

Rethinking the 'Equality of Arms' Framework between the State and the Accused in the Republic of Ireland

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Summary: Trials have evolved into an adversarial process, and the state has taken over the prosecutorial function. There are five challenges to this 'equality of arms': expanded powers of the state to address a perceived imbalance between prosecution and defence; emergency provisions becoming part of normal law; the application of criminal law to deal with regulatory issues; the use of civil jurisdiction as a crime prevention strategy; and the accommodation of victims and witnesses within the system. Maintaining a balance between security and public protection on the one hand and strong due process safeguards on the other is a complex task. But keeping both perspectives in mind helps ensure that new measures are driven by evidence-based criteria and broad considerations of strategy.

Keywords: Prosecutor, powers, normalisation, civil jurisdiction, victim.

Introduction

Many commentators believe that change is taking place in the criminal justice system. For the most part, however, such analyses focus on the back end of the system: on prison expansionism, on the decivilising of punishment, on the rise of a risk culture, on the increasing use of civil sanctions, on restrictions on judicial discretion, and on the steady loss of the humanism and social work expertise. In this article,¹ we wish to focus on the front end of the system, to demonstrate the variety of ways in which the modern due process model of justice is increasingly being

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reconfigured. The article will commence by explaining what is meant by the modern due process model of justice, setting out in particular how the 'equality of arms' framework between the state and the accused was created, before going on to document the various ways in which this model is being reshaped.

How would we define the modern due process model of justice?

In very general terms, it can be said that an exculpatory model of justice existed prior to the nineteenth century. Under such a model 'the paradigm of prosecution' was the victim (Hay 1983, p. 165). He or she was the key decision-maker and the principal investigator. It was the victim's energy that carried the case through the various prosecution stages. Victims, for example, engaged in fact-finding, gathered witnesses, prepared cases, presented evidence in examination in chief and bore the costs involved. Guilt was determined by a much looser conception of culpability than the 'beyond reasonable doubt' formula which we understand today. It was, for the most part, premised on moral blameworthiness and local knowledge about the nature of the accused. At trial, those accused of crime were ordinarily not entitled to have arguments made for them by legal counsel on the basis that 'it requires no manner of skill to make a plain and honest defence'. Furthermore, there was no explicit presumption of innocence. In 'accused speaks' trials, as they were referred to, the accused was always under an obligation of self-exculpation (Langbein 1983). At the end of the prosecution case, the trial judge would turn to the accused and ask how he wished to respond to the evidence. The inference was clear. If the accused had nothing to say in his defence, then he was more likely than not to be guilty (Beattie 1986).

In the course of the nineteenth and early twentieth centuries, however, the trial gradually evolved from an 'expressive theatre' that sought discovery of the truth via an accused speaks forum to a more reflective, categorised process that sought determination of justice through testing the prosecution's case (Langbein 2003). A logic of adversarialism slowly unfolded, which had a number of important consequences. The beyond reasonable doubt standard of proof, for example, crystallised into a legal formula and it became a maxim of law that it was better that ten guilty men should go free than to punish one innocent man. Facilitated by the

‘lawyerisation’ of the trial process, exclusionary rules of evidence were also formulated as rules of law. These acted as filtering devices that examined the prosecution case through the lens of its possible prejudicial effect on the accused. They included, *inter alia*, the inadmissibility of hearsay evidence; closer scrutiny of the voluntariness and fairness of confessions; corroboration warnings in respect of accomplice witnesses; more rigorous examination of the competence of certain prosecution witnesses; and the exclusion of bad character evidence against the accused as proof of his propensity to commit the crime in question. The accused was gradually freed from the burden of exculpation.

The state also, over the course of the nineteenth century, began to monopolise the prosecutorial function. The local *victim* justice system thus increasingly yielded to a *criminal* justice system as an ‘equality of arms framework’ was created between the state and the accused. This was all consistent with the emergence of a rule of law society in which executive arbitrariness and discretionary power abuses were constrained, egalitarianism was advocated and procedural justice was promoted in addition to substantive justice. Today, we would suggest that this equality of arms framework is being challenged in five related areas.

The ‘tooling up’ of the state

Many commentators would claim that the system is now over-protective of those accused of crime, at the expense of justice. For example, on 8 December 2003, the President of the Association of Garda Sergeants and Inspectors suggested that:

... the overwhelming feeling of members is that the criminal justice system has swung off balance to such an extent that the rules are now heavily weighted in favour of the criminal, murderer, drug trafficker, and habitual offender. At the same time, the system is oppressive on the victims of crime, the witness who comes to the defence of the victim and the juror whose role it is to ensure justice is done and seen to be done. Much of the blame can be laid at the door of the system. The State has an equal duty of care to the victim, witness and juror as to the accused.

Similarly, James Hamilton, Director of Public Prosecutions, noted that Ireland's laws are heavily weighted against the prosecution: 'I sometimes feel that the criminal law in Ireland can be like a game of football with very peculiar rules. The prosecution can score as many goals as they like but the game goes on. As soon as the defence scores a goal the game is over and the defence is declared the winner' (*The Irish Times*, 14 May 2006).

A 'tooling up' of the state is evident in the increased powers of search and seizure for the Garda Síochána. For example, gardaí are increasingly permitted to issue their own search warrants in 'circumstances of urgency'. This more self-substantiating process circumvents the need for judges or peace commissioners to be independently satisfied that reasonable grounds exist for the crossing of thresholds.² It is also evident in:

- The enactment of the so-called 'hot pursuit' provision, which enables gardaí to enter into private property without a warrant when pursuing a suspected offender.³
- The introduction of far-reaching powers under the Criminal Justice Act 1994 in relation to drug trafficking and money laundering that provide for the issuance of access orders and search warrants against innocent third parties, such as financial advisers and solicitors.⁴
- Increased Garda powers of detention without charge.⁵
- The inroads that have been made into the right to silence.
- Restrictions on the right to bail.
- A downwards pressure on the standard of proof.⁶

² See, for example, Section 8 of the Criminal Justice (Drug Trafficking) Act 1996.

³ See Section 6(2) of the Criminal Law Act 1997.

⁴ See *Hanahoe v. Hussey* [1998] 3 IR 69.

⁵ The Criminal Justice Act 2006, for example, increases the maximum period of detention from 12 hours to 24 hours. This trend in expanding pre-trial detention means, as Walsh (2005) suggests, that the 'whole centre of gravity of the criminal process is moving rapidly away from the open public forum of the court and into the private closed demesne of the police station'.

⁶ The Sex Offenders Act 2001, for example, provides that sex offender orders may be imposed where there are 'reasonable grounds' for believing that they are necessary.

The normalisation of extraordinary law⁷

A second way in which the equality of arms framework is being undermined is through the gradual normalisation of extraordinary measures into the ordinary criminal justice system. Following the War of Independence and the Civil War in the early 1920s, a law-bound democratic polity began to emerge in Ireland. Democracy itself, however, continued to be blighted in the ensuing two decades by a residual militant republicanism that manifested itself in the form of the Irish Republican Army (IRA). The fledgling Irish state responded with a series of draconian emergency laws and tactics that enjoyed a 'high degree of public tolerance' (O'Halpin 1999, p. 201). These included the introduction of military tribunals with the power to dispense justice for capital crimes, restrictions on the right to appeal the decisions of such tribunals, internment powers without trial, intrusive political surveillance, the proscription of certain organisations, the power to proclaim meetings and increased powers of search and seizure (Hogan and Walker 1989).

A new Constitution came into force following its approval by a referendum in July 1937. The history of paramilitarism in Ireland, however, ensured that provision was also made for the security menace still posed to the state. The establishment of special non-jury courts (under Article 38.3), whose powers, composition, jurisdiction and procedures were to be established by legislation, and provisions in respect of treason (under Article 39) all signpost the contingencies that were still being made to protect state security from subversive activity. More broadly, Article 28.3.3 also gave constitutional immunity to any law which was 'expressed to be for the preservation of public safety of the state in time of war or armed rebellion'. Once a declaration of emergency was made by both Houses of the Oireachtas, constitutional rights and safeguards could be abridged.

More permanently, and following renewed IRA activity in the late 1930s in Ireland and Britain, the Offences Against the State Act 1939 was introduced. The Act and its subsequent amendments, particularly in 1972 and 1998, are open to constitutional challenge. The 1939 Act forms the principal pillar in Ireland's permanent quest to protect state security.

⁷ For a fuller analysis, see Kilcommins and Vaughan (2004), pp. 55–80 and Kilcommins *et al.* (2004), pp. 154–161.

The first four parts of the Act are permanently in force. On the other hand, 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 why such draconian measures are deemed necessary. The necessary proclamations under Part V of the 1939 Act have been made for the periods 1939 to 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 (Kilcommins and Vaughan 2004).

The enactment of the 1939 Offences Against the State Act must be seen in a context in which it was thought that democracy in Ireland was extremely fragile and in need of extraordinary 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 legislation to counter the specific threat posed. What is striking about this extraordinary legislation, however, is that it has proved remarkably malleable in adjusting to more normal circumstances. 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 such extraordinary laws. Indeed they have come to be seen as an efficient means of investigating and prosecuting serious, though ordinary, crimes (Kilcommins and Vaughan 2004; Hillyard 1987). This has occurred in a variety of fields.

Evidence of this normalisation process is discernible in the wide use of the extraordinary powers of arrest and detention – so as to encompass some serious, though non-paramilitary, activities – permitted under Section 30 of the Offences Against the State Act 1939.⁸ Further evidence of this normalisation process can be gleaned from the continued retention of the non-jury Special Criminal Court. The re-introduction of

⁸ See DPP *v.* Quilligan [1986] IR 495. See also Walsh (1989).

the court in 1972, at the height of ‘the Troubles in Northern Ireland’,⁹ was justified on the basis that juries were likely to be intimidated by paramilitaries. It continues to be employed today despite little in the way of a risk assessment as to whether there is a possibility of continued paramilitary intimidation.¹⁰ Moreover, the Special Criminal Court is increasingly being employed to try cases that have no paramilitary connection. Indeed, far from being disbanded on the basis of the notable downturn in paramilitary activity, the Irish government has announced that a second such court will be established to expedite trials. The establishment of this second court will, according to a government press release, ‘serve to demonstrate the State’s resolve to seriously deal with any activity which is a threat to the State and its people’. The once emboldening claim that one has a right to a jury trial in Ireland, as provided for under Article 38.5 of the 1937 Constitution, seems much more fragile, and somewhat quixotic, in the light of such developments.

Criminalising the corporations

When we think about criminal law we tend to think only in terms of homicides, assaults, sexual offences, the requirements of *mens rea* and *actus reus* and the general defences. This is a mistake because criminal law is increasingly being employed to contend with regulatory issues. There are, for example, now over 400 company law offences on the criminal calendar. This growth in the administration of regulatory crime has two important consequences for the purposes of this article: the fragmentation of the prosecutorial function and further restrictions on due process rights (Braithwaite 2000).

Throughout the nineteenth century, the state very gradually began to monopolise the prosecutorial function as the view emerged that the

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

¹⁰ 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://iccl.ie/DB_Data/publications/ICCL%20SUBMISSION%20TO%20THE%20COMMITTEE%20TO%20REVIEW%20THE%20OFFENCES%20AGAINST%20THE%20STATE%20ACTS.pdf

security of society could not be left at the whim of individual victims. Violence and justice were now to a greater extent monopolised by the central authorities through the medium of the Office of the Director of Public Prosecutions. Conflicts were no longer viewed as the property of the parties most directly affected. Previously strong stakeholder interests such as victims and the local community were gradually colonised in the course of the nineteenth century by a state apparatus which acted for rather than with the public. The local victim justice system thus increasingly yielded to a Leviathan criminal justice system that was governed by a new set of commitments, priorities and policy choices.

Centrally organised schemes of prosecution, for example, were operated in Ireland since 1801 and by the mid-nineteenth century sessional crown solicitors were appointed in each of the counties.¹¹ In England, a statute passed in 1879 created the Office of the Director of Public Prosecutions, thus facilitating the gradual emasculation of the victim's previously pivotal role in initiating and carrying on criminal proceedings. By now, the duties of investigation, prosecution, sentencing and punishment – all of which had previously been premised to a large degree on popular participation – had become more privatised, focused and discreet state-accused events.

Today the Office of the Director of Public Prosecutions (DPP) is, to some extent, beginning to lose its monopoly role vis-à-vis particular types of regulatory crime. The number of agencies with the power to investigate crimes in specific areas and to prosecute summarily has increased dramatically in recent years and now includes the Revenue Commissioners, Competition Authority, Environmental Protection Agency, Health and Safety Authority and the Office of the Director of Corporate Enforcement.

In terms of the focus of this article, there are two interesting characteristics about the current use of these regulatory strategies in Ireland. First, the emergence of this regulatory criminal framework is significantly different from the unified monopolies of centralised control underpinning policing and prosecution in the modern state. Arguably these new techniques and strategies can be seen as part of a pattern of more (rather than less) governance, but taking 'decentred', 'at-a-distance' forms. This enlargement in scope, however, is fragmented in

¹¹ Private prosecutors could still initiate proceedings. See *People (DPP) v. Killen* [1958] ILTR 182; *The People (Attorney General) v. Boggan* [1968] IR 67.

nature, occupying diverse sites and modes of operation. Despite extensive powers to share information, there is no unifying strategy across the agencies or with other law enforcement institutions such as the DPP or Garda Síochána. Staffing levels, resources, workloads and working practices vary from agency to agency. Indeed, and apart from respective annual reports, there is little in the way of an accountability structure overseeing the policy choices of the various regulatory agencies, the manner in which they invoke their considerable investigative and enforcement powers or the way in which information is shared between them and the Garda Síochána.

Second, many aspects of regulatory crime operate in opposition to the general trend of paradigmatic criminal law, which permits general defences, demands both a conduct element and a fault element and respects procedural standards such as a legal burden of proof beyond reasonable doubt. Pure doctrines of subjective culpability and the presumption of innocence are increasingly abandoned within this streamlined regulatory framework. It remains a matter of speculation the extent to which the instrumental mentality underpinning much of the regulatory framework will seep into paradigmatic criminal law and be employed to undermine further the doctrinal reasoning that supports many of the due process protections operating in that domain. But we should certainly remain alive to the possibility of the normalisation of some of the more repressive, consequentialist aspects of this regulatory framework into the ordinary criminal justice system.

Employing the civil realm

What also appears to be emerging in recent years is the increasing adoption of a more variegated approach to the detection, investigation and punishment of offences. In particular the state has begun to use the civil jurisdiction as a crime prevention strategy. This can clearly be seen in relation to the enactment of measures by which the proceeds of crime can be confiscated or taxed.¹² The Proceeds of Crime Bill was mooted in Ireland in 1996 to combat the dangers posed to society by drug-related crime. Its cardinal feature permits the Criminal Assets Bureau (CAB) to

¹² Efficient civil actions will in all likelihood continue to grow as a legitimate response to social problems. The recent introduction of antisocial behaviour orders in Ireland may be cited as an example of such a trend.

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,¹³ an application for disposal can then be made. This extinguishes all rights in the property that the respondent party may have had (Kilcommins *et al.* 2004). CAB also has a power to ensure that the proceeds of criminal activity are subjected to taxation (Considine and Kilcommins 2006).¹⁴

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; 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 (McCutcheon and Walsh 1999). This practice of pursuing the criminal money trail through the civil jurisdiction – thereby immunising the state from the strictures of criminal due process embodied in the Irish Constitution – raises all sorts of civil liberty concerns about hearsay evidence, the burden of proof and the presumption of innocence. It is difficult to dislodge the perception that such a device permits the Irish state to achieve late-modern criminal justice goals – public protection, crime control and threat neutralisation – in a civil setting.

Moreover, measures such as the Proceeds of Crime Act 1996 might best be described as falling under a schema of *criminal administration*, a cost-efficient form of legitimate coercion which jettisons the orthodox safeguards of *criminal law* (the requirements of criminal guilt, proof beyond reasonable doubt and the presumption of innocence) in the

¹³ See also Section 7 of the Proceeds of Crime (Amendment) Act 2005.

¹⁴ But see previously *Hayes v. Duggan* [1929] IR 406, where it was held that it would be unethical for the state to benefit from criminal wrongdoing. Murnaghan J stated that he 'did not believe that any well ordered state can consider that its own criminal law will not be enforced'. The decision in *Hayes v. Duggan* was overturned by Section 19 of the Finance Act 1983, which provided that profits or gains on unlawful activity were chargeable to tax. See now Section 58 of the Taxes Consolidation Act 1997. Furthermore, the Disclosure of Certain Information for Taxation and Other Purposes Act 1996 authorised information sharing between the Revenue Commissioners and the Garda Síochána in respect of criminal assets.

‘public interest’. In addition to the absence of safeguards, this schema also, however, displays another important difference from the traditional criminal law. Injunctions that seize or tax assets thought to be the proceeds of crime are not designed to reorientate human behaviour or to reintegrate those that are deviant. Instead their focus is more ‘apersonal’ in nature and seeks to move the law away from the ‘barren aim of punishing human beings’ to the fruitful one of threat neutralisation.

Legal pluralism

The modern criminal justice system has excluded the voices of many stakeholders in its attempt to set up this equality of arms framework between the state and those accused of crime. It has, for example, often overemphasised the importance of the collective (‘the social’) and made categorical exclusionary assumptions about victims and witnesses which may be seen as part of the more generalising or totalising tendencies of modernity. Increasingly, however, the system is having to recognise that it operates within a complex matrix of competing tensions and that it cannot set itself up solely in terms of a contest between the state and the accused.

More accommodation of victims and witnesses has become necessary and this obviously has implications for the equality of arms framework. For example, in recent years the victims of crime have become much more prominent actors in the theatres of prosecution and sentencing. This has ensured a more responsive support structure in the aftermath of crimes, more empathetic treatment by criminal justice agencies in the detention and prosecution of crimes and a more conducive courtroom environment regarding the provision of information on crimes. Upgrading the status of the victim from ‘nonentity’ to ‘thing’ is of course a laudable and necessary tactic (Christie 1977).¹⁵ Evidence of this more inclusionary momentum is, for example, observable in the introduction of victim impact statements under Section 5 of the Criminal Justice Act

¹⁵ See also Lea (2002) who notes: ‘The result is that the relationship in which the victim remained an essentially passive participant in criminal justice, handing over the problem and the injury itself to the State, is beginning to be undermined. There is a move ... back in the direction of older social relations, predating those of crime control, in which crime was essentially a relationship between victim and perpetrator ... and in which the notion of the “social” as a collectivity, both material, with its own dynamics and interests and requiring careful governance, and moral, with the capacity to suffer harm, was much less developed’ (p. 175).

1993, which provides that in determining sentences for sexual offences or offences involving violence the court shall take into account and may, where necessary, receive evidence or submission concerning any effect on the victim. In addition allocution rights are provided to the victim under Section 5(3) of the Act. It is also evident in the abolition of a mandatory requirement on judges to warn juries of the dangers of convicting on the basis of the uncorroborated testimony of children and sexual complainants.¹⁶ Fortunately, the exclusionary notion that the testimony of children is inherently unreliable, and the 'folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it' (Temkin 1982, p. 418), no longer hold sway. This more inclusionary momentum is also, *inter alia*, evident in the employment of intermediaries, live television links and video testimonies for witnesses and victims in the courtroom; separate legal representation for rape victims under the Sex Offenders Act 2001; provisions for greater victim participation in the restorative justice model embodied under the Children Act 2001;¹⁷ and greater judicial awareness of the reasons that might prevent a sexual complainant from making a complaint at the first available opportunity.¹⁸

Conclusion

All of the five categories delineated above impact upon the equality of arms framework created between the state and the accused throughout the nineteenth and twentieth centuries. Much of the momentum for the changes taking place is grounded in the need for greater public protection and security. One current theme in particular, which repeatedly resonates in many Western countries, is the extent to which public protection and security should trump the individual liberty rights of people such as those accused of crime. The needs of public protection

¹⁶ See Section 28 of the Criminal Evidence Act 1992 and Section 7 of the Criminal Law (Rape) Amendment Act 1990.

¹⁷ See Lea (2002) who notes: 'Locally based forms of restorative justice and conflict resolution through mediation aim to use precisely the resources of local communities to disconnect the solution of a wide range of harms and conflicts from the state and the discourses of criminal justice and the criminalizing abstraction and to bring perpetrators and victims together as fellow community members. In this sense there appears to be a return to pre-modern systems of community control' (p. 179).

¹⁸ See *People DPP v. DR* [1998] 2 IR 106.

and security, of course, are essential goods in society which are necessary for our self-preservation, wellbeing and happiness. Criminal wrongdoing impairs the ability of citizens to enjoy the fruits of fair justice and public order. For these reasons alone, such criminal occurrences must be considered in the context of security and the need to enable justice to take place in an environment which is free from the threat of injury or harm. The pursuit of public protection and security through our criminal law system, therefore, is an objective that we should all support and we should constantly seek ways of reforming the law so as to enhance such goals.

But we should also bear in mind that the demand for security and public protection must be ranged against the need to live in a society which is genuinely committed to safeguarding civil liberties and human rights. Individuals want to be able to go about their daily lives free from the menace of crime. But they also want to live in a society where strong due process safeguards exist which guarantee, as far as practicable, fairness of outcome, should they themselves be accused or suspected of a crime by the state. This is an important point because we sometimes conveniently forget that those accused of crime and offenders are also citizens and that their liberty interests are also our liberty interests. Maintaining a balance between these often competing, though not mutually exclusive, perspectives is a complex and tortuous process. By keeping both perspectives in mind, we can better ensure that any measures designed at enhancing security are driven by evidence-based criteria and broader considerations of strategy implications rather than broad-based appeals to common-sense authoritarianism and simple majoritarianism.

Finally, it is also important to bear in mind, as we have seen above, that not all of the momentum is authoritarian and repressive in orientation. There is a tendency to view alterations in the equality of arms framework simply in Manichean terms with the forces of light of the equality of arms framework ranged against the forces of darkness of any attempts to change it. As we have sought to show above, some of the momentum underpinning changes in the equality of arms framework is more inclusionary and complex in design than this Manichean vision tends to portray. Attempting to include previously overlooked voices or 'strengthening the criminalisation' of previously overlooked crimes in the employment, corporate and environmental arenas cannot simply be explained in terms of a logic of repression.

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