

The prosecution of organised crime: removing the jury

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Abstract

Serious organised crime groups may enjoy virtual impunity through the corruption and coercion of parties involved in the criminal justice process. In the UK and Ireland, this is most evident in the intimidation of witnesses and jurors, leading to difficulties in successful prosecution of organised criminality. One notable response to this phenomenon is to hold juryless trials for serious indictable offences, mirroring a similar approach in counter-terrorism legislation arising from the political violence in Northern Ireland. Despite common rationales, such trials have been operationalised differently in these neighbouring jurisdictions: in England, Wales and Northern Ireland “ordinary” legislation was introduced, whereas in Ireland juryless trials are permitted under existing counter-terrorism laws. This paper reviews the problematic dimensions of both legislative schemes, and considers their application by the courts since enactment. After outlining viable alternatives, it concludes that juryless trials may be necessary in limited instances, and if so, the English model is to be preferred.

I. Introduction

Political discourse in the UK and Ireland emphasises the “scourge”¹ of organised crime that “blights”² communities. In particular, the dominant perception is that the odds remain stacked against the State in terms of the criminal process:³ the prosecution of suspected organised crime poses challenges in terms of investigating and constructing cases, and also of potential danger to individuals involved. In particular, witness testimony and lay participation may be difficult to obtain if witnesses and jurors fear

¹ Stage 1 of the Criminal Justice and Licensing (Scotland) Bill, Scottish Parliament, November 26, 2009, Col 21574 per Justice Secretary Kenny MacAskill.

² Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* (Cm 6167) (London, Stationery Office, 2004) 9.

³ *Ibid* para 6.3.

intimidation or reprisal.⁴ Intimidation, ranging from threats to involved parties, their families or property, through to physical violence or even homicide, results in the neutralisation of law enforcement, because, of course, without witness testimony and impartial juries convictions would be rather more difficult, if not impossible.⁵

Such “paralysis of justice” has been called a cardinal feature of organised crime.⁶ Nonetheless, despite its political and popular use, there is no “agreed-upon definition” of organised crime;⁷ the term may denote specific structures or organisations that are involved in criminality; the provision of illegal goods or services; or a certain type of crime that meets a given level of gravity.⁸ Maltz proposed a definition requiring not only violence, continuity, and variety in the types of criminality engaged in but also corruption.⁹ While corruption of the criminal justice process in other jurisdictions may involve the targeting of official agents and parties, in the United Kingdom and Ireland the primary focus of coercion by organised crime groups is against witnesses and jurors.

Though it is difficult to determine the extent of intimidation of lay participants in the criminal process, it appears that this phenomenon is not uncommon and has been a grave problem in certain parts in the UK for decades.¹⁰ Moreover, it appears that four to five trials per year require 24-hour police protection for jurors,¹¹ though, admittedly, these figures are not recent. There remains a dearth of empirical material on juror coercion and tampering, and when asked in Parliament questions, the Secretary of State

⁴ See eg House of Commons Northern Ireland Affairs Committee, *Organised Crime in Northern Ireland Volume I* (Third Report of Session 2005–06) (London, The Stationery Office, 2006) para 85.

⁵ AK Cohen, “The Concept of Criminal Organisation” (1977) 17 *British Journal of Criminology* 97, 106.

⁶ J Landesco, *Organised Crime in Chicago* (Chicago, University of Chicago Press, 1968) 23.

⁷ P Van Duyne, “The Phantom and Threat of Organized Crime” (1996) 24 *Crime, Law and Social Change* 341, 343. See also F Varese, “What is Organized Crime?” in F Varese (ed), *Organized Crime: Critical Concepts in Criminology* (London, Routledge, 2010) 1–33; FE Hagan, “The Organized Crime Continuum: A Further Specification of a New Conceptual Model” (1983) 8 *Criminal Justice Review* 52; and Frank E Hagan, “‘Organized Crime’ and ‘organized crime’: Indeterminate Problems of Definition” (2006) 9 *Trends in Organized Crime* 127.

⁸ See L Paoli and C Fijnaut, “Organised Crime and its Control Policies” (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 307, 308; N Hamilton-Smith and S Mackenzie, “The Geometry of Shadows: A Critical Review of Organised Crime Risk Assessments” (2010) 20 *Policing and Society* 257, 261.

⁹ M Maltz, “On Defining ‘Organized Crime’: The Development of a Definition and a Typology” (1976) 22 *Crime and Delinquency* 338; also see FE Hagan, *Crime Types and Criminals* (Thousand Oaks, CA, Sage, 2010) 300; J Finckenauer, “Problems of Definition: What is Organized Crime?” (2005) 8 *Trends in Organized Crime* 63, 81.

¹⁰ W Maynard *Witness Intimidation: strategies for prevention* (London, Home Office, 1994) 4.

¹¹ HL Deb 19 November 2003 vol 654 col 1963 per Baroness Scotland of Asthal.

for Justice noted that Her Majesty's Courts Service does not record any data centrally on the number of re-trials ordered as a result of jury intimidation.¹² Similarly, no empirical study has been carried out of juror intimidation or coercion in Ireland, but public concern has been heightened by incidents like the discovery of a jury list for a murder trial in a house-search in Dublin.¹³ Overall, these factors contribute to the receptiveness to the prospect of removing the jury in certain instances, both for the protection of the individuals involved but also to smooth the operation of the justice process.

Despite common rationales, juryless trials are implemented differently in the UK and Ireland: in England, Wales and Northern Ireland "ordinary" legislation was introduced to abolish the jury in certain instances for indictable offences, whereas in Ireland juryless trials are permitted under existing counter-terrorism laws. This paper reviews the problematic dimensions of both legislative schemes, and considers their application by the courts since enactment. Before analysing the means by which an accused may be tried without a jury, the paper next considers the notion of a jury trial and its significance.

II. The jury trial

In general, the right to a jury trial is regarded as a fundamental element of the adversarial criminal process, and as a norm that should not be interfered with lightly or unduly. The Magna Carta alluded to trial by one's peers,¹⁴ while in Ireland, the jury trial is guaranteed under the Constitution.¹⁵ The significance of this type of trial is manifold. By involving lay peers of the defendant in fact-finding, a representative element comprising the viewpoint and judgment of the community is imported into the justice process. Moreover, the jury trial can comprise an element of participatory democracy,¹⁶ improving community knowledge of the process and enhancing its legitimacy in the eyes of citizens. As De Tocqueville noted, juries "spread respect for the courts' decisions and for the idea of rights throughout the classes".¹⁷ Furthermore, the integration of professional and lay

¹² HC Deb, 10 February 2010, c1076W.

¹³ See *The Herald*, "Murder trial jury names uncovered in Garda raid", 6 March 2010.

¹⁴ J Clarke Holt, *Magna Carta and the idea of liberty* (New York, Wiley 1972).

¹⁵ Article 38.5.

¹⁶ V Hans and N Vidmar, *Judging the Jury* (New York, Plenum Press, 1986) 248.

¹⁷ A De Tocqueville, *Democracy in America* (New York, Doubleday, 1969) 274.

decision-making in the criminal trial is viewed as providing a check on the State. This safeguard is important both in substance and in a symbolic sense: the jury may mitigate or overturn over-reaching State powers or biases, and its presence demonstrates the public's potential to hold the State to account.¹⁸

Despite the long-standing convention of jury trials for criminal cases in common law systems, the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) does not guarantee a right to trial by jury. As the Court of Appeal stated in *R v Twomey*

It ... does not follow from the hallowed principle of trial by jury that trial by judge alone, when ordered, would be unfair or improperly prejudicial to the defendant... [F]or the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it is irrelevant whether the tribunal is judge and jury or judge alone.¹⁹

In contrast, the right to a jury trial is protected explicitly under the Irish Constitution for all trials on criminal charges, save for three exceptions: trials for minor offences, trials before military tribunals,²⁰ and trials before a special criminal court.²¹

III. Juryless trials of suspected organised crimes

Despite these significant dimensions of the jury trial, the possibility of holding juryless trials now is well established in England, Wales and Ireland, on the basis of the threats both to juror safety and to the administration of justice. Though such instances are most likely to arise in relation to organised criminality, the English scheme is not limited in this respect: here such a trial is permitted after court order only when specific criteria are satisfied. In Ireland, the usual mode of trial may be circumvented in relation to organised crime in two ways: existing counter-terrorism legislation permits the holding of a juryless trial on the order of the Director of Public Prosecutions (the DPP), and certain organised crimes now lead automatically to juryless trials.²²

¹⁸ P Devlin, *Trial by Jury* (London, Stevens, 1966) 160 and 164.

¹⁹ *R v Twomey* [2009] EWCA Crim 1035; [2010] 1 WLR 630 para 18.

²⁰ See Defence Acts 1954 to 2007.

²¹ Article 38.5.

²² As is outlined in more detail below, juryless trials were introduced in Ireland first to deal with offences against the State.

a. Juryless trials in the United Kingdom

Juryless trials first were held in the UK in Northern Ireland in the 1970s to deal with juror intimidation by paramilitary organisations and to address perverse acquittals along religious or sectarian lines.²³ Then the Criminal Justice Act 2003 established a separate scheme of juryless trials across England, Wales and Northern Ireland in cases of possible jury tampering.²⁴ The 2003 Act provided, *inter alia*, a framework for juryless trials on indictment in cases of serious or complex fraud²⁵ or where there is a danger of jury tampering.²⁶ This latter provision is not limited to terrorism or political offences. After the House of Lords rejected the initial proposals in the Bill, an amendment was inserted stating that approval of both Houses was required before the sections on fraud could be brought into force.²⁷ In fact, the fraud provisions were never enacted and in 2012 were removed,²⁸ but since 2006 juryless trials may be held under the 2003 Act in the event of possible interference with the jury.²⁹

²³ In Northern Ireland the Emergency Provisions Act 1973 allowed non-jury trials on indictment of scheduled offences in single judge “Diplock courts”. This Act was introduced in an attempt by the UK Government to deal with juror intimidation by paramilitary organisations as well as perverse acquittals along religious or sectarian lines. See *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, Cmnd. 5185 (London: Her Majesty’s Stationery Office, 1972) and Northern Ireland (Emergency Provisions) Act 1973. See S Greer and A White, “A Return To Trial By Jury” in A Jennings (ed) *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (London, Pluto Press, 1988) 58; S Greer and A White, “Restoring Jury Trial to Terrorist Offences in Northern Ireland” in M Findlay and P Duff (eds) *The Jury under Attack* (London, Butterworths, 1988) 186. Trials on indictment may still be held there without a jury where the DPP for Northern Ireland suspects that there is a link to a proscribed organisation or political or religious hostility, and that in view of this there is a risk to the administration of justice if the trial were conducted with a jury (Justice and Security (Northern Ireland) Act 2007 s 1). The legislation was due to expire on 31 July 2011, but was extended for a two-year period by the Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-Jury Trial Provisions) Order 2011.

²⁴ There has been no move towards such trials in Scotland, likely due to the fact that a simple majority verdict is permissible in jury trials: in Scotland the jury comprises 15 people, and a majority of eight to seven is sufficient. Juries in the rest of the UK and in Ireland comprise 12 people. Section 13 of the Criminal Justice Act 1967 removed the requirement of unanimity in jury verdicts in England and Wales, so a majority of 10 now suffices. The impetus for this included the prevention of acquittal due to the intimidation of a juror. Also see the Criminal Procedure (Majority Verdicts) Act (Northern Ireland) 1971 and the Criminal Justice Act 1984 in Ireland permitting a majority verdict of 10 to two.

²⁵ The complexity or length of the trial (or both) must be likely to make the trial so burdensome to a jury that the interests of justice require serious consideration to be given to a juryless trial.

²⁶ Criminal Justice Act 2003 ss 43 and 44.

²⁷ Criminal Justice Act 2003 s 330(5)(b).

²⁸ An attempt in the Fraud (Trials without a Jury) Bill 2006-07 to remove the requirement of approval of the two Houses was blocked again in the Lords (Hansard HL 20 March 2007, Col 1201, Vol 690). Section

As has been described and analysed previously,³⁰ juryless trials may be ordered in England, Wales and Northern Ireland where there is evidence of a real and present danger that jury tampering would take place and that despite any reasonable preventative steps there is so substantial a likelihood that tampering would occur as to make it necessary in the interests of justice to hold a juryless trial.³¹ In addition, a jury may be discharged during a trial and the trial continued without one, if the judge is satisfied that jury tampering has taken place and that to continue without a jury would be fair to the defendant.³² Alternatively, the judge may terminate the trial and may order that any new trial must be conducted without a jury.

Prior to enactment, it was stated that this development was prompted by the need to safeguard jurors from organised criminals,³³ and more pragmatically, by the cost of protecting jurors.³⁴ Despite this political rhetoric, judge-only trials are not limited to cases of organised crime, notwithstanding that systematic and violent coercion is most likely to arise in these instances. Indeed, the Court of Appeal in *R v Guthrie* rejected the submission that the relevant provisions were intended to be confined to very serious criminal activity and to cases where the tampering involved serious intimidation by professional criminals.³⁵ Nonetheless, the Court noted that the level of criminality and evidence of organised violent crime is more likely to be relevant where the question is whether a trial should start without a jury, than whether an existing trial should continue without one.³⁶ Thus, it is likely that such applications often will relate to organised crime.

The English model of juryless trials centres on a judicial determination of risk where there is strong evidence that the normal system could not operate properly. There is no category of suspected cases that falls automatically to be heard without a jury; instead the risk of tampering must be established to the satisfaction of the court. This may

113 of the Protection of Freedoms Act 2012 removed the provision on juryless trials in cases of fraud from the 2003 Act.

²⁹ Criminal Justice Act 2003 (Commencement No 13 and Transitional Provision) Order 2006) and Criminal Justice Act 2003 (Commencement No 15) Order 2006.

³⁰ See for example P Thornton "Trial by jury: 50 years of change" (2004) *Criminal Law Review* 683.

³¹ Criminal Justice Act 2003 s 46.

³² Criminal Justice Act 2003 s 46.

³³ HC Deb 19 May 2003 vol 405 c740 per David Blunkett.

³⁴ HL Deb 19 November 2003 vol 654 cc1963 per Baroness Scotland of Asthal.

³⁵ *R v Guthrie* [2011] EWCA Crim 1338 para 27.

³⁶ *ibid.*

be due to the fact that the provisions are not focused on one type of crime, but on specific instances of jury tampering. Thus, the focus is on the established risk of intimidation in a particular case, rather than a generic presumption that organised crime cases, say, are likely to involve tampering. Indeed, there is no statutory substantive definition of “organised crime” or “criminal organisation” in England and Wales, and there is thus no body of procedural law that applies to organised crime automatically. Instead, evidence must be presented of a real and present danger of jury tampering, and the criminal standard of proof is required, given that the “right to trial by jury is so deeply entrenched in our constitution”.³⁷ Secondly, it must be established that despite any reasonable preventative steps, including police protection, tampering is so likely to occur that the interests of justice necessitate a juryless trial. The Court of Appeal has emphasised that both conditions must be satisfied.³⁸

The application of this legislation since 2006 indicates approval of juryless trials in very limited instances: just one juryless trial has been held, in *R v Twomey*, in the Crown Court sitting in the Royal Courts of Justice.³⁹ While in *R v J, S and M* there was in fact a real and present danger of tampering, the Court concluded that necessary protective measures would not impose an unacceptable burden on the jurors.⁴⁰ Similarly, in *KS v R* a “fairly limited level of jury protection” was deemed to sufficient to outweigh the potential threat.⁴¹ This underlines that a juryless trial of a serious criminal offence “remains and must remain the decision of last resort”.⁴²

The limited use of the provisions may be explained by a number of factors. First, the two-pronged test in the 2003 Act sets a high threshold; this derives from the reluctance of the House of Lords in its legislative capacity to acquiesce in a break from the normal mode of criminal trials. Second, the Court of Appeal requires evidence of a real and present danger of tampering to be established to “the highest possible forensic standard of proof” before the constitutional right to trial by jury is removed.⁴³ Finally, the

³⁷ *R v Twomey* n 19, para 16.

³⁸ *ibid* para 18.

³⁹ *R v Twomey* n 19.

⁴⁰ *ibid* para 7.

⁴¹ *KS v R* [2010] EWCA Crim 1756.

⁴² *R v J, S and M* [2010] EWCA Crim 1755 para 8.

⁴³ *R v Twomey* n 19 para 16.

second aspect of the legislative test has been applied cautiously, and the courts have regarded the protection provided by the police as sufficient to safeguard jurors in most instances. Thus, the House of Lords and the judiciary in England, Wales and Northern Ireland have served as a bulwark against the erosion of jury trials for serious offences, notwithstanding the strident tenor of some political discourse preceding legislative enactment.

Section 46 of the 2003 Act also permits a jury to be discharged during a trial and the trial continued without one. The Court of Appeal in *R v Twomey* noted that “save in unusual circumstances, the judge faced with this problem [of tampering] should order not only the discharge of the jury but ... he should continue the trial”.⁴⁴ As Taylor commented, this is based not on efficiency and convenience but on the notion that no advantage should accrue to those involved in jury tampering from terminating a trial rather than proceeding to verdict.⁴⁵ A similar sentiment was expressed by the Court of Appeal in *R v Guthrie*, noting that it would be “strange” if a criminal or group of criminals could “take extreme steps to undermine the process of trial by jury, and then to argue that the judge who had made the necessary findings should not continue the trial.”⁴⁶ This is a pragmatic acceptance by the courts of the nature and gravity of jury tampering but again this section is used rarely.

Such continuation of a trial without a jury occurred in Northern Ireland in *R v Clarke and McStravick*, involving a “*soi-disant* ‘tiger kidnapping’ scenario” involving an employee of a security transportation company and his family.⁴⁷ McCloskey J in the Crown Court emphasised that “nothing has occurred ... to displace the presumption that, as a judge alone, I would constitute an independent and impartial tribunal – and no argument to the contrary was advanced”.⁴⁸ The Court of Appeal dismissed the appeal against this decision.⁴⁹ Similarly, in *R v Guthrie* the Court of Appeal heard an appeal from the decision of a recorder in the Crown Court to discharge the jury and continue the

⁴⁴ *R v Twomey* n 19 para 20.

⁴⁵ N Taylor, “Case Comment *R. v S*: judge alone - jury discharged because of jury tampering” (2010) *Criminal Law Review* 643.

⁴⁶ *R v Guthrie* [2011] EWCA Crim 1338 para 25.

⁴⁷ *R v Clarke and McStravick* [2010] NICC 7.

⁴⁸ *ibid* para 38.

⁴⁹ *ibid* para 47.

trial herself.⁵⁰ The recorder found the evidence regarding alleged tampering of a witness by a third party to be “clear and cogent”, and concluded that continuing with the trial and delivering verdicts would not be unfair to the defendants, though this was not a decision taken “lightly or happily”.⁵¹ Ultimately she determined that there was “no realistic or workable alternative”.⁵²

b. Juryless trials in Ireland

Like the situation in England, Wales and Northern Ireland, juryless trials may be held in Ireland in limited circumstances. The Irish Constitution allows the restriction of the right to a jury trial where the Executive declares the ordinary courts to be “inadequate to secure the effective administration of justice and the preservation of public peace and order”.⁵³ Part V of the Offences Against the State Act 1939 regulates the establishment and operation of special judge-only courts in Ireland and comes into force after Government proclamation about the inadequacy of the ordinary courts.⁵⁴ Such a proclamation has been in force since 1972.⁵⁵ The rationale for removing the jury was and remains juror intimidation and the potential compromising of the resultant decision: the Irish Government justified the restoration of the juryless Special Criminal Court (SCC) in 1972 on the basis that juries were likely to be threatened by paramilitaries,⁵⁶ and this court continues to be used on the basis that juries in the trial of organised criminals will be subject to threats or intimidation.⁵⁷

The 1939 Act allows the DPP to direct the hearing of a trial before the SCC on the basis that she believes the ordinary courts to be inadequate to secure the administration of

⁵⁰ *R v Guthrie* n 46.

⁵¹ *ibid* para 13.

⁵² *ibid*.

⁵³ Article 38.3.

⁵⁴ Offences Against the State Act 1939 s 35.

⁵⁵ Committee to Review the Offences Against the State Acts, *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (Dublin, Stationery Office, 2002) para 9.8.

⁵⁶ See the submission of the Irish Government in *Eccles, McPhillips and McShane v Ireland* (Application No 12839/87, 9 December 1988) as referred to in Irish Council for Civil Liberties, *ICCL Submission to the Committee to Review the Offences Against the State Acts, 1939-98, and Related Matters* (Dublin, ICCL, 2002).

⁵⁷ C.f. United Nations Human Rights Committee, *Report of the Human Rights Committee*, Official Records of the General Assembly, 48 Session, Supplement No 40, 1993 (A/48/40) Pt 1, 125-128.

justice and the preservation of public peace and order.⁵⁸ As well as this risk-based approach with the DPP as “gate-keeper”, certain crimes fall within the scope of counter-terrorism legislation and are heard without a jury automatically. Both avenues will now be considered.

The certification power of the Irish DPP under existing counter-terrorism legislation permits the denial of the constitutional right to a jury trial for non-scheduled offences. Two matters of concern arise, one of which is procedural, the other more fundamental: firstly, there is no possibility of review as long as the DPP’s decision is *bona fide*,⁵⁹ and secondly, a prosecutor rather than the judiciary holds the ability to limit a constitutional right.

In fact, the DPP exercises her power in a restrained manner, and does not direct the hearing of many cases in the SCC: in 2011 there were 13 juryless trials (including both scheduled and non-scheduled offences), compared to 16 in 2010, and ten in 2009.⁶⁰ The most common alleged offence was membership of an unlawful organisation, that is, a terrorism offence,⁶¹ but other offences include possession of firearms, ammunition or an explosive substance, false imprisonment, and violent disorder⁶² and thus may encompass organised criminality. Moreover, it has been asserted that the DPP’s policy is not generally in favour of trying organised crimes cases before the SCC;⁶³ nevertheless reliance on prosecutorial discretion is not ideal in terms of predictability of the application of the law and public perception of the legal process.

The second means by which organised crime cases are directed to the SCC results from the decision of the Irish Parliament to bring certain criminal offences within the scope of counter-terrorism legislation. Originally, the Schedule to the Offences Against the State Act 1939 encompassed not only acts of terrorism but also firearms offences, which are often linked to organised crime.⁶⁴ Now, substantive organised crime offences

⁵⁸ ss 47 and 48.

⁵⁹ *Savage and Owen v DPP* [1982] ILRM 385, 387.

⁶⁰ Courts Service, *Courts Service Annual Report 2011* (Courts Service, Dublin 2012) 31.

⁶¹ Offences Against the State Act 1939, part III.

⁶² Courts Service, n 60, 42.

⁶³ F Davis, *The History and Development of the Special Criminal Court, 1922–2005* (Four Courts Press 2007) 151.

⁶⁴ At the time of enactment, the vast majority of firearms-related offences were linked to the political struggle.

have been added to the Schedule and so the ordinary courts are deemed automatically to be inadequate.⁶⁵

Part 7 of the Criminal Justice Act 2006 introduced a number of substantive organised crime offences in Ireland: directing the activities of a criminal organisation,⁶⁶ participating in or contributing to activities of a criminal organisation,⁶⁷ and committing a serious offence for a criminal organisation.⁶⁸ There is no equivalent legislation in the UK.⁶⁹ These provisions lead to certain procedural and sentencing consequences, including being tried without a jury on the basis that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to organised crime.⁷⁰ This section in the Criminal Justice (Amendment) Act 2009 has a sunset clause of 12 months, but has been renewed each year since enactment, most recently in June 2013.⁷¹ The Minister for Justice emphasised that this provision and its renewal seek to address “[t]he complete disregard which these gangs showed for human lives [which] threatened to subvert the entire justice system”.⁷²

Ultimately, such a legislative approach is predicated on the view that organised criminality is not “ordinary” crime and so warrants the adoption of measures used against suspected terrorists. The level of concern is evident in the assertion of a previous Minister for Justice that “the drug and gun culture ... poses as significant a threat to the wellbeing of the Irish State and Irish society as the paramilitaries did at any stage of their campaign

⁶⁵ Criminal Justice (Amendment) Act 2009 s 8.

⁶⁶ Section 3 of the Criminal Justice (Amendment) Act 2009 defines a “criminal organisation” as a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence, which is that for which a person may be imprisoned for at least four years. A structured group comprises at least three persons and cannot be randomly formed for the immediate commission of a single offence, and the involvement in the group by two or more of those persons must be with a view to their acting in concert. For the avoidance of doubt, the legislation emphasises that such a group may exist despite not having formal rules or membership, any hierarchical or leadership structure, or continuity of involvement by persons in the group. This seeks to address the ephemeral and flexible nature of criminal groups in Ireland, as in the UK, in contrast to groups like the Mafia and the IRA.

⁶⁷ Criminal Justice Act 2006 s 71A (as amended). This has a direct predecessor in the Offences against the State (Amendment) Act 1998, which contains the offence of directing an unlawful organisation, such as the IRA.

⁶⁸ Criminal Justice Act 2006 s 72 (as amended).

⁶⁹ The Criminal Justice and Licensing (Scotland) Act 2010 criminalises involvement in and direction of “serious organised crime” but does not provide for juryless trials. See n 24 above.

⁷⁰ Criminal Justice (Amendment) Act 2009, s 8.

⁷¹ See *Speech on behalf of the Minister for Justice and Equality on Resolution on the continuation in operation of Section 8 of the Criminal Justice (Amendment) Act 2009* - Seanad Éireann, 19 June 2013.

⁷² Dáil Deb 12 June 2012 vol 768 col 367.

for a quarter of a century’,⁷³ and is reiterated in political comments that there is a “serious crisis in criminal justice”,⁷⁴ and that “[g]angland crime constitutes an attack on the State in much the same way as the IRA attacked the foundations of the State for many years”.⁷⁵ Indeed, the involvement in organised crime groups of individuals who once participated in paramilitary violence in Ireland⁷⁶ lends weight to the belief that organised crime merits extraordinary reactions beyond the scope of the “ordinary” criminal law. So, in the debates about extending juryless trials to organised crimes it was to counter-terrorism measures that Irish policy makers looked, rather than to the contemporary scheme in place in neighbouring jurisdictions.

The automatic holding of juryless trials is a crude reaction to the perceived problem of juror intimidation and the fear concerning organised crime in Ireland. As previously emphasised, no empirical work exists on the extent of this phenomenon, nor on alternatives to wholesale jury abolition. Despite political support for enactment of these powers and for their on-going retention, not one case has been brought before the SCC under the 2009 Act.⁷⁷ This may be a function of the length of time it takes to investigate and construct such cases, and given that a number of people have been charged with organised crime offences,⁷⁸ such trials may be heard in future without lay fact-finders.

VI Problematic dimensions of juryless trials

Certain issues arise regarding the holding of judge-only trials, regardless of whether the decision is based on suspected risk or automatic inclusion of certain offences, and whether prosecutorial or judicial decision is determinative.

⁷³ “Gardaí Investigate Drugs Link in Latest Shootings”, *Irish Times*, 25 January 2007.

⁷⁴ Dáil Deb 14 December 2006 vol 629 col 1672 *per* Mr Costello.

⁷⁵ Dáil Deb 29 April 2009 vol 681 col 373 *per* Mr Power.

⁷⁶ See An Garda Síochána & Police Service of Northern Ireland, *A Cross Border Organised Crime Assessment 2008* (Belfast and Dublin, Northern Ireland Office and Department of Justice, 2008) 6; Organised Crime Task Force, *2011 Annual Report & Threat Assessment Organised Crime In Northern Ireland* (Belfast, Northern Ireland Office, 2011) 16; Independent Monitoring Commission, *Eighth Report of the Independent Monitoring Commission* and *Tenth Report of the Independent Monitoring Commission* (London, The Stationery Office, 2006).

⁷⁷ See Dáil Deb 21 March 2012 vol 760 [15272/12] WA.

⁷⁸ *ibid.*

Regardless of one's views on the value of the jury trial,⁷⁹ it could be argued that the right to equal treatment is threatened when only certain categories of defendant are tried by jury. The right to equality is safeguarded by Art 14 of the ECHR, which precludes discrimination in the enjoyment of Convention rights. So, rather than constituting a "free-standing" right as such, it ensures that other rights are not applied in an unequal or discriminatory fashion. Given that there is no right to a jury trial under the ECHR, there cannot be any breach of Art 14 in this context.

In Ireland, the right to equality is protected by Article 40.1 of the Constitution. Though "Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances",⁸⁰ the Irish State may not discriminate between citizens in an unjust, arbitrary, capricious, or unreasonable manner.⁸¹ One could argue that the absence of an articulation of the DPP's reasons and the blanket removal of a jury for suspected organised crimes breaches some defendants' right to equality, given that there may be no intimidation.

The matter of equality has been raised before the Irish courts. In *Kavanagh v Ireland*, a case concerning the non-scheduled offence of false imprisonment, the Supreme Court held that as the determination of the adequacy of the ordinary courts was political in nature, such a decision should not be regulated in the judicial sphere and so did not engage with the substantive equality argument.⁸² Subsequently, the claim that equality was breached was dismissed in *Byrne and Dempsey v Government of Ireland*.⁸³ Hamilton J grounded his decision on the fact that the DPP is authorised directly by statute to issue such a certificate and thereby to make a distinction between citizens in this manner.⁸⁴ While Kavanagh's later petition to the United Nations Human Rights Committee was successful,⁸⁵ the Supreme Court held that the International Covenant on Civil and

⁷⁹ See P Darbyshire "The lamp that shows that freedom lives - is it worth the candle?" (1991) *Criminal Law Review* 740; RJ O'Hanlon "The Sacred Cow of Trial by Jury" (1990-92) *Irish Jurist* 57; Glanville Williams, *The proof of guilt: a study of the English criminal trial* (London, Stevens and Sons, 1955).

⁸⁰ *O'Brien v Keogh* [1972] IR 144.

⁸¹ *Dillane v Ireland* [1980] ILRM 167.

⁸² *Kavanagh v Ireland* [1996] 1 IR 348, 354.

⁸³ *Byrne and Dempsey v Government of Ireland*, unreported, Supreme Court, 11 March 1999.

⁸⁴ See n 53.

⁸⁵ *Kavanagh v Ireland*, Communication No 819/1998, UN Doc CCPR/C/71/D/819/1998 (2001) para 10.2.

Political Rights was not part of domestic law;⁸⁶ thus the substance of the decision was again bypassed.

These judgments indicate considerable judicial deference to the legislature due to the perception of an emergency, are resolutely formalistic and fail to engage with the crux of the issue which is the reason for treating differently those accused of and tried for certain crimes in Ireland.⁸⁷ However, I suggest that these concerns about equality would be remedied by the introduction of a means of review of the DPP's decision,⁸⁸ and by moving away from the blanket abolition of the jury in relation to a select class of offences. This would ensure that the measure is neither unjust, arbitrary, nor unreasonable.

In addition to concerns about equality, it could be argued that the quality of decision-making in an adversarial system is jeopardised through judge-only courts. In particular, the use of a single judge in England, Wales and Northern Ireland raises concerns regarding her role as arbiter of both fact and law. In their study of Diplock trials in Northern Ireland, Jackson and Doran determined that the defendants suffered an "adversarial deficit" on the basis that lay triers of fact can afford to take a more wide-ranging view of the merits of the prosecution case than an expert tribunals and that a professional approach necessitates a certain case-hardening in the sense that it demands that a colder, unemotional attitude is taken towards the evidence.⁸⁹

In particular, juryless trials pose problems regarding inadmissible evidence, when judges may be required to exclude from their minds incriminating material. Though this submission was rejected in *DPP v Special Criminal Court*,⁹⁰ it is questionable whether a judge may cast inadmissible material from her mind, or "'unbite' the apple of knowledge".⁹¹ As was conceded in *People (DPP) v Conroy*, "[e]xperience as a judge indicates that even as a trained lawyer there is a very significant difficulty in excluding

⁸⁶ *Kavanagh v Governor of Mountjoy Prison* [2002] 2 ILRM 81.

⁸⁷ Addressing the validity of judge-only trials for terrorist offences is beyond the scope of this paper.

⁸⁸ See n 59 above.

⁸⁹ J Jackson and S Doran, *Judge without Jury: Diplock Trials in the Adversary System* (Oxford, Clarendon Press, 1995) 293; also see J Jackson, "Modes of trial: shifting the balance towards the professional judge" (2002) *Criminal Law Review* 260.

⁹⁰ *DPP v Special Criminal Court* [1999] 1 IR 60.

⁹¹ M Damaška, "Free Proof and Its Detractors" (1995) 43 *American Journal of Comparative Law* 343, 352.

from one's mind [such] evidence.”⁹² This issue may be especially pronounced in England, Wales and Northern Ireland, given that the trials involve single judges, in contrast to the three judges that constitute the Irish Special Criminal Court.⁹³ Moreover, and critically, in England, Wales and Northern Ireland, evidence that might demonstrate a real and present danger of tampering is not limited to that which would be admissible at the defendant's trial.⁹⁴ This permits a broader range of intelligence and information to be divulged than would usually be permitted in a criminal trial.

Despite the “unrealistic cerebral activity”⁹⁵ required by the trial court's position as arbiter of fact and law, of course magistrates do this on a regular basis and this is generally seen as acceptable. In addition, this concern may be mitigated by the fact the court must provide a written judgment of the decisions, outlining the reasoning in relation to both aspects of its role,⁹⁶ in contrast to jury trials.⁹⁷ In *Director of Public Prosecutions v Gilligan* the Irish Court of Criminal Appeal noted that if the trial had been heard before a jury rather than before the SCC, it, as the appellate court, would not have known how the jury reached its verdict or what witnesses it considered to be credible.⁹⁸ Moreover, although the Court is not required to disqualify itself from a case where it has heard inadmissible evidence that is prejudicial to the accused it has the discretion to do so, and this would not be impracticable, given that the panel of judges for the SCC is sufficiently large to allow a reconstituted court to hear the case.⁹⁹ So, the provision of a written judgment and the possibility of a judge recusing herself remedies concerns about the quality of decision making in this context.

V. Alternatives to juryless trials

⁹² *People (DPP) v Conroy* [1986] IR 460, 472.

⁹³ Offences against the State Act 1939, s 39.

⁹⁴ *R v Twomey* n 19 para 18.

⁹⁵ P Hillyard and J. Percy-Smith “Converting Terrorists: The Use of Supergrasses in Northern Ireland” (1984) 11 *Journal of Law and Society* 335, 350.

⁹⁶ Criminal Justice Act 2003 s 48; Justice and Security (Northern Ireland) Act 2007 s 5.

⁹⁷ cf *Taxquet v Belgium* [2010] ECHR 1806; P Roberts, “Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?” (2011) 11 *Human Rights Law Review* 213.

⁹⁸ *DPP v Gilligan*, unreported, Court of Criminal Appeal, 8 August 2003, 18-19.

⁹⁹ *DPP v McMahon* [1984] ILRM 461. See G Hogan and C Walker, *Political Violence and the Law in Ireland* (Manchester, Manchester University Press, 1989) 231.

So, juryless trials raise issues in terms of equality and the quality of decision-making, though as noted these are not insurmountable. Due to these concerns and the absence of lay participation, one may conclude that juryless trials are never justified in the common law context, especially given the existence of alternative protective measures. These are now considered.

One feasible alternative to abolishing the jury is to limit the existing right to inspect the panel from which jurors are drawn.¹⁰⁰ The right to inspect is predicated on transparency, but affords considerable potential for intimidation; the names of jurors chosen could be matched with the initial panel list to find their addresses.¹⁰¹ Indeed, in Northern Ireland the right to inspect has been abolished, and restrictions have been placed on the disclosure of juror information by court, electoral and police officers as well as by jurors themselves.¹⁰² Surprisingly, given its potential as a safeguard, this development has not been mirrored in the rest of the UK or in Ireland.

Another approach would be to hold the trial without the jury present in court but rather viewing the proceedings by closed-circuit television.¹⁰³ Similar schemes for witnesses have been approved by domestic and European courts,¹⁰⁴ and so this would not affect the fair trial of the defendant. Nevertheless, it is possible that the members of the jury would be influenced by the protective measures deemed to be necessary in such cases, and even with a judicial warning could construe this as implying guilt or at least dangerousness on the part of the accused. Thus, caution should be exercised regarding the adoption of such a measure.

Crucially, neither of these suggestions overcomes the very real prospect of the jurors being followed home, and so may not be sufficient. To remedy this, juries could be transported to the court from a distance so that they are less likely to be followed. As

¹⁰⁰ s 5 of the Juries Act 1974 (England and Wales); s 16 of the Juries Act 1976 (Ireland). The copying and retention of the list of the jury panel was seen as a possible facilitator of jury intimidation in *DPP v Ward* [2011] IECCA 31.

¹⁰¹ See M Coen, "Elephants in the room: The Law Reform Commission's Consultation Paper on Jury Service – Part II" (2010) 20 *Irish Criminal Law Journal* 98.

¹⁰² Juries (Northern Ireland) Order 1996 (SI 1996/1141 (NI 6)) Article 26A, as inserted by s 10 of the Northern Ireland Act 2007. This was found not to breach the Article 6 right to a fair trial in *In re McParland* [2008] NIQB 1.

¹⁰³ R Goldstock and J Jacobs, "Blockbuster Trial: Catch It All on Tape" (1998-1999) 13 *Criminal Justice* 1.

¹⁰⁴ See Criminal Justice Act 2003, s 51 and Youth Justice and Criminal Evidence Act 1999, ss 23 and 24; Criminal Evidence Act 1992, s 13 (Ireland); *Kostovski v Netherlands* (1989) 12 EHRR 434; *White v Ireland* [1995] 2 IR 268; *Donnelly v Ireland* [1998] 1 IR 321.

Davis argues, however, there are economies of scale regarding the maintenance of anonymity in this way:¹⁰⁵ the possibility of transporting juries to the court from a distance may not prove practicable in Ireland, given the size of the country.

On the other hand, the members of the jury could be anonymised, such as has occurred in the United States in the trial of suspected organised criminals.¹⁰⁶ In *United States v Gotti*, for example, the jurors were referred to by number only, were housed in a secret location, and their calls, mail and visits were monitored.¹⁰⁷ This approach certainly would protect the vulnerable parties, but would also entail significant police resources and time, one of the precise reasons that the 2003 Act was introduced by the legislature in London. In addition, this attempt to retain a lay dimension for serious criminal trials holds the risk of prejudice in terms of what it expresses to the jury.

Goldstock further proposes the creation of a structure that permits citizen participation while minimising the likelihood of juror intimidation, through the use of a couple of “jurors” who would advise the judge as to questions of fact but whose advice would not bind the judge.¹⁰⁸ While initially this may seem appealing, it pays mere lip-service to the notion of lay involvement in the criminal trial and simultaneously may overlook the possibility of coercion.

This appraisal of alternatives indicates that inspection of the jury list should be abolished, but this itself is limited protection for the jury that ultimately is chosen. Only anonymisation holds the potential to safeguard the jury adequately but is problematic in terms of prejudice. Given the cost and logistical difficulties, in some extreme cases the potential threat may be such that a juryless trial is unavoidable, as otherwise jurors’ safety could not be guaranteed and the proper administration of justice could not be ensured.

VI. Conclusion

¹⁰⁵ Davis n 63, 151.

¹⁰⁶ See for example *United States v Barnes* 604 F 2d 121 (2nd Cir 1979), *cert den* 446 US 907 (1980) and *United States v Nicodemo Scarfo aka “The Little Guy”* 850 F2d 1015 (1988).

¹⁰⁷ *United States v Gotti* 777 F.Supp.224 (1991).

¹⁰⁸ R Goldstock, *Organised Crime in Northern Ireland: A Report For The Secretary Of State* (Belfast, Northern Ireland Office, 2004) para 5.15.

As this paper has detailed, the legislative provisions permitting juryless trials so far have been applied in a very cautious manner in England, Wales and Northern Ireland. Though prior to enactment policy makers cited the threat of organised criminality, the legislative scheme in fact is concerned with the proven specifics of individual cases rather than a generic concern about tampering in relation to certain types of offences. In contrast, the Irish legislature views the intimidation of jurors as an ineluctable concern in prosecuting organised crime. There, the removal of the jury has been permitted through the “seepage” into a broader context of “extraordinary” measures introduced to deal with subversive crime.¹⁰⁹ Without the scheme provided for in the Offences Against the State Act 1939, it is questionable whether legislation would have been enacted in Ireland to dispense with jury trials for those suspected of organised criminality.¹¹⁰ Yet, as the Special Criminal Court is seen as an established and benign feature of the Irish criminal justice system, there is little political or popular pressure to dispense with it,¹¹¹ or, as is relevant here, to limit its continued expansion.

Rather than contributing to state security or the protection of the rule of law, the limitation of the jury trial in these islands essentially is to ensure the safety of certain individual parties and so should not be subsumed within a counter-terrorism paradigm. Fortunately the threats posed by organised crime in Ireland and the UK to citizens on the jury and to the administration of justice are not widespread or endemic. This underlines the need for a case-by-case approach, grounded on objectively justifiable and articulated reasons, rather than a class-based presumptive model. This provides a reasonable compromise between the need to protect the jury and the fair trial of the accused, while maintaining the norm of the jury trial in most instances.

It could be argued that permitting an unorthodox mode of trial to be implemented in the usual criminal courts may in fact lead more readily to its normalisation. As Weisselberg observed in the context of terrorism prosecutions in the United States, employing the ordinary process and court system in this respect may affect the

¹⁰⁹ S Kilcommins and B Vaughan, *Terrorism, Rights and the Rule of Law: Negotiating State Justice in Ireland* (Cullompton, Willan Publishing, 2007) 56.

¹¹⁰ Committee to Review the Offences Against the State Acts, “Views and Recommendations of the Hon. Mr Justice Hederman”, n 53, para 9.93.

¹¹¹ Hogan and Walker n 99, 238-239.

development of domestic law adversely or distort existing law.¹¹² This fear has not been realised, given that the construction of the legislation and its application by the courts has maintained the norm of jury involvement for the trial of serious offences. In light of the potential restriction of the constitutional right to a jury trial, the decision regarding the form of trial should lie with the courts on a case-by-case basis, as occurs in England, rather than with the prosecution or legislature. It may be argued that this risks inconsistency and the possibility of more legal challenges. Though this may be true, dispensing with the jury automatically for certain offences is an unprincipled reaction to an issue that may not be a threat in every case of suspected organised crime.

¹¹² CD Weisselberg, "Terror in the courts: Beginning to assess the impact of terrorism-related prosecutions on domestic criminal law and procedure in the USA" (2008) 50 *Crime, Law and Social Change* 25.