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Determinants of the Irish bail system before and after 1997.

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Introductory remarks

Bail can be defined as:

The setting at liberty of an accused person upon others becoming sureties for the accused at his trial. The decision to admit a person to bail is a judicial matter and, consequently, the court cannot delegate the exercise of this judicial power to an administrative official¹.

According to the above definition it should be emphasized that an accused person has to ensure the State that he/she will return to the court proceedings or Garda Síochána Station at the particular time. It is imperative that bail is established on the fact that a criminal is deemed to be innocent until his guilt is proved.

The Irish bail system is based on the following legislation²:

- “Offences Against The State Act 1939”
- “Official Secrets Act 1963”
- “Criminal Procedure Act 1967”
- “Criminal Justice Act 1984”
- “Bail Act 1997”
- “Criminal Justice Act 2006”
- “Criminal Justice Act 2007”
- “Criminal Justice (Miscellaneous Provisions) Act 2009”

¹ H. Murdoch, *Murdoch's dictionary of Irish Law*, Dublin 2004; *DPP v Goulding* [2000] 1 ILRM 147. “The accused is bailed into the attendance of the accused at the trial or be liable to the State for the sums secured in the event of his non-attendance”.

² *The Courts Service of Ireland*, [online:] [<http://www.courts.ie/courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/Home>], accessed on the 20.10.2014.

1. Situation Analysis

Four types of bail can be distinguished in the Republic of Ireland³:

1. Station bail.

Usually takes place in local Garda station, where an accused person could be release on bail (in some cases sureties will apply – set by the Garda).

2. District Court bail.

In this case, the District Court judge will decide if the person stays in custody or will be released (in some cases sureties will apply – set by the judge).

3. Appeal bail.

District Court judge makes the bail decision. In this situation, the defendant will have logged an application to appeal to the Circuit Court.

4. High Court bail.

It applies to a person charged with offences under the “Offences Against the State Act 1939” and the “Official Secrets Act 1963” and also offences such as: attempted murder, war crimes, treason, piracy or genocide and murder⁴.

In the above four situations, bail could be set through⁵: own bail with no cash lodgement, own bail with cash lodgement/security, own bail and one or more independent surety or own bail and cash lodgement in lieu of an independent surety. The setting of bail is dependent on the Garda Síochána and judges.

The available sources provide the following statistics regarding bail applications proceeded by High Court in 2008 – 2012 (table number 1).

Table number 1. Analysis of bails orders made in 2008 – 2012 in High Court.

³ *The Courts Service of Ireland*, op. cit.

⁴ *Offences Against the State Act 1939*, [online:] [<http://www.irishstatutebook.ie/1939/en/act/pub/0013/print.html>], accessed on the 20.10.2014; *Official Secrets Act 1963*, [online:] [<http://www.irishstatutebook.ie/1963/en/act/pub/0001/print.html>], acc. 20.10.2014.

⁵ *The Courts Service of Ireland*.

Analysis of orders made	2012	2011	2010	2009	2008
Orders made on own surety (including cash lodgement)	594	785	626	686	623
Orders made on third party surety	379	420	443	401	269
Refused	465	491	447	339	367
Revoked	67	58	75	55	57
Withdrawn/Struck out	6	3	19	22	228
Vary terms of order	186				
Consolidation of bail	16				
Bail miscellaneous	35				
Total	1,748	1,757	1,610	1,503	1,544

Source: *The Courts Service of Ireland*, [online:] [<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/71AB353C07059D828025774A0050E1AE?opendocument>], acc. 20.10.2014.

As can be seen from table number 1, since 2008 the numbers of bail orders increased by 204 orders. Also in 2012, the numbers of refused applications reached by 465, which could be proportionally, compared with 2010 – 2011. The refused bail applications increased from 2009. Table number 2 provides an analysis of bail orders made in 2013 in High Court.

Table number 2: Analysis of bails orders made in 2013 in High Court.

Analysis of orders made	2013
Orders made on own surety (including cash lodgement)	630
Orders made on third party surety	335

Application refused	461
Bail revoked	34
Application withdrawn / struck out	13
Vary terms of order	168
Consolidation of bail	19
Bail miscellaneous	50
Total	1,710

Source: *The Courts Service of Ireland*, [online:] [<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/543E81DE12996F9D80257A64004D9A8B?opendocument>], acc. 20.10.2014.

In 2013 the High Court received 1710 bail orders where 461 applications were refused. There are only 4 applications less than in 2012. According to that, any significant changes in court proceedings cannot be noted.

1.1. Conditions of bail in the Republic of Ireland

The conditions of bail in the Republic of Ireland are placed in section 6 of the “Bail Act 1997”. Usually the courts take into consideration a number of factors before making a final decision. It includes previous convictions of an accused person, possible addictions, evidence regarding the charge and the character of the offence made by the accused person. According to the Sixteenth Amendment of the Constitution of Ireland in 1996 (Article 40.4.6) the High Court has the power to refuse bail application in order to prevent further offences being carried out⁶:

⁶ Constitution of Ireland (In operation as from 29th December 1937), [online:] [http://www.irishstatutebook.ie/en/constitution/index.html#article40_4_3], acc. 20.10.2014

Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.

Importantly, section 2 of the “Bail Act, 1997”, provides grounds for refusal of a bail application, for example “serious offences” (5 years sentence imprisonment). The circumstances are based on the reasonable prevention of “the commission of a serious offence by that person”.

During the analyses of bail condition in the Republic of Ireland the Irish case: “People v O’Callaghan”⁷ should be taken into account. The Supreme Court decision from 1966 is still valid and has the relevant application to current courts cases. In this Case the presumption of innocence rule can be found, which means that the accused person is innocent until his guilt is proved⁸. According to this, the main scope of giving bail is to secure the accused person presence during the court hearing. Supreme Court (Mr Justice Walsh) in this particular case held that:

Bail cannot be refused merely because there is the likelihood of the commission of further offences while on bail, as that is a form of preventive justice unknown to our legal system and contrary to the true purpose of bail⁹.

Once the accused person will receive the granted bail, it is her duty not to breach the terms and conditions of that particular bail. The person has a legal obligation to appear in the court on a designed date. Otherwise, there is a situation called breaching a bail bond, with the consequences of a bench warrant.

2. Determinants of bail before 1997

Bail situation before 1997 was based on a presumption of innocence and Habeas Corpus order.

The main Irish bail case before 1997 was “People v O’Callaghan” which was already mentioned and explained in section 1.1. The similar case is “Ryan v DPP”¹⁰. In this example (as in O’Callaghan’s Case), the President of the High Court, Mr Justice Hamilton granted the bail

⁷ The People (at the Suit of the Attorney General) v. Roger O’Callaghan [[1966] 1 Irish Reports 501, [online:] [[http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/\(WebFiles\)/1CC8C49846F8FF308025765E003785DC/\\$FILE/People%20\(AG\)%20v%20O%20Callaghan_1966.rtf](http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/(WebFiles)/1CC8C49846F8FF308025765E003785DC/$FILE/People%20(AG)%20v%20O%20Callaghan_1966.rtf)], acc. 20.10.2014

⁸ H. Murdoch.

⁹ Ibidem.

¹⁰ *Gordon Ryan v. The Director of Public Prosecutions, Respondent* [S.C. Nos. 111 & 155 of 1988] [1989] I.R. 399.

application for applicant, Mr. Ryan. Mr Justice refused either the principles that the accused person might perpetrate different offences in the near future.

The results of both above cases have still significant impact for future decisions regarding the granting of bail. In the *People (DPP) v Carmody* case, it is possible to determine some parts of Irish constitutional law, which has no concept of “preventive detention”¹¹. The Court of Criminal Appeal decided that in Ireland, the “Prevention of Crime Act, 1908” could not apply, because of absence of detention facilities in the State¹². Preventive detention was not common in Irish judicial system. To the degree that, the accused person (Carmody) got bail granted by Mr Justice McCarthy.

To find relevant determinants of bail situation before 1997 it is important to mention that all bail proceedings were based on the “Criminal Justice Act 1984”¹³. The Act in section 11 defines offences committed while on bail: consecutive sentences:

Any sentence of imprisonment passed on a person for an offence committed after the commencement of this section while he was on bail shall be consecutive on any sentence passed on him for a previous offence or, if he is sentenced in respect of two or more previous offences, on the sentence last due to expire, so however that, where two or more consecutive sentences as required by this section are passed by the District Court, the aggregate term of imprisonment in respect of those consecutive sentences shall not exceed two years.

On the other hand, Irish Courts had the power to suspend this sentence. The biggest impact for bail situation before 1997 was the Sixteenth Amendment of the Constitution of Ireland in 1996 (Article 40.4.6) which already explained in section 1.1. This amendment gives the relevant and bigger protection to the public and power for Irish Courts to refuse bail for accused person with a serious offence.

3. Determinants of bail after 1997

¹¹ *People (DPP) v Carmody* [1988] Irish Law Reports Monthly 370.

¹² “An Act to make better provision for the prevention of crime, and for that purpose to provide for the reformation of Young Offenders and the prolonged detention of Habitual Criminals, and for other purposes incidental thereto”, *Prevention of Crime Act 1908*, [online:] [<http://www.irishstatutebook.ie/1908/en/act/pub/0059/print.html>], acc. 20.10.2014.

¹³ *Criminal Justice Act 1984*, [online:] [<http://www.irishstatutebook.ie/1984/en/act/pub/0022/print.html>], acc. 20.10.2014.

The biggest changes for bail situation after 1997 brought the following acts:

- “Bail Act, 1997”
- “Criminal Justice Act, 2006”
- “Criminal Justice Act, 2007”
- “Criminal Justice (Miscellaneous Provisions) Act, 2009”

In general, after 1997 the preventive aspect of law can be observed in bail proceedings. The “Bail Act 1997” is the relevant, current and main legislation regarding bail in Ireland, which provides “related matters”¹⁴. This act is the natural outcome of the Sixteenth Amendment of the Constitution of Ireland. The act provides formalities regarding: refusal of bail (section 2), renewal of bail application (section 3), conditions of bail (section 6), etc.

The “Criminal Justice Act 2006” and “Criminal Justice Act 2007” make the application for bail more formal and complex. The “Criminal Justice Act 2006” amended to the current “Bail Act 1997” section 28A (offences under the provisions of the Criminal Justice Act 2006 in sections: 71, 71A, 72 or 73, 176, 183, 183A)¹⁵. The “Criminal Justice Act 2007” in part 2 (sections: 5 – 17) amendment new enactments relating to bail¹⁶. The most significant amendment enactments relates to the¹⁷:

- Statement by applicants for bail charged with serious offences,
- Evidence in applications for bail under section 2,
- Electronic monitoring of certain persons admitted to bail.

The “Bail Act 1997” and the part 2 of “Criminal Justice Act 2007” can be cited as a consolidated Bail Act. Criminal Justice (Miscellaneous Provisions) Act 2009 in section 48 amended the Bail Act¹⁸ makes bail conditions more stringent.

¹⁴ *Bail Act 1997*.

¹⁵ *Criminal Justice Act 2006*, [online:] [<http://www.irishstatutebook.ie/2006/en/act/pub/0026/print.html#sec79>], acc. 21.10.2014.

¹⁶ *Criminal Justice Act 2007*, [online:] [<http://www.irishstatutebook.ie/2007/en/act/pub/0029/print.html>], acc. 21.10.2014.

¹⁷ *Ibidem*.

¹⁸ *Criminal Justice (Miscellaneous Provisions) Act 2009* [online:] [<http://www.irishstatutebook.ie/2009/en/act/pub/0028/print.html>], acc. 21.10.2014.

An important Irish case after 1997 is *The People (Director of Public Prosecutions), Respondent v. Simon McGinley, Applicant*¹⁹. The court decision from this particular case is with respect to the refusal of bail, because of hearsay evidence provided by Garda and based on “Bail act 1997”, section 2. According to that case, the prosecution needs to prove probability of the committing of another offence by the accused person. Nowadays, this case gives a significant principle for the admission of hearsay evidence in bail application process, which could be accepted only in exceptional circumstances (for example anti-social behaviour)²⁰.

In *Colm Maguire, Applicant v. DPP, Respondent* bail application was refused under section 2 (2) of Bail Act in order to prevention further offence²¹.

Martin McDonagh and Patrick McDonagh, Applicants v. The Governor of Cloverhill Prison, Respondent Supreme Court release accused persons²². The Supreme Court decision was based on the breaching of constitutional law, as the applicants did not receive the information from the prosecution regarding objection to their bail. Also, the accused brothers did not get an opportunity to deal with the objections of the prosecution. Therefore, that detention was deemed to be unlawful.

4. Interpretation of results and conclusion

Based on current research, the cost of bail in Ireland should not be excessive. The Irish State law in relation to bail should be to abide and observe. This will help to keep public order and prevent offences or crimes.

The High Court in the last year processed 1710 bail applications, which 461 were refused and 13 withdrawn. Before considering the bail application, the courts should take into consideration all evidence and circumstances to avoid mistakes.

There is no perfect legal system in the world. After 1997, bail within the Irish legal system could be refused in order to prevent future crimes being committed. This is a very important point as it helps to protect the public and prevent future offences being committed. In 2012,

¹⁹ *People (DPP) v McGinley* [1998] 2 ILRM 233.

²⁰ *Garda Síochána Management Journal*, September 2007, [online:] [<http://www.garda.ie/Documents/User/communiquesep2007.pdf>], acc. 21.10.2014.

²¹ *Maguire v D.P.P* [2004] IESC 113, [S.C. No. 420 of 2004].

²² *McDonagh v Governor of Cloverhill Prison* [2005] IESC 4, [S.C. Nos. 12 and 13 of 2005].

there were nine murders committed by people out on bail with a total of 22,416 crimes²³ having been committed. According to these figures, courts and Garda should use all available tools to prevent these kinds of incidents.

It is also worth considering the responsibility of the Director of Public Prosecutions for the breaches of the bail condition. Mr Justice Paul Carney has recently released on bail, the Limerick sexual offender whilst the prosecution had no objection to this decision. Mr Justice also mentioned that the DPP office has to take full responsibility for rapist bail conditions²⁴. This is another argument to make bail procedure more stringent.

In conclusion, it is important to look into MJELR v Zielinski case from 2011²⁵. The EAW was issued against Polish defendants for low-level offences committed in Poland. Mr Zielinski applied for bail, which was refused regarding the “significant risk” that applicant may abscond. In this particular case, Mr Justice Edwards, took into consideration positive and negative factors for assessment the risk of absconding and refuse bail application. The last two cases are significant examples of how different perspectives and factors of bail application can determine the refusal or granting of bail.

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²³ The Journal, *Nine murders committed by people released on bail*, 12th of February 2013, [online:] [<http://www.thejournal.ie/offences-bail-2012-791444-Feb2013/>], acc. 21.10.2014.

²⁴ Irish Times, *Judge says DPP responsible for rapist released on bail*, 13th of October 2014, [online:] [<http://www.irishtimes.com/news/crime-and-law/judge-says-dpp-responsible-for-rapist-released-on-bail-1.1961710>], acc. 21.10.2014.

²⁵ *MJELR v Zielinski*, [2011] IEHC 45.

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