"REFORM OF THE CRIMINAL LAW – BEYOND KNEE JERK REACTION"

MICHAEL MC DOWELL S.C.

4TH NOVEMBER 2008

Notes for a lecture to the Current Legal Issues Course at University College, Dublin.

Article 40.3.1 and Article 40.3.2 of the Constitution read as follows:

> *"1. The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
>
> *2. The State shall, in particular, by its laws, protect as best it may from unjust attack and, in case of injustice done, vindicate the life, person, good name and property rights of every citizen."*

These provisions have been extensively mined and exploited by creative jurists to establish an order of fundamental personal rights which take precedence over the ordinary legislation of the State and by which ordinary legislation can be tested and invalidated where necessary.

The obligation goes further than the enumerated rights to do with the life, person, good name and property rights of the citizen. They encompass the unenumerated rights as determined or found by the judiciary in a series of important constitutional cases.

These particular constitutional provisions have, as **Kelly's Irish Constitution** points out, *"no precedent in the 1922 Constitution"*.

The obligation cast on the State by Article 40.3.1 not merely to respect but *"as far as practicable, by its laws to defend and vindicate"* the personal rights of citizens, require closer scrutiny. In a free society in which citizens enjoy extensive personal freedom and autonomy in their personal lives, the capacity of the State itself or of other citizens to infringe or to deprive one of one's constitutionally protected rights is very extensive.

What stops us from killing each other, sexually assailing each other, stealing from each other, defaming each other etc? It is one thing to interpret Article 40.3 as imposing on the State created by the Constitution to respect and to defend and vindicate the personal rights of its citizens. It is entirely another thing to examine it by reference to the State's positive obligation to put in place a series of laws which, *"as far as practicable ... defend and vindicate the personal rights of the citizen"*.

Turning to Article 40.3.2, the general obligation of Article 40.3.1 is particularised. While jurists have pointed to the phrase *"in particular"* in Article 40.3.2, as implying broader

rights than those mentioned in that paragraph, and thus as establishing or recognizing the unenumerated rights, it is as well to look at the *"particular"* obligation imposed on the State to have and put in place laws which enable the State *"as best it may"* protect the constitutional rights of citizens from *"unjust attack"*, and, *"in the case of injustice done"* vindicate *"the life, person, good name and property rights"* of every citizen.

By asking what the State does to prevent me being murdered, raped, stolen from, imprisoned, defamed or otherwise deprived of my rights, I pose the question as to what protective mechanisms and vindication mechanisms the State is obliged to have and to operate on behalf of the ordinary citizen in this regard? It seems to me to be obvious that the systems of criminal law and the civil law of torts, including the injunctive power of the Courts, probably constitutes the State's delivery on its fundamental obligations to its citizens under Article 40.3.1 and 2 of the Constitution.

Clearly, in a liberal society, a State cannot prevent all crime. Our freedoms and autonomy require inevitably that we are at liberty, in many senses, to injure and sometimes destroy each other, and to invade each other's constitutionally protected rights in an unlawful way.

Article 40.3 clearly does not impose an absolute and transcendent obligation on the State to prevent crime by any means possible.

But I would argue that it does clearly mandate and also require the State to establish an effective system of criminal law.

For instance, if the State, by its laws, limited the penalty for murder and rape to small fines or very small periods of detention, the State would, in my view, fail in its duties to establish a system of criminal law which was truly protective of the relevant constitutional rights of its citizens.

It follows, in my view, that the State must have an effective system of criminal justice as a matter of constitutional obligation.

The whole panoply of the criminal justice system from legislation to preventive enforcement to investigation of criminal acts, to their prosecution and punishment, forms part of an underlying constitutional duty of the State to its citizens as a whole and to each individual citizen in particular.

If the State has a system of criminal justice in place which does not deter, does not effectively investigate, does not prosecute, cannot convict and does not adequately punish those who infringe its criminal law, it is beyond argument, in my view, that the State has failed to comply with its fundamental obligations under Article 40.3.1 and 2 of the Constitution.

It is equally clear that the provision of rights protection as between the criminal and civil law is one of practicality and reasonableness.

For instance, if every casual defamation were to be a criminal act, and if the State's criminal justice apparatus were to be obliged to investigate, prosecute and punish every act of defamation, the system would collapse.

Clearly, Irish law provides that the right to complain to the judiciary in a criminal justice context is not confined solely to agents of the State in many cases of alleged criminality. An individual citizen is entitled to complain that a crime has been committed in respect of him or her and to set in motion the wheels of the criminal justice prosecution system.

Likewise, an individual citizen is given the freedom to institute, whether against the State or other citizens, civil proceedings to vindicate other infringements of the citizen's rights under the Constitution and under statute law.

Can it be doubted, then, that the establishment and maintenance of an effective system of criminal justice is not one of the primary duties of the Irish State under the personal rights provisions of the Constitution?

The notion of *"vindication"* in the case of *"injustice done"* clearly contemplates a process of criminal justice which needs to be effective.

The particular provisions of the Constitution dealing with *"trial of offences"* must be seen in this broader context. For instance, the provisions of Article 38.1 which provide that *"no citizen shall be tried on any criminal charge save in due course of law"* and the guarantee of jury trial set out in Article 38.5 of the Constitution, are each important examples of direct constitutional provisions in relation to the standard of criminal justice to which the accused citizen is entitled and which the State is obliged to afford him or her.

It follows from the foregoing, in my view, that the State must constantly ensure that its system of criminal justice is adequate to the task of discharging the State's general obligations under Article 40.3.1 and 2 of the Constitution while, at the same time, respecting the State's obligations to the accused citizen in the manner mandated by Article 38 of the Constitution.

It is the function of the legislature to ensure that its system of criminal justice is constantly maintained in a condition which is apt to deliver what the Constitution requires to the community and to the individual citizen by way of vindication of those rights which fall to be protected at first instance by the system of criminal justice.

Nor should it be thought for one minute that the system of criminal justice only protects and vindicates the right of a citizen by adjudicating on the innocence or guilt of the alleged perpetrator *"after the event"*. The system of criminal justice, in order to discharge its constitutional function, must be deterrent in the general sense of that term. It must hold out to all citizens the reasonable likelihood that those who contemplate committing an offence that will seriously infringe the rights of others to believe on

reasonable grounds that it is probable (not just possible) that they will be apprehended and punished if they do so.

A lesser standard of deterrents implies a very serious risk (which may or may not be acceptable) for the constitutionally protected rights of the victim citizen.

It is simply wrong to see constitutional rights in terms of the *"accused citizen"* without also having regard to the constitutional rights of the *"victim citizen"*. It is equally wrong to approach the issue of criminal justice solely by reference to *"actual crime"* while ignoring the very real need to deter *"potential crime"*.

Our judiciary do not live in a world where the rights of the *"accused citizen"* take precedence over the rights of the *"victim citizen"*. The rights of both classes of citizen are like two sides of a coin. Vindication of both is the business of the criminal justice system. A philosophy of *"accused centred"* criminal justice is as deficient as a philosophy of a *"victim centred"* system of criminal justice.

Both sets of rights must be respected and mediated. Neither is absolute to the exclusion of the other. Reconciliation of the conflicting interests of the *"victim citizen"* and the *"accused citizen"* is a matter for political judgment and reactionary, either from lawyers in defence of the *"accused citizen"* or from the tabloid media in defence of the *"victim citizen"* cannot be permitted to be the last word on reform of the criminal law.

It is in that context that the term *"rebalancing"* arose in the context of criminal law reform.

There is nothing wrong in examining the criminal justice system in its entirety with a view to posing the question as to whether it is effective from the point of view of the *"victim citizen"* as well as from the point of view of the *"accused citizen"*.

It would be very wrong for society to be frightened by shrill comment, whether from the bench or elsewhere, which suggests that the scales of criminal justice may be overly tilted towards vindication of the *"accused citizen"*.

The danger of such an *"imbalanced"* defence of the rights of the *"accused citizen"* is that it stultifies and frightens those who are concerned that the over-arching obligation to have a criminal justice system which is effective from articulating their concerns and, if necessary, from acting on them.

We live in a world in which the effective rights of the *"accused citizen"* have been massively transformed. The right of the accused to testify in a trial is less than a century old. Entitlements to sophisticated criminal legal aid, sophisticated systems of disclosure by the prosecution of all relevant material, elaborate pre-notification of evidence, and exclusionary rules in respect of evidence in the criminal justice system combined with recording and record keeping of detention and elaborate provisions in respect of forensic science samples and fingerprints and photographs have been developed hugely over the

last fifty years. Just as a criminal trial in the early 20th Century differed radically from a criminal trial in the late 18th Century, a criminal trial in the early 21st Century differs radically from a criminal trial in the mid 20th Century. In terms of complexity, length and formality, the trial process has been transformed dramatically over the last fifty years. The criminal justice system has, as regards the rights of the accused victim, changed very significantly in that period. Gone are the days of unsupervised and unaccountable *"helping the police with their inquiries"*, unrecorded interrogations, inaccessibility of legal advice, and all of the things that were seen as major dangers in the system of criminal justice from the perspective of the accused and from the perspective of society generally.

True, there have been developments in the interests of the *"victim citizen"*. New rules in respect of alibi evidence, the drawing of inferences from failure to mention certain matters in certain circumstances, the formalization of detention for the purposes of questioning, the mandatory taking of samples for forensic science purposes, are just some of the developments of the criminal justice system which were taken to rebalance the scales as between the accused and the prosecution. The question that frequently arises is as to whether the scales of justice between the competing constitutional interests in the administration of criminal law hang evenly or whether they ought fairly to be rebalanced.

Balancing the effectiveness of the criminal justice system, on the one hand, with the quality of the protection of the *"accused citizen"* on the other, is always an ongoing work in progress. Just as the Court of Criminal Appeal might feel entitled to say that in this day of recorded video statements only very special and exceptional circumstances would justify the admission of non-video recorded confessional material, it is equally legitimate to look at other aspects of the criminal justice system and to inquire whether the *status quo* is appropriate or, indeed, defensible.

In my view, while the proponents of change must always undertake the onus of demonstrating that the change is worthwhile, especially in the context of the criminal justice system as it works on the ground, they should not be deterred by shrill reactionary comment from the underlying duty which is to ensure that the criminal justice system actually works and the underlying truth that society requires that the guilty be punished just as it requires that the innocent should not be punished.

The balance of rights, in terms of substantive law, jurisprudence law enforcement, and indeed, punishment, is an area for a legitimate public discourse. Legislators, in particular, have a duty to examine and to act in the context of any perceived imbalance of rights in this area.

Ends