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# “Draconian” Yet Constitutional: The Republic of Ireland’s Offences Against the State Act (1998)

BY SEAN R. ELSBERND\*

## I. Introduction

*My heart goes out to all of those who have lost loved ones and those wounded and shocked by this senseless blast. The Irish government and security forces will give every assistance to bring those responsible to justice.*

—Bernie Ahern, Prime Minister of the Republic of Ireland<sup>1</sup>

Prime Minister Ahern’s above comment immediately followed the August 15, 1998, terrorist bombing in Omagh, County Tyrone, Northern Ireland.<sup>2</sup> The 500-pound bomb, which exploded in the main marketplace of the city, killed twenty-eight people and injured more than 200 others.<sup>3</sup> This Note discusses the attempts by Prime Minister Ahern and the government of the Republic of Ireland to “bring those responsible to justice,” and whether or not those attempts have conformed to the Irish Constitution and the European Convention on Human Rights.

## II. A Brief Introduction to the Conflict in Northern Ireland

The English first arrived on the island of Ireland over 800 years ago.<sup>4</sup> The present conflict in the North began in the sixteenth century

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1. Phelim McAleer, *Massacre of the Innocent in a Quiet Country Town*, SUNDAY TIMES (London), Aug. 16, 1998, Home News Section.

2. See Kevin Cullen, *Northern Ireland Car Bomb Kills 28*, BOSTON GLOBE, Aug. 16, 1998, at A1.

3. See *id.*

4. See DONALD P. DOUMITT, CONFLICT IN NORTHERN IRELAND 25 (1985).

when the Irish resisted English attempts to colonize the island.<sup>5</sup> Under the reign of Oliver Cromwell, as well as after William of Orange defeated James II's Catholic army in 1690, a large influx of Protestants moved into the six northern counties of Ireland.<sup>6</sup> These counties were full of rich and fertile land.<sup>7</sup> As such, the English rulers forced the native Irish out of these counties to the southern counties and gave the majority of the productive land to the English immigrants.<sup>8</sup>

Slowly but surely over the next few centuries, Protestants became a majority in the northern six counties.<sup>9</sup> The Anglo-Irish Treaty of 1921 and the Government of Ireland Act of 1920 created today's recognized borders between the Republic of Ireland and Northern Ireland.<sup>10</sup> The Government of Ireland Act provided that the northern six counties would forever remain an official part of the United Kingdom, unless a majority of its residents voted to join the southern twenty-six counties.<sup>11</sup> The Anglo-Irish Treaty provided for the southern counties' independence from England.<sup>12</sup> These legal instruments pacified the North's Protestant majority as it assured them of a monopoly of power for as long as they wanted it in the North.<sup>13</sup>

The political differences in the North escalated into its present military conflict approximately thirty years ago.<sup>14</sup> Catholics began a series of civil rights demonstrations and protests in 1968.<sup>15</sup> In response, the English government issued the Downing Street Declaration of 1969.<sup>16</sup> This document contained numerous reforms designed to bring an end to discrimination.<sup>17</sup> The Irish Republican Army (IRA), however, was extremely dissatisfied with the terms of

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5. See LAWRENCE J. McCAFFREY, *IRELAND FROM COLONY TO NATION STATE* (1979).

6. See DOUMITT, *supra* note 4.

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.*

11. See *id.*

12. See DOUMITT, *supra* note 4.

13. See *id.*

14. This military conflict is often referred to as Northern Ireland's "Troubles."

15. See DOUMITT, *supra* note 4.

16. See *id.*

17. Some of these reforms affected the police, local government, and the government of Northern Ireland.

the agreement and began their campaign of violence to completely expel all English presence from the North.<sup>18</sup> This campaign continued until the recent cease-fire called for by the Good Friday Agreement, signed recently.<sup>19</sup>

## II. The Omagh Bombing

At 3:00 p.m. on August 15, 1998, a 500-pound bomb ripped through the central marketplace of the bustling city of Omagh, located seventy miles west of Belfast.<sup>20</sup> A half hour before the bomb exploded, an anonymous caller, using an IRA-recognized code name, phoned the BBC newsroom in Belfast and reported that a bomb would detonate outside of Omagh's courthouse on the west end of town.<sup>21</sup> As a result, the local police, to prevent civilian injuries and to minimize the bomb's possible destructive capacity, evacuated the area around the courthouse to the nearby marketplace.<sup>22</sup>

"Police, meanwhile, had shepherded hundreds of shoppers about a quarter of a mile from the courthouse to the corner of Market Street and Dublin Road."<sup>23</sup> "It was at that very corner that the maroon Vauxhall sedan exploded."<sup>24</sup> A local pub owner, Nigel O'Kane, said, "They moved everybody toward the danger. They had the whole crowd assembled down on Market Street, and then the explosion came right in the middle of the crowd."<sup>25</sup> Ronnie Flannagan, director of the local police force, asserted that the misinformation from the anonymous caller and the resulting carnage was provided on purpose.<sup>26</sup> "We have had men, women and children slaughtered here this afternoon, slaughtered by murderers who wanted to murder, . . . who gave us [a] totally inaccurate warning."<sup>27</sup>

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18. See DOUMITT, *supra* note 4.

19. Most observers would not refer to the "Troubles" as a military conflict, but rather refer to it as a terrorist campaign.

20. See *Car Bomb Kills 28 in Northern Ireland*, DALLAS MORNING NEWS, Aug. 16, 1998, at 1A.

21. See *id.* In order to further their objectives, the terrorists frequently alert the authorities to an impending bomb explosion, thus preventing the loss of civilian lives, destroying only property and harming the perpetual peace process in Ireland.

22. See Cullen, *supra* note 2.

23. *Id.*

24. *Id.*

25. T.R. Reid, *Marketplace Car Bomb Kills 28 in Northern Ireland*, WASH. POST, Aug. 16, 1998, at A1.

26. See *id.*

27. *Id.*

Twenty-eight people were killed by the blast, and over 200 others were injured.<sup>28</sup> The bombing created the largest death toll in the thirty-year history of the sectarian violence in Northern Ireland.<sup>29</sup> The combination of the evacuation of people from the courthouse area to the marketplace, along with a planned carnival for that afternoon in the marketplace and all the women and children already in the area doing back-to-school shopping, led to this unusually high loss of life.<sup>30</sup>

The timing and location of the bombing are also worthy of note. First, August 15, 1998, marked the twenty-ninth anniversary of the deployment of British troops in Belfast.<sup>31</sup> Second, the Good Friday Agreement, signed by Catholic and Protestant leaders in Northern Ireland as well as the heads of state from Great Britain and the Republic of Ireland, had just been put into effect in May by an overwhelming popular vote through referenda in both the North and the Irish Republic.<sup>32</sup> Third, President Clinton's announced visit to the North, intended to celebrate the recent advancements in the peace process, was scheduled for the first week of September.<sup>33</sup>

As for the location, Omagh is not, nor has it ever been, considered a "hotbed" of terrorist activity. Supporters of the IRA refer to Omagh as a "yellow town" for no Omagh IRA members had ever done serious jail time.<sup>34</sup> The last bombing in Omagh had occurred in 1995.<sup>35</sup> No one was killed, and only one person required medical attention.<sup>36</sup> In comparison to some other cities within Northern Ireland, Catholics and Protestants in Omagh have lived relatively peacefully with one another.<sup>37</sup>

The bombing was thus completely unexpected. Granted, the

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28. See Cullen, *supra* note 2.

29. See *id.*

30. See *id.*

31. See *Car Bomb Kills 28 in Northern Ireland*, *supra* note 20. This date has, over the last thirty years, served as a rallying point for pro-IRA forces.

32. See *id.* Sinn Fein, the political wing of the IRA, participated in the Good Friday Agreement negotiations and signed the documents. A splinter group of the IRA, "Real IRA," is suspected of planting the bomb. The Real IRA, as well as other splinter groups on both sides of the negotiations, believe the Good Friday agreement has hurt their religion's position in the North.

33. See Cullen, *supra* note 2.

34. McAleer, *supra* note 1.

35. See *id.*

36. See *id.*

37. See *id.*

calendar date may have alerted authorities to a possible terrorist threat, but no one would have expected Omagh to be the site of the terrorist activity, nor did anyone expect such a brutal and devastating terrorist act.

### III. The Response to the Omagh Bombing

The unusually high death toll, coupled with the nature of the death toll—five children and one pregnant woman<sup>38</sup>—led to the universal condemnation of the act by all the parties to the Good Friday Agreement.<sup>39</sup> Even Gerry Adams, head of the political wing of the IRA, said “I am totally horrified by this action, and I condemn it without any equivocation.”<sup>40</sup> Adams’s comment, along with the IRA code name given in the warning to the Belfast BBC newsroom, served as further evidence that a splinter group of the IRA was dissatisfied with the peace process and was responsible for the bombing. Further, the technical skill and expertise of the bombers clearly pointed to training from the IRA.<sup>41</sup>

Bernie Ahern, the Republic’s Prime Minister, vowed that whoever was responsible would be “ruthlessly suppressed.”<sup>42</sup> Ahern believed that the vast majority of the responsible splinter group resided in the Republic.<sup>43</sup> He therefore assured the people of Omagh, located in the North, and all others concerned with peace in Ireland that the government would do everything they could to bring the offenders to justice.<sup>44</sup>

The Republic of Ireland’s primary piece of legislation directed toward anti-terrorism is the “Offences Against the State Act,” originally passed in 1939.<sup>45</sup> Its initial intention was to regulate “conduct calculated to undermine public order and the authority of the state.”<sup>46</sup> The Act has been amended numerous times, most recently in 1985, and again in 1998.<sup>47</sup> Public outrage also prompted

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38. See Cullen, *supra* note 2.

39. See McAleer, *supra* note 1.

40. *Id.*

41. See *De Rosssa Calls for “Unequivocal” Message from Republicans That Violence is Ended for Good*, IRISH TIMES (Dublin), Sept. 3, 1998, at 12.

42. Reid, *supra* note 25.

43. See *id.*

44. See McAleer, *supra* note 1.

45. See Offences Against the State Act, No. 13 (1939).

46. *Id.*, Preamble.

47. See Offences Against the State Act, No. 13 (1939) (amended 1998).

amendments to the Offences Against the State Act: "In the wake of such carnage it is natural and appropriate to examine our existing Offences Against the State legislation to see if it is adequate to meet the new security threat."<sup>48</sup>

Numerous ideas and amendments to the Act were suggested to curb and, hopefully, prevent further terrorist activities.<sup>49</sup> These included an increase in the penalties for those found guilty of storing ammunition or for providing "safe" houses to suspected members of the Real IRA or any other terrorist organization.<sup>50</sup> Some went so far as to suggest automatic internment of suspected members of the Real IRA.<sup>51</sup>

The government settled on the following general amendments, among others, to the Offences Against the State Act:

If the prosecution can prove that a suspected criminal was ever a member of an unlawful organization, and that the suspect fails to answer any question material to the investigation of an offence, the trial court may deem this silence as corroborating evidence of guilt, although no suspect shall be found guilty solely on the basis of such silence.<sup>52</sup>

....

If a terrorist suspect fails to mention any facts during police interrogation that he later uses in his defense, the trial court may draw any inferences it deems proper as corroborating evidence of guilt, although no suspect shall be found guilty solely on this basis.<sup>53</sup>

Although at first glance the public considered the amendments harsh, it welcomed these amendments to the Offences Against the State Act. Without question, the amendments were the strongest and most severe pieces of anti-terrorist legislation in the history of the

48. Gerald Hogan, *Internment Preferable to Laws That Fail the Tests*, IRISH TIMES (Dublin), Aug. 19, 1998, at 14.

49. *See id.*

50. *See id.*

51. *See, e.g.,* Denis Coghlan, *Surgical Use of Draconian Special Powers Considered*, IRISH TIMES (Dublin), Aug. 19, 1998, at 8; Denis Coghlan, *Security Package is as Broad-Ranging and Tough as Predicted*, IRISH TIMES (Dublin), Aug. 20, 1998, at 18; Christine Newman, *UK Must Step Up Security*, IRISH TIMES (Dublin), Aug. 20, 1998, at 8; Jim Cusack, *New Anti-Terrorist Measures Outlined*, IRISH TIMES (Dublin), Aug. 20, 1998, at 10.

52. *See* Offences Against the State Act, No. 13 § 2(1) (1939) (amended 1998); *cf.* Offences Against the State Act, No. 13 § 21 (1939).

53. *See* Offences Against the State Act, No. 13 § 5(2) (1939) (amended 1998).

Republic.<sup>54</sup> John O'Donoghue, a member of Ahern's cabinet, claimed that the new laws would be the strongest anti-terrorist laws in the free world.<sup>55</sup> The Minister of the Department of Justice, the primary author of the amendments, himself referred to the amendments as "draconian" in nature.<sup>56</sup>

Similar laws already were in place in Northern Ireland and had proved effective to curbing the terrorist threat.<sup>57</sup> Both the government and the public largely focused on the potential positive effects of the law—bringing the Omagh bombers to justice, rather than focusing on the potential destruction of and threat to society's civil liberties.

David Trimble, political leader of the North's Protestant community and the First Minister of the Northern Assembly, said "the important thing is the objective of ensuring that we take [the Real IRA suspects] off the streets and hope this [the amendments] will be effective."<sup>58</sup> The community was outraged:

The sheer enormity of the massacre, deliberately targeted at a wide cross-section of civilians, including children and infants, has sickened everybody so much that even the brave men of the Republican movement, whether on ostensible cease fire or not, are frightened by the strength and unanimity of public opinion.

At long last ordinary people have been stirred into asserting themselves and into asserting their opinion of this barbarism, and of those who perpetrated it. Even if this strength of feeling cannot prevent further atrocities, at least it makes them less likely.

So numbing has the Omagh outrage been that two weeks later the natural feelings of anger are only beginning to assert themselves.<sup>59</sup>

Public outrage necessitated the government's strong legal response. There were even some suggestions that the "draconian" amendments were not strong enough to pacify the public's intense desire to bring the Omagh bombers to justice.<sup>60</sup> Immediately following the announcement of the amendments, the *Irish Times*

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54. See Coghlan, *supra* note 51.

55. *See id.*

56. *Id.*

57. *See id.*

58. Newman, *supra* note 51.

59. *See An Insider's Guide to Politics*, IRISH TIMES (Dublin), Aug. 29, 1998, at 6.

60. *See Coghlan, supra* note 51.

editorial board wrote, "It is sufficient to describe the package of measures announced by the Government in the aftermath of the Omagh massacre as unpalatable but necessary to deal with fascists who would impose their will by force."<sup>61</sup>

On the other hand, there were pockets of opposition to the amendments.<sup>62</sup> The passage of the Good Friday Agreement and its accompanying message of an open society free of governmental abuses of power were contrasted to the "draconian" amendments and their severe restrictions on civil liberties.<sup>63</sup> Others suggested that the Good Friday Agreement was intended to protect human rights, which were now severely infringed by the amendments.<sup>64</sup> Trimble countered these suggestions by asserting that the overwhelming passage of the Good Friday Agreement vindicated the Republic's government choice to ensure the people's democratic choice.<sup>65</sup>

Solicitors from Northern Ireland argued that the amendments violated the European Convention on Human Rights.<sup>66</sup> Mr. Caoimhghin O'Caolain, a Sinn Fein government official, acknowledged that "there is justified anger against the tiny splinter group which carried out the bombing."<sup>67</sup> However, he further contended that "to use this anger to severely limit the civil liberties of all—in particular the right to silence—is simply sowing the seeds of future injustice."<sup>68</sup> Mr. Joe Higgins, a Socialist member of the Dail,<sup>69</sup> criticized the legislation as "incredibly ludicrous and dangerously wide-ranging in effect."<sup>70</sup>

Finally, five prominent international human rights organizations, including Amnesty International, urged the Republic's government to

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61. *Severe Measures But Necessary*, IRISH TIMES (Dublin), Aug. 20, 1998, at 19.

62. See, e.g., Derek Kelch, *New Security Measures*, IRISH TIMES (Dublin), Aug. 31, 1998; Dr. Sean Marlow, *New Security Measures*, IRISH TIMES (Dublin), Aug. 31, 1998; *Northern Ireland Solicitors Speak Out Against Changes in Law*, IRISH TIMES (Dublin), Aug. 28, 1998.

63. See Kelch, *supra* note 62, at 15.

64. See Marlow, *supra* note 62, at 15.

65. See Coghlan, *supra* note 51.

66. See *Northern Ireland Solicitors Speak Out Against Changes in Law*, *supra* note 62, at 6.

67. Coghlan, *supra* note 51.

68. *Id.*

69. The Dail is Ireland's parliamentary body.

70. *De Rossa Calls for "Unequivocal" Message from Republicans That Violence is Ended for Good*, *supra* note 41.

reconsider the proposed civil liberty restrictions.<sup>71</sup> Amnesty International's international secretariat warned that the amendments would violate international standards.<sup>72</sup> The Secretariat suggested that the Republic of Ireland faced a true test of their international obligations and their respect of human rights during the aftermath of the Omagh bombing.<sup>73</sup>

When Ahern and his government brought the amendments before the Dail on September 3, 1998, approximately three weeks after the bombing, only five members voted against them.<sup>74</sup> The debate took thirteen and one-half hours.<sup>75</sup> The opposition earned one concession: an annual review of the legislation.<sup>76</sup> In other words, the amendments might only be in place as long as the Omagh suspects were still at large.<sup>77</sup>

The remainder of this note will examine whether or not the Offences Against the State Act as amended is constitutional under the Irish Constitution, and whether or not it meets the standards set forth in the European Declaration of Human Rights.

#### IV. The Irish Constitution

Article 34.3.2 of the Constitution of the Irish Republic states the following:

Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court.<sup>78</sup>

Thus, unlike the United States where the practice of judicial review was developed through case law, Irish judicial review is

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71. See Marlow, *supra* note 62.

72. See Geraldine Kennedy, *Substantial Anti-Terror Bill Changes Proposed by the Government*, IRISH TIMES (Dublin), Sept. 2, 1998, at 6.

73. See *id.*

74. See Geraldine Kennedy & Rachel Donnelly, *Anti-Terror Bill to be Signed into Law Before Midnight*, IRISH TIMES (Dublin), Sept. 3, 1998, at 1.

75. See *id.*

76. See *Government Agrees to Annual Review of Anti-Terrorist Bill*, IRISH TIMES (Dublin), Sept. 4, 1998, at 6.

77. See *id.*

78. IR. CONST., art. 34.3.2.

explicitly provided for in the Irish Constitution.<sup>79</sup>

The Irish courts have interpreted the term "law" in this section to refer to any law enacted by the Oireachtas<sup>80</sup> established by the constitution.<sup>81</sup> Thus, any law passed after the adoption of the constitution, and its resulting creation of the Oireachtas in 1937, can be reviewed by the courts.<sup>82</sup> Laws passed before 1937 are still reviewable by the courts under a combination of Article 34 and Article 50, which require all preexisting laws to be consistent with the constitution.<sup>83</sup> Therefore, the Offences Against the State Act, as amended in 1998, is subject to constitutional scrutiny by the courts.

Determining the type of judicial review the Irish court will apply depends, as it does in the United States, on how each individual judge interprets the Irish Constitution.<sup>84</sup> The same forms of interpretation<sup>85</sup> as are used in the United States are also used in Ireland.<sup>86</sup> Yet there is no one consistent approach.<sup>87</sup> "One needs to [emphasize], however, that the courts have shown no consistency with regard to any particular approach and this gives rise to the suspicion that individual judges are willing to rely on any such approach as will offer adventitious support for a conclusion which they have already reached."<sup>88</sup> One commentator has suggested that "Irish judges have, in many different contexts, adopted an approach which experience elsewhere would seem to show is likely, if followed consistently in later cases, to lead to undesirable results."<sup>89</sup> Further, "when the inevitable has happened and the awkward case [materialized], the court has changed tack without much attempt to distinguish the earlier inconvenient precedent, preferring to do this than to reach the

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79. *Id.*; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review in the United States).

80. The Oireachtas is analogous to the United States Congress and the Dail, mentioned above, is analogous to the United States House of Representatives.

81. *See State (Gilliland) v. Governor of Mountjoy Prison* [1987] I.R. 226.

82. *See id.*

83. *See IR. CONST.* § 5(2).

84. *See generally* David Gwynn Morgan, *Judicial Activism – Too Much of a Good Thing*, in *IRELAND'S EVOLVING CONSTITUTION, 1937-97: COLLECTED ESSAYS* 115 (Tim Murphy & Patrick Twomey eds., 1998).

85. A non-exhaustive list of approaches includes: literal, broad, harmonious, historical, and natural law.

86. *See Morgan, supra* note 84.

87. *See id.*

88. *Id.*

89. *Id.* at 118.

undesirable result."<sup>90</sup>

The seminal case in Irish self-incrimination jurisprudence is *State (McCarthy) v. Lennon*.<sup>91</sup> Although decided under Ireland's 1922 constitution, its precedential effect carries through today.<sup>92</sup> In this case, the defendant was forced to confess under section 5 of article 2A of the 1922 constitution.<sup>93</sup> The court held his confession valid, as it was called for under the constitution, but still recognized the common law privilege against self-incrimination.<sup>94</sup>

Under the common law, which existed for centuries before the Free State was constituted, statements or confessions obtained from an accused party by threats or inducements held out by persons in authority could not be given in evidence against him, and the maxim *Nemo teneur se ipsum accusare* was rigidly enforced by the judges. When the constitution of the Free State was framed, that law continued in force under article 73.<sup>95</sup> This theory that the privilege against self-incrimination is supported by the common law suggests that the constitution fails to provide the privilege. Under the 1937 constitution, the courts continue to protect the privilege only as it relates to the common law, not to the constitution.

More similar to the terms of the amended Offences Against the State Act is the result in *People v. McGowan*.<sup>96</sup> At issue in this case was the original version of section 52 of the Offences Against the State Act, passed in 1939.<sup>97</sup> The court held that a statute that requires information to be given by the accused overrides the common law right against self-incrimination first recognized in *McCarthy*.<sup>98</sup> However, the court was prohibited from making a constitutional assessment of the right in relation to the constitution as it was a Court of Criminal Appeal.<sup>99</sup>

90. *Id.* at 119.

91. *State (McCarthy) v. Lennon* [1936] I.R. 485.

92. *See People (Attorney Gen.) v. Gilbert* [1973] I.R. 383.

93. *See generally* GERARD HOGAN & GERRY WHYTE, *THE IRISH CONSTITUTION* (1994).

94. *See id.*

95. *See id.*

96. *People v. McGowan* [1979] I.R. 45.

97. *See id.*

98. *See id.*

99. *See id.* Article 34.3.2 of the Irish Constitution only allows the High Court or the Supreme Court to exercise constitutional judicial review. A Criminal Court of Appeal would be prohibited, then, from measuring the constitutional validity of a statute.

The Irish Supreme Court had another opportunity to establish the constitutionality of the right against self-incrimination in the case of *People (Director of Public Prosecutions) v. Quilligan (No. 3)*.<sup>100</sup> In this case, the court denied another challenge to the Offences Against the State Act: "The Court does not find it necessary, therefore, to express any view on the question as to whether, in what circumstances, or subject to what qualifications, if any, a right of silence or self-incrimination is an unenumerated right pursuant to the Constitution."<sup>101</sup>

As one commentator has suggested,

The Supreme Court was plainly here reserving its position on this question, even if the authorities to date tend to lean against—rather than favor—the existence of a constitutional right protecting the privilege against self-incrimination. But clearly, if the general principle that one cannot be forced to incriminate oneself is perceived as a dimension of the due course of law prescribed by Article 38.1, the question must ultimately arise whether it is competent for the Oireachtas to abridge it by statute; and whether, if this can be permitted in the conditions of the Offences Against the State Act 1939, there is any reason why the privilege could not be dismantled by statute over the whole range of criminal law.<sup>102</sup>

Two cases that better reflect the legal issue in the amended Offences Against the State Act are *People (Attorney Gen.) v. Gilbert*<sup>103</sup> and *People (Dir. of Pub. Prosecutions) v. Doyle*,<sup>104</sup> both of which question the constitutionality of statutes that prescribe penalties for the accused if they fail to answer questions during police interrogation.

In *Gilbert*, the Court of Criminal Appeal reviewed the constitutionality of the Road Traffic Act of 1961.<sup>105</sup> Here, the defendant was accused of larceny of a motor vehicle.<sup>106</sup> Section 107 of the Act created penalties for someone accused of such a crime who failed to tell the police who drove the stolen motor vehicle.<sup>107</sup> The Court of Criminal Appeal held that the statement was inadmissible

100. *People (Dir. of Pub. Prosecutions) v. Quilligan (No. 3)* [1993] 2 I.R. 305.

101. *Id.*

102. HOGAN & WHYTE, *supra* note 93, at 594.

103. *People (Attorney Gen.) v. Gilbert* [1973] I.R. 383.

104. *People (Dir. of Pub. Prosecutions) v. Doyle* [1977] I.R. 317.

105. *Gilbert* [1973] I.R. 383.

106. *See id.*

107. *See id.*

for it was not made voluntarily; rather, it was made based on fear of the threatened penalties.<sup>108</sup>

On the other hand, *Doyle*, heard by a later Court of Criminal Appeal, held the exact opposite.<sup>109</sup> The defendant in this case challenged section 52 of the original Offences Against the State Act, which allowed the police to require a person detained to account for his movements or be penalized.<sup>110</sup> The Court of Criminal Appeal recognized that in normal circumstances any statement made due to a threat would be inadmissible.<sup>111</sup> However, the court held that because the penalties were statutory, the statement was admissible even though it was made in fear of a penalty.<sup>112</sup>

In general, it can thus be said that the Irish Constitution does not provide for a so-called right to silence. One must turn to Article 34.1 and its requirements of due process of law to find such a right.<sup>113</sup> As one commentator has suggested, “The Constitution is a disappointingly vague legal framework on which to base the protection of individual liberty from state power and on which to construct fair and just criminal procedures.”<sup>114</sup>

## V. Application of the Irish Constitution to the Offences Against the State Act

How, then, does the amended Offences Against the State Act work with current case law and its interpretation of the Irish Constitution? The first questionable section of the amended Act is section 2, which reads as follows:

Where in any proceedings against a person for an offence under section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer

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108. *See id.*

109. *Doyle* [1977] I.R. 317.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See* IR. CONST., art. 34.1.

114. Paul O'Mahony, *The Constitution and Criminal Justice, in IRELAND'S EVOLVING CONSTITUTION 1937-97: COLLECTED ESSAYS* 186 (Tim Murphy & Patrick Womey eds., 1998).

and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inference, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.<sup>115</sup>

In other words, after an arrest, but prior to being charged, the accused must answer questions material to the investigation to prevent the court from using silence as corroborating evidence of guilt.

*Gilbert* and *Doyle* appear to be the two cases most on point. As has already been shown, the two cases suggest two different approaches to the issues of prescribing penalties for the failure to answer questions while under arrest. *Gilbert* suggests that no such penalties are constitutional,<sup>116</sup> while *Doyle* holds that such penalties are constitutional as long as they are written within the statute.<sup>117</sup>

Under section 2 of the amended Offences Against the State Act, the penalty is not guilt. The statute prohibits a finding of guilt solely on the accused's silence.<sup>118</sup> The only prescribed penalty is allowing the judge to use silence as corroborating evidence.<sup>119</sup>

*Doyle*, rather than *Gilbert*, should be used as precedent because *Doyle* dealt with a challenge to the original Offences Against the State Act.<sup>120</sup> *Gilbert* dealt with a completely different law—a vehicle code statute.<sup>121</sup> The *Doyle* court recognized that the Offences Against the State Act was designed to prevent terrorist activity, not to infringe on personal rights.<sup>122</sup> The court balanced the possible infringements of personal liberties against the need to protect the public from terrorist activity and recognized that public safety took precedence in a limited context. The same situation applies under the amended Offences Against the State Act today. Therefore, under *Doyle*, section 2 would be constitutional.

Section 5 is another section of the Act that possibly infringes

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115. Offences Against the State Act, No. 13, § 2 (1939) (amended 1998).

116. *People (Attorney Gen.) v. Gilbert* [1973] I.R. 383.

117. *People (Dir. of Pub. Prosecutions) v. Doyle* [1977] I.R. 317.

118. Offences Against the State Act, No. 13 § 2 (1939) (amended 1998).

119. *See id.*

120. *Doyle* [1977] I.R. 317.

121. *Gilbert* [1973] I.R. 383.

122. *Doyle* [1977] I.R. 317.

upon an accused's right to silence. This section asserts that if the accused fails to mention a fact during police interrogation, and then later uses that fact during his defense, the judge may draw an inference from this original silence.<sup>123</sup> As with section 2, however, section 5 prevents a judge from making a finding of guilt solely on this failure to mention a material fact.<sup>124</sup>

The same analysis regarding constitutionality applies to both sections 2 and 5. Section 5 satisfies *Doyle's* requirement that the prescribed penalties be written into the statute. Further, the safeguard against a finding of guilt is present. Most importantly, the statute is limited in its application to a small number of accused criminals.<sup>125</sup>

## VI. The European Convention on Human Rights

As a member of the European Union, and as a signatory to the European Convention of Human Rights, Ireland is bound by the decisions of the European Commission of Human Rights in Strasbourg.<sup>126</sup> Ireland first recognized the Commission's authority when it ratified the Convention on February 25, 1953, and has continued to recognize its authority ever since.<sup>127</sup> While some countries renew their commitment to the Convention on an annual, bi-annual, or a quinquennial basis, Ireland, in 1953, committed to the Convention for an indefinite period of time.<sup>128</sup>

Article 53 of the Convention requires any state which is a party to an action before the Commission to abide by the Commission's decision.<sup>129</sup> During the years 1990-1996, ninety petitions were filed with the Commission against Ireland.<sup>130</sup> Of those ninety petitions, only five were deemed worthy of a hearing.<sup>131</sup>

Article 6(2) appears to be the only hurdle within the Convention that the amended Offences Against the State Act needs to clear. The Article reads as follows: "Everyone charged with a criminal offence

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123. See Offences Against the State Act, No. 13 § 5 (1939) (amended 1998).

124. See *id.*

125. See *id.* § 1.

126. See generally BRICE DICKSON, HUMAN RIGHTS AND THE EUROPEAN CONVENTION (1997).

127. See *id.*

128. See *id.*

129. See European Convention on Human Rights, art. 53.

130. See DICKSON, *supra* note 126, at 9.

131. See *id.*

shall be presumed innocent until proved guilty according to the law."<sup>132</sup> The amended Offences Against the State Act allows the presiding magistrate to infer guilt from the accused's refusal to answer questions during police interrogation.<sup>133</sup> However, this statute specifically provides that the accused cannot be found guilty solely on such silence.<sup>134</sup> Some other evidence and proof of guilt must be established by the state. Silence can only be used to corroborate this other evidence. Therefore, there is no literal violation of the Convention, for the accused is still considered innocent until proven guilty.

Challengers of the amended Offences Against the State Act could still argue that the legislation violates the spirit of the Convention. By stripping the accused of their right to silence and forcing them to possibly implicate themselves or others, the Irish government turns its back on the foundation of the Convention.

Even if this argument were to be accepted, the Republic of Ireland would still be justified in its implementation of the legislation. The Commission held in *Lawless v. Republic of Ireland (No. 3)* that

the Government of any High Contracting Party [e.g., Ireland] has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention . . . , provided that such measures are strictly limited to what is required by the exigencies of the situation and also that they do not conflict with other obligations under international law.<sup>135</sup>

This case was a challenge to a section of the Offences Against the State Act that allowed the detention of a member of the IRA for five months without trial.<sup>136</sup> The Commission found that Article 15(1) of the Convention allows member states to circumvent the Convention's requirements when there exists some public emergency threatening the life of the nation.<sup>137</sup> In *Lawless*, the Commission found that the following factors created such a public emergency: the existence in the territory of the Republic of Ireland of a secret army engaged in

132. European Convention on Human Rights, art. 6(2).

133. See Offences Against the State Act, No. 13 §§ 2(1), 5(2), 21 (1939) (amended 1998).

134. See *id.*

135. MARK JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 360 (1995) (quoting *Lawless v. Republic of Ir. (No. 3)*, 1 Eur. H.R. Rep. 15 (1961)).

136. See *id.* at 359.

137. See *id.* at 360.

unconstitutional activities; the fact that the army was also operating outside the territory of the State, thereby jeopardizing the Republic's relationship with its neighbor; and the steady and alarming increase in terrorist activities.<sup>138</sup>

The current situation in Ireland mirrors the situation present in *Lawless*. Today, the Omagh bombing certainly suggests that the Real IRA, although small in number, should be considered a secret army engaged in unconstitutional activity within the Republic. Further, intelligence information makes clear that members of the Real IRA live in the Republic but carry out illegal activities in Northern Ireland, a territory outside the Republic. These illegal activities are performed with the intention of disrupting the relations between the two countries. Finally, prior to the bombing in Omagh, the Real IRA claimed responsibility for other bombings in the North; the Omagh bombing was an escalation of their campaign to destroy the budding peace between the North and the Republic.

Article 15(1) further requires a member state asserting a public emergency to act only "to the extent strictly required by the exigencies of the situation."<sup>139</sup> In the current situation, this further requirement is better stated in the form of the following question: Are the restraints on individual liberty developed in the Offences Against the State Act as amended proportionate to the public emergency? The *Lawless* Commission found that previous legislation designed by the Republic to protect against IRA aggression had failed.<sup>140</sup> The ordinary and criminal courts had failed to "restore peace and order."<sup>141</sup> The greatest problem necessitating the new legislation in question in *Lawless* was the fact that "amassing . . . the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulty."<sup>142</sup> Despite the obvious depravity of imprisoning a suspect for up five months, the Commission held the exigent circumstances required such legislation.<sup>143</sup>

Today, similar exigent circumstances exist. Previous legislation did nothing to curb the rising acceleration of the Real IRA's illegal

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138. *See id.*

139. European Convention on Human Rights, art. 15(1).

140. JANIS ET AL., *supra* note 135, at 361.

141. *Id.*

142. *Id.*

143. *See id.* at 362.

activities. Courts were unable to restore peace and order. Most importantly, the code of silence among suspected members of the Real IRA prevented the authorities from ascertaining the true identity of the group's members as well as the group's future activities.

Finally, the amended Offences Against the State Act contains safeguards that prevent the authorities from taking advantage of the statute. Silence during police interrogation can only be used as corroborating evidence along with additional affirmative evidence to prove guilt.<sup>144</sup> No one may be found guilty solely based on silence; some affirmative evidence must be presented to the magistrate.<sup>145</sup>

Therefore, the current situation with the Republic of Ireland and the Real IRA satisfies the criteria set forth in *Lawless* as a situation meriting of legislation that circumvents the European Convention on Human Rights. The Offences Against the State Act, which on its face only slightly infringes on the Convention, stands up to the requirements of Article 15 allowing an abridgment of the guaranteed rights.

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144. See Offences Against the State Act, No. 13, § 5 (1939) (amended 1998).

145. See *id.*