

Crime Control, the Security State and Constitutional Justice in Ireland: discounting liberal legalism and deontological principles.

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Introduction

“Here, I think we are touching on...one of the most harmful habits in contemporary thought...: the analysis of the present as being precisely, in history, a present of rupture...The solemnity with which everyone who engages in philosophical discourse reflects on his own time strikes me as a flaw...I think we should have the modesty to say to ourselves that...the time we live in is not the unique or fundamental or irruptive point in history...We must also have the modesty to say, on the other hand, that the time we live in is very interesting: it needs to be analysed and broken down, and that we could do well to ask ourselves “What is the nature of our present”.”¹

Ireland’s criminal justice system is showing some signs of drift in the direction of an ‘assembly line’ model of justice in which the State-individual balance is increasingly tipped in favour of the former. This is been achieved by dismantling some of the previous ‘ceremonious rituals’ which cluttered up the process of justice and succeeded in blinding Damocles. This ‘tooling up’ of the Irish state is evident, for example, in the law of search and seizure; in the expansion of the pre-trial detention powers of the Gardaí (Irish police); in restrictions on the right to silence and the right to privacy; in the expansion in the range of hybrid offences which, at the option of the prosecutor, deny the right of an accused to a jury trial; in curtailments in the right to bail; and, in increased attempts being made to reduce the art of sentencing in Ireland to a Procrustean formula which mechanically fits punishment to crime. The whole centre of gravity of the criminal process, as Walsh has suggested, ‘is moving rapidly away from the open public forum of the court and into the private

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¹ M. Foucault ‘Structuralism and Post-Structuralism: an interview with Michel Foucault’ in M Kelly, ed, *Critique and Power* (London: MIT Press, 1994), at 126.

closed demesne of the police station'.² The same author noted: '[i]ncreasingly guilt will be determined by executive processes in the closed secrecy of the police station rather than by judicial processes in the public transparency of the courtroom. Judicial territory is being ceded to the police to achieve a further streamlining and bureaucratisation of the criminal process'.³ The employment of criminal law as the monopoly mechanism for dealing with deviant behaviour is also beginning to fragment and blur. In particular, the diversification and diffusion of the State into the civil sphere as a means of crime control—through, for example, the taxation and confiscation of the proceeds of crime even in the absence of a criminal conviction—is becoming more visible in Ireland.⁴

The direction and thrust of all of these various traits appear consistent with Packer's crime control model of justice which adopts an instrumental logic that favours the primacy of the public over the individual, promotes the need for efficiency as regards criminal justice operations and outputs,⁵ emphasises at every turn the exercise of authoritarian state power, and has as its validating authority a hyperactive legislature 'more concerned to subject penal decision making to the discipline of party politics and short-term political calculation'.⁶ Moreover, this erosion of institutional restraints and balances appears to be carved out on the back of political expediency, as a means of 'governing through crime'.⁷

The crime control analyses identified above is thus very useful in describing the thrust and direction of these various trends, particularly given the tendency in such literature to review events through the lens

² D. Walsh, 'The Criminal Justice Bill: Completing a Crime Control Model of Justice', Conference on the Criminal Justice Bill: implications for human rights and legal practice, Trinity College Dublin, 20th April, 2005.

³ D. Walsh, 'Police Powers in the Criminal Justice Act 2006: the triumph of executive convenience over judicial checks and balances', Thomson Round Hall Criminal Law Conference, Royal College of Surgeons, 25th November 2006.

⁴ S. Kilcommins and B. Vaughan, 'Reconfiguring State-Accused Relations in Ireland' (2006) XLI, *Irish Jurist* 90; L. Campbell, 'Criminal Justice and Penal Populism in Ireland' (2008) 28(4) *Legal Studies* 559.

⁵ K. Sweeney, 'The qualification of silence in Ireland: control, effectiveness and safeguards' (2015) 25(4) *Irish Criminal Law Journal* 109-118; M. Fitzgerald O'Reilly, 'Post Release Supervision of Sex Offenders' (2013) 23(4) *Irish Criminal Law Journal* 108; D. Kennedy, 'Has Packer's Crime Control Model become the dominant force in Irish Criminal Justice?' (2013) 23(3) *Irish Criminal Law Journal* 76; D. O'Dwyer, (2012) 'The Innocent have nothing to Hide – DNA Profiling and Mass Screening' 22(3) *Irish Criminal Law Journal* 80; A. Twomey, 'Reason, his giving way to emotion: the civilising and decivilising curve of punishment' (2012) 30 *Irish Law Times* 315.

⁶ D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001), at 13.

⁷ J. Simon, 'Governing Through Crime', in L.M. Friedman and G. Fisher (eds), *The Crime Conundrum: Essays on Criminal Justice*, (Boulder: Westview Press, 1997), at 171-189.

of stark juxtaposition: from *sovereign to disciplinary power*;⁸ *due process to crime control*;⁹ *modernity to late modernity/postmodernity* (Lea 2002);¹⁰ *penal welfarism to a culture of control*;¹¹ *a constitutional state to a security state*;¹² *individualised justice to actuarial justice*;¹³ *an inclusive to an exclusive society*;¹⁴ *civilising to decivilising trends*;¹⁵ *correctionalist criminology to criminologies of everyday life*;¹⁶ *liberalism to communitarianism/neo-liberalism/neo-conservatism*;¹⁷ and *Rule of Law to Rule by Law* modes of governance.¹⁸ Such juxtapositions are designed to facilitate analogies, contrasts and generalisations. This serves the very useful purpose of highlighting ruptures, discontinuities, and dissimilarities with orthodox practices and ways of thinking. It can pinpoint various contemporary threads in contemporary justice—relations with the accused, victims, the State, policing, politicians, the media, and society—and demonstrate the ways in which they are being unravelled from familiar patterns. All of this forces us to look at the bigger picture—at the ‘structural properties of the field’—in Ireland and consider the consequences and implications of the changes occurring.

There is a danger, however, in pursuing an agenda of juxtaposition too far. In only seeking to gather evidence of dramatic dissimilarities and discontinuities, crime control analyses often overlooks strong patterns of similarity, stability and continuity. Though it is tempting and indeed exciting to be swept up in the grand narrative of such analyses, particularly their nihilistic overtures, they may not accurately depict the complexities of the criminal process.¹⁹ This is particularly true in relation to the field of law which continues to play a vital role in the resolution of crime disputes. The discipline itself is often downplayed in crime control literature, particularly its ‘internal point of view’, its

⁸ M. Foucault, *Discipline and Punish: the birth of the prison* (Harmondsworth: Penguin Books, 1991 repr.).

⁹ H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

¹⁰ J. Lea, *Crime and Modernity* (London: Sage, 2002).

¹¹ Garland, above n. 6.

¹² B. Hudson, *Justice in the Risk Society: Challenging and Reaffirming Justice in Late Modernity* (London: Sage, 2003), at 170.

¹³ M. Feeley and J. Simon (1994) ‘Actuarial Justice: the emerging new criminal law’ in D. Nelken, ed. *The Futures of Criminology* (London: Sage), at 173-201.

¹⁴ J. Young, *The Exclusive Society* (London: Sage, 1999).

¹⁵ J. Pratt, ‘Toward the decivilising of punishment’ (1998) 7(4) *Social and Legal Studies* 487.

¹⁶ D. Garland and R. Sparks, ‘Criminology, Social Theory and the Challenge of our Times’ (2000) 40 *British Journal of Criminology* 189.

¹⁷ P. O’Malley, ‘Volatile and Contradictory Punishment’ (1999) 3(2) *Theoretical Criminology* 175.

¹⁸ D. Dyzenhaus, *Constitution of Law* (Cambridge: Cambridge University Press, 2006).

¹⁹ L. Zedner, ‘Dangers of Dystopia in Penal Theory’ (2002) 22(2) *Oxford Journal of Legal Studies* 341; R. Matthews, ‘The Myth of Punitiveness’ (2005) 9(2) *Theoretical Criminology* 175; C. Hamilton, *Reconceptualising Penalty: a comparative perspective on punitiveness in Ireland, Scotland and New Zealand* (Farnham: Ashgate), at 30.

‘institutions’²⁰ and structure of justification, its hierarchical and coordinated features, the limiting tendencies associated with rule determinism, and its capacity – through the judiciary - to be ‘last authoritative voice’ on all attempts at dispute resolution or settlement.²¹

The point the article particularly wishes to make is that the liberal ideology of legalism and constitutionalism has delivered, and continues to deliver, significant protections to those accused of crime that set some limits to the power of the Irish State and the ‘tyranny of the majority’. Though discounted in crime control literature, it has a power and a reach that remains significant and real. Its embedded nature offers more than token resistance to newly emerging, more control orientated, orthodoxies. To dismiss it, or to afford it epiphenomenal status only (as ‘law in books’ or ‘paper rules’), is to neglect its capacity to check power and to offer sustained and dogged opposition to the creation of a ‘culture of control’ society. Its continued presence ensures that there is unlikely to be any sudden irruptive point in the trajectory of the Irish criminal justice system that moves us decisively in the direction of absolutist control. Any broad reconfiguration is much likely to be of the staccato kind, involving relatively rapid reversals in some areas, whilst encountering sustained resistance on others that will require much in the way of confrontation and negotiation. This makes for a much more messy picture of ‘the present’, a contested site where old and the new phenomena cannot easily be compartmentalised into master patterns, and where the rhetoric of labels and reality of practices do not always coincide.

The article will commence with a very broad historical account of the emergence of a rights based conception of the Rule of Law in Ireland, before going on to examine, through an analysis of four cases on terrorism and sexual offending, how it continues to compete for priority in the Irish courts. The cases are designed to act as an analytic device, rather than a thickly descriptive, phenomenological account. They are included so as to provide sufficient evidence to avoid vacuity, but are also linked to a broader level of abstraction which will help to avoid parochialism or black-letterism.

Liberal Legalism in the Criminal Process

²⁰ N. MacCormick, *Institutions of Law: an essay in legal theory* (Oxford: Oxford University Press, 2007), at 12-13.

²¹ J. Raz, *Practical Reasons and Norms* (Oxford: Oxford University Press, 1999 repr.), p. 158.

A Rule of Law framework has developed in Ireland which restrains the arbitrary or coercive exercise of executive authority, where a strong state must have respect for and indeed, in some instances, yield to a weak enemy.²² Gradually in the course of the nineteenth century, the criminal complex was redrawn as a new statist administrative machinery emerged for investigating, prosecuting and punishing crime. Subjects increasingly ceded ‘their authorisations to use coercion to a legal authority that monopolises the means of legitimate coercion and if necessary employs these means on their behalf’.²³ The penal field increasingly dissociated itself from the local, personal and arbitrary confrontations that governed criminal relations in the eighteenth century and became a more depersonalised, rule-governed affair with the State at the centre. Private disputes and vendettas were thus gradually monopolised by the State apparatus and rerouted into the courtroom. A society in which ‘the law operates more and more as the norm’²⁴ slowly emerged – reflecting the ‘public interest’ and the ‘will of the people’ – in which the temptation to commit crime would no longer be countered by a sovereign will to command and a display of terror.²⁵ When this process was completed, ‘sovereign power was transformed into a public power’.²⁶

Though each citizen gave over some freedom to the sovereign in the interests of self-preservation, and the protection of liberty rights and human entitlements, the *quid pro quo* nature of the arrangement ensured, through a rhetoric and logic of liberal legalism, that the sovereign guaranteed to respect the liberty, equality and freedom of each citizen. The sum of power ceded could not be employed arbitrarily to usurp freedom or liberty. Gradually the old hierarchical order of patronage was increasingly undermined by a classical liberalist and utilitarian belief in the free individual who possessed ‘negative’ rights which could be construed as freedoms *from* government. The ascriptive status of individuals under the old hierarchical model of authority, where individuality was to some extent subsumed into a person’s attachment to a particular location, grouping, and placement within that grouping, was overtaken by a new horizontal vision which emphasised

²² O. Doyle, ‘Administrative Action, the Rule of Law, and Unconstitutional Vagueness’, in L. Cahillane *et al.*, eds, *Judges, Politics and the Irish Constitution* (Manchester: Manchester University Press, forthcoming).

²³ J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 2008 repr.), at 245-247.

²⁴ M. Foucault, *The History of Sexuality* (Harmondsworth: Penguin Books, 1979), at 144.

²⁵ R. McGowen, ‘A Powerful Sympathy: Terror, the Prison and Humanitarian Reform in Early Nineteenth Century Britain’ (1986) 25 *Journal of British Studies* 312, at 313-317.

²⁶ D. Garland, above n. 6, at 30.

rationalism, liberalism, egalitarianism and freedom.²⁷ The primacy of the individual and his or her self-determining and self-realising capabilities began to take centre-stage. In contrast to the fixed identities fashioned by pre-modern status relationships, modern ‘progressive’ societies were viewed as oscillating more towards relations that recognised the importance of individualism and individual autonomy. Lea refers to this process of ‘criminalising abstraction’—‘abstracting an accused’s criminality from the complex of other characteristics which make him what he is’—as one of the foundation stones of modern criminal law and criminal justice.²⁸

This overarching trend had important consequences for the pre-trial, trial and sentencing processes. As Wiener suggested, ‘during the first half of the nineteenth century criminal justice was pressed to move from a series of expressive semipersonal confrontations...to a more restrained, rule governed, predictable, depersonalised process’.²⁹ The trial, for example, evolved from an ‘expressive theatre’ that sought *the discovery of truth* via an ‘accused speaks’ forum to a more reflective, categorised process which sought *the determination of justice* through testing the prosecution case.³⁰ A whole corpus of exclusionary common law and statutory rules emerged to ensure that the accused was afforded the best possible defence against unfair prosecution and punishment. Since, and to paraphrase Stephen, the State was so much stronger than the individual citizen, and was capable of inflicting so very much more harm on the individual than the individual could inflict upon society, it could afford ‘to be generous’.³¹ 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.

Within such a society, executive arbitrariness and discretionary power abuses were constrained, egalitarianism advocated, and procedural justice increasingly promoted in addition to substantive justice. In distilling the criminal process into a more monopolised State-accused event, an ‘equality of arms’ framework was created as part of a broader Rule of Law value system. This addressed the problem of the previously ‘bad

²⁷ I. Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge: Cambridge University Press, 1986), at 80-150.

²⁸ J. Lea, above n. 10 at 1-3.

²⁹ M. Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England: 1830-1914*. (Cambridge: Cambridge University Press, 1990), at 65.

³⁰ J. Langbein, ‘The Historical Origins of the Privilege Against Self-Incrimination at Common Law’, (1994) 92(5) *Michigan Law Review* 1047.

³¹ J. Stephen, *A History of the Criminal Law of England*, Vol I, (London: Routledge/Thoemmes Press, 1883), at 354.

economy of power' which vested too much...on the side of the prosecution... while the accused opposed it virtually unarmed'.³² Redistributing this economy of power meant an expansion in the exclusionary rules of evidence that could be employed by the defence against the prosecution case, clearer and greater obligations imposed on the State to prove its case against the accused, better opportunities afforded to the defence to prepare its case and test the prosecution case, and the removal of any obligation of self-exculpation on the accused. Even when the case was proved against the accused, he or she was subjected to a new power to punish in which 'an economy of continuity and permanence ...replace[d] that of expenditure and excess'.³³

Following independence in 1922, the political inclination in Ireland was to maintain the inherited social, economic and legal structures subsisting on the demise of the colonial state. This meant that the 'ordinary' adversarial criminal trial — involving 'a contest morphology' that included oral presentation of evidence, cross examination by counsel, relative 'judicial passivity' during the guilt determining phase of the trial, and informational sources secured by both the prosecution and defence — became deeply ingrained throughout the twentieth century as the appropriate means of resolving criminal disputes,³⁴ despite the best efforts of successive government to hive off a zone largely devoid of such standards in order to safeguard the security of the state. It also meant that the ideological hegemony of liberalism, extolling the 'classical' negative need for citizens to be protected *from* the State but also the more positive need of citizens to be provided with an opportunity for self-realisation, gradually permeated most social, cultural and institutional strata — what Habermas refers to as 'freedom guaranteeing juridification'.³⁵ In the ordinary criminal realm, this ensured that standards of normative legitimacy were woven into the core of the ordinary pre-trial and trial process.³⁶

More importantly, these common law and statutory standards also increasingly became fused with constitutional jurisprudence and more recently, with human rights jurisprudence. Active judicial review, especially since the 1960s, has permitted the development of a great

³² M. Foucault, above n. 8., at 79.

³³ *Ibid* at 87.

³⁴ M. Damaska, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986), 88.

³⁵ J. Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason* (Cambridge: Polity Press, 2007), 361.

³⁶ M Damaska, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84(3) *Yale Law Journal* 480.

corpus of jurisprudence—constructing a ‘meta-Constitution’—on the constitutional role in protecting the rights of the accused and on restricting State power.³⁷ Logical consistency regarding rules (rule formalism or a ‘rulebook’ conception of the Rule of Law) was now further buttressed by rights and principles—implemented through a constitutional structure—which commands that ‘rules in the rule book capture and enforce moral rights’ (a rights-based conception of the Rule of Law).³⁸ Facilitated by constitutional rights jurisprudence, we have thus witnessed a gradual concretisation of the rights of the accused. This process is still, to some extent, on-going in Ireland where many due process rights have been expanded or given greater protection through constitutional recognition.³⁹ These include the presumption of innocence,⁴⁰ the right to silence in police custody,⁴¹ the right of access to a lawyer,⁴² the voluntariness of confessions,⁴³ the exclusion of unconstitutionally obtained evidence,⁴⁴ and the right to proportionality in punishment.⁴⁵ All of this occurred at a time when many western jurisdictions were meant to be experiencing more control-orientated justice and streamlined pain delivery. Moreover, there has also been an increased intervention in Irish State law through the proliferation of supranational sources. The European Convention on Human Rights, for example, affording another level of protection for those accused of crime, was only incorporated into Irish law in 2003, albeit a weak form of entrenchment given that it operates at a sub-constitutional level. The European Union also promotes respect for human rights as an essential ingredient of good governance. This ensures the coexistence and interaction of rights at different levels, ensuring ‘an on-going human

³⁷ J. Casey, *Constitutional Law in Ireland*, 3rd edn, (Dublin: Sweet and Maxwell, 2000), 25; D. Gwynn Morgan, *The Separation of Powers in the Irish Constitution*. (Dublin: Round Hall, Sweet and Maxwell, 1997).

³⁸ R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 11-12.

³⁹ D. McGrath, ‘The Constitutionalisation of the Law of Evidence’ in E. Carolan and O. Doyle, eds, *The Irish Constitution: governance and values* (Thomson: Round Hall 2008), 293-306.

⁴⁰ *O’Leary v The Attorney General* [1993] 1 IR 102 at 107.

⁴¹ *Heaney v Ireland* [1996] IR 580.

⁴² *People (DPP) v Healy* [1990] 2 IR 73; for an expansion in the right of access, see *People (DPP) v Gormley and White* [2014] IESC 17.

⁴³ *Re National Irish Bank* [1999] 3 IR 145.

⁴⁴ *People (DPP) v Kenny* [1990] 2 IR 110; for a restriction in the right to have unconstitutionally obtained evidence excluded, see *DPP v JC* [2015] IESC 31. See also J. Jackson, ‘Human Rights, Constitutional Law, and Exclusionary Safeguards in Ireland’ in P. Roberts and J. Hunter, eds., *Criminal Evidence and Human Rights: reimagining common law procedural traditions* (Oxford: Hart Publishing), at 119-144.

⁴⁵ *People (DPP) v WC* [1994] ILRM 321; *People (DPP) v M* [1994] 3 IR 306.

rights revolution on the law of criminal evidence and procedure',⁴⁶ making immunisation from their range and effects even more difficult.⁴⁷

The institutionalised nature of these accused rights has ensured that they cannot be easily 'trumped' for collective policy reasons such as security and public protection.⁴⁸ They remain very much part of the topography in the criminal process, carrying a 'threshold weight',⁴⁹ 'which the government *is* required to respect case by case, decision by decision'.⁵⁰ They provide a strong mediating influence on the legislature, which is supported by an independent judiciary. The remainder of this article will examine two relatively recent sexual offence cases, and two terrorist cases, to provide evidence of the argument being made here. Though based on 'thick' legal description, the reasoning and findings in such cases will allow me to demonstrate how the Irish criminal process continues to embrace liberal properties which cannot be accounted for under the unitary logic of crime control analyses. These properties include strong support for 'rights as trumps'; a core emphasis on legality; fidelity to precedent and the hierarchical nature of ontological legal sources; the continued appeal of deontological rather than consequentialist reasoning; and the maintenance of a constitutional structure which mandates an independent judiciary to have the last word on dispute resolution.

(i) Sexual offence cases

The treatment of those accused or convicted of sex offences is generally taken to exemplify crime control in its purest form. The policy choices adopted as regards such crimes are generally described as being expressive; emotional; orientated towards 'othering' and the control of aggregates; premised on risk control and greater restrictions that demonstrate little respect for the rights of those accused or convicted of sex offences; and pessimistic about reintegrative strategies or the reformability of such individuals.⁵¹ But this dystopian trend is not the full story, as we shall see through an examination of the following two cases.

⁴⁶ P. Roberts and J. Hunter (2012) 'The Human Rights Revolution in Criminal Evidence and Procedure' in Paul Roberts and Jill Hunter, eds., *Criminal Evidence and Human Rights: reimagining common law procedural traditions* (Oxford: Hart Publishing), 1.

⁴⁷ W. Twining, *Globalisation and Legal Theory*. (London: Butterworths, 2000), 228; J. Jackson, 'The Effects of Human Rights on Criminal Evidentiary Processes: towards convergence, divergence, or re-alignment' (2005) 68 *Modern Law Review* 737.

⁴⁸ R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), at 93-94.

⁴⁹ *Ibid.*, at 92.

⁵⁰ R. Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998 repr), at 223.

⁵¹ J. Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) 4 *Psychology, Public Policy and Law* 452; D Garland, above n. 6, 136-137.

CC v Ireland and Others – the requirement of mens rea.

In general, the accused benefits from the presumption that knowledge of the wrongfulness of the criminal act (*mens rea*) is an essential ingredient in any determination of guilt. This presumption has been described as a ‘silken thread in the fabric of the legal system ensuring a just process’.⁵² The issue of the requirement of *mens rea* arose for consideration in the case of *CC v Ireland and Others*.⁵³ Section 1(1) of the Criminal Law (Amendment) Act 1935 provided that any person who had carnal knowledge of girl under the age of 15 would be guilty of a serious offence, punishable by a maximum of life imprisonment.⁵⁴ The accused, a 19 year old, was charged with four offences contrary to s 1(1) of the Criminal Law (Amendment) Act 1935. He admitted having consensual intercourse with a girl named in the charges but said that she had told him that she was 16 years of age when in fact she was only 14. The offence under section 1(1) of the 1935 Act, however, afforded no defence once the *actus reus* (the actual act) was established.

This derogation from the requirement of *mens rea* was traditionally justified in law under the utilitarian rationale that the legislation was designed to ‘protect young girls, not alone against lustful men, but against themselves’.⁵⁵ Though such a provision had the potential to cause injustice in individual cases, it served the greater good because its ‘*in terrorem*’ effect would prevent men from having sexual intercourse with young girls in circumstances where they did not know for certain that they were above the relevant age. Citing Canadian authorities, counsel for the accused in the case argued that the foundation of our criminal justice system did not rest on utilitarianism but on the precept that a ‘man cannot be adjudged guilty and subjected to punishment unless the commission of the crime was voluntarily directed by a willing mind’.⁵⁶ The Supreme Court agreed—demonstrating the importance of integrity over narrow rule based consistency—stating that the provision expressly criminalized the mentally blameless. This was intolerable under any ‘civilized system of justice’. Hardiman J noted:

⁵² *CC v Ireland, Attorney General and Another; PG v Ireland, Attorney General and Another* [200] 4 IR 1 at 25 per Denham J. See also *People (DPP) v Murray* [1977] IR 360.

⁵³ [2006] 4 IR 1.

⁵⁴ Section 2 of the same Act provided that where the girl was aged under 17 at the time of the intercourse, the offence was punishable by up to 5 years’ imprisonment for a first offence and up to 10 years’ for a subsequent offence.

⁵⁵ See *Attorney General (Shaughnessy) v Ryan* [1960] IR 181 and *Coleman v Ireland* [2004] IEHC 288.

⁵⁶ See *Regina v City of Sault Sainte Marine* (1978) 85 DLR 161 per Dickson J.

It appears to us that to criminalize in a serious way a person who is mentally innocent is indeed to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a means to an end...It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and indicate the rights of liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution.⁵⁷

Accordingly, section 1(1) of the Criminal Law (Amendment) Act, 1935 was declared to be inconsistent with the provisions of the Constitution. Following the decision, the legislature was forced to rush through the Criminal Law (Sexual Offences) Act, 2006 which continues to make it an offence to engage in a sexual act with a child but now provides a defence for the accused if he can prove that he honestly believed that the child was over the relevant age.

S.H. v The Director of Public Prosecutions – the presumption of innocence and delay in sexual offence cases

One of the primary building blocks designed to recognise the 'principled asymmetry' of Government-citizen interactions in the criminal arena is the presumption of innocence. It demands that the State bear the burden of adducing sufficient evidence of all the elements of the offence charged against the accused, and that the guilt of the accused must be established beyond reasonable doubt. In practice this means that the accused does not have to account for his conduct or actions. He or she does not bear the onus of proving the circumstances which may reduce the charge against him or her, or lead to an acquittal. All that is required is that the trier of fact is left with a reasonable doubt on some essential matter after the prosecution has been 'put to proof'.

The normative legitimacy of this principle is rooted in the notion that a wrongful conviction is a deep injustice and a fundamental moral harm. The procedural protection afforded by the presumption is designed to recognise that conviction constitutes public censure and, invariably, leads to a punishment. Innocent individuals need to be protected from this otherwise legitimate violence. It is also a recognition of the huge disparity in resources between the State and the defendant and of the fragility of fact-finding at criminal trials. Thus in steering between the Scylla of acquitting the guilty and the Charybdis of convicting the innocent, the logic underpinning the presumption falls squarely within the latter camp. By allocating the 'risk of misdecision' to the State, the presumption acts

⁵⁷ [2006] 4 IR 1 at 78-79.

as a foundational principle which affords the innocent (and sometimes the guilty) accused every possible chance to be acquitted. It is an acknowledgement, in a democratic society which embraces the transcending value of the freedom and good name of every individual, that the social disutility of convicting an innocent citizen far exceeds the disutility of acquitting someone who is guilty.

The presumption was however severely tested by the emergence of a series of historic sexual abuse cases in the mid 1990s. In Ireland, an accused person facing criminal charges relating to a delayed complaint can seek to have the complaint struck out on the grounds that it prejudices his or her right to a fair trial. Where, however, the delay was attributable to the actions or conduct of the accused in delayed sexual abuse cases, the Irish courts had held in a series of judgments since the mid 1990s that those accused of such crimes would not be permitted to rely on the expiry of a lengthy period of time to frustrate the prosecution of the case. The jurisprudence which developed indicated that where a court was asked to prohibit the trial on grounds of excessive delay it could take into account the extent to which the accused had contributed to delay in the reporting of the offence to the prosecution authorities. The factors to be taken into account included whether there was a close personal relationship between the accused and the complainant which might prevent the making of a complaint, and whether there was evidence of the complainant having a position of dominance such as might delay the making of the complaint.⁵⁸ In *P.O'C. v Director of Public Prosecutions*,⁵⁹ for example, Keane CJ stated in the Supreme Court:

Where ... there has been significant delay on the part of the victim of the alleged crime in reporting it to the authorities, a question may arise as to whether the delay is explicable by reference to the nature of the crime itself. This question arises in cases of sexual offences allegedly committed by adults against children and particularly in cases where the adult is in a position of authority in relation to the child, e.g. as parent, step-parent, teacher or religious. In cases coming within the last named category, the inquiry conducted by the court which is asked to halt the trial necessarily involves an assumption by the court that the allegation of the victim is true. Without such an assumption, it would not be possible for the court to conduct any such inquiry and the court would be obliged

⁵⁸ See *PC v Director of Public Prosecutions* [1999] 2 IR 25; *B v Director of Public Prosecutions* [1997] 3 IR 140; *PO'C v Director of Public Prosecutions* [2000] 3 IR 87; *JO'C v Director of Public Prosecutions and PL v Buttimer* [2004] 4 IR 494.

⁵⁹ [2000] 3 IR 87 at 93.

automatically to halt the trial of a person because of the expiry of a lengthy period of time, even though the failure to make a complaint was due to domination exercised by the adult over the young child during the period of the abuse and even where—as has happened in a number of cases—the abuse has been perpetrated over many years by a parent or step-parent of a child actually living in the family home with the perpetrator. Since that patently cannot be the law, the presumption of innocence which applies in its full rigour to a criminal trial cannot apply to inquiries of this nature.

The problem with this reasoning is that in assuming that the trial can proceed because the delay was attributable to the accused's own actions, one is in effect in suspending or permitting a temporary reversal of the presumption of innocence.⁶⁰ A number of judgments believed that such a suspension was justified because it struck a proper chord between ensuring that the perpetrators of such crimes did not easily escape trial but also upholding the rights of an accused to a fair trial (the presumption would reapply for the trial of the offences the judicial review determined that the case should proceed). Nevertheless, this reasoning remained problematic, not least because it did not present the constitutional right to a presumption of innocence in its best possible light. The Irish Supreme Court in *S.H.*, drawn upwards in a 'justificatory ascent' in order to resolve the conflict,⁶¹ has now determined that the only relevant question in such cases is whether there is a real or serious risk that the accused by reason of the delay would not obtain a fair trial. The accused benefits fully from the presumption of innocence at all stages of the process, including the judicial review process. Murray CJ noted:

The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case...As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case.⁶²

⁶⁰ C. Hamilton, *The Presumption of Innocence in Irish Criminal Law: Whittling the Golden Thread* (Dublin: Irish Academic Press, 2005), at 57.

⁶¹ R. Dworkin, *Justice in Robes* (London: Harvard University Press, 2006), at 53.

⁶² [2006] 3 IR 575 at 620.

This places the presumption of innocence on a safer footing—again emphasising the importance of integrity over rule book formalism—and indicates that the values underpinning the presumption, at least at a judicial level if not more broadly, continue to resonate and compete for priority in the Irish criminal process.

(ii) Cases involving Terrorism

The use of emergency laws in Ireland has a long history. They have become a habitual part of the legal armoury of the State, creating a dual system of justice. The administration of justice has been affected by the continuous adoption of emergency legislation that circumvents normal due process rights due to the exigencies of the domestic situation. The deviations – suspension of habeas corpus, trial before a non-jury court overseen by military personnel, proscription of organisations, mass internment, direct political control of police operations, increased powers of detention without charge, restrictions on silence, and the use of ‘belief’ evidence – create special zones where normal laws do not apply. They are justified on the basis of the threats posed, and the paralysis of liberal constitutionalism in the light of such threats. The functional necessity of security and public protection in a time of emergency demands this.⁶³ But as we shall see in the following two cases, these instrumental special zones are not entirely beyond the reach of normative conceptions of the Rule of Law.

Damache v The DPP – self substantiating search warrants.

Most statutory powers of entry, search and seizure are still exercisable only on foot of a warrant in Ireland. Where the property to be searched is or includes a dwelling, a warrant is a standard prerequisite given the constitutional protection of the dwelling.⁶⁴ Most warrants also require the authorisation of an independent person, such as a District judge or peace commissioner, before they may lawfully be issued, and such issuing authority must be satisfied that there are reasonable grounds to believe that relevant evidence is to be found in the specified place. There has, however, been some legislative inroads into this principle of independent authorisation in recent years. A number of statutes now permit search warrants to be issued internally in ‘circumstances of urgency’.⁶⁵

⁶³ D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1999), at 39-98.

⁶⁴ See *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 243; *Byrne v Grey* [1988] IR 31

⁶⁵ See s. 14 of the *Criminal Assets Bureau Act 1996*; and section 8 of the *Criminal Justice (Drug Trafficking) Act 1996*.

Standing outside these exceptions is the Offences Against the State Act 1939, which forms a principal pillar in Ireland's quest to combat the menace of paramilitarism. Section 29(1) of the Act provides that 'where a member of the Garda Síochána not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence of or relating to the commission or intended commission of a [relevant] offence is to be found in any place whatsoever, he or she may issue to a member of the Garda Síochána not below the rank of sergeant a search warrant under this section in relation to such place'. Search warrants provided for under section 29 can only be issued in respect of specified offences relating mostly, though not exclusively, to terrorist activity. Despite the lack of independent oversight, the provision was seen as having a 'proven utility in relation to arms finds and related matters'.⁶⁶

The provision was subject to constitutional scrutiny in 2012. Ali Charaf Damache was investigated by An Garda Síochána in relation to a conspiracy to murder Mr. Lars Vilks, a Swedish cartoonist, who had depicted the Islamic prophet Mohammad with the body of a dog, thereby provoking serious unrest in several Muslim countries. A Garda superintendent involved in the investigation authorised a search of Damache's home pursuant to s. 29(1) of the Act of 1939. Arising from evidence gathered during this search, Damache was charged with making threatening telephone calls. He brought an application by way of judicial review seeking a declaration that s. 29(1) of the Act of 1939 was repugnant to the Constitution, on the grounds that the section permitted a search his home contrary to the Constitution, on foot of a search warrant which was not issued by an independent person. On behalf of the state, it was submitted that s. 29(1) of the Act of 1939 is not repugnant to the Constitution, but rather is a legitimate part of the State's armoury to protect itself from offences against the State and against the justice system. The High Court held that the statutory provision was valid. Damache then appealed to the Supreme Court. It held that the provision was inconsistent with the Constitution on the basis that the constitutional inviolability of the home was such that the issuance of a warrant to search a dwelling should adhere to fundamental principles encapsulating an independent decision maker, who was able to assess the conflicting interests of the State and the individual in an impartial manner.⁶⁷

Denham C.J noted:

⁶⁶ T O'Malley, *The Criminal Process* (Dublin: Thomson, 2009), at 367.

⁶⁷ [2012] IESC 11.

The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights.⁶⁸

The Supreme Court protected the right to inviolability of the dwelling, and reasserted the importance of the principle *nemo iudex in causa sua*, by focusing on the lack of independent oversight in the statutory regime provided for under section 29 of the Offences Against the State Act 1939. It did so, despite the evidence in the individual case, despite the ramifications for all cases that had not reached finality in respect of evidence gathered under the section 29 provision, and despite the ramifications for all prosecutions that planned to rely on evidence gathered under the section 29 provision as it then existed.⁶⁹

People (DPP) v Colm Murphy – the Omagh bombing, police interview notes and previous convictions.

On the 15th August, 1998, a car bomb exploded at Market Street, Omagh, County Tyrone, Northern Ireland, which resulted in one of the worst atrocities of 'the troubles', with 29 fatalities and over 300 injured. It occurred at a time when the town was crowded with shoppers and visitors. Telephone warnings had been given shortly before the explosion, but the location of the car bomb was wrongly stated in the warnings, in consequence of which people were moved from the area where the bomb was stated to be to the other end of the town where in fact, unknown to the police, the bomb was situated and duly exploded.

Colm Murphy, a 'known dissident republican terrorist', was charged with conspiracy to cause the Omagh bombing contrary to section 3 of the Explosive Substances Act 1883. Following his arrest on 21st February, 1999, the accused was detained at Monaghan Garda Station for three successive periods of 24 hours. He made admissions in the course of being interviewed. During questioning, however, two Garda (police) officers tampered with written interview notes and were found to have lied under oath. The non-jury trial court, the Special Criminal Court, dealt with this issue at the close of the prosecution case by declining a request for a direction but by altogether excising the evidence and

⁶⁸ Ibid, at 281.

⁶⁹ See D. Kenny, 'Grounding Constitutional Remedies in Reality: The Case for As Applied Constitutional Remedy In Ireland' (2014) 37(1) *Dublin University Law Journal* 53.

interview notes compiled by the two Gardaí from the body of evidence to which the court would have regard. It did not find however that the behaviour of the two Gardaí tainted the conduct of other officers who formed part of the interrogation team or that there was any basis for finding that a more widespread involvement of the investigation team in these improprieties had taken place. The accused was found guilty and sentenced to 14 years' imprisonment. In delivering judgment, the Special Criminal Court went on to note as follows:

The court is satisfied that the following facts which have been proved in evidence beyond a reasonable doubt are collectively corroborative of the accused's confessions of guilt regarding his part in the conspiracy to plant and detonate the Omagh car bomb...

7. The accused is a republican terrorist of long standing having been convicted of serious offences of that nature in this State and in the United States of America for each of which he served prison sentences.

In the light of that background and his membership of a dissident terrorist group in Ireland which is not on ceasefire, he is person (sic) likely to be involved in terrorist activities of the sort charged against him.⁷⁰

On appeal, Murphy argued, *inter alia*, that the Special Criminal Court failed to either grant a direction or acquit the accused when there was before the court evidence that police witnesses had altered notes of written interviews and had lied under oath, and that it breached his entitlement to a presumption of innocence by having regard to inadmissible evidence of previous convictions. The Court of Criminal Appeal overturned his conviction on both of these points. In respect of the issue of the alteration of notes, it held:

We do not consider that the court of trial brought to the issue of the possible contamination of evidence or to the evaluation of the surviving garda evidence that degree of extra critical analysis which was surely warranted... The court feels compelled for this reason to set aside the conviction as unsafe.⁷¹

In relation to the trial court's reference to previous convictions, it noted:

⁷⁰ (Unreported, Special Criminal Court, 22nd January, 2002, at 40-41.)

⁷¹ *People (DPP) v Colm Murphy* 2 IR [2005] 125 at 146.

To have regard to previous convictions in respect of which no admissible evidence was tendered and where no grounds for doing so were established can only be seen as a significant erosion of the presumption of innocence...While this was not a jury trial where the risk of prejudice would be glaringly obvious, it is impossible to avoid the conclusion that the previous convictions and bad character of the accused (as so found by the court) formed a significant element in the courts decision to convict... This court is therefore of the view that the conviction of the accused is unsafe and unsatisfactory for this reason also.⁷²

The court therefore set aside the conviction of the accused on both of those grounds.

A reading of these cases reveals much more than the operation of blanket instrumentalism. The reasoning put forward demonstrates a way of knowing that cannot be understood in terms of a post constitutional security state working entirely beyond the constraints of the Rule of Law, or of the decline of judicial governance more generally.⁷³ Instead the findings demonstrate the continued appeal of deontological considerations and principles, operating to uphold rights, despite the very unpleasant consequences. They reveal evidence of judges 'directed by principles embedded in the law as a whole, principles that adjudicate which consequences are relevant and how these should be weighted, rather than by their own political or personal preferences'.⁷⁴ If anything, when viewed in their entirety, these cases reveal a contradictory mix, where Rule of Law and Rule by Law elements sit alongside each other in a fluid arrangement, rather than presenting as mutually exclusive options. The extra-judicial/political v the juridical/constitutional operate as parallel systems – though involved in a constant dialective – rather than fitting in to neat schisms presented under culture of control analyses. Instead of seeking to align such practices with security and control master patterns only, it is better, as Agamben notes, to view it 'as a double structure, formed by two heterogeneous yet coordinated elements: one that is normative and juridical in the strict sense...and one that is ...metajudicial'.⁷⁵

What insights can cases of this kind offer?

⁷² Ibid, at 150.

⁷³ J. Simon, *Governing Through Crime* (Oxford: Oxford University Press, 2007), 111-140.

⁷⁴ D Dworkin, above n. 61, at 104.

⁷⁵ G. Agamben, *States of Exception* (London: University of Chicago Press, 2005), at 85-86.

The findings in *CC* (the right not to be criminalised for mentally blameless conduct), *SH* (the right to have the presumption of innocence apply at all stages of the criminal process), *Damache* (the need for independent oversight in protecting the right to inviolability of the dwelling), and *Murphy* (the possible contamination of evidence and the need to exclude evidence of previous convictions of the accused as probative of his guilt) demonstrate the continued resonance and ‘gravitational force’ of a rights-based conception of the Rule of Law, and its capacity to continue to compete for priority and act as a counterpoint to the supremacy of the paradigm of control. An explicit appeal to crime control alone cannot therefore give meaning to all events and decisions in the Irish criminal justice system, particularly given that the criminal process is not simply at the disposition of political policies.

Of course in recent years it is arguable that Ireland has also witnessed the emergence of many crime control tendencies in its approach to serious offending. In relation to sexual offences, this includes increases in the maximum sentences available for sexual assaults, the introduction of a tracking system with notification requirements, civil provisions for the making of sex offender orders, mandatory obligations to provide employers with information on previous sexual offences in certain circumstances, a lack of treatment programmes, and a failure to release an individual after the law upon which he was found guilty had been declared unconstitutional.⁷⁶ In a sense, a focus on Ireland’s approach to serious offences like those involving sex crime reveals a contradictory duality at play between the embedded nature of older modernising commitments and newer orthodoxies of control, security and public protection.

The problem with discourse on the control elements inherent in the criminal justice system is that it takes for granted the privileged, unifying position of public protection and security over the rights of those accused of crime. There is a tendency in such dystopian discourse to accept unconditionally the arrival of ‘unvarnished authoritarianism’, and the notion that ‘protection *from* the State’ has been replaced by ‘protection *by* the State’.⁷⁷ In painting this picture of the criminal process, control theorists concentrate almost exclusively on legislative function (acting upon policy considerations) and ignore the sometimes conflicting narrative of entrenched rights based discourse and judicial

⁷⁶ S. Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland*. (Dublin: Institute of Public Administration, 2004), 149. See *A v Governor of Arbour Hill Prison* [2006] IESC 45.

⁷⁷ D. Garland, above n. 6, at 12.

craft (very often acting in ‘hard cases’, upon ‘principle’ and the protection of rights against governmental interference). Both are qualitatively and functionally distinct.⁷⁸ Modern liberal political systems are often defined by a system of checks and balances on the organisation of government, and entrenched legal rights which are safeguarded by an independent, and largely unchecked, judiciary that cannot simply be dismissed as a mere instrument of more majoritarian institutions such as the executive or legislative assembly. All of this constitutes ‘a government of laws, and not of men’, with judges, protected from interference, supposedly acting as impartial arbiters. Control theorists adopt a narrow instrumental conception of law as simply a conduit for the attainment of governmental goals (Rule *by* Law). In doing so, they ignore the extent to which the Rule *of* Law—particularly the manner in which the principle of separation of powers restricts freedom of manoeuvre—is orientated towards furnishing societies with a ‘baseline for self-directed action’.⁷⁹

In interpreting cases, judges will be guided by the gravitational pull of earlier decisions as part of a process for adjudicating and certifying truth claims. In liberal societies, this will often be infused with visions of fairness, welfare, and respect for human dignity operating either as deontological constraints or simply as principles or justifications underpinning various precedents. As Dworkin notes, judges are often required—like interpretation within a chain novel—to make their decisions, in part, from an interpretation that both fits and justifies the institutional constitutional history of their society. This not only relates to a narrow rule based understanding of the rights and duties that flow from past collective decisions in the relevant disputed area, but also incorporates, more broadly, ‘the scheme of principles’ that justify them.⁸⁰ They can identify unenumerated rights, expand existing rights to incorporate unforeseen issues, revise them in the light ‘of fresh moral insight’, and re-examine common law and legislative provisions in the light of the Constitution and the European Convention on Human Rights striking down anything which is not compatible.⁸¹ These principles continue to comprise of a matrix of values and assumptions that are associated with the essence of liberal society.

⁷⁸ R. Dworkin, above n. 48, 82-92. Cross fertilisation does, however, occur in that the legislature can from time to time engage in the protection of rights and the judiciary can also engage in policy making.

⁷⁹ L. Fuller, *The Morality of Law*. (New Haven: Yale University Press, 1969), at 210.

⁸⁰ R. Dworkin, above n. 50, at 227.

⁸¹ More generally, see P. Roberts, ‘Normative Evolution in Evidentiary Exclusion: coercion, deception and the right to a fair trial’ in P. Roberts and J. Hunter, eds., *Criminal Evidence and Human Rights: reimagining common law procedural traditions* (Oxford: Hart Publishing, 2012), pp. 163-194.

The significance of the distinction between the judiciary and the legislature should not be underestimated, particularly in jurisdictions that accept that constitutional and human rights jurisprudence are higher up the hierarchical pecking order than parliamentary legislation. As Packer noted about the distinction:

Because the Crime Control Model is basically an affirmative model, emphasising at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is the judicial power and requires an appeal to supra-legislative law, to the law of the Constitution.⁸²

Control theorists have a tendency to elide the two in presenting this perceived drift towards more absolutist control. In doing so, they fail to appreciate that arguments of policy, specifying what is perceived to be in the public interest, are normally the concern of the legislature, not the judiciary. Moreover, they also fail to appreciate that it is the provisions of the Constitution and judicial interpretation of same (and the European Convention on Human Rights) rather than the concerns of the legislature that are the overriding word in any dispute about the rights of the accused.⁸³ Once enshrined in a constitutional document, a right is conferred with an immunity against legislative change, in effect ‘disabling the legislature from its normal functions of revision, reform, and innovation in the law’.⁸⁴ These rights, and their interpretation by the judiciary, qualify and limit collective justifications and strategies emanating from ‘the conscience of majoritarian institutions’.⁸⁵

This may give rise to the ‘counter-majoritarian paradox’—constitutions proclaim popular sovereignty but permit a non-elected group of individuals, the judiciary, to override what ‘the People’ might

⁸² H. Packer, above n. 9, 173.

⁸³ B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004), at 105.

⁸⁴ J. Waldron, ‘A Right-Based Critique of Constitutional Rights’, (1993) 13(1) *Oxford Journal of Legal Studies* 18, at 27.

⁸⁵ R. Dworkin, above n. 50, at 356. Of course, there is scope for Irish citizens to change a constitutional provision through a referendum, as occurred, for example, in 1996 when the grounds for refusing bail in a constitutional referendum were extended. This however is a cumbersome process—but not as cumbersome as it is in other jurisdictions—that has been seldom employed in Ireland in relation to criminal justice issues. Moreover, even if a constitutional right is amended in Ireland, it is not entirely immunized from the power and reach of supranational rights such as those provided for under Articles 3, 5 or 6 of the European Convention of Human Rights.

want—ensuring that ‘the majority cannot travel as fast or as far as it would like’.⁸⁶ It remains however a secure part of constitutional democracies because it ensures that individual citizens are not subject to populist and myopic penal politics by legislatures, who mindful of the need to secure re-election, are all too ‘susceptible to the influences of the short-term’, and ‘too liable to violent swings and panic measures’.⁸⁷ As Tocqueville phrased it, ‘the courts correct the aberrations of democracy’,⁸⁸ better ensuring that all citizens are accorded equal concern and respect. This is something often overlooked or downplayed in control literature. In Western democracies, it is the courts that have been assigned the power to detect constitutional and human rights violations, with the authority to override any authority, including representative institutions like the legislature, that commit them. Moreover, as ultimate decision-makers, they are likely to preserve rather than reject this tradition.

Of course, in suggesting this, we should be very wary of pursuing a progressive agenda that views the judiciary with rose tinted glasses, as the infallible protectors of rights. It is true that judges can, on occasion, engage in policymaking and interpret facts, principles, rules and rights in ways that support populist sentiments and control orientated goals (indeed it can be argued that the finding of the Special Criminal Court in *Colm Murphy* was consequentialist in approach). Irish courts can also be overly deferential when it comes to evaluating legislative decisions about what the Constitution means. There is also of course the danger of over idealising liberal constitutionalism and legalism, and of over emphasising the capacity of rights to act as a check on State power. It is undoubtedly true that many rights and safeguards are often contingent upon interpretation, are inherently limiting, provoke widespread disagreement about their weight (and the interests identified as rights), and do not always ‘proactively direct the law making process’.⁸⁹ Liberal rights and safeguards also have the capacity, as communitarians argue, to ‘atomise’ the legal subject at the expense of any responsibilities that he or she might have to the community. Rights-based discourse also does little to facilitate popular political participation and is, in general, uncomfortable with majoritarian forms of decision-making and democratic institutions that are concerned with collective welfare.⁹⁰ It is

⁸⁶ R. Dworkin, above n. 48, at 204.

⁸⁷ J. Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), at 260.

⁸⁸ A. de Tocqueville, *Democracy in America* (New York, Harper and Row, 1969 repr.), at 287.

⁸⁹ A. Hunt, ‘Evaluating Constitutions – The Irish Constitution and the Limits of Constitutionalism’ in T. Murphy and P. Twomey (eds) *Ireland’s Evolving Constitution: 1937-1997* (Oxford: Hart Publishing, 1998), 326; see also L. Campbell, above n. 4, at 571.

⁹⁰ J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), at 212-213.

not my intention to over idealise or eulogise about the safeguards that have been created for those accused of crime. The liberal ideology of legalism and constitutionalism is not without its problems. Nor is its hegemonic position as secure as it once was. As Loader has noted:

Liberal elitism made sense in, or was at least fitted to, a world where crime was less prevalent an act and more settled as a cultural category; a world where people evinced trust and deference towards social authority and had more patient expectations of government; a world marked by greater equality and solidarity and less ambient precariousness and insecurity. Such an outlook speaks less well to a society where crime has become a recurrent feature of everyday life; where the anxieties and demands it generates are widely and excitedly disseminated by the mass media; where reduced levels of trust in the institutions of government coincide with heightened public demands of them; where consumerism threatens to eclipse citizenship as the organizing political principle—and symbol of belonging—of the age.⁹¹

Conceding these points, however, does not permit ‘structural’ commentators to close themselves off from the continued appeal of constitutionalism, legalism, human rights, the internal logic of law, and judicial craft, all of which remain strongly imbricated in the cross-currents of the Irish criminal justice system.

Conclusion

This paper has been concerned with some of the ‘everyday’ of legal life - such as fidelity to precedent, ‘rights as trumps’, and the last authoritative voice possessed by the judiciary in the justice system. Though it may appear molecular and mundane, this engagement with doctrinal reasoning, rights, and the interpretation of legal provisions is a valid ‘space of action’⁹² within the criminal process. Its reality, however, is often downplayed in analyses that favour the sharp cut of binary distinctions. Though such analyses play an important role in permitting us to see the wood from the trees, and elevating lawyers out of black-letter, technocratic details, much can be lost in pursuing the logic of juxtaposition too far.

⁹¹ I. Loader, ‘Fall of the ‘Platonic Guardians’: Liberalism, Criminology and Political Responses to Crime in England and Wales’ (2006) 46(4) *British Journal of Criminology* 561, at 581.

⁹² N Rose, *Powers of Freedom: reframing political thought* (Cambridge: Cambridge University Press, 2008 repr.), at 280.

What has been lost for the purposes of this paper is the reality that legal and constitutional liberalism continues to provide institutional and epistemic authority in Ireland which cannot easily be dismissed or circumvented. Its absence from crime control literature, particularly its confinement to discontinued 'modern' ways of doing things, should be of concern to anyone exercised by 'the nature of our present'. This absence demands the employment of more heterogeneous 'structural' accounts of the criminal process which embrace more fully the contradictions and dualities at play, the contestations, the struggles around what is permissible, the limited room for manoeuvrability, and the internal structure of institutional practices.

Such accounts can reveal the complex diversity that lies behind the illusory and unifying comfort of 'fashionable labels', demonstrating the difficulties that binary divisions can have on our thinking. Binaries, though very useful as heuristic devices in the criminal process, can carve practices along artificial lines which do not replicate the messiness of practice. They paint pictures of singular simplicity, of unopposed authoritarianism where safeguards, limitations, and liberal values and cultures are downplayed.

Rather than persisting with essentialist binaries, it may be better to view the criminal justice system as comprising of mutually constitutive parts, where several, somewhat contradictory, principal features can co-exist together. Such a pluralist approach can more properly account for the ways in which the justice system in the early 21st century in Ireland is becoming more disaggregated and more contradictory. It is more principled but also more repressive, more instrumental but also more expressive. It involves more normative legitimacy for rights based discourse, as I have sought to show in this article, but also continues to embrace 'sites of exception'. It is more inclusionary in seeking to accommodate victims, witnesses and local communities but also more exclusionary through, among other things, the expressive tone adopted in respect of offenders and those accused of crime. It is more supra-national but also more local. It involves more monopolised criminal control but also more fragmentation and blurring of boundaries. It continues to emphasise adversarialism, but it also increasingly encourages fact-finding beyond the courtroom. It is more focused on the socially excluded, but is also embraces regulatory strategies that target white collar wrongdoing. All of these 'structural' phenomena do not neatly align with dystopian or progressive agendas, or comfortably fit

within the cuts produced by binary labels. They are, nonetheless, real elements of 'our present'.