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in co-operation with  
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**SEMINAR**  
**ON THE OCCASION OF THE**  
**5<sup>TH</sup> PLENARY OF THE UACCC SCIENTIFIC SYMPOSIUM**  
**ON**  
**“FAIR TRIAL”**  
**Saana, Yemen**  
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**REPORT**

**“Fair Trial in Ireland”**

by  
**Mr James HAMILTON**  
**(Substitute Member, Ireland)**

The 1937 Constitution of Ireland is superior to other sources of law namely common law, statute laws or international conventions. The High Court and the Supreme Court are effectively guardians of the Constitution and are empowered to declare invalid any laws which are in conflict with its provisions. Much of the Constitution is drafted in a minimalist manner so that room is left for interpretation in light of contemporary values and ideals. One commentator describes this dominant feature of Irish constitutional jurisprudence by saying that:

“...this approach recognises the contingent, evolutionary, and fluid nature of the law and, consequently advances and ensures the critical role of the judiciary in interpreting the Constitution and the law and in, effectively, creating a “meta-Constitution” based on judge made law...in practice this has meant that the High and Supreme Courts, in exercising their interpretative powers, have fleshed out the Constitution and plugged many of its obvious gaps, particularly in the area of criminal justice procedures.”<sup>1</sup>

This is especially true with regard to Article 38.1 of the Constitution. Article 38.1 is the primary article dealing with the trial of offences, it states that:

“No person should be tried on any criminal charge save in due course of law.”

The constitutional courts which are the High Court and the Supreme Court have interpreted and ‘fleshed out’ this phrase so that there now exists a large number of rights and safeguards in the area of criminal law and procedure.

In interpreting the rights that accord with a trial in due course of law the courts have been open to the influence of other sources of law where these other sources also recognise that an accused person should be entitled to at least minimal procedural guarantees. For example, in a decision on the presumption to innocence and the burden of proof, *O’Leary v. Attorney General*<sup>2</sup> the High Court interpreted the Constitution in light of internationally recognised principles. Costello J. stated:

“I have little difficulty in accepting the basic contention on which these arguments are posited and in construing the Constitution as conferring on every accused in every criminal trial a constitutionally protected right to the presumption of innocence. This right is now widespread and indeed enjoys universal recognition. Article 11 of the United Nations Universal Declaration of Human Rights, 1948, provides that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law . . .”: Article 6 (2) of the European Convention on Human Rights and Fundamental Freedoms, 1950, provides that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”: Article 8 (2) of the American Convention on Human Rights, 1969, prepared within the Organisation of American States provides that “Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law.”: Article 7 of the African Charter on Human and Peoples’ Rights provides that every individual has the right to have his cause heard and declares that this, inter alia , comprises “the right to be presumed innocent until proven guilty by a competent Court or tribunal.”<sup>3</sup>

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<sup>1</sup> Paul O’Mahony (ed) “*Criminal Justice in Ireland*” (Dublin: IPA, 2002) at p. 76

<sup>2</sup> [1993] 1 IR 102

<sup>3</sup> [1993] 1 IR 102 at 107

As the Irish legal system is part of the common law tradition its rules have long informed decisions of the courts with regard to Article 38.1. For example in *Knowles v. Malone*<sup>4</sup> the High Court undertook an analysis of the common law roots of the right to a trial with reasonable expedition. In the case of *Enright v. Ireland*,<sup>5</sup> a case considering the constitutionality of sex offender notification orders, the High Court found that Article 38.1 precludes any retrospective increase in sentence stating that the: “unswerving acceptance of such a principle which has long historical origins supports the view that this is a long recognised and established right in relation to criminal trials in the common law world.”<sup>6</sup>

The Council of Europe<sup>7</sup> drafted the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1950 which provided for the establishment of the Court of Human Rights. The Convention and the case law of the European Court of Human Rights have had considerable persuasive value in the Irish courts.<sup>8</sup> Article 6 of the Convention details the right of an accused person to a fair trial. The Convention was incorporated into domestic law in Ireland, albeit at a subconstitutional level, by the European Convention on Human Rights Act 2003. The Act dictates that every organ of the State must perform its functions in a manner compatible with the State’s obligation under the Convention. The Act states that the High Court and the Supreme Court may, in any proceedings, make a declaration that a statutory provision or rule of law is incompatible with the State’s obligation under the Convention provisions. Such a declaration may give rise to an *ex gratia* payment of compensation to the applicant however it will not affect the “validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made.”

Ireland ratified the International Covenant on Civil and Political Rights (CCPR) in 1989. Although it has never been incorporated into Irish law the Irish constitutional courts often refer to its provisions when identifying rights under Article 38.1. Since signing the CCPR the UN Human Rights Committee, as part of its function to monitor the progress made in improving respect for civil and political rights, has released two reports on Ireland (in 1993 and 2000). A third report is forthcoming. Many of the rights recognised in the CCPR are rights which the Irish courts have found to be protected under Article 38.1. This will be apparent when discussing individual rights later.

The Irish courts have also looked to U.S constitutional jurisprudence for guidance in specifying rights inherent in the guarantee of a trial in due course of law as many of the protections and safeguards identified under Article 38.1 are enumerated in the American Bill of Rights.<sup>9</sup>

In order to identify the protections, rights and principles that the constitutional courts have held to be imperative for a ‘trial in due course of law’ it is necessary to look at the extensive body of case law on the Article 38.1.

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<sup>4</sup> Unreported, Court of Criminal Appeal, 6<sup>th</sup> April 2001, McKechnie J.

<sup>5</sup> [2003] 2 IR 321

<sup>6</sup> *Ibid* at p. 331

<sup>7</sup> The Council of Europe is an institution that was established after World War II in an attempt to prevent the mass violation of human rights which had occurred during the war. The Council has 47 member states.

<sup>8</sup> Ireland became a member of the Council of Europe in 1949.

<sup>9</sup> *Heaney v. Ireland* [1994] 3 IR 593 at 605 - 606

To begin with a person cannot be charged with a crime unless that crime is one recognised in law. In *King v. Attorney General*<sup>10</sup> the Court held that “a person may be convicted of a criminal offence only if the ingredients of, and the acts constituting, the offence are specified with precision and clarity”.<sup>11</sup> If the decision is made to prosecute a person must be informed of the nature and cause of the charge promptly, in detail, and in a language which is understood.<sup>12</sup> Similar protections are provided for under Article 14(3)(a) of the CCPR and Article 6(3)(a) ECHR.

Once charged with an offence an accused person has, by virtue of Article 38.1, the right to be tried without undue delay. In the seminal decision on the issue, *State (O’Connell) v. Fawsitt*,<sup>13</sup> the accused who had first been charged in 1981 was not tried until 1985. There was no valid reason put forward for the inordinate delay. The delay was prejudicial to the accused because when his case finally came to trial an important defence witness was no longer available. The Court explicitly held that Article 38.1 guaranteed the right to a trial with reasonable expedition and found on the facts of the case that the accused could not be guaranteed a fair trial. The problem of delay arises most commonly in historic sexual abuse cases. Recently in *H v Director of Public Prosecutions*<sup>14</sup> the Supreme Court considered the jurisprudence in cases of alleged child sexual abuse where there has been a significant delay between the alleged abuse, the complaint and the preferment of charges. The Court held that a key issue was the constitutional right to a fair trial. It was held that the fact that the delay on the part of the victim in making the complaint to the State was not of itself a ground upon which the State should refuse to bring a prosecution. The prosecutor must decide whether there is evidence of sufficient weight to warrant a charge being preferred and whether a fair trial can be afforded to the accused person. Article 4(3)(c) CCPR and Article 6(1) ECHR acknowledge this right.

An accused is to be presumed innocent until the contrary is proven. The Supreme Court has accepted that the presumption of innocence was a necessary component of a trial in due course of law pursuant to Article 38.1.<sup>15</sup> A necessary consequence of the presumption of innocence is the placing of the burden of proof on the prosecution so that the prosecution must establish the guilt of the accused and if a defence is raised the prosecution must disprove the defence rather than the accused proving it. There are exceptions to this principle for example the defence of insanity must be proved by the accused on the balance of probabilities. The Supreme Court in *King v. Attorney General*<sup>16</sup> found that the presumption of innocence had been disregarded. The Court ruled that a provision making it a crime for a “suspected person or reputed thief” to “loiter with intent” was unconstitutional as the offence presupposed that a person was guilty of a crime. Article 14(2) CCPR recognises the presumption to innocence.

The right to silence and the privilege against self incrimination are constitutional rights which

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<sup>10</sup> [1981] IR 223

<sup>11</sup> *Ibid* at 263

<sup>12</sup> *State (Buchan) v. Coyne* [1936] 70 ILTR 185

<sup>13</sup> [1986] I.R. 362

<sup>14</sup> [2006] 3 I.R. 575

<sup>15</sup> *O’Leary v. Attorney General* [1993] 1 IR 102; *Hardy v. Ireland* [1994] 2 I.R. 550

<sup>16</sup> [1981] I.R. 233

are closely related to the presumption to innocence. In *Heaney v. Ireland*<sup>17</sup> there was a challenge to the constitutionality of anti - terrorism legislation which required a suspect to give an account of their movements around the time at which a crime was alleged to have taken place, it constituting an offence not to do so. It was claimed that the section infringed the applicant's constitutional right to silence. The Supreme Court accepted that there is a pre-trial right to silence, stating that such a right exists as a corollary of the right to freedom of expression under Article 40 of the Constitution. However it was held that this right is not absolute and can be encroached upon in the interests of maintaining public peace and order. A test of proportionality must be applied so that any encroachment is proportionate to the object of the legislation. In the instant case it was held that the section was constitutional as the legislative limitation of the right was proportionate to the aim of protecting the public from terrorist related activities. Following the Supreme Court judgment the applicants brought their case to the European Court of Human Rights.<sup>18</sup> They alleged that their conviction for failure to answer questions was a breach of their right to a fair trial under Article 6 of the European Convention on Human Rights, in that it amounted to punishment for invoking their rights to silence and against self-incrimination. The ECtHR upheld this argument and found that the national security concerns expressed by the Irish Government did not amount to a sufficient justification for the measure. It would appear that the legislature is continuing to introduce measures that have the effect of limiting the pre-trial right to silence. The Criminal Justice Act 2007 now provides for circumstances where inferences may be drawn in any subsequent proceedings from a failure by an accused to mention particular facts when questioned by the Gardaí (Irish police) or when being charged with an arrestable offence.<sup>19</sup> The inferences are only to be used as corroboration and cannot be the basis for conviction. Safeguards are contained in the Act, for example the Garda must caution the person in relation to the effect of a failure to mention a particular fact. The constitutionality of the provisions have yet to be tested in the courts. There also exists a right to silence at trial whereby an accused can choose not to testify however he can waive that right.

The privilege against self-incrimination has been given the status of a constitutional right which like the right to silence is a corollary of the right of freedom of expression and any limitation of it is subject to a proportionality test. In the case of *Re National Irish Bank*<sup>20</sup> there was a challenge to a provision in the Companies Act 1990 which provided for company officers to be compelled to answer questions posed by inspectors investigating a company. The bank in question was being investigated for fraud offences. The employees of the bank refused to answer questions claiming that it infringed their right to silence and that they could potentially incriminate themselves. The Supreme Court held that the right to silence could be abrogated expressly or impliedly by statute once a proportionality test was passed but one cannot be compelled to incriminate oneself. Therefore the legislature could restrict the right to silence but could not restrict the privilege against self-incrimination. The employees in this case could be required to answer the questions put to them but the answer to such questions could not be used in evidence against them. Barrington J. in the Supreme Court stated:

“It appears to me that the better opinion is that a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a

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<sup>17</sup> [1996] 1 IR 580

<sup>18</sup> *Heaney v. Ireland* (2001) 33 EHRR 264

<sup>19</sup> An arrestable offence is an offence for which a person can be punished by imprisonment for five years or more.

<sup>20</sup> [1999] 3 I.R. 145

voluntary confession were admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the executive or from the legislature.”<sup>21</sup>

Article 3(g) CCPR recognises the right not to be compelled to testify against oneself or to confess guilt.

An accused person must be given a fair and public hearing by a competent, independent and impartial court established by law.<sup>22</sup> If being tried before a jury an accused has the right to be tried before an impartial jury. An example of the vindication this right is *People (A.G) v. Singer*.<sup>23</sup> The accused was being tried in a complex fraud trial. His conviction was quashed when it transpired that the foreman of the jury was a victim of the fraud in question and a claimant against the accused’ company which was then in liquidation. His involvement in the trial as a juror could not be impartial. Related to this right is the power of a court to prohibit a trial where there has been adverse pre-trial publicity. The task of the courts in this situation is to balance the constitutional right of the accused to a fair trial in due course of law with the constitutional right to freedom of expression. Article 14(1) CCPR and Article 6(1) ECHR recognise the right to an independent and impartial court.

The courts have found that an accused has a fundamental constitutional right to be present at and to follow the proceedings against him.<sup>24</sup> He has the right to be legally represented and, if necessary to be financially assisted in securing such representation.<sup>25</sup> An accused must be given reasonable time and opportunity for the preparation of a defence.<sup>26</sup> He must be furnished by the prosecution with material in its possession that may be that be of assistance to his defence. This principle was stated in *People (DPP) v. Tuite*:<sup>27</sup>

“The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so.”<sup>28</sup>

An accused person must be given the assistance of an interpreter where necessary<sup>29</sup> (Article 14(3)(f)CCPR, Article 6(3)(e)ECHR).It must be possible for the accused to confront his accusers.<sup>30</sup>This right can be qualified when it is necessary to protect vulnerable victims. The

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<sup>21</sup> *Ibid* at 186 - 187

<sup>22</sup> *Eccles v. Ireland* [1985] I.R. 545

<sup>23</sup> [1975] IR 408

<sup>24</sup> *Lawlor v. Hogan* [1993] ILRM 606

<sup>25</sup> *State (Healy) v. Donoghue*[1976] IR 325

<sup>26</sup> *In re Haughey* [1971] I.R. 217 (Article 14(3)(b) CCPR, Article 6(3)(b)ECHR)

<sup>27</sup> (1983) 2 *Frewen* 175

<sup>28</sup> *Ibid* at 180 - 181

<sup>29</sup> *State (Buchan) v. Coyne* [1936] 70 ILTR 185

<sup>30</sup> *White v. Ireland* [1995] 2 IR 268

Criminal Evidence Act 1992 allows the evidence of a child victim of sexual abuse to give evidence in a location outside of the courtroom and to have that evidence broadcast via a live video link. The constitutionality of this provision was upheld in the case of *Donnelly v. Ireland*.<sup>31</sup> The Supreme Court found that an accused does not enjoy a distinct constitutional right to have a witness give evidence and submit to cross-examination in his physical presence. Similar rights are contained in Article 14(3)(e) CCPR and Article 6(3)(d) ECHR.

Having discussed some of the rights and protections that the courts have identified as inherent in the guarantee to a trial in due course of law under Article 38.1 it is necessary to look at the effect of a breach of those rights. The courts have adopted an exclusionary rule whereby certain evidence must be excluded if it is obtained in breach of an accused person's constitutional rights unless there are extraordinary excusing circumstances. If the rights of an accused have been violated in the course of a criminal investigation then by way of vindication the court must exclude evidence obtained as a result of that violation so that the accused is placed in the situation he would have been had those rights not been breached. The seminal case on the exclusionary rule is the Supreme Court decision in *People (AG) v. O'Brien*.<sup>32</sup> At issue was evidence obtained on foot of an invalid search warrant. The evidence obtained was stolen property and the warrant was for the search of a private dwelling. The warrant was deemed invalid because the address on the warrant was incorrect. It was claimed that this amounted to a breach of the defendant's constitutional right to inviolability of the dwelling as guaranteed by Article 40.5. The Court held that in order for evidence to be excluded the breach must be deliberate and conscious. On the facts of the case the error on the part of the police was accidental therefore it was held that there was no deliberate or conscious breach of the constitutional rights of the accused and the evidence obtained was admissible. Subsequently in *People (DPP) v. Kenny*<sup>33</sup> the Supreme Court applied an absolute protection rule whereby it is immaterial whether the person carrying out the breach was aware that it was illegal or amounted to a breach of a constitutional right. The Court's reasoning for an absolute protection rule was:

"To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights."<sup>34</sup>

This principle is of clear relevance to prosecutors when considering what evidence should be presented before the court.

Of assistance to prosecutors in ensuring that the prosecution process is conducted in a fair manner are guidelines for prosecutors. Various guidelines for prosecutors have set out principles which should guide the initiation and conduct of prosecutions. They give general guidelines to prosecutors on the factors to be taken into account at the different stages of prosecutions so that fair, reasoned and consistent policy underlies the prosecution process.<sup>35</sup> These factors will obviously include consideration of whether the accused person's constitutional rights have been respected. Guidelines for Prosecutors in the Ireland were first

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<sup>31</sup> [1998] 1 IR 321

<sup>32</sup> [1965] I.R. 142

<sup>33</sup> [1990] 2 I.R. 110

<sup>34</sup> *Ibid* at 133

<sup>35</sup> Guidelines for Prosecutors Office of the Director of Public Prosecutions Ireland (Revised October 2007) para 2

drafted in 2001. The principles are informed by and based on the U.N. Guidelines on the Role of Prosecutors,<sup>36</sup> by the Council of Europe Recommendation (2000)19 on the Role of Public Prosecution in the Criminal Justice System<sup>37</sup> and by the Standards of the International Association of Prosecutors.<sup>38</sup> The International Association of Prosecutors recognises the prosecutor's responsibility to observe human rights, stating:

"The prosecutor's first duty is to the law of his / her jurisdiction and his / her behaviour must be in conformity with that law. But international human rights law is not irrelevant to the proper discharge of professional obligations, reflecting as it does the standards and requirements of the commonwealth of nations formulated consistently with the *Universal Declaration of Human Rights* of 1948."<sup>39</sup>

Guidelines provide for consistency and transparency, and for the translation of human rights standards from aspirational principles to practical application.

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<sup>36</sup> Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.I at 189 (1990).

<sup>37</sup> Recommendation 2000(19) of the Council of Europe Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, Adopted by the Committee of ministers on 6 October 2000 at the 724<sup>th</sup> meeting of the Ministers' Deputies.

<sup>38</sup> Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Adopted by the International Association of Prosecutors on 23 April 1999.

<sup>39</sup> E. Myjer, B. Hancock and N. Cowdery (Eds.), *Human Rights Manual for Prosecutors*, International Association of Prosecutors, p. 2.