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Reconfiguring the pre-trial and trial processes in Ireland in the fight against organised crime

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Abstract This article describes and analyses the changes which have occurred to pre-trial detention and interrogation and to the trial process in Ireland as a result of the apparent threat posed by organised criminality. The templates for these measures often derive from extraordinary tactics first used against subversive paramilitary groups. However, while incursions have been made on protective procedural rights and rules, important safeguards remain which counterbalance such trends.

Keywords Due process rights; Rules of evidence; Organised crime; State of emergency

Recent years in Ireland have heralded increased concern about serious and organised crime¹ and a concomitant surge in legislative action. The notable rise in ‘gangland’ killings² and gun-related

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1 Although ‘criminal organisation’ was defined for the first time in s. 70 of the Criminal Justice Act 2006, terminology such as ‘organised crime’ was already in frequent use in legislative debates, political discourse and police and policy reports without any analysis of its precise meaning.

2 While ‘gangland killing’ generally refers to a planned homicide effected with the use of a firearm, the previous Minister for Justice, Equality and Law Reform (hereafter the Minister for Justice)

crime,³ coupled with low conviction rates⁴ and high-profile incidents, like the murders of Garda Jerry McCabe and journalist Veronica Guerin in 1996, have precipitated considerable political rhetoric and demands for legislative action.

The widely held belief in political and popular discourse is that the procedural rights which accrue to the individual suspect or accused must be reconsidered, as the undue concern with due process rights is to the detriment of the effective pursuit of crime control and the safety of the law-abiding public. The President of the Association of Garda Sergeants and Inspectors has stated that:

the criminal justice system has swung off balance to such an extent that the rules are now heavily weighted in favour of the criminal, murderer, drug trafficker and habitual offender.⁵

The Garda Commissioner has argued, to similar effect, that the system is:

in need of examination, with the burden of proof on the prosecution now set so high as to be, in most prosecutions, almost unachievable and the search for truth being sacrificed in a web of technicalities.⁶

The rights of the individual in the Irish criminal process

The threat of organised crime in Ireland has resulted in the abrogation of various rights of the accused throughout the criminal process. Although the Irish Supreme Court has stressed that ‘in accordance with the values on which our system of law rests, the acquittal of the guilty is not of the same order of injustice

noted that the term does not correspond to police classifications (see Dáil (lower house of Parliament) Debates, 13 April 2000, vol. 518, col. 388, *per* Minister for Justice, Mr McDowell). Nevertheless, the Minister has used such an expression himself (see e.g. Dáil Debates, 14 December 2006, vol. 629, col. 1677; and Department of Justice Press Release, 19 December 2006). 18.9 per cent of homicides in Ireland from 1972 to 1991 were committed with a firearm, and this figure increased to 27.3 per cent between 1992 and 1996. E. Dooley, *Homicide in Ireland 1972–1991* (Stationery Office: Dublin, 1995) 26; E. Dooley, *Homicide in Ireland 1992–1996* (Stationery Office: Dublin, 2001) 15.

- 3 The number of murders involving firearms has increased, while incidents of firearm possession and discharge of firearms have more than doubled since 2000. An Garda Síochána, *Annual Report of An Garda Síochána 2005* (Stationery Office: Dublin, 2006) 20 *et seq.*
- 4 From 1992 to 1996, there was a 20 per cent conviction rate for homicides related to gangland/organised crime, in comparison to 57.6 per cent for the study as a whole. See Dooley, above n. 2 at 16–17, table 12.
- 5 President of the Association of Garda Sergeants and Inspectors, ‘Submission to the Joint Committee on Justice, Equality, Defence, and Women’s Rights’, 8 December 2003.
- 6 ‘Garda chief warns on court “imbalance”’, *Irish Times*, 23 March 2005.

as the conviction of the innocent',⁷ the procedural rules which aim to protect the individual are not immutable. They can be altered to mirror an evolving understanding of the appropriate relationship between the State and the individual and the perceived effectiveness of the criminal justice system. As Galligan commented, '[p]rocedures are themselves deeply rooted in a social context and will reflect the beliefs and understandings prevailing in them'.⁸

Some of the rights which accrue to the individual in the Irish criminal process are being eroded by the imperatives of crime control and public protection in the fight against organised criminality. The most significant alterations to the pre-trial stage in recent years involve the issue of search warrants, the detention of the suspect, and the right to silence throughout interrogation. Moreover, during the trial, evidence from persons on the Witness Protection Programme is used, trials are held in non-jury courts, and previous inconsistent statements are increasingly admitted. Nevertheless, these changes should not necessarily be overstated in terms of the incursions they make on suspects' rights, given the safeguards that still remain, including the exclusion of illegally obtained evidence, the inadmissibility of compelled evidence, the recording of Garda interviews, and the rules pertaining to confession evidence.

The pre-trial process

Several developments in pre-trial criminal process exemplify the shift from due process values to a more result-oriented model of crime control in a bid to tackle organised crime. The first to be explored involves the issue of search warrants.

Search warrants

The powers conferred on the Gardaí (Irish police) to search premises pursuant to a search warrant, which they possess 'in defined circumstances for the protection of society',⁹ have been enhanced in recent years by permitting the officers themselves to issue warrants. While warrants are generally issued by a judge of the District Court¹⁰ or by a peace commissioner (magistrate) upon formal application by a member of the Gardaí,¹¹ senior police officers may issue warrants in urgent circumstances. Such a power was first granted by s. 29 of the Offences Against the

7 *Fitzgerald v DPP* [2003] 3 IR 247 at 258, per Keane J.

8 D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press: Oxford, 1996) 20.

9 *Simple Imports Limited v Revenue Commissioners* [2000] 2 IR 243 at 250, per Keane J.

10 The District Court is the lowest court in the hierarchy of courts in Ireland.

11 Similarly, in England and Wales, s. 8 of the Police and Criminal Evidence Act 1984 allows a justice of the peace to issue a warrant on application by a constable.

State Act 1939, for offences under that Act and for treason.¹² This tactic was then adopted to counter organised criminality, in s. 8(1) of the Criminal Justice (Drug Trafficking) Act 1996 and s. 14(2) of the Criminal Assets Bureau Act 1996, both of which allow a Garda not below the rank of superintendent to issue a search warrant, if circumstances of urgency which necessitate its immediate issue render it impracticable to apply to a District Court judge or a peace commissioner.¹³ Although in *People (DPP) v Byrne* Hardiman J stressed that the power of a Garda superintendent to issue a warrant ‘cannot be regarded as anything other than an emergency provision’,¹⁴ s. 6 of the Criminal Justice Act 2006 expands this approach to incorporate all arrestable offences.¹⁵ Thus a measure which was first deployed against subversive crime, then later organised crime, has now percolated into the general criminal justice system.¹⁶

Search warrants issued by senior Garda members are endorsed on the belief that crucial evidence could be destroyed without the immediate issue of a warrant and because of the need to investigate crime effectively and expeditiously.¹⁷ Nevertheless, it is questionable whether the removal of judicial supervision is warranted, as it is unclear if grave difficulties regarding the grant of warrants

12 The constitutionality of a warrant issued by a body other than a judge was upheld in *Ryan v O’Callaghan*, unreported, 22 July 1987, High Court, where the issue of a search warrant and the search were classified as procedural elements of the investigative process and as functions of an executive, rather than a judicial, nature.

13 The Criminal Justice (Drug Trafficking) Act 1996, the Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996 were enacted in the wake of the murders of Garda Jerry McCabe and journalist Veronica Guerin and target organised crime. Two Irish criminologists, O’Donnell and O’Sullivan, described the murders as ‘the catalyst for a hardening in political attitudes. Crime control became a national priority and it was almost as if a state of national emergency had been declared’: I. O’Donnell and E. O’Sullivan, *Crime Control in Ireland: The Politics of Intolerance* (Cork University Press: Cork, 2001) 2.

14 *DPP v Byrne* [2003] 4 IR 423 at 427.

15 Section 2 of the Criminal Law Act 1997 defines an arrestable offence as an offence for which a person of full capacity and not previously convicted may be punished by imprisonment for at least five years.

16 It may be the case that political representatives believe that the threat of organised crime is comparable to that posed by the IRA and other paramilitary groups. Indeed, the former Minister for Justice claimed that ‘the drug and gun culture ... poses as significant a threat to the wellbeing of the Irish State and Irish society as the paramilitaries did at any stage of their campaign for a quarter of a century’. See ‘Gardaí investigate drugs link in latest shootings’, *Irish Times*, 25 January 2007. However, it does not seem that organised crime as it exists in Ireland poses any threat to democracy or is working to overthrow the institutions of the State, as were the aims of subversive organisations. While it is indisputable that serious and organised crime is present in Ireland, it does not currently constitute a national emergency which merits extraordinary measures.

17 Dáil Debates, 15 February 2005, vol. 597, col. 1276.

exist. Indeed, the Irish Human Rights Commission (IHRC) denied the existence of any serious problems in applying to a District Court judge, and recommended the adoption of less restrictive procedural measures, such as the faxing of warrants.¹⁸ This suggestion has not been acted upon by the legislature, which has continued to extend the powers of the Gardaí in this regard.¹⁹

The circumvention of judicial scrutiny, and thus the absence of an independent examination of the justifications motivating the request for a warrant, renders the process susceptible to abuse and may harm its integrity. Prior to the enactment of the Criminal Justice Act 2006, the IHRC proposed that the warrant provision should require the issuing superintendent to limit the scope of the search and to exclude himself from direct involvement in that particular investigation,²⁰ but this safeguard was not included in s. 6 of the 2006 Act.

Detention

The capacity of the Gardaí has been further augmented by the introduction of lengthy periods of detention and questioning for certain offences. The purpose of arrest under the common law was to take the suspect into police custody to charge him with an offence and to bring him before a judge to answer the charge;²¹ interrogation or evidence-gathering could not be lawful motivating factors for arrest.²² However, s. 2 of the Criminal Justice (Drug Trafficking) Act 1996 sanctions detention for a period of up to 168 hours for suspected drug trafficking offences,²³ a provision mirrored in s. 50 of the Criminal Justice Act 2007, which applies to murder involving the use of a firearm or an explosive, murder of a Garda, prison officer or head of State,²⁴ possession of a firearm with intent to endanger life,²⁵ and offences under the Non-Fatal Offences Against the Person Act 1997 involving the

18 Ibid.

19 This search warrant tactic has not been challenged in either the Irish courts or in the European Court of Human Rights.

20 Irish Human Rights Commission, *Final Observations on the Criminal Justice Bill 2004*, 3 November 2004, para. 1.

21 D. Walsh, *Criminal Procedure* (Thomson Round Hall: Dublin, 2002) 149; see Walsh J in *People v Shaw* [1982] IR 1 at 29.

22 Ibid. at 30.

23 In England and Wales, s. 42 of the Police and Criminal Evidence Act 1984 (PACE), as amended, permits detention without charge for 36 hours for serious arrestable offences, and this may be extended for a further 60 hours, thus permitting a total of 96 hours' detention. Section 306 of the Criminal Justice Act 2003 allows an individual suspected of a terrorist offence to be held without charge for up to 14 days.

24 Criminal Justice Act 1990, s. 3.

25 Firearms Act 1925, s. 15.

use of a firearm.²⁶ Judicial authorisation is required to extend detention past 48 hours and is again mandated after 120 hours. The supervising judge must be satisfied that further detention is necessary for the proper investigation of the offence and that the investigation is being conducted diligently and expeditiously. Although a court will order the suspect's immediate release if it is not satisfied that detention is justified,²⁷ this safeguard depends on the judge inquiring into the reasons of the Gardaí for seeking the extension, and may be pre-empted by the argument that disclosure would compromise the investigation.²⁸

The instrumental justifications for this significant power include the need to furnish State authorities adequate time to gather evidence, given that the investigation may have an international element or the suspect may have swallowed evidence.²⁹ Whilst the Minister for Justice expressed his regret that seven-day detention was included in the Irish statute book, he claimed that 'it would be far more regrettable if the State did not take all action open to it commensurate with the threat which drug traffickers pose to the community'.³⁰ Moreover, the Gardaí assert that this detention provision is beneficial in the investigation of drug trafficking offences,³¹ although no empirical evidence has ever been adduced to support this contention.³² Nevertheless, it seems that the symbolic effect is

26 A person arrested under the Acts may initially be detained for up to six hours, and detention may be extended by a Garda not below the rank of chief superintendent for a further period of up to 18 hours, and again for a further 24 hours. Extensions are granted only if the authorising Garda has reasonable grounds for believing that it is necessary for the proper investigation of the offence concerned.

27 Criminal Justice (Drug Trafficking) Act 1996, s. 2(4); Criminal Justice Act 2007, s. 50(5). Indeed, Casey suggests that judicial intervention after 48 hours means that a challenge to the constitutionality of the detention provisions in the 1996 Act would be unlikely to succeed, and that it would be difficult to convince the Irish courts that it is a disproportionate response to the social problems caused by drug abuse. J. Casey, *Constitutional Law in Ireland*, 3rd edn (Round Hall: Dublin, 2000) 502. Moreover, the provisions would withstand a challenge under Article 5(3) of the European Convention on Human Rights, which provides that '[e]veryone arrested or detained ... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...', given the decision in *Brogan v United Kingdom* (1988) 11 EHRR 117.

28 A. Ryan, 'The Criminal Justice (Drug Trafficking) Act 1996: Decline and Fall of the Right to Silence?' (1997) 7 *Irish Criminal Law Journal* 22 at 33.

29 Dáil Debates, 2 July 1996, vol. 467, col. 2330.

30 Seanad Debates, 10 July 1997, vol. 151, col. 1143.

31 Minister for Justice, 'Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights', 10 December 2002.

32 Indeed, the provision in the 2007 Act was deemed necessary to deal with kidnappings and murders involving firearms because 'the existing detention periods are not adequate in these circumstances' (Dáil Debates, 5 April 2007, vol. 635, col. 1030), even though no one had yet been detained for seven days under the 1996 drug trafficking legislation (see Minister for Justice, 'Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights', 10 December 2002).

sufficient in itself. As the Minister for Justice explicitly stated, '[w]e cannot afford at this stage to give the message to drug traffickers that we are softening our approach'.³³ The use of lengthy detention periods embodies an expressive element, by demonstrating the opprobrium of the State towards drug trafficking. It also has an instrumental facet, since long detention periods are believed to improve the Gardaí's ability to investigate and prosecute drug crime. Prolonged detention is indicative of a milieu in which the due process rights of the suspect are increasingly delimited by the State's tough stance on crime control.³⁴

The right to silence

In addition to the intensification of State powers regarding search and detention, the right to silence of the accused is gradually being eroded, so as to improve the likelihood of successful prosecution and preclude the evasion of justice on the part of suspected organised criminals. This right, which intersects and overlaps with the presumption of innocence, the right against self-incrimination³⁵ and the right to privacy,³⁶ is a fundamental element of the principle that the prosecution must establish and prove the case against the accused. The rationale behind the right's very existence is to compensate for the imbalance of power and resources that exists between the State and the accused. It is seemingly unappealing for the State to place the accused in a position whereby he is likely to be punished whether he answers or remains silent when questioned.³⁷ In addition, the right is underpinned by the rationale of guarding against unsafe convictions.³⁸ Nevertheless, there is a growing belief in political and popular discourse that the right to silence assists the guilty to evade the full rigours of the law. This is borne out in a comment of the Association of Garda Sergeants and Inspectors:

33 Minister for Justice, above n. 32.

34 The use of arrest and detention for investigation of an offence is depicted by Packer as a quintessential crime control tactic. H. Packer, *The Limits of the Criminal Sanction* (Stanford University Press: California, 1968) 177. Nevertheless, the Gardaí are limited in their ability to rearrest an individual after detention in custody, ensuring that an individual cannot be rearrested and detained ad infinitum (Criminal Justice (Drug Trafficking) Act 1996, s. 4; Criminal Justice Act 1984, s. 10(1); Offences Against the State Act 1939, s. 30A). Rearrest is only permitted if the Gardaí become aware of further information since the person's release regarding his suspected participation in the offence for which his arrest is sought.

35 See J. Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press: Oxford, 2003) 277–8.

36 D. J. Galligan, 'The Right to Silence Reconsidered' (1988) 41 *Current Legal Problems* 69 at 88.

37 See *R v Director of Serious Fraud Office, ex p. Smith* [1993] AC 1 at 32; *Murphy v Waterfront Commission of New York Harbor* (1964) 378 US 52 at 55. Also see P. Roberts and A. Zuckerman, *Criminal Evidence* (Oxford University Press: Oxford, 2004) 392 *et seq.*, and I. Dennis, *The Law of Evidence*, 3rd edn (Sweet & Maxwell: London, 2007) 193 *et seq.*

38 See *Heaney v Ireland* [1994] 3 IR 593 at 604, *per Costello J.*

The present status of the right to silence is an historical relic and harks back to a previous age when suspects were deemed to be of limited intelligence. It is untenable that in serious crimes such as murder and rape, theft or fraud, suspects can refuse to disclose their whereabouts when questioned and courts cannot draw inferences from this.³⁹

As the majority of people will never be interrogated in police custody, the right to silence may seem superfluous and useful only to persons who wish to conceal evidence of illegal activity.⁴⁰ This sentiment has taken legislative form in recent years, with serious encroachments on the right to silence becoming more commonplace.

A number of statutory provisions which are used in combating organised criminality penalise the accused for remaining silent; that is, the accused's failure to answer will result in a sanction, rather than merely permitting an inference to be drawn. Under s. 52(1) of the Offences Against the State Act 1939, a Garda may demand a full account of a detainee's actions during a specified period of time, in addition to all information known to him regarding the commission by another person of an offence under the Act.⁴¹ Although this measure was originally introduced in response to sedition, it may now be used against organised crime, given that firearms offences fall within the remit of the 1939 Act.⁴²

The constitutionality of s. 52 was upheld in *Heaney v Ireland* where the restriction on the right was deemed to be proportionate with respect to the aims of the section to investigate and punish serious, subversive crime.⁴³ The Irish Supreme Court adjudged that the right of the citizen to remain silent was of lesser importance than the right of the State to protect itself and to maintain public peace and order.⁴⁴ However, this reasoning was not accepted by the European Court of

39 Association of Garda Sergeants and Inspectors, 'Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights', 8 December 2003. Such a view is expressed by P. McLaughlin, 'Legal Constraints in Criminal Investigation' (1981) XVI *Irish Jurist* 217 at 221; A. Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press: Oxford, 1989) 316–17.

40 See R. Posner, 'An Economic Approach to the Law of Evidence' (1999) 51 *Stanford Law Review* 1477 at 1534.

41 Failing to give such information or giving false information is an offence for which a person may be imprisoned for up to six months (s. 52(2)).

42 Part V of the Offences Against the State Act 1939 permits offences to be scheduled under the Act and so to fall within its remit. Firearms and explosives offences were scheduled by the Offences Against the State (Scheduled Offences) (No. 3) Order 1940 (SI 1940 No. 334).

43 *Heaney v Ireland* [1996] 1 IR 580.

44 *Ibid.* at 590.

Human Rights in *Quinn v Ireland*, which stressed that the existence of safeguards, such as the requirement that a police officer must have a bona fide suspicion prior to arrest or respect for the suspect's right to legal assistance, could not alter the choice presented by s. 52: either the suspect provided the information or he would be imprisoned for up to six months.⁴⁵ This 'degree of compulsion ... destroyed the very essence of his privilege against self-incrimination and his right to remain silent',⁴⁶ and was not justified by the security and public order concerns of the Irish State.⁴⁷ Subsequent to this decision, the Committee to Review the Offences Against the State Acts recommended the repeal of s. 52,⁴⁸ but such remedial action has not yet been taken.

Further measures impinging on the right to silence include s. 15(1) of the Criminal Justice Act 1984 which provides that a Garda who reasonably believes that an individual is in unlawful possession of a firearm or ammunition may require that person to explain how he came to have possession of it and of any previous dealings with the gun. Similarly, s. 19 of the Criminal Justice (Theft and Fraud Offences) Act 2001 permits a Garda to ask a person for an account of how he came to possess property which the officer reasonably believes to be stolen. Failure to conform to such requests, without reasonable excuse, is a criminal offence which may be punished by a fine or imprisonment for a term not exceeding 12 months or both.

In addition to these provisions which in effect criminalise silence, a number of measures on the Irish statute book permit the drawing of inferences. Section 18 of the Criminal Justice Act 1984 allows inferences to be drawn from the failure or refusal of the accused upon arrest to account for marks, objects or substances when asked to do so by a Garda who reasonably believes that their existence may be attributable to his participation in the commission of an offence. Moreover, inferences may be drawn from the presence of an accused at a particular place if the arresting Garda reasonably believes that his presence may be attributable to participation in the commission of an offence.⁴⁹ The constitutionality of these provisions was upheld

45 *Quinn v Ireland* (2001) 33 EHRR 264. See Dennis, above n. 37 at 164. Cf. *Saunders v United Kingdom* (1996) 23 EHRR 313 where the European Court of Human Rights held that the right not to incriminate oneself was breached by the use of compelled statements against the accused in court.

46 *Quinn v Ireland* (2001) 33 EHRR 264 at para. 55.

47 *Ibid.* at para. 59.

48 Committee to Review the Offences Against the State Acts, *Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters* (Stationery Office: Dublin, 2002) para. 8.60.

49 Criminal Justice Act 1984, s. 19. Sections 18(1)(c) and 19(1)(d) of the 1984 Act provide that while failure or refusal may amount to corroboration of other evidence, the suspect shall not be convicted of an offence solely on such an inference. Moreover, a court is not obliged to draw inferences. Sections 28 and 29 of the Criminal Justice Act 2007 clarify that ss. 18 and 19 apply to the questioning of the accused at any time before he is charged with the offence or when he is charged with the offence or informed by a Garda that he might be prosecuted for it.

in *Rock v Ireland* where the Supreme Court concluded that the presumption of innocence was not infringed, given that inferences could only amount to corroboration and that only those that ‘appear proper’ could be drawn.⁵⁰

Similarly in England and Wales ss. 34–37 of the Criminal Justice and Public Order Act 1994 allow inferences to be drawn from the failure of the accused to mention facts when being questioned or charged on which he later seeks to rely; from his silence at trial; from his failure or refusal to account for objects, substances or marks; and from his presence at a particular place.⁵¹ These measures are based on the Criminal Evidence (Northern Ireland) Order 1988, which was challenged before the European Court of Human Rights in *Murray v United Kingdom*.⁵² The European Court stressed that although a conviction cannot be based solely or mainly on the silence of the accused or on a refusal to answer questions, this should not prevent his silence from being taken into account in situations which call clearly for an explanation from him.⁵³

In the Irish context, s. 30 of the Criminal Justice Act 2007 inserts a new s. 19A into the Criminal Justice Act 1984, allowing inferences to be drawn in proceedings relating to all arrestable offences from the failure of the accused to mention any fact on which he later relies in his defence, if that fact was one which he could reasonably have been expected to mention when questioned.⁵⁴ Section 7 of the Criminal Justice (Drug Trafficking) Act 1996 and s. 5 of the Offences Against the State (Amendment) Act 1998 are consequently repealed.⁵⁵ While the inference-

50 *Rock v Ireland* [1997] 3 IR 384.

51 See Roberts and Zuckerman, above n. 37 at 440 *et seq.*

52 *Murray v United Kingdom* (1996) 22 EHRR 29.

53 *Ibid.* at para. 47. As Ashworth and Redmayne note, this indicates a cautious acceptance of the compatibility of such provisions with the European Convention on Human Rights. A. Ashworth and M. Redmayne, *The Criminal Process*, 3rd edn (Oxford University Press: Oxford, 2005) 95.

54 Again, inferences are corroborative, and only those that appear proper may be drawn. While the Balance in the Criminal Law Review Group recommended the introduction of a provision for all arrestable offences allowing an inference to be drawn from an accused’s failure to mention a defence on which he subsequently relies, it argued that this should be limited to the recent invention of a defence and should not permit a more general inference of guilt to be drawn. See Balance in the Criminal Law Review Group, *Final Report of the Balance in the Criminal Law Review Group* (Stationery Office: Dublin, 2007) 86. The Leahy Report had previously recommended an inference-drawing provision applicable to all serious offences. Expert Group, *Report of the Expert Group Appointed to Consider Changes in the Criminal Law which were Recommended in the Garda SMI Report* (Stationery Office: Dublin, 1998) 31.

55 The Committee to Review the Offences Against the State Acts recommended the retention of s. 5 (above n. 48 at para. 8.63). However, a minority opposed this on the grounds that these provisions allow inferences to be drawn even where there is no *prima facie* case against the accused, and may operate in an unjust way towards the accused, as he may be intimidated in the police station or may forget facts on which he seeks to rely in court at a later date, having had time for due consideration. *Ibid.* at para. 8.68.

drawing provisions under the 1984 Act pertain to the accused's response to the questions of the Gardaí, the 2007 Act places an onerous burden on the suspect who must envisage the particular facts which are likely to be used in his defence. This may result in injustice, due to the fact that the accused may honestly forget to mention facts or details on which he later seeks to rely in court.⁵⁶

Infringements on the right to silence are seen as necessary in order to tackle organised crime. Although s. 7 of the Criminal Justice (Drug Trafficking) Act 1996 (the precursor to s. 19A) was described as 'minimalist' in the Irish Parliament,⁵⁷ this provision represents a significant shift in the fundamental balance of the criminal process, in which the crime control objectives of the State impinge more and more on due process values. As the Taoiseach (Prime Minister) said:

The most basic civil liberties issue is the right to life and bodily integrity, to one's personal possessions and one's personal freedom. The arguments for the unrestricted right to silence of an accused ... are academic by comparison.⁵⁸

Penalising silence and allowing inferences to be drawn renders the accused a source of information for the police, thereby intensifying the strain on the individual. Furthermore, compulsion to assist the police on penalty of imprisonment involves a significant infringement on individuals' right to determine the extent of their cooperation with agents of the State. Such measures suggest a growing preference for public protection and crime control over traditional norms of due process and personal autonomy.⁵⁹

The criminal trial in Ireland

Comparable developments are identifiable at the trial stage of criminal proceedings, likewise premised on the perceived threat posed by organised criminality. Three such developments merit emphasis here: extension of the non-jury Special Criminal Court (SCC) to non-political crimes; increasing reliance on

56 Indeed, in *Averill v United Kingdom* (2001) 31 EHRR 839 at para. 49, the European Court of Human Rights recognised that there may be reasons why an innocent person may not be prepared to cooperate with the police in response to questioning, especially before he has had the chance to consult a solicitor.

57 Dáil Debates, 2 July 1996, vol. 467, col. 2343.

58 *Ibid.* at col. 2373.

59 Walsh, in his dissent to the *Report of the Committee to Review the Offences Against the State Acts*, above n. 48, described the enforcement of a moral duty to assist the police in their investigation by means of the criminal law as 'both an improper use of the criminal law and an excessive encroachment on the autonomy of the individual'.

testimony from individuals in the Witness Protection Programme (WPP); and greater admissibility of previous inconsistent statements.

Restricting the right to trial by jury

Trial by jury is traditionally regarded as a central element of the common law criminal justice system. As the Constitutional Review Group stressed, it brings a democratic element to the criminal justice system and therefore should not be interfered with lightly.⁶⁰ The rationale behind this right was articulated by Henchy J in *People (DPP) v O'Shea*, invoking memories of 'politically appointed and Executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution ... of summary trial or detention without trial, of cat-and-mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors'.⁶¹ Accordingly, the best way to prevent wrongful conviction was to allow the accused:

to 'put himself upon his country', that is to say, to allow him to be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution, who would see that all the requirements for a fair and proper jury trial would be observed.⁶²

Despite the importance of the right to jury trial, there is 'a tendency to think that, if anything goes wrong or is thought likely to go wrong with the criminal process, the first thing to do is to get rid of the jury',⁶³ and indeed this is evident in the trial of non-subversive crimes (that is, crimes which do not fall under the rubric of the Offences Against the State Acts 1939–1998) in the SCC.

The Irish DPP has considerable power to circumscribe the right to a jury trial, by requiring that a case be heard before the non-jury Special Criminal Court.⁶⁴ While persons charged with crimes under the Offences Against the State Act 1939 and

60 Constitution Review Group, *Report of the Constitution Review Group* (Stationery Office: Dublin, 1996) 202. This draws on De Tocqueville's sentiment that juries 'spread respect for the courts' decisions and for the idea of rights throughout the classes': A. De Tocqueville, *Democracy in America* (Doubleday: New York, 1969) 274.

61 *People (DPP) v O'Shea* [1982] IR 384 at 342.

62 *Ibid.*

63 P. Devlin, 'Foreword' in S. Greer and A. White (eds), *Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland* (Cobden Trust: London, 1986).

64 Article 38.5 of the Irish Constitution allows the constitutional right to a jury trial to be restricted by Article 38.3 which provides for the establishment of special courts where the ordinary courts are deemed to be inadequate.

crimes scheduled under the Act by virtue of Part V⁶⁵ are generally tried before the SCC,⁶⁶ the DPP may request SCC trial for non-scheduled offences on the basis that the ordinary courts are inadequate to secure the administration of justice and the preservation of public peace and order,⁶⁷ and the judge must acquiesce in such 'requests'. The DPP's power is not judicially reviewable in the absence of *mala fides*.⁶⁸ This lack of review is problematic, given the significant effect of a change of venue on the right of the accused to jury trial.

The trial of a non-scheduled case in the SCC arguably breaches the right to equality under Article 40.1 of the Irish Constitution, given that only certain criminal cases are referred by the DPP. This issue was circumvented in *Kavanagh v Ireland* where the Supreme Court held that determining the adequacy of the ordinary courts was a political decision outside the judicial sphere.⁶⁹ However, when Kavanagh petitioned the United Nations Human Rights Committee (UNHRC), the Committee criticised the legislature's ability to specify by statute which offences were to come within the jurisdiction of the SCC and to permit other offences to be so tried at the discretion of the DPP.⁷⁰ The UNHRC noted that reasons need not be given for these opinions and, moreover, that judicial review is 'effectively restricted to the most exceptional and virtually undemonstrable circumstances'.⁷¹ Ireland was deemed not to have established that the decision to try Kavanagh before the SCC was based upon reasonable and objective grounds. Accordingly, the UNHRC held that Kavanagh's right to equality under Article 26 of the International Covenant on Civil and Political Rights (ICCPR) had been violated.⁷² Nevertheless, when Kavanagh sought to have this decision applied in the Irish courts, it was held that the ICCPR did not form part of Irish domestic law.⁷³ It is regrettable that this serious infringement on the right to equality has not been recognised in Ireland.

65 Such scheduled offences include firearms and explosives offences (Offences Against the State (Scheduled Offences) (No. 3) Order (SI 1940 No. 334)), which often pertain to organised and gangland crime.

66 Offences Against the State Act 1939, s. 45.

67 Offences Against the State Act 1939, ss. 46–48.

68 See *Savage and Owen v DPP* [1982] ILRM 385; *O'Reilly and Judge v DPP* [1984] ILRM 224; *State (McCormack) v Curran* [1987] ILRM 225; *Byrne and Dempsey v Government of Ireland*, unreported, 11 March 1999, Supreme Court.

69 *Kavanagh v Ireland* [1996] 1 IR 348 at 354. In *Byrne and Dempsey v Government of Ireland*, unreported, 11 March 1999, Supreme Court, the applicants' claim that the decision of the DPP breached the Article 40.1 constitutional guarantee of equality because their co-defendants were on trial in the Central Criminal Court rather than the SCC was dismissed. Hamilton J grounded his decision on the fact that the DPP is directly authorised by statute to issue such a certificate and to so distinguish between citizens.

70 *Kavanagh v Ireland*, Communication No. 819/1998, UN Doc. CCPR/C/71/D/819/1998 (2001), para. 10.2.

71 *Ibid.*

72 International Covenant on Civil and Political Rights, GA res. 2200A (XXI), UN Doc. A/6316 (1966).

73 *Kavanagh v Governor of Mountjoy Prison* [2002] 2 ILRM 81.

A further contentious issue is that the judges in the SCC must act as arbiters of both fact and law. This poses particular problems as regards inadmissible evidence, when the judges may be required to exclude incriminating material from their minds. Indeed, it is questionable whether this is truly possible. As Finlay CJ revealed in *People (DPP) v Conroy*, '[e]xperience as a judge indicates that even as a trained lawyer there is a very significant difficulty in excluding from one's mind [such] evidence'.⁷⁴ However, in *DPP v Special Criminal Court*, Carney J asserted that while the members of that court may be exposed to prejudicial material when examining sensitive information, judges are capable of dealing with the case fairly and in accordance with law.⁷⁵ It is submitted that Finlay CJ's more principled analysis should be adopted, given that it is unreasonable to expect any person 'to "unbite" the apple of knowledge'.⁷⁶ Furthermore, the court is not required to disqualify itself from a case where it has heard inadmissible evidence which is prejudicial to the accused, although it has the discretion to do so.⁷⁷ It would not be impracticable to require the court to dismiss itself from a case in which such evidence has been tendered, given that the panel of judges for the SCC is sufficiently large to allow a reconstituted court to hear the case.⁷⁸

Despite the historical origins of this special jurisdiction, the Supreme Court has stressed that Part V of the 1939 Act, which governs the establishment of the SCC, is not concerned solely with subversive activities but rather pertains to the adequacy of the ordinary courts.⁷⁹ Indeed, cases which have been heard in the Special Criminal Court in recent years that lack any apparent subversive element include offences of kidnapping;⁸⁰ the murder of journalist Veronica Guerin;⁸¹ and a charge of receiving a stolen caravan and its contents.⁸² In this way, limitations on the right to jury trial have seeped into the 'ordinary' criminal justice realm.⁸³

74 *People (DPP) v Conroy* [1986] IR 460 at 472.

75 *DPP v Special Criminal Court* [1999] 1 IR 60.

76 M. Damaska, 'Free Proof and Its Detractors' (1995) 43 *American Journal of Comparative Law* 343 at 352.

77 *DPP v McMahon* [1984] ILRM 461.

78 G. Hogan and C. Walker, *Political Violence and the Law in Ireland* (Manchester University Press: Manchester, 1989) 231.

79 *People v Quilligan* [1986] IR 495.

80 *DPP v Kavanagh*, unreported, 18 May 1999, Court of Criminal Appeal.

81 See *People (DPP) v Ward*, unreported, 27 November 1998, Special Criminal Court; *People (DPP) v Meehan*, unreported, 29 July 1999, Special Criminal Court.

82 Irish Council for Civil Liberties, *Background Paper on the 30th Anniversary of the Establishment of the Special Criminal Court* (ICCL: Dublin, 2002).

83 S. Kilcommins and B. Vaughan, *Terrorism, Rights and the Rule of Law* (Willan Publishing: Devon, 2008); S. Kilcommins and B. Vaughan, 'Subverting the Rule of Law in Ireland' (2004) 35 *Cambrian Law Review* 55. For an examination of this normalisation process in Northern Ireland and Britain, see P. Hillyard, 'The Normalization of Special Powers: From Northern Ireland to Britain' in P. Scraton (ed.), *Law, Order and the Authoritarian State* (Open University Press: Milton Keynes, 1987) 279 *et seq.*

The primary reason adduced to justify the continued restriction on the right to a jury trial is the possibility that juries in the trial of organised criminals will be subject to threats or intimidation.⁸⁴ As Walsh J noted in *People v Quilligan*:

There could well be a grave situation in dealing with ordinary gangsterism or well-financed and well-organised large scale drug dealing, or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or of illegal interference, being prevented from doing justice.⁸⁵

Similarly, in *Kavanagh v Ireland*, Keane J stated that persons engaged in non-subversive crime could be tried before a special non-jury court where there appeared to be a significant risk of jury intimidation or corruption.⁸⁶ Indeed, the Committee to Review the Offences Against the State Acts 1939–1998 alleged that juries are ‘distinctly uncomfortable’ in cases involving organised crime, and claimed that attempts have been made to tamper with juries in the ordinary courts,⁸⁷ thus warranting non-jury trials.

Although parallels may be drawn with the Diplock Courts in Northern Ireland, non-jury trials in that court were only for offences scheduled under (what is now) the Terrorism Act 2003,⁸⁸ and were not determined by the prosecution, as is the case in Ireland.⁸⁹ The current relevant legislation in Northern Ireland, the Justice and Security (Northern Ireland) Act 2007, allows the DPP for Northern Ireland to issue a certificate requiring non-jury trial on indictment.⁹⁰ However, this is only

84 This is notwithstanding the opinion of the United Nations Human Rights Committee that it did not consider that ‘the continued existence of that court is justified’. United Nations Human Rights Committee, *Report of the Human Rights Committee*, Official Records of the General Assembly, 48th Session, Supplement No. 40, 1993 (A/48/40), Part 1, 125–8.

85 *People v Quilligan* [1986] IR 495 at 509.

86 *Kavanagh v Ireland* [1996] 1 IR 348 at 364.

87 Committee to Review the Offences Against the State Acts, above n. 48 at paras. 9.33, 9.36.

88 Part VII of the Terrorism Act 2003 allows for non-jury trials in the ‘Diplock Courts’, and s. 75(1) specifies that a trial on indictment of a scheduled offence shall be conducted by the court without a jury.

89 See P. Devlin, ‘Foreword’ in S. Greer and A. White (eds), *Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland* (Cobden Trust: London, 1986); S. Greer and A. White, ‘A Return To Trial By Jury’ in A. Jennings (ed.), *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press: London, 1988) 58; S. Greer and A. White, ‘Restoring Jury Trial to Terrorist Offences in Northern Ireland’ in M. Findlay and P. Duff (eds), *The Jury under Attack* (Butterworths: London, 1988) 186.

90 Section 1. The Independent Monitoring Commission expressed its preference for the normalisation of the trial process and for the use of jury trials if circumstances permit. Independent Monitoring Commission, *Sixteenth Report of the Independent Monitoring Commission* (Stationery Office: London, 2007) 27–8.

possible if there is a link between the accused or the offence to proscribed organisations or to religious or political hostility, and if the DPP is satisfied that in light of this link a jury trial may impair the administration of justice.⁹¹ Thus it seems that the Irish approach is more expansive than in Northern Ireland. The Irish DPP's decision to restrict jury trials potentially may apply to all offences and offenders.

Non-jury trials are also possible in England and Wales under the Criminal Justice Act 2003. Section 43, when brought into force, will allow an indictable fraud case to be conducted without a jury due to the trial's complex and technical nature. The provision will be triggered by an application by the prosecution to a Crown Court judge, who in turn requires the approval of the Lord Chief Justice. Furthermore, under s. 44 (which came into force in 2006), an application may be made by the prosecution to a judge of the Crown Court for a non-jury trial on indictment where there is evidence of a real and present danger that jury tampering would take place, and where, notwithstanding any reasonable preventative steps, a substantial likelihood of tampering occurring makes it necessary in the interests of justice for a non-jury trial. Nevertheless, the key difference between the English and the Irish models is the lack of judicial oversight in the latter jurisdiction.

While non-jury trials are permitted in limited circumstances in neighbouring jurisdictions, the scheme in the Offences Against the State Act 1939 provided a useful archetype in the Irish context which allowed this procedural modification to be adopted seamlessly for the trials of those suspected of organised crimes.⁹² The Special Criminal Court is now seen as a normal feature of the Irish criminal justice system, and there is little political or popular pressure to have the court disbanded.⁹³

The Witness Protection Programme

Further evidence of the modification of traditional standards, so as to facilitate the expedient resolution of crime, is evident in the growing use of testimony given by persons participating in the Witness Protection Programme (WPP) in the trial of suspected organised criminals. As will be demonstrated, some aspects of the WPP give rise to concerns about due process. Participation in the Programme is only available to a witness with evidence to offer in relation to serious crimes such as

91 Akin to the approach in Ireland, the Northern Irish model lacks the possibility of review of the DPP's decision.

92 Committee to Review the Offences Against the State Acts, 'Views and Recommendations of the Hon. Mr Justice Hederman et al.', above n. 48 at para. 9.93.

93 Hogan and Walker, above n. 78 at 238–9.

drug trafficking and organised crime, and this evidence must be essential to the prosecution and not available elsewhere.⁹⁴ Moreover, a substantial threat to the safety of the witness must exist.⁹⁵ The witness may be—and in practice often will be—an accomplice or associate of the suspect,⁹⁶ so in essence, this means that such evidence is confined to quintessential ‘organised crimes’.

The use of evidence from individuals who are under the protection of the State is comparable to the use of ‘supergrass’ or informant testimony in trials for subversive crimes where traditional investigative tactics are seen as ineffective, as they were in trials of alleged terrorists in the 1980s.⁹⁷ In the contemporary Irish setting, testimony from individuals in the WPP is justified by the secretive nature of criminal gangs which renders conventional investigative and prosecutorial approaches less effective and thereby necessitates the adoption of alternative methods of evidence-gathering. The establishment of the WPP has been described as ‘a recognition that Irish society was as amenable to the threat of organised crime as any other society’.⁹⁸ The Programme ensures that prosecutions may be taken in cases of serious organised crime such as those involving drugs and money laundering,⁹⁹ and to this extent guards against the perversion of justice by those who seek to suppress vital evidence at major trials.¹⁰⁰ Political acquiescence in the use of accomplice testimony in Ireland itself is to be contrasted with Irish politicians’ vehement rejection of such measures in Northern Ireland.¹⁰¹

Whatever its claimed advantages, the WPP also raises concerns in relation to the method of witness recruitment, the type of people recruited, and the preparation

94 See Commissioner of An Garda Síochána, ‘Submission to the Joint Committee on Justice, Equality, Defence and Women’s Rights’, 9 December 2003, Appendix 3.

95 An Garda Síochána, *Evaluation of An Garda Síochána Policing Plan 1999* (An Garda Síochána: Dublin, 2000) 25.

96 An Garda Síochána circular, above n. 94.

97 See S. Greer, ‘Supergrasses and the Legal System in Britain and Northern Ireland’ (1986) 102 *Law Quarterly Review* 198; S. Greer, ‘The Supergrass System’ in A. Jennings (ed.), *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press: London, 1988). Supergrass evidence was commonly used in the non-jury Diplock courts in Northern Ireland as an alternative means of facilitating the conviction of suspected terrorists, when the use of repressive interrogation techniques was restricted. See Hillyard, above n. 83 at 300.

98 Dáil Debates, 10 March 1999, vol. 502, col. 80, *per* Minister for Justice.

99 Dáil Debates, 20 October 1998, vol. 495, col. 814, *per* Minister for Justice.

100 Dáil Debates, 21 April 1999, vol. 503, col. 777, *per* Minister for Justice.

101 See Dáil Debates, 17 May 1984, vol. 350, col. 1390 where it was stated that ‘[t]he whole concept of the supergrass seems to go against human rights’. Similarly, it was noted that the legislature did ‘not like to see a system of supergrass trials where the uncorroborated evidence of an accomplice of one of the accused is used as a basis for convicting people’: Dáil Debates, 6 February 1986, vol. 363, col. 1939.

of such witnesses for trial.¹⁰² Furthermore, the enticements offered to witnesses and the probability that such witnesses are motivated by self-interest suggest that the use of such evidence should be closely monitored and corroborated.¹⁰³ The Court of Criminal Appeal in *DPP v Gilligan* accepted that benefits are inherent in the WPP, but stressed that evidence given in return for a specific sum of money from the Gardaí or the prosecution would be inadmissible.¹⁰⁴ The court further emphasised that strict delineation of the permissible benefits offered to witnesses and the manner in which negotiations are to take place is vital to ensure the reliability of testimony.¹⁰⁵ While the Supreme Court on appeal acknowledged that elements of Garda procedures compromised the evidence of some witnesses, this did not undermine the entire system.¹⁰⁶ Although the benefit given to witnesses in the WPP has been regarded as problematic in certain instances by the Irish courts, it is generally not seen to damage the validity of the evidence. Nevertheless, in order to ensure the integrity of the evidence and of the Programme as a whole, it would be preferable for the courts or the legislature to provide guidelines or standards concerning the appropriate benefits for witnesses, in addition to regulating the conduct of the Gardaí.¹⁰⁷

The corroboration, if any, required of evidence given by WPP witnesses is a further contentious matter, given the motivation and typically criminal status of such individuals. In *DPP v Gilligan*, the Irish Supreme Court highlighted the danger of acting upon the uncorroborated evidence of a witness in the WPP, namely that in the hope of receiving benefits the witness may not tell the truth.¹⁰⁸ Nevertheless, the court concluded that there is no rule of law that such uncorroborated evidence must be rejected. The trier of fact must be warned that it is dangerous to convict on uncorroborated evidence, but may nevertheless do so if the evidence is so clearly acceptable that the trier of fact is satisfied beyond reasonable doubt of the guilt of the accused.¹⁰⁹ The WPP was accepted as part of the State's legitimate response to the changing nature of crime, including organised crime, gang

102 Hillyard, above n. 83 at 300.

103 Greer, above n. 97 at 199.

104 *DPP v Gilligan*, unreported, 8 August 2003, Court of Criminal Appeal.

105 *Ibid.*

106 *People (DPP) v Gilligan*, unreported, 23 November 2005, Supreme Court.

107 In England and Wales, s. 71 of the Serious Organised Crime and Police Act 2005 provides for an 'immunity notice' which protects an offender from prosecution if the prosecutor believes that this is appropriate for the purposes of the investigation or prosecution of any offence. Section 72 of the Act allows a 'restricted use undertaking' to be made, precluding the use of information against an offender.

108 *People (DPP) v Gilligan*, unreported, 23 November 2005, Supreme Court.

109 *Ibid.*

violence, and drug trafficking.¹¹⁰ In addition to this judicial approval, increased expenditure on the Programme indicates growing reliance on this tactic in combating organised crime.¹¹¹ Indeed, it has been argued that to require corroboration in such cases would be ‘to pander to organised crime’.¹¹² Against this, it is submitted that rejecting the need for corroboration compromises the integrity of the trial process and increases the likelihood of miscarriages of justice due to the questionable motivations behind WPP witnesses’ testimony. Requiring corroborative evidence would represent a cautious approach reflecting concern for due process, the presumption of innocence, and the right to a fair trial.

Previous inconsistent statements

Section 16 of the Irish Criminal Justice Act 2006 provides for the admission in evidence of previous witness statements. This provision was introduced in response to the collapse of a murder trial in Limerick in 2003, where six witnesses who had previously given statements to the Gardaí recanted and refused to testify against the accused in court, resulting in a notice of *nolle prosequi* by the DPP.¹¹³ The Minister for Justice emphasised that this situation posed a challenge ‘for the Irish State, for the rights of individual citizens and of entire communities, and for the system of criminal justice’. Urgent legislative action was said to be required.¹¹⁴

Before the 2006 Act, a prior inconsistent statement could be introduced as evidence which destroys the witness’s credibility but not as direct testimonial evidence against the accused.¹¹⁵ In other words, an inconsistent statement simply undermined the evidence of the witness by impugning his credibility. This limitation posed significant problems for the prosecution, particularly in cases

110 Ibid. Also see *People (DPP) v Meehan*, unreported, 24 July 2006, in which the Court of Criminal Appeal stated that a Witness Protection Scheme may provide one of the few effective ways of dealing with the problem of illegal drugs and gangland killings, ‘a consideration which must be kept in mind if the community’s right to see serious crime being prosecuted is to be respected’.

111 €76,000 was spent on the Witness Security Programme in 1998, €152,000 in both 1999 and 2000, €559,000 in 2001, €1,092,000 in 2002, and €941,000 in 2003. See *An Garda Síochána, Annual Report of An Garda Síochána, 2002* (Stationery Office: Dublin, 2003) 39 and *Annual Report of An Garda Síochána, 2003* (Stationery Office: Dublin, 2004) 13. €1.1m was spent in 2004 and €540,000 in 2005 (Dáil Debates, 7 December 2006, vol. 629, col. 412).

112 P. Charleton and P. McDermott, ‘Constitutional Aspects of Non-jury Courts’ (2000) 6(3) *Bar Review* 106 at 110.

113 Carney J described the witnesses in this case as suffering from ‘collective amnesia’. See ‘A case of collective amnesia’, *Irish Times*, 8 November 2003. Also see Dáil Debates, 15 February 2005, vol. 597, col. 1276.

114 Dáil Debates, 4 November 2003, vol. 573, col. 579, *per* Minister for Justice.

115 Criminal Procedure Act 1865, s. 4. As Walsh J stated in *People (AG) v Taylor* [1974] IR 97 at 100, ‘[i]t must at all times be made clear to the jury that what the witness said in the written statement is not evidence of the fact referred to but is only evidence on the question of whether or not she has said something else—it is evidence going only to his credibility’.

where the evidence against an accused rested solely on one individual's statement to the police.¹¹⁶ Section 16 of the 2006 Act remedied this issue for the State, by allowing previous witness statements to be admitted where the witness refuses to give evidence in court, or where he gives evidence which is inconsistent with the earlier statement.¹¹⁷ The prior statement must be voluntary, reliable and made by a witness in circumstances where he understood the need to tell the truth.¹¹⁸ Its admission must also be in accordance with the interests of justice.¹¹⁹

Prior to the enactment of s. 16, the IHRC, following the Canadian Supreme Court in *R v B (KG)*, recommended that all admissible witness statements should be sworn on oath and video-recorded in their entirety and made in the presence of and after consultation with the witness's legal representative.¹²⁰ Regrettably, these proposals were not incorporated into the 2006 Act. A further divergence between the Irish model and that advocated in *R v B (KG)* concerns the cross-examination of the witness in question. While the Canadian Supreme Court requires that the opposing party must be able to cross-examine the witness at trial,¹²¹ no equivalent provision exists in Ireland. Admitting an out-of-court witness statement as evidence where the witness refuses to testify seriously undermines the right of the defence to hear and cross-examine the evidence against him effectively.¹²² This right of the accused to confront and probe the evidence against him is a cornerstone of adversarial criminal trial and due process. As the Irish Supreme Court has held, the opportunity to 'hear and test by examination the evidence offered by or on behalf of his accuser' represents a fundamental ingredient in the concept of

116 Mr Hogan SC, 'Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights', 28 November 2003, 34.

117 This provision is modelled on Canadian jurisprudence and on legislation in England and Wales and in Scotland. In *R v B (KG)* [1993] 1 SCR 740 the Supreme Court of Canada permitted the use of prior inconsistent statements subject to the following criteria: the statement must be made under oath following an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement; it must be video-recorded in its entirety; and the opposing party must be able to cross-examine the witness at trial. Section 119 of the Criminal Justice Act 2003 in England and Wales provided a further influence for the Irish approach. Similarly, according to s. 259(2)(e) of the Criminal Procedure (Scotland) Act 1995, previous statements are admissible in court if the witness refuses to testify, but not if he gives inconsistent evidence.

118 Criminal Justice Act 2006, s. 16(2). When deciding whether the statement is reliable, the court shall have regard to whether it was given on oath or was video-recorded, or if neither whether other evidence in support of its reliability exists: s. 16(3).

119 Criminal Justice Act 2006, s. 16(4).

120 *R v B (KG)* [1993] 1 SCR 740. Irish Human Rights Commission, above n. 20 at para. 5.3.

121 See above n. 117.

122 Irish Human Rights Commission, above n. 20 at para. 5.1. Also see Irish Council of Civil Liberties, 'Criminal Justice Bill 2004: Presentations—Joint Committee on Justice, Equality, Defence and Women's Rights', vol. 116, 28 March 2006.

fair procedures.¹²³ In addition to the denial of the accused's right to test the evidence, the jury may be deprived of the opportunity to consider the witness's demeanour.¹²⁴

Counterbalancing the repressive trend

Although significant changes have been made to the pre-trial and trial stages of the criminal process in Ireland which augment the powers of the State to the detriment of the rights of the accused, the capacity of the courts to offset the potential punitive effects of these developments is evident in a number of important safeguards. The exclusion of illegally obtained evidence and compelled statements, the recording of police interrogations, the criteria governing the use of confession evidence, the Judges' Rules and the Treatment in Custody Regulations all serve to compensate, at least to some extent, for the erosion of individual rights in the criminal process.

Illegally obtained evidence

Strict rules pertain to the admissibility of illegally obtained evidence in Ireland, exemplifying the protection accorded to individual rights by the Irish judiciary.¹²⁵ In *People (AG) v O'Brien*, Walsh J concluded that evidence acquired as a result of 'a deliberate and conscious violation of the constitutional rights of

123 *State (Healy) v Donoghue* [1976] IR 325 at 335–6. This mirrors the protection in Article 6(3)(d) of the European Convention on Human Rights.

124 IHRC, above n. 20 at para. 5.1. Also see Professor Binchy, 'Criminal Justice Bill 2004: Presentation—Joint Committee on Justice, Equality, Defence and Women's Rights', vol. 84, 2 March 2005.

125 Indeed the Irish approach is stricter on State agents than that in England and Wales. While s. 78 of PACE allows a court to exclude prosecution evidence if admission would have an adverse effect on the fairness of the proceedings (see Dennis, above n. 37 at 91 *et seq.*), this permits the use of improperly obtained but reliable evidence which does not compromise the fairness of the trial itself. Following the pre-PACE decision of *R v Sang* [1980] AC 402, oppressive conduct does not necessitate the exclusion of evidence obtained thereby, as it does not 'automatically override the fundamental test of fairness in admission of evidence' (*R v Chalkley* [1998] QB 848). Evidence obtained illegally 'is not *ipso facto* inadmissible but it would be excluded if its admission would make the trial unfair' (*R v Hardy* [2003] 1 Cr App R 30 at [18]). Nevertheless, Choo and Nash suggest that the recent decision in *A v Secretary of State for the Home Department* [2006] 2 AC 221 precluding the use of evidence obtained by torture seems to demonstrate a new mindset towards the exclusion of evidence. A. L.-T. Choo and S. Nash, 'Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales?' (2007) 11 E & P 75. Also see D. Giannouloupoloulos, 'The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First' (2007) 11 E & P 181, who highlights the constitutionally mandated exclusion in Greece of evidence obtained by the commission of criminal offences. For general consideration of the exclusion of improperly obtained evidence see Roberts and Zuckerman, above n. 37 at 150 *et seq.*; Ashworth and Redmayne, above n. 53 at 314 *et seq.*, and J. McEwan, *Evidence and the Adversarial Process: The Modern Law*, 2nd edn (Hart: Oxford, 1998) 205 *et seq.*

the accused person' must be deemed inadmissible 'where no extraordinary excusing circumstances exist'.¹²⁶ He emphasised that the defence of constitutional rights is superior to the duty to try individuals for a criminal offence.¹²⁷ Similarly, in *People (DPP) v Kenny*, Finlay CJ recognised that, while the exclusion of evidence can limit the ability of the courts to determine the truth and so to administer justice,

the detection of crime and the conviction of guilty persons ... cannot ... outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen'.¹²⁸

Evidentiary exclusion encapsulates the courts' elevation of constitutional rights over the expedient investigation of crime. Nevertheless, the Minister for Justice has expressed his desire to review this rule of evidence, if it 'leads to the unintended outcome of accused persons regularly getting away with crimes on a technicality'.¹²⁹ Similar sentiments have been expressed by the DPP¹³⁰ and by a majority of the Balance in the Criminal Law Review Group.¹³¹ In light of these comments, change to the protective exclusionary rule may be anticipated.

Recording police interviews

One development which could guard against the possibility of coercive actions by the Gardaí is the recording of police interrogations.¹³² The Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 provide for the recording of interviews of suspects detained under s. 4 of the Criminal Justice Act 1984, s. 30 of the Offences Against the State Act 1939 or s. 50 of the Criminal Justice

126 *People (AG) v O'Brien* [1965] IR 142 at 170. Walsh J stated that the imminent destruction of vital evidence or the need to rescue a victim in peril constitutes extraordinary excusing circumstances. In addition, the imminent destruction of drugs has been regarded as fulfilling this standard (*People (DPP) v Lawless* [1985] 3 Frewen 30), as has the preservation of vital evidence (*People (DPP) v McCann* [1998] 4 IR 397).

127 *People (AG) v O'Brien* [1965] IR 142 at 170.

128 *Ibid.* at 134.

129 Minister for Justice, 'Rebalancing Criminal Justice—Remarks by Tanaiste in Limerick', 20 October 2006, available at <http://www.justice.ie/en/JELR/Pages/SP07000417>, accessed 21 April 2008.

130 Director of Public Prosecutions, 'Opening Remarks', 7th Annual National Prosecutors' Conference, 13 May 2006, available at http://www.dpp.ie/filestore/documents/DIRECTOR_-_Opening_Remarks.pdf, accessed 21 April 2008.

131 Balance in the Criminal Law Review Group, above n. 54 at 165–6.

132 In England and Wales, police powers of arrest and detention are mitigated somewhat by the requirement in ss. 60 and 60A of PACE that interviews of suspects in police custody be electronically recorded.

Act 2007.¹³³ However, only Garda stations which have electronic recording equipment installed are affected by these regulations,¹³⁴ and there are no safeguards mandating the station to which a suspect should be brought.¹³⁵ Furthermore, the interview does not have to be recorded if the recording equipment is broken or already in use at the time of the interview,¹³⁶ or if recording is 'not practicable'.¹³⁷ These are significant limitations on electronic recording as a safeguard for suspects' rights.

Limiting the effects of the erosion of the right to silence

The Irish courts have compensated for legislative encroachments on the right to silence by holding that compelled statements should not be admissible in subsequent criminal proceedings. In *Re National Irish Bank Ltd and the Companies Act 1990*, Barrington J concluded that a confession obtained under the Companies Act 1990 would not be admissible at a subsequent criminal trial unless the trial judge was satisfied that the confession was 'voluntary'.¹³⁸ While the precise meaning of voluntary is often not elucidated in case law, the test used is that first propounded in *Ibrahim v R* that:

... no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.¹³⁹

This protective approach is to be welcomed.

133 Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (SI 1997 No. 74), reg. 3(2). Section 52 of the Criminal Justice Act 2007 ensures that detention under the Act is covered by the regulations.

134 Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, reg. 3(1).

135 In *People (DPP) v Holland*, unreported, 15 July 1998, Court of Criminal Appeal, it was argued that the questioning of the suspect in a Garda station which did not have recording equipment installed, rather than in another station which did, was a deliberate tactic on the part of the Gardaí to circumvent the recording of the interview. However, the court accepted that the particular station was chosen because it was the centre of investigation for the crimes in which the suspect was believed to be involved.

136 Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, reg. 4(3)(a)(i) and (ii).

137 Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, reg. 4(3)(b).

138 *Re National Irish Bank Ltd and the Companies Act 1990* [1999] 3 IR 145, following *Saunders v United Kingdom* (1996) 23 EHRR 313.

139 *Ibrahim v R* [1914] AC 599 at 609. See e.g. *People (DPP) v Hoey* [1987] IR 637 at 651 where the Supreme Court described this standard of voluntariness as 'firmly established in our legal system'.

Moreover, legislative extensions of the power to draw adverse inferences have been interpreted restrictively by the courts. In *People (DPP) v Finnerty*, the Supreme Court emphasised that unless the right to silence is expressly abrogated by statutory provisions permitting inferences to be drawn against the accused, the common law doctrine prohibiting any adverse inference must be upheld.¹⁴⁰

Confession evidence

Stringent rules governing the admissibility of confession evidence may also counterbalance the erosion of individual rights at the pre-trial and trial stages of the criminal process. The rules governing the admissibility of confession evidence are strict: statements deemed ‘involuntary’ will be excluded.¹⁴¹ The courts may also declare a confession to be inadmissible where it followed an inducement or suggestion on the part of the Gardaí that the suspect would gain some advantage,¹⁴² or where it was made as a consequence of oppression.¹⁴³ A pre-trial admission may also be excluded at trial if the circumstances in which it was procured fall below the requisite standard of fairness.¹⁴⁴ More generally, s. 10 of the Criminal Procedure Act 1993 requires the judge to warn the jury against convicting on uncorroborated confession evidence.

The Judges’ Rules and the Treatment of Persons in Garda Custody Regulations

In addition, the Judges’ Rules and the Treatment of Persons in Garda Custody Regulations 1987¹⁴⁵ moderate the harshness associated with custodial interrogation. The Judges’ Rules, which were approved in Ireland in *People v Cummins*, serve as the basic guide to police conduct.¹⁴⁶ As the Judges’ Rules are not formal rules of law, failure to adhere to them does not automatically result in the exclusion of evidence acquired as a result of the breach.¹⁴⁷ Nevertheless, in *People v Farrell*, the Court of Criminal Appeal stressed that, while the Judges’ Rules are merely rules for the guidance of persons taking statements, they ‘have stood up to

140 *People (DPP) v Finnerty* [1999] 4 IR 364.

141 *People (AG) v Cummins* [1972] IR 312.

142 *Ibrahim v R* [1914] AC 599 at 609; *People (DPP) v Geoghan and Bourke*, unreported, 18 November 2003, Central Criminal Court.

143 *People (DPP) v McNally and Breathnach* [1981] 2 Frewen 43. Similarly, s. 76(2) of PACE in England and Wales precludes the use of a confession obtained by oppression or in consequence of anything said or done which was likely to render the confession unreliable, unless the prosecution can prove otherwise.

144 In *People v Shaw* [1982] IR 1 at 61, Griffin J stressed that this rule is mandated by the fact that the Irish legal system is accusatorial and not inquisitorial, and because the Constitution requires the observance of fundamental procedural fairness.

145 Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (SI 1987 No. 119).

146 *People v Cummins* [1972] IR 312 at 317–18.

147 *Ibid.*

the test of time and will be departed from at peril'.¹⁴⁸ Only in very exceptional circumstances will a statement taken in breach of the rules be admitted in evidence, and every such breach calls for an adequate explanation.¹⁴⁹

The Treatment of Persons in Garda Custody Regulations also protect the accused. These regulations pertain to matters such as notification of solicitors, the information to be given to the accused on being detained, and the proper form of custody records. However, s. 7(3) of the Criminal Justice Act 1984 provides that failure to abide by the regulations does not 'of itself' render the custody of the accused unlawful, nor does it affect the admissibility of any statement made.¹⁵⁰

Conclusion

The burgeoning threat of organised crime in Irish society has precipitated the introduction of new legal measures and the proliferation of investigative tactics originally deployed against subversion activities. Pre-trial protections and aspects of the trial itself have been altered so as to augment the powers of the State and thereby increase its ability to combat gangland criminality effectively. The issue of search warrants by the Gardaí, the extension of detention periods and the erosion of the right to silence indicate a preference for the exigencies of crime control over the due process rights of the individual, and represent a move towards a more result-oriented way of thinking. In court, the right to a jury trial has been circumscribed, the Witness Protection Programme is increasingly used, and witnesses' previous inconsistent statements may be relied on as evidence against the accused. The overarching rationale for these measures lies in the imperative of public protection and the drive for successful convictions, which has the effect of eclipsing individual liberties.

Nonetheless, it is important to recognise the continued existence of safeguards which counterbalance incursions on individual rights in the Irish justice system. The inadmissibility of illegally obtained evidence and compelled statements, the recording of Garda interviews, the rules governing the use of confession evidence, the Judges' Rules and the Treatment of Persons in Garda Custody Regulations offset the attenuation of individual rights in the criminal process. These examples suggest that the drift away from due process is not unmitigated. Protective devices exist which temper the impact on the accused of more repressive legislative developments.

148 *People v Farrell* [1978] IR 1 at 21. This was followed in *People (DPP) v McNally and Breathnach* [1981] 2 Frewen 43.

149 *People v Farrell* [1978] IR 1 at 21.

150 See *DPP v Spratt* [1995] 1 IR 585 at 591.

While organised criminals might be portrayed as threatening the justice system, it is submitted that the phenomenon of organised crime should be seen as a serious social problem rather than precipitating a pervasive legal crisis with the potential to subvert the organs of the State. Indeed, it seems that there has been a blurring of the conventional distinction between social problems and national emergency¹⁵¹ in Ireland, which eases the seepage of emergency measures and tactics into the ordinary legal arena. Organised crime in Ireland has not infiltrated the fabric of government nor does it seem likely to compromise the pursuit of justice. Moreover, it is questionable whether the purported flaws in the existing trial system truly demand extraordinary remedies at the cost of significant rights. As the DPP recently remarked:

In the vast majority of cases brought to court, the trial system functions well. About 90% of indictable prosecutions end in a guilty plea, and of the remainder about half end in conviction and half with an acquittal, leaving an overall conviction rate of about 95% ...¹⁵²

This is not to downplay the fact that serious and gun-related crime is a growing problem in Ireland,¹⁵³ which may in fact merit the revision of traditional approaches to crime control. Interpretations of civil liberties and rules of the criminal process may need to be updated or altered given the shifting nature of crime. However, any adjustments must be grounded in careful political analysis and widespread popular debate, must be based on adequate evidence of both the need to act and the likely efficacy of the proposal, must be in the public interest and should involve minimal restrictions on rights. Such measured consideration and implementation of procedural reform is currently lacking in the Irish context, which is characterised by ad hoc and pragmatic rather than principled reactions to the perceived threat of organised criminality.

151 B. Hudson, *Justice in the Risk Society* (Sage: London, 2003) 218.

152 Director of Public Prosecutions, 'Review of the Criminal Justice System Arising from Public Concern at Recent Developments', Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights, November 2003. In fact, in 2004 89 per cent of prosecutions on indictment resulted in a plea of guilty, with a total conviction rate of 94 per cent. In 2004, the figures were 86 per cent and 92 per cent respectively, and in 2003 85 per cent and 92 per cent. Office of the Director of Public Prosecutions, *Annual Report 2006* (Office of the Director of Public Prosecutions: Dublin, 2007) 41, chart 7a.

153 There has been a sixfold increase in homicide numbers in as many decades, from 10.3 homicides per year in the 1950s to 60 in 2006: see An Garda Síochána, *Annual Report of An Garda Síochána 2006* (Stationery Office: Dublin, 2007) 20. The number of recorded firearms offences has increased substantially: see An Garda Síochána, *Annual Report of An Garda Síochána 2005* (Stationery Office: Dublin, 2006) 20 *et seq.* For a useful compilation of crime statistics in Ireland, see I. O'Donnell, E. O'Sullivan and D. Healy (eds), *Crime and Punishment in Ireland, 1922 to 2003: A Statistical Sourcebook* (Institute of Public Administration: Dublin, 2005).

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