# MEDIA REPORTING OF TRIALS IN FRANCE AND IN IRELAND

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## INTRODUCTION

This article gives an overview of media reporting of the legal process in Ireland and in France.[1] Media refers to various means of disseminating information, among which are the press or print media and newspapers. This article will limit itself to an analysis of the latter, but broadcast media and/or audio-visual media will be referred to during the course of the paper.[2]

It is always tempting to assume that different legal traditions and, accordingly, different legal institutions and rules may explain a different portrayal or representation by the media of the trial and its practical manifestations. To a certain and limited extent, and as we shall first see, this is true. Different legal institutions and different legal rules govern the portrayal of trials. Press freedom and public hearings are the main features in both systems. However, legal ways of restraining excesses differ slightly.

Nevertheless, the differences should not be overstated. In particular, Article 10 of the European Convention on Human

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[1] This article is partly based on the conference paper, "The Portrayal of Trials by the Media in France and in Ireland," by Dr. Pascale Duparc Portier (NUI, Galway) and Dr. Laurent Pech (NUI, Galway) in the context of the conference entitled *Representations of Justice in France and Ireland*, Trinity College, Dublin, 9 December 2005.

[2] See*, e.g.*, Walker, "Fundamental Rights, Fair Trials and the New Audio-Visual Sector," (1996) 59(4) *The Modern Law Review* 517. It would appear that broadcast coverage of trials in Ireland differs from that in France. In Ireland, parties involved in trials, *e.g.*, the parents of the victim in the Brian Murphy case, contributed their views on television, however, in France journalists tend to comment without inviting the parties involved to explain the facts or decisions.

Rights (ECHR), dealing with freedom of expression and freedom of the press, has led to a relative harmonisation of judicial practices throughout Europe. It seems that journalists in Ireland and in France sustain high standards of work ethics codified in codes of conduct.

Moreover, from a more sociological point of view, in both Ireland and France, we note a similar media interest for the same type of litigation, i.e., criminal trials involving public figures and/or abhorrent crimes. In both countries, excessive media reporting has led to miscarriages of justice. In France, heavy coverage of some paedophilia or incest cases may have led judges to overreact. The public outcry at the reporting of some trials has led the legislature to take action and reinforce a more control-oriented society where more and more statutes try to deal with criminal issues of public concern. Furthermore, media coverage of challenging legal crisis enhances the need for criminal judicial reform.

This article will first deal with the Irish and French legal rules on freedom of expression and its competing rights. Second, it will demonstrate that differences are levelled out thanks to the European Court of Human Rights case law. Thirdly, it will show how media reporting of trials, and particularly of criminal trials, can affect legislation and trigger potential reforms.

## I. LEGAL RULES

Both France and Ireland provide for legal sets of rules governing and limiting freedom of expression and its competing rights. In France, there are numerous legal rules governing freedom of expression. The right to freely express oneself is not without limitations, however, and these limitations apply equally to the print media. The French Freedom of the Press Act issued on 29 July 1881 clearly states that the press is free to report (Article 1).[3] This statute is the principal legal basis for press freedom. It is a liberal piece of legislation drafted by the law makers of the Third Republic who were inspired by the

[3] Statute of 29 July 1881 on the freedom of the press; Article 1: "L'imprimerie et la librairie sont libres."

Declaration of the Rights of Man and Citizen,[4] 26 August 1789. Article 11 of that Declaration states: "The free communication of thought and of opinion is one of the most invaluable rights of man: any citizen can thus speak, write, print freely, except where it is tantamount to the abuse of this liberty as determined by the law."[5]

This statute itself and French law in general also offers a comprehensive set of rules restraining media freedom in the name of several competing rights and interests. The Statute of 29 July 1881 has been amended and supplemented by a number of subsequent statutes, including the Statute of 29 July 1982 on broadcast communication[6] and the Statute of 1 August 1986 amending the legal set of rules governing the press.[7] Furthermore, the important statute of 13 July 1990 on racism, called "Loi Gayssot,"[8] has added some more restrictions.

The right to press freedom has to face traditional competing rights. As far as individual rights are concerned, the right to privacy is of particular importance, the infringement of which is sanctioned in the Civil Code.[9] The tort of privacy exists and is widely used both for individuals and for public persons. There is, under French standards, an important body of case law which interprets Article 9 of the Civil Code. Sanctions for privacy

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[4] Déclaration des droits de l'homme et du citoyen.

[5] "La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi."

[6] Statute no 82-652 of 29 July 1982 on broadcast communication (loi sur la communication audiovisuelle).

[7] Statute no 86-897 of 1 August 1986, OJ 2 August 1986 (loi portant réforme du régime juridique de la presse).

[8] Statute no 90-615 of 13 July 1990.

[9] Article 9 of the French Civil Code provides that: "Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order."

infringements are provided for in the Criminal Code, mainly in Article 226-1 and 226-2 Criminal Code.[10]

Other competing rights are the right to dignity (Article 16 Civil Code)[11] and the right to be presumed innocent (Article 9-1 Civil Code).[12] As far as public interests are concerned, we can add in particular the preservation of the authority and impartiality of the judiciary.[13]

In practice, French courts have demonstrated their eagerness to sanction the media when the media compromise the right of the defendant/accused to be presumed innocent or his right to privacy (Jacques Brel case[14]) or when the dignity[15] of an individual is at stake (Préfet Erignac[16] case).

The same values are obviously all protected in Ireland. However, it is important to note that some Irish freedoms are not only simple legislatively or statutorily recognised rights, but also enumerated or unenumerated constitutional rights.[17]

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[10] Article 226-2 of the French Criminal Code is to be read in association with Article 42 Statute of the 29 July 1881 on freedom of the press and with Article 93-3 of the Statute, of the 29 July 1982 on broadcast communications. Both of the latter Articles provide for sanctions of fines and imprisonment.

[11] Article 16 of the French Civil Code provides that: "Legislation ensures the primacy of the person, prohibits any infringement of the latter's dignity and safeguards the respect of the human being from the outset of life."

[12] Article 9-1 of the French Civil Code provides that: "Everyone has the right to respect of the presumption of innocence. Where, before any sentence, a person is publicly shown as being guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for injury suffered, may prescribe any measures, such as the insertion of a rectification or the circulation of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expenses of the natural or juridical person liable for that infringement."

[13] French Civil Code.

[14] Court of Appeal Paris (Cour d'appel de Paris, 1ère chambre), 9 July 1980, *Le meilleur et autre C. Consorts Brel*; French Supreme Court (Cour de cassation, 2ème Ch. Civ.), 8 July 1981, *Dlle Bamy c. Soc. Gogedipresse Paris-Match, Consorts Brel et Mme Camerlan.*

[15] Article 16 of the French Civil Code.

[16] Cour de cassation, 1ère civ., 20 December 2000. In the *Erignac* case, a picture taken by photographers of murdered Préfet Erignac's corpse covered with blood was deemed to have violated the right to dignity.

[17] See Article 40.3.2° of the Constitution of Ireland. In *Ryan v. The Attorney General* [1965] I.R. 294 at 313 (S.C.), Kenny J. stated that: "The next matter to be considered …is whether the general guarantee in Article 40, section 3,

Indeed, article 40.3.2 of the Irish Constitution is a significant article in this context as it provides for the protection of the "personal rights" of the citizen. Subsection 2 of section 3 of Article 40 goes further in stating that the State "in particular" should protect the life, person and good name and property rights of the Irish citizens. The inclusion of "in particular" has enabled the courts to interpret this provision as providing also for the right to privacy.[18] The right to free speech or the freedom of expression

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relates only to those personal rights which are specified in Article 40 or whether it extends to other unspecified personal rights of the citizen. If it extends to personal rights other than those specified in Article 40, the High Court and the Supreme Court have the difficult and responsible duty of ascertaining and declaring what are the personal rights of the citizen which are guaranteed by the Constitution. In modern times this would seem to be a function of the legislative rather than of the judicial power but it was done by the Courts in the formative period of the Common Law and there is no reason why they should not do it now. A number of factors indicate that the guarantee is not confined to the rights specified in Article 40 but extends to other personal rights of the citizen. Firstly, there is sub-s. 2° of section 3 of Article 40. It reads:- 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.' The words 'in particular' show that sub-s. 2° is a detailed statement of something which is already contained in sub-s. 1° which is the general guarantee. But sub-s. 2° refers to rights in connection with life and good name and there are no rights in connection with these two matters specified in Article 40. It follows, I think, that the general guarantee in sub-s. 1° must extend to rights not specified in Article 40. Secondly, there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all - the right to free movement within the State and the right to marry are examples of this. This also leads to the conclusion that the general guarantee extends to rights not specified in Article 40."

[18] Although privacy is not enumerated in the Constitution, the Irish Supreme Court has stated that the right to privacy is among the unenumerated rights protected by the Constitution, *e.g.*, *Norris v. Attorney General* [1984] I.R. 36 (S.C.). *See further Haughey and others v. Moriarty and others* [1999] 3 I.R. 1 (S.C.); *In Re A Ward of Court* (No. 1) [1996] 2 I.R. 73 (H.C.) asserting the constitutional value of privacy. *See also* the judgment of O'Higgins C.J. in *Norris v. Attorney General* [1984] I.R. 36 (S.C), where he explained that the right to privacy was not, however, unqualified, but may be subject, as were all other rights, to the constitutional rights of others and to the requirements of the common good. See also *Foley v. Sunday Newspapers Ltd.* [2005] 1 I.R. 88 (H.C.); *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573; *Colgan v. The Independent Radio and Television Commission* [2000] 2 I.R. 490 (H.C.).

and thus the freedom of the press are constitutionally recognised rights.

The limitations to press freedom are also to be found in the Constitution, namely in Article 40.6.1, which guarantees freedom to express opinions and convictions subject to considerations of public order and morality.[19] The test applied by the Supreme Court in *Cullen v. Toibin*[20] by O'Higgins, C.J., is that the freedom of the press "can only be curtailed or restricted by the courts in the manner sought in these proceedings where such action is necessary for the administration of justice." Theoretically, the freedom of the press and of communication cannot be lightly curtailed, but, interestingly, Irish courts seldom invoke Article 40.6.1 in support of media freedom.

The constitutional right to privacy has not been sufficiently tested so far. Judges have to use other legal paths to protect privacy issues: mainly defamation,[21] contempt of court[22] and, in

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[19] Article 40.6.1º of the Constitution of Ireland provides that: "The State guarantees liberty for the exercise of the following rights, subject to public order and morality: i. The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law."

[20] [1984] I.L.R.M. 577 (S.C.).

[21] See, *e.g., Foley .v. Sunday Newspapers Ltd*. [2005] 1 I.R. 88 (H.C.).

[22] See, *e.g., Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 at 406-407 (S.C.), Barrington J. explained that: "The freedom of expression guaranteed by Article 40.6.1° of the Constitution includes criticism of government policy. *A fortiori* it includes criticism of other aspects of State activity including the working of the courts. Apart from particular statutes designed to protect privacy or the weaker members of the community there are only two kinds of restrictions on publicity or criticism concerning the courts. Both exist to protect the administration of justice. The first kind of restriction is on publicity which tends to deny to an accused person a fair trial and the other is on the kind of irresponsible and malicious criticism which damages the administration of justice by bringing the courts into contempt."

England,[23] the equitable remedy of breach of confidence has been used to protect privacy interests. Defamation laws are very strongly in favour of political figures and other well known people in Ireland. Some journalists claim that decisions such as *Campbell-Sharp*, a case taken against the *Irish Independent*, endanger freedom of expression.[24]

Irish media representatives think that the defamation laws are outdated and focus neither on individuals' rights nor on the media's right to freedom of expression, which is significantly limited by those laws.[25] Eighty per cent of all defamation actions are brought against the media.[26]

By comparison with French judicial practice, Irish courts appear more willing to prevent or sanction any conduct likely to compromise the administration of justice and use the notion of contempt of court. Contempt of court can be explained historically[27] and has been applied in a number of cases taken

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[23] See, *e.g., HRH Prince of Wales v. Associated Newspapers Ltd* [2006] E.W.H.C. 522 (Ch.D.); *Harrods Ltd. v. Times Newspapers Ltd and others* [2006] E.W.H.C. 83 (Ch. D.).

[24] See *Campbell-Sharpe v. Independent Newspapers* High Court, unreported, 6 May 1997; Frazier, "Liberty of Expression in Ireland and the Need for a Constitutional Law of Defamation," 32 *Vanderbilt Journal of Transnational Law* 391 (1999).

[25] See "Press Freedom & Standards, " a speech delivered by Frank Cullen at the PRII forum on the 23rd March 2004 where he stated that "Irish media is … operating within a defamation framework that is discriminatory, inequitable and out of date. (…) The Irish defamation laws serve neither to protect the individual's reputation and good name nor to encourage a free and vibrant press, which is the cornerstone of any democracy. (…) The State has an obligation to protect freedom of expression, which is at the core of a properly functioning democracy (…) If the State does not bring about change, it is likely to be forced to do so at a European level. This would be regrettable." The text is available at http://www.nni.ie/ppresrel21.htm. See also speech by Minister at the Conference of the Irish Society for European Law on *The European Convention on Human Rights and the Media*. The text is available at www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6C4HC2-en. See Cahill, "Good Journalism Dependent on Libel Reform," available at: http://www.indymedia.ie/article/62609. See "Fine Gael pushes for change of suit in archaic libel law," *Irish Examiner*, 24 October 2001.

[26] See Wood, "Defamation Law In Ireland," *available at* http://indigo.ie/~kwood/defamation.htm.

[27] "The original rationale of contempt of court was to preserve discipline, 'for all persons ought to be subject to the king as supreme, and to his officers.'"

against the press to sanction their reporting of certain trials.[28] It is defined as an offence created by the common law to protect the administration of justice.

Contempt of court is usually invoked in support of the preservation of the authority of the judiciary and the right to a fair trial. An illustration of this legal and judicial trend is the Irish Supreme Court case of *Kelly v. O'Neill* which states that "the power to punish for contempt was designed to protect the constitutional right of the accused to a trial in the due course of law."[29] Contempt is frequently used against freedom of expression when the press is involved in the litigation. Criminal

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McGonagle and Boyle, "Contempt of Court: The Case for Law Reform," McGonagle (ed.), *Law and the Media: The Views of Journalists and Lawyers* (Round Hall Sweet & Maxwell, Dublin, 1997) at p. 128 quoting Bracton, *de Legibus*, cited by Fox, *The History of Contempt of Court*, p. 47. "A second area of historical interest is the use of contempt of court against the emerging press. There was a considerable struggle for the press to be free to report and comment on the activities of the King's courts"… "It was only from the 1880s onwards that fair reports of court proceedings could be published without fear of prosecution." McGonagle and Boyle, "Contempt of Court: The Case for Law Reform," McGonagle, (ed.), *Law and the Media: The Views of Journalists and Lawyers* (Round Hall Sweet & Maxwell, Dublin, 1997) at p. 128. Simultaneously, it seems that privacy interests are incidental questions dealt with a complex of torts supplemented by the law of confidence among others. At public law, there is an unenumerated constitutional right to privacy, but its extent is still unclear. It may be contended that the right to privacy has not been properly protected as such and that the actions used are distorted from their focus. A need for an independent legal doctrine which has as its primary focus the protection of privacy has arisen and found its way with the European Convention on Human Rights.

[28] See *D.P.P. v. Independent Newspapers (Ireland) Ltd. and another*, High Court, unreported, Dunne J., 3 May 2005. See *The People (D.P.P.) v. Davis* [2001] 1 I.R. 146 at 150-154 (C.C.A.), *per* Hardiman J. *obiter dictum*, "The shackling of a prisoner has an adverse effect both on his dignity and subjective well being and on the perception of him by the community." Recognising that protection of restrained prisoners from publicity, including photographers, was mandated by prison rules, the learned judge expressed the view that publication of photographs of persons in restraints was "capable of amounting to contempt of court." Acccordingly, a trial judge, in the exercise of his inherent powers to ensure a fair trial, would be permitted to require that such publications would not occur. " See also *Kelly v. O'Neill* [2000] 1 I.R. 354 (S.C.).

[29] [2000] 1 I.R. 354 (S.C.).

contempt is quite relevant to this discussion. Indeed, among others, a journalist cannot refuse to give his sources of information if asked during proceedings without facing charges of contempt *in facie curiae*.

In France, the Code of Criminal Procedure[30] protects journalists and journalistic sources. However, this protection might well be compromised by the obligation to reveal their sources of information according to some interpretations of the Statute Perben II.[31] The author would argue that Irish courts, in practice, appear less often concerned with the protection of individual rights than with the preservation of the authority of the judiciary and the right to a fair trial.[32] The case of *Dermot Desmond v. Mr Justice Michael Moriarty* is an interesting case deciding that matters of urgent public importance should be dealt with in public which may outweigh privacy rights.[33]

In comparison, the "respect due to the judiciary" provided for in the French Criminal Code[34] has been very liberally

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[30] Article 109 of the French Code of Criminal Procedure provides that: "Any person summoned to be heard in the capacity of a witness is obliged to appear, to swear an oath, and to make a statement, subject to the provisions of Articles 226-13 and 226-14 of the Criminal Code. Any journalist heard as a witness in respect of information collected in the course of his activities is free not to disclose its origin. If the witness does not appear or refuses to appear, the investigating judge may, on the request of the district prosecutor, order him to be produced by the law-enforcement agencies."

[31] *Le Monde*, 16 September 2004.

[32] In *D. v. The Director of Public Prosecutions* [1994] 2 I.R. 465 at 474, Denham J. stated "The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right. " See also *D.D. v. The Director of Public Prosecutions* [2004] 3 I.R. 172 (S.C.); in the matter of a criminal prosecution and in the matter of an application for an order of prohibition and an order granting a restraining injunction *Z. v. The Director of Public Prosecutions* [1994] 2 I.R. 476 (S.C.).

[33] *Desmond v. Moriarty* [2004] 1 I.R. 334 at 370 (S.C), Denham J. stated "…although the exceptional inquisitorial powers conferred upon the tribunal may interfere with a person's constitutional right to privacy, the exigencies of the common good require that such matters of urgent public importance be inquired into in public and this may outweigh a particular person's constitutional right to privacy: *Redmond v. Flood* [1999] 3 I.R. 79."

[34] Article 434-24 of the French Criminal Code, which deals with offences against the authority of justice, provides that: "Abuse by words, gestures or

interpreted. In France, in order to succeed in an action against the press, the prosecution must demonstrate that contentious "abusive" comments are aimed at a particular judge or prosecutor or at the judiciary in general. Since journalists usually pinpoint a specific judicial decision and not a judicial figure, the French Criminal Code provisions have not been applied to any significant extent.

Beyond those differences, it is noticeable that both Ireland and France provide for public hearings as a principle. Justice has to be done and to be seen to be done in any democratic country. Article 34.1 of the Irish Constitution provides for public hearings as a legal principle and in camera trials as an exception.[35] Article 34.1 states that "Justice shall be administered in courts established by law…and, save in such special and limited cases as may be prescribed by law, shall be administered in public." Those particular areas are sensitive areas like incest and rape. Irish law prohibits publications that would lead to the identification of the

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threats, written documents or pictures of any type not publicly available, or the sending of any article to a judge or prosecutor, a juror or any other member of a court acting in the course of or on the occasion of the discharge of his office and liable to undermine his dignity or the respect owed to the office which he holds is punished by one year's imprisonment and a fine of €15,000. If the abuse occurs at a hearing by a court, tribunal or any judicial forum, the penalty is increased to two years' imprisonment and to a fine of €30,000."

Article 434-25 of the French Criminal Code provides that: "The attempt to publicly discredit a court's act or decision by actions, words, documents or pictures of any type, in circumstances liable to undermine the authority of justice or its independence, is punished by six months' imprisonment and a fine of €7,500."

The provisions of the previous paragraph are not applicable to technical commentaries or to acts, words, documents or pictures of any type oriented towards the amendment, cassation or revision of a decision. When the offence is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible." Criminal proceedings are time barred after three months from the day on which the offence defined by the present article was committed, if in the meantime no act of investigation or prosecution has taken place.

[35] See McGonagle, (ed.), *Law and the Media: The Views of Journalists and Lawyers* (Round Hall Sweet & Maxwell, Dublin, 1997) at Ch. 8 for further analysis.

victims and of the alleged author.[36] The press is still allowed to come and attend trials of offences of a sexual nature if they safeguard the anonymity of the party.[37] Additionally, family law matters and issues pertaining to minors are areas where the media are usually excluded in Ireland.

A distinction may be drawn in the Irish case law between pre-trial publicity[38] and contemporaneous reporting[39] of trials.

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[36] See, *e.g.,* s. 20 (3) of the Criminal Justice Act, 1951; s. 6 of the Criminal Law (Rape) Act, 1981 as amended by s. 11 of the Criminal Law (Rape) (Amendment) Act, 1990; s. 2 of the Criminal Law (Incest Proceedings) Act, 1995 *etc*.

[37] See judgment of O' Flaherty J. in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 at 387-396 (S.C.).

[38] In *The Director of Public Prosecutions v. Independent Newspapers (Ireland) Ltd. and another*, High Court, unreported, Dunne J., 3 May 2005, the articles complained of were a contempt of court in that they were highly prejudicial to the notice party thus interfering in the administration of justice. While the media played an important role in bringing to the public information about cases coming before the courts, that task had to be conducted with great care. Contempt of court could occur in relation to the publication of material in respect of an accused person who had pleaded guilty but who had not at the time of publication been sentenced. See *Kelly v. O'Neill* [2000] 1 I.R. 354 at 367 (S.C.) *per* Denham J. "There have been a number of cases in recent years relating to pre-trial publicity where it was alleged that there had been an interference with the due administration of justice. However, it has been recognized that juries are robust and capable of hearing cases fairly even when there has been pre-trial publicity; See *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465. If there was a real or serious risk that an accused would not receive a fair trial then the balancing of his right to a fair trial against the community's right to prosecute would not arise. The test for the court is as to whether there was a real risk that an accused would not receive a fair trial. To enable an accused person obtain a fair trial not only should the trial be conducted in accordance with fair procedures but the jury should reach its verdict by reference only to evidence admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions aired by the media outside the trial; *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476. In that case it was held that in spite of pre-trial publicity to which prospective jurors would have been exposed (they would have heard of the case *Attorney General v. X* [1992] 1 I.R. 1) the trial judge would be able to deal with the publicity surrounding it in a very specific manner by directing the jury that the controversy and publicity surrounding the case was completely irrelevant to the trial and must be totally excluded from their minds. In other words the robustness of the Irish jury was recognised and the administration of justice proceeded.

Pre-trial publicity can constitute a serious impediment to the fairness of a trial. Whether and to what extent publicity of a trial is permissible is decided on the basis of a case-by-case analysis undertaken by the trial judge considering the facts and the consequences of publicity on the impartiality of the jury and on himself. The main criteria is whether publicity will or will not impair (or has or not impaired) the fairness of the trial. Moreover, as O'Flaherty, J. put it in the *Irish Times* case,[40] publication of evidence may be postponed by the decision of the judge:

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A similarly robust attitude was rightly taken by the trial judge in this case of his position. A judge, who has been trained in the law and who has made a declaration on taking office, must be capable of withstanding publicity potentially adverse to a trial. However, there still remain the other issues raised. If they, or any one of them, raised a real or serious risk that an accused would not receive a fair trial clearly the balance would be drawn in favour of the fair administration of justice."

[39] See in particular the judgment of Hamilton C.J. in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 at 385-386 (S.C.) where he stated: "It is the function and role of a trial judge in the conduct of criminal proceedings to ensure that the trial of an accused person is conducted in accordance with fair procedures and to ensure, so far as practicable, that the jury should reach its verdict by reference only to evidence lawfully admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions gathered from the media or any other outside sources. He is further under an obligation to hold the trial in public and not to interfere or in any way restrict the right of the media to publish a fair and accurate report of the proceedings publicly heard before the court unless such publication is prohibited by law or would interfere with or prejudice an accused person's right to a fair trial. An accused person's right to a fair trial includes the right to have the jury reach its verdict by reference only to evidence lawfully admitted at the trial." See, *e.g.,* criteria on whether contemporaneous reporting is legal in *Irish Times Ltd v. Ireland* [1998] 1 I.R. 359 at 385-386 (S.C.), Hamilton C.J. quoting Morris J. in *Irish Times Ltd v. Ireland* [1988] 1 I.R. 359 at 374 (H.C.) where he stated that the learned High Court Judge (Morris J.) had properly concluded that " … before a judge presiding over a trial imposes a ban on reporting he must be satisfied of two things:- (a) that there is a real risk of an unfair trial, if contemporaneous reporting is permitted, and (b) that the damage which such improper reporting would cause could not be remedied by the trial judge either by appropriate directions to the jury or otherwise."

[40] See judgment of O' Flaherty J. in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 at 393.

> Aside from such statutory provisions, however, it has been recognised for a long time that it may be necessary to postpone publication of evidence on occasion.

The French New Code of Civil Procedure provides for the public hearing principle. As occurs in Ireland, some particular cases will be heard as *in camera* proceedings (in particular, family law matters). The French Code of Criminal Procedure also provides for the public hearing of trials[41] except in case of rape, torture, etc., where the victim can require *in camera* proceedings which are granted as of right by the court. French pre-trial publicity is prohibited for the sake of the presumption of innocence. Article 9-1 of the Civil Code provides that:

> Everyone has the right to respect for the principle of the presumption of innocence. Where, before any sentence, a person is publicly shown as being

[41] Article 306 of the French Code of Criminal Procedure provides that: "The hearing is public unless publicity would be dangerous for order or morality. In such a case, the court so declares by a ruling made in open court. The president may nevertheless prohibit access to the courtroom for minors, or for certain minors. In the case of a prosecution for the offences of rape or torture and acts of barbarity accompanied by sexual aggression, a hearing in camera is granted as of right where the civil party victim or one of the civil party victims so requires; in the other cases a hearing in camera may only be ordered where the civil party victim or one of the civil party victims does not oppose it. Where a hearing in camera has been ordered, this applies to the reading of any judgments that may be made in respect of any procedural objections considered under Article 316. The judgment on the merits must always be read in open court …"
Article 400 of the French Code of Criminal Procedure provides that: "Hearings are public. Nevertheless the court, after ascertaining in its judgment that a public hearing would be prejudicial to public order, the orderly conduct of the hearing, human dignity or the interests of a third party, may order by means of a judgment made at a public hearing, that the hearing will take place in camera…The judgment on the merits must always be read at a public hearing…"
Articles 698-9 and Article 306 of the French Code of Criminal Procedure provide for *in camera* proceedings in case publicity constitutes a threat to national defence confidential information. The judgment on the merits takes place in public.

> guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for injury suffered, may prescribe any measures, such as the insertion of a rectification or the circulation of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expense of the natural or juridical person liable for that infringement.

In France, the first step of the pre-trial criminal process, i.e., the exercise of public prosecution and judicial investigation is held in camera.[42] On the reporting of criminal trials, the French Criminal Code, in Articles 434-16, provides that the publication, prior to the pronouncement of the final judicial decision, of commentary on anything that influences the statements of witnesses or the decision of the judicial investigating authority or trial court is punishable by six months' imprisonment and a fine of €7,500. When the offence is committed through the press or by broadcasting media, the specific legal provisions governing these matters apply in identifying the persons who are responsible. Moreover, Article 38 of the French Statute on freedom of the press, 29 July 1881, amended by the Statute of 22 September 2000, prohibits the publication of the charging of any individual with a criminal offence or any other matter in relation to criminal charges before such matters are announced in a public hearing (the fine amounts to € 3750).[43]

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[42] Article 11 of the French Code of Criminal Procedure provides that: "Except where the law provides otherwise and subject to the defendant's rights, the inquiry and investigation proceedings are secret**.** Any person contributing to such proceedings is subjected to professional secrecy under the conditions and subject to the penalties set out by Articles 226-13 and 226-14 of the Criminal Code. However, in order to prevent the dissemination of incomplete or inaccurate information, or to quell a disturbance to the public peace, the district prosecutor may, on his own motion or at the request of the investigating court or parties, publicise objective matters related to the procedure that convey no judgement as to whether or the charges brought against the defendants are well founded."

[43] See Cour de cassation, Ch. Crim*., X...et autre*, 22 June 1999: publication of documents in criminal proceedings before the reading of the said documents in

Ordonnance no. 45-174 of 2 February 1945, on juvenile offenders, as amended, provides for restrictions to the public hearing principle and lists the people permitted to attend the proceedings (the victim, the witnesses, the next of kin, the representatives of the underage offender, the lawyers, etc.). It also prohibits reporting on the trial in books, in the press, via broadcasting means or cinema and the publication through these means of any text or illustration on the identity and personality of the juvenile offenders.[44] The decision on the merits is given in a public hearing in front of the young offender. It can be published, but the name (and even the initials) of the young offender can't be given.[45] When a judge decides that a newspaper has committed an offence in publishing, the statute of 29 July 1881[46] states that compulsory rectifications have to be published to compensate partly the damage done notwithstanding other sanctions. Moreover, the statute of 29 July 1881 Article 32 sanctions defamation against individuals.[47]

It can be concluded on this point that France and Ireland have similar procedural legal rules as regards publicity of trials. They protect the individuals against abusive intervention of the media via rules which may differ slightly, but which all aim at a democratic balancing of interests.

## II. HARMONISATION OF MEDIA FREEDOM: THE IMPACT OF THE ECHR

Regardless of the different legal traditions and rules, it is important to stress that media freedom all across Europe is now governed by Article 10 of the ECHR.[48] France ratified the

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public hearing. Sanction: fine: FF 10,000 for breach of Article 38 para.1 of the Statute of 29 July 1881.

[44] A fine of €6,000, in the event of a second offence, a two-years long imprisonment sentence can be imposed

[45] A fine of €3,750 can be imposed.

[46] Article 13 of the Statute of the 29 July 1881.

[47] A fine of up to €12,000 can be imposed.

[48] Article 10 (1) of the European Convention on Human Rights, which deals with freedom of expression, provides that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and

Convention in 1974. In 1981, the right to individual appeal was agreed on. With effect from the 1st of January 2004, the European Convention on Human Rights Act requires the Irish courts to interpret every judge-made and statute law in a manner compatible with the provisions of the Convention.[49] Under the Convention, the right to freedom of expression and of information provided by Article 10 is not absolute. The State may validly interfere with the right to freedom of expression. To withstand European judicial scrutiny, limitations or restrictions on media freedom must be "prescribed by law," must "pursue a legitimate aim" (paragraph 2 of Article 10 enumerates a list of circumstances in which a State may legitimately interfere with the right of paragraph 1, i.e., enumerates a list of legitimate aims[50]) and, finally, must be "necessary in a democratic society." The interference is lawful only if those three factors are present.[51]

An example illustrating this point is the 1979 European Court of Human Rights case, *Times Newspapers Ltd. v. United Kingdom*.[52] It was held that an interference with the applicants' freedom of expression was not justified under Article 10(2) and,

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regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

[49] See O'Connell, "Ireland" in Blackburn & Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States*, *1950-2000* (Oxford University Press in association with the Council of Europe, 2001) at pp. 423-474; Pech, L., "Chronique Irlande,"(2004) 59 *Revue francaise de droit constitutionel* 663; Kilkelly (ed.), *European Convention on Human Rights and Irish Law* (Jordan Publishing Limited, Bristol, 2004) for further analysis.

[50] Article 10 (2) of the European Convention on Human Rights provides that: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[51] Pech, "Freedom of the Press: A Comparative Perspective" in Eoin O'Dell (ed.), *Freedom of Expression* (forthcoming: Ashgate, 2006).

[52] (1979) 2 E.H.R.R. 245.

accordingly, that there had been a violation of Article 10. It was stated:

> …Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10(2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary. (...) There has accordingly been a violation of Article 10.

The Convention posits a balancing of rights: the right to freedom of expression and the right to a fair trial. The test referred to is the following: is the relevant restriction on freedom of expression necessary in a democratic society? The test of "necessity in a democratic society" is largely illustrated by the ECHR case law.[53]

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[53] See, *e.g., Bladet Tromso and Stensaas v. Norway* (2000) 29 E.H.R.R. 125, where the court considered whether interference with an applicant's right to freedom of expression was necessary in a democratic society. The test of "necessity in a democratic society" requires a court to determine whether the "interference" related to a "pressing social need" was proportionate and whether the reasons given by the national authorities to justify the need were sufficient and relevant. The national authorities have a margin of appreciation in determining this need. However, the final ruling is by the European Court. In so saying, the court referred to the importance of the press in a democratic society and its important role in the imparting of information on all matters of public interest. It stated at 126, para. 59: "In cases such as the present one, the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of 'public watchdog' in imparting information of serious public concern." It determined, also at 127, para. 62: "Consequently, in order to determine whether the interference was based on sufficient reasons which rendered it 'necessary', regard must be had to the public-interest aspect of the case."

A practical consequence is that both Irish courts and French courts are required by the Strasbourg Court to undertake a *genuine* proportionality analysis or to balance the competing rights and interests at stake on a case-by-case basis. National courts of both countries must demonstrate a fair balance between freedom of expression of the press and competing individual rights (or public interests[54]).

It is very interesting to note that Irish judges already used balancing methods before Ireland signed the ECHR when applying Constitutional provisions. However, when the constitutionally guaranteed rights of freedom of opinion and expression, including that of the freedom of the press, competed with the right to a fair trial, the right to a fair trial was nearly systematically paramount.[55] In *Irish Times v. Ireland*,[56] significantly reinterpreting Article 34.1[57] of the Irish Constitution, the Supreme Court ruled that a court may interfere with the rights of the media to publish contemporaneous reports of criminal proceedings where this is necessary in order to protect

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[54] See, *e.g., Pedersen and Baadsgaard v. Denmark* (2004) E.C.H.R. 693.

[55] In *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 at 380 (S.C.), Hamilton C.J., quoting Morris J. in *Irish Times Ltd. v Irelan*d [1998] 1 I.R. 359 at 370 (H.C.), "The learned trial judge in balancing these two rights clearly found that the accused's right to a fair trial was paramount and ranked higher in the hierarchy of rights than the right of the media to contemporaneous reporting. In this conclusion, he was undoubtedly correct (see the judgment of Denham J. in *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465.)." "In the course of her judgment in that case Denham J. had stated at 474:-'…A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute. If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted.' These statements apply with equal force to the media's right to publish and the public's right to know and be informed."

[56] *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 (S.C.).

[57] Article 34.1 of the Constitution of Ireland provides that "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

the right of an accused person to a fair trial.[58] Trial judges have, therefore, to balance the community's right of access to the court with information about the hearing and the administration of justice.

Another more recent case, *Cogley v. RTE*,[59] offered an additional good example of a decision where judges attempt to "weigh and balance the competing rights and values at stake." In this particular case, the plaintiff asked the court to grant an interlocutory injunction (in ECHR words, "a prior restraint order") against RTE in order for a programme on nursing home care not to be broadcasted. The interlocutory injunction was refused. The key legal issue was how the right of privacy may be balanced against the freedom of the press. The TV programme was deemed to be of the highest public interest and if privacy proved to be violated then damages would be an adequate remedy. The Court explicitly referred to the ECHR case law to confirm that "the weight to be attached to the undoubted right of parties to privacy can vary significantly from case to case." The influence of the ECHR is to give more weight to press freedom.

Finally, in *Foley v. Sunday Newspapers Ltd*,[60] the court found that there was no general principle that only a competing

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[58] *Irish Times Ltd. v. Ireland*, [1998] 1 I.R. 375 at 380 (S.C.), Hamilton C.J. quoting Murphy J. in the Circuit Court, where he stated "The public must be informed that the trial is proceeding but I believe that there is in existence a judicial discretion, if the judge is satisfied that interference is possible, that he may interfere with the immediate interests of the media. This is not a ban on reporting. This is not a ban on the public. This is a delay which cannot conceivably adversely affect the public interest and for the reasons stated I think it was quite justified." Hamilton C.J. continued at 380, "The learned High Court Judge was of the view that the provisions of Article 34.1 had to be considered in the light of the Constitution as a whole and in particular with regard to the provisions of Article 38.1 and Article 40.6.1 of the Constitution and held that the learned Circuit Court Judge had balanced the right of the accused persons to a fair trial against the media's and the citizens' 'right to freedom of expression'…The learned trial judge in balancing these two rights clearly found that the accused's right to a fair trial was paramount and ranked higher in the hierarchy of rights than the right of the media to contemporaneous reporting. In this conclusion, he was undoubtedly correct."

[59] *Cogley v. Radio Teilifis Eireann, Aherne and others v. Radio Teilifis Eireann*, High Court, unreported, Clarke J., 8 June 2005.

[60] *Foley v. Sunday Newspapers Ltd.* [2005] 1 I.R. 88 (H.C.).

constitutional right could be weighed in the balance against the granting of an injunction to protect another constitutional right. Hence, the plaintiff had to demonstrate a convincing case for the curtailment of the freedom of expression of the press on proper evidence. So the balancing of rights can take into account rights which may not be only of a constitutional nature.

When comparing Irish and French cases, it seems that no significantly different conclusions can be drawn from the case law of French courts.[61] The Cour de cassation case, *X ...et autre*,[62] where the Court applied Article 10, para 2 of the ECHR to sanction the breach of Article 38, para 1 of the 1881 statute on press freedom illustrates this point. It states as follows: "…l'interdiction édictée par les dispositions précitées constitue dans une société démocratique une mesure nécessaire (…) à la garantie et à l'impartialité du pouvoir judiciaire" (That is to say, the prohibition contained in the above-mentioned provisions is necessary to maintain the power and impartiality of the judiciary in a democratic society). The publication had been made by a journalist in support of one of the involved parties to the proceedings, while the investigation was still ongoing.

The French Supreme Court, the Cour de cassation, has an extremely concise, abstract and sibylline style where the reasoning of the court hardly ever appears. It is thus difficult to identify the balancing exercise, although it must also underpin the French decisions. It is only in the lower courts that the identification of the balancing exercise can be made, given the more detailed nature of those decisions. However, in some cases, the French courts' decisions have been quashed, namely in *Fressoz and Roire v. France*,[63] and in *Colombani et autres v.*

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[61] Pech, *La liberté d'expression et sa limitation. Les enseignements de l'expérience américaine au regard d'expériences européennes : Allemagne, France et CEDH (Freedom of Expression and its Limitation: Lessons from the United States with regard to European case-law*), (Clermont-Ferrand/Paris, Presses Universitaires de la Faculté de droit de Clermont-Ferrand, Librairie Générale de Droit et de Jurisprudence, 2003).

[62] Cour de cassation, Ch. Crim., 22 June 1999.

[63] *Fressoz and Roire v. France* (1999) E.C.H.R. 1. "In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the journalists' conviction and the means deployed to achieve that aim, given the interest a democratic society has in ensuring and

*France*,[64] for a breach of Article 10 of the European Convention. The case *Ekin v. France* illustrates a further violation of article 10:[65]

> ...In the case before it, the Court, … considers that the content of the book did not justify, in particular as regards the issues of public safety and public order, so serious an interference with the applicant association's freedom of expression as that constituted by the ban imposed by the Minister of the Interior. Ultimately, the Court considers that the ban did not meet a pressing social need and was not proportionate to the legitimate aim pursued.
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> …In the light of these considerations and its analysis of the impugned legislation, the Court concludes that the interference arising from section 14 of the Law of 1881, as amended, cannot be regarded as "necessary in a democratic society". There has, therefore, been a violation of Article 10 of the Convention.

Interestingly, the European Court of Human Rights tends to lay emphasis on press freedom in cases where journalists are a party to the legal proceedings when balancing the competing interests because, for the Court, the press plays an essential role in a democratic society. Not only does the press have a duty to impart information, but the public has a right to be informed. Moreover, it is noteworthy to recall that the European Court of Human Rights[66] declared that the protection of journalists'

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preserving freedom of the press. There has therefore been a violation of Article 10 of the Convention."

[64] *Colombani and Others v. France* (2002) E.C.H.R. 521.

[65] *Ekin Association v. France* (2001) E.C.H.R. 473.

[66] In *Goodwin v. U.K.* (1996) 22 E.H.R.R. 123, para. 39, the European Court of Human Rights stated that the "Protection of journalistic sources is one of the basic conditions for press freedom… " This is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. *See* amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at

sources is "one of the basic conditions for press freedom" and that an order requiring a journalist to disclose his sources of information is not necessary in a democratic society and that such a measure must be justified by an overriding requirement in the public interest. The case *Roemen and Schmit v. Luxembourg*[67] illustrates a violation of journalistic sources during searches carried out at the first applicant's home and workplace and concludes that "impugned measures must be regarded as disproportionate and that they violated the first applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention." It seems that neither France[68] nor Ireland[69] has

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the Fourth European Ministerial Conference on Mass Media Policy, Prague, on the 7th-8th December 1994 and Resolution on the Confidentiality of Journalists' Sources by the European Parliament on the 18th January 1994, Official Journal of the European Communities No.C 44/34. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.

[67] *Roemen and Schmit v. Luxembourg* (2003) E.C.H.R. 102.

[68] Article 109 of the French Code of Criminal Procedure provides that: "… Any journalist heard as a witness in respect of information collected in the course of his activities is free not to disclose its origin. If the witness does not appear or refuses to appear, the investigating judge may, on the request of the district prosecutor, order him to be produced by the law-enforcement agencies."

See Criticism, available at http://www.rsf.org/article.php3?id_article=2855 "Reporters sans frontières s'étonne que la justice ait toujours besoin des journalistes pour étoffer certains de ses dossiers, en particulier dans les affaires corses, et s'inquiète de la mise en cause toujours plus fréquente du secret des sources journalistiques en France. Malgré la "légalité" de ces écoutes téléphoniques, le fait que les juges ne fassent aucun cas du principe du secret des sources journalistiques pose désormais un vrai problème de liberté de la presse en France. Reporters sans frontières réclame à nouveau une modification de la législation en la matière. L'organisation propose, depuis septembre 2001, une modification de l'article 109 alinéa 2 du Code de procédure pénale, modifié par la loi du 4 janvier 1993, visant à renforcer le droit pour les journalistes de ne pas révéler l'origine de leurs informations. Dans un nombre croissant d'affaires, la justice française exerce en effet une

concretely followed the Court in its conclusions in that particular field up to now.

The "public watchdog" is strong in cases where public figures are involved in proceedings against the press since they are part of the political scene. Consequently, primacy is given to freedom of the press when a public official is the target because that freedom affords the public the best means of being informed of political matters. When a private person is involved, the "public watchdog" is not as active and the journalist should act in a more restrained way. On the issue of contempt of court, the overriding concern of the ECHR in cases where judges have come under criticism is the protection of the individual judge as opposed to the judiciary as a whole. The Strasbourg court operates a balance between the press and individual rights, the protection of "reputation and rights of others" is a legitimate aim under Article 10, paragraph 2. Therefore, cases which are national defamation cases fall under this Article.

Article 6 of the ECHR guarantees the right to a fair trial in criminal and in civil matters.[70] Hearings *in camera* are expressly

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pression sur les journalistes pour les contraindre à révéler l'origine de leurs informations. L'interpellation, la mise en garde à vue, et la mise en examen sont utilisées pour contraindre le journaliste à se comporter en auxiliaire de justice ou de police."

[69] See *The People (D.P.P.) v. Nevin* [2003] 3 I.R. 321 at 331 (C.C.A.), *per* Geoghegan J. "Counsel for the applicant had submitted to the trial judge that she should order the journalists to disclose their sources. As he pointed out there is no doubt that, on the law as it stands, there is no such thing as journalistic privilege and this was confirmed by a judgment of this court in *In re O'Kelly* (1974) 108 I.L.T.R. 97. Nevertheless, it has been understood to be the practice in this jurisdiction and in other common law jurisdictions that a trial judge will exercise a certain element of discretion in ruling as to whether a journalist does have to answer a question about sources. The judge is entitled to satisfy himself or herself that the answer to such a question is properly relevant to the matters to be tried and that the interests of justice require that an answer be given."

[70] Article 6 (1) of the European Convention on Human Rights provides that: "…Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice…"

authorised. The grounds on which such hearings can take place are listed in Article 6. The right of privacy is guaranteed by Article 8 of the ECHR and has been commented on by the European Court of Human Rights.[71] Everyone has the right to respect for his private and family life, his home and his correspondence. The presumption of innocence is also provided for by the ECHR.[72] Article 6(2) on the presumption of innocence has been applied in particular in the case, *Allenet de Ribemont v. France*,[73] which dealt with a high profile murder of a well-known person. The media announced that Mr. Allenet de Ribemont was the murderer before the trial could take place. After the Strasbourg court's decision which found that there had been a breach of the presumption of innocence, he was subsequently released. Apart from the ECHR, the potential future role of EU Charter of Fundamental Rights signed in Nice, 7 December 2000[74] is also of importance. It might well lead to a further harmonisation of Irish and French case law and legislation in the future. This piece of legislation is not yet binding.[75]

The European Court of Human Rights also refers to the ethics of "journalism".

> The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and the rights of others, its duty is nevertheless to

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[71] *Von Hannover v. Germany* (2004) E.C.H.R. 294.

[72] Article 6(2) of the European Convention on Human Rights provides that: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

[73] (1995) 20 E.H.R.R. 557.

[74] Charter of Fundamental Rights of the European Union , (2000/C 364/01), 18th December 2000, deals with dignity, freedoms, and in particular the freedom of expression and information *etc*.,

[75] *See* European Commission for Democracy through Law (Venice Commission), Opinion No. 256/2003, The Implications of a legally-binding European Union Charter of Fundamental Rights on Human Rights Protection in Europe. The text is available at www.venice.coe.int/docs/2003/CDLAD(2003)022e.asp?.

> impart –in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest."[76]

The ECHR's interpretation of obligations and responsibilities is very liberal and the duty to inform the public may even override other duties such as criminal law.[77] Apart from the standardisation of Irish and French law via the ECHR, of relevance also is the spirit of journalism in both countries. Both have codes of conduct which differ slightly, but which show the efforts by journalist representatives to abide by high standards of morals[78].

In sum, the ECHR is a key factor of harmonisation in the reasoning of Irish and French judges. Moreover, codes of ethics show a concern for high moral standards in both countries.

## III. SOCIOLOGICAL SIGNIFICANCE

Irrespective of the impact of Article 10 of the ECHR on judicial practices, it is tempting to argue that media reporting would have nonetheless presented similar characteristics in France and Ireland. In both countries, national newspapers tend to refer to major crimes, while regional papers focus on local minor criminal issues. However, some reports which are published in the main Irish national newspapers would not be found in their equivalent French counterparts, but in the regional press. This is probably due to the difference in population and in the corresponding volume of cases in the two countries. One finds in Ireland and in France rather sober newspapers with a high standard of morals and less objective ones: broadsheets and tabloids respectively. In both countries, journalists have a

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[76] *De Haes and Gijsels v. Belgium*, (1997) E.C.H.R. 7. Reports 1997-I para. 37.

[77] In *Fressoz and Roire v. France* (1999) E.C.H.R. 1, the French authorities alleged an infringement of the confidentiality of taxation documents published by journalists (Canard Enchaîné).

[78] In Ireland, a Code of Conduct was adopted by the National Union of Journalists on the 29 June 1994. In France, a Charter of the Professional duties of French Journalists, was adopted by the National Syndicate of French Journalists in 1918 and revised and completed by the Syndicate in 1938.

linguistic and pedagogical role of explaining litigation while reporting the trial. Hence, they report in easy to understand language or seek to simplify legal terminology. In French newspapers, journalists specialise in the reporting of legal matters and in particular of trials. They are referred to as "chroniqueurs juridiques" or "legal correspondents." In Ireland, it is not as widespread. Common features appear as regards the way the media report trials. For instance, it is typical for the media to report quotations from the oral arguments of the lawyers of the victims and the defence made by the accused.

On the negative side, trials are also marked by the same excesses: press rumours, accusation anticipated by the media, photographs of the accused, leaks to journalists (despite the *secret de l'instruction*, i.e. respect of the professional secrecy of the process), etc. Indeed, excesses by the media can be illustrated both in France (affaire d'Outreau) and in Ireland (Nevin case[79]).The media massively covered those two criminal trials.

In France, the general traditional tendency of journalists is to comment on facts rather than to report on them. This can lead to a higher level of unjustified and unfair comments. In Ireland, equivalent newspapers tend to stick much more to the facts of the case. Therefore, French papers are regularly sued on the grounds of privacy infringement. It seems that Irish papers are rarely sued for infringement of privacy, since they seem mostly objective in the way they report. When they are sued, it is mostly for inaccuracies (especially where names or charges are inaccurate because journalists have the right to take down notes, but don't have a right to access legal court documents).

Irish and French journalists cover predominantly and extensively the same types of trials. In France, it is particularly clear that civil law and administrative law do not attract the same

[79] In the *Nevin* case, the media had pre-tried the men who had allegedly killed Mr Nevin at Mrs Nevin's request. *The Mirror*, 12 November 2004, reported as follows: "Hospital guard for black widow Nevin; exclusive attack fears over visit." Catherine Nevin's trial for the killing of her husband Tom was the longest running in Irish history and attracted huge media attention in 2000. She was convicted of his murder and jailed for life. *See* "Appeal court impressed by the way judge conducted Nevin trial," *Irish Times*, 15 March 2003, on the dismissed appeal by Nevin.

media attention as criminal law. Only civil cases involving a "public figure" (e.g., Bernard Tapie[80]), political parties (e.g., Urba case in the 90s[81]) and/or a subject of public concern (victims of asbestos dust[82]) are reported. Administrative litigation, because of peculiar procedural rules (mainly the almost exclusive written character of the procedure), interests the media even less. However, one famous case heard in the Administrative Supreme Court, the Muslim scarf (voile islamique) case,[83]

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[80] Bernard Tapie, a French businessman with political connections, has been involved in a significant number of cases over the last 20 years (*Crédit Lyonnais, Va Om etc.,*). Media reporting of the trials have made the headlines since then. *See, e.g.,* the *Adidas* case, *Le Monde*, 2 October 2005 which stated "L'ex-homme d'affaires français Bernard Tapie a indiqué, samedi 2 octobre, sur TF1 qu'il demanderait au Crédit lyonnais des dommages et intérêts pour le "préjudice moral" subi "pendant 10 ans." Interrogé au lendemain de la décision de justice ayant condamné le Consortium de réalisation (CDR) à lui verser 135 millions d'euros dans le litige sur la cession de son ancien groupe Adidas, M. Tapie a confirmé qu'il demanderait par la suite des dommages et intérêts. Le CDR est chargé d'assumer la gestion passée de la banque Crédit Lyonnais, qui était celle de Bernard Tapie lorsqu'il a revendu son groupe d'équipement sportif Adidas en 1993-94, et qui a depuis été privatisée." Other public figures have been widely exposed to media reporting of trials, including extreme right Le Pen (gas chamber broadcasted declaration: various court decisions between 1989-1991); denying being involved in torture in Algeria and claiming defamation, court case 1997).

[81] A vast number of cases have involved political parties and some of their leaders or members and many were reported during the 1990s, e.g., Socialist Jean-Marc Boucheron, mayor of Nice Jacques Médecin, conservative Michel Noir and Pierre Botton, conservative Jean-Claude Méry in the affaire des HLM de Paris, member of Grenoble mayor's cabinet Alain Carignon. However, the most striking example of all the cases in the 1990s remains the *Elf Aquitaine* case, which was opened in 1997 by Judge Eva Joly, who subsequently wrote a book on the saga and the threats she endured after the years she spent trying to comprehend the financial imbroglio involving Loïc Le Floch-Prigent (a close friend of late President Mitterrand) and Alfred Sirven, Roland Dumas and his mistress Christine Deviers-Joncour. The story still continues in 2006 with Judge Renaud van Ruymbeke who has carried on the investigation following Eva Joly's departure from France.

[82] In France, a long series of asbestos cases have been dealt with by the courts and by the Cour de cassation, the French Supreme Court, since the 1990s and, owing to the considerable media reporting of the trials, the prohibition of asbestos came about in 1997.

[83] Media reporting on the "voile islamique" issue rose dramatically in 2003. See Conseil d'Etat's case on religious signs at school, C.E., Assemblée

generated some interest. Moreover, civil and administrative judges do not seek out the media to defend their decisions. This has not been necessarily the case in the past in some criminal matters.

Leaving aside civil and administrative law, it seems possible to argue that in both Ireland[84] and France, the criminal process captures press attention more than any other type of litigation. To quote Jean Carbonnier, criminal law being "the most theatrical of all branches of law," it is understandable that the media find criminal litigation more easily newsworthy. This is especially so when crimes involve public figures (either as perpetrators or victims), or when crimes are particularly "serious" and/or directed towards a specific category of society (children, minorities, elderly people, etc).

In both countries, crime on children raises a lot of concern. Recently, the killing of young Cork boy Robert Holohan[85] attracted a lot of attention in Ireland. The murder of 16 year old Audrey [86] in 2003 and the trial in early 2006 have recently made the headlines in France. Unsurprisingly, French paedophilia cases are typically the most sensitive today.

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générale (Section de l'intérieur) - no 346.893 - 27 November 1989. A law, passed in March 2004, bans conspicuous religious signs, including head scarves, from public school classroom. In France, the scandal came about in 1989 when three schoolgirls came to school with a scarf. It was the beginning of the scarf affair, which lasted for 15 years until a law in 2004 prohibited wearing a scarf or any religious sign.

[84] See, *e.g.,* "No justice by Brian, on Brian Murphy's death," *Sunday Times* (London), 27 February 2005.

[85] See *Irish Times*, 26 January 2006, "Killer Wayne O' Donoghue being kept under close watch in his cell"; See further "Unanswered questions: a full report on facts (the semen, the phone call, the State case, Robert's last hour, the bicycle, the refuse bags, the second journey, burning refuse bags, the mud stains, the injuries)," *Irish Times*, 28 January 2006. This very long and detailed report would never be published in a French national broadsheet, but in the regional press.

[86] *Le Figaro*, 27 January 2006, "Les jurés face à l'horreur du meurtre d'Audrey." *Le Figaro*, 28 January r 2006, "Trente ans de réclusion pour le meurtrier d'Audrey."

Racist or hate speech cases[87] are covered in France to a large extent. In Ireland, allegations of discrimination against members of the Travelling Community arise regularly,[88] and with increasing immigration, cases involving foreigners likewise attract media attention.[89]

Cases involving medical stories or mistakes are also scrutinized by the media in both countries. Thus, a father who was a G.P sued one of his fellow doctors for the death of his child because he could prove the medical mistake.[90] The story of Vincent Humbert in France, whose doctor agreed to help him die after an accident, had left him completely blind and tetraplegic, has triggered the interest of the media. The high profile trial has been covered and the polls show that this story has modified French society's opinion on euthanasia.[91]

The most widely reported cases in France are criminal cases involving politicians.[92] In the 1990s, a huge number of such trials took place. In France, a number of criminal trials involving politicians might never have come to a conclusion if the media had not been covering them (affaire du sang contaminé,[93] affaire

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[87] *Le Monde*, 10 March 2006, Dieudonné has been ordered to pay € 5000 for hate speech (incitation à la haine raciale) against the Jewish community in an interview published in *Journal du dimanche*, February 2004. The court also ordered him to publish the judgment in four main national newspapers: *Le Journal du dimanche*, *Le Monde*, *Le Figaro et Libération.*

[88] In a case that attracted a great deal of media attention, whereby a member of the Travelling Community was shot dead by Padraig Nally, a farmer, in Co. Mayo.

[89] "Lithuanian man's head was jumped on, jury told," *Irish Times*, 23 February 2006.

[90] *Le Monde*, 2.February 2006, "Devant le tribunal, la douleur d'un médecin après la mort de sa fille."

[91] *Le Monde*, 14 March 2006, "86 % des Français favorables à la légalisation de l'euthanasie." "Legislative steps are being taken as regard the right to die in dignity and some other projects aim at allowing euthanasia." *Le Monde*, 27 February 2006, "On a trahi mon fils," estime la mère de Vincent Humbert après le non-lieu.

[92] *Le Monde*, 6 April 2006, Charles Pasqua mis en examen dans l'affaire "Pétrole contre nourriture."

[93] Le drame du sang contaminé s'est transformé en "scandale" en avril 1991, lorsque "L'événement du jeudi" publie un rapport prouvant que le centre national de transfusion sanguine a sciemment distribué, en 1985, des produits sanguins contaminés. L'ancien premier ministre Laurent Fabius et les anciens

Elf Aquitaine,[94] etc.). The media fully play their role of being a counterweight against the political sphere in those cases. If they did not enjoy the freedom they have, many important trials and prosecutions would be stifled.

In France, the press is always active when policemen are involved. Cases involving "bavures policières" or "serious errors by policemen" make the headlines regularly.[95] In Ireland, the behaviour of Gardaí also attracts attention.[96]

Interestingly, France papers report extensively on Corsica-related trials and Ireland on IRA membership-related trials.[97]

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ministres Georgina Dufoix et Edmond Hervé ont comparu du 9 février au 2 mars devant la Cour de Justice de la République (CJR) pour "homicide involontaire." L'opinion publique n'est réellement alertée qu'à la mi-1985, lorsque le premier ministre annonce le dépistage obligatoire des donneurs de sang à partir du 1er août. L'ampleur du drame n'est connue qu'en août 1986 avec la publication d'un rapport du Centre National de Transfusion Sanguine (CNTS) qui affirme qu'un hémophile sur deux a été contaminé, soit près de 2000 personnes.

[94] *Agence France Presse*, 9 January 2006, "Emplois présumés fictifs d'Elf: vingt personnes renvoyées en correctionnelle."

[95] Jean Chichizola, Moins de bavures policières selon les inspections, *Le Figaro*, 12 February 2006.

[96] See, *e.g.,* "Manager awarded €20,000 in unlawful arrest," *Irish Times*, 1 April 2006.

[97] "Court upholds IRA membership conviction," *Irish Times*, 5 April 2006. "Le procès Erignac à l'affiche" *Liberation*, 16 January 2006 "Elles ont le format des grandes affiches publicitaires, quatre mètres par trois, et seront visibles aux entrées des principales agglomérations corses. Mais il ne s'agit ni de yaourt, ni du dernier 4X4 japonais. Ces affiches risquent de faire parler d'elles. Deux visages, ceux de Jean Castela et de Vincent Andriuzzi, sur un fond noir, avec un slogan, en corse et en français: "Notre seule préoccupation, un procès équitable." Ces deux hommes ont été condamnés en juillet 2004 à trente ans de prison, comme "commanditaires" de l'assassinat du préfet Claude Erignac, abattu en février 1998. L'un comme l'autre ont toujours proclamé leur innocence. La Ligue des droits de l'homme corse, qui signe l'affiche, estime que leur procès en première instance a été bâclé. Andriuzzi et Castela ont fait appel et leur nouveau procès s'ouvre à Paris le 1er février."*Liberation,* 23 February 2006, Doutes; Evènement 1. Procès Erignac: "Dans notre système de justice, le doute profite aux accusés… Mais la conséquence la plus importante de leur acquittement est le doute que leur procès aura jeté sur la manière dont a été menée l'enquête ayant abouti à l'arrestation d'Yvan Colonna, l'assassin présumé d'Erignac, qui clame lui aussi son innocence. Si le dossier d'accusation contre lui est aussi fragile et contestable qu'était celui contre les

Why do similar criminal trials attract media attention and scrutiny in both countries? The specific social role of criminal law explains the greater media interest. Criminal prosecution sends a message to society as a whole. A criminal trial triggers catharsis. The people identify with the victims and a collective, acute desire for justice is engendered.

The public's right to know, however, may lead to undue pressure on the judiciary and damage the lives of the people involved. In all times and across the world, individuals have always demanded from the courts exemplary sentences. As was stated in *Kelly v O'Neill*:

> There are special considerations, however, arising where the sentencing of convicted persons are concerned, which must at least be borne in mind. In such cases, depending on the nature of the publication, the inference may be drawn that a court responded to a popular demand for an exemplary sentence and such an inference, however unjustifiable, might, on one view, be regarded as damaging to the administration of justice.[98]

Of course, there are also financial reasons behind the choice of media to report on particular issues. Historically, crime reporting has always sold well.

Media reporting only differs to the extent that the legal actors involved in the criminal process and its construction are not identical. In France, wider criminal coverage might be explained in particular because it is easy to identify the *juge d'instruction* (the investigating judge) in charge of a file and shift all the discontent of the population from the judicial institution to one person who is the symbol of the institution. The specific role played by the *juge d'instruction* is worthy of note. A powerful figure, he/she is sometimes the subject of intense media interest at

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deux acquittés, on peut avoir de sérieux doutes quant à l'issue d'un procès qui sera déterminant pour la Corse, et la République,".*Agence France Presse*, 3 February 2006, Affaire Erignac: le "faux" PV, "une erreur matérielle."

[98] *Kelly v. O'Neill* [2000] 1 I.R. 354 (S.C.).

the pre-trial stage (e.g., in *Affaire of Little Gregory*). His/her power to send a defendant into custody before trial made him/her a powerful figure in the 1990s, when numerous politicians were prosecuted on corruption charges. Several cases (e.g., *Outreau*) where mistakes, officially called "dysfunctions of justice," were made have since considerably damaged the reputation of judges and of the whole judicial system. Following the reporting of the latter case, the era of "star" judges in France seems over.

What are the consequences of media coverage of trials in both countries? First, the media definitely play a role in the increase in criminal legislation in both countries.[99] Second, they also put the judicial system into question.

How do the media play a role in the increase of criminal legislation? Wide coverage of events triggers, *inter alia*, fear and panic[100] in the population in both countries, and probably a certain level of discontent or doubt towards the efficiency of the judicial machinery. Indeed, all high-profile criminal cases are very emotive cases. Is the media coverage largely responsible for this emotion?[101] In Ireland, it seems that the fear of crime is not close to the real level of violence in the country, but is enhanced by papers.[102]

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[99] See, *e.g.,* Cuklanz, *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change*, (University of Pennsylvania Press, Philadelphia, 1996).

[100] See Cohen, *Folk Devils and Moral Panics* (Mac Gibbon and Kee, London, 1972), whereby Stanley Cohen has termed it "the moral panic." While the judge in the *Nevin* case admitted there was a great deal of "inappropriate and inexcusable" press coverage of the case before and after Ms Nevin's first, but aborted trial, he also ruled that there was no real or serious risk of unfair trial and the trial proceeded. The court rejected all grounds of appeal based on adverse publicity.

[101] *Le Monde*, 30 January 2006 "Le retour des classes dangereuses," by Laurent Greilsamer stressing the thirst of media for crime and in particular sexual crime reporting in France; *Le Monde*, 23 January 2006 "Outreau: la justice sur le banc des accusés, Daniel Soulez Larivière : Ayant confirmé le coté 'voyeurisme' ajoute "Cela procède de l'émotion aussi. La publicité des auditions a emporté une grande surprise, car elles sont passées sur La Chaîne parlementaire et LCI, les journalistes se sont aperçus que c'était incroyable, et donc ils ont compris que les téléspectateurs pouvaient s'identifier aux victimes de la justice."

[102] "Crime stats not worth the fuss: In other words, crime is not out of control. We are no less safe in our beds than before. The gangland bosses do not hold

*The Irish Times* reported that a survey/poll commissioned by the Department of Justice recently showed that:

> 85% are concerned about crime and public order…75 per cent of older people said they were "very concerned" at crime and public disorder levels...Just five per cent of those surveyed believed crime had fallen in the last ten years, with 66 percent believing it had increased.

Although there is a higher level of crime in France, the same question may be asked. *Le Monde* reports on similar matters.[103]

As Lesley Sands has observed:

> The path of the panic, however, can take one of two directions. Either it quickly dies out and for all intents and purposes is forgotten, or it has more serious and lasting implications such as incorporation into legislation and social policy.[104]

It is particularly true both in Ireland in the 1990s,[105] after the Guerin case, and in France over the last 15 years.[106] Following the paedophilia Outreau case, the French legislation on child protection is now being reconsidered: a new bill on children rights is in the offing.[107] This seems to represent a move from a liberal democracy, which values due process, to a more populist,

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society in their power. As for legislation, we have had three or four major pieces of criminal legislation per year, a lot of it irrelevant or obnoxious." Vincent Browne, *Irish Times*, 15 March 2006.

[103] See, *e.g., Le Monde*, 17 January 2006, Infographie, Les actes de violence à l'école en 2003-2004.

[104] Sands, "Moral Panics," text available at www.aber.ac.uk/media/Students/lcs9603.html.

[105] Irish legislation is available at www.bailii.org.

[106] Perben Statutes (Lois Perben I (2002) et II (2004); Loi Perben II, Décision numéro 2004-492 DC du 2 mars 2004 (loi portant adaptation de la justice aux évolutions de la criminalité)), Schoettl, Jean-Éric, *La Gazette du Palais*, no 102, 11 April 2004, pp. 3-26.

[107] *Le Monde*, 3 May 2006, "Le gouvernement veut renforcer la protection des enfants en insistant sur la prévention."

punitive one where politicians might use public panic about crime to create a more control-oriented societal model, which, in turn, may lead to the endangering of the fundamental rights and freedoms of individuals. Emotional reporting of criminal events underpins this evolution.

Media coverage also subjects the judicial system to intense questioning. In France, the Omar Raddad case in 1994 had been widely covered in all newspapers for months. The gardener had been condemned to 18 years of imprisonment after the murder of his wealthy 65 year old female boss, Mrs. Ghislaine Marchal. In 1998. he was pardoned by President Chirac. Omar Raddad had already spent 7 years in jail. He has always claimed his innocence. Since the reform of 15 June 2000, it is finally possible to appeal against a decision by the Cour d'assises in France. The Cour d'assises deals with serious crimes and a jury decides. Traditionally, a jury could not be wrong. This reform of the presumption of innocence was a step towards meeting the requirements of the ECHR. There might well be a link between this widely covered and much debated murder and the proceedings reform.

There has been extensive coverage on criminal cases which later transpire to have been devastating miscarriages of justice. In France, thousands of articles have reported on the Outreau case, one of the worst miscarriages of justice ever,[108] called by some "the most spectacular judiciary soap opera in modern history." President Chirac called it "an unprecedented judiciary disaster." The fiasco was at its highest peak in December of 2005 when a

[108] This case has made headlines in national and regional papers for months. Abroad, it's been widely covered by the press; hundreds of articles in English, German, Spanish, Italian, *etc.,* have been published on the Outreau affair. To cite just a sampling of English-language examples: Ireland: *The Irish Times*, 11 February 2006, "Rough justice and shattered lives"… "An extraordinary story of paedophilia, shoddy investigation and false prosecutions in the French town of Outreau has implications for the entire French justice system." Australia: *Sydney MX*, 30 March 2006 "Doom & Gloom: Children Accuse Family Of Rape." "Seven members of the same family went on trial today on suspicion of raping 11 young relatives in the same French town where another case turned into a judicial disaster. The seven defendants three couples and a woman face accusations from several children that their parents, aunts and uncles raped them in Outreau between 1994 and 2001."

French appellate court overturned the conviction of six people accused in 2000 of participating in a paedophilia ring in the North of France. Justice Minister Clement ordered an investigation into the police, judiciary and social services involved. The judge in charge of the case was heard in Parliament by a special *ad hoc* commission and the hearing had been televised, which was absolutely unique in France's history.[109] The investigating judge, Burgaud, refused to apologise on national TV, although innocent people had been jailed for years and one of them had committed suicide. He said he was satisfied he had applied the letter of the law. But then the millions of French people watching wondered what underpins "justice?" Is equity a matter of concern in the French judicial system? How could a young man admitted to the *juge d'instruction* position be forced to deal on his own with dramatic facts without the opportunity to consult a more senior colleague? Is it safe to have recent law postgraduates become judges – without prior professional experience – and, in particular, *juges d'instruction*? Is the inquisitorial system the correct one? These questions have been posed[110] and are now being carefully discussed.[111]

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[109] *Le Monde*, 9 February 2006, "La commission d'enquête parlementaire a entendu, mercredi, le juge Fabrice Burgaud pendant sept heures *La "chaîne judiciaire" révèle ses failles humaines!* "

[110] Après Outreau : le juge d'instruction, bouc émissaire et symbole : "La débâcle judiciaire d'Outreau ne doit pas être un prétexte au "lynchage" des juges d'instruction. Cette affaire, qui a provoqué la constitution d'une commission d'enquête parlementaire- une première en France-, est en revanche la démonstration que la fonction d'instruction, clef de voûte du système pénal français, n'est pas une garantie absolue de succès judiciaire"…. "la suppression du juge d'instruction n'apportera un plus que si elle est accompagnée d'un profond remaniement de notre procédure pénale. Un remaniement destiné à faire du juge un arbitre entre les parties et non plus un acteur à part entière du procès pénal, comme l'est aujourd'hui le juge d'instruction. Un remaniement qui distingue clairement entre la phase d'enquête confiée à la police et la phase de contrôle et de mise en accusation assurée par un parquet réellement indépendant. Ce nouveau système procédural donnerait de la vigueur à l'investigation - tout en renforçant les droits de la défense ainsi que les possibilités d'action offertes aux victimes, grandes oubliées des réformes successives. En un mot, en autorisant tous les acteurs à influer directement et concrètement sur le déroulement des opérations à tous les stades de l'enquête, il limiterait les impasses de l'organisation pénale actuelle. Mais l'adoption d'un tel système présente également un coût ; celui de la défense des droits de

The role of the media[112] is not entirely positive. The Outreau case showed that the presumption of innocence might not

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chacun, des contre-expertises et des honoraires d'avocat. Pour ne pas produire une justice à deux vitesses, l'aide juridictionnelle devra être revue et élargie aux publics les plus démunis. *Le Figaro*, 14 January 2006.

[111] "Me Iweins:Il faut affirmer que l'on choisit la présomption d'innocence," *Le Monde,* 5 April 2006 ; "Outreau: la justice française au banc des accusés," quoting Daniel Soulez Larivière: "Le juge Burgaud dit qu'il a appliqué la loi, et il n'a pas tort. Ce qui démontre que la loi est mauvaise et qu'il faut la changer, ce pourquoi je milite depuis plus de vingt ans," *Le Monde*, 23 January 2006.

[112] "Après Outreau, le fait divers en question : 'Il faut changer nos pratiques, mais il y va avant tout de notre responsabilité individuelle. Actuellement on observe encore des dysfonctionnements importants." Quoting Pierre Chapelle, regional paper Ouest France Les affaires de pédophilie sont aujourd'hui présentes dans 80% des audiences et les viols de mineurs concernent un tiers des affaires dans les douze départements que nous couvrons." *See* text *available at* www.acrimed.org/article.php3?id_article=2221. Thibault, Cara, "Affaire Outreau": Après le "délire" médiatique, l'amnésie collective," quoting a journalist, Jules Clauwaert: "Au chapitre des autocritiques attendues, ne craignons pas d'ajouter une médiatisation qui devait davantage à la pression et aux attentes du public qu'à la relation des faits," *Le Monde*, 18 March 2006. *Le Monde,* 25 February 2006, Le Tribunal Mediatque, par Robert Solé: "Sabine Mariette, conseillère à la cour d'appel de Douai (Nord), n'est pas moins sévère: "Mesure-t-on combien il est paradoxal de reprocher à la justice d'être autiste, hermétique aux attentes des citoyens, et dans le même temps de constater sa grande réactivité à l'opinion publique telle qu'elle est façonnée par les médias? Car Outreau, c'est aussi un emballement médiatique à tous les stades de la procédure, qui a fait perdre à chacun ses repères et sa place dans le débat judiciaire."

Mme Mariette, qui a été membre de la chambre de l'instruction ayant suivi le dossier d'Outreau, ajoute: "Jusqu'au procès d'assises de Saint-Omer, les médias ont d'avance jugé et condamné toutes les personnes impliquées sans s'interroger sur les conséquences d'une telle "médiatisation à charge", alors qu'en interférant dans l'enquête ils ont pu agir sur le comportement des personnes mises en cause et influencer les décisions, notamment celles relatives à la détention provisoire. (...) Les mêmes journalistes qui avaient condamné médiatiquement les accusés avant le procès de Saint-Omer les avaient également médiatiquement innocentés avant le verdict de Paris."

Le 20 mai 2004, après la volte-face de la principale accusatrice, et sans attendre le verdict, *Le Monde* titre en manchette: "Justice: les vies brisées des 13 innocents d'Outreau." Il sera démenti par le tribunal, qui, le 2 juillet, condamne six des accusés clamant leur innocence. Mais c'est le procès de la justice qui commence..."Heureusement que les audiences de Saint-Omer ne se sont pas tenues à huis clos, remarque Acacio Pereira. Si le scandale a pu

be respected at all in paedophilia cases where emotions conveyed by the media prevail (children were at stake). It is not entirely negative either.

This case showed that while the media largely pre-tried the accused men and women of the most dreadful acts on children for four years, they also recently raised concern about inaccuracies and inconsistencies during recent months. They put in the public light the extraordinary power of the *juge d'instruction* to place someone in pre-trial/preventive detention solely on the assertions of children which had not been carefully checked by experts. Consequently, judicial trade unions require urgent measures to ensure mainly that the presumption of innocence is safeguarded and to reduce pre-trial detention.[113] Media coverage of this case may well have been the impetus for the proposal by many high ranking professionals, and by the Minister of Justice, to reform the powers of the *juge d'instruction*[114] and the role of the newly institutionalised *juge des libertés et de la detention.*[115] Lawyers have advocated for a reform of legal aid in particular. The Outreau affair also underlines the extreme lack of financial resources of the Ministry of Justice. The image of justice is severely tarnished.[116]

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éclater, c'est aussi parce que la presse a rendu compte quotidiennement des dysfonctionnements de l'instruction."

[113] "Après Outreau, le ' travail de reconquête des magistrats" *Le Monde*, 13 March 2006.

[114] "Après le fiasco d'Outreau, faut-il revoir le rôle du juge d'instruction?," *Le Figaro*, 20 January 2006; "Rough justice and shattered lives," *Irish Times*, 11 February 2006: "Napoleon Bonaparte, who created the position of investigating magistrate, said French judges were the most powerful men in the country: they can summon anyone at will, and send them to prison the same day. Following judge Burgaud's hearing, the former justice minister Robert Badinter remarked on "the difference between the solitude of a young man and the immensity of the powers he holds."

[115] "Juge des libertés et de la détention, de la difficulté d'incarcérer," *Le Monde*, 20 February 2006.

[116] "Outreau : la justice française sur le banc des accusés," *Le Monde*, 23 January 2006; "Après Outreau, le 'travail de reconquête' des magistrates," *Le Monde*, 13 March 2006; *L'Express,* 26 January 2006, France; Enquête; p..48, 1323 mots, "Comment éviter un nouvel Outreau ? "

Following the overwhelming media attention, a parliamentary Law Commission[117] has been set up and tackles concretely the role of the press in the Outreau case.[118] It should report on reform proposals in the summer of 2006. Even if the *secret de l'instruction* and the *obligation de reserve* – the judge should remain silent – of the French judge remains strong, the Outreau case led the legal authorities in France to reconsider the media's attitude toward the judiciary and vice versa.[119] Accredited journalists might be given the procedural documents with the names and charges to avoid inaccuracies during trial reporting. Judicial training should be a significant part of the journalism school curriculum and the Ecole Nationale de la Magistrature (E.N.M.) should develop its modules addressing the media relation issue. A proposal has been made to institutionalise nationwide a "magistrat référent-presse" who will be in charge of informing the journalists of the law and procedure. He might also have to answer questions from journalists regarding specific cases.

Of course, in both Ireland and France, some barristers have used the potential press coverage of trials when judges used to hide behind secrecy.[120] However, there have been French judges in the last decades who have actually used the media channel and have given interviews because they felt the obligation of secrecy had reverse effects, i.e., led to misinterpretation by the media. This is quite an interesting development. The French judge used to consider the media as a danger while she uses them now

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[117] Rapport du groupe de travail chargé de tirer les enseignements du traitement judiciaire de l'affaire dite "d'Outreau," February 2005, French Republic, Ministry of Justice.

[118] "Outreau : la commission parlementaire se penche sur le rôle de la presse," *Le Monde*, 9 March 2006.

[119] Rapport du groupe de travail chargé de tirer les enseignements du traitement judiciaire de l'affaire dite "d'outreau," February 2005, French Republic, Ministry of Justice. See in particular Chapter 6 : "Les relations avec les médias."

[120] Jacques Vergès, a famous French lawyer, has specialised in high-profile trials, mostly political cases with wide media coverage, and has taken the opportunity in those trials to put the prosecution on trial. In Ireland, Patrick MacEntee has been associated with a great deal of high-profile criminal cases and has pointed out dysfunction in the Garda Síochána.

regularly and actively in challenging situations. Indeed, there is a real risk that, without explanations, the citizenry will not understand a judicial stance in particularly sensitive high profile cases. Interestingly, after the disaster of Outreau, the judiciary itself has openly used the media to reach public opinion.[121] The DPP Yves Blot used this channel, which has led to criticism from other high ranking judges, and, in particular, the President of the Paris Cour d'assise d'appel, Odile Mondineu-Hederer. This evolution is taken into account in the *Rapport du groupe de travail*.

The inquisitorial system is criticized in France's newspapers, particularly following the Outreau disaster. Interestingly, the adversarial system is a contentious issue in Irish newspapers. In a recent article on the young Irishman Brian Murphy's death, it is argued that the efficacy of Ireland's adversarial legal system is at stake.

> The presumption of innocence is the "golden thread" that runs through the tangle of Irish criminal law. Constitutionally enshrined, the burden of proving guilt beyond a reasonable doubt rests with the prosecution, but some lawyers fear the system is open to abuse and that the laws are fine-tuned in favour of the accused…One option to lawmakers is to adopt the continental European model, which is inquisitorial. In countries such as France and Germany, criminal trials are conducted by an investigating judge, in the absence of a jury. Evidential errors, such as those that featured in the Murphy trial, can be overruled by highly trained jurists, who participate directly in criminal investigations alongside police officers. This often leads to swifter and more efficient justice.[122]

The article then quotes barrister Declan McGrath.

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[121] "Outreau: un dossier en sable," selon Florence Aubenas, *Le Monde*, 15 March 2006.

[122] "No Justice by Brian", *Sunday Times*, 27 February 2005.

> There is no legal system in the world that has been devised to ensure the guilty are convicted and innocents go free. Has the pendulum swung too far in favour of the State? If anything, new laws passed in the last five years granting more powers to Gardai have eroded the rights of the accused.…The reality is that legal rules are there for good reason: they are there to prevent innocent people being convicted...We are then back to the old adage that it is better that nine guilty walk free than one innocent be convicted.[123]

In both countries, the media intervention questions the inquisitorial and/or adversarial systems. Neither of them is flawless or perfect. No ideal solution is expected. However, the simple fact of questioning is healthy in a democratic society.

## CONCLUSION

Although Irish and French laws have differing legal traditions, and, therefore, different remedies and legal actions, they have similar goals, i.e., to safeguard the freedom of the press and its competing rights. In both countries, a public hearing is the rule and the hearing *in camera* the exception, which means that journalists, as a matter of principle, have the right to attend trials and are the usual channel of information for the public. As Hamilton, C.J. opines in the *Irish Times Limited and Others* case:

> Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done but be seen to be done. Only in this way, can respect for the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic state, be maintained.[124]

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[123] *Ibid.*

[124] *Irish Times Ltd.v. Ireland* [1998] 1 I.R. 375 at 382 (S.C), *per* Hamilton C.J. See also *R v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256 at 259 *per* Lord Hewart C.J.: "…a long line of cases shows that it is not merely of some

The European Court of Human Rights case law plays an important role in the harmonisation of legislation and case law. Under the ECHR, the media plays a pre-eminent role in state governed by the rule of law. More precisely, the media have a role as a "watchdog." And in addition to the media's right to impart information and ideas, there is the public's right to receive them. The ECHR case law is in favour of the freedom of the press, especially when the publications which are challenged in court cover events of a political nature. This should further lead to more liberalism in Ireland and in France.

Sociologically, modern Western societies, including France and Ireland, have the same or similar cultural, political, economic, sociological backgrounds. The public waits for the same or similar newspapers reports and, because papers have to make money, they tend to serve the same courses in both countries. Market demand has remained the same for centuries. In turn, media reporting shapes societies[125] and thus legislation and judicial systems. Interestingly, the gulf between the press and judicial perceptions of the trial can be bridged. This bridging is in process. In both countries, the judiciary is slowly moving from its

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importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. "

[125] See Wiltenberg, "True Crime: The Origins of Modern Sensationalism," 109 (5) *The American Historical Review* 1377 (2004). "But while all overestimated these figures, those exposed to the fewest reports were closest to the truth. In other words, increased consumption of true news reports actually decreased people's objective knowledge about the prevalence of crime. Despite their low or even negative informational value, such reports have substantial emotional impact. The fears sparked by perceptions of crime influence decisions about where to live, how to raise children, where to invest social wealth, what punitive governmental actions to support, how to view groups perceived as likely criminals—a broad range of choices and attitudes that affect the quality of a society and its political life.1 This story forcefully underlines the impact of sensationalist crime reporting. Irrespective of the intent of their originators, who may see themselves as neutrally conveying factual material, the crime reports exert substantial political and cultural power. Representations of crime influence people's conceptions of their lives and communities far out of proportion to the actual incidence of criminal activity[…] the representation of crime operates semi-independently of crime itself. In all periods, discourses and rituals of crime, rather than direct experience of criminal acts, are the key determinants of crime's cultural impact."

traditional secrecy to more openness to enable journalists to do their work properly and to have the opportunity to report on the basis of legal documents instead of making mistakes when taking down names and charges during trials. Wrong information can put the judicial machinery at risk. Justice has to be understood by the people.

The judiciary and the media, which once were opposed, might find a compromise. The quality of reporting can be enhanced if journalists, who, for the most part, have high morals and respect a strict code of conduct, are provided the means to do their jobs properly, i.e., to report to the people what happens in courts as is necessary in a purportedly transparent democracy, instead of being considered troublemakers. In short, courts might then find an ally in the press instead of an enemy.

In this vein, Keane, J. (later Chief Justice) once wrote the following of today's information-driven society. "In modern conditions, the media are the eyes and ears of the public and the ordinary citizen is almost entirely dependent on them for his knowledge of what goes on in court."[126]

[126] *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 375 at 409 (S.C.).