From Due Process to Crime Control: The Decline of Liberalism in the Irish Criminal Justice System

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At all stages of the Irish criminal process, from pretrial detention and investigation, through the court hearing and at sentencing, a shift in focus from the due process rights of the accused towards the crime control aims of the State is apparent. Due process values, which seek to establish a degree of parity between the State and the accused, are increasingly seen in popular and political discourse as inconveniences to be overcome, rather than vital safeguards.

First, this article describes the concept of due process, and then, a selection of legislative measures which indicate the erosion of due process rights is considered. Next the capacity of the judiciary to stem this punitive drift is outlined. These developments are then placed in a theoretical setting, using the work of Herbert Packer. As Garland notes, “theoretical argument enables us to think about that real world of practice with a clarity and a breadth of perspective often unavailable to the hard-pressed practitioner”. In The Limits of the Criminal Sanction Packer presents two normative models of the criminal process, the crime control and the due process models, which are useful in determining the values underpinning a criminal justice system.

While Packer’s work provides a useful platform on which an analysis of current trends may be based, he fails to outline the reason why a shift in the structure of a criminal justice system may occur. At this juncture, the possibility that the decline of due process is related to the demise of liberalism as a prominent political outlook is examined. The concept of due process is closely allied to liberalism, given the liberal school’s emphasis on rule of law and the primacy of the individual. Therefore, it is conceivable that the waning of liberalism’s influence in the political and popular sphere explains the weakening of due process. Finally, liberalism’s replacement by communitarianism which emphasises societal rather than individual rights is explored.

DUE PROCESS RIGHTS

Due process rights developed in response to the disparity in power and wealth between the State and the defendant in the criminal process, as a means of protecting the individual and of compensating for this imbalance. Furthermore, 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.” This rationale underpins the procedures which guard against wrongful conviction and circumscribe the powers of the State.

In a trial in the Irish criminal justice system, the State must prove beyond a reasonable doubt that the accused is guilty of an offence in accordance with the requirements prescribed by law. Moreover, the accused is not obliged to establish his or her innocence, and traditionally could maintain silence throughout the course of the proceedings. In addition, prosecution of an individual for substantially the same crime for which he or she already stood trial is precluded under the rule against double jeopardy. Other rights which accrue to the defendant in the course of investigation and prosecution include the right to freedom from self-incrimination, the right to legal representation, the right to know the case against him or her, the right to test the
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.” [7] The extent to which such rights are preserved and the way they are interpreted is influenced by alterations in political and judicial outlook. As Galligan comments, “[p]rocedures are themselves deeply rooted in a social context and will reflect the beliefs and understandings prevailing in them.” [8] Various procedural rights have been modified in recent years, thus enhancing the crime control capacity of the Irish State. A selection of these legislative measures will now be outlined.

EXTENSION OF THE POWERS OF THE STATE

From the investigation of the offence, throughout the court hearing, and at sentencing, numerous legal developments have furthered the power of the State to the detriment of due process rights.

Pre-trial

During investigation, warrants may be issued internally by senior Garda officers in urgent circumstances, in contrast to the conventional approach whereby a warrant is issued by a judge of the District Court or by a peace commissioner after receiving information under oath from a Garda. [10] Section 8(1) of the Criminal Justice (Drug Trafficking) Act 1996, s.14(2) of the Criminal Assets Bureau Act 1996 and s.6 of the Criminal Justice Act 2006 allow for the issuance of a warrant by a senior Garda. Such a tactic circumvents judicial approval for the issuance of a warrant and thereby renders the process more susceptible to abuse, given the absence of independent examination of the request for the warrant. Further extension of the State’s power of search and entry is evidenced in ss.63 and 64 of the Criminal Justice Act 1994 which provide for the issuance of access orders and search warrants which apply to innocent third parties. [11]

Moreover, the capabilities of the State and its agents as regards detention and interrogation have been bolstered in recent years, to the detriment of the rights of the accused. While s.4 of the Criminal Justice Act 1984 permits detention and interrogation for up to 12 hours, [12] s.9 of the Criminal Justice Act 2006 extends the maximum period of detention for criminal offences which carry a penalty of at least five years imprisonment to 24 hours. Furthermore, s.2 of the Criminal Justice (Drug Trafficking) Act 1996 sanctions detention of up to 168 hours for suspected drug trafficking offences, and s.50 of the Criminal Justice Act 2007 provides for such seven-day detention for murder involving the use of a firearm or an explosive, murder of a Garda, prison officer or head of State, [13] and some firearms offences. [14]

In addition, the right to silence has been eroded. While a precedent for the infringement of this right was set by s.52 of the Offences Against the State Act 1939, [15] such an approach is now evident in other, more recent, statutes. Section 9(1) of the Offences Against the State (Amendment) Act 1998 makes it an offence for a person to fail to disclose information which he or she knows to be of material assistance in preventing the apprehension, prosecution or conviction of another person as soon as practicable to the Gardaí. In addition, ss.18 and 19 of the Criminal Justice Act 1984 permit inferences to be drawn from the failure of the accused upon arrest to account for marks, objects, substances or his or her presence at a particular place when asked to do so by a Garda, [16] while s.19A (as inserted by s.30 of the Criminal Justice Act 2007) allows inferences to be drawn from the failure of the accused to mention any fact on which he or she later relies in his defence, if that fact was one which he or she could reasonably have been expected to mention when questioned.

These incursions on pre-trial rights of the accused are compounded by the limited
interpretation of the constitutional right of access to a lawyer. This right, which seeks to establish parity between the detainee and his interrogators, has been construed by the courts as a right of reasonable access. [17] The efficacy of this right is questionable given that interrogation may be carried on before the accused's solicitor has arrived, provided that the Gardaí are making bona fide attempts to provide the accused with a lawyer, [18] and detention is not rendered unlawful if Gardaí deny the solicitor access to the interrogation notes. [19]

In addition to the enhancement of State powers of investigation, detention and interrogation, the right to bail was circumscribed on foot of a constitutional referendum in 1996. While the traditional rationale for bail was to ensure the accused's attendance at trial, [20] 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 him. [21] 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. [22] This allows the court to base a decision concerning an individual's liberty on the type of person it believes him to be rather than on a finding of guilt, [23] thereby compromising the presumption of innocence.

In addition to the expansion of State powers at the pre-trial stage of the criminal process, the accused's rights have also been circumscribed in the context of the trial of the offence.

**Trial**

The right of the accused to a jury trial, as protected by Art.38.5 of Bunreacht na hÉireann, may be limited in certain cases if the case is heard before the non-jury Special Criminal Court (SCC). [24] While subversive offences are automatically sent to the SCC, the Director of Public Prosecutions (DPP) may certify that a case should be heard there when he or she believes that the ordinary courts are inadequate to secure the administration of justice. [25] This decision cannot be judicially reviewed in the absence of mala fides or the influence of an improper motive or policy, [26] nor is the DPP answerable to the Dáil or democratically accountable. Even though the United Nations Human Rights Committee found that sending cases to the SCC on the basis of a certificate from the DPP without any explanation violated the right of the accused to equality before the law under Art.26 of the International Covenant on Civil and Political Rights, the practice has not ceased. [27]

**Sentencing**

Recent developments in the context of sentencing provide further examples of the development of a culture in which the exigencies of crime control 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. [28] Each sentence must be formulated with the individual facts of the case in mind [29] and must be proportionate to the gravity of the crime and the circumstances of the individual in question. [30] However, this orthodoxy was 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 10-years imprisonment unless exceptional circumstances exist which would make such a sentence unjust. [31] The Criminal Justice Act 2006 extends the presumptive minimum sentence to cover the importation of drugs worth at least 13,000, [32] and introduces presumptive sentences of between five and 10 years for firearms offences. [33] Moreover, the Criminal Justice Act 2007 delineates “mandatory” sentences for second offences which apply to a wide range of offences, including murder, false imprisonment, [34] firearms offences, [35] aggravated burglary, [36] drug trafficking, [37] and organised
In addition to the use of presumptive sentences, the powers of the State were bolstered by the Criminal Justice Act 1994 which allows for the confiscation and forfeiture of property after an individual has been convicted. Sections 4 and 9 provide for the making of confiscation orders upon conviction for drug trafficking or other offences. If the court determines that the person has benefited from his crime, the court must make a confiscation order requiring him to pay the value of the proceeds of the crime. In addition, the 1994 Act allows a forfeiture order to be made in respect of property used to commit an offence or to enable another person to avoid detection.

As may be seen, developments at the pre-trial, trial and sentencing stages of the criminal process have shifted the Irish system towards a model of justice in which the expedient resolution of crime is favoured over the rights of the accused. This trend is also evident in the creation and operation of the Criminal Assets Bureau (CAB).

Criminal Assets Bureau
CAB has the capacity to seize assets believed to be the proceeds of crime in the absence of a criminal conviction. This development, which received judicial imprimatur, fundamentally revised the State’s approach to tackling the problem of serious crime. 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. If the interlocutory order stays in force for seven years, an application for disposal can be made which negates the individual’s rights in the property. The proof required in this context is the balance of probabilities; hearsay evidence is permitted; 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 crime, and demonstrate a preference for the needs of the State over due process rights.

DUE PROCESS V CRIME CONTROL: PACKER’S MODELS OF THE CRIMINAL PROCESS

Herbert Packer’s work on criminal process is valuable in illuminating the legislative changes which have occurred in this jurisdiction. In The Limits of the Criminal Sanction, Packer presents two normative models, the crime control and the due process models, which represent the two competing value systems in the criminal process.

The crime control model sees the suppression of crime as the most significant function of the criminal process. Efficiency, speed and finality are of primary importance: therefore, the criminal process should not involve rituals that delay the progress of a case. Packer portrays this model as “an assembly-line conveyor belt down which moves an endless stream of cases”. Furthermore, the crime control model regards the screening process operated by the police and prosecutors as a reliable indicator of guilt, and sees extrajudicial, informal mechanisms of factfinding as superior to formal and adjudicatory processes.

In contrast, for the due process model the aim of the criminal process is as much to protect the innocent as it is to convict the guilty. Though accepting that the repression of crime is socially desirable, this model highlights the possibility of error in informal adjudicative fact-
finding. Therefore, formal adjudicative factfinding is central, and reliability is of greater consequence than efficiency. The underlying rationale for this is the primacy of the individual and the desire for limitation on official power. As power is susceptible to abuse, a diminution in the efficiency of the criminal process is accepted to prevent official oppression of the individual.

Packer’s models are valuable as interpretive devices which allow the current trajectory of the Irish criminal process to be conceptualised and analysed. Current developments in the Irish criminal process, such as the erosion of the rights to bail and to silence and the introduction of presumptive sentences, indicate a shift along the continuum towards the crime control model. Moreover, prolonged detention periods, the use of non-jury courts, and the limited interpretation of the right of access to a lawyer illustrate the move away from due process values. The establishment of the Criminal Assets Bureau also highlights the growing emphasis on the principles of the crime control model.

Although Packer’s dichotomously opposing models of the criminal process provide a valuable base on which an analysis of the trajectory of the Irish criminal process may be grounded, Packer fails to provide a theoretical foundation for his models. To remedy this gap it is suggested that the key principles of the due process model derive from liberal ideology while, conversely, the crime control model represents the antithesis of liberalism. The liberal agenda, from which due process arguably developed, will now be examined.

LIBERALISM

Due process values mirror the fundamental principles of liberalism, and their entrenchment may be explained by reference to the rise of that political approach. In other words, without liberalism, it is unlikely that due process values would ever have developed. Adherence to the principles of liberalism seems to militate against the adoption of results-oriented, risk-based policies which undercut individual rights.

Although due process rights did not truly solidify until the late 18th century with the drafting of the US Constitution, the liberal philosophy on which the concept of such rights was based had been developing in the preceding centuries. During the Renaissance, an emphasis on the individual and on human liberty was evidenced in scholarly writings. In the 17th century, with the work of Hobbes, the first firm foundations of the modern individualist outlook were set from which the liberal tradition derived. Liberalism finally matured into a systematic political creed in the 19th century.

The development of liberalism presaged the introduction of a legal system based on procedural and individual rights, encapsulating the dictates of the due process model. Indeed, the Irish Constitution, which protects due process rights by virtue of Art. 38.1, is firmly rooted in the liberal democratic tradition. Key elements of liberalism underpin the notion of individual due process rights: liberalism is individualistic, as it affirms the primacy of the individual against the claims of society; egalitarian, as it confers the same moral status on all individuals; and universalist, as it upholds the unity of humankind. In a similar fashion, due process rights are individualistic, egalitarian and universalist, given that they inhere in each individual by virtue of her status as a human being.

According to the liberal school of thought, each person is entitled to the basic liberties required to realise her entitlement to equal concern and respect. No constitutive attachment, either to state, family, or cultural group, may defeat these basic rights. Moreover, liberalism regards the public sphere as legitimate only to the extent that it represents a delegation of a circumscribed and definite degree of private sovereignty. In addition, liberalism advocates a limited form of government, an element which is crucial to the concept of individual rights in the criminal process. Furthermore, the rule of law, as opposed to rule through the capricious or
random demands, is fundamental to the liberal agenda. The concept of the rule of law also encompasses the requirement that law must be clear, equal and certain. This element of liberal thought is mirrored in the procedural rights which accrue to the accused in the criminal process.

Discrete strands of liberalism such as social contractarianism and deontologism which influence the due process paradigm will now be examined.

**Social contractarianism**

The social contract is an important conceptual device used by liberal thinkers to explain the system of rules and laws in place in liberal countries. This idea, originally advocated by Hobbes, comprises an agreement consented to by free men which enabled them to become subjects of a legitimate state which protects its citizens. Hobbes believed that the life of man before the social contract was “solitary, poor, nasty, brutish, and short”, and involved a state of “war of every Man against every Man”. Therefore, each individual renounced a portion of her liberty to the State, in return for security and the protection of her interests.

The social contract device has been adopted by many liberal theorists to explain the legitimacy of State power and the role of the individual subject vis-à-vis the State. Various freedoms, such as the right to punish crime, have been relinquished to the State, in return for which a matrix of rights and duties was established. However, in the contemporary setting, Hobbes’s negative perspective on the state of nature has been rekindled, as is evident in inflammatory political discourse which exacerbates the fear of crime. Indeed, it was asserted to the Joint Committee on Justice, Equality, Defence and Women’s Rights that many reasonable people would sacrifice some civil liberties to live in a safer environment. This assertion is supported by an opinion poll finding which indicates that 78 per cent of people would give up some of their civil liberties in order to tackle crime and lawlessness.

An increasing number of liberties and due process rights have been ceded to the State, predicated on the assumption that this is necessary to enable the State to protect its citizens from crime. Thus, it is arguable that the social contract, which initially represented a key component of the liberalist agenda, is now used for illiberal ends, by facilitating encroachment on individual due process rights.

**Deontologism**

Deontologism is primarily concerned with duties and rights, and centres on the primacy of the individual. Therefore, the deontological element of liberalism is a significant influence on the concept of individual rights in the criminal process. For deontologists, the ends cannot justify the means; in other words, even the most commendable goal should not be attained in an unjust manner. In the context of criminal justice, this implies that the prevention, repression and punishment of crime cannot justify the attrition of important individual liberties.

The principal exponent of a deontological ethical theory was Immanuel Kant, whose central thesis was that persons should never be treated as ends rather than means: “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only”. Human rights theories and notions of individual due process rights rely on a Kantian perspective of the individual. Adherence to deontological principles safeguards individual liberties, and precludes the sacrifice of such rights for majoritarian or societal gain. As Gray highlights, if an individual has fundamental rights, she must be able to invoke them to resist the claims of general welfare. Having a right means that others may be inconvenienced while the individual in question exercises her right.
It is evident that deontologism forms the cornerstone for the protection of due process rights. Another ideology, which was originally a facet of liberalism, but which harbours the potential to undermine liberalism, and in particular the deontological project, is utilitarianism.

**Utilitarianism**

Utilitarianism promotes the greatest amount of good for the greatest number of people. In other words, and in contrast to deontologism, the appropriateness of an action is determined by its capacity to further the good of the community as a whole. According to Bentham, the foremost advocate of utilitarianism, a measure conforms to the principle of utility when its ability to increase the advantage or happiness of the community is greater than its ability to diminish it. [72] The utilitarian tradition was continued by Mill, who stressed that an action is right in proportion to its propensity to promote happiness, and wrong as it tends to produce the reverse of happiness. [73]

Utilitarianism poses significant problems for the maintenance of standards in the criminal process, given its willingness to compromise rights on the grounds of general utility. As a utilitarian is ultimately committed to the general welfare, rights are not independent and stable, [74] but only count as factors which may affect the general welfare. [75] Only if it is expedient to recognise and uphold a right will utilitarianism do so. Therefore, whilst utilitarianism represents a key strand of liberalism, as a moral theory it has the capacity to lead to anti-liberal conclusions. [76]

**Liberalism in the criminal process**

Deontological and utilitarian imperatives may be discerned in the Irish criminal process, given the existence of a due process framework which protects individual rights, tempered by the public interest in the resolution and punishment of crime. However, current trends in this jurisdiction indicate a strengthening of utilitarian demands, with the adoption of repressive, illiberal measures which are justified by reference to the objectives of crime control. For example, the extension of the grounds on which bail may be refused indicates a utilitarian favouring of crime control tactics over the traditional liberal right to liberty and the presumption of innocence. Moreover, an expansion in state interference may be perceived in the criminal process, with the extension of police powers of entry, search and seizure. This represents a shift away from the classical liberal ethos of minimal interference from the state.

It is evident that deontological liberalism cannot withstand the influence of expedient crime control model, given the steady encroachment on civil liberties and due process rights in jurisdictions which purport to be liberal democracies, not least Ireland. The utilitarian facet of liberal thinking is gaining strength, to the detriment of deontological concerns, and the notion of the social contract has been adopted for illiberal ends, by permitting the erosion of rights in return for protection by the State. The repressive provisions which have been introduced operate within the rule of law complex, thereby presenting a liberal veneer, whilst simultaneously introducing illiberal measures.

The rise of liberalism facilitated the growth of a concept of individual rights, including due process rights which protect the accused against the State in the criminal process and which circumscribe State power. In addition, liberalism heralded the introduction of the rule of law, which facilitated the introduction of due process values. However, liberalism’s replacement with competing ideologies, in particular communitarianism, portends a significant shift in the justice system.
CHALLENGES TO LIBERALISM

A number of challenges to liberalism may be identified, which have the potential to dislodge the position of due process in the justice system. The liberal tradition has been criticised on various levels in recent years,\[77\] with censure deriving from both side of the political spectrum.\[78\] Conservatives display scepticism of liberalism’s generic humanity and abstract individuality, and regard authority, loyalty and order as of more importance than equality and liberty. Socialists similarly reject liberalism’s abstract individualism, and question the inherent inequality and injustice in the allocation of resources in liberal societies.\[79\]

However, in the Irish context, the most significant threat posed to liberalism as a dominant ideology is the concept of communitarianism. Communitarians criticise liberalism for establishing a society composed of individualistic, isolated egotists, or, on the other hand, for mistakenly depicting life in such a fashion.\[80\] Etzioni, a prominent political communitarian, argues that there is currently an imbalance between rights and responsibilities.\[81\] He contends that rights should only be claimed in conjunction with the imposition of responsibilities. Communitarianism rejects the individualistic nature of liberal society, and recommends that laws and social arrangements be reconfigured, to recognise the centrality of the community. Indeed, the community is presented as an entity with an entitlement to protection from harm, whose rights may compete with individual rights.\[82\]

Various political statements in Ireland suggest a tacit support for communitarianism, as evidenced in the conflation of individual rights with those of the community. For example, Willie O’Dea, as Minister of State at the Department of Justice, Equality and Law Reform, stated that “the very purpose of police powers is to vindicate the human rights of victims or potential victims of crime and the wider rights of society “ [emphasis added].\[83\] He further spoke of the balance which must be achieved between these rights. In addition, the former Minister for Justice, Michael McDowell, commented that the rights of society to be protected take second place in the quest to ensure fairness to the suspect.\[84\] Further discussion of the “rights of society” as a counterpoint to the rights of the individual, and of the need to attain an appropriate balance between the two species of rights, has been evidenced in Dáil debates.\[85\] In addition, strident opposition to the right to silence was expressed on the grounds that “it does not acknowledge the right of society as being equal to the right of the individual regarding a criminal prosecution.”\[86\]

In addition to political rhetoric, current trends in criminal justice policy indicate that the rights of the community are seen as having parity, or even of being superior, to the rights and interests of the individual. For example, the restriction of the right to bail was based solely on the perceived need for increased public protection in this regard. Moreover, the work of CAB, which arguably impinges on individual rights and liberties, is legitimated by the need to protect the public from organised criminals, by the seizure of their assets. The espousal of the rights of the community in this context is in direct contradiction to the precepts of liberal thought, in which the primacy of the individual is immutable. Equating the rights of the community with those of the individual allows her rights to be subsumed by the demands and needs of the community and undercuts the protection and respect accorded to each individual.

Despite the growing endorsement of communitarianism in political and popular circles in Ireland, a number of contentious issues arise in this context. The meaning of community is problematic, given that in this context, the notion of community is a defensive one which developed in opposition to a perceived threat.\[87\] Repressive measures designed to protect the rights of the community may be concealed by nostalgia for an idealised past with its desire to rekindle community values.\[88\] Moreover, a community’s interests are often parochial.\[89\] This insular tendency means that the macropicture, which includes general governing principles such as liberty or equality, may be forgotten.
In addition, the adoption of communitarianism may result in majoritarianism, where minority and individual rights are overlooked. Focusing on the interests of the community and adhering to the demands of the majority to the neglect of the individual, poses significant danger to the core precepts of liberalism. The attribution of rights to the community presents a serious threat to individual rights, and is indefensible from a liberal perspective. As Dworkin argues, classifying the “right” of the majority as a competing right that must be balanced erodes the concept of individual rights. Although communitarian theory is not opposed or indifferent to rights, from the perspective of the community, individual rights are derivative and secondary. The potential for the rescission of individual liberties so as to benefit the community suggests that communitarianism must be rejected.

There exists a pervasive assumption that the interests of the community are advanced by reducing the rights of defendants and suspects and by intensifying the repressiveness of the criminal justice system. This notion presumes 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. However, it is submitted that the right to live in a society with circumscribed police powers is a significant element in a liberal democratic society, and must not be overshadowed by the desire to restrict crime.

CONCLUSION

This article began with a discussion of a selection of legislative changes which altered the Irish criminal justice process in a significant sense. From investigation and questioning, through the trial and at sentencing, considerable changes have been wrought which modify the traditional approach to criminal justice. Although this shift is far from unopposed, the current trajectory of the justice system, as driven by the legislature, seems to be away from the due process model. Packer’s normative models of the criminal process were considered in this regard, and a shift along the criminal justice continuum towards the crime control model was identified in recent legislative developments. Expedient and pragmatic tactics are now employed by the State, with diminishing concern for individual liberties and rights.

However, while Packer’s thesis serves as a useful heuristic framework on which an analysis of current trends may be based, he fails to present a deeper consideration of the political theories which may drive the trajectory of a justice system in a given direction, towards one of his models. Therefore, this article suggested that the liberal school of thought provides the theoretical underpinning for the due process model of justice, given the shared emphasis on the primacy of the individual and on the need for strict circumscription of state power. An exploration of liberalism was undertaken to determine the overlap between that political theory and the notion of due process. Furthermore, the challenge posed to liberalism by communitarianism was considered, and the degree to which communitarianism has become entrenched in Ireland was assessed.

Liberal notions of the primacy of the individual and of individual rights are being eroded by premodern calls for vengeance, and a heightened legislative concern for security has compromised liberty. Central liberal precepts such as the concept of individual rights, the rule of law, and limitation on State power have been eroded, often during times of public anxiety and perceived social peril. Nevertheless, such attrition may be stemmed by a firm commitment to legal principles grounded in constitutional theory. While convenience and justice are often not on speaking terms, adherence to traditional liberal legal precepts will ensure the protection of individual rights and liberties.
Article: FROM DUE PROCESS TO CRIME CONTROL—THE DECLINE OF LIBERALISM IN THE IRISH CRIMINAL JUSTICE SYSTEM : Liz Campbell* B.C.L., LL.M (N.U.I.), Ph.D candidate, University College, Cork, and lecturer in law, University of Aberdeen. This research is generously funded by the Irish Research Council for the Humanities and Social Sciences. The author would like to thank Dr Shane Kilcommins ...

1990), p.277. ]


[3] [ In Wardius v Oregon (1973) 412 U.S. 470 at 480, 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. Similarly, in Williams v Florida (1970) 399 U.S. 78 at 111–112, Black J. highlighted “the awesome investigative and prosecutorial powers of government”. ]


[5] [Dermot Walsh, Criminal Procedure (Thomson Round Hall, Dublin, 2002), p.1. ]


[7] [Walsh, above n.5, p.5. ]

[8] [Walsh, above n.5, p.5. ]


[10] [Such a power was first granted by s.29 of the Offences against the State Act 1939 to combat subversive crime. ]

[11] [Ss.63, 64 . ]

[12] [This section applies to any offence for which a competent adult without previous convictions may be punished by imprisonment for a term of five years or more. ]

[13] [See s.3 , Criminal Justice Act 1990 . ]

[14] [S.15 , Firearms Act 1925 , and s.15 , Non-Fatal Offences against the Person Act 1997 . ]

[15] [S. 52 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 . The constitutionality of s.52 was upheld by the Supreme Court in Heaney v Ireland [1996] 1 I.R. 580 .]

[16] [The constitutionality of these provisions was upheld in Rock v Ireland [1997] 3 I.R. 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. ]

[17] [ DPP v Healy [1990] 2 I.R. 73 at 81, per Finlay C.J. Indeed, it has been claimed that police practice is to define reasonable access as amounting to one hour in every six hours’ detention. John White, “The Confessional State—Police Interrogation in the Irish Republic”, Part I (2000) 10(1) Irish Criminal Law Journal 17, 18. ]

[18] [ People (DPP) v Buck [2002] 2 I.R. 268. ]
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[19] [ Lavery v Member in Charge, Carrickmacross Garda Station [1999] 2 I.R. 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. 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 (CPT) 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. ]

[20] [ People (AG) v O’Callaghan [1966] I.R. 501 at 513 per Walsh J. ]

[21] [Art.40.4.7° of Bunreacht Na hÉireann, which was inserted as a consequence of the referendum, reads: “Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person” and thereby permitted the enactment of the Bail Act 1997. ]

[22] [S.2(2) , Bail Act 1997. ]

[23] [Walsh, above n.5, p.526. ]

[24] [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, 1961–1962 and 1972 to date. ]

[25] [Ss.46 and 47 of the Offences against the State Act 1939. ]

[26] [ State (McCormack) v Curran [1987] I.L.R.M. 225. ]

[27] [Joseph Kavanagh v Ireland , Communication No. 819/1998, UN Doc CCPR/C/71/D/819/1998 (2001). Cases with no subversive element that have been tried in the Special Criminal Court include kidnapping ( DPP v Kavanagh , unreported, Court of Criminal Appeal, May 18, 1999); and the murder of journalist Veronica Guerin ( People (DPP) v Ward , unreported, Special Criminal Court, November 27, 1998 ; People (DPP) v Meehan , unreported, Special Criminal Court, July 29, 1999). ]

[28] [ People (DPP) v McCormack [2000] 4 I.R. 356 at 359 per Barron J. ]

[29] [ People (DPP) v Gallagher , unreported, Court of Criminal Appeal, March 4, 1994. ]

[30] [ People (DPP) v M. [1994] 2 I.L.R.M. 54. ]

[31] [S.15A , Misuse of Drugs Act 1977 , as inserted by s.5 , Criminal Justice Act 1999. 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 or she did so, and whether he or she materially assisted in the investigation of the offence. In People (DPP) v Galligan , unreported, Court of Criminal Appeal, July 23, 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. ]
Irish Law Times
(2007) 25 ILT 281; Article: FROM DUE PROCESS TO CRIME CONTROL—THE DECLINE OF LIBERALISM IN THE IRISH CRIMINAL JUSTICE SYSTEM : Liz Campbell* B.C.L., LLM (N.U.I.), Ph.D candidate, University College, Cork, and lecturer in law, University of Aberdeen. This research is generously funded by the Irish Research Council for the Humanities and Social Sciences. The author would like to thank Dr Shane Kilcommins ...

[32] [S.86 , inserting s.15B into the Misuse of Drugs Act 1977 . See Irish Human Rights Commission, Observations on Additional Proposals for Amendments to the Criminal Justice Bill 2004, 8 March, 2006, para.2.1.2; also 617 Dáil Debates, Col 67 per Mr McDowell, Minister for Justice, Equality and Law Reform. ]

[33] [See ss.42 , 57–60 . See 617 Dáil Debates, Col 65 per Mr McDowell, Minister for Justice, Equality and Law Reform. ]

[34] [S.15 , Non-Fatal Offences Against the Person Act 1997 .]

[35] [Firearms Acts 1925 – 1964 .]

[36] [S.13 , Criminal Justice (Theft and Fraud Offences) Act 2001 .]

[37] [S.3(1) , Criminal Justice Act 1994 .]

[38] [Ss.71–73 , Criminal Justice Act 2006 .]

[39] [S. 25 of the Criminal Justice Act 1999 amended s.4 of the 1994 Act to make this provision mandatory. The applicable standard of proof in relation to ss.4 and 9 in determining whether a person has benefited from the offence and the amount to be recovered is the civil standard., s.4(6) .]

[40] [S.61 . This provision mirrors s.43 of the English Powers of Criminal Courts Act 1973 .]

[41] [The Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 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. ]

[42] [ Murphy v GM , unreported, High Court, June 4, 1999 ; Gilligan v Criminal Assets Bureau [1998] 3 I.R. 185 .]

[43] [Ss. 2 and 3 .]

[44] [However , s.7 of the Proceeds of Crime (Amendment) Act 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. ]

[45] [Gilligan, above n.42, at 224–225 per McGuinness J. ]

[46] [S.8 .]

[47] [Packer, above n.2, p.153. ]

[48] [Ibid, p.158 et seq. ]

[49] [Ibid, p.159. ]

[50] [Ibid, p.164 et seq. ]

[51] [Despite the usefulness of Packer’s thesis as an analytical tool, a number of criticisms may be
raised concerning his approach. It may be argued that his analysis is superficial, and fails to present an adequate exposition of the models and the conflict between them. His work merely skims the surface of the models, and fails to present a thorough examination of the theoretical basis for them. Although Packer’s consideration may be lacking in depth somewhat, this does not undermine the worth of his models in an interpretive sense. As Henham notes, Packer’s approach is theoretically deficient, but heuristically valuable as an empirical tool. Ralph Henham, “Human Rights, Due Process and Sentencing” (1998) 38 British Journal of Criminology 592 at 593.


[56] Gray, above n.53, xii.

[57] Paul Kelly, Liberalism (Polity Press, Cambridge, 2005), p.66. Kelly regards these basic liberties as including freedom from arbitrary arrest and detention and the right to due process.

[58] Ibid. p.10.


[61] Quinn, above n.59, p.283.

[62] Ibid.

[63] Freeman, above n.52, p.107.


[67] Survey for Irish Times by MRBI (code: MRBI/4510/97), between March 26, 1997 and March 27, 1997, Q.10. Available at Irish Opinion Poll Archive http://www.tcd.ie/Political_Science/IOPA.
Article: FROM DUE PROCESS TO CRIME CONTROL—THE DECLINE OF LIBERALISM IN THE IRISH CRIMINAL JUSTICE SYSTEM

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[68] [Barbara Hudson, Justice in the Risk Society (Sage, London, 2003), xi. ]


[70] [John Gray, Liberalism: Essays in Political Philosophy (Routledge, London, 1989), p.121. ]


[74] [Lyons, above n.71, p.21. ]


[76] [Joseph Raz, The Morality of Freedom (Doubleday, New York, 1986), p.267; Gray, above n.53, p.28; Heywood, above n.54, pp.50-1. ]

[77] [As Kelly notes, “liberal” is used as a term of political abuse: the “hand-wringing of ‘bleeding heart’ liberals”. Kelly, above n.57, p.5. ]

[78] [Gray, above n.53, p.78. ]

[79] [Ibid, pp.79–80. ]

[80] [Michael Walzer, “The Communitarian Critique of Liberalism” (1990) 18 Political Theory 6, 7–9. ]


[82] [Hudson, above n.68, pp.82-3. Measures such as anti-social behaviour orders (ASBOs) and the prohibition of littering and drinking in public spaces indicate the level of support for this perspective. ]

[83] [“A Human Rights Approach to Policing”, Irish Council for Civil Liberties Seminar, March 4, 2003, per Mr O’Dea TD, Minister of State at the Department of Justice, Equality and Law Reform. ]

[84] [597 Dáil Debates Col 1276 per Mr McDowell, Minister for Justice, Equality and Law Reform. Translation available at http://www.iprt.ie/proceedings/1228. ]
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[85] [465Dáil Debates Col 1441 per Mr Byrne. ]
[86] [444 Dáil Debates Col 189 per Mr Lenihan. ]
[87] [Hudson, above n.68, p.91. ]
[90] [Nevertheless, Etzioni argues that communitarians are not majoritarians, and cites constitutional and moral safeguards which exist in the US like the American Constitution and the Bill of Rights, to support his contention. Etzioni, above n.81, p.255; Amitai Etzioni, (ed.) The Essential Communitarian Reader (Rowman and Littlefield, Maryland, 1998), xiv-xv ]
[91] [Dworkin, above n.75, pp.199–200. ]
[95] [Hudson, above n.68, p.42. ]
[96] [As Pound notes, whenever the public become alarmed in a period of transition and unrest there is an orgy of drastic penal legislation. Roscoe Pound, “The Future of the Criminal Law” (1921) 21 Columbia Law Review 1, 13. ]
[98] [ General Medical Council v Spackman (1943) A.C. 627 at 638 per Lord Atkins. ]