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NORTHERN IRELAND'S CRIMINAL TRIALS WITHOUT JURY: THE DIPLOCK EXPERIMENT

CAROL DAUGHERTY RASNIC*

*"There is no more potent symbol
of the common law tradition
than the jury trial."¹*

Northern Ireland's principle of non-jury felony trials is an anomaly in Anglo-American jurisprudence. Indeed, it is unique among common law systems. One British legal scholar has referred to the jury trial as the "paradigm of all [criminal] trials."² The exceptional situation in Northern Ireland has resulted from the ongoing "troubles" which, since the late 1960s, have been a prominent feature of life in this small segment of the United Kingdom.³ Eliminating the jury in trials dealing with terrorist charges was determined to be necessary in dealing with the mounting sectarian violence.

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1. JOHN JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY* 1 (1995). John Jackson is Professor of Law and Dean/Director of the School of Law, Queen's University Belfast, and Sean Doran is Senior Lecturer in Law at Queen's University Belfast. Both are well-known throughout the United Kingdom and Ireland for their expertise in the criminal law and evidence areas.

2. W.L. TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 157 (1990).

3. Irish-English dissension has been a fabric of their mutual histories for centuries, more prominently since the early 1660s when Oliver Cromwell ravished and plundered the land of all of Ireland and repressed its people, particularly Catholics.

Part I of this article summarizes the issue dividing Northern Ireland.⁴ Part II analyzes the procedure of non-jury trials, paying particular attention to how the ordinary rules of evidence are altered. Part III enumerates the reasons for Northern Ireland's departure from the norm in these criminal proceedings, and examines the measure in practice. Finally, the article considers the arguments for and against retaining the practice of non-jury trials.

I. THE "TROUBLES"

After years of tension and failed revolutionary efforts to win freedom from England, Ireland finally achieved Home Rule in 1921.⁵ Under this agreement, Ireland retained its dependent status as an official part of the United Kingdom, but was permitted to govern itself with regard to designated domestic matters such as education and policing. The island was then partitioned for the first time, such that the greater portion (twenty-six counties to the south and far northwest) fell within the Home Rule jurisdiction, and the remainder (the six counties lying to the northeast of the island) fell under the direct rule of the English Parliament.

The Irish Free State Constitution was adopted in 1937. This document claimed sovereignty over the entire island — all thirty-two counties, including the six counties to the north.⁶ The division was not random, but rather was crafted along lines of the predominately Catholic (the Free State portion, today approximately 95% Catholic) and the predominately Protestant (the six counties to the north) areas. At that time, Northern Ireland's religious constituencies were approximately

4. An excellent summary of the sequence of the events in Northern Ireland can be found in *NORTHERN IRELAND: POLITICS AND THE CONSTITUTION* xi-xv (Brigid Hadfield, ed. 1992).

5. Government of Ireland Act 1920. Previous Home Rule bills had been defeated both in the British House of Commons (1886) and in the House of Lords (1893). There have been many uprisings for Irish independence, most notably in 1798 and in 1916 (the Easter Rising), but the larger and better-equipped British military was always victorious.

6. Articles 2 and 3, *CONSTITUTION OF THE REPUBLIC OF IRELAND*. The Good Friday agreement includes Ireland's relinquishment of this constitutional claim.

two-third Protestant (mostly Presbyterian) and one-third Catholic. Today, the minority status of Catholics has become less pronounced, and the current division is approximately 55% Protestant and 45% Catholic. Traditionally, the Protestant portion (the “Unionists” or “Loyalists”) aligned itself with England and had no desire to become part of the Free State, while the Catholic portion (the “Nationalists” or the “Republicans”) aligned itself with the southern twenty-six counties and desired reunification with the Free State. It has been these two segments — the Protestant Unionists and the Catholic Nationalists — which have been unable to resolve the issue regarding affiliation with the United Kingdom in a peaceful manner.

In 1949, the twenty-six counties under Home Rule left the British Commonwealth and became the Republic of Ireland,⁷ retaining intact the Free State Constitution. The six northern counties remained part of the United Kingdom, maintaining a modified type of self-determination similar to Ireland’s earlier Home Rule.

Although relations between the two religious sectors in Northern Ireland have always been contentious, 1968 saw a sharp increase in the level of animosity, as marked by civil rights marches and intermittent violence. In October of that year, a march in Londonderry (“Derry” to the Catholic Nationalists) was marred by the violence which has since recurred time and again. As of 1998, more than 3,000 killings have resulted from the “troubles.” For the most part, terrorist activities have been the work of paramilitary groups on both sides, for example, the Irish Republican Army (IRA) and the Irish Nationalist Liberation Army (INLA) on the Nationalist side, and the Loyalist Volunteer Force (LVF) and the Unionist Volunteer Force (UVF) on the Unionists’ side.⁸

It should be noted that these self-appointed armies, which essentially constitute the instigating and continuing cause of

7. Ireland Act 1949 (Act of the Westminster Parliament).

8. See JOHN CONROY, *A BELFAST DIARY* (1995) for a more detailed account of the composition of these paramilitary groups.

the injuries, loss of life, and damage to property that have characterized the troubles, are fringe groups comprising a small minority of the whole of Northern Ireland. For the most part, even those inhabitants who solidly support their respective disparate positions on the issue of a united vs. a divided Ireland do not engage in violence. However, the relative few have engendered a very real fear in many because of their vengeance, passion and inflexibility.

Despite Northern Ireland's small size, no two-party system has evolved. There are several unionist parties (for example, the Ulster Unionist Party [UUP], the Democratic Unionist Party [DUP], and the Populist Unionist Party [PUP]), and several republican ones (for example, Sinn Fein and the Socialist Democrat Labor Party [SDLP]). The Alliance Party, generally regarded as the most central of all, appears pro-union, but is not expressly so.

In response to the mounting terrorism, the British Parliament suspended the Northern Ireland government in March 1972,⁹ and England again exercised direct rule. Efforts to reinstate some sort of self-government in the six counties have failed. The 1998 Good Friday Agreement and the May 22, 1998 referendum established another Northern Ireland Assembly, which was elected in June 1998.¹⁰

The tension is most pronounced during the so-called "parade season" — particularly during the week of July 12 — when Protestants celebrate the 1690 defeat of Irish forces by William

9. Northern Ireland (Temporary Provisions) Act of 1972. The 1972 law has been amended. The current law is the Northern Ireland (Emergency Provisions) Act of 1991 [hereinafter "EPA"], which is the successor to the Civil Authorities (Special Powers) Act (NI) of 1922-33, as well as to prior Emergency Provisions Acts of 1973, 1978, and 1987. Another law implementing the emergency measures is the Prevention of Terrorism (Temporary Provisions) Act of 1989 (applicable to all of the United Kingdom).

10. The April 10, 1998 Stormont Settlement — generally referred to as the "Good Friday Agreement" — was executed by all of Northern Ireland's major political parties. It was submitted to voters via a referendum in both the Republic of Ireland and Northern Ireland on May 22, 1998. It needed majority acceptance in both sectors to pass. The "yes" vote in Ireland was in excess of 95%, and, in Northern Ireland, over 71%. Most of the population in the north concur, however, that peace still remains an ideal, and that much compromise and work remain before the strife will be ended.

of Orange.¹¹ The violence is so extreme that most stores barricade their storefronts to avoid windows being smashed or property being torched. The 1995-98 peace talks have not muted paramilitary action on either side. For example, the city of Belfast reported 206 recorded sectarian shootings or beatings in 1996. This figure rose in 1997 to 232.¹² Moreover, in 1997 more than 1500 bombing incidents and 837 attacks on security forces in Belfast alone resulted from an Orange Order (Protestant Unionists) parade in the week preceding the actual July 12 celebration day. Because of these uncontrolled eruptions, Parliament established a Parades Commission to determine if and when to reroute, or even cancel a planned parade.¹³

The terrorism has been widespread and consistent; indeed, a study of the troubles provides subject matter sufficient, at a minimum, for a two-semester university level course. The foregoing condensed portrayal of a complex problem is intended to emphasize that the real problem is not so much a religious one as a disagreement over an Irish or a British affiliation for the six counties of Northern Ireland.

II. THE "DIPLOCK" SYSTEM

Non-jury felony trials in Northern Ireland are known as Diplock trials, named for Lord Diplock, chairman of the Parliamentary Commission which studied the problems emanating from the violence and ultimately recommended the measure.¹⁴

11. In this conflict, the Protestant forces of William of Orange defeated those of Catholic King James II, giving rise to the still enduring Protestant domination of the monarchy of the United Kingdom.

12. *Violence That Must Be Reported Now*, BELFAST NEWS LETTER, Jan. 15, 1998, at 5, col. 6.

13. 1997 The Public Procession (Northern Ireland) Act.

14. Diplock Report 1970, promulgated into statute in 1973, now the Northern Ireland (Emergency Provisions) Act 1991.

A. PRE-TRIAL PROCESS

Some aspects of pre-trial criminal procedure are identical to those found in the ordinary criminal procedure in Northern Ireland. However, there are key differences. For example, in the Diplock system, a suspect taken into custody immediately after arrest can be held up to four weeks pending a first hearing before a magistrate. In contrast, the non-Diplock procedure provides for an immediate bail hearing, similar to the typical American system.

The office of the Director of Public Prosecution (DPP) was created in 1972 as a safeguard against unjustified prosecutions, since the decision whether or not to proceed with prosecution formerly rested in the sole discretion of the arresting constable (or soldier). The DPP immediately begins his investigation, which is comprised largely of discussions with whomever conducted the arrest, either the Royal Ulster Constabulary (or RUC) or the British army. The DPP then has the discretion to proceed or to order the defendant released and charges withdrawn, based upon whether (a) it is probable that the defendant will be convicted, and (b) trial is in the best interest of the public. If the case proceeds, committal papers setting forth the charges are served upon the defendant while he is in jail.¹⁵

At this point the process differs if a Diplock-type trial is warranted. If the act with which the defendant is charged is obviously not a terrorist act (e.g., domestic violence), a hearing is held before a magistrate who will then determine whether probable cause exists to substantiate the charge. This predetermination is based upon prosecution evidence, much in the nature of a combination of state lower court preliminary hearings and grand jury proceedings in the United States. Lesser crimes are heard and summarily disposed by the magistrate, who has authority to sentence a defendant up to 12

15. Conversations with Denis Boyd, barrister in Belfast and member of faculty law, Queens University Belfast, January 15, 1998, and March 11, 1998.

months in jail and a fine up to £2,000 (roughly \$3300 in U.S. currency) and/or to order the defendant to make restitution.¹⁶

One distinction between criminal practice in Northern Ireland and the typical criminal practice in the United States is that Northern Ireland proscribes plea bargaining to reduce the charge to a lesser one in exchange for a guilty plea. Despite this unofficial rule, plea bargaining often does occur behind closed doors in Northern Ireland.¹⁷ It is interesting to note that the defendant has up to twelve peremptory challenges in criminal jury cases, while the prosecution has none. Moreover, a unanimous decision is the goal, but if no agreement has been reached after only two hours of deliberation, the jury can return a verdict of 10-2 or 11-1.¹⁸

If the prosecutor believes the charge to be related to terrorism (or if it involves armed robbery), he schedules it for a Diplock non-jury trial. If the charge is related to terrorism, the magistrate has no authority to grant bail.¹⁹ Instead, this power is vested in the High Court or Crown Court²⁰ — both are appellate courts — in order that possible retaliatory attacks against the judiciary will be directed against a smaller number of judges.²¹

If the case is scheduled as a Diplock hearing,²² the file is forwarded to the United Kingdom Attorney General (AG), who is a member of the Westminster Parliament. The Attorney General reviews whether the charge clearly falls within a statutory “schedule,” which contains a list of predetermined offenses which are subject to a Diplock hearing.²³ The AG then

16. *Id.*

17. BRICE DICKSON, *THE LEGAL SYSTEM OF NORTHERN IRELAND* 142 (3rd ed. 1993).

18. *Id.* at 155.

19. Criminal Justice (Northern Ireland) Order 1980.

20. *Id.*

21. DICKSON, *supra* note 17, at 164.

22. Section 2(2) EPA.

23. Section 1 EPA includes common law offenses such as murder, manslaughter, riot, kidnapping, false imprisonment, and assault, in addition to statutory crimes such as wounding with intent to cause grievous bodily harm, robbery and aggravated burglary, arson, and aggravated criminal damage.

determines if the evidence supports a conclusion that the alleged charge was "terrorist-related." In the event of a negative determination, he "deschedules" the case and refers it back to the jury trial docket. Generally, in order to keep a case on the Diplock schedule, the AG requires "hard evidence" that terrorism was involved.²⁴ If the defendant has been charged with more than one crime, and only one of the multiple charges is regarded as "scheduled," all the charges are tried together by a Diplock court.²⁵ In case of an order to deschedule,²⁶ the case automatically reverts to the usual criminal proceeding.

The Attorney General's duty is to render the decision whether or not to retain the case in a Diplock court within twenty-four hours of receiving the file.²⁷ The system is designed to filter out of the Diplock process trials which are not terrorist-related, which the statute defines as involving the use of violence for political means.²⁸

Since 1972, any British soldier on duty in Northern Ireland can arrest a person without a warrant, provided that the soldier reasonably suspects that the person has committed a crime. If arrested by a member of the military, no reason needs to be given to the suspect for his arrest; however, an arresting policeman (RUC) must specify the charges to the suspect.²⁹

In 1992, fifty-three of the 190 Crown Court trials in Northern Ireland (or 28%) were without jury. However, these fifty-three trials involved 195 defendants, since terrorism in Northern Ireland is nearly always perpetuated by groups rather than by individuals. The Diplock court system, including Crown Court and others,³⁰ has processed a total of 418 persons, of whom 223

24. JACKSON & DORAN, *supra* note 1, at 21.

25. Section 2(2) EPA.

26. An order to deschedule is appended to this article. The names, addresses, and other identifying data have been changed for reasons of confidentiality. The author is grateful to Denis Boyd, *supra* note 15, for having supplied this document.

27. JACKSON & DORAN, *supra* note 1, at 21.

28. Prevention of Terrorism (Temporary Provisions) Act 1989, Section 14.

29. Section 18 EPA.

30. The statute does not specify a particular court to hear trials without juries. Judges on county courts, High Courts, Crown Courts, and even the Northern Ireland

pleaded guilty. 57 additional defendants were found guilty by the presiding judge at trial.³¹

B. VARIATION OF RULES OF EVIDENCE, TRIAL PROCEDURE, AND APPEAL IN THE DIPLOCK TRIAL

1. The Right to Remain Silent and Admissibility of Confessions

Perhaps the most critical change is that the law abrogates the suspect's right to remain silent without prejudice.³² This right is abrogated not just in Diplock procedures, but in jury trials throughout Northern Ireland. The court (or jury) is expressly permitted to draw inferences of guilt from a defendant's failure to mention any fact relevant to his defense. This rule applies throughout the entire process, from arrest³³ to trial.³⁴ The original 1988 statute permitting these inferences at least required that the judge admonish the accused and warn him of the possibility of presumption of guilt upon a refusal to testify. But the 1994 law³⁵ requires only that the judge be "satisfied" that the defendant is aware of these consequences. This "satisfaction" is subjective, as there are no statutory objective standards imposed upon the judge. Compare this rule with *Miranda v. Arizona*,³⁶ the well-known Warren Court decision holding that the Fifth Amendment privilege against self-incrimination applies to any interrogation which might (possibly) result in taking the questioned person into custody.

Supreme Court are competent to sit. All such trials are conducted at the Crumlin Road court building in Belfast. JACKSON & DORAN, *supra* note 1, at 83.

31. DICKSON, *supra* note 17, at 165.

32. Criminal Evidence (Northern Ireland) Order 1988. Compare CONSTITUTION OF THE UNITED STATES, Amendment V.

33. Article 5 of the Criminal Evidence (Northern Ireland) Order 1988 requires the accused to answer any questions from the arresting police or soldier(s) regarding the presence of any objects, substances, or marks on his person or property, provided only that the arrestor has a reasonable belief that such questions are relevant in determining his participation in the crime. Article 6 refers to the accused's failure to account for where he was and what he was doing at the time the offense was committed. If he refuses to respond, the negative inference can be drawn.

34. Criminal Evidence Order 1988, Article 4.

35. Amendment to Article 4 of the Order accompanying Criminal Justice and Police Order Act 1994, section 10, paragraph 1.

36. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Miranda also requires that the suspect be advised of his rights, including the right to counsel before any questioning by police. In Northern Ireland, the right to counsel does not arise until the DUP has decided to proceed with the prosecution. The right commences upon the scheduled appearance before the magistrate. As in the United States, legal aid is available for the destitute defendant.³⁷ He must complete a fairly lengthy form, supplying extensive personal information, including the number of dependents, employment, receipt of any social benefits, and the amount of income from all sources. The judge has discretion to decide whether the accused has proved a legitimate need.³⁸ The defendant must actually present financial data reflecting his earnings and obligations.

The term "voir dire" in the British-Irish context refers not to the process of impaneling a jury, but to what is commonly called the "trial-within-a-trial" phase (out of presence of the jury, in jury trials) in which the judge decides whether a confession is admissible. From the defendant's perspective, the rule applicable to confessions in the Diplock context is rigorous. The common law rule that a confession is admissible evidence only if it was voluntarily made has been substantially modified under the Diplock system. In the violent atmosphere of Northern Ireland, the Diplock Commission deemed that such a rule would impede the orderly course of justice. This ruling has resulted in pre-trial detention in order to deter any additional violence during the arrest-to-trial period. In Diplock proceedings, the confession is presumed admissible in the absence of any overt evidence of the interrogator's deliberate effort to force the confession.

An example of the difference between the common law and Diplock standards can be seen in *R. v. McAlister*, a 1988 case that involved a jury trial.³⁹ The judge held the confession

37. Note that the provision of legal services for those unable to pay has applied also to civil litigation since 1949 in England and Wales, and since 1965 in Northern Ireland. DICKSON, *supra* note 17, at 105.

38. In civil cases, however, this decision is made by the Law Society, which is similar to a state bar association in the United States.

39. An unreported 1988 case cited by JACKSON & DORAN, *supra* note 1, at 37.

inadmissible because the questioning constable had erroneously believed that the case involved a scheduled Diplock offense. Thus, a confession that would properly have been admitted as evidence in a Diplock case was excluded. The court determined that the intensity of the questioning had caused the accused to confess against his will.

The Diplock statute does, however, permit a “moderate degree of physical maltreatment” of the suspect in order to obtain a confession. An earlier case attempted to clarify this standard.⁴⁰ The mere involuntariness of the confession does not automatically work to exclude it. Rather, the statute grants the judge discretion to exclude a confession if he decides it would be “appropriate . . . in order to avoid unfairness to the accused or otherwise in the interests of justice.”⁴¹ The statute does, however, make clear that any violence on the part of the interrogators shall be deemed “unfair.”⁴² One must assume, then, that there is a difference (albeit a narrow one) between the “moderate degree of physical maltreatment” that is permitted and the “violence” that is prohibited.

2. “Supergrass” Informants

The main feature that marked “the Diplock court’s blackest phase”⁴³ was the introduction in the early 1980s of the use of so-called “supergrass” information for group convictions of terrorist suspects. “Supergrass” refers to the blanket grant of immunity to a person probably involved in an act of terrorism in exchange for his or her proffering evidence against the other principals. The term was coined by an English judge in the *R v. Turner*⁴⁴ case, where one woman testified against a large number of defendants who had been charged with a series of armed robberies between 1968 and 1971.

“Supergrasses” are generally used when several persons have committed the crime, as is nearly always the case when acts of

40. *R v McCormick and Others* (1977) 105, 111 (McGonigal, J.).

41. Section 11(3) EPA.

42. Section 11(2)(b) EPA.

43. JACKSON & DORAN, *supra* note 1, at 44.

44. 61 Cr App R67 (1975).

terrorism are involved. The criticism leveled against this practice is that the court accepts as credible the uncorroborated testimony of a known paramilitary terrorist who is under no obligation to cease his own illegal activities and who has not the reason nor the incentive to be candid and truthful. In November 1981 and November 1983, approximately 600 suspects were arrested on the information of seven Loyalist and 18 Republican supergrassess, 15 of whom later retracted their testimony.⁴⁵ Another complaint is that the trials inevitably become "shows" designed to result in the convictions of as many defendants as possible in a single trial.⁴⁶

3. Form of Judgment

The Diplock statute requires the judge to include substantiating legal bases and a logical rationale for a Diplock conviction.⁴⁷ As a rule, judges in Northern Ireland follow the same rule for acquittals. This rule provides a counterpart to the judge's charge and summary to a jury at the conclusion of a trial and prior to deliberation.⁴⁸ It need not be written and usually is not produced in written form unless a transcription is needed for appeal, or the particular case is of special interest.

Appeal is automatic in Diplock trials. There is no mandate to the Court of Appeal to decide solely on matters of law, and the general consensus is that this body reviews a mixture of law and fact.⁴⁹ This guaranteed appeal is to ensure review as a *quid pro quo* of sorts, to provide something of procedural value to the defendant who has had to forego his right to have a jury determine his guilt.

45. JACKSON & DORAN, *supra* note 1, at 44.

46. *Id.* at 45.

47. Section 10(5) EPA.

48. JACKSON & DORAN, *supra* note 1, at 24-25.

49. *Id.* at 26.

III. WHAT IS WRONG WITH THE JURYLESS CRIMINAL TRIAL? A RETROSPECTIVE ASSESSMENT

In 1998 senior defense attorneys in Northern Ireland — expressing their “grave concern at the failure of the rule of law”— called for a thorough review of the police (RUC) and asked the Secretary of State to see that the emergency laws are repealed.⁵⁰ There is a general perception that the RUC is riddled with anti-Catholicism, since only 8% of the police force is Catholic. The inference is that Catholics would fear recrimination if they were to serve the queen. Moreover, RUC members are presumed to be unionists, since they are employed by the United Kingdom. Human rights violations have been committed against Northern Irish solicitors who have represented Catholics charged with acts of terrorism.⁵¹ One barrister⁵² was threatened and later killed by terrorists for one such representation. The prevailing view of practicing barristers in Belfast is that the RUC is much more successful at investigating terrorist charges against Loyalist (Protestant) paramilitary groups than those against Republican (Catholics) groups, for the following reasons: (a) a Protestant feels more at liberty to divulge relevant information to the RUC, because both the Protestant and the largely Protestant RUC are presumed Unionist, and thus he fears no retaliation from Republicans who harbor animosity against these officers; and (b) because of its largely Protestant makeup, RUC officers themselves are not fearful of investigating in Protestant areas.⁵³

50. Chris Thornton, *Lawyers Back Review of Police*, BELFAST TELEGRAPH, Jan. 12, 1998, at 1, col. 4-5.

51. ITV Channel 4, “Dispatches,” Jan. 15, 1998 (commentator’s interview with Par’an Cremaraswamy, a Malaysian lawyer investigating human rights violations).

52. The British and Irish legal systems distinguish between lawyers who are solicitors and those who are barristers. Solicitors interview clients in their offices and draft legal documents such as wills and deeds, while the barrister conducts all necessary courtroom work. Solicitors are not authorized to make court appearances. The requisite training for each differs substantially. A barrister must be retained by a solicitor and, unlike the solicitor, is not permitted to advertise, even to the extent of using business cards which indicate his profession.

53. Conversation with Denis Boyd in Belfast, *supra* note 15, 1998.

The principal experts on the Diplock system, John Jackson and Sean Doran of Queen's University Belfast, have criticized the process as altering the traditional Anglo-American adversary system where the lawyers try the case, and the judge plays an "umpire" role. Jackson and Doran view the emergency experiment as having produced a system which more closely resembles the continental European civil law inquisition system.⁵⁴ Their most pressing concern is the nearly conclusive proof of guilt which an admissible confession creates.⁵⁵

Moreover, Jackson and Doran feel that judges empowered to be the sole arbiter in these cases have become so hardened as to be biased against acquittals. They note that Diplock acquittals have decreased from 53% in 1984 to 29% in 1993. This contrasts with the acquittal rate for jury criminals trials of 49% in 1984, and 48% in 1993.⁵⁶ The high Diplock conviction rates are particularly disturbing in light of several releases in recent years of groups convicted as terrorists but later proved not guilty, such as the Guildford Four, the Birmingham Six, the Maguire Family, and the Cardiff Three.

There are, however, arguments in favor of retaining the Diplock system. Regarding the judiciary, most judges through the early 1970s were members of the Protestant Unionists majority. More recently, the bench has begun to reflect the sectarian affiliations of the general population. Indeed, there has not been any conclusive proof that the courts have dealt more leniently with Protestants than with Catholics, although doubt of judicial non-bias is widespread. Most legal scholars agree that they have found no evidence of systematic judicial bias against Catholics, either in jury trials or Diplock trials.⁵⁷

Yet another argument supports retention of the Diplock process. It was suggested above that the automatic appeal of a Diplock court conviction provides the necessary safeguard

54. JACKSON & DORAN, *supra* note 1, at 56-80 and 288-89.

55. *Id.* at 57-58.

56. *Id.* at 35, Table 2.2.

57. K. BOYLE, T. HADDEN, & P. HILLYARD, *TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE* 86 (1980).

against an overly harsh judge. History shows that appellate courts tend to reverse Diplock judges' convictions more often than convictions rendered by juries. Experts surmise that the requirement that the judge support his decision with articulated, reasoned judgment — unlike the jury, which need not offer any reason — renders his more elaborate findings of fact more amenable to challenge.⁵⁸

It is still uncertain whether the peace talks initiated in 1995 and concluded on April 10, 1998 (the "Good Friday Agreement") and the May 22, 1998 referendum results have substantially eased the tension in Northern Ireland. Clearly, paramilitary attacks were not muted during the peace talks. The ignominious Belfast prison, the Maze, has given new meaning to the concept of prison security. On December 27, 1997, while imprisoned within the Maze, convicted Loyalist terrorist Billy Wright was murdered by imprisoned Catholic paramilitaries. Shortly after the murder, a local Belfast newspaper ran a photograph of other convicted Loyalists conducting a prison memorial to Wright, armed and wearing terrorist masks.⁵⁹

Even the euphoria following the Good Friday Agreement did not effect an immediate cessation of bombing by terrorist fringe groups. Rail line explosions near the Northern Ireland-Republic of Ireland border caused a disruption of services in early May 1998. That same weekend, the annual Belfast marathon was rerouted at the last minute because of a failed mortar bomb attack on an RUC station, which was located on the originally scheduled route.⁶⁰

The two weeks preceding the Protestant celebration of the July 12, 1690, Battle of the Boyne⁶¹ were disappointingly violent in

58. See JACKSON & DORAN, *supra* note 1, at 276-279, for an explanation of this view. They quote the Lord Chief Justice's opinion in *R v Donnelly*, 4 NIJB 70 (1986): "[E]xperience in Northern Ireland has shown how much greater in a Diplock trial are the appellant's opportunities of persuading the Court to interfere than when the appeal is from sphinx-like verdict of a properly directed jury, which does not have to give reasons for its verdict."

59. Ric Clark, *The Jail Gunmen*, BELFAST NEWS LETTER, Jan. 13, 1998, at 1, col. 2-5.

60. *Bombers Hit Back*, BELFAST NEWS LETTER, May 5, 1998, at 1, col. 3-7.

61. See *supra* note 11.

1998. Due to eruptions in prior years, the Northern Ireland Parades Commission banned a controversial segment of the Order of the Orange parade. This march would have crossed through the small Catholic village of Drumcree, which lies adjacent to the larger predominantly Protestant town of Portadown. Nearly 19,000 British soldiers were called in to handle the vociferous adamant Protestant opposition to the ban, and a standoff ensued. Gasoline bombs were tossed into crowds, barricades and motor vehicles were burned, and both policemen and bystanders were injured.⁶²

Perhaps the most brutal, and surely the most publicized act of violence in July 1998, was the fire-bomb explosion of a house in the small Northern Ireland town of Ballmoney which killed three brothers, ages seven, nine, and ten.⁶³ The assumed motive for targeting this particular house was that the boys' Catholic mother cohabited with a Protestant man.⁶⁴

The next most publicized attack occurred the following month. On August 15, 1998, the "real Irish Republican Army"⁶⁵ planted a car bomb in the small town of Omagh, killing and wounding 220, mostly women and children. This latest act of terrorism has likely had the effect of solidifying the curtailment of criminal defendants' rights, the backbone of the Diplock process. If the Diplock trial is responsive to terrorist activity, the continuation of terrorism by implication will affirm the need for the juryless Diplock process.

Taoiseach (Prime Minister) Bertie Ahern of the Republic of Ireland called an emergency session of his cabinet which approved a restriction of the right to bail for terrorist suspects, empowered judges to infer guilt from a refusal to respond to

62. See *Blair Will mit Oranierorden Sprechen*, SÜDDEUTSCHE ZEITUNG, July 8, 1998, at 6, col. 3-6.

63. RICHMOND TIMES-DISPATCH (LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE), July 13, 1998, at 4, col. 3-6.

64. *Three Brothers are Buried*, RICHMOND TIMES-DISPATCH, July 15, 1998, at 4, col. 2-4.

65. This splinter group bitterly opposed the IRA's 1997 announced truce and its general acceptance of the Good Friday Peace Agreement, and accordingly broke away in order to maintain the earlier militant stance of the IRA.

questioning, and extended of the current permissible time to hold a terrorist suspect without formally charging him from 48 hours to 72 hours.⁶⁶

IV. CONCLUSION

Although the Diplock trial was instituted as an emergency — and therefore a temporary — measure in 1973, the system of dispensing with jury trials on matters of sectarian terrorism persists. Northern Ireland's departure from the usual common law criminal procedure in serious charges has clearly been one of the most radical of the means used to cope with the escalating violence throughout the country.

John Jackson and Sean Doran have called Northern Ireland a “kind of [constitutional] laboratory” in which the Diplock trials have been used to “superimpose extraordinary and alien features onto the conventional legal system.”⁶⁷ These measures are indeed alien to the American lawyer, for whom the right to trial by jury in such cases is sacred.

There is no discernible consensus among bench and bar in Northern Ireland as to whether the Diplock trial functions as a means toward the laudable goal of dealing with violence in the most effective and expeditious manner. Despite the progression toward a lasting peace in the first half of 1998, the non-jury trial has endured for over 25 years, and it is unrealistic to assume that all of the paramilitary sectarian groups would become pacifists overnight in obedience to the settlement and the vote of the people.

The road to peace will be a protracted one, regardless of the euphoria which immediately followed the referendum results. Northern Irishman Brendan O'Leary, Professor of Political Science at London School of Economics and political

66. *Irish Anti-terrorist Laws to be Tightened; 16 Buried*, RICHMOND TIMES-DISPATCH, Aug. 20, 1998, at A-4, col. 3-5. This attack resulted in more carnage and killings than any other in the 30-year modern history of the “troubles.”

67. JACKSON & DORAN, *supra* note 1, at 13.

commentator for the British media, has addressed the potential success for the home-rule assemblies in Scotland and Wales, and prophetically, now in Northern Ireland. O'Leary's admonition is that the participants must learn from the past. He has expressed his philosophy that "[a] nation is built on successful forgetting, as well as successful remembering."⁶⁸ It is perhaps the forgetting that is the most difficult, and at least some residual violence, even terrorism, is anticipated.

The position of the majority of Northern Irish citizens is that the Diplock system is imperative as long as the violence and terrorism continues. If this view is also the general will of the Westminster Parliament (and new Assembly), it is dubious to expect any serious efforts to revisit the wisdom of the Diplock experiment.

68. Remarks to United Kingdom Fulbright Association, Westminster Parliament Buildings in London, Jan. 29, 1998.

APPENDIX

NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1996**SCHEDULE 1 PART 1 NOTE 1****CERTIFICATE OF THE SOLICITOR GENERAL**

In the case of Mickey Murphy of 202 Ballybunion Road, **Enniskillen**; Molly Malone of 202 Ballybunion Road, **Enniskillen**; Cornelius O'Brien of 10 Lisburn Park, **Enniskillen**, Seamus McConnell of 439 Stranmillis Gardens, **Enniskillen**, who stand jointly charged with the following offence:

That they, on the 18th day of August 1996, in the County Court Division of Fermanagh and Tyrone, assaulted Sean O' Malley, thereby occasioning him actual bodily harm, contrary to Common Law and section 47 of the Offences Against the Person Act 1861.

I, SIR DEREK SPENCER QC MP, Her Majesty's Solicitor General, acting in exercise of the powers conferred upon me by section 10(3) of the Northern Ireland Constitution Act 1973 do hereby certify in respect of the said offence that it is not to be treated as a scheduled offence.

Derek Spencer

Dated this 5th day of September 1996

