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POLICE ACCOUNTABILITY AND THE IRISH LAW OF EVIDENCE

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Abstract
Common law courts have differed on whether and to what extent an exclusionary rule should be used as a tool to impose standards on the police. The Irish courts have pursued an uncompromising approach in this area. Basing themselves on the imperative of upholding the constitutional rights of the accused, they have been willing to exclude relevant and cogent evidence on the basis that it was obtained by the police in breach of those rights. This article locates the Irish constitutional exclusionary rule in the broader context of the role of the law of evidence in police governance. Citing specific examples from the Irish legislation and case law, it shows how recent legislative interventions and some judicial hesitancy have fuelled inconsistent and contradictory trends. It concludes that there is now a pressing need for reflection on the respective roles of the legislature and the courts in this area.

Introduction

The purpose of this paper is to explore the relationship between the law of evidence and police governance in Ireland. I would like to consider the extent to which evidentiary rules and practices promote transparency, accountability and best practice within law enforcement and the extent to which they undermine these values. The disparate, unstructured nature of the Irish law of evidence complicates the process of assessing its contribution to police governance. The paper will dwell in particular on the attitude of the courts to the propriety of their role in using evidentiary rules as a means of indirectly supervising the police. Account will also be taken of certain legislative initiatives relating to criminal evidence that potentially impact upon the issue of police accountability.

Should the Courts Police the Police?

A good place to begin is the normative question whether promoting police accountability is a proper function of the law of evidence. Historically, the courts adhered to the view that the investigation of offences should be divorced from the trial of offenders. In *Kuruma v R*, Lord Goddard famously stated:

> [T]he test to be applied in considering whether evidence is admissible is whether it is relevant to the matters at issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained. [1955] AC 197.[1]

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[1] Quoted with approval in *AG v McGrath* (1960) 98 ILTR 59. *See also Fox v Gwent Chief Constable* [1985] 1 WLR 1126; *R v Sang* [1980] AC 402; [34; p.118].

Wigmore, among others, supported this approach on the basis that the trial of a criminal suspect is not a suitable forum for resolving incidental questions of wrongdoing on the part of law enforcement [35; para.2183]. The traditional common law view has since given way to a vision of criminal justice as a unitary, seamless process in which police conduct has a direct bearing on the admissibility of evidence at trial.[2] The question remains, however, whether the courts should play a role in police governance and, if so, how active that role should be.

The separation of powers is a central plank in the case against this form of judicial activism. Lord Goddard's understanding of evidentiary relevance voiced in *Kuruma* is rooted in judicial deference to the criminal investigative function of the executive branch and the policy and oversight functions of the legislative branch.[3] While this perception may seem outdated when applied to the investigation of ordinary offences, it continues to resonate in the context of extraordinary offences which threaten the security of the Irish State.[4]

Judicial economy provides a further justification for divorcing the investigative process from the trial process. According to this argument, the conduct of law enforcement officers in the gathering of evidence is secondary at best to the primary issue of the accused's guilt or innocence.[5] Consequently, enquiries into allegations of investigative misconduct are a needless drain on judicial time and resources and distract judge and jury from their respective fact-finding and adjudicative functions. This position finds support in the related argument that other mechanisms outside the trial process exist to tackle this form of wrongdoing and indeed are better suited to the purpose.[6] These include disciplinary procedures, civil proceedings and complaints to the Garda Síochána Ombudsman Commission [33; ch.17, 37, 46].

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2 See, for example, *People (AG) v O'Brien* [1965] IR 142; *Olmstead v United States* 277 US 438 (1928); *R v Collins* [1987] 1 SCR 265; *R v Ireland* (1970) 126 CLR 321; *R v Shaheed* [2002] 2 NZLR 377; *A and Others v Secretary of State for the Home Department* [2006] 2 AC 221.

3 In *R v Collins* [1987] 1 SCR 265, 38 DLR (4th) 508, Lamer J lamented the cost of judicial deference: "… it is true that the cost of excluding the evidence would be high: someone who was found guilty at trial of a relatively serious offence will evade conviction. Such a result could bring the administration of justice into disrepute. However, the administration of justice would be brought into greater disrepute, at least in my respectful view, if this court did not exclude the evidence and dissociate itself from the conduct of the police in this case …"; at p.529

4 See eg *People (DPP) v Kelly* [2006] 3 IR 115 (belief evidence in relation to the offence of membership of an illegal organization under s.21 of the Offences Against the State Act 1939); *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390 (access to legal advice during custodial detention under the Offences Against the State (Amendment) Act 1998); *Heaney & McGuinness v Ireland* [1996] 1 IR 580, [1997] 1 ILRM 117 (offence of failing to account for one's whereabouts under s 52 of the Offences Against the State Act 1939). This approach to evidentiary issues that touch upon national security is consistent with judicial reluctance to review governmental decision-making on war and national emergency. *See eg Horgan v An Taoiseach* [2003] ILRM 357; [20; para.5.1.37]

5 See, for example, *People (AG) v McGrath* (1965) 99 ILTR 59.

6 "It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial." *R v Sang* [1980] AC 402 at 436 (*per* Lord Diplock). *See also Hudson v Michigan* 547 US 586, 126 S Ct 2159 (2006).

The strongest argument in favour of judicial intervention in the face of investigative misconduct lies in the constitutional duty of the courts to ensure that the personal rights of the accused are respected and vindicated [2, 4, 16].[7] If the police infringe a suspect's protected rights, in all likelihood the prosecution will pay an evidentiary price: the evidence may be excluded at trial or, if admitted and relied upon, may render the conviction susceptible to challenge on appeal.[8] This swathe of constitutional protection is buttressed by the increasingly penetrating reach of international human rights law [4].

The need for trial courts to be alert to police wrongdoing also derives from the fundamental concept of fairness within the trial process [28, 34; p.1132]. Whereas the imperative of fair procedures has a constitutional hue, fairness is also a value instilled in the very fabric of routine court practice. Thus, it is prevalent in the strictly adversarial context of civil proceedings where the practice of discovery is guided by considerations of reciprocity and equality of opportunity between the parties [1, 14; ch.10]. On the criminal side, fairness flows from the font of Article 38.1 of the Irish Constitution which guarantees an accused a trial in due course of law [20; para.6.5.66] and the corresponding protection of Article 6 of the European Convention on Human Rights [3].[9] It is reflected in a myriad of evidentiary rules and principles and a residual exclusionary discretion.[10] These imperatives necessarily bring the judicial branch within the spectrum of police governance. Where the vindication of personal rights or adherence to fair procedures trumps police policy or behaviour, it may have the incidental effect of promoting transparency and accountability. As will be seen later, the extent to which the courts engage in this measure of oversight and the enthusiasm with which they embrace the task varies from one context to the next.

Constitutional considerations aside, the need for the trial judges to be alert to the professionalism of the police is also a common sense component of criminal trial practice. Determinations about the admissibility of items of evidence turn more often than not on considerations of relevance and reliability. Enquiries into the reliability of prosecution evidence invariably touch upon the conduct of the gardaí in gathering the information in question. Thus, where police misconduct has a direct bearing on the quality of the evidence presented, the courts must take a stand. The case of *DPP v Murphy* [2005] 2 Irish Reports 125, in which the Court of Criminal Appeal overturned the conviction of Colm Murphy for conspiracy to cause the Omagh bomb, is an extreme example. The Court concluded that the doctoring of interview notes and the giving of perjured testimony by two garda officers rendered the conviction unsafe notwithstanding the remedial action of the trial court in excising the notes and testimony from the body of evidence before it. Indeed, the Court of Criminal Appeal was critical of the failure of the trial court to evaluate the surviving garda

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7 See, for example, *People (AG) v O'Brien* [1965] IR 142; *People (DPP) v Kenny* [1990] 2 IR 210.

8 See, for example, *People (DPP) v Kenny* [1990] 2 IR 210*; R v Collins* [1987] 1 SCR 265, 38 DLR (4th) 508; *Mapp v Ohio* 367 US 643 (1961).

9 See, for example, *Kostovski v Netherlands* (1990) 12 EHRR 434; *Kraska v Switzerland* (1994) 18 EHRR 188; *Khan v UK* (2001) 31 EHRR 45.

10 See, for example, *People (DPP) v Meleady (No3)* [2001] 4 IR 16 at 31.

evidence with the degree of "extra critical analysis" which was warranted given the misconduct revealed at trial [2005] 2 Irish Reports 125 at 146.

In a similar vein, the Supreme Court quashed a conviction for murder in *People (DPP) v Diver* on the ground that the gardaí had failed to record properly a custodial interview with the accused. Hardiman J stated in part:

> I wish to reiterate that the gardaí are not entitled to exercise total editorial control in recording what has been said. Nor are they entitled to cherry pick what is to be recorded. In this case, the omission of a series of denials is utterly unacceptable. It is not that the gardaí are required, when they are relying on written notes of an interview with an accused, to record what an interviewee has said *verbatim.* Regulation 23 requires that the record of the interview be 'as complete as practicable'. It must be a fair record of what was said and it is important to provide sufficient context to allow for an evaluation of what is said, especially where, as here, the accused was allegedly making ambiguous or inconclusive verbal statements and manifesting symptoms of distress. [2005] 3 Irish Reports 270 at 280.

The failure of the gardaí to meet the legal standards pertaining to the recording of the interview crossed the constitutional line of a trial in due course of law. But at the level of ordinary common law, it tainted the evidence itself rendering it unreliable for purposes of admissibility.

Governance in Practice

The Irish law of criminal evidence is grounded in exclusionary rules derived from common law, constitutional and statutory bases. Many of these rules are designed to protect an accused and to promote fairness in the criminal trial but have the additional consequence of promoting police accountability. Judicial adherence to rules and principles of this kind safeguards against wrongful convictions and encourages best investigative practices.

A classic example is the controversial rule against unconstitutionally obtained evidence which, in the Irish context, has generated a vibrant discourse among judges, policy-makers and academics [23, 24; ch.7, 27; para.19.14, 25, 32; ch.9]. In *People (AG) v O'Brien* [1965] Irish Reports 142, the Supreme Court famously broke with the common law tradition and fashioned an exclusionary rule predicated upon the vindication of constitutional rights. Walsh J stated:

> The Courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist, such as the imminent destruction of vital evidence or the need to rescue a victim in peril [1965] Irish Reports 142 at 170.

The need to establish a "deliberate and conscious" breach of rights on the part of the State implied that the Irish exclusionary rule was fashioned with the additional consideration of deterrence in mind. The requirement spawned a divisive line of jurisprudence[11] which was resolved ultimately by the Supreme Court's adoption of "an absolute protection rule of exclusion" in *People (DPP) v Kenny* [1990] 2 Irish Reports 110 at 133. The majority judgment of Finlay CJ made plain that the term "deliberate and conscious" refers to the conduct of the gardaí as opposed to their state of mind. It follows that a court may not admit evidence on the basis that the gardaí were unaware or mistaken or otherwise acting in good faith.[12] The rigour of the Irish exclusionary rule has led to controversy[13] and calls for reforms that would give trial judges a greater measure of discretion in dealing with evidence unconstitutionally obtained [15; pp.160-165 and 286-294].[14]

The law governing the admissibility of confessions provides a related, apt illustration. A trial judge will not permit the prosecution to adduce evidence of a confession unless he or she is satisfied that the confession was voluntary and the product of fair procedures.[15] A confession may also fall foul of the Irish exclusionary rule if it was causatively linked to a breach of the accused's constitutional rights and there were no extraordinary excusing circumstances that would justify its admission.[16] Confession evidence represents a highwatermark in terms of judicial scrutiny of police conduct. *People (DPP) v Healy* [1990] 2 Irish Reports 73 is one in a series of seminal cases in which the Supreme Court addressed directly and in forthright terms the conduct required of the gardaí, in this instance in order to adequately safeguard a suspect's right of access to a lawyer. Finlay CJ stated in relevant part:

> A right of reasonable access to a solicitor in a detained person, I am satisfied, means in the event of the arrival of a solicitor at the garda station in which a person is detained, an immediate right to that person to be told of the arrival and, if he requests it, an immediate access. The only thing that could justify the postponement of informing the detained person of the arrival of the solicitor or of immediately complying with a request made by the detained person when so informed, for access to him, would be reasons which objectively viewed from the point of view of the interest or welfare of the detained person, would be viewed by a court as being valid. I reject completely the submission made [on behalf of the DPP] that the test to be applied to the question of reasonable access is a subjective test in the mind of the jailer of the detained person. The test is whether the superintendent's refusal of access

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[11] See, for example, *People v Madden* [1977] IR 336; *People (DPP) v Shaw* [1982] IR 1; *People (DPP) v Healy* [1990] 2 IR 73.

[12] The Supreme Court decided not to follow the approach in *United States v Leon* 468 US 897 (1984) which was based on the principle of deterrence rather than the principle of absolute protection of constitutional rights. [1990] 2 IR 73 at 130. For a judicial critique of this aspect of the rule, see *DPP (Walsh) v Cash* [2007] IEHC 108 (28 March 2007) (Charleton J).

[13] See, for example, *People (DPP) v Ryan* [2005] 1 IR 209; *Curtin v Dáil Éireann* [2006] 2 IR 556; *Competition Authority v Irish Dental Association* [2005] 3 IR 208.

[14] Criminal Law (Admissibility of Evidence) Bill 2008 (private members bill introduced by the Fine Gael members of the Seanad). See [13, 5].

[15] See, for example, *People (DPP) v Shaw* [1982] IR 1; *Re National Irish Bank Ltd* [1999] 3 IR 145, [1999] 1 ILRM 321.

[16] See, for example, *R v Sang* [1980] AC 402; *People (DPP) v Lynch* [1982] IR 64; *DPP v McCrea* [2009] IEHC 39 (28 January 2009) (Edwards J).

> was a conscious and deliberate act, as it clearly was. The fact that he may not have appreciated that his refusal was a breach of the respondent's constitutional right is immaterial. … [1990] 2 Irish Reports 73 at 81.

Ironically, although almost 20 years have elapsed since the Supreme Court's decision in *Healy*, the affirmative steps required of the gardaí to guarantee respect for the right of access to legal advice remain a source of contention.[17]

Custodial detention is just one context which reflects an inherent imbalance between the respective capacities of the prosecution and defence to gather evidence for use in a criminal trial. Investigations routinely involve the police in the gathering of prosecution evidence which will be rigorously tested by the defence, but the police may also be required to seek out and preserve evidence which may independently assist the defence [18, 32; pp.718-725]. This is just one potentially complex aspect of evidence-gathering which leaves a measure of discretion in the hands of the gardaí subject to a relatively benign form of judicial supervision. Challenges to the duty to preserve are seemingly ubiquitous but successful challenges are rare indeed.[18] This may be attributable to various causes such as the extreme nature of the remedy (an order prohibiting the trial)[19] and a lack of emphasis within our system on the positive evidentiary rights of the defence [17]. The need to address the conditions on the ground that have led to the proliferation of missing evidence cases was implicit in the comments of Denham J in the recent case of *People (DPP) v Savage* [2008] IESC 39. The learned justice issued a common sense direction to the gardaí in the following terms:

> It would be best practice for An Garda Síochána to give notice, to inform an accused, or a potential accused, of the intention to destroy a vehicle or evidence which may reasonably be materially relevant to a trial, giving such person time to have the vehicle, or evidence, examined, if they so wished. Such a notice could be served at the same time as a Notice of Intention to Prosecute. The notice could inform of the place where the vehicle was, that it could be examined, and of the intention to destroy the vehicle at a future date, perhaps one month hence. The receipt of such a notice, at the same time or shortly after the Notice of Intention to Prosecute, would alert a person to the situation and give time to have the car examined if they so wished, or to make a reasonable request that it not be destroyed. [2008] IESC 39.[20]

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[17] For recent decisions on point *see DPP v McCrea* [2009] IEHC 39 (28 January 2009) (Edwards J); *DPP v Creed* [2009] IECCA 85 (31 July 2009); *DPP v Gormley* [2009] IECCA 86 (27 July 2009); *People (DPP) v AD* [2008] IECCA 101 (25 July 2008). *See also People (DPP) v O'Brien* [2005] 2 IR 206; *People (DPP) v Buck* [2002] 2 IR 268.

[18] See, for example, *McGrath v DPP* [2003] 2 IR 25; *Braddish v DPP* [2001] 3 IR 127; *Murphy v DPP* [1989] ILRM 71.

[19] See, for example, *Dunne v DPP* [2002] 2 IR 25; *Z v DPP* [1994] 2 IR 476.

[20] Denham J elaborated further in *People (DPP) v Ludlow* [2008] IESC 54 (31 July 2008): "In general, if it is critical evidence of a serious road accident, steps should be taken to preserve the evidence until trial, or until the accused (who may not be the owner) had had time to have the evidence examined by his experts. … Just as it would not be appropriate to return a bloody knife at the scene of an assault to its owner, until DNA or other forensic evidence is taken, so too would it be best practice not to return defective tyres to their owner at the

The Irish law of evidence is sprinkled with other less prevalent examples of judicial governance such as the principle that a witness may not identify an accused in court in the absence of evidence that the gardaí conducted an appropriate pre-trial identification procedure [21, 24; pp.185-208; 32; pp.869-872].[21] The formal identification parade with its attendant safeguards constitutes the norm but in exceptional circumstances the gardaí may have recourse to identification procedures of a more informal nature.[22] Much judicial ink has been spilled over when and how informal parades should be conducted.

People (DPP) v O'Reilly [1990] 2 Irish Reports 415 provides one colourful example. An 81-year-old woman had been the victim of a theft in her home. About two months after the crime, she was brought by the gardaí to the local town where, from the vantage of a garda car, she tentatively identified the accused from a group of 5 people who entered the courthouse from the street. "I think that's him here" she said "I didn't get a good look at him". An hour later, a group of 4 persons emerged from the courthouse and the woman declared: "That's him, that's him, the fellow with the ugly face". At trial, one of the garda officers was cross-examined as to why no identification parade had been held. He stated that in his 23 years in the guards he had never had occasion to hold an identification parade.[23] He also expressed his view that an informal parade was far more beneficial to a defendant. In the Court of Criminal Appeal, O'Flaherty J concluded that the explanation for not holding a formal identification parade was less than satisfactory. He noted that the decision as to what is most beneficial for an accused in the preparation and conduct of his defence must be primarily a matter for the accused and his legal adviser.

O'Reilly is also instructive in so far as it is one of many instances in which a court tempers its criticism of the gardaí with an acknowledgement that they acted in good faith. O'Flaherty J stated that the court was in no doubt that the garda officer in question "acted out of a dutiful though mistaken conception as to what was right and proper in the circumstances of this case."[24]

Judicial and Legislative Reticence

At the same time, not all rules and practices promote police accountability; on the contrary, closer scrutiny of the Irish law of evidence reveals a panoply of principles, procedures and practices which may undermine transparency and condone abuses.

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scene of a serious road traffic accident, or to enable them to be destroyed until an accused or relevant party has had an opportunity to have them analysed." For an earlier view, see *McGrath v DPP* [2003] 2 IR 25.

[21] See, for example, *People (DPP) v Cooney* [1997] 3 IR 205, [1998] 1 ILRM 321; *People (DPP) v Cahill & Costello* [2001] 3 IR 494.

[22] See, for example, *People v Martin* [1956] IR 22; *People (DPP) v Duff* [1995] 3 IR 296; *People (DPP) v Cahill & Costello* [2001] 3 IR 494; *People (DPP) v Lee* [2004] IECCA 18 (20 July 2004).

[23] When questioned by counsel for the accused, the garda officer could not describe any of the other individuals who passed into and out of the courthouse at the relevant time: [1990] 2 IR 415 at 420.

[24] *Ibid*.

It is noteworthy that several of these measures are legislative in origin. A notable example is the caveat, which appears in various enactments including the Criminal Justice Act 1984[25] and the Criminal Justice (Surveillance) Act 2009,[26] that failure on the part of the gardaí to adhere to prescribed standards shall not necessarily render any evidence obtained inadmissible.[27] Provisos of this kind walk a fine line between the need to ensure respect for the substance of regulatory regimes and the desire to spare the gardaí from slavish adherence to requirements that may be perceived to be technical in nature. It is the task of the trial judge to determine which side of that line a particular failure to observe a regulation falls[28] and there are notable examples in the reported cases of appellate courts upholding decisions to overlook breaches of the regulations.[29] Nevertheless, *People (DPP) v Diver* [2005] 3 Irish Reports 370, noted above, may be indicative of a willingness on the part of the courts to engender greater respect for the regulations by analysing breaches against the yardstick of the overall fairness of the trial.

Other restrictions on police accountability flow not from express statutory terms but from the manner in which the courts have interpreted the legislation. A recent example is the controversial endorsement by the Supreme Court in *People (DPP) v Boyce* [2009] 1 Irish Law Reports Monthly 253 of the taking of forensic samples outside the statutory framework. A majority of the court held that the common law powers of the gardaí to take and retain forensic samples survived the enactment of the Criminal Justice (Forensic Evidence) Act 1990. The implication is that the gardaí can sidestep the conditions and safeguards set out in the Act and its regulations through the expedient of asking a suspect to 'volunteer' a sample for purposes of forensic testing.[30] In a trenchant dissent, Fennelly J remarked:

> Did the Oireachtas intend to lay down a regime which was to apply, where samples are taken by consent from persons in custody, while the gardaí could simply ignore that regime by seeking consent based on common law? That would be absurd. It would be inherently inconsistent and potentially unfair.

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25 Section 7(3), referring to failures on the part of the gardaí to observe provisions of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.

26 Sections 13(3) & (4).

27 See also s 24(7) of the Criminal Justice Act 1984 regarding non-compliance with the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulation 1997; s 118 of the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010 (No2 of 2010) regarding non-compliance with the Bill and any regulations or codes of practice adopted thereunder.

28 In *DPP v Spratt* [1995] 1 IR 585, [1995] 2 ILRM 117, O'Hanlon J interpreted s.7(3) of the Criminal Justice Act 1984 as meaning that "non-observance of the regulations is not to bring about automatically the exclusion from evidence of all that was done and said while the accused was in custody." See also *People (DPP) v McFadden* [2003] 2 IR 105 in which Keane CJ suggested that the appropriate test was whether the breach of the regulations was so "trivial and inconsequential" as not to affect the lawfulness of the suspect's detention or the admissibility of any statements made.

29 In relation to the 1987 Garda Custody Regulations *see eg DPP v Spratt* [1995] 1 IR 585, [1995] 2 ILRM 117; *People (DPP) v Connell* [1995] 1 IR 244; *People (DPP) v Darcy*, unreported, Court of Criminal Appeal, 29 July 1997. In relation to the Electronic Recording Regulations *see eg People (DPP) v Michael Murphy* [2005] 4 IR 504; *People (DPP) v Cunningham* [2007] IECCA 49 (24 May 2007); *DPP v PA* [2008] IECCA 21 (21 February 2008).

30 This practice was criticised by the Law Reform Commission [22; para 2.24].

> The key fact is that the person from whom the sample is taken is in custody. In matters of criminal law and procedure, the courts lean towards interpretations of statutory provisions which favour the rights of the accused person. In the present case, there is the additional factor that the Garda Síochána had laid it down as a matter of policy that consent should be sought outside the scope of the Act and that, only in the event of refusal, should the statutory procedures be applied [2009] 1 Irish Law Reports Monthly 253 at p.283.[31]

Ironically, advances in technology have compounded the contradictory trends in the relationship between the law of evidence and police accountability. Technologies such as DNA hold the promise of greater transparency and objectivity in the investigation of offences. However, the generation of scientific evidence and its incorporation within the trial process can itself result in obfuscation and the infringement of rights. The decision of the European Court of Human Rights in *S and Marper*[32] is a telling reminder of the need for State authorities to tread carefully when marshalling technology to the engine of criminal investigation. The European Court held that the indefinite retention by the UK authorities of the fingerprints and DNA material of "one-time suspects" (persons suspected of criminal wrongdoing but ultimately not convicted of any offence) interfered with the suspects' right to respect for private life as protected by Article 8 of the Convention.[33] The European Court's condemnation of the UK regime puts in doubt the relatively recent changes in Irish law governing the retention of fingerprints [7; s.8(1), 10; s.49] and casts a shadow over aspects of the Government's proposed legislative foundation for the establishment of a DNA database [11].[34]

Unfortunately, the application of some other forms of technology to Irish policing has also been a source of controversy. Whereas the electronic recording of custodial interviews was canvassed as a measure designed specifically to promote transparency and accountability, its implementation in practice has been tardy and lacklustre. This prompted Hardiman J. to comment in *People (DPP) v Connolly*:

> …It is clear from the history of legal and legislative concern with uncorroborated confessions over a period of nearly two decades that legislators and judges alike have emphasised the importance of the audio visual recording of interviews. This is routine in most First World common law countries. Its failure to become routine, or even remotely to approach that status in this country, nearly twenty years after statutory provision for it was first made has ceased to be a mere oddity and is closely approaching the status of an anomaly. … The Courts have been very patient, perhaps

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31 For analysis of the case, see [33; paras.6.37-6.43].

32 App Nos 30562/04 & 30566/04, judgment of 4 December 2008.

33 It is interesting to note the European Court's rejection of the view that the UK Government should be accorded some leeway by virtue of its position in the vanguard of the development of DNA for purposes of crime detection. *Ibid* at paras 111-112.

34 The judgment of the European Court also calls into question the garda practice of seeking samples outside the statutory scheme which was upheld by the Supreme Court in *Boyce.* The Irish Bill purports to place the taking of samples on an exclusively statutory footing. It would seemingly roll back the common law power by prohibiting the gardaí from taking samples from suspects other than in accordance with the terms of the Bill [11: s.26].

> excessively patient, with delays in this regard. The time cannot be remote when we will hear a submission that, absent extraordinary circumstances (by which we do not mean that a particular garda station has no audio visual machinery or that the audio visual room was being painted) it is unacceptable to tender in evidence a statement which has not been so recorded. [2003] 2 Irish Reports 1 at 17-18.

Developments in contemporary practice have rendered the custodial interview a complex terrain for the gathering of evidence, whether in the form of statements or silence.[35] The electronic recording of interviews provides an important safeguard beneficial to the gardaí and suspects alike[36] yet several years after *Connolly* its use remains subject to a substantial measure of garda discretion [33; para.4.32].[37] The courts continue to be called upon to adjudicate challenges to failures to electronically record interviews, with mixed results.[38]

As noted above, courts tend to be more deferential to executive action when the criminal conduct at issue is perceived to threaten the security of the State. In *Heaney v McGuinness v Ireland* [1996] 1 Irish Reports 580,[39] the Supreme Court famously rejected a constitutional challenge to provisions of the Offences Against the State Act 1939 which criminalised failures on the part of persons detained under the Act to account for their movements and actions during specified periods. O'Flaherty J rested the judgment of the court on the proposition that the right to silence, a corollary to the freedom of expression conferred by Article 40 of the Constitution, can be abrogated proportionate to the need to maintain public peace and order [1996] 1 Irish Reports 580 at 588-590. The European Court of Human Rights demurred, concluding that "the security and public order concerns of the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination" guaranteed by the Convention (2001) 33 European Human Rights Reports 12 at para.58.

In *People (DPP) v Kelly* [2006] 3 Irish Reports 115, the Supreme Court endorsed the wide latitude afforded to senior garda officers to invoke informer privilege as a prop to so-called "belief evidence" [26; s.3(2)].[40] The court held that there was no unfairness in the applicant's trial for membership of the IRA where the defence was prevented from cross-examining a garda chief superintendent as to the source of his belief that the applicant had been a member

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35 In *People (DPP) v Breen* [2008] IECCA 136 (16 December 2008), the Court of Criminal Appeal set a noteworthy precedent regarding the contexts in which questioning may legitimately take place where the answers given will be used not only for investigative purposes but also as prosecution evidence at any subsequent trial. The court overturned a conviction where the prosecution had relied on verbal statements made by the appellant while he had been physically restrained by the gardaí but before he had been formally arrested and detained.

36 This point has been recognised in various policy documents. See, for example, [30; p.54].

37 The lacklustre approach of the Irish authorities to the implementation of electronic recording of interviews has been noted by the European Committee for the Prevention of Torture. See, for example, [31; para.19].

38 See, for example, *People (DPP) v Rattigan* [2008] IESC 34 (7 May 2008); *People (DPP) v PA* [2008] IECCA 21 (21 February 2008); *McCormack v DPP* [2008] ILRM 49; *People (DPP) v Cunningham* [2007] IECCA 49 (24 May 2007).

39 See also *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390.

40 See also *O'Leary v AG* [1993] 1 IR 102 (HC).

at the material time. Writing for the majority, Geoghegan J recalled the traditional justification for the restriction on the rights of the defence inherent in belief evidence:

> [I]t is perfectly clear that the legislation has been passed in the context of preserving the security of the State and the legitimate concern that it will not in practice be possible in many, if not most cases, to adduce direct evidence from lay witnesses establishing the illegal membership. Such witnesses will not come forward under fear of reprisal. The Special Criminal Court was itself established to avoid the mischief of juror coercion and intimidation. In relation to all anti-terrorist offences, as a matter of common sense, there would be equal apprehension about intimidation of witnesses. [2006] 3 Irish Reports 115 at 121.

Whether belief evidence remains strictly necessary some three decades following its enactment and several years after the formal cessation of hostilities in Northern Ireland remains an open question.[41] The Court of Criminal Appeal has buttressed *Kelly* by affirming the compatibility of belief evidence and informer privilege with Article 6(3) of the European Convention on Human Rights.[42] Analysis of the relevant Strasbourg case law suggests that the issue is by no means as straightforward as the Irish jurisprudence would suggest [19]. Recent legislative initiatives to combat gangland crime have added fuel to this fire by sanctioning an additional and potentially broader species of belief evidence. Section 71B(1) of the Criminal Justice (Amendment) Act 2009 inserts into the Criminal Justice Act 2006 a new provision rendering admissible the opinion of a member or former member of the gardaí who appears to the court to be an "appropriate expert" as to the existence of a particular criminal organization [6].

Concluding Remarks

The law of evidence plays a direct role in police governance in so far as it sets legal standards that govern the manner in which the gardaí gather evidence in the investigative process. The courts also contribute indirectly by attaching evidentiary consequences to infractions of legal rules and infringements of personal rights and by excluding from the ambit of admissible evidence any information rendered unreliable by the taint of irregularity. In carrying out their constitutional and evidentiary responsibilities, the courts have an opportunity to promote best practice in law enforcement. The snapshots of practice outlined in this paper suggest inconsistent and contradictory trends in the relationship between the law of evidence and police governance. In the contemporary debate about governance and accountability, there is scope for reflection on the role of the legislature in fashioning evidentiary rules and the role of the courts in implementing them just as in legislative and judicial practice, there is scope for more directed, constructive engagement with these issues.

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41 The issue whether to repeal belief evidence divided the *Committee to Review the Offences Against the State Act 1939-1998 and Related Matters* which reported in 2002 [29; paras.6.93-6.96].

42 See, for example, *People (DPP) v Matthews* [2007] 2 IR 169; *People (DPP) v Donohue* [2007] IECCA 97 (26 October 2007); *People (DPP) v Binead* [2007] 1 IR 374; *People (DPP) v Vincent Kelly* [2007] IECCA 110 (6 December 2007).

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