

United Kingdom

The year was marked by developments that could constitute a fundamental change in the judicial system. The diverse role of the Lord Chancellor came increasingly into question and accepted judicial appointment procedures were challenged. The majority of political attention was focused on the Pinochet case and the affirmation by the House of Lords of his lack of immunity for certain crimes. Northern Ireland remained in a transitory stage. There were several developments that improved the focus on human rights, but lawyers remain under serious threat.

The United Kingdom of Great Britain and Northern Ireland (UK) is a constitutional monarchy with a democratic, parliamentary government. It does not have a single written constitution, rather its constitutional law is made up of a combination of statute, common law and unwritten practices and traditions called conventions.

The UK system of government is based on the principle of parliamentary sovereignty. The parliament consists of the monarch, the House of Commons and the House of Lords, however most power lies with the House of Commons. The House of Commons is a directly elected chamber consisting of 659 members who serve for a five-year term. The House of Lords is an unelected chamber which can initiate and revise legislation and also examines government activities. Most legislation originates in the House of Commons and usually requires the assent of both houses of parliament and the monarch. By convention the House of Lords, at a second or third reading, will not vote against a government bill contained in the government's election manifesto.

The executive authority is vested in the monarch and is exercised on behalf of the monarch by the government. The monarch appoints the Prime Minister, who by convention is always the leader of the party with the majority in the House of Commons, and other members of the Cabinet on the recommendation of the Prime Minister. Most ministers are members of the House of Commons, although the Lord Chancellor, the head of the judiciary, is always a member of the House of Lords. The monarch's role in the constitutional system is largely symbolic.

A bill abolishing hereditary peers in the House of Lords was passed in November 1999. The bill reduced membership of the House of Lords to 670 members, consisting of 92 former hereditary peers elected in internal House of Lords elections, and all former life peers and clergy members. The interim chamber, now consisting of approximately 700 members, will sit pending final reform, which is likely to be based on the report of the Wakeham Royal Commission. The Wakeham Commission published its report in January 2000. Broadly it recommended that the House be given certain extra responsibilities and that it be made more representative of British society through a combination of elected members and other members appointed by an independent commission.

Much of the political attention in 1999 focused on the devolution of powers from the UK Parliament to regional parliaments and assemblies in Wales, Scotland and Northern Ireland. Devolved powers were formally transferred to the Welsh and Scottish administrations on 1 July 1999, and to the Northern Ireland administration on 2 December 1999, although this was later revoked. The devolution process has resulted in a complicated network of competences shared between the national and regional parliaments and assemblies.

The Home Secretary, Mr Jack Straw, decided on 2 March 2000 not to extradite General Augusto Pinochet to Spain to face charges of torture, due to unfitness to stand trial. (see chapter on Chile)

The Judiciary

Three legal systems operate within the UK governing the areas of England and Wales, Scotland, and Northern Ireland, all following the common law tradition. Laws passed by the UK parliament can apply to these areas uniformly, or may apply to one or more specified areas individually. With the devolution of powers, regional parliaments and assemblies also have the power to legislate in specific areas. The UK's membership of the European Union also shapes the development of the legal system. The Lord Chancellor, a member of the executive and the Speaker of the House of Lords, is the head of the judiciary in England and Wales.

The European Courts

As parties to the treaties of the European Communities and the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), the United Kingdom is subject to the jurisdiction of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). These courts hear cases alleging violations of the provisions of the treaties of the European Union and the Convention, respectively. Individuals can directly petition the ECHR, however, the ECJ only hears cases referred to it by domestic courts for a determination of the law. Individuals asserting violations of the Convention must first exhaust domestic remedies.

With the expected coming into force of the Human Rights Act 1998 in October 2000, most of the fundamental rights contained in the Convention will be able to be directly invoked in UK courts.

The House of Lords

The House of Lords is the final court of appeal for all the legal systems of the United Kingdom. In England, Wales and Northern Ireland appeals can be heard in civil and criminal matters from the Court of Appeal, and in criminal matters from the Divisional Court of the Queens Bench Division of the High Court and the High Court in Northern Ireland. Appeals can be heard from the Scottish Court of Session only in civil matters. Leave to appeal must be given by the House of Lords or by the previous court whose order is being appealed. Cases are heard by an Appellate Committee of the House of Lords consisting of five Law Lords (Lords of Appeal in Ordinary) or in cases of exceptional difficulty, seven Law Lords.

England, Wales and Northern Ireland

The court systems in England, Wales and Northern Ireland are relatively similar. The Magistrates Court is the court of first instance and hears the majority of minor criminal cases and other minor family and administrative cases. Cases in this court are heard by a panel of at least two lay magistrates, members of the public without legal qualifications, who are assisted by a legal clerk who advises them on points of law. Cases can also be heard by a stipendiary magistrate, who has a legal qualification, sitting alone. Appeals from this court lie to the

Crown Court and, in England and Wales, on matters of law to the Divisional Court of the Queens Bench Division of the High Court.

The Crown Court hears trials for serious criminal offences and appeals from summary decisions of Magistrates Courts. Trials in this court are heard by a single judge and a jury, and appeals, on facts and law, lie to the Criminal Division of the Court of Appeal if either court grants leave.

County Courts deal with minor civil matters. These are cases involving a civil claim of less than £25,000 (£15,000 in Northern Ireland), or a personal injury claim of less than £50,000 (£15,000 in Northern Ireland). The cases are heard by a single judge. Decisions of the County Court can be appealed to the High Court.

The High Court and the Court of Appeal, together with the Crown Court, constitute the Supreme Court. The High Court deals mostly with substantial civil claims in contract, tort, property or family matters. The court is divided into three divisions; the Family Division, the Chancery Division and the Queens Bench Division. Cases are heard by a single judge. A divisional court of the Queens Bench Division, usually composed of two judges, hears applications for judicial review. The Court of Appeal is divided into civil and criminal divisions and hears all cases on appeal from lower courts. The court can give leave to appeal to the House of Lords.

Scotland

The existing Scottish court system was preserved under the Act of Union 1707, and continues to exist independently. Scotland is divided into 6 Sheriffdoms and the courts in these areas operate as the main court of first instance and hear civil, criminal and commissary (probate) cases. The court hears civil cases involving claims of less than £1,500 and can deal with criminal offences summarily or by jury trial. Cases are mostly heard by a single sheriff and appeal lies from this court to the High Court of the Justiciary in criminal matters, or to the Court of Session for civil matters. Appeals in civil matters can initially be heard by the Sheriff Principal. The High Court of Justiciary hears serious criminal cases, such as murder or armed robbery, and criminal appeals from lower courts. Trials in these cases are heard before a judge and a jury. The Court of Session is divided into an Outer House and Inner House. The Outer House hears larger civil claims, whilst the Inner House mostly hears civil appeals from lower courts or from the Outer House. Cases in the Outer House are usually heard by a division of three judges. Appeals lie from this court to the House of Lords.

Judges

Judges are generally independent and free to decide cases impartially without any improper influences, threats or interferences. The UK constitutional system does not guarantee the independence of the judicial body as a whole through the doctrine of separation of powers, but rather it provides guarantees for the independence of individual judges through their tenure and conditions of work. Responsibility for the judiciary lies with the Lord Chancellor who is a judge, a minister and a member of the House of Lords. In accordance with the Act of Union 1707 the Scottish courts have their own judicial bench, although senior members of the Scottish bench may be appointed as Law Lords in the House of Lords.

Appointment

Judges are appointed by the monarch on the recommendation of either the Prime Minister or the Lord Chancellor. Lords of Appeal in Ordinary, the Lord Chief Justice, Lord Justices of Appeal, the Master of the Rolls, the President of the Family Division and the Vice Chancellor are appointed by the monarch on the advice of the Prime Minister who receives advice from the Lord Chancellor. Other members of the judiciary such as High Court judges, Deputy High Court judges and Recorders are appointed by the monarch on the advice of the Lord Chancellor. Magistrates are appointed directly by the Lord Chancellor. Although formally appointment requires the consent of the monarch, by convention this consent is always given. Effectively, the Lord Chancellor exercises direct influence and control over which candidates are appointed.

The preliminary selection procedure for judicial candidates is conducted by the Lord Chancellor's Department. The Judicial Group within the Lord Chancellors department is responsible for the administration of the appointments system, but the final decision to nominate or appoint is made by the Lord Chancellor. The Lord Chancellor is guided by the principles that appointment should be strictly on merit; part time service is a prerequisite for full time appointment; and that significant weight will be placed on the independent views of others regarding suitability for appointment. The selection procedure involves interviews, consultation with individual barristers and solicitors and their respective professional associations, and other senior members of the judiciary.

The Lord Chancellor's reliance on independent opinions, often gathered informally, for appointments to higher courts, results in a selection process that lacks transparency. This prevents an independent evaluation of the credibility of those opinions that are sought, the factual basis for the opinion or of the relative reliance that the Lord Chancellor placed on the guiding criteria. An inquiry established by the Lord Chancellor, headed by Sir Leonard Peach, recommended in December 1999 that an Independent Commissioner for Judicial Appointments be established and that there be increased transparency in the selection procedure. The terms of reference of the Peach Commission excluded consideration of the feasibility of an independent appointments system.

In the Scottish Courts appointments are governed by Section 95 of the Scotland Act 1998. The Lord President of the Court of Session and the Lord Justice Clerk are appointed by the monarch on the recommendation of the Prime Minister. The Prime Minister is required to recommend only those that have been nominated by the First Minister of Scotland for appointment. Other members of the Court of Session, sheriff's and sheriff's principals are appointed by the monarch upon recommendation of the First Minister. During the selection process the First Minister is required to consult the Lord President and the Lord Justice Clerk. Authority to appoint temporary sheriffs is granted to the Secretary of State for Scotland by the Sheriff Courts (Scotland) Act 1971. In practice, the Lord Advocate is responsible for the evaluation and nomination procedure and by convention the responsible parties always act upon the advice of the Lord Advocate.

Removal

The Act of Settlement 1701 provides that judges are to hold office on the condition of good behaviour. Judges can only be removed by the monarch, acting on advice of ministers, either following a conviction for a serious offence or official misconduct, or upon an address to both houses of parliament. This provides judges with life tenure and enables them to exercise

the judicial function free from executive interference. Members of the lower judiciary, to the level of Circuit Court judge, can be removed for misconduct by the Lord Chancellor.

The Lord Chancellor is also empowered to make temporary appointments, such as deputy High Court judges, assistant recorders, acting stipendary magistrates, and members of various judicial tribunals. These appointments do not have life tenure and, as will be discussed later, are more subject to executive influence and may constitute a violation of the right to an independent and impartial tribunal.

Human Rights Act

The Human Rights Act 1998 is expected to come fully into force in October 2000. Currently only Sections 18, 19, 20 and 21(5) are in force. None of these provisions provide for the invoking of the rights contained in the Convention within the United Kingdom domestic legal system. However as a result of the devolution process, the Convention rights can already be invoked in domestic proceedings in Wales, with respect to actions of the Welsh Assembly, and in Scotland with respect to actions and legislation of the executive and the assembly.

The ability to rely on rights contained in the Convention in domestic proceedings has implications for the current structure of the judiciary within the United Kingdom. In particular, Article 6(1) of the Convention entitles everyone to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The European Court of Human Rights (ECHR) in *McGonnell v The United Kingdom* (8 February 2000) reaffirmed the requirements for independence and impartiality contained in its decision in *Findlay v The United Kingdom* (25 February, 1997). For a tribunal to be regarded as independent regard must be given to, inter alia:

- * the manner of appointment of its members and their term of office
- * the existence of guarantees against outside pressures
- * the question whether the body presents an appearance of independence for the requirement of impartiality,
- * the tribunal must be subjectively free of personal prejudice or bias
- * and it must also be impartial from an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt.

Therefore, the criteria for independence and impartiality consist of both subjective and objective factors. A tribunal must not only be actually independent, it must also appear to be independent. These requirements have implications for the current appointment procedure for judges and for the unique position of the Lord Chancellor within the United Kingdom Constitutional System.

Temporary Appointments

As stated earlier the Lord Chancellor plays a central role in the nomination and appointment of judges. These powers extend to the making of temporary appointments. Section 57(2) of the Scotland Act 1998 provides that a member of the Scottish executive has no power to perform an act insofar as it is incompatible with any of the Convention rights, i.e. those rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms that will be given effect through the Human Rights Act 1998.

In *Starr and Chalmers v Procurator Fiscal, Linlithgow* (Nos. 1798/99, 1799/99, 2006/99, 11 November 1999), a decision of the Appeal Court of the High Court of the Justiciary in Scotland, the court ruled that a temporary sheriff was not an independent and impartial tribunal as required by Article 6(1) of the Convention. Section 11(2) of the Sheriff Courts (Scotland) Act 1971 allows the Secretary of State for Scotland to appoint a person to act as a sheriff for any reason that it appears expedient to do so, to avoid a delay in the administration of justice.

Although the act refers to the Secretary of State, now the responsibility of the First Minister due to the devolution of powers, a critical role is played by the Lord Advocate. The Lord Advocate decides that temporary sheriffs are required; assesses applicant suitability with respect to certain criteria, including whether the applicant is suitable for a permanent appointment; consults other officials including the Lord President, and then provides a list of candidates to be appointed. Appointments are made for one year, and as a general rule are renewed for successive periods of a year. However, the Lord Advocate can at his/her discretion choose not to renew if the temporary sheriff did not serve for a minimum of twenty days per annum, or for reasons of illness or misconduct, or can simply refuse to use the person as a matter of administrative practice. Reasons are usually not given. However, the Lord Advocate has no control over where a temporary sheriff hears cases.

The court found that the lack of security of tenure of temporary sheriffs, and the unfettered power of recall, does not constitute a sufficient appearance of independence and impartiality. The Lord Justice Clerk stated that "the use of the one year term suggests a reservation of control over the tenure of office by the individual" and that "the power of recall under Section 11(4) is incompatible with the independence and the appearance of independence of the temporary sheriff." Lord Reid reasoned that "the system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the executive when his appointment comes up for renewal: in short, a relationship of dependency."

This identifies that the issue is not only that the executive may seek to directly influence a person who has been appointed for a temporary period, but that the shortness of tenure can result in the exertion of more subtle indirect influences over the exercise of judicial power.

This case is equally applicable to the use of temporary appointments by the Lord Chancellor in England and Wales, such as deputy High Court judges, assistant recorders and acting stipendiary magistrates. The Lord Chancellor clearly states in his selection criteria that part time service is a prerequisite for a full time appointment. Equally, periods of temporary service will be important for a future career in the judicial service.

The Lord Chancellor's central role in the appointment process and the fact that he is a senior member of the executive increases the perception that a person appointed for a temporary period may be influenced by extraneous considerations and is not sufficiently independent. The fact that the Lord Chancellor does not seek to influence temporary members of the judiciary is not sufficient to ensure an independent and impartial tribunal. The point is neatly summarised by Lord Reid in his judgement in *Starr and Chalmers v Procurator Fiscal, Linlithgow*:

The adequacy of judicial independence cannot appropriately be tested on the assumption that the executive will always behave with the appropriate restraint: as the European Court of

Human Rights has emphasised in its interpretation of Article 6, it is important that there be guarantees against outside pressures.

Temporary appointments to tribunals by other persons could equally violate Article 6(1). Lay members of the Employment Appeals Tribunal are appointed by the Secretary of State on a short term basis. In *Secretary of State for Trade and Industry v Mr T. Smith* (11/10/99), the Employment Appeals Tribunal held that once the Human Rights Act is in force "there is a real and troubling question as to whether employment tribunals may properly and lawfully adjudicate on claims made against the Secretary of State."

On 4 April 2000, the Scottish Court of Session, in *Clancy v Claird* (No 0199/6/97), ruled that the use of temporary judges did not necessarily violate Article 6(1) of the Convention. In that case, the court found that the judges' three year period of appointment was not unreasonably short; the judges were not vulnerable to dismissal in the course of their employment; they enjoyed the same status as other judges and were subject to the same procedures; and they did not sit in sensitive cases involving the state.

The Lord Chancellor announced, on 12 April 2000, new rules regarding the service of part-time judicial office holders. The rules apply to a wide range of part-time appointments made by the Lord Chancellor to courts or tribunals, and appointments made by the Secretary of State for Social Security and the Chancellor of the Exchequer. Part-time appointments will now be for a minimum period of 5 years and will be renewed automatically except in the case of, inter alia, misbehaviour, incapacity, persistent failure to comply with sitting requirements without good reason or due to a reduction in numbers because of changes in operational requirements. Part-time appointees can also be removed on the same basis. The decision to remove or not to renew an appointment will be taken by the Lord Chancellor only with the concurrence of the Lord Chief Justice, following an investigation by a judge.

The Lord Chancellor

In the case of *McGonnell v the United Kingdom* (8 February 2000), the European Court of Human Rights ruled that Article 6(1) of the Convention had been violated as the Bailiff of Guernsey's position within the constitutional framework of Guernsey was sufficient to cast some doubt on his judicial impartiality.

The Bailiff of Guernsey plays a central role within most government institutions and is effectively head of the legislature, the executive and the judiciary. As President of the States of Deliberation, the legislative body, the Bailiff is responsible for advising the legislature on constitutional matters, participating in debates and has a casting vote if the chamber is evenly divided. As head of the judiciary the Bailiff is President of the Royal Court and President of the Court of Appeal. The Bailiff hears cases and advises lay jurats on questions of law who then decide the case. The jurats are elected by the States of Election, of which the Bailiff is also President. The European Court stated, without advocating any particular constitutional doctrine, that

any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue. (paragraph 52)

In a concurring judgement, Sir John Laws stated that a violation had taken place only because the Bailiff had presided over the passage of the legislation that was at issue in the judicial proceedings. This view is also expressed in the main judgement. He emphasised that he would firmly dissent from an interpretation of paragraph 52 that would place a violation of Article 6(1) "on any wider basis, having regard to the Bailiff's multiple roles."

The Lord Chancellor occupies a somewhat similar position within the UK constitutional system. As head of the judiciary the Lord Chancellor is the head of the Supreme Court of England and Wales and is the Presiding Chairman of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. He delegates the responsibility of selecting Law Lords to hear individual cases to the senior Law Lord, but has the final deciding power. The Lord Chancellor can sit on any cases he chooses, only subject to common law requirements of fairness, although he rarely does so.

The Lord Chancellor is also the Speaker of the House of Lords and introduces and speaks in support of legislation on behalf of the government. He has full voting rights within the House of Lords. Finally, the Lord Chancellor is a senior minister within the executive with responsibility for the administration of justice. The Lord Chancellor has no security of tenure and holds office at the discretion of the Prime Minister.

Whilst not arguing that the Lord Chancellor acts in a biased manner, objectively, his executive and legislative responsibilities conflict with the exercise of judicial power and the maintenance of the independence of the judiciary. The lack of any security of tenure, and his central role within the executive fail to provide any objective guarantees that the Lord Chancellor will be free from improper influences in exercising his judicial functions.

Although by convention the executive does not attempt to influence the judicial process or members of the judiciary, this is not a "sufficient guarantee" as required by the court in *Findlay v The United Kingdom* (25 February 1997). The participation of the Lord Chancellor in the judicial process is sufficient to raise a legitimate doubt that the tribunal is not impartial.

Although, due to changes in the operation of the House of Lords, it is rare that the Lord Chancellor sits in a judicial role, he makes the final decision whether to sit in any case. It is possible to rely on the Lord Chancellor to recuse himself when he perceives there may be a conflict of interests, but the absence of any specific guidelines or requirements as to when he should do so does not promote the appearance of independent and impartial decision making.

Furthermore, the participation of other Law Lords in the legislative process may be sufficient to cast doubt upon their objective impartiality in particular cases involving the interpretation of a piece of legislation. As members of the House of Lords they may be called upon to participate in debates, give opinions on legal matters and vote on legislation, and therefore are directly involved in the passage of legislation. This potentially gives them an advisory and a judicial function in respect of the same decisions. This may particularly be the case where there is a question of incompatibility with Convention rights as defined in the Human Rights Act 1998. This doubt may be vitiated by the fact that at least five Law Lords will hear a case before the House of Lords, so one judge will not be solely responsible for the interpretation of a law.

On 2 March 2000, the Lord Chancellor announced that he would take care not to sit in cases that would violate Article 6 of the Convention, and recommended that Law Lords exercise

circumspection when participating in debates in the House of Lords. Furthermore, in April 2000 the Lord Chancellor announced the creation of a new post of Senior Law Lord, to head the Appellate Committee of the House of Lords, to which the Lord Chief Justice was appointed.

Pinochet Case

Concerns have been raised about the potential ramifications of the judgement by the House of Lords in *In Re Pinochet*. It was not clear from the judgement what kinds of activities would be sufficient to ground a claim of judicial bias. The response to this has been an increase in the number of challenges by litigants to the independence and the impartiality of the court in their proceedings. This has led to a wider public debate regarding the situations in which a judge's personal interest would be sufficient to disqualify them in a particular case. Some concerns have been raised that judges will be excluded from participating in a range of activities, such as human rights, that may increase the potential for allegations of bias. In a recent decision by the Court of Appeal, *Locabail v Bayfield Properties and others* (17/11/99), it was held that judges should only recuse themselves if there is a "real danger or possibility of bias."

Access To Justice

As part of the government's program of modernising the justice system in the UK, the Access to Justice Act 1999 was passed on 27 July 1999 (see *Attacks on Justice 1998*). This act contains substantive reforms to the legal aid system, replacing the Legal Aid Board with a Legal Services Commission (LSC). The LSC will manage the bodies directly responsible for the provision of services, the Community Legal Service and a Criminal Defence Service. The act will eventually limit the provision of legal aid services to lawyers employed directly by one of the services or other lawyers contracted to the Legal Services Commission.

Lawyers in the UK have been particularly concerned by the extent of control that the Lord Chancellor has over the determination of priorities, access and maximum costs that can be charged under the new system. The ability to set priorities allows the Lord Chancellor to limit the funding of cases in sensitive areas such as immigration, asylum and public law in general. Further, the exclusive contracting system inhibits the provision of legal aid services by new firms and the development of new areas of law. These provisions allow the Lord Chancellor's Department to influence the type, extent and quality of the legal service that lawyers can provide.

Section 47 of the act also allows the Lord Chancellor to make an order to amend Section 11(3) of the Solicitors Act 1974, which allows the Law Society to use the fees raised from the profession for any of its purposes. Under the current arrangements fees paid to the Law Society for obtaining a licence to practice law and from those lawyers who become members of the Law Society are pooled into the same fund. Section 47 will allow the Lord Chancellor to specify that licence fees can only be used for the purposes of regulation, education and training, or any other such purposes that the Lord Chancellor considers appropriate. Concerns were raised that this would inhibit the ability of the Law Society of England and Wales to represent the profession's interests.

The Lord Chancellor responded to a letter from the International Bar Association regarding these concerns, stating that he felt it was "wrong in principle that solicitors should be

compelled to pay for activities which they do not support, which relate to the Law Society's representation or trade union activities, or which have no wider public interest." He further stated that he would consult with the Law Society and that no order would be made under this provision for at least eighteen months.

Northern Ireland

In Northern Ireland, after protracted negotiations regarding the establishment of power sharing institutions and a timetable for weapons decommissioning, a Cabinet was formed on 29 November 1999. The Cabinet consisted of four Ulster Unionist Party, four Social Democratic and Labour Party, two Democratic Unionist Party, and two Sinn Fein members. On 2 December 1999 the UK parliament formally transferred powers and the 1998 Good Friday Agreement was enacted between the UK and Irish Governments. The North-South Ministerial Council and the Council of the Isles, established under the Good Friday Agreement, held their inaugural meetings on 13 and 17 December 1999 respectively (see *Attacks on Justice 1998*).

In February 2000 after a report by General John de Chastelain, head of the Independent International Commission for Decommissioning, noting the failure of the IRA to decommission any weapons, the institutions established under the devolution process were suspended.

Harassment of Lawyers

Attacks on Justice has reported on the systematic harassment of lawyers by RUC officers in Northern Ireland since 1989. The Special Rapporteur on the Independence of Judges and Lawyers concluded in his report of the 5 March 1998 (E/CN.4/1998/39/Add.4) that harassment resulted from the RUC identifying lawyers who represent those accused of terrorist related offences with their clients' causes. The harassment ranges from interference with the solicitor/client relationship, to physical violence, and death threats. In two cases, lawyers have been murdered by unknown assailants. The tragic murders of Rosemary Nelson in March 1999 and Patrick Finucane in February 1989 still remain unsolved.

The developments in the peace process and the introduction of audio recording have led to a decrease in cases of harassment of lawyers. However, harassment still continues in Northern Ireland. It has been reported that police continue to issue threats outside the interview procedure and even when recording is taking place. As a result of continuing harassment some lawyers have sought protection under the Key Persons Protection Scheme provided by the Northern Ireland Office. This scheme had several faults, including a risk assessment by the RUC, the people often responsible for the threats. The system has been improved in some respects, with a home security assessment, part of the evaluation for eligibility, now carried out by a private security firm, rather than by the RUC.

Although some lawyers have been granted protection under the scheme, others continue to be denied access, despite them being active in defending those accused of violent activities. Governments are required to safeguard lawyers when their security is threatened in the discharge of their functions. With the obvious threat to the lives of lawyers in the Northern Ireland criminal justice system, protection should be granted under the scheme.

The Independent Commission on Policing and the Criminal Justice Review

The Independent Commission on Policing for Northern Ireland, established under the 1998 Good Friday Agreement, delivered its report in September 1999. The Commission, chaired by Mr Chris Patten, was mandated to formulate proposals for future policing arrangements and to develop policies to encourage widespread community support. The report was welcomed by the Secretary of State for Northern Ireland, the Rt. Hon Peter Mandelson, who indicated that the government would implement the majority of the report's recommendations.

The report stated that the fundamental purpose of policing should be the protection and vindication of the human rights of all and recommended a program of action to focus policing on a human rights based approach. This included recommendations for a new police oath and code of ethics, human rights training for police officers and that a lawyer with specific expertise in the field of human rights be appointed to the staff of the police legal service. The Commission also recommended the renaming of the police force from the Royal Ulster Constabulary (RUC) to the Northern Ireland Police Service.

However, the report failed to explicitly address police harassment of lawyers. Lawyers in Northern Ireland have been subject to verbal and physical harassment, stemming from improper association with their clients' causes. It is important that police officers be educated about the role that lawyers play in protecting their clients' interests and upholding human rights values. All accused have the right to legal assistance and lawyers must be able to perform their tasks free from hindrance. Greater consultation should be encouraged between lawyers and police as a means of increasing awareness of human rights issues.

In October 1999, Ms Nuala O'Loan was appointed as Police Ombudsman. This office will replace the Independent Commission for Police Complaints. Ms O'Loan will be responsible for investigating complaints regarding the conduct of police officers.

The Review of the Criminal Justice System of Northern Ireland (March 2000) addressed the harassment of lawyers and emphasised that legal assistance is a primary measure of ensuring the protection of the human rights of people accused of criminal offences. The review also stated:

that government has a responsibility to provide the machinery for an effective and independent investigation of all threats made against lawyers and note the role of the Police Ombudsman if such allegations relate to the actions of police officers ... (and) that training seminars should be organised to enable police officers and members of other criminal justice agencies to appreciate the important role that defence lawyers play in the administration of justice and the nature of their relationship with their clients.

The International Commission of Jurists (ICJ) and the Centre for the Independence of Judges and Lawyers (CIJL) organised a workshop on the criminal justice review in June 1999. The workshop was a closed meeting attended by members of the Criminal Justice Review Group, the Special Rapporteur on the Independence of Judges and Lawyers, Lord William Goodhart (House of Lords), Justice Michael Kirby (High Court of Australia), and representatives of various ICJ sections.

Human Rights Mechanisms

The Good Friday Agreement mandated the establishment of a Northern Ireland Human Rights Commission (NIHRC), which was established on 1 March 1999, consisting of commissioners appointed by the Secretary of State for Northern Ireland. The NIHRC is mandated to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights, to assist individuals in bringing cases to enforce their rights, and in limited circumstances it can institute proceedings itself. The NIHRC also is to play a central role in the development of a Bill of Rights containing rights supplementary to the Convention reflecting the particular situation in Northern Ireland. However, considering the scope of its functions, the Commission is inhibited from a full and effective performance due to a limited annual budget of £750,000.

Audio Recording of Interviews

In May 1999, a code of practice regulating the audio recording of police interviews of suspects held under emergency laws was introduced. The code applies to persons detained under Sections 14(1)(a) or (b) of the Prevention of Terrorism (Temporary Provisions) Act 1989. The code sets out detailed recording procedures for interviews ensuring that the entire interview is recorded, that all people present in the interview identify themselves and that the recordings cannot be tampered with. However, it does grant the interviewing officer the discretion to not record the interview when it is impracticable to do so, or they consider on reasonable grounds that the interview should not be delayed. This potentially leaves the system open to abuse, without proper guidelines of what are reasonable grounds.

On 13 December 1999, the closure of Castlereagh Holding Centre was announced. The CIJL had frequently called on the UK Government to close this centre, as it had been the site of many human rights violations by the police and security forces, including the making of threats against the safety of lawyers. However, two other detention centres in Derry and Armagh remain open. Audio and video recording equipment has been installed at these locations.

Terrorism

The government introduced a new Terrorism Bill into the House of Commons on 2 December 1999. This bill is intended to replace the Prevention of Terrorism (Temporary Provisions) Act 1989, the Northern Ireland (Emergency Provisions) Act 1996, and Sections 1 to 4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998. The new legislation will be permanent once enacted and will apply uniformly throughout the UK.

The bill defines terrorism as the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which involves serious violence against any person or property; endangers the life of any person; or creates a serious risk to the health or safety of the public or a section of the public. The new bill applies to acts of terrorism throughout the world.

In light of the continuing terrorism problems in Northern Ireland the government included in Part VII of the bill special provisions relating to that area. Clause 111 of the bill specifies that this part will cease to have effect one year after coming into force, but it may be renewed for twelve month periods by the Secretary of State for Northern Ireland for up to five years. Part VII continues the operation of the Diplock Courts which deny those accused of scheduled offences of trial by jury. The provisions regarding detention without warrant have been

improved, only allowing an initial period of detention for 48 hours. Any extension of detention must then be authorised by a judicial authority. However, there is no provision for access to legal counsel during detention, except in the case of persons detained in Scotland.

The Criminal Evidence (Northern Ireland) Order 1988, which allows negative inferences to be drawn from the accused's silence, was modified by the Criminal Evidence (Northern Ireland) Order 1999. Article 36 provides that these negative inferences may not be drawn if the accused was not allowed an opportunity to consult a solicitor prior to questioning. However, under emergency laws, there is still no right for the suspect to have access to legal counsel during questioning.

Cases

Patrick Finucane *lawyer*: Mr Finucane was murdered in front of his family on 12 February 1989 (see *Attacks on Justice* 1990 onwards). The Deputy Commissioner of the London Metropolitan Police, Mr John Stevens, was placed in charge of the reopened murder investigation in March 1999. Mr Stevens had already headed two previous investigations into Mr Finucane's murder. As a result of the reopened investigation, eleven suspects were arrested, with four being eventually charged.

Mr William Stobie, one of those charged, was arrested in June 1999 and charged with murder. During his arraignment Mr Stobie stated that at the time of Mr Finucane's death he was a police informer for the Special Branch, as well as a member of the Ulster Defence Association, and on the night of the murder had given the Special Branch information that a person was to be shot. These allegations were detailed in an article in *The Sunday Tribune* by Ed Moloney on 27 June 1999. The article stated that Mr Moloney had first met Mr Stobie in 1990, and has met him on three further occasions since that time.

Mr Stobie alleges that a week before the murder of Mr Finucane he informed the Special Branch that someone was to be killed, and that the commander of the operation was well known to the police. On the night of the murder he also informed Special Branch of the provision of guns for the murder and that he believed it to be imminent. He further alleges that after the murder an RUC Special Branch operation watched the disposal of the murder weapons without taking action. He believes this to be strong evidence that the RUC colluded in the murder of Mr Finucane.

News reports of 23 January 2000 state that six members of the Ulster Defence Association suspected of the murder of Mr Finucane have been identified and their case files delivered to the Director of Public Prosecutions for further action.

The CIJL, along with other human rights organisations, the NIHRC and the Special Rapporteur for the Independence of Judges and Lawyers has called for an Independent Judicial Commission of Inquiry into the circumstances of Mr Finucane's death.

Rosemary Nelson *lawyer*: Rosemary Nelson was murdered in a car bomb attack on 15 March 1999 (see *Attacks on Justice* 1998). Responsibility was claimed by The Red Hand Defenders, a dissident loyalist group. Ms Nelson had received death threats in the years preceding her murder, and many of her clients reported that members of the RUC had made threats against her safety.

On 10 January 2000, the Northern Ireland Office informed the Special Rapporteur on the Independence of Judges and Lawyers that, after consideration of the report of Commander Mulvihill, it had decided not to prosecute allegations of threats against Ms Nelson due to insufficient evidence.

Ms Nelson's murder investigation is being headed by Colin Port, Deputy Chief Constable of the Norfolk Constabulary in England. There are serious concerns about the independence of the investigation of Mr Port as he must report to the RUC Chief Constable. The investigation is also being carried out in RUC offices in Lurgan, where many threats were made against Ms Nelson, and makes use of members of the RUC. Although later efforts were made to reduce RUC involvement in the investigation, the initial stages were carried out almost entirely by RUC officers.

In December 1999, British Irish Rights Watch published a report regarding the murder of Ms Nelson. This report was strongly critical of the failure to provide adequate security, and provided evidence indicating official collusion in the murder of Ms Nelson. In light of this report, and the threats issued by the RUC against Ms Nelson, it is essential that an independent body be established to investigate the circumstances surrounding her murder.

The CIJL, along with other human rights organisations has called for an independent Judicial Commission of Inquiry to investigate the circumstances of Ms Nelson's death.