

The Irish Legal System: An Introduction

Abstract: Professor William Binchy provides a summary of the legal system in the Republic of Ireland and reflects on constitutional developments and challenges facing the country, particularly in the light of the recent economic collapse.

Keywords: constitutional law; legal systems; Ireland

Introduction

Ireland has been through much in the last decade or so. It has experienced a peaceful settlement of the complex and difficult conflict in Northern Ireland¹, accompanied by a period of sudden great economic prosperity in the Republic of Ireland² only to be followed by an ever more sudden dramatic collapse³. During the economic good times, it seemed that the days of insularity, poverty and emigration had been replaced forever by an ethos of cosmopolitanism, with high rates of immigration, mainly from Eastern Europe, by those wishing to participate in the celtic tiger economy. Today, in unprecedentedly bad times, there is no certainty as to Ireland's economic, political and cultural future.



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possible for the people to amend the Constitution, at the initiative of the legislature, by a majority of votes cast in a national referendum¹¹.

Europe exerts its influence in two principal ways. Ireland was quick to ratify the European Convention on Human Rights but far slower to incorporate its provisions into domestic law. That incorporation process occurred as late as 2003¹², in a somewhat restrictive manner. The reason offered by politicians over the years for not rushing to take this step was that very substantial protection to human rights was already provided under the Irish Constitution. In some respects this was more generous than that afforded by the Convention, and that those areas where the Convention appeared to go further tended to involve issues of political controversy better dealt with under the Convention's doctrine of the "margin of appreciation". Of course, once domestic incorporation took place, judges became more "Convention-sensitive" and the influence of the Convention may now be seen in a range of areas of domestic law, including criminal prosecutions, mental health and administrative justice.

The second European influence is that necessitated by Ireland's membership of what was originally referred to as the Common Market and which has since undergone a number of modifications in structure and nomenclature as it transformed itself into the European Union. Ireland followed the lead of the United Kingdom in becoming a Member State in 1973. This required a constitutional amendment. Every later development at European level that involved a substantial recasting of the institutional structures and powers required a further constitutional amendment¹³. The Irish voter has not rushed to endorse these changes. Both the Nice and Lisbon Treaties required two submissions to the electorate before the necessary amendment was approved. It remains to be seen what effect the European Charter on Fundamental

Changes to the Irish Legal System

The Irish legal system has reflected these changes⁴. It is a complex amalgam of four legal streams: the common law, the Constitution, the European Convention on Human Rights and the European Union. After independence in 1921, the Irish legal system continued to be modeled on the English common law. A weak Constitution of 1922 had little effect in reshaping the law as administered in the courts⁵. In 1937 a new Constitution was promulgated. This Constitution, which has undergone several amendments of its specific provisions, continues in force⁶. Its most important contribution has been to establish a system of fundamental human rights⁷, which all organs of state (as well as non-state actors) must respect and which is enforced by the courts. Thus, in Ireland, the principle of parliamentary sovereignty is dead⁸: the courts have the last word⁹ on what protection the Constitution affords to human rights¹⁰, though it is

Rights, made legally binding by the Lisbon Treaty, will have on the future development of Irish law.

Constitutional Jurisprudence: the Walsh years

The 75 years of constitutional jurisprudence can conveniently be divided into two chapters. The first involved a period of judicial activism, led by Mr. Justice Brian Walsh, who was a member of the Supreme Court, from 1962 to 1990¹⁴. Walsh J realised that judicial power is never surrendered by other political forces and must always be asserted by the courts themselves. Under his influence, the Supreme Court developed a strong human rights culture, significantly restraining the powers of legislature and executive in the interests of the rights of citizen and non-citizen alike. The Court abolished state immunity¹⁵ and interpreted the Constitution as involving a horizontal application so as to require non-State actors as well as the State to respect constitutional rights, under sanction of awards of damages for infringement of these rights¹⁶. The Court also identified a range of personal rights protected by the Constitution, though not expressly identified in its text¹⁷. These included the rights to bodily integrity¹⁸, health¹⁹, privacy²⁰ and travel²¹ and the right to earn a livelihood²².

It would be wrong to characterise the Walsh years as particularly radical in terms of social justice: what was evident was rather a paternalistic desire to protect the vulnerable than to assert the principle of equality as an engine for social change.

A Second Chapter: Hardiman

The second chapter, which continues to this day, covers the post-Walsh years. Characteristic of this period is a discernible lack of enthusiasm for natural law philosophy or, indeed, for any strongly normative interpretation of the Constitution. Many of the personal rights identified three decades ago have atrophied; the notion of human dignity, which finds a place in the Constitution²³, has not generally been the source of inspiration that it has in other countries. Most strikingly there has been a shift to the right, led by Mr. Justice Adrian Hardiman. The Supreme Court has turned its face against the judicial enforcement of economic and social rights, even where these rights are expressly guaranteed by the Constitution²⁴.

The concern of Hardiman J, and of other judges falling under his influence, is that the doctrines of the separation of powers and of democratic legitimacy require that decisions relating to the allocation of the economic resources of the state be made by parliament and government rather than courts. On this view, a court has no business ordering the State how to spend its money, even in vindication of a constitutional right.

Hardiman J's influence can also be seen in the area of parental rights²⁵. The Irish Constitution has been criticised by some commentators for deferring too much to parental autonomy at the expense of effectively protecting the rights and welfare of children. Hardiman J, no enthusiast for a natural law perspective, champions parental rights on the basis that parents can be better relied on than state officials to afford that protection. In *N. v Health Services Executive*²⁶, he stated:

“A presumptive view th[at] children should be nurtured by their parents is, in my view, itself a child centred one and the alternative view, calling itself ‘child centred’ because it is prepared more easily to dispense with the rights and duties of parents must guard against the possibility that in real individual cases it may become merely a proxy for the views of social workers or other third parties. That is not for a moment to belittle the need for State intervention in the nurturing of children in appropriate cases, but to emphasise that the presumption mandated by our Constitution is a presumption that the welfare of the child is presumptively best secured in his or her natural family.”

In the area of civil liability, and compensation for personal injury, one can again without too much difficulty contrast the expansionary Walsh years with the retrenchment of later times. Under the influence of Walsh J, the Supreme Court held that occupiers of premises could in some circumstances owe a duty of care to trespassers²⁷; today, echoing and seeking to interpret the minds of legislators²⁸, the Supreme Court is not certain whether occupiers may be free from liability towards trespassers and ‘recreational users’ (such as walkers or campers on open land) even where the occupiers have been guilty of gross negligence²⁹. Whereas Walsh J had extended the parameters of vicarious liability to frankly implausible breadth³⁰, Hardiman J would prefer to restrict that concept far more narrowly³¹ than courts today in Canada³² and Britain³³ are willing to prescribe.

Hardiman J has had a notable, benign, influence in another important area of law: the protection of the rights of accused persons. He has been particularly exercised by the dangers for courts in trusting too easily the evidence of police officers (members of An Garda Síochána). In a relatively recent case³⁴, the Supreme Court awarded exemplary damages of 1 million euro, as well as over 2 million general damages (including aggravated damages) to the victim of an egregious miscarriage of justice engineered by police officers – which the authorities conceded was “the worst known example of oppression of a citizen by the State”. Hardiman J observed:

“If this case and others like it teach anything, it is that it does no favour to an institution like the

[police] to accord their members a special level of presumptive credence. On the contrary, this attitude offers a temptation to unscrupulous [police officers] who may assume that, most of the time, the public, the media, judges and juries will accord credence to the garda account, even if it is in certain ways rather improbable. This case plainly demonstrates that some [police officers] will lie, simply to benefit their own careers, and lie again, even on oath, to avoid the consequences of having told the first set of lies, and so on. It also reveals that the prospect of this being detected and acknowledged by the [police] themselves is restricted by an attitude which dictates that ‘...we don’t name the names...we are not going to be hanging our people.’ Moreover, one must recall that a conspiracy of the sort featured in this case may develop into something much larger than originally intended.”

Economic crisis

The present economic crisis which Ireland is experiencing has had effects on the legal profession and the

judiciary. At the height of the economic boom, incomes in the public service increased significantly. Judicial salaries reached levels that were very high³⁵. When the economy collapsed, the legislature introduced a levy on incomes but did not apply this to the judiciary out of concern that to do so might offend the constitutional guarantee that “[t]he remuneration of a judge shall not be reduced during his continuance in office”³⁶. The somewhat lethargic steps taken by members of the judiciary to take a voluntary reduction in salaries provoked popular concern³⁷. The newly-elected Government is committed to introducing a proposal to amend the Constitution to permit reductions of judicial salaries in future times of economic stringency³⁸.

The Future

What lies ahead for the Irish legal system is far from clear. Economic storm clouds continue to fill the sky but the Irish are a resilient and optimistic³⁹ people who have overcome adversity in the past. The legal system, with its complex sources, domestic, British and European, seems well capable of sustaining the country in its struggle for a more secure future.

Footnotes

¹See Doherty, “The Northern Ireland Peace Process: A Solution to the Problems of an Ethnically Divided Society?” 7 *Brown J. of World Aff.* 49 (2000).

²R. MacSharry & P. White, *The Making of the Celtic Tiger: The Inside Story of Ireland’s Boom Economy* (Dublin: Mercier Press, 2000).

³See K. Whelan, *Ireland’s Sovereign Debt Crisis* (UCD Centre for Economic Research Working Paper Series 2011, WP11/09, May 2011).

⁴See Byrne & McCutcheon on *the Irish Legal System* (Dublin: Bloomsbury Professional, 5th ed., by Byrne, McCutcheon, Bruton & Coffey, 2009).

⁵The 1922 Constitution was subject to such easy amendment that legislation inconsistent with it was considered by the courts to have implicitly amended it: see Crowe, “Human Rights, the Irish Constitution and the Courts”, 47 *Notre Dame L.* 281, at 285–288 (1971). The Statute of Westminster 1931, which might have been considered supportive of national autonomy, actually created difficulties for Irish nationalist theory as the 1922 Constitution did not permit developments inconsistent with the terms of the 1921 Treaty between Britain and Ireland.

⁶See J. Kelly, *The Irish Constitution* (Dublin: Round Hall, 4th ed., by G. Hogan & G. Whyte, 2004), Hanafin, “Constitutive Fiction: Postcolonial Constitutionalism in Ireland” 20 *Penn. St. Int’l L. Rev.* 339 (2002).

⁷Cf. Articles 40–44 of the Constitution.

⁸Cf. Article 15.4 of the Constitution.

⁹Cf. Article 34 of the Constitution.

¹⁰The Constitution speaks in terms of “fundamental rights” rather than “human rights” but it is clear from the most rudimentary textual analysis of Articles 40 to 44 (as well as an historical analysis) that what is envisaged is a compendium of rights inherent in human beings by virtue of their rationality of moral freedom, anterior to positive law. See Grogan, “The Constitution and the Natural Law”, 8 *Christus Rex* 201 (1954), Costello, “Natural Law, the Constitution and the Courts”, in P. Lynch & J. Meehan eds, *Essays in Memory of Alexis Fitzgerald* (Dublin: Incorporated Law Society of Ireland, 1987), 161, C. Millen, *The Right to Privacy and Its Natural Law Foundations in the Constitutions of the United States and Ireland* (Dublin: Blackhall Publishing, 1999).

¹¹Cf. Article 27 of the Constitution. As to whether there are implicit limitations on the amendability of the Irish Constitution, as there are in India, for example, is a matter of lively debate, given sharp focus by the Supreme Court decision of *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IRI; see O’Hanlon, “Natural Rights and the Irish Constitution”, 11 *Ir. L. Times* (n.s.) 8 (1993), Clarke, “The Constitution and Natural Law:

- A Reply to Mr. Justice O’Hanlon”, 11 Ir. L. Times (n.s.) 177 (1993), Whyte, “Natural Law and the Constitution”, 14 Ir. L. Times (n.s.) 8 (1996), Twomey, “The Death of Natural Law?” 13 Ir. L. Times (n.s.) 270 (1995), Hanafin, “Reproductive Rights and the Irish Constitution: From the Sanctity of Life to the Sanctity of Autonomy?” 3 Eur. J. of Health L. 179 (1996), Jacobson, “An Unconstitutional Constitution? A Comparative Perspective”, 4 Int’l J. of Constit. L. 460 (2006).
- ¹²European Convention on Human Rights Act 2003, analysed by Egan, “The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation”, 25 Dublin U.L.J. 230 (2003), O’Connell, “The ECHR Act 2003: A Critical Perspective”, in U. Kilkelly ed., *ECHR and Irish Law* (Dublin: Jordans, 2004), 1, Hogan, “Incorporation of the ECHR: Some Issues of Methodology and Process”, *id.*, 13, Bodnick, “Bringing Ireland up to Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms”, 26 Fordham Int’l L.J. 396 (2003).
- ¹³See *Crotty v An Taoiseach* [1987] 1 IR 713, O. Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008), Chapter 14.
- ¹⁴See O’Flaherty, “Brian Walsh 1918–1998”, 17 Ir. L. Times (n.s.) 300 (1999).
- ¹⁵*Byrne v Ireland* [1972] IR 241.
- ¹⁶*Meskill v Coras Iompair Eireann* [1973] Ir 121. The Supreme Court subsequently weakened the effect of this decision by channeling claims for compensation for violations of constitutional rights into the tort system, save where the particular tort is “basically ineffective” in vindicating the right in question: *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd.* [1988] ILRM 629. See further G. Hogan & D. Morgan, *Administrative Law in Ireland* (4th ed., 2010), paras. 18.63–18.109.
- ¹⁷This is possible because of the manner in which Article 40.3 is drafted. Under sub-section (1), the State guarantees in its laws to respect, defend and vindicate “the personal rights of the citizen”. Sub-section (2) provides that the State “shall, in particular” by its laws protect and vindicate “the life, person, good name and property rights of every citizen” (emphasis added).
- ¹⁸*Ryan v Attorney General* [1965] IR 294, *State (c) v Frawley* [1976] IR 365, *State (Richardson) v Governor of Mountjoy Prison* [1987] IR 131.
- ¹⁹*Ryan v Attorney General* [1965] IR 294.
- ²⁰*McGee v Attorney General* [1974] IR 284, *Norris v Attorney General* [1984] IR 36, *Kennedy v Ireland* [1987] IR 587, *Herrity v Independent Newspapers* [2008] IEHC 249.
- ²¹*The State (M) v Attorney General* [1979] IR 73. See further Kelly, *op. cit.*, fn. *Supra*, paras. 7.3.177–7.3.182.
- ²²*Murtagh Properties v Cleary* [1972] IR 330.
- ²³See the Preamble of the Constitution, Binchy, “Dignity As a Constitutional Concept”, in E. Carolan & O. Doyle eds., *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008), 327.
- ²⁴See *Sinnott v Minister for Education* [2001] 2 IR 545, *T.D. v Minister for Education* [2001] 4 IR 259, Kieran, “T.D. Re-Considered: Constituting a New Approach to Enforcement of Rights”, 7 Trinity College L. Rev. 62 (2004), Lawlor, “The Conscience of the Nation: Socio-Economic Rights and the Irish Constitution”, 5 University College Dublin L. Rev. 34 (2005), Mullally, “Substantive Equality and Positive Duties in Ireland”, 23 S. Afr. J. on Human Rts 291 (2007), McGrattan, “The Constitutional Vindication of Socio-Economic Rights: A Catholic Perspective”, 7 University College Dublin L. Rev. 29 (2007).
- ²⁵See *North Western Health Board v H.W. and C.W.* [2001] 3 IR 622, critically analysed by R. Byrne & W. Binchy, *Annual Review of Irish Law 2001* (Dublin: Round Hall, 2002), 316–338, *N. v Health Services Executive* [2006] IESC 60.
- ²⁶[2006] IESC 60. See Kelly, “Baby Ann’s Constitutional Rights”, 10 Ir. J. of Fam. L. 3 (2007).
- ²⁷See *Purtill v Athlone Urban District Council* [1968] IR 205, *McNamara v Electricity Supply Board* [1975] IR 1.
- ²⁸See the Occupies’ Liability Act 1995, a measure introduced to placate a strong farmers’ lobby, concerned about their theoretical exposure to liability to ungracious trespassers and recreational users who might be injured while on their land.
- ²⁹*Weir Rodgers v SF Trust Ltd.* [2005] IESC 2.
- ³⁰*Moynihan v Moynihan* [1975] IR 192.
- ³¹*O’Keeffe v Hickey* [2008] IESC 72.
- ³²*Bazley v Curry* 174 DLR (4th) 45 (S.C.C., 1999), *Jacobi v Griffiths* 174 DLR (4th) 71 (S.C.C., 1999).
- ³³*Lister v Hickey Hall Ltd.*, [2002] 1 AC 215.
- ³⁴*Shortt v Commissioner of An Garda Siochana* [2007] IESC 9. Hardiman J elaborated on his philosophical approach extrajudicially in “Weasel Words and Doubtful Meanings: A Study in the Language of ‘Law Reform’”, 2007 (2) Judicial Studies Inst. J. 1.
- ³⁵Judicial salaries in Ireland were second highest in the world in 2004/2005: Choi, Gulati & Posner, “Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate”, 1 J. of Legal Analysis 47, at 61 (2009). (British judicial salaries took first place).
- ³⁶Article 35.5 of the Constitution.
- ³⁷“One in Five Judges Yet to Pay Voluntary Pension Levy”, Irish Times, 1 January 2010.
- ³⁸Lally, “Coalition Plans to Cut Judges’ Salaries”, Irish Times, 7 March 2011.
- ³⁹An international study published by the Charities Aid Foundation found that Irish people ranked 16th happiest out of 153 countries: Smyth, “Irish Among Most Charitable and Happiest in the World, Study Finds”, Irish Times, 9 September 2010.

Biography

Professor William Binchy is Regius Professor of Law at Trinity College, Dublin Law School, Ireland. He is a member of the Irish Human Rights Commission and specializes in private international law, the law of torts and family law. He is a Barrister-at-Law, a consultant to the Department of Foreign Affairs and represented Ireland at the Hague Conference on Private International Law. Professor Binchy has also campaigned widely over proposed amendments to the Constitution of Ireland.

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Law Reform in Northern Ireland

Abstract: Professor Brice Dickson offers forthright views relating to law reform issues in Northern Ireland against the background of the peace process.

Keywords: law reform; legal systems; Northern Ireland

Introduction

Now that Northern Ireland has at last attained a certain stability and peacefulness (even if virtually every day there are still bombs, hoaxes or shootings, which only by luck or good policing have not yet resulted in numerous casualties), there is an opportunity for elected politicians to settle down to serious law reform. While responsibility for anti-terrorism law remains a matter reserved for Westminster,¹ the devolution to Stormont of responsibility for policing and justice has certainly added impetus to the drive for change².

The Alliance Party's David Ford, elected as Minister of Justice on a cross-community vote in the Northern Ireland Assembly, has been in post since April 2010 and will remain in office until at least April 2012, when the mechanism for choosing the Minister will be reviewed. Ford has put in train a series of important reform processes that have the potential to make a significant difference to the efficiency and effectiveness of the local legal system.

criminal law – have done very well out of the troubles. The Northern Ireland Legal Services Commission has indicated that in 2009–10, for example, payments from the legal aid fund to solicitors amounted to £62 million, with £46 million going to 100 firms³. Barristers received a total of £35 million, with an incredible £30 million going to just 100 individuals⁴. The Minister has insisted that new rules on costs be adopted in order to reduce the fees payable in complex criminal cases. As one might expect, these rules have not been well received by the professionals and some have refused to undertake legal aid work as a result. When pressed in public, however, they find it hard to defend their position. Even after Ford's reforms lawyers in Northern Ireland will in many cases be paid at higher rates than lawyers anywhere else in these islands. To claim, as the solicitors' Criminal Bar Association has done, that defendants in criminal cases will not receive a fair trial if the cuts in legal aid rates are accepted is to suggest that lawyers in England and Wales, who work on even lower rates, are already breaching that right – an outrageous proposition.

Legal costs

First and foremost, the Department of Justice has taken on the vexed question of legal costs, in particular the sums claimed by lawyers for legal aid work. During the past 30 years many members of the legal professions in Northern Ireland – especially those specialising in

Prison Service

The need for change in the way Northern Ireland's prisons are run has also achieved much attention of late. A Review Team headed by Dame Anne Owers, a former Chief Inspector of Prisons in England and Wales, has produced an interim report painting a very grim picture of