Fourth Progress Report

The Courts and the Judiciary

COISTE UILE-PHÁIRTÍ AN
OIREACHTAS AR AN MBUNREACHT

THE ALL-PARTY OIREACHTAS
COMMITTEE ON THE CONSTITUTION

Baile Átha Cliath
Arna Fhoilsiú ag Oifig an tSoláthair

Le ceannach díreach ón
Oifig Dhíolta Foilseachán Rialtais
Teach Sun Alliance
Sráid Theach Laigean, Baile Átha Cliath 2

nó tríd an bpost ó
Foilseacháin Rialtais, An Rannóg Post-Tráchta
4-5 Bóthar Fhearchair, Baile Átha Cliath 2
(Teil: 01 - 661-3111 - fo-líne 4040/4045; Fax: 01 - 475 2760)
nó trí aon díoltóir leabhar.

Dublin
Published by the Stationery Office

To be purchased directly from the
Government Publications Sale Office
Sun Alliance House
Molesworth Street, Dublin 2
or by mail order from
Government Publications, Postal Trade Section
4-5 Harcourt Road, Dublin 2
(Tel: 01 – 661 3111 – ext 4040/4045; Fax: 01 – 475 2760)
or through any bookseller.

£15.00

Pn 7831

ISBN 0-7076-6297-4

Printed by Criterion Press Limited

The All-Party Oireachtas Committee was established on 16 October 1997. Its terms of reference are:

In order to provide focus to the place and relevance of the Constitution and to establish those areas where Constitutional change may be desirable or necessary, the All-Party Committee will undertake a full review of the Constitution. In undertaking this review, the All-Party Committee will have regard to the following:

a *the Report of the Constitution Review Group*

b *participation in the All-Party Committee would involve no obligation to support any recommendations which might be made, even if made unanimously*

c *members of the All-Party Committee, either as individuals or as Party representatives, would not be regarded as committed in any way to support such recommendations*

d *members of the All-Party Committee shall keep their respective Party Leaders informed from time to time of the progress of the Committee's work*

e *none of the parties, in Government or Opposition, would be precluded from dealing with matters within the All-Party Committee's terms of reference while it is sitting, and*

f *whether there might be a single draft of non-controversial amendments to the Constitution to deal with technical matters.*

The committee comprises eight TDs and four senators:

Brian Lenihan, TD (FF), *chairman*
Jim O'Keeffe, TD (FG), *vice-chairman*
Brendan Daly, TD (FF)
Senator John Dardis (PD)
Thomas Enright, TD (FG)
Séamus Kirk, TD (FF)
Derek McDowell, TD (LAB)
Marian McGennis, TD (FF)
Liz McManus, TD (DL)
Senator Denis O'Donovan (FF)
Senator Fergus O'Dowd (FG)
Senator Kathleen O'Meara (LAB)

The secretariat is provided by the Institute of Public Administration:

Jim O'Donnell, *secretary*
James McDermott, *assistant secretary.*

While no constitutional issue is excluded from consideration by the committee, it is not a body with exclusive concern for constitutional amendments: the Government, as the executive, is free to make constitutional proposals at any time.

The All-Party Oireachtas Committee on the Constitution
Fourth Floor, Phoenix House
7-9 South Leinster Street
Dublin 2

Telephone: 01 662 5580
Fax: 01 662 5581
Email: info@apocc.irlgov.ie

Contents

Foreword

In its survey of the institutions of State the committee dealt with the President in its *Third Progress Report*. The present report deals with another major institution of State, the Courts. The committee had available to it the *Report of the Constitution Review Group* (1996) and the *First Progress Report* of the All-Party Oireachtas Committee on the Constitution 1996-1997 (the O'Keeffe Committee).

_____

Brian Lenihan, TD

Chairman

November 1999

The Courts and the Judiciary

The Courts and the Judiciary

Introduction

15.2.1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

28.2 The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.

34.1 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 French political philosopher Montesquieu (1689-1755) divided the powers of government into three kinds: legislative, executive and judicial. In Ireland the Constitution, in Article 6.1, provides for a tripartite division of powers:

> All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

The courts have on numerous occasions referred to the separation of powers as being a fundamental principle of the Constitution. Thus the Supreme Court in *Attorney General v Hamilton (No 1)*[1]:

> The doctrine of the separation of powers under the Constitution has been identified by this Court as being both fundamental and far-reaching, and has been set out in various decisions of this Court in very considerable detail.

The officers the people appoint, whether directly or indirectly, to the Oireachtas, the government and the courts observe the doctrine of the separation of powers. However, while the powers of government are divided in three and entrusted to separate organs, the ultimate responsibility for all the powers of government, in a democracy, rests with the people: the organs are accountable to the people.

Perhaps the greatest service performed by the doctrine has been to uphold the necessity of having an independent judiciary. The reason for the separation of the judiciary from the legislative and executive was provided by Montesquieu:

> Again, there is no liberty, if the judiciary be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the

[1] [1993] ILRM 81, at 96, per Finlay CJ

> legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[2]

The rule of law is that characteristic of civilised society which is created by the application of the laws to every individual within a community in an equal manner. The rule of law is one of the pillars upon which the western liberal tradition rests. An independent judiciary ensures the rule of law.

To be independent a judiciary must be free from all extraneous pressures. Historically, when judges were the servants of kings, they could be dismissed at will for making decisions which were unfavourable to the executive. In modern times the pressures on judges may be widely diffused. Cases may pit a powerful element of the state such as a state-sponsored body, or even the state itself, against a private company or an individual. They may pit a powerful individual against a weak individual. They may involve marginalised groups seeking to assert their rights in the face of communal prejudice.

The independence of the judiciary is seen to rely on the answers to the following questions: How are judges appointed? How securely do they hold their posts? Is the level at which they are paid maintained? Can they hold other remunerated posts? Do they formally assert their independence before the people? Do they comport themselves, on the bench and off the bench, in a manner that maintains confidence in their independence? Do they in fact act independently in the courts and are they seen to do so? Are there systems in place to sanction judges who fail to carry out their duties in the way a judge should? And are such systems so scrupulously fair as to enhance rather than threaten the independence of the judiciary?

[2] Montesquieu, *The Spirit of the Laws,* Thomas Nugent (trans), Hafner Press, New York, 1949, at p 151

Appointment of judges

The manner in which judges are appointed is the first crucial issue relating to the independence of the judiciary.

At the outset, it should be noted that there is a difference in the way that judges are appointed in a civil law state and a common law state.[3] The civil law system is the system of law which prevails in continental European countries and their former colonies. The common law system, which originated in England, is the system of law which operates in England and Wales and those countries whose legal systems were influenced by Britain, such as Ireland, Australia, Canada, New Zealand and the United States.

The fundamental difference between these two legal systems regarding judicial appointments is that in civil law states judges are drawn from a cadre that opts for judging as a career and applies itself to specialised training and education. In common law states judicial appointees are drawn from the ranks of the legal profession and appointment to the judiciary is viewed as the ultimate achievement in a lawyer's career. Despite the different modes of appointment, the common ideal of both legal systems is the impartiality of all appointees and the determination to protect the independence of the judiciary.

Since Irish judges are appointed to operate a common law system our analysis of the appointment of judges is pursued through a comparison with the practice in the common law countries.

There are three stages in the appointment of a judge:

a) eligibility
b) short-listing
c) selection and appointment.

Elegibility In Ireland, to be eligible for appointment as a judge one must be a member of the legal profession. The legal profession is divided in two branches, solicitors and barristers. The 1995 Courts and Court Officers Act provides that to be eligible for appointment as a judge to the Circuit Court and District Court one must be a practising barrister or solicitor of not less than ten years' standing. Only practising barristers of not less than twelve years' standing are eligible for appointment to the superior courts, that is the High and Supreme Courts. The 1995 Act also provides for promotion of a Circuit Court judge to the Supreme Court or the High Court bench

[3] See Appendix I

after four years' service in the Circuit Court. Therefore, a solicitor who was appointed to the Circuit Court could be appointed to the Supreme Court or the High Court by way of promotion after four years' service.

These experiential conditions for eligibility are normal in other common law countries. Thus, in England and Wales applicants for High Court office must have a ten-year right of audience in all proceedings before that court or have been a Circuit judge for at least two years.

Short-listing Under the 1995 Act, a Judicial Appointments Advisory Board has been established to recommend persons for judicial positions.[4] The board consists of the Chief Justice, the presidents of the High Court, Circuit Court and District Court, the Attorney General, a practising barrister nominated by the chairman of the Bar Council, a practising solicitor nominated by the president of the Law Society, and no more than three persons appointed by the Minister for Justice, who have knowledge of commerce, finance or administration, or experience as users of the courts. The role of the board is to identify persons, through their own application or the board's invitation, who are suitably qualified for judicial office. Short-listing is on the basis of merit and not political affiliation. The remit of the board excludes the offices of Chief Justice and presidents of the other courts, though in relation to those offices, the government is subject to some limitations in that it is required to 'have regard first' to the qualifications and suitability of existing judges. Where the government proposes to appoint a person who is already a judge, the board is not involved.

The board on a request from the Minister for Justice submits to him or her the names of all the applicants. In general, the board is required to recommend at least seven names (if numbers are sufficient) from the list it submits. In addition, s16 of the Act provides that the board must not recommend a person unless, in the board's opinion, the person:

a) has displayed in his or her practice as a barrister or solicitor, as the case may be, a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned
b) is suitable on grounds of character and temperament
c) is otherwise suitable, and
d) undertakes in writing to the board his or her agreement, if appointed to judicial office, to take such course of training or education, or both, as may be required by the Chief Justice or the president of the court to which the person is appointed.

[4] See Appendix II for structure of courts

This recent procedure supersedes the rather informal process pursued by successive governments who were seen to appoint, almost invariably, their own supporters to judicial office. There is no evidence, it should be noted, that such appointees displayed favouritism to the party that appointed them.[5] The new procedures were introduced because there was pressure on governments to ensure transparency in appointments.

The short-listing procedure in Ireland compares favourably with those in other common law countries because the opportunity has been taken to combine the best features of those systems.

Selection and appointment All judges in Ireland, whether they be judges of the District, Circuit, High or Supreme Court, are appointed by the President of Ireland on the advice of the government. This is provided for by Articles 35.1 and 13.9 of the Constitution. Article 35.1 states:

> The judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President.

However, it is the government which actually selects the judges. Thus Article 13.9 provides:

> The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.

Under the 1995 Act, the government, as we have seen, has available to it a list of suitably qualified persons for the vacancies that occur. The Act does not preclude the government from using its discretion – s16(6) provides that the government shall *firstly* (our emphasis) consider the names on the list. However, the government is encouraged to choose only persons recommended by the board by s16(8) which provides that appointments must be published in *Iris Oifigiúil* and the notice must include a statement that the person was recommended by the board, if that was the case. Under the Act, the government has total discretion in the appointment of the Chief Justice and the presidents of each of the other courts.

The independence of the judiciary might suggest that the executive should have no discretion in the appointment of judges. But, since

[5] See Bartholomew, *Irish Judiciary*, 1971

the judiciary is an organ of state, it must ultimately be held accountable to the people. As Chief Justice Finlay put it:

> At the end of the day somebody must be accountable for the standard and type of judiciary that is appointed. There is a significant amount to be said for making politicians accountable for the standard and type of judiciary that is appointed. They are the ones to whom people in general can turn if bad judicial appointments are being made. If appointments are being made by some body of people who are relatively anonymous then there is no-one to turn to and blame[6].

In the United States where the election of some state judges is made by the people, the judges are made directly accountable to the people on completion of the term for which they are elected. The committee agrees with the view of Constitution Review Group that an election would expressly politicise the appointments procedure. There is of course the further danger that it would interfere with the impartiality of judges. Given that their tenure is dependent on successive election by the electorate, judges could be persuaded to adopt popular stances on matters coming before the courts so as to guarantee re-election.

The committee takes the view that our present system of appointing judges should be retained. It feels that the government has sufficient non-partisan advice from the Judicial Appointments Advisory Board and that it, as the executive of the elected representatives of the people, should retain the final decision. It is significant that because the judicial candidates are already short-listed by the board strictly on merit, the government cannot be open to the criticism that it appoints only its own supporters rather than suitably qualified persons when it chooses from the list.

The selection and appointment procedures in Ireland are broadly comparable to those that obtain in the other common law states.[7] In those states the law provides for consultation, either formal or informal, with senior members of the judiciary and the legal profession. Moreover, in all those states it is the executive that appoints the judiciary although there is a deviance from this in the United States at federal level – there, while the executive nominates the judges, each nominee is subject to approval by a simple majority vote in the Senate.

Irrespective of the method of appointing judges, the independence of judges is asserted in Article 35.2:

---

[6] Finlay CJ interview, Sturgess and Chubb, *Judging the World,* Butterworths, 1988, pp 413-414

[7] See Appendix I

All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.

Security of tenure and other conditions

Security of tenure ensures that judges can reach judicial decisions impartially and fairly without fear of removal for making a politically unfavourable decision.

Prior to 1688, judges in England and Wales held office precariously at the pleasure of the Crown. When they incurred the displeasure of the Crown they were likely to be dismissed. The English Act of Settlement of 1701 (which also applied to Ireland) embodied the terms of the agreement which put William and Mary upon the throne. It provided that courts should be independent of the executive and that judges should hold office for life subject to good behaviour. This granted judges security of tenure. In effect it meant that judges were irremovable from office except on grounds of misbehaviour.

In Ireland, judges are appointed for life subject to a statutory retirement age of seventy years for judges of the Supreme, High and Circuit Courts[8] and sixty-five years for District Court judges with a possible extension to seventy years[9]. Security of tenure for High and Supreme Court judges is provided by Article 35.4.1°:

> A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.

Judges of the Circuit and District Courts are guaranteed similar security of tenure by Section 20 of the Courts of Justice (District Court) Act 1946[10]. Historically, only judges of the superior courts were given security of tenure. This was because of their professionally distinguished position vis-à-vis the judges of the lower courts, who were often lay justices. Now that all judges are professionally distinguished, it might seem unjustifiable to continue with a distinction in terms of how their tenure is rooted. The Constitution Review Group in its Report[11] considered whether the constitutional guarantee against removal should be extended to judges of the Circuit and District Courts.

36 Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:—

iii the constitution and organization of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.

[8] Section 47(1) Courts and Court Officers Act 1995 provides for a retirement age of seventy years for High Court and Supreme Court judges appointed after the Act came into effect. Prior to the 1995 Act, the age of retirement for judges of the High and Supreme Court was seventy-two years. Section 18 Courts (Supplemental Provisions) Act 1961 set the retirement age of Circuit Court judges at seventy years.
[9] Section 30(1) Courts (Supplemental Provisions) Act 1961
[10] And s39 Courts of Justice Act 1924
[11] Stationery Office, May 1996, at p 185

The Circuit and District Courts were established by Act of the Oireachtas pursuant to Article 36 iii. The general terms in which that Article is expressed allows the Oireachtas considerable flexibility in structuring the lower courts to meet the justice needs which arise from time to time. The Constitution Review Group, by majority, felt that extension of Article 35.4.1º to Circuit and District Court judges would enshrine those courts in the Constitution and thus limit the flexibility of the Oireachtas. It concluded:

> … such a change would be inconsistent with the establishment of the Circuit and District Courts by Act of the Oireachtas as provided in Article 34.3.4º and the policy of the Review Group to give the Oireachtas discretion as to the type of courts which it may establish.

The Oireachtas has used the flexibility available to it, on the structural side, by creating the Special Criminal Court and on the court personnel side by the appointment of temporary District Court judges.

Because Article 35.4.1º provides for security of tenure for High and Supreme Court judges, this precludes temporary appointment to those courts. However, legislation[12] provides for temporary appointment of judges to the Circuit and District Courts. The constitutionality of that legislation has been upheld by the Supreme Court in *Magee* v *Culligan* [1992] 1 IR 223. Thus Finlay CJ:

> The fact that the provisions of s20 of the 1946 Act as a legislative regulation of the terms and conditions of judges of the District Court applies that particular protection to judges of the District Court who are permanent, as distinct from temporary, does not, the court is satisfied, in any way render the appointment of judges of the District Court for fixed short periods inconsistent with any provision of the Constitution, nor does it in any way interfere with or limit their constitutionally guaranteed independence.

The committee agrees that Circuit and District Court judges should not be given a constitutional guarantee of security of tenure.

remuneration

Another factor which buttresses the independence of the judiciary is that of the remuneration of judges. The critical issue is that a judge's

[12] Section 51 of the Courts of Justice Act 1936 (as applied by s48 of the Courts (Supplemental Provisions) Act 1961. This allows the government to appoint temporary judges where 'there is a temporary absence from duty' on the part of any judge or there is an 'unusual and temporary increase in business in the District Court'

salary should continue to be paid regularly and that it should not be reduced by the executive as a mark of disfavour. Article 35.5 provides:

> The remuneration of a judge shall not be reduced during his continuance in office.

36 Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:—

i the number of judges of the Supreme Court, and of the High Court, the remuneration, age of retirement and pensions of such judges,

ii the number of the judges of all other Courts, and their terms of appointment…

Article 36 i and ii leave it in the hands of the Oireachtas to determine the level of remuneration, the age of retirement and pensions of all judges.

The independence of the judiciary could be threatened if judges held other paid positions. Article 35.3 states:

> No judge shall be eligible … to hold any other office or position of emolument.

The Constitution Review Group considered that the prohibition on judges taking up paid appointments should remain and the committee agrees with this.

public declaration

Another factor that helps to promote the independence of judges is a public declaration by them on entering into office that they will apply themselves to their job in an impartial manner. Article 34.5 provides that every judge on his or her entry into office must make a declaration as follows:

> In the presence of Almighty God I, do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (*or as the case may be)* without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me.

This declaration is a ringing endorsement of the rule of law. However, it has drawn some formal criticism. The Constitution Review Group observed that the United Nations Human Rights Committee in its final report under Article 40 of the International Covenant on Civil and Political Rights drew attention to the religious references in what was described by some members of that committee as ‘a religious oath on entering office’. The Constitution Review Group continued:

> Article 34.5.1° uses the word ‘declaration’ rather than ‘oath’. The requirement to make the declaration in its present form

> could be thought to discriminate against people who do not believe in God or who believe in more than one God.[13]

A minority of the committee endorses the view of the Constitution Review Group:

> It does not appear desirable that a judge be required openly to choose between two forms of declaration thereby indicating his or her religious beliefs. The daily exercise of the judicial function requires that a judge's impartiality should not be put in doubt by a public declaration of personal values. The same consideration does not apply to the President.

The majority of the committee, however, takes the view that a judge should have a choice between a religious and non-religious declaration. The committee believes that, because the majority of people in Ireland hold religious beliefs, it would not be desirable to delete the references to God from the declaration. A choice of declarations fulfils Ireland's obligations under the UN International Covenant on Civil and Political Rights. The committee made a similar recommendation in relation to the presidential declaration in its Third Progress Report: The President, November 1998.

Recommendation

Add the following to Article 34.5:

A judge may omit the religious references.

[13] *Examples of oaths and declarations in other countries are set out in Appendix III*

Judicial conduct

The independence of judges is essential to their impartiality. Impartiality is manifested in the objective manner in which a judge applies the law to the case before him or her. It is manifested in the balanced way in which he or she engages both sides in the case. The public must have confidence that impartiality is not only seen to exist but exists.

34.1 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.

Thus the declaration proposed for judges on entering into office has them affirm that they will 'uphold the Constitution and the laws', and execute their offices 'without fear or favour, affection or ill-will towards any man'; and Article 34.1 provides that justice 'shall be administered in public'.

Because judges exercise power on behalf of the people they must, in a democracy, be held accountable. As the Constitution Review Group commented:

> Judges, of course, are not immune from human frailties and from time to time there are complaints about matters such as disparaging or disrespectful comments, rudeness and failure to attend to judicial duties.

One of the great dilemmas for the administration of justice is how can one preserve the independence of judges while holding them accountable. The Chief Justice of New Zealand has remarked[14]:

> The imperative of judicial independence means that, although publicly funded, the judiciary cannot be directed by or held to account by a Minister in the same way as other public officials. Judicial independence does not mean, however, that the judiciary is free from the requirement to be accountable.

In analysing the dilemma it is necessary to distinguish between those instances where the judge's decision is in question and those where the judge's conduct is in question. If a party feels that a judge's decision is wrong, he or she may appeal the decision to a higher court. That is the proper and only recourse available. If a party feels that a judge's conduct is wrong, he or she has no formal means of having the conduct reviewed. However, procedures exist for the review of the conduct of judges of the District Court. Section 10(4) of the Courts (Supplemental Provisions) Act 1961 provides that where the Chief Justice is of the opinion that the conduct of a judge

[14] Sir Thomas Eichelbaum, *Report on the New Zealand Judiciary 1995,* Wellington, December 1995

of the District Court has been such as to bring the administration of justice into disrepute, the Chief Justice may interview the judge privately and inform him or her of that opinion. No disciplinary sanctions are provided for.

Furthermore, pursuant to section 36(3) of the Courts (Supplemental Provisions) Act 1961 the president of the District Court may investigate the conduct of a colleague where it appears that the conduct is prejudicial to the efficient and prompt discharge of the business of the court. The president must consult the judge in question and report his or her findings to the Minister for Justice, Equality and Law Reform. As Casey[15] points out, if an unfavourable report were received, the minister may consider invoking the powers conferred by s21 of the Courts of Justice (District Court) Act 1946. Under this section, the minister may request the Chief Justice to appoint a Supreme Court or High Court judge to hold an inquiry into the condition of health (mental or physical) or the conduct of the District Court judge. The conduct may be general conduct or conduct on a particular occasion. The judge appointed may conduct the inquiry as he or she may think proper, and in public or in private. The report on the inquiry is then sent to the Minister for Justice. It would be possible for a minister on consideration of the report to invoke the statutory impeachment procedure for a judge's removal which is similar to the impeachment provisions for Supreme and High Court judges in Article 35.4.1º. This inquiry procedure was used only once, in 1957, and on that occasion the judge resigned.

As far as the other courts are concerned, there is an informal arrangement whereby a complaint about judicial conduct can be raised with the president of a bench about one of the judges of that bench.

The Sixth Report of the Working Group on a Courts Commission considered the procedures which are adopted in other countries relating to the handling of conduct unsuitable for a member of the judiciary.[16]

The judicial disciplinary systems in operation in the civil law countries such as France, Germany, Denmark and Sweden are not helpful exemplars for our system in Ireland. Judges on the continent are essentially civil servants and so are directly accountable to the Minister of Justice in their respective countries. The systems that operate in the common law countries are cognate and those of Canada and New South Wales, being of particular interest, are set out below in detail. New Zealand is currently establishing a formal new judicial complaints procedure and an outline of what is proposed is also given.[17]

---

[15] Casey J, *Constitutional Law in Ireland*, 2nd edn, at p 252
[16] Stationery Office, Pn 6533, 1998
[17] Systems operating in some other countries are set out in Appendix IV

Canada

In 1971, Canada established the Canadian Judicial Council. This council was established by statute pursuant to the Judges Act 1971. Its objectives are to 'promote efficiency and uniformity and to improve the judicial services' of the superior courts. The council's work falls into the following areas:

a) the continuing education of judges
b) the handling of complaints against federally appointed judges
c) the development of consensus among council members on issues involving the administration of justice
d) the preparation of recommendations to the federal government, or advisory commissions, usually in conjunction with the Canadian Judges Conference, regarding judicial salaries and benefits.

The Canadian Judicial Council is composed solely of judges; its members include the Chief Justice of the Supreme Court and the chief judges of the various benches of all the federal courts. It provides a means of having the conduct of judges reviewed by other than the executive and creates a distance between the judiciary and the government in cases involving allegations of misbehaviour on the part of a judge. The council has also sought to maintain the balance between judicial independence and accountability by the measures it takes to promote public transparency.

In considering judicial complaints, the role of the council is to examine the behaviour of a judge and not decisions the judge has made. As in Ireland, judicial decisions are subject to review by the appellate courts. Conduct alone is for the council to examine and consider. It is for parliament to decide ultimately whether such conduct breaches the requirement of 'good behaviour'.

The complaints procedure

Complaints are processed by the Judicial Conduct Committee of the council. Any individual can make a complaint. There are three stages in the processing of a complaint: an initial stage, a panel stage and an investigation/inquiry stage.

Initial complaint At the initial complaint stage, a complaint must be made in writing by an individual naming a specific judge or judges before a complaint file will be opened. The validity of the complaint is then considered by the chairman or vice-chairman of the committee to determine whether the file requires further consideration or whether it should be closed. Comments from the particular judge and the judge's chief justice may be sought. In all cases a copy of the complaint is forwarded to the judge concerned. If it is found that no

misconduct has occurred the file is closed with an appropriate reply to the complainant. Alternatively the file may be forwarded to a panel of up to five members of the committee for further consideration. This initial stage results in the dismissal of approximately 95% of complaints because most complaints are found to relate to the merits of a decision.

Panel stage The function of the panel is to determine whether the conduct complained of is sufficiently serious and, if it is, whether prima facie a formal investigation is necessary. The chair or vice-chair, or a panel, may also request independent counsel to make further inquiries on an informal basis.

The panel may conclude that no further action by the council is warranted and direct that the file be closed with or without an expression of disapproval or regret at the conduct of the judge in question. In essence, an expression of disapproval represents the panel's view that a complaint has a measure of validity but is not sufficient to lead to a recommendation to remove the judge involved from the bench.

Inquiry stage If the complaint is considered sufficiently serious, the panel may recommend that the council formally investigate it under subsection 63(2) of the Judges Act to establish whether a recommendation for removal is called for. The Inquiry Committee has the same powers as a superior court to summon witnesses and require the admission of evidence under oath. This committee then reports back to the full council on whether a recommendation for removal is called for.

Pursuant to s65(2) of the Judges Act 1971 there are four grounds on which the council may base a recommendation for removal:

a) age or infirmity
b) misconduct
c) having failed in the due execution of office
d) having been placed, by conduct or otherwise, in a position incompatible with the due execution of office.

Only rarely does a complaint result in a formal investigation. Not until 1996 did the council make a recommendation to have a judge removed from office and in that instance parliament did not have to vote on the matter because the judge in question resigned.

New South Wales (Australia)

At present there is no federal system for disciplining judges in Australia. However, in New South Wales a discipline system has been established pursuant to statute (Judicial Officers Act 1986). This Act established a Judicial Commission. One of the principal

functions of the commission is the investigation of complaints against judges. The commission comprises eight members, six of whom are judges and two of whom are appointed by the governor of New South Wales on the nomination of the Minister for Justice. With regard to the two appointed members, the 1986 Act provides that one must be a legal practitioner and the other a person 'who in the opinion of the minister has high standing in the community'. A recent amendment to the Act now provides for the appointment of two additional community members to the commission. This amendment has yet to take effect.

Any person may complain to the commission about the behaviour of a judge, or the Attorney General can refer a complaint to the commission. A complaint must be made in writing in a standard form as set out in the Act and it must identify the complainant and the judge in question. The Judicial Officers Regulation 1995 requires that the particulars of the complaint be verified by a statutory declaration. On receiving a complaint the commission is obliged to conduct a preliminary investigation and then it is required to:

a) summarily dismiss the complaint
b) classify the complaint as minor, or
c) classify the complaint as serious.

A minor complaint may be referred to the conduct division or to the appropriate head of jurisdiction. If the conduct division finds that a minor complaint is substantiated it can either inform the judge complained about or decide that no action needs to be taken. Either way it must report to the commission setting out the action it has taken. The head of a jurisdiction may counsel the judge or make administrative arrangements within his or her court so as to avoid a repetition of the problem. The head of a jurisdiction has no power to sanction a judge.

Serious complaints are those which could justify parliamentary consideration of removal from office of a judge. Such complaints must be referred to the conduct division of the commission which consists of three judges or two judges and a retired judge. The conduct division has the authority to undertake an investigation and it may convene a hearing in connection with such an investigation. Hearings concerning serious complaints are held in public.

The conduct division is statutorily obliged to prepare a report as to its findings, irrespective of whether a complaint is classified as minor or serious. Where a complaint is classified as serious, the report setting out the division's conclusions is made to the governor. If a serious complaint has been substantiated and the conduct division is of the view that the matter may justify parliamentary consideration of removal of the judge in question, the Attorney General is required to lay the report before both houses of parliament.

The relevant head of jurisdiction may suspend a judicial officer from the exercise of judicial functions in any of four events, namely if the judicial officer is:

a) the subject of a complaint, or
b) the subject of a report by the Conduct Division containing its opinion that a matter could justify parliamentary consideration of removal from office, or
c) charged with an offence which in New South Wales would be punishable by imprisonment for at least twelve months, or
d) convicted of such an offence (s40).

A judicial officer may not be suspended or removed from office except by or in accordance with this or another Act (s4).

Complaints are dismissed on the basis of criteria set out in the 1986 Act[18]. Such criteria include the fact that the complaint was frivolous, vexatious, not made in good faith, related to the exercise of a judicial function which could be appealed, or the matter complained about occurred at too remote a time. The statutory criterion for classifying a complaint as 'serious' is that the grounds of complaint, if substantiated, could justify parliamentary consideration of the removal from office of the judge complained of. Any other undismissed complaint is defined as 'minor'.

In the commission's annual report 1997-98, the most common ground of complaint identified involved apprehension of bias. Other matters amounted to complaints concerning judicial decisions where the appropriate form of redress is by way of appeal. The report also highlighted that a high proportion of complaints arose out of apprehended violence orders (domestic violence).

Breakdown of complaints for year 1997-98

Complaints dismissed	114
Minor complaints	7
Serious complaints	5
Complaints withdrawn	1

Of the five complaints classified as serious, three related to a magistrate of the local court. The magistrate resigned on medical grounds. The other two concerned a judge of the Supreme Court of New South Wales. The report of the conduct division concerning the judge expressed the view that the complaints had been substantiated and could justify parliamentary removal on the basis of proven incapacity. In May 1998, the Attorney General tabled the report in parliament. In June 1998 the judge in question addressed the legislative council concerning the findings of the conduct division.

[18] See Appendix V

Following debate about the report, the legislative council voted 24-16 against the removal of the judge.

New Zealand

New Zealand has recently introduced a Constitution Amendment Bill which deals with, *inter alia*, the removal of judges. In tandem with this, the government is drafting an administrative judicial complaints procedure based on convention, in consultation with the judiciary.

Written complaints about a judge will be directed to the relevant Head of Bench. Complaints must relate to the conduct of the judge in question, not to the judge's decisions. In a case where a valid complaint is established, the Head of Bench and the judge in question will settle on a remedy, which may include an apology or counselling or training for the judge.

If a complaint is considered serious enough possibly to warrant the removal of a judge, the matter will be referred to the Attorney General. The Attorney General will be empowered to call on a panel of retired judges to consider the case. If the Attorney General finds it necessary, he will put a resolution to parliament requesting the Governor General to remove the judge.

Working Group on a Courts Commission

The Sixth Report of the Working Group on a Courts Commission dealt with the procedures which are adopted in other countries relating to the handling of judicial conduct that might be considered unsuitable for a member of the judiciary. It recommended the establishment of a Judicial Committee and, on publication of that report in November 1998, such a Committee was established by the Chief Justice in April of this year. The Committee is considering the Sixth Report and the position in other jurisdictions including Canada, New South Wales, United States of America and New Zealand. It will consult with the Minister for Justice, Equality and Law Reform, the Bar Council, the Law Society, academics and others and it will also receive submissions from interested bodies. Furthermore, it will advise on and prepare the way for the establishment of a judicial body which would contribute to high standards of judicial conduct and establish a system for the handling of complaints relating to such conduct. It will do other preparatory work including that relating to judicial standards and ethics and will consider matters which have arisen since the Sixth Report was finalised in November 1998.

The membership of the Committee is as follows:

The Chief Justice, Mr Justice Hamilton
The President of the High Court, Mr Justice Frederick Morris

The President of the Circuit Court, Mr Justice Esmond Smyth
The President of the District Court, Judge Peter Smithwick
Mrs Justice Susan Denham, past Chairwoman of the Working Group on the Courts Commission
Mr Justice Ronan Keane, past President of the Law Reform Commission
The Attorney General Mr Michael McDowell SC, who represents the public interest.

The committee welcomes this initiative.

summary

As part of a general drive for transparency in public life, there is a trend in some common law countries to establish formal procedures for the review of the conduct of all judges. In Canada, New South Wales and New Zealand we see the establishment of complaints review bodies manned primarily by judges – with in New South Wales and New Zealand, a lay element – which receive complaints from the public, filter out those that are frivolous, send on the ones that are serious – these are very rare – for judgment by the parliament, and deal with those which are minor in terms of expressing disapproval of the judge involved or counselling the judge or providing the judge with training.

In terms of power, the complaints review bodies are weak. They have no power to impose sanctions on judges because that would jeopardise the independence of judges. Such powers as they may have are of a moral character. However, as far as the public for whom the complaints system exists is concerned, they have the educational effect of upholding the critical distinction between judicial decisions and judicial conduct; in the case of minor breaches of conduct, there is usually, for the public, an expression of regret and an affirmation that such conduct will not recur; and in cases of serious breaches of conduct there is the ultimate sanction of the removal of a judge. In Canada the publication on the Internet by the Judicial Council's Panel of the disapproval of certain conduct increases the publicity and therefore the deterrent effect of the process.

The establishment of complaints review bodies has naturally caused apprehension among judges. Thus, the commission in New South Wales and the Judicial Council in Canada have been the subjects of much public debate.

The commission was trenchantly opposed by judges of the New South Wales Supreme Court. In 1990 Mr Justice McLelland in an

article[19] wrote that the legislation was the 'greatest threat to the independence of the judiciary since colonial times'. He went on to argue that the mere establishment of such a body renders judges 'vulnerable to a form of harassment and pressure of an unacceptable and dangerous kind, from which their constitutional position and the public interest require that they should be protected'.

He went on:

> The mere fact of a complaint will mean that it assumes a significance which it would not otherwise have possessed. It would be impossible to keep the particulars of the complaint confidential. There is enormous potential damage to a judge's reputation and consequently in the authority of his court.
>
> The procedures contemplated by the Act are likely to cause very substantial wastages of judicial time and effort in unproductive activities, a matter of no little consequence in times of increasing pressures of business, limited judicial resources and substantial court delays.
>
> The imposition of any official sanction against a judge who is to remain in office is objectionable in principle. Unless a judge is to be removed, there is a powerful public interest in preserving his effectiveness and authority as judge. Litigants and practitioners may not have full confidence in a judge with some kind of 'black mark' on his record. It would be impossible to protect from publication the facts of a complaint or the result of the investigation.

Despite the judicial criticism, the system has been in operation for over ten years. The statistics show that the commission has not been overrun with complaints and it is significant that out of 123 complaints received in the year 1996-97, only two were classified as minor and none as serious. One hundred and sixteen complaints were examined and dismissed. The remaining five were withdrawn.

In Canada, the annual report of the Canadian Judicial Council 1996-97 also acknowledges judges' fears:

> Occasionally, [the complaints process] results in judges being exposed to unjust accusations and unwarranted public questioning of their character. Judges cannot easily refute such accusations and sometimes resent the questioning of their character and what they see as damage to their reputations. This is particularly true when a complaint is found to be unjustified and this finding is not given the same public prominence as the original accusation often is.

---

[19] *Disciplining Australian Judges,* Australian Law Journal, Volume 64, July 1990

response to criticisms

Notwithstanding the fact that the process can be a grievous one for judges, the committee agrees with the view of the Canadian Judicial Council that it is desirable that those who feel aggrieved by judicial conduct should have an avenue of recourse. Equally, they believe that a judge who is the subject of a complaint should be protected as far as possible from unfair publicity of unproven allegations and that the matter should be resolved as quickly as possible. Any scheme of complaints should prohibit general complaints about a particular judge and permit complaints on specific grounds only, as in Canada (under s65(2) of the Canadian Judges Act 1971)[20].

The committee believes that a clear line should be drawn in the public's mind between a judge's decisions and a judge's conduct. In accordance with the principle of judicial independence, a complaints body should have no power to retry cases or reverse decisions. Decisions are properly scrutinised on appeal to a higher court. The body should be concerned with the review of complaints about a judge's conduct. Such a review would necessarily include the issue as to whether the health, physical or mental, of a judge removes the judge's ability to deliver impartial and reasonable judgments. By maintaining the distinction between judicial decisions and judicial conduct one can maintain a balance between judicial independence and accountability.

The danger that a judge's reputation could be wrongly injured by the complaints process has to be tackled in the detailed legislation. Clearly a judge against whom a complaint is made must be made aware of the complaint and have an opportunity to refute it, unless it is a frivolous or vexatious one. Moreover, confidentiality must be maintained at least until good grounds are exposed for believing the complaint.

The fear that a review body might lead to extraneous demands on judicial time and perhaps therefore to a lengthening of court waiting-lists is a real one. However, the committee has noticed the improvement in the waiting times brought about by administrative measures, a trend that is likely to continue with the establishment of the Courts Service.

conclusion

The committee believes that the arrangement whereby all judges are subject to impeachment 'for stated misbehaviour or incapacity' but only District Court judges are formally subject to review of conduct falling below that standard is not adequate to the needs of the public. It recommends that a Judicial Council be established to review

[20] Ibid

35.2 All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.

judicial conduct. The council should consist of judges and retired judges. In order to ensure that broad social concerns are represented, and seen to be represented, the council should also have a lay element. In keeping with the principle of judicial independence the council should have no power to impose legal sanctions on judges. The committee believes that any such council should have a foundation in the Constitution. Hence the committee agrees with the Constitution Review Group that Article 35.2 should be amended to provide for a system of review of judicial conduct. The Review Group envisaged that such a review would be carried out by the judges themselves. However, lest there be any concern that Article 35.2 might preclude the Oireachtas from legislating for disciplinary control of the judiciary (short of removal from office), the Review Group felt that the Article should be amended to provide for that possibility.

Recommendation

Article 35.2 should be amended to allow for review of judicial conduct by a Judicial Council with a lay element by adding the following:

> Judicial conduct, as distinct from judicial decisions, may, however, be reviewed by a Judicial Council the composition of which includes a lay element and whose powers, duties and functions, including the drawing up of a code of ethics, may be determined by law.

Judicial Council

The key conclusion of the committee is that there should be a Judicial Council with a constitutional foundation. The committee believes it would assist understanding of this topic if a sketch of a possible scheme were outlined.

The composition and procedures of the Judicial Council might be based on three available models – those for Canada, New South Wales and New Zealand.

Composition The council, whose function is to review judicial conduct, as distinct from judicial decision, might consist of the Chief Justice, the presidents of the other benches and a lay element chosen in a similar way to the lay element of the judicial appointments advisory board. It would have as many sub-committees as necessary, drawn from the judiciary or the body of retired judges, to review complaints, and a number of lay persons.

Procedures On receipt of a complaint the council should review it and:

a) dismiss the complaint
b) classify the complaint as minor, or
c) classify the complaint as serious.

A complaint might be dismissed on one or more of the grounds to be set out in legislation, such as that the complaint was frivolous or vexatious, that it occurred at too remote a time to justify further consideration or that the matter could have been adequately dealt with on appeal. A useful precedent may be found in s20 of the New South Wales Judicial Officers Act 1986[21]. A minor complaint is best defined negatively: it is one that is not one to be dismissed as frivolous or vexatious etc, nor a serious one that warrants further consideration of whether a judge should be removed. In such cases if a preliminary review reveals that a private hearing is warranted, the judge who is the subject of the complaint would be given an opportunity to refute the complaint. If the complaint were upheld, the review body might, through the president of the relevant bench, express its disapproval and/or propose counselling/training, make administrative arrangements to avoid a repetition of the problem, issue a written apology to the complainant or publish a summary of its findings. These are not legal sanctions. They are moral sanctions.

Sanctions The distinction between legal sanctions and moral sanctions is that legal sanctions are penalties imposed by law and moral sanctions are psychological pressures imposed by society. Typically, moral sanctions are imposed through general social conventions and/or the conventions specific to the social group or groups to which one belongs. Moral sanctions may be imposed weakly or strongly. When we say that the Judicial Council will not have sanctions we mean it will not have legal sanctions. Its existence and operations, however, provide it with moral sanctions. The weight of such sanctions will depend on the sensibility of society in general and of the judiciary as a group in particular. The committee believes that the establishment of a Judicial Council would provide a major underpinning for the development and maintenance of a strong culture of judicial accountability.

Serious complaints If the Judicial Council decides that a complaint is serious, that is to say that it is of a character that may justify parliamentary consideration of the removal of a judge from office, it will proceed to a preliminary investigation of the case, the procedure for which may again be set out in legislation. Provision shall be made for the judge to answer the complaint.

If the council decides there may be a case for the Oireachtas to consider removal, it should forward a report of the results of its investigation to the Minister for Justice, Equality and Law Reform for consideration by the Oireachtas.

[21] See Appendix V

Removal of judges

35.4.1° A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.

Through illness, whether physical or mental, a judge may lose the capacity to deliver impartial decisions. Through corrupt judgments or through behaviour that is so gross that it demeans the office of judge, a judge may lose the essential character of being impartial or at least capable of it. In such cases the people, through their representatives in the Oireachtas, must be in a position to hold him or her accountable and to remove him or her from office. For that reason, Article 35.4.1º provides for an impeachment process.

some common law countries

The committee in reviewing the impeachment process looked at the various methods prescribed in some other jurisdictions.[22] Removal of judges in common law countries is by an impeachment process. Impeachment processes everywhere are rare and one finds that they are in general founded on loose definitions. Even in so large and populous a country as India, there is only one instance when a motion for the removal of a judge of the Supreme Court was brought before the Lok Sabha (the House of the People). Perhaps Canada has made the best definition of impeachment procedures but even Canada has not defined the crucial term 'misconduct'.

In the United States the process is initiated by the laying of a charge in the House of Representatives. Trial is held in the Senate, which may convict by a two-thirds majority vote. The constitutional provisions in Canada are similar to the Irish provisions. Recently, there have been calls for a referendum so as to amend the voting procedure to a two-thirds majority vote as opposed to the simple majority vote now required. Australia has discovered inadequacy in an impeachment procedure similar to ours. On one occasion the Australian response to an allegation of judicial misbehaviour was the establishment of an informal tribunal of inquiry. The inquiry did not give satisfaction.

15.11.1° All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member.

12.10.1° The President may be impeached for stated misbehaviour.

Irish procedure

The full impeachment procedure has never taken place in Ireland. Article 35.4.1º is silent on the actual mechanics of the impeachment process. Article 35.4.1º refers to the passing of resolutions for the removal of a judge by both Houses of the Oireachtas. By virtue of Article 15.11.1º such resolutions of the Dáil and Seanad may be passed by a simple majority vote of those present and voting. The

[22] See Appendix VI

Constitution Review Group recommended that the Article 12.10 impeachment process in respect of the President should be replicated for the impeachment of judges and other constitutional officers.

The Ceann Comhairle in a letter to the party leaders dated 20 April 1999 stated:

> Given that in any exercise of its constitutional function under Article 35.4, the Dáil itself is in judicial mode with its concomitant responsibility for impartiality and adherence to fair procedures and natural and constitutional justice, there is an onus on the Dáil to ensure as far as possible that the procedures to be adopted not alone meet the highest standards required but that the actions taken by the Dáil in passing any such resolution (including any preliminary steps undertaken to that end) are not open to successful legal challenge subsequently whereby – albeit in a worse case scenario – the resolution of the Dáil (and presumably the Seanad) would be struck down by the Courts themselves on a legal technicality.
>
> It is generally acknowledged, e.g. *Report of the Constitution Review Group* 1996, that the impeachment *process* set out in Article 35.4 (i.e. apart from the wording of the paragraph itself which could create difficulties of interpretation) would need to be improved to correspond with modern requirements of fair procedure and obviously the constitutional dimension to the issues arising from recent events needs to be addressed in addition to other aspects of this matter referred to in the Dáil on the statements on the early release of Philip Sheedy today.
>
> In the light of recent events the opportunity should be taken to examine procedures and other aspects raised by this issue, for example the recommendation of the aforementioned report (namely that Article 35.4 should be amended to afford the same process as exists for the impeachment of the President in Article 12.10) could be referred to the All-Party Committee on the Constitution with a view to an early recommendation to both Houses of the Oireachtas.

12.10.2° The charge shall be preferred by either of the Houses of the Oireachtas, subject to and in accordance with the provisions of this section.

12.10.3° A proposal to either House of the Oireachtas to prefer a charge against the President under this section shall not be entertained unless upon a notice of motion in writing signed by not less than thirty members of that House.

12.10.4° No such proposal shall be adopted by either of the Houses of the Oireachtas save upon a resolution of that House supported by not less than two-thirds of the total membership thereof.

12.10.5° When a charge has been preferred by either House of the Oireachtas, the other House shall investigate the charge, or cause the charge to be investigated.

12.10.6° The President shall have the right to appear and to be represented at the investigation of the charge.

12.10.7° If, as a result of the investigation, a resolution be passed supported by not less than two-thirds of the total membership of the House of the Oireachtas by which the charge was investigated, or caused to be investigated, declaring that the charge preferred against the President has been sustained and that the misbehaviour, the subject of the charge, was such as to render him unfit to continue in office, such resolution shall operate to remove the President from his office.

the presidential procedure

The presidential procedure requires that a charge shall be preferred by either of the Houses of the Oireachtas. A proposal to either House to prefer a charge shall not be entertained unless a notice of motion in writing is signed by not less than thirty members of that House and no such proposal shall be adopted by either of the Houses except upon a resolution of that House supported by not less than two-thirds of the total membership thereof. Once a charge has been preferred by one House, the other House shall investigate the charge, or cause it to

be investigated, with the President having a right to appear and be represented at the investigation.

If, as a result of the investigation, a resolution is passed supported by not less than two-thirds of the total membership of the House by which the charge was investigated, or caused to be investigated, declaring that the charge preferred against the President has been sustained and that the misbehaviour, the subject of the charge, was such as to render him or her unfit to continue in office, such resolution shall operate to remove the President from office.

views of the committee

The committee proposes that Article 35.4 should be amended to provide a procedure for the impeachment of judges similar to that which exists for the President. In our view the presidential procedure has the following advantages over the existing procedure:

1) clear division of function between the Houses
2) clear distinction between charge and hearing
3) requirement that minimum number of members initiate charge
4) clear recognition of right of charged party to appear and be represented at the hearing of the charge.

The committee believes that a simple majority of the total membership of the House of the Oireachtas by which the charge was investigated should suffice to remove a judge from office. The present voting arrangement permits a majority of the members present and voting to remove a judge. The requirement that a simple majority of the total membership so vote precludes abstention and compels members of exercise their responsibility.

The crucial question arises as to how the circumstances surrounding a possible impeachment are to be investigated. The adoption of the presidential procedure would mean that one House of the Oireachtas would prefer the charge and the other House would investigate the charge. The investigating House would be empowered by way of alternative to cause the charge to be investigated.

The committee believes that the House investigating the charge should have the pivotal role of directing what inquiry should take place. For example legislation might cause the facts to be investigated by a retired judge from another jurisdiction.

The committee agrees with the Ceann Comhairle that legislation should be drafted to set out clear steps in the investigation process. India, for example has enabling legislation – the Judges (Inquiry) Act 1968.

The Oireachtas would retain the capacity to prefer a charge on its own initiative.

Recommendation

Amend Article 35.4 to read as follows:

4 1° A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon a resolution calling for his or her removal passed in accordance with this section.

2° The charge shall be preferred by either of the Houses of the Oireachtas, subject to and in accordance with the provisions of this section.

3° A proposal to either House of the Oireachtas to prefer a charge against a judge under this section shall not be entertained unless upon a notice of motion in writing signed by not less than thirty members of that House.

4° No such proposal shall be adopted by either of the Houses of the Oireachtas save upon a resolution of that House supported by not less than a majority of the total membership thereof.

5° When a charge has been preferred by either House of the Oireachtas, the other House shall investigate the charge, or cause the charge to be investigated. The investigation procedure, which shall accord with fair procedures, shall be regulated by law.

6° A judge shall have the right to appear and to be represented in the investigation of the charge.

7° If, as a result of the investigation, a resolution be passed supported by not less than a majority of the total membership of the House of the Oireachtas by which the charge was investigated, or caused to be investigated, declaring that the charge preferred against the judge has been sustained and that the misbehaviour or incapacity, the subject of the charge, was such as to render him or her unfit to continue in office, such resolution shall operate to remove the judge from his or her office.

8° The Taoiseach shall duly notify the President of any such resolution passed by a House of the Oireachtas, and shall send him or her a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.

9° Upon receipt of such notification and of copies of such a resolution, the President shall forthwith, by an order under his or her hand and Seal, remove from office the judge to whom they relate.

'stated misbehaviour or incapacity'

The words 'stated misbehaviour or incapacity' in Article 35.4.1º are not defined in the Constitution nor have they been interpreted by the Irish courts. It seems that 'incapacity' refers to physical or mental disability. However, the Constitution Review Group felt that the term 'stated misbehaviour' could give rise to difficulties. They noted Professor Kelly's comments: '… does "misbehaviour" imply simply criminal misconduct? Or does it extend more widely and include possible infractions of the accepted (but unwritten) judicial code of behaviour?'[23] Moreover, it has been suggested that what may be forgiven in the ordinary citizen may not be pardoned in a judge. The Constitution Review Group recommended that the words 'stated misbehaviour' should be qualified by the insertion of 'prejudicial to the office of judge'.

The committee disagrees with the Constitution Review Group. It feels it is unnecessary to narrow the grounds for removal in this manner. The terms are used throughout the common law world. When the New Zealand Government Administration Committee[24] considered similar constitutional provisions, it reviewed the work of Professor Shimon Shetreet, a leading authority in the area. Professor Shetreet's summary of English practice encompasses several types of conduct which could come within the meaning of misbehaviour. These are:

- misconduct involving moral turpitude (corruption or corrupt motives)
- unjustified absence from office or neglect of official duties
- persistent political partisanship or partiality
- misconduct in private life
- criminal behaviour.

[23] JM Kelly, *The Irish Constitution*, 3rd edn, Butterworths, Dublin, 1994, p 552

[24] Report of the New Zealand Government Administration Committee on the 1999 Constitution Amendment Bill, p vi

In Professor Shetreet's view, the test as to whether events reach a standard justifying removal is whether the behaviour has consequences for public confidence in the administration of justice. This permits the conduct to be considered in the social context in which it occurs. Retaining the existing grounds will allow the Oireachtas to refer to precedents in other common law countries.

Public transparency

The Constitution envisages that the great majority of cases would be held in public. Article 34.1 provides:

> 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 Supreme Court in the case of *In re R Ltd* [25] emphasised that democracy requires the administration of justice in public. Walsh J in that case pointed out:

> … the actual presence of the public is never necessary, but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done …

The administration of justice in public ensures public confidence in the legal system. Recently, the Supreme Court in the case of *The Irish Times Ltd v Ireland* [26] affirmed the principle in Article 34.1. Hamilton CJ [27] stated:

> Justice is best served in 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.

The exceptions to the exercise of the administration of justice in public are limited. Such exceptions can only be 'prescribed by law', that is by an Act of the Oireachtas. Legislation can provide for hearings in private (in camera[28]), and for degrees of privacy, that is to say whether the exclusion of the public be absolute, limited or at the discretion of the judge. Some such legislation leaves with the court the discretion as to whether the public should be excluded and other legislation allows no discretion.

---

[25] [1989] IR 126 at p 134, per Walsh J
[26] [1998] 1 IR 359
[27] at p 382
[28] *In camera:* the term literally means 'in chambers' where private hearings were first held. Now private hearings are most often held in the courtroom but the public is excluded

The principal exceptions to the principle that justice be administered in public are set out in section 45(1) of the Courts (Supplemental Provisions) Act 1961 which confers a discretionary power on the court by providing that 'justice may be administered otherwise than in public' in the following cases:

a) applications of an urgent nature for habeas corpus, bail, prohibition or injunction
b) matrimonial causes and matters
c) lunacy and matters involving minors
d) proceedings involving the disclosure of a secret
e) manufacturing process.

In addition, pursuant to the Companies Acts 1963-90, where a company shareholder alleges oppression by the majority shareholders such proceedings may be heard in camera (s205) and this may happen where the High Court is of the opinion that a public hearing would 'involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company' (s205(7)).

Moreover, in the context of criminal proceedings a number of exceptions apply. Sections 20(3) and (4) of the Criminal Justice Act 1951 empower a court 'in any criminal proceedings for an offence which is, in the opinion of the court, of an indecent or obscene nature' to exclude the general public. In prosecutions for rape and other sexual offences, the trial judge is required to exclude the general public, but bona fide representatives of the media as well as court officers and those directly involved in the case can attend the hearing; and while the verdict and sentence must be pronounced in public, the names of the defendant and the complainant may only be published by the media where the court authorises this (s6 Criminal Law (Rape) Act 1981 as amended by s11 Criminal Law (Rape) (Amendment) Act 1990). Similar restrictions apply in prosecutions for incest (s2 Criminal Law (Incest Proceedings) Act 1995). The public may be excluded, save bona fide representatives of the press, when a preliminary investigation of an indictable offence is being conducted in the District Court, because of the nature or circumstances of the case[29]. With regard to such proceedings, restrictions apply as to the information that may be published concerning the defendant once proceedings have commenced. The only information that may be published is the fact that the person has appeared in court, the name and address of the person and the charge brought against the person. This restriction applies until the hearing of the trial of the offence[30]. The aforementioned legislative provisions for excluding the public in cases concerning sexual offences can be justified on the basis of protecting the identity of the persons concerned.

[29] S16 Criminal Procedure Act 1967
[30] S17 Criminal Procedure Act 1967

It is to be noted that, generally speaking, all family law proceedings are heard otherwise than in public[31]. Indeed, in family law matters both the press and public are excluded and it is even difficult for bona fide law students or researchers to gain admission[32]. Various statutes provide for such exclusion. Thus, proceedings under the Family Law (Maintenance of Spouses and Children) Act 1976 'shall be heard otherwise than in public'[33]. This is also provided for in regard to divorce proceedings[34], judicial separations[35], adoption proceedings[36] and cases involving children[37]. Several provisions in the Succession Act 1965 stipulate that proceedings concerning the appropriation of the family home or those concerning provisions for spouses and children 'shall be heard in chambers'[38].

The exceptions to the publicity rule in the courts are made to allow justice to be administered in the courts in relation to certain categories of cases. If privacy were not available certain cases, for example these involving family matters or sexual offences, might never be brought to court. When the Constitution Review Group considered whether Article 34.1 needed to be amended it accepted that certain cases should be held in camera. The Review Group concluded that the Article gave the Oireachtas the necessary flexibility to legislate:

> Should it think fit, the Oireachtas is free to enact legislation which would extend the categories of cases which can be heard *in camera*, provided always that this can be justified by objective factors.

The committee agrees that Article 34.1 should not be amended.

Recommendation

Article 34.1:

No change is proposed.

While the categories of cases held 'otherwise than in public' are limited, the actual number of cases so held is growing. In 1980

[31] Kelly, *The Irish Constitution*, 3rd edn, at p 403
[32] Law Reform Commission Report on Family Courts (LRC 52-1996), at p 4
[33] S25
[34] S38(5) Family Law (Divorce) Act 1996
[35] S34 Judicial Separation and Family Law Reform Act 1989
[36] S3(5) Adoption Act 1988
[37] S29(1) Child Care Act 1991
[38] Ss 56(12), 119 and 122

family law cases in the District Court totalled 4,056. By 1998 this had risen to 20,932. Indeed in relation to family law cases there is evidence in many countries of a questioning of the balance between openness and privacy in hearings. In Ireland, the Law Reform Commission expressed concern about holding family law cases behind closed doors in that 'the absence of any opportunities for external scrutiny of family proceedings, even if it does not in fact affect the quality and consistency of judicial behaviour, creates an unhealthy atmosphere in which anecdote, rumour and myth inform the public's understanding of what goes on in the family court'[39]. Parental Equality, in its submission to the committee, argues that in camera proceedings in family cases allow the perpetuation in the justice system of what it regards as an outdated and unbalanced view of the family and in particular of the role of fathers.

The committee notes that this issue was considered by both the Committee on Court Practice and Procedure[40] and the Working Group on a Courts Commission.[41] The committee concluded that the present constitutional framework is adequate for balanced legislative change in this area. Concern about adequate public scrutiny of court proceedings can be addressed by ordinary legislation. However, the committee recognises the sensitive and private nature of such proceedings.

special courts

38.3.1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

38.3.2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

38.6 The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.

Under Article 38.3.1° special courts may be established by law for the trial of offences where the ordinary courts are inadequate to secure the effective administration of justice. The Offences Against the State Act 1939 contained in part V provision for the establishment of special criminal courts. Section 38(1) provides that as soon as may be after that Part of the Act is brought into force a Special Criminal Court is to be established, and further such courts may be established as the need arises under Section 38(2).

Under Article 38.6 the provisions of Articles 34 and 35 (including the requirement that justice be administered in public) do not apply to courts established under Article 38. This exemption was considered by the Constitution Review Group:

> The provision in Article 38.6 which exempts special courts (as distinct from military courts) from the provisions of Articles 34 and 35 of the Constitution does not appear to be warranted. The proposal is that the phrase 'section 3 or' should be deleted from that subsection. This would have the

[39] LRC Report ibid at p 15
[40] Twenty-Third Interim Report, submitted to Minister for Justice, December 1994
[41] Stationery Office, Pn 6533, 1998

result that special courts would function under the same general constitutional regime as the ordinary courts with the exception, of course, of a jury.

They outlined the arguments for and against such a change as follows:

Arguments for

1 this would reflect the current practice with regard to such courts

2 having regard to such practice, there appears to be no justification for not applying Articles 34 and 35 to trial before special courts

3 the change would mean that no suggestion could reasonably be made that the State is not honouring its international commitments and guarantees in relation to such trials

4 the only justifiable difference between the ordinary courts and the special courts is the absence of a trial by jury in the latter.

Arguments against

1 circumstances may well change so as to warrant a change from the current practice; it would not be prudent to render this constitutionally impossible

2 it is inconsistent and illogical to require that special courts, whose establishment is based upon the inadequacy of the ordinary courts, should be regulated exactly in the same constitutional manner as the ordinary courts

3 departures from the standards relating to the ordinary courts may regretfully be necessary owing to the actual or potential activities of large-scale organised criminal/paramilitary factions of differing types.

The committee agrees with the Constitution Review Group that courts such as the Special Criminal Court should comply with the requirements of Articles 34 and 35 which include the requirement that justice be administered in public.

Recommendation

Delete the words ‘section 3 or’ from Article 38.6.

Judicial ethics

The great privilege of judicial appointment under the Constitution brings prestige but also the burden of high popular expectations in regard to conduct. In a complex modern society numerous and changing ethical issues confront judges. Can a judge become a member of the executive committee of a charitable organisation which may wish to seek funds from the government or may become embroiled in public policy conflict in the media in its area of interest? Should a judge report on a lawyer to the lawyer's professional governing body if he or she believes that the lawyer is acting inappropriately?

Irish judges have as their ethical guidance the values that they have affirmed to uphold as well as the normal conventions of civil intercourse. However, in some countries a written code of conduct exists to guide judges. This is so, for example, in the United States and Canada. The committee believes that Irish judges should have the benefit of a written code and that the Judicial Council would be the appropriate body to draw it up and develop it as required. A code of conduct has a moral and not a legal import. The *Ethical Principles for Judges* published by the Canadian Judicial Council in November 1998 provides a good exemplar.

That document fulfils a long-standing ambition of the Canadian council to formulate a statement of judicial ethics so as to assist judges in carrying out their duties. *Ethical Principles for Judges* is a comprehensive yet concise set of principles. Its purpose is 'to provide ethical guidance for federally appointed judges'. The statements and principles contained in the document are advisory in nature and 'are not and shall not be used as a code or a list of prohibited behaviours', nor does it set out standards defining judicial misconduct. In addition it clearly points out that the statements and principles set out are not intended to limit or restrict judicial independence in any manner.

The committee believes it would be of value to set out the statement as an illustration:

Judicial independence

Statement: An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.

Principles:

1 Judges must exercise their judicial functions independently and free of extraneous influence.
2 Judges must firmly reject any attempt to influence their decisions in any matter before the court outside the proper process of the court.
3 Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary.
4 Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

Integrity

Statement: Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

Principles:

1 Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair-minded and informed persons.
2 Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

Diligence

Statement: Judges should be diligent in the performance of their judicial duties.

Principles:

1 Judges should devote their professional activity to judicial duties broadly defined, which include not only presiding in court and making decisions, but other judicial tasks essential to the court's operation.
2 Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.
3 Judges should endeavour to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness.
4 Judges should not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

Equality

Statement: Judges should conduct themselves and proceedings before them so as to assure equality according to law.

Principles:

1 Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination.
2 Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.
3 Judges should avoid membership in any organisation that they know currently practices any form of discrimination that contravenes the law.
4 Judges, in the course of proceedings before them, should dissociate themselves from and disapprove of clearly irrelevant comments or conduct by court staff, counsel or any other person subject to the judge's direction which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law.

Impartiality

Statement: Judges must be and should appear to be impartial with respect to their decisions and decision making.

Principles:

A General

1 Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.
2 Judges should as much as reasonably possible conduct their personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases.
3 The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

B Judicial demeanour

1 While acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.

C Civil and charitable activity

1 Judges are free to participate in civic, charitable and religious activities subject to the following considerations:

a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.
b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.
c) Judges should avoid involvement in causes or organisations that are likely to be engaged in litigation.
d) Judges should not give legal or investment advice.

D Political activity

1 Judges should refrain from conduct such as membership in groups or organisations or participation in public discussion which, in the mind of a reasonable, fair-minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts.

2 All partisan political activity must cease upon appointment. Judges should refrain from conduct that in the mind of a reasonable, fair-minded and informed person, could give rise to the appearance that the judge is engaged in political activity.

3 Judges should refrain from:

a) membership in political parties and political fund-raising
b) attendance at political gatherings and political fund-raising events
c) contributing to political parties or campaigns
d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice
e) signing petitions to influence a political decision.

4 Although members of a judge's family have every right to be politically active, judges should recognise that such activities of close family members may, even if erroneously, adversely affect the public perception of a judge's impartiality. In any case before the court in which there could reasonably be such a perception, the judge should not sit.

E Conflicts of interest

1 Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.

2 Judges should disqualify themselves in any case in which they believe that a fair-minded, reasonable and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.

3 Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.

In addition to providing a statement and principles relating to each major element of the code, *Ethical Principles for Judges* also provides a commentary on them.[42]

The committee believes that the creation and development of a code of judicial ethics should be carried out by the Judicial Council.

Recommendation

The establishment of the Judicial Council in the Constitution should refer to the function of prescribing a code of ethics. Further detail should be left to legislation.

Judicial Studies Institute

The Department of Justice, Equality and Law Reform has always assisted with initiatives which the judiciary has brought forward in the area of training, and funds have always been made available to judges at all levels to enable them to attend training seminars and conferences both at home and abroad. The Courts and Court Officers Act 1995 provides that the Minister for Justice, Equality and Law Reform may with the consent of the Minister for Finance provide funds for the training and education of judges.

The Act also provides that persons wishing to be considered for judicial appointment must give their agreement, if appointed to judicial office, to undertake such course or courses of training or education or both as may be required by the Chief Justice or President of the court to which that person is appointed. In 1996 the Chief Justice established the Judicial Studies Institute to oversee judicial training and to ensure that funds which are made available for training are used as effectively as possible. In 1998, £50,000 was made available to the Institute and this has been increased to £60,000 in 1999.

[42] The commentary on Judicial Independence is given in Appendix VII by way of example

The committee welcomes the establishment of the Judicial Studies Institute. There may be scope for integrating the work of the Institute with the proposed Judicial Council.

Other issues

the High Court

34.2 The Courts shall comprise Courts of First Instance and a Court of Final Appeal.

The Constitution Review Group[43] considered that Article 34.2 was too restrictive in as much as the word 'comprise' might be thought to preclude the establishment of intermediate appellate courts. They argued that even though the constitutionality of the Court of Criminal Appeal[44] – an appellate court not mentioned by the Constitution – had been upheld, it was better to put the matter beyond all doubt. In view of the huge increase in litigation in recent times the Review Group concluded that it would be desirable that Article 34 should permit the Oireachtas the maximum degree of flexibility in changing or modifying the court structures. The majority of the committee agrees with this.

Recommendation

Amend Article 34.2 to read as follows (bold indicating addition only):

> The Courts shall include Courts of First Instance, a Court of Final Appeal **and such other Courts as may be prescribed by law**.

courts of local and limited jurisdiction

34.3.4° The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.

Article 34.3.4º obliges the Oireachtas to establish courts of local and limited jurisdiction. The Circuit and District Courts were established by the Courts (Establishment and Constitution) Act 1961.[45] Article 34.3.4º requires their jurisdiction to be local as well as limited. The Constitution Review Group points out that there is ambiguity in the word 'local'. The courts have been established on a local basis, but does Article 34.3.4º require that they are 'local' in their actual operation? Section 32 of the Courts and Court Officers Act 1995 permits the transfer of trials from Circuit Courts outside Dublin for hearing by the Dublin Circuit Court. The Supreme Court held that an earlier version of this provision was constitutional.[46] It took a purposive approach to the interpretation of Article 34.3.4º. Walsh J said that the purpose of the Article was to provide local, that is,

---

[43] See Appendix VIII

[44] The court's powers have since been vested in the Supreme Court by s4 of the Courts and Court Officers Act 1995

[45] The jurisdiction of the Circuit and District courts is determined by reference to essentially local criteria, such as the place where the tort occurred or where the offence is alleged to have occurred

[46] *State (Boyle) v Judge Neylon* [1986] IR 551

cheaper and more convenient, venues for litigants. He held that 'local jurisdiction' did not necessarily require a connection with the place of residence of one party or the other.

Some members of the Constitution Review Group maintained that the expressions 'local' and 'limited' taken together created an undue restriction on the orderly distribution of business within the legal hierarchy. The committee however believes that the present wording of Article 34.3.4° has not caused any problems. It should not be altered. The High Court should be the principal court of first instance. All other courts of first instance should remain subordinate to it. As the Review Group point out, Article 34.3.4° prevents the Oireachtas from attempting to undermine the prestige and authority of the High Court by creating courts with duplicate jurisdiction to that court.

Recommendation

Article 34.3.4°

No change is proposed.

the right of appeal: a potential anomaly

34.4.3° The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.

34.4.4° No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.

Article 34.4.3º sets out the appellate jurisdiction of the Supreme Court. There is a constitutional right of appeal from the High Court to the Supreme Court. This right may be excluded by legislation. However, Article 34.4.4º goes on to provide that the appellate jurisdiction of the Supreme Court cannot be removed in cases involving the constitutionality of any law. It follows that Article 34.4.4º can be construed as permitting the prosecution to appeal against an acquittal if the case relates to the validity of any law having regard to the provisions of the Constitution.

As the Constitution Review Group points out:

> While Article 34.4.4° is designed to ensure that the Supreme Court's appellate jurisdiction cannot be removed in cases involving the constitutionality of any law, this provision has had the consequence – presumably not foreseen by the drafters – that certain rules and practices favourable to the liberty of the individual have been invalidated.

A majority of the Review Group recommended that consideration should be given to the question whether Article 34.4.4° should be amended so as to remove any doubt about the ability of the Oireachtas to exclude by law a right of appeal from a decision to acquit an accused.

The committee takes the view that it would be better not to limit the right of appeal in this context. The constitutionality of laws is so important that there should be an appeal in all such cases even if it relates to an acquittal on a criminal charge. It is essential that the Supreme Court is the sole and final forum for settling the interpretation of the Constitution. Legislation can provide that such an appeal would be without prejudice to an acquittal.

Recommendation

Article 34.4.4°

No change is recommended.

number of judges of the Supreme Court to determine the validity of laws

26.2.1° The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.

Unlike Article 26.2.1º which provides for a minimum of five judges in Article 26 reference cases, Article 34 is silent on the requisite number of judges for decisions where the validity of a law is being questioned. Section 7 of the Courts (Supplemental Provisions) Act 1961 requires the Supreme Court to consist of five judges for decisions on the constitutional validity of a law.

The Constitution Review Group expressed the view that a minimum of five judges should sit where the constitutionality of an Act is being challenged. It stated that:

> The Constitution, having required five judges for the decision on the Bill referred under Article 26, should likewise require not less than five judges for the subsequent determination of the constitutional validity of the Act.

The O'Keeffe Committee[47] agreed that the Supreme Court should sit with the same number of judges for Article 26 reference cases and cases to determine the validity of a law. However, they took the view that seven judges should sit:

> Owing to the importance of these cases, the Committee tends to favour the practice followed by the American Supreme Court which is to sit with its full membership when deciding constitutional cases. Since the Supreme Court now numbers nine (including the President of the High Court), the Committee takes the view that it should sit with seven members to decide Article 26 reference cases [and cases to determine the validity of a law]: that number allows for a depletion in the number of available judges through illness or

[47] See Appendix IX

absence and, since an uneven number is required for reaching decision by a majority, it is the highest such number available after allowing for depletion.

They recommended that that requirement should be provided for in both Article 26 and Article 34.

The committee concluded that the recommendations of the O'Keeffe Committee would introduce too much rigidity into the administration of the Supreme Court business.

Conclusion

The committee recommends that the number of judges of the Supreme Court who sit to determine the validity of a law should continue to be regulated by legislation rather than enumerated expressly in Article 34. No change is recommended in the number of judges prescribed in Article 26.

35.3 No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument.

12.6.3° The President shall not hold any other office or position of emolument.

ineligibility for membership of the Oireachtas

Article 35.3 provides that no judge is eligible to be a member of either House of the Oireachtas. The Constitution Review Group recommended that this prohibition should be extended to exclude judges from serving as President of Ireland or holding any other position inconsistent with the office of judge. The committee believes that the prohibitions in Article 12.6.3° and Article 35.3 are sufficient to exclude a judge from serving as President. The issue of what positions are inconsistent with the office of a judge can be addressed in the proposed code of judicial ethics.

Recommendation

Article 35.3

No change is recommended**.**

34.3.2º Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court.

judicial review of the constitutionality of legislation

Article 34.3.2º provides that only the High Court and Supreme Court may review the constitutionality of legislation. A litigant wishing to challenge the constitutionality of legislation must commence proceedings in the High Court.

.

The Constitution Review Group considered whether the District and Circuit Courts should be permitted to state a case concerning the constitutionality of a law to the High Court (with an appeal to the

Supreme Court). The committee notes that the presumption that laws enacted by the Oireachtas are in accordance with the Constitution applies to the Circuit and District Courts. These courts are required to act on the assumption that enactments are constitutional. Accordingly the committee views any extension of jurisdiction in relation to the invalidation of legislation as undesirable.

Recommendation

Article 34.3.2°

No change is recommended.

constitutionality of Bills and Laws and related matters

The committee reconsidered the analysis of the All-Party Oireachtas Committee on the Constitution 1996-97 (the O'Keeffe Committee).[48]

A majority of the committee agrees that:

1) the time-limit for the Supreme Court to pronounce on a reference under Article 26 should be increased to ninety days
2) the one-judgment rule when deciding on the constitutionality of Bills or Acts should be removed
3) the immutability of any law which has been the subject of an Article 26 reference should be removed.

However, the committee is not satisfied that it is essential to make an express provision in the Constitution in relation to the consequences of invalidity.

constitutional cases: consequences of a declaration of invalidity

The courts have interpreted Article 15.4 to mean that, if a court declares a provision of a post-1937 Act to be repugnant to the Constitution, it is void ab initio because Article 15.4 prevents it ever being valid law. The O'Keeffe Committee discussed whether the courts should have express power to declare an Act to be unconstitutional not from the date of its enactment but from some later date. The O'Keeffe Committee endorsed the majority view of the Constitution Review Group and recommended that the Constitution be amended:

> to provide the courts with an express discretion, where justice, equity or, exceptionally, the common good so requires, to afford such relief as they consider necessary and appropriate in

[48] See Appendix IX

respect of any detriment arising from acts done in reliance in good faith on an invalid law.

The O'Keeffe Committee looked at cases concerning the declaration of invalidity of a law the Bill for which had been referred to the Supreme Court under Article 26. They also looked at cases of so called 'creeping unconstitutionality' where legislation which was constitutional at the date of its enactment has become unconstitutional by reason of changing circumstances. The O'Keeffe Committee concluded that rather than making special provision for each of these two types of case, Article 34.3.3° should be amended to give the High and Supreme Courts a general power to decide upon the consequences of a declaration of invalidity of a law.

However, this committee notes that the courts have grappled with and resolved the practical problems stemming from findings of constitutional invalidity. The committee questions whether the conferment of an express power is necessary or desirable.

Recommendations

Article 26 reference cases: the time-limit for pronouncing decisions

Amend Article 26.2.1° to read '... and in any case not later than ninety days after the date of such reference'.

one-judgment rule

Delete Article 26.2.2°.
Delete Article 34.4.5°.

Article 26 reference cases: immutability of the Supreme Court's decision

Delete Article 34.3.3°.

Summary of Recommendations and Conclusions

Summary of recommendations and conclusions

Appointment of judges (pages 5-9)

The committee takes the view that our present system of appointing judges should be retained.

Security of tenure and other conditions (pages 10-13)

Add the following to Article 34.5: 'A judge may omit the religious references.'

Judicial conduct (pages 14-25)

Article 35.2 should be amended to allow for review of judicial conduct by a Judicial Council with a lay element by adding the following:

> Judicial conduct, as distinct from judicial decisions, may, however, be reviewed by a Judicial Council the composition of which includes a lay element and whose powers, duties and functions, including the drawing up of a code of ethics, may be determined by law.

Removal of judges (pages 26-31)

Article 35.4 should be amended to make the impeachment procedure for a judge similar to that for the President. The new Article 35.4 should read as follows:

4 1° A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon a resolution calling for his or her removal passed in accordance with this section.

2° The charge shall be preferred by either of the Houses of the Oireachtas, subject to and in accordance with the provisions of this section.

3° A proposal to either House of the Oireachtas to prefer a charge against a judge under this section shall not be entertained unless upon a notice of motion in writing signed by not less than thirty members of that House.

4° No such proposal shall be adopted by either of the Houses of the Oireachtas save upon a resolution of that House supported by not less than a majority of the total membership thereof.

5° When a charge has been preferred by either House of the Oireachtas, the other House shall investigate the charge, or cause the charge to be investigated. The investigation procedure, which shall accord with fair procedures, shall be regulated by law.

6° A judge shall have the right to appear and to be represented in the investigation of the charge.

7° If, as a result of the investigation, a resolution be passed supported by not less than a majority of the total membership of the House of the Oireachtas by which the charge was investigated, or caused to be investigated, declaring that the charge preferred against the judge has been sustained and that the misbehaviour or incapacity, the subject of the charge, was such as to render him or her unfit to continue in office, such resolution shall operate to remove the judge from his or her office.

8° The Taoiseach shall duly notify the President of any such resolution passed by a House of the Oireachtas, and shall send him or her a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.

9° Upon receipt of such notification and of copies of such a resolution, the President shall forthwith, by an order under his or her hand and Seal, remove from office the judge to whom they relate.

Public transparency (pages 32-36)

The requirements of Articles 34 and 35, which include that justice be administered in public, should apply to special courts

established under Article 38. The words 'section 3 or' should be deleted from Article 38.6.

Judicial ethics (pages 37-42)

The establishment of the Judicial Council in the Constitution should refer to the function of prescribing a code of ethics. Further detail should be left to legislation.

Other issues (pages 43-47)

Amend Article 34.2 to read as follows:

> The Courts shall include Courts of First Instance, a Court of Final Appeal and such other Courts as may be prescribed by law.

The committee recommends that the number of judges of the Supreme Court who sit to determine the validity of a law should continue to be regulated by legislation rather than enumerated expressly in Article 34. No change is recommended in the number of judges prescribed in Article 26.

Article 26 reference cases: the time-limit for pronouncing decisions:

> Amend Article 26.2.1° to read '... and in any case not later than ninety days after the date of such reference'.

One-judgment rule:

> Delete Article 26.2.2°
> Delete Article 34.4.5°.

Article 26 reference cases: immutability of the Supreme Court's decision:

> Delete Article 34.3.3°.

Appendices

Appendix I

Judicial appointments in some common law and civil law states

A paper prepared by Laura Rattigan and Karen Cullen

---

common law states

England and Wales

In England and Wales, judicial appointments at higher court and lower court level are made with different procedures, but in respect of all appointments the Lord Chancellor has a significant role to play. The Lord Chancellor is a political appointee nominated by the Prime Minster and formally appointed by the Crown. The Lord Chancellor is head of the judiciary, a member of the cabinet and the speaker of the House of Lords, and thereby, in the one person, combines the threefold function of executive, legislator and jurist (and thus embodies a dispassion for Montesquieu's separation of powers).

Senior judicial appointments (the Law Lords, the Court of Appeal judges, the Lord Chief Justice, the Master of the Rolls, the Vice-Chancellor and the President of the Family Division) are made by the Crown on the recommendation of the Prime Minister, who receives advice from the Lord Chancellor. Appointment to these positions is by invitation only. It is customary for the Lord Chancellor, in advising on judicial appointments to the higher echelons of the courts system, to consult senior members of the judiciary[49].

High Court judges are appointed by the Crown on the recommendation of the Lord Chancellor. Previously, appointment to these posts was also by invitation only. However, in 1998[50] the Lord Chancellor invited applications for appointment to the High Court by an advertisement procedure, although the Lord Chancellor reserves the right to appoint from those who have not made an application. Again, it is the custom of the Lord Chancellor to consult senior members of the judiciary before making a recommendation for appointment.

---

[49] Lord Chancellor's Department, *Judicial Appointments,* published by the Lord Chancellor's Department, March 1999

[50] Lord Chancellor's Department, Press Notice, February 1998, First Advertisements for High Court Judges

Judges of the lower courts[51] are appointed by the Crown on the recommendation of the Lord Chancellor. Appointments are now made following an annual advertisement and selection procedure conducted by the Judicial Group under the auspices of the Lord Chancellor's department. Advertisements are placed in some national newspapers and/or legal journals. Interested persons must complete an application form and submit it to the Judicial Group. Those who satisfy certain criteria laid down by the Lord Chancellor's department are interviewed by a panel composed of a senior official of the Judicial Group, a Circuit judge and an independent lay person with knowledge of the justice system. The panel assess, the suitability of the candidate. It is this information, together with the views of other judges, which assists the Lord Chancellor in making a decision[52].

A system of part-time judicial positions known as Recorders and Assistant Recorders operates in England and Wales. Recorders sit in the lower courts and their jurisdiction is similar to that of Circuit judges. They are required to sit judicially for at least twenty days a year. Appointment to this position is achieved by promotion from Assistant Recorder level. Assistant Recorders also sit in the lower courts but have a limited jurisdiction. Appointment to this post is by an advertisement and selection procedure. Assistant Recordership is the first rung on the ladder to judicial appointment: those who have served as Assistant Recorders may be promoted to Recorders and thereafter could be considered for judicial office. This system of part-time judicial posts provides, in effect, a testing-ground for the promotion and appointment of persons to full-time judicial office at lower level because it is the Lord Chancellor's policy to appoint and promote to full-time judicial positions persons who have served satisfactorily as Recorders. It should be noted that a system of part-time judicial officers would be unconstitutional in Ireland on foot of Article 35.3.

Since 1907, party politics do not seem to have played a role in the selection process[53]. Appointments to judicial office are made exclusively from the ranks of the legal profession. As is the case in Ireland, the legal profession in England and Wales is divided into two branches, solicitors and barristers. Until 1990, the barristers' profession enjoyed a monopoly over senior judicial posts. However, this monopoly was broken by the Courts and Legal Services Act, 1990. Solicitors are now eligible for such posts provided they possess the relevant advocacy qualification. The necessary advocacy qualification for appointment to either higher or lower judicial posts is based on a right of audience for a specific number of years in all

[51] Judges of the Crown and County Courts – these judges are referred to as Circuit judges
[52] Lord Chancellor's Department, *Judicial Appointments,* ibid
[53] Richard M Jackson, *The Machinery of Justice in England*, 7th edn, Cambridge University Press, 1977, p 469

proceedings in the court where the appointment is sought. Thus, to be appointed a High Court judge, an individual must have had a right of audience in all proceedings in the High Court for at least ten years or have been a Circuit judge for at least two years[54].

To complete the picture of appointments in the English and Welsh courts system, reference must be made to the position of magistrates who preside over criminal matters in the Magistrates' Court at the base of the court hierarchy. These are lay positions. Virtually any adult citizen is eligible to become a magistrate. Appointment is made by the Lord Chancellor, but party politics is a significant factor in the procedure.

United States

At the outset it should be noted that the United States system of government is federal. Each of the fifty states possesses the entire apparatus of a sovereign nation. Consequently, the United States operates a dual court system of federal courts and state courts. The Federal Courts system consists of the Supreme Court, the Courts of Appeals and the District Courts. Their jurisdiction extends to matters involving the constitution, federal laws, treaties of the United States and other exclusive matters as laid down by the constitution. Each state has its own structure of trial and appellate courts, whose jurisdiction extends to state law.

Federal and state judges are selected from amongst the ranks of the legal profession. The legal profession in the United States is unitary, consisting of a single cadre of attorneys.

Federal judges are appointed by the President subject to confirmation by simple majority vote of the Senate[55]. Whilst the President formally nominates a person for judicial office, three factors may play a decisive role in the selection process[56]. First, it is customary to consult with the US senators in the home state of the candidate, if the senators are of the same political party as the President. This custom is known as 'senatorial courtesy'. It developed in order to prevent a president from appointing a senator's political adversary. Secondly, the American Bar Association (ABA) Committee on the Federal Judiciary, which is a private body established in 1946, evaluates the qualifications of candidates. The committee conducts an investigation based on a detailed questionnaire which lasts for approximately six to eight weeks. The committee then reports to the Justice Department on the qualifications of the prospective nominee and rates him or her in one of three ways: well qualified, qualified, not qualified. The committee also sends its ratings independently to the Senate Judiciary

[54] S71 Courts and Legal Services Act 1990
[55] Article II, S2.2 of the US Constitution
[56] Abraham, *The Judicial Process*, 7th edn, at p 22 ff

Committee. Thirdly, the views of sitting and retired members of the judiciary, especially the Chief Justice, are canvassed. Once a nomination is made, the Senate Judiciary Committee conducts confirmation hearings for each nominee.

The states use several methods in selecting judges. These can take the form of partisan elections, non-partisan elections, elections by the state legislature, gubernatorial appointment or by merit. One of the main methods of selecting judges in the American states is based on the Missouri Plan, named after its place of origin. It aims to create a more meritorious system of judicial selection. It involves non-partisan nominating boards, operating at different court levels and selecting three candidates for every vacant judicial post. The governor of the state is then required to choose one of the three candidates selected by the board and appoint him or her to the bench until the next general election, but not for a term of less than twelve months. At the general election the particular candidate must be approved or disapproved as the case may be. If approved, service may be for a full twelve-year term[57].

Canada

Canada, too, operates a federal parliamentary system, the legislative power being divided between the federal parliament and the provincial parliaments. However, the Canadian court system is unitary in nature unlike that of the US which, as seen earlier, is a dual structure consisting of both a federal court system and fifty state court systems. In Canada, the court structure consists of provincial court systems and a national court of last resort known as the Supreme Court. Each province has its own structure of superior and inferior courts whose jurisdiction extends to both provincial and federal law. There is a right of appeal from the provincial court of appeal, which stands at the apex of the provincial court hierarchy, to the Supreme Court of Canada.

The federal government on the recommendation of the federal Minister for Justice appoints the judges of the superior courts in each province[58]. Judges of the inferior courts in each province are appointed by the provincial government[59]. In Canada, the legal profession is unified, consisting of a single grouping of lawyers. Federally appointed judges must be members of the lawyers' profession of the province for which they are appointed. The judges of the Supreme Court of Canada are appointed by the federal government on the recommendation of the Prime Minister.

[57] Ibid no 4, at p 16 ff
[58] S96 Constitution Act 1867
[59] S92(4) Constitution Act 1867

Party political considerations have played a considerable but indefinable role in Canada in the selection and appointment of judges. Attempts have been made to restrain the discretion of governments in the appointment of members of the judiciary by the establishment of a Committee of the Canadian Bar Association on Judicial Appointments similar to the American Bar Association which could review the names of candidates submitted by the federal Minister for Justice. The Supreme Court Act 1985 requires that appointees to the Supreme Court of Canada must have served as superior court judges of a province or have been lawyers of at least ten years' standing at the bar of a province. The Supreme Court Act also stipulates that three of the nine judges must be appointed from Quebec. Convention requires that the remaining members of the court must represent the other regions of the country.

Australia

Australia also operates a federal system of government with legislative power divided between the parliament of the various states and territories and the federal parliament. Each state and territory also has its own court system. However, the High Court of Australia is the final court of appeal in respect of all matters, whether decided in federal or state/territory jurisdictions.

The Australian Constitution[60] provides for the appointment of federal judges by the Governor General in Council. In practical terms this means that judges are appointed by the cabinet, generally on the recommendation of the Attorney General, with the formal appointment being made by the Governor General.

The appointment of state/territory judges is similar in that the governor of a particular state/ territory formally appoints the judges following a cabinet decision on the matter. Legislation further provides in the case of the appointment of High Court judges that the Attorney General for the Commonwealth is required to consult with state/territory Attorneys General about the appointment of a High Court judge. As is the case in other common law countries, judges in Australia are selected from the senior members of the barristers' profession.

New Zealand

New Zealand is a unitary state, with a unicameral legislature, a government and court system. As in other common law states, the New Zealand judiciary is drawn from the legal profession, which also has two branches as in Ireland.

[60] S72

Until recently, the appointment procedure was criticised because the process was covert and little was known about how it operated. In April 1999, the Constitution Amendment Bill was introduced which, inter alia, provided for a more transparent appointment process for the judiciary. Under the current arrangements the appointment is made by the Governor General, but, by convention or statute (depending on the court) the recommendation is made by the Attorney General, Minister of Justice or Minister holding the Labour portfolio. The Bill provides that all appointments shall be made by the Governor General on the recommendation of the Attorney General, except for the Chief Justice, who will continue to be recommended by the Prime Minister, and Maori Land Court Judges who will continue to be appointed by the Minister of Maori Affairs.

The actual process of selection is not part of the Bill, it is an administrative procedure already in place which would accompany the new legislation. The Attorney General's Judicial Appointments Unit, attached to the Ministry of Justice, will support the new judicial appointments process. The Unit advertises for nominations or expressions of interest from those who wish to be considered for the bench. The expressions of interest received are recorded on a confidential register. As a vacancy arises, the names of those who have expressed interest in that jurisdiction and location are extracted from the register. The Attorney General compiles a shortlist. The candidates are interviewed and the references are checked. Various groups and figures in the community may be consulted during the selection process in order to assess the merits of prospective candidates. The Attorney General's approval is required for the final selection. Cabinet is advised of the final recommendation before it is put to the Governor General.

(There is a variation in the case of High Court Judges in that, rather than operate on a vacancy by vacancy basis, all potential candidates are reviewed at the beginning of the year and are given a rating which indicates those considered suitable for immediate appointment, those suitable in two or three years, and those in neither category. The Attorney General approves a shortlist and the order of preference and from that list, in order, appointments are made as vacancies arise.)

Interviews are not carried out at Court of Appeal level, may be conducted at High Court level and are part of the process at District Court and Employment Court level.

The process of appointment to the Court of Appeal and the High Court will be carried out under the direction of the Solicitor General. The Secretary for Justice will oversee the process for appointments to the District, Family, Environment and Employment Courts.

While appointments will continue to be made on merit, there is a commitment to seeking diversity in the Judiciary. The one statutory qualification criterion that is common to all judges is that appointees

must have held a practising certificate as a barrister or solicitor for at least seven years.

In addition:

> Family Court Judges must, by reason of their training, experience, and personality, be suitable persons to deal with matters of family law (Family Courts Act 1980).
>
> Youth Court Judges must be suitable persons to deal with matters within the jurisdiction of a Youth Court by virtue of their training, experience and personality, and understanding of the significance and importance of different cultural perspectives and values. (Children, Young Persons and Their Families Act 1989).

In the case of Community Magistrates, suitability for appointment is determined only after a period of training.

The recent process of making the appointments process more systematic, formalised and transparent included the establishment of selection criteria for all of the benches:

> For the appointment to the Court of Appeal and High Court of New Zealand (as judges and masters)
>
> *Legal ability*
> - professional qualifications and experience
> - outstanding knowledge of the law and its application
> - extensive practice of law before the courts or wide applied knowledge of the law in other branches of legal practice
> - overall excellence as a lawyer
>
> *Qualities of character*
> - personal honesty and integrity
> - impartiality, open mindedness and good judgement
> - patience, social sensitivity and common sense
> - the ability to work hard
>
> *Personal technical skills*
> - oral communication skills with lay people as well as lawyers
> - the ability to absorb and analyse complex and competing factual and legal material
> - listening and communication skills
> - mental agility
> - management and leadership skills
> - acceptance of public scrutiny

Reflection of society

- awareness and sensitivity to the diversity of New Zealand community
- knowledge of cultural and gender issues

For appointment as judges to the District Court, Family Court, Youth Court, Environment Court, and Employment Court

Legal ability

- professional qualifications and experience
- demonstrated knowledge of the law and its application
- demonstrated experience in the practice of law before the courts or in other branches of legal practice
- overall high quality as a lawyer

Qualities of character

- personal honesty and integrity
- impartiality, open-mindedness and good judgment
- patience, social sensitivity and common sense
- the ability to work hard

Personal technical skills

- oral communication skills with lay people as well as lawyers
- the ability to absorb and analyse complex and competing factual and legal material
- listening and communication skills
- mental agility,
- management and leadership skills
- acceptance of public scrutiny

Reflection of society

- awareness and sensitivity to the diversity of New Zealand society
- knowledge of the New Zealand community
- knowledge of cultural and gender issues

For appointment as community magistrates

Qualities of character

- personal honesty and integrity
- impartiality, open-mindedness and good judgment
- patience, social sensitivity and common sense

Personal technical skills

- relevant qualifications and experience
- oral communication skills
- listening and communication skills
- leadership skills

- acceptance of public scrutiny
- connections with the community.

Reflection of society
- Awareness and sensitivity to the diversity of New Zealand society.
- Knowledge of the local community
- Knowledge of cultural and gender issues

civil law states

France

There are two distinct court systems in France – judicial courts and administrative courts. Within each of these court systems, there are two distinct types of judges, known as sitting judges and judges who act as prosecutors. The former actually hear and determine cases and correspond most closely to the Irish idea of a judge. The latter type acts on behalf of the Minister for Justice. Both types of judge are specially trained.

Judging is a career in France. Because sitting judges of the judicial courts correspond more closely to Irish judges, only their appointment will be analysed.

The 1958 Constitution of the Fifth Republic did much to strengthen the independent position of the judiciary in France. The President of the Republic, pursuant to the constitution, is the guarantor of the independence of the judiciary and is assisted in this task by the Superior Judicial Council. This council is composed of sixteen members, the majority of whom are elected by the judges. It is presided over by the President of the Republic or the Minister for Justice. One of the functions of the council is the nomination of senior judges and the approval of the nomination of all other judges.

To become a judge one must train at the *Ecole Nationale de Magistrature* (*ENM*) at Bordeaux. The school is under the administrative control of the Minister for Justice. Entry to the *ENM* is by competitive examination for three categories of candidate. The first category comprises students who hold a legal qualification. The second category consists of existing civil servants who have held a post for a minimum of four years. The third category consists of persons who have held public office. Admission can also be gained from the legal profession without examination (this method accounts for 5% of total admissions to the *ENM*). Entrants to the *ENM*, known as *auditeurs de justice*, must complete thirty-one months of training before they can graduate and enter the judiciary. The thirty-one months of training can be divided into two periods. The first consists of twenty-five months of general training which is broken down into

three months in the civil service, a private company and a public corporation, followed by eight months of study at the *ENM* where judicial decision making is taught, and finally a fourteen-month placement in a court. The second consists of six months of specialised training. Most graduates from the *ENM* are about thirty years of age. After graduation, each graduate is nominated, with the approval of the Superior Judicial Council, to judicial posts. As with most civil service jobs, there are a number of career levels for the judiciary. The work of judges is reviewed every two years by the heads of their divisions and these reviews are used by the Ministry of Justice for advancement, with the approval of the Superior Judicial Council.

Germany

Germany has a federal system of government with powers divided between the central government authority (*Bund*) and the sixteen states (*Lander*). However, as with Canada the German court structure is unitary. The *Lander* courts apply both federal and state law. There is a right of appeal from the state courts to the federal courts. A special feature of the German courts system is the compartmentalisation of the courts along the lines of substantive law (for example, Administrative Court, Labour Court). In addition, Germany possesses a Federal Constitutional Court which has jurisdiction in respect of all constitutional matters.

Judging is a separate career in Germany. However, unlike in France, all persons who wish to enter the legal profession either as a judge or as a lawyer must follow a standard two-stage training process. The first stage requires the completion of at least three-and-a-half years' legal study at university level after which the student must sit the 'first state examination' set by the judicial administration's own examination board (not by the student's own university). If successful, the student then proceeds to the second stage, a two-year practical apprenticeship in the courts. During this period the trainee must work in five areas: in civil courts, in a criminal court, in a public prosecutor's office, in a private law office and with an administrative authority. Trainees during their apprenticeships are regarded as temporary civil servants and receive a government salary. At the end of this two-year training period, the trainee must sit the 'second state examination'. Successful completion of this examination enables the trainee to enter the judicial profession. This two-step training regime is not confined to judges. It is standard training for all German lawyers. Judges are initially appointed to a court of first instance (i.e. a local or regional court) on a probationary basis for a period of three to five years depending on the states (*Lander*). After that the position may be made permanent. Judges are regarded as professional civil servants.

Appointments and promotions are made by the Minister of Justice of the *Lander* and in some *Lander* with the agreement of a Committee on Judicial Appointments composed of members of the *Land* parliament, judges and lawyers. Generally, the *Land* cabinet must approve the appointment. Promotion to the higher courts may take place only after ten years' service in the courts of first instance. At federal court level, members of the two houses of parliament are involved in the appointment process along with the Federal Justice Minister and the *Lander* Justice Ministers, in consultation with the judiciary's presiding council.

The judges of the Federal Constitutional Court are not civil servants and are not likened to the other federal and lander judges. In effect this court does not form part of the career ladder of the judiciary, although judges from the federal courts may be appointed to the Federal Constitutional Court. To become a judge of that court one must be at least forty years of age, be eligible for election in the Bundestag and possess a legal qualification. The court consists of two chambers or senates consisting of eight judges each. Appointment to the Federal Constitutional Court is by election: each of the Houses of Parliament elects, by a two-thirds majority, half the judges to each of the two senates of the court. Most of the judges come from judicial backgrounds or are civil servants, law professors, or lawyers. Appointment to the court is for a fixed twelve-year term which is non-renewable.

Denmark

The legal system in Denmark is not modelled on the civil law system but is more akin to that of the common law. However, the Danish judiciary has demonstrated quite a degree of judicial restraint in developing the laws, in contrast to the activism of their common law brethren. Denmark operates under a written constitution which provides for a unitary state with a unicameral legislature, a government and a courts system.

Judges in Denmark are appointed by the monarch on the recommendation of the Minister of Justice, who is advised by the President of the Supreme Court and the Presidents of the Courts of Appeal (these courts are at the apex of the court hierarchy, which is a three-tier system with city courts at the base of the structure). Although the appointment of judges lies with the executive power, the decisive influence rests with the judiciary itself. It is most unlikely that the minister would appoint a judge not recommended by the courts.

To be appointed to the Supreme Court, applicants must pass an examination by rendering his or her opinion before the full court in four cases.

To qualify for judicial office, an individual must possess a university law degree. Most judges have had previous careers either as deputy judges or as civil servants in the Ministry of Justice. Deputy judges are civil servants employed by the Ministry of Justice who sit judicially for a number of days per year. The appointments system has been the subject of debate in Denmark with consideration given to the setting up of an independent board to advise the minister.

Sweden

The Swedish legal system occupies a halfway house between the civil law system and the common law system. It does not have a strong codified system like the French and Germans and it does not rely heavily on case law. Instead Swedish law is based to a large extent on written law that is mainly influenced by German law.

Judges are appointed by the government. A special committee known as the Judge Proposal Committee gives a proposal to the government on the applicants who are best suited to the post, listed in order of preference. The selection procedure for District Court judges is based on an application procedure supported by references. The system of proposing names to the government is done openly.

For appointment to the higher judicial posts there is no application procedure and the committee is not involved in the process. These judges are appointed directly by the government.

In Sweden judges must undergo specialised training. After obtaining a law degree a person intent on becoming a judge must serve an apprenticeship in a District Court (the courts of first instance) for a period of two years. An apprentice is known as a law clerk. After apprenticeship it is then necessary to serve time as a reporting clerk in a court of appeal. Subsequent to service as a reporting clerk, promotion is to the position of assistant judge in a court of first instance for a training period of twelve months. The assistant judge is given full judicial powers. After this training period, a trainee must undergo a nine-month period as an assistant judge in a court of appeal. After this training, appointment is made to the position of judge.

Appendix II
Court structure and jurisdiction

Extracts from *Report of the Constitution Review Group*[61]

The present system of courts, as envisaged in Article 34 of the Constitution, was established by The Courts (Establishment and Constitution) Act 1961. It is essentially the same as the system that was established under the previous Constitution and that continued until 1961 under the Transitory Provisions of the present Constitution.

The organisation and the number of judges of the various courts are, pursuant to Article 36 of the Constitution, regulated in accordance with law. The present structure is as follows:

The *Supreme Court* consists of the Chief Justice and up to seven ordinary judges.

The *High Court* consists of its President and up to nineteen ordinary judges.

The Chief Justice and the President of the Circuit Court are ex officio additional judges of the High Court and the President of the High Court is ex officio an additional judge of the Supreme Court. In addition, ordinary Supreme Court and ordinary High Court judges may be requested to sit, respectively, as additional High Court and additional Supreme Court judges.

The *Circuit Court* consists of its President and up to twenty-four ordinary judges. The President of the *District Court* is ex officio an additional judge of the Circuit Court.

The *District Court* consists of its President and up to fifty other judges.

The *Special Criminal Court* came into existence in 1972 when the Government invoked Part V of the Offences Against the State Act 1939, which allows for non-jury courts in times of emergency when the Government by proclamation declares the ordinary courts to be inadequate to secure the administration of justice. There are nine judges assigned to the court, all of whom are serving judges of the High Court, the Circuit Court or the District Court. The court sits as a court of three without a jury. The President of a sitting is one of three of the nine judges appointed to serve in that capacity. Offences scheduled under that Act are tried in the Special Criminal Court. Offences other than those scheduled in the Act can be brought before the Special Criminal Court at the discretion of the Director of Public Prosecutions.

[61] Stationery Office, 1996. See pp 141, 142, 143

jurisdiction

The jurisdiction of each court is established in broad terms by the Constitution. Legislation and, to some extent, case law determine the type of business which can be assigned to, or withdrawn from, each court.

The State (outside of Dublin city) has been divided into twenty-two District Court districts and most of the District Court judges are assigned by the Government to a particular district; the remainder of the District Court judges are assigned to courts in the Dublin metropolitan area or are moveable. Within each district, there is a number of District Court areas, the significance of which is that a court must be held in each area. For the purposes of the Circuit Court, the State has been divided into eight circuits. The District and Circuit courts are considered to be the courts of 'local and limited jurisdiction'. They are local in the sense that each Circuit and District Court judge sitting in any city, town or village has the jurisdiction (generally speaking) to hear only cases which either are brought against defendants living in the county or district for which the judge is sitting or arise from events occurring there or relating to property there.

The High Court has always had a very wide jurisdiction in civil and in criminal cases (when it sits as the Central Criminal Court). The High Court's jurisdiction is underpinned by Article 34.3.1° which gives it 'full original jurisdiction and power to determine all matters and questions, whether of law or fact, civil or criminal'. This gives the court jurisdiction over all justiciable controversies.

The Supreme Court's most important jurisdiction is appellate. Article 34.4.4° provides that no statute may be enacted which excludes the Supreme Court's appellate jurisdiction in cases which involve the constitutionality of a law.

EU law is part of Irish law. In most cases, Irish domestic courts have jurisdiction over actions involving EU law. Where an Irish court has difficulty in interpreting EU law it may (and if it is a final court of appeal it must), by virtue of Article 177 of the EEC Treaty, request a preliminary ruling from the European Court of Justice (ECJ) concerning:

i) the interpretation of the Treaties
ii) the validity and interpretation of acts of EU institutions
iii) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

This, uniquely, provides for a division of jurisdiction, with the Irish court retaining the power to determine questions of fact and Irish law, while EU law is settled by the ECJ, which makes an authoritative interpretation.

Appendix III

Oaths and declarations in some other states

England and Wales

In England and Wales, the judicial oath takes the following format:

> I, , do swear that I will well and truly serve our Sovereign in the office of , and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will. So help me God.

New Zealand

All judges are required to take the oath of allegiance and the judicial oath. The wording is set out in the Oaths and Declarations Act 1957.

Judicial oath

> I, , swear that I will well and truly serve her (or his) Majesty (specify as above), her (or his) heirs and successors, according to law, in the office of ; and I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill-will. So help me God.

Official oath

> I, , swear that I will well and truly serve her (or his) Majesty (specify as above), her (or his) heirs and successors, according to law, in the office of .
> So help me God.

Germany

The relevant legal provision is s38 of the Deutsches Richtergestz (German Law of Judges) which states (unofficial translation):

s38 Oath of judges:

1 The judge has to take the following oath during a public session of the court:

I swear to execute the office of a judge true to the Basic Law of the Federal Republic of Germany and true to the Law, to judge according to my best knowledge and belief and without respect of person, and to only serve truth and justice, so help me God.

2 The oath can be taken without the words, so help me God.

3 The oath can, for judges in the service of a Federal State, contain a signing on to the constitution of that Federal State, and can – instead of being taken before a court – be taken publicly in another manner.

Sweden

A judge shall take the following oath before assuming the duties of office:

> I (name) promise and affirm on my honour and conscience that I will and shall impartially, as to the rich as well as to the poor, administer justice in all matters to the best of my ability and conscience, and judge according to the law of the Realm of Sweden; that I will never manipulate the law or further injustice for kinship, relation by marriage, friendship, envy, ill-will, or fear, nor for bribes or gifts, or any other cause in whatever guise it may appear; nor will I declare guilty one who is innocent, or innocent one who is guilty. Neither before nor after the pronouncement of the judgment of the court shall I disclose to the litigants or to other persons the *in camera* deliberations of the court. All this, as an honest and righteous judge, I will and shall faithfully observe.

The oath shall be taken before the court or its chairpersons.

Appendix IV

Reviewing judicial conduct

A paper prepared by Laura Rattigan

in some common law states

England and Wales

In England and Wales an informal system of judicial discipline is operated by the Lord Chancellor. Complaints about the behaviour of a judge are dealt with by the Judicial Group section of the Lord Chancellor's department. The complaints procedure is initiated by a complainant in writing to the Lord Chancellor's department. This letter is then passed on to the judge in question, who is given a chance to reply to the complaint. The complaint is then considered by the Lord Chancellor, who writes a letter back to the complainant with the judge's comments.

Apart from the statutory power of removal in the case of lower court judges, the Lord Chancellor has no formal powers of discipline. Despite this, the Lord Chancellor asserts his authority in an informal manner and in this regard works closely with the heads of division (the Lord Chief Justice, the Master of the Rolls, the Vice-Chancellor and the President of the Family Division of the High Court). In practice, it is open to the Lord Chancellor to rebuke or reprimand a judge but whatever course he adopts, he is careful to ensure that the principles of natural justice are observed and that the judge in question is given the opportunity to put forward his or her comments[62].

United States[63]

In the United States, Congress in 1980 passed the Judicial Conduct and Disability Act, thereby creating a system of self-discipline for federal judges. The Act provided for the administration of the disciplinary procedure to be left within the judicial branch. Removal from office is excluded as an available sanction and a

[62] Working Group on a Courts Commission, Sixth Report, November 1998 at p 171

[63] Report of the ABA Commission on Separation of Powers and Judicial Independence, *Federal Judicial Independence: A Review of Recent Issues and Arguments, Institutional Independence Issues.* http://www.abanet.org/govaffairs/judiciary/r4b.html

disciplinary action cannot be brought against a judge because of disagreement with the merits of his or her decision.

The Act permits any person to file a complaint alleging that a federal judge (except Supreme Court judges) 'has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or … is unable to discharge all the duties of office by reason of mental or physical disability'. Since 1990, the Act has also let a chief judge of a federal circuit dispense with a formal complaint. It is open to the chief judge to dismiss the complaint if it is frivolous. If he does not dismiss the complaint he or she must appoint a special committee to investigate the complaint and file a written report containing both the findings and recommendations with the circuit judicial council. The Act specifies some of the actions a council may take. However, the sanction of removal from office is prohibited because only the President has the power to do this. The sanctions that are available include: certifying disability of a judge, requesting that the judge in question retire, ordering that no more cases be assigned to that judge for a time, and censuring or reprimanding a judge privately or publicly. The judicial council may also dismiss a complaint or refer it to the judicial conference for resolution.

The Act permits a complainant or a judge aggrieved by the order to petition the judicial council for review and also permits a petition for review to the judicial conference.

in some civil law states

France

The Superior Judicial council is endowed with responsibility for disciplining judges. The council was established under the 1958 Constitution and consists of sixteen members, the majority of whom are elected by judges. It is presided over by the President of the Republic or the Minister for Justice. Disciplinary measures are provided for by statute and these include: a reprimand in the judges' file; transfer to another position; downgrading; enforced retirement; dismissal. Disciplinary proceedings before the council are initiated by the Minister for Justice who is also responsible for the enforcement of any decisions reached. French citizens also have the right to sue the state for damages arising from the faults of judges.

Germany

Pursuant to German law of 1961, Special Judicial Service Courts were established to discipline judges. These are not independent bodies but are formed from existing courts. Like France, the Germans introduced legislation whereby aggrieved citizens can sue the state for damages arising from the fault of a judge. The state retains the right to sue the judge at fault to recover any damages paid to the victim.

Denmark

The special court, composed of judges of the Supreme Court, a court of appeal and a city court, which decides on whether a judge should be removed, can also take disciplinary action against a judge for lesser failures in carrying out his or her duties.

Sweden

Disciplinary action falls to the Labour Courts and takes the form of a warning or deduction from wages in regard to lesser contractual failures.

Appendix V

Judicial conduct

Criteria adopted by the Commission for Classifying Complaints under s20 New South Wales Judicial Officers Act 1986

s20(1) (b) and 20(1) (h)
The complaint was frivolous, vexatious, or not in good faith. Further consideration of the complaint by the Commission was unnecessary or unjustifiable

s20(1) (b) and 20(1) (f)
The complaint was frivolous, vexatious or not in good faith and was related to the exercise of a judicial or other function that was subject to adequate appeal or review rights

s20(1) (b), 20(1) (d) and 20(1) (h)
The complaint was frivolous, vexatious and not in good faith and occurred at too remote a time. Further consideration of the complaint by the Commission was unnecessary or unjustifiable

s20(1) (d) and 20(1) (h)
The matter complained about occurred at too remote a time and further consideration of the complaint by the Commission was unnecessary or unjustifiable

s20(1) (d), 20(1) (f) and 20(1) (h)
The matter complained about occurred at too remote a time to justify further consideration and related to the exercise of a judicial or other function and was subject to adequate appeal or review rights. Further consideration by the Commission was unnecessary or unjustifiable

s20(1) (e) and 20(1) (h)
There was a satisfactory means of redress or of dealing with the complaint or the subject matter of the complaint and further consideration by the Commission was unnecessary or unjustifiable

s20(1) (e), 20(1) (f) and 20(1) (h)
There was a satisfactory means of redress or of dealing with the complaint or the subject matter of the complaint and the complaint related to the exercise of a judicial or other function and was subject to adequate appeal or review rights. Further consideration by the Commission was unnecessary or unjustifiable

s20(1) (f) and 20(1) (h)
The complaint related to the exercise of a judicial or other function that was subject to adequate appeal or review rights and further consideration of the complaint by the Commission was unnecessary or unjustifiable

s20(1) (g) and 20(1) (h)
The person complained about was no longer a judicial officer and further consideration of the complaint by the Commission was unnecessary or unjustifiable

s20(1) (g)
The person complained about was no longer a judicial officer

s20(1) (h)
Further consideration of the complaint by the Commission was unnecessary or unjustifiable

Appendix VI

Removal of judges in some common and civil law states

A paper prepared by Laura Rattigan

common law states

England and Wales

Power of removal is vested in the Lord Chancellor who may remove lower court judges for incapacity or misbehaviour[64]. Superior Court judges hold office during good behaviour subject to a power of removal by Her Majesty on an address presented to her by both Houses of Parliament[65]. But in fact English and Welsh judges are not protected in any way from a change in their tenure brought about by statute: parliament retains the power to alter their tenure of office. Thus in 1981, the Supreme Court Act set a retirement age of seventy-five years for higher judges. As for removal from office, since 1701 only one judge has been removed from office on petition of both Houses of Parliament[66].

United States

Federal judges hold their positions during good behaviour, which in effect means for life or until they choose to retire at either sixty-five years or seventy years. Removal of federal judges is effected by a process of impeachment and conviction pursuant to Article II, section 4, of the US constitution on grounds of 'treason, bribery or other high crimes and misdemeanours'. Considerable controversy exists as to the exact meaning of 'other high crimes and misdemeanours'.

The impeachment process is initiated in the House of Representatives by the laying of a charge which is voted upon by a simple majority vote of the members of the House of Representatives, there being a quorum on the floor. Trial is then held in the Senate which may convict by a two-thirds vote of the members of the Senate present and voting, if a quorum is present[67]. Since American independence in 1776, thirteen federal judges have been impeached. Of the thirteen

[64] S17(4) Courts Act 1971
[65] S11(3) Supreme Court Act 1981
[66] Sir Jonah Barrington, an Admiralty Judge in Ireland was removed for embezzling money and neglecting his bench duties in 1830
[67] Article I, S3

impeachment proceedings, eleven went to trial with four resulting in acquittals and seven in removals[68].

Australia

The Australian constitution guarantees security of tenure for federal judges by providing for life appointment with retirement at seventy years[69]. Parliament may fix a lower retirement age for federal judges below the office of the High Court.

Section 72 (ii) of the Australian constitution states that judges:

> Shall not be removed except by the Governor General in Council, on an address from both houses of the parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

The Australians, too, have been faced with difficulties posed by the meaning of the terms 'misbehaviour or incapacity' because they are not constitutionally defined.

Each house may conduct its own inquiry. Alternatively, one of the houses may begin the impeachment process and the other house may accept the finding. If misbehaviour or incapacity is proved to the satisfaction of each house, then an address must be made by each house to the Governor General in Council in the same session. An 'address' is the normal method employed by a house to make known its wishes to the Crown. 'Praying' underlines the petitionary nature of the communication to the Governor General in Council. Removal is effected formally by the Governor General in Council.

Like Bunreacht na hÉireann, the Australian constitution does not detail specifically how the impeachment process is to be conducted. The inadequacies of procedure were highlighted in 1984 when allegations of judicial misconduct were raised about a High Court judge, Murphy J. In this case an ad hoc tribunal of inquiry was established, known as the Senate Select Committee, to investigate the conduct of the judge in question. The committee comprised six senators, drawn from three political parties. A majority decision (three to two and one undecided) was reached by the committee that there was no conduct amounting to misbehaviour. As a result of the split vote, a second committee of four senators from the same three political parties was established, assisted by two retired Supreme Court judges. This committee embarked on a fact-finding mission to determine whether the judge had perverted the course of justice and whether there was conduct amounting to misbehaviour. In the course of so doing, witnesses were examined and the ordinary rules of

[68] Abraham, *The Judicial Process*, 7th edn, at p 48
[69] S72(iii) of the Australian Constitution

evidence were applied. On the balance of probabilities, the committee found that the judge was guilty of s72 misbehaviour. However, the Court of Criminal Appeal of New South Wales did not support these findings. In 1986, further allegations were brought against the same judge. On this occasion, parliament passed the Parliamentary Commission of Inquiry Act 1986 which established a body comprised of three retired judges for the purpose of investigating the allegations. The commissioners reported to parliament on the meaning of 'misbehaviour' pursuant to section 72(ii). They held that misbehaviour is not restricted to misconduct in office and need not constitute a crime and is satisfied by conduct rendering a judge unfit for office. The 1986 Act was repealed later that year by parliament which effectively wound up the Commission of Inquiry. A month later Murphy J died.

New South Wales (Australia)

The New South Wales Constitution Act, 1902 has been amended so as to provide by s53 that no holder of a judicial office, including a magistrate, can be removed from office except by the Governor, or an address from both houses of parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity. Section 53 is similar to s72 (ii) of the Australian Constitution but it extends to all judicial officers. A judicial officer is given added protection by s41 of the Judicial Officer Act 1986 (NSW). That section provides that a judicial officer may not be removed from office in the absence of a report of the Conduct Division of the Judicial Commission that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.

Canada

The Canadian constitution has provisions very similar to the Irish. In Canada, security of tenure of judges of the superior courts is guaranteed by section 99 of the Constitution Act 1867:

> The judges of the superior courts shall hold office during good behaviour but shall be removable by the Governor General on address of the Senate and House of Commons.

Section 99 originally provided for life tenure but this section was amended to provide for mandatory retirement at seventy-five years. In 1971, the Judges Act was passed which established the Canadian Judicial Council, an independent body composed of judges, for the purpose of promoting efficiency and improving the judicial services. As part of its work the council investigates complaints concerning judges as a precondition of removal. However, the ultimate decision

concerning the removal of a judge rests with parliament. Parliament may remove a judge by a joint address by simple majority vote by both houses. Amendment of this voting procedure to a two-thirds voting majority has been recommended by various authorities[70]. This could be brought about by a constitutional amendment, which the council viewed as unlikely, or parliament could legislate for it. To date no action has been taken.

Since Confederation in 1867 only five petitions[71] for removal of a superior court judge have been filed in the Canadian parliament. Four of these occurred in the nineteenth century but none came to a parliamentary vote. The fifth petition, known as the Landreville Case after the judge in question, occurred in 1966-67 and was dealt with through a commission of inquiry. The matter did not come to a parliamentary vote because the judge resigned. However, this case exposed the serious deficiencies in the impeachment process. It provided the impetus for the creation of the Canadian Judicial Council which examines the conduct of judges. Following the creation of the council, parliament has not yet voted on the removal of a judge[72].

New Zealand

Appointment as a judge in New Zealand is for life. Section 23 of the Constitution Act 1986 provides that a judge of the High Court shall not be removed from office except by the Sovereign or the Governor General, acting upon an address of the House of Representatives. The grounds for removal are the judge's 'misbehaviour' or 'incapacity to discharge the functions of the judge's office'.

A new Constitution Amendment Bill 1999 proposes to amend section 23 by providing that the parliamentary removal procedure must be initiated by a motion of the Attorney General. The motion must be accompanied by the Attorney General's report setting out the reasons why he or she considers the motion should be considered by the House. The House of Representatives must then appoint a select committee to consider the motion and the report and recommend to the House whether or not the address should be agreed to.

The Constitution Amendment Bill also amends the 1986 Act to make the grounds of removal of certain judges and judicial officers consistent with those of High Court judges.

---

[70] Canadian Judicial Council, Annual Report, 1996-97; Dr Martin Friedland's Report, *A Place Apart: Judicial Independence and Accountability in Canada*

[71] Canadian Judicial Council, Annual Report, 1996-97

[72] Ibid

civil law states

France

The 1958 Constitution asserts the life tenure of the judiciary. Judges are removable solely for misconduct in office and then only on the recommendation of the Constitutional Council.

Germany

The removal of federal judges is initiated by the Federal Parliament against any federal judge thought to be guilty of 'infringing the principles of the basic law'[73]. The Federal Constitutional Court then tries the accused judge and a two-thirds vote of the court is required to convict. The court may give the offending judge a different function, retire or dismiss him or her. This impeachment process has never been used.

Judges of the Federal Constitutional Court can only be removed by the Federal President on a motion by the court itself and not by political impeachment or removal by parliament.

Denmark

Under the Danish constitution a judge may be removed from office only by a decision of a court[74] and only in the case of gross misconduct or terminal illness. Removal is determined by a special court composed of judges from the Supreme Court, a court of appeal and a city court. Otherwise, appointment is for life subject to retirement at sixty-five years.

Sweden

In Sweden the most important source of constitutional law is the Instrument of Government of 1975. Pursuant to Chapter 11, section 5, of this Instrument, a permanent salaried judge may be removed from office only

1 if through a criminal act or through gross or repeated neglect of his official duties he has shown himself to be manifestly unfit to hold the office; or
2 if he has reached the relevant age of retirement or is otherwise under a legal obligation to retire on pension.

[73] Article 98 of the Constitution
[74] S64 of the Danish Constitution

In principle judges are irremovable. However, removal on the basis of dereliction of duty is dealt with as part of labour law, and is determined in the final instance by the Labour Court. Indeed, the Swedish constitution (contained in the Instrument of Government) provides that if a permanent salaried judge is removed from office by a decision of a body other than a court of law, the judge is entitled to have that decision reviewed by a court. The decisive factor is whether a judge has fulfilled his obligations to his employer (the state).

Appendix VII

Judicial independence

Extract from *Ethical Principles for Judges*

Canadian Judicial Council, 1998

Commentary

1 Judicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making[75]. Judicial independence thus characterizes both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality in fact; the latter with defining the relationship between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence and impartiality. The Statement and Principles deal with judges' ethical obligations as regards the individual and collective independence. They do not deal with the many legal issues relating to judicial independence.

2 In *Valente v The Queen,* LeDain J noted that '… judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationship to the executive and legislative branches of government [76]. He concluded that '… judicial independence is a status or relationship resting on objective conditions or guarantees as well as a state of mind or attitude in the actual exercise of judicial functions …'[77] The objective conditions and guarantees include, for example, security of tenure, security of remuneration and immunity from civil liability for judicial acts.

3 The first qualification of a judge is the ability to make independent and impartial decisions ... Judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter if independent and impartial

[75] S Shetreet, *Judges on Trial*, 1976 (hereafter '*Shetreet*'), at 17
[76] [1985] 2 SCR 673 at 687
[77] Ibid at 689

decision-making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence.

4 Judges must, of course, reject improper attempts by litigants, politicians, officials or others to influence their decisions. They must also take care that communications with such persons that judges may initiate could not raise reasonable concerns about their independence. As the Honourable JO Wilson put it in *A Book for Judges*:

> It may be safely assumed that every judge will know that [attempts to influence a court] must only be made publicly in a court room by advocates or litigants. But experience has shown that other persons are unaware of or deliberately disregard this elementary rule, and it is likely that any judge will, in the course of time, be subjected to ex parte efforts by litigants or others to influence his decisions in matters under litigation before him.
>
> …
>
> Regardless of the source, ministerial, journalistic or other, all such efforts must, of course, be firmly rejected. This rule is so elementary that it requires no further exposition.[78]

5 Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence. As professor Nolan points out, judicial independence and judicial ethics have a symbiotic relationship.[79] Public acceptance of and support for the court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

> [O]nly by maintaining high standards of conduct will the judiciary (1) continue to warrant the public confidence on which deference to judicial rulings depends, and (2) be

[78] JO Wilson, *A Book for Judges* (1980) (hereafter '*Wilson'*) at 54-55.
[79] B Nolan, 'The Role of Judicial Ethics in the Discipline and Removal of Federal Judges', in *Research Papers of the National Commission on Judicial Discipline & Removal*, Volume I (1993), pp 867-912, at 874

> able to exercise its own independence in its judgements and rulings.[80]

In short, judges should demonstrate and promote high standards of judicial conduct as one element of assuring the independence of the judiciary.

6 Judges should be vigilant with respect to any attempts to undermine their institutional or operational independence. While care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change in the institutional arrangements affecting the judiciary, judges should be staunch defenders of their own independence. Although the form and nature of the defence must be carefully considered, the propriety in principle of such defence cannot be questioned.[81]

7 Judges should also recognize that not everyone is familiar with these concepts and their impact on judicial responsibilities. Public education with respect to the judiciary and judicial independence thus becomes an important function, for misunderstanding can undermine public confidence in the judiciary. There is, for example, a danger of misperception about the nature of the relationship between the judiciary and the executive, particularly given the Attorney General's dual roles as the cabinet minister responsible for the administration of justice and as the government's lawyer. The public may not get a completely balanced view of the principle of judicial independence from the media which may portray it incorrectly as protecting judges from review of and public debate concerning their actions. Judges, therefore, should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence, in view of the public's own interest.[82]

8 Judges are asked frequently to serve as inquiry commissioners. In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the appointment. There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticized and embarrassed by the very governments which appointed them. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their

---

[80] Ibid at 875

[81] These issues are addressed further in chapter 6, *infra*

[82] The phrase 'appropriate opportunities' should remind judges that the circumstances of such public interventions must be considered carefully given the constraints of the judicial role. Some of the relevant considerations are discussed more fully in chapter 6, 'Impartiality'; see also, for example JB Thomas, *Judicial Ethics in Australia* (2d, 1997) (hereafter '*Thomas'*) at 106-111

compatibility with the judicial functions.[83] The Position of the Canadian Judicial Council on the Appointment of Federally Appointed Judges to Commissions of Inquiry, approved in March 1998, provides useful guidance in this area.

[83] It is interesting to note that the Australian High Court has ruled that, on separation of powers grounds, there are strict limits in law on the nature of commissions to which judges may be appointed: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743; *Kable v DPP* (1996) 70 ALJR 814; see also R MacGregor Dawson, *The Government of Canada* (3d) at 482: 'There would seem to be little purpose in taking elaborate care to separate the judge from politics and to render him quite independent of the executive, and then placing him in a position as a Royal Commissioner where his impartiality may be attacked and his findings – no matter how correct and judicial they may be – are liable to be interpreted as favouring one political party at the expense of the other. For many of the inquiries or boards place the judges in a position where he cannot escape controversy: … It has been proved time and again that in many of these cases the judge loses in dignity and reputation, and his future is appreciably lessened thereby. Moreover, if the judge remains away from his regular duties for very long periods, he is apt to lose his sense of balance and detachment; and he finds that the task of getting back to normal and of adjusting his outlook and habits of mind to purely judicial work is by no means easy'

Appendix VIII

Extracts from *Report of the Constitution Review Group*

whether the one-judgment rule should be retained where the validity of laws is in question

This rule applies to constitutional decisions of the Supreme Court on the validity of post-1937 laws, not just to those arising from Article 26 references.

Article 34.4.5° was inserted into the Constitution by the Second Amendment of the Constitution Act 1941 during the transitional period when the Constitution could be amended by ordinary legislation. It parallels Article 26.2.2° (the italicised portions of which were also inserted by the Second Amendment) which provides:

> The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court *and shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed*.

Both provisions seem to have been inserted as a direct result of the decision of the Supreme Court in *In re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470. In this very sensitive case, the Supreme Court upheld the constitutionality of the Offences Against the State (Amendment) Act 1940 (which provided for internment) a few months after the High Court had pronounced that similar legislation was unconstitutional. Chief Justice Sullivan commenced the judgment of the court by announcing that it was the 'decision of the majority of the judges' and as Chief Justice Finlay was later to state in *Attorney General v Hamilton (No 1)* [1993] 2 IR 250:

> This was apparently seen to indicate a dissenting opinion which, it was felt, could greatly reduce the authority of the decision of the court and, we are informed, and it is commonly believed, led directly to the additional clauses by the Act of 1941 in both Article 26 and Article 34.

This is borne out by Mr de Valera's comments in the Dáil during the debate on the Second Amendment of the Constitution Bill (82 *Dáil Debates* 1857-9):

> From an educational point of view, the proposal [for separate judgments] would, no doubt, be valuable, but, after all, what do we want? We want to get a decision ... The more definite the

> position is the better, and, from the point of view of definitiveness, it is desirable that only one judgment be pronounced ... [and] that it should not be bandied about from mouth to mouth that, in fact, the decision was only come to by a majority of the Supreme Court. Then you have added on, perhaps, the number of judges who dealt with the matter in the High Court before it came to the Supreme Court, as might happen in some cases. You would then have an adding up of judges, and people saying: 'They were five on this side and three on the other, and therefore the law is the other way.'

What is important is legal certainty as to the judgment, which may affect fundamental issues. It was also suggested that the one-judgment rule allows the Supreme Court to provide the legislature with certainty without any of its members becoming the subject of political criticism and, possibly, pressure. Moreover, certainty would not be provided by a three-to-two judgment where at any time in the future a judge might change his mind on a fundamental issue.

It was argued, on the contrary, that a diversity of judgments would reflect society's diversity on issues, would provide the losing side with the comfort that its views had been taken into consideration, and, as a result, society's satisfaction with the court would be increased. A variety of judgments would enrich the development of jurisprudence. Moreover, the judgments of the individual judges would be formulated in a manner designed to convince reasonable people.

The 'one-judgment rule' operates in the case of the Court of Criminal Appeal (see s28 of the Courts of Justice Act 1924) and the Special Criminal Court (see s40 of the Offences Against the State Act 1939). It may be noted that in *The State (Littlejohn) v Governor of Mountjoy Prison* (1976) the Supreme Court appeared to accept that this statutory 'one-judgment' rule was designed to protect individual members of the three-member Special Criminal Court from untoward pressures. A similar rule applies in the case of the European Court of Justice (although not in the European Court of Human Rights). Here again the 'one-judgment' rule is thought to protect individual members of that court, as otherwise in sensitive cases affecting the vital interests of one state the judges of that particular nationality might be expected to pronounce in favour of that state.

Proposals for change

The Review Group considered the following:

i) delete Article 34.4.5°
ii) delete Article 26.2.2°
iii) retain Article 26.2.2° but delete Article 34.4.5°.

Arguments for deletion of Article 34.4.5°

1 a) the rule does not apply to pre-1937 legislation and multiple judgments have been delivered in important cases such as the *Norris* case which examined the constitutionality of such pre-1937 laws. The courts also have had difficulty in determining whether the rule applies to 'mixed' cases where pre-1937 laws have been subsequently amended by post-1937 laws

b) the rule does not apply where a Divisional High Court (that is, where the High Court sits as a court of three) pronounces on the validity of a post-1937 law. Such a court may deliver several judgments. In *In re Haughey* [1971] IR 217 several judgments were delivered by the High Court, yet the Supreme Court was bound by the one-judgment rule as far as the constitutionality of the law was concerned

c) the rule obliges the Supreme Court to engage in an often artificial division between the constitutionality of the law and the other related constitutional issues raised by a case. This point was adverted to by Blayney J in *Meagher v Minister for Agriculture and Food* [1994] 1 IR 239, a case where one judgment was delivered on the validity of the law, yet several judgments were delivered on the validity of statutory instruments promulgated pursuant to that law, even though the court plainly found it difficult to separate the issues in that case. In this respect, *Meagher* is not an isolated case, as 'split' Supreme Court judgments (that is, where one judgment is given on the issue of the validity of the law, with several judgments given on the subsidiary issues arising) have been delivered in upwards of twenty cases

d) as *Meagher* confirms, the one-judgment rule does not apply to statutory instruments made pursuant to a post-1937 law

e) the rule does not apply to constitutional cases (for example the *X* case) which do not concern the validity of a law

2 the rule may give rise – and possibly it already has done so – to serious practical difficulties in its application. Suppose that two judges are in favour of invalidating the law on ground A, but reject ground B, whereas another two are in favour of invalidating the law on ground B, but reject ground A. The fifth member of the court is in favour of invalidating the law on ground C, while rejecting grounds A and B. How is the judgment of the court to be delivered? Or is the court merely to state that the law is invalid?

3 the rule is itself completely out of harmony with the common law tradition which has always permitted individual judgments. Moreover, even in some civil law jurisdictions where the 'one-

judgment' rule is the norm, it has been considered desirable to abandon the rule in the Constitutional Court. This has already happened in Germany and Spain

4 empirical evidence – admittedly impressionistic – suggests that the one-judgment rule affects the quality of the judgment, since dissent is artificially suppressed and the court strives for the lowest common denominator so that a majority of the court can endorse the judgment. It certainly inhibits the development and clarification of the law in the manner envisaged in the common law case by case system which is of the essence of our legal system. As the Attorney General's Committee on the Constitution (1968) noted:

> A single majority judgment may be a compromise and so less precise in its reasoning than an individual judgment .... Concurring and dissenting judgments will help to clarify the law for the authorities in implementing a Bill held valid under Article 26 and in drafting similar legislation, and may express a view which later on may obtain public support. Where the majority decision declares an Act or Bill invalid, separate judgments might be useful in indicating what alternative legislation would be permissible ... If the majority judges disagreed on their reasons for the decision, the majority judgment might give quite a misleading impression of the weight of authority for a particular view. The possibility of separate judgments should help to ensure clarification of the thinking of the majority who will be compelled to answer criticisms of their views more explicitly than they otherwise would. There might be a chance that a judge who knew he was in a minority might fail to write a judgment which, if fully reasoned and written, would have changed his colleagues' minds

5 the rationale for the rule was that the authority of the court's judgment might be undermined if dissents were to be published.

This contention remains to be established. Several judgments have been delivered in many of the key constitutional cases: see, for example, *The People (Director of Public Prosecutions) v O'Shea* [1982] IR 384, *Norris v Attorney General* [1984] IR 36, *Crotty v An Taoiseach* [1987] IR 713, *Attorney General v X* [1992] 1 IR 1, *Attorney General v Hamilton (No 1)* [1993] 2 IR 250 (the *Cabinet Confidentiality* case) and *In the matter of a Ward of Court* [1995] 2 ILRM 401. The authority of these decisions has not been shaken by the presence of minority judgments. As the Attorney General's Committee on the Constitution (1968) added:

> The 'uncertainty' resulting from public knowledge of the existence of dissenting or concurring judgments, which will be primarily of interest to lawyers, is probably unlikely to be a serious problem.

The presence of dissents in each of the above cases has added to the richness of our constitutional law

6 as the former US Supreme Court judge, Holmes J put it, a dissent in a constitutional case is essentially an appeal to a later generation of judges and lawyers. His dissents in a series of free speech cases in the 1920s are perhaps the most famous judgments in the entirety of US constitutional law and led the US Supreme Court later to accept them as good law and to the over-turning of the majority judgments. In this jurisdiction, dissents have sometimes later proved the basis for the over-ruling of the first decision: see, for example, the Supreme Court's acceptance in *The State (Browne) v Feran* [1967] IR 147 of the correctness of Johnston J's dissent in *The State (Burke) v Lennon* [1940] IR 136

7 even if the presence of minority judgments tended to encourage political dissent, such a consequence is not, as the Attorney General's Committee (1968) observed, 'necessarily undesirable' in a democratic society. Indeed, it supported the principle of freedom of expression. The one-judgment rule requires the judges to form a consensus. A consensus is usually based on either the lowest common level of agreement, or neutral grounds. In neither instance would one expect to find the soil most suitable for the development of jurisprudence. If each judge could make a judgment, the quality of judgments would tend to rise as each judge would articulate a position which must necessarily engage reasonable people. Moreover, the public would see the expert weighing of arguments for and against; they would appreciate that their views, even if they were on the losing side, were properly taken into account; the public's appreciation of the whole process would be enhanced because it would fairly reflect the diverse opinions within society. Furthermore, the procedure would sharpen people's perception of the independence of each judge.

Arguments for retaining Article 34.4.5°

1 it is the decision of the majority of the Supreme Court which really counts and only uncertainty is created by allowing the publication of dissenting opinions

2 the publication of dissenting opinions serves only to weaken the authority of the court's pronouncement and impair its persuasiveness.

Arguments for deleting Article 26.2.2°

1 the arguments already set out above apply with equal force to Article 26.2.2°

2 while it is admitted that an Article 26 reference is a special, unique procedure, in essence it is simply another mechanism by which the Supreme Court adjudicates on the validity of a

parliamentary measure. On this view, there is no reason why the one-judgment rule should apply to Article 26 references

3 even if one rationale of the one-judgment rule was to emphasise the collective nature of the Supreme Court's pronouncement and thereby to protect individual judges from untoward pressure in sensitive cases, this still does not justify retaining the rule for Article 26 references. While it is admitted that the majority of Article 26 references have involved matters of fundamental constitutional importance (although some have not), there have been many cases of fundamental importance (for example the *X* case and the *Cabinet Confidentiality* case) where the one-judgment rule did not apply and multiple judgments were delivered. The fact that multiple judgments were delivered does not appear to have compromised the stance of any individual judge.

Arguments for retaining Article 26.2.2° while deleting Article 34.4.5°

1 the special character of the Article 26 procedure justifies the retention of the 'one-judgment' rule. Here it is not a case of private litigants seeking a reasoned judgment but rather of one organ of the State requiring a straight, unqualified answer from another organ of the State on the constitutionality of proposed legislation. The certainty needed on such an important matter justifies the retention for Article 26 references of the one-judgment rule. Article 26 involves the Supreme Court in giving a decision of a binding nature and it may be contended that the President, Government, Oireachtas and the wider public are entitled to have that advice tendered with one voice. In this regard, it may be noted that on the one occasion when the Supreme Court dealt with an Article 26 reference prior to the adoption of the one-judgment rule – namely, the Offences Against the State (Amendment) Bill 1940 – the Chief Justice merely announced that the decision was that of the majority, even though no dissenting opinions were delivered. It was evidently felt that, even in the absence of a formal one-judgment rule, it would have been inappropriate to permit the delivery of dissenting opinions in an Article 26 reference

2 many of the Bills referred to the Supreme Court under the Article 26 procedure involve sensitive and fundamental issues. In such circumstances, it is appropriate that the court should speak collectively and with one voice. This shields individual judges from improper influence or pressure.

Recommendation

On the whole, Article 34.4.5° should be deleted. The rule is unsatisfactory in its operation and is apt to create anomalies. There is not, however, a consensus that Article 26.2.2° should be deleted, some members of the Review Group being of the view that the special character of the Article 26 reference procedure justifies the retention of Article 26.2.2°.

whether a decision in an Article 26 reference by the Supreme Court should be immutable

Article 34.3.3°, which confers immunity from legal challenge, was inserted into the Constitution by the Second Amendment of the Constitution Act 1941 during the transitional period when that Constitution could be amended by ordinary legislation. At that stage, only one Article 26 reference had taken place and a majority of the Supreme Court had upheld the validity of the internment provisions of the Offences Against the State (Amendment) Act 1940. Similar legislation had previously been invalidated by the High Court in December 1939. The language of Article 34.3.3° 'shall have been referred ...' suggests the drafters wished to ensure that the internment provisions of the 1940 Act should enjoy a permanent immunity from constitutional attack.

Despite the care taken in preparing a Bill, doubt may arise as to its constitutionality. Some Bills concern fundamental issues on which doubt cannot be allowed, indeed where it is desirable that there should be certainty extending indefinitely, or at least over a long period. In relation to adoption, for instance, certainty for a period of over fifty years, that is to say, over about two generations, would seem desirable. On the constitutionality of elections to the Dáil an even longer period could be essential.

The certainty provided by the Article prevails indefinitely unless terminated by a referendum. However, with the efflux of time, changed circumstances and attitudes may bring about a situation where a referred Bill that has been enacted may operate harshly and unfairly, denying justifiable redress in a context not originally foreseen.

The question to be addressed is whether the desirability of a measure of stability is reconcilable with an openness to challenge where reason and justice so demand.

The arguments for retaining and for relaxing the present unchallengeability rule may be summarised as follows:

Arguments for the retention of Article 34.3.3° in its present form

1 the object of the Article 26 procedure might be undermined if a Bill which had been upheld by the Supreme Court could be open to later challenge. In this regard, certainty and finality might be

said to be a seamless web: once the possibility of later challenge was admitted, the entire fabric unravels and the object of the procedure is defeated

2 even if the rule were to be relaxed and a limited period of immunity (of, say, seven years) were to be put in its stead, such a period would be essentially arbitrary. It might also have undesirable consequences in that as the end of the seven-year period approached a degree of uncertainty might be engendered, with the threat of fresh litigation.

Arguments for relaxing the present unchallengeability rule

1 while the need for some stability is recognised, the absolute nature of the present Article 34.3.3° is open to objection. As the number of Article 26 references increases and with on-going constitutional development, there is a real risk that this rule will operate to protect the validity of law in circumstances where, if the Supreme Court could later consider the matter afresh in the light of new circumstances, it would probably take a different view. The law should never be frozen. It should be free to flow with the needs of the people

2 a substantial degree of certainty is accorded by an affirmative decision on a reference to the Supreme Court. Such a decision would not be easy to dislodge, though it would not, of course, be immutable

3 at the time Article 34.3.3° was enacted (1941), it was assumed that the Supreme Court was strictly bound by its own previous decisions and could not overrule them (by reason of the doctrine of *stare decisis*). Now that this doctrine has been itself relaxed (in that the Supreme Court will over-rule previous decisions which have been shown to be clearly wrong), the retention of Article 34.3.3° is anomalous.

Arguments in favour of deleting Article 34.3.3°

1 the rule is inflexible and risks denying justifiable redress in circumstances not envisaged in the arguments on the Article 26 reference

2 if it appears likely that the reasoning underlying a judgment upholding the constitutionality of a law is defective and would not now be supported or endorsed by the Supreme Court, would it not be unsatisfactory if litigants or other persons affected by the law were to be required to wait for the expiration of some essentially arbitrary period (for example seven years) before being allowed to challenge the law in question?

3 the rule is apt to create anomalies such as the situation which would arise where, after the decision of the Supreme Court upholding the validity of the Bill, the Article or Articles upon which it based the decision is or are amended by referendum

4 furthermore, any immunity conferred by Article 34.3.3° could, of necessity, apply only to a challenge based on domestic constitutional law. It does not – and could not – immunise such a law against a challenge based on supposed incompatibility with European Union law

5 the unchallengeability feature of Article 34.3.3° may tend to inhibit the President from invoking his or her powers under Article 26. If the immunity were removed, the potentially useful reference procedure might be invoked more often

6 a further consequence of Article 34.3.3° is that the Supreme Court may be more prepared (especially, perhaps, where the arguments for and against the constitutionality of the Bill are finely balanced or where the practical consequences of the measure might be difficult to foresee) to strike down a Bill as unconstitutional, rather than to risk upholding the Bill in such circumstances.

Possible compromises

The Committee on the Constitution (1967) suggested that the immunity from legal challenge in Article 34.3.3° should be retained but limited to seven years. The Review Group reconsidered this solution as it has the benefit of appearing to give certainty, albeit for a limited period, whilst not calcifying the law for all time. However, the Review Group rejects this solution primarily for the following reasons:

a) the Supreme Court in *Murphy v Attorney General* [1982] IR 241 decided that a declaration that a post-1937 law is repugnant to the Constitution means that it is invalid from the date of its enactment. Without amendment of the present wording of Article 15.4, the same invalidity *ab initio* would probably apply to an Act for which the Bill had been referred to the Supreme Court if that Act were declared unconstitutional on a challenge after the seven-year period. The certainty contemplated by the seven-year stay could thus prove to be illusory, with undesired consequences, for example an obligation to compensate numerous claimants for loss or damage during the seven years. The desirability of amended provisions as to the date from which the invalidity of an Act declared unconstitutional takes effect, particularly where there has been an Article 26 reference, is discussed later

b) where the Supreme Court has given a favourable decision on an Article 26 reference it can be assumed that a subsequent successful challenge to the Act could only be brought by a person prejudicially affected in a manner not envisaged at the time of the reference or because of some other significant change of circumstances. It appears undesirable that anyone so affected should be delayed from challenging the constitutionality of the Act for a seven-year period

c) any period specified would of necessity be arbitrary and different time limits might be appropriate to different types of legislation. Such detailed selective provision would not be appropriate to the Constitution.

Two further suggestions were considered by the Review Group but did not receive general approbation:

a) that, on an Article 26 reference, the Supreme Court be asked to give an opinion rather than a decision on the constitutionality of the Bill. The majority of the Review Group are of the view that the role of the Supreme Court and separation of powers provided for in the Constitution make it preferable that the Supreme Court should give a decision rather than an opinion

b) that Article 34.3.3° be replaced by a provision which would require a person seeking to challenge the constitutionality of an Act, the Bill for which had been the subject of an Article 26 reference, to obtain leave from the court upon showing that a *prima facie* case existed. The majority of the Review Group considered that such a provision was not appropriate to the Constitution and would not be preferable to the simple deletion of Article 34.3.3°.

Some current difficulties

Attention should be drawn to some potentially anomalous features of Article 34.3.3°:

i) where an Act of the Oireachtas (the constitutionality of which while in Bill form has been upheld by the Supreme Court under an Article 26 reference) is subsequently amended by later legislation, perhaps in a radical fashion, may it be presumed that Article 34.3.3° does not also apply to the amendments? Would there come a point when the cachet of Article 34.3.3° could cease to apply, not only to the amendments, but perhaps also to the original Act following these radical amendments?

ii) where the Constitution was amended following the Supreme Court's decision upholding the constitutionality of a particular Bill, would Article 34.3.3° continue to apply? Although this question has not been authoritatively determined by the courts, the answer would appear to be that it would not.

Recommendations

On balance, Article 34.3.3° should be deleted in its entirety. Such a deletion would impact only marginally upon legal certainty, inasmuch as a decision of the Supreme Court upholding the constitutionality of the Bill would still be an authoritative ruling on the Bill which would bind all the lower courts and be difficult to dislodge. It is to be expected that the Supreme Court would not, save in exceptional circumstances, readily depart from its earlier decision

to uphold the constitutionality of the Bill. Such exceptional circumstances might be found to exist where the Constitution had been later amended in a manner material to the law in question, or where the operation of the law in practice had produced an injustice which had not been apparent at the time of the Article 26 reference, or possibly where constitutional thinking had significantly changed.

date of operation of judicial declaration of invalidity of an Act of the Oireachtas

The Review Group considered whether the courts should have power to place temporal limits on the effect of a finding of unconstitutionality. It recognised that a court decision which finds that a particular item of legislation is unconstitutional can have potentially far-reaching effects, particularly where the legislation has been in place for some time and has been widely acted upon. Accordingly, it considered the question whether the Constitution should be amended to ensure that the courts have power to place some form of temporal limitation on the scope of a finding of unconstitutionality. It seems appropriate first to consider briefly some of the case law in this area.

The nature of the problem is illustrated by examining the consequences which might have followed the Supreme Court's decision in *de Búrca v Attorney General* [1976] IR 38. In this case, the court held that key provisions of the Juries Act 1927 were unconstitutional because they excluded women and non rate-payers. The question immediately arose as to whether prisoners convicted by juries whose composition had been found to be unconstitutional would not have to be released. In the event, only one such prisoner sought to challenge the validity of his conviction. While a majority of the Supreme Court acknowledged the invalidity of that conviction, the prisoner was adjudged in the very special facts of that case to have forfeited his right to challenge it, as he had deliberately elected to proceed with a trial in full knowledge of the *de Búrca* case decision which had been handed down in the course of his trial: see *The State (Byrne) v Frawley* [1978] IR 326. It remains an open question what the position might have been had these special factors not been present.

In the seminal decision of *Murphy v Attorney General* [1982] IR 241, a majority of the Supreme Court ruled that a law enacted by the Oireachtas which was later ruled to be unconstitutional was void *ab initio*. Speaking for a majority of the court, Henchy J articulated what he termed the 'primary rule' of redress:

> Once it has been judicially established that a statutory provision is invalid, the condemned provision will normally provide no legal justification for any acts done or left undone or for transactions undertaken in pursuance of it; and the persons damnified by the operation of the invalid provision will normally be accorded by the courts all permitted and necessary redress.

However, Henchy J recognised that this rule was subject to important exceptions, especially having regard to the need to avoid injustice to third parties who had changed their position in good faith in reliance on the validity of the (now condemned) statutory provisions. Moreover, Henchy J also drew attention to the possibility of 'transcendent considerations which make such a course [of redress] undesirable, impractical or impossible'.

In the *Murphy* tax case, the invalidation of a key provision of the Income Tax Act 1967 raised the possibility of enormous claims for arrears of tax which – in the light of the Supreme Court decision – it was clear had been unconstitutionally collected. This did not happen because the Supreme Court held that the State was entitled to defeat the vast majority of such past claims for repayment of taxes by reason of its change of position and expenditure of public funds in reliance in good faith on the validity of the provisions in question. Even where such public policy considerations do not directly come into play, the potentially disruptive consequences of a finding of unconstitutionality may be mitigated by analogous pleas such as laches (that is, undue delay coupled with prejudice) or the Statute of Limitations. Thus, in *Murphy v Ireland* (1996), Carroll J held that a teacher who had been dismissed in 1973 by operation of section 34 of the Offences Against the State Act 1939 was now debarred by both laches and the Statute of Limitations from pursuing a claim for damages against the State, despite the fact that the section in question had been declared to be unconstitutional by the Supreme Court in 1991: see *Cox v Ireland* [1992] 2 IR 503.

While it is true that the Supreme Court ruled in the *Murphy* tax case that a statute of the Oireachtas which is later found to be unconstitutional must be deemed to be void *ab initio*, the Review Group considers that there may be a category of instances of so-called 'creeping unconstitutionality' which the court might not have had directly in mind. Thus, there may be instances where a statute was perfectly valid and constitutional at the date it was enacted, but *became* unconstitutional by reason of changing circumstances such as inflation or population movements. It is possible, for example, for an item of legislation fixing the maximum rent a landlord can recover for his or her property which was perfectly valid at the date of its enactment to have become unconstitutional with the passage of time because of the failure of the Oireachtas to revise the monetary limit upwards in line with inflation.

Experience in other jurisdictions

The question when constitutional invalidity becomes operative has also caused considerable difficulties in other jurisdictions possessing similar powers of judicial review. The United States Supreme Court has held that it has the inherent power to place temporal limits on the effect of its judgments and that it may decline to give a particular ruling or finding of invalidity retrospective effect: see *Linkletter v Walker* 381 US 618 (1965). In that case the court ruled that the US

constitution 'neither prohibits nor requires retrospective effect', so that it was the judicial task 'to weigh the merits and demerits' of retroactivity of the rule in question by looking 'to the prior history', to the 'purpose and effect of the new constitutional rule' and to whether 'retrospective operation will further or retard its operation'. This approach has the merit of pragmatism in that it leans against retrospectivity, but it is intellectually difficult to defend. It also leads to arbitrary results, in that, in practice, the benefit of judicial rulings is confined to the litigants in the case before the US Supreme Court or where similar cases are definitively pending at the date of the pronouncement of the judgment. It may be noted that such an approach did not commend itself to our Supreme Court in the *Murphy* case with Henchy J speaking of the arbitrariness and inequality, in breach of Article 40.1, that would result in a citizen's constitutional right depending on the fortuity of when a court's decision would be pronounced.

However, despite these criticisms, it must be noted that pragmatism is also the approach of the European Court of Justice (ECJ) which has frequently asserted the right to place temporal limitations on the scope of its own decisions: see, for example, Case 43/75 *Defrenne v Sabena* [1976] ECR 455 and Case 24/86 *Blaizot v Université de Liege* [1988] ECR 379. Moreover, the ECJ has asserted that it alone has the power to impose such a temporal limitation on the effect of its own judgments: see Case 309/85 *Barra v Belgium* [1988] ECR 355. A further refinement of this point is that a judgment must be deemed to have retroactive effect, *unless* the ECJ itself places 'a limitation of the effects in time of an interpretative preliminary ruling ... in the actual judgment ruling upon the interpretation sought': Case C-57/93 *Vroege* [1994] ECR 1-4541. A recent indication of the criteria governing the decision to place a temporal limitation is supplied by the decision in Joined Cases C-38/90 and C-151/90, *Lomas v United Kingdom* [1992] ECR 1-1781, where the ECJ said that such a limitation might be imposed on the basis of 'overriding considerations of legal certainty involving all the interests in the case concerned'.

The ECJ's case law in this area is highly complex, a point illustrated by the aftermath of its decision in Case 262/88 *Barber v Guardian Royal Exchange* [1990] ECR 1-1889, a case where it was held for the first time that the requirements of Article 119 of the EEC Treaty governing equal pay for men and women applied also to redundancy payments and 'contracted out' pension schemes. The ECJ did purport to place a temporal limitation on the scope of this judgment, but the ambiguities in that portion of the judgment led directly to a special Protocol in the Maastricht Treaty. Protocol No 2 was designed to clarify these ambiguities by restricting further the temporal effect of the *Barber* decision, while containing a saving clause 'in the case of workers or those claiming under them who have before [17 May 1990 – *Barber* judgment] initiated legal proceedings or introduced an equivalent claim under the applicable national law'. The *Barber* decision has given rise to no less that nine separate

judgments of the ECJ, each of which seeks to clarify aspects of the ruling as a temporal limitation: see Hyland 'Temporal Limitation of the Effects of the Judgments of the Court of Justice' (1995) 4 *Irish Journal of European Law* 208.

The practice of continental constitutional courts is to lean against retroactivity. Thus, in practice, all rulings of the German constitutional court are prospective in nature, save that a specific legislative provision (section 79(2) of the Federal Constitutional Court Act) permits new trials in criminal cases where a court convicts a defendant under a subsequently voided statute. The German constitutional court has also devised new strategies designed to deal with the impact of rulings of unconstitutionality. A law may be declared null and void (*nichtig)*, in which case the law will cease to be operative as and from the date of the decision. In addition, the law may be declared to be incompatible (*unvereinbar*) with the Basic Law, in which case the law remains unconstitutional, but not void. In such instances, the law in question is allowed a temporary transitional period in order to allow for the enactment of fresh legislation. This is an example of a so-called 'admonitory' decision of the constitutional court, a strategy which is designed to permit the legislature 'time to adjust to changing conditions or to avoid the political and economic chaos that might result from a declaration of unconstitutionality: see Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, 1989, p 61.

The Irish courts have to date declined to accept any 'admonitory' jurisdiction of this character. As Keane J said in *Somjee v the Minister for Justice* [1981] ILRM 324:

> The jurisdiction of the court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity ... is limited to declaring the Act in question to be invalid, if that indeed is the case. The court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.

This passage was expressly approved by the Supreme Court in *Mhic Mhathúna v Ireland* [1995] 1 ILRM 69. Perhaps the only example of where our courts have adopted something approaching the 'unconstitutional but not void' admonitory practice of the German courts may be found in *Blake v Attorney General* [1981] IR 117. In this case, having declared that key elements of the Rent Restrictions Acts 1946-1967 were unconstitutional, the Supreme Court expressly indicated that the Oireachtas should take steps to fill the immediate 'statutory void' and indicated that any new legislation 'may be expected to provide for the determination of fair rents, for a degree of security of tenure and for other relevant social and economic factors'. The court also strongly hinted that in this transitional period the applications brought by landlords for possession of rented property

should normally either be adjourned or decrees of possession granted with 'such stay as appears proper in the circumstances'.

whether the courts should be expressly given discretion to determine the date of operation of a judicial declaration of invalidity of an Act of the Oireachtas and/or afford relief from the consequences of such a declaration

In the light of the foregoing discussion, two aspects of the invalidity issue need to be considered:

1 the date from which the unconstitutional provision is declared invalid

2 the consequences of such a decision.

1 date of invalidity

At present Article 15.4 expressly prohibits the Oireachtas from enacting any law repugnant to the Constitution. The Review Group has not recommended any change in this Article. The courts have interpreted Article 15.4 to mean that, if a court declares a provision of a post-1937 Act to be repugnant to the Constitution, it is void *ab initio* because Article 15.4 prevents its ever being a valid law. This principle may not apply to a law declared unconstitutional which was not at the date of the passing of the Act repugnant to the Constitution but became so thereafter ('creeping unconstitutionality').

If the courts were now to be given power to declare an Act invalid from, say, a prospective date only, notwithstanding that it was repugnant to the Constitution when passed, this would mean that an Act which was enacted in contravention of Article 15.4 was to be treated as a valid law for the period prior to the effective date of the declaration of invalidity. The arguments for and against doing so may be summarised as follows:

Arguments for

1 at present the potentially chaotic aftermath of a finding of unconstitutionality is avoided only by the somewhat dubious invocation of doctrines such as laches (*Murphy v Attorney General* [1982] IR 241) and estoppel (*The State (Byrne) v Frawley* [1978] IR 326). To give the courts a general power of fixing the date of validity of a finding of unconstitutionality would be to do no more than recognise the reality that the courts will in practice find it necessary to limit the retroactive effect of their rulings

2 if the courts were given such a general power to be exercised on a 'just and equitable' basis, it is to be expected that the power would be exercised in a flexible manner so as to mitigate the unfairness of the arbitrary 'cut-off' dates which is a feature of US and European Court of Justice (ECJ) jurisprudence in this area

3 at present, the fear of the retroactive consequences of a finding of invalidity may deter the courts from ruling that a statute is unconstitutional.

Arguments against

1 the doctrine of voidance *ab initio* is the normal sanction attaching to both unconstitutional statutes and invalid administrative acts

2 if the courts were given the power to limit the temporal effect of a finding of invalidity, this could lead – as demonstrated by the US and ECJ jurisprudence – to arbitrary results and indefensible distinctions

3 it is not clear how the courts would exercise this power if it were conferred. What criteria could be employed to determine the date on which the law became unconstitutional? What parties would be heard by the courts before this power was exercised? In this regard, it may be noted that the successful plaintiff will often be indifferent as to the extent to which a finding of invalidity is given general retroactive effect.

Recommendation

The importance of the prohibition in Article 15.4 in ensuring that the Oireachtas operates within the limits set by the Constitution is recognised. A majority of the Review Group is, therefore, not disposed (Article 26 cases and 'creeping unconstitutionality' apart) to recommend generally that the courts should have jurisdiction to declare invalid, otherwise than *ab initio,* a statutory provision which at the date of its passing was repugnant to the Constitution.

2 consequences of a declaration of invalidity

Although a provision in an Act may be void *ab initio,* it is a separate issue as to whether the courts have adequate jurisdiction to deal with claims arising in relation to acts done prior to the declaration of invalidity in good faith and in reliance on the invalid law. To date, the courts have shown a willingness to exercise such a jurisdiction based upon doctrines such as laches (*Murphy v Attorney General*), and estoppel (*The State (Byrne) v Frawley* [1978] IR 326) or on the Statute of Limitations (*Murphy v Ireland* (1996)).

The courts appear to recognise that, notwithstanding the invalidity *ab initio,* the clock either cannot or should not be turned back. As Henchy J stated in *Murphy v Attorney General:*

> For a variety of reasons, the law recognises that, in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operations in a particular case, what has happened has happened and cannot and should not be undone.

A majority of the Review Group is, however, concerned that, while to date the courts have taken a pragmatic approach to claims resulting from declarations of unconstitutionality of laws and relied upon estoppel etc to prevent claims being pursued in relation to matters done pursuant to the invalid statute, circumstances might arise that would prevent the courts from relying on such expedients. Unacceptable situations could thus arise where relief could not be granted to persons who had acted in good faith, albeit on an invalid law, or where damaging consequences for society could not be averted.

Consideration was, therefore, given to providing the courts with an express constitutional jurisdiction to deal with such situations. The majority of the Review Group saw a special need for such an express provision where the courts were not authorised to fix a date from which invalidity of a law took effect other than the date of the original enactment. Some grounds for a cautious approach were first noted:

1 such a provision should not be drawn so widely as to provide a temptation for enacting legislation of uncertain constitutionality and relieving the State of the consequences, to the prejudice of those unable to obtain relief for damage suffered. This would greatly reduce the protection Article 15.4 is intended to give to individuals

2 if criteria are to be set for the exercise of discretion by the courts, they should include the need to balance the different rights involved: the rights of individuals who had suffered detriment by reason of the invalid law or acts done thereunder; the rights of individuals to be protected where in good faith they had acted in reliance on the invalid law; and, in exceptional circumstances, the interests of the common good where a declaration of invalidity would have adverse consequences for society.

Other members of the Review Group, while recognising that the courts should have jurisdiction to deal with the consequences of a declaration of invalidity, consider that the courts have shown a willingness to date to exercise such a jurisdiction and that the development of this jurisdiction should be left to the courts on a case by case basis. The members who take this view consider that the risks attached to giving an express jurisdiction to the courts in the Constitution (which might lead to a weakening of the protection intended by Article 15.4) are greater than the risk of the courts not developing their jurisdiction to prevent any damaging consequences for society of a declaration of invalidity.

Recommendation

A majority of the Review Group is in favour of amending the Constitution to provide the courts with an express discretion, where justice, equity or, exceptionally, the common good so requires, to afford such relief as they consider necessary and appropriate in

respect of any detriment arising from acts done in reliance in good faith on an invalid law.

While the foregoing comments are of general application to findings of constitutional invalidity, special consideration needs to be given to two exceptional categories:

1 the so-called 'creeping unconstitutionality' cases

2 cases where validity was originally confirmed on an Article 26 reference.

1 'creeping unconstitutionality' type cases

In this situation, legislation which was constitutional at the date of its enactment has become unconstitutional by reason of changing circumstances (for example, the failure to revise monetary limits in line with inflation or the failure to revise constituency boundaries in line with population movements). It would seem that it would not be correct, even when judged from a purely theoretical standpoint, to describe a law rendered unconstitutional on this ground as void *ab initio* and that to give the courts express power to determine the date on which such a law became unconstitutional would be simply to acknowledge the realities of this special type of case. Indeed, it is likely that the courts will assert such an inherent power to determine the date the law became unconstitutional in the special instance of 'creeping unconstitutionality', despite some judicial dicta to the contrary: see, for example, the comments of Murphy J in *Browne v Attorney General* [1991] 2 IR 58.

Recommendation

Given the uncertainties in this area, the Review Group favours giving the courts express power, in cases where they declare an Act to be unconstitutional but determine that at the date of its enactment it was not repugnant to the Constitution, to determine the date upon which it became unconstitutional.

2 Article 26 reference cases

These are cases where the Acts in their Bill form were referred to the Supreme Court under Article 26 of the Constitution and whose validity was originally upheld but in respect of which the Supreme Court has subsequently taken a different view and ruled the legislation in question to be unconstitutional. This situation could, of course, arise only if the Review Group's recommendation to amend Article 34.3.3° (which at present confers a permanent immunity on a Bill upheld under the Article 26 procedure) were accepted.

Argument for

1 the special features attending a declaration of invalidity in these circumstances means that the courts should have discretion in such cases to fix a date of invalidity other than the date of enactment. These special features are:

a) one of the principal purposes of Article 26 is to create legal certainty, particularly where the Bill is of a type which, if it were not referred and were subsequently declared unconstitutional, there would be serious consequences for society or for those who had acted in reliance upon it

b) the Bill will have been signed into law by the President only after receiving a decision of the Supreme Court to the effect that the Bill is not unconstitutional

c) having been signed into law pursuant to the express provisions of Article 26.3.3° the Act should never be considered to be protected by Article 15.4 at the time of its enactment and it is thus distinguished from the position of an Act where there has been no Article 26 reference

d) those administering the legislation and those affected by it must of necessity be entitled to rely on the Supreme Court decision upholding the validity of the law, especially as in the course of an Article 26 reference the court is obliged to consider every possible set of circumstances and arguments which might render the Bill unconstitutional. (In the course of ordinary litigation the *locus standi* rules generally prevent the court from doing this, because it is confined to dealing with such arguments as are relevant to the plaintiff's personal circumstances.)

e) many persons may have acted to their detriment, or altered their position in good faith, in reliance on the Supreme Court's decision upholding the constitutionality of the Bill.

Argument against

1 the power to impose a temporal limitation results – as is evidenced by the jurisprudence of the European Court of Justice and the US Supreme Court – in arbitrary cut-off dates and indefensible distinctions. This is true of the Article 26-type case as much as of the ordinary case where the court has declared a law to be invalid.

Recommendation

In the special case of declaration of invalidity of a law the Bill for which had been referred to the Supreme Court under Article 26, a

majority of the Review Group is in favour of amending the Constitution to give the courts an express jurisdiction to declare the law to be unconstitutional as of a stated date other than the date of enactment.

Appendix IX

Constitutionality of Bills and Laws

Extracts from the Report of The All-Party Oireachtas Committee on the Constitution 1996-97

26.1.1° 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.

26.1.2° Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach to the President for his signature.

26.2.1° The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.

34.4.5° 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.

26.3.3° In every other case the President shall sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.

When a Bill has been passed, or deemed to have been passed, by the Dáil and Seanad, it is sent to the President for signing into law and promulgation in *Iris Oifigiúil,* the official gazette. Article 26 of the Constitution provides that the President may, after consultation with the Council of State, refer a Bill to the Supreme Court for a decision on its constitutionality, that is to say, on whether the Bill, in whole or in part, is repugnant to the Constitution. If a Bill is found unconstitutional, the President declines to sign it and it has no legal effect.

The provision does not apply to all Bills. It excludes a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for consideration of which has been abridged under Article 24.

The Article 26 reference procedure is as follows:

i) after consulting with the Council of State, the President refers the Bill to the Supreme Court within seven days after the Taoiseach has presented it to the President for signature (Article 26.1.1°-2°)

ii) the Supreme Court, consisting of not less than five judges, hears the arguments for the proposed Bill presented by the Attorney General, and the arguments against it presented by counsel appointed by the court (Article 26.2.1°)

iii) the Supreme Court gives its decision not later than sixty days after the date of reference by the President (Article 26.2.1°)

iv) the Supreme Court hands down a single judgment on constitutionality (as it does on the constitutionality of a law under Article 34.4.5°)

v) if the Supreme Court declares a Bill to be constitutional, the President signs the Bill into law as soon as may be (Article 26.3.3°)

vi) such an Act cannot thereafter be challenged in the courts (Article 34.3.3°).

As the Constitution Review Group observed, the procedure is used infrequently. In the past fifty-five years, during which over 1,900

Bills were enacted, it has been used ten times. Five of those referrals occurred in the past fourteen years. This indicates a trend of increasing, though still rare, use of the procedure.

Recommendations

34.3.3° No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.

The Committee considered the recommendations made by the Constitution Review Group.

i) *Article 26 reference cases: number of judges*

Section 6 of the Courts and Court Officers Act 1995 increased the number of judges in the Supreme Court from the Chief Justice and four ordinary members to the Chief Justice and seven ordinary members. Under the 1961 Courts (Establishment and Constitution) Act 1961, the President of the High Court is *ex officio* an additional judge of the Supreme Court. Under the same Act, the Chief Justice has the power to request any ordinary judge or judges of the High Court to sit on the hearing of any appeal or other matter cognisable by the Supreme Court where, owing to the illness of a judge of the Supreme Court or for any other reason, a sufficient number of judges of the Supreme Court is not available for the transaction of the business of that court.

Article 26.2.1° provides that not less than five judges should sit to decide Article 26 reference cases. The Constitution Review Group considered that no change was necessary in the subsection:

> ... five represents more than half the total proposed Supreme Court membership and allows the court to deliver a judgment even if a number of judges cannot sit for such reasons as illness or absence abroad. If immunity from challenge is removed [as the Review Group recommended], the case for retaining the five-judge minimum would be all the stronger.

Owing to the importance of these cases, the Committee tends to favour the practice followed by the American Supreme Court which is to sit with its full membership when deciding constitutional cases. Since the Supreme Court now numbers nine (including the President of the High Court), the Committee takes the view that it should sit with seven members to decide Article 26 reference cases: that number allows for a depletion in the number of available judges through illness or absence and, since an uneven number is required for reaching decision by a majority, it is the highest such number available after allowing for depletion.

Amend Article 26.2.1° to begin 'The Supreme Court consisting of not less than seven judges ...'

In its discussion of the number of judges of the Supreme Court to determine the validity of laws (as distinct from Bills under the Article 26 procedure) the Constitution Review Group observed:

> Article 34 does not specify any minimum number of judges for the determination by the Supreme Court as to the constitutional validity of a law. Section 7 of the Courts (Supplemental Provisions) Act 1961 requires a Supreme Court of five judges for such decisions. The Review Group has already, in the section on the Constitutionality of Bills and Laws, expressed the view that it is desirable that a minimum of five judges for such decisions should be specified in Article 34. This would be particularly important if the Review Group recommendation for the removal of immunity from challenge of Acts the Bills for which had been referred under Article 26 is accepted. The Constitution, having required five judges for the decision on the Bill referred under Article 26, should likewise require not less than five judges for the subsequent determination of the constitutional validity of the Act.

The Committee agrees with the view that the Supreme Court should sit with the same number of judges for Article 26 reference cases and cases to determine the validity of a law.

Insert a subsection after Article 34.4.4° to read as follows:

> 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 made by not less than seven judges.

ii) *Article 26 reference cases: the time limit for pronouncing decisions*

Article 26.2.1° states that, in questions referred to it by the President under this Article the Supreme Court shall pronounce its decision on such questions in open court as soon as may be, and in any case not later then sixty days after the date of such reference.

The Constitution Review Group recommended that the period should be extended to ninety days. It argued as follows:

> It is accepted that Bills subject to reference require urgent attention. The rule may, however, result in a situation where counsel appointed by the Supreme Court to put the arguments against the Bill have too little time. The Government side is far better placed in this regard because it will have been dealing with the Bill before it has been referred. If the presentation of evidence were to be included in the process, the shortage of time would become grievous.

The Committee agrees with that recommendation.

The Constitution Review Group also considered that if a point of European law arises, and there is a need for reference to the European Court of Justice (ECJ), provision for an extension of the time limit in such cases should be made. The Committee, however, does not agree with this for the reason that since it may take years for the ECJ to arrive at a decision such a delay would remove the efficacy of the Article 26 procedure in providing almost immediate certitude on the constitutionality of a Bill. In any event, the Supreme Court is itself the interpreter of the operation of EU law within the state.

Amend Article 26.2.1° to read '... and in any case not later than ninety days after the date of such reference'.

The two changes should be incorporated in Article 26.2.1° as follows:

> The Supreme Court consisting of not less than seven judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than ninety days after the date of such reference.

26.2.2° The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.

34.4.5° 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.

iii) *Article 26 reference cases: one-judgment rule*

Article 26.2.2° provides that the Supreme Court shall pronounce a single judgment in these cases. The same rule applies (Article 34.4.5°) to cases where the Supreme Court decides on the validity of a law made under the Constitution, arising from cases on appeal from the High Court.

The Constitution Review Group was unable to reach a consensus on whether the rule should be abolished in regard to Article 26 reference cases. Some members were of the view that the special character of the Article 26 reference procedure justifies the retention of Article 26.2.2°. They set forth the arguments for and against deletion (see *Report of the Constitution Review Group*, (CRG) 1996, pp 80-85).

The Committee believes that the arguments weigh overwhelmingly in favour of deletion of Article 26.2.2°. It feels that the two arguments against deletion do not carry great weight in modern conditions. The one-judgment rule seeks to give the decisions of the Supreme Court the character of an oracular utterance. However, it is not credible that people nowadays, who are habituated to the analysis of complex issues by the presentation of arguments for and against through the media,

would presume that the members of the Supreme Court invariably reach an unanimous decision on the complex issues placed before them. The argument that the rule shields judges from improper influence or pressure does not take sufficient account of how easily such factors can be neutralised by the exposure of them in the media.

Delete Article 26.2.2°.

The Constitution Review Group reached unanimous agreement on the deletion of Article 34.4.5°: 'The rule is unsatisfactory in its operation and is apt to create anomalies'. The Constitution Review Group analysed the issue very closely in its report and the Committee endorses its conclusion.

Delete Article 34.4.5°.

iv) *Article 26 reference cases: immutability of the Supreme Court's decision*

Article 34.3.3° provides that, once the Supreme Court delivers its decision on the constitutionality of a Bill referred to it under Article 26, that decision stands immutable. The Article provides certainty about the validity of Bills referred under the procedure before their enactment. However, this certainty may be bought at too high a price. As the Constitution Review Group said:

> Despite the care taken in preparing a Bill, doubt may arise as to its constitutionality. Some Bills concern fundamental issues on which doubt cannot be allowed, indeed where it is desirable that there should be certainty extending indefinitely, or at least over a long period. In relation to adoption, for instance, certainty for a period of over fifty years, that is to say, over about two generations, would seem desirable. On the constitutionality of elections to the Dáil an even longer period could be essential.
>
> The certainty provided by the Article prevails indefinitely unless terminated by a referendum. However, with the efflux of time, changed circumstances and attitudes may bring about a situation where a referred Bill that has been enacted may operate harshly and unfairly, denying justifiable redress in a context not originally foreseen. The question to be addressed is whether the desirability of a measure of stability is reconcilable with an openness to challenge where reason and justice so demand.

The Constitution Review Group discussed the arguments for and against deletion of the Article in its report (see CRG, pp 76-80). It recommended:

> On balance, Article 34.3.3° should be deleted in its entirety. Such a deletion would impact only marginally upon legal certainty, inasmuch as a decision of the Supreme Court upholding the constitutionality of the Bill would still be an authoritative ruling on the Bill which would bind all the lower courts and be difficult to dislodge. It is to be expected that the Supreme Court would not, save in exceptional circumstances, readily depart from its earlier decision to uphold the constitutionality of the Bill. Such exceptional circumstances might be found to exist where the Constitution had been later amended in a manner material to the law in question, or where the operation of the law in practice had produced an injustice which had not been apparent at the time of the Article 26 reference, or possibly where constitutional thinking had significantly changed.

The Committee agrees with the recommendations made by the Constitution Review Group.

Delete Article 34.3.3°.

v) *Constitutional cases: consequences of a declaration of invalidity*

15.4.1° The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof.

15.4.2° Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.

The courts have interpreted Article 15.4 to mean that, if a court declares a provision of a post-1937 Act to be repugnant to the Constitution, it is void *ab initio* because Article 15.4 prevents it ever being valid law.

The Constitution Review Group discussed whether the courts should have express power to declare an Act to be unconstitutional not from the date of its enactment but from some later date (see CRG, pp 167-168). It recommended:

> The importance of the prohibition in Article 15.4 in ensuring that the Oireachtas operates within the limits set by the Constitution is recognised. A majority of the Review Group is, therefore, not disposed (Article 26 cases and 'creeping unconstitutionality' cases apart) to recommend generally that the courts should have jurisdiction to declare invalid, otherwise than *ab initio,* a statutory provision which at the date of its passing was repugnant to the Constitution.

Note that in regard to Article 26 reference cases the Constitution Review Group recommended:

> In the special case of declaration of invalidity of a law the Bill for which had been referred to the Supreme Court under Article 26, a majority of the Review Group is in favour of amending the Constitution to give the courts an express jurisdiction to declare the law to be unconstitutional as of a stated date other than the date of enactment.

In the situation of 'creeping unconstitutionality' type cases, legislation which was constitutional at the date of its enactment has become unconstitutional by reason of changing circumstances (for example, the failure to revise monetary limits in line with inflation or the failure to revise constituency boundaries in line with population movements). In regard to such cases the Constitution Review Group recommended that:

> Given the uncertainties in this area, the Review Group favours giving the courts express power, in cases where they declare an Act to be unconstitutional but determine that at the date of its enactment it was not repugnant to the Constitution, to determine the date upon which it became unconstitutional.

To deal with the consequence of a declaration of invalidity a majority of the Constitution Review Group favoured amending the Constitution:

> to provide the courts with an express discretion, where justice, equity or, exceptionally, the common good so requires, to afford such relief as they consider necessary and appropriate in respect of any detriment arising from acts done in reliance in good faith on an invalid law.

The Committee endorses this majority view. However, it considers that such a general power would enable the courts to deal adequately with Article 26 reference cases and 'creeping unconstitutionality' type cases. They do not recommend therefore any special provision in relation to those two types of case.

Replace the deleted Article 34.3.3° with:

> 34.3.3° Where a law has been found to be invalid having regard to the provisions of this Constitution, the High Court or the Supreme Court (as the case may be) shall have jurisdiction to determine in the interests of justice the consequences of such a finding of invalidity.

Since the object of this suggested draft is to give the courts a general jurisdiction to determine the temporal and other effects of a finding of unconstitutionality, it may be expected that this jurisdiction would be exercised on a case by case basis and that

the courts would balance the interests of good administration and the avoidance of legislative chaos against the *prima facie* right of the successful litigant to recover appropriate redress in the wake of a finding of unconstitutionality. The Committee recognises that it is difficult to come up with an *a priori* formula which would adequately deal with every contingency, but the present draft is suggested as a means of dealing with the very real difficulties identified in the *Report of the Constitution Review Group*.

An analogous provision is required for Article 50 to deal with findings of constitutional inconsistency in the case of pre-1937 laws.

50.1 Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Amend Article 50.1 by adding:

Where such a law has been found to be inconsistent having regard to the provisions of this Constitution, the High Court or the Supreme Court (as the case may be) shall have jurisdiction to determine in the interests of justice the consequences of such a finding of invalidity.

Index to the text of the Report