Decline of Due Process in the Irish Justice System: Beyond the Culture of Control?

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The Culture of Control

A significant contribution to legal and penological scholarship was provided by David Garland in his seminal work, The Culture of Control, which considers the recent trajectory of criminal justice policy in the UK and the US. This influential book provides an incisive explanation of the dramatic changes in crime control and penal policy which occurred in the final quarter of the twentieth century. It precipitated a plethora of reviews and commentary, and continues the tradition of a body of work which fuses the realms of law and sociology. In The Culture of Control, Garland explores the criminal justice systems in two late-modern societies at the macro-level so as to discover the structural patterns in those systems, and identifies the shifts in criminological theory, crime prevention tactics and penal policy which have recently occurred.

Garland lucidly describes and analyses various indices of change which illustrate the burgeoning of a “culture of control” in the UK and the US, and in doing so has furthered the study of contemporary penology. This emerging culture of control is represented by the decline of the rehabilitative ideal, with the re-emergence of punitive sanctions and by a change in the emotional tone of crime policy. Moreover, the role of the victim has been strengthened, public protection is privileged in criminal justice discourse, and the issue of crime has been politicised. New management styles have developed in dealing with crime which utilise actuarial techniques and focus on aggregates rather than individuals, and the expansion of crime control into the private sector is evident. According to Garland, the overarching factor which underpins and advances these other elements is the engendering of a perpetual sense of crisis.

Garland considers the social, economic and cultural changes and the political realignments which have brought about these alterations to the criminal justice topography in the UK and the US. His analysis of this transformation provides a useful matrix on which an assessment of the changes in the contemporary Irish criminal justice system may be based.
justice system fails to consider in any detail the role played by the law and by evidential or procedural rules in the growth of a culture of control. [5] [See Kilcommins and Vaughan, “Subverting the Rule of Law in Ireland” (2004) 35 Cambrian L R 55.] This article seeks to move beyond his culture of control thesis in a basic respect, by examining the fundamental influence of the law in the alteration of the criminal justice process in Ireland. Assessing recent developments in the Irish legislative framework from a theoretical perspective arguably indicates the growth of a culture of control in this jurisdiction.

Legislation in Ireland that pertains to serious and organised crime is characterised by a favouring of public protection over the rights of the accused; by an increased concern for security with a concomitant diminution of the significance of liberty. Throughout the pre-trial stage of the criminal process, the court-hearing and sentencing, a shift in focus from the due process rights of the accused towards the result-oriented aims of the State is apparent. Furthermore, the fight against organised crime has extended into the civil domain with the creation of the Criminal Assets Bureau (CAB), with its low burden of proof and limited range of procedural protections.

This article contends that in the Irish criminal justice system, due process values are being subsumed by the imperatives of crime control. Firstly, the concept of due process rights will be considered in a general sense, before the rationale underpinning such rights will be examined. While due process rights are, in principle, protected in the Irish justice system, the claim that these rights are gradually being eroded will be explored, with particular reference to various legislative measures introduced to tackle serious crime. However, before this legislative analysis is undertaken, the thesis of Herbert Packer, an American legal theorist, will be outlined, as it elucidates and explains the current trajectory of the Irish criminal process. Packer describes two normative models of the criminal process which, when applied to the specific Irish context, allow recent shifts in the system to be assessed.

Developments at all stages of the criminal process will then be considered, from the investigatory stage, throughout the trial, and sentencing. At the pre-trial stage, the powers of the State, as regards the grant of search warrants and the detention and interrogation of an accused, have been augmented in recent years. In addition, the attrition of the right to silence and the limited interpretation of the right of access to a lawyer will be examined. Next, the requirement that Garda interviews be recorded, which may mitigate the harsh effect of the repressive pre-trial provisions on the accused, will be assessed.

In addition, the limitations on due process rights which have been effected during the criminal trial, with the circumscription of the right to bail and the use of non-jury trial, will be considered. Furthermore, the use of mandatory sentences and the civil process of asset forfeiture will be appraised.

These legislative provisions reveal the development of a culture of control in Ireland, encapsulated by the preference for expedient resolution of crime over long-established legal norms which favour the rights of the accused. However, the ability of the judiciary to stem this punitive tide will also be explored, given that the courts alone seem capable of preventing the development of a culture of control.

**Due Process Rights**

Due process rights and the rules of evidence derive from the need to compensate for the enormous imbalance of power which exists between the State and the individual defendant. [6] [In Wardius v Oregon 93 S Ct 2208 (1973) p 2215, , Douglas J in the US Supreme Court spoke of “the awesome power of indictment and the virtually limitless resources of government investigators” which secures an advantage for the State in a government prosecution. Similarly, in Williams v Florida 90 S Ct 1893 (1970), p 1911 , Black J highlighted “the awesome investigative and prosecutorial powers of government.”] The State is endowed with vast resources and agencies that facilitate the investigation,
(2006) 6(1) HLJ 125 Article: DECLINE OF DUE PROCESS IN THE IRISH JUSTICE SYSTEM: BEYOND THE CULTURE OF CONTROL? : Elizabeth CampbellBCL, LLM (NUI), PhD candidate and Government of Ireland scholar, University College Cork. This article is based on a paper presented at the Socio-Legal Studies Association Annual Conference 2005, 30 March-1 April 2005, University of Liverpool. I would like to thank Dr Shane Kilcommi ...

In a trial in the Irish criminal justice system, the onus is on the State to prove beyond a reasonable doubt that the accused is guilty of an offence in accordance with the requirements prescribed by law. 

If it be asked why an accused person is presumed to be innocent, I think the true answer is, not that the presumption is probably true, but that society in the present day is so much stronger than the individual, and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict on society, that it can afford to be generous. [Stephens, History of the Criminal Law of England (London, 1883) ,Vol 1, p 354 , cited in McAuley and McCutcheon, Criminal Liability: A Grammar (Dublin: Round Hall Sweet & Maxwell, 2000), p 34]

Walsh notes that “[t]he contents of this list and more particularly, the compass of the individual measures within it, have never been set in stone.” [Walsh, supra note 8, p 5] The extent to which due process rights are preserved and the manner in which they are interpreted is influenced by the political and popular interpretation of the state of the criminal justice system. As Galligan comments, “[p]rocedures are themselves deeply rooted in a social context and will reflect the beliefs and understandings prevailing in them.” [Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures (Oxford: Clarendon Press; New York: Oxford University Press, 1996), p 20] Nevertheless, the fundamental notion on which our system of criminal justice is based is that it is far worse to convict an innocent man than to let a guilty man go free. As Keane J remarked in Fitzgerald v DPP , “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 as the conviction of the innocent.” [ Fitzgerald v DPP [2003] 3 IR 247 . Such dicta are common in US jurisprudence, for example in In Re Winship 90 S Ct 1068 (1970) p 1076 , Harlan J emphasised that “[i]n a criminal case ... we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.’] Therefore, certain procedures have been introduced which seek to guard against the conviction of the innocent.

Decline of Due Process Rights?

Despite the ostensible protection accorded to due process rights in the Irish criminal justice system, it is evident that the concept of due process is slowly being subsumed by the intensifying demands for public protection. It is arguable that the desire to eradicate crime and to protect the “law-abiding”
majority has begun to take precedence over the notion of due process. In recent years, “...justice...” has come to be almost synonymous with punishment, and the aspect of justice that involves taking responsibility for the person who is brought before the court ... is disappearing.” [18] [Hudson, Justice in the Risk Society: Challenging and Re-affirming ‘Justice’ in Late Modernity (London: Sage, 2003), p 203]

Justice (in this contemporary sense) and procedure are regarded as incompatible. Concern with process is seen as the antithesis of a fair result. [19] [Fennell, Crime and Crisis in Ireland: Justice by Illusion? (Cork: Cork University Press, 1993), p 5] For example, 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.” [20] [Joint Committee on Justice, Equality, Defence, and Women’s Rights, 8 December 2003, per Mr Dirwan, President of the Association of Garda Sergeants and Inspectors]

Similarly, the Garda Commissioner has argued that the criminal justice 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.” [21] [See Lally, “Garda chief warns on court ‘imbalance’” The Irish Times (23 March, 2005)]

Moreover, the Minister for Justice, Michael McDowell, recently noted:

Time and time again one hears repeated voicing of disquiet that the rights of society to be protected take second place in the quest to ensure fairness to the suspect — in other words that the balance has shifted too far in favour of the accused. I believe this is a legitimate concern which must be addressed... [22] [597 Dáil Debates Col 1276 (Criminal Justice Bill 2004: Second Stage)]. The Minister for Justice, Equality and Law Reform delivered his speech in Irish, the original text of which reads: “Arís agus arís eile cloistear guthanna á athphlé na callóide go dtógann cearta cosanta an tsochaí an dara áit chun cothromaíocht a chinntiú don amhrastach — i bhfocal eile go bhfuil an mheá gluaiste an iomad i bhfabhar an chúisí. Creidim gur ceist dlisteanach é seo a chaithfear a phlé agus táim a dhéanamh sin sa Bhille seo — fós ag iarraidh nach dtarlaíonn a mhalairt.”

The belief that too few serious offenders are caught, and that of these too few are convicted, has been ascribed to the rules of criminal procedure, which are considered “unreasonably technical obstacles” to the conviction of the guilty. [23] [Dession, “The Technique of Public Order: Evolving Concepts of Criminal Law ” (1995) 5 Buffalo L R 22, p 40] Legal safeguards, which, as discussed above, [24] [See text supra accompanying note 6 et seq] were developed to protect the individual against the might of the State and which strive to introduce a measure of equality in the State/accused relationship, are regarded as awkward technicalities which frustrate the efforts of the police. Moreover, there has been a marked shift from the view that the criminal justice system protects citizens from the power of the State, to a perspective that sees the aim of the system solely as guarding the citizen against other individuals. [25] [Hudson, “Punishment, Rights and Difference: Defending Justice in the Risk Society” in Stenson and Sullivan, eds, Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies (Cullompton: Willan, 2001), p 153] The State is now seen as a benign entity which protects the law-abiding public from the threat of the criminal, rather than as an omnipotent creature whose powers must be circumscribed.

The general political and popular consensus as to the rectitude of this repressive and result-oriented approach to the control of crime may be explained, at least in part, by a number of factors. Firstly, in 1996, two high-profile murders occurred which proved instrumental in the modification of the criminal justice system in a fundamental sense and precipitated an expansion of State powers in the fight against organised crime. The murders of Garda Jerry McCabe in the course of an attempted robbery, and of Veronica Guerin, the investigative journalist, expedited the introduction of robust legislative measures to deal with organised criminals.
Secondly, the terrorist legacy of Ireland and the emergency powers adopted to deal with the threat of subversive crime has normalised the restriction of civil liberties in the pursuit of crime control and has familiarised the public with such an approach. The insidious expansion of such extraordinary powers into the ordinary criminal justice realm has occurred without protest and is seen as enhancing the State’s capacity in the fight against organised and serious crime.

Thirdly, the lack of criminological study in Ireland until the mid-1990s meant that political expediency and short-term gains were of more concern to those involved in formulating penal policy than any continuing adherence to research-derived objectives. [26] [The first Institute of Criminology in Ireland was not founded until 2000. It was established in University College Dublin.] This paucity of criminological and penological study facilitated and eased the introduction of oppressive tactics which favour pragmatism and crime control over individual liberties.

Two Models of the Criminal Process

The analysis of the criminal process undertaken by Herbert Packer in The Limits of the Criminal Sanction serves as a useful interpretive tool in exploring the recent trajectory of the Irish criminal justice process. [27] [Packer, The Limits of the Criminal Sanction (California: Stanford University Press, 1968)] Packer presents two normative models of the criminal process, the crime control and the due process models, which allow “the normative antimony at the heart of the criminal law” to be recognised. [28] [Ibid, p 153] The former model takes the aim of the criminal justice system to be the effective suppression of crime, while the latter sees those objectives as being inferior to the need to defend the rights of the individual. Packer stresses that the models are not to be regarded as “Is and Ought”, but rather are abstract representations of the two separate value systems which vie for superiority in the criminal process. [29] [Ibid]

The Crime Control Model

The value system on which the crime control model is founded maintains that the suppression of criminal conduct is the most significant function of the criminal process. [30] [Ibid , p 158] This model regards the screening process operated by the police and prosecutors as a reliable indicator of probable guilt. [31] [Ibid , p 160] After the “screening out” of those regarded as probably innocent, “a presumption of guilt” comes into play. [32] [Packer emphasises that the presumption of guilt is not the converse to the presumption of innocence. While the former is simply a prediction of outcome, the latter is a “direction to officials about how they are to proceed.” In other words, while the presumption of innocence is normative and legal, the presumption of guilt is descriptive and factual. Ibid, pp 161-162] As expert administrative mechanisms of fact-finding are deemed to be more reliable and efficacious than formal and adjudicatory procedures, minimum restrictions must be placed on extrajudicial, informal and administrative fact-finding processes. [33] [Ibid , p 162. This element is essential to the operation of the model, as it allows the system to deal efficiently with large numbers.]

The Due Process Model

The alternative paradigm presented by Packer is the due process model. While the crime control model is depicted as “an assembly-line conveyor belt down which moves an endless stream of cases”, [34] [Ibid , p 159] the due process model resembles an obstacle course in which various impediments are situated, hindering the progress of the accused through the process. [35] [Ibid , p 164] Although the due process model sees the repression of crime as socially desirable, it highlights the possibility of error in informal fact-finding and therefore insists on formal adjudicative adversary fact-finding. If efficiency is compromised by the demands of reliability, then absolute efficiency must be rejected.
According to this model, the aim of the criminal process is as much to protect the factually innocent as it is to convict the factually guilty. The underlying rationale of this objective derives from the primacy of the individual and a desire for limitation on official power. An individual may only be held guilty if he is found, on the basis of reliable evidence, to be factually likely to have committed the criminal act, and if those factual determinations are made in a procedurally regular fashion by competent authorities. Importantly, even if the facts indicate that the person is likely is to be guilty, he is not deemed to be so if certain rules designed to protect him and to preserve the integrity of the process are not adhered to.

Packer’s Models in the Irish Context

The legislature and the judiciary in Ireland often encapsulate the division between Packer’s two models. Recent statutory measures and comments of members of the legislature suggest that the utilitarian and consequentialist crime control model represents the ideological basis on which contemporary Irish political discourse on crime is founded. However, the capacity of the Constitution and of the judiciary to uphold due process values and so to counterbalance the punitive and result-oriented objectives of the legislature must not be underestimated.

Nevertheless, judicial approval of various measures, including prolonged interrogation, pre-trial detention, and the Criminal Assets Bureau, which arguably contradict the dictates of the due process model, indicates that the status of this model may not be so secure. Furthermore, Keane CJ recently remarked that “there seems no reason why the acquittal of a guilty person should not be regarded as a miscarriage of justice, albeit of a significantly less grave character than the conviction of an innocent person.” This comment may reveal a burgeoning feeling on the part of the courts that individuals believed to be guilty are availing of legal procedures to evade justice. The subtle yielding by the judiciary, who are entrusted with the protection of the due process model, to the demands of the crime control lobby, may disturb the precarious position of due process in the Irish criminal justice system.

Various substantial alterations to the fabric of the Irish criminal justice system have occurred which are symptomatic of a developing culture of control, in which due process values are curtailed and devalued by the pragmatic, results-oriented approach of the State in controlling crime. These changes, which relate to all stages of the criminal process, from the pre-trial stage of the criminal process, through to the court proceedings and sentencing, will now be examined.

Applying Packer’s Analysis to the Irish Criminal Process

Pre-Trial Stage

At the pre-trial stage of the criminal process, the crime control capacity of the State has been furthered at the expense of due process.

Search Warrants

The powers conferred on the Gardaí to search premises on foot of a search warrant, which they must enjoy “in defined circumstances for the protection of society”, have been enhanced in recent years. For example, the Gardaí are now...
authorised to issue warrants in certain situations. Although warrants are generally issued by a judge of the District Court or by a peace commissioner after receiving information under oath from a member of the Gardaí, in urgent circumstances warrants may be issued internally by senior Garda officers. While such a power was first granted by section 29 of the Offences Against The State Act, 1939 in the context of the national emergency, this power was held to be constitutional in People (DPP) v O’Leary (1988) 3 Frewen 163. Under this section, an officer of An Garda Síochána not below the rank of chief superintendent, who was satisfied that there were reasonable grounds for believing that evidence relating to an offence under the Act or to the offence of treason would be found, could issue a search warrant. Information under oath is not required for the issuance of a search warrant under this section. Section 5 of the Criminal Law Act, 1976 lowered the standard, so that any officer not below the rank of superintendent could issue such a warrant in respect of an offence under the Act. Recent statutory measures have extended it into the ordinary criminal justice realm. For instance, section 8(1) of the Criminal Justice (Drug Trafficking) Act, 1996 allows a Garda not below the rank of superintendent to issue a search warrant if “circumstances of urgency”, which necessitate the immediate issue of the warrant, render it impracticable to apply to a District Court judge or a peace commissioner. The constitutionality of warrants issued by an authority other than a judge, namely by a peace commissioner, was upheld in Ryan v O’Callaghan, High Court, unreported, 22 July 1987. The High Court held that the issue of a search warrant and the search carried out under the warrant were elements of the investigative process, and so were functions of an executive rather than judicial nature. This judgment was followed in Byrne v Grey and Berkeley v Edwards. Walsh speculates that the decision in Ryan, although made in relation to peace commissioners, applies to statutory provisions which confer the power to issue a search warrant on members of the Gardaí; see Walsh, supra note 8, p 405. Similarly, section 14(2) of the Criminal Assets Bureau Act, 1996 permits a bureau officer who is a Garda not below the rank of superintendent to issue a warrant if he is satisfied that there are reasonable grounds for suspecting that evidence relating to the commission of an arrestable offence is to be found in that place.

The avoidance of judicial approval for the issuance of a warrant renders the process more susceptible to abuse, as an independent examination of the justifications and suspicions which underpin the request for the warrant is circumvented. The rationale behind limiting the power of issuance to judges or peace commissioners is to ensure that an adequate detachment and independence is maintained between the investigating body and the issuer of the warrant. The grant of a warrant by a member of the investigating agency of the State may lead to warrants being issued without due care, and may compromise the integrity of the system due to the lack of an independent review of the application. Nevertheless, the grant of a warrant by a senior Garda is justified by reference to the need to investigate crime promptly and efficiently. In urgent circumstances, it may not be feasible to apply to a judge or peace commissioner, and so this power of the Gardaí may be defended by the demand to effectively investigate crime and access vital evidence. The adoption of this tactic indicates a preference for the demands of crime control over due process.
Further extension of the power of the police to carry out searches is evident in the Criminal Justice Act, 1994, which relates to drug-trafficking and money-laundering investigations. These far-reaching powers, which provide for the issuance of access orders and search warrants, pertain to innocent third parties. Traditionally the subject of a search warrant or a production order was the individual suspected of the offence. However, under this statute, innocent individuals, who have the misfortune of having materials or documents in their possession that may relate to a suspected offence, may be the focus of the order. This measure drastically increases the powers of the Gardaí in the pursuit of crime control, and concomitantly undermines civil liberties. The favouring of expedient crime control and investigation over due process rights is therefore evident in legislative measures pertaining to the issuance of search warrants.

Detention

In relation to detention and interrogation, the capabilities of the State and its agents have been bolstered in recent years, to the detriment of due process. While an individual arrested and detained under section 4 of the Criminal Justice Act, 1984 may be detained and questioned for up to 12 hours, section 30 of the Offences Against The State Act, 1939 permits a person suspected of an offence which falls under the Act to be detained for up to 72 hours. The influence of such an extraordinary power is evident in section 2 of the Criminal Justice (Drug Trafficking) Act, 1996 which sanctions detention of up to 168 hours. Judicial authorisation is required to extend the period of detention under the 1996 Act past 48 hours and is again mandated after 120 hours. The judge may order the immediate release of the suspect if he is not satisfied that the detention is justified. Moreover, section 9 of the Criminal Justice Act, 2006 extends the maximum period of detention for ordinary, though serious, crime from 12 to 24 hours.

The primary motivation for the significant power of detention under the 1997 Act is based on the State’s need to gather evidence, especially in investigations with an international element. It has been asserted in political circles that the detention provision is beneficial in the investigation of drug trafficking offences. In addition, the need to retrieve evidence from smugglers who have swallowed the drugs has also been cited as justifying this expansive power. It has been asserted in political circles that the detention provision is beneficial in the investigation of drug trafficking offences. In addition, the need to retrieve evidence from smugglers who have swallowed the drugs has also been cited as justifying this expansive power.
be speculated that the extensive power, with its inherent risk of abuse, is in fact not needed, and so should be removed from the statute book to preclude its misuse. In addition, no empirical evidence was proffered in the Dáil either at the time of its enactment, or more recently, to support the claim that this measure is crucial in the investigation of crime. Nevertheless, recent developments suggest a growing trend in Ireland towards the expansion of pre-trial detention periods.

The Right to Silence

Furthermore, the erosion of the right to silence of the accused, long regarded as a fundamental element of the adversarial criminal system and a crucial counterpoint to the extensive powers of the State, denotes a preference for the crime control aims of the State over due process rights. Section 52 of the Offences Against The State Act, 1939 allows a Garda to demand a full account of the movements and actions of a detained suspect during a specified period of time, in addition to all information known to him regarding the commission or intended commission by another person of an offence under the Act. \[59\] The constitutionality of section 52 was upheld by the Supreme Court in Heaney v Ireland \[1996\] 1 IR 580. However, when section 52 was challenged in Quinn v Ireland \(2001\) 33 EHRR 264, the European Court of Human Rights rejected the submission that the various protections available to the accused minimised the risk of a wrongful confession to a crime and safeguarded against any abuse of the powers provided by the section. Failing to give such information or giving false information is an offence for which a person may be imprisoned for no longer than six months. \[60\] Further legislative provisions which permit restrictions on the right of the suspect to silence include section 9(1) of the Offences Against The State (Amendment) Act, 1998, \[61\] which makes it an offence, punishable by up to five years imprisonment, for a person to fail without reasonable excuse to disclose information as soon as it is practicable to the Gardaí which he knows or believes to be of material assistance in preventing the commission of a serious offence. \[62\] A serious offence is described in section 8(4) of the Act as an offence for which a person of full age and capacity who has been not previously convicted may be punished by imprisonment for five years or more, and that involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss or damage, or in securing the apprehension, prosecution or conviction of any other person for such an offence. \[63\]

In addition to provisions which penalise silence, section 18 of the Criminal Justice Act, 1984 permits 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 presence may be attributable to the participation of the person in the commission of the offence for which he was arrested. Similarly, inferences may be drawn from the presence of an accused at a particular place if the arresting Garda reasonably believes that his presence at that place and at that time may be attributable to his participation in the commission of the offence. \[64\] The constitutionality of these provisions was upheld in Rock v Ireland \[1997\] 3 IR 384 where the court emphasised that as inferences could only amount to corroboration and only those that “appear proper” could be drawn, the right to the presumption of innocence was not infringed.

Inferences may also be drawn under section 7(1) of the Criminal Justice (Drug Trafficking) Act, 1996 from the failure of the accused to mention any fact which he later relies on in his defence, if that fact was one which he could reasonably have been expected to mention when questioned. This provision imposes an onerous task on the suspect, who must envisage what particular facts are likely to be used by him
in his defence. The application of these sections may result in injustice, due to the fact that the accused may be confused or intimidated by the surroundings of 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 and reflection. [65] [Report of the Committee to Review the Offences Against The State Acts, 1939-1998 and Related Matters (Dublin: Stationery Office, 2002) para 8.68]

The Right of Access to a Lawyer
These restrictions on the right to silence are aggravated by the limited interpretation of the detainee’s constitutional right of access to a lawyer. This important right, which establishes a measure of equality between the detained person and his interrogators, has been construed by the courts as a right of reasonable access. [66] [DPP v Healy [1990] 2 IR 73, p 81 per Finlay CJ] Indeed, it has been claimed that police practice is to define reasonable access as amounting to one hour in every six hours’ detention. [67] [White, “The Confessional State — Police Interrogation in the Irish Republic Part 1” (2000) 10(1) Irish Criminal L J 17, p 18] It is questionable whether this right is of much practical effect, given that the police are permitted to interrogate the suspect before his solicitor has arrived, provided that they are making bona fide attempts to provide the individual concerned with a lawyer. [68] [People (DPP) v Buck [2002] 2 IR 268] Moreover, an accused’s detention is not unlawful if his solicitor is denied access to the notes of the interrogation. [69] [Lavery v The Member in Charge, Carrickmacross Garda Station [1999] 2 IR 390] Although the European Committee for the Prevention of Torture has recommended in its past three reports to Ireland that the right of access to a lawyer should include the right to have the lawyer present during police interrogations, this has not prompted the adoption of legislation in this regard, nor have the courts expanded the interpretation of the right in subsequent cases. [70] [Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (C.PT.) from 20 to 28 May 2002 CPT/Inf (2003) 36, para 22; Report to the Irish Government on the visit to Ireland carried out by the CPT from 31 August to 9 September 1998 CPT/Inf (99) 15, para 22; Report to the Irish Government on the visit to Ireland carried out by the CPT from 26 to 5 October 1993, CPT/Inf (95) 14, para 43]

Electronic Recording of Interviews
The restrictive interpretation of the right of access to a lawyer and the associated capacity for abuse may be mitigated to some extent by the implementation of regulations providing for the electronic recording of interviews. The Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 [71] [Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations 1997 (SI 74 of 1997)] provide for the recording of interviews conducted with suspects detained under section 4 of the Criminal Justice Act, 1984 , section 30 of the Offences Against the State Act, 1939 and section 2 of the Criminal Justice (Drug Trafficking) Act, 1996 . [72] [Reg 3(2)] However, only Garda stations which have electronic recording equipment installed are covered by these regulations, [73] [Reg 3(1)] and moreover, the interview does not have to be recorded if the recording equipment is broken or in use at the time of the interview, [74] [Regs 4(3)(a)(i) and (ii)] or if recording is “not practicable”. [75] [Reg 4(3)(b)]

Nevertheless, the third report of the Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons expressed its pleasure at the very high rate of audio/video recording of interviews. An analysis of Garda statistics for the period from January to November 2003 indicates that 96 per cent of the total interviews conducted were recorded. [76] [Third Report of the Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons...
The Trial of the Offence

The Right to Bail

During the trial of serious offences, inroads have been made on due process rights, as is apparent in the erosion of the right to bail. This right was circumscribed as a result of the constitutional referendum held on November 25, 1996, which facilitated the refusal of bail in certain instances. While traditionally the aim of bail was to ensure the attendance of the accused individual at his trial, bail can now be refused to an individual charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person. 

When faced with a bail application, the court must have regard to, inter alia, the nature and degree of seriousness of the offence charged, any conviction of the accused person for an offence committed while he was on bail, and any previous convictions. This in essence allows the court to base a decision concerning an individual’s liberty on the type of person it believes the individual to be rather than on a finding of guilt, and thereby compromises the presumption of innocence.

The presumption of innocence underpinned the judgment in People (AG) v O’Callaghan, a case decided by the Supreme Court in 1966, where the concept of preventative detention to prevent the commission of offences on bail was described as “a form of preventative justice which has no place in our legal system and is quite
alien to the true purposes of bail.” [83] [O'Callaghan, supra note 79, p 516, per Walsh J] Such preventative detention was seen to impinge on the right to the presumption of innocence and sought to punish an individual for offences “neither completed nor attempted.” [84] [Ibid, pp 508-509, per O'Dálaigh CJ. Similarly, in DPP v Ryan [1989] IR 399 [hereinafter Ryan ], the Supreme Court concluded that an accused could not be refused bail on the grounds that he may commit more crime, as to do so would be to permit preventative detention and would compromise the presumption of innocence. See also People (DPP) v Doherty , Supreme Court, unreported, 26 February 1993 ; People (DPP) v Brophy , Supreme Court, unreported, 2 April 1993 ] O'Callaghan was followed in People (DPP) v Ryan , [85] [Ryan, supra note 84, p 407. O'Callaghan was followed in numerous cases, including People (DPP) v Carmody [1988] ILRM 370 ; and People (DPP) v Jackson , Court of Criminal Appeal, unreported, 26 April 1993 ] where the Supreme Court stressed that “[t]he criminalising of mere intention has been usually a badge of an oppressive or unjust legal system. The proper methods of preventing crime are the long-established combination of police surveillance, speedy trial and deterrent sentences.” [86] [Ryan, supra note 84, p 407]

Despite the traditional rejection of preventative detention which was grounded on the presumption of innocence, the new bail scheme was approved by an overwhelming majority in the referendum in 1996. [87] [Although the amendment was carried by a sizeable majority with 74.83 per cent of the votes in favour of the amendment, the turnout for the referendum was very low with only 29.2 per cent of the electorate voting. See King and Wilford, “Irish Political Data, 1996” (1997) 12 Irish Political Studies 148, p 161] Although section 11 of the Criminal Justice Act, 1984 provides for mandatory consecutive sentences for offences committed while on bail, and does not impinge on the liberty of innocent individuals, this was not seen to be sufficiently effective in deterring the commission of crimes by individuals on bail. Political comment converged in supporting the new approach, which was seen to readjust the criminal process towards victims and society as a whole. Indeed, O’Mahony has characterised the bail referendum as “a triumph of populist, pragmatic politics and sloganising hardline rhetoric over principled concern for fairness and civil liberties.” [88] [O’Mahony, “The Constitution and Criminal Justice” in O’Mahony, ed, Criminal Justice in Ireland (Dublin: Institute of Public Administration, 2002), p 87] It was claimed in the Dáil that the decision in O’Callaghan was “a liberal bridgehead too far”, [89] [467 Dáil Debates Col 2369 (Private Members’ Business — Measures Against Crime: Motion) per Ms O’Donnell] and that “the traditional notion of being innocent until proven guilty must be balanced against the fact that we have a criminal population, many of whom are persistent offenders who pose a risk to public safety if released on bail.” [90] [477 Dáil Debates Col 1439 (Bail Bill, 1997: Second and Subsequent Stages) per Ms O’Donnell. Another TD, Mr McGahon, stated that he was concerned, as was “the average person in the street who does not get his knickers in a twist about points of law, as people in the law business do, that people charged with grievous crimes of murder and rape, horrendous crimes which have been downgraded by the legal profession and politicians who stood idly by and allowed such a system to prevail, are allowed out on bail.” 470 Dáil Debates Col 272 (Sixteenth Amendment of the Constitution Bill, 1996: Second Stage (Resumed))] Moreover, the Bail Act, 1997 was described as “one of the most important anti-crime measures introduced since the foundation of the State” which “represents a fundamental rebalancing of our criminal justice system in favour of the victims of crime and the law abiding members of society generally.” [91] [477 Dáil Debates Col 1422 (Bail Bill, 1997: Second and Subsequent Stages) per Ms Owen]

The scheme of preventative detention established by the 1997 Act erodes the presumption of innocence. In addition, the low standard of proof [92] [There is nothing in the Bail Act, 1997 regarding the standard of proof to be applied, nor is there any indication of how the State should prove criteria, some of which may not in fact prove amenable to proof. It is likely that the balance of probabilities is the
applicable standard of proof in the context, having regard to the statement of Walsh J in O’Callaghan, supra note 79, p 517, where he noted that the court must be satisfied that an objection made to the grant of bail “is sufficient to enable the Court to arrive at the necessary conclusion of probability.” Furthermore, in People (DPP) v McGinley [1998] 2 IR 408, p 414, Keane J speaks of “a matter of probability.” and the admissibility of hearsay evidence in bail applications [93] McKeon v DPP, Supreme Court, unreported, 12 October 1995; People (DPP) v McGinley [1998] 2 IR 408 reveal a preference for crime control over due process. While detention pending trial may cause serious hardship to the accused in an economic and personal sense, and also may preclude the preparation of an adequate defence, [94] O’Callaghan, supra note 79, p 513, per Walsh J these issues are subsumed by the desire to protect the public at all costs. The introduction of preventive detention is indicative of the seeping of a “risk management” ethos into the criminal justice system, which concentrates more on risk and public protection than on justice or individual rights. [95] See Feeley and Simon, “Actuarial Justice: The Emerging New Criminal Law “ in Nelken, ed., The Futures of Criminology (London: Sage Publications, 1994), p 173; Feeley and Simon, “The New Penology: Note on the Emerging Strategy of Corrections and its Implications” (1992) 30 Criminology 449. The US Supreme Court in United States v Salerno 107 S Ct 2095 (1987) upheld the constitutionality of the Bail Reform Act, 1984 which permits pre-trial detention to protect the safety of the community. The US court based its decision on the fact that the aim of this preventive detention provision was to manage risks rather than punish. By classifying the measure as regulatory rather than punitive, the court was able to circumvent the issue of due process rights. The growth of such an actuarial approach is a prime illustration of the development of a culture of control.

The Right to a Jury Trial
In addition to the expansion of the grounds on which bail can be rejected, the right of the accused to a jury trial, as protected by Article 38.5, Bunreacht na hÉireann, 1937, can be limited in certain cases by hearing cases before the Special Criminal Court. [96] The Special Criminal Court was established by Part V of the Offences Against The State Act, 1939 on the proclamation of the Government that the ordinary courts were insufficient to ensure the effective administration of justice and the preservation of peace and order. Such proclamations have been issued on three occasions: from 1939-1946, 1961-62 and 1972 to date.) Subversive offences are automatically sent to the Special Criminal Court, which sits without a jury. [97] Under section 45(1) of the Offences Against the State Act, 1939, the DPP may request that a person charged with a scheduled offence which may be dealt with summarily in the District Court be tried before the Special Criminal Court. Section 45(2) provides that if the accused is to be tried on indictment, he will be sent before the Special Criminal Court unless the DPP issues directions to the contrary.) In other cases, the Director of Public Prosecutions (DPP) has the power to certify that a case should be heard in this non-jury court where he is of the opinion that the ordinary courts are inadequate to secure the administration of justice. [98] [ss 46 and 47 of the Offences Against The State Act, 1939] This decision cannot be judicially reviewed in the absence of mala fides or the influence of an improper motive or policy, [99] See O’Reilly and Judge v DPP [1984] ILRM 224; State (McCormack) v Curran [1987] ILRM 225; Byrne and Dempsey v Government of Ireland, Supreme Court, unreported, 11 March 1999 nor is the DPP answerable to the Dáil or democratically accountable. The power to restrict an individual’s right to a jury trial has been exercised in recent years against suspected organised criminals. [100] Cases with no subversive element that have been tried in the Special Criminal Court include kidnapping (see DPP v Kavanagh, Court of Criminal Appeal, unreported, 18 May 1999); and the murder of journalist Veronica Guerin (see People (DPP) v Ward, unreported, Special Criminal Court, 27 November 1998 and People (DPP) v Meehan, Special Criminal Court, unreported, 29 July 1999) Even though the United Nations Human Rights Committee found that sending cases to the Special Criminal Court on the basis of a certificate from the DPP
without any explanation violated the right of the accused to equality before the law under Article 26 of the International Covenant on Civil and Political Rights, the practice has not ceased. [101] [Kavanagh v Ireland, Communication No 819/1998, UN Doc CCPR/C/71/D/819/1998 (2001)]

The reasons adduced to justify the restriction on the right to jury trial include the possibility that witnesses will be threatened, or that jurors will be intimidated. The Committee to Review the Offences Against The State Acts asserts that juries are “distinctly uncomfortable” in cases involving organised crime [102] [Report of the Committee to Review the Offences Against The State Acts 1939-1998, supra note 65, para 9.33] and claims that attempts have been made to tamper with juries in high-profile criminal trials in the ordinary courts. [103] [Ibid, para 9.36] Nevertheless, there is a marked paucity of empirical data to substantiate these contentions. Moreover, no other common law jurisdiction has come to the conclusion that the risk of jury intimidation warrants non-jury trial in a special court. [104] [Ibid, para 9.93, Views and Recommendations of the Hon Mr Justice Anthony J Hederman, Professor William Binchy, Professor Dermot Walsh on the Special Criminal Court]

Without the 1939 Act, it is unlikely that legislation would have been enacted in recent years to dispense with jury trial for those suspected of organised crime. [105] [Ibid] However, 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. [106] [Hogan and Walker, Political Violence and the Law in Ireland (Manchester: Manchester University Press, 1989), pp 238-239] The abrogation of the fundamental right to a jury trial exemplifies the elevation of crime control over individual rights. Indeed, the apathy of politicians and the public alike to this repressive tactic may be as a result of the familiarisation with such an approach in the context of subversive crime relating to the situation in Northern Ireland. The use of the Special Criminal Court and the DPP’s referral power in the context of non-subversive crime represents “disquieting evidence of the ‘seepage’ of emergency legislation into the ordinary law of the State.” [107] [Ibid , p 239]

As has been detailed, during the trial of the offence, the right of the accused to bail and to a jury trial may be circumscribed. This favouring of public protection and the swift resolution of crime over civil liberties and due process indicates a substantial shift in the topography of the criminal justice realm. Similar developments may be identified in the context of sentencing.

Sentencing

Recent developments in the context of sentencing provide further examples of the development of a culture of control, in which the exigencies of the crime control model supersede due process imperatives. The traditional model of sentencing in Ireland is a flexible one, which allows the particular characteristics and circumstances of the individual to be taken into account in the determination of the sentence. [108] [The notion of imposing sentencing guidelines in the context of rape cases was rejected in People (DPP) v Tiernan [1988] IR 250 [hereinafter Tiernan] due to the absence of any statistics or information before the Court concerning the general pattern of sentences imposed for the crime of rape in Ireland and having regard to the need to impose a sentence which meets all the circumstances of the case and the accused. The need for a sentence to be appropriate having regard to the facts of the cases and to the personal circumstances of the accused was reiterated in People (DPP) v McCormack [2000] 4 IR 356, p 359 per Barron J.] Each sentence must be formulated with the individual facts of the case in mind [109] [People (DPP) v Gallagher, Court of Criminal Appeal, unreported, 4 March 1994] and must be proportionate to the gravity of the crime
and the circumstances of the individual in question. [110] [ People (DPP) v M [1994] 2 ILRM 541 [hereinafter M ]] Furthermore, until recently, review dates were inserted into sentences and served as a “process by which a judge is enabled to individualise a sentence for the particular convicted person”. [111] [ People (DPP) v Sheedy [2000] 2 IR 184, p 194 , per Denham J] However, recent developments indicate a shift away from this traditional sentencing strategy. [112] [Indeed, a “just deserts” policy of sentencing was recommended by a majority of the Law Reform Commission, Report on Sentencing (LRC 53–1996) para 2.12] For example, the practice of inserting review dates into sentences was stopped in People (DPP) v Finn. [113] [ People (DPP) v Finn [2001] 2 IR 25 . The Supreme Court deemed this practice to be inconsistent with section 23 of the Criminal Justice Act, 1951 (No 2 of 1951), which vested the power of commutation or remission of sentence exclusively in the government or the Minister for Justice, and considered it to offend the separation of powers. See O’Connell, “The Supreme Court Decision in DPP v Padraig Finn” (2001) 6 (6) Bar Review 354 ] In addition, while a plea of guilty is an important mitigating factor in imposing a sentence, [114] [Tiernan, supra note 108; M, supra note 110] section 29 of the Criminal Justice Act, 1999 [115] [Criminal Justice Act, 1999 (No 10 of 1999)] provides that a court may impose the maximum sentence for an offence on an individual who pleads guilty if the court is satisfied that there are exceptional circumstances relating to the offence which warrant the maximum sentence.

Presumptive Sentences

The established sentencing orthodoxy has been further undermined by the introduction of a scheme of presumptive sentencing under the Criminal Justice Act, 1999 , which provides that any person convicted of the possession of drugs with a value of €13,000 or more with intent to supply shall receive a term of at least ten-years imprisonment unless there are exceptional circumstances which would permit derogation. [116] [s 15A, Misuse of Drugs Act, 1977 (No 12 of 1977), as inserted by s 5, Criminal Justice Act, 1999 ] Whilst it was claimed by Irish politicians that this mandatory minimum sentence would serve to eradicate the illegal drugs trade, [117] [503 Dáil Debates Col 838 (Criminal Justice (No. 2) Bill, 1997 [Seanad]: Report Stage (Resumed) and Final Stage) per Mr O’Donoghue, Minister for Justice, Equality and Law Reform] no evidence was cited to substantiate this contention. Nevertheless, the “unequivocal” message that this provision would send to criminals was emphasised in the Dáil, [118] [Ibid, Col 837 See also 493 Dáil Debates Col 883 (Criminal Justice (No. 2) Bill, 1997 [Seanad]: Second Stage (Resumed))] as was its capacity to demonstrate society’s abhorrence of the trafficking of drugs. [119] [503 Dáil Debates Col 787 (Criminal Justice (No. 2) Bill, 1997 [Seanad]: Report Stage) per Mr O’Donoghue, Minister for Justice, Equality and Law Reform]

A significant issue which arises in the context of this presumptive sentence is the question of how the drugs are to be valued. A member of the Garda Síochána or an officer of the Customs Drug Law Enforcement who has knowledge of the unlawful sale or supply of controlled drugs may give evidence as to the market value of the drug seized. However, there is no objective means by which to determine the value of a seizure of drugs, which may vary from place to place, and may depend on the availability of the drugs at a given time. [120] [The difficulty the State may have in determining exactly how to value drugs is illustrated by an example reported in 1997: In July 1997, Customs officers seized 55 kg of benzyl-methyl-ketone, a chemical which is used in the manufacture of amphetamines. While the initial estimate of the haul was put at £4 million, a few days later the chemical was valued at around £7,000. See Cusack, “State keeps to high value assessment of drugs when price on streets is lower”, The Irish Times (20 November, 1997).] Furthermore, the value of the drugs seized may differ considerably depending on the purity of the substance, a factor which may not be reflected in the estimate given by the authorities. Overestimation of the value of the drugs may result in an unduly harsh sentence being imposed. The Criminal Justice Act, 2006 builds on the presumptive sentence scheme in the 1999 Act, by extending the presumptive minimum sentence to cover the importation of drugs worth at least €13,000. [121] [s 86] Moreover, in such
proceedings, the prosecution need not prove that the defendant had knowledge of the value of the drugs or was reckless in this regard. [122] [s 82(3)] In addition, when the court is considering mitigating factors such as cooperation and a guilty plea, it may also have regard to previous drug trafficking convictions and to whether the imposition of a sentence of less than ten years compromises the public interest in the protection of the community against the actions of drug traffickers. [123] [s 84(d)] Furthermore, the Criminal Justice Act, 2006 introduces presumptive minimum sentences of between five and ten years for various firearms offences. [124] [s s 57-60] Such presumptive sentences are subject to the same caveat as the scheme under the 1999 Act, namely that such sentences need not be imposed in “exceptional and special circumstances”.

Presumptive sentences suggest a preference for the mechanical application of generalised standards over the individualised approach which takes the specific characteristics of the accused into account. This is representative of a trend towards the crime control model which favours aggregates over individual characteristics. Furthermore, the imposition of punitive sentences serves a symbolic end, by indicating the abhorrence of society to particular types of offences. Expressive sanctions relieve tension and serve as a cathartic and gratifying moment of unity in the face of crime. [125] [Garland, “The Culture of High Crime Societies: Some Preconditions of Recent ‘Law and Order’ Policies” (2000) 40 British Journal of Criminology 347, p 350]

As may be seen, numerous developments at the pre-trial, trial and sentencing stages of the criminal process have shifted the Irish system towards a crime control model of justice. This trajectory is also evident in the creation of the Criminal Assets Bureau. The extension of the fight against organised crime into the civil realm has increased the strength of the State and demonstrates a continued adherence to the precepts of the crime control approach.

The Civil Realm

Following the murder of investigative journalist Veronica Guerin in 1996, the Criminal Assets Bureau (CAB), which has the capacity to seize assets believed to be the proceeds of crime, was established. [126] [The Criminal Assets Bureau Act, 1996 (No 31 of 1996) and the Proceeds of Crime Act, 1996 (No 30 of 1996) respectively provide for the establishment of the Criminal Assets Bureau and a system of forfeiture of assets deemed to be the proceeds of crime.] Although legislation exists which facilitates the confiscation of a convicted offender’s property, [127] [s s 4 and 9, Criminal Justice Act, 1994, (No 15 of 1994)] CAB may seize property in the absence of a criminal conviction. This development, the constitutionality of which has received judicial approval, [128] [Murphy v GM, High Court, unreported, 4 June 1999 [hereinafter Murphy]; Gilligan v The Criminal Assets Bureau [1998] 3 IR 185 [hereinafter Gilligan]] fundamentally revised the tactics adopted by the State in tackling the problem of organised and serious crime. The rationale behind the espousal of such a mechanism lies in the ability of leaders of organised crime gangs to dissociate themselves from criminal behaviour by delegating responsibility for the implementation of criminal acts to lower-level criminals, thereby insulating themselves from prosecution or conviction.

CAB can secure interim and interlocutory orders against a person’s property which is valued in excess of €13,000 and which can be shown to be the proceeds of crime. [129] [s s 2 and 3] If the interlocutory order stays in force for seven years then an application for disposal can be made which negates any rights in the property which the individual had. [130] [However, the Proceeds of Crime (Amendment) Act, 2005 (No 1 of 2005) permits an application for a consent disposal order to be made where an interlocutory order has been in force for a period of less than seven years.] The proof required in this
regard is the balance of probabilities; [131] [When discussing the burden of proof in Gilligan, supra note 128, pp 224-225, McGuinness J noted that before an order may be made under sections 2 or 3, it must be established to the satisfaction of the court on the balance of probabilities that the respondent is in possession or control of assets which comprise the proceeds of crime. Only when the State discharges that initial evidential burden is the obligation to disprove the contention transferred to the respondent. Furthermore, once it is accepted that the proceedings are civil in nature there is no constitutional bar on placing the onus on the respondent to refute the inference that a criminal offence has been committed.] Hearsay evidence is permitted; [132] [Hearsay evidence in an application for an order under the Act is admissible by virtue of section 8. In M v D [1998] 3 IR 175, p 179, as crucial Garda evidence was tendered on a hearsay basis, Moriarty J stressed that the Garda in question could be cross-examined and challenged viva voce so as to ensure that the demands of natural justice were met. Although Moriarty J reserved consideration of how to deal with a case in which hearsay evidence alone is proffered, he noted that significant circumspection and care may require to be exercised. In a similar manner, in Gilligan, supra note 128, p 243 it was stressed that “a court should be slow to make orders under s 3 on the basis of such evidence without other corroborating evidence.”] and the respondent must produce evidence to refute the contention that the property represents the proceeds of crime. All of these elements indicate a realignment of the approach adopted by the agents of the State in the fight against organised crime, and demonstrate a preference for the needs of the State over the individual’s right to due process. Moreover, the revenue-producing capacity of bodies such as CAB is a cause for concern, as the conflation of justice and fiscal interests may not be desirable. [133] [Indeed, the Assets Recovery Agency (ARA) in Northern Ireland was given an explicit target of seizing £60m in 2004/05, see Assets Recovery Agency, Annual Report 2003-04, (London: Home Office Communication Directorate, 2003) p 5. The Agency’s 2006/2007 Report indicates that this target was exceeded with £84 million being recovered. Assets Recovery Agency, Annual Report 2006/07, (London: Home Office Communication Directorate, 2006) p.8] Furthermore, as Lea highlights, seizing assets under such a procedure represents a soft option in contrast to rigorous criminal investigation and prosecution which requires a higher standard of proof; [134] [Lea, “Hitting Criminals Where it Hurts: Organised Crime and the Erosion of Due Process” (2004) 35 Cambrian L R 81] and therefore, it is likely that the mechanism of civil forfeiture will be used more often, with an increased possibility of abuse.

Although support for the introduction of a scheme of civil forfeiture of the proceeds of crime was expressed in 1985 in the Whitaker Report [135] [Report of the Committee of Inquiry into the Penal System, (The Whitaker Report) (Dublin: Stationery Office, 1985)] and in the Sixth Report of the Select Committee on Crime, Lawlessness and Vandalism, [136] [Sixth Report of the Select Committee on Crime, Lawlessness and Vandalism, Confiscation of Assets Illegally Acquired Through Drug Trafficking (Dublin: Stationery Office, 1985)] little measured consultation or analysis was undertaken before the remarkably speedy introduction of the legislation in 1996. Political and popular sentiment converged in the desire to establish a mechanism by which the wealth of organised criminals could be seized. In the Dáil, inflated rhetoric was employed, with terminology such as “overlords” [137] [467 Dáil Debates Col 2473 (Private Members’ Business — Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996: Second Stage) per Mr O’Dea] and “godfathers” [138] [468 Dáil Debates Col 376 (Private Members’ Business — Measures Against Crime: Motion (Resumed)) per Mr Haughey] of organised crime being used. One member of the house insisted that if we, “as a community [are] prepared to tolerate the continued unhindered existence in our midst of people who have accumulated vast and unexplained wealth …Veronica Guerin died in vain.” [139] [467 Dáil Debates Col 2406 (Private Members’ Business — Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996: Second Stage) per Mr O’Donoghue] Furthermore, politicians emphasised the fact that the law-abiding would have nothing to fear from the provisions of the legislation. [140] [Ibid , Col 2473 per Mr O’Dea] This point draws the dichotomy between “us” and “them” in political discourse sharply into focus, and encapsulates the notion that the respectable majority must be protected at all costs to civil liberties from the “other”, the rapacious and vicious criminal.
While the North American exemplar of civil forfeiture proved persuasive in the establishment of a similar scheme in this jurisdiction, [141] [The Racketeering Influenced Corrupt Organisations (RICO) provision, Title IX to the Organised Crime Control Act, 1970 , 18 USC § et seq , (1961) which authorised the confiscation and forfeiture of property involved in the commission of a crime under the Act, is the most well-known of these measures, although it only applies after a criminal conviction. In addition, the Continuing Criminal Enterprise Act, which was passed in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 1970 , 21 USC § 848, permitted the forfeiture of profits in criminal enterprises concerning drug crimes, but also introduced a means by which property could be forfeited in a civil court without the need for a criminal conviction. See Gurule, "Federal Asset Forfeiture Reform Introduction: The Ancient Roots of Modern Forfeiture Law " (1995) 21 Journal of Legislation 155; Jaipaul, “Assets Forfeiture in the United States” [1999] 9 Irish Criminal L J 191] Clancy v Ireland [142] [Clancy v Ireland [1988] IR 326 [hereinafter Clancy ] also represented a “clear and direct precedent” for the Proceeds of Crime legislation. [143] [467 Dáil Debates Col 2409 (Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996: Second Stage) per Mr O’Donoghue. Also see Col 2374 per Mr Ahern and Col 2473 per Mr O’Dea] The court in Clancy examined the constitutionality of the Offences Against The State (Amendment) Act, 1985 [144] [Offences Against The State (Amendment) Act, 1985 (No 3 of 1985)] which authorised the freezing and forfeiture of monies held by a bank which the Minister for Justice believed to be the property of an unlawful organisation. Barrington J concluded that the Act amounted to a permissible delimitation of property rights in the interests of the common good, and therefore was constitutional. [145] [Clancy, supra note 142, p 336] Although this piece of legislation represented an ad hoc response to a specific situation, [146] [Law Reform Commission, Report on the Confiscation of the Proceeds of Crime (LRC 35– 1991), para 4.8] it was explicitly recognised in the Dáil that the 1985 Act could establish a framework for dealing with any future cases of this nature. [147] [356 Dáil Debates Col 132 (Offences Against The State (Amendment) Bill, 1985: Second Stage) per Mr Noonan, Minister for Justice] The adoption of this extraordinary measure of property forfeiture, which was originally utilised in limited circumstances, demonstrates an emerging acquiescence in the use of repressive tactics in the furtherance of crime control.

While CAB’s mandate is to seize and forfeit the proceeds of crime, in fact the confiscation and forfeiture procedure operates solely within the civil realm, with none of the protections and safeguards associated with the criminal process. As was noted in a different context, a court may “merely redefine any measure which is claimed to be punishment as ‘regulation,’” and, magically, the Constitution no longer prohibits its imposition.” [148] [ Salerno v US , supra note 95, p 760 per Marshall J (dissenting)] By describing a measure as regulatory, the requirements of due process are circumvented. Judicial approval of CAB and its mechanism of asset forfeiture may reveal the crime control leanings of the judiciary, according to which the standards of due process are circumvented in a bid to improve the control of crime.

**Bucking the Punitive Trend?**

Despite the perceptible strengthening of a culture of control, as evidenced in the legislative provisions discussed above, the law and the judiciary have the potential to act as a counterpoint to the repressive tendencies of the legislature. Diverse examples of the capacity of the courts to counterbalance the illiberal approach of the Dáil may be identified at different stages of the criminal process.

*Illegally Obtained Evidence*

For example, evidence obtained in breach of constitutional rights is excluded by the Irish courts. In *People (Attorney General) v O’Brien* the Supreme Court emphasised that evidence acquired as a result
of “a deliberate and conscious violation of the constitutional rights of the accused person” must be
deemed inadmissible “where no extraordinary excusing circumstances exist”. [149] [ People (AG) v
O’Brien [1965] IR 142 [hereinafter O’Brien ]. Walsh J suggests that the imminent destruction of vital
evidence or the need to rescue a victim in peril would constitute extraordinary excusing
circumstances. In addition, he noted that evidence obtained by a search relating to a lawful arrest
although made without a valid search warrant, would belong in this category. Although the
investigation of a criminal offence has been held not to represent an extraordinary excusing
circumstance ( People v O’Loughlin [1979] IR 85 ), 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 ) As Finlay J recognised in
People (DPP) v Kenny , following O’Brien, “[t]he 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’.” [150] [ People (DPP) v Kenny
[1990] 2 IR 110 [hereinafter Kenny ] p 134. This statement echoes that of Walsh J in O’Brien, supra
note 149, p 170: “The vindication and the protection of the constitutional rights of the citizen is a duty
superior to that of trying such citizen for a criminal offence.”] The exclusion of evidence obtained on
foot of an invalid warrant indicates the paramountcy accorded to constitutional rights by the Courts in
this context. This strong support for the constitutional rights of the citizen is to be lauded, for its
elevation of rights over the expedient investigation of crime.

Confession Evidence

Moreover, the rules governing the admissibility of confession evidence are strict and ensure that only
voluntary confessions are admissible. [151] [ People (AG) v Cummins [1972] IR 312 ] The courts may
declare a confession to be inadmissible where it was given due to an inducement or suggestion on the
part of the Gardaí that the suspect would gain some advantage, [152] [ Ibrahim v R [1914] AC 599, p
609 ; People (DPP) v Geoghan and Bourke , Central Criminal Court, unreported, 18 November 2003 ]
or where it was made as a consequence of oppression. [153] [ People (DPP) v Breathnach [1981] 2
Frewen 43. Oppressive questioning was described by the Court of Criminal Appeal as “something
which tends to sap, and has sapped, that free will which must exist before a confession is voluntary…”,
approving Sachs J’s dictum in R v Priestley [1967] 51 Cr App R 1 ] A statement may also be
excluded if it falls below the requisite standard of fairness. [154] [ People (DPP) v Shaw [1982] IR 1 ]

Search Warrants and Production Orders

In addition, the scope of the search warrants and production orders enacted under the Criminal Justice
Act, 1994 , which were described above, was considered in Hanahoe v Hussey . [155] [ Hanahoe v
Hussey [1998] 3 IR 69 ] Kinlen J noted that these provisions, which involve innocent third parties in
the investigation of an offence, represent “a new and serious invasion of constitutional rights including
the invasion of privacy and possibly the invasion of confidential relationships.” [156] [Ibid , p 94] He
further observed that “[w]e live in an era of fantastic and intrusive invasions of privacy”, which are
approved by the State and the media because of the fight against crime and the alleged “public’s right
to know”, and cautioned that “the courts must be the restraining arm to protect privacy and only allow
invasion into privacy where on balance it can be justified.” [157] [Ibid , p 96] This measured decision
by the High Court indicates that the provisions under the 1999 Act will only be applied in accordance
with established notions of rights, again denoting the strength of the courts to counterbalance the trend
towards a crime control model of justice.

The Right to Silence
Although serious legislative incursions have been made on the right to silence of the accused, \[158\] [See text supra accompanying note 59 et seq] the courts have countered these restrictions to a certain extent, by precluding the admissibility of compelled statements in a later criminal trial. \[159\] [In Re National Irish Bank Ltd and the Companies Act 1990 [1999] 3 IR 145, Barrington J concluded that a confession obtained under section 10 of the Companies Act, 1990 (No 33 of 1990) would not be admissible at a subsequent criminal trial unless the trial judge was satisfied that the confession was voluntary. This judgment follows Saunders v United Kingdom [1996] 23 EHRR 313 where the European Court of Human Rights held that, notwithstanding the various procedural safeguards in place, the use of the applicant’s statements in subsequent criminal proceedings was not justified, and breached held his right against self-incrimination.] The approach of the Supreme Court in this regard is to be welcomed as it may mitigate to a degree the erosion of the right to silence. In addition, the courts have defined the limits to the capacity to draw adverse inferences. Unless the right to silence is expressly restricted by statutory provisions which permit the drawing of inferences from the silence of the accused, then the right must be upheld. \[160\] [People (DPP) v Finnerty [1999] 4 IR 364]

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

In addition, the Judges’ Rules and the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations Garda Síochána Stations) Regulations, 1987 \[161\] [Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (SI 119 of 1987)] mitigate the harshness associated with custodial interrogation. The Judges’ Rules, which serve as the basic guide to police conduct, were outlined by Walsh J in People v Cummins. \[162\] [People v Cummins [1972] IR 312] As the Rules are discretionary in nature, rather than rules of law, failure to adhere to them does not automatically result in the exclusion of evidence acquired as a result of the breach. Nevertheless, the Court of Criminal Appeal stressed in People v Farrell that the Rules “have stood up to the test of time and will be departed from at peril”. \[163\] [People v Farrell [1978] IR 1, 21. This was followed in Breathnach, supra note 153] Only in very exceptional circumstances will a statement taken in breach of the Rules be admitted in evidence, and every breach calls for an adequate explanation.

The Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 also pertain to the treatment of the accused in the police station, and deal with various elements such as the notification of a solicitor, the information to be given to the accused, and the proper form of custody records. Although failure to abide by the Regulations does not render the custody of the accused unlawful or affect the admissibility of any statement made, the Regulations provide a useful model for appropriate behaviour by the Gardai in the course of detention and interrogation.

Presumptive Sentences

Judicial interpretation of the presumptive sentencing scheme under the Criminal Justice Act, 1999 \[164\] [See text supra accompanying note 116 et seq] reveals the capacity of the courts to guard against the development of a culture of control. The Act provides that the presumptive sentence of ten years shall not apply if there are exceptional and specific circumstances relating to the offence or the offender which would make a sentence of not less than ten years imprisonment unjust. \[165\] [s 5] Among the matters to which the court may have regard are whether the person pleaded guilty and, if so, at what stage and in what circumstances he did so, and whether he materially assisted in the investigation of the offence. \[166\] [Ibid. In People (DPP) v Galligan, Court of Criminal Appeal, unreported, 23 July 2003, the court stated that although the issue of whether the court is dealing with
a first offence is not named in the provision, it is a matter to which the court may have regard.] The judiciary have made frequent use of the “exceptional circumstances” caveat to avoid the imposition of a ten-year sentence in cases when to do so would be unjust. [167] [People (DPP) v Botha, [2004] 2 IR 375; People (DPP) v Vardacardis, Court of Criminal Appeal, unreported, 20 January 2003; People (DPP) v Benjamin, Court of Criminal Appeal, unreported, 14 January 2002] Indeed, a report commissioned by the Department of Justice which examined 55 judgments from the Circuit Court and Court of Criminal Appeal from November 1999 to May 2001 noted that the mandatory minimum sentence was imposed in only three cases. [168] [McEvoy, Research for the Department of Justice on the criteria applied by the Courts in sentencing under s. 15A of the Misuse of Drugs Act 1977 (as amended) 15 February 2005. However, the bulk of the sentences imposed fell between six and eight years, ibid, p 10.] This demonstrates the reticence of the judiciary to impose any sentence which is seen to be incongruous with the specific situation of the offence and the offender in question, and encapsulates the courts’ potential to frustrate the growth of a culture of control.

Conclusion

In examining a selection of recent legislative measures introduced to tackle organised and serious crime, this article has sought to assess the extent to which these developments indicate the growth of a culture of control, which emphases public protection and the expeditious resolution of crime at the expense of due process values. At all stages of the criminal process, from investigation through to sentencing and into the civil realm, the rights of the accused have been subsumed by the demands of the State. Such a process has been facilitated by a “law and order” consensus among the main political parties, by the terrorist history of Ireland and its associated restrictions on civil liberties. By representing the social problem of crime as a threat to the core of democracy in Ireland, politicians engender a feeling of fear in the public that permits the enactment of repressive measures, the effectiveness of which has yet to be proved. As Hudson has noted, there is a “blurring of the distinction between social problem and national emergency, social utility and vital national security.” [169] [Hudson, supra note 18, p 218] Nevertheless, the ability of the judiciary, in interpreting the Constitution, to act as counterweight to the repressive legislation indicates that the development of a culture of control is far from unopposed.

It is commonly stated that questions of crime control and due process must be decided by striking the right balance between the interests of the individual and the interests of the community as a whole. [170] [Dworkin, “Principle, Policy, Procedure” in Tapper, ed, Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross (London: Butterworths, 1981), p 194] This perspective regards the interests of the community and those of the individual as fundamentally at odds. There exists a pervasive assumption that the interests of the community are antithetical to the rights of individual citizens and so are advanced by reducing the rights of defendants and by intensifying the repressiveness of the criminal justice system. [171] [Ashworth, “Crime, Community and Creeping Consequentialism” (1996) Criminal L R 220, p 225] However, the presumption that civil liberties, such as the freedom from arbitrary searches and detention, the right to fair treatment in custody, and the right to bail, are of little significance to citizens, disregards the crucial role of such rights as a counterpoise to the power of the State.

In order to defend the rights of the individual and to guard against official abuse in the justice system, the aim of the criminal process, that of crime control, must be adequately tempered by the dictates of due process. The protection of civil liberties and due process values ensures that the rights of the individual will not be sacrificed at the altar of crime control.
Article: DECLINE OF DUE PROCESS IN THE IRISH JUSTICE SYSTEM: BEYOND THE CULTURE OF CONTROL? : Elizabeth CampbellBCL, LLM (NUI), PhD candidate and Government of Ireland scholar, University College Cork. This article is based on a paper presented at the Socio-Legal Studies Association Annual Conference 2005, 30 March-1 April 2005, University of Liverpool. I would like to thank Dr Shane Kilcommi ...