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Item Type	Article
Authors	Kilcommins, Shane;Vaughan, Barry
Citation	Cambrian Law Review;35, pp. 55-80
Publisher	University of Wales, Department of Law
Download date	2026-03-16 21:35:16
Item License	<a href="https://creativecommons.org/licenses/by-nc-sa/1.0/">https://creativecommons.org/licenses/by-nc-sa/1.0/</a>
Link to Item	<a href="https://hdl.handle.net/10344/3986">https://hdl.handle.net/10344/3986</a>

# A Perpetual State of Emergency: Subverting the Rule of Law in Ireland

Shane Kilcommins and Barry Vaughan

## Introduction

It is not difficult to find, in Ireland, traces of what David Garland would call the “crime complex”. Such phenomena include the politicisation of law and order, increases in maximum sentences, prison expansionism, the curtailment of judicial discretion in certain circumstances, legislative control of groups such as convicted sex offenders, a developing pro-victim/witness momentum, and the increased dissociation of the offender from the state and society. It is also true, however, that many of the phenomena outlined are surface events which are not yet constitutive of a new penal order in Ireland. They remain largely peripheral rather than governing principles of the criminal justice system. It still remains to be seen whether such phenomena will develop into a new structural pattern of control or will be marginalized.

It is possible also, however, to unearth stronger evidence of a possible drift towards a new trajectory of punishment and a more punitive “logics of action.” Alongside developments such as “truth in sentencing,” the system has also witnessed increased calls for “truth in procedure” and “truth in evidence.”<sup>1</sup> The expanding powers of law enforcement and prosecutorial agencies is part of a long-term, often unnoticed, shift in the civil liberties landscape, to one more closely aligned with the state’s result oriented needs and its desire to control more effectively.<sup>2</sup> As one of the leading commentators on criminal procedure in Ireland recently noted: “The heavy emphasis on due process values which imposed a heavy burden on the State to prove guilt against a passive defendant has been replaced by a model in which, at the very least, the State can coerce a much greater degree of co-operation from the suspect, both directly and indirectly, in the investigation of his or her own guilt than had been the case previously.”<sup>3</sup>

Curiously, however, and apart from recognising the general decline in respect for the rights of offenders particularly as it related to notification and expungement laws, Garland had little to say about such a reorientation in criminal procedure. This is surprising given that many of the characteristics of this alteration in emphasis on due process are consistent with his culture of control thesis. For example, procedural laws that steadily encroach upon the traditional civil liberty rights of offenders are invariably the product of politicised crime control; feed into the notion that offenders are rational maximisers; are often justified on the basis of the “otherness” of the criminals

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<sup>1</sup> M. Feeley and K. Levine, “Assaults on the Adversarial Process: Rethinking American Criminal Justice,” *Punishment and Society* 3(4) (2001): pp. 537-545.

<sup>2</sup> For a fuller discussion, see S. Kilcommins, I. O’Donnell, E. O’Sullivan, and B. Vaughan, *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration, 2004), chapter 4.

<sup>3</sup> D. Walsh, *Criminal Procedure* (Round Hall, Sweet and Maxwell, 2002), xii.

targeted; expand the powers of the “sovereign command” in the criminal domain whilst also working in the “civil” arena; often have a reassuring, retaliatory character; and legitimate themselves by focusing populist attention on the crime and on the victims of such crime.<sup>4</sup>

Indeed the strongest evidence of the possibility of a drift towards a control model of justice in Ireland is manifest in the dissolution of fairness of procedure safeguards. If anything, it could be said that in terms of a devaluation in due process values, Ireland is now a lodestar for other jurisdictions. This marks a complete reversal in Ireland’s usual practice of criminal justice policy imitation from other western countries. Much, though not all, of the impetus for the tooling down of accused/offender rights must be construed against a backdrop of the “extra-ordinary” circumstances posed by the conflict in Northern Ireland. The “proportionate”, “emergency” legal responses drawn up to combat the threat posed by paramilitaries have proved remarkably malleable in adjusting to more normal circumstances. For Ireland, at least, justifying the need for extra-ordinary powers by virtue of supposedly exceptional circumstances has obscured the trade-off that has taken place between enhanced public protection, on the one hand, and the commitment to due process values on the other. It did so by affirming that securities were being enhanced and denying that democratic values were being sacrificed – because the powers only worked in exceptional circumstances. And then the process of normalisation was obscured through a series of small steps, often with “judicial imprimatur.” In times of penal crisis, the result-orientated potential of these extra-ordinary provisions quickly looked attractive to the authorities. Indeed they have come to be seen as an efficient means of investigating and prosecuting serious, though ordinary, crimes, (not least through the ways in which extra-ordinary provisions neatly side-step any constitutional due process concerns).

The purpose of this article is to highlight the various means by which extra-ordinary laws have “trickled down” into the ordinary criminal justice system, facilitating the creation of a discretionary two tiered system of justice. We detail five sites where this normalisation of anti-paramilitary legislation and practice has occurred. These are:

- the manner in which the Gardaí gather information.
- their use of extra-ordinary arrest provisions for ordinary offences.
- the use of a non-jury court for ordinary offences (despite the constitutional right to a jury trial).
- the impetus provided by extra-ordinary provisions in respect of seizing the proceeds of crime in the ordinary domain.
- the apathy that exists in respect of the use of supergrass testimony for ordinary offences.

Though much of the normalisation process has taken place against a backdrop of Ireland’s particular history in the twentieth century, there are lessons for

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<sup>4</sup> The murder of journalist Veronica Guerin, for example, acted to some extent as a catalyst for the enactment of a spate of punitive legislative measures which have had consequences for procedural safeguards.

<sup>5</sup> C. Fennell, *The Law of Evidence in Ireland* (Butterworths, 2003), p. 23.

many western countries now attempting to grapple with anti-terrorist laws in a post 9/11 milieu. First, emergency laws invariably remain longer on the statute books than the exigencies of the situation require. Secondly, they will find their way into the operation of the “ordinary” criminal justice system as their “truth seeking” effectiveness becomes apparent and they will be employed against non-terrorist targets. As the discretionary two tiered system of justice advances, it becomes increasingly difficult to tell the dancer from the dance. Thirdly, the extra-ordinary or emergency provisions will eventually act as a yardstick for the public against which it can measure its ability to counteract the threat posed by other demonised, non-terrorist, pariahs. The message that these are “extra-ordinary” or “emergency” provisions gets lost in the clamour to draw perfunctory parallels between the threat posed by terrorists and that posed by particular groupings of “ordinary” criminals.<sup>6</sup>

## The Normalisation Process

The 1937 Constitution of Ireland provides for the establishment of special criminal courts where it is found that the ordinary courts are “inadequate to secure the effective administration of justice, and the preservation of public peace and order” (Art. 38.3). Rather than exercising this function at particular times through the introduction of dedicated legislation, the Government of the day introduced general enabling legislation in the form of the Offences Against the State Act, 1939.

The first four parts of the Act are permanently in force. For example, Part II deals *inter alia* with offences against the state such as the usurpation of the functions of government, obstruction of government, obstruction of the President, unauthorised military exercises, and the possession treasonable and seditious documents. Part III contends with membership of unlawful organisations. Part V, which makes provision for the establishment of the Special Criminal Court and the power of the government to schedule offences, only comes into operation when the government makes the appropriate proclamation that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. In making such proclamations under Part V, the government does not have to explain to the Dáil (the Irish equivalent of the House of Commons) why such draconian measures are deemed necessary. The necessary proclamations under Part V of the 1939 Act have been made for the periods 1939-1946, 1961 to 1962, and 1972 to date. The current proclamation can be annulled only by a resolution of the Dáil or when the government issues a proclamation declaring that Part V is no longer in force.

These measures were intended primarily to be directed at paramilitary organisations such as the Irish Republican Army. This legislative framework has two important features. The fact that the government never has to give a justificatory reason for its belief that ordinary criminal procedures are inadequate surely encourages a degree of flexibility in the deployment of

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<sup>6</sup> See P. Hillyard, “The Normalisation of Special Powers: From Northern Ireland to Britain”, in *Law, Order and the Authoritarian State* ed. P. Scruton (Open University, 1987), pp. 279-312.

emergency powers. And the fact that such powers existed surely exercises a powerful temptation for officers of the law to deploy them in a wide variety of circumstances. The degree of tranquillity with which the general population has accepted such repressive measures has been explained by the reduction in personal liberties occasioned by the military and civil strife in Ireland in the first half of the twentieth century.<sup>7</sup> In the sections below, we argue that there has been a similar process of habituation to extraordinary legislation.

(i) *Gardaí holding and information gathering tactics*

To begin with, one can refer to the increasing normalisation of extraordinary paramilitary legislation by examining the overspill of extraordinary detention provisions into the ordinary criminal justice realm. For example, up to 1979, the Gardaí had on occasion utilised the tactic of “holding suspects for questioning” for ordinary offences. This ploy acted as a “useful” information gathering technique and it meant that the suspects did not need to be promptly produced before the courts as they were not *de jure* under arrest. In that year, however, the Supreme Court held that this practice constituted a *de facto* arrest and represented an unlawful invasion of constitutional rights. In *The People (DPP) v. O’Loughlin*, O’Higgins, C.J. explained: “‘Holding for questioning’ and ‘taking into custody’ and ‘detaining’ are merely different ways of describing the act of depriving a man of his liberty. To do so without lawful authority is an open defiance of Article 40, s.4. sub-s.1 of the Constitution.”<sup>8</sup> Following the decision, the Gardaí, for a number of years, began to resort to the stratagem of arresting persons suspected of committing serious crime under section 30 of the Offences Against the State Act 1939 (which then permitted a maximum period of detention of up to 48 hours),<sup>9</sup> an extraordinary piece of legislation designed, as detailed above, primarily to combat subversive activities and political violence. According to Hogan and Walker, the number of persons so arrested, increased dramatically between 1979 (1,431 persons) and 1984 (2,216), the year in which the Criminal Justice Act authorised a maximum period of detention of 12 hours for ordinary offences punishable by a term of imprisonment of five years or more.<sup>10</sup> Indeed the same authors suggest that most persons wanted for serious crime -subversive in nature or otherwise – during this period were arrested and detained under section 30 of the 1939 Act.

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<sup>7</sup> E. O’Halpin, *Defending Ireland: The Irish State and its Enemies since 1922* (Oxford University Press, 1999).

<sup>8</sup> [1979] I.R. 85. See also *The People (DPP) v. Shaw* [1982] I.R. 1 where such Garda practices were described as “no more than a euphemism for false imprisonment.” See also *The People v Finnerty* [1999] 4 IR 364 at 377-378.

<sup>9</sup> The Offences Against the State (Amendment) Act in 1998, introduced following the Omagh bombing, increased this maximum period of detention to 72 hours.

<sup>10</sup> The relevant provision of the Act, section 4, did not, however, come into operation until 1987, a year in which 2,854 persons were arrested under section 30. G. Hogan, and C. Walker, *Political Violence and the Law in Ireland* (Manchester University Press, 1989), pp. 180-181; See also *Report of the Committee to Review the Offences Against the State Acts, 1939 to 1998, and related matters* (Stationery Office, 2001), para 7.12 which noted: “While the provisions of that legislation [the 1939 Act] was intended to afford the Gardaí specific powers in cases where the security of the State was threatened, they were routinely applied in cases of which came to be described as ‘ordinary crime’.

Moreover, and as the UN Human Rights Committee and the Committee to Review the Offences Against the State Acts recently pointed out, the manner in which section 30 was employed was also a cause for concern, particularly as it related to the disparity between persons arrested and those subsequently charged. In 1981, for example, 2,303 people were arrested but only 323 were charged with an offence. In 1982 the figures were 2,308 arrested (256 charged); in 1983, 2,334 (363 charged); in 1984, 2,216 (374 charged); in 1985, 1,834 (366 charged); and in 1986, 2,387 (484 charged).<sup>11</sup> This disparity led to the Committee to Review the Offences Against the State Acts to suggest that a further safeguard should be introduced to prevent section 30 being misapplied, namely that the Gardaí be placed under a statutory duty to release a suspect detained under section 30 if it became clear that there were no reasonable grounds for continued detention.<sup>12</sup>

The ability of the Gardaí to switch, virtually unimpeded, from ordinary to extra-ordinary detention procedures – bearing in mind the extensiveness of the latter – in respect of suspects accused of ordinary, though serious, offences demonstrates, to some extent, the ambivalent culture that exists in Ireland regarding individual liberty safeguards. This is particularly so when one considers that the extra-ordinary provisions which legitimate such extensive detention periods without charge were initially designed only “with actions and conduct calculated to undermine the security of the State” in mind.<sup>13</sup> The Offences Against the State Act 1939 itself was introduced, as noted, at the commencement of the Second World War to combat the threat posed to the state by the IRA.<sup>14</sup> Despite the signing of the Good Friday Agreement in 1998, which is dependent on the maintenance of paramilitary ceasefires and decommissioning, and which “looks forward to a normalisation of security arrangements and practices,” the Irish government has demonstrated no willingness to remove the extraordinary laws put in place to counteract such violence.

## (ii) *Extra-ordinary measures and non-paramilitary activity*

This overspill from the paramilitary realm into the ordinary realm is also evident in the Supreme Court’s sanctioning of the wider use of the extra-ordinary powers of arrest and detention permitted under section 30 of the Offences Against the State Act 1939. Under section 30 of the Act, a member of the Gardaí is authorised to arrest any person suspected of the commission of an offence under the 1939 Act or an offence which is “scheduled.” Section 36 of the Offences Against the State Act 1939 empowers the government to declare offences to be scheduled whenever it is satisfied that the ordinary courts are inadequate to secure the effective administration of

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<sup>11</sup> *Report of the Committee to Review the Offences Against the State Acts*, para. 7.14. These are the only years for which such figures are available.

<sup>12</sup> *Ibid.*, para. 7.17.

<sup>13</sup> See the long title to the Offences Against the State Act 1939. For a different view, see *People (DPP) v. Quilligan* [1986] I.R. 495.

<sup>14</sup> The introduction of emergency law was authorised by Article 28.3 of the Irish Constitution which empowers the Oireachtas to introduce emergency legislation at a time of “war, armed conflict, or armed rebellion.”

justice.<sup>15</sup> As noted, a suspect arrested under section 30 may be detained for an initial period of 24 hours followed by a further 24 hours provided a certain direction is given.<sup>16</sup> Section 30 itself is very broad and permits a Garda to arrest anyone whom he or she suspects of “having committed, or being about to commit, or being or having been concerned in the commission of an offence,” or “having information in relation to the commission or intended commission” of any offence under the 1939 Act or a scheduled offence. There is no specific requirement that the Garda must show some reasonable basis for his or her suspicion. The section, in effect, has the potential to be a “power of preventative detention.”<sup>17</sup>

In the case of *DPP v. Quilligan*,<sup>18</sup> for example, the defendants were suspected of breaking into the home of two elderly brothers, as a result of which both brothers had been injured, one fatally, and damage had been done to their property. The offences committed were not political or subversive in nature. At the time of the offences, malicious damage to property was a scheduled offence. Both defendants, accordingly, were arrested and detained under section 30 on suspicion of malicious damage which had been caused to a door and some furniture at the home of the victims. Whilst so detained, both defendants made incriminating statements regarding the more serious, though non-scheduled, offence of murder. The trial judge, however, held that the considerations which prompted the introduction of the 1939 Act related to crimes of a subversive nature which threatened the security of the state. As no subversive elements attached to the crimes in issue, the arrest and detention of the defendants was held to be illegal, and a direction was given to the jury to record a verdict of not guilty in favour of each of the defendants.

This ruling was reversed on appeal to the Supreme Court. It held that as the arrest and detention by the Gardaí had been genuinely directed towards the investigation of the scheduled offence of malicious damage, the fact that they had come to be more attentive to the more serious though not scheduled offence of murder – which was *closely linked* with the scheduled offence of malicious damage – did not render illegal the arrest and detention process. In effect, the Supreme Court sanctioned the use of the minor holding charge (malicious damage to property) to permit questioning under section 30 in respect of the more serious, though non-scheduled, murder charge, provided there was a link between the two, and the Gardaí, in good faith, suspected the accused of having committed the minor charge. In *People (DPP) v Howley*, a non-subversive case involving a scheduled offence of cattle maiming and a non-scheduled offence of murder, the Supreme Court further enhanced Garda powers by holding that the link between the scheduled, minor offence and non-scheduled serious offence was not necessary, and that the predominant motive for the arrest did not need

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<sup>15</sup> Offences currently scheduled include those under the Explosive Substances Act, 1883 and the Firearms Acts, 1925-1971.

<sup>16</sup> A further 24 hour period of detention without charge is now provided for under the Offences Against the State (Amendment) Act, 1998.

<sup>17</sup> *Report of the Committee to Review the Offences Against the State Acts, 1939-1998*, dissenting views of Professor Dermot Walsh.

<sup>18</sup> [1986] IR 495. See also *People (DPP) v Walsh* [1988] IJLRM 137; see also D. Walsh “The Impact of Anti-Subversive Laws on Police Powers and Practice in Ireland: the Silent Erosion of Individual Freedom” *Tulane Law Review* 62(4) (1989): pp. 1099-1102.

to be the minor, scheduled offence. All that was demanded was that the arrest be made in good faith, and brought about in circumstances where an actual Garda suspicion existed for the scheduled, albeit minor offence.<sup>19</sup>

Such decisions smack of Nelsonian blindness in that they sanction the detention of suspects under section 30 without the need for a connection to be made to the causal framework in which the scheduled offences were committed. At a more particular and legalistic level, there are two specific problems with the employment of section 30 for scheduled offences that do not involve paramilitary activity. First, the scheduling power granted to Government under section 36 is probably unconstitutional given that it provides the government with a power to legislate, thereby usurping the role of the Irish legislature (the Oireachtas) as provided for under Article 15.2.1 of the Constitution. Aside from this “constitutional infirmity”<sup>20</sup> as it relates to the separation of powers, employing section 30 to arrest persons for offences not connected with paramilitary activity has facilitated the creation of an entirely capricious and discordant system of detention without charge, quite out of keeping with spirit of the constitutional guarantee of personal liberty as provided for under Article 40.4.1 of the Irish Constitution.

For example, under the law as it currently exists in Ireland, a person suspected of raping someone can only be detained without charge for a maximum period of 12 hours,<sup>21</sup> as provided for under section 4 of the Criminal Justice Act, 1984. If the same person was suspected of raping his neighbour, and at the time the offence was committed of having possession of an unloaded gun (which was unconnected with the offence of rape), he could be detained for a maximum period of 72 hours under the Offences Against the State Act, 1939, as amended, given that the possession of a firearm is a scheduled offence. If, as the Irish Council for Civil Liberties has pointed out, section 30 had been confined to paramilitary related offences, “there would at least be a logical explanation for the discrepancy in detention periods.”<sup>22</sup>

From an historical standpoint, permitting offences with no subversive connotations to fall within the rubric of extraordinary legislation because, *stricto sensu*, they are scheduled appears to be at enmity with the reasoning behind the enactment of the Offences Against the State Act 1939 – which was to safeguard the interests of the State against subversive elements. More practically, permitting terrorist legislation to be applied in such an insouciant manner represents a significant seepage from the extraordinary to the ordinary criminal justice realm. The creation of such a powerful investigative tool for the Gardaí in ordinary criminal procedure – detention without charge for a maximum period of 72 hours – also constitutes a significant encroachment upon the civil liberty rights of suspects. As Professor Dermot Walsh noted in his dissenting views appended to the Report of the Committee to Review the Offences Against the State Acts, 1939-1998:

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<sup>19</sup> [1989] ILRM 629.

<sup>20</sup> *Report of the Committee to Review the Offences Against the State Acts*, para.7.26

<sup>21</sup> The Criminal Justice Bill 2004 seeks to increase this maximum period to 24 hours.

<sup>22</sup> Irish Council of Civil Liberties *Submission to the Committee to Review the Offences Against the State Acts, 1939-1998, and related matters* available at: [http://www.iccl.ie/criminalj/emergency/99\\_submission.oasa.html](http://www.iccl.ie/criminalj/emergency/99_submission.oasa.html)

In a society based on respect for human rights and civil liberties, a reasonable balance must be maintained between the individual's fundamental right to liberty and the police need to use arrest and detention for the effective investigation and detection of crime. Since section 30 constitutes a gross departure from the norms governing police powers of arrest and detention, it follows that its retention needs to be justified by very convincing arguments . . . [S]ection 30 constitutes an excessive and unwarranted intrusion on the individual's fundamental right to liberty in a "normal" society based on respect for human rights . . . A more reasonable balance needs to be struck between the requirements of effective criminal investigation and the individual's fundamental right to liberty.<sup>23</sup>

(iii) *The Retention of the Non-Jury Special Criminal Court for non-paramilitary activities*

Further support for this normalisation process can also be gleaned from the retention of the non-jury Special Criminal Court (re-established in 1972) and its use for non-scheduled, non-terrorist offences. The introduction of the Court in 1972, at the height of "the Troubles in Northern Ireland",<sup>24</sup> was justified on the basis that juries were likely to be intimidated by paramilitaries. It continues to be employed to day despite little in the way of a risk assessment as to whether or not there was a possibility of continued paramilitary intimidation.<sup>25</sup> Moreover, the Special Criminal Court is increasingly being employed to try cases that have no paramilitary connections. Offences without subversive connections which have been tried in the Special Criminal Court include the supply of cannabis, arson at a public house, theft of computer parts, kidnapping, the murder of Veronica Guerin, receiving a stolen caravan and its contents, the unlawful taking of a motor car, and the theft of cigarettes and £150 from a shop.<sup>26</sup> Such cases appear to verify Mary Robinson's concern, made in 1974, that the continuation of the Special Criminal Court would abolish the "jury trial by the back door."<sup>27</sup>

Perhaps even more alarmingly, the decision to have such offences tried before the non-jury Special Criminal Court are not subject to any checks or safeguards. Under sections 46 and 47 of the Offences Against the State Act 1939, the DPP has the power to have *any* case heard in the Special Criminal

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<sup>23</sup> *Report of the Committee to Review the Offences Against the State Acts, 1939-1998* dissenting views of Professor Dermot Walsh.

<sup>24</sup> This was how the Irish government justified its introduction to the European Commission of Human Rights in *Eccles, McPhillips and McShane v Ireland* (Application No. 12839/87, Decision of 9 December 1988).

<sup>25</sup> The Irish Council for Civil Liberties suggests that the "level of paramilitary violence has declined more than tenfold since the mid 1970s and the threat of paramilitary violence now comes largely from very small splinter groups with virtually no popular support." Irish Council of Civil Liberties Submission to the Committee to Review the Offences Against the State Acts, 1939-1998, and related matters available at: [http://www.iccl.ie/criminalj/emergency/99\\_submission.oasa.html](http://www.iccl.ie/criminalj/emergency/99_submission.oasa.html)

<sup>26</sup> available at: [http://www.iccl.ie/criminalj/emergency/99\\_submission.oasa.html](http://www.iccl.ie/criminalj/emergency/99_submission.oasa.html)

<sup>27</sup> M. Robinson, *The Special Criminal Court* (Dublin University Press, 1974).

Court where s/he is of the opinion that the ordinary courts are inadequate to secure the effective administration of justice. Significantly, the decision of the DPP to have a case tried in the Special Criminal Court is not susceptible to judicial review in the absence of evidence of *mala fides* or of being influenced by an improper motive or an improper policy. In *Kavanagh v. Ireland*, for example, the applicant was arrested on several charges in connection with the alleged false imprisonment of a senior manager of a banking company, demanding monies with menaces, and possession of a firearm. There was no evidence to suggest that the offences were committed on behalf of or to further subversive organisations. The DPP had certified that the ordinary courts, in his opinion, were inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of the applicant on those charges, and directed that the applicant be brought before the Special Criminal Court and there charged with those offences. Kavanagh challenged the decision of the DPP to grant the appropriate certificate in respect of the non-scheduled offences. In particular, he argued that this arrangement legitimated a prosecutorial practice of referring non-scheduled, non-subversive cases before the Special Criminal Court; denied him the right to equal protection of the law by creating a two tiered system of justice in that particular individuals found themselves before an extraordinary court whilst others, accused of similar offences, could be placed before ordinary courts; and, subverted the constitutional right to trial by jury. In the Supreme Court, it was held that as the determination of whether or not the ordinary courts were adequate to secure the effective administration of justice was political in orientation, such a decision should be regulated within the political rather than judicial arena.<sup>28</sup>

Kavanagh then applied to the Human Rights Committee of the United Nations, claiming that the procedures adopted in his case violated his entitlement to equality before the law as guaranteed by Article 26 of the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee upheld his claim.<sup>29</sup> Kavanagh then returned to the Irish courts and sought to have this decision recognised. In the High Court, however, it was held that he was not entitled to rely on rights under the ICCPR as they did not form part of domestic law.<sup>30</sup> The unfettered and arbitrary nature of this

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<sup>28</sup>*Kavanagh v. Government of Ireland* [1996] I.R. 321. In 1997, in the Special Criminal Court, Kavanagh was convicted of robbery, possession of a firearm with intent to commit an indictable offence of false imprisonment and demanding money with menaces; he received concurrent sentences of 12, 12 and 5 years respectively to date from 20 July 1994.

<sup>29</sup> "No reasons are required to be given for the decision that the Special Criminal Court would be 'proper' or that the ordinary courts are 'inadequate' and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances. The Committee considers that the State Party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based on reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under Article 26 to equality before the law and to equal protection of the law has been violated." Human Rights Committee of the United Nations, April 4, 2001, (CCPR/C/7D/819/1998).

<sup>30</sup>*Kavanagh v. Special Criminal Court* (Unreported, High Court, 29 June, 2001). This decision was upheld in the Supreme Court where it was noted: "The provision of an international agreement which has not been adopted into Irish law cannot prevail over the legal effect of a conviction by a

arrangement – which requires no reasons or justifications to be given by the DPP for circumventing the ordinary court process and the right to trial by jury – seems inherently unjust, particularly so in relation to offences that do not involve subversive activities. It also stands far apart, in dissonant isolation, from one’s constitutional right to a jury trial, as provided for under Article 38.5, and is indicative of the increasingly more result-orientated logic being adopted in the Irish penal complex.

Even despite its breach of the ICCPR, and the fact that it was established under an anti-terrorist framework that is no longer applicable,<sup>31</sup> the arrangement continues to be justified on the basis of its usefulness to the State in combating organised crime – a form of crime that has, without much debate, assumed the “folk devil” security-threatening status previously only associated in Ireland with political violence.<sup>32</sup> Indeed the Offences Against the State Review Committee recently argued for the retention of the Special Criminal Court on the grounds that the threat posed by organised crime alone is sufficient to justify its maintenance. Much of the reasoning behind this justification was premised on the notion that “there have been instances in recent times where it appears that attempts have been made to tamper with juries in high-profile criminal trials in the ordinary courts.” To be content to justify the continuance of a non-jury, extraordinary court on the fragile, somewhat whimsical, evidence of “instances” – without feeling the need to present any qualitative or quantitative verification, or to engage in any debate as to whether such evidence tipped the balance in favour of enhancing security or preventing the loss of liberties – raises serious questions about the State’s commitment to the values enshrined by the Irish people in its Constitution. As Fennell suggests:

[T]he existence of an “emergency” or extraordinary regime outside constitutional parameters in the context of the Special Criminal Court has been facilitated by the folk devil of terrorism. This emergency measure has facilitated the existence of differential, exceptional or “non-constitutional” treatment for certain offenders. Moreover . . . the phenomenon would appear to be ongoing as the demonisation of drugs and organised crime may ensure a future currency for this exceptional provision, and its persistence even in light of elimination or resolution of its originating *raison d’être*. This dissonance at the heart of the Irish criminal justice system in terms of departure from overt constitutional values is not insignificant in assessing its adherence to principle.<sup>33</sup>

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duly constituted Irish court.” *Kavanagh v. The Governor of Mountjoy Prison and the A.G* (Unreported, Supreme Court, 1 March, 2002). The European Convention on Human Rights Act was enacted in 2003. The incorporation of the Convention, however, is minimalist in orientation. Indeed, on a strict interpretation, it does not incorporate the Convention; it merely gives it (subject to constitutional provisions) “greater effect” in domestic law. See U. Kil Kelly, *ECHR and Irish Law* (Jordans, 2004).

<sup>31</sup> See, for example, the *Report of the UN Human Rights Committee* in 1993 which suggested that “it did not consider that the continued existence of that court is justified in the present circumstances.” *Report of the Human Rights Committee*, Official Records of the General Assembly, 48<sup>th</sup> Session, Supplement No. 40, 1993,(A/48/40), Part 1, pp 125-128

<sup>32</sup> See, for example, the *Committee to Review the Offences Against the State Acts, 1939-1998*, para. 937.

<sup>33</sup> C. Fennell, *The Law of Evidence in Ireland*, 28.

#### (iv) *Seizing Criminal Assets without requiring a Criminal Conviction*

The Proceeds of Crime Bill was mooted in Ireland in the mid 1990s to combat the dangers posed to society by drug-related crime. The current Act was initially proposed as a private member's Bill, one week after the assassination of journalist Veronica Guerin.<sup>34</sup> Five weeks later, the normally sluggish and consultative legislative process was complete and the Proceeds of Crime Act was law. Indeed, and in something of a reversal of the established position in Ireland of political imitation and policy transfer from other jurisdictions, the "structure and modus operandi of the Criminal Assets Bureau [the bureau empowered to seize assets under the Proceeds of Crime Act, 1996] have been identified as models for other countries which are in the process of targeting the proceeds of crime."<sup>35</sup>

The Act's cardinal feature permits the Criminal Assets Bureau to secure interim and interlocutory orders against a person's property, provided that it can demonstrate that the specified property – which has a value in excess of £13,000 – constitutes, directly or indirectly, the proceeds of crime. If the interlocutory order survives in force for a period of seven years,<sup>36</sup> an application for disposal can then be made. This extinguishes all rights in the property that the respondent party may have had.

The speed with which the legislation was introduced is a cause of concern, not least because of the manner in which it seeks to circumvent criminal procedural safeguards guaranteed under Article 38 of the Constitution. In particular, the legislation authorises the confiscation of property in the absence of a criminal conviction; permits the introduction of hearsay evidence;<sup>37</sup> lowers the threshold of proof to the balance of probabilities; and, requires a party against whom an order is made to produce evidence in relation to his or her property and income to rebut the suggestion that the property constitutes the proceeds of crime.<sup>38</sup> This practice of pursuing the criminal money trail through the civil jurisdiction raises all sorts of civil liberty concerns about hearsay evidence, the burden of proof, and the presumption of innocence. Moreover, and given the revenue producing capacity of the Criminal Assets Bureau, the temptation, as Lea notes, "to displace concerns of justice with those of revenue flows cannot be ruled out."<sup>39</sup>

The primary impetus for this model was derived, once again, from the terrorist domain where the Offences Against the State (Amendment) Act 1985 – a piece of legislation also introduced extremely quickly – empowered the

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<sup>34</sup> See also J. Meade, "Organised Crime, Moral Panic and Law Reform: the Irish Adoption of Civil Forfeiture," *Irish Criminal Law Journal*, 10(1) (2000): pp. 11-16.

<sup>35</sup> See Criminal Assets Bureau, *Annual Report 1999*, (Stationery Office, 2000), 5.

<sup>36</sup> The Proceeds of Crime (Amendment) Bill, 2003 proposes to reduce this period to three years.

<sup>37</sup> It has been held, however, that where there is no other corroborative evidence, courts should be reluctant to grant an interlocutory order on the basis solely of hearsay evidence.

<sup>38</sup> The DPP would not, it appears, be entitled to use such evidence, should it be forthcoming, in a future criminal prosecution. See *M v.D* (Unreported, High Court, 10 December, 1996); see also J.P. McCutcheon, and D. Walsh, "Seizure of Criminal Assets: An Overview" *Irish Criminal Law Journal*, 9(2) (1999): pp. 127-132.

<sup>39</sup> J. Lea, (2001) 'Crime Control and Civil Liberties', available at <http://www.bunker8.pwp.blueyonder.co.uk/>.

Minister for Justice to certify that money held in banks which was the property of an unlawful organisation should be forfeited and vested in the Minister.<sup>40</sup> This certification by the Minister was not dependent on the initiation of criminal proceedings. The Act contained further provisions entitling a person who claimed to be the owner of the money to apply to the High Court for an order directing the return of the money if he or she could demonstrate that it was not the proceeds from the operations of an unlawful organisation. In introducing the Bill to the Dáil in 1985, the then Minister for Justice stated as follows:

The necessity for this Bill arises from a specific situation that has arisen and which has such serious implications for the maintenance of public order in this country that the Government have no option but to move with speed and decisiveness to deal with it. Information has been conveyed to me by the Garda authorities that a large sum of money which is the proceeds of criminal activity by the IRA – specifically extortion under threat of kidnap and murder – has found its way into a bank in this country and is being held to the use of and for the purposes of the IRA . . . This necessitated urgent action by the Government to prevent the money becoming available to the IRA to fund their campaign of murder and destruction.<sup>41</sup>

The 1985 Act had a life span of three months and was only designed to combat the threat posed by the one terrorist incident cited by the Minister in introducing the Bill. The powers conferred under the legislation were only ever invoked in respect of that one specific cases. Indeed, the Minister in introducing the Bill recognised the draconian nature of the powers conferred but justified it having regard to the “evils of the IRA”:

Before I conclude I want to say that the Government have not lightly brought forward this Bill and would not have done so were it not convinced that the Bill is essential and that there is no other way of dealing with the problem that now faces us. I do not deny that it is a strong measure and that the power it confers on the Minister is one that ought never to be used lightly. I can and do now give a firm assurance that I will not use it lightly but it may be more to the point if I say that I do not think that it can ever be used lightly . . .<sup>42</sup>

Arising out of this one incident, the provisions of the 1985 Act were held up to judicial scrutiny in the case of *Clancy v Ireland*,<sup>43</sup> where Barrington J, in a brief judgment, held that the abridgment of property rights provided for under the Act was a permissible delimitation of property rights having regard to the common

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<sup>40</sup> See F. Cassidy and The Law Society of Ireland *Money Laundering and the Criminal Assets Bureau* (Law Society, 2003), 8. Other impetuses for the Proceeds of Crime Act, 1996 would include legislative initiatives in the United States in the early 1970s and a number of international conventions on drug trafficking, money laundering, confiscation of the proceeds of crime in the late 1980s and early 1990s.

<sup>41</sup> Seánad Éireann, Vol 107, 19 February, 1985, col. 316

<sup>42</sup> Seánad Éireann, Vol 107, 19 February, 1985, col. 322.

<sup>43</sup> [1988] IR 326.

good, and was not in breach of fair procedures. This 1985 terrorist legislation, and the decision to uphold it in *Clancy*, provided a constitutional template, albeit in the extra-ordinary realm, for the confiscation of assets in the absence of a criminal conviction. With only a slight skip and a jump, and the odd wink or two, the same template could be exploited in the ordinary realm having regard to proceeds of crime legislation. This is precisely what happened. For example, when introducing the Proceeds of Crime Bill to the Dáil, its initiator, Mr John O'Donoghue, could suggest as follows:<sup>44</sup>

The suggestion that this Bill is in some unspecified way unconstitutional is equally unsustainable. A clear and direct precedent exists for legislation of this type. The Offences Against the State (Amendment) Act, 1985, permits the freezing of assets of illegal organizations. The constitutionality of that Act was tested in the High Court in the case of *Clancy v Ireland* . . . Similarly a direct precedent exists for the acceptance of the court of opinion evidence from a Garda Superintendent.<sup>45</sup> The Offences Against the State (Amendment) Act, 1972, provides in section 3(2) that the belief of a member of the Garda Síochána, not below the rank of chief superintendent is sufficient evidence on which to grant a conviction for membership of an unlawful organization.<sup>46</sup>

Such reasoning provides further evidence of the obfuscation of the clear lines that should exist between extraordinary and ordinary provisions. It is a sign of the dissonance that currently exists in relation to constitutional values, and the extent to which the system no longer irradiates with due process ideals. In seeking to constitutionally legitimate an ordinary Bill by reference to extraordinary provisions, John O'Donoghue swept over a breadth of history that acknowledges that statutes such as the Offences Against the State (Amendment) Act, 1985, are premised on extraordinary powers that are designed to combat the threat posed by subversives intent on overthrowing the State. The constitutionality of such extraordinary provisions is supposedly closely tethered to the notion that they are a proportionate, albeit draconian, response to the emergency threat posed. In particular, the *Clancy* decision must be seen against the legislative background of the Offences Against the State Act, 1939 which was enacted to combat the threat posed by unlawful organisations, such as the IRA, which engage in “activity of a treasonable nature”, advocate “the procuring by force” of “an alteration of the Constitution”, or raise or maintain “a military or armed force in contravention of the Constitution.”<sup>47</sup> Indeed, the possibility of an overspill from the extra-ordinary to the ordinary realm, as

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<sup>44</sup> Dáil Eireann, Vol 467, 2<sup>nd</sup> July, 1996, col. 2409.

<sup>45</sup> This relates to the hearsay provision in the Proceeds of Crime legislation.

<sup>46</sup> The provision in question, section 3(2) of the Offences Against the State (Amendment) Act, 1972 was also designed to combat the threat of terrorism. A discussion of the overspill of this provision into the ordinary realm take place further on in the text.

<sup>47</sup> See Section 18 of the Offences Against the State Act, 1939. In cases where the Proceeds of Crime Act, 1996, has been subject to constitutional challenge, the State, *inter alia*, has also relied on the constitutional support provided by the decision in *Clancy*. See *Michael Murphy v GM, PB, PC, GH; John Gilligan v CAB, Revenue Commissioners, The Garda Commissioner, Ireland and the Attorney General* [2001] 4 IR 113. See also *Gilligan v Criminal Assets Bureau* [1998] I.R. 326.

regards the Offences Against the State Amendment Act, 1985, was remarked upon by Senator Brendan Ryan. Commenting on the Offences Against the State (Amendment) Bill, 1985, as it passed through the Seánad (the Irish parliamentary equivalent of the House of Lords), he suggested: "Every power that I am aware of that has been given under emergency legislation . . . has been abused and extended beyond its initial intent and purpose. While it is not for me to weep over those who have millions of pounds on deposit in banks if the Minister for Justice or the Government choose to make life difficult for them, nevertheless I wonder about the possibilities that will be read into such a provision in years to come because the evidence in the past is that what may well be necessary to deal with a specific task can become very convenient to deal with a vast range of tasks."<sup>48</sup>

The enactment of the Proceeds of Crime Act, 1996 has only proved his point too well. It must be seen as part of the expanding repertoire of exclusionary, tactics designed by the State to contend with criminal deviance. The thrust of the current trend has very much been towards the crime *control model* of justice as prescribed by Herbert Packer, namely efficiency and outputs, an instrumental logic that emphasises the repression of criminal conduct as a primary concern, an emphasis on administrative fact finding processes, and a dislike of "equality of arms" values such as the presumption of innocence and the privilege against self-incrimination.<sup>49</sup> In particular, where biographical knowledge was employed under the modern penal welfarist framework to socialise the deviant, produce new kinds of knowledge about the origins of crime that would facilitate intervention and displace a "common law polity which presupposed a homogeneous dangerous class",<sup>50</sup> now it is increasingly employed, as in the extra-ordinary realm, not to normalise but to neutralize the threat posed. Knowledge in this extra-ordinary realm is almost entirely premised on the maintenance of fragile borders of exclusion through "risk thinking,"<sup>51</sup> disciplinary law, a politics of safety and the management of the dangerous. As Ericson and Carriere have suggested: "the values of the unsafe society displace those of the unequal society."<sup>52</sup>

#### (v) *The acceptance of supergrass testimony in the ordinary criminal justice system*

On a slightly more remote footing – though evidence of the normalisation process and the result-orientated logic of the system more generally – is the introduction of a witness protection programme, set up following the murder of Veronica Guerin, to assist the Gardaí in the fight against organised crime. The

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<sup>48</sup> Seánad Éireann, Vol 107, 19 February, 1985, cols, 328-329.

<sup>49</sup> See H.L Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968)

<sup>50</sup> R. Pound, "The Administration of Justice in the Modern City" *Harvard Law Review* 26 (1912-1913): 309; see also R. Pound, "Discretion, Dispensation and Mitigation: The Problems of the Individual Special Case" *New York University Law Review* 35 (1960): 925-937. The extent to which the socialization law has ever occurred in Ireland is, however, debatable.

<sup>51</sup> See N. Rose, "Government and Control" *British Journal of Criminology* 40 (2000): pp. 321-339.

<sup>52</sup> R. Ericson, and K. Carriere "The Fragmentation of Criminology" in *The Futures of Criminology* ed. D. Nelken (Sage, 1994), pp. 102-103.

type of witnesses protected by the programme are not simply run-of-the-mill self-confessed accomplices, but fall into a definitional category more in keeping with supergrass testimony,<sup>53</sup> a term made infamous following a series of paramilitary trials in the Diplock Courts in Northern Ireland in the 1980s.<sup>54</sup> The damning information which such witnesses have provided has been utilised by the State to apprehend and prosecute a series of high profile individuals operating in the world of organised crime. In return for such information, the witnesses, who themselves had also repeatedly partaken in criminal activities, were given the opportunity of an improved lifestyle.

For example, one witness, Charles Bowden, in return for information on members of the so-called Gilligan gang and their alleged involvement in the murder of Veronica Guerin and drug trafficking, was given a series of privileges. They included: an undertaking from the DPP that he would not be prosecuted for his part in the murder of Veronica Guerin; a very modest prison sentence having pleaded guilty to serious drugs and firearms charges; special concessions while serving the sentence; his wife and children all received the benefit of the witness protection programme and were completely dependent on the State for financial support while Bowden served his sentence; and, it was promised that he and his family would be set up with new identities in a foreign country on his release from prison. All of these tactics – immunity from prosecution, lenient sentences, and resettlement under new identities – were also very evident in the supergrass trials that took place in Northern Ireland.

Aside from the possibility of jeopardising the entire criminal procedure process by admitting evidence which is highly susceptible to fabrication and exaggeration, and which is often incapable of being properly verified, the practice of utilising such witnesses has also increased the likelihood of Garda corruption, particularly in relation to information gathering. Indeed, in the Special Criminal Court in *The People (DPP) v. John Gilligan*,<sup>55</sup> it was pointed out that these witnesses, who were later referred to in court as “perjurers and self-serving liars”, were often interviewed by the Gardaí without any record being kept as to the contents of the interviews. Moreover, it was also alleged that payments were made to the same witnesses by the Gardaí, which purported to belong to the witnesses, but which, to all intents and purposes, appears to

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<sup>53</sup> Perhaps given the negative connotations associated with the word, and given what was held in the particular Court, the Special Criminal Court in *The People v. Paul Ward* (Unreported, Special Criminal Court, 27 November, 1998) held that the testimony of such witnesses on the programme in Ireland did not constitute ‘supergrass’ testimony. On appeal to the Court of Criminal Appeal (Unreported, Court of Criminal Appeal, 22 March 2002), however, Murphy J. left the question open: “Whether or not Charles Bowden fell within the category comprised in the slang expression ‘supergrass’, clearly his general lack of credibility and his position as a criminal negotiating with the authorities to secure advantage for himself at the expense of his former friends and criminal associates did require that his evidence should be considered with the utmost care.” In *John Gilligan v DPP* (Unreported, Court of Criminal Appeal, 8 August, 2003) the Court of Criminal Appeal attempted to distinguish witnesses such as Bowden and Warren from supergrass witnesses on the basis that the testimony of the latter implicated many accuseds and it was usually the sole evidence against them.

<sup>54</sup> S. Greer, “Supergrasses in the Legal System in Britain and Northern Ireland,” *Law Quarterly Review* 102 (1986): pp. 198-249; S. Greer, *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (Clarendon Press, 1995).

<sup>55</sup> *People (DPP) v. John Gilligan* (Unreported, Special Criminal Court, March 15, 2001).

have been the proceeds of crime. On appeal, McCracken J. noted the following about the witness protection programme:

There are certainly some very disturbing factors in the way in which the authorities sought to obtain the evidence . . . This was the first time that a witness protection programme had been implemented in this State, and one of the most worrying features is that there never seems to have actually been a programme. There ought to have been clear guidelines as to what could or could not be offered to the witnesses. This was not done, and instead there was an ongoing series of demands by the witnesses, most of which, it must be said, were rejected, but the position was kept fluid almost right up to the time when they gave evidence . . . [T]he authorities appeared at all times to be open to negotiation, but is something which certainly ought not to have been allowed to happen.<sup>56</sup>

The introduction of a witness protection programme for the first time in the history of the state constitutes, to some extent, a recognition of the limitations of ordinary Garda methods of controlling and regulating organised crime. It represents a highly pragmatic and result-orientated information gathering technique for the Gardaí in their attempts to pierce the veil of organised crime. Significantly, however, it is also indicative of a declining support for procedural safeguards. The dangers of convicting on uncorroborated testimony, the potential for fabrication and exaggeration, the possibility of witness evidence being shaped to suit particular ends especially in the light of the inducements that may exist, the lack of Garda accountability regarding its handling of such witnesses, the tendency of such evidence to lower the threshold of proof from “guilty beyond reasonable doubt” to “probably guilty,” and the likelihood that most of these cases will be heard in the non-jury Special Criminal Court, all signpost and assist in tipping the State-accused relation balance in favour of the former.<sup>57</sup>

Current ambivalence about such testimony and the “fluidity” in the operation of the programme is even more surprising when one considers that only 20 years ago Irish politicians and the general public condemned with gusto the adoption of similar extraordinary practices in Northern Ireland. For example, on 17 May 1984 Fianna Fáil TD, Ben Briscoe, stated in the Dáil: “The

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<sup>56</sup> *John Gilligan v DPP* (Unreported, Court of Criminal Appeal, 8 August, 2003) per McCracken J. at p. 12. In the same court it was noted: “A further worry arises from the evidence of . . . an official in the Department of Justice who wrote a memorandum in relation to granting overnight temporary releases to the witnesses which included the following: “*The question of an overnight TR was also discussed. And this was not ruled out by the Gardaí. The granting of an overnight would only be considered for a very special occasion and would be dependent on his performance in court.*” He gave that memo to an Assistant Secretary in the Department to be shown to the Minister and the memo came back with the words ‘and would be dependent on his performance in court’ crossed out.”

<sup>57</sup> Strict judicial interpretations of such accomplice testimony can act as a counterpoint to its potential to compromise the criminal process system. See, for example, *People (DPP) v Paul Ward* (Unreported, Court of Criminal Appeal, 22 March, 2002). For examples of cases where such testimony has been accepted, see *People (DPP) v Brian Meehan* (Unreported, Special Criminal Court, 29 July 1999); *The People (DPP) v John Gilligan* (Unreported, Special Criminal Court, 15 March, 2001); *The People (DPP) v Paul Ward* (Unreported, Special Criminal Court, 27 November, 1998).

whole concept of the supergrass seems to go against human rights . . . It is important that we are seen to be on the side of justice.” In the same sitting, another Fianna Fáil TD, Gerry Collins, referred to the supergrass system as “not only a travesty but a corruption of justice.”<sup>58</sup> Similarly, the Minister for Foreign Affairs in 1986, Mr Peter Barry, in response to a question in the Dáil about the supergrass system in Northern Ireland, could suggest that he was committed, through inter-governmental conferences, to seeking the “introduction of measures to increase public confidence in the administration of justice in Northern Ireland.”<sup>59</sup> In the space of two decades, however, arguments about the right to a fair trial, the protection of the innocent, transparent management, and basic human rights have been displaced by the need for a more efficient “truth seeking” criminal justice system. Albeit referring more to the reorientation in State-offender relations as opposed to State-accused relations, this general point has been picked up by Garland. Asking why it is that offenders’ perceived worth “tends towards zero”, as reflected in the deprivation of their “citizenship status”, he answers by suggesting the following:

[W]e allow ourselves to forget what penal-welfarism took for granted: namely that offenders are citizens too and their liberty interests are our liberty interests. The growth of a social and cultural divide between ‘us’ and ‘them’, together with new levels of fear and insecurity, has made many complacent about the emergence of a more repressive state power. In the 1960s, critics accused penal-welfare institutions of being authoritarian when they wielded their correctional powers in a sometimes arbitrary manner. Today’s criminal justice state is characterised by a more unvarnished authoritarianism with none of the benign pretensions.<sup>60</sup>

More specifically, Lea, in describing the emerging pattern, puts it well when he suggests:

It fosters what might be called the security culture which is one in which the end justifies the means. The criminal justice system is viewed *solely* from the standpoint of efficiency and the concern for civil liberties becomes a sort of afterthought in which we are assured that ‘safeguards will of course be respected’ but the system is not designed around them as where respect for rule of law and due process are seen as vital mechanisms in securing public confidence in the system and hence the flow of information about crime. Such concerns are increasingly an irritant and (from the standpoint of practitioners) intrusions which can be safely ignored to make the organisation more rather than less efficient.<sup>61</sup>

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<sup>58</sup> See Dáil Debates, 17 May, 1984, Vol. 350, cols 1390 et seq; Dáil Debates, 25 October, 1983, Vol. 345, col 481.

<sup>59</sup> Dáil Debates, 6 February, 1986, vol. 363, col 1978; see also Dáil Debates, 2 December, 1997, vol. 483, col. 62. per G. Mitchell.

<sup>60</sup> D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001), pp. 181-182.

<sup>61</sup> J. Lea (2001) ‘Crime Control and Civil Liberties’, available at <http://www.bunker8.pwp.blueyonder.co.uk/>. For other provisions that exist in respect of witness intimidation, see section 41 of the Criminal Justice Act, 1999.

## A Criminology of the 'Extraordinary'

*'Sovereign is he who decides upon the exception'* (Carl Schmitt)<sup>62</sup>

The resilience of the penal-welfare complex so ably described by Garland rested in part on a perceived affinity between "ordinary citizens" and offenders and a sense that they did not pose a fundamental threat to the state. Failure to inculcate appropriate societal norms in convicted criminals was seen as a correctional defect that reflected poorly on the state. The majority of convicted criminals were viewed as conditional citizens who could be re-integrated into the heart of civil society under expert tutelage. To effect such re-integration, a knowledge of where an offender had diverged from the path of normality was gained through deployment of human sciences. The extent to which this norm pre-dominated and permeated penal practice is still in dispute and Garland's work is the latest attempt to resolve this issue.

Ireland, to some extent however, has followed a different penal trajectory than many other liberal democracies which has mitigated against the emergence of a penal-welfare complex. To begin with, Ireland has never witnessed a sustained commitment to the "project of solidarity" ideals such as rehabilitation and reintegration or a correctionalist criminology agenda. The tendency for policy makers has been to focus on pragmatism, expediency and intuition at the expense of strategic vision. Some significant consequences arise as a result of treading this alternative route. The first was that there was little interest shown in rehabilitation and thus the human sciences had little impact upon penal practice.<sup>63</sup> Ireland's distinctive penal characteristic was not that policy-makers may not have lent much weight to rehabilitation or that it was overshadowed by other concerns. Models of rehabilitation derived from the human sciences never made an appearance in operational practice within the Irish criminal justice system for most of the twentieth century. This, to some extent, has shielded Ireland from the nihilism of "nothing works." A different momentum is being generated here as compared to countries like England and Wales and the US. Any drift to crime control in Ireland, accordingly, is occurring in a more oblique and staccato way.

The second important consequence is that Ireland's civil war from 1919-21 and the outbreak of troubles in Northern Ireland from 1969 meant that democracy in Ireland was thought to be extremely fragile and in need of emergency powers to sustain it against the "enemy within" who sought to subvert the state. This meant that Ireland placed a degree of reliance on extraordinary legal powers to counter this threat which the normal legal apparatus seemed ill-equipped to do. In many respects, this has facilitated the fast-tracking of a crime control model of justice as it relates to issues such as an emphasis on security, public protection and the devaluation of accuseds' rights.

The somewhat unique position of Ireland as regards its extra-ordinary legal powers raises interesting questions about the pursuit of the rule of law in a liberal democracy. These questions are not unique to our times and have been

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<sup>62</sup> C. Schmitt (1988) *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press), p.5.

<sup>63</sup> For a fuller account, see Kilcommins, O'Donnell, O'Sullivan, and Vaughan, *Crime, Punishment and the Search for Order in Ireland*.

raised before, most poignantly in the case of Weimar Germany. As democracy crumbled under the political extremism of left and right, the German jurist Carl Schmitt advocated the suspension of normal laws and the invocation of emergency powers by the president. Schmitt ended up being lauded by the Nazi's as their crown jurist and interrogated by the Allies after the war.<sup>64</sup> His disastrous lack of political judgement should not blind us to the challenge he throws down to the belief that democracies are irrevocably bound by the rule of law.

Schmitt indicted liberal democracies for their blind faith in the rule of law which left them helpless before exceptional events that threatened their very existence. Faced by such a threat, liberal democracies could only survive by appointing a dictator who would invoke emergency powers in which "everything is justified that appears to be necessary for a concretely gained success."<sup>65</sup> This sovereign figure suspends law but his or her edicts still have the force of law, no longer hampered by checks and balances. From a contemporary perspective, current democracies, of which Ireland may be a trail-blazer, seem less susceptible to Schmitt's charge. And the reasons are not hard to discern.

Schmitt believed that the defining question of politics was the distinction between friend and enemy, reminiscent of President Bush's observation that "you are either with us or against us in the fight against terror." In such a period, "all legitimate and normative illusions with which men like to deceive themselves regarding political realities in periods of untroubled security vanish"<sup>66</sup> and the sovereign has a free hand to protect the community. The Hobbesian spectre of unchecked animosity motivates people to vest the state with the ultimate power of decision-making: to decide whether there exists a state of emergency and to decide what must be done to eliminate it. For Schmitt, the political sphere – with the mutually hostile relationship of friend and foe intrinsic to it – transcends and supercedes the legal sphere with its presumption to universalism. Political life cannot be bound by legal norms as it is the former that makes the latter possible. It is for the sovereign to decide whether the community is being threatened. This can only be done by recourse to a decision, motivated by an actual historical event, rather than a timeless legal norm. Law is subservient to politics and may need to be suspended so that politics can survive.

Undoubtedly, Schmitt's account suffers from a startling lack of concern for how this arbitrary power might be put to use. As we have seen with Ireland, it is highly unlikely that the law will be suspended completely in a state of emergency. Instead, a special zone will be set up in which normal laws do not apply. As a result of public and political pressure, this zone expands to incorporate more and more normal crime. There is not one supreme moment of sovereignty in which laws are suspended. The normalization of the exception is achieved through a steady accretion of views which go largely unchallenged.

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<sup>64</sup> He announced to his Russian interrogators, "I drank the Nazi bacillus but was not infected." See the discussion of Schmitt in M. Lilla, *The Reckless Mind: Intellectuals in Politics* (New York Review of Books, 2001), p. 52.

<sup>65</sup> J.P. McCormick, *Carl Schmitt's Critique of Liberalism* (Cambridge University Press, 1997), p. 124. Schmitt originally saw the establishment of a dictatorship as a time-bound institution necessary to return a government to a state of normality but later magnified the decision-making powers of the sovereign as the only entity capable of saving politics from degradation.

<sup>66</sup> McCormick, *Carl Schmitt's Critique of Liberalism*, p. 252.

Without much thought or assessment, those involved in organized crime in Ireland have quickly been elevated to the status of a security threat equivalent to that of the paramilitaries. The intense outrage produced by such crimes, coupled with demands for the State to reassert its power through the criminal justice system, has resulted in a “national emergency” that demands that ever clearer lines be drawn between a fearful public and “monstrous” criminals. Increasingly, the state has been tempted to turn to its long history of extraordinary provisions to combat the threat posed by ordinary, “folk devil” criminals. It does so in the absence of any considered debate about the actual threats posed by such individuals, the suitability of extraordinary provisions in the circumstances, or the impact on due process values in general reminiscent of Schmitt’s scorn for protracted discussion. What has been called the “decisionism” in Schmitt’s philosophy of law is exemplified by former Justice Minister John O’Donoghue’s desire not to be part of the “can’t do anything, won’t do anything brigade.”<sup>67</sup>

A glance at the parliamentary reports and judicial reports over the years demonstrates the metaphoric pathways being created between terrorism and ordinary crime.

- “[D]rugs have replaced terrorism as the number one threat to the security of the State.”<sup>68</sup>
- “Just as President Clinton proclaimed in his visit to Belfast that the children of this generation in Northern Ireland have a right to be born and raised in an environment free from terrorist violence, so too do the children of this generation throughout Ireland have the right to be born and raised in an environment free from criminal violence and abuse”<sup>69</sup>
- “Whether we like it or not there is a state of emergency. It is no use saying otherwise. This has happened because . . . [civil libertarians] . . . who are always trotted out whenever there is a situation like that created by the dreadful murder of the journalist, Veronica Guerin, have been saying for a long time that criminals are entitled to their civil rights. These murderers and criminals do not recognise other people’s civil rights. Why should we recognise theirs? We should open up the Curragh [a former military camp] and intern them. People who are caught selling drugs, purchasing drugs, or selling them to get their own free deals should be taken out of circulation.”<sup>70</sup>

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<sup>67</sup> Dáil Debates, 30 January, 2002, vol. 547, col 113, per Mr O’Donoghue.

<sup>68</sup> Dáil Debates, 6<sup>th</sup> February, 1996, vol. 641, col 284, per Mr Haughey.

<sup>69</sup> Seánad Debates, 31 January, 1996, vol 146, col 88, per Mr O’Kennedy.

<sup>70</sup> Dáil Debates, 4th July, 1996, vol 488, col. 554-555, per Mr Briscoe. Internment is now provided for under Part II of the Offences Against the State (Amendment) Act, 1940. It comes into force, if and when the government publishes a proclamation declaring that internment is necessary to secure the preservation of public peace and order. The majority of the Committee established to review the Offences Against the State Acts, 1939-1998, declared that “internment as a measure could under appropriate conditions constitute a legitimate, exceptional response to exceptional circumstances.” *Report of the Committee to Review the Offences Against the State Acts, 1939 to 1998*, para. 5.55.

- “. . . I mentioned the threat the IRA posed, and continues to pose, to this State. I have also begun to wonder whether there is the same realisation of the threat posed to our society by the criminal underworld. . . . I was informed of a community meeting held in Dublin recently at which the drugs problem was discussed, when there was a discreet Special Branch presence outside the building endeavouring to ascertain whether there was any IRA presence. . . . I wonder whether all criminals nationwide are watched as closely. We must encourage rather than discourage such surveillance.”<sup>71</sup>
- The collapse of a murder trial in November, 2003 led to claims about a “crime crisis”; suggestions that the “fabric of society . . . [was] at risk”; calls for more “anti-terrorist type laws;” and a recognition by the Taoiseach that the Gardaí “cannot take on a crowd of gangsters with their peann luaidhes (pencils).”<sup>72</sup>
- In *Gilligan v Criminal Assets Bureau* the presiding judge concluded that there existed “an entirely new type of professional criminal who . . . renders himself virtually immune to the ordinary procedures of criminal investigation and prosecution” and that this necessitated the use of the “lower probative requirements of the civil law . . . not to achieve penal sanctions but to effectively deprive such persons of such illicit financial fruits of their labours.” The judge argued that the kind of crime to be targeted, drug-trafficking, was “probably perceived by ordinary members of the community as more threatening and more likely to effect [sic] the everyday lives of themselves and their children [than terrorism].”<sup>73</sup>

This changed political context has ramifications for how the operations in the penal sphere are being conducted. One of the implications of the penal-welfare context was that the psychiatrist had a “judiciary role within the very unfolding of justice”<sup>74</sup> advising what kind of sentence is necessary. These kinds of pronounce-

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<sup>71</sup> Dáil Debates, 3 July, 1996, vol 468, col 373.

<sup>72</sup> See *The Irish Times*, 6 November, 2003, pp. 6-7. On the value put on due process more generally, see the comments of Paul Connaughton in the Dáil: “Democracy is built on the rights assigned to individuals and communities over a period and the normal evolution of rights in a progressive society means introducing more liberal laws to enable people to think and act for themselves. However a dangerous culture has grown up here in the past few years whereby more and more rights are assigned to wrongdoers, lawbreakers, muggers and all sorts of evildoers. The perpetrators of crime now have more rights than the victims. The poacher has outfoxed the gamekeeper . . . We had better accept that the fight is on. This is not something that has arisen in the past two months. It has been a creeping paralysis over the past ten or 15 years . . . Any person who peddles drugs should be sentenced to hard labour. I would not be sorry if the death penalty were reintroduced for convicted drug barons. We have reached the stage where we must introduce draconian measures. The godfathers of crime have access to information and are legally well briefed. They are playing for extremely high stakes . . . I have little time for the champions of civil liberties and do gooders as far as this issue is concerned. It is incumbent on us to put the boot in.” Dáil Debates, 14 March, 1996, vol 463, cols. 318-322.

<sup>73</sup> See *Gilligan v The Criminal Assets Bureau* [1998] 3 IR 185; S. Murphy, “Tracing the Proceeds of Crime” *Irish Criminal Law Journal* 9(2) (1999): p. 165.

<sup>74</sup> M. Foucault, “White Magic and Black Gown” in *Foucault Live* (interviews, 1961-1984) ed, S. Lotringer (New York, 1996), pp. 287-291.

ments depend on a relative imbalance of power between state and offender so that police investigations proceed relatively smoothly. As John Lea points out in his paper in this volume, the rise of organized crime throws this process into disarray. Findings of guilt are harder to secure and the principle of re-integration is called into question. This alters the customary modality of doing justice.

In combating such crime, the state is no longer relying on the power/knowledge nexus that Foucault believed was at the heart of modern punishment. Or, at least, it is a very different kind of knowledge serving a distinct purpose of power. In cases influenced by “extra-ordinary” legislation, the knowledge that is being demanded is not employed as part of any aetiological process, designed to discern distal causes of criminality that will be ameliorated through benign intervention. Instead, criminal biographies are being employed to denote that the individuals in question have passed beyond the pale of acceptable behaviour. Indeed, stratagems such as the Proceeds of Crime legislation utilise criminal biographies initially so as facilitate the process of self-incrimination (the obligation is on the individual to provide knowledge of his/her innocence so as to unfreeze the assets); once this has been achieved, the relevant interim and interlocutory orders are then employed to neutralize the risk posed. And it is no longer the psychiatrist who embodies the judicial role, but the police officer whose suspicion and hunches form sufficient evidence for the judiciary to ratify the use of “extra-ordinary” legislation.

For example, in the extra-ordinary realm, section 21 of the Offences Against the State Act, 1939 makes it an offence to be a member of an unlawful organisation. The relevant section does not however properly define what constitutes “membership” or “organisation.” Moreover, a number of evidential techniques are permitted to provide evidence that an individual is a member of an unlawful organisation. Section 3 of the Offences Against the State (Amendment) Act, 1972 provides that evidence of oral or written statements, the conduct of the accused, or the opinion evidence of a Chief Superintendent in the Gardaí may be admitted to prove membership. Section 24 of the Offences Against the State Act, 1939 also allows evidence of incriminating documents to be adduced to prove membership. Despite concerns that section 21 infringes a variety constitutional rights and the notion that “we are coming dangerously close to using the criminal law to control how an individual defines himself or herself,”<sup>75</sup> the Offences Against the State Review Group endorsed the continued use of the provisions.<sup>76</sup>

Recently, the Minister for Justice has suggested that he is currently considering inserting an additional provision into the current Criminal Justice Bill that will make it unlawful to be member of an organised criminal gang. No doubt section 21 of the Offences Against the State Act, 1939, the evidential provisions that surround it, and judicial interpretations that have upheld their constitutionality,<sup>77</sup> will facilitate the purchase of justification (without the need

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<sup>75</sup> See *Report of the Committee to Review the Offences Against the State Acts, 1939 to 1998*, dissenting views of Professor Dermot Walsh.

<sup>76</sup> *Report of the Committee to Review the Offences Against the State Acts, 1939 to 1998*, para. 6.49.

<sup>77</sup> See, for example, *O’Leary v Attorney General* [1995] 1 IR 254; *People (Director of Public Prosecutions) v McCurk* [1994] 2 IR 579; and *People (Director of Public Prosecutions) v Ferguson* (Unreported, Court of Criminal Appeal, 31 October, 1975).

for any qualitative or quantitative evidence) as the provision seeks public, legislative and judicial endorsement. All of this demonstrates, to some extent, the shape that policymaking takes under the culture of control: “[It] becomes a form of acting out that downplays the complexities and long-term character of *effective* crime control in favour of the immediate gratifications of a more *expressive* alternative. Law making becomes a matter of retaliatory gestures intended to reassure a worried public and to accord with common sense, however poorly those gestures are adapted to dealing with the underlying problem.”<sup>78</sup>

Schmitt valorised the transformation of the rule of law into “an increasingly amorphous and indeterminate structure as vague legal standards like “in good faith” or “in the public interest”, standards incompatible with classic liberal conceptions of the legal norm proliferated.”<sup>79</sup> Many of his contemporaries were horrified by Schmitt’s position as they were clear that it would lead to a political despotism that, in turn, led to horrors like the Holocaust. It is important to keep a sense of proportion and note that the parallels between Schmitt and contemporary political discourse are suggestive of an affinity, no more. We should also recognise that the rule of law can still provide a check to incipient authoritarianism, as the vignette below demonstrates.

### *The Counterweight of Law*

A consolidated example of the normalization of extra-ordinary provisions in the State’s attempts to combat organised crime is provided by the circumstances surrounding the murder of Veronica Guerin. She has become a powerfully symbolic figure in the fight against organized crime and her murder fuelled a spate of coercive legislative and Garda initiatives. Paul Ward was arrested in October 1996 and charged with participating in her murder. The evidence against him comprised verbal admissions allegedly made by him on his arrest under section 30 of the Offences Against the State Act 1939 and the testimony of Charles Bowden, an accomplice (or supergrass). Details of his detention are set out below to highlight the tensions that exist between the result orientated needs of the Gardaí as ranged against a judicial desire to uphold fairness of procedure principles.

Ward was arrested and brought to Lucan Garda station in Dublin, which had no equipment to electronically record interviews with accuseds. On his arrival at the station, Ward asked to see his doctor. He did so for two reasons: first, to ensure that there was professional evidence to establish that at the time of his detention he showed no signs of physical injury; secondly, as he was a heroin abuser he required medication called physeptone to stave off withdrawal symptoms. He was then subjected to five sessions of “intense interrogation” – comprising in total of 14½ hours – but remained silent throughout. After a visit from his girlfriend, however, and in what the Court described as a “remarkable *volte face*”, the accused confessed to participating in the murder of Veronica Guerin. It also transpired that two teams of Garda interrogators again

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<sup>78</sup> D. Garland, *The Culture of Control*, p. 134.

<sup>79</sup> W.E. Scheuremann, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (MIT Press, 1994), p. 1.

questioned Ward the next morning for two hours without knowing that he had allegedly confessed the night before. Moreover, and on the same day, the Garda doctor again examined the accused and found a red mark on the side of his neck which was not present on his initial examination. Furthermore, and again on the same day, Ward's 74 year old mother was brought in to see him, without either requesting to see the other. The Special Criminal Court found that the meetings of the accused with his girlfriend and mother constituted a deliberate and conscious breach of his constitutional right to fairness of procedures, thereby rendering inadmissible the alleged voluntary confession. Nonetheless, and despite these shortcomings, the Court convicted Ward as a result of Charles Bowden's testimony. The Court was also undeterred by its own belief that Bowden was a "self-serving, deeply avaricious and potentially vicious criminal" who would "lie without hesitation."<sup>80</sup>

So what we have is evidence of a series of coercive measures employed in the Ward case – such as the use of terrorist legislation to detain a suspect of non-terrorist crime, the accused's trial in a non-jury court and, the use of supergrass testimony to secure his conviction – which are designed to tip the State-accused balance in favour of the former. More generally, we have witnessed how many of the initiatives aimed at combating organised crime are highly politicized, focus attention on victims, and are justified in part on the basis of their retaliatory attributes. All of this fits neatly with the culture of control as derived from Garland. If the analysis finishes at this point, a nice, compartmentalized control package can be presented – Irish style.

But the case is also interesting for other, less dramatic, reasons. In particular, it should not be forgotten that the "our security depends on their control" mantra – as presented by Garland – has not penetrated all levels of State-accused relations as the liberty interests of the latter continue to be upheld by the Courts. In the Court of Criminal Appeal, and reversing the decision of the Special Criminal Court, the conviction and sentence of Ward were set aside on the ground of the difficulty – in the absence of corroboration – of ensuring the integrity of Bowden's testimony.<sup>81</sup>

In the appeal judgment, we find the Irish judiciary driving a wedge between result-orientated State needs and the individual liberty interests of the accused. In coming down in favour of the latter in the Ward case, it demonstrates the continued potential of the judiciary to resist, in part, the controlling, retaliatory tendencies of contemporary criminal justice. Of course, it is just potential and one should remain alive to the possibility that the liberty interests of accuseds are also capable of manipulation by the judiciary. Legal rights and concepts, as Critical Legal Studies scholars constantly remind us, are "flippable." This is, to some extent, borne out in an analysis of the Ward case. The Special Criminal Court, perhaps smelling guilt, was ambivalent about the accused's legal rights vis-à-vis the testimony of Charles Bowden. Nonetheless, and bearing this caution in mind, these juridical details – albeit less dramatic – must also be factored into any analysis of the Irish penal landscape as it relates to the culture of control. Such details can help us see a possibility beyond a penal dystopia in which the exception becomes the norm.

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<sup>80</sup> (Unreported, Special Criminal Court, 27 November, 1998).

<sup>81</sup> See (Court of Criminal Appeal, Unreported, March 22, 2002).

## Conclusion

Ireland is currently being exposed to many of the indicia of change identified by Garland in his *Culture of Control* thesis. Many of these phenomena, however, are occurring at a surface level and it is far too early to say whether or not they are constitutive of new master strategy of control. Nonetheless, one domain of the Irish criminal justice system where a discernible reconfiguration is taking place is in the priority assigned to due process values and considerations. This reconfiguration, which permeates extensively, demonstrates many “culture of control” characteristics. The process whereby accused and offender rights are curtailed, for example, is highly politicized; expands the powers of the “sovereign” in the criminal arena; is designed to reassure a worried public that it is not being governed by a “can’t do anything, won’t do anything brigade”; prioritises public protection above all other competing demands; and relies upon vapid, justificatory mantras such as “the innocent have nothing to fear.”

This deprioritisation of due process values in Ireland has however, in part, a different causal flow to that adumbrated by Garland. As noted, Ireland has a long history of relying on extraordinary powers to combat the threat posed by paramilitarism on the island. This tradition of invoking extra-ordinary laws and creating special zones where normal laws do not apply has facilitated the rapid advance of a crime control model of justice. The normalization of these special zones has been achieved through *inter alia* a criminology of the “extra-ordinary” which seeks to accentuate the public security parallels that supposedly exist between paramilitaries and particular groupings of ordinary “folk-devil” criminals. Such metaphorical and dramaturgical parallels can by and large be defined by a paucity of supporting details. This absence of a scintilla of convincing evidence to support the parallels being drawn, or the justifications being purchased, has not however, and as we have seen, curtailed efforts to dismantle the “equality of arms” values that traditionally existed between the state and accuseds. Indeed the reconfiguration has occurred in an environment where the public has become habituated to the employment of a crime control model of justice for paramilitaries and amenable – however fragile the evidence – to a similar instrumental logic of repression on the grounds of security being employed in the ordinary sphere. More and more ordinary groupings of accuseds have been assimilated into the special zones where normal laws do not apply. At the same time the “normal” laws themselves, which increasingly only apply to low risk groups of offenders and accuseds, are being unconditionally championed as evidence of our unceasing commitment to civil liberties, human rights and due process concerns.<sup>82</sup> It

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<sup>82</sup> For example, in April 2003, the Minister for Justice, Equality and Law Reform, Michael McDowell, could suggest that Ireland was the only “member-state of the EU in which individual citizens are guaranteed the constitutional right to due process, exclusion of illegally obtained evidence, to trial by jury in all non-minor cases, to fair bail, to the presumption of innocence, to *habeas corpus*, and the right to have any law invalidated in the courts which conflicts with his or her rights and the right not to have any of these rights altered except by referendum’. *The Irish Times* 24 April, 2003. That such a claim – so reflective of the “benign pretensions” vista which Garland now believes to be *passé* – could be made despite the “radical re-alignment” which has taken place is reflective of the State’s ability to “pay homage to certain ideals” whilst “fashioning a structure more closely wedded” to its own perceived needs. See C. Fennell, *Crime and Crisis in Ireland: Justice by Illusion*. (Cork University Press, 1993), p. 8.

remains to be seen if the law itself, and particularly the values enshrined in the Constitution, can act as a counterpoint to this rising tide of crime control – as witnessed in the Court of Criminal Appeal decision in *Ward*. But given that “judicial imprimatur” has already been given to some elements of the crime control model of justice in Ireland, as witnessed in *Quilligan*, this is by no means a forgone conclusion.