The Criminal Justice Process: From Questioning to Trial

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Abstract

The manner in which criminal suspects are brought to trial has changed considerably in the past forty years in the criminal justice processes of both the Republic of Ireland and Northern Ireland. While the 'normalisation' of emergency measures has played a considerable role in altering the nature and shape of these processes, other factors have also been influential: for example, rights-protection under the European Convention on Human Rights in both jurisdictions and under the Constitution in the Republic; political reaction to perceived domestic crises; and the emergence of new voices, such as those of victims, within the criminal justice sphere.

Introduction

The manner in which criminal offences are investigated, prosecuted and tried varies greatly from jurisdiction to jurisdiction. The particular criminal process or criminal justice system which operates is arrived at over time and results from the convergence of many factors as varied as the historic background of the jurisdiction, the international human rights instruments to which the state has acceded, the cases which happen to have come before the courts, current or past crises or perceived crises which have occurred therein, and the political leanings of its current government.

A particular distinguishing feature of the development of the criminal processes in Northern Ireland and the Republic of Ireland has been the impact of security threats on the ordinary corpus

of criminal procedure. Ever since the partition of Ireland the island has been blighted by periodic bouts of political and paramilitary violence, met on the part of governments on both sides of the border by emergency legislation which has spilled over into the criminal justice systems of both jurisdictions. In Northern Ireland, the old Stormont government's response to security threats was to resort to detention without any form of trial at all under the infamous Special Powers legislation (Boyle *et al.* 1973). After direct rule was imposed by the British government in 1972 non-jury trials on indictment were introduced into the criminal justice system in so-called 'Diplock courts' and such trials can still take place.[1]Powers designed purely for security were invested in the ordinary criminal justice agencies which were given responsibility for countering the security threat in Northern Ireland in a strategy known as 'criminalisation' (Boyle *et al* 1980: 31). In the Republic, *Bunreacht na hÉireann*, the Irish Constitution, specifically provides for special non-jury courts to be established by legislation and the Offences Against the State Act (OASA) 1939 made provision for a Special Criminal Court to come into operation when the government deemed the ordinary courts inadequate to secure the effective administration of justice. Proclamations to this effect, in response to security threats linked to the 'Troubles' in Northern Ireland, were made for prolonged periods of time: 1939-46; 1961-62; and, 1972 to the present day.[2] As we shall see, this non-jury court came to be used in the trial of offences with no link to paramilitary activity.

This is one example of how the normalisation of emergency powers has played a significant role in the development of the criminal process in both jurisdictions. The result of the security legislation spill-over into the criminal justice systems in both jurisdictions was that for many years law was, as Kilcommins and Vaughan (2008: 67-69) have put it, 'in the shadow of the gunman' .

[1] See Justice and Security Act 2007, ss 1-7 described in Dickson (2013). For an analysis of the workings of such courts, see Jackson and Doran (1995).
[2] For an analysis and history of the Special Criminal Court, see Davis (2007).

While Mulcahy (2005: 186) has cautioned against the overstatement of the 'contagion thesis' he, like others, accepts that emergency measures introduced in the context of addressing paramilitary activity in the Republic and in Northern Ireland displayed a tendency 'gradually to influence the entire legal landscape' (Mulcahy, 2005: 189). Although a peace process has been in place on both parts of the island since the signing of the Good Friday Agreement in 1998, many of these measures continue in force and, by a process described by one of us (in the context of expanding legislative incursions on the right to silence) as 'function creep' (Daly 2011: 32; 2014: 74), have come to be used to combat other threats to the state such as that of 'gangland' crime.

This chapter considers the manner in which certain aspects of criminal procedure both north and south of the border have developed and changed in the course of the past four decades.While the period from partition up to the 1970s was marked by 'slow deliberate change in the basic principles, structures and processes of the criminal justice system', within the last 40 years the pace of change has quickened significantly (Walsh 2002: x).Structural changes have included the introduction of the Office of the Director of Public Prosecutions (DPP) in 1972 which transformed prosecution arrangements in the Republic (Hancock and Jackson, 2008) and a number of changes following the Good Friday Agreement in Northern Ireland including: a new Public Prosecution Service in 2005; the devolution of policing and criminal justice functions to the Northern Ireland Assembly; and, the introduction of Criminal Justice Inspection Northern Ireland - a body responsible for inspecting all aspects of the criminal justice system other than the judiciary. However, the central focus of this chapter is not on structural changes, but on significant shifts observed over the course of four decades in terms of the manner in which suspects are brought to trial. Our discussion is loosely structured around Packer's (1968) famous models of 'crime control' and 'due process' which were used to illustrate the tensions between certain 'value-clusters'

(Kraska, 2006: 179) within the American criminal process. His models have been widely applied elsewhere and for all the criticisms made of them (e.g. Reed, 1985; Smith 1997, 1998; Roach, 1999), they provide a useful starting point for any discussion of the criminal process.[3]

The 'crime control' model views the repression of crime as the primary goal of the criminal process and places emphasis on speed and efficiency within the criminal process over the protection of individual rights, in order to achieve that goal. The 'due process' model, by contrast, considers that even though the repression of crime is a laudable and important goal, other issues such as the protection of individual rights and the prevention of state oppression of the individual must also be considered. Although Packer (1968) was at pains to emphasise that his models were not based upon entirely opposing values and there was common ground between them, one of the criticisms of his approach is that he 'failed to give a clear explanation of the relationship between his models' (Ashworth and Redmayne, 2010: 40). This has allowed an arguably 'artificial opposition' to be set up between the models in subsequent criminal justice discourse with the 'crime control' model being assigned the role of the public interest and the 'due process' model asserting the private interest of the individual accused. This has set the parameters for how these interests should be 'balanced' (Dennis, 1989: 30). Another limitation of Packer's models, which were designed in the 1960s, is that they are not cognisant of the rise of victims' rights (Roach, 1999). The perspective of victims now also has to be accommodated alongside other competing values within the criminal process (Ashworth and Redmayne, 2010), although as we shall see, there has been a tendency to assume that the interests of victims are always in opposition to the interests of the accused.

[3] According to Langer (2014), it is hard to exaggerate the influence of Packer's models on thinking about criminal procedure throughout the world. Kraska (2004) included the models in a comprehensive listing of eight theoretical orientations which are routinely employed in the field of criminal justice research.

One of the most notable changes in the criminal process of both the Republic and Northern Ireland over the last 40 years has been a decided shift from the courtroom to the police station as arrested suspects can be detained for longer periods and are systematically questioned in police custody with anything they say or do not say recorded and, in many cases, able to be used against them in court.[4] After questioning, large numbers of defendants who are charged with criminal offences and prosecuted as a result plead guilty with no forensic examination in court of the evidence against them.[5] The minority who persist in pleading not guilty are faced with a trial where the prosecution faces fewer obstacles in attempting to prove their guilt than used to be the case. These shifts in the direction of crime control are not unique to the Republic or Northern Ireland which raises the question whether criminal justice policy in each of the jurisdictions over the past 40 years has been driven primarily by global developments seen elsewhere or by peculiarly 'local' factors.

The shift towards crime control may be indicative of more general institutional and cultural changes that Garland has argued have taken place in the USA and the UK where 'penal welfarism' has been displaced by a politicisation of crime and a growth in popular punitiveness (Garland, 2001). But it is clear that not every country has experienced such a 'punitive turn' (Zedner, 2002; Downes, 2011) and commentators have highlighted the comparatively low rates of imprisonment and the general resistance to punitiveness in the Republic of Ireland (e.g. Kilcommins *et al*., 2004; O'Sullivan and O'Donnell, 2007; Hamilton, 2014). We will argue that domestic 'home grown'

[4] For an analysis of the impact of the changes to the right to silence on this process in Northern Ireland, see Jackson (2001).

[5] Not surprisingly there are significant variations in plea rates according to how serious the offence is. In the Republic of Ireland, for example, a guilty plea rate of only 33% was recorded in the case of offences that were proceeded with in the Central Criminal Court (which tries homicide and sexual offences) while 80% of defendants pleaded guilty to cases in the Circuit Court (which tries less serious offences) (Courts Service, 2013). Pleas rates were not recorded for offences in the District Court which tries the least serious offences. In Northern Ireland, 39% of defendants tried in the Crown Court (where the most serious offences are tried) pleaded guilty to all the charges against them compared to 60% of defendants tried in the magistrates' court (which tries summary cases) (Northern Ireland Courts and Tribunals Service, 2012).

crises, such as the emergence of so-called 'gangland' crime in the Republic or paramilitary violence in Northern Ireland provide a better explanation for the shifts of policy in the direction of crime control but that these crises have been fomented by a rhetoric that is familiar in other jurisdictions, namely that the traditional focus on due process for the individual accused must be 're-balanced' in the interests of safeguarding security, protection and the rights of victims. In other words, *both* the domestic and the global contexts have served to reinforce the shift towards crime control. In the context of this apparent shift, questions arise about the influence of the Constitution in the Republic of Ireland and of the European Convention on Human Rights, to which both jurisdictions are signatories, in upholding 'due process' values. These issues are also examined within the chapter.

In the next section we set out the 'due process' underpinnings of the criminal processes in the Republic and Northern Ireland, highlighting the impact of the Constitution in particular in the Republic and the influence of the European Convention on Human Rights in both jurisdictions. Next we look to the rise of crime control measures and compare the position of a criminal suspect in the early 1970s with the modern-day suspect. We examine the 'front-loading' of criminal cases from the trial to the pre-trial process, an experience not unique to the two jurisdictions under consideration here, and we analyse notable shifts which have occurred at the trial stage. We finally consider the strength, or otherwise, of base-line protections, the need for legitimacy in the criminal processes of the two jurisdictions, and their future shape.

Due Process: The Constitutionalisation of the Criminal Process and Human Rights

Bunreacht na hEireann, the Irish Constitution, contains several express rights which relate to the prosecution and trial of criminal offences, e.g. Art 38.1 the right to a fair trial; Art 38.5 the right to trial by jury on serious criminal charges; Art 40.4.1 the right to liberty; and, Art 40.5 the inviolability of the dwelling (relevant in the context of garda search and seizure). Constitutional status has also been conferred upon a number of other rights not expressly stated within the document itself, through the interpretation of the superior courts from the mid-1960s onwards. The doctrine of unenumerated rights was first established in *Ryan v AG*,[6] wherein the Supreme Court recognised a constitutional right to bodily integrity. Other unenumerated rights were recognised in criminal cases and, indeed, O'Malley (2009: 1) states that some of the leading decisions '…were motivated by a concern for the rights of suspects and accused persons who found themselves facing the coercive power of the State'. Examples include the presumption of innocence; the right to silence; the right of reasonable access to legal advice; the right to trial within a reasonable time; and, the right to proportionality in sentencing.[7] While the courts have been less inclined to expand the list of recognised unenumerated rights since the mid-1990s,[8] O'Malley (2009: 2) suggests that there is an advantage to allowing due process values to be developed through judicial interpretation as 'the rights of suspects, defendants and, nowadays, victims, can evolve in accordance with emerging concepts of justice and progress'. Of course, one of the main drawbacks of this method of rights-recognition, besides arguments relating to the legitimacy of such decisions being made

[6] [1965] IR 294.

[7] Some of these rights have been read into the general protection of the right to a fair trial under Art 38.1, which allows for no derogation, while others have been judicially located within the general protection of individual rights set out in Art 40.3, which requires that such rights be protected only 'as far as practicable' and therefore does allow for some legitimate limitation of rights.

[8] On the decline in judicial recognition of unenumerated constitutional rights see Gwyn Morgan (2001); Hardiman (2004); and Whyte (2006).

by an unelected judiciary, is that it is reliant on the somewhat arbitrary happenstance of which cases make it as far as the superior courts and the specific questions that they raise.

One of the strongest protections for suspect rights within the criminal process of the Republic of Ireland is the strict approach adopted by the courts towards the exclusion of unconstitutionally obtained evidence. If only legal rights are breached in obtaining evidence the trial judge has a discretion to admit or exclude such evidence, based on a number of considerations. If the rights breached are of constitutional status, however, the evidence must be excluded except in extremely limited 'extraordinary excusing circumstances' (*People (AG) v O'Brien*[9]). This rule, 'one of the strictest exclusionary rules (if not *the* strictest one) in the common law world' (Daly, 2011: 63), has had considerable impact since, from the moment an individual comes into contact with the criminal process, it is primarily constitutional rights which come into play: most garda misconduct in the investigative, pre-trial phase is classified as infringing constitutional, as opposed to purely legal, rights (Daly, 2009). This protectionist rationale has been expressly adopted, despite its potential to remove relevant evidence that is probative of guilt from trial. In *People (DPP) v Kenny*, Finlay CJ stated that 'the detection of crime and the conviction of guilty persons, no matter how important they may be to the ordering of society, cannot … outweigh the unambiguously expressed constitutional obligation "as far as practicable to defend and vindicate the personal rights of the citizen"'.[10] Despite a number of strong dissents from the bench in *Kenny*, judicial criticism of the harshness of the rule in later cases (see, for example, the judgment of Charleton J. in the High Court in *DPP (Walsh) v Cash*[11]) and calls for its replacement with a rule based on balancing and judicial discretion (Balance in the Criminal Law Review Group 2007), the strict exclusionary rule

[9] [1965] IR 142.
[10] [1990] 2 IR 110, at 134, quoting Art.40.3.1 of the Constitution.
[11] [2007] IEHC 108 (28 March 2007).

in relation to unconstitutionally obtained evidence continues in existence in the Republic. While the legislature has introduced many crime control-oriented measures, and Kilcommins and Vaughan (2004: 56) suggest that 'in terms of a devaluation in due process values, [the Republic of] Ireland is now a lodestar for other jurisdictions', this strong due process rule remains in place.

In contrast to the Republic of Ireland, Northern Ireland has no written constitution to which the courts are required to adhere. Traditionally, a number of the rights which have been recognised as unenumerated constitutional rights under the Irish Constitution existed as common law rights developed by the judiciary. Examples relevant to the criminal process include the right to a fair trial, the right to silence and the right to private communication with one's lawyer. Other rights have been underpinned by statute, most notably a suspect's right of access to a lawyer recognised under art. 59 of the Police and Criminal Evidence (NI) Order 1989 (PACE). Since the passage of the Human Rights Act 1998 the courts may also make a declaration of incompatibility in respect of any legislative act that is considered to breach the European Convention on Human Rights (ECHR). Although the Northern Irish courts cannot strike down primary legislation in breach of the human rights in the Convention, they must interpret such legislation in a Convention-compliant manner 'in so far as it is practicable to do so'.

The ECHR had an influential effect on the Northern Irish criminal process before it became directly applicable under the Human Rights Act. The landmark judgment of the European Court of Human Rights (ECtHR) in *Ireland v UK*,[12] which ruled that detainees held under the Special Powers legislation in Northern Ireland had been subjected to inhuman and degrading treatment in breach of Art. 3 of the ECHR, sent a strong message about the need for ECHR compliance. The

[12] (1979-80) 2 EHRR 25.

ECHR provided a benchmark for assessing the proportionality of the emergency powers that were introduced into the criminal process as part of the criminalisation strategy in response to the Troubles. When the ECtHR delivered a crushing blow to this policy in *Brogan v UK*,[13] by holding that Art. 5 (the right to liberty) was infringed by the detention of terrorist suspects for seven days before bringing them before a court, the UK was forced to derogate from its Convention obligations until the emergency powers were scaled down following the Good Friday Agreement. The ECtHR has continued to intervene on issues since the Agreement and the incorporation of the ECHR into UK law. Thus Art. 6(2) of the ECHR which enshrines the presumption of innocence has been applied to require that certain reverse onus clauses putting the burden of proof on the defence be 'read down' as evidential rather than legal burdens (see, for example, *Attorney General's Reference (No 4 of 2002)* [14]), and Art. 5 has been applied to circumscribe the circumstances under which the police may stop and search persons under the Terrorism Act 2000 when there is no suspicion that they are in possession of prohibited articles (*Gillan and Quinton v UK*[15]). We shall see, however, that a broad application of the proportionality principle enabling the courts to balance certain rights such as the right to a fair trial against other public interests has led to uncertainty about their scope and reach. In contrast to the constitutional exclusionary principle applied in the Republic, there is also uncertainty over the degree to which the ECHR requires evidence obtained in breach of convention rights to be excluded in a criminal trial (Jackson, 2012).

The ECHR has been influential in the Republic of Ireland since entering into force there in 1953. In the context of the criminal process, a number of state violations of Art. 6 ECHR (the right to a

[13] (1989) 11 EHRR 117.
[14] [2004] UKHL 43.
[15] (2010) 50 EHRR 45.

fair trial) have been found by the ECtHR, specifically relating to the privilege against self-incrimination/right to silence (e.g. *Heaney and McGuinness v Ireland*[16]), and to delays in criminal proceedings (e.g. *Barry v Ireland*[17]). While it was at one point envisaged that the ECHR might ultimately be adopted directly into law at a constitutional level in the Republic, or that it might be enacted at a legislative level with superiority over ordinary legislation, the legislature in fact chose to import much of the framework for its domestic rights-protection from the Human Rights Act in the UK, and enact it as a piece of 'indirect/interpretive legislation' which simply obliges the organs of the state to take account of its provisions and guarantees (Egan, 2003). The European Convention on Human Rights Act 2003 allows for ECHR issues to be directly litigated before the domestic courts, requires that every organ of the State shall perform its functions in a Convention-compliant manner (s 3(1)), provides that judicial notice should be taken of the jurisprudence of the ECtHR (s 4), and allows for the superior courts to make a declaration of incompatibility with the Convention under certain circumstances (s 5). The impact of the Act on domestic rights-protection has, however, been minimal, due to the fact that most rights-based disputes in the Republic can be resolved on the basis of the Constitution, without the need for recourse to the Convention. De Londras (2014: 58-59) suggests that in the Republic, 'rights that flow from the ECHR have always played second fiddle to constitutionally enshrined rights' and that the former are really only called into play when recourse to the latter has been unsuccessful. Indeed, since the introduction of the 2003 Act, the courts have insisted that constitutional matters should be considered first and Convention matters only addressed if the Constitution affords no resolution (*Carmody v Minister for Justice, Equality and Law Reform*[18]). This has raised the concern that the declaration of

[16] (2001) 33 EHRR 334.
[17] application no 18273/04 (15 December 2005).
[18] [2010] 1 IR 635.

incompatibility with the ECHR, provided for under the 2003 Act, might become a non-remedy in the Republic given the somewhat "awkward fit of a Declaration…designed to instigate political contestation as to rights in a structure of constitutional supremacy in which rights—or at least 'rights that matter' from a political perspective—are legally determined and minimally contestable" (de Londras, 2014: 64). While not entirely toothless to date, the incorporation of the ECHR at a domestic level in the Republic has effected no sizeable shift in the criminal process, though members of the Oireachtas have long been aware of their responsibility to uphold both the Constitution and the ECHR in developing legislation.[19]

As a result of the Good Friday Agreement, both jurisdictions have remained committed to human rights protection. It was envisaged that a joint committee of representatives of the two Human Rights Commissions which the governments agreed to establish would consider the possibility of establishing a charter reflecting and endorsing agreed measures for the protection of fundamental rights of everyone living in the island of Ireland (Egan and Murray, 2007). This has yet to see the light of day but there remains a commitment to the Human Rights Commissions remaining in place. With constitutional protection in the Republic and human rights protection in both jurisdictions, the question remains why crime control measures have taken such a hold over the criminal justice agenda over the last four decades.

Crime Control: Re-balancing the Criminal Process

[19] For more on the influence of the ECHR on the criminal process in the Republic of Ireland see McDermott and Murphy (2008) and Ní Raifeartaigh (2004).

In order to see the full measure of change that has taken place in the way suspects are dealt with in both jurisdictions over the last four decades, we need to go back to the criminal process of the early 1970s. At that time a person suspected of a serious criminal offence could not be arrested for the purpose of questioning (except within the context of emergency legislation such as the OASA 1939 in the Republic and the special powers legislation in Northern Ireland). Within the ordinary criminal justice system, arrest was only for the purposes of bringing the suspect to court to be charged. If charged, a suspect could only be refused bail in the Republic of Ireland on the basis of a risk that he might abscond or interfere with witnesses or evidence; no issue arose as to his propensity to commit crime while on bail. In Northern Ireland, bail could be refused in order to prevent further offences but here too there was a long tradition in favour of bail (Northern Ireland Law Commission, 2010). The suspect would be tried by a judge and jury (unless charged in the Republic under the 1939 Act), and would not need to provide the prosecution with any advance information as to what defence he might lead at trial. At trial the jury could not be invited to draw any particular conclusions from any failure on the accused's part to answer questions the police might have put to him before trial. If a witness who had spoken to the police about the accused's involvement in the alleged offence told the court that he could no longer remember what he had seen or heard, no evidence as to his prior statement could be introduced. If the accused was acquitted that was the end of the matter and, under the rule against double jeopardy, he could not be retried in relation to the same offence even if new evidence came to light.

For the modern-day suspect on both parts of the island much has changed. A suspect can be arrested for interrogation and detained before being brought to court for much longer periods of time (in the Republic for up to twenty-four hours in relation to most serious offences, and as long as 168 hours (or seven days) in relation to drug-trafficking offences or 'organised crime' offences;

in Northern Ireland for up to 96 hours in the case of indictable offences and up to 14 days in terrorist cases). After an initial police-authorised limit is reached (36 hours under PACE in Northern Ireland, 48 hours under various statutes in the Republic), the police must apply to court to further extend detention but the detained person may not be entitled to attend or have his legal representative attend any such hearing.[20] During detention a suspect can be questioned by the police and fingerprints and 'non-intimate' samples including swabs from any part of the body including the mouth but excluding other body orifices and the genital region may be taken without consent. Failure to agree to give 'intimate' samples including samples of blood, pubic hair, or urine can give rise to adverse inferences at trial. If charged, bail may now be denied in the Republic because there is a risk that the accused might commit offences while on bail. Most indictable offences are still tried by a judge and jury but whereas the Special Criminal Court was previously used for subversive crime it is now also specifically designated to hear certain 'organised crime' offences (see Criminal Justice (Amendment) Act 2009 s 8 and Campbell, 2013). The Diplock courts have been scaled back by the abolition of scheduled offences (offences that were presumptively tried without a jury) but trials on indictment without a jury can still take place for 'certified' trials when the DPP certifies that the offence in question appears to be connected to a proscribed organisation or to religious or political hostility of one person or group towards another person or group (Justice and Security Act 2007, ss 1-9: see Dickson, 2013; Jackson, 2009).

Another change is that there are greater obligations on the defence to co-operate with the police and prosecuting authorities. In both jurisdictions, cautions dating back to the early 20th century

[20] This would only arise, in the Republic, in the context of offences under the Offences Against the State Acts, the Criminal Justice (Drug Trafficking) Act 1996, or s.50 of the Criminal Justice Act 2007. In Northern Ireland legal representatives may attend the hearing but may be excluded where the court is to be informed about intelligence information: see *Ward v Police Service of Northern Ireland* [2007] UKHL 50.

informing suspects that they have a right to remain silent are now outdated as a failure to answer police questions may in fact harm a suspect's defence (Daly, 2011; Jackson, 2001). Furthermore disclosure obligations in the Republic of Ireland now require the defence to provide the prosecution with advance notice of any alibi on which they will seek to rely at trial (Criminal Justice Act 1984, s.20), if seeking to adduce evidence of a mental condition (Criminal Law (Insanity) Act 2006 s19(1)), if intending to call an expert witness or adduce expert evidence (Criminal Procedure Act 2012, s34;), or, on a charge of membership of an unlawful organisation under the Offences Against the State Acts, advance notice of any witness to be called (Offences Against the State (Amendment) Act 1998, as amended, s.3(1)). In Northern Ireland, defendants charged with an indictable offence are now required to give a defence statement to the court and the prosecutor setting out what their defence is (Criminal Procedure and Investigations Act 1995, s 5(5)). The pressures on the defence to participate prior to trial have gone hand in hand with a general lowering of the evidentiary barriers erected against the prosecutor in having to prove guilt beyond reasonable doubt when cases go to trial. Examples include the growth in the number of 'reverse onus clauses' which interfere with the presumption of innocence by imposing burdens of proof upon the accused in respect of certain issues (Ni Raifeartaigh, 1995; Hamilton, 2007). We shall see that a general relaxation of the evidentiary rules relating to opinion evidence and hearsay have enabled prosecutors to admit evidence that would have been inadmissible 40 years ago, including prior contradictory statements of witnesses, and that inroads have been made to the double jeopardy rule. Although we shall see that some of these changes in the direction of crime control can be attributed to the process of 'function-creep' arising from emergency powers legislation, a large number of them mirror changes that have occurred in the neighbouring

jurisdiction of England and Wales and invite a discussion of how exactly they came to be imported on to Irish soil.

'Front loading' the Criminal Process

Over a number of years there has been a general policy across many common law jurisdictions to 'front load' the forensic enterprise into the pre-trial phase of proof in order to expedite criminal proceedings and keep cases out of court. One of the starting points in this drive towards crime control efficiency has been to give the police powers to make arrests and hold suspects for questioning so that they can be questioned prior to any court appearance about their suspected criminal activity.

The OASA 1939 can be viewed as the forebear of a number of measures which illustrate the shift from due process ideals towards a crime control orientation in the Republic. That Act was introduced as a response to the declaration of the IRA in late 1938/early 1939 that its Executive Council was the legitimate and legal government of every part of Ireland and its purported declaration of war on the United Kingdom. Amongst its provisions were the first to allow for detention for the purposes of interrogation (s 30), interference with the right to silence (s 52), and use of the Special Criminal Court (ss 35-53). Following their initial introduction, expanded use of garda powers under the 1939 Act led to their normalisation and eventual acceptance in a broader context (see de Londras and Davis, 2010; Gross and Ni Aolain, 2006; Walsh, 1989). This is particularly true of the power to arrest a suspect under the 1939 Act for the purposes of detention for questioning. Within the ordinary corpus of criminal law such a power did not exist until the mid-1980s, whereas it was provided for under s 30 of the 1939 Act. While it was confined to the

offences covered by the Act, the Garda Síochána developed certain practices to circumvent this difficulty and broaden its application. First, the Gardaí began to employ the anti-subversive legislation in cases which lacked any element of a subversive nature. Secondly, they began to use 'holding charges', i.e. they would arrest and detain suspects for offences covered by the 1939 Act where their real investigative interest in the suspect related to a wholly different offence which was not covered by the Act. A number of conflicting judgments were initially issued by the courts in relation to the legality of these garda practices (e.g. *People (DPP) v Towson*[21]; *State (Bowes) v Fitzpatrick*[22]; and *State (Trimbole) v Governor of Mountjoy Prison*[23]),but the Supreme Court ultimately gave them legal *imprimatur* in *People (DPP) v Quilligan*.[24] Walsh (1989: 1110-1111) has suggested that this effected a 'silent, but very significant, shift in the traditional balance built into the criminal process'. Eventually, the exception provided for under the 1939 Act was adopted as the norm as later legislation introduced a more general power of arrest for detention (Criminal Justice Act 1984 s 4) and allowed for extensive periods of potential detention for suspects in particular types of cases (Criminal Justice (Drug Trafficking) Act 1996 s 2; Offences Against the State Act 1939 s 30 as amended by the Offences Against the State (Amendment) Act 1998; and the Criminal Justice Act, 2007 s 50(1)).

The 'Troubles' in Northern Ireland and the emergency powers that arose from them also provided the backcloth for many increased police powers there. The criminalisation strategy introduced in the 1970s divided the criminal justice system into two tiers – an emergency tier where suspects were arrested and questioned under emergency powers and processed through the Diplock courts;

[21] [1978] ILRM 122.
[22] [1978] ILRM 195.
[23] [1985] IR 550.
[24] [1986] IR 495.

and an ‘ordinary’ tier reserved for the euphemistically described ‘ordinary decent criminals’ who were processed under ordinary powers and tried by judge and jury. In the late 1980s, however, this two-tiered system began to fragment when powers that were justified as necessary to deal with the ‘emergency’ seeped into the ordinary criminal justice process and the gap between the two tiers began to narrow. The catalyst for this fragmentation was the introduction of legislation across the entire criminal process to enable adverse inferences to be drawn when suspects refused to mention facts to the police later relied on in their defence or refused to account for incriminating facts linking them to crimes (Criminal Evidence (NI) Order 1988; Jackson, 1989). The provisions have their genesis in the recommendations of the report of the Criminal Law Revision Committee in England and Wales (1972). The report was shelved at the time because of widespread opposition to such deep-rooted inroads into the right of silence (although they were introduced in Singapore in 1977). Curtailment of the right to silence was justified in the 1980s by the need to break down the ‘wall of silence’ erected by terrorist suspects when they were questioned by the police. As in the Republic of Ireland, measures justified for an emergency context became the norm across the entire criminal justice spectrum. The legislation pre-empted a package of measures known as PACE which had been introduced in England and Wales in 1984 and came to be enacted in Northern Ireland under the Police and Criminal Evidence (NI) Order 1989, giving greater powers of arrest and detention to the police in ordinary criminal cases balanced by safeguards such as a right of access to a lawyer in detention (Greer, 1989).

When the curtailment of the right of silence came to be challenged before the ECtHR, the Court held that although the right to remain silent under police questioning and the privilege against self-incrimination were recognised standards which lay at the heart of a fair procedure under Art. 6, the right to silence was not absolute and it could not prevent a court taking into account an

accused's silence in situations which clearly called for an explanation (*Murray (John) v UK*[25]). However, the Court considered that the scheme contained in the legislation made it of 'paramount importance' for the rights of the defence that an accused had access to a lawyer at the initial stages of police investigation. This helped to narrow the gap still further between the processing of terrorist and ordinary suspects and meant that in time terrorist suspects were given very similar rights of access to a lawyer as those given to ordinary suspects. There continue to be separate codes of practice governing the two kinds of suspect and non-jury courts still continue for terrorist suspects. Under the Terrorism Act 2000 anti-terror powers were put on a permanent footing along with anti-terror powers in the rest of the UK and responsibility for terrorism law remains with the UK government rather than with the Department of Justice in Northern Ireland. However, the interchange between the way the two types of suspect are processed has resulted in a normalisation and convergence of treatment.

The acceptance by the ECtHR in *Murray* that there might be some legitimate interference with the privilege against self-incrimination or the right to silence, reiterated by that Court in *Heaney and McGuinness v Ireland*,[26] legitimised the use of similar inference-drawing provisions in the Republic of Ireland. Under the Criminal Justice Act 1984, inferences can be drawn at trial from the pre-trial failure of the accused to account for his presence in a particular place or for objects, substances or marks on his person or in his possession or in the place where he was arrested. In 1996, following the high-profile murders of investigative journalist Veronica Guerin and Detective Sergeant Jerry McCabe and a resultant public outcry (see O'Donnell and O'Sullivan, 2001; O'Mahony, 1996), a more extensive inference-drawing provision was introduced as part of a

[25][25] (1996) 22 EHHR 29.
[26][26] (2001) 33 EHRR 334.

package of legislative measures, though it only operated in the context of drug trafficking offences. This provision allowed for inferences to be drawn from the failure of the accused to mention, during the pre-trial process, a fact which he later relied on in his defence which he ought reasonably to have mentioned at the time of questioning or charging (Criminal Justice (Drug Trafficking) Act 1996 s 7). This was replicated under the Offences Against the State (Amendment) Act 1998. In 2007, a broader provision of the same nature was applied to all arrestable offences (Criminal Justice Act 1984 s 19A, as inserted by the Criminal Justice Act 2007), and in 2009, an even more wide-ranging inference-drawing provision was added to the statute-book in the Republic, permitting inferences to be drawn at trial directly from a failure to answer any question material to the investigation of an offence of participating in or contributing to any activity of a criminal organisation (Criminal Justice Act 2006 s 72A, as inserted by the Criminal Justice (Amendment) Act 2009).

These inference-bearing provisions in both Northern Ireland and the Republic of Ireland represent an important shift in the balance of power between the police and the suspect in the police station, breaking with tradition by making the police station and not just the courtroom a legitimate forum for holding suspects to account for their actions and giving the police the moral authority to do so. They gave formal endorsement to a view propounded particularly in England and Wales that as suspects are given increasing access to legal advice in the police station, the balance should shift towards curtailing the right of silence and set an important precedent for other jurisdictions to follow. Although the United States, Canada and most of the territories of Australia continue to hold out against adverse inference provisions, the Northern Ireland provisions were adopted in England and Wales in 1994 (ss 34-37 of the Criminal Justice and Public Order Act 1994) and in 2013 New South Wales embraced the concept of drawing inferences when accused persons

charged with indictable offences fail to mention facts relied on in their defence (Evidence Amendment (Evidence of Silence) Act 2013).

Shifting the balance at trial

While one of the most prominent changes in the criminal process has been the shift in focus from the courtroom to the police station, the trial stage remains important in those cases where guilt is contested. Writing over 40 years ago, Damaška (1973) argued that across the common law world there were significant barriers mounted against prosecutors at trial in proving the guilt of the accused which contrasted with European continental trial practice. In the intervening 40 years these barriers have been lowered across many common law jurisdictions. Within the Irish context the use of the Special Criminal Court and the 'Diplock' courts resulting in the withdrawal of the jury to deal with subversion has led in practice to an 'adversarial deficit' for the defence in terms of narrowing the scope for challenging the prosecution evidence (Jackson and Doran, 1995). In Northern Ireland, the threshold for admitting confessions in 'Diplock' cases was lowered from the old voluntariness standard at common law to the minimum standard of the absence of torture, inhuman and degrading treatment, although this was raised to conform with the PACE standard based upon reliability and the lack of oppression in 2002 (see art 74 of the PACE (NI) Order 1989). In the Republic, the provision permitting gardaí to give opinion evidence that the accused was a member of an unlawful organisation continues in force (OASA (Amendment) Act 1972 s 3(2)) and a new provision has been introduced permitting gardaí to give an opinion on the existence of a criminal organisation in organised crime cases (Criminal Justice Act 2006 s 71B as inserted by the Criminal Justice (Amendment) Act 2009 s 7). The former provision has withstood

constitutional and human rights challenge in a number of cases (e.g. *DPP v Donnelly and Others*[27]).

The provisions discussed above permitting judges and jurors to draw inferences from silence are a further example of measures introduced on the basis that they were necessary to deal with the 'Conflict' that have remained on the statute book as permanent, normalised measures. However, it can be argued that these measures have had more impact at the pre-trial stage because of their psychological impact in persuading suspects to answer questions than at the trial stage where the ECtHR has scrutinised very carefully the inferences that judges have drawn and the kinds of directions to be given to juries (e.g. *Condron v UK*[28]). In Northern Ireland the provisions have gone further than in the Republic by permitting inferences to be drawn from an accused's failure to testify at trial (Criminal Evidence (NI) Order 1988, Art 4) and research suggests that this provision has had a considerable impact in encouraging defendants in both jury and non-jury trials to give evidence (Jackson *et al*., 2000).

Although these measures have their provenance in the need to deal with particular security threats arising from the Conflict, a number of other measures lowering the evidentiary barriers for proving guilt at trial can be attributed to a broader demand evident across a number of other jurisdictions that the criminal justice system be 're-balanced' in favour of victims. Within the last four decades there has been a growing recognition of the importance attached to those who are victims of crime. Forty years ago, the offending individual was the focus of much criminological concern and the individual victim hardly featured at all (Garland, 2002). Today these positions have been reversed with the process of individualisation shifting away from the defendant towards the victim and

[27] [2012] IECCA 78.
[28] (2000) 31 EHRR 2.

centring upon keeping victims informed, offering them support, consulting with them prior to decision making and involving them in the judicial process (see Kilcommins and Moffat, *infra*). Within the jurisdictions under consideration here, attempts to put the victim more at the centre of the criminal process have included giving the victim a right to make a personal statement informing the court of the impact that a crime has had. A number of reforms have additionally focused on the concerns of vulnerable witnesses. Special measures have been introduced to provide support to witnesses and enhance their ability to achieve their best evidence such as the giving of evidence via video-link, the use of recorded pre-trial statements and the removal of the public from the courtroom (Criminal Evidence Act 1992 in the Republic and Criminal Evidence (NI) Order 1999 in Northern Ireland).

While these changes have not particularly impacted on defendants, others have had the effect of undermining defendants' rights as they have gone hand in hand with conscious efforts to re-balance the criminal justice system in favour of victims against defendants. Thus in Northern Ireland in the early 2000s, before the devolution of criminal justice functions to the Northern Ireland Assembly, a package of reforms was introduced as a result of a deliberate policy on the part of the 'New Labour' government in the UK to put victims at the core of criminal justice at the expense of defendants. This included major incursions on the hearsay rule, allowing for the admission of the written statements of witnesses who are unable to be cross-examined in court, and changes aimed at expanding the circumstances in which juries can be informed about a defendant's previous convictions and bad character whilst reducing the circumstances under which witnesses' bad character may be revealed to the jury (Criminal Justice (Evidence) (NI) Order 2003). While the value of these measures for victims has been questioned (Jackson, 2003), they have made major inroads into traditional common law safeguards protecting defendants at trial. A

human rights challenge to the hearsay provisions on the basis that they infringed the defendant's right to examine witnesses resulted in an adverse finding by the ECtHR against the UK in 2009,[29] although this was partially reversed in 2012 by a later ruling of the Grand Chamber that convictions could be based 'solely' or 'decisively' on written statements provided there were sufficient counter-balancing measures in place, including the existence of strong procedural safeguards.[30] A further break with tradition was made in 2003 when the double jeopardy rule was curtailed by permitting a retrial of defendants who have been acquitted of certain serious criminal offences where there is 'new and compelling evidence' (Criminal Justice Act 2003 s 78).

In the Republic, concerns about the need to protect victims have given rise to a similar rhetoric of 're-balancing' the criminal justice system. In 2006, the Minister for Justice established the *ad hoc* Balance in the Criminal Law Review Group (2007: 3) aimed at 'striking a fair balance between the rights of the community in general and those of victims of crime in particular on the one hand and the traditional rights of an accused as protected by the Constitution, the ECHR, statute and, indeed, the common law on the other'. The Final Report of this Group called for changes to the right to silence, the exclusionary rule relating to unconstitutionally obtained evidence, character evidence, and the rule against double jeopardy amongst other matters. Most, but not all, of these recommendations were implemented.

As in Northern Ireland, changes to the hearsay rule allowing for the admission of previous witness statements have come about in the Republic also, though their introduction in that jurisdiction was prompted by the high-profile collapse of the Liam Keane murder trial in November 2003 through the apparent intimidation of witnesses. Legislation was enacted to admit the previous statement of

[29] *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1.
[30] *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23. For critique see Jackson and Summers (2013).

a witness who is available for cross-examination but refuses to give evidence, denies making the statement or gives evidence which is inconsistent with it (Criminal Justice Act 2006 s 16). Despite coming into existence in the context of so-called 'gangland' crime, the statutory language was sufficiently broad to encompass 'a panoply of scenarios involving uncooperative witnesses who have made pre-trial statements' outside the particular setting of gangland crime (Heffernan, 2014: 5.32). Accordingly, a measure apparently targeted at a specific difficulty has again been normalised and broadly applied. Despite its wide scope and the ramifications of the provision for the tradition of relying on oral witness testimony in criminal trials, this measure would likely withstand any constitutional or human rights challenge because the witness must be tendered for cross-examination (see *DPP v O'Brien*[31]).

The rhetoric of victims' interests has also been cited in the Republic as the reason for introducing other measures in recent years. Announcing proposals for what ultimately became the Criminal Procedure Act 2010 the then Minister for Justice stated that the criminal justice system must be responsive to the needs of society generally 'but it must be especially aware of the trauma and distress of the victims of crime' (Department of Justice, Equality and Law Reform, 2008). In the context of victims' interests, that Act included certain amendments and additions to the law on victim impact statements and it provided for an accused at trial to lose his shield against the admission of bad character evidence if he or his advocate makes imputations against a deceased or incapacitated victim. Beyond this, the Act also allowed for appeals to the Supreme Court on a point of law following an acquittal at a trial on indictment and it altered the long-established rule against double jeopardy by allowing for a re-trial in relation to specific offences where there is 'new and compelling evidence' and it is in the public interest to allow a re-trial. These are most

[31] [2011] 1 IR 273.

significant changes to the criminal process in the Republic, made more palatable perhaps by their professed provision for the interests of victims.

Re-calibrating the Balance: Base-line Protections, Legitimacy and the Future

This chapter has outlined some of the significant changes which have occurred in the criminal processes of both jurisdictions on the island of Ireland in the course of the past forty years. Whether initially introduced to address subversive activity and later assimilated into the ordinary corpus of the criminal law; enacted in an effort to address victims' interests; or brought about in some other circumstance, many of the changes affecting both the pre-trial and trial stages can be said to have shifted criminal processes in the direction of crime control. The legislature has played a clear role in initiating these changes. Writing in the context of American criminal procedure, Packer (1968) recognised that this organ of government would be the validating authority for the crime control model, an affirmative model that emphasises the existence and exercise of official power. On the other hand, he suggested that the due process model which asserts the limits on official power would find its validation in the judiciary and in the law of the Constitution (Packer 1968: 173). Within the Irish constitutional context, Conway *et al* (2010) have argued that the courts guard rights which have constitutional status with particular care and are slow to allow any practices to develop which would breach those rights. For example, the courts would not allow pre-trial detention for questioning under the common law or the Constitution until the introduction of the OASA 1939 initially, and then the more mainstream Criminal Justice Act 1984 (see *Dunne v*

Clinton[32]; *People (DPP) v O'Loughlin*[33]; *People (DPP) v Walsh*[34]). However, once legislative measures were put in place, the courts did not interfere with them.

This has been the general experience: where legislation is enacted which interferes with constitutional rights, the courts have usually endorsed it, so long as certain base-line protections are in place to protect the suspect who is subjected to increased risks of lengthy custody and questioning as a result of expanding police powers. In the recent Supreme Court case of *DPP v Gormley; DPP v White*,[35] for example, the Supreme Court unanimously held that an arrested person is entitled to legal advice prior to the commencement of any interrogation. Hitherto the right of access to a lawyer in the Republic had been rather narrowly interpreted as a right to *reasonable* access only. But in a shift of constitutional emphasis away from viewing such a right as embedded in the constitutional lawfulness of custody towards viewing it as a right embedded in the right to a trial in the due course of law, the Court considered that once the power of the State has been exercised against a suspect in the form of an arrest, deprivation of liberty and subjection to mandatory questioning, it was proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a purely investigative stage. This shift in emphasis seems to be a reflection of the shift of the centre of gravity of the criminal process backwards into the police station and a judicial view that due process protections should follow that crime control-oriented realignment. In reaching its decision, the court noted that both the ECtHR and the US Supreme Court took the position that norms of procedural fairness apply from the point of arrest. It noted the Strasbourg benchmark developed since *Murray* requiring access to

[32] [1930] IR 366.
[33] [1979] IR 85.
[34] [1980] IR 294.
[35] [2014] 1 ILRM 377.

a lawyer before and during police questioning in custody (*Salduz v Turkey*[36]) and it also noted the importance stressed by the US and Canadian Supreme Courts of holding off any questioning until a suspect has had an opportunity to consult with counsel (*Miranda v State of Arizona*[37]; *R v Sinclair*[38]). The Supreme Court considered that a 'clear international view' had developed to refrain from interrogating a suspect at a time after the suspect has requested a lawyer which was based upon the vulnerability of the accused in custody and upon the need to protect him or her from self-incrimination. Following the decision in *Gormley and White*, and in light of the forthcoming provisions of the EU Directive on the right of access to a lawyer in criminal proceedings (2013/48/EU) along with the decision of the ECtHR in *Salduz v Turkey* and the related UK Supreme Court case of *Cadder v HM's Advocate*,[39] the DPP directed the Garda Síochána that, as of April 2014, suspects were entitled to have a requested solicitor present during Garda interrogation. A Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody was issued in April 2015 (Garda Siochána 2015). This development represents a significant strengthening of due process, brought about to a large extent by external pressures and international comparisons.

The willingness of the Irish courts to have regard to the legal cosmopolitanism of other foreign judgments in interpreting the Constitution and the legislative requirement on the courts on both sides of the border to take account of Strasbourg jurisprudence are positive indications of the lengths to which the courts will go to ensure that due process baselines are factored into any legislative expansion of police powers. Beyond these baselines, however, the courts have tended

[36] (2009) 49 EHRR 19.
[37] 384 US 436 (1966).
[38] [2011] 3 SCR 3.
[39] [2010] UKSC 43.

to accept the normalisation of increasing police powers and have, in certain contexts, employed the concept of proportionality to allow the state to encroach on citizens' rights in pursuit of legitimate aims such as maintaining public peace and order, provided the right is affected as little as possible (e.g. *Heaney and McGuinness v Ireland*[40]). The ECtHR has also embraced principles of proportionality and subsidiarity when considering the extent to which Art. 6 rights may be restricted.[41]

Deference to the legislature can account for some of the judicial acceptance of interference with individual rights. There has been a tendency for the courts to accept proportionality arguments based on the need to balance individual rights against the legitimate public interest in crime control. A persistent theme of our review of the criminal justice processes on both parts of the island of Ireland has been the introduction of 'exceptional' measures justified in terms of the need to respond to 'home grown' attacks on the security of the state but applied across the criminal justice system as a whole as they have resonated well with a view expressed across a number of jurisdictions that there needs to be a re-calibration away from the traditional focus on defendant's rights (see, for example, Tonry, 2010). One way of giving greater priority to defence interests is to see them not merely in terms of protecting the individual accused but in terms of a public interest legitimating the whole system of criminal justice. In this manner the rights of the suspect or the accused do not merely qualify the legitimate aims of criminal justice as constraints on crime control; they are themselves part of these legitimating aims. Although legitimacy was long neglected by

[40] [1996] IR 580.
[41] Cf *Janosevic v Sweden* (2004) 38 EHRR 22 at [101] (restrictions on presumption of innocence have to be 'reasonably proportionate to the legitimate aim sought to be achieved'); *Van Mechelen and others v Netherlands* (1998) 25 EHRR 647 at [59] (any measures which restrict the rights of the defence in a criminal case should be strictly necessary; if a less restrictive measure can suffice then that measure should be applied).

criminologists, it is now recognised that where legal authority is regarded as legitimate by the citizen, compliance is more likely to ensue (Tyler 1990, Bottoms 2002). Part of that legitimacy may be seen in securing verdicts that are not merely accurate in terms of controlling crime but are based upon a process that adheres to the rule of law (cf Dennis 2013).

One specific measure which continues to apply both in the Republic and in Northern Ireland, despite constituting a serious challenge to legitimacy in the criminal process, is the use of special, non-jury courts. These may be viewed as a hangover from the darker side of recent Irish history but we have seen that they remain as an almost permanent feature of the Irish criminal landscape, reinvigorated in the Republic by the assignment of 'organised crime' cases to their jurisdiction and available on an ongoing basis in Northern Ireland for cases relating to the paramilitary activity. On both sides of the border the DPP has an unreviewable power to refer classes of offences to non-jury trial. The continued use of non-jury courts for classes of cases rather than on the basis of a case-specific threat of intimidation was found to violate the right to equality pursuant to Art. 26 of the International Covenant on Civil and Political Rights on foot of an individual application to the UN Human Rights Committee (UNHRC) (*Kavanagh v Ireland*[42]). The UNHRC found that the Republic of Ireland was obliged to provide the applicant with a remedy for a breach of this right and to ensure that in the future persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision to use that Court are provided. The same applicant was not successful before the Irish courts, however, (*Kavanagh v Ireland*[43]) and no such change has come about. As recently as August 2014, the UNHRC expressed concern about the expansion of the general remit of the Special Criminal Court in the Republic to include organised crime and

[42] 819/1998, ICCPR, A/56/40 vol. II (4 April 2001) 122.
[43] [1996] 1 IR 348.

recommended the abolition of the Court (UNHRC, 2014). In our view, the use of such wide unreviewable powers to remove offences from the purview of jury trial remains a stain on the legitimacy of the Irish criminal process. It may be hard to argue that those caught up in subversive activity or organised crime are going to be affected in any way by whether they are tried by jury or by a juryless court, but so long as those accused of such crimes are treated differently from other criminal defendants and are able to escape the particular moral censure that is attached to defendants who are convicted by their peers, the criminal justice system has less of a moral claim to command their compliance.

Conclusion

It is clear that there has been immense change in the criminal processes of the Republic and Northern Ireland in the course of the past forty years. We have seen that a decided shift in the direction of crime control has been prompted by pressing domestic needs to combat subversion and gangland crime and bolstered by a global rhetoric which has subjugated defence interests in favour of victims' interests. It may seem somewhat paradoxical that this shift has taken place alongside greater recognition of the need to have regard to 'due process' constitutional and human rights. In its application of these rights, however, the judiciary has sought to ensure that the legitimate aims of crime control can be pursued proportionately. As criminal behaviour, policing and prosecution develop into the future there is likely to be much further change, not least occasioned by advances in technology which allow for different types of offending, investigations, detection and prosecution. Further changes are likely to come about as a result of increasing EU influence on the criminal process, including provisions for victims and defendants, as well as

measures aimed at enhancing the movement of criminal intelligence between member states (see further, Ryan and Hamilton, *infra*). The criminal processes on the island of Ireland in forty years' time are likely to be very different from those currently in operation. The challenge for those who work within these processes will be to manage this change in a manner that inspires confidence both in dealing with crime and in safeguarding the values embedded in the rule of law.

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