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THE IRISH JUDICIARY

*Paul C. Bartholomew**

I. Introduction

Law and courts arrived in Ireland with the Normans in the twelfth century. Royal justice actually began to be dispensed about the beginning of the thirteenth century by a permanent deputy known as a Justiciar. From the use of royal writs by this representative of the King there was a gradual development into the jury system and assizes. In 1210 King John visited Ireland and ordered that English common law be used there. Initially this law was applied only to English settlers located chiefly around Dublin. Although application of the common law expanded as time went on, it was not until the seventeenth century that the native system of law, the *brehon*, was dropped completely, and English law was used throughout Ireland.

II. Historical Development of the Irish Court System

The historical development of the first courts in Ireland paralleled the history of courts in England. The royal representative in Ireland was the Justiciar whose court before the end of the fourteenth century came to be known as the Irish Court of King's Bench. About the same time the courts of the Exchequer and Common Pleas developed. Somewhat later the Court of Chancery appeared. In time legislation provided for appointment of Justices of the Peace and of Resident Magistrates. Over the years the Irish Parliament enacted statutes by which English law was to be applied in Ireland. This development was climaxed by the Act of Union in 1800, enacted by both Irish and English parliaments, which provided that the law and courts of Ireland as they then existed should be continued; subject, of course, to later revision. In fact, the Irish court system of 1800 was to undergo a basic change in 1877 and then have little fundamental change until 1920.

The Irish judiciary in 1800 consisted of six types of courts, the four courts already mentioned—Exchequer, Common Pleas, King's Bench, and Chancery—plus the Court of Prerogative and Faculties with probate jurisdiction (which was shortly to become the Court of Probate) and the High Court of Admiralty. Between 1800 and 1877 three other courts were established. These were the Landed Estates Court, the Court of Bankruptcy and the Court of Matrimonial Causes. Then in 1877 legislation was enacted which made a basic change in the organization of the courts in Ireland. The courts in existence were merged into one court — a very early predecessor of the modern integrated court system. This court was called the Supreme Court of Judicature in Ireland and had jurisdiction in law and equity. Within the court there were two divisions — the High Court of Justice and the Court of Appeal. The former had general original jurisdiction and also possessed limited appellate jurisdiction, specifically

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over cases coming from local courts. Within the High Court the Landed Estates Court was merged with Chancery, and the Court of Matrimonial Causes was merged with Probate. Subsequent legislation moved all courts except Chancery to Ireland's King's (Queen's) Bench Division.

In 1920 the revolutionary unicameral Dail¹ established a judicial system of Parish courts with minor civil and criminal jurisdiction, District Courts with greater (but still limited) civil and criminal jurisdiction over Parish courts, Circuit Courts of unlimited civil and criminal jurisdiction and a Supreme Court with both original and appellate jurisdiction. These "Dail courts" were "in competition with" the regular courts that were still functioning; they were abolished by decree of the Provisional Government in 1922.

The 1922 Constitution of the Irish Free State contained a provision authorizing the establishment of a judiciary.² The Courts of Justice Act of 1924 set up a system of courts consisting of a unified District Court with minor civil and criminal jurisdiction, and a Circuit Court of Justice with greater civil jurisdiction and unlimited criminal jurisdiction excepting only murder, treason, and piracy. The Circuit Court of Justice had appellate jurisdiction over cases heard originally in the District Court. The legislation also provided for a High Court of Justice with full civil and criminal jurisdiction and a Supreme Court of Justice with appellate jurisdiction. Finally, provision was made for a Court of Criminal Appeal consisting of judges from the High Court and the Supreme Court. Appeals could be taken from this court to the Supreme Court. The court organization thus established remained basically unchanged until the adoption of the Constitution of 1937.

The constitutions both of the United States and of Ireland set up provisions for the judiciary in the respective countries and contain striking similarities in the language used.³ However, one needs to remember the difference in the basic legal nature of the two political states. The United States is a federal republic and Ireland is a unitary republic. As a result, in the United States there are two governments existing side by side — federal and state — while in Ireland there is only one basic government with local governments serving in a subordinate administrative capacity in relation to the central government. As for the judiciary, this difference results in two distinct court systems in the United States while in Ireland there is one basic system. Obviously within this one system there may be all sorts of ramifications, such as separate arrangements for types of cases, *i.e.*, civil and criminal, but the system is still under one government.

In Ireland the judiciary is established by action of the Oireachtas, the Dail and Seanad⁴ acting together under authority conferred by article 34 of the Irish

1 The Dail is the technical name for the present Irish House of Representatives. See note 4 *infra*. However, it is also used colloquially to denote the Parliament as a whole. For example, in the United States a member of the House of Representatives is often referred to as a "congressman" despite the fact that the word "Congress" designates both the House and the Senate. So, too, in Ireland — although the technical name for the Parliament is the Oireachtas, the term Dail is often used as a synonym.

2 IRISH CONST. art. 64.

3 IRISH CONST. art. 34; U.S. CONST. art. III. Unless otherwise noted, this and subsequent references to the Irish Constitution are to the 1937, the current, Constitution.

4 The Oireachtas is the name given to the combined Houses of the Irish Parliament of

Constitution. The court system must include, by constitutional mandate, courts of first instance and a court of final appeal. Further, the courts of first instance are to include a High Court which is to have complete original civil and criminal jurisdiction. By contrast, the United States Constitution empowers Congress to establish a Supreme Court and inferior tribunals. There is no constitutional direction with regard to the division of jurisdiction among these courts except that the original jurisdiction of the Supreme Court is limited to two kinds of cases — those involving states of the Union and those involving diplomats and consuls.⁵ The courts of each of the states of the United States are established under the constitution and laws of each state acting independently and separately subject only to possible applicable federal statutes and constitutional provisions.

The Irish Constitution, like the American, empowers the national legislature to make exceptions to and regulations of the appellate jurisdiction of the Supreme Court, but in the Irish Constitution there is the proviso that none of these exceptions is to apply to cases involving the validity of a law under the Constitution. There is no such provision in the United States Constitution, and in the light of the Court's decision in *Ex parte McCordle*⁶ the Court's jurisdiction in such matters may well be restricted by statute.

Under the Irish Constitution there is to be only one opinion by the Court in any case involving a question of the validity of a law under the Constitution.⁷ This rules out concurring opinions as well as dissenting opinions, very familiar features of the judicial scene in the Supreme Court of the United States.

The Courts Establishment and Constitution Act of 1961 proceeded to set up formally and officially in accordance with article 34 of the 1937 Constitution the hierarchy of Irish courts as these courts exist today. These courts are the District Court, the Circuit Court, the Court of Criminal Appeal, the High Court, and the Supreme Court. In point of actual fact, these courts were already in existence having been, as noted, established by the Courts of Justice Act of 1924 and had continued to function under article 58 of the 1937 Constitution. This was a transitory provision under which the then-existing courts and judges were to continue to function until changed by statute. The 1961 Act, therefore, simply formalized under the new Constitution what was already a fact. In the same year there was also passed a Courts Supplemental Provisions Act which dealt with matters that under article 36 of the Constitution were to be "regulated in accordance with law." Under this statute, incumbent judges who were willing

which the Dail is the House of Representatives and the Seanad is the Senate. IRISH CONST. art. 15, § 1 provides:

The National Parliament shall be called and known, and is in this Constitution generally referred to, as the Oireachtas.

The Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dail Eireann and a Senate to be called Seanad Eireann.

⁵ U.S. CONST. art. III, § 2.

⁶ 74 U.S. (7 Wall.) 506 (1868).

⁷ Art. 34, § 4(5), provides:

The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.

to continue in office were to be the only ones qualified to be appointed as the first justices of these courts as new legal creations.

III. The Present Irish Judicial System

A. *The District Court*

The lowest level of court in the system is the District Court.⁸ Under section 6 of the Adaptation of Enactments Act of 1922, the District Justices were vested with all powers of Justices of the Peace or Resident Magistrates. Actually, "District Courts" had been a part of the Irish judicial scene ever since 1920 when they had been established as a part of the program of the revolutionary Dail. These remained in operation until a decree of the "cabinet of Dail Eireann" abolished them on October 26, 1922.⁹ On the same day a decree of the Minister for Home Affairs provided for the appointment of "District Justices." Later in the same year came the statute that conferred the powers of the Justices of the Peace and the Resident Magistrates on these District Justices. In the following year, 1923, the District Justices Act vested the appointment of District Justices in the Governor-General of the Irish Free State on the advice of the Executive Council. These District Justices continued to operate for another year, at which time the "District Court" was established by the Courts of Justice Act of 1924. This arrangement continued through the adoption of the 1937 Constitution and until the 1924 plan was legally formalized under the new Constitution by the statute of 1961.

The District Court of Ireland is a unified court consisting of thirty-four justices and a President of the Court. No jury is used in this court. Each of the justices holds court in his particular area. District Court judges, and all other judges as well, are appointed by the President of Ireland with the advice of the government. Barristers or solicitors who have actively engaged in the practice of law for not less than ten years are eligible for appointment to the District Court. Appointees to the higher courts must have been practicing barristers for a minimum of ten years.

The distinction between solicitors and barristers is recognized in the law. Solicitors constitute the lesser branch of the law and their legal recognition is based on a combination of training and examinations. In general, the solicitor deals with routine matters of the law. By contrast the barristers constitute the "inner bar," although normally only senior counsel have this term applied to them. Barristers plead cases before the higher courts and are divided into two groups: senior and junior. Admission to the status of barrister is regulated by the Benchers of King's Inns and is based on education and the passing of examinations. Upon admission a new barrister usually spends some time as an understudy of an older barrister. The older and more eminent barristers may be admitted to the ranks of senior counsel upon application to the Chief Justice. This step is known as "taking silk."

⁸ See Appendix A *infra*.

⁹ V. DELANEY, *THE ADMINISTRATION OF JUSTICE IN IRELAND* 39 (Institute of Public Administration, Introduction to Public Administration, No. 4, 2d ed. 1965).

Under the terms of a 1946 statute,¹⁰ District Court judges are given the same tenure as other judges, that is, they are not removable "except for stated misbehaviour or incapacity" and then only with a resolution passed by both houses of the Oireachtas.¹¹ In addition to removal, the 1946 legislation also provides for the disciplining of District Court Judges.¹² Under this provision the Minister of Justice may request the Chief Justice to appoint a judge to investigate the condition of health or the conduct of a District Judge and then report to the Minister of Justice. Under a more recent statute, the Courts Act of 1961, the Chief Justice may interview a justice of the District Court privately regarding conduct which the Chief Justice considers to be of a type that might bring the courts into disrepute. Finally, any judge can be removed by *address*, that is, by the President after a resolution of authorization has been passed by both houses of the Irish parliament, the Oireachtas.

B. *The Circuit Court*

Next in the judicial hierarchy is the Circuit Court of Justice.¹³ Technically there is only one District Court and only one Circuit Court, but the exercise of jurisdiction by particular justices and judges is in general confined to specified and limited geographical areas. Thus the Circuit Court is also an integrated court with eight judges and a President. The territory of Ireland is divided into eight circuits with a judge assigned to each. As will be noted shortly, the District Court and the Circuit Court are both courts of limited jurisdiction.

C. *The High Court*

The first court of general original trial jurisdiction in the Irish system is the High Court.¹⁴ Specifically mentioned in the Constitution, this court is "invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."¹⁵ This court succeeded the High Court of Justice established under the Government of Ireland Act of 1920 and continued after the creation of the Irish Free State in both the 1922 Constitution and the 1937 Constitution. The present organization of the High Court, and of the other courts, was set by the Courts Act of 1961. The High Court consists of six judges and an additional presiding judge who is known as the President of the High Court. In addition to these seven judges, the President of the Circuit Court is a judge of the High Court. When this court is exercising the criminal part of its jurisdiction it is known as the Central Criminal Court.¹⁶

A jury may be used by the High Court in both civil and criminal cases.

10 Courts of Justice (District Court) Act of 1946. See also DELANEY, *supra* note 9, at 66.

11 IRISH CONST. art. 35, § 4(1).

12 Courts of Justice (District Court) Act of 1946, § 21.

13 Courts (Establishment and Constitution) Act of 1961. See Appendix A *infra*.

14 *Id.*

15 IRISH CONST. art. 34, § 3(1).

16 Courts (Supplementary Provisions) Act of 1961, § 11(1), (2). See Appendix A *infra*.

In civil cases a vote of nine of the twelve jurors is sufficient to award a judgment, while in criminal cases the verdict must be unanimous. Statutory provisions governing the composition of juries are found chiefly in the Juries Acts of 1927 and 1945. Service on juries is limited to citizens between the ages of twenty-one and sixty-five who are registered voters and own property. Eligible women are not called unless they make application. Jurors Books which contain the names of eligible jurors in alphabetical order are prepared and maintained by County Registrars. When needed, jury panels are chosen by a form of random selection based on the frequency of occurrence of initial letter of surname. The empanelling and summoning of jurors is the responsibility of the Sheriffs or the country registrars. In civil actions both the plaintiff and defendant may each challenge without cause not more than three jurors. In criminal trials the accused may challenge without cause not more than five jurors. This is what is known in the American judicial vernacular as peremptory challenge. Where two or more persons are accused together they may challenge without cause as many as ten jurors in cases of murder or treason and six in any other case. Challenges for cause are unlimited for both sides in both civil and criminal cases.

D. *The Court of Criminal Appeal*

The Court of Criminal Appeal is an intermediate statutory court.¹⁷ First established by the Courts of Justice Act of 1924, the present court owes its existence to section three of the Courts Act of 1961. It is an *ex officio* court reminiscent of the Circuit Courts set up in the United States by the Judiciary Act of 1789.¹⁸ The Court of Criminal Appeal consists of not less than three judges, one of whom is to be either the Chief Justice or a judge of the Supreme Court appointed by the Chief Justice. The other two are either two ordinary judges of the High Court appointed by the Chief Justice, or the President of the High Court along with a judge of the High Court named by the Chief Justice. However, any other judge or judges of the Supreme Court or the High Court may, at the request of the Chief Justice, attend as a member or members of the court. Invariably, the practice has been to limit the number of members of this court to three even though under both the 1961 and 1924 statutes there can be more than three. Although the Chief Justice is empowered by statute to direct it to sit elsewhere,¹⁹ the court has always held its sessions in Dublin.

E. *The Supreme Court*

At the apex of the Irish judicial pyramid is the Supreme Court.²⁰ This body consists of the Chief Justice and four ordinary judges, or *puisne* judges, as they are sometimes known. The President of the High Court may also serve as a member *ex officio*. Sessions are held in the Four Courts Building in Dublin.

17 See Appendix A *infra*.

18 Judiciary Act of Sept. 24, 1789, 1 Stat. 73.

19 Courts of Justice Act of 1924, § 28.

20 See Appendix A *infra*.

IV. Jurisdiction and Procedure

A. District Courts

Given this judicial structure, the next point of inquiry concerns the jurisdiction and procedure of these courts. The civil and criminal jurisdiction of the District Court is provided in the Courts Act of 1961.²¹ Basically, the Act continued the jurisdiction that was vested in the District Court which had been established in 1924.²² The District Court has a very limited civil jurisdiction. The limitation involves both the amount of money involved — in most instances a fifty or a hundred pound limit has been set — and the subject matter of a case. This court also has functions of a miscellaneous nature such as ordering payments from fathers of illegitimate children, enforcing court orders in debt cases, and issuing liquor and dance hall licenses. There is no equity jurisdiction vested in this court and it has no jurisdiction to determine questions of title to land. No jury is used in the District Court in civil cases, and appeals may be taken to the Circuit Court.

In the area of criminal jurisdiction the District Court hears what are called summary offenses, which are triable without a jury, and indictable offenses, which may or must be tried by a judge and jury. These latter include all matters that are not minor offenses, matters that are public offenses under common law, and matters of statutory violation where no alternative remedy is provided. A distinction between summary and indictable offenses requires a look at the historical background involved. The procedures applicable to offenses triable by jury were reduced to statutory form in 1848, 1849, and 1851.²³ As a result, many offenses are both summary and indictable. While a large number of offenses which are indictable may be tried summarily, an accused person charged with an indictable offense has always had an absolute right to be tried by a jury. On the other hand, a person charged with a summary offense has no such right.

Under present statutes, most of the work of the District Court is concerned with the trial of minor offenses which may be tried summarily. All but a few excepted indictable offenses may be tried by the District Court if the accused wishes to plead guilty.²⁴ The maximum punishment for offenses that are tried summarily by the District Court is a fine of one hundred pounds or imprisonment for twelve months, or both. The Attorney General may always object to a summary trial in the District Court and his consent is mandatory for the summary trial of certain offenses. In those cases where the mandatory consent of the Attorney General is not required, if the facts proved or alleged in a case really constitute a minor offense and if the accused does not object to being tried summarily the District Court may proceed to summary trial.

The grand jury was abolished in Ireland in 1924. In cases involving in-

21 Courts (Supplemental Provisions) Act of 1961, § 33.

22 Courts of Justice Act of 1924, § 67. See text following note 2 *supra*.

23 Indictable Offenses Act of 1848; Indictable Offenses Act of 1849; Petty Sessions Act of 1851.

24 Criminal Justice Act of 1951.

dictable offenses which do not qualify to be tried summarily in the District Court, the District Justice may conduct a preliminary hearing at which prosecution witnesses are heard so that he may determine the existence of a prima facie case. At the conclusion of this hearing, the justice may turn the accused over for trial on indictment either by the Circuit Court or the Central Criminal Court or he may discharge the prisoner. In the event of discharge, the Attorney General may overrule the District Justice and order the accused to be tried. This procedure is similar to the functioning of the United States Commissioner and the grand jury in the American federal court system.

B. Circuit Courts

The civil jurisdiction of the Circuit Court is not unlimited but is restricted to monetary values varying from sixty pounds to two thousand pounds, depending upon the nature of the case. For example, the lower figure holds in cases concerning the title to land and the higher figure applies to the administration of estates.²⁵ Juries may be used in civil cases in this court but seldom are. Furthermore, its jurisdiction extends to matters in equity as well as law.

The original criminal jurisdiction of the Circuit Court includes only indictable offenses.²⁶ Exceptions to this jurisdiction are treason, murder, conspiracy to murder, attempt to murder, and piracy which are tried in the High Court. Criminal cases may be transferred by a judge from one part of his circuit to another on application of either the Attorney General or the defendant, or a case may be transferred to the Central Criminal Court, possibly to avoid local prejudice. Cases in the Circuit Court are tried by a jury of twelve persons from the circuit in which the alleged offense was committed or in which the defendant has been arrested or resides.

C. High Court

The High Court has unlimited civil and criminal jurisdiction.²⁷ In civil cases proceedings begin with the drawing up of a civil bill by the plaintiff in which he states his claim. In pleadings in the High Court this bill is called a "Plenary Summons." A court official serves this on the defendant who then answers. After the defendant's answer or "appearance" the plaintiff sets out in detail his contentions in a "Statement of Claim." This is answered in a point-by-point reply by the defendant which the plaintiff may then attempt to controvert. These statements are all in writing and simply constitute a series of claims and denials — they do not deal with evidence. Depending on the nature of the case, the extended proceedings noted here are sometimes reduced to a simple claim and denial. As might be expected, criminal proceedings are initiated in much the same way as they are in the United States and England, except for the lack of the possibility of indictment by a grand jury.

²⁵ Courts of Justice Act of 1924, § 48; Courts (Supplemental Provisions) Act of 1961, § 22.

²⁶ Courts (Supplemental Provisions) Act of 1961, § 25.

²⁷ IRISH CONST. art. 34, § 3(1).

As noted earlier, when exercising its criminal jurisdiction the High Court is known as the Central Criminal Court.²⁸ Its jurisdiction extends to all cases triable on indictment and is exercised by one or more judges designated by the President of the High Court. When two or more judges are so assigned they sit together in collegial fashion. While the President of the High Court may direct the Central Criminal Court to sit anywhere, the court usually holds its sessions in the Green Street Courthouse in Dublin; it also holds sessions on circuit when hearing civil appeals from the Circuit Court. In all cases the trial is before a jury.²⁹

The Central Criminal Court has the power to issue what used to be called the "Prerogative Writs" — certiorari, mandamus, and prohibition. These writs are now issued by the High Court and are directed to any of the inferior courts. Certiorari is used principally to determine improper exercise of jurisdiction by lower courts, either in the sense of assuming excessive jurisdiction, or bias in the exercise of jurisdiction, or refusal of a court to carry out its duties. Mandamus is used principally to direct a lower court to perform a duty. Prohibition is used to direct a lower court to refrain from exceeding or exercising its jurisdiction.

V. Appellate Jurisdiction

A. *The Circuit Court*

An appeal may be taken from the decision of a District Court in any case. The Circuit Court then holds a rehearing of the entire case and either the plaintiff or defendant may present new and additional evidence other than that used in the original hearing in the District Court. If instead of an appeal on the merits of the case there is an allegation that the District Court's order is defective in form, possibly beyond the court's jurisdiction, the proper procedure is to apply to the High Court for a prerogative order of certiorari. Appeals from District to Circuit courts may usually be taken only on motion of the defendant, but in a number of instances determined by statute there may be appeal on the part of the complainant. When hearing cases on appeal the Circuit Court does not use a jury and its decision is final, *i.e.*, it is not subject to further appeal as a matter of right.

When an appeal from the District Court is based on alleged defects in form, *i.e.*, when the question raised is whether that court has exceeded its powers, the appeal is not taken to the Circuit Court but to the High Court. Moreover, a District Judge may certify questions of law to the High Court; this is called "case stated" procedure. If a District Judge refuses certification, either party may apply to the High Court for an order directing the District justice to present the question of law. The High Court's action on questions such as these may be either to answer such question or questions or to reverse, affirm, or change in some manner the decision of the District Court.

²⁸ Courts (Supplemental Provisions) Act of 1961, § 11(1), (2).

²⁹ DELANEY *supra* note 9, at 49.

B. The Court of Criminal Appeal

As mentioned previously, when the High Court is exercising its criminal jurisdiction it is known as the Central Criminal Court. Cases tried on indictment in this court or in the Circuit Court may be appealed to the Court of Criminal Appeal. Only the accused in a criminal case may appeal to this court and appeal may be taken only if the defendant either secures a certificate from the trial judge or if the Court of Criminal Appeal directly grants the appeal. The overwhelming majority of such appeals is by the second method. The Courts of Justice Act of 1924 allows rather complete discretion to the Court of Criminal Appeal on the granting of appeal requests³⁰ but such requests are presumed to rest primarily on questions of law or situations where the trial in the lower court appears to have been unsatisfactory. The hearing in the Court of Criminal Appeal is based first on the trial record, but new or additional evidence may be heard. As a result of such hearing on appeal, the conviction may be affirmed, (particularly if the court feels, in spite of relatively minor points which could constitute reversible error, that there has been no injustice done) or reversed in whole or in part, or the sentence may be reduced or increased. Retrial of the accused may be ordered. The court's determination is final and may not be appealed except on motion of the Court of Criminal Appeal itself or of the Attorney General. Although appeal can then be taken on such motion to the Supreme Court,³¹ such appeals have been rare.

C. The High Court

The territory of Ireland is divided into a number of circuits for the High Court. Twice a year those judges "ride circuit," hearing appeals in counties and county boroughs. Cases on appeal where there was no oral evidence in the court below are not heard on circuit but in Dublin. Those heard on circuit will have a complete rehearing of the evidence even though a jury was used when the case was originally heard in the Circuit Court. In cases that are in the High Court on appeal from the Circuit Court either party in the case may ask the High Court to refer a question of law to the Supreme Court.

D. The Supreme Court

The appellate jurisdiction of the Supreme Court includes all matters begun or commenced in the High Court as well as all those cases from the inferior courts that involve prerogative orders. The Supreme Court's appellate jurisdiction also includes, with certain reservations, "case stated" matters coming from the Circuit Court and from the District Court by way of the High Court. In appeals to the Supreme Court the decision is made on the basis of the record in the trial court. The Supreme Court is free to make any decision that the trial judge (hearing the case *de novo*) might have made. This may involve

30 Courts of Justice Act of 1924, §§ 32, 33, and 97.

31 Courts of Justice Act of 1924, § 29.

reversal or complete change of the trial court's determination. Appeals from the High Court in cases in which a jury was used may bring a judgment from the Supreme Court ordering a new trial or vacating the trial court's verdict and substituting some other judgment.

VI. Judicial Review

Judicial review is specifically provided by the terms of the Constitution which states that:

the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court.³²

It is reasonably certain that Mr. Eamon de Valera and others concerned with the writing of the 1937 Constitution did not intend to vest in the courts any power of review analogous to that exercised by the Supreme Court of the United States. In fact, however, judicial review in Ireland is quite analogous to that in the United States.³³ The power was first exercised in 1939 and has been exercised on several subsequent occasions.³⁴ As noted earlier, when the Supreme Court is ruling on a question as to the validity of a law having regard to the provisions of the Constitution, the decision is to be pronounced by only one judge of the Court and there are to be no other opinions either concurring or dissenting.³⁵ This is known as the "one judgment" rule. As the words of the Constitution indicate, neither the District Court nor the Circuit Court has jurisdiction to hear cases questioning the validity of a statute under the Constitution. This is a distinct difference from the situation in the United States where Article VI of the Constitution expressly makes the Constitution binding in all matters before any of the courts, state and federal. In Ireland the net result is that the inferior courts must in all instances regard all statutes as constitutional. The only departure from this occurs when a superior court has before it the question of the constitutionality of a statute in issue in a lower court. The lower court may then await action by the superior court on the matter before acting itself.³⁶

The Supreme Court has expressly declared that it will not adhere to *stare decisis* in rendering its decisions.³⁷ Two reasons have been advanced for this. First, the courts established under the present Constitution are "new" courts and should not be bound by the decisions of previous courts. Second, the "one judgment" rule suppresses minority opinions and the very real possibility that

32 IRISH CONST. art. 34, § 3(2).

33 J. KELLY, FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION 17-19 (1967).

34 *Id.* at 25-26.

35 IRISH CONST. art. 34, § 4(5). See note 7 *supra*.

36 *The State (A.G.) v. Mangan*, 1961 Ir. R. 17.

37 *The State (Quinn) v. Ryan*, 1965 Ir. R. 70, 100 Ir. L.T.R. 105.

these might gain favor in later years militates against taking prior judgments as "law."³⁸

The Supreme Court has established the rule³⁹ that a statute enacted since 1937 (the date of the current Constitution) is to be presumed valid until the contrary is clearly shown. Thus, the burden of proof of the unconstitutionality of a statute is on the party challenging the statute.

While the provisions of the Constitution⁴⁰ that the High Court and the Supreme Court may exercise jurisdiction to determine constitutionality only in respect to laws already existing preclude the possibility of advisory judicial opinions (such as are sometimes found on the state level in the United States⁴¹ but not on the federal level⁴²), there is the possibility of an advance determination of the constitutionality of proposed legislation. The Constitution provides that the President may, after consultation with the Council of State,⁴³ refer to the Supreme Court for a determination of the constitutionality of any bill, or any specified provision or provisions of a bill, passed by both houses of the Oireachtas.⁴⁴ Exceptions to this provision are made for "a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by Seanad Eireann shall have been abridged . . ."⁴⁵ This procedure of securing an advance determination of constitutionality has been employed three times since 1937.⁴⁶

VII. The Cost of Litigation

In civil cases parties to the litigation pay court fees, the expense of having witnesses and other expenses in connection with the gathering of evidence as well as the fees charged by the litigant's own counsel. In a civil action the successful party may bill the loser for these "costs," except for solicitor fees and expenses. If the loser disagrees as to the amount, the matter can be appealed to a court official known as the Taxing Master, whose decisions in turn can be appealed to a judge of the High Court. All of this "taxation of costs," of course, involves added expense. The legal profession sets minimum fees for barristers but the fees for solicitors are set by statute.

Under the Criminal Justice Act of 1962, indigent persons in criminal cases

38 KELLY, *supra* note 33, at 30-33.

39 In re Article 26 and the Offences against the State (Amendment) Bill, 1940 Ir. R. 470.

40 IRISH CONST. art. 13, § 3; art. 34, § 3(2).

41 *E.g.*, FLA. CONST. art. 4, § 13; MASS. CONST. ch. III, § 83.

42 *Muskrat v. United States*, 219 U.S. 346 (1911).

43 The Council of State is a body composed of eleven persons who can be classified as *ex officio* members and "[s]uch other persons, if any, as may be appointed by the President" IRISH CONST. art. 31, § 2.

44 IRISH CONST. art. 26, § 1(1) states that:

The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.

45 IRISH CONST. art. 26.

46 In re Article 26 and the Offences against the State (Amendment) Bill, 1940 Ir. R. 470, 74 Ir. L.T.R. 61; In re Article 26 and the School Attendance Bill of 1942, 1943 Ir. R. 334, 77 Ir. L.T.R. 96; In re Article 26 and the Electoral (Amendment) Bill of 1961, 1961 Ir. R. 169.

are entitled to all necessary legal assistance at government expense. In civil cases, litigants without funds are extended aid by the legal profession if trade union aid or insurance coverage is not available.⁴⁷

VIII. Conclusion

While the similarities in judicial organization and procedure in Ireland and the United States are perhaps to be expected in the light of history, the parallels are nevertheless mildly impressive. The systems themselves are different because of the difference in basic governmental principles—federal and unitary—but in each country the legislature, Oireachtas and Congress respectively, has great power over the structuring of the judicial system and, to a lesser extent, the jurisdiction of the courts. There is an express provision for judicial review in the Irish Constitution; in the United States Constitution the power has a basis in the combination of Article III, section two, with Article VI. However, in both countries the realization of the power has been the result of practice. The names of the courts are familiar with only an exception like “High Court” to attract attention. Although differences exist between the two systems, as, for example, the fact that the Irish Supreme Court has no concurring or dissenting opinions, such differences are minor. There seems to be no escape from the conclusion that the similarities in the two systems outweigh the differences; this may be regarded as another of the ties that bind the Irish and American peoples.

⁴⁷ J. O'DONNELL, *HOW IRELAND IS GOVERNED* 86-88 (1967).

APPENDIX A

Organization of the Courts of Ireland

