

A COMPARISON OF ARTICLE 6 OF THE
EUROPEAN CONVENTION ON HUMAN RIGHTS
AND THE DUE PROCESS REQUIREMENTS OF THE
CONSTITUTION OF IRELAND

DONAL O'DONNELL*

It is a daunting task to attempt to describe the jurisprudence of the provisions of Article 6 - about as difficult as describing the due process requirements of the Irish Constitution. To attempt to compare the two bodies of law is now so impossible as to leave me with the more agreeable task of picking and choosing those aspects of the area which appear of interest. It is clear that there is a substantial degree of overlap between the two areas and I thought it useful, if uninspiring, to attempt first, to map the area covered by both the Convention and the Constitution, and then to look briefly at those areas which are either governed by the Constitution alone, with no comparable convention jurisprudence, or where the Convention covers the area and the Constitution does not. The usefulness of this, as any comparative exercise lies, I think, in considering even briefly, what, if any, fresh insights it throws on aspects of our law which might otherwise appear fixed and beyond question.

In approaching this task, certain arbitrary editorial decisions have to be taken and I have adopted the maxim of the tabloid editor that good news is not news and no-one rushes to buy a newspaper with the headlines "Everything is Fine". I am conscious, however, that in concentrating on areas of difference and some controversy, that the basic truth might be missed. The Convention and the Constitution are in the area of due process, broadly similar, and they have been interpreted over the past 50 years in a generally satisfactory and sometimes impressive way to provide a high degree of protection to the citizen.

While my task is to look at the area with what the late Professor

* B.C.L., LL.M. (U.Va.), S.C.

Kelly described as an admiring but not uncritical eye, it would be wrong and misleading if the concentration on contentious issues at the margin, distracted from an understanding and appreciation of the broad area of satisfactory agreement at the centre. The other initial observation I might make, is that there is an inevitable tendency when considering human rights to consider that, like Mae West, you can't get too much of a good thing. It is easy to assume that the greater the reach of fundamental right provisions and the more exacting their interpretation, the better it is for everyone. However, the creation or expansion of rights creates correlative duties, in the first place, on society and the State as a whole, and if constitutional rights are given horizontal enforcement (as they are in Ireland) on other citizens which necessarily restricts the liberty of others. The development of Human Rights law, is therefore, not always progression in a single expansionary direction and so in some cases, at least, it is right to ask the question whether it is necessary to have this area dealt with by constitutional or convention law.

The Constitution of Ireland was adopted in 1937 just before the cataclysm of the Second World War, and the Convention on Fundamental Rights and Freedoms was adopted in 1950 in its immediate aftermath. Ireland acceded to the Convention in 1953. Article 6 of the Convention, however, contains provisions which, to the eyes of a common lawyer, are immediately recognisable, and in that sense, the Convention at least in this regard, is much less civilian in its tone than the Treaty of Rome adopted some seven years later in 1957. This is probably because of the significant involvement of British statesmen and lawyers, such as Winston Churchill and Lord Kilmuir in the devising and drafting of the Convention. Somewhat ironically, the radical Labour Government of 1945 to 1950 was much less enthusiastic. The Lord Chancellor, Lord Jowitt, confided that his Cabinet colleagues were “not prepared to encourage our European friends to jeopardise our whole system of law which we have laboriously built up over centuries in favour of some half-baked scheme to be administered by some unknown court”.¹

The first shred of insight I would offer, therefore, is the thought

¹ Quoted in Bingham, T.H., *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000), p. 134. See also Wicks, W., “The United Kingdom Governments Perception of the European Convention on Human Rights at the Time of Entry” [2000] P.L. 438.

that the U.K. drafters saw the Convention as an attempt to give a troubled Continent the stabilising benefit of the rule of law, rather than as a document of fundamental rights to bring about change in the U.K. To some extent, I think they thought they were describing and prescribing for Europe, principles already found in England. It is a measure of how things have changed over the last 50 years, that it was the New Labour Government in the U.K., who proposed the incorporation of the Convention of Human Rights into domestic law under, what is for me, the slightly queasy title of “Bringing Rights Home”.²

One of the features of the Human Rights Act in the U.K. is the explosion of commentary and publications. One text book which I have found useful is Clayton and Tomlinson, *The Law of Human Rights*³ which in a slightly dogged but undoubtedly comprehensive way, sets out the pre-existing common law, the convention law, some comparative constitutional law, and then comments on the likely impact of the Act on English Law. The book does contain a dutiful, if somewhat limited, account of some of the provisions of Irish Constitutional Law, but as the foreword shows, the authors in common with most English commentators, tend to look to Strasbourg and then to the U.S.A.

Canada and Australia and sometimes South Africa, but not to Ireland, reversing rather neatly, the approach of the educated hedge schoolteacher in Brian Friel’s *Translations* who observed to the sensitive English engineer, Yolland that in matters of literature “we tend to overlook your island”. This, I confess, to find a trifle irritating. In the past 80 years, this country has seen the application of principles of fundamental rights to a common law system that was pre-1922, identical and post-1922, very similar, to that of the United Kingdom. I would have thought that the experience of Irish Courts in analysing that system and the impact of broadly similar fundamental rights provisions on it would have provided some insight when considering the impact of the Convention of Human Rights on the U.K. common law, and there are, I think, a number of areas where a consideration of the Irish Constitutional experience

² Some of us remember that the 1996 European Championships were held around the same time in England, under the slogan “*Football is Coming Home*”, an episode that ended with football, and the trophy, going back to the Continent.

³ Clayton, R. and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, Oxford, 2000).

could have been useful. It is a little frustrating to have the question of the impact on Irish Law of the Convention treated as if it were identical to the likely impact of the Convention on U.K. Law. However, that is no reason not to benefit from the scrutiny of the U.K. legal system initiated by the introduction of the Human Rights Act, and the most useful portion of this work and other comparable studies is the analysis of the possible impact of the Convention on Human Rights on existing English law, since that exercise might identify possible corresponding areas of Irish Law which may be the subject of challenge when and if the Convention on Human Rights is incorporated into Irish Law.

The general consensus seems to be that English Law will be subject to significant revision when analysed in the context of the Human Rights Act, and that a particular area of impact, will be the area of criminal procedure covered by Article 6. Up until the year 2000, Clayton & Tomlinson⁴ note, Article 6 has been the most litigated provision of the Convention in relation to the U.K. giving rise to 60 cases heard by the Court, in which violations were found in 26. Up until now, the most common experience the Irish courts have had of an attempt to invoke the European Convention of Human Rights, is of unsuccessful efforts on the part of challengers who contend that the court should treat the Convention on Human Rights as in some way already part of, or enforceable in, Irish Law. That process of claim and resistance to it, may give rise to the subliminal and possibly misleading, implication that if the Convention were indeed enforceable in Irish Law, it would lead to a different conclusion in the individual case and that therefore the provisions of the Convention and the Irish Constitution are significantly different. Some perceptive commentators have foreseen a significant effect on Irish criminal procedure if the Convention is incorporated.⁵ However, I would suggest, somewhat hesitantly, that the impact of the Convention may be less traumatic than is thought by some and less significant than its impact in England. The reason, I believe, is simply that the characteristic feature and indeed glory of the Common Law has been its somewhat idiosyncratic and

⁴ Clayton, R. and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, Oxford, 2000).

⁵ See McDermott, P.A., "The Impact of the ECHR on Irish Criminal Law" (2000) 9 I.J.E.L. 23.

serendipitous development through individual cases from which, when viewed collectively, broad principles may be discerned. However, in a Constitution, the process is reversed. Principles are established first as rules of general application and the particular cases are addressed later. In that process, some of the more idiosyncratic and contentious provisions of the law become difficult to fit within the principle and are vulnerable to challenge. In the case of Ireland, however, many of these provisions have already been the subject of constitutional scrutiny by reference to broadly similar principles of procedural fairness. I would suggest, therefore, that the area of Irish law likely found to be incompatible with Article 6 of the European Convention (and not already struck down by the Irish Constitution) will be necessarily smaller than the area of English Law which is potentially subject to challenge under the Convention.

There is a quite striking degree of congruence between the structure and content of Article 6 and the constitutional guarantees found in Irish Law. The structure of Article 6 provides for a basic entitlement to fair procedures in civil and criminal matters (Article 6) (1) with more explicit and detailed guarantees in criminal matters (Article 6(2) and 6(3)). By way of comparison, Article 38 of the Constitution of Ireland sets out detailed and explicit guarantees of trial in due course of law on criminal matters, and there is a general principle of fair procedures applicable in any public law decision making and in particular, in civil cases, derived in the case of civil proceedings from the Article 34 establishment of the administration of justice in courts and in the case of other decision making bodies, by the unenumerated rights provisions of Article 40(3). It is true that the guarantee of fair procedures in civil matters is not quite as explicit in the 1937 Constitution as in the Convention, but I cannot bring myself to consider that a defect, since the elucidation of those rights gave rise to such important cases as *In Re: Haughey*,⁶ the *State (Healy) v. Donoghue*,⁷ *Kiely v. the Minister for Social Welfare*⁸ and *O'Brien v. Bord Na Mona*.⁹

Looking at the specific features provided for by Article 6 it is possible to find in the Irish Constitution, counterparts with a high

⁶ [1971] I.R. 217 (H.C.).

⁷ [1976] I.R. 325 (H.C. & S.C.).

⁸ [1977] I.R. 267 (H.C. & S.C.).

⁹ [1983] I.R. 255 (H.C. & S.C.).

degree of similarity. For example, Article 6.1 provides, at the outset, a guarantee of fair trial by an impartial tribunal. Article 35.2 of the Constitution provides that “all Judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law”. Article 6.2 of the Convention sets out the principle of the presumption of innocence which is applicable in all criminal proceedings. This is not explicitly identified in the Irish Constitution but is clearly considered to be an essential feature of trial in due course of law under Article 38, giving rise, for example, to the position taken by the Supreme Court in relation to bail.¹⁰

Article 6.3 of the Convention sets out certain specific rights such as the right, under Article 6.3(a) to be informed of a charge in a language you understand and under Article 6.3(e) to have the assistance of an interpreter if necessary. That was a right found applicable under the Free State Constitution, in the *State (Callan) v. Coyne*.¹¹ Article 6.3(b) provides that an accused should have adequate time and facilities for a defence, a principle eloquently identified and enforced in *State (Healy) v. Donoghue*. Article 6.3(c) provides that an accused may defend himself through legal assistance of his own choosing and if not able to afford it, to be given it free. Again, this principle was established conclusively and impressively, in *State (Healy) v. Donoghue*. Under Article 6.3(d), the accused has a right to examine witnesses against him and secure the attendance of witnesses in his favour. Again, this is something explicitly provided for in *In re Haughey*, which goes much further, since it applies not simply to criminal matters, but to other matters, including the procedures to be adopted by any public law deciding body which makes any decision affecting, even if not determining, rights.

In addition to those rights specifically guaranteed by Article 6, an important part of the jurisprudence of the European Convention has been to identify matters arising by implication from the explicit guarantees set out in Article 6 or clearly deduced from them. The first and most important, is the principle of access to the Court, which was similarly deduced from the Irish Constitution and

¹⁰ See for example the *People v. O’Callaghan* [1966] I.R. 501 (S.C.) and *Ryan v. D.P.P.* [1989] I.R. 399 (H.C. & S.C.).

¹¹ (1936) 70 I.L.T.R. 185 (H.C.).

enunciated for the first time in *MacAuley v. the Minister for Post & Telegraphs*.¹² The European Court has, in a series of cases commencing with *Engel v. Netherlands*¹³ has insisted that the question of what constitutes a “criminal charge” and thus gives rise to the specific protections of Article 6.2 and 6.3, is not a matter for national determination but must be a matter for independent assessment pursuant to the European Convention. This principle was the basis of the celebrated decision in *Melling v. O’Mathghabhna*¹⁴ where the Supreme Court held that procedures under the customs code which had predated the 1922 Constitution which had hitherto been treated as civil were in truth criminal.¹⁵ The principle in *Melling’s* case has been applied in a number of subsequent cases and indeed, for example, the recent unsuccessful challenge to the Proceeds of Crime Act, 1996 in *Gilligan v. C.A.B.; M. v. M.*¹⁶ Somewhat controversially, the right to silence has been held by the Court of Human Rights to be an essential component of a criminal trial resulting in the somewhat unsatisfactory decision in *Saunders v. U.K.*¹⁷ The constitutional status of the right to silence has also been reviewed by the Irish Courts (again perhaps not entirely satisfactorily) in *Heaney and McGuinness v. Ireland*¹⁸ and *In re N.I.B. (No. 1)*¹⁹ Additionally, the European Convention on Human Rights has held an essential component of a criminal trial that there should normally be no trial in absentia. Again, this is part of Irish Constitutional jurisprudence.²⁰ Finally, an important part of the Strasbourg jurisprudence has been the decision that the Convention requires trial of proceedings within a reasonable time. In criminal matters, this has been part of the jurisprudence of the Irish courts since the *State (O’Connell) v. Fawsitt*²¹ and in civil matters, the principle can be found in cases permitting the striking out of proceedings brought within an extended limitation period on the

¹² [1966] I.R. 345 (H.C.).

¹³ (1979/80) E.H.R.R. 647.

¹⁴ [1962] I.R. 1 (S.C.).

¹⁵ See now the decision in U.K. that civil penalties under the VAT Regime were nevertheless, a criminal charge for the purposes of Article 6(1): *Han v. Commissioner for Customs & Excise* [2001] 4 All E.R. 687 (C.A.).

¹⁶ Supreme Court, unreported, 18 October 2001.

¹⁷ [1998] 1 B.C.L.C. 362; (1996) 23 E.H.R.R. 313.

¹⁸ [1996] 1 I.R. 580 (S.C.).

¹⁹ [1999] 3 I.R. 169 (H.C. & S.C.).

²⁰ See for example the *People (Attorney General) v. Messitt* [1972] I.R. 204 (C.C.A.).

²¹ [1986] I.R. 362 (H.C. & S.C.).

grounds that a fair trial could no longer be provided to the defendant, for example, *O'Dombnaill v. Merrick*.²² The one possible *lacuna* here, is that the European Court has provided a remedy in the case of inordinate delays between hearings and delivery of Judgment. There is probably little doubt that this too is a requirement of the Constitution, but no-one has ever had the temerity, or to perhaps seen the benefit of, attempting, to commence separate proceedings to compel the delivery of a Judgment or alternatively to seek damages in respect of any such delay.

This necessarily broad overview of the comparison between Article 6 and the jurisprudence of the Irish Constitution shows a very high degree of congruence between the provisions of the Convention and the Constitution and indeed the manner in which they have been interpreted and applied.

In view of the degree of correspondence between the provisions of Article 6 of the Convention and Articles 34, 38 and 40.3 of the Constitution of Ireland, it would be surprising in my view, if the incorporation of the Convention gave rise to a dramatic impact on the procedures in criminal or civil matters. Many of the potential issues have already arisen and indeed, it is arguable that the Irish Constitution as interpreted, requires more exacting standards than Article 6. For example, *Maher v. the Attorney General*²³ (conclusive evidence provision incompatible with independent judicial function) and *Deaton v. the Attorney General*²⁴ and *Curtis v. the Attorney General*²⁵ (trial, conviction and sentence indivisible parts of the judicial function) represent, if anything, a more robust approach to the enforcement of the independence of the judicial function than can be found under the Convention.

There are also areas where concentration on the Convention may lead the court astray. In England, one of the most contentious issues which has arisen in recent times is the extent to which the *Wednesbury* test of irrationality can be applied to decisions affecting human rights. It is hard to imagine an Irish Court considering that a decision affecting constitutional rights should be reviewed by

²¹ [1986] I.R. 362 (H.C. & S.C.).

²² [1984] I.R. 151 (S.C.).

²³ [1973] I.R. 140 (S.C.).

²⁴ [1963] I.R. 170 (S.C.).

²⁵ [1985] I.R. 458 (H.C.).

application of the principles in the *State (Keegan) v. the Stardust Tribunal*.²⁶ In any event, the House of Lords in *R. v. Secretary of State for Home Department, ex parte Daly*²⁷ has recently held that the court must apply a test of proportionality when reviewing decisions that effect human rights rather than the *Wednesbury* test or any adaptation thereof, such as “anxious” or “heightened” scrutiny. So far so good. However, Lord Cooke went on to offer the following more general observation:

And I think the day will come when it will be more widely recognised that *Associated Picture Houses v. Wednesbury* was an unfortunately regressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.²⁸

I wonder if this approach does not put the baby at risk with the bath water. Certainly, in the Irish courts, proportionality review and/or strict scrutiny of interference with constitutional rights has co-existed reasonably peaceably with irrationality review of other decisions, and no-one has seriously criticised the underlying rationale although some have argued with some merit for a more searching and testing application of the rationality test.²⁹ However, the proportionality test is only the application of a different formula which does not itself determine the result. It remains for a court to decide precisely what degree of proportionality is required and that test is capable of being applied very strictly. The idea that some decisions, not necessarily directly affecting rights, might be considered by a court to be wrong but not unlawful is, I think, a fairly fundamental principle of administrative law and flows from the different functions the courts and administration decision makers have in much the same way as the limitations on appeal from the High to the Supreme Court are features, not so much of any

²⁶ [1986] I.R. 642 (H.C. & S.C.).

²⁷ [2001] 2 A.C. 532 (H.L.).

²⁸ [2001] 2 A.C. 532 at 549 (H.L.).

²⁹ See Hogan, G. and Morgan, D.G., *Administrative Law in Ireland* (3rd ed., Round Hall Sweet 7 Maxwell, Dublin, 1998), Foreword.

statutory provision, but rather flow from the different functions and powers of the respective courts.³⁰ It is, I think, difficult in practical terms to devise a test that is less permissive than Keegan and yet does not amount to review on the merits.

The second area which I propose to deal with, are those areas which the Irish Constitution provides some different (and arguably greater) protection or at least more demanding requirements, than Article 6 of the Convention has been interpreted to require. The first, and perhaps striking difference, is that Article 38 requires that an accused has the option of a trial by jury in non-minor (non-scheduled) offences. The concept of trial by jury which is at the heart of the Anglo/Irish/American approach to criminal law is not a feature of the European Convention. This is an obvious consequence of the fact that the Convention sets out to identify certain fundamental features common to all the contracting states and it is inevitable, therefore, that it should have the quality of the lowest common denominator. One of the distinctions between the criminal and civil law codes, is that the central feature of trial by jury in the common law code is not found in the civil law system.

Following from this and closely related to it is the fact that while proof beyond reasonable doubt is undoubtedly a central feature of “due course of law” under Article 38, it is not necessarily required under the Convention which has been held in *Austria v. Italy*³¹ to require merely that there should be evidence “sufficiently strong in the eyes of the law to establish guilt”. Similarly, I cannot find any precise equivalent in the European Convention jurisprudence to the powerful (and somewhat underestimated) decision in *King v. the Attorney General*³² invalidating provisions of the Vagrancy Act, on the grounds that the criminal offences created were hopelessly vague and subjective.

Cross examination has always been regarded as a central feature of the common law system of criminal (and indeed civil) justice which, together with trial by jury and proof beyond reasonable doubt has been seen as the most distinctive features of that system.

³¹ (1963) E.H.R.R.

³² [1981] I.R. 233 (H.C. & S.C.).

However, it is clear that while Article 6 does require that an accused person have a right to examine a witness against him, perhaps understandably it has not been held to require the type of confrontational cross examination which is the essence of the criminal justice system embodied in Article 38. For example, the United Kingdom Criminal Justice Act provides that evidence can be given by statement, without the possibility of cross-examination in a number of defined circumstances including the fear of the witness. While the question of confrontation of witnesses has come before the European Court of Human Rights on a number of occasions, no clear or coherent principle emerges with, as Harris Warbrick and O'Boyle³³ note the Court tending to concentrate on the question of whether the absent witness was central to the conviction. While it is possible that the interpretation of the Convention will gradually advance to the point where cross examination is seen as a *sine qua non*, that point does not yet appear to have been reached.

On the other hand, the Irish Courts have been enthusiastic on holding that cross examination is a fundamental aspect of any trial where facts are in issue. This emerges clearly, of course, from *In re Haughey* which expressly upheld the right to cross examination as one of the fundamental guarantees of fair procedure, but also from two less obvious decisions. In *Phonographic Performance (Ireland) v. Cody*³⁴ the Supreme Court was called upon to interpret Ord. 39 of the Rules of the Superior Courts in the context of proof of copyright in a copyright dispute. It is hard to avoid the conclusion that the Supreme Court's decision, in that case, was, at least, in part, influenced by the central feature which cross examination has been held to hold in constitutionally guaranteed fair procedures. Another strong decision was that of the Supreme Court in *Paul Gallagher v. the Revenue Commissioners*.³⁵ That case was yet a further judicial review of internal disciplinary proceedings brought against a Revenue Official who, it was alleged, had placed unduly low figures on the value of imported cars for the purposes of the vehicle registration tax regime. The Revenue sought to establish the true value of the cars by the statement of witnesses from outside the

³³ Harris, D.J., O'Boyle M. and Warbrick,, C., *Law of the European Convention on Human Rights* (2nd ed., Butterworths, London, 2001), p. 212.

³⁴ [1998] 4 I.R. 517 (H.C. & S.C.).

³⁵ [1995] 1 I.R. 55 (H.C. & S.C.).

jurisdiction (not entirely unreasonably since the cars were imported). A consequence of this was, however, that the witnesses could not be compelled to attend. On the other hand, while Mr Gallagher might have been deprived of the opportunity of cross examining those witnesses, he had the advantage that their statements only had such weight as the Tribunal might properly accord to it, in the absence of cross examination and furthermore, that he could adduce if he so wished, witnesses as to value who would, in a sense, have the field to themselves. Nevertheless, the Supreme Court held that the evidence was strictly speaking, hearsay and that in the absence of cross-examination, it could not properly be admitted by the Disciplinary Tribunal. The facts of the Gallagher case are undoubtedly strong and the decision is perhaps justifiable. However, given the relatively lower status accorded to cross examination under the Convention, it might be useful to question whether this decision did not go too far in requiring internal disciplinary proceedings (even those which can result in dismissal) to be precise analogues of a criminal trial.

Cross examination of witnesses of fact (and arguably of opinion) is now a fixed feature of the criminal, civil and administrative law landscape, as a result of the decision in *In re Haughey*. However, that great and important decision also serves to illustrate another very significant distinction between the jurisprudence of the European Convention and that of the Irish Constitution.

That landmark and literally unprecedented decision held that where any procedure was involved which affected the Constitutional rights of the individual (and in most cases, his or her right to a good name) then the safeguards identified in the decision must apply. As a result, the decision has been held to apply to official reports of any kind, even though they are not determinative of rights but simply (although importantly in my view) because the publication of an official report can often significantly damage the reputation of an individual without any redress in court. Perhaps the high point of this line of authority is the *State (Shannon Atlantic Fisheries Limited) v. McPolin*³⁶ where it was held that an inquiry pursuant to

³⁶ [1976] I.R. 93 (H.C.).

section 465 of the Merchant Shipping Act, 1894, held by an Inspector appointed by the Minister who reported to the Minister, but where the Minister would then decide any appropriate action to be taken, was, nevertheless of such importance, that it was obliged to observe fair procedures even though the report was itself not decisive and there was the opportunity for argument and representations before the Minister.

The result of the *Haughey* line of decisions had been that, for example, Companies Act Inspectors under section 10 of the 1990 Act, have considered (correctly in my view), that they were not free to adopt the procedures under the precisely equivalent English Act which had been approved of in the Court of Appeal in *Maxwell v. the Department of Industry, Trade and Commerce*³⁷ and *In re Pergamon Press*³⁸ which held that the Inspectors were merely required to put the essence of any contrary evidence to any individual against whom a finding might be made, without giving to that individual, any opportunity of perusing the detail of the evidence, hearing it, or challenging it. Instead, Irish Companies Act Inspectors have taken the view that where the conclusion depended upon the credibility of contested evidence an interested party had the right to challenge and, if necessary, cross examine that evidence. The procedures providing for such an opportunity of cross examination were approved by the High Court in *In re N.I.B. (No. 1)*³⁹ and although appealed to the Supreme Court, the appeal was withdrawn. It is noteworthy that the appeal was on the grounds that these procedures did not sufficiently comply with the *Haughey* principles, *i.e.* that there should have been a more elaborate opportunity of challenging and testing the evidence. Nobody seemed to think that the procedures went too far.

One question that arises in the light of the European Court of Human Rights jurisprudence is whether this approach is entirely correct. In *Fayed v. the United Kingdom*⁴⁰ the Court of Human Rights had to consider part of the long-running *Lonrho v. Fayed* battle over the acquisition in Harrods which had resulted in an inspection under the Companies Acts and the publication of the

³⁷ [1974] Q.B. 523 (C.A.).

³⁸ [1971 Ch. 388 (C.A.).

³⁹ [1999] 3 I.R. 145 (H.C. & S.C.).

⁴⁰ (1994) 8 E.H.R.R. 397.

Inspectors Reports which were largely unfavourable to the Fayed's making findings of dishonesty and misrepresentation and that they had lied both to the Department of Trade and to the Inspectors and had further produced a set of documents as evidence which they knew to be false. There was no doubt that these findings were damning and they were published by the Secretary of State who had stated that the Inspectors Report "clearly disclosed wrongdoing" and where the Minister of State told the House of Lords that the Secretary of State considered that "the publication of the report ... would be a severe blow to their reputation, as indeed I think it has proved".

The decision of the European Court to the effect that the substantive law of the United Kingdom inasmuch as it provided for absolute privilege for such reports in defamation proceedings was something which could be reviewed for its consistency with the Convention (although in this case, it was held not to infringe the Convention) has proved controversial. But less attention has been paid to what, in my view, is a more significant feature of the decision. The Fayed's argued that the procedure by which the report was arrived at, was in breach of their rights under Article 6 inasmuch as they contended that the procedures were inadequate for the protection of their reputation. The Court (and it is perhaps interesting to note, in the Commission, Judge Rozakis dissented from this finding) rejected that claim holding that there was no dispute as to the civil or legal rights of any party that the report was investigative and not determinative of any rights and, accordingly, that Article 6 did not apply. The court observed:

The Inspectors did not adjudicate either in form or in substance. They themselves said in the report that their findings would not be dispositive of anything. They did not make a legal determination as criminal or civil liability concerning the Fayed Brothers and in particular, considering the latter's civil right to honour in reputation. The purpose of their inquiry was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities -

prosecuting regulatory, disciplinary or even legislative.⁴¹

Accordingly, the court concluded that “in short, it cannot be said that the Inspector’s Inquiry ‘determined’ the Applicant’s civil right to a good reputation, for the purposes of Article 6(1) or that its result was directly decisive for that right”.⁴² As a result, Article 6(1) did not apply and it was not possible to argue that the procedures adopted fell short of those required by Article 6(1). This was a result which the Court found congenial since holding that any other interpretation of Article 6(1) “would, in practice, unduly hamper the effect of regulation in the public interest of complex financial and commercial activities. In the Court’s view, investigative proceedings of the kind in issue in the present case fall outside the ambit and intendment of Article 6(1)”.⁴³

The consequence of the Fayed decision, therefore, was that the procedures by which reports of this kind, whether conducted under the Companies Act, or otherwise, were arrived at, could be the subject of scrutiny under the substantive law of the contracting states as to administrative procedures, but did not involve any fundamental right giving rise to the procedures guaranteed by the Convention. The problem the Court faced was obvious. If Article 6 applied, certain procedures were required. It was a choice of all the Article 6 procedures or nothing. The Court chose nothing.

This is startlingly at odds with *In re Haughey*. The reasoning of the Court in Fayed is familiar enough: it was by this reasoning that the Supreme Court in *Goodman v. Hamilton*⁴⁴ held that findings by a Tribunal of Inquiry on matters which could be essential features of criminal and civil proceedings, was nevertheless not the administration of justice. However, the decision in Fayed is dramatically different to that arrived at *In re Haughey*. It is, I think, arguable that the reason why the Supreme Court in *In re Haughey* required more extensive and court-like procedures in a Tribunal of Inquiry, was precisely because constitutional rights were at risk, the courts taking the pragmatic view that if, as the United Kingdom

⁴¹ (1994)18 E.H.R.R. 397, at para. 61.

⁴² (1994)18 E.H.R.R. 397, at para. 61.

⁴³ (1994)18 E.H.R.R. 397, at para. 62.

⁴⁴ [1992] 2 I.R. 542 (H.C. & S.C.).

seemed to freely acknowledge, a reputation could, in practical terms, be destroyed by a report, the fact that the report in legal terms could not be said to be determinative, was beside the point.

This leads to what in the aftermath of *Haughey v. Moriarty*⁴⁵ might otherwise thought to be a question which was no longer a live one in Irish jurisprudence: is *In re Haughey* correct? In my view, for what it is worth, on the issue of whether rights are implicated in determinations by Tribunals of Inquiry or Inspectors making public reports with the authority of the State, *Haughey* makes much more persuasive reading than *Fayed*. It is noteworthy that in that regard, *i.e.* holding that rights are affected, which gives rise to procedural protections, *Haughey* has been adopted and followed in other jurisdictions for example New Zealand.⁴⁶ In fact, it is hard to see how in the light of Article 40.3.2° of the Constitution of Ireland different. The Article treats the right to a good name in the same name as the rights to life, property and person. Once this is the case, it must also be recognised that a report does affect good name (unlike life or property) and if the evidence and report are absolutely privileged, may do so unjustly since there is no other method of challenging the correctness or fairness of the statement or thereby vindicating the right to good name of the citizen. It is hard to see therefore, how the Supreme Court could properly come to any other conclusion that it did *i.e.* that due process was required.

Perhaps a more difficult question is what is required to ensure compliance with the Constitutional guarantee of fair procedures. This is a vexed question and no jurisdiction has been able happily to reconcile the essentially investigative nature of inquiries with the adversarial procedures traditionally felt necessary to protect rights. Looked at in this way I do not think the conclusion the Irish courts have come to, under the Constitution, is by any means necessarily worse than the ad hoc solutions in other countries. If anything, the insight *Haughey* offers may be more persuasive. There is a substantial academic debate on the merits of the adversarial system. One important insight suggested for some time by, among others, Professor Lon Fuller⁴⁷ and subject to a degree of empirical testing⁴⁸ is

⁴⁵ [1999] 3 I.R. 1 (H.C. & S.C.).

⁴⁶ See *Peterson v. Davis* [1999] 2 N.Z.L.R. 164 at 186.

⁴⁷ The adversary system in Berman, H.J., *Talks on American Law: A Series of Broadcasts to Foreign Audiencies by Members of the Harvard Law School Faculty* Vintage Books, New York, 1961), p. 43

⁴⁸ See in particular Thibaut, J., Walker, L. and Lind, E.A., "Adversary Presentation on Bias in Legal Decision-Making" (1972) 86 Harv. L.R., 386.

that an adversarial system of adjudication acts to significant extent to prevent unconscious bias on the part of the decision maker and indeed the appearance of bias in the eyes of onlookers. As Thibaut, Walker and Lind conclude “as a case is presented, the adversary mode apparently counteracts Judge or Juror bias in favour of a given outcome” and this indeed seems to combat, in Fuller’s words “a tendency to judge too swiftly in terms of the familiar that which is not yet fully known”.⁴⁹

Certainly, there is no queue of lawyers for clients who are the subject matter of Tribunal of Inquiries complaining that the procedures of Tribunals and Inspectors are too fair. This, of course, is not the only consideration: uncertainly about procedures, and the extent of the procedures required by *In re Haughey* undoubtedly contribute to the time it takes to complete inquiries which is itself a matter of public interest. Nevertheless, there do not seem to me to be compelling reasons for saying that the decision in *In re Haughey* is fundamentally unsound. What might, however, be reconsidered is whether *Haughey* is applied too readily, and then whether the analogy with a criminal trial is necessarily required in all cases.

One other related area where the Irish Constitution differs from the protections afforded by the European Convention, is in reference to previous convictions. It appears from the decision in *X. v. Austria*⁵⁰ that the introduction of previous convictions as evidence of guilt was not itself inconsistent with the presumption of innocence. To the contrary effect is the decision of the Irish High Court in *King v. D.P.P.*⁵¹ which held that one of the defects of the Vagrancy Act prosecution was that it allowed the introduction of such evidence.⁵² Once again, this might cause us to reconsider what would otherwise be sacred cows of Irish procedure. Much as I admire the sentiments expressed in *King v. D.P.P.* and the decision itself I am not sure that it can be said that a blanket rule against the admission of evidence of previous convictions is required by the Constitution. After all, Section 1(f) of the Criminal Justice (Evidence) Act, 1924, permits similar fact evidence to be admitted. Section 1(f) (ii) permits cross

⁴⁹ See also Wolfe, J.S., Hon. Justice and Proszek, L.B., “Interaction Dynamics and Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer” (1997-1998) 33 *Tolsa L.J.* 293 and Landsman, S., “A Brief Survey of the Development of the Adversary System” (1983) 44 *Ohio St. L.J.* 713; cf. Sward, E.E., “Values, Ideology and the Evolution of the Adversary System” (1988-1989) 64 *Ind. L.J.* 301.

⁵⁰ (1966) 9 Y.B. 550.

⁵¹ [1981] I.R. 233 (H.C. & S.C.).

⁵² See also Hogan, G. and Whyte, G., (ed.) *J.M. Kelly: The Irish Constitution* (3rd ed., Butterworths, Dublin, 1994), p. 602.

examination as to previous convictions when the accused has “dropped his shield”. Although such cross-examination is said to be directed to character and not necessarily to proof of the offence, in real terms, it must often have that effect on the jury. It is hard, therefore, to say that a blanket rule of non-admissibility of previous convictions is required by the Constitution, and equally hard to say that the Constitution permits the evidence to be admitted in accordance with the 1924 Act, but to prevent any other statutory exception. This line of authority is, perhaps, an example of the Irish courts understandably treating the procedurally familiar as constitutionally required.

One other area of distinction arises from the case of *Monell & Morris v. United Kingdom*.⁵³ That case involved the instinctively appealing power granted by statute to the U.K. Court of Appeal, to disregard time served between trial and appeal in the event that an appeal was considered frivolous or unfounded. The rationale of this provision is, that the original sentence may have been appropriate and could not be extended, but appellants, who have received sentences, would be discouraged from bringing groundless appeals by the fact that they might lose the benefit of any time served between conviction and appeal. No matter how attractive in practical terms such a provision might be, it is difficult to see it surviving challenge under Article 38 of the Constitution of Ireland, although it was found not to be inconsistent with the Convention.

These are specific areas of difference between the application of the due process guarantees of the Constitution and those of the Convention, but in approaching Article 6 in this way, it is important not to lose sight of broader areas of divergence.

First, the Convention simply does not apply in that area which is understood in civil law as public law for example immigration and revenue matters. Second, the Convention has no horizontal effect in that it has not been held to give directly enforceable claims as between individuals. The Irish Constitution, by contrast, does give rise to constitutional claims by individuals.⁵⁴ In fact, it appears that the Irish approach to this issue is the most extreme example of

⁵³ (1987) 10 E.H.R.R. 205.

⁵⁴ See for example *Meskeil v. C.I.E.* [1973] I.R. 21 (S.C.).

horizontal effect.⁵⁵ The law in this regard is not particularly persuasive or elegant⁵⁶ and the fact that the Supreme Court has sought to impose some practical limitations on the impact of constitutional issues on the law of torts is, perhaps, evidence of an unarticulated unease with the principle, but I do not propose here to argue that the position adopted in Ireland is necessarily wrong. What is striking is that the position the Irish courts adopted was arrived at almost without argument as to its consequences and without acknowledging the significant departure involved in contending that the Constitution is not simply a guarantee of rights between the state and the individual but also creative of rights and claims between individuals. It is perhaps worthwhile to reconsider the theoretical underpinning of this jurisdiction particularly in the light of the current debate under other constitutional regimes of the nature and extent of the horizontal effect of Constitutions.⁵⁷

One other dramatic area of distinction is one not heavily emphasised by commentators on the Convention. At the risk of invoking the spirit of Lord Jowitt and his colleagues, it is worth pointing out, that not only does the Convention seek to identify fundamental rights applicable in a number of widely different regimes which must make the Convention necessarily look like something of the lowest common denominator, but also that the Convention, although protective of the right of citizens, has never, to my knowledge, been chosen or adopted by any citizens and cannot be changed by them either in individual countries or collectively. The Convention was draft by Governments, adopted by Governments, is interpreted by Government appointed Judges and can only be altered by Governments. In contrast, one of the successes of the 1937 Constitution is the high degree of involvement with it of ordinary citizens. The degree to which referenda are accepted and rejected, in a manner and division which cannot be explained by party affiliation, is a measure of this. The explicit statement in Article 6

⁵⁵ See Hunt, M., "The 'Horizontal Effect' of the Human Rights Act" [1998] P.L. 423 . See also Wade, H.W.R., "Opinion: Human Rights and the Judiciary" (1998) *European Human Rights Law Review*, 520 and Wade, H.W.R., "Horizons of Horizontality" (2000) 116 L.Q.R. 217 and Clayton, R. and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, Oxford, 2000), paras 5.38-5.99

⁵⁶ See Binchy, W., "Constitutional Remedies and the Law of Torts" in O'Reilly, J. (ed.) *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press, Dublin, 1992), pp. 201-225.

⁵⁷ It is noteworthy and chastening that the horizontal effect debate in the United Kingdom was, in effect, commenced by a paper delivered by Professor Sir William Wade to the English National Institute of Judges

that it is the people who, in final appeal, have a right to decide all matters of policy, is I think a vitally important principle which also provides a useful safety net for constitutional decision-makers. The pertinacious litigation of people like Denis Riordan proves, if nothing else, the degree to which the Constitution has become assimilated and internalised by the People to the extent that litigation in relation to it is readily accepted as a feature of public life, in much the same way as it is in the U.S.A.

One consequence of these matters is that the Court of Human Rights is obliged to afford to individual countries a “margin of appreciation” which it is argued should not apply when a country is itself enforcing its domestic constitutional provisions or indeed the provisions of the Convention as incorporated in domestic law.⁵⁸ The process of making the Convention simultaneously applicable in widely disparate legal systems has the effect, much like that of simultaneous translation, of necessarily excising the more vivid, expansive, innovative and eye-catching decisions. In other words, it seems to me that an Irish court has the capacity and indeed the obligation to ensure a strict and unremitting compliance with the dictates of the Constitution. One tentative conclusion I would draw, therefore, from a comparison of Article 6 of the Convention with Articles 34, 38 and 40.3 of the Constitution is that there are areas which are and will remain solely the province of the Irish Constitutional guarantees and that while there is a high degree of overlap between the guarantees, the level of scrutiny and review required by the Irish Constitution is likely to be greater than that under the Convention. Accordingly, I would expect the constitutional provisions to be the first and decisive port of call for most challenges to procedures for civil, criminal or administrative matters although the argument will, inevitably, be influenced by the jurisprudence under the Convention.

There are, however, areas which appear to be dealt with under the Convention differently or by more exacting standards or sometimes, the Convention might be the only provision providing the possibility of a remedy to its disappointed citizens. Before

⁵⁸ See McDermott, P.A., “The Impact of the ECHR on Irish Criminal Law” (2000) 9 I.J.E.L. 23.

considering those, it is perhaps necessary to explain how such a circumstance can exist consistent with the analysis I have just tentatively advanced. While the Convention is an expression of fundamental principles which must be acceptable to widely different countries, there is an inevitable tendency to explore the margins of any jurisdiction even if controversial. Accordingly, we can probably continue to expect more adventurous decisions by the Court of Human Rights, some of which will diverge from established principles of Irish Law.

The most obvious area (and one of immediate concern to this audience) in which the Convention has been held to provide a remedy for which there is no immediate Irish equivalent, is where there is a delay in civil proceedings and particularly a delay hearing and Judgment. Ireland has struggled to provide a domestic remedy in this regard and it remains one of the most striking features of the jurisprudence of the European Court of Human Rights is the extent to which legal delays are a feature of nearly all of the legal systems covered by the Convention.⁵⁹

One more controversial area is the line of authority started in *Fayed* and which came to a head in the decision of *Osman v. the United Kingdom*.⁶⁰ That was a case which was decided, initially, by the United Kingdom Court of Appeal in reliance and application of the principle established by the House of Lords in *Hill v. the Chief Constable of West Yorkshire*.⁶¹ In *Hill*, the parents of the last victim of the Yorkshire Ripper had sought to sue the police in negligence contending that if the investigation had been carried out more effectively, efficiently and carefully, Peter Sutcliffe would have been apprehended earlier, and accordingly, their daughter would still have lived. The House of Lords, applying the test of the existence of a duty of care established in *Caparo v. Dickman*⁶² held that the police in such circumstances owed no duty of care in negligence to citizens such as the Hills, because, *inter alia*, to do so would be inconsistent with public policy.

The facts in *Osman* were even more horrific. The Osmans were a family who had a son attending a local school and to whose son,

⁵⁹ It is perhaps, of only modest comfort that there is significant delay in having complaints adjudicated on by the Court of Human Rights itself.

⁶⁰ [1998] 5 B.H.R.C. 293.

⁶¹ [1989] 1 A.C. 53 (H.L.).

⁶² [1990] 2 A.C. 605 (H.L.).

a disturbed schoolteacher formed an inappropriate attachment amounting ultimately to an obsession. There were a series of incidents and reports culminating in an attack in which the schoolteacher shot and wounded the boy and killed his father and also the principal schoolteacher. When apprehended, he asked the police “why didn’t you stop me before I did it, I gave you all the warning signs”. The argument in *Osman* was that had the police acted earlier, they would or could have prevented the tragedy of the *Osman* family. Applying the principle in *Hill v. the Chief Constable* the Court of Appeal held that no cause of action lay in such circumstances.

This line of reasoning is particularly significant in the context of Irish Law, because the Irish Courts have always accepted that there is a public policy element to the identification of a duty of care, and recently in *Glencar Mining*, the Supreme Court has departed to some extent from the test set out in *Ward v. McMaster*, and appears to have adopted the *Caparo* approach.⁶³ When the *Osman* case reached the Court of Human Rights, the court held by majority that the decision violated the rights of the *Osmonds*, under Article 6 because it, in essence, amounted to the immunity of the forces of the State, and the existence of such an immunity enforceable at the outset of litigation, amounted to an interference with the right of access to Court, guaranteed by (although not expressly stated in) Article 6 of the Convention.

The decision in *Osman* provoked an immediate response. If correct, it raised question marks over all the other areas in where the *Caparo* principle had been held to preclude the existence of a duty of care, and in particular, the negligence and liability of local authorities in respect of the treatment of children in care. In a subsequent case, *Barrett v. London Borough of Enfield*⁶⁴ Lord Browne-Wilkinson went to some lengths to explain what he considered to be the misunderstanding in *Osman*. The mere fact that the English courts proceeded (as they had done from the days of *Donoghue v. Stevenson* and before) to try as a preliminary issue the question of the existence of a duty of care, did not amount to an

⁶³ *Glencar p.l.c. and Andam Resources v. Mayo County Council*, Supreme Court, unreported, 19 July 2001.

⁶⁴ [1999] 3 WLR 79 (H.L.).

immunity enforceable at the outset of litigation. In truth, the case was to be understood as a consideration of the circumstances in which a duty of care arose, which up until then, had always considered to be a matter of national law. Lord Justice Buxton wrote to similar effect, extra-judicially, in the *Law Quarterly Review*⁶⁵ and Lord Hoffman weighed in the *Modern Law Review*.⁶⁶

My view, for what it is worth, is that *Osman* was undoubtedly a difficult case which did not present the issues helpfully or clearly. It is certainly conceivable that the rules of tortious and other civil liability, may be held to be affected by the provisions of the Convention and/or in Irish terms, the Constitution (although it is noteworthy how little impact on the law of torts, the Irish Constitution has had). However, I think that the critics of *Osman* rather have the better of the argument, for one reasonably compelling reason. It seems to me to be wrong to stigmatise the decision in *Osman* and *Hill etc.* as having any implication for the right of access to court. It is difficult to explain why cases which have been argued at length in the High Court, Court of Appeal and up to and including the House of Lords, can nevertheless be said to involve a denial of the right of access. This is an analysis which has been reasonably well covered in Irish law. In *Slattery v. An Taoiseach*⁶⁷ it was observed that issues such as this, involve, in truth, no question of the right of access, but rather a right to litigate claims. There is, of course, no right to litigate claims to success and it is only in unusual circumstances that the Constitution requires a particular result to such litigation. This might appear to be too neat or simplistic a reason for criticising the decision in *Osman* but in my view, it is substantial. In fact, to apply the right of access to court in circumstances where parties have had ample access to court, but simply have not succeeded in their claims, would be to risk the heresy involved in that most famous constitutional oxymoron: substantive due process. It implies that what are in essence, procedural guarantees, necessarily contain some substantive content which requires a particular result. It is an important (indeed critical) feature of any constitutional adjudication that the reasons should be

⁶⁵ Lord Justice Buxton, "The Human Rights Act and Private Law" (2000) 116 L.Q.R. 48.

⁶⁶ Lord Hoffman, "Human Rights and the House of Lords" (1999) 62 M.L.R. 159.

⁶⁷ [1993] 1 I.R. 286 (H.C. & S.C.).

capable of being explained to and if possible, accepted by individual citizens. One of the telling weaknesses of the substantive due process of the line of authority (apart from its increasing political unpopularity) was that it seemed to involve a self evident contradiction of the constitutional terms, i.e. importing into what was a procedural guarantee, a requirement that a substantive requirement. By the same token, one of the features of *Roe v. Wade* which has contributed to the continued popular debate about that decision, is the fact that whatever the merits of the decision, as a matter of constitutional reasoning it is remarkably unpersuasive. By the same token, it seems to me that whatever the *Osman* were denied, it was not access to court and that a decision which so holds, will find acceptance difficult.

It is, I think, particularly interesting to note how this saga has developed. When *X. v. Bedfordshire County Council* reached the European Court this year, the Court in *Z. & Ors. v. The United Kingdom*⁶⁸ took the opportunity of effectively overruling *Osman*. In *Z. & Ors. v. The United Kingdom* the court stated:

The Court considers that its reasoning in *Osman v. U.K.* was based on an understanding of the law of negligence (see, in particular, *Osman v. U.K.* at paras 138-139) which has to be reviewed in the light of the clarification subsequently made by the domestic courts and the House of Lords. The Court is satisfied that the law of negligence was developed in the domestic courts since the case of *Caparo Industries v. Dickman* and as recently analysed in the case of *Barrett v. London Borough of Enfield* includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case, does not disclose the operation of an immunity.⁶⁹

⁶⁸ (2002) 34 E.H.R.R. 97; [2001] 2 F.L.R. 612; 10 B.H.R.C. 384.

⁶⁹ (2002) 34 E.H.R.R. 97; [2001] 2 F.L.R. 612; 10 B.H.R.C. 384 at paras. 97-100.

It is noteworthy that Judge Rozakis (now on the Court) dissented from this conclusion. Of course, there was a sting in the tail: in *Z. & Others v. the United Kingdom* the Court went on to hold that the treatment suffered by the children in that case, amounted to a breach of Article 3 and furthermore, that the Convention required that local authorities be liable for damages in such circumstances, something which arguably goes a long way in giving horizontal effect in domestic law to the provisions of the Convention.

One very important lesson to be drawn, however, from the *Osman* and *Z.* cases, is the significant impact on the decision of the European Court Human Rights of the expressions of judicial opinion in the United Kingdom. One of the advantages of incorporation of the terms of the Convention itself is as Lord Bingham has observed that when cases go the European Court, they have the benefit of a reasoned decision of the domestic courts, speaking, as it were, the same language and addressing the same issues. In other words, the process of incorporation and subsequent interpretation by the domestic courts, may allow the domestic courts to have some input into, and influence over, the decisions of the European Court of Human Rights. This is an opportunity which Irish Courts should welcome, and exploit.

One other interesting area where there has been a divergence between the jurisprudence of the Convention and the Irish Courts is that which relates to the vexed issue of the right to silence. In the somewhat controversial decision of *Saunders v. the United Kingdom*⁷⁰ the Court of Human Rights had held that the introduction of evidence in a prosecution of Ernest Saunders which evidence had been obtained under the Companies Acts inspection regime was a breach of the right of silence and rendered his trial unfair. As has been pointed out, there was some controversy about this decision because the statements made by Mr Saunders to the Inspectors, were not in the nature of inculpatory admissions, but rather sought to be exculpatory. The significance of their use at the trial, was that they were inconsistent with the version of events and

⁷⁰ [1998] 1 B.C.L.C. 363.

explanation proffered by Mr Saunders at trial. Nevertheless, the Court, while upholding the importance (a la Fayed), of having a system of Companies Act inspection, and the capacity to compel answers, held that the admission of those answers in a criminal trial, would render the trial unfair.

At roughly the same time, the Supreme Court had to deal with the decision in *Heaney v. McGuinness*⁷¹ and consider the effect of section 52 of the Offences against the State Act, 1939. In the Companies Act Inspectorships, a witness could be compelled to give an answer and if they fail to do so, could be punished for deemed contempt (under the English provision) or after a High Court Inquiry (under the Irish provisions as interpreted in light of *In re Haughey*). Either way, there was a penalty for failing to answer. Section 52 of the Offences Against the State Act, while in more direct terms, was, in substance, similar. It made it an offence to refuse to account for movements in certain situations. In *Heaney and McGuinness's* case, the Plaintiffs had been found in Donegal close to the scene of a significant explosion in County Derry, but when questioned under section 52, refused to account for their movements. One of the issues which had not yet been conclusively determined, was whether any answers given in response to such questions, would also be admissible in a trial for any other offence. In the event, Messrs Heaney and McGuinness were prosecuted under section 52 for failing to respond to the questions, were convicted and their challenge to the constitutionality of Section 52 failed, the Supreme Court holding (in a perhaps less than compelling Judgment) that the right to silence could be abrogated and that the act was constitutional. The Supreme Court reserved the question of whether any answers given under a section 52 demand would be admissible in a subsequent trial on a separate offence.

Later again in 1999 the Supreme Court had to address *In re N.I.B. (No. 1)*⁷² provision of the Companies Act 1990 almost identical to those which applied in Saunders. By now, the Supreme Court had the benefit of the decision in Saunders and reviewed the decision in *Heaney and McGuinness*, and adopted a position very

⁷¹ [1996] 1 I.R. 580 (S.C.).

⁷² [1999] 3 I.R. 169 (H.C. & S.C.).

similar to that of Saunders *i.e.* that the privilege against self-incrimination could not be raised in response to questions validly put by inspectors, but that any answers given would not normally be admissible in a criminal trial unless (in unusual circumstances) the trial Judge concluded that the answers given were voluntary. It seemed, therefore, that the principle had been established fairly conclusively that the right to silence did not permit the refusal of answers given under pain of punishment but would normally preclude the admission of any such answers in any other criminal trial.

However, *Heaney* and *McGuinness* then made its way to the Court of Human Rights and was decided on 21 March 2001. Again, it is not a particularly impressive decision. It appears to have been decided on the papers alone without any oral hearing. It would have been possible to decide *Heaney* on very narrow grounds. It might have been plausibly argued that although the rule enunciated *In re N.I.B. (No. 1)* was compatible with the Convention, that had not been explicitly stated in *Heaney* and *McGuinness* and indeed was not by any means certain at the time in which Mr *Heaney* and Mr *McGuinness* were asked to answer under section 52 *i.e.* it was not clear to them and could not have been made clear to them that the answers given under section 52 would not be admissible in any subsequent trial. It might, therefore, have been argued that the trial of Mr *Heaney* and *McGuinness* for that reason alone was inconsistent with the requirements of Article 6, even though any subsequent demands made under section 52 of other suspects would be valid (as long as it was established that any answers would not be admissible in any future trial of any other criminal charge). However, the Court of Human Rights did not take this line and instead held that section 52, on its face, infringed the Convention of Human Rights.

I must confess to having some difficulties with this decision. The provisions of the Offences against the State Act, 1939 are perhaps not popular, (particularly among those who regularly have recourse to the European Court of Human Rights) but they undoubtedly represent a response to a serious threat to the State. It is hard to reconcile the decision in *Heaney* and *McGuinness* with the decision

in *Saunders*. The decision in *Saunders* was based on the perceived public importance of Companies Acts inspections, but it is hard to see how that is of more moment than the importance of the investigation and prosecution of subversive crime. One possible distinction, is that section 52 creates a separate criminal offence for which one can be tried whereas arguably, the Companies Act provisions permit of coercion, but not punishment, for default. This is not a distinction which I find compelling. I don't believe the cells are any more pleasant if one is detained there for coercive punishment for contempt rather than punishment for breach of a statutory provision. In any event, this then is one area where the interpretation of the Convention has departed from the Supreme Court's interpretation of the Irish Constitution. It seems to me that at a minimum, the decision of the European Court of Human Rights in *Heaney* and *McGuinness* might have benefited from a decision of the Irish Supreme Court that analysed both the Convention and the Constitution.

One other interesting area where the Convention casts light on the Constitution of Ireland provisions, is the provisions relating to the impartiality of deciding bodies. In the first place, it appears that the Convention does not make the rigid distinction which English (and to some extent) Irish Law makes between automatic disqualification for interest (e.g. the holding of shares) and discretionary disqualification for favour, i.e. the apprehension on the part of a person in the position of a party, that they might get less than a fair and impartial hearing.⁷³ This might be one area where the Irish Law might profitably be reviewed in the light of the Convention jurisprudence. It is difficult to explain why two shares in a massive public company should automatically disqualify a Judge from hearing a personal injury case involving the company with no conceivable impact on the share price.

A related area where the Constitution is surprisingly and unexpectedly weak, is its guarantee of judicial independence. Although that guarantee is stated explicitly in Article 35.2, Article 34.4 provides for the removal of a Judge by the resolution of both

⁷³ See also Olowofoyeku, A.A., "The *Nemo Index* Rule: The Case Against Automatic Disqualification" [2000] P.L. 456. See also Bingham, T.H., *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000).

Houses of the Oireachtas. Effectively, a simple majority will suffice something that contrasts, somewhat inexplicably, with the provisions of Article 12.10 which require a two third majority in the case of the President. The requirement of independence of the judiciary is a requirement in the first place, of independence from politics and, in particular, the executive arm of Government. However, in our Constitution, the Executive necessarily controls a majority of the Houses of the Legislature, and accordingly, a provision that a Judge can be removed on a majority determination of the Houses of the Legislature is, in effect, a provision which permits a removal of a Judge by the Executive. In my view, the only thing that saves this from a breach of the requirements of impartiality established by the Convention of Human Rights is the fact that in practice, the powers have never been sought to be operated along party lines. One of the more depressing features of public affairs of recent years was the collapse of the proposed amendment to the Constitution which would have altered this provision in the face of public indifference and some naked hostility to the judiciary.

To suggest that the judicial tenure should be entrenched, is perhaps not entirely radical thought, at least as far as this audience is concerned. One other issue which arises, however, which perhaps has not received sufficient debate, is the question of the Constitutional requirements of the appointment process. A useful point to conclude on, then might be to reconsider the position of the 1945-1950 Labour Government in the United Kingdom. That was the Government which decisively put an end to the system of appointment of Judges by reference to their support of the Government party of the day. Thereafter, while many valid criticism can be made of the selection process⁷⁴ for the appointment of Judges in the U.K. it has been regarded as an anathema that party political considerations should have any influence let alone be decisive.⁷⁵ In Ireland, this is a matter which has received very little public attention. Nevertheless, the fact that the appointment of Judges is perceived to be influenced by party political considerations, has

⁷⁴ See the article by Dame Brenda Hale of the Court of Appeal, "Equality and the Judiciary - Why Should We Want More Women Judges" [2001] P.L. 489.

⁷⁵ A very interesting account of the system is provided by the former Permanent Secretary in the Lord Chancellors department in Legg, T., "Judges for the New Century" [2001] P.L. 62. See also Bingham, T.H., *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000), p. 58.

given rise to easy, and in my view, unfair criticism of judicial conduct and decisions. The shared assumptions which permitted appointments to be made which were broadly satisfactory and which did not attract criticism are now, increasingly outdated. The future is unlikely to be characterised by a lesser degree of scrutiny and/or criticism (fair or unfair) of Judges. Nevertheless, it appears to be the view that the fact that Judges are appointed by the President under Article 34.1 and that the President exercise his or her powers on the advice of the Government, means that the Constitution permits and contemplates governmental (and therefore, politically influenced) appointments.

I am not sure that this is necessarily the case. Article 35.1 is immediately followed by Article 35.2 which is a trenchant statement of the importance of judicial independence. That independence (as the next succeeding sub-article, Article 35.3 makes absolutely clear) must be independence of the Executive (and indeed the Legislature) and politics in general, as well as independence from the matter in controversy in any individual case.⁷⁶ It does not seem to me implausible that if the person to be appointed is required to be independent, that the appointment process can be required to guarantee or promote such independence. The fact that judicial appointments are subject to some statutory control itself shows that there is no prohibition on the regulation of the manner in which appointments are made and leads me to suggest that it might be possible to further refine and tighten the appointment procedure and, in particular, to seek to exclude political considerations. While this may appear to be a remote and unfashionably naïve approach at this stage and not to trouble the horizon of the European Court of

⁷⁶ See Bingham, T.H., *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000), pp. 58, 60. Article 35.2 has also been considered to hamper the creation of a system of judicial oversight. However, it has been noted that Article 35.4 contains no procedure for a fair hearing etc before the Oireachtas. It has been suggested that this must necessarily be implied. However, it might be more consistent with the framework of the Constitution, that the facts of any case be established by an independent third party (as indeed is permitted by Article 12.10.5^o in the case of impeachment of the President) (“the House shall investigate the charge or cause the charge to be investigated”). It would then be left to the House of the Oireachtas to decide, by resolution whether or not on those facts to remove.

Human Rights⁷⁷ the point might yet come when the guarantees of independence of the judiciary contained in both documents, and other human rights developments⁷⁸ might yet lead to significant changes in this area as well.

⁷⁷ *Campbell & Fell v. U.K.* (1984) 7 E.H.R.R. 165. See Clayton, R. and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, Oxford, 2000), para 11.225

⁷⁸ One of the worst examples of the application of the principle attributed to Lord Halsbury "*caeteris paribus* be damned, I'm going to appoint my nephew" was Northern Ireland pre-1969. Now, it is proposed, as part of the Good Friday Agreement and insisted upon by the Government of Ireland, that judicial appointment board meet and recommends only one name for appointment.