforesaid as are specified by him (Prisons Act, 1972: Section 2(3)(b)).

The Minister would declare the conditions for such a transfer to exist:

> if and whenever, at a time when this section is in operation, the Minister is of the opinion that prison accommodation or prison staff is insufficient to provide secure and reasonable conditions for custody without serious detriment to the maintenance in prison of the normal arrangements for the rehabilitative treatment and welfare of prisoners (Prisons Act, 1972: Section 2(3)).

No reasons need be stated by the Minister for coming to this decision and such transfers are simply put before the *Dáil* without elaboration. Rarely are they questioned in the House.

The wording of this subsection is made even more confusing when considered in the light of reasons voiced in the *Dáil* (Vol. 261:77–360) during the bill's debate as to the necessity of military custody. These reasons centered on the emergency situation caused by the Mountjoy riot, the lack of suitable numbers of prison officers to staff the Curragh detention barracks as a civil prison, were that indeed a possible alternative, and the existence within the prison population of disruptive or dangerous prisoners.

Despite the fact that the Act was represented as being an unfortunate but necessary response to an emergency situation, it has since been renewed on two occasions. In 1980, the Act was amended to continue for an additional three years. During the most recent debates which accompanied the second stage of the bill, the Minister for Justice pronounced a more elaborate justification for the continuing need for military custody:

> To isolate out of the civil prisons,
>
> (a) persons requiring a high degree of security who cannot be accommodated in Portlaoise prison or elsewhere in the civil prison system and
>
> (b) persons who promote or actively engage in seriously disruptive activity in civil prisons (Seanad 94:241).

So it now seems that the military custody establishment is being used as an isolation unit for "known troublemakers and disrupters" (Seanad 94:241), in addition to the separation facilities being completed in the form of a new

high security prison at Portlaoise. Such facilities are in the early stages of construction, although few details have been disclosed regarding the structure and use of the new unit. The continued use of military custody for civil prisoners has been widely criticized as an "unthoughtout, uninformed, evolving situation where, for administrative convenience and for punishment of individuals who are disruptive in the prison service. We have tolerated the notion of civilians being held in military custody" (Seanad 94:258).

The detention of subversive or terrorist prisoners within the general jail population of both states is also unique, unique not only in terms of the physical conditions of the detention, but also because of the character and organization of the inmates in question.

In the Republic almost all those inmates viewed by the government as "subversive" are detained in Portlaoise prison. At first view Portlaoise appears more like some sort of military institution rather than a civil jail. Its outer perimeter is secured by a substantial military presence. Inside the prison both police and prison officers take responsibility for maintaining order.

Unlike the policy at the Maze prison in Belfast, the local administration which runs Portlaoise recognizes the paramilitary cohesion operating amongst the various inmate groups, and they have chosen to use this cohesion to facilitate communication within the jail. The apparent results of this policy are that in return for some de facto recognition of their political status, the paramilitary inmates have made available their hierarchy of discipline for conflict resolution, rather than for conflict.[10]

This is not the case in the North, as the years of "dirty protest" and hunger strikes in the "H blocks" reveal. It is interesting to contrast the apparent peace of Portlaoise (won with few substantial concessions) with the ongoing crisis in the Maze. By refusing to recognize even in a de facto sense the unique status of the inmates in the H blocks, the government of the Province perpetuates the myth of criminalization with disastrous results. The regimen and conditions under which the paramilitary prisoners in the North are detained are unusual, if only in so far as the efforts made to secure their confinement. Yet in denying these inmates the opportunity for free association, the right to wear their own clothes, and to refuse to engage in prison labor (all conditions which exist in Portlaoise), the paramilitary cohesion has been directed towards the continued challenge to the state's claim to exercise a legitimate right to punish.

Criminality as Control

The ambiguities of "justice" so widely represented in the unique administrative hybrids referred to above should be viewed as the inevitable products of the form of law which has developed in Ireland. They are not simply dichotomies of administration and purpose, nor are they weak points in the system—quite the contrary. They have been intentionally introduced into the criminal justice process of both states to enhance its operational strength as a vehicle for the repression of "politically motivated terrorism" and organized dissent. They serve as a crucial means by which the criminal sanction can be

effectively directed against what may be represented as marginal behavior. Rather than undermine the ideology of the justice process as a whole, they coexist with it through their very legality. As McBarnett proposes, it is the fact that the law institutionalizes such contradictions, that the gap between what it does and what it should do is managed and the law becomes all things to all men.

To appreciate the influence of such new developments on the future legitimacy of the criminal sanction in Ireland, these new developments need to be analyzed neither as anachronisms, nor as aberrations tolerated because of the requirements of public peace, but rather as examples of a new form and substance to the law which exists in certain liberal democratic states under challenge. If one sees the parallel between these developments, and the recent use of the police by the government in the United States and more recently in Britain to suppress widespread urban unrest, then the structural importance of these changes becomes clear.

The criticism of the criminal sanction in its role of shoring up a state under challenge should no longer remain on the level of the exercise of discretion. The analysis must be one of the law in essence rather than of the operational process which manifests it.

As an example of this concern, one might choose to examine the relationship between the Special Criminal Court and military custody in the Republic. The Special Criminal Court and military custody were the central institutional creations within which the new scope of the criminal law could be given effect. Once the government had scheduled an offense, or the Attorney General declared it necessary to be heard before the Special Criminal Court, the new evidentiary and procedural requirements could come into play. The acceptance of hearsay evidence, the additional burdens of proof placed on the accused, and the decline of the jury would prove fundamentally unacceptable to the normal criminal courts. The answer was to create a new court, the structure of which could embrace such radical departures from established procedure. These courts were also to deal with a new type of offender whose deviance ought to be represented as political as well as criminal. The institutions for imposing penal sanctions at the time could not weather the disruption caused by this new type of offender. Therefore a new type of sanction was provided to remove the problem from the civil prison service.

The stated reason for establishing the Special Criminal Court was the need to overcome the inadequacy of the ordinary courts to administer justice and effectively preserve peace. Yet this inadequacy only became apparent when the scope of the criminal justice process was widened to cover the more marginal challenge to public peace. The criminal law is never so clearly in use as a tool for the maintenance of public order as when it is directed to this type of offender. As the law swings away from its normally clearly defined role to determine guilt or innocence (criminal liability) and to impose penal sanctions, many of the safeguards for the defendant, which are built into the adversary process, come under strain. Therefore the necessity for the Special Criminal Court might equally be explained in terms of the inappropriateness of the

normal criminal justice process when regulating political dissent. If these procedural safeguards are not continually to face challenge or constantly thwart the prosecution of such offenders, a new court with new rules must be created.

The same explanation might be shared for the imposition of military custody. It removes the pressures caused by this new class of inmate. The civil prisons are protected and the power of the executive over the nature of the penal sanction is emphasized. It would be foolish, however, to consider that these institutional creations will not reflect on the normal working of the criminal justice system. Their existence is not entirely separate—it must pose some challenge to the continued importance accorded to the procedural safeguards which they discard.

The utility of the criminal sanction as a legitimate source of control rests on the presumption that the radical modifications to the system through which it is imposed will be viewed by the community as an acceptable feature of proper government. The only criticism of these measures which is accepted as legitimate by the respective governments relates to whether or not such measures are justifiable in terms of the potential for success in achieving their objectives. However, the real question is: "Whether those modifications may become so 'normalized' that the original objective of relying on the ordinary criminal process will itself become unobtainable" (Boyle, Hayden, and Hillyard, 1975).

Across Border Comparison

Both governments in Ireland promote the criminal law as the most appropriate method for countering terrorism. Although the nature of organized resistance to the two states differs considerably, the response to such challenges on both sides of the border is remarkably consistent. Because of this, one can make certain comments about the relationship between the criminal law, ideology, and legitimacy, as they are distorted in two quite different neocolonial frameworks.

The analysis presented in this article leaves many questions unanswered. For example, what are the distinguishing characteristics of the forms of organized resistance in both Irish states, which nonetheless have prompted the parallel criminalization response? In short, what great differences exist between the paramilitary groups on both sides of the struggle? What indeed do the states choose to mean by terrorism? And what distinguishes unjustified violence and terror from active political dissent?

While not denying the interest and importance of particular answers to these questions, I have not attempted the broad social analysis from which these answers would arise, because it is the nature of the state's response which I take as my limited focus. If one accepts that the circumstances under which challenges are mounted to the legitimacy of both Irelands differ greatly, then the similarity in the major features of each state's reaction is even more remarkable.

Significant results will arise for an understanding of the role of the criminal

sanction in the control of political dissent, from a comparative analysis of the two states' reactions in the control equation. While it would be enhanced by a detailed understanding of the different factors at work in each individual situation of organized violence in the Province and the Republic, such an analysis will not necessarily rely on a coexistent examination of the sociopolitical circumstances of the original challenge.

The principal value of such a comparative analysis rests with the uniform response of two quite different "liberal democratic states" transmogrified by prolonged organized resistance to their legitimacy. The parallels of coercion in the two states suggest how variations in the nature of the organized resistance may have little effect on the state's response, provided that the objectives of such political dissent remain constant.

Both states have reverted to the ideology of the criminal law for dealing with political violence. In so doing, they have chosen to alter drastically the nature of "normal" criminal sanctions and "normal" criminal law processes. Resort to the rhetoric of the "rule of law," in other words, is paradoxically belied by the adoption of special procedures which acknowledge its inadequacy. Thus the torturous efforts of the state to either regain or retain legitimacy have fundamentally influenced the substance and the status of the criminal law in Ireland.

As can be seen in the recent reactions of other states facing a crisis of legitimacy, there has been a noticeable movement in the process of "criminal justice," where exceptional forms of domination (the authority of which only rests on claims to legality) are preferred to more traditional democratic ideologies of consensus. Political challenge and organized resistance are now answered with repressive forms of state power. Too often these are manifested in the administration of the criminal sanction.

NOTES

1. There is a great variety of social histories of Ireland which document the influence over Irish society and politics since the 1600s. For a concise resumé of British involvement, see Kee (1908).

2. Even in cities such as Belfast and Derry today, it is economic deprivation through the provision of housing and employment, as well as imbalances in political representation and the consequent self-determination, which is the center of the social rupture.

3. For such a criticism see Findlay and Duff (1982:253–265).

4. It should be remembered that although certain sections of the Irish community may not be affected by such mystification, they may not be the object of the state's efforts in this regard. For example the Catholics on the Falls Road may never accept the British version of events. However, the government of the Province may see the British electorate and "patriots" in the U.S. as needing to be convinced.

5. Balbus (1983) emphasizes this dichotomy in terms of "the dialectics of repression" within the bourgeois liberal state. He differs from the more structural models for analyzing criminal justice in that he sees the law as fundamentally determined by class conflict. He sees the dichotomy retained with the qualification that it is a function of the class nature of society.

Balbus also emphasizes the risk that any liberal democratic state takes when the divergence between the rhetoric of legality and challenges to the rule of law becomes too obvious. He emphasizes the "definite constraints put forward as essential to 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 which run so contrary to it. See also Hogg (1983).

6. See Offenses Against the State (Amendment) Act, 1940, Section 5, and Offenses Against the State (Amendment) Act, 1972, Section 5.

7. Please note the resemblance with the Prevention of Forceable Entry and Occupation Act, 1971, Section 4 (3).

8. These recommendations were first enacted in the Emergency Provisions (Northern Ireland) Act, 1973. They were later expanded upon in 1978.

9. Article 38:

> (1) "No person shall be tried on any criminal charge save in due course of Law."
> (5) "Save in the case of the trial of offenses under S. 2 (minor offenses), S. 3 (cases before special courts) or S. 4 (cases before military tribunals) of this Article no person shall be tried on any criminal charge without a jury."

10. For further details concerning the detention of political prisoners in the Republic, see Findlay (1984).

REFERENCES

Balbus, I.D.
1973 *The Dialectics of Legal Repression*. New York: Russel Sage.

Boyle, K., T. Hayden and P. Hillyard
1975 *Law and the State: The Case of Northern Ireland.* Oxford: Martin Robinson.

Dáil
N.D. *Parliamentary Debates,* Vol. 261, *Dáil.*

Diplock, Lord
1972 Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, Cmnd 5185, H.M.S.O.

Findlay, M.
1984 "Criminalization and the Detention of Political Prisoners—An Irish Solution." *Contemporary Crises* 8. New York: Elsevier Science.

Findlay, M. and P. Duff
1982 "The Jury in England: Practice and Ideology." *International Journal of Sociology of Law* 10.

Habermas, J.
1976 *Legitimation Crisis*. London: Heinmann.

Hogg, R.
1983 *Perspectives on the Criminal Justice Administration.* Sydney: George Allen and Unwin.

Kee, R.
1980 "Ireland, A Television History." London: BBC.

McBarnett, D.
1981 *Conviction Law, the State, and the Constitution of Justice.* London: MacMillan.
1979 "Arrest: The Legal Context of Policing." In J. Holdway (ed.), *The British Police*. London: Edward Arnold.
1978 "False Dichotomies in Criminal Justice Research." In J. Baldwin and A.K. Bottomley (eds.), *Criminal Justice*. London: Martin Robertson.

Minister of Justice
1972 Prisons Act. London: H.M.S.O.

Robinson, M.T.W.
1974 *The Special Criminal Court*. Dublin: Trinity College Press.

Seanad
N.D. Parliamentary Debates, 94: Seanad.

Skolnick, J.
1966 *Justice Without Trial*. New York: John Wiley and Sons.

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